No. 21095 - State of West Virginia v. Ronald Dean Rummer

Workman, C.J., concurring:

I concur with the majority opinion because it is totally consistent with the law enunciated in many other cases by this Court as well as by the United States Supreme Court.

Because only about one-third of the dissenter's fifty-page diatribe actually relates to the majority opinion (the other two-thirds of which touches upon everything but the kitchen sink, is full of incredible stereotypes,[1] and which of course attributes almost all of society's ills to working women), I address only

[1]The dissent sets forth these stereotypes, among others: most public defenders are "simply hacks"; assistant prosecutors are there for the

part II.

The dissent fails to recognize, much less discuss, the recent United States Supreme Court cases that have fashioned the Double Jeopardy Clause relating to multiple punishments for the same criminal act as an inquiry into legislative intent. The majority traces this constitutional rule beginning with Iannelli v. United States, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616, (1975), through Albernaz v. United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981), and culminating with Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

"government coffee suck in lieu of more ardous, stress-laden and challenging work"; violent criminials are almost always poor and stupid; police officers almost always lie; most family-related pathologies are due in large part to a 73% female working population; parents who both work outside the home are self-absorbed and negligent; and the entire drug industry is fueled by sociopathic reckless youth from single-parent homes. (Archie Bunker lives again!)

Moreover, the majority traces this same development in our double jeopardy law most recently articulated in State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992), and extending back through State v. Trail, 174 W. Va. 656, 328 S.E.2d 671 (1985); State v. Peyatt, 173 W. Va. 317, 315 S.E.2d 574 (1983), and State v. Carter, 168 W. Va. 90, 282 S.E.2d 277 (1981). Furthermore, as the majority demonstrates, other jurisdictions have accepted those same double jeopardy principles in other similar sexual offense cases.

The most astounding thing about the dissent is the gross inconsistency of the dissenter's position on the double jeopardy issue in this sexual abuse case with his position on the same issue in numerous other contexts. In all of the cases cited from this Court, the dissenter joined the majority without comment. Why is the dissenter such a blazing civil libertarian only in the

context of a sexual offense? (Generally, he is ready to uphold the maximum sentence for the pettiest of petit larcenists.)

Reading his dissent against the backdrop of his position in other criminal cases, one reaches the inescapable conclusion that he believes different principles should apply to sexual offenses than to other criminal offenses.

For example, in State v. Johnson, 179 W. Va. 619, 371 S.E.2d 340 (1988), the defendant was convicted for both breaking and entering and larceny. We held that such convictions did not violate double jeopardy principles, recognizing that breaking and entering and grand larceny are separate and distinct offenses for double jeopardy purposes. Even though the two offenses "occurred close in time," conviction for both offenses did not violate double jeopardy principles. Id. at 632, 371 S.E.2d at 353.

Similarly, in State v. Drennen, 185 W. Va. 445, 408 S.E.2d 24 (1991), we found no violation of double jeopardy principles where a defendant had been convicted of three separate offenses arising out of the same drug-dealing transaction. Although the marijuana was contained in only one container at the time of the defendant's arrest, the defendant had purchased the marijuana with joint funds of three juveniles and had delivered the marijuana to one of the juveniles in the presence of the other two. As we noted in syllabus point 1 of Drennen, "`Although under double jeopardy principles that proper procedure is a trial of all offenses arising out of the same `criminal transaction' jointly, separate punishments may be imposed for separate offenses arising out of a single criminal transaction.' Syllabus point 3, State ex rel.

Johnson v. Hamilton, 164 W. Va. 682, 266 S.E.2d 125 (1980) [,cert. denied, 449 U.S. 1036, 101 S. Ct. 613, 66 L. Ed. 2d. 498 (1980)]." 185 W. Va. at 446, 408 S.E.2d. at 25.

Finally, in State v. George, 185 W. Va. 539, 408 S.E.2d 291 (1991), we held that malicious assault and attempted murder of the same victim were different offenses for double jeopardy purposes because malicious assault required proof of serious bodily injury that would not be required for an attempted murder conviction. Attempted murder required proof of premeditation or lying in wait with specific intent to kill and an overt act toward commission of the crime. Thus, even though the two offenses arose out of the exact same transaction, they were two separate and distinct offenses for purposes of double jeopardy.

Justice Neely dissented in none of these opinions. Why, one may ponder, is the principle of multiple offenses arising from transactions close in time so objectionable to Justice Neely in the context of sexual offenses when he has concurred with the majority of similar criminal matters not involving sexual offenses?

One must also conclude that the dissenter puts his civil libertarian clothes on in a chameleon-like fashion because he essentially believes that a "grope" (as he so crudely describes it) is really a de minimis act. (One can almost hear him saying, "Just a grope . . . what's the big deal?").

The dissent's reliance on assault cases is singularly misplaced simply because assault statutes do not attempt to differentiate the various methods by which an assault can be accomplished, as is the hallmark of our sexual offense statutes. This distinction was addressed by the majority. The

dissent suggests that, because no penetration was involved, this shouldn't even be a sexual offense.

Perhaps a clue to why the writer of the dissent adopts such inconsistent positions can be found in his sweeping statement that "when a defendant is accused of the current crime of fashion (any crime with the word `sexual' in it), his constitutional rights cease to exist."

Such a statement is no only irresponsibly inaccurate, but the whole tenor of the dissent (which suggests that conviction in sexual assault/abuse cases is a foregone conclusion) reveals an abysmal lack of knowledge of the difficulty of these cases on the trial level. Lastly, the dissent's characterization of the other members of this Court as engaging in Gestapo-like tactics is a gross disservice to the whole appellate process in

West Virginia. The true civil libertarian on this Court is the writer of the majority opinion.