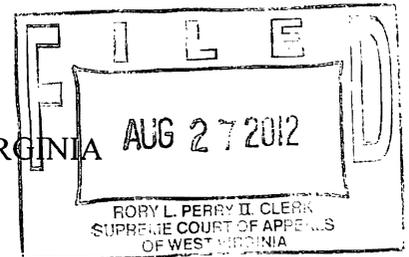


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA, Ex rel.
MYRON DEWAYNE DANIELS,
Petitioner,

12-0180
Supreme Court No. ~~11-1047~~

v.

Circuit Court No. 05-MISC-265
(Kanawha)

WILLIAM FOX, WARDEN,¹
St. Mary's Correctional Center,
Respondent.

REPLY BRIEF

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REPLY ARGUMENT

- A. Respondent's case law cited to support the contention that two offenses finalized on the same day can be separately enhanced is improperly taken out of context, and the very case cited contains language contradicting Respondent's claim.**

The response brief in section (A) argues two main points, that Myron Daniels committed two predicate felonies and that two convictions finalized on the same day can be enhanced separately. (Respondent's Brief at 7-8). The first is not contested. Mr. Daniels does have prior felony convictions in the years 1976 and 1990 that would count as predicate offenses for either of his robbery convictions. That a life recidivist sentence is not appropriate is not Mr. Daniels' claim, rather that only one recidivist life sentence is allowed under the law rather than two.

Respondent's brief (at 7-8) then quotes State v. Housden, 184 W.Va. 171, 399 S.E.2d 882 (1990), at length in support of the its claim that two convictions finalized on the same day can be enhanced:

In applying these principles to the present case it becomes clear the judgment of sentence which must be finalized prior to the institution of the recidivist statute is the underlying or former convictions which in this case consisted of the 1968 conviction for breaking and entering and the 1982 conviction for grand larceny. The record reflects that both of these convictions had been finalized by the entry of a judgment of sentence and therefore were properly utilized in the recidivist proceeding. There is no requirement that the final offense, in this case the burglary, has to be finalized by the entry of a judgment order before the state can initiate action under the Habitual Criminal Statute.

Id. at 175-6, 399 S.E.2d at 886-7.

Yet later in the same case, on the same page in fact, this Court notes:

[M]ultiple sentences can be enhanced under the habitual criminal statute only once where the sentences are imposed for convictions rendered on the same day.

Id. at 176, 399 S.E.2d at 887 (quoting Hutchinson v. Dietrich, 183 W.Va 25, 393 S.E.2d 663 (1990)).

Housden is not directly relevant to this case in that the issues there are distinguishable from the facts at bar, and even then the reasoning in Housden supports Daniels' claims. Housden presented three questions to this Court. The first was a proportionality issue not relevant to the case at bar.

The second issue is the issue from which the first above quotation originates. Housden was convicted of burglary and grand larceny. The state sought to pursue the recidivist penalty for the burglary count. An information was filed and a recidivist proceeding held before the burglary and grand larceny convictions were finalized via a sentencing order. Housden argued that since his present conviction was not finalized, it could not count as one of the three felonies. This Court rejected this argument, applying the analysis in the above quotation.

This is a totally different issue than the one at bar. Had Daniels been subject to the recidivist penalty on only one of the two current convictions, then his case would be similar to Housden. The issue here is whether two separate recidivist penalties both can be enhanced when they are finalized on the same day. As to this issue, Housden merely allows the state to have a recidivist hearing before the sentence is handed down on the triggering offense.

Housden's third issue is where the second above quotation comes from. Once Housden was convicted of being a recidivist as to the burglary count, the trial court sentenced him to life for the burglary and a one to ten year sentence for the grand larceny. These sentences were ordered to run consecutively. Housden argued this was not permissible, and in rejecting this claim this Court noted that only one of the present felonies was being enhanced, and as such there was nothing wrong with a separate sentence being ordered served consecutively.

Again, this is a different issue from the case at bar as where the problem is with there being two enhanced sentences rather than an enhanced sentence and an unenhanced sentence.

Far more similar to this case is Hutchenson v. Deitrich, 183 W.Va. 25, 393 S.E.2d 663 (1990). In Hutchenson, the petitioner was the same day convicted of delivery of marijuana and delivery of cocaine. As petitioner had a prior felony, the state sought to enhance both offenses as second felony offenses.

The petitioner challenged the double enhancement via writ of habeas corpus, and this Court held “that only one of the defendant's two convictions rendered on August 14, 1989, can properly be enhanced under the recidivist statute and that the circuit court erred in enhancing both the defendant's conviction for delivery of marijuana and delivery of cocaine.” Id. at 28, 393 S.E.2d at 666.

There is no material difference between the facts in Hutchenson and the facts in the case at bar. In Hutchenson, the convictions for two offenses were finalized on the same day. These two convictions were separately enhanced. The only difference is that Hutchenson dealt with a second offense recidivist enhancement and the case at bar deals with a third offense recidivist enhancement.

It could not be any clearer that only one conviction out of two convictions returned on the same day can be enhanced.

B. Respondent’s contention that the plea agreement was rightly upheld is circular in that it depends on the sentence being legal, and because it fails to cite any legal authority that an otherwise illegal sentence is permissible if it is agreed to.

Part (B) of the response brief fails to squarely address any issue in this case, and seems to rely on the fact that Daniels was informed of the nature of the plea and “got what he bargained for in this plea agreement.” (Respondent’s Brief at 8.)

That Daniels agreed to this arrangement has is immaterial as “the legislature has the primary right to define crimes and their punishments... courts cannot set punishments that are inconsistent with the statutory penalties.” State v. Wilson, 226 W. Va. 529, 534-5, 703 S.E.2d 301, 306-7 (2010). Also, “if the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand.” Syl. Pt. 1, State ex rel. Morris v. Mohn, 165 W. Va. 145, 267 S.E.2d 443 (1980).

[A] plea agreement that provides for an illegal sentence is invalid and must be vacated.” State ex rel. Gessler v. Mazzone, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002) (per curiam) (citing State ex rel. Morris v. Mohn, 165 W. Va. 145, 267 W.Va. 443). Also, the plea bargain itself says that “If this plea agreement shall be vacated or set aside by any state or federal court, the parties shall be returned to their original positions as though this plea agreement has not been entered into.” (App. at 90); See Gessler at 372, 572 S.E.2d at 895 (“a plea agreement that cannot be fulfilled based upon legal impossibility must be vacated in its entirety, and the parties must be placed, as nearly as possible, in the positions they occupied prior to the entry of the plea agreement”).

Therefore, as the two enhanced sentences are illegal, the whole plea bargain must be vacated.

C. The Circuit Court failed to award Petitioner a new trial for lack of a trial transcript due to a wrongful application of the “concurrent sentence” rule.

The circuit court did not speak at length as to the resentencing issue. The court noted the applicable law, and then for the most part dodged the issue by misapplying Syllabus Point 2 of Varney v. Superintendent, West Virginia Penitentiary, 164 W.Va. 420, 264 S.E.2d (1980). Varney held that “One who had been convicted of two crimes, one of which convictions has

been declared void, will be relieved of punishment for such void conviction, but he must serve the term provided by statute for the valid conviction.” Id.

Varney’s meaning is clear. If one conviction is invalid it does not relieve the petitioner from any other valid sentences. This is basic and seemingly obvious.

It is, however, not applied correctly in this case. If we accept for the purposes of this issue that the conviction and life sentence for count three are valid, this does not mean that it is irrelevant whether the conviction and sentence for count one are invalid. All Varney means is that if the conviction and sentence for count one were invalidated, then the sentence for the valid conviction would still stand.

If again, assuming that the life sentence for count three is valid, Petitioner is still due a ruling on the merits as to whether count one is valid:

Although there may be occasions where the validity of one sentence has been upheld in review and the review of a separate conviction will not alter the circumstances of defendant’s confinement, a defendant is still entitled to a ruling on the merits when post-conviction habeas corpus relief is sought.

Syl. Pt. 1, State ex. re. State ex rel. Blake v. Chafin, 183 W. Va. 269, 395 S.E.2d 513 (1990).

As to the merits, the circuit court made two findings of fact as to this issue. First, that “The Petitioner wished to appeal his conviction as to Count One but trial counsel failed to do so.” (App. At 134.) Second, that “The Office of the Clerk of the West Virginia Supreme Court of Appeals has stated that full transcripts of the trial as to Count One do not exist.” (Id.)

Respondent apparently argues the inaction of Petitioner and his counsel in not immediately ordering a transcript invalidates his right to an appeal. (Respondent’s Brief at 9.) The law is both contrary and clear. In West Virginia, the constitutional right to petition for appeal is virtually absolute. It “cannot be destroyed by counsel’s inaction or by a criminal defendant’s delay in bringing such to the attention of the court, but such delay on the part of

defendant may affect the relief granted.” Syl. Pt. 8, Rhodes v. Leverette, 160 W. Va. 781, 239 S.E.2d 136 (1977); Syl. Pt. 1, Billotti v. Dodrill, 183 W. Va. 48, 394 S.E.2d 32 (1990). A defendant will be unconditionally released only when “the state has been extraordinarily derelict.” Syl. Pt., Johnson v. McKenzie, 160 W. Va. 385, 235 S.E.2d 138 (1977).

Respondent’s fears that many prisoners will, upon conviction, “do nothing, wait six years and then get out of jail because of the passage of time has introduced error into the proceedings” are unfounded for several reasons. (Respondent’s Brief at 10.) Foremost because such a tactic would not result in freedom, merely a new trial or an appeal from a reconstituted record. Second, it isn’t the passage of time but the destruction and/or loss of the transcript and notes that trigger the relief; had the court reporter properly stored these there would be no issue. Third, if there were evidence of this being a deliberate tactic, a respondent could present this to the circuit court and make a legal argument based on said evidence. In the present case, the reverse is true. The circuit court found that Daniels wanted an appeal and the delay was attributable to counsel’s failure to perfect same.²

Respondent also places weight on the facts of Varney, that in that case there were repeated attempts to obtain a transcript and repeated refusals by the court. (Respondent’s Brief at 10.) This has little bearing on this case as in fact there were repeated attempts to obtain a transcript leading to a letter from the Office of the Clerk of the West Virginia Court of Appeals saying no transcripts exist.

² Petitioner has not raised this issue as ineffective assistance of trial counsel as such an approach presents the difficulty of showing that counsel’s inaction caused the transcripts to be unavailable. This is not possible as there is no evidence of their existing at the time the appeal could have first been perfected. As counsel’s inaction is clear from the record, counsel’s inaction serves in this case to absolve Daniels of any accusation of dilatory conduct.

Even so, Respondent misreads Varney as to the need for repeated requests and denials. The “repeated refusal by court during appeal period to furnish transcript and subsequent loss of reporter’s notes (from which trial transcript could be made) constitute extraordinary dereliction on the part of the state and dictate the discharge of the petitioner on that conviction.” Varney at 422, 264 S.E. 2d at 474. The “repeated refusal” was relevant only as to the available remedy in that “extraordinary dereliction” allows for a total discharge, while the mere lack of a transcript only allows for either a retrial or appeal based on a reconstituted record. Syl. Pt. 2, State ex rel. Kisner v. Fox, 165 W. Va. 123, 267 S.E.2d 451 (1980). Petitioner is not alleging “extraordinary dereliction” and seeks only a new trial. The lack of a transcript is sufficient to trigger this right.

Respectfully submitted,

MYRON DANIELS
By Counsel

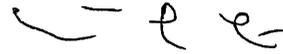


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CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on the 24th day of August, 2012, I sent via United States Postal Service a copy of the foregoing Reply Brief to Andrew D. Mendelson, Assistant Attorney General, 812 Quarrier Street, 6th floor, Charleston, West Virginia 25301.



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