IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

v. No.: 19-0447

STEVEN TEWALT,
Petitioner.

(An appeal of a final order in Preston County Circuit Court Case No.: 18-F-44)

PETITIONER'S REPLY BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying the Petitioner's Motion for Judgment of Acquittal due to insufficient evidence.
2. The Circuit Court erred by denying the Petitioner's Motion for New Trial based upon the improper admission of collateral acts evidence under Rule 404(b).
3. The Circuit Court erred by denying the Petitioner's Motion for Arrest of Judgment based upon the invalidity of the "Strangulation" statute for being unconstitutionally vague.
4. The Circuit Court erred by denying the Petitioner's Motion for Mistrial based upon the jury's resolution of doubt in favor of the State rather than the accused.
5. The Circuit Court erred by issuing a lifetime no-contact order against the Petitioner.
6. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because the fifth assignment of error concerns an issue of first impression. Alternatively the case is appropriate for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because of a result against the weight of the evidence, and an unsustainable exercise of discretion by the trial court. The case should be resolved by signed opinion.

ARGUMENT

In this Reply Brief, the Petitioner submits additional argument on the second, and fifth, assignments of error. The Petitioner stands upon the argument set forth in the Petitioner's Brief

on the first, third, fourth, and sixth assignments of error.

1. The Circuit Court clearly violated Syl. Pt. 1 of *McGinnis* by reading off the litany of possible purposes for the evidence under Rule 404(b) rather than selecting only the applicable purpose of the evidence. (Second assignment of error).

The Respondent, in responding to the Petitioner's contention that the requirements of Syllabus Point 1 of *State v. McGinnis* 193 W.Va. 147, 455 S.E.2d 516 (1994), were violated by the form of the Circuit Court's limiting instruction, cites to the instruction used by the lower court as described in *State v. Williams*, 198 W. Va. 274, 278, 480 S.E.2d 162, 166 (1996) (*per curium*), which was very similar to the one used in the instant case. (Respondent's Brief, at 18-19). The Respondent suggests that the *Williams* instruction was "affirmed" by this Court, and it is true that this Court considered the appellant's complaint about the instruction and affirmed the conviction. However, that *per curium* opinion did not modify Syllabus Point 1 of *McGinnis*.

Moreover this Court noted in *Williams* that during the *in camera* hearing, the State had provided "absence of mistake" as the particular purpose, rather than merely offering the 404(b) litany, which distinguishes *Williams* from the present case as at least partially compliant with *McGinnis*, notwithstanding the words of the limiting instruction. *Williams*, 198 W. Va. at 280, 480 S.E.2d at 168. In the years since the *Williams* opinion was issued, it has not been cited a single time by this Court in support of an instruction that so blatantly violates the direct and unambiguous language of Syllabus Point 1 of *McGinnis*. It would be appropriate for this Court to take the opportunity presented by this case to clarify that Syllabus Point 1 of *McGinnis* means what it says, and was not somehow trumped by a rarely-cited, one-off *per curiam* opinion from twenty-three years ago.

2. All aspects of a sentence handed down in the final judgment of a Circuit Court are ripe for review on direct appeal. (Fifth assignment of error).

Tellingly, the Respondent makes no substantive defense of the Circuit Court's lifetime

no-contact order placed upon the Petitioner at sentencing, instead relying on a ripeness argument. (Respondent's Brief, at 24-26). The Respondent does not cite a single case in which this Court has ever deemed an aspect of a sentencing order as not being ripe for review upon direct appeal. To the contrary, there are numerous instances in which defendants have, on direct appeal, challenged future restraints on liberty placed upon them prior to being punished for the violation thereof.

In *In re Brandi B.*, 231 W.Va. 71, 743 S.E.2d 882 (2013), this Court considered a juvenile status offender's objection to a term of probation that required her to complete high school, prior to any allegation that she violated that requirement. This Court considered that contention on the merits. In *State v. Deel*, 237 W.Va. 600, 788 S.E.2d 741 (2016), a criminal defendant challenged the imposition of extended supervised release prior to ever having been accused of violating the same. This Court, again, considered that contention on the merits. In *State v. Cookman*, 813 S.E.2d 769 (W. Va., 2018), a defendant challenged the imposition of an additional period of probation as illegal, and this Court considered that challenge prior to Mr. Cookman ever being punished for the violation of the second period of probation. In *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011), three separate defendants challenged the imposition of supervised release without having been punished for violating its terms, and this Court considered the challenges on the merits. The Respondent's ripeness argument is wholly without merit.

The Respondent contends that the Petitioner "has no reason to even have the provision removed from the sentencing order unless he intends to violate it by contacting the victim of his crime." (Respondent's Brief at 26). This assertion is Kafkaesque, bordering on the absurd. The law requires no "reason" for a person to object to the illegal restraint on personal liberty by the

State. The Respondent likewise argues that "Petitioner has not been punished in any manner for violating the no contact provision" (Id., at 25) which is an utter non sequitur; the no contact provision *is* the punishment. It is a restraint upon liberty imposed as a result of the conviction of a crime. *See, Jett v. Leverette*, 247 S.E.2d 469, 474, 162 W.Va. 140, 148 (1978) (dissenting opinion, McGraw, J.).

The Petitioner insists that the Circuit Court imposed a restriction on liberty against him, *for life*, which the Circuit Court had no power to impose. Yet by the State's ripeness formulation, he should not be able to challenge that restraint on liberty until he is actively being punished for violating it. This situation is not analogous to a citizen who objects to a criminal legislative enactment, but who lacks an actual case or controversy to challenge it. There is an actual court order, bearing the Petitioner's name, and the judge's signature, telling the Petitioner that he is restrained from doing something he would otherwise be permitted to do, with no time limitation.

The Petitioner is not asking for an advisory opinion. The Petitioner is asking this Court to reverse the order of the Circuit Court of Preston County, and to compel the judge of that Court to vacate the illegal no-contact provision of his sentencing order. Far from being subject to ripeness analysis, an illegal sentence may be challenged *at any time*, pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure. And this sentence is clearly illegal. The Petitioner directly confronted the Circuit Court to cite the authority that permitted him to enter such an order. The Circuit Court failed to name any authority. (A.R.5., at 12-13). The Respondent has had the opportunity to try and locate a justification in the law for the sentence, and has come up with nothing better than the Legislature's Article 27, Chapter 48 public policy statement and admonition that domestic violence provisions should be "liberally construed."

(Respondent's Brief, at 25). Those provisions would be liberally construed indeed if this Court permitted an application of that article that far exceeds what the legislature expressly allowed, as discussed in argument section 5 of the Petitioner's Brief. Because the State has offered only a spurious defense against this assignment of error, and because there is clearly no authority that permitted the Circuit Court to enter a no-contact order, this Court should grant relief and reverse the imposition of that aspect of the sentencing order.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the following relief:

1. That the conviction be vacated and remanded for entry of a judgment of acquittal or other order dismissing the matter with prejudice;
2. That the conviction be vacated and remanded for a new trial;
3. That the lifetime no-contact order be vacated and the matter remanded for a lawful order;
4. That the Court grant any other relief the Court deems just and proper.

Respectfully Submitted,

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By counsel,

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