

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 12-0256

STATE OF WEST VIRGINIA, RESPONDENT

V.

RONALD GOINS, PETITIONER

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

Comes now Petitioner Ronald Goins and hereby makes the foregoing reply to the States Brief:

The State errs in its contention that W.Va. Code 61-7-11 creates unlimited criminal liability.

Petitioner Ronald Goins argues that the State errs in its contention that W.Va. Code 61-7-11 creates unlimited criminal liability.

The key questions to be resolved is what the legislature made the “allowable unit of prosecution” See State v. Green, 534 SE 2d 395 (W.Va. 2000).

To ascertain legislative intent, the first place this court should look is to the brandishing statute itself. It bears noting that the crime is designated a misdemeanor punishable by a jail sentence, and not a penitentiary term. Had the legislature intended for a simple episode of recklessness with a firearm to be punishable by multiple years of incarceration, it could have been designated a felony, all punished by a term in the state penitentiary.

Second, Petitioner argues that the allowable unit of prosecution is set forth in the statute; it is a breach of the peace or the threatened breach of the peach. W.Va. 61-7-11 reads.

Brandishing deadly weapons; threatening or causing breach of the peace; penalties.

It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threatened, a breach of the peace. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction therefore, shall be fined not less than fifty nor more than one thousand dollars, or shall be confined in the county jail not less than niety days nor more than one year, or both.

Hence, Petitioner argues that the crime was completed once the Tillers saw a gun, and the number of shots or number of persons present are irrelevant because that’s when the peace was threatened and the firing of the weapon nearly added onto an already broke peace. In these – regards the brandishing statute may be likened to the threats of terrorist acts crime or W.Va. 61-6-24 which is also a per event as opposed to a per person statute, *i.e.* one act of threatening a football stadium for example, is one felony irregardless of the number of people involved.

Further, the States argument is that the convictions are somehow okay because multiple rounds were fired fails to pass muster because the Petitioner was charged per person, not per event. In such an event, issues as to a violation of Petitioners Fifth Amendment to rights as to indictment by grand jury, and notice of what the charged offense conduct is are present.

Even assuming the State is correct that each round fired constitutes a separate offense, then Petitioner argues it should have been indicted as such. It was not. Hence, should the State prevail in its argument then all the convictions must fall as Petitioners right to indictment under the Fifth Amendment were seriously violated. U.S. vs. Hooker, 841 F. 2nd 1225 (4th Cir 1983). Moreover, to accept the States argument is to place unlimited criminal liability on a citizen every time a firearm is discharged. In the case at bar, it would add up to five counts per round fired for 20 counts, and that's before every neighbor that could conceivably hear shot—if as the state contends that the “victims” didn't have to ever have to be aware they were victims is correct.

Further, such an interpretation would open “misdemeanor” statutes for multiple convictions every time someone hears a gunshot. This is clearly not what the legislature intends and is obviously why it is a per event crime that is complete when the peace is threatened.

Petitioner also notes that such a interpretation by the State, would criminalize most police firing ranges in the State. Although, the State says these are differences in the conduct, this testimony is undercut by the investigative officers testimony. Officer Coulter testified at page 105 of the transcript:

Q. But substantial risk. I was wondering where to look to see what risk is—what would be acceptable risk? Okay? Do you think that's a fair inquiry?

A. Yes, sir.

Q. Sure. And I thought this: I thought I might check the distances at of some of the police ranges around here, to see what the gold standard was, because you would agree with me the police officers' firing range would never create a substantial risk of harm to another.

A. I wouldn't refer to that as being the gold standard.

Q. So you're saying the police officers' firing ranges would create substantial risk?

A. I'm saying that that wouldn't be the gold standard of marksmanship across the United States.

It is evident from the text of the brandishing statute that the Legislature intended it to be a per event crime the event being a breach of peace or a threatened breach of peace and not to impose unlimited criminal liability upon a gun owner for discharging a firearm while alone in the middle of a 20 acre track. Hence, the convictions violate the double jeopardy clause and must fail.

Wherefore, Petitioner prays this Court reverse his sentence and remand this case for further proceedings.

RONALD GOINS
By Counsel.

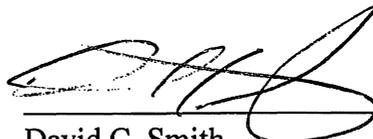
CERTIFICATE OF SERVICE

I, David C. Smith, do hereby certify that I have on this 27th day of July 2012, served a true and correct copy o the foregoing Petitioner's Reply Brief upon the following:

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