No. 31405 – *State of West Virginia v. Edwin Mack Taylor*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring:

The critical issue in this case is whether Appellant was properly convicted for the crimes he was charged with committing, or whether he was convicted "on an improper basis, commonly . . . an *emotional one,*" due to the introduction of what is referred to as "bad acts" evidence. *See* Fed. R. Evid. 403 advisory committee's note (emphasis added). As Justice Cleckley articulated in the seminal West Virginia case on Rule 403:

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

Syl. Pt. 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). Yet another significant observation made by Justice Cleckley in *Derr* is that the West Virginia Rules of Evidence "constitute more than a mere refinement of common law evidentiary rules; they are a comprehensive reformulation of them." *Id.* at 177, 451 S.E.2d at 743.

Against this backdrop of the purposes sought to be achieved by Rule 403, this Court's decisions in *Derr* and *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), prove useful when discussing the limitations that Rule 403 is intended to impose on the introduction of evidence that is otherwise relevant. With regard to the case *sub judice*, *McGinnis* is particularly instructive given its extensive consideration of the State's proffer of evidence of other crimes, wrongs, or acts of a criminal defendant under West Virginia Rule of Evidence 404(b), in view of the fact that the evidence sought to be introduced in *McGinnis* also addressed the character of the accused.

In *McGinnis,* this Court delineated the pertinent considerations at each and every stage of a proceeding in which the introduction of Rule 404(b) evidence is sought. Before evidence is introduced under Rule 404(b), the following summarized four-part analysis must be conducted by the trial court:

> 1. Is the "other crime" evidence probative of a material issue other than character?
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> 2. Is the evidence relevant under Rules 401 and 402, as enforced by Rule 104?
>
> 3. Under the Rule 403 balancing test, is the probative value of the evidence outweighed by a substantial risk of prejudice if the evidence is admitted?
>
> 4. Should a limiting instruction be given?

See McGinnis, 193 W.Va. at 155-56, 455 S.E.2d at 524-25.

To assist trial courts when conducting the balancing test required by the third prong of the Rule 404(b) analysis, Justice Cleckley identified a list of relevant factors to be examined:

> (a) the need for the evidence, (b) the reliability and probative force of the evidence, (c) the likelihood that the evidence will be misused because of its inflammatory effect, (d) the effectiveness of limiting instructions, (e) the availability of other forms of proof, (f) the extent to which admission of evidence will require trial within trial, and (g) the remoteness and similarity of the proffered evidence to the charged crime.

McGinnis, 193 W.Va. at 156 n.11, 455 S.E.2d at 525 n.11. In addressing the competing considerations at play during the trial court's hearing of a Rule 404(b) motion, Justice Cleckley elucidated that:

> (a) "The balancing necessary under Rule 403 must affirmatively appear on the record."
>
> (b) Evidence of prior crimes, wrongs or acts "may be offered for *any* relevant purpose that does not compel an inference from character to conduct."
>
> (c) "It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b)."
>
> (d) "The specific and precise purpose for which the evidence is offered must clearly be shown from the record."

McGinnis, 193 W.Va. at 154, 156, 455 S.E.2d at 523, 525.

Returning to the subject case, the record in this matter indicates that Appellant was initially prosecuted in Grant County upon a single indictment which set forth two separate offenses of breaking and entering closely related in time to each other and two larcenies committed in the course of the respective breaking and entering incidents. *Because of the danger of prejudice* arising from news stories related to the crimes, the cases were moved to Mineral County pursuant to a successful change of venue motion. Seeking again to protect Appellant from a conviction based on prejudice, his counsel objected to the introduction of the 404(b) evidence based primarily on references made to Appellant's involvement in drug dealings, both before and after the commission of the crimes alleged in the indictment.

In preparing for trial, the State had obtained solid evidence that Appellant had committed the crimes at issue to acquire money and to use that money for the purchase of drugs and other goods.[1] The record of this case demonstrates that the State had little difficulty in categorizing Appellant as "a bad actor," given his substantial criminal record. (The trial court even approved the use of a misdemeanor conviction for possession of drugs that occurred more than ten years ago, although that particular "bad actor" evidence was not actually used at trial). In presenting the reasons for the State's Rule 404(b) motion, the

[1]In reviewing the record in this case, I have carefully examined the motion for the introduction of the Rule 404(b) evidence; the transcript of the hearing on the motion; including the oral argument of the parties, the findings of the trial court made from the bench, and the circuit court's ruling on this evidentiary motion.

prosecutor referred in summary fashion to "the litany of possible uses listed in Rule 404(b)." *McGinnis,* 193 W.Va. at 154, 455 S.E.2d at 523. Because both the State and the trial court relied almost exclusively on the Rule's "laundry list" of possible uses, it is difficult, if not impossible, to discern the actual evidentiary purpose for which the drug dealing evidence was admitted into evidence.

Significantly, the record is devoid of any analysis of the *McGinnis* factors which this Court identified for purposes of engaging in the required Rule 404(b) balancing process. For instance, although the State claimed it needed the evidence to show motive, the transcripts of the interviews of the "drug" witnesses acquired before trial make clear that the entire substance of their testimony could have been utilized at trial without mentioning any use of "drugs." The record is similarly lacking of any analysis of whether the introduction of "drug dealing" by Appellant at trial would be likely to lead to a misuse of the evidence to convict Appellant for "drug dealing," rather than for the charges at issue – breaking and entering and larceny. Nor does the record show whether the trial court considered whether its limiting instructions (given twice) would in fact be effective to cleanse the Rule 404(b) evidence of any undue prejudicial effect. Critically, the record demonstrates that the State had a substantial case likely to lead to a conviction, without the introduction of "drug" evidence. It is clear from the record below that the trial court gave no consideration at the hearing, which was held several weeks before the trial, to whether the State needed this Rule

404(b) evidence to make its case. Of further note is the fact that some of the evidence – which the State intended to introduce, and did in fact introduce, to show plan and scheme – related to dealing in stolen goods which took place months before the offenses included in the indictment.

I do not mean to suggest that evidence of prior or subsequent drug dealing is never appropriate, especially where such evidence might be shown to be crucial to the State's case. However, much like the evidence of satanic ritual involvement that was introduced in *State v. Wyatt*, 198 W.Va. 530, 482 S.E.2d 147 (1996), evidence of Appellant's "drug dealing" had a palpable capacity to inflame the collective emotions of jurors, who were likely to be concerned, and understandably so, about the sale and use of illegal drugs in and around their communities. Although this Court found that the issue of satanic ritual participation had no bearing on the relevant issues in *Wyatt*, the Rule 404(b) evidence of Appellant's involvement in "drug dealing" did bear some relevancy to the issues being tried in the case at bar. Critical to a proper understanding of this issue, however, is an appreciation of that fact that Appellant's "drug dealing" was not determinative of any issue in the case, and, as the record demonstrates, the State had ample evidence to prove each element of its case *without* introducing the prejudicial evidence of "drug dealing." Consequently, under those circumstances, it is arguable that the introduction of Appellant's "drug dealing" evidence gave rise to an increased likelihood that he would be convicted of

breaking and entering and larceny based, in part, on the fact that he had engaged in "drug dealing," both before and after the crimes for which he was on trial, and also based on his characterization as a "bad actor." In spite of the valid concerns recognized by the federal advisory committee on this very issue, Appellant's conviction likely resulted from "an improper basis" that was "emotional" in nature after the jurors heard the Rule 404(b) evidence. Fed. R. Evid. 403 advisory committee's note.

In my judgment, the lasting value of this case to both the practicing bar and the judiciary, is the opportunity to encourage the State to seek the introduction of Rule 404(b) evidence in those cases where it can articulate and demonstrate clear grounds for its need for such evidence; to encourage defense counsel to vigorously object to the introduction of such evidence with well-articulated grounds; and to encourage trial courts to engage in the required balancing test with a proper consideration of all relevant factors bearing on the introduction of such evidence. Only through such a detailed, deliberate and well-documented process can the true purpose of the rule be achieved, which is to ensure that the introduction of this type of evidence will be limited to those instances in which its use is clearly warranted under the facts of a given case after due and full consideration has been given to its potential to improperly sway the jury's decision.