

13-0962

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA.

v. Case No.: 12-F-204
(Judge Yoder)

DANIEL L. HERBERT,
DOB 07/10/1984
SS XXX-XX-0290,

Defendant.

BERKELEY COUNTY
CLERK OF COURT
2013 JUL 29 PM 3:16
VIRGINIA M. SINE, CLERK

SENTENCING ORDER

On July 25, 2013, came the Defendant, in person and by counsel, Matthew L. Harvey, and the State of West Virginia by Christopher C. Quasebarth, Chief Deputy Prosecuting Attorney, for a previously scheduled sentencing hearing.

The record reflects that the Defendant was convicted in this Court on May 29, 2013, by a petit jury on Count Eleven of the Indictment, charging the felony offense of Felon in Possession of a Firearm, in violation of **W. Va. Code § 61-7-7(b)(1)**. Count Eleven was earlier severed for a separate trial from the other counts of the Indictment on the Defendant's motion. Trial on the remaining counts of the indictment is pending.

Neither the Defendant nor his counsel offered any just or legal cause why sentence should not be imposed. The Defendant orally moved to renew his post-conviction motions. The Court denied the motions for the same reasons reflected in the previously entered written denial order. The parties acknowledged receipt of the Pre-sentence Investigation Report. The Defendant noted his objections to the Report.

The Defendant waived his right of allocution. The Defendant's counsel and the State argued their respective positions.

Taking all of these matters, and the papers and pleadings filed herein, into consideration, the Court made its findings, as appear more fully on the record. Based on those findings, it is ORDERED that, upon the conviction of one (1) felony count of Felon in Possession of a Firearm, in violation of **W. Va. Code § 61-7-7(b)(1)**, the Defendant is SENTENCED TO THE STATUTORY DETERMINATE PENALTY OF FIVE (5) YEARS

BKPR
cc: PA
PO
ERS
DOC
Harvey
7-30-13

IN THE PENITENTIARY.

CONVICTION DATE: MAY 29, 2013.

SENTENCE DATE: JULY 25, 2013.

EFFECTIVE SENTENCE DATE: JULY 4, 2012.

FURTHER ORDERED that the Defendant pay all costs in this matter within one (1) year of his release.

FURTHER ORDERED that the Defendant is remanded to the custody of the West Virginia Division of Corrections to begin serving his sentence. Until such time that a representative of the Division of Corrections takes custody of the Defendant, the Defendant is remanded to the temporary custody of the Administrator of the Eastern Regional Jail. The *per diem* cost associated with the Defendant's custody shall be paid solely by the Division of Corrections from the date of his sentencing.

FURTHER ORDERED that the Defendant is to remain housed at the Eastern Regional Jail until further order of this Court while awaiting trial on the remaining counts of the Indictment, which matter is currently scheduled as follows:

Pre-trial Hearing: August 29, 2013, at 9:00 a.m.

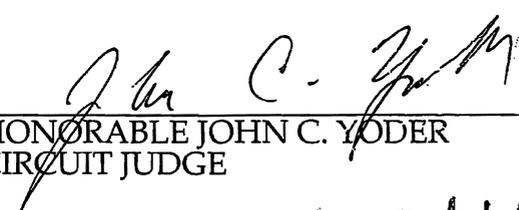
Jury Trial: September 3, 2013, at 9:00 a.m.

The exceptions of the Defendant to the rulings made herein is noted.

The Defendant was advised of his appeal rights. FURTHER ORDERED that, without objection, Mr. Harvey is appointed as counsel for the purposes of appeal.

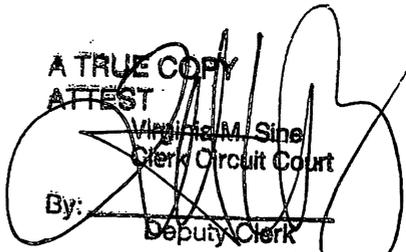
THE CLERK shall enter the foregoing as of the day and date noted below and shall transmit attested copies to: counsel of record; the West Virginia Division of Corrections; and the Eastern Regional Jail.

ENTERED: 7/29/13


HONORABLE JOHN C. YODER
CIRCUIT JUDGE

2

A TRUE COPY
ATTEST


William M. Sine
Clerk Circuit Court

By: _____
Deputy Clerk

CCX

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

Case No. 12-F-204

Judge Yoder, Div. VIII

DANIEL HERBERT,

Defendant.

BERKELEY COUNTY
CIRCUIT CLERK
2013 MAY 21 PM 3:38
VIRGINIA M. SINE, CLERK

**ORDER DENYING DEFENDANT'S MOTION
TO BIFURCATE TRIAL OF COUNT ELEVEN**

On May 21, 2013, this matter came before the Court for decision upon the Defendant's motion for a bifurcated trial of Count Eleven. Though the Court issued a previous Order for Severance of Offense and Bifurcated Trial, upon further consideration and deliberation, this Court decided that it must vacate that Order. The Court has considered the Defendant's motion, the State's response opposing the motion, and the May 16, 2013, oral argument of the parties. The Court hereby denies the Defendant's motion to bifurcate the trial of Count Eleven.

In the October, 2012, term of the Berkeley County Grand Jury, the Defendant was indicted for two counts of Attempted Murder, three counts of Malicious Assault, five counts of Wanton Endangerment, one count of Felony Possession of a Firearm, and one count of Fleeing from a Law Enforcement Officer.

The State alleges the charges arise from the Defendant shooting a twenty-five-year-old man twice and an eight-year-old girl once at the City of Martinsburg Fourth of July celebration at War Memorial Park on July 4, 2012. The State further alleges that after the Defendant fired as many as five shots, the Defendant was chased by city police officers, on foot, out of the park and was captured. The State represents that a video will be introduced showing the Defendant

fleeing the park on foot from police officers and the Defendant throwing a .38 caliber revolver directly in front of the patrol vehicle filming the pursuit.

On March 20, 2013, the Defendant filed a motion to sever Count Eleven charging Felony Possession of a Firearm from the remaining counts of the indictment so the jury would not know the Defendant was a convicted felon when considering the Defendant's guilt on other charges.

On May 16, 2013, the Court granted the Defendant's motion upon no objection by the State. The State elected to proceed to trial on Count Eleven on May 28, 2013.

In addition to moving to sever Count Eleven from the remaining counts, the Defendant requests the Court conduct a bifurcated trial to prevent the State from "mentioning the Defendant's prior conviction." [Def. Motion for Severance and Bifurcation, p. 2.]

The elements of the crime of Felony Possession of a Firearm applicable to this case are: (1) a person, (2) did possess, (3) a firearm, and (4) the person was previously convicted of a felony crime of violence against the person of another. The State alleges the Defendant was previously convicted of Aggravated Robbery.

The Defendant requests the Court not inform the jury of the Defendant's charge of Felony Possession of a Firearm during the first part of the trial. The Defendant further requests the jury only be informed that it is impaneled to determine whether the Defendant was in possession of a firearm.

Possession of a firearm is not illegal in the State of West Virginia without the Defendant being in a category in which his possession of a firearm would be illegal. Therefore, the Defendant is requesting the jury not weigh upon the Defendant's guilt, but should be impaneled to resolve questions or elements piece by piece.

In support of this procedure, the defense cites to State v. McCraine, Syl Pt. 11, 214 W.Va. 188, 588 S.E.2d 177 (2003) which holds that “a trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. This decision modified the Court’s decision a few years earlier in State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999).

Though a broad reading of McCraine would support the Defendant’s position, this Court is of the opinion that the holding should be more narrowly construed. In this regard, the Court is convinced by the reasoning in United States v. Barker, 1 F.3d 957 (9th Cir. 1993). The Ninth Circuit held in Barker that a single offense of being a felon in possession of a firearm may not be bifurcated into multiple proceedings. 1 F.3d 957, 959 (9th Cir. 1993). In Barker, the court based its holding on the reasoning that “[t]he government would be precluded from proving an essential element of the charged offense” and that any “bifurcation order might unfairly confuse the jury, prompting it to exercise its power of nullification on the unwarranted belief that the defendant was charged for noncriminal conduct.” Id. The court also observed that “[t]he bifurcation order removes an element of the crime from the jury’s consideration . . . and changes the very nature of the charged crime.” Id.

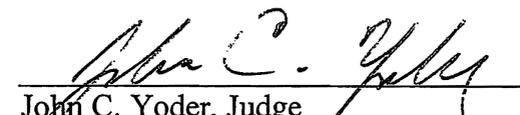
Other federal courts have reached similar conclusions. See United States v. Gilliam, 994 F.2d 97, 101-02 (2d Cir. 1993); United States v. Birdsong, 982 F.2d 481, 482 (11th Cir.1993), cert. denied, 508 U.S. 980, 113 S.Ct. 2984, 125 L.Ed.2d 680 (1993); United States v. Collamore, 868 F.2d 24 (1st Cir. 1989), United States v. Aleman, 609 F.2d 298, 310 (7th Cir. 1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); United States v. Brinklow, 560

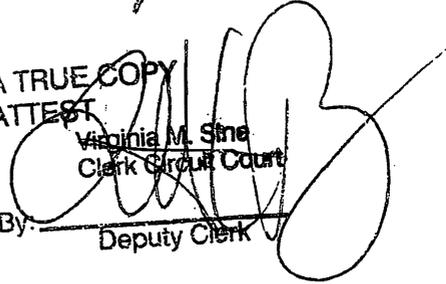
F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978).

Accordingly, the Court finds that guaranteed bifurcation and its procedure outlined in Nichols and modified in McCraime is limited to certain criminal offenses that contain status elements of prior convictions to “enhance” or “recidivise” the same criminal behavior that could otherwise stand alone for jury consideration. In the instant case there is no crime that stands alone for jury consideration if the jury is kept in the dark about the Defendant’s prior conviction.

Wherefore, the Court finds that the bifurcation procedure discussed in Nichols and McCraime is not applicable to the charge of Felony Possession of a Firearm. However, the Court finds that the Defendant may stipulate the he “previously was convicted of a felony crime of violence to the person of another.” If the Defendant chooses to stipulate to this fact, pursuant to Old Chief v. United States, 519 U.S. 172, (1997), the State would be prohibited from introducing any other evidence, besides the stipulation, on this element.

The Clerk shall enter this order as of the date hereinbefore listed and send copies of this order to counsel of record.


John C. Yoder, Judge
Twenty-Third Judicial Circuit

A TRUE COPY
ATTEST
Virginia M. Stone
Clerk Circuit Court
By: 
Deputy Clerk