

No. 33322

*State of West Virginia ex rel. Shane Shelton v. Howard Painter,
Warden*

FILED
December 20,
2007

Benjamin, Justice, concurring, in part, and dissenting, in part:

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I agree with the majority to the extent that this Court affirms the conviction of the appellant for the crime of first-degree murder. However, I dissent from the majority decision to reverse the sentence of life in prison without the possibility of parole and to remand the case for further proceedings related to the sentencing of appellant. In dissenting and writing separately, I wish to emphasize that my disagreement with the majority on the issue of the defense given below is admittedly one of degree. However, I also question the wisdom of this Court in cases such as this making a determination that trial counsel was ineffective, but only in so far as it relates to sentencing and not to guilt. One might wonder how it is, if trial counsel was so ineffective so as to require this Court's action as the majority finds here, that that ineffectiveness was limited only to the appellant's sentencing. It would seem that if ineffectiveness in the defense of appellant was present to the level needed for a partial reversal, that such ineffectiveness no doubt permeated the entire defense to such a degree as to require a complete reversal and remand for a new trial, not simply a resentencing.

The majority opinion recounts not only the viciousness of the crime for which

the appellant was found guilty, but also the appellant's ready admission to having shot the victim. In doing so, the majority relies on excerpts of the record – excerpts which I believe have the potential for misleading this Court in its cold appellate review. The court below did not labor under such a restriction. It is in this latter respect, and the effect which the appellant's admission had in the trial, which causes me to disagree with my colleagues and to conclude that the court below ruled correctly.

At first blush, I, too, might question some of trial counsel's tactics. However, a more thorough review of the appellant's testimony and, just as importantly, the practical inability of the trial counsel to mount any legitimate defense are considerations which I believe receive too little consideration from the majority. It is easy to "Monday-morning quarterback" a defense counsel's performance in a trial. That, of course, is not the test for ineffectiveness. Here, I think one must realistically look at what the defense counsel had to work with. And it was precious little. While I'm not certain how I might have defended appellant, I'm not prepared to say that defense counsel below could have done any better than he did with what he had available to him – particularly after his client, the appellant, testified in the manner he did. The trial court below was in the best position to determine effectiveness. I would defer to that court in this instance and not hold defense counsel to an unattainable standard. Indeed, I'm not sure what, if any, prejudice was actually caused to appellant herein even if counsel's performance came up a bit short.

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