

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0854

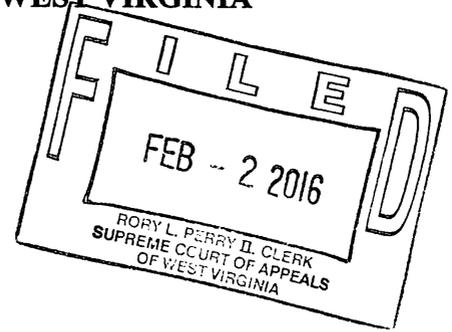
STATE OF WEST VIRGINIA,

Petitioner,

v.

DARIUS HENNING,

Respondent.



RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

I.

STATEMENT OF THE CASE

The victim and the Petitioner were in an off-and-on relationship. (Appendix [hereinafter, "App.,"] at 105.) On December 19, 2014, the victim, Petitioner, and a third person were traveling in a car. The victim was driving, Petitioner was a backseat passenger, and the third person was in the front-passenger seat. (App. at 104.) The victim was giving Petitioner a ride to a friend's house, most likely the whole crew was looking to buy drugs. (App. at 103.) The victim and Petitioner began arguing over their relationship. (App. at 105.) At one point, Petitioner threatened to kill the victim ("He threatened that he was going to kill me.") (App. at 106.) He also reached up from the backseat and attempted to take money from the victim's bra. (*Id.*) The victim pulled over to let Petitioner out of the car, at his request. (App. at 108.) However, he refused to get out and threatened to slash all the tires. (*Id.*) The victim was afraid to be in the car with Petitioner any longer. (App. at 110.) The victim also noticed Petitioner had a knife in his

hand. (App. at 111.) She tried to pull Petitioner from the car. (*Id.*) However, when she pulled her hand back, she was cut badly on her hand. (*Id.*) The wound required around ten stitches (App. at 113.)

Petitioner was indicted for one count of malicious assault. (App. at 5.) He was tried on June 29, 2015. During the trial, the State asked the trial court to give an instruction on the lesser included offense of misdemeanor assault, among others. (App. at 161.) Petitioner objected. (*Id.*) Ultimately, Petitioner was convicted of the misdemeanor assault and no other charges. (App. at 200.)

II.

SUMMARY OF THE ARGUMENT

Petitioner alleges that the lower court should not have instructed the jury on the offense of misdemeanor assault as a lesser included offense to malicious assault. Petitioner alleges that there are elements of misdemeanor assault that are irrelevant to malicious assault, and therefore, misdemeanor assault cannot be a lesser included offense under the test from *State v. Wilkerson*, 230 W. Va. 366, 738 S.E.2d 32 (2013).

However, the Respondent urges the court to avoid following *State v. Wilkerson*. Common law misdemeanor assault, along with battery, has long been considered a lesser included offense to malicious assault. See: *State v. King*, 140 W. Va. 362, 84 S.E.2d 313 (1954). In addition, when assault and battery were eventually enacted in the code, the offenses were kept within the same code section. The legislative purpose was not to craft differing statutes for assault as it relates to lesser included offense. The purpose was to set differing degrees of punishment for more severe and less severe forms of assault. Thus, assault remained a lesser included offense of malicious assault despite having slightly differing elements.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is ripe for decision by memorandum opinion as the law contemplated within Petitioner's Assignments of Error is well settled. Oral Argument is unnecessary in this matter, as the case is adequately presented by the briefs and appendix. The decision process would not be aided by oral argument. However, if the Court deems oral argument to be necessary, it would be appropriate for Rule 19 argument.

IV.

ARGUMENT

A. The Court Should Avoid Applying the Wilkerson Test

The Wilkerson test to determine if one crime is a lesser included of another does not need to be applied in this case. Common law assault and battery were previously deemed to be lesser included offenses to malicious assault. When assault and battery were codified within the same section, the legislature intended to set different degrees of punishment for differing degrees of assault. They remained as a continuous flow of closely related offenses. Thus, misdemeanor assault remains a lesser included offense of malicious assault.

State v. Collins is an example of a common law offense remaining a lesser included offense after being enacted in the code. 174 W. Va. 767, 329 S.E.2d 839 (1984). In this case, the Court dealt with similar circumstances in the context of double jeopardy in a robbery case. The Court stated that "our robbery statute must be read in conjunction with the common law elements of larceny..." (Id. at 769, 842.) It further stated that "the primary purpose of our robbery statute was to set the degrees of robbery". Id. Despite codifying robbery from the common law, the Court stated that "we believe that the legislature has not by the enactment of W.Va. Code § 61-2-

12, redefined the elements of robbery from those established by the common law." *Supra* at 770, 842. In other words, the creation of the robbery statute did not completely separate it from common law larceny. The two remained linked as related offenses with differing degrees of punishment.

The same can be said for the assault crimes at issue in this case. Common law assault and battery has always been a lesser included offense of malicious assault. The codification of assault and battery did not change that. This is evident in the case of *State v. King*, 140 W. Va. 362, 84 S.E.2d 313 (1954). The case concerned whether the defendant could be indicted for felony malicious assault, but actually convicted of the lesser included misdemeanor assault and battery beyond the statute of limitations. *Id.* at 364, 314 (1954). Throughout the opinion, the Supreme Court treated assault and battery as a lesser included of malicious wounding. At one point, the Court said that "simple assault, as distinguished from malicious assault and unlawful assault, is an offense at common law, and punishable as a misdemeanor." *Id.* at 365-66, 315. The Supreme Court further stated that "the defendant was effectively indicted for felonious wounding under Code, 61-2-9, which crime, as heretofore indicated, *embraces the misdemeanor of assault and battery.*" The Court constantly referred to assault and battery as lesser included offenses of malicious assault.

The State asks the Court to keep assault as a lesser included offense to malicious assault. When common law assault and battery was codified and enjoined to malicious assault under a single statute, the different offenses remained linked. Statutory assault and battery should remain a lesser included offenses of malicious assault. Under this reasoning, there is no need to run a *Wilkerson* test. Thus, the lower court's discretion to allow an instruction on simple assault as a lesser included offense of malicious assault should be upheld.

B. If the Court Uses the Wilkerson Test, it should Limit Factor One to the Facts of the Particular Case, and Not any Potential Hypothetical.

The test to determine if one offense is a lesser included of another is set forth in *State v. Wilkerson*, 230 W. Va. 366, 738 S.E.2d 32 (2013):

“The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.”

Id. at Syl. Pt. 4

As pointed out by Petitioner, the Court stated that "we decline to adopt the approach...utilized by a minority of jurisdictions whereby each case is considered individually to determine whether the evidence adduced at trial supports a lesser included instruction." Id. at 230 W. Va. 366, 370, 738 S.E.2d 32, 36 (2013).

As a result, if any hypothetical can be conjured that shows the offense in question is not a lesser included offense of another, then the analysis fails. For instance, in this case, if any hypothetical set of facts can show that misdemeanor assault is not a lesser included of malicious assault, then it is not a lesser included offense according to *Wilkerson*. The State urges the Court to adopt the approach by the minority of jurisdictions and limit the analysis to the facts of the case at hand. For instance, in this case, there was evidence from the victim that she was put in fear of her life by Petitioner. (App. at 106.) There is also evidence that the Petitioner stabbed the victim in the hand with a knife. (App. at 111.) Thus, the facts of this case support both assault (i.e. reasonable apprehension of fear) and malicious assault (i.e. inflicting a wound with a dangerous weapon). Consequently, misdemeanor assault would be a clear lesser included offense of malicious assault. It is true that one might be able to dream up a scenario in which it is technically impossible to commit malicious wounding and not misdemeanor assault.

However, to narrowly focus on Petitioner's argument based on *Wilkerson* ignores the very real fact that misdemeanor assault was committed by Petitioner and they jury agreed.

V.

CONCLUSION

The Respondent respectfully requests that the Supreme Court uphold the lower court's decisions to uphold the Petitioner's Magistrate Court conviction.

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Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

CERTIFICATE OF SERVICE

I, Nic Dalton, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *RESPONDENT'S BRIEF* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of February, 2016, addressed as follows:

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