

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

No. 32610

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

DAVID M. REED,
Defendant Below, Appellant

FILED
November 29, 2005

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

Appeal from the Circuit Court of Cabell County
Honorable Alfred E. Ferguson, Judge
Civil Action No. 03-F-51

AFFIRMED

Submitted: October 11, 2005
Filed: November 29, 2005

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The Opinion of the Court was delivered PER CURIAM
JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “In the absence of any substantial countervailing factors, where a new rule of criminal law is made of a nonconstitutional nature, it will be applied retroactively only to those cases in litigation or on appeal where the same legal point has been preserved.” Syllabus Point 3, *State v. Gangwer*, 168 W.Va. 190, 283 S.E.2d 839 (1981).

2. “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syllabus Point 5, *State v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Per Curiam:

This case is before the Court upon the appeal of the appellant, David M. Reed. On March 11, 2003, the appellant was convicted by a jury in the Circuit Court of Cabell County of third offense domestic battery and thereafter received an enhanced sentence pursuant to the habitual criminal statute. The appellant argues that the circuit court erred in denying his motion for bifurcation to contest the validity of his prior convictions in accordance with *State v. McCraine*, 214 W.Va. 188, 588 S.E.2d 177 (2003), an opinion released by this Court shortly after the appellant's trial. By order dated April 23, 2003, the appellant was sentenced to two-to-five years in the State penitentiary. Based upon the parties' briefs and arguments in this proceeding, as well as the relevant statutory and case law, we are of the opinion that the circuit court did not commit reversible error and accordingly, affirm the decision below.

I.

FACTS

On January 9, 2003, a Cabell County Grand Jury returned a six-count indictment against the appellant for three counts of third offense domestic battery in violation

of West Virginia Code § 61-2-28(d),¹ and three counts of second offense violation of a domestic violence protective order in violation of West Virginia Code § 48-27-903(b).² The appellant made a motion to sever the counts against him and the circuit court granted the motion. The appellant also moved to bifurcate the trial with regard to his two previous domestic battery convictions which occurred in 1996 and 1999 involving his wife. The State argued that the appellant had the burden to show he was not the person involved in the prior convictions and if he could not do so he had to stipulate to those convictions. The circuit court then denied the appellant's motion to bifurcate and the appellant stipulated to the two prior convictions. The appellant did not object to the circuit court's denial of bifurcation nor

¹West Virginia Code § 61-2-28(d), in part, provides:

Any person who has been convicted of a third or subsequent violation of the provisions of subsection (a) or (b) of this section, a third or subsequent violation of the provisions of section nine of this article where the victim was a current or former spouse, . . . is guilty of a felony if the offense occurs within ten years of a prior conviction of any of these offenses and, upon conviction thereof, shall be confined in a state correctional facility not less than one nor more than five years or fined not more than two thousand five hundred dollars, or both.

²West Virginia Code § 48-27-903(b), provides:

A respondent who is convicted of a second or subsequent offense under subsection (a) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be confined in the county or regional jail for not less than three months nor more than one year, which jail term shall include actual confinement of not less than twenty-four hours, and fined not less than five hundred dollars nor more than three thousand dollars, or both.

did he request a hearing to present evidence on the issue.

On March 13, 2003, the jury found the appellant guilty of the third offense domestic battery charges. On April 17, 2003, the State filed a recidivist information alleging that the appellant had previously been convicted of a felony. After the appellant admitted being the same person named in the recidivist information, the circuit court found him guilty under the recidivist statute. The circuit court then sentenced the appellant to two-to-five years imprisonment. This appeal followed.

II.

STANDARD OF REVIEW

In Syllabus Point 1 of *State v. Paynter*, 206 W.Va. 521, 526 S.E.2d 43 (1999), we held, “‘Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.’ Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” We have further indicated that a circuit court’s final order and ultimate disposition are reviewed under the abuse of discretion standard. *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997).

III.

DISCUSSION

The appellant maintains that following this Court's decision in *State v. McCraine*, 214 W.Va. 188, 588 S.E.2d 177 (2003), he is entitled to reversal and a remand for a new bifurcated trial. Specifically, the appellant points out that in Syllabus Point 11 of *McCraine*, this Court held:

A trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. To the extent that our decision in *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999), conflicts with this holding it is hereby modified.

While *McCraine* was decided after the appellant was convicted and sentenced, he argues that his case falls within the boundaries for retroactive application of that case. In Syllabus Point 3 of *State v. Gangwer*, 168 W.Va. 190, 283 S.E.2d 839 (1981), this Court held, “[i]n the absence of any substantial countervailing factors, where a new rule of criminal law is made of a nonconstitutional nature, it will be applied retroactively only to those cases in litigation or on appeal where the same legal point has been preserved.” In addition, footnote 21 from *McCraine* provides:

Since our decision regarding bifurcation is a procedural requirement and ‘prophylactic standard[] designed to safeguard the right of every [similarly situated] criminal defendant to’ a fair trial, it has limited retroactive effect. *State v. Blake*, 197 W.Va. 700, 712, 478 S.E.2d 550, 562 (1996). The application of our decision today, therefore, is limited to the retrial of Appellant and to cases in litigation or on appeal during the pendency of this appeal in which the issue has been properly preserved. Syl. Pt. 3, *State v. Gangwer*, *infra*.

The appellant's counsel moved for bifurcation on February 19, 2003, and his motion was denied on March 6, 2003. Based upon that denial the appellant stipulated to the two prior domestic battery convictions. The appellant maintains that since *McCraine* was decided after his March 13, 2003, conviction, and after his April 23, 2003, sentencing, but before his September 1, 2004, petition for appeal was filed, that retroactively applies to his case. Conversely, the State contends that the appellant should not receive the benefit of the new procedural rule because the appellant had not yet filed his petition for appeal by the time *McCraine* was actually decided by this Court on May 16, 2003.

The State's assertion that retroactivity is inapplicable in this case simply because the appellant's petition for appeal was not yet filed at the time of our decision in *McCraine* is inconsistent with our prior holdings. In fact, in *State v. Blake*, 197 W.Va. 700, 711-12, 478 S.E.2d 550, 561-62 (1996), we explained that, "[a] conviction and sentence becomes final for purposes of retroactivity analysis when the availability of direct appeal to this Court is exhausted or the time period for such expires." While our review of the record leads us to conclude that the appellant's case was "in litigation or on appeal" for purposes of retroactivity, our analysis does not stop there.

We now turn to the requirement as set forth in Syllabus Point 3 of *Gangwer*, *supra*, that the application of retroactivity is limited to cases in litigation or on appeal "in

which the issue has been properly preserved.” It is the State’s contention that the appellant did not timely preserve his objection as required by *Gangwer*. We agree.

When the circuit court refused the appellant’s motion to bifurcate, the appellant stipulated to his two prior domestic violence convictions without any argument or presentation to the contrary. The appellant simply stood silent and did not exercise his right under then-existing law to request a pre-trial hearing on the bifurcation issue. *See* Syllabus Point 4, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999). Thus, the appellant is not similarly situated with individuals who were denied bifurcation by a circuit court, who then requested a hearing on the issue of bifurcation, and whose cases were in litigation or pending on appeal when this Court decided *McCraine*.

The appellant raised the issue of bifurcation for the first time on appeal based solely upon our decision in *McCraine*. Applying *McCraine* retroactively to this case would undermine the principles of limited retroactivity and defeat the fundamental rule that similarly situated defendants should be treated the same. We believe that those whose appeals were pending at the time of this Court’s decision in *McCraine*, who properly preserved the issue below, should benefit from that decision; however, the appellant is not in that category. Consequently, the appellant is not entitled to the benefit of our holding in *McCraine*.

We must also point out that even if we had applied *McCraine* retroactively to the appellant's case, he still would not have survived a harmless error analysis. In footnote 21 of *McCraine*, we explained that our new requirement of bifurcation was “a procedural requirement and ‘prophylactic standard[] designed to safeguard the right of every [similarly situated] criminal defendant to’ a fair trial [and that] it has limited retroactive effect.” (Citation omitted.). With that in mind, it is well settled that, “[m]ost errors, including constitutional ones are subject to harmless error analysis.” *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). In *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), we explained that, “[a]s to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment.” (Citations omitted.).

Likewise, in *State v. Blair*, 158 W.Va. 647, 659, 214 S.E.2d 330, 337 (1975), we noted that “[t]he doctrine of harmless error is firmly established by statute, court rule and decisions as a salutary aspect of the criminal law of this State. In a constitutional context, the doctrine is also applied because appellate courts are not bound to reverse for a technical violation of a fundamental right.” (Citations omitted.) In Syllabus Point 5 of *Blair*, we further held, “[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” *Id.*

Equally important, as we said in *State v. Salmons*, 203 W.Va. 561, 582, 509

S.E.2d 842, 863 (1998), “[i]t defies logic for this Court to hold that a harmless error analysis applies to substantive constitutional violations, yet hold that a harmless error analysis does not apply to a prophylactic rule designed to protect enforcement of a constitutional right.” In fact, “[o]ur cases consistently have held that nonconstitutional errors are harmless unless the reviewing court has grave doubt as to whether the [error] substantially swayed the verdict.” *State v. Potter*, 197 W.Va. 734, 748, 478 S.E.2d 742, 756 (1996). *See State v. Rahman*, 199 W.Va. 144, 483 S.E.2d 273 (1996); *State v. Young*, 185 W.Va. 327, 406 S.E.2d 758 (1991); *State v. Ferrell*, 184 W.Va. 123, 399 S.E.2d 834 (1990). *See also* West Virginia Rule of Criminal Procedure 52(a) (“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”).

In this case, there is simply no evidence suggesting that the appellant’s stipulation to his prior crimes contributed to the judgment against him. Moreover, based upon the appellant’s stipulation, the State did not disclose the appellant’s prior convictions to the jury during the guilt phase of his trial even though there was substantial evidence proving those prior convictions. This is confirmed by the record before us which contains a certified copy of a criminal complaint and disposition sheet from April 18, 1996, stating that an individual named David Reed, with the same birth date and other identifying information as the appellant, pled guilty to domestic battery and served two days incarceration. The record also contains an indictment charging David Reed with third offense domestic battery and malicious wounding.

It is difficult for this Court to understand how the appellant was prejudiced by his admission to his prior offenses and the circuit court's denial of bifurcation. The appellant did not object to the circuit court's denial of his motion, he did not request a hearing or present any evidence on the issue, and he did not raise it in his post-trial motions. Moreover, the appellant actually benefitted from his stipulation to his prior offences because the State agreed not to introduce West Virginia Rule of Evidence 404(b)³ evidence in return for his stipulation, which included his two prior convictions for domestic battery. Thus, even if the appellant had been able to use our holding in *McCraine* retroactively, any violation would have been deemed harmless under these circumstances.

Our review of this matter does not indicate any error by the lower court, and we do not find that the lower court acted in an arbitrary or irrational manner. We

³Rule 404(b) of the West Virginia Rules of Evidence provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

consequently affirm the circuit court's decision.⁴

IV.

CONCLUSION

Accordingly, for the reasons stated above, the final order of the Circuit Court of Cabell County entered on April 23, 2003, is affirmed.

Affirmed.

⁴The appellant argues that if his underlying conviction is reversed by this Court then the sentencing enhancement of one-to-five years in the penitentiary to two-to-five years in the penitentiary should be void. Since we have affirmed the appellant's underlying conviction this issue is moot.