IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1992 Term

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No. 21304

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STATE OF WEST VIRGINIA EX REL.
O. C. SPAULDING, PROSECUTING ATTORNEY
FOR PUTNAM COUNTY,
Relator

v.

HONORABLE CLARENCE L. WATT,
JUDGE OF THE CIRCUIT COURT OF PUTNAM COUNTY,
AND MARK J. MCCLELLAND,
Respondents

Petition for Writ of Prohibition

WRIT AWARDED

Submitted: September 2, 1992
Filed: September 17, 1992

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Mark J. McClelland

JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

The offense of first degree sexual assault under W. Va. Code, 61-8B-3(a)(2) (1984), involves violence to a person and is, therefore, subject to the provisions of W. Va. Code, 62-1C-1(b) (1983), with regard to post-conviction bail.

Miller, Justice:

This is an original proceeding in prohibition. On July 21, 1992, we issued a rule, returnable on September 2, 1992. This proceeding represents the second time in recent months that these parties have appeared before this Court. The relator asks us to order the respondent, the Honorable Clarence L. Watt, Judge of the Circuit Court of Putnam County, to revoke the post-conviction bail of Mark J. McClelland.

In March of 1990, Mr. McClelland was convicted of nine counts of sexual assault in the first degree involving his five-year-old stepdaughter and his seven-year-old stepson. Mr. McClelland subsequently filed a motion for a new trial on the basis of newly discovered evidence. In November of 1991, the trial court granted that motion, and Mr. McClelland was freed on post-conviction bail.

Thereafter, the State sought a writ of prohibition in this Court to prevent the new trial. We granted the writ, holding that there was insufficient evidence to warrant a new trial and that the trial court had exceeded its legitimate powers in granting the motion. State ex rel. Spaulding v. Watt, ___ W. Va. ___, ___ S.E.2d ___ (No. 20853 7/10/92).[1]

[1]In Syllabus Point 2 of State ex rel. Spaulding v. Watt, supra, we stated the legal basis for the writ of prohibition:

The State subsequently brought a motion before the circuit court to revoke bail on the ground that W. Va. Code, 62-1C-1(b) (1983), precludes a circuit court from granting post-conviction bail where the crime involves "the use of violence to a person."[2] A hearing was

(..continued)

> "'The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.' Syllabus point 5, State v. Lewis, [___ W. Va. ___, ___ S.E.2d ___] No. 20930 (W.Va. July 6, 1992)."

[2]W. Va. Code, 62-1C-1(b), states:

> "Bail may be allowed pending appeal from a conviction, except that bail shall not be granted where the offense is punishable by life imprisonment or where the court has determined from the evidence at the trial or upon a plea of guilty or nolo contendere that the offense was committed or attempted to be committed with the use, presentment or brandishing of a firearm or other deadly weapon, or by the use of violence to a person: Provided, That the denial of bail under one of these exceptions may be reviewed by summary petition to the supreme court of appeals or any justice thereof, and the petition for bail may be granted where there is a likelihood that the defendant will prevail upon the appeal. The court or judge allowing bail pending appeal may at any time revoke the order admitting the defendant to bail."

held on July 17, 1992, at which time the motion was denied. The State then brought this original proceeding in prohibition to compel the trial court to revoke Mr. McClelland's post-conviction bail.

Mr. McClelland argues that the circuit court was not precluded from granting him bail because he was not convicted of a crime involving violence to a person. In particular, Mr. McClelland was convicted of first degree sexual assault pursuant to W. Va. Code, 61-8B-3(a)(2) (1984), which provides:

> "(a) A person is guilty of sexual assault in the first degree when:
>
> * * *
>
> "(2) Such person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is eleven years old or less."

Unlike the crime of first degree sexual assault defined in W. Va. Code, 61-8B-3(a)(1) (1984),[3] the offenses of which Mr. McClelland was convicted do not require proof of forcible compulsion. Instead, the gist of the crime is the child's presumed incapacity to consent to

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[3]W. Va. Code, 61-8B-3(a)(1) (1984), provides:

> "A person is guilty of sexual assault in the first degree when:
> "(1) Such person engages in sexual intercourse or sexual intrusion with another person and, in so doing:
> "(i) Inflicts serious bodily injury upon anyone; or
> "(ii) Employs a deadly weapon in the commission of the act[.]"

sexual intercourse or sexual intrusion.[4] However, both offenses are felonies which carry a penalty of imprisonment in the penitentiary for a term of not less than fifteen nor more than twenty-five years. W. Va. Code, 61-8B-3(b) (1984).[5]

Mr. McClelland asserts that because the State prosecuted him under W. Va. Code, 61-8B-3(a)(2) (1984), and was not required to show forcible compulsion or physical violence in the commission of the offense, he has not been convicted of a crime of violence to a person. The State contends that even if there was no physical injury to the victim, the very nature of the crime of sexual assault against

[4]W. Va. Code, 61-8B-2 (1984), provides:

> "(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
>
> "(b) Lack of consent results from:
> "(1) Forcible compulsion; or
> "(2) Incapacity to consent; or
> "(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
>
> "(c) A person is deemed incapable of consent when such person is:
> "(1) Less than sixteen years old; or
> "(2) Mentally defective; or
> "(3) Mentally incapacitated; or
> "(4) Physically helpless."

[5]In 1991, after the date of the crimes in this case, the statute was amended to increase the penalty to imprisonment for not less than fifteen nor more than thirty-five years. See W. Va. Code, 61-8B-3(b) (1991).

young children results in severe emotional and psychological damage which constitutes violence.

W. Va. Code, 62-1C-1(b), precludes the trial court from granting post-conviction bail "where the offense is punishable by life imprisonment or . . . [where] the offense was committed or attempted to be committed with the use, presentment or brandishing of a firearm or other deadly weapon, or by the use of violence to a person[.]" (Emphasis added). This provision allows this Court to review, by summary petition, the denial of bail in the circuit court under the foregoing restrictions.[6]

In State v. Steele, 173 W. Va. 248, 314 S.E.2d 412 (1984), we discussed the procedure for obtaining post-conviction bail in this Court under W. Va. Code, 62-1C-1(b). We recognized that under the statute the trial court was prohibited from granting post-conviction bail in the enumerated circumstances. However, we did not address the meaning of the phrase "by the use of violence to a person" in Steele or in any subsequent case.

It appears that our post-conviction bail statute is unique. Statutes in other jurisdictions which preclude bail in certain circumstances fall into three general categories. One category of

[6]See note 2, supra, for the full text of W. Va. Code, 62-1C-1(b).

statute provides a list of specific crimes for which post-conviction bail is not authorized.[7] The second type of statute conditions an award of post-conviction bail upon the length of the sentence imposed.[8] Finally, there is a hybrid statute which determines whether bail is authorized by looking at both a list of specific crimes and the severity of the sentence imposed.[9] See generally Annot., 28 A.L.R. 4th 227 (1984) (right of defendant to bail pending appeal).

Perhaps as a result of the specificity of bail statutes in other jurisdictions, we have not encountered a case which discusses the meaning of "violence to a person" in the context of post-conviction bail exclusions. However, the California courts have addressed a similar issue in the context of a sentence enhancement statute. In People v. Hetherington, 154 Cal. App. 3d 1132, 201 Cal. Rptr. 756 (1984), the court considered a statute which provided for an enhanced sentence upon conviction of a "violent felony." The statute defined the term "violent felony" as including sexual acts against children under the age of fourteen. The defendant was convicted under the

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[7]See Fla. Stat. Ann. § 903.133 (1992 Cum. Supp.); Miss. Code Ann. § 99-35-115 (1992 Cum. Supp.); Okla. Stat. Ann. tit. 22, § 1077 (1992 Cum. Supp.).

[8]See S.C. Code Ann. § 18-1-90 (Law. Co-op. 1985).

[9]See 18 U.S.C. § 3143(b)(2) (1992 Cum. Supp.); Ga. Code Ann. § 17-6-1(g) (1992 Cum.Supp.); Tex. Crim. Proc. Ann. § 44.04(b) (1992 Cum. Supp.).

portion of the child molestation statute which did not require proof of forcible compulsion.

In determining whether this was a violent felony for purposes of the enhancement statute, the court in Hetherington initially focused on the interplay between these statutes. The court held that the legislature had expressly stated in the enhancement statute that "'these specified crimes merit special consideration when imposing a sentence to display society's condemnation for such extraordinary crimes of violence against the person.' (Italics added.)" 154 Cal. App. 3d at 1139-40, 201 Cal. Rptr. at 760. The court then analyzed the phrase "violence against the person" to determine whether the enhancement statute applied only to crimes involving physical violence:

> "We consider it significant that the statute refers simply to 'violence' rather than to 'physical violence,' 'physical injury' or 'bodily harm.' The statute's unadorned language indicates the Legislature intended to impose increased punishment . . . not only for certain felonies which are 'violent' in a physical sense but also for other selected felonies which cause extraordinary psychological or emotional harm." 154 Cal. App. 3d at 1140, 201 Cal. Rptr. at 760.

See also People v. Stephenson, 160 Cal. App. 3d 7, 206 Cal. Rptr. 444 (1984) (child molestation a violent felony).

There is, we believe, sound logic to this reasoning. As in Hetherington, the word "violence" in our post-conviction bail

statute is not limited by the adjective "physical." There can be no dispute that even in the absence of any significant physical trauma, sexual assaults on young children result in severe emotional and psychological harm.

Furthermore, we cannot ignore the severe penalty attached to the offense of first degree sexual assault as defined in W. Va. Code, 61-8B-3(a)(2) (1984). The fact that the penalty is the same as that imposed for sexual assault by forcible compulsion demonstrates the legislature's view of the seriousness of the offense.

In summary, we decline to resolve the question presented here solely on the ground that physical violence is not an element of the crimes of which Mr. McClelland was convicted. The fact that the State elected to prosecute first degree sexual assault under W. Va. Code, 61-8B-3(a)(2) (1984), based on the age of the children rather than upon a theory of forcible compulsion, does not mean that the children were not the victims of violence.

For these reasons, we conclude that the offense of first degree sexual assault under W. Va. Code, 61-8B-3(a)(2) (1984), involves "violence to a person" and is, therefore, subject to the provisions of W. Va. Code, 62-1C-1(b), with regard to post-conviction bail.

The trial court exceeded its legitimate powers in denying the State's motion to revoke bail under the circumstances of this case. We, therefore, grant the writ of prohibition prayed for, and direct the respondent judge to revoke Mr. McClelland's post-conviction bail.

Writ awarded.