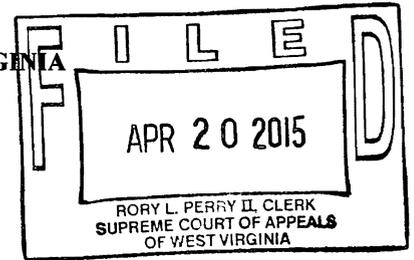


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 14-1255



**PATRICK MIRANDY, WARDEN,
ST. MARYS CORRECTIONAL CENTER,
RESPONDENT BELOW,
Petitioner**

V.)

Appeal from an order of the
Circuit Court of Ritchie
County (11-P-19)

**GREGG D. SMITH,
PETITIONER BELOW,
Respondent**

RESPONDENT'S BRIEF

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QUESTION PRESENTED

- I. Under the United States and West Virginia Constitutions, did the Circuit Court err when it determined that the State of West Virginia violated the prohibition against double jeopardy when Gregg D. Smith was sentenced to consecutive sentences for malicious assault with a firearm of one victim and wanton endangerment with a firearm of another victim when the Circuit Court determined that both charges arose out of Gregg D. Smith's single volitive act of shooting the victim in the presence of the victim's son?

STATEMENT OF THE CASE

On the eighth day of April, 2009, Gregg D. Smith appeared before the Honorable Robert L. Holland, Jr., in the Circuit Court of Ritchie County for sentencing on the charges of malicious assault with a hammer, malicious assault with a shotgun, wanton endangerment with a firearm, and attempted first degree murder. (A.R. 4-13). Both Mr. Smith and his counsel, Rocco Mazzei, spoke on Mr. Smith's behalf, but neither raised the issue of double jeopardy at sentencing. The Honorable Robert L. Holland, Jr., determined that Mr. Smith was not a good candidate for either Probation or Home Confinement and sentenced Mr. Smith as follows:

For his conviction in Count I, of Malicious Assault, the Court does hereby sentence the Defendant to serve not less than two (2) nor more than ten (10) years in the penitentiary, with credit for 249 days previously served; for his conviction in Count II, of Malicious Assault, the Court does hereby sentence the Defendant to serve not less than two (2) nor more than (10) years in the penitentiary; for his conviction in Count III, of Wanton Endangerment Involving a Firearm, the Court does hereby sentence the Defendant to serve a definite term of five (5) years in the penitentiary; and, for his conviction in Count IV, of Attempted First Degree Murder, the Court does hereby sentence the Defendant to serve not less than three (3) nor more than (15) years in the penitentiary. Said sentences are to run consecutively, one to the other.

(A.R. 11-12).

After failing to obtain relief on other grounds in his direct appeal, Gregg D. Smith pursued a writ of habeas corpus alleging that he was denied due process of law, the effective assistance of counsel, and the prohibition against double jeopardy. (A.R. 53-62). On the seventh

day of November, 2013, the Circuit Court rejected the due process and effective assistance of counsel grounds, but found that the State of West Virginia violated Mr. Smith's protections against double jeopardy. (A.R. 64-74).

The Circuit Court made the following factual findings on the double jeopardy issue:

The evidence at trial was that Petitioner attacked Thomas F. Smith with Thomas F. Smith's own hammer, and then the two struggled to the rear of Petitioner's car where Petitioner had a loaded shotgun. Petitioner and Thomas F. Smith then struggled over the loaded shotgun, which discharged into the leg of Thomas F. Smith. The State of West Virginia proved at trial that T.L.P.C., a minor, was also present during the struggle over the shotgun and the subsequent firing of the shotgun and used the presence of T.L.P.C. to charge and convict Petitioner of Wanton Endangerment Involving a Firearm in addition to charging and convicting Petitioner of Malicious Assault. Neither Petitioner's trial counsel, Jerry Blair, nor his sentencing and appellate counsel, Rocco E. Mazzei, raised the issue of double jeopardy.

(A.R. 70).

Applying State v. Sears, the Circuit Court found that Gregg D. Smith presented a "nonfrivolous claim and that the State of West Virginia bears the burden to show that double jeopardy principles do not bar the imposition of multiple punishments on the Petitioner for committing a single act." (A.R. 72). According to the Circuit Court,

[a]ll evidence before this court is that the firing of the shotgun that injured Thomas F. Smith and the "endangerment" to his son both grew out of a single volitive act, and the State of West Virginia has not shown otherwise. Nor has the State provided the court any law that specifies that for double jeopardy to be applicable the victim of the lesser included offense must be the same person as the major offense.

(A.R. 88-89). Based upon its finding, and the State of West Virginia's decision not to dismiss either the malicious assault or wanton endangerment involving a firearm conviction, the Circuit Court allowed Mr. Smith to elect the conviction to be dismissed. According to Mr. Smith's wishes, the Circuit Court dismissed Mr. Smith's conviction and sentence for malicious assault

with a shotgun, for which Mr. Smith was sentenced two to ten years in the West Virginia Department of Corrections. (A.R. 91).

SUMMARY OF ARGUMENT

The Circuit Court correctly found that the State of West Virginia violated the prohibition of multiple sentences for the same act when Gregg D. Smith was sentenced to consecutive sentences for the crimes of malicious assault and wanton endangerment with a firearm. The Circuit Court's judgment should be affirmed with respect to Mr. Smith's double jeopardy claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this case under Rule 19(a) of the Revised Rules of Appellate Procedure. The Circuit Court's decision to dismiss the malicious assault charge involved the application of settled law and presents a narrow issue of law. Additionally, none of the factors present in Rule 18(a) of the Revised Rules of Appellate Procedure are present in this case. Therefore, this case is appropriate for oral argument under Rule 19(a) of the Revised Rules of Appellate Procedure.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT GREGG D. SMITH'S CONVICTIONS FOR THE CRIMES OF MALICIOUS ASSAULT AND WANTON ENDANGERMENT WITH A FIREARM VIOLATED THE STATE AND FEDERAL PROHIBITIONS AGAINST DOUBLE JEOPARDY

A. The standard of review of a double jeopardy claim is *de novo*.

A double jeopardy claim is reviewed *de novo*. State v. Sears, 196 W. Va. 71, 75, 468 S.E.2d 324, 328 (1996).

In order to establish a double jeopardy claim, a defendant must first present a *prima facie* claim that double jeopardy principles have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant.

Id.

B. The Double Jeopardy Clause prohibits multiple punishments for the same offense.

“The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.” State v. Wright, 200 W. Va. 549, 552, 490 S.E.2d 636, 639 (1997) (quoting Syllabus Point 1, Conner v. Griffith, 160 W. Va. 680, 238 S.E.2d 529 (1977)).

C. Wanton endangerment with a firearm is a lesser included offense of malicious assault when predicated on a single act involving a single gunshot.

Gregg D. Smith committed a single act of shooting the victim in the leg while in the presence of the victim's son. In 1997, this Honorable Court ruled that wanton endangerment with a firearm is a lesser included offense of malicious assault when both convictions are predicated on a single act involving a single gunshot. State v. Wright, 200 W. Va. 549, 553-554,

490 S.E.2d 636, 640-641 (1997). Because in this case wanton endangerment with a firearm is a lesser included offense of malicious assault and because in this case Mr. Smith fired one shot only, the appropriate question is whether the presence of two victims when a single shot is fired constitutes two violations of the wanton endangerment statute or whether it is the same offense for double jeopardy purposes.

D. Gregg D. Smith could not be convicted of two counts of wanton endangerment with a firearm because a single act involving a single gunshot is the same offense for double jeopardy purposes.

“[W]hether a criminal defendant may be separately convicted and punished for multiple violations of a single statutory provision turns upon the legislatively-intended unit of prosecution.” State v. McGilton, 229 W. Va. 554, 562, 729 S.E.2d 876, 884 (2012) (quoting State v. Green, 207 W. Va. 530, 537, 534 S.E.2d 395, 402 (2000)). Under the legislatively-intended unit of prosecution theory, Gregg D. Smith could be convicted of wanton endangerment for any act with a firearm that created a substantial risk of death or serious bodily injury to another. Here, the legislatively-intended unit of prosecution is “act” and not “another.” Because the “act” at issue is a single gunshot, and the State of West Virginia fails to provide evidence of additional acts, Mr. Smith could not be convicted of two violations of wanton endangerment with a firearm.

For further context, we can look to cases involving the brandishing statute. In State v. Bell, this Honorable Court held that “the offense of brandishing as defined by West Virginia Code § 61-7-11 is a lesser included offense within the definition of wanton endangerment under West Virginia Code § 61-7-12.” 211 W. Va. 308, 313, 565 S.E.2d 430, 435 (2002).

In State v. Kendall, Michael Kendall knocked on the door of a home with his pistol drawn. 219 W. Va. 686, 690, 639 S.E.2d 778, 782 (2006). Michael Kendall then entered the

room which contained four people. Id. Among other charges, Michael Kendall was indicted on three counts of wanton endangerment. Id. A jury convicted Michael Kendall of “burglary and three counts of brandishing, as the lesser included offense of wanton endangerment.” Id. Pertinent to this case, Michael Kendall appealed alleging that “he should not have been convicted of three counts of brandishing where only one act of brandishing was proven.” Id. In examining the facts of the Kendall case, this Honorable Court concluded that “the State’s evidence indicated only one act of brandishing a weapon. Despite the presence of multiple witnesses, one act of brandishing should produce a conviction for only one count of brandishing.” Id. at 696, 788.

In State v. Goins, Ronald Goins aimed and fired a pistol numerous times in the direction of a vehicle containing five occupants. 231 W. Va. 617, 620, 748 S.E.2d 813, 816 (2013). Among other charges, Mr. Goins was indicted for five counts of wanton endangerment. Id. After a jury trial, “[t]he jury acquitted Mr. Goins of the wanton endangerment charges but found him guilty of five counts of the lesser included offense of brandishing.” Id. In examining the brandishing statute, this Honorable Court determined that “[t]he unit of prosecution focuses upon the ‘breach of peace’ without regard to any specific number of persons affected.” Id. at 623, 819 (quoting W. Va. Code § 61-7-11 (1994) (Repl. Vol. 2010)).

Thus, we must conclude, and so hold, that the focus of the unit of prosecution under the brandishing statute, W. Va. Code § 61-7-11 (1994) (Repl. Vol. 2010), is not dependent upon the number of victims present when a deadly weapon is used to breach the peace. Therefore, a single incident of brandishing may not be punished as multiple offenses merely because there are two or more victims present or affected thereby.

Id.

Like in the present case, in State v. Goins, the State of West Virginia, at the trial, argued that Goins should be convicted of one count of wanton endangerment for each victim present.

However, on appeal, the State of West Virginia argued that “every time [Goins] fired his pistol in the direction of the [vehicle] constitute[s] a separate act of brandishing, as each shot was a separate breach of the peace, for which he could be convicted and sentenced.” *Id.* Although recognized as a potentially valid legal argument by the dissenting justices, this interpretation was rejected by the majority as “an absurd interpretation of the statute.” *Id.* at 624, 820. Regardless of the validity of this argument, Gregg D. Smith can be punished only for one offense of wanton endangerment because he fired only one shot.

E. The State of West Virginia’s analysis fails because the unit of prosecution is the “act” and not “another.”

The State of West Virginia quotes State v. Goins for the proposition that “when the unit of prosecution prohibits conduct specifically against a ‘victim’ or ‘another,’ a single incident of the prohibited conduct may be punished as a separate offense for each person present.” (Petitioner’s Brief, Page 12).

In State v. Goins, this Honorable Court looked to Kelsoe v. Commonwealth and Tuggle v. State for instruction. In Kelsoe v. Commonwealth, “Robert Lee Kelsoe was convicted of three separate charges of brandishing and pointing a firearm in violation of Code § 18.2-282, and sentenced to 60 days in jail on each.” 226 Va. 197, 308 S.E.2d 104 (Va. 1983).

Kelsoe had an argument with three men. After they walked away from him, [Kelsoe] withdrew a pistol from his coat and pointed it at them. The men were standing together a few feet from Kelsoe, facing him. They were frightened and backed away from [Kelsoe]. Thereupon Kelsoe replaced the pistol in his coat.

Id. The question for the Supreme Court of Virginia was whether Kelsoe committed one offense or three offenses. In analyzing the statute, the Supreme Court of Virginia determined that “[t]here are two elements of the offense: (1) pointing or brandishing a firearm, and (2) doing so in such a manner as to reasonably induce fear in the mind of the victim.” *Id.* The Supreme Court

of Virginia found that “[t]he gravamen of the offense is the inducement of fear in another[.]” and concluded that “when [Kelsoe] frightened the three men by pointing his weapon, he committed three separate crimes.” This is because the “agreed facts establish that Kelsoe ‘pointed the pistol toward’ the three men and that each was ‘afraid and backed away from [Kelsoe].’ ” Id.

In Tuggle v. State, Gerald Tuggle threatened his girlfriend, Janet Wells, with a drawn rifle while she was at work at King & King law offices. 733 P.2d 610, 611 (Wyo. 1987). Brett King exited his office and was also threatened by Tuggle with a drawn rifle. Id. Tuggle pleaded guilty to two counts of aggravated assault and battery in violation of § 6-2-502(a)(iii), which provides that “(a) A person is guilty of assault and battery if he: (iii) [t]hreatens to use a drawn deadly weapon on another unless reasonably necessary in defense of his person, property or abode or to prevent serious bodily injury to another[.]” Id. at 610-613. When Tuggle was sentenced to a minimum of seven and one-half years and a maximum of ten years on each count to be served consecutively, he appealed under the double jeopardy clause and argued that the two assaults formed a “single transaction.” Id. at 611. However, the Supreme Court of Wyoming found that Tuggle committed “two separate acts against two different individuals, each of which violated a single criminal statute.” Id. In upholding Tuggle’s convictions and sentence, the Supreme Court of Wyoming found that the “facts needed to prove each element of the ‘act’ of assault against Ms. Wells would necessarily be different than those facts needed to prove each element of the ‘act’ of assault against Mr. King.”

In Kelsoe, the unit of prosecution is “the inducement of fear in another.” Kelsoe v. Commonwealth, 226 Va. 197, 308 S.E.2d 104. It is for this reason that Kelsoe could be convicted of three separate charges of brandishing when each victim was afraid and backed away from the defendant. However, Tuggle presents a different situation. In Tuggle, the unit of

prosecution is not another, it is the threat to use a drawn deadly weapon. The Supreme Court of Wyoming found that Tuggle “committed two separate acts against two different individuals, each of which violated a single criminal statute.” 733 P.2d 610, 612. Tuggle first threatened Janet Wells with a drawn rifle; he then threatened Brett King with a drawn rifle.

Although cited for its application of the rule of lenity, State v. Stone is instructive in the present case. 229 W. Va. 271, 728 S.E.2d 155 (2012). In State v. Stone, Brian Stone challenged “his multiple punishments for the leaving the scene of an accident resulting in injury or death[.]” Id. at 274, 158. Stone was driving while intoxicated, and caused a car driven by Courtney Evans to cross the median of Interstate 68 and crash into a sport utility vehicle driven by Donnell Perry. Id. at 274-275, 159. “As a result of the accident, Mr. Evans and his son were killed as were Mr. Perry and two of his daughters.” Id. at 275, 159. After crashing his truck, Stone was found “hitchhiking in the opposite direction of the accident scene, approximately one-half mile away.” Id.

This Honorable Court reviewed “whether, as a matter of law, the driver of a vehicle who leaves the scene of an accident resulting in injury to or death of more than one person may be convicted of and sentenced for multiple violations of West Virginia Code §17C-4-1 (1999).” Id. at 276, 160.

West Virginia Code §17C-4-1 (1999) provides, in relevant part: (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident as close thereto as possible but shall then forthwith return to and shall remain at the scene of the accident until he or she has complied with the requirements of section three [§ 17C-4-3] of this article[.]

Id. According to the State of West Virginia, “under West Virginia Code §17C-4-3, a driver of a vehicle involved in an accident shall, among other things, render to ‘any person’ injured in such

accident reasonable assistance, which the State argues requires [Stone] to render aid to each and every one of the victims in this case.”

Under this Honorable Court’s guidance in State v. Goins, one might assume that because of the “any person” language, Stone’s single act of leaving the accident scene could be punished as a separate offense for each person present. However, this expansive judicial interpretation was rejected. Instead, this Honorable Court correctly punished Stone’s single act of leaving the accident scene. This Honorable Court held that “[a] driver who fails to comply with the requirements of West Virginia Code § 17C-4-3 violates West Virginia Code § 17C-4-1 only once regardless of the number of injuries or deaths resulting from the accident.” State v. Stone, 229 W. Va. 281, 728 S.E.2d 155, 165.

F. To the extent that the unit of prosecution may be considered ambiguous, the rule of lenity requires that we resolve the ambiguity in favor of Gregg D. Smith.

In State v. Goins, this Honorable Court cited State v. Stone for the rule of lenity. State v. Goins, 231 W. Va. 617, 623, 748 S.E.2d 813, 819.

To the extent that the unit of prosecution may be considered ambiguous, the rule of lenity requires that we are to resolve that ambiguity in favor of the defendant. See State v. Stone, 229 W. Va. 271, 278, 728 S.E.2d 155, 162 (2012). “If the unit of prosecution is not clearly indicated, the rule of lenity must be applied.” All this means is “that when the Legislature fails to indicate the allowable unit of prosecution and sentence with clarity, doubt as to legislative intent should be resolved in favor of lenity for the accused.”

Id. (quoting State v. Sears, 196 W. Va. 71, 81, 468 S.E.2d 324, 334 (1996)).

After applying the rule of lenity, this Honorable Court held that

the focus of the unit of prosecution under the brandishing statute, W. Va. Code § 61-7-11 (1994) (Repl. Vol. 2010), is not dependent upon the number of victims present when a deadly weapon is used to breach the peace. Therefore, a single incident of brandishing may not be punished as multiple offenses merely because there are two or more victims present or affected thereby.

