

WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

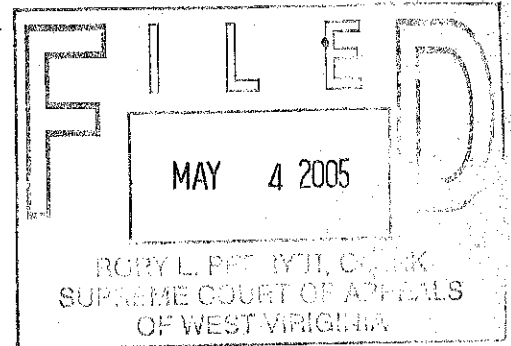
APPELLEE

NO: 32500

VS.

RONNIE LYNN LEGG

APPELLANT



APPELLANT'S APPEAL BRIEF

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**THE KIND OF PROCEEDING AND NATURE OF
THE RULING IN THE LOWER TRIBUNAL**

Ronnie Lynn Legg, the Defendant and Appellant herein, hereinafter called the Appellant, was indicted by the Grand Jury of Greenbrier County, West Virginia, of the felony offense of the "Wrongful Removal of Timber - More Than \$ 1,000.00." The matter proceeded to trial before the Honorable James J. Rowe, Judge of the Circuit Court of Greenbrier County, West Virginia, upon the charge. The jury returned a verdict of guilty against the Appellant. The Appellant moved for a new trial, which was denied by Judge Rowe. The Appellant appeals this conviction and the denial of his Motion for a New Trial.

STATEMENT OF THE FACTS OF THE CASE

Ronnie Lynn Legg was indicted by the June, 2003, term of the Grand Jury of Greenbrier County, West Virginia, of the felony offense of the "Wrongful Removal of Timber - More Than \$ 1,000.00." The Appellant was alleged to have entered upon the property of Josh Bruner on July 20, 2002, and timbered two red oak trees, which had a value of more than \$ 1,000.00. DNR Officer Charles Robert Johnson testified that he investigated the removal of the trees, and in March, 2003, questioned Clinton "Bucky" Holland in jail (Johnson Testimony, Page 18). Officer Johnson then testified that as a result

of the statement from Mr. Holland, he then went for the indictment against the Appellant (Ibid, Page 19).

The evidence of the boundary line between the property owned by Josh Bruner and the Holland family was contradictory. There was no agreement as to the existence or location of a fence between the property (Main Transcript, Volume I, Pages 95-96, 123-124, Testimony of Clinton W. Holland, Page 20). The State chose to not introduce any deeds describing the property, and did not introduce any evidence from a licensed surveyor.

Mr. Holland tried to invoke his 5th Amendment Rights repeatedly throughout his testimony, but did offer testimony that he had rented the timbering equipment from his employer (Testimony of Clinton Holland, Page 7) and that he was using this equipment to work on his family's property (Ibid, Page 6). This occurred during the first day of Trial. At the start of Day 2 of the Trial, the State requested that the Court add an instruction to the Jury Charge concerning "Aiding and Abetting". The Court granted this request over the objections of Counsel for the Appellant. Upon the conclusion of the Testimony, the Court instructed the Jury both upon the State's original theory of the case (Jury Instruction, Page 9-10) and upon its new theory of the case (Ibid, Page 13-15). The jury verdict form allowed for the Appellant to be found guilty of a felony, or a misdemeanor, or not guilty. It did not specify which felony under the jury charge that they would find him guilty of. This is covered in the Transcript of the Jury Instruction, Pages 19-21, although there are significant gaps in the Transcript.

The Appellant was convicted of a felony, and moved for a new trial upon the grounds that the "Aiding and Abetting" jury instruction had been improperly given, that the indictment became invalid upon that instruction being given, and that the verdict form failed to indicate under which theory of the State's case the Appellant had been convicted. The Court denied this motion upon the grounds that the two instructions applied to the same crime. This appeal follows.

ISSUES PRESENTED

1. DID THE TRIAL COURT ERR IN RULING THAT THE INDICTMENT WAS VALID ?
2. DID THE TRIAL COURT ERR IN GIVING THE INSTRUCTION REQUESTED BY THE STATE CONCERNING AIDING AND ABETTING ?
3. DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY AS TO TWO POTENTIAL FELONY OFFENSES, BUT HAVING THE VERDICT FORM REFLECT ONLY THE OPTIONS "GUILTY OF A FELONY", "GUILTY OF A MISDEMEANOR" OR "NOT GUILTY" ?
4. DID THE STATE ESTABLISH THE BOUNDARY LINES OF THE PROPERTY AND THAT A TRESPASS OCCURED BEYOND A REASONABLE DOUBT ?
5. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL ?

CITATION OF AUTHORITIES

STATUTES:

West Virginia Constitution, Article III, Section 14
West Virginia Code Section 61-3-52

COURT RULES:

West Virginia Rules of Criminal Procedure Rule 7(c)(1)
West Virginia Rules of Criminal Procedure Rule 30

CASES REFERENCED:

State v. Wallace, 205 W. Va. 155, 517 S. E. 2d 20 (1999)

State ex. rel. Jonathan L. Day v. Honorable Gray Silver, III, Judge of the Circuit Court of Morgan County, and David H. Sevastien, Prosecuting Attorney for Morgan County, 210 W. Va. 175, 556 S. E. 2d. 820 (2001)

State v. Palmer, 210 W. Va. 372, 557 S. E. 2d. 779 (2001)

State v. Petry, 166 W. Va. 153, 273 S. E. 2d. 346 (1980)

State v. Ashcraft, 172 W. Va. 640, 309 S. E. 2d. 600 (1983)

State v. Williams, 209 W. Va. 25, 543 S. E. 2d 306 (2000)

SUMMARY OF ARGUMENT

In West Virginia, an indictment must meet certain criteria in order to be valid. It must (1) state the elements of the offense charged, (2) put the Defendant on fair notice of the charge against which he must defend, and (3) enable the Defendant to assert a prior acquittal or conviction in order to prevent being placed twice in jeopardy. Any assessment of the facial sufficiency of an indictment is limited to its "four corners", and because supplemental pleadings, such as a Bill of Particulars, cannot cure an otherwise defective indictment, Trial Courts are precluded from considering evidence from beyond the charging instrument. In the present case, the Defendant was indicted for the felony offense of the "Wrongful Removal of Timber - More Than \$ 1,000.00." After the first day of Trial, the State sought to obtain a conviction for the felony offense of the "Aiding and Abbetting the Wrongful Removal of Timber - More Than \$ 1,000.00." This is a seperate and distinct offense, with differing elements of proof. Once the State elected to proceed upon this theory, it rendered the indictment invalid. As a result, the indictment should have been dismissed.

The next assignment of error by the Appellant is that it was improper for the Trial Court to instruct the jury as to two seperate felony offenses. Even in cases where the State

is allowed to wait until the conclusion of the evidence before electing upon which offense it seeks a conviction by the jury, the State must make its election prior to the Court's instruction of the jury. In the present case, the Court did not require the State to make such an election, and instead instructed the jury as two possible felony offenses upon which they could find the Appellant guilty. Only one of these offenses had been previously charged against the Appellant, and neither offense was a lesser include offense of the other. It was error for the Trial Court not to have the State elect upon which theory of the case it was seeking to proceed, and instead instruct the jury as to both of the State's theories.

The next assignment of error by the Appellant is that it is impossible to tell from the Verdict form which of the two felony offenses that the jury was instructed that they actually found the Appellant guilty of committing. While the State argued that the two offenses were one and the same, the fact that it had offered two separate jury instructions for two felony offenses with differing elements of proof refutes that argument. Therefore, the Verdict Form used in this matter was flawed, and it was error for the Trial Court to permit its use.

The next assignment of error is that the State failed to establish a trespass by the Appellant upon the property of Josh Bruner beyond a reasonable doubt. The State failed to establish the boundary line of Mr. Bruner's property by use of either a deed or survey evidence. The evidence that the State did introduce was contradictory on the location of the boundary line and the existence of a fence that might have established the boundary line. Thus the evidence was insufficient to support a finding that the Appellant trespassed upon the property of Josh Bruner beyond a reasonable doubt.

Finally, the Appellant asserts that it was error for the Trial Court to deny his Motion for a New Trial. The Court did so based upon its ruling that only one felony offense had been involved. This ruling by the Court ignores the fact that it instructed the jury upon two separate felony offenses, with two separate jury instructions which contained different elements of proof. The Appellant has a right to know against which

offense he must defend, and what the elements of that offense are. That did not occur in this matter, and the only remedy to cure this mistake was for a new trial to be granted. It was error for the Court to deny the Motion for a New Trial by the Appellant.

ARGUMENT

1. THE TRIAL COURT ERRED IN RULING THAT THE INDICTMENT OF THE APPELLANT WAS VALID AFTER THE STATE CHANGED ITS MIND CONCERNING ITS THEORY OF THE CASE.

In the decision of STATE V. WALLACE, 205 W. Va. 155, 517 S. E. 2d 20 (1999), the Court held that for an indictment to be sufficient under Article III, Section 14 of the West Virginia Constitution, and Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure, it had to (1) state the elements of the offense charged, (2) put the Defendant on fair notice of the charge against which he must defend, and (3) enable the Defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy. The Court further stated that any assessment of the facial sufficiency of an indictment is limited to its "four corners", and because supplemental pleadings, such as a Bill of Particulars, cannot cure an otherwise invalid indictment, Courts are precluded from considering evidence from sources beyond the charging instrument.

Following this doctrine, in STATE OF WEST VIRGINIA ex rel. JONATHAN L. DAY V. HONORABLE GRAY SILVER, III, JUDGE OF THE CIRCUIT COURT OF MORGAN COUNTY AND DAVID H. SEVASTIEN, PROSECUTING ATTORNEY FOR MORGAN COUNTY, 210 W. Va. 175, 556 S. E. 2d 820 (2001), the Court held that an indictment for Grand Larceny was insufficient when it failed to set forth the exact items of property alleged to have been stolen. In STATE V. PALMER, 210 W. Va. 372, 557 S. E. 2d 779 (2001), the Court held that an indictment for D.U.I. -

3rd Offense was insufficient when it failed to state that the prior convictions cited in the indictment were for D.U.I. offenses.

In the present case, the Appellant was indicted for the felony offense of "Wrongful Removal of Timber - More Than \$ 1,000.00". The Indictment sets forth the elements of the offense as being that (1) the Appellant, (2) in Greenbrier County, West Virginia, (3) on or about the 20th day of July, 2002, (4) willfully, maliciously and feloniously, and with intent to do harm, unlawfully entered upon the lands of Josh Bruner, (5) where he cut down, injured or removed red oak timber (6) without the permission of the landowner, and (7) that the value of timber was more than \$ 1,000.00. This Indictment would appear to be valid pursuant to the WALLACE doctrine.

The trial in this matter lasted a day and a half. At the start of the proceedings on the second day, the State submitted a proposed jury instruction to the Court wherein it sought to have the jury instructed upon the offense of "Aiding and Abetting the Wrongful Removal of Timber - More Than \$ 1,000.00". In accordance with this theory, the elements of the offense that must be proven are (1) that the Appellant, (2) in Greenbrier County, West Virginia, (3) on or about the 20th day of July, 2002, (3) while actually present at the time and place of the commission of the "Wrongful Removal of Timber", (4) did knowingly aid and abet (5) another individual (6) in the willful, intentional and malicious entry upon the land of another, with intent to do harm, (7) without the permission of the lawful owner, (8) and removed red oak timber (9) of a value of more than \$ 1,000.00.

At the time that this instruction was offered, the Indictment became defective under the WALLACE doctrine, as the elements of this offense were not set forth in the Indictment, nor was the Appellant put on fair notice that of the charge against which he had to defend. At the time that this instruction was offered unto the Court, the State had completed its case, and the only witness left to testify was the Defendant. The State argued that it had not changed its theory of the case, and relied upon STATE V. PETRY, 166 W. Va. 153, 273 S. E. 2d 346 (1980) and STATE V. ASHCRAFT, 172 W. Va. 640,

309 S. E. 2d 600 (1983), that a general indictment as a principal in the first degree would be sufficient to sustain a conviction as an aider or abettor, or as an accessory before the fact. While the Appellant acknowledges that PETRY and ASHCRAFT have never been expressly overruled, he would submit that they have certainly been modified by WALLACE.

In PETRY, the Court stated that facts and details concerning the State's case, which were not required to be set forth in the indictment, might be properly discovered by applying for a Bill of Particulars. Under WALLACE, all the elements of the offense alleged must be set forth within the "four corners" of the indictment, and Courts are precluded from considering evidence from sources beyond the charging instrument. In ASHCRAFT, the Court held that a criminal defendant is constitutionally entitled to be fully and plainly informed of the charges against him. WALLACE found that this must be done expressly in the indictment. Therefore, as soon as the State changed its theory of the case, and sought to have the Appellant convicted of an offense for which the elements were not set forth in the indictment, the indictment became invalid pursuant to WALLACE.

2. THE TRIAL COURT ERRED BY NOT MAKING THE STATE ELECT BETWEEN ITS TWO THEORIES OF THE CASE, AND INSTEAD INSTRUCTING THE JURY UPON BOTH THEORIES OF THE CASE PUT FORTH BY THE STATE.

It is the duty of the Court to instruct the jury as to the law to apply in the case that is being heard, pursuant to Rule 30 of the West Virginia Rules of Criminal Procedure. The State requested that the jury be instructed on two separate and distinct felony offenses. The first instruction in question is for the offense that was charged in the indictment (Instructions Transcript, Pages 9-10, 13). The second instruction sets forth an offense with different elements of proof (Ibid, Pages 13-15). It follows that offenses with different elements of proof cannot be the same offense. The State's proffered instruction for the

second offense should have been rejected as not pertaining the offense that was being tried before the Court.

Of course, jury instructions are to be tailored to fit the evidence that has been presented. STATE V. BENNETT, 157 W. Va. 702, 203 S. E. 2d 699 (1974). There are some instances where the State is allowed to wait until just before the jury instructions are given to elect which theory of the case it is proceeding under. Such an instance in the case of a possible "Felony-Murder Rule" proceeding, where the State may wait to elect as to whether it is seeking convictions for both First Degree Murder AND another felony, or if it is seeking a First Degree Murder conviction BECAUSE of the commission of the other felony. However, the State must elect one theory or the other prior to the instruction of the jury. In the present case, the State did not elect, and was allowed to proceed to the jury on a "multiple choice" theory. Counsel for the Appellant objected to the "second instruction" when it was offered at the start of the second day of trial, and the Trial Court noted a continuing objection to that instruction by the Appellant. In fact, the State even carried its multiple choice theory of the case into closing arguments, where it was argued that the jury could believe that the Appellant acted alone, or together with Clinton "Bucky" Holland, or with Mr. Holland and Hunter, or perhaps with some unknown persons, that the jury should still find the Appellant guilty. (Instructions, Page 17) It was error for Court to not have the State elect upon which theory of the case it was seeking to proceed with, and instead to instruct the jury as to both of the State's theories

3. THE TRIAL COURT ERRED IN USING A VERDICT FORM WHICH MAKES IT IMPOSSIBLE TO TELL WHICH OF THE TWO SEPERATE FELONY OFFENSES THAT THE JURY WAS INSTRUCTED CONCERNING THAT THEY FOUND THE APPELLANT GUILTY.

The verdict form given to the jury in this case gave the options of finding the Appellant guilty of a felony, guilty of a misdemeanor, or not guilty. However, the jury in this case was instructed upon two seperate felonies with different elements of proof, and

neither of which is a lesser included offense of the other. It is impossible to tell which offense the Appellant has been convicted of committing. The State has argued that the offenses are one and the same, but that argument ignores the fact that the two jury instructions in question (Jury Instructions, Page 9-10, 13-15) contain differing elements that must be proven by the State in order for the Defendant to be found guilty. Therefore, the Appellant would submit that the State's argument is without merit, and that the Verdict Form was inadequate.

4. THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THE LOCATION OF THE BOUNDARY LINE BETWEEN THE HOLLAND PROPERTY AND THE BRUNER PROPERTY.

One of the elements of the offense of the Wrongful Removal of Timber, pursuant to West Virginia Code Section 61-3-52, is that the accused must have entered upon the lands of another. As with all elements of an offense, this must be proven beyond a reasonable doubt. In this case, the State did not introduce a copies of the deeds setting forth the boundary line between the two tracts of property involved, nor did it introduce a survey of either tract of land to establish the boundary line. There was contradictory evidence presented as to the existence of a fence between the properties. Josh Bruner testified that, while he knew that there were some fences on his property lines, he didn't know their exact locations, or whether one was in existence at the location in question. (Main Transcript, Volume I, Pages 123-124). Harmon Boggs testified that such a fence did exist (Ibid, Pages 95-96). Clinton "Bucky" Holland testified that he believed that the trees in question were upon property belonging to his family (Testimony of Clinton W. Holland, Page 20).

While the Appellant has a heavy burden to support in challenging the sufficiency of the evidence, STATE V. WILLIAMS, 209 W. Va. 25, 543 S. E. 2d 306 (2000), makes it clear that the State must establish the location of the boundary line between properties beyond a reasonable doubt, and that this may be done by introduction of the deeds, or by

the testimony of a surveyor, or by evidence of a fence line. The State chose not to introduce the deeds, chose not to call a surveyor, and the evidence concerning any boundary line fence was contradictory, at best. As a result, the State failed to prove this element of the offense beyond a reasonable doubt.

5. THAT THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL.

The Appellant raised the issues of the validity of the indictment, the appropriateness of the State's "Aiding and Abetting" instruction, and the sufficiency of the verdict from in his Motion for a New Trial. (Sentencing Transcript). These matters were rejected by Court upon the grounds that only one felony offense was involved.

This reasoning by the Court would seem to be flawed, as the Court instructed the jury on two separate and distinct felony offenses with differing elements of proof. Therefore, they cannot be the same crime. Under the WALLACE decision, the Defendant has a right to have all the elements of the offense against him set forth in the indictment. Certainly it should follow that the Defendant has the right to know of which offense he has been convicted. That has not happened in this case, and the only way in which to rectify this mistake is to grant the Defendant a new trial. The Court erred in failing to do so.

CONCLUSION

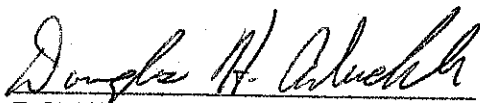
Pursuant to the WALLACE decision, a defendant has the right to be fully informed of the charge against him. In this case, the State did have a valid indictment against the Appellant, until the State decided change theories of the case mid-trial. The Appellant based his defense upon the charge against him. He established that it was Bucky Holland who had borrowed the logging equipment for use upon his family's property. he established that he had no knowledge of the location of any property boundary lines in that area, and that he relied upon the representations of Mr. Holland as to whose property the trees being cut were located upon. He established that Mr. Holland received the money paid in exchange for the timber obtained from the trees cut. The Appellant testified in this

matter, while Mr. Holland asserted his right against self incrimination. The Appellant's defense was based upon the elements of the offense charged, as set forth in the indictment. This was the case of which he had been put on notice, and which he had prepared his defense against. Once the State changed its theory of the case, the indictment became defective. In addition, the jury was instructed as to the multiple theories that the State put forward, and was allowed to pick one from among them. While there is no doubt that the jury convicted the Appellant, it is impossible to tell which offense and under which jury instruction that the jury convicted him of having committed. Contrary to the argument of the State, and the ruling by the Court that the offenses are one and the same, it took two separate jury instructions, with differing elements of proof, to set the State's multiple choice theory of the case before the jury. In addition, the State even failed to prove the necessary element of trespass under both of its theories of the case. As a result, the Appellant should have been granted a New Trial by the Court.

The Appellant would pray that this Court reverse his conviction, and remand the matter to the Circuit Court of Greenbrier County, West Virginia, for a new trial.

RONNIE LYNN LEGG

By Counsel



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CERTIFICATE OF SERVICE

I, Douglas H. Arbuckle, Counsel for Appellant - Ronnie Lynn Legg, do hereby certify that I have served a true and exact copy of the foregoing Appellant's Appeal Brief, upon the following persons, at their addresses listed below, on this the 4th day of May, 2005:

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