

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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DOCKET NO. 11-0587

LISA DAVIS,

Petitioner

V.)

Appeal from a final order
of the Circuit Court of
Marion County (10-MAP-4)

STATE OF WEST VIRGINIA,

Respondent

Petitioner's Brief

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ASSIGNMENTS OF ERROR

1. THE DEFENDANT ADMITTED CONDUCT PROHIBITED BY WEST VIRGINIA CODE §61-5-17(c) (GIVING FALSE INFORMATION TO A POLICE OFFICER), BUT WAS CHARGED ONLY UNDER WEST VIRGINIA CODE §61-5-17(a). THE CIRCUIT COURT INCORRECTLY FOUND THAT THIS CONDUCT WAS ALSO UNLAWFUL UNDER THE LATTER SUBSECTION.

STATEMENT OF THE CASE

This was a prosecution for obstructing an officer [West Virginia Code §61-5-17(a)] which originated in the Magistrate Court of Marion County. The Petitioner was found guilty in a bench trial in Magistrate Court and sentenced to 10 days in jail (time served) plus \$165.80 Court costs. The Petitioner appealed to the Circuit Court.

A bench trial was held on 24 November 2010 before Hon. Fred L Fox, II, Senior Status Judge, and by order entered 1 March 2011 (AR 1), the Circuit Court affirmed the Magistrate Court.

The defendant seeks reversal of her conviction and dismissal. obstructing an officer as set out in West Virginia Code §61-5-17(a).

The Circuit Court again found the petitioner guilty. The court made a written finding of fact regarding the defendant's conduct which was consistent with the testimony of the deputy sheriff.

“3. At the bench trial before the Circuit Court, the State called Marion County Deputy Sheriff Christopher F. Gearde to testify. He testified that on 26 May 2010, he went to the Defendant’s residence in Marion county to execute an arrest warrant upon Phillip Moran for violation of home confinement in a felony case. The Defendant and Phillip Moran were romantically linked at the time and Mr. Moran had given the Defendant’s residence as his own address. While standing on the front porch, Deputy Gearde asked the Defendant if Mr. Moran was inside the residence. The Defendant denied his presence in the home. This exchange repeated multiple times. Another deputy then heard a noise within the structure and advised Deputy Gearde. Upon Deputy Gearde entering the residence, the Defendant then admitted that Phillip Moran was there. Mr. Moran was found in the residence and taken into custody. Deputy Gearde noted that the Defendant was not abusive and made no physical act to oppose him. The Defendant did not dispute Deputy Gearde’s testimony.” (AR 2 - 3)

Moreover, the finding of fact was never opposed. Defendant’s counsel noted in opening:

Just to give the Court an advanced idea of what’s going on, the Defendant’s not going to contest any of the facts. The argument here is whether she – what she did, which was deny that her boyfriend was in the house when he [the deputy] was looking for - - to pick him up when he really was in there, whether that is a violation of the statute. (AR 9)

SUMMARY OF ARGUMENT

The Defendant's admitted conduct of lying to a police officer without physically opposing him in any way is specifically prohibited by a statute which was not charged. The rules of statutory construction and the Rule of Lenity prevent a conviction under the wrong statute.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principal issues in this case involve well settled rules of statutory construction and the Rule of lenity, oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

1. THE DEFENDANT ADMITTED CONDUCT PROHIBITED BY WEST VIRGINIA CODE §61-5-17(c) (GIVING FALSE INFORMATION TO A POLICE OFFICER), BUT WAS CHARGED ONLY UNDER WEST VIRGINIA CODE §61-5-17(a). THE CIRCUIT COURT INCORRECTLY FOUND THAT THIS CONDUCT WAS ALSO UNLAWFUL UNDER THE LATTER SUBSECTION.

West Virginia Code § 61-5-17 provides, in pertinent part:

(a) Any person who by threats, menaces, acts or otherwise, forcibly or illegally hinders or obstructs, or attempts to hinder or obstruct, any law enforcement officer acting in his or her official capacity is guilty of a misdemeanor .

* * *

(c) Any person who, with intent to impede or obstruct a law-enforcement officer in the conduct of an investigation of a felony offense, knowingly and willfully makes a materially false statement, is guilty of a misdemeanor . . . However, the provisions of this section do not apply to statements made by a spouse, parent, stepparent, grandparent, sibling, half-sibling, child, stepchild or grandchild, whether related by blood or marriage, of the person under investigation. . . .

Your Petitioner has never denied her conduct. When asked by Deputy Gearde if her then-boyfriend Mr. Moran was in her residence, she denied his presence until another officer heard noises within the residence.

In this case, the question is not whether your Petitioner acted like a good citizen. She did not. For whatever it may matter, your Petitioner realized pretty quickly that her behavior was unacceptable. That does not change the fact that she did it.

Nor does your Petitioner get away from this affair unstained. This

is a lady who had never been in any trouble and who had made a memorably poor decision regarding someone with whom to undertake a romantic relationship. She served 10 days in jail and will never get those 10 days back.

Neither is it even a question about whether it should be illegal to lie to police officers or constitutional to prohibit that conduct.. West Virginia Code §61-5-17(c) prohibits materially false statements to police officers other than state police. West Virginia Code §15-2-16 prohibits lying to the state police. While this Court has not dealt with the issue in the Code §61-5-17(c) realm, it has done so with regard to Code §15-2-16 with the implicit approval of that charge as an offense against the State. *E.g.*, *State v. Strock*, 201 W.Va. 190, 495 S.E.2d 561 (1997), *State v. Milburn*, 204 W.Va. 203, 511 S.E.2d 828 (1998).

That being said, the State used the equivalent of a concept of “that’s close enough” to stretch the law here to cover what the Defendant actually did but as not charged with. Had the defendant been charged under West Virginia Code § 61-5-17(c), she would have been convicted. She was not. She was charged under § 61-5-17(a). (AR 5)

It is long been the law West Virginia that the state can modify misnomers and trivialities where no prejudice is worked to the defendant.

E.g., State v. Thompson, 26 W.Va. 149 (1885). But it is also a part of the law of West Virginia but once the trial commences, we cannot adjust the charges to fit the evidence. In *State v. Noll*, 672 S.E.2d 142 (W.Va., 2008), a defendant was charged with breaking without uttering entering, but the evidence at trial proved that he had really committed a nighttime burglary. A bit of tinkering with the indictment cured that difference at the trial court level, but this Court reversed. That defendant was prepared to defend against one charge, but not the one that was substituted.

That is similar to what happened in the instant case. This Defendant committed conduct which violates **a** statute. But she wasn't start charged with violating **that** statute. She was charged with violating a different statute. The Rule of Lenity requires that before someone "can be punished as a criminal... his case must be plainly and unmistakably within the provisions of some statute." Report for Congress, Statutory Interpretation: General Principles and Recent Trends, Congressional Research Service, 1997, quoting *United States v. Gladwell*, 243 U.S. 476, 485 (1917). It follows necessarily that this be the statute that the defendant is charged with violating.

Shoehorning your Petitioner's behavior into the wrong statute

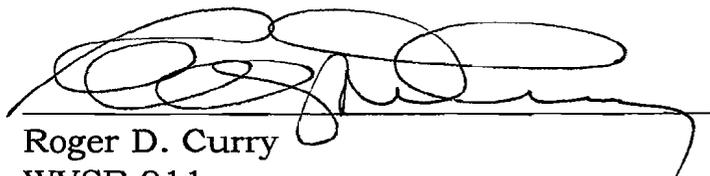
simply does not work. The ancient maxim *Inclusio unius est exclusio alterius* seems to apply. While it is rather common to suggest that the West Virginia Legislature acts with less than meticulous care, nevertheless it is the Legislature that writes the statutes, it is the statutes which drive the criminal law and the Legislature is entitled to the respect that it knows what it is doing. We must presume that the Legislature had a rational reason to enact West Virginia Code § 61-5-17(c). That reason is simple. Lying to officers, while uncivil behavior, wasn't yet illegal. Where it is possible, we do not dismiss statutory language as mere surplusage. By dealing with the issue of lying to police officers specifically, the Legislature has invoked another rule of statutory construction. "When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized if possible, and where they conflict, the latter prevails. *Peerless Ins. Co. v. County of Fairfax*, 274 Va. 236, 244, 645 S.E.2d 478, 483 (2007). Clearly, it was intent of the Legislature that § 61-5-17(c) criminalize falsehoods to the police because § 61-5-17(a) does not.

The Circuit Court made reference to *State v. Srnsky*, 213 W.Va. 412, 582 S.E.2d 859 (2003) for the proposition that mere vocal actions could

hinder a law enforcement officer. (AR 4) That reference is correct as far as it goes. However, *Srnsky* simply “addresses the narrow question of whether failure of a citizen to give one’s name when asked by a law enforcement officer, without more, constitutes the offense of obstructing an officer.” Dicta in the decision states that such a charge could be substantiated if there were an express statute requiring that a defendant do so. The Rule of Lenity requires that a defendant be charged with violating that statute before he or she is convicted of that violation.

CONCLUSION

The Circuit Court's order should be reversed, and this matter should be remanded with instructions to dismiss the matter.

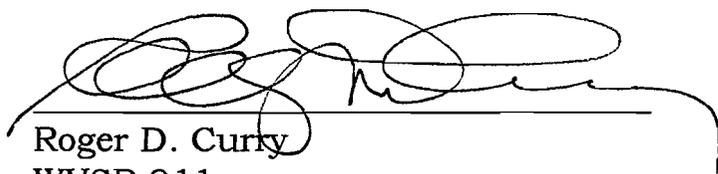


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CERTIFICATE OF SERVICE

I hereby certify that on 20 September 2011, true and accurate copies of the foregoing Petitioner's Brief and Motion to File Petitioner's Brief Out of Time were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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A handwritten signature in black ink, appearing to read "Roger D. Curry", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Roger D. Curry
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