

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OCT 19 2011

STATE OF WEST VIRGINIA,

v.

Supreme Court No. 11-0410

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

BRENT LEVI VICTOR McGILTON

Petitioner.

REPLY BRIEF

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REPLY ARGUMENT

I. The State’s Argument Hinges on A Dubious Grammatical Assertion Regarding The Word “Injury.”

The state concedes that the legislature’s use of the word “injury” in W.Va. Code §61-2-9(a), rather than the word “injuries” is dispositive to this case. (Respondent Brief (“R.B.”) at 17.) The state claims that the legislature using the term “cause him bodily injury” rather than “cause him bodily injuries” is in and of itself definitive proof that the state meant each singular distinct injury as a separate cause of action. (Id.) This is incorrect.

First, if the legislature were to make clear that “cause him bodily injury” was to be taken in a strictly singular sense, it would have drafted the statute to read “cause him a bodily injury.” “Bodily injury” can be, and often is, used in a universal sense. An example of this would be “The team has been weakened by injury.” This does not mean that one person on the team has suffered one discrete physical harm. The usage in this statute is at best ambiguous, and as such the rule of lenity dictates that the word “injury” not be exclusively defined as pertaining to a singular harm.

Second, in section(c) of the same statute, battery is defined as “causing physical harm” as opposed to, as the state would have it, “causing physical harms.” Yet it is accepted that multiple blows struck during a battery are not individually punishable. 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”).

II. The State Fails To Address Petitioner’s Claims That A Double Jeopardy Issue Arising From Sentencing Can Be Raised At Any Time.

The state may prove each of the offenses subject to a double jeopardy restriction but may only sentence once. State v. Barnett, 168 W.Va. 361, 365, 284 S.E.2d 622, 624 (1981). “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).

The State fails to address this, rather concentrating on this being an issue of waiver and looking to cases dealing with double jeopardy issues totally different than those at bar. Double Jeopardy rights can be waived, and in some circumstances are waived by failure to raise the issue. However, as Sears makes clear, this does not apply to a sentencing issue, Taylor v. Horn, 504 F.3d 416, 447(3rd Cir 2007).

The State cited a case that discusses that a defendant can “knowingly and intelligently waive” double jeopardy rights. (R.B. at 23.) In this case, there is no evidence on the record whatsoever that there was an explicit waiver of this right.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert C. Catlett, do hereby certify on the 19th day of October, 2011, I delivered by hand the attached *Reply Brief of Petitioner*, to Robert Goldberg, Assistant Attorney General, Appellate Division, P.O. Box 1789, Charleston, WV 25326.

A handwritten signature in black ink, appearing to read 'R. Catlett', written above a horizontal line.

Robert C. Catlett
Deputy Public Defender