STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-1042 (Morgan County 07-F-68)

Jason M. Payne,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Jason Payne, by counsel, B. Craig Manford, appeals the Morgan County Circuit Court's "Agreed Order Re-Sentencing Defendant" entered on June 6, 2011, denying petitioner's motion for a new trial and for a judgment notwithstanding the verdict and confirming his convictions of two counts of breaking and entering, one count of grand larceny, and one count of destruction of property.[1] Respondent State of West Virginia appears by its counsel, Benjamin F. Yancey III.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On November 21, 2006, a Century 21 real estate office in Bath, West Virginia, reported that it had been burglarized to the Bath Police Department. Subsequent investigation revealed that someone had entered through a rear window of the business, that a door leading to law offices located on the second floor of the same address had been forced open and damaged, and that a laptop computer and a computer scanner had been stolen from the Century 21 office. It appears that nothing was taken from the law offices.

In the course of the ensuing police investigation, officers obtained video surveillance footage from several businesses in the area showing a white male wearing a stocking cap and carrying a backpack disappearing into the alleyway behind Century 21 at approximately 12:39 a.m. on November 21, 2006; showed the suspect emerging from the alleyway still carrying the backpack at 1:48 a.m.; and showed the suspect getting into a white pickup truck with a "splash" decal on the side and the tailgate down at approximately at 2:02 a.m. Video surveillance footage obtained from a

[1] Petitioner raises each of his assignments of error in his brief as "plain and prejudicial error." He relies only upon the plain error doctrine, however, in his assignments of error related to his inculpatory, pretrial statements.

nearby Sheetz convenience store and gas station showed a white pickup truck pull up to a gas pump around 2:04 a.m. The gas for the truck was purchased with a MasterCard belonging to petitioner's then-wife, Vanessa Mickey Payne.[2]

Subsequently, the police executed a search warrant upon petitioner's property and residence where a white truck with the splash decal was observed. A skullcap and a backpack containing assorted tools, including wire cutters and a crowbar, were recovered from petitioner's home. Thereafter, petitioner was arrested.

On May 24, 2007, a hearing was held before the circuit court during which Corporal Pearrell of the Bath Police Department testified concerning statements that petitioner made to him both before and after petitioner's preliminary hearing in magistrate court. Cpl. Pearrell testified that petitioner initiated a conversation with him in the hallway prior to petitioner's preliminary hearing; that he told petitioner that he needed to wait for his legal counsel; that petitioner told him that he was guilty and wanted to plead no contest; that he again told petitioner that he needed to wait for his attorney; that petitioner's counsel arrived and met with petitioner after which counsel told the magistrate that she had advised her client to exercise his right to remain silent and not to incriminate himself; that petitioner, petitioner's counsel, and the prosecutor met with him after the preliminary hearing at which time petitioner volunteered that he knew he had "done wrong" and that he could retrieve the stolen property if he were released from jail for seventy-two hours; and that he told petitioner that if the laptop computer and computer scanner were not returned quickly, charges could possibly be brought against petitioner's wife, a cousin, and a third person. Testimony at trial revealed that petitioner's wife brought the computer scanner to the police the day after petitioner's preliminary hearing. She was unable to secure the return of the laptop computer.

The transcript of the May 24, 2007, hearing does not reflect that it was being held on any particular motion. Although the parties refer to that hearing as a suppression hearing, there is no motion to suppress in the appendix record, and petitioner indicates on appeal that no motions were made at this hearing. The trial court stated in its order entered on June 4, 2007, that "[b]ased upon the testimony of the officer [Cpl. Pearrell], the Defendant made no motions."

On September 4, 2007, petitioner was indicted in Case No. 07-F-68 on two counts of breaking and entering in violation of West Virginia Code §61-3-12, one count of grand larceny in violation of West Virginia Code §61-3-13, and one count of destruction of property in violation of West Virginia Code §61-3-30.[3] Petitioner's trial took place on April 22 and 23, 2008.

The State's evidence at trial included the results of the police investigation, including the surveillance videos and the evidence recovered pursuant to the search warrant, as discussed above. Cpl. Pearrell testified, inter alia, that the markings on the door frame leading to the law offices inside

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[2] The record reflects that petitioner and his wife divorced shortly before petitioner's trial.

[3] Petitioner was originally indicted on these same charges in Case No. 07-F-34, which was voluntarily dismissed by the State without prejudice.

the Century 21 offices were the same size as the crowbar seized pursuant to the search warrant. Following an objection from defense counsel, the trial court ruled that Cpl. Pearrell could testify to his observations, but could not opine as to whether the seized crowbar was actually used on the door frame. Pearrell also testified concerning petitioner's prior, inculpatory statements.

Petitioner's then ex-wife, Vanessa Payne, testified for the State. She stated that she took the computer scanner to her place of employment in Virginia; that she turned the scanner over to the police but was unable to retrieve the laptop computer; and that on the night in question, she did not see petitioner take her credit card. She further testified that she told petitioner before his preliminary hearing about the conversations that she previously had with Cpl. Pearrell during which she sought leniency for petitioner if the stolen property were returned.

The State also presented the testimony of Amanda Gregory, a manager at the local Sheetz, who authenticated the still photographs from the Sheetz surveillance video. Ms. Gregory was also questioned regarding various documents from Sheetz corporate offices that had been subpoenaed by the State, including documentation that Sheetz obtained from MasterCard. Petitioner objected to the admission of this documentation on the basis that Ms. Gregory was not a custodian of the records, could not testify that the records were kept in the normal course of business, and could not substantiate their authenticity. Following additional questioning by the State and the trial judge, during which Ms. Gregory confirmed that the documents were handled in the normal course of business between her store and Sheetz's corporate offices, the trial court allowed the admission of the documents into evidence.

Additional State's evidence included the testimony of an employee of Citizens National Bank that bank records showed that the MasterCard issued to petitioner's wife was the same card referenced in the financial records from Sheetz and MasterCard and the testimony of a Century 21 employee that the recovered computer scanner was his property and that the combined value of the laptop computer and the computer scanner was greater than $1,000.

After the State rested its case, petitioner moved for a judgment of acquittal, which was denied. The jury returned its verdict finding petitioner guilty on all counts. Petitioner's motion for a new trial was denied. The State filed a recidivist information and petitioner admitted to the prior felony conviction. The trial court sentenced petitioner to one to ten years in prison for the first breaking and entering conviction, two to ten years in prison for the second breaking and entering conviction (reflecting a recidivist enhancement), one to ten years in prison for the grand larceny conviction, and twelve months in jail for the destruction of property conviction, all sentences to run consecutively.

Failure to Direct a Verdict

Petitioner asserts that the trial court erred in failing to direct a verdict in his favor. In the alternative, petitioner asserts that the jury's verdict was contrary to the evidence at trial and that all of the evidence against him was circumstantial. Regarding his confession to Cpl. Pearrell, petitioner asserts that he was overly anxious to speak with Cpl. Pearrell to make certain that no criminal charges were brought against his pregnant wife and that Cpl. Pearrell led him to believe that unless the stolen property was returned, charges would possibly be brought against his wife and other

family members. Petitioner argues that the trial court abused its discretion in allowing the jury to decide the case as no reasonable, rational trier of fact could have found him guilty beyond a reasonable doubt.

> "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011). We have also stated that

> "[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). Having applied these standards to our review of the State's evidence at trial as set forth in the appendix record, and having considered the parties' arguments in this regard, we find that there was sufficient evidence to support petitioner's convictions.

Admission of Business Records

Petitioner asserts that the trial court erred in allowing the records from Sheetz's corporate office, as described above, to be admitted into evidence at trial through the testimony of local Sheetz manager, Amanda Gregory, under the business records exception to the hearsay rule, Rule 803(6) of the West Virginia Rules of Evidence. Petitioner asserts that the State did not meet its foundational burden of showing personal knowledge of the records or the knowledge of the supplier of the information.

The record reflects that this documentation was provided by Sheetz's corporate headquarters to its employee, Ms. Gregory, pursuant to the State's subpoena duces tecum. Ms. Gregory positively identified the records and testified that the records are compiled and transmitted in the ordinary course of business between Sheetz's corporate office and her local Sheetz store.

"'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syllabus Point 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 5, *State v. McCartney*, 228 W.Va. 315, 719 S.E.2d 785 (2011). Applying this standard to our review and consideration of the parties' arguments and the trial transcript in the appendix record, we find that the trial court did not abuse its discretion in the admission of this evidence.

Suppression

Petitioner asserts that the trial court erred in not suppressing his statements made to Cpl. Pearrell because the State failed to show that *Miranda* had been complied with and because the statements were not voluntary. Although Cpl. Pearrell testified that petitioner's counsel advised petitioner of his right to remain to silent, petitioner contends that he was not warned that anything he said could and would be used against him in a court of law. Petitioner argues that his statements were solicited under a promise of leniency. Petitioner asserts that a suppression of the statements that he made to Cpl. Pearrell while in the presence of petitioner's counsel would have lessened the impact of his initial, unsolicited statements to Cpl. Pearrell.

"'It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review.' Syllabus point 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syl. Pt. 1, *State v. Black*, 227 W.Va. 297, 708 S.E.2d 491 (2010). Further, "'[a] trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.' Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syl. Pt. 1, *State v. Jones*, 220 W.Va. 214, 640 S.E.2d 564 (2006). Also, "'[w]hether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances.' Syl. Pt. 2, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995)." Syl. Pt. 4, *Id.*

From our review of the totality of the circumstances, we find that all of petitioner's statements to Cpl. Pearrell were voluntarily made and that there was no abuse of discretion in the admission of the statements at trial. Petitioner argues that it was plain error for the trial court not to sua sponte rule that his prior statements were involuntary. "'To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.' Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)." Syl. Pt. 1, *State v. Davis*, 220 W.Va. 590, 648 S.E.2d 354 (2007). We find no demonstration of plain error by petitioner in this regard.

Sentencing

Petitioner argues that his cumulative sentence for four non-violent crimes committed during one transaction should shock the conscience of the Court and of society. If the Court disagrees with this argument, then petitioner argues that given the nature of the offenses and the legislative purpose behind punishment, as well as a comparison of punishment of similar crimes in other jurisdictions and with other offenses within this State, the Court should still find that the sentence imposed was disproportional.

This Court reviews sentencing orders under a deferential abuse of discretion standard, "unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Here, the sentences imposed are within statutory limits and petitioner does not assert that sentencing was based upon an impermissible factor. Upon a review of the record and the parties' arguments, we find neither error nor an abuse of discretion in sentencing.

Conclusion

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh