



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-1309

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

VS.

JAMES SCOTT YOCUM,

Defendant Below, Petitioner.

Appeal from a final order
of the Circuit Court of Marshall
County (12-F-47)

PETITIONER'S BRIEF

Counsel for Petitioner:
Brent A. Clyburn, Esq.
THE LAW OFFICE OF
BRENT A. CLYBURN
R.R. 3 Box 529A
Wheeling, WV 26003
(304) 232 – 0509

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS ii

II. TABLE OF AUTHORITIES iii

III. ASSIGNMENT OF ERROR 1

IV. STATEMENT OF CASE 1

V. SUMMARY OF ARGUMENT 4

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 4

VII. ARGUMENT 5

VIII. CONCLUSION 12

IX. CERTIFICATE OF SERVICE 13

II. TABLE OF AUTHORITIES

Decisions of the Supreme Court of Appeals

Christopher v. Christopher, 144 W.Va. 663, 110 S.E.2d 503 (1959) 11

State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538 (1974) 5, 6

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) 6

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000) 11

State v. Sigler, 224 W.Va. 608, 687 S.E.2d 391 (2009) 11

State v. Sulick, No. 11-0043, 2012 WL 602889 (W.Va. Feb 23, 2012) 8

West Virginia Constitutional Provisions

W. Va. Const. Art. III, § 10 5

Federal Constitutional Provisions

U.S. CONST. AMD. I 5, 6

U.S. CONST. AMD. XIV 5

West Virginia Rules of Court

Rule 29 W. Va. R. Crim. Proc. 6

Provisions of the West Virginia Code

W. Va. Code § 27-1-12 9, 10

W. Va. Code § 61-2-10b 10, 11

W. Va. Code § 61-6-24 5, 6, 8, 11,12

**Decisions of the United States Supreme Court, Lower Federal Courts,
& Other State Authorities**

Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1407 (1966) 5

Lofgren v. Commonwealth, 55 Va.App. 116, 684 S.E.2d 223 (Va.App. 2009) 7

III. ASSIGNMENTS OF ERROR

1. The Circuit Court of Marshall County, West Virginia, erred in denying the Petitioner's motion seeking dismissal of the underlying matter, as section 61-6-24(b) of the West Virginia Code, relating to terroristic threats, is unconstitutionally vague.

2. The Circuit Court of Marshall County, West Virginia, erred in denying the Petitioner's motion seeking acquittal in this matter, given that the conduct proscribed by section 61-6-24(b) of the West Virginia Code, if it be constitutional, requires a terrorist threat "likely to result in serious bodily injury," and not mere words which, at the time uttered, have no basis in reality; particularly when the person uttering such words is handcuffed in the back of a police cruiser, on his way to jail.

IV. STATEMENT OF CASE

On or about February 9, 2012, officers from the Moundsville Police Department, Sergeant Shawn Allman ("Sergeant Allman") and Corporal Richard Milbert, arrived at 1013 Parriott Avenue, located in Moundsville, Marshall County, West Virginia, pursuant to a domestic disturbance call. (A.R. 2, 6, 171.)

Following their investigation at the residence, including a discussion with the owner, Victoria Bradley, the officers went to 1200 Covert Street, also located in Moundsville, Marshall County, West Virginia, and arrested the Petitioner, James Scott Yocum. (A.R. 2, 6, 172-173.)

During the Petitioner's arrest, and before he could be lodged in the local jail, Sergeant Allman transported the Petitioner to Reynold's Memorial Hospital based upon the Petitioner complaining of "chest pains." (A.R. 2, 6, 8, 174-175.) Some time thereafter, the Petitioner was

determined medically cleared to go to jail. (A.R. 2, 6, 9, 177.) Sergeant Allman handcuffed the Petitioner and placed the Petitioner in the rear seat of his patrol car, and transported the Petitioner to the local jail. (A.R. 2, 6, 9, 179.)

While en route to the jail, it is alleged that the Petitioner stated to Sergeant Allman, “I know where you live and I’m going to fuck your daughter.” (A.R. 2, 6-7, 9, 179.) Sergeant Allman says that the Petitioner said this on two (2) occasions while they were traveling to the jail. (A.R. 2, 6-7, 9, 180.)

Pursuant to the testimony offered, Sergeant Allman has two (2) step-daughters. (A.R. 184.)

According to Sergeant Allman’s testimony, he does not recall ever knowing the Petitioner before this night, February 9, 2012; he and the Petitioner were not familiar with each other; and, to his knowledge, the Petitioner did not know where he lived. (A.R. 180-182, 184) Sergeant Allman also testified that he does not recall telling the Petitioner that he had a daughter(s) or step-daughter(s) (A.R. 180, 184); moreover, it was Sergeant Allman’s prior testimony that even if he did not have a daughter, if the daughter did not exist, he would have charged the Petitioner with threatening a terrorist act (A.R. 187.)

On July 10, 2012, the State of West Virginia (the “State”) filed, the grand jury returning, an indictment against the Petitioner, charging him with threatening a terrorist act in violation of section 61-6-24(3)(iii) of the West Virginia Code. (A.R. 29.) Pursuant to the document, the State alleged that the Petitioner, James Scott Yocum, threatened to “commit a terrorist act likely to result in serious bodily injury and intended to affect the conduct of a branch or level of government by intimidation or coercion against a branch or level of government . . .” (*Id.*)

How he did that, according to the State and its indictment, Mr. Yocum, while being transported by Sergeant Allman to the Northern Regional Jail, “threatened Sergeant Allman that he knew where he lived and he was going to sexually assault his daughter.” (*Id.*)

On September 10, 2012, the matter proceeded to trial. The State’s evidence consisted of Sergeant Allman’s testimony; while the Petitioner testified on his own behalf.

During closing statements, the State argued that the phrase “likely to result in serious bodily injury,” contained within the definition of a “terrorist act,” in speculative terms; that is, *if* the Petitioner had, actually, sexually assaulted Sergeant Allman’s daughter, as charged, and if the jury believed such conduct would likely result in serious bodily injury to Sergeant Allman’s daughter, then he must be convicted of the offense. (A.R. 231-232, 240-241.) Meanwhile, the Defense argued that “likely to result in serious bodily injury” connotes a reasonable expectation of harm, and if the jury believed Sergeant Allman or, more precisely, Sergeant Allman’s daughter could not reasonably expect an injury from an individual arrested, shackled and placed in the back of a patrol car, headed to the local jail, then acquittal is appropriate. (A.R. 236 -240.)

The jury returned a “guilty” verdict against the Petitioner.

On September 27, 2012, the matter came before the lower court for sentencing. (A.R. 253-278.) During sentencing, the court did consider the Petitioner’s *Motion to Dismiss; or, in the alternative, Judgment of Acquittal*, and, thereafter, denied the same. (A.R. 87, 260-268.) The court sentenced the Petitioner “to the West Virginia Penitentiary for Men for a period of not less than one (1) nor more than three (3) years . . .” with no fine imposed. (A.R. 87, 278.)

On October 31, 2012, the Petitioner’s counsel filed a “Notice of Appeal.”

The Petitioner now tenders unto the Court his Petition for Appeal.

V. SUMMARY OF ARGUMENT

Section 61-6-24(b) of the West Virginia Code is void for vagueness as the statute fails to provide an adequate definition as to what conduct is prohibited.

Meanwhile, and if the statute is, indeed, constitutional, the conduct for which the Petitioner was adjudicated guilty fails to rise to the level of a criminal act as proscribed by the same.

The State, through the underlying indictment, attempts to manipulate words to mean more than what has been commonly accepted by society. Moreover, the State's evidence, which it presented at the underlying trial, did not amount to anything near threatening a terrorist act, insomuch as the offense of the threatening a terrorist act requires that the act in question be a "likely" occurrence, and the Petitioner, at the time of the offense, handcuffed in the back of a police cruiser, was not likely going to do anything but go to jail.

VI. STATEMENT REGARDING ORAL ARGUMENT & DECISION

Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, the Petitioner submits that the facts and legal arguments in the present matter are adequately presented; thus, making the decisional process of the Court achievable without the aid of oral argument.

Nevertheless, should the Court find it necessary, this case is appropriate for oral argument pursuant to Rule 20(a) of the West Virginia Rules of Appellate Procedure, and disposition by memorandum decision.

VII. ARGUMENT

1. *Vagueness*

The conduct proscribed by section 61-6-24(b) of the West Virginia Code is threatening to commit a “terrorist act,” which, as defined by 61-6-24(a)(3), is “an act that is *likely to result in serious bodily injury* . . . and intended to: intimidate . . . influence . . . affect . . . or retaliate” Emphasis added. The State takes the position that the phrase “likely to result in serious bodily injury” may be viewed in speculative terms, while the defense relies upon the common, ordinary and accepted meaning, which connotes a reasonable expectation, or probability, that an event will occur.¹ Obviously, without clear guidance as to what this phrase means, the statute suffers for being overly vague and, therefore, violates the due process clause of, both, state and federal constitutions. *See State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

“One of the fundamental requirements at common law was that a criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute.” *Id.* at 117, 208 S.E.2d at 542. Put another way, “definiteness is necessary to satisfy the due process requirements of the Fourteenth Amendment,” and Article III, Section 10 of the West Virginia Constitution. *Id.*

Quoting the United State Supreme Court, the West Virginia Supreme Court of Appeals, in *Flinn*, put forth, “when First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.” *Id.* at 120, 208 S.E.2d at 543, quoting *Ashton v. Kentucky*, 384 U.S. 195, 86 S.Ct. 1407 (1966). Syllabus Point 2 in *Flinn* provides, “statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional

¹ See Part 2., which contains the Petitioner’s argument regarding acquittal.

rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute.”

Section 61-6-24 of the West Virginia Code, a violation of which the Petitioner has been charged, is a criminal statute which carries, upon conviction, a criminal penalty. The conduct which constitutes the offense involves mere words. Words are speech, and the First Amendment to the United States Constitution provides that “Congress shall no laws . . . abridging the freedom of speech”

In the matter *sub judice*, and as reflected by the parties’ closing remarks, the State and the Petitioner disagree as to what the phrase “likely to result in serious bodily injury,” as a definition to the term “terrorist act,” actually means. Such a disagreement certainly tests the “certainty” and “definiteness” of such a phrase, and, therefore, the statute, which, then, serves to illustrate an apparent vagueness within the same.

2. Acquittal

Rule 29 of the West Virginia Rules of Criminal Procedure governs judgment of acquittal. To determine whether the evidence at issue is sufficient to sustain a conviction, “all the evidence, direct and circumstantial, must be viewed from the prosecutor’s coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict.” Syl Pt. 2, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

According to the Court in *LaRock*, “this rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution’s theory of guilt.” *Id.*

First of all, as it relates to the present matter, to choose the inference that best fits the prosecution's theory of guilt, the Court must be willing to accept the proposition that a word means more than its generally accepted definition.²

The State, through the indictment, alleges that the Petitioner threatened a terrorist act, as prohibited by the statute, by threatening "Sergeant Allman that he knew where he lived and he was going to *sexually assault* his daughter." Emphasis added.

According to the evidence actually presented, the Petitioner said to Sergeant Allman, "I know where you live and I am going to *fuck* your daughter."³ Emphasis added. He allegedly said it twice, and provided no further elaboration.

Merriam-Webster's Dictionary defines the word "fuck" as "to engage in coitus with – sometimes used interjectionally with an object (as a personal or reflexive pronoun) to express anger, contempt or disgust." The word is also defined as "to deal with unfairly or harshly." www.merriam-webster.com/dictionary/fuck. See also *Lofgren v. Commonwealth*, 55 Va.App. 116, 120, 684 S.E.2d 223, 225 (Va.App. 2009).

Translated, then, the Petitioner, either, said, "I know where you live and I am going to engage in coitus [or have sex] with your daughter;" or "I know where you live and I am going to deal with your daughter unfairly or harshly." Neither translates, *per se*, to sexual assault or rape as alleged in the indictment.⁴

² The Petitioner finds such a supposition particularly troubling, inasmuch as that would mean the State controls language, which would suggest that they now have some authority to control speech in general.

³ The Petitioner would also note the State's attempt to control the narrative through semantic word-play by pointing out that the Petitioner allegedly made reference to Sergeant Allman's daughter, who, technically, does not exist. He only has step-daughters, who, of course, the State alleges the Petitioner was referring to when he made the alleged utterance.

⁴ The Petitioner is aware that sexual assault could be seen as treating another "harshly." Nevertheless, in common parlance, no reasonable individual would necessarily think of a "rape" or "sexual assault" when hearing another was dealt with "harshly."

The State's evidence also falls short in this matter because it does not meet the threshold requirements of section 61-6-24 of the West Virginia Code, the basis of the indictment. Primarily the "terrorist act," which the Petitioner allegedly threatened, was not a "likely" occurrence; first, because of the Petitioner's position at the time he made the statement (handcuffed in the back of a police cruiser, heading to jail) and, second, because the arresting officer made it clear he would have charged the Petitioner no matter the actual likelihood of such a "threat" (making it a charge born of spite).

"Any person who knowingly and willfully threatens to commit a terrorist act, with or without the intent to commit the act, is guilty of a felony." W.Va. Code § 61-6-24(b). A "terrorist act" is an act that is "*likely* to result in serious bodily injury or damage to property or the environment; and intended to: intimidate . . . influence . . . affect . . . or retaliate" W. Va. Code § 61-6-24(a)(3). Emphasis added.

Stepping back, reviewing the constitutionality of the statute, and given the divergence of opinion, between the State and the Petitioner, as to what the phrase "likely to result in serious bodily injury" means, Syllabus Point 6, *State v. Sulick*, 022312 WVSC, 11-0043 (2012), declares that "in the absences of any definition of the intended meaning of words or terms in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."

Merriam-Webster's Dictionary defines the word "likely" as "having a high probability of occurring or being true;"⁵ thereby suggesting that the threat of an act, which must likely result in serious bodily injury, must have a high probability of occurring or being true when uttered.

⁵ <http://www.merriam-webster.com/dictionary/likely>

Attempting to further understand the phrase, within the confines of statutory construction, guidance is found in Chapter 27 of the West Virginia Code, relating to Mentally Ill Persons.

Pursuant to section 27-1-12(a) of the West Virginia Code:

“Likely to cause serious harm” means an individual is exhibiting behaviors consistent with a medically recognized mental disorder or addiction, excluding, however, disorders that are manifested only through antisocial or illegal behavior and as a result of the mental disorder or addiction:

- (1) The individual has inflicted or attempted to inflict bodily harm on another;
- (2) The individual, by threat or action, has placed others in reasonable fear of physical harm to themselves;
- (3) The individual, by action or inaction, presents a danger to himself, herself or others in his or her care;
- (4) The individual has threatened or attempted suicide or serious bodily harm to himself or herself; or
- (5) The individual is behaving in a manner as to indicate that he or she is unable, without supervision and the assistance of others, to satisfy his or her need for nourishment, medical care, shelter or self-protection and safety so that there is a substantial likelihood that death, serious bodily injury, serious physical debilitation, serious mental debilitation or life-threatening disease will ensue unless adequate treatment is afforded.

Moving past the first paragraph, itself labeled “(a),” which appears to deal, primarily, with the mental state (*mens rea*) of an individual, the next, enumerated paragraphs (number 1 through 5) seem to address those actions (*actus reus*) which would suggest whether said person is “*likely* to cause serious harm.” Emphasis added

For the purposes of the present matter, the enumerated paragraph numbered “(2)” seems helpful in determining whether, given the evidence presented in this matter, the Petitioner was “likely” to act in such a way to cause anyone harm.

As noted, section 27-1-12(a)(2) requires an individual, by threat, place others in “reasonable fear of physical harm to themselves.” The Petitioner allegedly told Sergeant Allman, “I know where you live and I’m going to fuck your daughter.” At the time, pursuant to Sergeant Allman’s testimony, the Petitioner was handcuffed, placed in the back of his cruiser, heading for the regional jail.

First, in terms of whether the Petitioner placed Sergeant Allman’s daughter in reasonable fear of physical harm, that depends on whether Sergeant Allman told his step-daughters, either one, of the event. Second, and (really) overriding the question of whether Sergeant Allman’s daughter(s) even knew or had reasonable fear of the Petitioner’s alleged threat, is whether anyone, particularly Sergeant Allman, given the Petitioner’s predicament at the time of the statement – “cuffed and stuffed,” as it were – could *reasonably* fear harm befalling any person at the hands of the Petitioner at that time.

The issue lends itself to the question, had the alleged threat been made to Sergeant Allman himself, whether he, sitting in the cruiser with the Petitioner and his words, could have charged the Petitioner with “Assault on a Police Officer” pursuant to section 61-2-10b of the West Virginia Code.⁶ The answer is quite simply, no, as an “assault on a police officer” requires the officer be placed in “reasonable apprehension of immediately receiving a violent injury,” and one situated in the back of an officer’s cruiser, handcuffed, is in no such position to do so.⁷

Attempting to connect the logic, the terms “fear,” as referenced in section 27-1-12 of the West Virginia Code, and “apprehension,” as referenced in section 61-2-10b, are often treated as

⁶ It is the Petitioner’s position, that the offense of threatening a terrorist act is, ostensibly, an assault. Moreover, the State has alleged that the Petitioner threatened sexual assault.

⁷ Oddly enough, on cross-examination, Sergeant Allman testified, that had the Petitioner stated “I know where you live and I’m going to fuck you,” he would have charged the Petitioner with “Assault on a Police Officer.” (A.R. 185-186.)

one in the same; and, at times, used interchangeably by this Court, as in footnote 6 of *State v. Sigler*, 224 W.Va. 608, 687 S.E.2d 391 (2009); *State v. Poling*, 207 W.Va. 299, 305, 531 S.E.2d 678, 684 (2000); *Christopher v. Christopher*, 144 W.Va. 663, 671, 110 S.E.2d 503, 508 (1959). Further, *Black's Law Dictionary* defines “apprehension” as “fear.” Black's Law Dictionary, p. 97 (7th ed. 1999). Without the required likelihood that a harm would befall a person, which said likeliness begets a fear and/or apprehension, the State's case fails to sufficiently support the charged offense.

Moreover, given the common, ordinary and accepted meaning of the term “likely” connotes a reasonable expectation on the part of the listener,⁸ and, once again, reflecting upon the evidence presented, the charge cannot stand given the Petitioner's predicament at the time of the offense.

Finally, and reflecting on the person to whom harm must likely befall to convict for a terrorist threat, the State's evidence was insufficient to sustain such a conviction in this matter because Sergeant Allman had made it clear, pursuant to his testimony, that even if the person to whom the Petitioner was referring did not exist,⁹ he would have, nevertheless, charged the Petitioner with the offense. Obviously, and tracking the statutory language of the offense, one cannot threaten an act which is “*likely* to result in serious bodily injury” upon a figment of the imagination.” *See* W.Va. Code § 61-6-24. Emphasis added.¹⁰

According to the sworn testimony of Sergeant Allman, relating to this alleged offense, even if he did not have a daughter, if the daughter did not exist, he would have charged the

⁸ Which also lends itself to the fear and/or apprehension element.

⁹ The Petitioner still raises the issue of whether the “daughter” allegedly referred to by the Petitioner, and cited in the indictment, really exists, as Sergeant Allman only has step-daughters.

¹⁰ The speculative nature of this particular set of circumstances, that a threat to a fictional being violates section 61-6-24 of the West Virginia, serves to further illuminate the danger of the State's position as to what the phrase “likely result in serious bodily injury” means.

Petitioner with threatening a terrorist act. Moreover, according to his testimony, and despite the fact that the terrorist act connected to the threat has to “likely” result in physical harm to somebody, Sergeant Allman said he would charge the Petitioner with terrorist threats even if that “somebody” did not exist.

Clearly, this offense, as charged herein, was born of spite and meant to, perhaps, punish and/or harass the Petitioner for crass statements and the use of profanity.

Nevertheless, such a fact does not support a conviction in this instance by any stretch of the imagination, as a figment of one’s imagination cannot support the “likely” requirement of the charge.

VIII. CONCLUSIONS

The circuit court committed error in this matter. For these reasons and any others which may be apparent to this Court, your Petitioner, James Scott Yocum, respectfully prays that his Petition be granted, that this Court enter an Order granting him leave to appeal the underlying sentence, and for such other relief as this Court deems just and proper.

Respectfully Submitted,

JAMES SCOTT YOCUM
Petitioner and Defendant below

By: _____



Brent A. Clyburn, Esq.
State Bar I.D. No. 10192
THE LAW OFFICE OF
BRENT A. CLYBURN
R.R. 3 Box 529A
Wheeling, WV 26003
(304) 232 – 0509
Of Counsel for Petitioner

IX. CERTIFICATE OF SERVICE

I, Brent A. Clyburn, Esq., counsel for James Scott Yocum, certify that I have served the attached PETITIONER'S BRIEF upon the State of West Virginia by forwarding a true and accurate copy thereof by United States Postal Service, postage pre-paid, to the Office of the Attorney General, Scott E. Johnson, AAG, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301 on the 31st day of January, 2013,



Brent A. Clyburn, Esq.
State Bar I.D. No. 10192
THE LAW OFFICE OF
BRENT A. CLYBURN
R.R. 3 Box 529A
Wheeling, WV 26003
(304) 232 – 0509
Of Counsel for Petitioner