

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

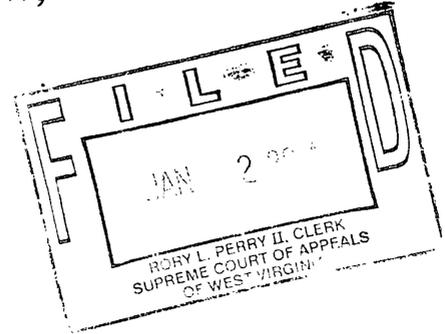
DOCKET NO. 13-0962

(Berkeley County Circuit Court Case No. 12-F-204)

**STATE OF WEST VIRGINIA, PLAINTIFF BELOW,
RESPONDENT,**

v.

**DANIEL L. HERBERT, DEFENDANT BELOW
PETITIONER.**



**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
HONORABLE JOHN C. YODER, JUDGE
CASE NO. 12-F-204**

DANIEL L. HERBERT,
Defendant/Respondent, below



Matthew L. Harvey, Esquire
(WV State Bar No. 9813)
TAYLOR AND HARVEY
134 W. Burke Street
Martinsburg, WV 25401
(304) 263-7900
E-mail: matt_harv@yahoo.com

ASSIGNMENTS OF ERROR

Defendant timely requested that the trial court bifurcate the status element of a prior felony conviction of violence from the charge of a Person Prohibited from Possession of a Firearm as required in State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003), to allow him an opportunity to challenge the validity of the prior conviction. App. Pg. 4

The trial court denied the Petitioner/Defendant's request and the Defendant was forced to either stipulate to a prior felony conviction of a crime of violence, or to allow the jury to hear unfairly prejudicial evidence of a prior conviction without the Defendant first being allowed an opportunity to present a challenge to the validity of the prior conviction. The court instructed the jury as follows:

“you have heard a stipulation concerning a prior conviction of the defendant. This evidence is admitted for limited purpose only. It maybe considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. This instance, a stipulation that the defendant has previously been convicted of a felony crime of violence against another person may be considered only for the purpose of determining whether the State has established that element. Accordingly, this evidence may be considered by you only for the limited purpose for which it has been admitted” App. Pg. 21-22

which Petitioner submits is prejudicial error.

STATEMENT OF THE CASE

In the October, 2012 Term of Court, the Petitioner/Defendant was indicted for on three (3) counts of Malicious Assault, five (5) counts of Wanton Endangerment, one (1) count of Flee from Law Enforcement Officer by Means Other than Use of Vehicle, and one (1) count of Person Prohibited from Possession of a Firearm. App. Pg. 7

On the 16th day of May, 2013, counsel for the Petitioner/Defendant filed a Motion for Severance of Offense and Bifurcated Trial. This motion asked the court to sever Count 11 of the indictment, Person Prohibited from Possession of a Firearm from the remaining charges and then bifurcate the issue concerning the validity of the predicate felony. App. Pg. 4

The motion to sever was unopposed by the State and granted by the trial court. The issue of bifurcation was initially granted by the court and then reversed and denied at a subsequent hearing on the 21st day of May, 2013. The State elected to try the Person Prohibited from Possession of a Firearm first. App. Pg. 12

The Defendant then stipulated to the prior felony, to avoid the jury from hearing details of the prior felony conviction, and the case went to trial on the 28th of May, 2013. The jury returned a verdict of Guilty the next day. App. Pg. 1

SUMMARY OF THE ARGUMENT

Defendant timely requested that the trial court bifurcate the status element of a prior felony conviction of violence from the charge of a Person Prohibited from Possession of a Firearm as required in State v. McCraine, 214 W.Va. 188, 588 S.E.2d 177 (2003), to allow him an opportunity to challenge the validity of the prior conviction.

The trial court denied the Petitioner/Defendant's request and the Defendant was forced to either stipulate to a prior felony conviction of a crime of violence, or to allow the jury to hear unfairly prejudicial evidence of a prior conviction without the Defendant first being allowed an opportunity to present a challenge to the validity of the prior conviction. The court instructed the jury as follows:

“you have heard a stipulation concerning a prior conviction of the defendant. This evidence is admitted for limited purpose only. It maybe considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. This instance, a stipulation that the defendant has previously been convicted of a felony crime of violence against another person may be considered only for the purpose of determining whether the State has established that element. Accordingly, this evidence may be considered by you only for the limited purpose for which it has been admitted” App. Pg. 21-22

The West Virginia Supreme Court has ruled in McCraine, supra, that

“we hold 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 an alleged prior conviction as a status element and timely requests that the jury consider the issue of a prior conviction separately from the issue of the underlying charge.”

The language in McCraine, supra, does not provide discretion for the trial court to deny the Defendant's May 16th, 2013 timely request to challenge the prior conviction's validity. The trial court made a finding in McCraine, supra. The trial court in reliance of five (5) clearly distinguishable Federal decisions made a finding that McCraine, supra, only applies to status

elements of prior convictions to “enhance” or “recidivate” the same criminal conduct that could otherwise stand alone for jury consideration.

The finding by the trial court is not supported by the holding in McCraine, supra, and forced the Defendant to stipulate to an element of an offense without an opportunity to challenge the validity of the prior conviction, thereby alleviating the burden from the state of legally proving every element beyond a reasonable doubt.

ARGUMENT

It is Petitioner's contention that the Circuit Court of Berkeley County, the Honorable John C. Yoder presiding, committed reversible and prejudicial error when the trial Court, over counsel for Petitioner's objection, entered its Order of May 20th, 2013, and denied Petitioner's request to bifurcate his trial, by requiring the State to first present evidence that Petitioner knowingly possessed a firearm on July 4, 2012 and the jury should so find beyond a reasonable doubt before allowing the State to offer evidence the Petitioner was previously convicted of a crime of violence. App. 23-27 and App. Pg. 25-27. In refusing to follow what Petitioner believes is the correct legal standard as discussed in State v. McCraine, 588 S.E.2d 177, 214 W.Va. 188 (2003), and State v. Reed, 625 S.E.2d 348, 218 W.Va. 586 (2005), the Circuit Court chose to instead rely on several federal decisions to-wit: U.S. v. Barker, 1 F.3d. 957 (1993), U.S. v. Gilliam, 994 F.2d 97 (2nd Cir. 1993); U.S. v. Birdsong, 982 F.2d 481 (11th Cir. 1993); U.S. v. Collamore, 868 F.2d 24 (1st Cir. 1989); and U.S. v. Aleman, 609 F.2d 298 (7th Cir. 1979). and instructed the jury at trial as follows:

“you have heard a stipulation concerning a prior conviction of the defendant. This evidence is admitted for limited purpose only. It maybe considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. This instance, a stipulation that the defendant has previously been convicted of a felony crime of violence against another person may be considered only for the purpose of determining whether the State has established that element. Accordingly, this evidence may be considered by you only for the limited purpose for which it has been admitted” App. Pg. 21-22

Petitioner submits that applying the legal standard as discussed in the above federal cases i.e. whether it is per se prejudicial to allow a jury to made aware of the defendant's prior conviction(s) when said prior conviction(s) is/are elements of the offense to be tried, was an incorrect statement of law to be utilized by the Court in deciding this issue. In each of the Federal cases cited above, the

Federal Court described/defined the prior convictions as elements of the offense to be tried and thus in each case, bifurcation was denied.

Judge Yoder, in his order of May 16th, 2013, which reversed and vacated his original Order granting bifurcation, based his grounds and reasons to ignore McCraine, supra, because this Court and McCraine described his prior convictions as mere “status” elements, not as what your Petitioner believes should be more correctly described as “integral” elements. Petitioner submits whether a prior conviction is a “status” element or an “integral” element, is an artificial distinction without a difference when deciding this precise issue. The reference to prior convictions whether set forth as an element of statute upon which a Defendant is being tried or is not contained in the language of the statute for which it the Defendant is being tried but is contained in a collateral statute elevating the offense of a misdemeanor to a felony, or enhancing the sentence upon conviction, raises the same issues that are discussed in both State v. McCraine, supra and the later decision of State v. Reed, supra. The rule from these two decisions is if a defendant desires to challenge the validity of a prior conviction, he is entitled to bifurcation of the trial proceedings, to-wit:

“...we hold 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 an 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” 214 W.Va. at 193/194.

Judge Yoder ignored the fact that this court has broadened the rights of a defendant to permit him to challenge the validity of a prior conviction in the Court where the prior conviction is being introduced by the State to either elevate the offense from a misdemeanor to a felony offense, or to enhance the sentence that your Petitioner may receive upon conviction of the underlying offense. Petitioner submits this is not the rule of law in the majority of the federal courts, wherein under the

federal system, a defendant who seeks to challenge the validity of a prior conviction being used to enhance the sentence upon a conviction may only do so by a collateral proceeding to-wit: either a habeas corpus or coram nobis proceeding and thus a defendant in federal court is not thus permitted to challenge the conviction in a court where the conviction is being introduced to enhance the penalty upon conviction. See U.S. v. Martinez Cruz, No. 12-3050 (DC 2013), U.S. v. Roman, 989 F.2d 1117 (11 Cir. 1993) U.S. v. Isaacs, 14 F.3d. 106 (1st Cir. 1993), U.S. v. Cooper, 203 F.3d (1279 11.Cir 2000), Cuppett v. Duckworth, 8 F.3d. 1132 (7th Cir. 1993), U.S. v. Spell, 44 F.3d 936 (11. Cir 1995).

Regardless of whether by stipulation or by the calling of witnesses and the presentation of evidence in a unitary trial wherein the jury is being asked to determine the validity of the conviction, the validity of the prior conviction, as well as the guilt or innocence of your Petitioner, the prejudice to a defendant, in this case your Petitioner is the same. What makes either procedure prejudicial to your Petitioner is the denial to Petition of his right an opportunity to offer a challenge to the validity of the prior conviction outside the jury's presence, in a bifurcated proceeding, only after the jury had first decided beyond a reasonable doubt that defendant did possess a firearm. By ignoring the rule of law as set forth in State v. McCraine, supra and State v. Reed, supra, Petitioner's right to due process of law, pursuant to Article III, Section 10 of the West Virginia Constitution and the Fifth and Fourteenth Amendment of the United States Constitution was denied even though as discussed in footnote 2 of McCraine, supra, decision, this court termed or deemed this particular issue as a "...prophylactic procedural issue".

The final basis to support Petitioner's argument that Judge Yoder erred in his decision to rely on the five (5) above cited federal cases is that even though they were all decided prior to both

McCraine, supra and Reed, supra, being decided, none of the federal decisions was ever relied on by this Court in either of its decision.

STATEMENT REQUESTING ORAL ARGUMENT

Now comes your Petitioner, pursuant to Rule 19 of the Revised Rules of Appellate Procedure and requests that this Court schedule the matter for oral argument on the following grounds and for the following reasons, to-wit: this case involves an assignment of error in which there was a misapplication of settled law by the trial court judge, the Honorable John C. Yoder, Judge of the Circuit Court of Berkeley County; 2) this case involved an unsustainable exercise of discretion wherein the law governing that discretion was and is settled but was not followed by the trial court Judge, the Honorable John C. Yoder, Circuit Judge of Berkeley County; 3) this case involved a narrow issue of law as set forth in the summary of the argument and in the argument portion of the brief. Petitioner believes that an arguments pursuant to Rule 19 (c) of ten minutes is more than sufficient but does believe that it would not be inappropriate to schedule this case for oral argument of 20 minutes if the court does find that pursuant to Rule 20(A)(4) the case involves an inconsistency or conflict among the decisions of lower tribunals in this state.

CONCLUSION

Petitioner requests that this Court reverse and vacate the conviction and sentencing order entered on the 24th day of October, 2013, and award to your Defendant a new trial; said new trial to be a bifurcated proceeding wherein Defendant would be permitted to challenge the validity of the alleged prior conviction if the jury finds the the Defendant possessed a firearm beyond a reasonable doubt.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0962

**STATE OF WEST VIRGINIA, PLAINTIFF BELOW,
RESPONDENT,**

v.

**DANIEL L. HERBERT, DEFENDANT BELOW
RESPONDENT**

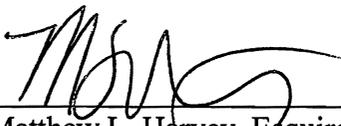
CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2013, true and accurate copies of the foregoing **APPEAL BRIEF TO THE WEST VIRGINIA SUPREME COURT FROM THE CIRCUIT COURT OF BERKELEY COUNTY, HONORABLE JOHN C. YODER, JUDGE, CASE NO. 12-F-204** were deposited in the United States mail contained in a postage pre-paid envelope addressed to counsel for all other parties to this petition as follows:

The Honorable John P. Yoder
Judge, Berkeley County Circuit Court
Berkeley County Judicial Center
380 W. South Street
Martinsburg, WV 25401

Christopher Quaesbarth, Esq.
Assistant Prosecuting Attorney
Berkeley County Judicial Center
380 W. South Street
Martinsburg, WV 25401

Signed: _____


Matthew L. Harvey, Esquire
(WV State Bar No. 9813)