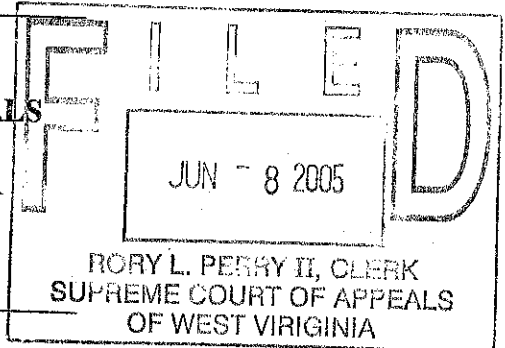


IN THE
SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA

No. 32582



FREDRICK SMITH,

Appellant,

v.

Case No. 01-F-92

STATE OF WEST VIRGINIA,

Appellee.

BRIEF FOR FREDRICK SMITH

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I
FROM THE HONORABLE FRED L. FOX, II

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ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED BY NOT EXCLUDING THE STATEMENT MADE BY THE APPELLANT TO AUTHORITIES AFTER REFUSING TO WAIVE HIS RIGHT TO HAVE AN ATTORNEY PRESENT FOR ANY QUESTIONING.**
- A. Admitting the appellant's statement to authorities into evidence was plainly wrong because the statement was not voluntary.**
- 1. The appellant's rights were not given to him in proper form or substance because there is no evidence the appellant fully understood his rights or how to exercise those rights.**
 - 2. The appellant did not fully understand his rights because he has only an eighth (8th) grade education, a learning disability, and his rights were not explained to him in a manner which the appellant understood.**
 - 3. The appellant did not waive his rights and only made the statement after repeated questioning by the authorities.**
- B. The appellant's statement to authorities was clearly against the weight of the evidence.**

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STATEMENT OF THE CASE

On June 12, 2001, Fredrick Smith (hereinafter Appellant) was indicted by the Grand Jury of Marion County, West Virginia,¹ one (1) count of "Possession with Intent to Deliver Cocaine, a Schedule II Narcotic Controlled substance [Count I];" one (1) count of Possession of Marihuana [Count II];" and one (1) count of "Possession of Deadly Weapon by a Person having been Convicted of a Felony [Count 3]."²

On November 6, 2003, the appellant filed his "Motion to Suppress Statements" and "Motion to Suppress Physical Evidence." The Court heard the motions on November 26, 2003 and December 5, 2003 and denied those motions.³

The trial was conducted on December 4th and 5th of 2003. On December 5, 2003, the jury, in open court, returned the following verdict regarding Count I "We, the jury, find the [appellant], Fredrick Smith, guilty of possession with intent to deliver cocaine, a schedule II narcotic controlled substance, as charged in the indictment." It was signed "Travis Wycoff, Foreperson." The jury returned the following verdict with regard to Count II: We, the jury, find the [appellant], Fredrick Smith, not guilty." It was signed "Travis Wycoff, foreperson." Finally, with regard to Count III, the jury returned the following verdict: "We, the jury, find the [appellant], Fredrick Smith, guilty of possession of a deadly weapon by a person having been convicted of a felony, as charged." It was signed "Travis Wycoff, foreperson."⁴

The appellant filed "*Defendant's Omnibus Post-Trial Motions*" on December 19, 2003, asserting that the verdict was against the weight of the evidence; specifically, that the prosecution failed to produce any evidence to meet the element of possession that is required for

¹ See The grand Jury Charges, filed June 12, 2001.

² *Id.*

³ See Order Denying Defendant's Omnibus Post Trial Motions, entered April 28, 2004, at pg. 2 paragraph 1.

⁴ *Id.* at pg. 6, paragraph 9.

Count I "Possession with Intent to Deliver Cocaine, a Schedule II Narcotic Controlled Substance," and Count III "Possession of Deadly Weapon by a Person having been Convicted of a Felony."⁵ Additionally the appellant alleged that the Court erred when it admitted the appellant's statement made to Officer Fluharty, given the fact that the officer continued to question him after the appellant refused to sign the rights waiver form. Finally, the appellant asserts the Court erred by admitting physical evidence taken from Ms. Hortons's home without a valid search warrant or a clear statement from the possessor of the home giving the officer permission to search.⁶

The Court denied the appellant's motions on April 28, 2004 and the sentencing hearing was held on May 19, 2004. The appellant was Ordered to be confined in the State Penitentiary for a period of not less than one (1) year nor more than fifteen (15) years on Count I, for possession with intent to deliver cocaine, a schedule II narcotic controlled substance and five (5) years on Count III for possession of a deadly weapon by a person having been convicted of a felony, sentences to be served concurrently.⁷

STATEMENT OF FACTS

On April 24, 2001, Bertha "Peaches" Horton (hereinafter Ms. Horton) flagged down Fairmont City Police Officer Arlie Ashby (hereinafter Officer Ashby) and informed him there was a man in her home with a gun and drugs. Ms. Horton told Officer Ashby that this man was using her bedroom with her permission although not to her exclusion, and she now wanted the man out of her house. Officer Ashby called Officer Raymond E. Fluharty (hereinafter Officer

⁵ See The Grand Jury Charges, filed June 12, 2001.

⁶ See Order Denying Defendant's Omnibus Post-Trial Motions, entered April 28, 2004, at pg. 2, paragraph 1.

⁷ See Sentencing Order, entered June 2, 2004.

Fluharty) to the scene. Ms. Horton asked the officers to wait until she had been home for at least ten (10) minutes before responding.⁸

Subsequent thereto, Sergeant Kelly Moran (hereinafter Sergeant Moran), Officer Fluharty, Officer Ashby, and Officer John Murphy arrived at Ms. Horton's home at 508 Benoni Avenue in Fairmont, West Virginia. Sergeant Morgan and Officer Fluharty went to the front door while the other two officers covered the perimeter. As soon as Sergeant Morgan entered the home, he saw the appellant run up the stairs and turn right into a bedroom. The officers followed.⁹

Once the officers reached the top of the stairs, they ordered the appellant out of Ms. Horton's bedroom, and he exited and surrendered. Sergeant Moran estimated the appellant was in Ms. Horton's bedroom for about fifteen (15) to thirty (30) seconds before he exited the room. Sergeant Moran asked Ms. Horton if the appellant was the man about whom she had spoken earlier, and she confirmed he was. She then privately gave the officers permission to search the home, although she testified she later "played it off" for the benefit of the appellant by telling the officers they had no right to search her home. Apparently, the home of Benoni Avenue belongs to Ms. Horton's mother, who has lived out of state for several years. Sergeant Moran testified he had known Ms. Horton to live there for at least six (6) to seven (7) years.¹⁰

Sergeant Moran testified he found a small bag of marijuana in plain view in the bedroom upstairs. However, Ms. Horton recalled one of the officers took the marijuana out of the appellant's pocket. Sergeant Moran also found a handgun under one of the pillows on the bed, but he could not locate the cocaine at that point. Ms. Horton then surreptitiously asked the appellant, who had been secured downstairs, where he put the cocaine, and she then informed the

⁸ See Order Denying Defendant's Omnibus Post-Trial Motions, entered April 28, 2004, at pg. 2, paragraph 1.

⁹ Id. at pg. 2, paragraph 2.

officers the appellant had put it in the bed. Sergeant Moran found a bag with ninety (90) individually wrapped pieces of crack cocaine in between the mattress and box springs of the bed in Ms. Horton's room.¹¹

Upon transporting the appellant to the police station, Sergeant Moran advised the appellant of his Miranda rights. The appellant refused to sign the rights waiver form, but did not otherwise indicate that he did not want to talk to them or desired to have a lawyer present. Thereafter, Sergeant Moran left the room and ceased speaking to the appellant. Officer Fluharty proceeded to process the appellant.¹²

Prior to processing, Sergeant Moran informed Officer Fluharty the appellant refused to sign the waiver form but did not request an attorney. While fingerprinting the appellant and taking mug shots, Officer Fluharty asked the appellant several times to whom the gun belonged if it did not belong to the appellant. After repeated questioning, the appellant told Officer Fluharty the gun belonged to him, but the drugs did not.¹³

On June 12, 2001, Fredrick Smith (hereinafter Appellant) was indicted by the Grand Jury of Marion County, West Virginia,¹⁴ one (1) count of "Possession with Intent to Deliver Cocaine, a Schedule II Narcotic Controlled substance [Count I];" one (1) count of Possession of Marihuana [Count II];" and one (1) count of "Possession of Deadly Weapon by a Person having been Convicted of a Felony [Count 3]."¹⁵

¹⁰ Id. at pg. 3, paragraph 3.

¹¹ Id. at pg. 4, paragraph 4.

¹² Id. at pg. 4, paragraph 5.

¹³ Id. at pg. 5, paragraph 6.

¹⁴ See The grand Jury Charges, *filed* June 12, 2001.

¹⁵ Id.

On November 6, 2003, the appellant filed his "Motion to Suppress Statements" and "Motion to Suppress Physical Evidence." The Court heard the motions on November 26, 2003 and December 5, 2003 and denied those motions.¹⁶

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The appellant filed "*Defendant's Omnibus Post-Trial Motions*" on December 19, 2003, asserting that the verdict was against the weight of the evidence; specifically, that the prosecution failed to produce any evidence to meet the element of possession that is required for Count I "Possession with Intent to Deliver Cocaine, a Schedule II Narcotic Controlled Substance," and Count III "Possession of Deadly Weapon by a Person having been Convicted of a Felony."¹⁸ Additionally the appellant alleged that the Court erred when it admitted the appellant's statement made to Officer Fluharty, given the fact that the officer continued to question him after the appellant refused to sign the rights waiver form. Finally, the appellant asserts the Court erred by admitting physical evidence taken from Ms. Horton's home without a

¹⁶ See *Order Denying Defendant's Omnibus Post Trial Motions*, entered April 28, 2004, at pg. 2 paragraph 1.

¹⁷ *Id.* at pg. 6, paragraph 9.

¹⁸ See *The Grand Jury Charges*, filed June 12, 2001.

valid search warrant or a clear statement from the possessor of the home giving the officer permission to search.¹⁹

The Court denied the appellant's motions on April 28, 2004 and the sentencing hearing was held on May 19, 2004. The appellant was Ordered to be confined in the State Penitentiary for a period of not less than one (1) year nor more than fifteen (15) years on Count I, for possession with intent to deliver cocaine, a schedule II narcotic controlled substance and five (5) years on Count III for possession of a deadly weapon by a person having been convicted of a felony, sentences to be served concurrently.²⁰

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT EXCLUDING THE STATEMENT MADE BY THE APPELLANT TO AUTHORITIES AFTER REFUSING TO WAIVE HIS RIGHT TO HAVE AN ATTORNEY PRESENT FOR ANY QUESTIONING.

When addressing claims that evidence should not have been admitted because it was obtained in violation of a defendant's right to counsel and right to remain silent, we review, de-novo, both questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action that led to the challenged evidence.²¹

"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 confession and ordinarily this discretion will not be disturbed in review."²² Furthermore "[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."²³

¹⁹ See Order Denying Defendant's Omnibus Post-Trial Motions, entered April 28, 2004, at pg. 2, paragraph 1.

²⁰ See Sentencing Order, entered June 2, 2004.

²¹ See State v. Jones, ___ W.Va. ___, 607 S.E.2d 498, 501 (2004) (citing State v. Lilly, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995)).

²² State v. Albright, 209 W.Va. 53, 543 S.E.2d 334 (2000) (citing Syl. pt. 2, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978)). See also State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999).

²³ Id. at Syl. pt. 3.

A. Admitting the appellant's statement to authorities into evidence was plainly wrong because the statement was not voluntary.

"The State has the burden of proving that the accused knowingly and intentionally relinquished or abandoned that right in order to introduce into evidence incriminating statements made outside the presence of counsel."²⁴

"In the trial of a criminal case, the State must prove, at least by a preponderance of the evidence, that a person under custodial interrogation has waived the right to remain silent and the right to have counsel present."²⁵

It is not invariably necessary that a person under interrogation make an explicit oral or written statement of waiver in order that it may be properly concluded as a matter of law that the person has waived the right to counsel as guaranteed by W.Va. Const. art. III § 14 and U.S. Const. amend. VI, or has waived the right to remain silent as guaranteed by W.Va. Const. art. III § 5 and U.S. Const. amend. V.²⁶

Rissler,²⁷ sets forth the test to determine if the State has proven the waiver issue by a preponderance of the evidence. "The determination is threefold: were the rights given in proper form and substance, did the defendant fully understand them, and did he waive them?"²⁸

1. **The appellant's rights were not given to him in proper form or substance because there is no evidence the appellant fully understood his rights or how to exercise those rights.**

The appellant contends that his rights were not given to him in proper form or substance. To demonstrate his point the appellant points to the exchange between his trial counsel and Officer Fluharty concerning the acquisition of the appellant's statement he requested be excluded from evidence:

²⁴ See State v. Jones, ___ W.Va. ___, 607 S.E.2d 498, 502 (2004) (citing Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977))

²⁵ Syl. Pt. 2, State v. Rissler, 165 W.Va. 640, 270 S.E.2d 778 (1980).

²⁶ Id. at Syl. Pt. 1.

²⁷ 165 W.Va 640, 270 S.E.2d 778 (1980)

²⁸ State v. Boxley, 201 W.Va. 292, 496 S.E.2d 242 (1997) (citing Syl. Pt. 2, State v. Rissler, 165 W.Va. 640, 270 S.E.2d 778 (1980)).

- Q: Officer Fluharty, you've testified that you personally did not Mirandize Mr. Smith; is that correct?
- A: Yes, sir; I did not.
- Q: And you were not physically present when he was allegedly Mirandized; is that correct?
- A: Yes, sir.
- Q: And you do know for certain that there was never a signed statement -- signed statement indicating that he was in fact Mirandized; is that correct?
- A: I did -- you mean, did I see this statement or was --
- Q: Was there ever one signed when he acknowledged being Mirandized?
- A: Uh, I can't recall. *I just know that Detective Moran stated that -- I mean, just that he had Mirandized him*, but he denied to waive.
- Q: So he -- he denied --
- A: He denied to sign the waiver.
- Q: *And you do know that he denied to sign the -- denied to sign the waiver, correct?*
- A: *Just from what Detective Moran stated.*
- Q: And initially when you had asked him -- as your police report says, 'I asked him who owned the gun *several times*. He initially denied owning it,' correct?
- A: Yes.
- Q: And you continued to ask him again even though he denied signing the Miranda Waiver?
- A: He didn't request an attorney, so...
- Q: But he didn't at any point say, 'Now I want to speak to you;' is that correct?
- A: Uh, not to me, no.
- Q: He just didn't specifically request an attorney?
- A: No. Not that I know of.²⁹

Interestingly, the trial court stated the following on record, following that exchange:

The Court: Okay, the issue is the matter of the officer testifying, the prior evidence in the case is that, *as the Court recollects, the defendant was properly Mirandized*, refused to sign the Miranda form, but did not ask for counsel. I think the police, under those kind of circumstances, can continue to question him as this officer did.

I have some problem with the fact he actually asked him several times, but based on what I -- what is before the Court at this time, I think it is a voluntary statement. I don't see that there's any violation that the -- of the defendant's rights in this regard; therefore, I will allow the testimony. And I would anticipate revisiting this issue post trial if there is a conviction, and at that time I'll be in a position to have done more research and make a proper findings of fact and conclusions of law. So the statement will be admitted.³⁰

²⁹ Trial Transcript pg. 191 L. 19 - pg. 193 L. 2. (Emphasis Added)

³⁰ Trial Transcript pg. 194 L. 14 - pg. 195 L. 4. (Emphasis Added)

Significantly, Sergeant Moran went so far as to terminate the interview because the appellant would not sign the waiver. Sergeant Moran recognized that the appellant was attempting to exercise his right to remain silent and have an attorney present during questioning. Refusing to sign a waiver does not mean that the appellant even knew what rights he had or could waive, it does demonstrate that the appellant was not willing to provide a voluntary statement to police; therefore, impliedly meaning that he was exercising his rights to remain silent and have an attorney present for any questioning.

The failure of the appellant to grasp the meaning of his rights at that time and the significance of any waiver of those rights is demonstrated in the following exchange:

- Q: Okay. Do you remember them trying to get you to sign a Miranda form?
A: Uh, Kelly Moran did.
Q: And did you --
A: I wouldn't sign because he started blaming stuff on me and saying these drugs was mine and the gun and all this stuff. I kept telling him no. He said to sign it. It's something like a written something admitting to the crime. I wouldn't sign it. He never told me it would used -- you could get a attorney or anything, because I was to get an attorney, not talk to the police.³¹

The testimony of the appellant demonstrates that he was not Mirandized in proper substance because he did not even understand the significance of his rights much less how signing that form may impact those rights.

Based upon the aforementioned, the appellant respectfully requests that this Honorable Court find that his rights were not given to him in proper form or substance.

- 2. The appellant did not fully understand his rights because he has only an eighth (8th) grade education, a learning disability, and his rights were not explained to him in a manner which the appellant understood.**

The appellant did not understand his rights at any point during the investigation of this matter because they were not properly given or explained to the appellant by the authorities.

To begin with, the appellant has only an eighth (8th) grade education and quit attending school due to a learning disability, receiving no additional education or training.³² That finding was corroborated by the appellant's following testimony:

- Q: Uh, Mr. Smith, I'd like to ask do you have a learning disability?
A: Yes, I do.³³
Q: As a matter of fact, have you applied for Social Security for a learning disability?
A: Yes, sir.
Q: Did you -- are you getting Social Security?
A: Yes, sir.³⁴

Additionally, as previously noted, the appellant demonstrated no comprehension of his constitutional rights, how to invoke those rights, nor the implications of the Waiver of Rights Form. The appellant stated the following concerning this matter:

- Q: Okay. Do you remember them trying to get you to sign a Miranda form?
A: Uh, Kelly Moran did.
Q: And did you --
A: I wouldn't sign because he started blaming stuff on me and saying these drugs was mine and the gun and all this stuff. I kept telling him no. He said to sign it. It's something like a written something admitting to the crime. I wouldn't sign it. He never told me it would used -- you could get a attorney or anything, because I was to get an attorney, not talk to the police.³⁵

The trial court stated that "[t]he defendant in the case at bar understood his rights. In fact, had been convicted of a felony in the past, which would make him familiar with the criminal justice system."³⁶ However, that assumption is not correct based on the information available. Having a previous felony does not necessarily dictate that the appellant was familiar enough with the criminal justice system to be inherently knowledgeable about his constitutional rights and the proper manner to invoke those rights.

³¹ Trial Transcript pg. 218 L. 13-23.

³² See State of West Virginia Sixteenth Judicial Circuit Pre-Sentence Report, dated February 5, 2004.

³³ Trial Transcript pg. 230 L. 5-7

³⁴ Trial Transcript pg. 230 L. 14-16

³⁵ Trial Transcript pg. 218 L. 13-23.

³⁶ See Order Denying Defendant's Omnibus Post-Trial Motions, entered April 28, 2004, at pg. 14.

There is no evidence on record that demonstrates the appellant was made to fully understand his constitutional right to remain silent in the face of repeated questioning by law enforcement or the right to have an attorney present during said questioning. Moreover, there is nothing on the record in this case that could lead to the conclusion that the appellant was informed of his rights and fully understood those rights. In fact, if anything the record is clear that the appellant wholly lacked the understanding of his constitutional rights and how to invoke them during the line of repeated questioning that is the subject of this appeal.

Based upon the aforementioned, the appellant respectfully request that this Honorable Court find that the appellant did not fully understand his rights because he holds only an eighth (8th) grade education, has a learning disability, and his rights were not explained to him in a manner which he could understand.

3. The appellant did not waive his rights and only made the statement after repeated questioning by the authorities.

This Court has long since held, in accordance with the United States Supreme Court decision, that:

Once a person under interrogation has exercised the right to remain silent guaranteed by the W.Va. Const. Art. III § 5, and U.S. Const. amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial.³⁷

Furthermore, "[w]e examine such a claim of relinquishment and abandonment under a 'totality of the circumstances' approach."³⁸

³⁷ State v. Boxley, 201 W.Va. 292, 297, 496 S.E.2d 242, 247 (1997) (citing Syl. Pt. 3, Rissler. See also Syl. Pt. 1, State v. Woodson, 181 W.Va. 325, 382 S.E.2d 519 (1989); Syl. Pt. 4, State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994).

³⁸ See State v. Jones, ___ W.Va. ___, 607 S.E.2d 498, 504 (2004) (citing State v. Crouch, 178 W.Va. 221, 358 S.E.2d 782 (1987)).

The trial court concluded that the appellant waived his rights once he "responded while Officer Fluharty "asked the defendant during processing if he knew to whom the stolen gun belonged[.]"³⁹

The prosecution characterized the appellant's "waiver" by stating the following: In the present case, the defendant was being processed by Officer Fluharty. In the course of that processing, the defendant is asked many questions such as his name, social security number, address, etc. In the course of those [sic] questions, the officers were talking about the weapon that had been found. The weapon was being reported by NCIC as stolen. Officer Fluharty asked the defendant who was the owner of the weapon since the defendant denied it was his. the defendant was not under arrest for the stolen weapon, nor is there any indication that he was going to be arrested for a stolen weapon. The questions being asked were to determine the owner for possible return of the property.⁴⁰

As previously pointed out, Officer Fluharty did not inform the appellant of his rights, did not explain the appellant's rights to him, and was fully aware that the appellant had refused to sign any waiver of his rights.⁴¹ Furthermore, Officer Fluharty acknowledged that the only information about the appellant being informed of his rights was received from Sergeant Moran.⁴²

Quite to the contrary of the prosecution's description of this interrogation as something incidental to general processing questions, Officer Fluharty stated the following when asked about his line of questioning:

- Q: And initially when you had asked him -- as your police report says, 'I asked him who owned the gun several times. He initially denied owning it,' correct?
- A: Yes.
- Q: And you continued to ask him again even though he denied signing the Miranda Waiver?
- A: He didn't request an attorney, so...
- Q: But he didn't at any point say, 'Now I want to speak to you;' is that correct?
- A: Uh, not to me, no.

³⁹ See Order Denying Defendant's Omnibus Post-Trial Motions, entered April 28, 2004, at pg. 14.

⁴⁰ See State's Response to Defendant's Omnibus Post-Trial Motions, at section I.B. paragraph 6. (Page 4 although the Response does not contain page numbers.)

⁴¹ See Appellant's argument under section A.1. of this brief generally. See also Trial Transcript pg. 191 L. 19 - pg. 193 L. 2.

⁴² Id. (Significant considering that Sergeant Moran terminated his interview of the appellant.)

Q: He just didn't specifically request an attorney?
A: No. Not that I know of.⁴³

Therefore, as described by Officer Fluharty, an individual must say the magic words "I want an attorney" before he is determined to have actually invoked his right to counsel or his right to remain silent. If Officer Fluharty was merely asking to whom the gun belonged in order for it to be returned as the prosecution asserted, there would have been no need to repeatedly ask the appellant after he originally responded it was not his.

As previously stated, when the appellant refused to sign the waiver offered by Sergeant Moran, the Sergeant terminated his interview. The fact that Sergeant Moran terminated his interview when the appellant refused to sign the waiver demonstrates that he was aware the appellant did not wish to waive his rights. Furthermore, all information Officer Fluharty had concerning the appellant's waiver of rights came from Sergeant Moran according to his testimony.⁴⁴

Sergeant Moran realized that the appellant was invoking his rights and refused to waive them when he terminated his interview, Officer Fluharty should have realized the same and refrained from further interrogation and/or provocation of the appellant. Officer Fluharty violated the appellant's right to have counsel present and his right to remain silent when he repeatedly questioned the appellant after he refused to sign the waiver.

Insightfully, once this testimony was presented to the trial court, the court made the following remark on record.

I have some problem with the fact he actually asked him several times, but based on what I -- what is before the Court at this time, I think it is a voluntary statement. I don't see that there's any violation that the -- of the defendant's rights in this regard; therefore, I will allow the testimony. And I would anticipate revisiting this issue post trial if there is a conviction,

⁴³ Trial Transcript pg. 191 L. 19 - pg. 193 L. 2.

⁴⁴ Trial Transcript pg. 191 L. 19 - pg. 193 L. 2.

and at that time I'll be in a position to have done more research and make a proper findings of fact and conclusions of law. So the statement will be admitted.⁴⁵

The appellant contends that based on the *totality of the circumstances*, the trial court erred by finding that the appellant waived his rights considering the *repeated questioning* he was subjected to by Officer Fluharty, after he had refused to sign a waiver of his rights.

Wherefore, the appellant respectfully requests that this Honorable Court find that the trial court was plainly wrong by admitting his statement into evidence because a preponderance of the evidence did not demonstrate the appellant's rights were given to him in proper form or substance; the appellant fully understand his rights; and the appellant waived those rights as he understood them.

B. The appellant's statement to authorities was clearly against the weight of the evidence.

After repeated questioning by authorities about the ownership of the firearm recovered from 508 Benoni Avenue, Fairmont, the home of Bertha "Peaches" Horton, the appellant allegedly told Officer Fluharty that the gun belonged to the appellant but the drugs were not his.⁴⁶

To begin with, the officer who extracted that statement from the appellant, Officer Fluharty, did not even believe that it was a truthful statement himself.

Q: Well, are you attempting to use this statement -- do you believe that he was being truthful when he gave you this statement?

A: About the gun being his but not the drugs?

Q: Yes.

A: No.

Q: So you don't believe the statement that he gave was truthful anyway?

A: No.⁴⁷

⁴⁵ Trial Transcript pg. 194 L. 14 - pg. 195 L. 4.

⁴⁶ Trial Transcript pg. 191 L. 1-8.

⁴⁷ Trial Transcript pg. 193 L. 23 - pg. 194 L. 7.

Secondly, not a single officer on scene in this instance observe the appellant in possession of any firearm. The evidence demonstrates the firearm was found in Ms. Horton's bedroom, in the house Ms. Horton had lived for several years. The only witness who testified that she saw the appellant with the firearm was Bertha "Peaches" Horton, whom would most likely not admit the firearm belonged to her considering the fact that it was stolen and found under her pillow, in her bedroom, of her home.⁴⁸

Based upon the aforementioned, the appellant asserts that his statement to authorities was *clearly against the weight of the evidence*.

CONCLUSION

In summary, the appellant asserts that the trial court was *plainly wrong* in finding that the appellant's statement was voluntary because the appellant's rights *were not given to him in proper form or substance*; there is *no evidence that the appellant fully understood his rights* considering the fact that he has a learning disability and an eighth (8th) grade education; and because *the appellant did not waive his rights* but only provided the statement at issue after repeated questioning by authorities. Furthermore, the appellant asserts that the trial court erred by admitting the statement to authorities because it was *clearly against the weight of the evidence*.


PRAYER FOR RELIEF

WHEREFORE, the appellant respectfully request that this Honorable Court find that the trial court's decision to admit the appellant's statement to authorities was *plainly wrong* and was *clearly against the weight of the evidence* and set aside his conviction and/or grand him a new trial and any further and additional relief that this Honorable Court may deem appropriate.

⁴⁸ Trial Transcript pg. 10 L. 7; pg 10 L. 23 - pg. 11 L. 3.

FREDRICK SMITH,

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IN THE
SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA

No. 32582

FREDRICK SMITH,

Appellant,

v.

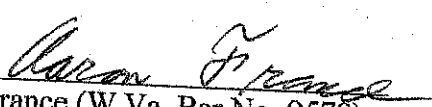
STATE OF WEST VIRGINIA,

Appellee.

Case No. 01-F-92

DESIGNATION OF RECORD

The Appellant, Fredrick Smith, by counsel, Aaron S. France, hereby designates the entire case file as record on this brief.



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CERTIFICATE OF SERVICE

Pursuant to Rule 15 of the Rules of Appellate Procedure for the West Virginia Supreme Court of Appeal, the undersigned counsel for Fredrick Smigh hereby certifies that on the 7th day of June, 2005, a copy of the foregoing "**Brief for Fredrick Smith**" was deposited in the United States mail, postage prepaid, addressed to the following:

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