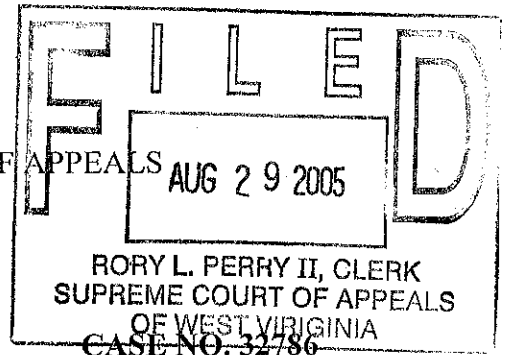


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



**STATE OF WEST VIRGINIA,**

**v.,**

**CHRISTOPHER FRYE,**

Appellant

**APPELLANT'S CRIMINAL APPEAL BRIEF**

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**STATE OF WEST VIRGINIA,**

**v.,**

**CASE NO. 32786**

**CHRISTOPHER FRYE,**

Appellant

**APPELLANT'S CRIMINAL APPEAL BRIEF**

**Kind of Proceeding**

This is an appeal of a jury verdict of guilty to grand larceny found by the Circuit Court of Logan County, West Virginia, against the Appellant on August 18, 2004, and a sentence on that conviction to not less than one nor more than ten years in the West Virginia State Penitentiary by order entered October 15, 2004, and amended sentencing order entered October 27, 2004.

**Statement of Facts**

1. Defendant Christopher M. Frye was charged with grand larceny in the Magistrate Court of Logan County, West Virginia, on October 24, 2003, for an incident that allegedly occurred on July 14, 2003.
2. Attorney Michael Esposito, of the Logan law firm of Esposito & Esposito, was appointed as counsel for the Defendant by order entered December 18, 2003.
3. The defense and trial was handled on behalf of Christopher Frye by Attorney Thomas Esposito of the same law firm of Esposito & Esposito in Logan, West Virginia.
4. Christopher Frye was indicted for grand larceny at the May 2004 term of the Circuit Court of Logan County, West Virginia.
5. A jury trial was held in this matter on August 17 and 18, 2004, in the Circuit Court of Logan County, West Virginia.

6. Christopher Frye was found guilty by that jury of grand larceny as charged.
7. Co-defendant Robert Fields pleaded guilty to grand larceny before the trial of the Appellant and testified against the Appellant at the said trial.
8. The Appellant was sentenced to not less than one nor more than ten years in the West Virginia State Penitentiary by order entered October 15, 2004.
9. The said sentencing order was amended by order entered October 27, 2004.
10. Attorney Thomas Esposito filed a "Notice of Intent to Appeal" with the Clerk of the Circuit Court of Logan County, West Virginia, on November 3, 2004.
11. Attorney John W. Bennett was appointed as counsel for the Appellant by order entered November 22, 2004.
12. An "Appellant Transcript Request" was filed in this matter on December 13, 2004.
13. By order entered January 24, 2005, the time within which the Appellant may file his petition to appeal was extended by an additional sixty days due to the fact that the transcript of the trial had not yet been completed.
14. The transcript of the trial was received on or about March 15, 2005.
15. The Petition for Appeal in this case was filed on April 6, 2005.
16. The Petition for Appeal was granted by this court by order entered May 9, 2005.
17. Christopher Frye has remained incarcerated pursuant to the said conviction.

#### Assignments of Error

1. Ineffective assistance of counsel.
2. Failure to adequately question prospective jurors and especially so in view of the response of Juror McCoy.

## Authorities Relied Upon

### Argument No. 1 – Ineffective Assistance of Counsel

The ineffective assistance of counsel is governed by the two-prong test established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which states as follows:

1. Counsel's performance was deficient under an objective standard of reasonableness and
2. There is a reasonable probability that but for counsel's unprofessional errors, the result from the proceedings would have been different. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

In reviewing counsel's performance, court's must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. State ex rel Vernatter v. Warden, West Virginia Penitentiary, 207 W.Va. 11, 528 S.E.2d 207 (1999). This Court in State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974) stated that "counsel's actions are to be held ineffective only if no reasonable attorney would have so acted under the circumstances of the case."

The right of an accused to be represented by counsel includes the constitutional right to "effective assistance" of counsel. See The Constitution of West Virginia, Article III, Section 14, and State ex rel. Levitt v. Bordenkircher, 176 W.Va. 162, 342 S.E.2d 127 (1986).

The question then becomes did Attorney Thomas Esposito act as a reasonable lawyer would have acted under the circumstances when representing Mr. Frye at trial in this action. The undersigned believes that the actions of Attorney Thomas Esposito are not what a reasonable

lawyer would have done under the same circumstances at least in the following most noticeable areas:

A. **Failure to cross-examine State's witnesses.** A most glaring deficiency in the defense provided by counsel was his refusal to ask even one question of any of the State's witnesses. The State presented nine witnesses in its case against this defendant. They included investigating officers, alleged victims, neighbors and a co-defendant. Counsel did not ask even one question of any of the State's witnesses. While some might argue that it is strategy, no reasonable attorney would agree especially when the co-defendant was the **only** witness who placed the defendant at the crime scene, the co-defendant had a prior criminal record and admittedly was drunk at the time of the crime. See page 98, line 12, of the trial transcript of August 17, 2004. None of those areas were explored during cross-examination by counsel for the defense.

Cross-examination of the remaining State's witnesses to enforce the fact that they had no direct evidence to tie the defendant to the crime could and should have been explored and presented clearly to the jury for its consideration.

Cross-examination of the investigating officers to make it clear that the only evidence they had tying this Defendant to the crime was the statement of the co-defendant should have been pursued and highlighted for the jury.

B. **Time of the crime.** The issue of just when the crime occurred was material in view of the defense presented on behalf of Mr. Frye. He did present two alibi witnesses to indicate that he was home on the night in question but both indicated there was a time period when they were asleep and he could have left the house, committed the crime, and returned. The case went to the jury with these "holes" in the alibi, which was highlighted by the prosecutor. Cross-examination of the State's witnesses should have been explored to pin down

the time frame within which the crime occurred. This could have minimized the counter-argument of the prosecutor and strengthened the alibi. It was not even explored.

Further cross-examination of the investigating officers to pin down the problems they had in determining the guilty should have been pursued. No arrests occurred until several months after the crime took place. The officers should have been quizzed on their efforts in the interim, the names of suspects outside of this defendant, the manner in which they pursued their investigation, the fact that they took physical evidence from the scene and ultimately from this defendant, and yet there were no test results or other evidence of any type that linked this defendant to the crime.

C. **Only one eye witness.** Even though the co-defendant was the only State's witness that linked this defendant to the crime, the prosecutor was permitted to ask numerous leading questions of the co-defendant. Instead of objecting and thereby requiring the co-defendant to tell his own version of what happened rather than that provided through the statements of the prosecutor, defense counsel inexplicably stated in open court in front of the jury that he had no objection and the prosecutor should go ahead and lead him and tell him what the prosecutor wanted him to say! The prosecutor promptly did lead him through the rest of his entire testimony. See page 109, line 14, of the transcript of August 17, 2004.

D. **Motions for directed verdict.** At the conclusion of the State's evidence, defense counsel not only failed to move for a directed verdict but advised the court that "I have no motions, judge. I am not going to waste your time." See page 124 of the transcript of August 17, 2004.

Likewise, when both sides finished presentation of their evidence, defense counsel failed to proceed with a motion for directed verdict.

What type of a defense strategy would include these errors? How could the actions of defense counsel possibly have assisted in presenting the defense? No reasonable lawyer would have failed to argue the motion for directed verdict at the conclusion of the evidence and at the conclusion of the State's evidence. These are argued out of the presence of the jury and in no way could possibly adversely affect the case for the defense. The failure to move for a directed verdict was one of the failures of counsel held to be ineffective by this Court in State v. Thomas, supra.

Without doing any cross examination of **any** of the State's nine witnesses, the defense leaves the impression that it does not question anything those witnesses have said and that it is satisfied with that testimony. Instead, numerous questions could and should have been asked to make certain that the jury was well aware of the role played by each witness, what little they knew about the alleged involvement of the defendant, their failure to gather evidence properly and run tests available on it, or for that matter even what tests could have been run, the fact that no individual placed the defendant at the crime scene other than the co-defendant, explored the extent of the drunkenness of the co-defendant at the time of the crime, pin down exactly when the crime occurred to assist the defendant in his alibi, question the co-defendant as to his own criminal record so that the jury would know that the co-defendant had a prior criminal record when considering his testimony (see Rule 609(a)(2)(A) of the West Virginia Rules of Evidence), objected and required the prosecution to make their witnesses testify from their own knowledge as opposed to being led through the case by the prosecution, and question prospective jurors in a voir dire process, which is more thoroughly described below.

In essence, trial counsel did little to present the defendant's side of the case in a light most favorable to the defendant. While he did, on the second day of trial, offer two alibi witnesses and a third witness who had been approached by the co-defendant, the

questioning was extremely brief and, as mentioned above, since the time of the crime was not specifically pinned down, mostly ineffective. The testimony of those three defense witnesses, **including cross examination by the prosecutor**, consist of a mere 19-pages of transcript. The entire defense, other than the testimony of the defendant himself, was 19 pages of transcript in a two-day trial!

Instead, defense counsel told the jury repeatedly, from opening statement through the closing argument, that he would be “brief” and move the case along.

The bottom line is that anyone of these matters clearly shows that the court-appointed defense attorney did not act as a reasonable lawyer would or should have acted under the circumstances when providing a defense to Mr. Frye in this case. Furthermore, the overall effect of his failure to so act on each of these matters proved devastating to the defense and certainly did not provide the effective assistance of counsel for Mr. Frye as guaranteed to him by the Constitution of this state.

**Argument No. 2 – Failure to adequately question prospective jurors  
and especially so in view of the response of Juror McCoy.**

Transcript of the trial clearly indicates that counsel for the defendant never asked one question on voir dire. While the prosecution did ask to question some of the prospective jurors individually, even then counsel for the defense never pursued any questioning of his own. Furthermore, he did not provide any written list of questions he wanted the judge to ask prospective jurors. Sometime, this may not be so significant, but it certainly was in this case.

When one reviews the transcript of the August 17, 2004, first day of the trial in this case, beginning specifically at page 8, one can see how devastating the failure to provide any voir dire questioning by the defense was to Mr. Frye. Specifically, when **all** of the prospective jurors were being questioned by the court as to whether or not they were related by blood or marriage

to defendant Christopher Frye or whether they knew him from any business or close social relationship, Prospective Juror McCoy stated as follows:

“I know the **reputation** of him.”

“I know the **reputation that follows him.**”

Arguably, with such comments by a prospective juror in open court in front of all of the prospective jurors, even if he was meaning to be complimentary to the defendant, it is obvious counsel needs to inquire as to just what “reputation” the prospective juror is talking about. From what source did he learn about any such reputation? Defense counsel should have asked for the opportunity to question that prospective juror individually pursuant to West Virginia Code, Chapter 56, Article 6, Section 12.

What effect did such comment by this prospective juror in open court have on the remaining prospective jurors? No effort was made by the court or defense counsel to make that determination. To have a fair trial, it was imperative on all the officers of the court to make that determination. Certainly, it was incumbent upon defense counsel to explore that point thoroughly.

Instead, Juror McCoy remained in the jury pool in the courtroom with the other prospective jurors **while the court and the prosecutor questioned at least seven other prospective jurors individually.** Not only did defense counsel not participate in that questioning, but Juror McCoy was still among the remaining jury-pool members. How can one be certain that Juror McCoy did not discuss his knowledge of the “reputation” of the defendant with one or more of those members at that time? He was not questioned further by anyone, and he was not instructed at that point not to mention anything to the remaining prospective jurors. Were the court and counsel in front of the entire prospective jury during the entire time the other

seven were questioned, or were they taken back to chambers thereby allowing Juror McCoy additional time to speak with other prospective jurors?

Clearly, the reputation issue and its possible effect on the other jury members had to be explored. Failure to explore that by defense counsel was a critical error, and we most likely will never know whether it had an adverse effect on this jury verdict or not. If this juror had been questioned for details about his knowledge of the defendant's reputation, it may have been necessary to discharge the entire jury pool based on what he said, what he knew, what he may have told other prospective jurors, or the tone and manner in which he said he knew of the defendant's reputation that followed him. Such a comment about the defendant's reputation that follows him can have a devastating meaning in the context of a criminal trial. More often than not, it refers to a poor reputation or perhaps even a criminal background as opposed to a favorable reputation. Certainly, it required follow up by counsel and/or the court. This certainly would have been permissible under Rule 24 of the West Virginia Rules of Criminal Procedure. When a juror indicates such possible prejudice, he should be excused or questioned individually under the guidelines of State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600 (1983).

Doing nothing robbed the defendant of a fair trial as well as effective assistance of counsel. In essence, it allowed the jurors to hear a comment about the defendant's reputation in the voir dire process that **WOULD NOT HAVE BEEN ALLOWED AS TESTIMONY FROM A WITNESS DURING THE TRIAL ITSELF**. In the Ashcraft, supra case, defense counsel asked the court to inquire individually of four prospective jurors who had indicated that they were either related to or a friend of a law enforcement officer. The court refused. This was reversible error.

Our court, in Ashcraft, supra, has consistently held that a meaningful and effective voir dire of the jury panel is necessary to effectuate the fundamental right to a fair trial by an

impartial and objective jury. Both the gravity of the offense charged and the possibility of prejudice revealed by the initial questioning are to be considered by the court. Both apply in the case at bar requiring reversal.

While Juror McCoy was later struck for cause and did not sit on this jury, even that did not cure the problem. As mentioned, after further exploration of the reputation issue, it is conceivable that Juror McCoy should have been removed from the jury by the court without either side having to strike Juror McCoy for cause. Failure to do so required the defense to use one of his strikes for cause unnecessarily.

### Conclusion

The defendant is guaranteed a fair trial in a criminal case like this. West Virginia Constitution, Article III, Sections 6 and 14, and the Sixth Amendment to the United States Constitution. He is guaranteed that counsel will be appointed for him to assist him in his defense if he indeed cannot afford counsel. Since he could not afford counsel in this case, he was eligible for that court-appointed counsel, and the court assigned Attorney Thomas Esposito. While the constitution does not require that the defendant receive the best defense available or that appointed counsel perform as the best defense lawyer, he is entitled under our law to have a defense that is reasonable under the circumstances and his attorney is required to act as a reasonable lawyer would act under the circumstances in his case. This simply did not happen in this case. Instead, court-appointed counsel was ineffective and did not provide this defendant with the type of defense to which he is guaranteed under our constitution. Instead, he failed to question prospective jurors even when it was clear one of them knew of the defendant's reputation (the defendant has prior convictions); he failed to cross-examine **any** of the State's nine witnesses; he failed to question the co-defendant and highlight his past criminal record; he failed to point out or pursue the point that the co-defendant, who was the only person who placed

the defendant at the scene of the crime, admittedly was drunk at the time of the crime; he failed to pin down the time of the crime so that his alibi defense would be much more effective; he failed to pin down the officers on tests and other evidence that might have been available to them if they had been more thorough; he failed to point out that the co-defendant was the only person who placed the defendant at the crime scene; he failed to file a motion for directed verdict at the conclusion of the State's evidence; and he failed to file a motion for directed verdict at the conclusion of all of the evidence. In short, defense counsel failed to act as a reasonable defense lawyer should under the circumstances. The defendant was not provided with a reasonable defense and therefore his conviction should be reversed and he should be given a new trial with a new defense attorney and the opportunity for a fair trial under the terms of our Constitution. These failures by the defense lawyer were significant and present a reasonable possibility that, but for the counsel's unprofessional errors, the result from the proceedings would have been different. See State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

#### **Relief Requested**

The undersigned prays that the conviction in this case be overturned and that he be awarded a new trial in the Circuit Court of Logan County, West Virginia, on the charge of grand larceny set forth in the indictment in this case.

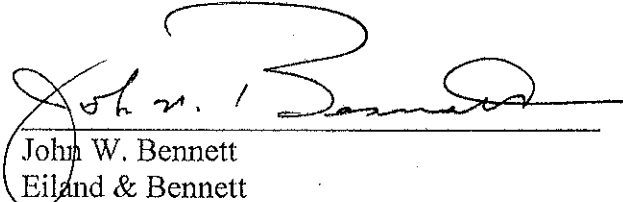
Respectfully submitted by Christopher Frye,

By 

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CERTIFICATE OF SERVICE

I, JOHN W. BENNETT, counsel for Appellant Christopher Frye, certify that I served the attached **Appellant's Criminal Appeal Brief** on the State of West Virginia by mailing a true copy thereof to Darrell McGraw, Attorney General, Attention Ms. Dawn E. Warfield, Deputy Attorney General, at their office address of State Capitol, Charleston, West Virginia 25305, by regular first-class mail, postage prepaid, and by hand delivering a true copy thereof to the office of Brian Abraham, Prosecuting Attorney for Logan County, West Virginia, at his office address of 420 Main Street, Suite 300, Logan, West Virginia, on August 29, 2005.



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