

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED

December 6, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30524

RELEASED

December 9, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

DAVID ANDERSON,
Defendant Below, Appellant

Appeal from the Circuit Court of Monongalia County
Honorable Russell M. Clawges, Jr., Judge
Criminal Action No. 01-F-23

REVERSED

Submitted: October 29, 2002
Filed: December 6, 2002

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Attorney General
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Attorneys for Appellees

The Opinion of the Court was delivered PER CURIAM.

JUSTICE MAYNARD dissents, in part, and concurs, in part, and reserves the right to file a separate opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct. The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose.” Syllabus Point 1, *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986).

2. “The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.” Syllabus, *State v. Miller*, 184 W.Va. 367, 400 S.E.2d 611 (1990).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Monongalia County entered on June 13, 2001. In that order, the circuit court denied motions for judgment of acquittal and a new trial filed by the appellant and defendant below, David Anderson, and sentenced him to twelve months in the county jail for his conviction of transferring stolen property. However, the appellant's sentence was suspended, and he was placed on probation for a period of two years.

In this appeal, the appellant contends that the circuit court erred by failing to instruct the jury on all of the essential elements of the offense of transferring stolen property. He also claims that the circuit court erred by not allowing his attorney to argue during his closing argument that there had not been an actual transfer of stolen property in this case. The appellant further claims that the State failed to prove that there was an actual transfer of stolen property. Finally, he contends that the evidence was insufficient to support the jury's verdict.

This Court has before it the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, we reverse the appellant's conviction.

I.
FACTS

The appellant was indicted for transferring stolen property on January 5, 2001. At trial, the appellant testified that some time in April 2000, he was walking along a path under a bridge on South University Avenue in Morgantown, West Virginia. The appellant was going fishing when he noticed a large black canvas bag under the bridge. Upon closer inspection, the appellant discovered that the bag contained a camera and some camera equipment including filters and a flash unit. The appellant put the camera and equipment in his own backpack and went fishing.

Within the week, the appellant took the camera to Superior Photo, a local camera shop, for an appraisal. The appellant indicated that he had received the camera from an uncle. Superior Photo estimated that the camera was worth \$1,000.00, and offered to put the camera in its consignment case for resale. The appellant chose to keep the camera. He then advertised it for sale in a newspaper, but did not receive any offers to purchase the camera.

Sometime later, when the appellant needed funds to pay his bills, he called various camera shops in Morgantown trying to sell the camera. The appellant learned that the camera was the type used by studios and eventually he contacted Sue Amos at Genesis Studio. Ms. Amos expressed an interest in purchasing the camera so the appellant took it to her for

inspection. The appellant again stated that he had received the camera from an uncle and wanted to sell it for \$150 to \$200. He left the camera at Genesis Studio so Ms. Amos could determine its value, and he went fishing.

Ms. Amos called a colleague to discuss the value of the camera and was advised that it sounded like a camera that had been stolen from Images by Joy, another photo studio. Soon after, the Morgantown Police were contacted, and by comparing serial numbers, it was determined that the camera was the one stolen from Images by Joy.

Subsequently, the appellant was questioned by the police. He willingly gave a statement regarding how he had found the camera under a bridge. He also took the police to the location where he found the camera. The canvas bag from which he retrieved the camera was still under the bridge.

Thereafter, the appellant was indicted for transferring stolen property as set forth in W.Va. Code § 61-3-18 (1923).¹ Following a jury trial on April 19, 2001, the appellant was

¹W.Va. Code § 61-3-18 states:

If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be deemed guilty of the larceny thereof, and may be prosecuted although the principal

(continued...)

found guilty. He filed post trial motions for a judgment of acquittal and a new trial. His motions were denied, and he was sentenced to twelve months in the county jail. His sentence was suspended, and he was placed on probation for a period of two years in the final order entered on June 13, 2001. This appeal followed.

II.

STANDARD OF REVIEW

As noted above, the appellant appeals an order denying his motions for judgment of acquittal and for a new trial. This Court has held that:

“‘Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W.Va. 325, 168 S.E.2d 716 (1969).” Syl. pt. 1, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974).

Syllabus Point 10, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986). This Court has also stated that:

¹(...continued)
offender be not convicted.

As a general proposition, we review a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995) (citation omitted). With these standards in mind, we now consider the parties' arguments.

III.

DISCUSSION

The appellant first contends that the circuit court erred by failing to instruct the jury on all of the essential elements of the offense of transferring stolen property. Specifically, the appellant says that the circuit court failed to instruct the jury that the State had to prove beyond a reasonable doubt that the property was stolen by someone other than himself. In support of his argument, the appellant relies upon Syllabus Point 1 of *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986), wherein this Court held:

W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct. The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must

have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose.

The record in this case shows that the jury was instructed as follows:

Before the Defendant, David Anderson, can be convicted of Transferring Property (greater than \$1,000.00) as charged in the indictment, the State of West Virginia must prove to the satisfaction of the jury beyond a reasonable doubt that:

1. The Defendant, David Anderson,
2. in Monongalia County, West Virginia,
3. on or about June 19, 2000,
4. did intentionally and unlawfully,
5. transfer to another person, other than the owner,
6. goods which he knew or had reason to believe had been stolen,
7. valued greater than One Thousand Dollars (\$1,000.00),
8. which transfer was with dishonest purpose and with the intent to permanently deprive the owner.

Since the circuit court failed to include the element which requires proof that the property was stolen by someone other than the accused, the appellant contends that the circuit court committed reversible error.

In response, the State concedes that the circuit court failed to include one of the essential elements of the offense of transferring stolen property in the charge to the jury. However, the State urges this Court to overrule *Taylor* and remove the element requiring proof that the property must have been stolen by someone other than the accused to sustain a conviction for transferring stolen property. In making this argument, the State notes that other

jurisdictions have allowed separate convictions for stealing and transferring the same property. Citing *State v. Michielli*, 132 Wash.2d 229, 937 P.2d 587 (1997) (a defendant who steals property and later sells it can be charged with trafficking in stolen property); *State v. Strohm*, 75 Wash.App. 301, 879 P.2d 962 (1994) (a person can be convicted of theft and of trafficking the same property); *State v. Banks*, 358 N.W.2d 133 (Minn. Ct. App. 1985) (a defendant convicted of theft based on retaining possession of a stolen item could also be convicted for receiving stolen property based on transferring the stolen item).

Clearly, the circuit court committed reversible error in this case. This Court has held that, “The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.” Syllabus, *State v. Miller*, 184 W.Va. 367, 400 S.E.2d 611 (1990). See also *State v. Barker*, 176 W.Va. 553, 558, 346 S.E.2d 344, 349 (1986) (“Failure to afford a criminal defendant the fundamental right to have the jury instructed on all essential elements of the offense charged has been recognized as plain error.”).

Having found that the circuit court erred in instructing the jury, we must reverse the appellant’s conviction.² In doing so, we note that we have considered the State’s request

²Because the appellant’s conviction is reversed, we need not address the
(continued...)

that the law regarding the transfer of stolen property be changed by eliminating one of the elements of the offense. However, we can find no basis to reverse this Court’s decision in *Taylor*. That decision was based upon the plain meaning of W.Va. Code § 61-3-18 which has not been amended since 1923. We decline to modify our holding in *Taylor* regarding the elements of the offense of transferring stolen property without a statutory basis to do so. As we have pointed out on several occasions, “This Court does not sit as a superlegislature . . . It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions.” *Boyd v. Merritt*, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986). *See also Verba v. Ghaphery*, 210 W.Va. 30, 36, 552 S.E.2d 406, 412 (2001); *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 735, 474 S.E.2d 906, 911 (1996).

IV.

CONCLUSION

²(...continued)
remaining assignments of error.

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Monongalia County entered on June 13, 2001, is reversed.

Reversed.