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

Davis, J., concurring:

The majority opinion concluded that the defendant was not entitled to bifurcate the status element of his offenses. I agree with this result. However, this result should have been attained by different rationale.

McCraine Should Be Overruled

In this case, the defendant argued that he should have been given the benefit of this Court's decision in *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003).

McCraine 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.

Syl. pt. 11, *McCraine*. In the instant case, the majority refused to apply *McCraine* retroactively to the defendant's case because he allegedly¹ failed to satisfy our retroactivity

¹I say "allegedly" because in my opinion the defendant, did, in fact, satisfy our retroactivity principles.

principles. In my view, *McCraine* should not be applied in this case because *McCraine* should be overruled.

In *McCraine* I argued against the creation of *mandatory* bifurcation for a status element of an offense. I gave the following reasons for rejecting mandatory bifurcation:

As a result of the majority decision, every defendant convicted of an offense having a status element should now be strongly motivated to demand a bifurcated trial. I so conclude because a defendant will have nothing to lose by requiring the State to have a separate jury determine the issue. I have little doubt in further concluding in an overwhelming majority of all such cases, defendants will not prevail. Consequently, the majority's decision has encouraged a terrible waste of judicial resources. Simply put, the majority is clogging an already overburdened judicial system.

McCraine, 214 W. Va. at 206, 588 S.E.2d at 195 (Davis, J., concurring in part and dissenting in part).

My criticism of the majority decision in *McCraine* was also due to this Court's previously established procedures for handling a status element of an offense in *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999). This procedure was enunciated in syllabus points 3, 4 and 5 of *Nichols* as follows:

3. When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior

conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that *State v. Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled.

4. A defendant who has been charged with an offense that requires proof of a prior conviction to establish a status element of the offense charged, and who seeks to contest the existence of an alleged prior conviction, may request that the trial court bifurcate the issue of the prior conviction from that of the underlying charge and hold separate jury proceedings for both matters. The decision of whether to bifurcate these issues is within the discretion of the trial court. In exercising this discretion, a trial court should hold a hearing for the purpose of determining whether the defendant has a meritorious claim that challenges the legitimacy of the prior conviction. If the trial court is satisfied that the defendant's challenge has merit, then a bifurcated proceeding should be permitted. However, should the trial court determine that the defendant's claim lacks any relevant and sufficient evidentiary support, bifurcation should be denied and a unitary trial held.

5. At a hearing to determine the merits of a defendant's challenge of the legitimacy of a prior conviction pursuant to Syllabus point 4 of *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999), the defendant has the burden of presenting satisfactory evidence to show that the alleged prior conviction is invalid as against him or her.

At the time of this defendant's trial, *Nichols* was the law on the issue of bifurcation of a status element of an offense. Thus, the defendant could have asserted syllabus point 4 of *Nichols* and obtained a hearing to determine if there was any merit to the issue of whether he was the person named in the abstracts of the prior convictions. Instead,

the defendant chose, pursuant to syllabus point 3 of *Nichols*, to stipulate to the prior offenses. Consequently, under *Nichols* the defendant's appeal is without merit. For this reason, I concur in the judgment of this case.

I believe the Court should have taken the opportunity to examine the viability of *McCraine's* mandatory bifurcation and overrule the opinion on that narrow point of law. The instant case points out exactly what the *Nichols* Court was trying to avoid. *Nichols* sought to prevent the unjustifiable waste of judicial resources and time that results from requiring mandatory bifurcation in every case involving a status element offense. In this case, the defendant had no valid reason for challenging the abstract of his prior convictions. That is the reason he voluntarily chose to so stipulate. Unfortunately, as a result of *McCraine*, the defendant contends that he should have been allowed to bifurcate a meritless and worthless issue for jury determination. Had the majority opinion not applied the law of retroactivity, the defendant would have been entitled to a new trial for a clearly absurd reason. In fact, this case is a perfect example of the mischief that will be cultivated by *McCraine's* illogical rule of mandatory bifurcation. I look forward to the day when this Court will realize the absurdity of the *McCraine* opinion and overrule its mandatory bifurcation requirement.

In view of the foregoing, I concur in the judgment in this case.