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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 20-0323 (Berkeley County CC-02-2019-F-144)

Lateef McGann,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Lateef McGann, by counsel Robert C. Stone Jr., appeals the order of the Circuit Court of Berkeley County, entered on April 2, 2020, sentencing him to: a term of one year in a regional jail upon his misdemeanor conviction of rioting; a term of one year in a regional jail upon his misdemeanor conviction of conspiracy (to run concurrently with the first sentence); a term of six months in a regional jail upon his misdemeanor conviction of willful disruption of government process (to run consecutively with the first two sentences); and imprisonment in a state penitentiary for one to five years upon his felony conviction of making a facility less secure. Respondent State of West Virginia appears by counsel Patrick Morrisey and Elizabeth Grant.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. McGann was charged in a nine-count indictment and later tried for his part in an October 23, 2018, incident at a state regional jail where he was confined. The State's trial evidence showed that the events were precipitated by an assault on an inmate by Mr. McGann and his cellmate, Marcus Benn, and the consequential threatened lockdown of Mr. McGann and Mr. Benn. Before inmates' cells were locked for the night, Mr. McGann or Mr. Benn and other inmates placed objects in the locking mechanisms of their cells to prevent cell doors from locking. A fire alarm sounded in the section where these inmates were housed at 3:00 a.m. Surveillance video showed that Mr. McGann had attempted to break sprinkler heads in that section, and that Mr. Benn successfully broke a sprinkler head. When the fire alarm sounded, water poured into the area. Correctional officers communicated (through a locked door) commands that inmates return to their cells for lockdown, but Mr. Benn responded that "it's past lockdown. We went this far. Someone

is going to die here today. We don't know if it's going to be me and I don't know if it's going to be you."

Correctional officers determined that officers from other sections were needed for assistance. When officers were summoned to the section, a single officer was left to supervise the remaining inmates, which comprised about two-thirds of the jail population. The incident lasted for three hours. In that time, Mr. McGann tore a sheet into strips that he tied to door handles to prevent officers' entry, and Mr. McGann, Mr. Benn, and other inmates covered surveillance cameras with wet toilet paper, covered windows, and barricaded entryways. While the officers' views were obstructed, at around 4:00 a.m., some inmates started a fire. They started another fire at around 5:00 a.m. Based on the officers' later investigation, it appears Mr. McGann did not start the fire, but stood by while another inmate did. Officers regained control of the section around 6:00 a.m.

After the State presented its trial evidence establishing the situation described above, Mr. McGann moved for judgment of acquittal, and the circuit court denied his motion. Mr. McGann was convicted of misdemeanor rioting, misdemeanor conspiracy to riot without injury, misdemeanor willful disruption of government process, and felony making a correctional facility less secure. Mr. McGann made a motion for a new trial, and it was denied.

On appeal, Mr. McGann asserts four assignments of error: 1) that West Virginia Code § 61-6-6, under which he was convicted of rioting, is void by desuetude; 2) that the State's evidence was insufficient to support his conviction for conspiracy; 3) that the State's evidence was insufficient to prove that he made a facility less secure; and 4) that a regional jail inmate cannot be charged with violation of West Virginia Code § 61-6-19(a).

We begin with Mr. McGann's attempt to wield the rarely-used doctrine of desuetude, under which a statute may be declared void for non-use. *State ex rel. Canterbury v. Blake*, 213 W. Va. 656, 660, 584 S.E.2d 512, 516 (2003). Citing this principle, Mr. McGann calls for the application of this doctrine to West Virginia Code § 61-6-6, which provides:

> If any person engaged in a riot, rout or unlawful assemblage, pull down or destroy, in whole or in part, any dwelling house, courthouse, jail, prison, asylum, hospital, school or college building, or any public building of any character, or assist therein, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years; and though no such building be injured, every rioter, and every person unlawfully or tumultuously assembled, shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail not more than one year and fined not exceeding five hundred dollars.

Mr. McGann's advocacy is based on his "belief" that this statute was crafted to address the tumultuous mine wars in our state, and there is a dearth of jurisprudence addressing this law after the resolution of that turbulence in the early part of the last century. Mr. McGann's subjective belief does not sufficiently address the elements necessary for the application of desuetude:

> Penal statutes may become void under the doctrine of desuetude if:
>
> (1) The statute proscribes only acts that are *malum prohibitum* and not *malum in se*;
>
> (2) There has been open, notorious and pervasive violation of the statute for a long period; and
>
> (3) There has been a conspicuous policy of nonenforcement of the statute.

Syl. Pt. 3, *Comm. on Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 416 S.E.2d 720 (1992). In attempt to expend only slightly more attention on these elements than Mr. McGann did, we simply state that Mr. McGann has offered no credible evidence that there is open and notorious destruction of government property that has been allowed to continue without redress. We also note that a more extensive analysis of the first element would likely yield the conclusion that property destruction is, indeed, malum in se and, therefore, not likely to lose its criminal character. *Id*. at 188, 416 S.E.2d at 726.

We combine Mr. McGann's second and third assignments of error for review because both concern the sufficiency of the evidence to support Mr. McGann's convictions, and because Mr. McGann's arguments supporting each assignment of error are similarly tenuous. We review this evidence as follows:

> "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Jenkins*, 229 W. Va. 415, 729 S.E.2d 250 (2012).

First, Mr. McGann challenges his conspiracy conviction on the ground that the State offered no evidence of an agreement between him and any other inmate.[1] We agree with the State

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[1] Mr. McGann was convicted under West Virginia Code § 62-8-1(a), which provides:

> A person imprisoned or otherwise in the custody of the Commissioner of Corrections and Rehabilitation is guilty of a felony if he or she kills, wounds, or inflicts other bodily injury upon any person at any correctional facility; or breaks, cuts, or injures, or sets fire to any building, fixture, or fastening of any correctional

(continued…)

that the actions described at trial and summarized above are more than adequate to show "that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syl. Pt. 4, in part, *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981). We further agree that engagement in the prohibited conduct is, itself, the agreement. *Id*. at 265, 294 S.E.2d 67. Second, Mr. McGann challenges his conviction of rendering a facility less secure on the ground that the State offered no evidence that any inmate attempted to escape.[2] West Virginia Code § 62-8-1 sets forth numerous offenses with which an inmate could be charged. Under the plain reading of the statute, an inmate could compromise the security of a facility without regard to any attempted escape. The evidence is sufficient to support Mr. McGann's convictions.

In his final assignment of error, Mr. McGann challenges his conviction for willful disruption of governmental processes, described in West Virginia Code § 61-6-19(a) as follows:

> If any person willfully interrupts or molests the orderly and peaceful process of any department, division, agency, or branch of state government or of its political subdivisions, he or she is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100, or confined in jail not more than six months, or both fined and confined: *Provided*, That any assembly in a peaceable, lawful, and orderly manner for a redress of grievances is not a violation of this section.

In asserting that this statute may not be applied to a regional jail inmate, petitioner argues that this statute, enacted in 1971, has been examined only once by this Court, in *State v. Berrill*, 196 W. Va. 578, 474 S.E.2d 508 (1996), a case describing the application of the statute to public meetings in a manner restricting freedom of speech. Our consideration of this matter parallels our discussion of Mr. McGann's first assignment of error above: Mr. McGann has simply offered no evidence or authority that would entice us to upend a longstanding statute.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 27, 2021

> facility, or jail or any part thereof, for the purpose of escaping or aiding any other inmate to escape therefrom, or renders any correctional facility or jail less secure as a place of confinement; or makes, procures, secretes, or has in his or her possession, any instrument, tool, or other thing for such purpose, or with intent to kill, wound, or inflict bodily injury; or resists the lawful authority of an officer or guard of any correctional facility or jail for such purpose or with such intent. Any three or more inmates confined, or in custody, who conspire together to commit any offense mentioned in this section are each guilty of a felony. . . .

[2] *See n.1.*

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton