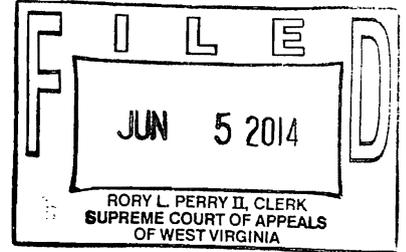


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1123



STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent,

v.

KEITH D.,
Defendant Below,
Petitioner.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In March 2013, an indictment was returned in the Circuit Court of Summers County, West Virginia, charging Keith D. (“Petitioner”) with four counts of Sexual Assault in the First Degree, one count of Sexual Abuse in the First Degree, five counts of Sexual Abuse by a Parent or Guardian, and four counts of Incest. (App. at 1-6.) Each count in the indictment related to alleged incidents occurring between Petitioner and his five year old stepdaughter during a period between May 5, 2012 and December 19, 2012. (*Id.*) Petitioner was also charged in a separate indictment with one count of Possession of a Firearm by a Prohibited Person. (*Id.* at 7-8.)

On March 8, 2013, Petitioner pled not guilty to the charges contained within the two indictments at his arraignment hearing, and the circuit court thereafter set deadlines for motions and discovery and scheduled a status conference on May 3, 2013. (*Id.* at 42-44.) During the status conference on May 3, 2013, Petitioner’s counsel brought to the court’s attention that he had filed a motion for a forensic evaluation to which the State had no objection. (*Id.* at 45.) The circuit court thereafter referred Petitioner to Clayman & Associates for a forensic evaluation and continued the matter until after the evaluation was completed. (*Id.*) A hearing was held on June 14, 2013, in regard to Petitioner’s evaluation wherein it was determined that Petitioner was competent to stand trial. (*Id.* at 47.) Petitioner’s counsel asked for additional days during this hearing to discuss with Petitioner whether to retain a psychiatrist and subsequently moved to continue the trial date. (*Id.*) The court granted Petitioner’s motion and continued the matter generally and set a status conference for July 8, 2013. (*Id.* at 47-48.)

During the July 8, 2013, hearing the State informed the circuit court that a plea agreement had been reached in regard to both indictments wherein Petitioner would plead guilty to Sexual Assault in the Third Degree and to Possession of a Firearm. (*Id.* at 49.) A plea hearing was then scheduled and held on July 19, 2013. (*Id.*) At the plea hearing, Petitioner pled guilty to both

being a convicted felon in possession of a firearm and to third degree sexual assault, a lesser-included offense of Sexual Assault in the First Degree as charged in count one of the indictment. (*Id.* at 13-18, 19-22, 52-59.) The State agreed to dismiss the remaining thirteen counts against Petitioner. (*Id.*) After the circuit court adjudged Petitioner guilty of both offenses, Petitioner agreed to waive his right to a presentence investigation report wanting to be sentenced that day. (*Id.* at 58.) The State opposed asserting that the victim's advocate, the mother of the victim, wanted to be a part of sentencing and should be given the opportunity to be heard.¹ (*Id.*) The circuit court thereafter scheduled sentencing for August 2, 2013. (*Id.* at 59.)

On July 25, 2013, the State filed a recidivist information alleging that Petitioner had been previously convicted and sentenced upon two prior felonies. (*Id.* at 9-11.) The information alleged that Petitioner pled guilty in 1996 to the felony offense of Grand Larceny, and that Petitioner also entered a plea of guilty in 2004 to the felony offense of Voluntary Manslaughter. (*Id.*) On August 2, 2013, Petitioner filed a motion to withdraw his guilty plea arguing that neither the State nor defense counsel notified Petitioner he would be potentially subject to a life sentence in prison. (*Id.* at 38, 62-63.) The court, after reviewing the authority cited by Petitioner, denied Petitioner's motion. (*Id.* at 23, 63-64.)

¹ Petitioner asserts that the State's given reason for setting sentencing for a later date was at least partially a pretext as the State subsequently filed a recidivist information. (Pet'r's Br. at 2.) Petitioner's own given reason to proceed immediately to sentencing (his inability to post bond) may be equally construed as a pretext as Petitioner points out in his brief that the State could not have filed a recidivist information had Petitioner already been sentenced. (*Id.*) See *State v. Layton*, 189 W. Va. 470, 491-92, 432 S.E.2d 740, 761-62 (1993) (Where defendant had tactical reason for not wanting presentencing investigation report, which was that his recidivist information would not appear, defendant meaningfully waived his right to presentencing report by requesting immediate sentencing).

On September 25, 2013, Petitioner was tried by jury on the charges within the recidivist information. (*Id.* at 77-151.) The jury returned a verdict finding that Petitioner was the same person previously convicted of Grand Larceny in 1996 and Voluntary Manslaughter in 2004. (*Id.* at 128.) The circuit court subsequently sentenced Petitioner to life imprisonment. (*Id.* at 24-32, 129.) Petitioner now takes the instant appeal.

SUMMARY OF THE ARGUMENT

Petitioner argues on appeal that the circuit court abused its discretion when it denied Petitioner's motion to withdraw his guilty plea. Petitioner specifically argues that this Court should determine that defendants are required to have actual knowledge of possible recidivist proceedings before their decision to plead guilty and further asks this Court to either distinguish or overrule its decision in *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) to the extent it conflicts with Petitioner's claim.

Contrary to Petitioner's assertions, the circuit court did not abuse its discretion when it denied Petitioner's motion to withdraw his plea. Petitioner is not entitled under West Virginia law to be advised of the possibility of recidivist proceedings before entering a plea of guilty. Accordingly, Petitioner's claim must be rejected and the decision of the Circuit Court of Summers County affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case as the dispositive issue has been decided. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision would be appropriate.

ARGUMENT

I. Standard of Review.

“If a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed, the court may permit withdrawal of the plea if the defendant shows any fair and just reason.”

W. Va. R. Crim. P. 32(e). This Court employs the following standard of review in regard to a circuit court’s decision to deny a motion to withdraw a plea:

“Notwithstanding that a defendant is to be given a more liberal consideration in seeking leave to withdraw a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing. Moreover, a trial court's decision on a motion [to withdraw a plea] will be disturbed only if the court has abused its discretion.”

Syl. Pt. 2, *Duncil v. Kaufman*, 183 W. Va. 175, 176, 394 S.E.2d 870, 871 (1990).

II. Petitioner is Not Entitled Under West Virginia Law to be Advised of the Possibility of Recidivist Proceedings Before Entering a Plea of Guilty.

Petitioner argues that the circuit court erred when it denied his motion to withdraw his guilty plea because Petitioner did not know prior to entering his plea that he could later be convicted under W. Va. Code § 61-11-18 for having been convicted of a third felony offense.

(Pet’r’s Br. at 6.)

“The law is clear that a valid plea of guilty requires that the defendant be made aware of all the direct consequences of his plea. By the same token, it is equally well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea, or, as one Court has phrased it, of all possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty,”

State ex rel. Appleby v. Recht, 213 W. Va. 503, 511, 583 S.E.2d 800, 808 (2002) (per curiam) (quoting *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1365–66 (4th Cir.1973)).

“The distinction between ‘direct’ and ‘collateral’ consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Id.* at 511, 583 S.E.2d at 808 (quoting *Cuthrell*, 475 F.2d at 1366).

W. Va. Code § 61-11-18(c) states that “[w]hen it is determined, *as provided in section nineteen of this article*, that [a] person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the state correctional facility for life.” (emphasis added). Section nineteen of this article provides that the prosecuting attorney must file an information upon the circuit court setting forth a person’s previous convictions and sentences. W. Va. Code § 61-11-19. If the person charged within the information denies or stands silent as to the allegations of his/her previous convictions, the statute then requires a jury to be empanelled to inquire whether the person charged is indeed the same person mentioned within the information. *Id.*

In *Appleby*, this Court determined that the imposition of a life sentence under the procedures set forth in W. Va. Code §§ 61-11-18 & 19 is not “definite, immediate, and largely automatic,” as to require “a criminal defendant [to] be advised of the possibility of habitual criminal proceedings prior to the entry of a guilty plea.” *Appleby*, 213 W. Va. at 511-12, 583 S.E.2d at 808-09. This Court reasoned as follows:

“The State not only retains the discretion to decide when to pursue recidivist sentencing (or to decide not to so proceed), but the separate nature of the recidivist proceeding requires the State to satisfy a number of requirements, such as: (1) filing a written information, Syl. pt. 1, *State ex rel. Cox v. Boles*, 146 W.Va. 392, 120 S.E.2d 707 (1961); (2) proving “beyond a reasonable doubt that each penitentiary offense, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence[.]” Syl., *State v.*

McMannis, 161 W.Va. 437, 242 S.E.2d 571 (1978); and (3) proving beyond a reasonable doubt to the jury the identity of the defendant. W. Va.Code § 61-11-19; Syl. pt. 4, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).”

Id. at 511, 583 S.E.2d at 808. Therefore, given the foregoing authority, the circuit court cannot be deemed to have abused its discretion when it denied Petitioner’s motion to withdraw his guilty plea.

Petitioner nonetheless argues that the *Appleby* decision should be distinguished or overruled to the extent it is in conflict with his claim. (Pet’r’s Br. at 6.) Petitioner asks this Court to rather “recognize that defendants should receive actual notice of the State’s ability and intent to file habitual offender informations prior to trial courts accepting their guilty pleas, preferably conferred on the record.” (*Id.* at 6-7.) Petitioner attempts to distinguish *Appleby* from this case by arguing that the defendant in *Appleby* was seeking a more burdensome remedy, and that the defendant in *Appleby* did in fact have actual notice of the possibility of recidivist proceedings. (*Id.* at 7-8.)

However, to find that *Appleby* is distinguishable and limit the decision to its facts would render this Court’s conclusion in *Appleby* inexplicable. *Appleby* expressly concluded that criminal defendants are not required to be advised of the possibility of habitual criminal proceedings because habitual criminal proceedings are not a direct consequence of a defendant’s guilty plea. *Appleby*, 213 W. Va. at 512, 583 S.E.2d at 809. To accept Petitioner’s argument, however, would nevertheless limit the application of *Appleby* to those instances where defendants have in fact been advised as to the possibility of habitual offender proceedings at some point prior to a guilty plea. This limitation renders the above conclusion in *Appleby* futile.

Petitioner also argues that the remedy of requiring defendants to have actual knowledge of recidivist proceedings before entering a plea of guilty is less onerous than the remedy asked for in *Appleby* where the defendant demanded to be informed of habitual offender eligibility by the trial court in plea colloquies. (Pet'r's Br. at 7-8.) This distinction is also unfitting because the remedy asked for in *Appleby* is no more arduous than that asked for by Petitioner. In fact Petitioner's remedy asks indirectly what the defendant in *Appleby* asked for directly. Under Petitioner's remedy, circuit courts would essentially be required to make sure defendants have been informed of the possibility of recidivist proceedings prior to their guilty plea lest they run the risk of a defendant being entitled to withdraw his guilty plea later down the line.

Because *Appleby* runs contrary to the relief Petitioner asks for in the instant appeal, the bulk of Petitioner's argument asks this Court to overrule its *Appleby* decision. (Pet'r's Br. at 8-16.) Petitioner argues that West Virginia's procedure for habitual offender proceedings whereby a separate proceeding is commenced after the underlying conviction is a minority approach as the vast majority of states address the defendant's habitual offender status in the same proceeding as the underlying felony. (Pet'r's Br. at 9.) West Virginia's two proceeding system is defined by statute, and as Petitioner recognizes, has been determined not to violate federal due process by the United States Supreme Court in *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501 (1962). (Pet'r's Br. at 8.) *Cf.* Syl. Pt. 3, *W. Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 329, 472 S.E.2d 411, 414 (1996) ("If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery.").

Petitioner also argues that the direct versus collateral distinction upon which *Appleby* rested is of questionable validity given the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010). (Pet'r's Br. at 11.) The defendant in *Padilla* filed for post-conviction relief arguing that his attorney was ineffective in misadvising him about potential for deportation as a consequence of his guilty plea. *Padilla*, 559 U.S. at 359, 130 S. Ct. at 1478. The Supreme Court found that deportation as a consequence of a criminal conviction was "uniquely difficult to classify as a direct or a collateral consequence" and subsequently found that the collateral versus direct distinction was ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. *Id.* at 366, 130 S. Ct. at 1482. Importantly, however, the Supreme Court determined in *Padilla* that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context." *Id.*

Thus the *Padilla* Court did not call into question reliance on the direct versus collateral distinction generally, but rather found that the distinction was difficult to apply in the context of an ineffective assistance claim concerning the risk of deportation. As opposed to *Padilla*, wherein the Supreme Court found it difficult to divorce the deportation penalty from the conviction, West Virginia determined in *Appleby* that recidivist proceedings were not a direct, automatic result of a guilty plea. *Appleby*, 213 W. Va. at 511-12, 583 S.E.2d at 808-09. Further undermining Petitioner's argument that the validity of *Appleby* is questionable is the Fourth Circuit's affirmance of this Court's reasoning in *Appleby* as not being contrary to federal law.

The defendant in *Appleby* applied for federal relief regarding this Court's decision concerning whether he had entered his guilty plea "knowingly and voluntary, in light of the

question whether his sentence of life imprisonment was a direct or collateral consequence of his guilty plea.” *Appleby v. Warden, N. Reg'l Jail & Corr. Facility*, 595 F.3d 532, 535 (4th Cir. 2010). The defendant asserted in his appeal to the Fourth Circuit that “he was never told that by pleading guilty that he might be subject to a sentence in excess of the indeterminate consecutive sentence of two to six years imprisonment.” *Id.* at 536. The Fourth Circuit affirmed the district court’s denial of the defendant’s claim for federal relief agreeing with this Court’s decision in *Appleby* “that recidivist proceedings are of a ‘separate nature’” *Id.* at 538. The Fourth Circuit explained as follows:

“First, even if a defendant has committed the requisite predicate crimes, it is not a certainty that the recidivist information will be filed. The decision to file the recidivist information is soundly left to the prosecuting attorney’s discretion. W. Va.Code § 61–11–19; *see also Rummel v. Estelle*, 445 U.S. 263, 281, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (“It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes....”). Because the recidivist information is filed after the court accepts the defendant’s guilty plea, and because the prosecuting attorney has the discretion to decide whether to file it, the trial court cannot necessarily be expected to have knowledge of the possibility. *See United States v. Cariola*, 323 F.2d 180, 186 (3d Cir.1963) (“[U]nsolicited advice concerning *539 the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required.”).”

Id. at 538-39. The Fourth Circuit further explained:

“Second, if the prosecuting attorney decides to file the recidivist information, it must be timely and a separate proceeding must be held and several additional elements must be proven. The fact that each predicate offense was actually committed and that the defendant is the person who committed these crimes must be proven beyond a reasonable doubt. W. Va.Code § 61–11–19. If a jury is impaneled for the recidivist proceedings, that jury is completely distinct from that of the original proceeding. *See George v. Black*, 732 F.2d 108, 110–11 (8th Cir.1984) (holding that a mandatory mental health commitment proceeding is not a direct consequence of the plea because the “proceedings are completely distinct from the original criminal proceedings and are conducted by a different tribunal”). Thus, the nature of recidivist proceedings pursuant to the West Virginia recidivist

statutes verifies that those proceedings are not a “direct” consequence of the plea because they are not “definite, immediate and largely automatic.”

Id. at 538-39. The Fourth Circuit also found instructive the United States Supreme Court opinion in *Oyler*, *supra*, which emphasized that “due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding.” *Id.* at 539 (quoting *Oyler*, 368 U.S. at 452, 82 S. Ct. at 504).

Contrary to Petitioner’s assertions, the continued vitality of this Court’s decision in *Appleby* is not under attack. The policy behind the *Appleby* Court’s decision wherein it determined that defendants are not *required* to be advised of possible recidivist proceedings remains sound. As the *Appleby* Court explained:

“To hold otherwise may result in unacceptable consequences—a defendant could plead guilty to a possible triggering felony (well aware, of course, of his own criminal record), while the State is ignorant of the predicate felonies which could implicate West Virginia Code § 61–11–18. The defendant could then seek to void the plea based on lack of notice of the habitual criminal proceedings. ‘The purpose of the habitual criminal statute is to deter a person from future criminal behavior[,]’ *State v. Pratt*, 161 W.Va. 530, 546, 244 S.E.2d 227, 236 (1978) (citations omitted), and ‘to protect society from habitual criminals’ *State v. Stout*, 116 W.Va. 398, 402, 180 S.E. 443, 444 (1935). ‘[T]o hold other than we do would frustrate th[ese] purpose[s].’ *Pratt*, 161 W.Va. at 546, 244 S.E.2d at 236.”

Appleby, 213 W. Va. at 512, 583 S.E.2d at 809 n7.

The State appropriately followed the procedures outlined in W. Va. Code §§ 61-11-18 & 19 in this case properly filing an information alleging that Petitioner had two prior felony convictions upon Petitioner’s conviction and before sentencing. Given the foregoing authority, the circuit court did not abuse its discretion when it denied Petitioner’s motion to withdraw his guilty plea, and Petitioner’s claim must be rejected.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Summers County must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'D. A. Knopp', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 5th day of June, 2014, addressed as follows:

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