

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

Plaintiff below/Respondent,

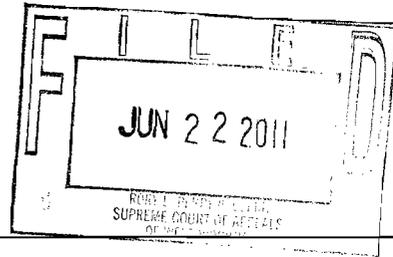
Vs.

No. 11-0043

KENDRA SULICK,

Defendant below/Petitioner,

**PETITIONER KENDRA SULICK'S REPLY TO
RESPONDENT'S RESPONSE AND BRIEF**



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REPLY TO ARGUMENT

On June 8, 2010, Petitioner did proceed to a trial by jury on counts 1-9 of the indictment; all counts being violations of West Virginia Code § 61-6-21(b). (A.R. 1055-1238). On June 10, 2010, a Berkeley County Jury did find Petitioner Kendra Sulick guilty of count 1, count 6, and count 8 of the indictment and did find Petitioner Kendra Sulick not guilty of the remaining six (6) counts of the indictment. (A.R. 652-654). In the State's response to Petitioner's Brief, the State spends an inordinate amount of time on irrelevant evidence placed before the jury by recounting testimony setting forth alleged acts of other persons, uncharged bad acts, or acts for which Petitioner Kendra Sulick was acquitted. Further, the State fails to address whether the use of racial slurs alone constitute a "hate crime" in violation of West Virginia Code § 61-6-21(b).

1. PETITIONER'S REPLY TO STATE'S ARGUMENT THAT THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR ACQUITTAL

a. The State failed to offer sufficient evidence to prove that Petitioner actually committed the acts that are the basis of the counts for which she was convicted

In its response, the State fails to successfully refute the Petitioner's claim that insufficient evidence was offered at trial to establish that Petitioner actually committed the acts that form the basis of counts 1, 6, and 8 of the indictment. Instead, the State spends a majority of its response citing to testimony that relates to *all* of the nine counts for which she was tried. (See Respondent's Brief, pages 15-16).

In its response, the following singular paragraph is dedicated to outlining the evidence which was offered by the State to convict Petitioner of counts 1, 6, and 8.

Despite all of the testimony from Ms. Obiri that is recounted above, the Appellant asserts that there was “absolutely no evidence” to support the three convictions. To the contrary, Ms. Obiri specifically testified to the day, with her two children in the car at the bus stop, the Appellant drove up and called she and the children “fucking niggers.” Hers was the only black family at the bus stop. [Tr., 6/8/10, App., Vol. 3, 916-918.] This conduct was alleged in Count One. Ms. Obiri also testified to another day when she was in her front yard with her children when the Appellant stopped in a car and gave her the finger and said “you fucking niggers.” [Id., 923-924.] This conduct was alleged in Count Six. Ms. Obiri also testified to the Appellant driving by very quickly and swerving the car toward Ms. Obiri as she walked to her mailbox and that she felt threatened by this. [Id., 925-926.] Similar conduct was alleged in Count Eight.

(See Respondent’s Brief, page 17).

However, a simple review of the testimony cited by the State proves that Petitioner’s motion for acquittal should have been granted for all or some of the counts for which she was convicted.

Count 1

The factual predicate for conviction under count 1 of the indictment requires the State prove that, between the ___ day of December, 2007 and the ___ day of June 2008, Petitioner Kendra Sulick “did harass and attempt to intimidate Brian Smith and Betty Ann Obiri’s and their six year old child, I.S., while they walked to, or waited for, the school bus, by the use of racial slurs, profanities and obscene gestures, because of Mr. Smith’s and Ms. Obiri’s race or color.” (A.R. 354).¹ In support of affirming Petitioner’s conviction under count 1 of the indictment, the State cites to Ms. Obiri’s testimony spanning from pages 916-918 of the record; in full, said testimony is set forth as follows:

¹ Quotation of said indictment includes all typographical errors.

Q. Ms. Obiri, I want to go now between December 2007 and June of 2008. Can you tell us how - - Isaiah was in school at the time; is that correct?

A. Yes, ma'am.

Q. During that time period. What grades would he have been in in the fall of 2007?

A. He would have been in first grade.

Q. How did he get to school?

A. He drove the bus - - rode the bus, excuse me.

Q. Where does he catch the bus in proximity to your house?

A. It is actually above the hill and it's on Wisconsin Lane and Homewood Avenue.

Q. Ms. Obiri, how would you get your child to the bus stop?

A. We would either drive him to the bus stop or walk up.

Q. Did you have any incidents with Kendra Sulick regarding walking your child to the school bus during that time period?

A. Yes, ma'am, I did.

Q. Tell us what happened, please.

A. I was driving Adrianna and Isaiah to the bus stop and I would pull up to the corner of I think it's Raging River Road which is where the bus pulls in which is right off of Homewood and I was facing out. Ms. Sulick would come up behind me, turn around and be facing my vehicle. I'm facing out, she's facing in basically. She purposely rolled her window down and referred to my children and I as F-ing niggers.

THE COURT: For the record, she didn't use the term F-ing, did she?

THE WITNESS: No, sir. Do I need to say the word?

THE COURT: yeah you can go ahead and do that.

THE WITNESS: She referred to my children and I as fucking niggers.

(A.R. 916-918).

Again, as set forth in count 1 of the indictment, Petitioner, over the course of six months, did “harass and attempt to intimidate Brian Smith and Betty Ann Obiri’s and their six year old child, I.S., while they walked to, or waited for, the school bus, by the use of racial slurs, profanities and obscene gestures, because of Mr. Smith’s and Ms. Obiri’s race or color.” (A.R. 354).

The testimony cited above simply fails to establish all of the necessary factual predicates to sustain conviction under count 1 of the indictment. Specifically, said testimony refers to one incident involving the alleged uttering of a racial slur that occurred between December, 2007 and June, 2008. The singular incident testified to at trial does not provide sufficient evidence to prove the acts alleged in count 1 of the indictment. First, the singular incident testified to at trial did not involve Brian Smith but only was alleged to have involved Betty Ann Obiri and Isaiah Smith. Second, the singular incident testified to at trial did not allege that Betty Ann Obiri, Brian Smith, or Isaiah Smith was walking to the bus stop at the time the racial slur was yelled but that said slur was uttered when both parties were in their respective vehicles and Petitioner “purposely rolled her window down and referred to [the] children and [Ms. Smith] as F-ing niggers.” (A.R. 918).

Clearly, the evidence referenced by the State to support Petitioner’s conviction for count 1 of the indictment is insufficient as the incident either didn’t happen or said witness was testifying to another, unmeritorious allegation that did not involve Betty Ann Obiri, Brian Smith, and Isaiah Smith walking to the bus stop.

Count 6

The factual predicate for conviction under count 6 of the indictment requires the State prove that, on or about the ___ day of September, 2008, Kendra Sulick “called Betty Ann Obiri a racial slur and made obscene, hostile and threatening gestures toward Ms. Obiri as she sat on the steps of her home with her children.” (A.R. 357). In support of affirming Petitioner’s conviction under count 6 of the indictment, the State cites to Ms. Obiri’s testimony spanning from pages 923-924 of the record; in full, said testimony is set forth as follows:

Q. Did something occur on an occasion in September of 2008 that involved Ms. Sulick, yourself and your children on that event, please?

A. Yes, ma’am. We were sitting out in the yard. Kendra rode by, stopped her vehicle directly in front of my mailbox which gives me eye view of her and she gave me the finger and then she said again you fucking niggers.

(A.R. 923-924).

Again, the testimony cited above simply fails to establish all of the necessary factual predicates to sustain conviction under count 6 of the indictment. First, said testimony refers to an incident where Ms. Obiri was not sitting on the steps of her home but was sitting out in the yard. Second, the incident is alleged to have involved “obscene, hostile, and threatening gestures” but said witness only testified to one plausibly “obscene” gesture when she alleged that Petitioner “gave me the finger.” (A.R. 924). To support said conviction, the State cites to no “hostile” or “threatening” gestures made by Petitioner but simply relies on the testimony given at trial that alleges Petitioner committed the “obscene” gesture of giving “the finger.” Again, the State improperly cites

this singular incident of Petitioner giving the victims “the finger” and uttering a racial slur to support a felony hate crime conviction as alleged in count 6 of the indictment.

Count 8

The factual predicate for conviction under count 8 of the indictment requires the State prove that, on or about the ___ day of October, 2008, Kendra Sulick “called Betty Ann Obiri a racial slur as Ms. Obiri walked to her mailbox.” (A.R. 358). Although Petitioner respectfully contends that none of the three (3) counts for which Petitioner was convicted should be considered felony hate crimes in violation of West Virginia Code § 61-6-21(b), count 8 of the indictment is the most insufficient count of the indictment as it simply alleges that Petitioner called adult Betty Ann Smith a racial slur as Ms. Obiri walked to her mailbox. In support of affirming Petitioner’s conviction under count 8 of the indictment, the State cites to Ms. Obiri’s testimony spanning from pages 925-926 of the record; in full, said testimony is set forth as follows:

Q. And was there an occasion that you were walking towards your mailbox that Ms. Sulick did something else to you?

A. Yes. Coming out of her property which is the main road for in and out between the two of us, she rode by very quickly and swerved in towards me.

Q. *Did she say anything at that time?*

A. *No, ma’am.*

Q. But this had been an ongoing situation with you; is that correct?

A. Yes, ma’am.

Q. Was there anyone else there?

A. Not at the time, no.

(A.R. 925-926).

Despite the fact the above cited testimony makes absolutely no reference to the use of a racial slur, the State, in its response, argues that because Petitioner was “driving by very quickly and swerving the car toward Ms. Obiri as she walked to her mailbox and that she felt threatened by this” that said conduct is “similar” to what is being alleged in count 8. Simply, this argument has no merit. (Respondent’s brief, page 17). The *sole* allegation in count 8 was that Petitioner *uttered a racial slur* and said count makes absolutely no reference to driving quickly or swerving an automobile. (A.R. 358). In contrast, counts 2, 3, 7, and 9, include an allegation that Petitioner was driving her car at a high rate of speed. As such Ms. Obiri was most likely testifying to the acts alleged in other counts for which Petitioner was acquitted.

The jury verdict regarding count 8 of the indictment should have been set aside as the record contains “no evidence, regardless of how it is weighted from which a jury could find guilt beyond a reasonable doubt.” Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Further, said evidence cited as support for said conviction is “manifestly inadequate” and sustaining a conviction pursuant to the same would result in a “consequent injustice.” Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1979).

When reviewing the testimony offered to support Petitioner’s convictions, Petitioner respectfully contends that said testimony should be considered to lack credibility as all witnesses had their own motives for seeking conviction. Further, the testimony of the State’s primary witnesses used to convict Petitioner of counts 1, 6, and 8 of the indictment is the exact category of testimony used to acquit Petitioner of counts 2, 3, 4, 5, 7, and 9 of the indictment. As insufficient evidence was offered at trial to uphold

a conviction to each of these counts, it is clear that the jury misunderstood its instructions and determined that if they believed Petitioner uttered a racial slur that a conviction must be had without taking into consideration any of the other elements required for a conviction under West Virginia Code § 61-6-21(b).

As the State's response failed to establish that sufficient evidence was offered at trial to meet its burden of proof in proving all of the elements necessary to convict Petitioner Kendra Sulick of counts 1, 6, and 8 of the indictment, Petitioner must be acquitted of the same.

b. The State failed to offer sufficient evidence to prove that Petitioner's acts constituted actual "force" or "threat of force"

As noted throughout, racial slurs, while horrible, in and of themselves are not felony hate crimes in violation of West Virginia Code § 61-6-21(b) if the State fails to prove the acts alleged involve the use of "force" or "threat of force." In its response, the State completely declines to cite to the record any evidence which proves that the necessary elements of "force" or "threat of force" was offered at trial. The State simply asserts that the "terms 'force' and 'threat of force' are plainly definite in prohibiting the use of violence, or communicated intent to use violence, in the context of W. Va. Code § 61-6-21(b)." In reply, Petitioner generally agrees that the "use of violence" or "communicated intent to use violence" is required to respectively establish the element of "force" or "threat of force." (See Respondent's Brief, page 18). However, the three (3) counts for which Petitioner was convicted not only fail to assert facts which allege "force" or "threat of force" but no evidence cited by the State offers any modicum of proof that Petitioner acted with "force" or "threat of force."

Petitioner was acquitted of all of the counts which alleged acts of “force” or “threat of force” but was only convicted of the three counts that were based solely on the use of racial slurs or obscenities. The Texas hate crime referenced in the State’s opening and closing wherein an individual was dragged behind a truck and severely beaten because of his race is undoubtedly a hate crime as said act involves the use of “force” or “threat of force.” (A.R. 881, 1209). However, the facts before the Court are vastly different from said Texas hate crime. The State’s argument that use of racial slurs and obscenities set forth in counts 1, 6, and 8 of the indictment are acts which should sustain a conviction under West Virginia Code § 61-6-21(b) is simply incorrect.

c. The State failed to offer sufficient evidence to prove that Petitioner’s acts were motivated by racial bias

In its response, the State argues that if the racial slur is uttered to an a member of a certain race then the same is de facto evidence of “racial bias.” Further, the State argues that Petitioner “offered no evidence to suggest a non-discriminatory motivation for her conduct toward Ms. Obiri and her family.” (See Respondent’s Brief, page 18). Although it is never a defendant’s burden to disprove any element of a crime, if this Honorable Court believes sufficient evidence was presented to establish that the utterance of racial slurs occurred, Petitioner again cites to the following factors, among others, that would provide “non-discriminatory” motivation for her utterance of said slurs: the fact that Bruce Poole shot the Smith family’s dogs and the Smith family did not agree with the same; the constant fighting between Bruce Poole and Brian Smith; the continued intimidation and harassment dealt by Brian Smith; the continued threats and insults made by the Smith Family; the continued, unjustified complaints made to the Berkeley County

Planning Commission by the Smith family; or the 26 calls to the authorities made by the Smith family after their dogs were shot.

A simple review of the Petitioner's trial exhibits #1 and #2 show that the head of the Smith household, Brian Smith, freely referred to Petitioner and her family with several derogatory terms. Under the State's logic, if Petitioner had simply used other derogatory statements that were not racial slurs Petitioner would not have been charged with a hate crime in West Virginia Code § 61-6-21(b). Again, the Petitioner's argument is intellectually challenging but should be accepted as it is a correct and sound legal principle.

Lastly, in reply to the State's response, Petitioner directs the court to the record wherein Petitioner requested that the following language be given in each jury instruction regarding racial bias motivation:

If you determine that multiple concurrent motives exist for Defendant Kendra Sulick's actions of "force" or "threat of force", Defendant Kendra Sulick's bias against said persons' race or color must be a "substantial factor" for her actions. For instance, if you find that Defendant Kendra Sulick's actions were caused by a general dislike of the alleged victims or for any other reason, and you determine that bias against said persons' race or color was not a substantial factor in causing Defendant Kendra Sulick's actions, then you must find Defendant Kendra Sulick not guilty of the crime charged in Count 1 of the Indictment.

(A.R. 513-514).

Said instruction was based on language found in *In re M.S.*, 10 Cal. 4th 698, 896 P.2d 1365, 42 Cal. Rptr. 3rd 355 (1995). Petitioner again renewed his objection to the Court's determination not to include this language in the proposed jury instructions at trial. (A.R. 1168-1169). An instruction to this effect would have properly instructed the jury as to the degree race should be taken into account when determining whether a hate crime was

committed pursuant West Virginia Code § 61-6-21(b) and the Circuit Court committed reversible error by not including said language in the jury instructions.

2. PETITIONER'S REPLY TO STATE'S ARGUMENT THAT THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S MOTION TO DISMISS CHALLENGING THE CONSTITUTIONALITY OF W. VA. CODE § 61-6-21

a. **West Virginia Code § 61-6-21 is unconstitutional because it violates Article III, § 10 of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution as said statute is void for vagueness**

Petitioner maintains and stands upon the arguments asserted in her initial brief regarding the unconstitutionality of West Virginia Code § 61-6-21 but does wish to reply to one particular aspect of the State's response. In Petitioner's brief, Petitioner set forth the language of Delaware's hate crime statute, Delaware Code Annotated, Title 11, § 1304, to give an example of a constitutionally permissible hate crime statute which creates an independent, substantive criminal offense based on criminal conduct motivated by bias.

In response, the State directed this Honorable Court to California's Civil Rights Bias statute, West's Ann. Cal. Penal Code § 422.6(a)[2004], and claimed that said statute "reads remarkably similar to West Virginia Code § 61-6-21(b) in the conduct it proscribes and was upheld against vagueness and First Amendment challenges by the California Supreme Court in *In re M.S.*, 10 Cal. 4th 698, 896 P.2d 1365, 42 Cal. Rptr. 3rd 355 (1995)." (See Respondent's Brief, page 23). The State then proceeds to cite section (a) of said code section which states as follows:

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or

privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

West's Ann. Cal. Penal Code § 422.6(a)

However, the State conveniently fails to cite to the remainder of said code section which makes the statute constitutionally permissible and is highly relevant and applicable to the facts before the Court. The remaining portions of said code section state as follows:

(b)No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

(c)Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars (\$5,000), or by both the above imprisonment and fine, and the court shall order the defendant to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance. *However, no person may be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.*

(d)Conduct that violates this and any other provision of law, including, but not limited to, an offense described in Article 4.5 (commencing with Section 11410) of Chapter 3 of Title 1 of Part 4, may be charged under all applicable provisions. However, an act or omission punishable in different ways by this section and other provisions of law shall not be punished under more than one provision, and the penalty to be imposed shall be determined as set forth in Section 654.

West's Ann. Cal. Penal Code § 422.6(b)-(d)(Emphasis added).

Pursuant to said code section, a defendant cannot be convicted of violating section (a) of said code section “based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.” West’s Ann. Cal. Penal Code § 422.6(c). The language the State artfully left out of its brief is the same language that is most applicable to the instant proceeding. If West Virginia Code § 61-6-21(b) included this additional language in its hate crime statute in conjunction with the existing language said code section would be constitutionally permissible. Certainly, if the language found in West’s Ann. Cal. Penal Code § 422.6(c) were found in West Virginia Code § 61-6-21(b) Petitioner would not have been prosecuted for the counts for which she was convicted as said counts alleged acts of speech alone and did not threaten violence.

In its current state, West Virginia Code § 61-6-21(b) is unconstitutionally void as it fails to delineate what conduct is prohibited by said statute with “sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. Pt. 1, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998) (quoting Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

3. PETITIONER’S REPLY TO STATE’S ARGUMENT THAT THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER’S MOTION TO ARREST JUDGMENT

In its response to Petitioner’s argument that her Motion for Arrest of Judgment should have been granted, the State limits its argument to claiming that each count is “constitutionally sufficient as each ‘(1) states the elements of the offense charged; (2)

puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.” *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). (See Respondent’s Brief, pages 28-29). The State refuses to address the provision of Rule 34 of the West Virginia Rules of Criminal Procedure which requires arrest of judgment if the indictment “does not charge an offense.” As noted throughout, the three (3) counts for which Petitioner was convicted fail to charge an offense as the acts of using racial slurs and obscene gestures, while despicable, in and of themselves, should not be considered violations of West Virginia’s hate crime statute, West Virginia Code § 61-6-21(b).

**CONCLUSION, RELIEF REQUESTED,
AND SUGGESTED SYLLABUS POINTS**

For the reasons set forth above, Petitioner respectfully requests that the judgment of the Circuit Court of Berkeley County be reversed and that the three counts for which Petitioner was convicted be dismissed with prejudice. Any arguments not addressed in the instant reply were intentionally withheld as they were sufficiently briefed in Petitioner’s initial brief.

If this Honorable Court determines to reverse Petitioner’s conviction and issue an Opinion on the issues raised in all pleadings, Petitioner respectfully suggests that two possible syllabus points could be included in such an opinion:

Syl. Pt. ___ No person may be convicted of violating subdivision West Virginia Code § 61-6-21(b) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Syl. Pt. ___ If multiple concurrent motives exist for actions of “force” or “threat of force” against a person charged with violating West Virginia

Code § 61-6-21(b), bias against a person's race or color must be a "substantial factor" for the actions of "force" or "threat of force" in order to sustain a conviction under West Virginia's hate crime law.

Respectfully submitted,
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STATE OF WEST VIRGINIA
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Vs.

No. 11-0043

KENDRA SULICK,
Defendant below/Petitioner,

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Reply upon the following persons, by hand delivery on this 22 day of June, 2011:

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