

No. 30737 - *State of West Virginia ex rel. David Appleby v. Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County*

Albright, Justice, dissenting:

**FILED**

**Decembser 11, 2002**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**December 13, 2002**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I respectfully dissent from the majority position because I firmly believe that a writ of prohibition should have been granted in this case. In my view, two issues of constitutional proportion deserved full exploration which cannot be found in the majority opinion. The first of these is the interplay of *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999), on the fundamental fairness we have always required in recidivist proceedings. The second is the decision in *State v. Williams*, 196 W.Va. 639, 474 S.E.2d 569 (1996), permitting the use in recidivist proceedings of offenses which are felonies solely by reason of status elements such as we addressed in *State v. Nichols*.

**I. The Interplay of *State v. Nichols*, Fundamental Fairness and Recidivist Proceedings**

*Nichols* allows a defendant charged with an offense which is enhanced by prior convictions of like offenses to elect to admit before trial the prior convictions, called “status elements” of the enhanced offense, in order to avoid the possibility that a jury will be swayed to convict a defendant of the charged offense because of the prior convictions.

In the case before us, the petitioner was charged with third offense driving under the influence (hereinafter “DUI”) and third offense driving on a license suspended for DUI. Taking advantage of *Nichols*, the petitioner admitted the prior convictions at a hearing held by the circuit court before trial. On the day set for trial of the charged offense, the petitioner pled guilty to the charged felony offenses as well, thus subjecting himself to two sentences enhanced by his prior convictions. Subsequent to the petitioner’s guilty plea, the State filed an information against the petitioner, seeking to further enhance his sentence under West Virginia Code §§ 61-11-18 and 19 (also referred to hereinafter as “recidivist statute”). Under the information, the petitioner would be liable to imprisonment for life unless sooner paroled.

The majority found that the information filed under the recidivist statute constituted timely notice to the petitioner of the State’s intent to seek a life term of imprisonment and did not offend Rule 11 of the Rules of Criminal Procedure regarding the punishment information required to be given to a defendant before accepting his or her guilty plea.

However, the majority failed to seriously examine the issue of adequate notice in light of our 1999 decision in *Nichols* and our holdings in other recidivist cases that a judge about to hear a recidivist information is required to “duly caution” a defendant regarding the penalties to which any admissions may expose a defendant. W.Va. Code § 61-11-19 (1943) (Repl. Vol. 2000).

The petitioner argued that the State's delay in filing the recidivist information did not meet the immediacy requirement set forth in West Virginia Code § 61-11-19.<sup>1</sup> In finding that the statutory prescription for filing the information was satisfied, the majority said that "[t]o hold otherwise would risk a defendant being able to avoid imposition of a recidivist sentence if the State is unaware at the time of conviction of any predicate offenses." *State ex rel. Appleby v. Recht*, No. 30737, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (December 4, 2002). Of course, given the fact that the enhancing crimes set forth in the information to garner a life sentence in this case are, with one exception, *exactly the same offenses* relied upon in the indictment to raise the charged offenses to a felony, and all such charges were in this case known fully to the prosecutor when the underlying indictment was returned, the reason stated by the majority is mere piffle.

There is no justifiable reason why a prosecutor, having drawn an indictment stating certain prior convictions relied upon to raise the charged offenses to a felony should be permitted to stand silent on the State's intent to seek even further enhancement by way of a recidivist information, when a defendant is about to completely "cook his own goose" by making admissions under *Nichols* or in a Rule 11 guilty plea hearing that virtually guarantee punishment enhanced twice. Certainly, the trial court's statement to the petitioner regarding

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<sup>1</sup>West Virginia Code § 61-11-19 states, in pertinent part, that "[i]t shall be the duty of the prosecuting attorney when he has knowledge of [a person's] former sentence or sentences to the penitentiary . . . to give information thereof to the court immediately upon conviction and before sentence."

possible punishment incident to his Rule 11 hearing prior to pleading guilty was totally inaccurate in light of the prosecutor's later pursuit of a recidivist information.

Perhaps more to the point is that this State has long recognized that a defendant is entitled, as a matter of fundamental fairness, to be "duly cautioned" before making admissions that may enhance a sentence by reason of recidivism.<sup>2</sup> In its rush to uphold the result below in this case, the majority did not consider the due process implications of the *Nichols* procedure upon a subsequent and then unannounced intent to seek a life sentence under the recidivist statute. *See* Syl. Pt. 7, *Ex parte Watson*, 82 W.Va. 201, 95 S.E.648 (1918) (when interpreting a statute the presumption is that the Legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective). Pursuant to West Virginia Code § 61-11-19, the subject of a recidivist information must be "duly cautioned" by the trial court before that person acknowledges in open court that he or she is the same person convicted of and sentenced for the offenses listed in the information. Although this Court has not adopted a rigid definition of the term "duly cautioned," we have recognized that, being jurisdictional, it is a mandatory statutory requirement placed on the trial court which serves to satisfy principles of fundamental fairness in a recidivist proceeding. *See*

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<sup>2</sup>The majority's concern for the prosecution lacking knowledge of a particular defendant's criminal history appears to be exaggerated inasmuch as criminal records have become accessible through various computerized sources. I have little doubt that the majority is aware of such technological advancements since the majority opinion, in what appears to be an effort to expand the horizons of legal research, cited as authority an Internet website address of a lobbying group.

*State ex rel. Combs v. Boles*, 151 W.Va. 194, 201, 151 S.E.2d 115, 120 (1966) (the duly cautioned provision of the recidivist statute has been fulfilled when the requirements of fundamental fairness, affording the defendant due process, have been satisfied). The reasons for affording due process protections in a recidivist proceeding were summarized in *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980), in the following way:

A recidivist proceeding is not simply a sentencing hearing, but a proceeding whereby a new criminal status, that of being an habitual criminal, is determined. . . . If an individual is successfully prosecuted as an habitual criminal, a greater penalty than that attaching to the underlying crime is imposed. For these reasons, courts have required substantial due process protection in recidivist proceedings.

*Id.* at 225, 262 S.E.2d at 429 (citations omitted).

Given the heightened due process protections which are implicated by recidivist proceedings, it is obvious that unless those protections are extended to admissions given under *Nichols*, their subsequent employment in the actual recidivist proceeding will be mere sham justice, devoid of any meaning whatever. Fundamental fairness requires that the State inform the trial court of its intent to file a recidivist information before admissions are made in a *Nichols* hearing whenever the State intends to use in a recidivist proceeding any prior convictions which are status elements in the charged offense in order to preserve any semblance of the defendant's due process rights to be "duly cautioned."<sup>3</sup>

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<sup>3</sup>Contrary to the majority opinion discussion, I believe that we have to look no  
(continued...)

## II. It is Time to Reverse *State v. Williams*

The petitioner contended that this Court misapprehended legislative intent in deciding *State v. Williams*, in which it was held that a felony conviction resulting from one or more enhanced misdemeanor convictions could be used to form the basis for sentence enhancement under the terms of the recidivist statute. I am not convinced that this issue was ripe for decision at this juncture and should have been thus decided.<sup>4</sup> However, the majority chose instead to summarily conclude that reconsideration of *Williams* was not in order because the Legislature has not chosen to amend the recidivist statute since *Williams* was decided. My initial reaction to this declaration of presumptive knowledge of legislative intent is that it overlooks the fact that the decision in *Williams* was reached without reliance on any relevant statutory change, but nonetheless overturned a seventy-year-old precedent established in *State v. Brown*, 91 W.Va. 187, 112 S.E. 408 (1922).

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<sup>3</sup>(...continued)

further than the West Virginia Constitution to locate the due process safeguards which are called into play in these proceedings. *See* W.Va. Const. art. III, §10. Reliance on federal sources is misplaced in this instance because these sources have not taken into consideration the unique features of our statutory and case law or the extent of protection extended by our state constitution.

<sup>4</sup>Instead of meaningfully addressing the proportionality issue, the majority proceeded to decide a matter upon which the lower court had not yet ruled, that is, whether DUI offenses are violent in nature so as to warrant the imposition of a recidivist life sentence. This improvident action was taken despite the majority's recognition that the petitioner had not yet been tried or sentenced as a recidivist by the court below.

I am even more concerned that by providing such cursory consideration of the proportionality argument the majority failed to recognize that our decision in *Williams* has broader implications than convictions under the DUI statute. A number of offenses can be construed to fall within the *Williams* classification for purposes of imposing a recidivist sentence, many of which have no general association with violence or threats of violence. *See, e.g.,* W.Va. Code §§ 17A-8-4 (1999) (joyriding); 17B-4-3 (1999) (driving while license suspended or revoked for driving under the influence); 60-6-9(i) (1999)(offering alcohol to another in a public place; possessing alcohol in excess of 10 gallons without obtaining proper stamps or seals) 61-3A-3 (1994) (shoplifting); 61-11-20 (1923) (petit larceny). In my estimation, a proportionality argument in this context remains to be decided by this Court.

This Court has recognized that since the recidivist statutes are in derogation of the common law they “are generally held to require a strict construction in favor of the prisoner.” *State ex rel. Ringer v. Boles*, 151 W.Va. 864, 871, 157 S.E.2d 554, 558 (1967). We relied on this proposition in *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), when we noted that this Court has historically adopted a rather strict and narrow construction of the recidivist statute. The discussion thereafter in *Wanstreet* related various instances wherein this narrow construction occurred with specific reference to our decision in *State v. Brown*, 91 W.Va. 187, 112 S.E. 408 (1922):

In *Brown*, we explained that the felonies within the scope of the recidivist statute must be those that are felonies because of the

“character of the offense,” rather than those that are felonies because of the “character of the accused.”

*Wanstreet* at 526, 276 S.E.2d at 208 (citation omitted.). Although our decision in *Williams* overruled *Brown* by placing felony convictions based on predicate misdemeanor offenses within the ambit of the recidivist statute, this statement with regard to the character of the offense subject to the provisions of the recidivist statute retains its vitality. The *Wanstreet* discussion concerning the narrow construction of the recidivist statute concluded by saying that “it is apparent that we have consistently viewed the West Virginia recidivist statute in a restrictive fashion in order to mitigate its harshness.” *Wanstreet* at 528, 276 S.E.2d at 209. Trial courts are well-advised to continue to adhere to these principles as standards against which proportionality issues are decided in recidivist proceedings. As summarized in syllabus point five of *Wanstreet*, determination of “whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” 166 W.Va. at 523-24, 276 S.E.2d at 207.<sup>5</sup>

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<sup>5</sup>It should also be noted that the majority opinion could be read (I hope it is not) to authorize an expanded discretion in prosecuting attorneys to select (without any judicial or other check) from the pool of people with past multiple-offense convictions, and to effectively impose mandatory life sentences on those people who are selected. Especially when combined with the notice and due process issues identified in Part I of this opinion, such as unfettered discretion, which purports to divest the judiciary of its constitutional role in the (continued...)

It seems to me far wiser to humbly admit the error in foresight and correct it, especially when constitutional rights are inadvertently trampled upon. The principle of stare decisis is not intended to perpetuate such errors. As we related in *State v. Nichols*, “Remaining true to an “intrinsically sounder” doctrine . . . better serves the values of stare decisis. . . . In such a situation “special justification” exists to depart from the recently decided case.’ *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 231, 115 S.Ct. 2097, 2115, 132 L.Ed.2d 158 (1995).” *Nichols* at 445, 541 S.E.2d at 323 (1999).

For the foregoing reasons, I dissent from the majority opinion in this case. Regardless of whether this Court might choose to address its earlier decisions in *State v. Williams* and *State v. Brown*, I believe the petitioner is entitled to the writ prayed for in light of the interplay of *State v. Nichols* and the petitioner’s entitlement to be “duly cautioned” under West Virginia Code § 61-11-19. Consequently, a writ of prohibition, moulded to address either or both issues raised in this dissent, should have been granted.

I am authorized to state that Justice Starcher joins in this separate opinion.

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<sup>5</sup>(...continued)  
consideration of proportionality in sentencing, raises an additional source of constitutional concern.