

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1991 Term

No. 20141

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

v.

ROBERT MITCHELL BARKER
Defendant Below, Appellant

Appeal from the Circuit Court of Wood County
Honorable Arthur N. Gustke, Judge
Criminal Action No. 88-F-36

REMANDED FOR RESENTENCING

Submitted: September 17, 1991
Filed: October 22, 1991

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This Opinion was delivered PER CURIAM

SYLLABUS BY THE COURT

"The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute." Syl. pt. 7, State v. Beck, 167 W. Va. 830, 286 S.E.2d 234 (1981).

Per Curiam:

The sole issue before us in this appeal is whether the Circuit Court of Wood County erred in sentencing the appellant, Robert Mitchell Barker, to a life sentence under the habitual criminal statute, W. Va. Code, 61-11-18 [1943].¹ The appellant contends that the imposition of a life recidivist sentence violates the proportionality clause in Article III, Section 5 of the West Virginia Constitution in light of the non-violent nature of the crime and of his previous convictions for forgery and uttering. We agree, and accordingly, we remand this case to the circuit court for resentencing.

A warrant for arrest was issued on January 6, 1988, charging that the appellant committed a felony by forging and cashing a check belonging to Mark Swingle in the amount of \$40.48. The appellant was subsequently indicted on one count of forgery and one count of uttering. A trial by jury was held on May 3, 1988, and the jury returned a verdict finding the appellant guilty of the offenses of forgery and uttering in violation of W. Va. Code, 61-4-5 [1961].²

¹The final paragraph of W. Va. Code, 61-11-18 [1943] provides:

When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.

²W. Va. Code, 61-4-5 [1961] provides, in relevant part, that "[i]f any person forge any writing, . . ., to the prejudice of another's right, or utter or attempt to employ as true such forged writing, knowing it to be forged, he shall be guilty of a felony[.]"

Pursuant to W. Va. Code, 61-11-19 [1943],³ the State filed an information with the circuit court stating that the appellant had previously been convicted and sentenced for three other felonies. The State represented in the information that the appellant had been convicted of and sentenced for: (1) the offense of uttering on November 18, 1974; (2) the offenses of forgery and uttering on September 8, 1978; and (3) the offenses of forgery and uttering on December 6, 1979.⁴

A recidivist trial was held on June 3, 1988, and the jury returned a verdict identifying the appellant as being the same person who was convicted of the previous crimes stated in the information and convicting him of recidivism. The circuit court subsequently sentenced the defendant to be confined in the penitentiary for life under the habitual criminal statute, W. Va. Code, 61-11-18 [1943].

The appellant now appeals his life sentence under the habitual criminal statute.

The sole issue in this appeal is whether the life sentence imposed upon the appellant under the recidivist statute, W. Va. Code,

³W. Va. Code, 61-11-19 [1943] provides, in pertinent part: "It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence."

⁴The information was amended at the recidivist trial to change the date of one of the appellant's convictions of the offense of forgery and uttering from December 9, 1979, to December 6, 1979.

16-11-18 [1943], violated the proportionality principle. The appellant asserts that the sentence of life imprisonment is disproportionate to the offenses upon which it is based because the crimes of which the appellant had previously been convicted were nonviolent crimes. The State argues that the life sentence is not disproportionate because the appellant has demonstrated a propensity to commit the crimes of forgery and uttering.

We explained the procedure for analyzing a life recidivist sentence under the proportionality principle in Wanstreet v. Bordenkircher, 166 W. Va. 523, 533, 276 S.E.2d 205, 212 (1981):
When we analyze a life recidivist sentence under proportionality principles, we are in effect dealing with a punishment that must be viewed from two distinct vantage points: first, the nature of the third offense and, second, the nature of the other convictions that support the recidivist sentence.

See also State ex rel. Boso v. Hedrick, ___ W. Va. ___, ___, 391 S.E.2d 614, 621 (1990). We also pointed out in Wanstreet that although the sole emphasis cannot be placed on the character of the final felony which triggers the life recidivist sentence, "the third felony is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence." 166 W. Va. at 534, 276 S.E.2d at 212. See also State v. Miller, ___ W. Va. ___, ___, 400 S.E.2d 897, 900 (1990); State ex rel. Boso v. Hedrick, ___ W. Va. at ___, 391 S.E.2d at 621; State v. Deal, ___ W. Va. ___, ___, 358 S.E.2d 226, 231 (1987).

Finally, we articulated the standard for review of life
recidivist sentences in syllabus point 7 of State v. Beck, 167 W. Va.

830, 286 S.E.2d 234 (1981):

The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.

The appellant in the case before us was convicted of the crimes of forgery and uttering, neither of which can be characterized as violent crimes. Moreover, none of the underlying felonies committed by the appellant involved actual or threatened violence to any person. Furthermore, the penalty upon conviction of forgery or uttering is confinement in the penitentiary for not less than one nor more than ten years. W. Va. Code, 61-4-5 [1961].

We believe that the imposition of a life sentence under the recidivist statute in this case is unjustified. Therefore, we conclude that this case should be remanded to the Circuit Court of Wood County for resentencing.

Remanded for resentencing.