

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

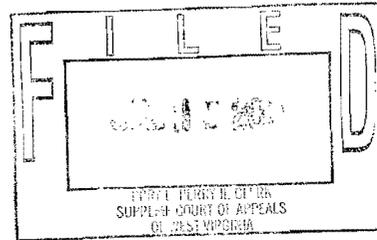
v.

Supreme Court No. 11-0394

Circuit Court No. 09-F-110
(Fayette)

TYRONE R. CROUCH,

Petitioner.



REPLY BRIEF

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REPLY ARGUMENT

I. Defense Counsel Objected To The Involuntary Manslaughter Instruction

Defense counsel argued that his involuntary manslaughter instruction rather than the state's instruction should have been given. (A.R. Vol. III at 100 – 102). The trial court ruled in favor of the state. When asked if there were any *other* objections, defense counsel said no. (A.R. Vol. III at 102).

Respondent claims this is not an objection to the instruction given, and that the defense objection clearly implied by the judge's comments went solely to "criminal negligence." (Response at 25). This is not supported by the record. During this discussion, defense counsel merely read his proposed instruction and noted the two were different. (A.R. Vol. III at 101-2). The court ruled for the state and clearly noted the defense objection to the instruction as given by asking if there were other objections. This was an objection to the instruction as a whole.

II. Standard of Review

Respondent claims the proper standard of review is "abuse of discretion" because the jury instruction was not legally improper. (Response at 22). This puts the cart before the horse. Mr. Crouch's brief rests on the premise that the jury instruction was legally deficient, as to the elements of involuntary manslaughter, and as that is purely a question of law it is reviewed *de novo*. State v. Guthrie, 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (1995). If this were, as the state claims, a question of specific wording of a complete instruction, then the proper standard would be abuse of discretion. This is not the case here.

III. That The Trial Court Gave Differing Versions Of The Involuntary Manslaughter Instruction Is Not Dispositive

Three times, including when the jury specifically asked to be instructed on the elements of the relevant crimes, the trial court defined involuntary manslaughter. (A.R. Vol. III at 126, 127, and 171). The first and last time it defined it as requiring a lawful act. The second time (A.R. Vol. III at 127), the trial court used the word “unlawful” instead of “lawful.” Given its prior rulings on the subject, the trial court obviously misspoke as it can be assumed the trial court did not intend to give inconsistent instructions.

The State would have this mistake remove Mr. Crouch’s right to seek review regarding the two times, including the time when the jury asked to be re-instructed, the trial court failed to include the “unlawful act” language required by case law. This would be absurd, as it would be impossible for defense counsel to preserve error in such a situation. Defense counsel is not obliged to object to an instruction when it is given when he has previously objected.

Also, “[i]t is error to give inconsistent instructions, even if one of them states the law correctly, inasmuch as the jury, in such circumstances, is confronted with the task of determining which principle of law to follow...” Syl. Pt. 1, West Virginia Department of Highways v. Bartlett, 156 W.Va. 431, 194 S.E.2d 383 (1973). In this case, there are facially inconsistent instructions, but neither are completely correct as neither are complete. The two instructions mandating a “lawful act” failed to mention that the act could be unlawful. The one instruction mandating an “unlawful act” failed to mention the act could be lawful. Also, as the trial court later responded to a query from the jury by giving only the “lawful act” instruction, (A.R. Vol. III at 170), the jury had far clearer guidance than if it were left with the two earlier inconsistent instructions.

Accordingly, this is not a case of inconsistent instructions. This is a case of incorrect instructions. The trial court was able to clear up any ambiguity and instructed the jury that a legal act is a necessary predicate for a involuntary manslaughter conviction. As this is an incorrect statement of the law, Mr. Crouch's conviction for voluntary manslaughter must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on the 15th day of July, 2011, I sent via United States Postal Service a copy of the foregoing Brief of Petitioner to Robert Goldberg, Assistant Attorney General, Appellate Division, P.O. Box 1789, Charleston, West Virginia 25326.



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