No. 35339 – *State of West Virginia v. Richard Lewis Morris*

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OF WEST VIRGINIA

Ketchum, J., dissenting:

I respectfully dissent. The hearsay testimony of Officer Tiong plainly went to the very heart of the State's case against the defendant, and was an error of constitutional dimension that deprived the defendant of a fair trial.

Testimonial Legerdemain

The primary factual dispute in the defendant's trial was whether or not the defendant was driving the vehicle at the time of the crash. The defendant contended that he was not the driver. To buttress its case that the defendant was the driver, and that the defendant was therefore guilty of DUI causing death, the prosecutor asked Officer Tiong, one of the investigating police officers, *why the defendant had been arrested for driving the vehicle*. The officer testified that he had "received information from the nurse from marks she observed [on the defendant]." The prosecutor then asked the police officer "What kind of marks?" to which the officer testified that "[the nurse] observed that there was what appeared to be seat belt marks going up the left area down to the lower right area which showed the possibility of wearing a seat belt in the driver's side."

The defendant strenuously objected to the officer's testimony as hearsay. In response to the objection, the prosecutor told the judge that the officer's testimony regarding the nurse's statements to him were not hearsay because the nurse who made the statements would personally testify at trial.[1] The prosecutor's assurance that the nurse would testify later in the trial was obviously offered to give the trial court the impression that any risks inherent in the officer's hearsay testimony would be ameliorated by the fact that the declarant of the hearsay statement was to appear at trial and be subject to cross-examination. *See State v. Jessica Jane M.*, ___ W.Va. ___, ___, ___ S.E.2d ___, ___ (No. 35441, September 16, 2010) (Slip Op. at 13) (the declarant's later appearance at trial ameliorates any hearsay or confrontation objection).

The prosecutor's assurances to the trial court were, however, little more than testimonial legerdemain, *i.e.*, notwithstanding the prosecutor's assurances to the trial court that the nurse would testify, the nurse never appeared or testified at trial. Consequently, the defendant could not ask the nurse if she made the statement to the police officer, much less cross examine the nurse on the accuracy of her observations.

The State now argues, in its brief on appeal, that the nurse was under subpoena to testify at the trial, but defied that subpoena by not appearing. However, there is no

[1]On appeal, the State also argues for the first time that the officer's testimony repeating the nurse's out-of court statement was not hearsay because it had not been offered to prove the truth of the matter asserted. The State now contends the incriminating statement was only offered to show the officer's reason for arresting the defendant.

evidence of this in the record and no evidence that the prosecutor made any real effort to secure this witness's testimony. There is no evidence showing the prosecutor checked with the witness as to her trial appearance, or checked the morning that the trial began as to her attendance. If the prosecutor assures a trial judge that a witness will testify, then the prosecutor has a duty to present the witness. The admission of the nurse's hearsay statement is not an instance concerning the introduction of a relatively harmless matter, but instead went to the very core of a key issue in dispute.

Why would a jury only deciding guilt or innocence need to know why the police arrested the defendant? Why the police officer arrested the defendant was not relevant to any issue in the case. The jury's sole duty was to decide whether the defendant was the driver of a vehicle at a time when he was legally impaired and, if so, whether the defendant's drunk driving caused the death of another person. In other words, the reasons why the police officer arrested the defendant had no bearing on defendant's guilt or innocence.

The only valid reason for asking a police officer why he arrested a person *is to establish probable cause for the arrest.* Probable cause is decided by the court out of the presence of the jury, or by a Grand Jury. The petit jury only decides guilt or innocence, not whether the police officer had probable cause to arrest the defendant in the first instance.

One of our leading cases addressing hearsay issues that arise when police officers testify as to the background of their investigations is *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990). In *Maynard*, Justice Workman, writing for an unanimous Court,

correctly noted that evidence as to why a defendant became a suspect is not admissible because it is not relevant to a fact of consequence in a criminal trial. *Id.*, 183 W.Va. at 5, 393 S.E.2d at 225.

Justice Workman recognized in *Maynard* that an appellate court can find this type of hearsay, even if improperly admitted, to be harmless error. As a general proposition, I agree with that conclusion. However, I strongly disagree with that conclusion where – as in the case before us – the hearsay goes to the very heart of a much contested issue in the trial. In such instance it cannot be harmless. The mere fact that a co-defendant – who may have been the drunk driver, and who received a very favorable plea deal to testify against this defendant – testified that the defendant was the driver does not make it any less harmless, because that co-defendant's testimony is suspect as a result of the plea deal and a desire to not be held accountable as the driver of the vehicle. Similarly, the fact that a lab technician drawing blood also testified that he saw bruising on the defendant does not make it any less harmful that the out-of-court statements of a nurse – *a medical professional* – were introduced saying that the defendant's bruising was left to right, and indicated a driver's side seat belt.

While the majority opinion finds this testimony harmless, I would not. Why the police officer arrested the defendant was not an issue for the jury, it was not relevant to any issue being presented to the jury, and it was highly prejudicial to the defendant's case.

The Hearsay Rule Needs Modification

I believe that this Court needs to revisit our hearsay rule. We frequently see cases coming before this Court where a prosecutor has thwarted a defendant's right to confront a witness or to receive a fair trial by introducing hearsay statements. Even when an objection is made, the prosecutor falls back on the time-proven exception and tells the trial judge, "Oh, we are not offering this statement to prove the truth of the matter asserted." This is more or less a wink-and-a-nod type argument, and it needs to be stopped. It appears that other jurisdictions are putting a stop to this type of testimony. An excellent article discussing police officers testifying as to why they arrested a defendant is *Arresting Officers and Treating Physicians: When May a Witness Testify to What Others Told Him for the Purpose of Explaining his Conduct?*, 18 Regent Univ. L. Rev. 229 (2006).[2] The article points out that leading authorities on evidence note that allowing a police officer to testify as to incriminating hearsay statements of other persons leading to his decision to arrest the defendant is usually an abuse of discretion. The need for this evidence is slight, and the likelihood of misuse great. *See also, John W. Strong, et al*, *McCormick on Evidence*, Section 249 (5th ed. 1999).

[2]For a more detailed review of how some other jurisdictions are addressing the issues, see footnotes 6 and 7 of the article, where the article's author cites many appellant courts which hold that it is error for a police officer, in explaining why a defendant was arrested, to testify about the details of incriminating hearsay statements.

We should restrict the hearsay testimony of a police officer regarding "why he arrested the defendant" by limiting the officer's testimony to a more simple statement such as "on information received, I arrested the defendant" without allowing the officer to repeat the content of any incriminating hearsay statements that may have formed a basis for the officer's decision to make an arrest. *See, Statements of Bystanders to Police Officers Containing An Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct*, 55 U. Miami L. Rev. 771 (2001). Other courts limiting an officer's testimony have recognized that the out-of-court statement inferring the defendant's guilt is "classic hearsay," *Id.*, at 10, "[w]hen the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label." *Keen v. State*, 775 So. 2d 263, 273 (2000). *See also, United States v. Silva,* 380 F.3d 1018, 1020 (7th Cir.2004) (notwithstanding arguments of prosecutor, police officer's hearsay statements could not have been relevant to any issue other than their truth); *People v. Warlick*, 707 N.E.2d 214 (Ill. Ct. App. 1998).

The time has come for prosecutors to present live witnesses rather than non-rebuttable incriminating hearsay testimony. Some prosecutors may take pride in their "slight of hand" tactics; however, it not only violates a defendant's constitutional rights to confront his or her accusers and to receive a fair trial, but it will lead to innocent people being found guilty of crimes they did not commit. My philosophy on criminal trials is straight-forward.

Try a defendant with witnesses who have first-hand knowledge, not with irrebuttable hearsay testimony. It will force prosecutors to work harder in determining the real facts rather than relying on the police to convict with hearsay. Prosecutors should prepare for trial and present witnesses with first hand knowledge. Evidence presented to a jury by prestidigitation only serves to undermine the fairness of our jury system.

For these reasons, I respectfully dissent.