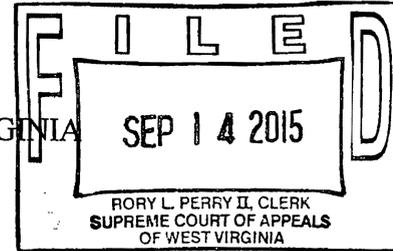


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent

V.

DOCKET NO.: 15-0345
(Mercer Co. Case No.: 04-F-300)

JERRY DEEL,
Defendant Below,
Petitioner

PETITIONER'S BRIEF

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MEMORANDUM OF PARTIES

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TABLE OF AUTHORITIES

<i>Crockett v. Andrew</i> , 153 W.Va. 714, 172 S.E.2d 384 (1970) P. 6
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Now comes Petitioner, Jerry Deel, Defendant below, and moves this Court to reverse and vacate in part the Order entered below March 10, 2015, which modified Petitioner's probationary period. Petitioner further moves this Court to vacate the imposition by the court below of a term of twenty years of sex-offender supervision, while maintaining Petitioner's probationary term at the five-year statutory maximum.

I.: Assignment of Error

That the court below erred in part in changing the sentencing order of the original trial court by adding a term of sex-offender supervision.

In the original sentencing order in this matter, the Hon. John R. Frazier placed Petitioner on probation for a period of ten years following his discharge from the penitentiary upon his ten-to-twenty year sentence upon his conviction of Count Four - sex abuse by a parent, guardian, or custodian. *Appendix*, p. 64-67. Petitioner's suspended sentence was upon his other three convictions. All four sentences were to be served concurrently.

Upon Petitioner's release, the Hon. Derek C. Swope changed Judge Frazier's sentencing order to reflect five years probation (instead of ten), but added a consecutive term of twenty years of sex-offender supervision. *App.*, p. 70.

In that Judge Frazier, at the time, by statute, enjoyed the discretion of not imposing sex-offender supervision, Petitioner avers that Judge Swope erred in imposing twenty years sex-

offender supervision ten years after Judge Frazier had decided otherwise.

II.: Statement of Facts and Procedural History

In an indictment returned by the Mercer Co. grand jury October 13, 2004, Petitioner was charged with Count One: sexual abuse in the first degree; Count Two: attempt to commit a felony - sexual assault in the first degree; Count Three: sexual assault in the first degree; and Count Four: sexual abuse by a custodian. *App.*, p. 56-57. The victim, B. H., was under the age of twelve at the time of the alleged offenses.

This matter proceeded to trial, before the Hon. John R. Frazier, and, on January 24, 2005, the jury returned guilty verdicts on all four counts. *App.*, p. 62-63.

A sentencing hearing was held August 5, 2005, and, in an order dated same date, Petitioner was sentenced as follows:

(a) Upon Count One, an indeterminate term in the penitentiary of one to five years. Upon Count Two, an indeterminate prison term of one to three years. Upon Count Three, an indeterminate term of fifteen to thirty-five years. Upon Count Four, an indeterminate term of ten to twenty years.

(b) These sentences were to run concurrently.

(c) The sentences upon Counts One, Two, and Three were suspended. Petitioner was to be placed on probation for ten years upon completion of his ten-to-twenty year sentence upon Count Four. *App.*, p. 64-67.

Petitioner appealed his convictions to this Court, and his petition of appeal was refused. W.Va. Sup. Ct. Docket No. 06-0404. The issues therein are unrelated to the issue of the instant

petition.

Upon completing his ten-to-twenty year sentence, Petitioner was released from prison January 24, 2015. *App.*, p. 68-69. He registered as a sex offender and reported to the Mercer Co. Probation Office.

Although no motion or other pleading was filed, at the request of Probation Officer Kimberly Moore a hearing was scheduled before the Hon. William J. Sadler March 2, 2015. Judge Sadler had succeeded Judge Frazier upon the retirement of the latter.

On March 2, 2015, Judge Sadler decided that he could not hear the matter, since he had been Mercer Co. Prosecuting Atty. during the pendency of this matter in the trial court.

On this same date, a hearing was convened before Judge Swope. Probation Officer Moore stated that Judge Frazier's sentencing order placed Petitioner on probation for ten years. *App.*, p. 44. Ms. Moore requested that Petitioner's probation be modified to five years. *App.*, p. 44-45.

Neither Ms. Moore nor the Asst. Prosecuting Atty. John McGinnis requested imposition of sex-offender supervision.

Judge Swope inquired of Sex-Offender Supervision Officer Jennifer Lester (who was present at the hearing) whether Petitioner was "supposed to be on your supervision too". *App.*, p. 47. Ms. Lester answered in the affirmative. *App.*, p. 47.

Judge Swope then asked if the minimum term of supervision was ten years, and the Asst. Prosecuting Atty. responded that there had been no minimum at the time Petitioner was sentenced. *App.*, p. 47-48.

Judge Swope then seemed to state that he cannot now impose sex-offender supervision not

imposed by Judge Frazier. *App.*, p. 48.

Judge Swope then imposed twenty years sex-offender supervision, consecutive to five years probation. *App.*, p. 48-49.

III.: Summary of Argument

Judge Frazier had the authority to impose no sex-offender supervision, since *W.Va. Code* 62-12-26 at the time gave him the discretion of imposing extended sex-offender supervision, stating, at 62-12-26(a), that someone convicted of a requisite offense, “*may* be required” to serve a period of supervised release. (Emphasis added.)

Since Judge Frazier at Petitioner’s sentencing hearing placed Petitioner on probation, and not “extended sex offender supervision,” it is clear that Judge Frazier chose not to impose any extended sex-offender supervision. *App.*, p. 66.

Therefore, the only thing Judge Swope could do at the March 2, 2015, hearing was to change the term of probation from ten years to the statutory maximum of five years. *W.Va. Code* 62-12-11. Imposing twenty years of supervision ten years after Judge Frazier declined to impose any is clearly improper. No one at the hearing requested any sex-offender supervision (although Ms. Lester thought that Petitioner was “supposed to be” on such supervision, *App.*, p. 47).

IV.: Statement Regarding Oral Argument and Decision

Petitioner states that oral argument in this matter is unnecessary as adding little to the argument of counsel upon the issue presented as can be adequately treated by the parties’ briefs.

This case does not appear appropriate for a memorandum decision.

V.: Argument

West Virginia Code 62-12-26(a) in effect at the time of Petitioner's conviction reads,

“Notwithstanding any provision of this code to the contrary, any defendant convicted after the effective date of this section of a violation of section twelve, article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b, eight-c or eight-d of said chapter *may*, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty imposed or condition imposed by the court, a period of supervised release of up to fifty years.” (Emphasis added.) This was the initial enactment of *W.Va. Code* 62-12-26. (Senate Bill 654, passed March 8, 2003, in effect ninety days from passage.)

W.Va. Code 62-12-26(a) was amended in 2006, changing the word “may” to “shall”.

(House Bill 101, passed June 14, 2006, in effect October 1, 2006.)

Petitioner was convicted in January, 2005, and sentenced in August, 2005. *App.*, p. 58-61, 64-67.

Petitioner is aware of *State v. Howard*, filed August 31, 2015, W.Va. Sup. Ct. Docket No. 14-0485. There, Howard argued that the commission of his crime occurred in 1999, and that *W.Va. Code* 62-12-26 was changed in 2006. Howard makes due process and ex post facto arguments.

That is not Petitioner's argument here. Petitioner acknowledges that the requirements of sex-offender supervision and sex-offender registration are civil in nature and can therefore be applied retroactively. *Hensler v. Cross*, 210 W.Va. 530, 558 S.E.2d 330 (2001).

Petitioner's argument is that legislative intent, as is evident from the plain language of *W.Va. Code* 62-12-26(a) itself, does not supply retroactivity here.

By comparison, see the Sex Offender Registration Act, at *W.Va. Code* 15-12-2, where, at

the very outset of the section, at *W.Va. Code* 15-12-2(a), the section reads, “The provisions of this article apply both retroactively and prospectively.” 15-12-2(b) reads, “*Any person who has been convicted of an offense . . . shall register . . .*” (Emphasis added.) No qualifying language such as “convicted after the effective date of this section” appears in 15-12-2 as it does in 62-12-26(a).

For there to be retroactivity, it must be supplied by the Legislature. In *W.Va. Code* 62-12-26(a) it is not, unlike in *W.Va. Code* 15-12-2.

Interestingly, *W.Va. Code* 62-12-26(a), in applying its requirements to defendants *convicted* after the Act’s effective date, does supply a bit of retroactivity where it wants to, reaching those who committed their offenses before enactment but who were sentenced after. As to *W.Va. Code* 62-12-26(a) in its original 2003 version, that does apply to Petitioner (offense committed in 2001, convicted in 2005).

But no retroactivity applies to the 2006 change from “may” to “shall” because the Legislature supplied none.

In fact, the language of *W.Va. Code* 62-12-26(a) specifically does *not* extend retroactivity of its provisions. “[A]ny defendant convicted *after the effective date of this section . . . may* [/shall] . . . be required to serve . . . a period of supervised release . . .” (Emphasis added.)

Again, compare *W.Va. Code* 15-12-2, which specifically grants retroactivity.

This Court has held, “Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” Syl. Pt. 2, *Crockett v. Andrew*, 153 W.Va. 714, 172 S.E.2d 384 (1970), quoted in Syl. Pt. 2, *State ex rel. Daye v.*

McBride, 222 W.Va. 17, 658 S.E.2d 547 (2007), quoted in *State v. Hubbard*, *infra*, at p. 5.

Simply stated, Judge Frazier enjoyed, per *W.Va. Code* 62-12-26(a), the discretion whether or not to require that Petitioner serve a period of supervised release under the sex-offender supervision provisions therein, and Judge Frazier chose not to require such.

By comparison, see *State v. Hubbard*, W.Va. Sup. Ct. Docket No. 11-0690, *Memo Dec.*, filed 2/13/12, at p. 5, where this Court upheld the lower court's adding a term of supervised release in 2011, at a probation-revocation hearing three years after Hubbard's 2008 sentencing, because Hubbard's sentence by the trial court was illegal since it had not included mandatory sex-offender supervision per *W.Va. Code* 62-12-26(a). Of course, Hubbard's 2008 sentencing (conviction) was "after the effective date of this section . . ." *W.Va. Code* 62-12-26(a), as amended in 2006.

In the instant case, Petitioner's conviction was *prior to* 62-12-26(a) becoming mandatory ("may" changed to "shall", as discussed above) per the 2006 amendment.

Also note that the statute states that the court "may, *as part of the sentence imposed at final disposition*, be required to serve . . . a period of supervised release . . ." *W.Va. Code* 62-12-26(a). (Emphasis added.) Judge Swope's adding of the sex-offender supervision ten years later was surely not "part of the sentence imposed at final disposition".

Petitioner also notes that *W.Va. Code* 62-12-26(e)(2) (2003 statute) (at *W.Va. Code* 62-12-26(g)(2) as amended, 2006) does not apply here. "The court may [e]xtend a period of supervised release if less than the maximum authorized period was previously imposed . . ." *Loc. cit.*

Here, Judge Frazier chose not to impose a period of supervised release. There would need to be

a period in order to extend the period. There was nothing to extend. The analogy here would be if a judge decided to “extend” a defendant’s probation to, say, three years when the sentencing judge, years earlier, had not even placed the defendant on probation.

There was no supervised release for Judge Swope to extend.

VI.: Conclusion

The court below erred in imposing a term of sex-offender supervision on Petitioner. The statute in effect at the time of Petitioner’s sentencing applies only to convictions “after the effective date of this section”. *W.Va. Code 62-12-26(a)*. Amendments to 62-12-26(a) since have not changed that phrase.

At the time of Petitioner’s conviction, the trial court, by the plain language of 62-12-26(a), enjoyed the discretion whether or not to require sex-offender supervision. The trial court elected not to impose such supervision on Petitioner.

By equally plain language, *W.Va. Code 62-12-26(a)* was not enacted to apply retroactively. This is clear from its applying, by its own language, to convictions “after the effective date of this section”.

Petitioner’s conviction was before the 2006 amendment to 62-12-26(a) that changed the discretion of the trial court (a “defendant convicted after the effective date of this section . . . may . . . be required to serve . . . a period of supervised release . . .” (emphasis added)) to a mandate (“ . . . shall . . . be required to serve . . .” (emphasis added)).

Petitioner moves this Court to reverse the Order from the March 2, 2015, hearing in the

Mercer Co. Circuit Court, to the extent of vacating said Order's imposition of the term of extended sex-offender supervision.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served, by hand delivery, today,
September 14, 2015, a true copy of the attached *Petitioner's Brief* and *Appendix* upon:

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