IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

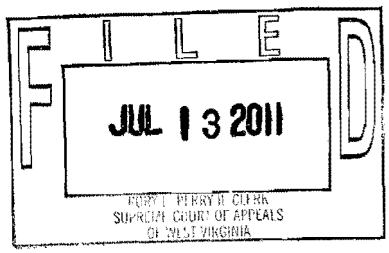
v.

BRENT LEVI VICTOR McGILTON

Petitioner.

Supreme Court No. 11-0410

Circuit Court No. 10-F-20
(Ohio)



BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 4

ARGUMENT:

I. The Trial Court Violated Petitioner's Double Jeopardy Protections By Sentencing Petitioner For Three Counts Of Malicious Assault For Three Wounds Caused During A Single Event 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES | Page

People v. Wilson, 417 N.E.2d 146, 147 (Ill. App. 1981) 6,7

State v. Barnett, 168 W.Va. 361, 284 S.E.2d 622 (1981) 5,6,7

State v. Miller, 194 W.Va. 3, 18, 459 S.E.2d 114 (1995) 7

State v. Rummer, 189 W.Va. 369, 379, 432 S.E.2d 39, 49 (1993) 5

State v. Sears, 196 W.Va. 71, 75, 468 S.E.2d 324, 328 (1996) 5,7

Weatherly v. State, 733 P.2d 1331, 1337-8 (1987) 6

CONSTITUTIONAL PROVISIONS

Article III, Section 5 of the West Virginia Constitution 8

Fifth Amendment to the United States Constitution 8

RULES

W.Va. R. Crim. P. 35(a) 7

STATUTES

W.Va. Code 61-2-9 (2011) 6

ASSIGNMENT OF ERROR

I. The Trial Court Violated Petitioner's Double Jeopardy Protections By Sentencing Petitioner For Three Counts Of Malicious Assault For Three Wounds Caused During A Single Event.

STATEMENT OF THE CASE

This case involves a November 22, 2009, incident on altercation in which Brent McGilton allegedly stabbed his wife, Angela McGilton, three times. These stab wounds were inflicted very close in time to one another. The defense alleged that the victim's wounds were self inflicted, while the state claimed it was an unprovoked attack.

For purposes of this appeal, the essential fact is that the three wounds were caused during one brief episode. The victim's testimony was that Mr. McGilton started stabbing her during an argument over house keys. (A.R. Vol. III at 133). She testified that she was eventually able to escape and barricaded herself in the bathroom where she could call 911 and wait for the police to arrive. (Id. at 140). She did not testify that additional wounds were inflicted after she managed to escape. All the wounds were caused during this initial attack.

Brent McGilton was indicted by the November, 2009 term of the Ohio County Grand Jury for three counts of malicious assault, and one count of assault during the commission or attempt to commit a felony, to-wit: malicious assault. (A.R. Vol. I at 6) This fourth count was dismissed prior to trial. (A.R. Vol. III at 13) His trial began on June 22, 2010, and on June 23, 2010 a jury found him guilty of three counts of malicious assault. (A.R. Vol. III at 520) On August 2, 2010, a recidivist hearing was held and Mr. McGilton was identified as having committed a previous felony, which enhanced one of the malicious assault sentences by doubling the minimum sentence[1]. (A.R. Vol. IV at 117) On November 23, 2010, the trial court sentenced Mr. McGilton ordering all sentences to be run consecutively, in effect a four to thirty year sentence. (A.R. Vol. I at 9)

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[1] The sentence for malicious assault is an indeterminate term of two to ten years. The enhanced sentence would be a term of four to ten years.

SUMMARY OF THE ARGUMENT

Brent McGilton was wrongfully sentenced for three counts of malicious assault. The three wounds serving the basis for these three charges were a result of a single brief episode, and thus were one offense for double jeopardy purposes.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument as not all issues raised have been authoritatively decided and the decisional process would be significantly aided by oral argument. Petitioner requests a Rule 19 argument as this case presents error in an application of settled law. Petitioner suggests a memorandum decision is not appropriate in this case as a full opinion will give guidance to the lower courts as to the proper application of the law relevant to this case.

ARGUMENT

I) The Trial Court Violated Petitioner's Double Jeopardy Protections By Sentencing Petitioner For Three Counts Of Malicious Assault For Three Wounds Caused During A Single Event.

Standard of review:

Double Jeopardy claims are reviewed *de novo*. State v. Sears, 196 W.Va. 71, 75, 468 S.E.2d 324, 328 (1996). Once an appellant has shown a non-frivolous claim, "the burden shifts to the state to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution, or punishment of the defendant. Id.

The three alleged malicious assaults were one crime for double jeopardy purposes.

Petitioner was convicted of three counts of malicious assault when he, in a single episode, allegedly attacked the victim with a knife and left three wounds. As a general rule, absent legislative intent to the contrary, identical offenses committed during a single transaction are the same offense for double jeopardy purposes. See State v. Rummer, 189 W.Va. 369, 379, 432 S.E.2d 39, 49 (1993) (noting that "traditional double jeopardy analysis of a battery through legislative intent would fail to reveal any intention to create a separate crime based upon separate blows"); see also Syl. Pt. 3, State v. Barnett, 168 W.Va. 361, 284 S.E.2d 622 (1981) (holding "delivery of two controlled substances at the same time and place to the same person is one offense under our double jeopardy clause"). The state may prove each of the offenses but may only sentence once. Barnett, 168 W.Va. at 365, 284 S.E.2d at 624.

In Rummer, the petitioner was convicted of two counts of sexual abuse in the first degree, one for touching the victim's breasts, the other for touching her sex organ. Both incidents occurred within a brief period of time, and the petitioner contended that because of that they were one offense for double jeopardy purposes. This Court rejected this argument, holding that

since the definition of "sexual contact" (a element of sexual abuse) included several specific body parts, separate convictions could lie for touching each part as each of these offenses required proof of a fact the other did not. This Court went on to note that had the petitioner touched the victim on the same body part multiple times, those acts would be the same offense for double jeopardy purposes.

The malicious assault statute, W.Va. Code 61-2-9 (2011) does not set out specifics like the area of the body wounded, or the number of wounds. While it does lay out several ways the offense can be performed (shoot, stab, cut, or wound), the state did not allege or prove that the wounds were caused by different means. As such there is no difference between these wounds and blows landed during a battery in that they do not fall under specific categories under the statute.

In Oklahoma, the Court of Criminal Appeals in a case where a woman was stabbed forty times found that the assailant could be only charged with two stabbings. Weatherly v. State, 733 P.2d 1331, 1337-8 (1987). The court found two rather than one because during the event, the assailant broke off his attack for a significant period before he again resumed his assault. Id; See also People v. Wilson, 417 N.E.2d 146, 147 (Ill. App. 1981) ("The prosecution asserts, however, that each of the blows delivered by the defendant may serve as the basis for a separate offense... . Such suggestion is inane.").

While the trial court did not err in allowing the state to prove the three offenses, it did err by sentencing Mr. McGilton to all three offenses. See Barnett, 168 W.Va. at 365, 284 S.E.2d at 624.

It is not necessary for Mr. McGilton to establish the trial court error as "plain error" because a double jeopardy issue arising from sentencing can be raised at any time.

As noted above, the trial court erred in sentencing Mr. McGilton to each if the three counts of malicious assault. See Barnett, 168 W.Va. at 365, 284 S.E.2d at 624. "The rule is clear that most double jeopardy claims arising from sentencing may be raised for the first time on appeal." State v. Sears, 196 W.Va. 71, 75, 468 S.E.2d 324, 328 n. 5 (1996). Furthermore, "the court may correct an illegal sentence at any time." W.Va. R. Crim. P. 35(a).

Nevertheless, the trial court error below qualifies as "plain error."

Plain error is defined as "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. pt. 7, State v. Miller, 194 W.Va. 3, 18, 459 S.E.2d 114 (1995). The double jeopardy violation is set out above, and at no point did petitioner make a clear waiver of his rights regarding double jeopardy.

The error is likewise plain. As the Illinois Appellate Court put it, the suggestion that multiple blows in a single event can be charged separately "is inane." People v. Wilson, 417 N.E.2d at 147. From a common sense view, a rule allowing for separate offenses for each blow struck in something like a bar fight could result in life sentences for those involved. Such consecutive sentencing occurs in sex cases as the legislature has set out a statutory scheme where the intention to multiply punish these offenses is clear. This is not the case for the battery / malicious wounding statute.

That the error affected Mr. McGilton's substantial rights is obvious. Presently he is serving an eight to thirty year sentence[2]. Were this error corrected he would be serving a four to ten year sentence.

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[2] This is three two to ten year sentences run concurrently, with one of the three being enhanced by the recidivist statute making it a four to ten year sentence.

The error also affects the fairness, integrity, and public reputation of the judicial proceedings. As to fairness, Mr. McGilton stands to serve at least four and as much as twenty extra years in prison due to an obvious oversight by his counsel and the trial court. Allowing such an error to go uncorrected would be an insult to the rule of law, specifically the double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

CONCLUSION

Petitioner requests this Court vacate two of his malicious assault sentences and remand to the trial court for a new sentencing hearing.

Respectfully submitted,

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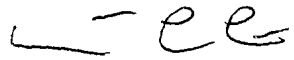
CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on the 13th day of July, 2011, I sent via United States Postal Service a copy of the foregoing Brief of Petitioner to the Office of the Ohio County Prosecuting Attorney, 1500 Chapline Street, Wheeling, West Virginia 26003.



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