

In the Supreme Court of Appeals
of
West Virginia

OCT 14 2011

DOCKET NO. 11-0784

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

v.

(Preston County Case Nos. 09-F-50 & 10-M-1)

JOHN A HARTMAN, Defendant Below,
Petitioner

Appellant's Reply Brief

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Introduction. This case was originally accepted by the West Virginia Attorney General's Office for response by the State, but at the eleventh hour was transferred back to the Preston County Prosecuting Attorney's Office for response. An extension of time was granted allowing a later filing of Respondent's Brief (hereinafter referred to as "State Response Brief" and "SRB" for citation purposes).

The State Response Brief does not contest that it filed a misdemeanor information charging an offense arising from the same act or transaction of an offense previously presented to the Preston County Grand Jury. The State Response Brief does not seek to justify this later filed misdemeanor information based upon new evidence, but rather generally asserts that although "felony charges must be presented to a grand jury, ...misdemeanors may be prosecuted in the circuit courts by either indictment or information." SRB at page 1.

The State Response Brief mistakenly argues that the State can avoid presentment to the grand jury of a misdemeanor charge arising from the same transaction as a felony presented to the grand jury because "Rule 8(a)(2) of the West Virginia Rules of Criminal Procedure requires a single *prosecution*, not a single charging document." SRB at page 1. (Emphasis in original.)

Although Syl. Pt. 8, *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002), is directly contrary to the argument, the State Response Brief argues in effect that Rule 8(a), W.V.R.Crim.P., is ambiguous and applies "fundamental maxim[s]" such as "*noscitur a sociis*" and "*expressio unius est exclusio alterius*" to interpret and arrive at a

meaning that “the term ‘prosecution’ does not imply a unitary charging document ...[but rather]...[a] unitary trial.” SRB at page 4.

The State Response Brief does not assert that Appellant’s Brief incorrectly stated any fact or legal argument save a reference to *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996). SRB at page 3. Appellant’s Brief argues that State’s Counsel knew or should have known of the facts underlying the later filed misdemeanor information at the time of the grand jury presentment and was therefore required to present that charge to the grand jury along with the felonies charged arising out of the same act or transaction. Appellant’s Brief at 9 to 11. The State Response Brief points out that the issue under consideration in *Forbes* is “entirely different from the case now before this Court...” because, in part, “Mr. Forbes (sic) had been prosecuted on misdemeanor charges in magistrate court before being indicted on felony charges.” SRB at page 3. (Note. As is apparent from the full title of the case, Mr. Forbes was the prosecuting attorney, not the defendant.)

By this Reply, Appellant seeks to explain any mistake, ambiguity or misunderstanding that may exist in the briefing of this case as raised in the State’s rather succinct four page (unnumbered) Response Brief.

1. *Statement of Case Reply.* The State Response Brief does not contest any fact stated by Appellant in his Brief concerning Statement of the Case. *Cf.*, Appellant’s Brief pages 1 to 4, and SRB page 1. Likewise, Appellant does not contest any factual assertion made in the State Response Brief “Statement of Case.”

2. *Summary of Argument Reply.* Appellant disagrees with the premise of the State Response Brief that a misdemeanor arising out of the same nexus of fact as an indicted felony charge can be filed without presentment to the grand jury. Appellant contends it was error to consolidate the indictment and later filed misdemeanor information into a single prosecution over objection of Defense Counsel. See, Appellant's Brief pages 5 to 16. Appellant also disagrees with the contention that avoidance of the grand jury was justified by eliminating "unnecessary delay."

3. *Statement Regarding Oral Argument Reply.* Appellant agrees that this case is appropriate for argument under Rule 19(a)(4), Revised Rules of Appellate Procedure.

4. *Argument Reply.* The State Response Brief is divided into two sections. Section A. argues that the issue presented is procedural and not constitutional. SRB at page 2. Section B. argues that the change made by the Court to Rule 8(a), West Virginia Rules of Criminal Procedure, in 1996, negated the requirement that the State present misdemeanors arising out of the same act or transaction in the same indictment. SRB at 4. It makes more sense for Appellant to reply to the latter argument in Section B. first because it implicates West Virginia Constitution Articles: Art. III, Section 20, and Art. IV, Section 5.

The heart of Appellant's argument is that, in effect, the lower court improperly allowed the State to amend the grand jury indictment to include an additional misdemeanor charge and the motivation for this amendment was to enhance the State's argument to introduce prior bad act evidence. The State argues in effect "so what," the

1996 amendment to Rule 8(a), W.Va.R.Crim.P., allows it to do this.

It is helpful to look at the amended rule: Rule 8(a) before September 1, 1996 read as follows:

Rule 8. Joinder of offenses and of defendants:

(a) Joinder of offenses. - - Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character. All offenses based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan shall be charged in the same indictment or information in a separate count for each offense, whether felonies or misdemeanors or both.

...

Rule 8(a) was amended, effective September 1, 1996, to read as follows:

Rule 8. Permissive and mandatory joinder of offenses and of defendants.

(a) Joinder of offenses. - - (1) Permissive joinder. - - Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character.

(2) Mandatory joinder. - - If two or more offenses are known or should have been known by the exercise of due diligence to the attorney for the state at the time of the commencement of the prosecution and were committed within the same county having jurisdiction and venue of the offenses, all such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution if they are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, whether felonies or misdemeanors or both. Any offense required by this rule to be prosecuted by a separate count in a single prosecution cannot be subsequently prosecuted unless waived by the defendant.

...

Appellant asserts that the word "prosecution" is not ambiguous. It is merely more inclusive than the word "charged." In fact, it is clear that a prosecution begins at the time "the Government has committed itself to prosecute..." because... "it is then that a defendant finds himself faced with the prosecutorial forces of organized society, and

immersed in the intricacies of substantive and procedural criminal law.” *U.S. v. Gouveia*, 467 U.S. 180, 189 (1984) (Discussing when right to counsel attaches in a “prosecution.”) The initiation of judicial criminal proceedings marks the commencement of the “criminal prosecution.” *Kiby v. Illinois*, 406 U.S. 682, 689 to 690 (1972).

This Court in *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000), clearly answered the question of when prosecution commences. *Boyd* cites Rule 3 of the West Virginia Rules of Criminal Procedure, and W.Va. Code Section 50-4-2 (1997) (Commencement of criminal prosecutions). *Id.*, 543 S.E.2d at 650. The conclusion is that “Undoubtedly, the complaint... is the initial step in the prosecution, ...[and] it commences the action.” *Id.*, 543 S.E. 2d at 650, (internal quotation marks omitted).

State’s Counsel notes in its Statement of the Case, the ...“crimes ...occurred on August 10, 2009...” and ...“Appellant was arrested shortly thereafter...” SRB at page 1. There can be no dispute that prosecution began at some time before Appellant’s arrest when the State obtained a warrant. Because felony charges were prosecuted in the present case, it was necessary to commence the prosecution by indictment. *See*, Rule 7(a), W.Va.R.Crim.P. State’s Counsel was thus required to prosecute by indictment “separate counts in a single prosecution” ...all offenses “whether felonies or misdemeanors” ...that the “attorney for the state” ...knew of or should have known of “by the exercise of due diligence.” Rule 8(a)(2), W.Va.R.Crim.P. (Selective quotations out of order). It is clear from any fair reading of the rule that this election of charges to

proceed upon must be made at the “commencement of the prosecution,” and not thereafter. Rule 8(a)(2), W.Va.R.Crim.P.

The Court in *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980), held in syllabus point one: “A defendant shall be charged in the same indictment, in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both ...are based on the same act or transaction...” This syllabus point in *Watson* was superseded by the Rules of Criminal Procedure adopted by the Supreme Court of Appeals effective October 1, 1981. See, *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419, 427 (2002) (footnote 6). That this Court continues the requirement as set forth in syllabus point one of *Watson* is evident in *Games-Neely*: “A defendant shall be charged in the same indictment, in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both ... are based on the same act or transaction ...” Syl. Pt. 8, *State ex rel. Games-Neely v. Sanders*, 211 W.Va. 297, 565 S.E.2d 419 (2002). Certainly, this Court would not have continued this holding if it meant to change Rule 8(a)(2), W.Va.R.Crim.P., to mean “the term ‘prosecution’ does not imply a unitary charging document.” See, SRB at page 4.

It is highly unusual for the State to argue that a rule promulgated by this Court is ambiguous. Such arguments are usually reserved for a statute that might have resulted from a difficult political compromise or contracts where there was no meeting of minds on a contested point. Decisions on these ambiguous points can be difficult and only in such difficult circumstances are rules of construction resorted to. The suggestion by the

State that this Court was less than clear in its choice of words in promulgating the amended rule is nothing more than a feckless attempt to cover up the State's own shortcomings.

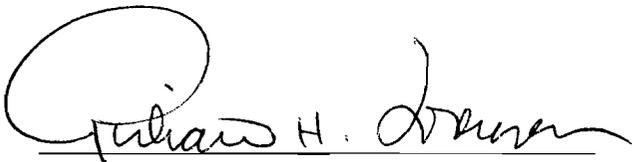
Appellant asserts that the West Virginia Constitution is violated by the actions of the State in the present case. *See*, Appellant's Brief, at pages 14 to 16. Appellant refers to his Appellant's Brief for all other points pertaining to his argument that the indictment be declared void as improperly amended in this case.

CONCLUSION

The Appellant's conviction should be reversed, the indictment and information be declared void as improperly amended in this case, and this matter should be remanded for further proceedings.

Respectfully submitted,

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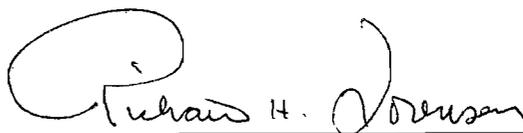
CERTIFICATE OF SERVICE

I hereby certify that on this **14th** day of **October, 2011**, true and accurate copies of the foregoing **Appellant's Reply Brief** 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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