No. 21691 - State of West Virginia, Plaintiff Below, Appellee, v. Charles Walls, Defendant Below, Appellant

Workman, J., dissenting:

Regrettably, I must dissent from the majority opinion. My regret is based upon the sure belief that this Appellant is truly dangerous. This same belief obviously impacted the majority's reasoning. However, if any scintilla of intellectual honesty is to be preserved, the failure of the State to present any real evidence to refute the overwhelming defense evidence of insanity necessitates this dissenting opinion.

Upon the introduction of evidence regarding the insanity of the Appellant, the State had the burden of proving the Appellant's sanity beyond a reasonable doubt. Syl. Pt. 2, State v. Milam, 163 W. Va. 752, 260 S.E.2d 295 (1979). The State failed to produce a single witness, lay or expert, to testify that the Appellant was sane at the time of the attack on his stepfather. The only other person who was there at time of the attack was the Appellant's mother and she testified that the Appellant "looked at me sort of wild and he said this is the son of a bitch that killed my son."[1]

[1]Since the Appellant's son was alive on the date of the attack, this would seem to indicate that the Appellant was delusional at the time of the attack.

The majority's reliance on this Court's decision in State v. McWilliams, 177 W. Va. 369, 352 S.E.2d 120 (1986), is misplaced. Although we ruled in McWilliams that lay witnesses can testify regarding a person's mental condition, this rule is tempered by the requirement that the lay witness' opportunity to observe the person's behavior relevant to the incident in question must be considered as well as the nature of the observed behavior. Id. at 378, 352 S.E.2d at 129. While the Appellant's sister testified that his behavior prior to the incident appeared normal, she also testified that the Appellant, earlier on the same evening, told her to "give him back his powers." Given the Appellant's history of mental health problems and the uncontroverted evidence that the Appellant and the stepfather, prior to the murder, had a loving and nonconfrontational relationship with no history of any problems whatsoever, this case is factually similar to McWilliams, where we concluded that no sufficient reason was offered to explain the murder, other than insanity. 177 W. Va. at 378, 352 S.E.2d at 130.

The fact that the lay witnesses, as contrasted to McWilliams, actually knew the Appellant does not eliminate the need to examine their testimony in light of the entire evidence. Moreover, the fact that the Appellant may have appeared rational at the time he drove his sister home does not negate the fact that he may have been suffering from delusions at the time of the commission of the murder.

The Appellant's mother's testimony would appear to be the most relevant lay evidence as to his state of mind at the time of the murder and her testimony describes Appellant's actions and appearance as that of a crazed individual. The State clearly failed to meet its burden of establishing beyond a reasonable doubt the Appellant's sanity at the time of the commission of the crime.

The primary purpose of this separate dissent, however, is to point out that there is a crying need for review of our laws on criminal insanity. Our statutes and case law are inadequate in addressing the need for humane treatment of the insane while providing the necessary protections to the community at large. We invited the legislature back in 1986 at the time of McWilliams to examine the problem created by the gap in differing burdens of proof for proving insanity and for civil commitment.

> If the State fails to meet its burden and the defendant is found not guilty by reason of insanity, the State then has the burden during the involuntary civil commitment hearing to prove that the defendant is mentally ill by clear, cogent, and convincing evidence. The difference in the burdens of proof creates a gap through which a defendant may pass. The State may not be able to prove either that the defendant was sane at the time of the offense beyond a reasonable doubt or that he is mentally ill at the time of the involuntary civil commitment hearing by clear, cogent, and convincing evidence. As a result, a defendant who has committed a crime may neither serve time in the penitentiary nor undergo treatment at

> a mental institution. It would appear that some legislation is needed to fill this gap.

177 W. Va. at 379, 352 S.E.2d at 130.

We noted in McWilliams, the United States Supreme Court decision in Jones v. United States, 463 U.S. 354 (1983), in which the Court upheld the constitutionality of a District of Columbia (D.C.) statute providing for automatic commitment of defendants who are found not guilty by reason of insanity. 177 W. Va. at 379, 352 S.E.2d at 130 n.16 (citing D.C. Code § 24-301(j) (1981)). Under the D.C. statute, a defendant must prove his insanity at trial by a preponderance of the evidence. 463 U.S. at 356. The Supreme Court in Jones "upheld the automatic commitment procedure even though it allowed an insanity acquittee to remain committed for more than the maximum sentence he could have served had he been convicted, without requiring a separate civil commitment proceeding." 177 W. Va. at 379, 352 S.E.2d at 130 n.16.

Another possible reform which has already been implemented in the federal court system, which we noted in McWilliams, is an alteration of the burden of proof. With the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (1984), insanity became an affirmative defense and the defendant has the burden to prove

insanity at trial by clear and convincing evidence. See 18 U.S.C.A. § 20 (Supp. 1986).

Inherent in any involuntary commitment is the potential for release upon demonstration of mental condition which evidences to the treating psychiatrist that the defendant is no longer a danger to either himself or society. Where criminal defendants found not guilty by reason of insanity are concerned, standards should be developed, legislatively or otherwise, which ensure that releases are made only under extremely cautious criteria. All too often, upon release, such an individual returns to society, and either because he refuses to take the medication necessary to control his psychotic tendencies or for other reasons, commits another violent crime. For these reasons, stringent conditions should be imposed upon the release of such an individual.

As we explained in McWilliams, "[t]he rule relating to the burden of proof of insanity does not rise to a constitutional level. . . . Therefore, the legislature may change the judicially established burden of proof." 177 W. Va. at 379, 352 S.E.2d at 131 n.16.

Although the record is scant on this issue, there appears to be some evidence to suggest that the Appellant's mental health is dependant on his ingestion of prescribed medication. At some point, this Court needs to examine whether voluntary refusal to take prescribed medication, resulting in criminal insanity ought to be analagized to the legal effect of an individual choosing to imbibe alcoholic beverages. Voluntary intoxication is not an affirmative defense to criminal conduct but at most can only result in the reduction of the level of intent. Voluntary refusal to take medication perhaps should be treated in a similar fashion.

In Zion v. Xanthopoulos, 178 Mont. 468, 585 P.2d 1084 (1978), the Supreme Court of Montana upheld certain conditions and struck others imposed on a defendant who had been committed following acquittal on a charge of murder on the ground of mental disease or defect excluding responsibility. While the court struck those conditions which it described as punitive in nature and likened to those imposed on convicted criminals, it upheld those conditions pertaining to requiring the acquittee to maintain frequent contact with psychiatrists. Id. at 470-78, 585 P.2d at 1086-90. The Zion

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Examples of those conditions which were struck as being unconstitutional in Zion are the following:

> 1. Defendant does not change her place of residence without approval of the parole officer.
> 2. That the parole officer know defendant's place of residence and her place of employment at all times.
> 3. That defendant comply with the rules and regulations of the Department of Institutions, Parole Division, and that she report regularly to her parole officer as required by him.

585 P.2d at 1086-89.

Those conditions which were upheld in Zion, include the following:

> 1. The defendant continue her consultations at the mental health facility and continue taking such medications as are prescribed.
> 2. That defendant suffers from no regression in her mental condition which require that she be returned to the State Hospital at Warm Springs.
> 3. That defendant maintain her behavior so she

court quoted with approval the following language from State v. Carter, 64 N.J. 382, 316 A.2d 449 (1973), overruled on other grounds sub nom. State v. Kroll, 68 N.J. 236, 344 A.2d 289 (1975), as an explanation of what would qualify as acceptable post-release supervision by a probation officer:

> Throughout the period of conditional release, it is imperative that the trial court maintain frequent contact with the patient and supervising psychiatrists. To facilitate this burden of responsibility, the trial judge should require regular and continuous reports to a court appointed probation officer both from the psychiatrists to whom the patient is reporting and from the patient himself. The court must retain jurisdiction over the proceeding. This retention of jurisdiction is essential to enable the authorities to return the patient to the state hospital for psychiatric care immediately upon being notified that some problem has arisen which jeopardizes the safety and well being of the patient or those around him. The ability of the trial judge to immediately recall the patient in a summary fashion is crucial to the court's ability to protect the public from harm.

64 N.J. at 408, 316 A.2d at 463 (emphasis supplied).

> is not a danger to herself or to others.

585 P.2d at 1086-90.

Despite the fact that a defendant may have been found not guilty by reason of insanity, even those conditions found overly punitive by the Zion court seem perfectly legitimate in that their thrust is to keep track of the individual's whereabouts for his own protection, as well as that of the community.

The appellate court in Zion was properly concerned with the ramifications of the acquittee's failure to stay on her prescribed medication and noted the following findings of the district court:

> 'Defendant is mentally ill, but her mental condition does not make her a present danger to herself or to others. The improvement in defendant's mental condition over what it was at the time of her original confinement is probably the result of her taking of the tranquilizing drug, Thorazine. Defendant's ability to maintain social control over her behavior will depend on the degree of stress imposed upon her and upon her continued use of the tranquilizing drug. Since she is not a present danger to herself or to others, she is entitled to be released. However, her release must be strictly supervised and controlled to insure that she does not regress to her previous mental state.'

178 Mont. at 477, 585 P.2d at 1089-90. The concept of conditional release appears to comport with "the court's function . . . to balance protection of the public safety against the therapeutic value and humaneness of conditional release." Carter, 64 N.J. at 409, 316 A.2d at 464.

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