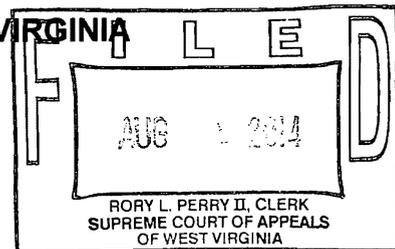


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0173



Kenneth Seen, Defendant Below,
Petitioner,

v.

State of West Virginia, Plaintiff Below,
Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. **THE TRIAL COURT'S FINDING OF SEXUAL MOTIVATION AND CONSEQUENT ORDER THAT DEFENDANT REGISTER AS A SEX OFFENDER CONSTITUTES PLAIN ERROR AND MUST BE VACATED BECAUSE NEITHER THE STATE NOR THE COURT GAVE DEFENDANT PRETRIAL NOTICE CONCERNING SEX OFFENDER STATUS AND REGISTRATION**

The State acknowledges that its failure to provide pretrial notice to Petitioner of its intent to seek a sexual motivation finding upon conviction, thus requiring Petitioner to register as a sex offender for 10 years, constitutes plain error. Respondent's Brief, p.15. The State asserts, however, that Petitioner's substantial rights were not affected because Petitioner had notice of the crime charged - misdemeanor battery - which is the crime for which he was convicted. And, so the argument goes, if Petitioner had been acquitted of battery, then he would not have been designated by the State as a sexual offender. *Id.* This argument, however, ignores the reality of the legal and real world consequences laid upon Petitioner's head. The result of the error below has gravely affected Petitioner's substantial rights.

Petitioner was denied his right to meaningful notice of the "character and cause of the accusation" against him. Although the Sex Offender Registration Act, WV Code §§ 15-12-1, *et seq* is not a criminal law, it is necessarily intricately intertwined with criminal statutes that do not have a specific sexual act as an essential element. The Act has, as applied in this case, affect only in the context of a criminal prosecution for a generic crime. WV Code § 15-12-2(c). A defendant must be charged, prosecuted and convicted of the generic offense, and the evidence presented at the criminal trial must satisfy the judge, beyond a reasonable doubt, that defendant acted from a sexual motivation. The defendant

must defend against the crime charged and against the sexual motivation finding. The prosecution must prove the essential elements of the crime charged and sexual motivation beyond a reasonable doubt. In other words, the prosecution had to prove an element - sexual motivation - that is in addition to the essential elements of the offense. The State need not prove, nor the court find, motive for most criminal offenses. Motive is not an essential element of battery under WV Code § 61-2-9(c). The criminal trial is the venue in which the issue of sexual motivation must be decided. Therefore, a defendant must be given pretrial notice so he may prepare, have benefit of effective assistance of counsel, have "a reasonable time to prepare for his defense," and to subpoena witnesses and evidence. Art III, Section 14, W.Va. Constitution. Without timely pretrial notice, defendant is denied fundamental fairness and due process. Art III, Section 10, W.Va. Constitution.

Petitioner's substantial rights are also violated due to the consequences of the sexual motivation finding; the requirement that he register as a sex offender for 10 years. There can be no doubt that the action of the State in designating a citizen a sex offender implicates and impairs a defendant's fundamental and constitutional interests in his liberty, reputation and good name, and indirectly in his property. The officially certified sex offender loses liberty: he must register and report; he is subject to restrictions on where he can live, where he may visit, and with whom he may associate. He is publically displayed in our contemporary town square: the internet. He likely will be shunned and scorned by decent folk. His privacy is subject to otherwise unjustified intrusion by officers of the State. His property interests are also affected. Employment prospects and business opportunities are diminished; in some cases employment is prohibited. His earning capacity is reduced.

Finally, the failure of notice violated this Court's teaching in Whalen. In that case, the sexual motivation finding was vacated and defendant permitted to withdraw his guilty plea, even though the evidence of his motivation appeared overwhelming.

This Court, in Whalen, recognized that a sexual motivation finding and the resulting sex offender status and registration requirement, implicate rights of sufficient substance to require pretrial notice. Yet in this case, the prosecuting attorney only mentioned sexual motivation in his opening remarks. The prosecutor did not intend to make an opening, but began trial by calling the State's first witness. He made an opening - and disclosed the State's request for a sexual motivation finding - only when the trial judge directed him to make an opening statement. This casual approach to notice betrays a misunderstanding of the importance to Petitioner and the trial judge of pretrial notice. The prosecutor's approach to notice also betrayed his disregard or lack of knowledge of this Court's decision in Whalen.

The Court may use this occasion to reiterate the rule in Whalen, and should consider the benefit of stating it as a bright-line rule. Ideally, the State should be required to provide written notice, pretrial. Such a rule would serve to protect defendant's substantial rights, and allow the trial court as well as the accused to know what issues are to be tried. The benefits to the accused are obvious. The courts also would benefit from such a rule. Issues would be clarified, trials made more efficient. Direct appeals would be simplified. And post-conviction proceedings made simpler. On the other hand, written pretrial notice would place no perceptible burden on the State's prosecuting attorneys.

II. THE TRIAL COURT'S FINDING OF SEXUAL MOTIVATION WAS BASED ON SPECULATION AND MUST BE VACATED

Conviction of the misdemeanor battery charged is not a sufficient basis on which to conclude that Petitioner acted to achieve sexual gratification. Assuming, *arguendo*, sufficient evidence to find battery beyond a reasonable doubt, it does not ineluctably follow that sexual gratification was the motive animating Petitioner. There must be something more. Notwithstanding that Judge Evans thoroughly reviewed and considered the evidence, it does not follow that he was correct in finding sexual motivation. The trial court worked with the evidence the State presented, but in the final analysis found sexual motivation because the court could not 'call to mind' any other reason. Tr. 10/31/2013, p. 16. Such is the precise manner in which the trial court speculated.

Courts and juries assuredly may use common sense in performing their duties. But Respondent presses that point too far in their case. Witnesses referred to the event as "unusual" and "bizarre," and so it appears to be. One may call the central event "weird." But here lies the danger: that the event is out of the experience of most people, the victim was aged and infirm, and human nature presses for an explanation. The common sense most of us possess does necessarily comprehend "bizarre" events. There must be evidence.

Dr. Seen treated patients for 25 years without incident. Prior to this case, he has been a productive citizen contributing to the community. Despite an investigation involving searches of places, computers and records, there is no evidence that he had a predisposition or sexual attraction to men, elderly or ill men, or patients. And, despite Mr. Shafer's ability to speak with and appropriately understand Dr. Metzger on the morning

after, he said only that he did not want to dwell on the encounter with Dr. Seen.

The trial court did not “strictly and narrowly” read and apply the statute - WV Code 15-2-2(j) - defining sexual motivation. The court failed in this regard by simply concluding that it could not think of any other reason for the battery. Again assuming, *arguendo*, Petitioner to be guilty of battery, the trial court did not consider whether mouth-to-mouth contact is grave, dangerous and sexually illicit in nature, as the specific offenses listed in the Act. We respectfully suggest that such a touching is not so “sexually illicit” as the listed sex crimes. The harm to the victim in this case - or some other - is more transitory, less likely to result in physical harm to the victim, or psychological and emotional trauma. Certainly, if intentionally done, one must consider non-consensual mouth-to-mouth touching to be provocative, insulting, unpleasant and gross. But if such touching were recognized as intrinsically sexual, or intrinsically a source of sexual gratification, then such touching should have been defined by the legislature as a sex offense. A man kissing another man or a woman - without consent - may be guilty of battery; but if that act is routinely and inherently sexual in nature then the legislature should have so defined it.

The evidence in this matter is simply too thin, too insubstantial, to support a conclusion that Petitioner sought sexual gratification and so was sexually motivated.¹

III. THE TRIAL COURT’S FINDING THAT DEFENDANT WAS GUILTY OF BATTERY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE

There is not direct evidence that Petitioner intentionally placed his tongue in Mr. Shafer’s mouth. Mr. Shafer, who answered Dr. Metzger’s queries on the morning after,

¹ Respondent posits, in its brief, that the “only real defense . . . in this case was - I didn’t do it[.]” Respondent’s Brief, p.16. However, the burden of proof is always on the prosecution. The State was obligated to prove Petitioner sought sexual gratification.

appeared to the doctor to communicate, answered the first two questions accurately, and then declined to further discuss the matter.

On the other hand, Dr. Seen has been entirely consistent in stating that he did not cause the contact. As the trial court noted, Respondent did not describe the precise mechanics of how Mr. Shafer bit his tongue the same way each time he described the event; a point the court below found to impeach Respondent. But imagine an innocent physician - who is bitten by a patient - a sudden, shocking and painful event. Not all physicians - or people - would be able to observe and accurately report precisely how he suffered the injury. Likewise, with Respondent's post-event conduct, pain, shock, confusion, as well as professional and institutional concerns, and embarrassment and humiliation could naturally flow through the event.

Finally, the trial court failed meaningfully to account for two important factors; first the undisputed evidence that about 90 minutes before the event, Mr. Shafer used his hand or hands to grasp T.E.D. hose from the table, put the hose in his mouth, and only reluctantly let go of them, after the aide first tried, and failed, to recover the hose, and went and came back with a nurse. The victim could use his hands, and he did place an unusual object in his mouth.

Review of medical records show that Mr. Shafer had good days and bad. He did not always manifest confusion, and no doubt his mental and physical condition varied with the vagaries of his ailments, medications and other factors.

Therefore the trial judge's findings that Mr. Shafer could not have initiated the physical contact, and was not able to communicate, are in stark conflict with the entire record.

CONCLUSION

Respondent, Kenneth Seen, respectfully prays this Court vacate the judgment below, including the finding of sexual motivation, and remand the case for dismissal by the Circuit Court.

Respectfully Submitted,

KENNETH SEEN

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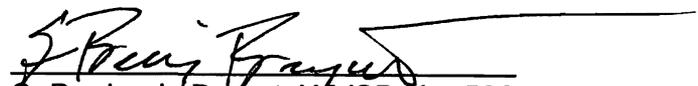
Respondent.

CERTIFICATE OF SERVICE

I, S. Benjamin Bryant, do hereby certify that on the 8th day of August, 2014, I have served the foregoing "**Petitioner's Reply Brief**" upon the parties to this action, via United States Postal Service, postage pre-paid, and electronic mail as follows:

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