

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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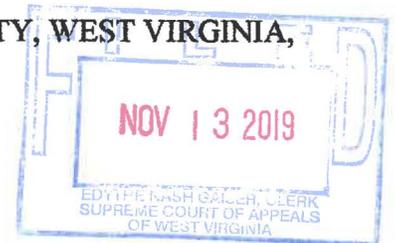
STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

DEAN E. GAMBLE, SR.,
Defendant Below, Petitioner.

PETITIONER'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA,
INDICTMENT NOS.18-F-19 and 18-F-20



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STATE OF WEST VIRGINIA,
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v.

DEAN E. GAMBLE, SR.,
Defendant Below, Petitioner.

PETITIONER'S BRIEF

NOW COMES Dean E. Gamble, Sr. (hereinafter "Petitioner"), by and through his undersigned counsel, and hereby submits the *Petitioner's Brief* pursuant to this Honorable Court's *Amended Scheduling Order* entered on October 17, 2019.

I. ASSIGNMENT OF ERROR

The trial court committed plain error by separately enhancing two (2) of Petitioner's sentences pursuant to West Virginia Code § 60A-4-408 for convictions rendered on the same date and in the same proceeding in the absence of express language authorizing separate sentence enhancements for convictions rendered against a defendant on the same date and in the same proceeding as is required under previous holdings of this Honorable Court, namely *Turner v.*

Holland, 175 W.Va. 202, 332 S.E.2d 164 (1985) and *Hutchinson v. Dietrich*, 183 W. Va. 25, 393 S.E.2d 663 (1990).

II. STATEMENT OF THE CASE

Petitioner was indicted on two (2) counts of Delivery of a Schedule III Controlled Substance in the January 2018 Term of the Grand Jury of the Circuit Court of Fayette County.¹ (Appx. R. Pgs. 8-9). Further, Petitioner was separately indicted on one (1) count of Conspiracy to Commit a Felony, one (1) count of Burglary, and one (1) count of Grand Larceny in the same Term of the Grand Jury of the Circuit Court of Fayette County.² (Appx. R. Pgs 10-14).

On March 26, 2018, Petitioner pled guilty to two (2) counts of Delivery of a Schedule III Controlled Substance as contained in Indictment 18-F-19 and one (1) count of Conspiracy to Commit a Felony as contained in Indictment 18-F-20. (Appx. R. Pgs. 130). On May 15, 2018, Petitioner was sentenced to not less than one (1) nor more than five (5) years on each of the three (3) counts. (Appx. R. Pgs. 130-135). The circuit court then separately enhanced Petitioner's two (2) sentences for Delivery of a Schedule III Controlled Substance, pursuant to West Virginia Code § 60A-4-408, to *twice* that otherwise authorized; and additionally, ran those two (2) sentences consecutive to one another and also consecutive to the Conspiracy to Commit a Felony for a total term of incarceration of not less than five (5) nor more than twenty-five (25) years in the penitentiary. (Appx. R. Pgs. 130-135).

III. SUMMARY OF ARGUMENT

There is no express language in West Virginia Code § 60A-4-408 authorizing a trial court to separately enhance multiple sentences for convictions rendered on the same date and in the

¹ Indictment No. 18-F-19.

² Indictment No. 18-F-20.

same proceeding as is required by this Court's previous holdings in *Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 and *Hutchinson v. Dietrich*, 183 W. Va. 25, 393 S.E.2d 663. In the absence of express language, the trial court's separate enhancement of multiple sentences for convictions rendered on the same date in the same proceeding was plainly erroneous.

Petitioner is requesting that this Court: (1) extend the sound reasoning of *Turner* and *Hutchinson* to West Virginia Code § 60A-4-408 sentence enhancements; (2) reverse the circuit court's sentencing order insofar as it impermissibly separately enhanced multiple convictions rendered on the same date and in the same proceeding; and (3) remand this matter back to the Circuit Court of Fayette County to remove one (1) of the two (2) enhancements.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as this is a matter of first impression. No precedent exists specifically addressing the authority of a trial court to separately enhance multiple sentences for convictions rendered on the same date and in the same proceeding in the absence of express language in West Virginia Code § 60A-4-408 permitting the separate enhancements of multiples sentences for convictions rendered on the same date and in the same proceeding as is required according to this Court's prior precedent in *Turner* and *Hutchinson*. Accordingly, Petitioner would request oral argument under Rule 20 of the Rules of Appellate Procedure. In the alternative, as the issue involves the interpretation of an existing statute, Petitioner would request oral argument under Rule 19 of the Rules of Appellate Procedure.

Petitioner suggests a memorandum decision is not appropriate in this case as a full opinion will give guidance to the lower courts as to the proper application of the law.

V. ARGUMENT

THE CIRCUIT COURT PLAINLY ERRED IN SEPERALTY ENHANCING MULTIPLE SENTENCES FOR CONVICTIONS RENDERED ON THE SAME DATE AND IN THE SAME PROCEEDING AS IS REQUIRED BY PREVIOUS HOLDINGS OF THIS COURT IN *TURNER* AND *HUTCHINSON*.

“To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.’ Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).” *State v. Brown*, 210 W. Va. 14, 17, 552 S.E.2d 390, 393 (2001). As this case turns on a question of law, and specifically on the proper interpretation of a state statute, the lower court’s decision is reviewed *de novo*. Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

1. **West Virginia Code § 60A-4-408 has no express language authorizing the separate enhancement of multiple convictions rendered on the same date and in the same proceeding.**

The lower court separately enhanced two (2) of Petitioner’s three (3) sentences for convictions rendered on the same date—March 26, 2018—in the same proceeding pursuant to West Virginia Code § 60A-4-408. The language contained in West Virginia Code § 60A-4-408 resembles the language contained in West Virginia Code § 61-11-18. This Court has previously held that a trial court may not separately enhance multiple sentences for convictions rendered on the same date and in the same proceedings absent some express language and West Virginia Code § 61-11-18 lacks such express language. *See Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 (1985)”; *see also State v. Stover*, 179 W. Va. 338, 368 S.E.2d 308 (1988); *State v. Lusk*, No. 13-0556, 2014 WL 6607447 (W. Va. Nov. 21, 2014) (memorandum decision).

Therefore, it follows that absent express language in West Virginia Code § 60A-4-408, the trial court was without authority to separately enhance Petitioner's multiple convictions rendered on the same date and in the same proceeding as the language contained in West Virginia Code § 60A-4-408 resembles the language contained in West Virginia Code § 61-11-18.

West Virginia Code § 60A-4-408 states:

(a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both. When a term of imprisonment is doubled under section 406, such term of imprisonment shall not be further increased for such offense under this subsection (a), even though such term of imprisonment is for a second or subsequent offense.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under section 401 (c).

Similarly, West Virginia Code § 61-11-18(a) provides, in relevant part, as follows:

[W]hen any person is convicted of an offense and is subject to confinement in the state correctional facility therefore, and it is determined ... that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.

(Emphasis added). Both aforementioned code provisions are recidivist—or habitual offender—statutes. Whereas West Virginia Code § 61-11-18 is general recidivist statute—meaning that it

is applicable to any subsequent felony conviction—West Virginia Code 60A-4-408 is a specific recidivist statute aimed at enhancing penalties for convictions for crimes involving controlled substances. West Virginia Code § 61-11-18 and West Virginia Code § 60A-4-408 are two sides of the same coin. To categorize West Virginia Code § 61-11-18 as a recidivist statute and West Virginia Code § 60A-4-408 as an enhancement is a difference without a distinction. ““The primary purpose of our recidivist statutes . . . is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses.’ Syllabus point 3, in part, *State v. Jones*, 187 W.Va. 600, 420 S.E.2d 736 (1992).” Syllabus point 3, in part, *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002). The only difference between the two (2) statutes is the level of proof required to establish the fact of a prior conviction and who may seek enhancement.³

“[F]or the purpose of applying the habitual criminal act . . . two convictions [on the same day] are tantamount to one conviction, within the meaning of the habitual criminal statute, 61-11-18, 19,” *State ex rel. Medley v. Skeen*, 138 W. Va. 409, 415, 76 S.E.2d 146, 149 (1953); *see also State ex rel. Stover v. Riffe*, 128 W.Va. 70, 35 S.E.2d 689 (1945); *Dye v. Skeen*, 135 W.Va. 90, 62 S.E.2d 681 (1950); *State ex rel. Hill v. Boles*, 149 W. Va. 779, 781, 143 S.E.2d 467, 468 (1965). ““In the absence of some express language in our recidivist statute, W.Va. Code, 61-11-18, authorizing criminal convictions returned against the defendant at the same time to be separately enhanced by a prior felony, it may not be done and only one enhancement

³ Under West Virginia Code West Virginia Code § 61-11-19 the state must file an information setting forth a defendant’s prior convictions. A jury is then empanelled and, if the jury finds that the defendant is the same person mentioned in the records filed by the State, the circuit court is required to sentence him or her to such further confinement as is prescribed by West Virginia Code § 61-11-18. Alternatively, under West Virginia Code § 60A-4-408, the circuit court has complete discretion whether to enhance a defendant’s sentence. The State may move for such an enhancement, but the circuit court is not bound by such a recommendation.

is permissible.’ Syllabus, *Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 (1985).” Syllabus, *State v. Stover*, 179 W. Va. 338, 368 S.E.2d 308; see also *State v. Lusk*, No. 13-0556, 2014 WL 6607447 (W. Va. Nov. 21, 2014) (memorandum decision). There is no express language in West Virginia Code § 60A-4-408 authorizing the separate enhancement of multiple sentences for convictions returned against the defendant on the same date and in the same proceeding by a prior conviction “relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.”

It would be illogical to conclude that multiple convictions obtained on the same day cannot be treated as separate convictions for purposes of enhancing each other, but can be treated as multiple convictions for purposes of being enhanced.

State v. Stover, 179 W. Va. 338, 339, 368 S.E.2d 308, 309. Thereafter, in *Hutchinson v. Dietrich*, 183 W. Va. 25, 393 S.E.2d 663, this Court held in Syllabus point 3:

Multiple convictions rendered on the same day should be treated as a single conviction for the purposes of the habitual criminal statute . . . and multiple sentences can be enhanced under the habitual criminal statute only once where the sentences are imposed for convictions rendered on the same day.

This Court has upheld prior sentence enhancements where a defendant had multiple convictions rendered on the same date and in the same proceeding pursuant to West Virginia Code § 60A-4-408,⁴ but this Court has never explicitly held that West Virginia Code § 60A-4-408 contains *express language* authorizing circuit courts to separately enhance multiple sentences for convictions rendered on the same date and in the same proceeding where it has

⁴ See *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008); *State v. Adkins*, 168 W.Va. 330, 284 S.E.2d 619 (1981); *State v. Barnett*, 168 W.Va. 361, 284 S.E.2d 622 (1981); *State ex rel. Daye v. McBride*, 222 W.Va. 17, 658 S.E.2d 547 (2007), *certiorari denied* 129 S.Ct. 131, 555 U.S. 858, 172 L.Ed.2d 100; *State ex rel. King v. Ielapi*, No. 11-0237, 2012 WL 2979072 (W. Va. Mar. 9, 2012) (memorandum decision); *State v. Ferrell*, No. 14-1097, 2015 WL 3875748 (W. Va. June 22, 2015) (memorandum decision).

previously held that a statute resembling West Virginia Code § 60A-4-408—West Virginia Code § 61-11-18—lacked such express language.

Though defendant did not properly preserve the sentencing error assigned herein, this Court nevertheless has discretionary authority to consider the issue under the “plain error” doctrine. *State v. Miller*, 194 W.Va. 3, 18, 459 S.E.2d 114, 129. *See* W. Va. R.Crim. P. 52(b) (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”). “‘To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.’ Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114.” *State v. Brown*, 210 W. Va. 14, 17, 552 S.E.2d 390, 393.

Petitioner did not intentionally or knowingly relinquish or abandon his right to object to the sentencing error complained of herein. Petitioner was unaware of the error when it was committed and therefore did not purposely waive his right to object to the sentencing error committed by the circuit court. Turning to the plain error analysis: first, the circuit court committed error by separately enhancing two (2) of Petitioner’s three (3) sentences for convictions rendered on the same date and in the same proceeding. Next, the error is clear and obvious within the four corners of the circuit court’s *Sentencing Order*. (Appx. R. Pgs. 130-135). Next, the error affects a substantial right as a defendant has a due process right to be sentenced accurately—including having said sentence enhanced accurately—not only in accordance with the language of the applicable sentencing and enhancement statutes but also in accordance with this Court’s interpretation of the applicable sentencing and enhancement statutes. Last, the error herein affects the fairness, integrity, or public reputation of the judicial proceedings as an error

resulting in a higher sentence establishes a reasonable probability that a defendant will serve a prison sentence greater than what is required for retribution, deterrence, incapacitation, and rehabilitation.

Additionally, the error complained of herein is not a mere “technical” error that did not affect the actual outcome of the proceeding. But for the error herein, the outcome in this matter would have been different and Petitioner would be less than what it is presently. The outcome of the error complained of herein is that Petitioner will be incarcerated for a longer period of time than he would have been had the error never been committed. Therefore, it is more than a mere procedural error, but one that affected the substantive outcome. Last, The relief requested herein is not as onerous as a full re-trial. Petitioner is merely requesting the removal of one (1) of the two (2) sentence enhancements.

2. The Legislature is presumed to have had full knowledge of prior judicial decisions when it enacted West Virginia Code § 60A-4-408.

‘When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.’ Syllabus point 2, in part, *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995).”

Syllabus point 3, *CB&T Operations Company, Inc. v. Tax Commissioner of the State of West Virginia*, 211 W.Va. 198, 564 S.E.2d 408 (2002). Therefore, when the Legislature enacted West Virginia Code § 60A-4-408 in 1971, it was aware of this Court’s previous decisions wherein it held that two (2) or more convictions entered on the same day are considered one conviction for purposes of habitual offender statutes. *See State ex rel. Stover v. Riffe*, 128 W.Va. 70, 35 S.E.2d

689; *Dye v. Skeen*, 135 W.Va. 90, 62 S.E.2d 681; *State ex rel. Medley v. Skeen*, 138 W.Va. 409, 76 S.E.2d 146; and *State ex rel. Hill v. Boles*, 149 W. Va. 779, 781, 143 S.E.2d 467, 468.⁵ The lack of express language authorizing separate enhancements for multiple convictions rendered on the same day is indicative that the Legislature did not intend for West Virginia Code § 60A-4-408 to authorize circuit courts to separately enhance multiple convictions rendered on the same date and in the same proceeding or it would have so stated in light of this Honorable Court's previous decisions that it is presumed to be aware of.

The language "[a]ny person convicted of a second or subsequent offense" is not express language. The language "[a]ny person convicted of a second or subsequent offense" simply means that the provisions of West Virginia Code § 60A-4-408 apply to second offense convictions, third offense convictions, fourth offense convictions, *et cetera*. Again, the Legislature had full knowledge of this Court's prior rulings whereby it stated that multiple convictions rendered on the same day counted as only one (1) conviction for purposes of sentence enhancement. The fact that it failed to expressly acknowledge that West Virginia Code § 60A-4-408 applied to each conviction separately without regard for the date of entry of the conviction shows that the Legislature did not intend for West Virginia Code § 60A-4-408 to apply separately to multiple convictions rendered on the same date. Concluding otherwise reads language into the statute that is simply not there.

3. Insofar as West Virginia Code § 60A-4-408 is ambiguous, the Rule of Lenity prevails.

Assuming, *arguendo* that West Virginia Code § 60A-4-408 is ambiguous, due process requires that "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor

⁵ West Virginia Code § 61-11-18 dates back to 1939.

of lenity.” *Cleveland v. United States*, 531 U.S. 12, 25 (2000). “In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant.” Syllabus point 5, *State ex rel. Morgan v. Trent*, 195 W.Va. 257, 465 S.E.2d 257 (1995). The rule of lenity “serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.” *Crandon v. United States*, 494 U.S. 152, 158 (1990). Given the absence of a clear indication that the Legislature intended for the separate enhancement of multiple sentences for convictions rendered on the same date and in the same proceedings the rule of lenity requires that West Virginia Code § 60A-4-408 to be interpreted to exclude such a result. In the present case, there is no indication that the Legislature intended to subject defendants to separate sentence enhancements pursuant to West Virginia Code § 60A-4-408 for convictions rendered on the same date and in the same proceeding. This Court has found the lack of such language in West Virginia Code § 61-11-18 which reads strikingly similar to West Virginia Code § 60A-4-408.

VI. CONCLUSION

West Virginia Code § 60A-4-408 does not provide for the separate enhancement of multiple convictions rendered on the same day. Permitting such is inconsistent with this Courts prior rulings in *Turner* and *Hutchinson* that requires *express language* authorizing same. Petitioner prays that this Court will extend it sound reasoning in *Turner* and *Hutchinson* to West Virginia Code § 60A-4-408 as there is no express language in West Virginia Code § 60A-4-408 authorizing the separate enhancement of multiple convictions rendered on the same day.

Petitioner further prays that this Court will reverse the circuit court's sentencing order insofar as it impermissible enhanced multiple convictions rendered on the same date and remand this matter back to the Circuit Court of Fayette County to remove one of the enhancements.

Respectfully Submitted,
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