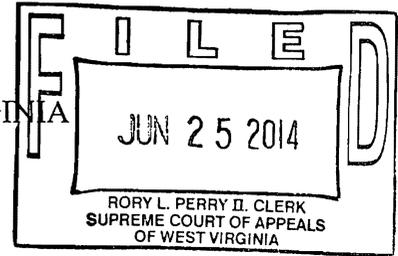


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

(Contains Confidential Material)



STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.13-1123

Circuit Court No. 13-F-4 and 13-F-6  
(Summers County)

KEITH D.,

Petitioner.

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PETITIONER'S REPLY BRIEF

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## REPLY ARGUMENT

Keith D. should be permitted to withdraw his plea or request specific performance of the sentencing range the State originally promised because he did not have actual notice his plea could result in a life sentence. The State, trial court, and even his own lawyer represented the most prison time Keith D. could receive was ten years, not a life habitual offender sentence, and this disparity between what he was promised and what he received is a fair and just reason to withdraw his plea or request specific performance. (*See* A.R. 15-16, 40a, 53-54, 62-63).

This relief is consistent with *State ex. rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) (Per Curiam), insofar as that case can be distinguished. Furthermore, all but one other state has rejected the State's position that it is a fair tactic for it to promise one sentence to induce a plea, and then surprise the defendant by unilaterally changing the terms of the plea contract by seeking a life sentence. (*See* Pet'r's Br. at 9-10). This strong majority, and also general public policy, favors the rule Keith D. requests – that defendants have actual notice they may qualify for habitual offender sentencing before they can plead guilty to the triggering offense.

The State responds that *Appleby* is controlling in this case, and that it precludes the relief Keith D. seeks. (Resp's Br. 7-8). However, in order to reach this conclusion the State must give *Appleby* an unduly broad interpretation. In *Appleby*, the defendant knew he could receive a habitual offender sentence because the State told him so prior to his guilty plea. *Appleby*, 213 W. Va. at Footnote 2, 6. Mr. Appleby attempted to plead to a lesser included offense to avoid this result, and the State refused because, as it affirmatively indicated, it intended to seek a life sentence. *Id.* He then pleaded guilty to the felony and sought immediate sentencing – again, presumably trying to avoid habitual offender proceedings by cutting short the time in which the

State could act. *Id.* at 508; *see also id.* at Footnote 7. Finally, when the court postponed sentencing and the State filed its information, Mr. Appleby sought extraordinary relief to prohibit his habitual offender trial. *Id.* at 507. In pertinent part he asked that defendants receive notice in a particular manner – by the court, on the record, during the plea colloquy – without regard for whether an individual defendant already had actual notice conveyed in some other way, as Mr. Appleby did. *Id.* at 510. Also, besides his generic request for appropriate relief, Mr. Appleby only asked for a severe remedy, that the State be prohibited from trying him. *Id.* at 509, 510.

This Court denied Mr. Appleby’s petition on those facts. *Appleby*, 213 W. Va. at 509. Compare those facts to Keith D.’s situation. Neither Keith D. nor his lawyer knew he could receive a life sentence. (A.R. 62-63). Keith D.’s lawyer never discussed the possibility with him, it did not inform his lawyer’s tactical decisions, and his lawyer said that had he known, he never would have advised his client to plead guilty. (A.R. 38, 40a, 62-63). The State, however, knew of Keith D.’s record and that he was eligible for a habitual offender sentence. (A.R. 36). The State did not tell Keith D. it could or would do so, and instead represented that the most he could receive would be a ten year sentence. (A.R. 15-16). The State even agreed to remain silent as to sentencing. (A.R. 16). Only after Keith D. accepted the plea, induced by the State’s promises, did the State announce its intent to seek a life sentence. (A.R. 9-12).

Notwithstanding these differing facts, the State argues the foregoing principles in *Appleby* prohibit Keith D. from prevailing on appeal. However, this does not obtain as a logical necessity. This Court has the authority to prohibit defendants like Mr. Appleby from gaming the system by cutting short the State’s time and also prohibit the State from doing likewise by taking advantage of a defendant’s ignorance and employing a bait and switch tactic, as happened here. Therefore,

distinguishing the two cases does not render *Appleby* inexplicable; it simply demarcates its reach, and establishes that prosecutors cannot abuse the process, either.

The State further argues that notwithstanding the contrary judgment of all but one of the states with general habitual offender statutes, (*See* Pet'r's Br. at 9-10), its interpretation of *Appleby* is on solid legal footing because "...the defendant need not be advised of all collateral consequences of his plea" and the Fourth Circuit's ruling in *Appleby v. Warden, N. Regional Jail & Corr. Authority*, 595 F.3d 532 (4th Cir. 2010) supports the continuing vitality of the direct/collateral dichotomy. (Resp's Br. at 6, 10-11). However, it does not follow from the premise "defendants need not be advised of *all* collateral consequences" that they need not be advised of *any* collateral consequences. This Court has ruled, for example, that if a defendant charged with a sexual offense pleads down to a lesser included offense that is not explicitly sexual, the trial court must inform him or her of sexual offender registration requirements even though it is merely within the court's discretion to make a finding requiring the defendant to register. *See* Syllabus Point 1, *State v. Whalen*, 214 W. Va. 299, 588 S.E.2d 677 (2003).

The State's argument regarding the Fourth Circuit's disposition of *Appleby v. Warden*, cited *supra*, is also unavailing. That case was decided before the United States Supreme Court issued its opinion in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010). *Compare id. with Appleby v. Warden N. Regional Jail & Corr. Facility*, 595 F.3d 532 (4th Cir. 2010). *Padilla* weakens the direct/collateral dichotomy by ruling the distinction does not apply to consequences "intimately related to the criminal process," and thus defendants must be advised of these consequences even if a state has declared them collateral. *See Padilla*, 559 U.S. at 365-66. Even civil penalties may be intimately related to the criminal process if they are sufficiently severe and

automatic, but this analysis is inapplicable here. *See, id.* at 365-66. Habitual offender proceedings are criminal in West Virginia, and it is axiomatic that criminal proceedings are intimately related to criminal process.

Finally, public policy supports Keith D.'s position that prosecutors should not be allowed to bait and switch a defendant during plea bargaining. The State repeats the policy argument from *Appleby*, that prosecutors may not know at the time the defendant pleads that he or she is eligible for habitual offender sentencing. (Resp's Br. at 12). This argument may have been persuasive in *Appleby*, but it is not compelling here. Keith D. is not asking for a rule requiring prosecutors to elect whether to file a habitual offender information at the time of the plea. He is merely asking that the defendant receive notice in some fashion that past convictions could result in a higher sentence than what the prosecutor is representing. Far from putting a burden on the State, all this rule does is keep it honest.

Instead, actual notice furthers several important policies. Notice provides better fairness to the accused, and helps legitimate the finality accorded to guilty pleas. Especially with regards to second-offense habitual offenders, actual notice that persistent criminality will result in harsher sentences better fulfills the deterrent intent behind the law. Perhaps most important to the criminal justice system as a whole, requiring the State to negotiate in good faith with defendants will foster plea bargaining. The State does not rebut any of this.

### **CONCLUSION AND REQUEST FOR RELIEF**

Keith D. respectfully requests that this Court reverse the trial court's denial of his motion to withdraw his plea, and remand the case back to the trial court with instructions to either

withdraw his plea or, if justified by the circumstances and Keith D. so requests, order specific performance of the agreed upon sentencing range absent enhancement.

Respectfully submitted

Keith D.,  
By Counsel

A handwritten signature in black ink, appearing to read "Matt Brummond", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Matthew Brummond, hereby certify that on this 25 day of June, 2014, a copy of the foregoing Petitioner's Reply Brief, was sent via U.S. Mail to counsel for respondent, Derrick Knopp, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, 6<sup>th</sup> Floor, Charleston, WV 25301.

A handwritten signature in black ink, appearing to read "Matt Brummond", written over a horizontal line.

Matthew Brummond  
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