
NO. 32663

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

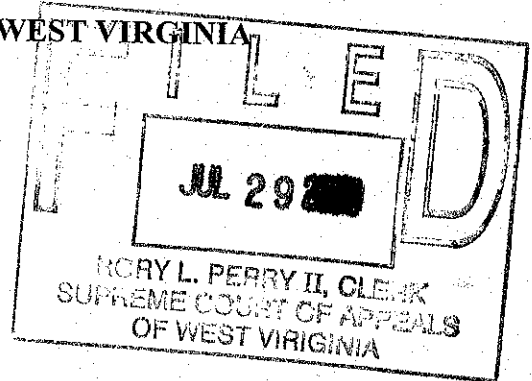
STATE OF WEST VIRGINIA,

Appellee,

v.

FRANCIS ANTHONY SANDOR III,

Appellant.



**BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA**

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**

**BENJAMIN M. MISHOE
LEGAL INTERN, OFFICE OF ATTORNEY GENERAL
Third-Year Law Student Practicing Under
Rule 10, Rules for Admission to the Practice of Law**

**BARBARA H. ALLEN, WWSB #1220
MANAGING DEPUTY ATTORNEY GENERAL
SUPERVISING ATTORNEY
OFFICE OF THE ATTORNEY GENERAL
STATE CAPITOL, ROOM 26-E
CHARLESTON, WEST VIRGINIA 25305
304-558-2021**

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. KIND OF PROCEEDING AND NATURE OF RULING BELOW	2
III. STATEMENT OF THE FACTS	3
IV. ISSUES PRESENTED	11
V. STANDARD OF REVIEW	11
VI. ARGUMENT	12
A. THE CIRCUIT JUDGE'S CONCLUSION THAT THE APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL WAS NOT CLEARLY ERRONEOUS, AS IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE INCLUDING THE APPELLANT'S STATEMENTS AND CONDUCT	12
1. The Appellant Did Not Complete the Financial Affidavit on November 19, 2001 for the Purpose of Obtaining Court-appointed Counsel	14
2. The Circuit Court Did Not Have an Unconditional Duty to Advise the Appellant on the Record of His Right to Counsel as Long as the Conduct and Other Circumstances Show That the Waiver of Such Was Made Knowingly and Understandingly	19
3. The Judge's Familiarity with Appellant from a Recent Prior Case Was Proper to Consider When Determining Whether the Appellant Had Actual Knowledge of His Right to Counsel and of the Risks of Self-representation	23
4. The Motion Demanding Constitutional Rights Was Not a Request for Counsel	27
5. Due Process Was Not Violated Because the Appellant Was Not Denied His Right to Counsel; He Waived it Knowingly and Voluntarily	28

6.	Express Waiver in Magistrate Court Should Be Considered to Be Prima Facie Evidence of a Continuing Waiver Throughout the Circuit Court Appeal	29
B.	THIS COURT SHOULD NOT ESTABLISH A PER SE RULE REQUIRING AN ADVICE-OF-RIGHTS COLLOQUY BETWEEN THE CIRCUIT COURT AND A DEFENDANT PROCEEDING <i>PRO SE</i>	31
C.	THOUGH THE STATE DENIES ANY ERROR, ASSUMING <i>ARGUENDO</i> THAT THE CIRCUIT COURT WAS REQUIRED TO SPECIFICALLY ADVISE THE APPELLANT OF HIS RIGHT TO COUNSEL, OR OF HIS RIGHT NOT TO TESTIFY, THE COURT'S FAILURE TO DO SO IN THIS CASE WAS HARMLESS ERROR	32
D.	THE APPELLANT WAS GIVEN A FAIR TRIAL; NO SUBSTANTIAL ERRORS OCCURRED AND CERTAINLY NO CUMULATIVE ERRORS THAT WOULD WARRANT A REVERSAL OF THE CIRCUIT JUDGE'S RULING	33
VII.	CONCLUSION	35

TABLE OF AUTHORITIES

CASES:	Page
<u>Arbraugh v. Boles</u> , 149 W. Va. 193, 139 S.E.2d 370 (1964)	20
<u>Carnley v. Cochran</u> , 369 U.S. 506 (1962)	20, 21
<u>Haines v. Kerner</u> , 404 U.S. 519 (1972)	7
<u>Humphrey v. Mauzy</u> , 155 W. Va. 89, 181 S.E.2d 329 (1971)	14
<u>Public Citizen, Inc. v. First National Bank</u> , 198 W. Va. 329, 480 S.E.2d 538 (1996)	11
<u>Robertson v. Goldman</u> , 179 W. Va. 453, 369 S.E.2d 888 (1988)	14, 15, 16, 17
<u>State ex rel. Kozdron v. Boles</u> , 149 W. Va. 596, 142 S.E.2d 769 (1965)	25, 26
<u>State ex rel. Powers v. Boles</u> , 149 W. Va. 6, 138 S.E.2d 159 (1964)	12
<u>State ex rel. Ring v. Boober</u> , 200 W. Va. 66, 488 S.E.2d 66 (1997)	30
<u>State v. Armstrong</u> , 175 W. Va. 381, 332 S.E.2d 837 (1985), <i>overruled on other grounds by State v Hopkins</i> , 192 W. Va. 483, 453 S.E.2d 317 (1994)	12, 13, 29
<u>State v. Britton</u> , 157 W. Va. 711, 203 S.E.2d 462 (1974)	19, 20, 29
<u>State v. Flippo</u> , 212 W. Va. 560, 575 S.E.2d 170 (2002)	32
<u>State v. Gravely</u> , 176 W. Va. 220, 342 S.E.2d 186 (1986)	23, 24, 25, 26
<u>State v. Head</u> , 198 W. Va. 298, 480 S.E.2d 507 (1996)	17, 18
<u>State v. Jenkins</u> , 195 W. Va. 620, 466 S.E.2d 471 (1995)	28
<u>State v. McCraine</u> , 214 W. Va. 188, 588 S.E.2d 177 (2003)	13, 19
<u>State v. Moore</u> , 166 W. Va. 97, 273 S.E.2d 821 (1980)	14
<u>State v Sandler</u> , 175 W. Va. 572, 336 S.E.2d 535 (1985)	12, 13, 20, 21

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. VI 7

STATUTES:

W. Va. Code § 8-34-1 15

W. Va. Code § 29-21-16(b),(e) 14

W. Va. Code § 29-21-16(d) 14, 17

W. Va. Code § 50-4-3 30

W. Va. Code § 50-5-13(a) 15

W. Va. Code § 50-5-13(b) 30

W. Va. Code § 50-5-8(b) 30

OTHER:

W. Va. R. Crim. P. 35(b) 18

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

FRANCIS ANTHONY SANDOR III,

Appellant.

**BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA**

I.

INTRODUCTION

The record of this case leaves no doubt that the appellant knowingly and voluntarily waived his right to counsel in the proceedings below, and the circuit judge was correct in so finding. Additionally, contrary to the appellant's assertions, the circuit court had no duty to advise the appellant on the record concerning his right to counsel as long as the conduct of the appellant and all of the other circumstances demonstrated that the right was waived knowingly and understandingly. The court found that it was and the record strongly supports this finding.

Between the time he expressly waived his right to counsel on May 5, 2001, until the time he finally requested the assistance of counsel on February 4, 2002, the appellant, acting *pro se*, authored and filed fifteen motions, three memoranda of law, and four other miscellaneous documents with the

courts, none of which expressed or implied a desire to be represented by counsel. In addition, the appellant appeared *pro se* for one magistrate court bench trial, one circuit court hearing, and one circuit court bench trial, again never once expressing or implying that he desired any assistance from counsel.

To the contrary, his conduct clearly displayed his desire and conscious decision to voluntarily represent himself. Not until two weeks after the circuit court found the appellant guilty of battery did he suddenly contend that he had desired counsel. The only evidence the appellant offers to support his contention is a financial affidavit which he filled out on November 19, 2001, but he admitted on the record that the only reason he completed the affidavit was to get an appeal date set, not because he wanted a lawyer.

Taking all of this into consideration, together with his recent experience with the appellant from a separate felony case in which the appellant successfully defended himself, the circuit judge reasonably concluded that the appellant never intended to request court-appointed counsel and that he made a knowing, intelligent, and voluntary decision to represent himself.

II.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

By order dated January 25, 2002 the appellant, Francis Anthony Sandor III, was found guilty of misdemeanor battery following a bench trial on January 22, 2002, in the Circuit Court of Monongalia County before Judge Russell M. Clawges. (App. at 98.) On February 4, 2002, the appellant requested assistance of counsel to aid with his appeal and, for the first time, claimed that he had wanted counsel in the prior proceedings but was denied this right. (App. at 105-107.)

Counsel was appointed on February 11, 2002. (App. at 112.) Several post-trial motions were filed and several hearings held. Following a lengthy delay while transcripts were prepared, the judge denied the appellant's motion for a new trial and scheduled a new sentencing hearing for October 12, 2004. At this hearing, and by order dated October 21, 2004, the appellant was sentenced to serve one year in jail and pay some fines and restitution. (App. at 302-304.)

He appeals his conviction primarily on the grounds that he was denied his constitutional right to assistance of counsel.

III.

STATEMENT OF THE FACTS

It is important to keep in mind that the judge below, after examining all of the evidence and circumstances, made a *finding of fact* that the appellant never intended to request court-appointed counsel and that he made a knowing, intelligent, and voluntary decision to represent himself. Much of the procedural history appears in this statement of the facts because the procedures, and more importantly the appellant's conduct during these procedures, are part of the facts the lower court examined in reaching its conclusion and that this Court will examine to determine if the lower court was clearly erroneous.

The appellant, Francis Anthony Sandor, III, was arrested and charged with misdemeanor battery on May 5, 2001. (App. at 2.) The arrest was a result of an altercation inside a Dairy Mart in Monongalia County, near Morgantown, in which the appellant forced a female acquaintance to the ground and "restrained" her by placing his foot on her throat for approximately 15 minutes while simultaneously restricting her arms. (App. Vol. III at 12.) Later that day, he signed a magistrate court form expressly waiving his right to counsel, thus exercising his constitutional right to

self-representation. (App. at 7.) Importantly, the magistrate signed the form as well, indicating that he had informed the appellant of the applicable matters and then finding that the waiver of his right to counsel had been made “knowingly and voluntarily.” (App. at 8.) The appellant commenced an admirable defense in magistrate court, filing eight motions on his own behalf, and one request for discovery prior to appearing *pro se* at his magistrate court bench trial on November 14, 2001. (App. at 19-22, 26-31.) These motions included one successful motion for continuance, two motions for dismissal, and some motions concerning discovery of evidence. *Id.* Ultimately, his defense was unsuccessful and he was found guilty of battery. (App. at 1.)

Pressing on, the appellant decided to appeal his conviction to the circuit court. On November 19, 2001, the appellant filled out necessary paperwork to commence his appeal, that being a criminal appeal bond form. (App. at 10-11.) The appellant initialed both the cash and personal recognizance (“PR”) sections of the form. *Id.* At the same time that he filled out this form, the magistrate clerk had him fill out a standard financial affidavit that is used to determine eligibility for public defender services. (App. at 9.) This is probably the most important piece of evidence to support the appellant’s argument in this appeal (perhaps the only piece). However, the conduct and statements of the appellant following the completion of this affidavit were carefully considered by the lower court in reaching its conclusion that “the [appellant] did not complete the affidavit for the purpose of obtaining an attorney, nor did the [appellant] desire court appointed counsel.” (App. at 280.) The relevant conduct and statements follow.

On November 27, 2001, eight days after filling out the affidavit, the appellant, still acting *pro se*, filed a notice of intent to appeal. (App. at 14.) On January 17, 2002, almost two months after filling out the affidavit, the appellant, still acting *pro se*, filed a motion for continuance. (App. at 72.)

One of the reasons the appellant sought a continuance was to request “the time that would be needed to subpoena witnesses for my defense,” but the motion made no mention of a desire to have counsel aid him in this preparation or ask for counsel to be appointed; he just wanted more time to prepare his case. *Id.* The next day, January 18, 2002, the appellant, still acting *pro se*, attended a hearing concerning the motion for continuance and again never once mentioned the need or desire to have counsel appointed. (App. Vol. IV.)

Quite the contrary, it was at this hearing that the appellant informed the court of his reason for filling out the financial affidavit. After informing the court that he filled out “whatever they gave me” and that the magistrate clerk “had me just fill out these two papers,” he then clearly stated, “*so I filled out a pauper’s affidavit just so I could get a date.*” (App. Vol. IV at 2-3; emphasis added.) Additionally, the appellant made several statements to the judge conveying that he had embraced self-representation and was acting diligently on his own behalf, formulating a defense strategy, preparing motions, researching Rules of Evidence, and formulating strategies for impeaching and questioning witnesses. (App. Vol. IV.) But again, there was no statement or conduct to indicate anything other than a desire to continue self-representation. For example:

“I have a list of materials for evidence and I have – I prepared the case.” *Id.* at 4.

“I have the case basically together. I just need some time to just pull it all together.” *Id.* at 5.

“I have several motions that I would like to present to the court, and they’re not ready. I have a rough draft on some of them” *Id.* at 4.

“[T]he case basically depends on the credibility of two witnesses’ statements, and with the West Virginia Rules of Evidence, I can attack the truthfulness with their character. And I’m referring to, I believe, 608A, 608B, 613, 609A, and those are basically the issues I was dealing with on preparing for the case. . . .” *Id.* at 5.

“He would have to be subpoenaed, and I would have to be able to lead him as a hostile witness because in the manner in which he testified last time.” Id. at 10.

“But, anyway, I would have to lead the witness. He would have to be my witness and cross-examination wouldn’t be sufficient, I feel.” Id. at 9.

Prior to the bench trial on January 22, 2002, the appellant, still acting *pro se*, filed three more motions with the court and three memoranda of law in support of the motions. (App. at 75-89.) One of these motions was to suppress all of the State’s evidence. (App. at 79.) One was a motion for trial by jury. (App. at 84.) This motion was denied because the appellant expressly waived his right to trial by jury in magistrate court and the waiver of this fundamental right at that level continues through the appeal in circuit court. (App. Vol. III at 3.)

The third motion was a “motion notice and demand of constitutional rights.” (App. at 75.) The memorandum in support of this motion clarifies that the appellant felt he had insufficient time to obtain compulsory process to subpoena witnesses in his favor. (App. at 76-77.) He clearly stated “that ‘some time’ would be needed only to complete the compulsory process,” and continued to discuss his constitutional right to subpoena witnesses and compel them to appear, which he felt was being violated because the court failed to grant his motion for continuance. Id. This motion only asked for more time, not for counsel. Before ruling on the motion, the judge asked the appellant if there was something specific that the motion addressed and he responded that “it deals with confrontation and the alleged plaintiff,” but did not say that it dealt in any way with the need or want of counsel. (App. Vol. III at 4.)

Significantly, the exact same sentence of the Sixth Amendment that guarantees the right to have compulsory process for obtaining witnesses also guarantees the right to have the assistance of

counsel for one's defense.¹ Yet, once again, there was not a single word in the appellant's motion or memorandum requesting or demanding this constitutional right, though it is obvious that the appellant was quite familiar with the Sixth Amendment. (App. at 76-77.) Also significant is footnote 1 of this memorandum, where the appellant cites a United States Supreme Court case² which held that a *pro se* litigant should not be held to the same legal standard as a licensed attorney. (App. at 76 n.1.) The appellant then asked the court to take judicial notice of his right as a *pro se* defendant not to be held to the same legal standard as a licensed attorney. Id.

After the judge sorted through the motions, the bench trial commenced. The appellant presented a well planned defense. He cross-examined all three of the prosecution's witnesses, (App. Vol. III at 14, 31, 38), he raised an objection to the testimony of one, (App. Vol. III at 25), and even moved for a judgment as a matter of law at the close of the prosecution's case, including a statement as to why the case against him was insufficient. (App. Vol. III at 43.) After this motion was denied the appellant testified on his own behalf and presented a closing argument summarizing his defense and analyzing the evidence presented. (App. Vol. III at 66.) Again, during this entire proceeding, the appellant never once mentioned or gave any indication that he desired counsel or felt that he was being improperly denied his right to counsel.

On January 25, 2002, Judge Clawges entered a judgment of guilty against the appellant and contemporaneously sentenced him to one year in jail. (App. at 98.) On February 1, the appellant, still acting *pro se*, filed a motion accusing the prosecutor of involving herself in a "scheme" to deprive

¹"In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

²Haines v. Kerner, 404 U.S. 519 (1972).

him of witnesses. (App. at 100.) The same day, he also filed a notice of intent to appeal and a motion for stay of sentence until the appeal was heard. (App. at 114.)

On February 4, 2002 – nine months after knowingly and voluntarily waiving his right to counsel, after authoring and filing fifteen motions, after researching the law and drafting several memoranda of law including one that asked the court to take judicial notice of his *pro se* status, after appearing *pro se* for two bench trials and one hearing, without ever once mentioning or implying that he wanted assistance of counsel – the appellant filed a motion asking the judge to clarify “why I didn’t receive the Counsel requested.” (App. at 105.) The attachment to this motion, which is the only evidence the appellant offered to suggest that he had ever requested counsel, was the financial affidavit that the magistrate clerk had him fill out on November 19, 2001, when he was beginning the appeal process. (App. at 105, 109.) This is the same affidavit that the appellant told the judge on the record he had filled out just so he could get an appeal date set. (App. Vol. IV at 3.) In sum, after he expressly waived his right to counsel on May 5, 2001, he gave no indication that he wanted to rescind this waiver until February 4, 2002 – two weeks after his conviction in circuit court – when he submitted the motion claiming that the financial affidavit of November 19, 2001, was a request for counsel.

Also on February 4, the appellant filed a motion requesting the assistance of counsel for the appeal process. (App. at 107.) Counsel was appointed on February 11, 2002. (App. at 112.) That same day, the judge continued the hearing date for the post-trial motions until February 28, and stayed the imposition of the sentence pending resolution of all post-trial motions. (App. at 121.) At the hearing, the judge granted the appellant an extension of time to file post-trial motions in anticipation of the transcripts being prepared. (App. Vol. VIII.) On March 28, 2002, the judge

granted the appellant's motion for re-sentencing and set aside the previous sentence of one year incarceration. (App. at 203.)

The re-sentencing hearing was held on June 14, 2002. (App. Vol. IX.) At this hearing several post-trial motions were argued by appellant's counsel, including a motion for new trial due to the alleged deprivation of counsel. Once again, the sole piece of evidence presented to show that the appellant actually desired counsel was the financial affidavit of November 19, 2001. The judge, fully aware that of the appellant's earlier representations about the circumstances surrounding the affidavit, ordered the appellant to submit a sworn affidavit supporting his new story: that the reason he completed the financial affidavit was to obtain court-appointed counsel. (App. Vol. IX at 40.) Both parties agreed with the judge that the financial affidavit was never properly forwarded to the chief judge for consideration, as financial affidavits typically are. (App. Vol. IX at 27-28.) The judge delayed issuing an order until the sworn affidavit could be completed by the appellant and transcripts from a separate felony trial involving the appellant could be prepared. (App. Vol. IX at 58.)

Transcripts from the felony case (No. 01-F-65 in Monongalia County Circuit Court) were important because Judge Clawges had also presided over that case and the appellant chose to represent himself in that matter as well, after many discussions about the right to counsel and the right to self-representation. (App. Vols. V-VII.) Judge Clawges continually attempted to convince the appellant to seek court-appointed counsel, but the appellant said no, he would obtain counsel on his own. (App. at 281.) In fact, the case was continued at least three times because the appellant never did obtain counsel despite repeatedly telling the judge that he would. (App. at 260-261.) The appellant filled out two financial affidavits during that case, one to obtain free transcripts, and the second to (finally) obtain court-appointed counsel. (App. at 281.) After the dust settled, counsel was

appointed and appeared at a hearing only to be promptly turned away by the appellant, who said that he did not want court-appointed counsel but wanted to proceed self-represented. Id. The two-day trial followed, ending on November 28, 2001, with the appellant successfully defending himself and the jury returning a verdict of not guilty. Id.

Eventually, the transcripts from those proceedings were completed and the appellant submitted a sworn affidavit that his reason for completing the financial affidavit was to obtain counsel, in total contradiction to his previous statements to the court. The state responded to the appellant's motions, the appellant filed a rebuttal, and the court ruled on all of the post-trial motions by order dated August 11, 2004. (App. at 277-283.) The court considered the appellant's arguments and then denied the appellant's motion for a new trial. Id. The judge ruled that the financial affidavit of November 19, 2001, was not completed to obtain court-appointed counsel, nor did the appellant desire court-appointed counsel. (App. at 280.) The judge found this to be true based not only on the conduct and statements of the appellant in the present case, but also on his very recent experience with the appellant in the felony battery case and his assessment of the appellant's credibility. (App. at 281.) The court concluded that the appellant was well aware of his rights and made a knowing, intelligent, and voluntary decision to represent himself. Id.

On October 12, 2004, a sentencing hearing was finally held. The appellant was granted his right to allocution then was sentenced to a one-year prison term, some fines and restitution. The sentencing order was issued on October 21, 2004, which led to this appeal.

IV.

ISSUES PRESENTED

1. The circuit judge's conclusion that the appellant knowingly and intelligently waived his right to counsel was not clearly erroneous, as it was supported by substantial evidence including the appellant's statements and conduct.
2. This Court should not establish a per se rule requiring an advice-of-rights colloquy between the circuit court and a defendant proceeding *pro se*.
3. Assuming *arguendo* that the circuit court was required to specifically advise the appellant of his right to counsel, the court's failure to do so in this case was harmless error.
4. The appellant was given a fair trial; no substantial errors occurred and certainly no cumulative errors that would warrant a reversal of the circuit judge's ruling.

V.

STANDARD OF REVIEW

The standard of review concerning appeals to this Court from non-jury trials, or bench trials, is set forth in Syllabus Point 1 of Public Citizen, Inc. v. First National Bank, 198 W. Va. 329, 480 S.E.2d 538 (1996):

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

The overriding issue in the present case is whether the appellant was denied his constitutional right to counsel or if he made a knowing and intelligent waiver of this right. When the circuit court

ruled that the appellant "made a knowing, intelligent and voluntary decision to represent himself," it made a finding of fact that is reversible only if clearly erroneous.

Whether the circuit judge had an unconditional duty to advise the appellant on the record concerning his right to counsel, and whether completing a financial affidavit is irrefutable evidence of the appellant's desire for counsel, are questions of law and should be reviewed using a *de novo* standard.

VI.

ARGUMENT

A. **THE CIRCUIT JUDGE'S CONCLUSION THAT THE APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL WAS NOT CLEARLY ERRONEOUS, AS IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE INCLUDING THE APPELLANT'S STATEMENTS AND CONDUCT.**

"The right to have assistance of counsel may be waived if done so intelligently and understandingly." Syl. pt. 5, State ex rel. Powers v. Boles, 149 W. Va. 6, 138 S.E.2d 159 (1964).

"Whether the waiver of the right to counsel was intelligently and understandingly made is a question of fact." Id. at 9, 138 S.E.2d at 162. "The determination of whether an accused has knowingly and intelligently elected to proceed without the assistance of counsel depends on the facts and circumstances of the case." Syl. pt. 2, State v Sandler, 175 W. Va. 572, 336 S.E.2d 535 (1985).

Therefore, whether a waiver of right to counsel was knowingly and understandingly made is a question of fact to be determined upon the particular circumstances of each case. State v. Armstrong, 175 W. Va. 381, 332 S.E.2d 837 (1985), *overruled on other grounds by State v Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994).

The test in such cases is not the wisdom of the decision to proceed *pro se*, but rather, whether the defendant is aware of the dangers of self-representation and clearly intends to waive the rights he relinquishes by proceeding *pro se*. Syl. pt. 2, Sandler. Importantly, an accused may waive his constitutional right to assistance of counsel by *conduct* which demonstrates intelligent and understanding waiver, even if he never explicitly declares that he is waiving his right to counsel. State v. McCraine, 214 W. Va. 188, 588 S.E.2d 177 (2003) (citing Syl. pt. 1, State v. Britton, 157 W. Va. 711, 203 S.E.2d 462 (1974)). This Court has also held that completing a rights form that expressly waives the right to counsel, though not conclusive, does constitute prima facie evidence that the waiver of counsel was proper. Thus, it becomes incumbent upon the appellant to present evidence which would preponderate against a finding of informed waiver. Armstrong, 175 W. Va. at 387, 332 S.E.2d at 842.

Although the appellant claims that the circuit judge had an unconditional duty to advise the appellant on the record of his rights regarding counsel, this is not an accurate portrayal of the law. The case law does say that it would be helpful and appropriate for appeal purposes if a discussion takes place on the record, but none of the cases cited by the appellant or found by the appellee make this mandatory as long as the conduct and other evidence make it clear that the appellant knew of his rights but chose self-representation.

In the present case, the circuit judge did consider all of the facts and circumstances before reaching the conclusion that the appellant "never intended to request court appointed counsel and that he made a knowing, intelligent and voluntary decision to represent himself." The evidence considered includes the appellant's conduct and statements in the present proceedings and the prior felony case before the same judge as well as the financial affidavit of November 19, 2001, the

in-court statements of the appellant regarding that affidavit and the additional sworn affidavit of the appellant which, in practical effect, repudiated the prior in-court statement and was therefore suspect.³ Each of the appellant's arguments will be challenged in detail below.

1. The Appellant Did Not Complete the Financial Affidavit on November 19, 2001, for the Purpose of Obtaining Court-appointed Counsel.

Typically, when a defendant desires court-appointed counsel the first step is completing a financial affidavit (commonly, though unfortunately, termed a "pauper's affidavit"), which is used to determine if the defendant qualifies for court-appointed counsel based on his/her income level and other factors. W. Va. Code § 29-21-16(b),(e). In counties with no public defenders' office, such as Monongalia, the circuit judge reviews the affidavit to determine if the applicant meets the eligibility requirements to receive court-appointed counsel. *Id.* at subsection (d). Although completing a financial affidavit does serve as an application for public defender services, it is also commonly used to determine indigent status for other reasons, such as eligibility for free trial transcripts and waiver of some court fees. *See State v. Moore*, 166 W. Va. 97, 273 S.E.2d 821 (1980); *Humphrey v. Mauzy*, 155 W. Va. 89, 181 S.E.2d 329 (1971).

Most significant for the present appeal is the holding of *Robertson v. Goldman*, which declared that a statute requiring posting of appearance bond for perfection of appeal, as applied to indigents, would be unconstitutional. 179 W. Va. 453, 369 S.E.2d 888 (1988). In that case, the indigent defendant was found guilty in municipal court of shoplifting and sought an appeal. The judge informed the defendant that the initial bond would not be returned until an appeal bond was posted. This Court held that the constitutional guarantee of equal protection prevents a court from

³The order of August 11, 2004, summarizes the judge's deliberations and conclusion. (App at 280-281).

requiring a cash bond for appeal when the defendant is indigent because it would deny him his statutory right to appeal. *Id.* Thus, if a defendant is indigent then the bond required for appeal from magistrate to circuit court by W. Va. Code § 50-5-13(a) may be made upon the defendant's own recognizance.⁴

In the present case, the appellant began his appeal to the circuit court on November 19, 2001, by completing the criminal appeal bond and a financial affidavit which obviated the necessity for a cash bond. It is undisputed that the affidavit was not forwarded to the circuit judge as a normal application for court-appointed counsel would have been. Instead, the magistrate assistant apparently placed the affidavit in the case file before forwarding the file to the circuit clerk for the appeal.

The appellant has repeatedly (although belatedly) claimed that this financial affidavit was a request for court-appointed counsel that should have been ruled upon by the circuit judge. However, the appellant does agree that the affidavit was never presented to the circuit judge for approval and that he did not actually find out about the affidavit until the hearing on January 18, 2002. The appellant argues that the judge should have ruled on it when he found out about it and that the appellant did "advise" the judge at the hearing that he had completed a financial affidavit.

To say that the appellant "advised" the circuit judge of the financial affidavit is quite misleading. The appellant mentioned the affidavit exactly one time during the entire proceedings below. This happened at the January 18 hearing when he informed the judge that he filled out the affidavit "just to get a date." Though it is a very important statement to ascertain the appellant's true

⁴ The defendant in Robertson was appealing from municipal court pursuant to West Virginia Code § 8-34-1, but the holding was based on equal protection of indigent criminals and therefore applies to all appeal courts requiring bond.

motivation for filling out the affidavit, it is far from “advising” the judge that he desired counsel; in fact, it advises the judge that the affidavit was *not* completed for the purpose of obtaining counsel.

The relevant statements:

I went to [the magistrate’s] office and filled out two papers for a notice of intent to appeal, or whatever they gave me. And I believe it was Ms. Forbes⁵ informed me that since I wasn’t – I was placed on no bond, that she had me just fill these two papers out blank, and criminal bail agreement/criminal appeal bond ... and these are the two that I filled out blank, and it was 11-19-01... so I filled out a pauper’s affidavit just so I could get a date... That was the understanding that I had, that I was on a PR bond of \$200, and that the case was set for July.

(App. Vol. IV at 2-3.)

Reading this statement of when he “advised” the judge clearly conveys that the appellant did not complete the affidavit for the purpose of obtaining counsel; rather, he filled it out because the magistrate assistant told him it was necessary to accompany the criminal appeal bond that he was simultaneously filling out. This makes perfect sense considering the holding of Robertson v. Goldman, discussed above, which held that an indigent defendant is not required to post bond for his appeal. Because the appellant expressly waived his right to counsel during the magistrate proceedings, no financial affidavit was ever completed at that level. The affidavit became necessary on November 19, 2001 because that is the day that the appellant filed the criminal appeal bond, which could be made by personal recognizance if the appellant demonstrated indigence by filing a financial affidavit.

This also explains why the affidavit was not forwarded to the circuit judge for appointment of counsel and why the defendant initialed both the cash portion and the recognizance portion of the criminal appeal bond. The magistrate assistant had no reason to forward the affidavit for

⁵ The magistrate clerk assistant.

appointment of counsel because no counsel was actually being sought. The appellant - by initialing both the PR and cash portions of the appeal bond, and by stating that he understood that he was "on a PR bond of \$200" - indicates that at least a portion of his bond was in fact a PR bond, which requires proof of indigency by financial affidavit per Robertson.

The appellant still contends that the circuit judge was required to rule upon the affidavit once he discovered it pursuant to West Virginia Code 29-21-16(d). This argument defies logic since the affidavit was discovered by way of the appellant telling the judge that he filled it out just so he could get an appeal date and just because the magistrate assistant asked him to. The appellant effectively told the judge to disregard the affidavit, but now is complaining to this Court because the judge did just that. Furthermore, the statute cited by the appellant simply defines who is responsible for ruling on a defendant's application for court-appointed counsel.⁶ However, there was no reason for the judge to rule on whether the appellant qualified for court-appointed counsel based solely on the existence of a financial affidavit, when it was not only obvious but also expressly stated by the appellant that the affidavit was not completed for the purpose of obtaining counsel.

The appellant next argues that a financial affidavit is actually a "motion" for court-appointed counsel and the court is required to rule on this motion pursuant to the holding of State v. Head, 198 W. Va. 298, 303, 480 S.E.2d 507 (1996). This argument is completely lacking in legal support, especially if the support is sought from State v. Head, which has nothing to do with financial affidavits and is totally irrelevant to the present appeal. In Head, the defendant was sentenced to 60 years in prison for aggravated robbery. He filed a rule 35(b) motion for reduction of sentence within

⁶ "In circuits in which no public defender office is in operation, circuit judges shall make all determinations of eligibility. In circuits in which a public defender office is in operation, all determinations of indigency shall be made by a public defender office employee designated by the executive director." W. Va. Code § 29-21-16(d).

the 120-day time limit for filing such motions. The judge never ruled on it until the defendant amended the motion four years later, at which point the judge ruled that the original motion had been abandoned due to passage of an unreasonable amount of time. This Court reversed the decision, holding that the failure of a defendant to remind the judge of a 35(b) motion does not constitute abandonment of the motion.

The holding in Head is a narrow holding and applies specifically to motions for reduction of sentence made pursuant to West Virginia Rule of Criminal Procedure 35(b), the language of which places a "reasonable time" limit on how long a judge can wait to rule such a motion. It does not pertain to a financial affidavit, which is certainly not a 35(b) motion and, in fact, is not a motion at all. It is used to gather information about the defendant's financial situation so that a determination of indigency can be made, but it is not a motion. Even if a financial affidavit could be construed as a motion, the bottom line is that the appellant told the judge on January 18, 2002, that it was not completed for the purpose of obtaining counsel, thus eliminating any merit to the appellant's claim that the affidavit had somehow transformed into a motion for counsel that required a ruling by the judge.

Regarding the financial affidavit, the judge had substantial, almost irrefutable evidence that it was not completed for the purpose of obtaining counsel. The appellant himself informed the judge of this on the record. Though the appellant later completed a sworn affidavit stating that it actually was completed for the purpose of obtaining counsel, this was done only at the judge's insistence and was done long after the appellant had lost his *pro se* appeal to the circuit court and was looking for a legal "hook." The judge obviously considered the testimony offered in the affidavit and compared it to the prior conduct and statements of the appellant before properly reaching the conclusion that

the appellant “did not complete the affidavit to obtain court-appointed counsel, nor did the [appellant] desire counsel.” (App. at 280.) This was a factual finding based, at least in part, on determinations of witness credibility. Such findings should be accorded “great deference.” Syl. pt. 2, State v. McCraine, supra. Accordingly, the circuit judge’s finding of fact regarding the financial affidavit was not clearly erroneous and this Court should show deference to the finding and affirm the ruling.⁷

2. The Circuit Court Did Not Have an Unconditional Duty to Advise the Appellant on the Record of His Right to Counsel as Long as the Conduct and Other Circumstances Show That the Waiver of Such Was Made Knowingly and Understandingly.

While it is true that the judge must determine that the right to counsel was waived knowingly and understandingly, it is also true that there is some flexibility in how this determination is made and the law does not require a right-to-counsel discussion on the record. In fact, it is clear that the appellant can affirmatively waive his right to counsel if his *conduct* shows that it was done knowingly and understandingly. Syl. Pt. 1, State v. Britton, 157 W. Va. 711, 203 S.E.2d 462 (1974). In this regard, the facts of Britton are instructive.

In that case, the defendant contacted the prosecutor and scheduled a plea negotiation, where he discussed the case and possible plea bargains without his attorney present. After his conviction the defendant claimed that he was denied his right to counsel at the plea negotiation. This Court easily dismissed the argument as “absolutely without merit” after finding abundant evidence to demonstrate an intelligent waiver during the negotiations. Id. at 465. The Court pointed out that he

⁷The appellant included a copy of the sworn affidavit as an addendum to his brief. That addendum is irrelevant for appeal purposes. The circuit judge did not ignore it, as the appellant claims; rather he found it not to be credible. Apparently, the appellant wants this Court to reconsider the testimony and find it credible, but that function belongs to the circuit court.

had “conducted himself as if he could negotiate a favorable plea bargain without assistance” and found that “[t]he actions [of] the defendant affirmatively demonstrate his waiver.” *Id.* Annoyed that the defendant would so clearly act on his own behalf and then complain that he was denied his right to counsel, the Court then reminded the defendant that “he who acts as his own attorney has a fool for a client.” *Id.*

In addition to considering a defendant’s conduct, the judge should consider all of the facts and circumstances of the case in determining if waiver was effected knowingly and understandingly. Syl. pt. 2, State v Sandler, *supra*. The holdings of Britton and Sandler would seem to foreclose the argument made here, that there is an unconditional duty to have a discussion on the record between the judge and appellant before the former can make a determination that waiver occurred.

Notwithstanding Britton and Sandler, the appellant contends that the law requires the judge to advise a defendant on the record of his rights. No case cited by the appellant requires such a discussion on the record, although most of them encourage it since it would at least eliminate after-the-fact claims such as this one. For example, the Court in Arbraugh v. Boles held that a conviction is void “where there is no indication from the record, *or otherwise*, that an accused . . . intelligently and understandingly waived the assistance of counsel.” Syl. pt. 3, 149 W. Va. 193, 139 S.E.2d 370 (1964) (emphasis added). By including the words “or otherwise,” this Court left no doubt that it intended to allow a finding of intelligent waiver when the facts and other circumstances indicate such, even with no specific indication on the record.

The appellant cites Carnley v. Cochran, a United States Supreme Court decision from Florida, which holds that the record must show, “*or there must be an allegation and evidence which show,*” that the defendant intelligently and understandingly waived his right to counsel. 369 U.S.

506, 516 (1962) (emphasis added). The appellant conveniently omitted this emphasized portion of the holding from his brief without any indication of the omission (such as use of ellipses). Appellant's Br. at 14. The Court placed the responsibility on the trial court to determine if there is an intelligent waiver of counsel, stating that "whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.* at 515. This language does not create an unconditional duty to inform a defendant on the record of his rights. Rather, it simply requires that the court explicate the factual basis for its ruling on the waiver issue. It is clear that the United States Supreme Court, just like this Court, intended to allow a finding of waiver based on all of the evidence, even if waiver was not directly discussed with the defendant on the record.

In State v. Sandler, also cited by the appellant, the Court said that warning a defendant of all possible perils of self-representation is not mandatory and failure to warn does not necessarily require reversal, "so long as it is apparent from the record that the defendant made a truly intelligent and knowledgeable waiver of his right to counsel." 175 W. Va. at 574, 336 S.E.2d at 537. As previously stated, a defendant can make an intelligent and knowledgeable waiver by conduct which conveys to the court his desire to proceed *pro se*. The present appellant's conduct made it quite apparent that he was aware of his right to counsel but chose to embrace self-representation.

The appellant has offered little evidence that he actually desired counsel and no evidence that he was unaware of his right to counsel or of the dangers associated with self-representation. However, there is overwhelming evidence that he chose self-representation fully aware of his rights and then claimed that he desired counsel only after losing his appeal in circuit court. The appellant's evidence that he actually desired counsel is the financial affidavit of November 19, 2001, which has

already been discredited by the circuit judge based on the appellant's own in-court statements, and the motion demanding constitutional rights, which the appellant now claims to have been a request for counsel but actually requested that the court take judicial notice of his *pro se* status and "take it easy on him" as a result. Meanwhile, the evidence that he knowingly and voluntarily chose self-representation includes:

- his express waiver of counsel in magistrate court which was never rescinded,
- his filing of 15 *pro se* motions including at least 7 after completing the financial affidavit that was supposedly a request for counsel (none of which contained any indication that he desired counsel),
- his statement on the record that the financial affidavit was completed for reasons other than obtaining counsel,
- his conduct and statements during the hearing indicating that he had embraced self-representation, was preparing the case himself and simply needed more time to prepare,
- his request that the court take judicial notice that he was acting *pro se* and therefore should not be held to the same standard as a licensed attorney (this filed two months after the financial affidavit which supposedly was a request for counsel),
- his conduct during the trial, where he cross-examined all the witnesses against him, raised objections to testimony, moved for a judgment as a matter of law, and offered testimony in his own defense without once indicating that he desired counsel and was being denied this right,
- his very recent experience in front of the same circuit judge in which he caused many delays due to his refusal of a court-appointed attorney,
- and his successful defense in that same felony case without the aid of an attorney.

All of this evidence was properly considered by the circuit judge in accordance with the case law that requires a judge to consider all of the conduct, facts and circumstances before concluding

that the appellant "never intended to request court-appointed counsel and that he made a knowing, intelligent and voluntary decision to represent himself." (App. at 281.) Certainly, his waiver of counsel in the prior felony case does not act as a waiver of counsel in the present case, but it is proper evidence to determine if the appellant had actual knowledge of his right to counsel and the risk of self-representation, which will be discussed in more detail below.

The bottom line is that the right to counsel may be waived if such waiver is made knowingly and intelligently. Therefore, the essential question is whether the appellant had actual knowledge of his right to counsel and of the dangers associated with waiving this right but still voluntarily chose to represent himself. Certainly an in-depth colloquy on the record with every defendant who appears without counsel would be a very effective method to determine the answer to this question. However, it is not the only method, which is why this Court has always encouraged such a colloquy but never made it mandatory, and has allowed some leeway to find that proper waiver occurred based on all the relevant facts and circumstances. The present case is a perfect example of the wisdom of this approach; the circuit judge in this case had substantial evidence that a knowing and understanding waiver occurred and, consequently, his finding of fact was not clearly erroneous and should not be disturbed.

3. The Judge's Familiarity with Appellant from a Recent Prior Case Was Proper to Consider When Determining Whether the Appellant Had Actual Knowledge of His Right to Counsel and of the Risks of Self-representation.

"The fact that the circuit court did not warn the appellant of the specific dangers and disadvantages of self-representation is not reversible error... where the record indicates that the

appellant was familiar with the court system and exhibited an awareness of the consequences of his decision" State v. Gravely, 176 W. Va. 220, 224, 342 S.E.2d 186, 190 (1986).

The appellant's brief completely mischaracterizes the circuit judge's reliance on his prior encounter with the appellant in court. The appellant claims that "the circuit court adopted the State's argument ... that the appellant waived counsel in this proceeding because he waived counsel in his earlier felony trial." Appellant's Br. at 15. He further claims that the circuit judge contended that "the appellant was precluded from counsel [in the present case] because of his decision in the earlier proceeding." Id. Once again, this is a complete misrepresentation of the judge's ruling. The circuit judge never claimed that the prior waiver of counsel served as a waiver in the present case, nor did he contend that the appellant was precluded from asking for counsel in the present case because of his waiver in the prior case.

Rather, the judge viewed the prior court encounter with the appellant as some evidence that the appellant was familiar with the court system and was aware of his right to counsel and the responsibility he was accepting by acting *pro se*. (App. at 280-281.) At no time did the judge say or imply what the appellant claims. He simply recalled the prior experience and said that his present finding of a knowing and understanding waiver was further supported by the appellant's prior court experience. Id. Determining whether there has been a knowing and intelligent waiver of counsel depends upon all of the facts and circumstances of the case, and the test is whether the appellant is aware of the dangers of self-representation and clearly intends to waive his right to counsel, Syl. pt. 1, State v. Gravely, 176 W. Va. 220, 224, 342 S.E.2d 186, 190 (1986); recent prior court experience in front of the same judge can undoubtedly aid that judge in determining whether the appellant was aware of the dangers of self-representation.

The appellant's claim that this type of analysis is "devoid of legal authority" is incorrect. In Gravely, a case remarkably similar to the present case, the appellant was convicted of aggravated robbery but successfully appealed to this Court, which reversed the conviction. The appellant represented himself at the second trial and was again found guilty. In his appeal of the second conviction, he claimed that the court erred in holding that he had knowingly and understandingly waived his right to counsel. 176 W. Va. at 224, 342 S.E.2d at 190. In its opinion, this Court held that "the trial court did not err in finding that the appellant knowingly and intelligently elected to proceed to trial without the benefit of counsel." Id. The court based this holding in part on the judge's prior experience with the same appellant, stating "[t]he court in this case was familiar with the appellant, having presided over the first trial, and was able to evaluate the appellant's intelligence and understanding of the consequences of waiving counsel." Id. It further stated, "[h]aving sat through his first trial, the appellant obviously was familiar with the manner in which a trial is conducted and was well aware of the responsibility he was accepting by relieving his counsel." Id. The Court then ruled that the failure of the trial court to warn of specific dangers and disadvantages of self-representation was not reversible error where the record indicates that the appellant was familiar with the court system and the consequences of his decision. Id.

The appellant argues that the case of State ex rel. Kozdron v. Boles, 149 W. Va. 596, 142 S.E.2d 769 (1965), prevents the judge in the present case from considering his prior experience with the appellant. As previously explained, the appellant misconstrued the judge's reliance on the earlier case and consequently misapplies the holding of Kozdron. In Kozdron, the grand jury handed down three indictments against the defendant on the same day but for different crimes. Id. at 597. The defendant was arraigned for the first indictment on November 22, waived counsel, pled not guilty

but was found guilty by jury trial. Id. On November 24, the defendant was arraigned on the remaining two indictments and this time pled guilty to both of them without counsel present and without ever waiving counsel. Id. During the habeas proceeding the respondent contended that the refusal of counsel to represent him with respect to the first indictment acted as a refusal of counsel with respect to the remaining two. The Court held that there could be no presumption that counsel was waived at the latter arraignment based solely on the waiver at the prior one. Id. Due to a silent record on the matter, the guilty pleas were dismissed. Id.

That case is distinguishable from the present case for several reasons. First of all, in that case the respondent actually contended that the waiver of counsel in the prior case served as a waiver in the latter case. The circuit judge in the present case simply viewed his prior encounter with the appellant as *additional* evidence that the appellant was aware of his right to counsel and the dangers of self-representation, not as *conclusive* evidence of waiver. This is perfectly reasonable and supported by the Gravely decision. The court never presumed that counsel was waived just because it was waived in a prior case, as the appellant contends.

Secondly, in Kozdron the defendant simply entered a guilty plea without counsel present, so there was no conduct that the reviewing court could examine to help determine if a knowing and intelligent waiver occurred. In the present case, as in Gravely, the appellant conducted an entire trial without the assistance of counsel, so there is ample conduct and other evidence to show that waiver was made knowingly and intelligently. The facts and rulings in the present case are far more analogous to Gravely than they are to Kozdron. Therefore, the circuit judge's familiarity with the appellant was properly considered as evidence and does not constitute reversible error.

4. The Motion Demanding Constitutional Rights Was Not a Request for Counsel.

Though the appellant asserts that his motion titled "Motion Demanding Constitutional Rights" showed that he was not waiving counsel, a reading of the motion and memorandum in support of the motion reveals that the appellant's only intent was to request more time to obtain witnesses and to unequivocally inform the judge that no counsel was desired. In effect, regardless of its title, this was a renewed motion for continuance because a prior motion for continuance had been denied just four days earlier. This time the appellant chose to cite the constitutional right to "have compulsory process for obtaining witnesses in his favor" as grounds for a continuance. (App. at 76-77.) Nevertheless, this motion never mentions a desire for counsel, a demand for counsel or a concern that he was being denied his right to counsel.

That the appellant would cite this motion as a demand for counsel is particularly absurd considering that the memorandum in support of the motion specifically asks the court to recognize that he is acting *pro se* and should not be held to the same legal standard as a licensed attorney. *Id.* at 76 n1. This demand provides the clearest indication that the appellant knowingly and intelligently chose self-representation and had no desire for counsel. The appellant asked the court to take judicial notice that he was acting on his own behalf in order to take advantage of the leniency afforded *pro se* litigants; he now asks this Court to view the exact same motion as a prayer for counsel and as evidence that he was *not* acting on his own behalf. His argument is ridiculous. To use an old maxim, he wants to have his cake and eat it too.

The truth is that the appellant knowingly and intelligently waived his right to counsel and only claimed that he was denied this right after being convicted in circuit court. The motion

demanding constitutional rights does not support the appellant's argument, but actually proves it false. The circuit judge was correct to disregard this motion as a request for counsel. The only thing it demanded was that he take judicial notice of the appellant's desire to proceed *pro se* and this Court should not reverse the final ruling based on this motion.

5. Due Process Was Not Violated Because the Appellant Was Not Denied His Right to Counsel; He Waived it Knowingly and Voluntarily.

"[A] trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to . . . offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the [Constitutions of the United States and West Virginia]" Syl. pt. 3, State v. Jenkins, 195 W. Va. 620, 466 S.E.2d 471 (1995).

The appellant cites Jenkins as support for his argument that his due process rights were violated. This argument is merely a rehash of his previous arguments and requires no new analysis. The appellant claims that he did not waive his right to counsel but was denied this right, which resulted in a violation of due process. Accordingly, this argument, like his previous arguments, relies on this Court finding that the circuit court was clearly erroneous when it found that the appellant knowingly and understandingly waived his right to counsel. However, if this Court concludes that the circuit court's finding was not clearly erroneous, then it must also conclude that the appellant's due process was not violated because his right to counsel was properly waived.

For all of the reasons already discussed in detail in the preceding sections of this brief, the circuit court's finding that the appellant knowingly and intelligently waived his right to counsel,

opting instead for self-representation, was not clearly erroneous. Therefore, the appellant's due process was not violated and this Court should affirm the circuit court's ruling.

6. Express Waiver in Magistrate Court Should Be Considered to Be Prima Facie Evidence of a Continuing Waiver Throughout the Circuit Court Appeal.

Completing a statement of rights form, which informs a defendant of his right to counsel and his right to waive counsel, though not conclusive, does constitute prima facie evidence that the waiver of counsel was done knowingly and intelligently. State v. Armstrong, 175 W. Va. at 387, 332 S.E.2d at 843, *overruled on other grounds by State v Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994).

When the appellant was arrested on May 5, 2001, the magistrate informed him of his right to counsel and his right to have counsel appointed if he could not afford one. The appellant signed a statement of rights form confirming that he was aware of his rights and that he was giving up his right to have an attorney represent him. (App. at 7.) The appellant signed the form with the added notation "without prejudice," apparently attempting to convey that he might later want to change his mind; however, he expressly waived counsel at that moment and opted for self-representation, which he never did rescind until February 4, 2002 – two weeks after he was found guilty in circuit court – when he filed a motion requesting the assistance of counsel and a motion asking why he "did not receive the counsel requested." The appellant claims that the financial affidavit of November 19, 2001, was a request for counsel and rescinded his earlier waiver, but that affidavit has already been discredited in great detail and the circuit judge determined, based in part on the appellant's own in-court representations, that it was not a request for counsel.

The appellant concedes that completing the form properly waived counsel in magistrate court, but argues that the circuit judge is required to perform the same discussion of rights that was already performed in magistrate court. Though no case law could be found stating that a waiver of the right to counsel in magistrate court remains presumptively valid through the appeal process in circuit court until the defendant rescinds the waiver, the state now urges this Court to adopt such a rule.

Creating such a rule would logically correspond with this Court's already existing rule that the waiver of the right to a jury trial in magistrate court, also a fundamental constitutional right, is a waiver of the right to jury trial for the duration of the case, including the circuit court appeal. *See State ex rel. Ring v. Boober*, 200 W. Va. 66, 488 S.E.2d 66 (1997). The Court in *Boober* held that the procedures set forth in West Virginia Code § 50-5-8(b) are sufficient to inform the magistrate that the constitutional right to jury trial has been voluntarily, knowingly, and intelligently waived, thus protecting a defendant's right to jury trial. Syllabus, *Id.* The section of code referenced in *Boober* states that "the defendant shall be advised of the right to trial by jury in writing," and that the demand must be made within twenty days of the initial appearance. W. Va. Code § 50-5-8(b). Failure to demand a jury trial within the twenty day limit forfeits the right to trial by jury even for the circuit court appeal. W. Va. Code § 50-5-13(b).

The section of code regarding the right to counsel states, "the magistrate shall at the time of the initial appearance advise a defendant of his right to counsel and his right to have counsel appointed if such defendant cannot afford to retain counsel." W. Va. Code § 50-4-3. The language of this section is so similar to the language regarding the right to jury trial that it would be reasonable to conclude that a waiver in magistrate court remains in effect for the duration of the case, including

the appeal to circuit court, unless the defendant expressly rescinds the waiver and/or makes a request for counsel, in good faith, that is not interposed merely to delay or disrupt the proceedings.

B. THIS COURT SHOULD NOT ESTABLISH A PER SE RULE REQUIRING AN ADVICE-OF-RIGHTS COLLOQUY BETWEEN THE CIRCUIT COURT AND A DEFENDANT PROCEEDING *PRO SE*.

The appellant argues that the circuit court had an unconditional duty to advise him on the record of his rights regarding the assistance of counsel before a proper waiver could occur. As previously discussed, that is an incorrect statement of the law. While there are cases that encourage such a colloquy, none make it mandatory.⁸ In fact, the law is clear that a defendant can affirmatively waive counsel through conduct that demonstrates a knowing and intelligent waiver even without an in-depth discussion on the record. That being established, the appellant's brief implies that this court should overrule the prior cases and create a per se rule requiring an advice-of-rights colloquy on the record with *pro se* defendants before a proper waiver can occur.

This Court needs to look no further than the facts of the present case to see that the current law works and the supporting policy is sound. Here we have a defendant who unquestionably knew of his right to counsel and unquestionably opted for his right to self-representation. To reverse the appellant's conviction would reward the appellant for playing games and changing his version of events to fit his new legal theories. Accordingly, this Court should not adopt a new rule requiring an advice-of-rights colloquy, but should maintain the current rule and affirm the ruling of the court below.

⁸ Relevant case law was already cited and discussed in a previous subsection beginning on page 18, supra.

C. THOUGH THE STATE DENIES ANY ERROR, ASSUMING ARGUENDO THAT THE CIRCUIT COURT WAS REQUIRED TO SPECIFICALLY ADVISE THE APPELLANT OF HIS RIGHT TO COUNSEL, OR OF HIS RIGHT NOT TO TESTIFY, THE COURT'S FAILURE TO DO SO IN THIS CASE WAS HARMLESS ERROR.

"Failure to observe a constitutional right; constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, State v. Flippo, 212 W. Va. 560, 575 S.E.2d 170 (2002). Moreover, "errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Id. at 191.

In the present case, assuming that such a duty existed, the failure to warn the appellant of his right not to testify is harmless beyond a reasonable doubt. The appellant, though acting *pro se*, had the foresight to move for a judgment as a matter of law at the close of the prosecution's case, including a statement as to why the evidence presented was insufficient to establish that he committed the crime of battery. (App. Vol. III at 43.) In denying the motion, the judge verbally recounted all of the evidence presented by the prosecution and stated on the record that a prima facie case had been made against the appellant. Id. The appellant then testified on his own behalf, but called no other witnesses.

Even if the judge would have informed the appellant of his right not to testify and the appellant had then chosen not to testify, it is clear that the outcome would have been the same because the judge had already ruled that a prima facie case had been made by the State. Therefore, the appellant's testimony was the only evidence offered to rebut the prosecution's case and he would have been convicted with or without it.

Regarding counsel, had the judge advised the appellant on the record of his right to counsel it is clear that the appellant would still have opted to represent himself, as he was already fully aware of his right to counsel and fully aware that he could have requested counsel at any point during the proceedings. It is clear that he was fully aware of his right to counsel based on the disclosure of such in magistrate court, at which time he expressly waived his right to counsel after confirming that the magistrate had informed him of his rights and even added the notation "without prejudice" to his signature, indicating his awareness that he could rescind the waiver and request counsel later in the case. Also indicative of his awareness of rights is his prior felony case in circuit court before the same judge, in which the judge repeatedly informed the appellant of his right to counsel and even urged him to take advantage of his right as an indigent to have counsel appointed, which the appellant repeatedly declined. Therefore, advising the appellant of his right to counsel yet again would have had the effect of preaching to the choir and the court's failure to do so did not affect the outcome of the case.

D. THE APPELLANT WAS GIVEN A FAIR TRIAL; NO SUBSTANTIAL ERRORS OCCURRED AND CERTAINLY NO CUMULATIVE ERRORS THAT WOULD WARRANT A REVERSAL OF THE CIRCUIT JUDGE'S RULING.

The appellant's final argument is that he was denied a fair trial due to cumulative error. The "egregious" errors alleged by the appellant simply did not occur or were not errors at all. These alleged errors have already been discussed supra, so a quick recap is sufficient.

He alleges that he was denied counsel, which is not true; he knowingly and voluntarily waived his right to counsel. He alleges that the circuit court failed to inquire if the appellant desired self-representation, which is not actually required and the desire to self-represent was clearly

conveyed by the appellant's conduct. He claims that the judge failed to discuss his right not to testify, which is not actually required by the cases cited and was, in any event, harmless beyond a reasonable doubt. Finally, he alleges (without citing any authority) that he was denied his right to confront the victim, which he apparently confuses with his right to confront the witnesses against him. The appellant's constitutional right to confrontation is limited to the witnesses presented against him. The victim was not called as a witness and the state had no obligation to call the victim as a witness; therefore, this argument fails along with the entire argument of cumulative error.

VII.

CONCLUSION

As discussed in this brief, the appellant was not denied his right to counsel, he was not denied his due process rights, and he was not denied a fair trial. Accordingly, this Court should affirm the ruling of the circuit court and lay this case to rest once and for all.

Respectfully submitted,

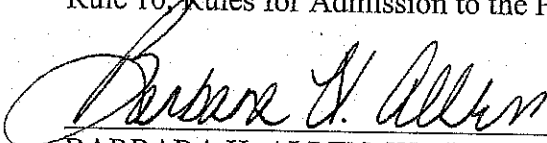
STATE OF WEST VIRGINIA,
Appellee,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



BENJAMIN M. MISHOE
Legal Intern, Office of Attorney General
Third-Year Law Student Practicing Under
Rule 10, Rules for Admission to the Practice of Law

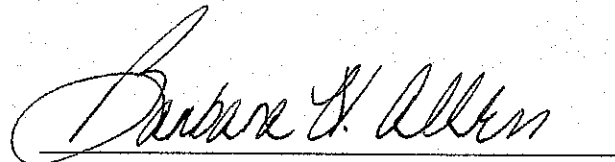


BARBARA H. ALLEN, WVSB #1220
MANAGING DEPUTY ATTORNEY GENERAL
Supervising Attorney
Office of the Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
304-558-2021

CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for the State of West Virginia, hereby certify that a copy of the within Brief of Appellee, State of West Virginia, was served upon counsel for Appellant by depositing in the United States mail, first class postage prepaid, on this 29th day of July, 2005, addressed as follows:

Karen L. Hall, Esq.
235 High Street, Suite 422
Morgantown, WV 26505


BARBARA H. ALLEN