

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 19-0142
Case No. 18-F-241
Circuit Court of Harrison County

MARK A. WILSON,

Petitioner.



PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

Petitioner fled in his vehicle when Trooper Jones attempted to stop him for an improper registration.¹ A.R. 119. The chase lasted approximately 15 minutes and occurred primarily on back roads and off road. A.R. 123-24, 351. The pursuit ended when Petitioner abandoned his vehicle and escaped on foot. A.R. 124. A jury convicted Petitioner of fleeing in a vehicle with reckless indifference to the safety of others. A.R. 168.

During trial, Petitioner's theory of defense admitted flight but disputed that it was with reckless indifference. His cross examination of Trooper Jones, the only witness, identified evidence that disputed the element of reckless indifference: there was light or no traffic, he did not try to ram other vehicles, the pursuit largely occurred away from the public on back roads and off road, and the police did not call off the pursuit despite a policy to do so if there is imminent danger to the officer or public. A.R. 138-143, 351.

At the conclusion of trial, Petitioner requested a jury instruction on the lesser included offense of fleeing in a vehicle. A.R. 148-49. However, the trial court ruled that there was no factual basis for the instruction. *Id.* The trial court also gave a flight instruction over Petitioner's objection. A.R. 147-48.

I. Petitioner created an evidentiary dispute regarding the element of reckless indifference to the safety of others. The trial court committed error when it refused to instruct the jury on the lesser included offense.

The trial court should have instructed the jury on the lesser included offense of fleeing in a vehicle. To warrant a lesser included instruction, a defendant must meet a two prong test. First, "the lesser offense . . . by virtue of its legal elements or definition [must be] included in the

¹ Most of the pursuit was captured on Trooper Jones's dashcam and was introduced into evidence. The appendix includes a copy of the video on page 351.

greater offense.” *State v. Davis*, 205 W. Va. 569, 573, 519 S.E.2d 852, 856 (1999) *citing* Syl. Pt. 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985). Second, there must be “evidence which would tend to prove such lesser included offense.” *Id.* Such evidence is established by an “evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense . . .” Syl. Pt. 2, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982).

The State agreed that fleeing in a vehicle is a lesser included offense of fleeing in a vehicle with reckless indifference to the safety of others. Resp.’s Br. 8-9. At issue is whether Petitioner established an evidentiary dispute regarding the element of reckless indifference to the safety of others. During trial, Petitioner presented the jury with evidence that he fled in a vehicle without reckless indifference: there was light traffic, he did not try to ram other vehicles, the pursuit largely occurred away from the public on back roads and off road, and the police did not call off the pursuit despite a policy to do so if there is imminent danger to the officer or public. A.R. 138-143, 351. Thus, Petitioner created an evidentiary dispute regarding the additional element in the greater offense and the trial court committed reversible error by not giving the instruction.

The State cited *Richardson* for the proposition that “overwhelming evidence in support of the greater offense is grounds for a court to refuse instruction on the lesser included offense.” Resp.’s Br. 10; *State v. Richardson*, 240 W. Va. 310, 811 S.E.2d 260 (2018). The State then listed the “overwhelming evidence” against Petitioner. However, the State conflated an argument proffered by the respondent in *Richardson* with the holding of the case. It was not overwhelming evidence that upheld the trial court’s denial of a lesser included offense instruction. Rather, the instruction was properly rejected “[b]ecause *there was no evidence* ‘which would tend to prove’

the lesser included offense . . .” *Richardson*, 240 W. Va. at 322 (emphasis added). During the *Richardson* trial, the defendant admitted she was an accessory before the fact to premeditated murder but argued that she negated intent by testifying that “her will was overcome by” her co-defendant. *Id.* at 321. This testimony did not establish an evidentiary dispute regarding premeditation as it was not evidence that the murder was “spontaneous and of a non-reflective nature . . .” *Id.* at 321. Accordingly, a second degree murder instruction was not warranted. In contrast, Petitioner created an evidentiary dispute by proffering evidence that he was not fleeing with reckless indifference to the safety of others. A.R. 138-43, 351.

The State also argued that pursuant to *Phillips*, a factual basis for an instruction does not mandate giving the instruction. Resp.’s Br. 11-12; *State v. Phillips*, 199 W. Va. 507, 512, 485 S.E.2d 676, 681 (1997). However, *Phillips* is inapplicable and the State misconstrued its holding—a holding rendered obsolete by the overhaul of the robbery statute in 2000. Compare W. Va. Code § 61-2-12 (1961), with W. Va. Code § 61-2-12 (2000). In *Phillips*, this Court explained that its precedent explicitly precluded giving the requested lesser included instruction. *Phillips*, 199 W. Va. at 512. In contrast, and by virtue of its elements, fleeing in a vehicle is always a lesser included of fleeing in a vehicle with reckless indifference to the safety of others. It is impossible to flee with reckless indifference without also committing the crime of fleeing; the State admitted as much in its Response. Resp.’s Br. 9. The only issue in this case is whether there was an evidentiary dispute or a complete capitulation by Petitioner such as in *Richardson*. If nothing else, the decision to continue the pursuit, despite a policy to terminate pursuits if civilians are endangered, created an evidentiary dispute. A.R. 138-43.

Finally, the State cited *Henning* as requiring “self-contradicting or inconsistent” facts before a trial court must instruct on a lesser included offense. Resp.’s Br. 12-13; *State v.*

Henning, 238 W. Va. 193, 200, 793 S.E.2d 843, 850 (2016). While this is one method of proving an evidentiary dispute, it is not exclusive. In this case, Petitioner met his burden of demonstrating an evidentiary dispute by introducing and highlighting evidence that disputed the reckless indifference element: there was light traffic, he did not try to ram other vehicles, the pursuit largely occurred away from the public on back roads and off road, and the police did not call off the pursuit despite a policy to do so if there is imminent danger to the officer or public. A.R. 138-143, 351.

Petitioner established an evidentiary dispute and the trial court abused its discretion by refusing to instruct the jury on the lesser included offense. This Court should reverse Petitioner's conviction.

II. The trial court gave a flight instruction in a fleeing case. This was an impermissible comment on the evidence that told the jury Petitioner was guilty of fleeing because he fled.

The trial court abused its discretion and improperly commented on the evidence because it gave a flight instruction when the only crime charged was fleeing. The trial court's instruction told the jury that it could use a later stage of Petitioner's flight from Trooper Jones (on foot) as evidence of guilt for an earlier stage of the same flight (in a vehicle). This was an abuse of discretion and prejudiced Petitioner by creating a self-proving crime: Petitioner's flight proved he was fleeing.

The State argued that when Petitioner stopped his truck the crime of fleeing with reckless indifference ended. Resp.'s Br. 15-16. Then, Petitioner attempted to "escape the location where his vehicular flight ended" by fleeing on foot. *Id.* at 16. This new instance of flight was not "part-and-parcel" of the vehicular flight. *Id.* Therefore, the trial court properly gave a flight instruction because Petitioner engaged in two separate and distinct acts of flight. *Id.*

While it is possible to categorize Petitioner's flight into separate stages, it is unreasonable to argue that the two stages are not one inextricable attempt to flee from Trooper Jones. Under the State's logic, if a defendant is on the West Side of Charleston and flees from the police on foot, then jumps on a bicycle and continues his flight on the bike lane next to MacCorckle Ave., and ultimately tries to swim away by jumping in the Kanawha River, three separate and distinct instances of fleeing have occurred. The foot pursuit would be an attempt to flee the police, the bicycle pursuit would be fleeing the scene of the foot chase, and the attempt to swim across the river would be a flight from the location where the bicycle pursuit ended. The State's logic would also not recognize that a triathlon is one race.

Furthermore, Petitioner cited two cases that held a flight instruction is error when the charged conduct is flight. In response, the State did not cite any cases holding otherwise. Instead, the State argued that Petitioner's flight occurred after the commission of a crime whereas in the cited cases the flight was "inextricably linked to, and one and the same with, the criminal activity taking place." *Id.* at 15. This argument does not pass muster and ignores the legal theory prohibiting flight instructions when the charged conduct is fleeing.

In *Girard*, the defendant was the suspect in a burglary investigation. *State v. Girard*, 34 Or. App. 85, 578 P.2d 415 (1978). Two officers entered the house he was in and attempted to arrest him for the burglary. *Id.* at 87-88. A fight between the officers and the defendant ensued and the officers retreated to call for backup. *Id.* After the officers left the house, the defendant escaped through a window. *Id.* A jury convicted the defendant of first degree burglary, first degree escape (with the use of physical force and with aid from another) and second degree assault. *Id.* at 92. During trial, the court gave a flight instruction. *Id.* at 88. The Oregon Appellate Court held that the flight instruction was reversible error because "[w]hen the basis of a crime

with which a person is charged is flight, as in this case where the defendant was charged with escape, the prejudice of the trial court's pointing out evidence of flight is obvious.” *Id.* at 89–90.

In *Girard*, the flight instruction was improper because the defendant’s flight through a window was inextricably linked with his violent attempt to resist arrest. Similarly, Petitioner’s flight on foot was inextricably linked to his flight in the vehicle. More importantly, *Girard’s* reasoning is equally applicable to Petitioner’s case: instructing a jury that it can infer guilt from a later stage of the same flight is an impermissible comment on the evidence.

In *Graves*, a police officer stopped the defendant because his vehicle had a “defective brake light.” *Graves v. Commonwealth*, 65 Va. App. 702, 705, 780 S.E.2d 904, 905 (2016). When the officer was about to get out of his car, the defendant took off. *Id.* He escaped when the officer ended the pursuit due to “excessive speed.” *Id.* The trial court in *Graves* gave a flight instruction that the appellate court ruled an abuse of discretion because it “single[d] out for emphasis a part of the evidence tending to establish a particular fact.” *Id.* at 711 (internal citations and quotation omitted). Ultimately, the *Graves* court held the error was harmless because the only issue in the case was identity. *Id.* at 713. Nevertheless, the reasoning applies to the instant case. Because the trial court gave a flight instruction over Petitioner’s objection, it impermissibly commented on the evidence and created a self-proving crime: flight proved guilt of flight.

The State also argued that the flight instruction was warranted because evidence of Petitioner’s flight on foot was admissible and not prejudicial. Resp.’s Br. 16-19. It is true that evidence of Petitioner’s flight on foot was admissible *res gestae* and not prejudicial. However, the trial court prejudiced the Petitioner when it instructed the jury that it could use the evidence

of the foot flight as proof of guilt for the vehicular flight. Additionally, the trial court singled out and commented on an element of the charged offense.

Finally, Petitioner does not agree that flight instructions are “defense instructions.” Resp.’s Br. 18. Both parties should be free to use closing argument to argue what import a jury should ascribe to an alleged flight. Defendants are prejudiced when the judiciary comments on the circumstantial evidence of flight and instructs the jury that it can use the evidence to infer guilt. Such comments serve only to heighten the evidence’s import in the minds of jurors and allows prosecutors to effectively argue that the judge agrees with them. “[A] number of other jurisdictions . . . have either disapproved or strongly discouraged the use of a flight instruction.”²

The Supreme Court of Georgia cited the following when it abolished flight instructions:

[T]he jury instruction on flight in criminal cases [. . .] serves no real purpose, as it is a particularization of the general charge on circumstantial evidence, and as the state is free to use circumstantial evidence of flight to argue the defendant's guilt [. . .] Moreover, the charge inevitably carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply the guilt of the defendant; this is especially true since the trial court does not give specific charges on other circumstances from which guilt or innocence may be inferred.

Renner v. State, 260 Ga. 515, 518, 397 S.E.2d 683, 685–86 (1990) (citations omitted).

Instructing a jury that certain evidence implies guilt is not a defense instruction.

² *Fenelon v. State*, 594 So. 2d 292, 294 (Fla. 1992) citing *People v. Larson*, 194 Colo. 338, 572 P.2d 815, 817 (1977); *State v. Wrenn*, 584 P.2d 1231, 1233 (Idaho 1978); *State v. Bone*, 429 N.W.2d 123, 125-27 (Iowa 1988); *State v. Cathey*, 241 Kan. 715, 741 P.2d 738, 748-49 (1987); *People v. Williams*, 66 N.Y.2d 789, 497 N.Y.S.2d 902, 903, 488 N.E.2d 832, 833 (1985); *State v. Stilling*, 285 Or. 293, 590 P.2d 1223, 1230, cert. denied, 444 U.S. 880, 100 S.Ct. 169, 62 L.Ed.2d 110 (1979); *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169, 171 (1980); *State v. Menard*, 424 N.W.2d 382, 384 (S.D.1988).

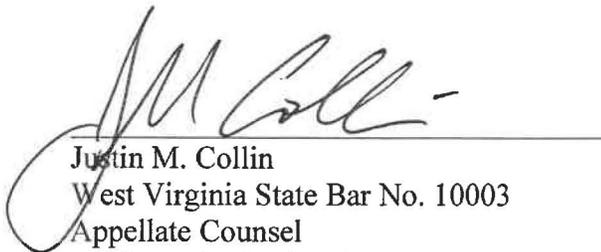
CONCLUSION

The trial court prejudiced Petitioner by refusing to instruct on a lesser included offense and by giving a flight instruction in a fleeing case. Accordingly, this Court should reverse Petitioner's conviction and remand for a new trial.

Respectfully submitted,

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