

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia v. Davis Wolverton and Kathryn Wolverton

State of West Virginia v. Davis Wolverton and Kathryn Wolverton · No. Nos. 11-1617 and 11-1642 · Decided May 17, 2013

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the convictions and sentences of Davis Wolverton and Kathryn Wolverton for delivery of a Schedule II controlled substance, conspiracy, and gross child neglect creating a risk of serious bodily injury or death. The court rejected claims concerning allegedly false testimony, failure to direct a verdict, and the seating of a husband and wife on the jury, finding no abuse of discretion or prejudicial error.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Brent D. Benjamin; Justice Robin J. Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Allen H. Loughry II
JURISDICTION	West Virginia
DECIDED	May 17, 2013
DOCKET	Nos. 11-1617 and 11-1642
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed their convictions, post-trial orders, and sentences from the Circuit Court of Webster County.
STANDARD OF REVIEW	Evidentiary and procedural rulings are generally reviewed for abuse of discretion. The trial court's decision regarding striking a juror is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published memorandum decision; the opinion states that it was issued under Rule 21 because the case presented no substantial question of law and no prejudicial error.
PARTIES	Davis Wolverton, Kathryn Wolverton v. State of West Virginia

TOPICS

[criminal procedure](#)[evidence](#)[prosecutorial misconduct](#)[jury selection](#)[appellate procedure](#)

PRACTICE AREAS

criminal procedure

criminal evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court erred by refusing to strike Payne's testimony because of inconsistencies between his trial testimony and prior sworn testimony.
2. Whether the defendants were entitled to a new trial because the prosecutor allegedly presented false testimony.
3. Whether the circuit court erred by refusing to direct a verdict of acquittal at the close of the State's case.
4. Whether the circuit court erred by allowing a husband and wife to serve together on the jury without a showing of prejudice.

HOLDINGS

1. The defendants were not entitled to a new trial because they failed to establish that the prosecutor presented false testimony, knew or should have known the testimony was false, and that the testimony materially affected the verdict.
2. The circuit court did not abuse its discretion by refusing to strike Payne's testimony, and because the testimony was properly left for the jury to assess, the court did not err in refusing to direct a verdict of acquittal.
3. The circuit court did not abuse its discretion by allowing a husband and wife to serve together on the jury where the defendants made no showing of prejudice.

KEY QUOTATIONS

"In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict." (at 2)

"Because the circuit court correctly refused to strike Mr. Payne's testimony, we find that the court did not err by refusing to direct a verdict of acquittal at the close of the State's case." (at 3)

FACTUAL BACKGROUND

Phillip Payne acted as a confidential informant in a controlled purchase of pills from Davis Wolverton at Wolverton's residence. Payne testified that Kathryn Wolverton retrieved the pills, handed them to Davis, and that Davis completed the sale; testing showed that the pills contained morphine. At trial, Payne's testimony about his prior contacts with Davis appeared inconsistent with testimony from an earlier proceeding, but both defendants cross-examined him about the inconsistency. The jury convicted both defendants on all charged counts.

PROCEDURAL HISTORY

Davis Wolverton and Kathryn Wolverton were indicted separately for delivery of morphine, conspiracy, and gross child neglect creating a risk of serious bodily injury or death. Following a joint jury trial, both were

convicted on all counts. The circuit court adopted the verdicts, denied their post-trial motions, and sentenced them. They appealed, challenging the admission and alleged falsity of a confidential informant's testimony, the denial of a directed verdict, and the seating of a husband and wife on the jury.

DISPOSITION

affirmed

CASES CITED

- McDougal v. McCammon, 193 W. Va. 229, 455 S.E.2d 788 (1995)
- Watson v. Inco Alloys International, Inc., 209 W. Va. 234, 545 S.E.2d 294 (2001)
- Helmick v. Potomac Edison Co., 185 W. Va. 269, 406 S.E.2d 700 (1991)
- State v. Wade, 200 W. Va. 637, 490 S.E.2d 724 (1997)
- Franklin v. McBride, 226 W. Va. 375, 701 S.E.2d 97 (2010)
- Helmick v. Potomac Edison Co., 185 W. Va. 269, 406 S.E.2d 700 (1991)
- West Virginia Division of Highways v. Butler, 205 W. Va. 146, 516 S.E.2d 769 (1999)

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS FILED State of West Virginia, May 17, 2013 Plaintiff Below, Respondent released at 3:00 p.m. RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS vs) No. 11-1617 (Webster County No. 11-F-6) OF WEST VIRGINIA Davis Wolverton, Defendant Below, Petitioner and State of West Virginia, Plaintiff Below, Respondent vs) No. 11-1642 (Webster County No. 11-F-7) Kathryn Wolverton, Defendant Below, Petitioner MEMORANDUM DECISION Petitioner Davis Wolverton (“Mr.

Wolverton”), by counsel Daniel R. Grindo, and petitioner Kathryn Wolverton (“Ms. Wolverton”)1, by counsel Bernard R. Mauser, appeal from the Circuit Court of Webster County’s August 29, 2011, trial order convicting each of them of one count of delivery of a Schedule II controlled substance, conspiracy, and gross child neglect creating risk of bodily injury or death.

Additionally, they appeal the October 28, 2011, order denying their post-trial motion for a new trial and sentencing them. The State, by counsel, Scott E. Johnson, argues in support of the orders. Upon consideration of the standard of review, the parties’ briefs, the record presented, and the oral arguments, this Court finds no substantial question of law and no prejudicial error in this case.

Thus, we find that a memorandum decision is the appropriate disposition for this case under Rule 21 of the Revised Rules of Appellate Procedure. 1 Mr. Wolverton is Ms. Wolverton’s son. 1 Phillip “P.J.” Payne (“Mr. Payne”) agreed to assist the state police by acting as a confidential informant.2 On January 12, 2010, Mr. Payne met with Mr. Wolverton and the two agreed to meet at Mr.

Wolverton's residence later that evening so that Mr. Payne could purchase "pills." Prior to the rendezvous with Mr. Wolverton, Mr. Payne was searched by Sergeant Andrew Shingler ("Sgt.

Shingler") to ensure that he had no money or drugs on his person. Sgt. Shingler, along with another officer, Corporal Michael Anderson, drove Mr. Payne to Mr. Wolverton's house and dropped him off in the road directly in front of the house with money to purchase drugs.

The police officers then parked a small distance away with a partial view of the house. Mr. Payne testified that after going into the house, he purchased pills from Mr. Wolverton: "Well, his mom [Ms. Wolverton] got off from the couch and walked into a room, and then she came out, handed him the pills, and then I gave him money, he gave me pills...." After the sale, Mr. Payne left the house and got in the officers' vehicle.

He gave the pills, marked "Kadian 60 milligrams," to Sgt. Shingler. The police officers searched Mr. Payne again prior to releasing him to ensure that he had no other drugs on his person. Testing indicated that the pills contained morphine.

On January 11, 2011, Mr. Wolverton and Ms. Wolverton were each indicted for delivery of a controlled substance, to wit: morphine, a Schedule II controlled substance; conspiracy; and gross child neglect creating risk of serious bodily injury or death.³ The trial of both defendants took place on August 4 and 5, 2011. At the trial, Mr. Payne testified that he had previously had infrequent contact with Mr. Wolverton.

During cross-examination of Mr. Payne, counsel for each defendant questioned Mr. Payne regarding this testimony, which appeared to contradict sworn testimony he gave during a previous hearing in another case.⁴ Mr. Wolverton's counsel asked Mr. Payne, "So you've either lied under oath here today, or you've lied under oath before. Which is it?" Mr. Payne replied that he did not mean to lie, and that he must have misunderstood the questions during the previous hearing.

At the conclusion of the trial, the jury returned a verdict against both defendants on each count of the indictment. The court entered an order adopting the jury's verdict on August 29, 2011. ² Mr. Payne testified at trial that prior to offering to act as a confidential informant, he had been charged with a drug related felony. Neither the police nor the prosecutor made any deals with Mr. Payne in exchange for acting as a confidential informant in this case.

³ Mr. Payne testified that two of Mr. Wolverton's children were present in the home when he purchased the pills from the petitioners. ⁴ The prior hearing testimony was not marked as an exhibit at trial and is not included in the record provided to this Court.

The transcripts in the record indicate that the prior testimony was part of an abuse and neglect proceeding. ² A hearing on post-trial motions took place on September 30, 2011. During that hearing, the petitioners' post-trial motions were denied. Ms. Wolverton was placed on probation

for five years. Mr. Wolverton was sentenced to a term of 1 to 15 years for delivery of a controlled substance, 1 to 5 years for conspiracy, and 1 to 5 years for gross child neglect, with the sentences for the first two counts to run concurrently and consecutively to the third count.

Mr. Wolverton's sentence was suspended and he was placed on home confinement which was to be followed by five years of probation. Both petitioners now appeal to this Court. They argue that the circuit court committed error by failing to strike the testimony of Mr. Payne, by allowing the prosecutor to present false evidence, by failing to direct a verdict of acquittal at the close of the State's case, and by allowing a husband and wife to sit together on the jury.

The admissibility of testimony is evidentiary. "Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. pt. 1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995). See also syl. pt. 1, *Watson v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001) ("The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W.Va.

269, 406 S.E.2d 700 (1991), cert. denied, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991).⁴ Syllabus point 1, *West Virginia Division of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999).⁵ Furthermore, "[w]e review the trial court's decision on [striking a juror] under an abuse of discretion standard." *State v. Wade*, 200 W. Va. 637, 654, 490 S.E.2d 724, 741 (1997).

The petitioners argue that they are entitled to a new trial pursuant to syllabus point 2, *Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97 (2009), which states, In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict.

This Court finds no merit in the petitioners' argument because they cannot satisfy any of the three prongs of syllabus point 2 in *Franklin*. Although the trial transcript indicates that Mr. Payne was untruthful, the petitioners have produced no evidence to show whether Mr. Payne was dishonest during the Wolvertons' trial or in the prior hearing. Furthermore, no evidence was produced by the petitioners showing that the prosecutor knew Mr. Payne's testimony was false; the record shows only that the 3 prosecutor recognized that Mr. Payne had testified inconsistently.⁵ Finally, the petitioners have not shown, even if Mr. Payne's testimony at their trial was false, that it had a material effect on the jury verdict.

Both Mr. Wolverton's counsel and Ms. Wolverton's separate counsel cross-examined Mr. Payne on the inconsistencies in his sworn testimony, allowing the jury to weigh Mr. Payne's credibility

accordingly. Because the circuit court correctly refused to strike Mr. Payne's testimony, we find that the court did not err by refusing to direct a verdict of acquittal at the close of the State's case.

We also find no error in the circuit court's decision to allow a husband and wife to sit together on the jury in this case. In *Helmick v. Potomac Edison Company*, 185 W. Va. 269, 406 S.E.2d 700 (1991), appellee Potomac Edison Company alleged that it had been prejudiced by the trial court's decision to allow a husband and wife to serve together on the jury.

The Court said, "We find no merit in this claim." *Helmick*, 185 W. Va. at 278, 406 S.E.2d at 709. We similarly find no merit to Mr. Wolverton's claim, which, like Potomac Edison Company's claim, is absent a showing of prejudice.

We conclude that the circuit court did not abuse its discretion with regard to Mr. Payne's testimony or its decision to allow a husband and wife to serve together on the jury. Therefore, we affirm the circuit court's August 29, 2011, trial order, and we affirm the October 28, 2011, order sentencing the petitioners and denying post-trial motions. Affirmed. ISSUED: May 17, 2013 CONCURRED IN BY: Chief Justice Brent D. Benjamin Justice Robin J. Davis Justice Margaret L. Workman Justice Menis E. Ketchum Justice Allen H. Loughry II 5 Contrary to the position of the Wolvertons' counsel during oral argument before this Court, the record does not reflect that the prosecutor ever stated that Mr. Payne's testimony at trial was false.

At the post-trial hearing, the prosecutor said, "I agree that Mr. Payne testified inconsistently.... I did not present knowingly false testimony." 4