No. 22-0023 – *State of West Virginia v. Charles Lee Finley*

WOOTON, J., concurring, in part, and dissenting, in part:

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In a decision noteworthy for its seeming lack of understanding of the way criminal law and procedure are actually practiced in West Virginia state courts, the majority undermines the principles which underlie and are the foundation for the West Virginia Rules of Criminal Procedure – in particular Rule 2 and Rule 11(a)(2) – and may have compromised the conditional plea agreement as a mechanism for challenging a circuit court's ruling on an issue of statutory construction. Accordingly, I concur in the Court's judgment and agree with its determination that possession of methamphetamine, standing alone, is insufficient to sustain a charge of possession of pseudoephedrine in an altered state under West Virginia Code section 60A-10-4(d) (2020). However, I vehemently dissent from the Court's determination that this case presented a question of fact rather than a question of law – a determination that underpins the majority's surprising holding that an issue of statutory construction such as this cannot be raised in a motion to dismiss,[1] and/or thereafter by entry of a conditional guilty plea pursuant to West Virginia Rule of Criminal Procedure 11(a)(2) (discussed *infra* in greater detail). The majority's holding unnecessarily unravels the practical, common-sense procedure traditionally utilized in this

[1] *See* W. Va. R. Crim. P. 12(b)(1) (providing that "[a]ny defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial . . . (1) Defenses and objections based on defects in the institution of the prosecution . . . .").

State. Noted scholar and jurist Franklin D. Cleckley cautioned that to the extent the provisions of Rule 11(a)(2) are disregarded or no longer viewed as a fair and expeditious method of resolving unsettled questions, both the State and defendants will be forced to go through a jury trial to resolve a legal issue that is not dependent upon whether sufficient facts exist for a conviction – a waste of time, money and judicial resources. *See State v. Lilly*, 194 W. Va. 595, 605, 461 S.E.2d 101, 111 (1995) (Cleckley, J., concurring) ("By invoking Rule 11(a)(2), the parties not only eliminated the need for a protracted trial, but paid the ultimate respect to limited judicial resources and judicial economy. To be specific, the appropriate use of a conditional guilty plea by a criminal defendant serves the interests of justice by, inter alia, safeguarding the defendant's right to appeal and promoting judicial economy. *See State v. Forshey*, 182 W.Va. 87, 93, 386 S.E.2d 15, 21 (1989) (forcing party to go through an unnecessary trial is a "'pointless and wasteful exercise'") (Miller, J., dissenting). (Citation omitted).").

Seemingly oblivious to these concerns, the majority invokes the plain error doctrine to resolve an issue neither raised nor argued by the parties: that the circuit court erred "by finding a factual basis for the plea to attempt to possess pseudoephedrine in an altered state, when the evidence was that Mr. Finley ['the petitioner' or 'Mr. Finley'] possessed methamphetamine." That is a mischaracterization of what happened here. *See* text *infra*. The majority unnecessarily complicates the straightforward procedure employed by defense counsel, the State, and the circuit court, whereby Mr. Finley entered a conditional guilty plea in order to seek appellate review of a purely legal question of

statutory interpretation. *See* Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation *presents a purely legal question* subject to *de novo* review.") (emphasis added); W. Va. R. Crim. P. 11(a)(2) (discussed *infra* in greater detail).

Use of the plain error doctrine, which the majority notes in a footnote should be used "sparingly" (surely an unintentional irony) was wholly unnecessary. I would have reversed the circuit court's decision on the straightforward legal issue raised in Mr. Finley's conditional guilty plea: that, as a matter of law, a charge under section 60A-10-4(d) could not lie where a defendant possessed only completed methamphetamine, and no other drugs.[2] I would then have remanded this case for further proceedings consistent with the agreed-upon terms of Mr. Finley's conditional plea agreement.

Mr. Finley was indicted by a Wayne County grand jury on four counts, including one count of possession of pseudoephedrine in an altered state. During the course of pre-trial proceedings he filed a pretrial motion to dismiss as set forth *supra*. The State countered that methamphetamine is "a substance containing . . . pseudoephedrine . . . in a state or form which is, or has been altered or converted from the state or form in which

[2] Mr. Finley also asserted a double jeopardy challenge to his convictions for both possession of a controlled substance with intent to deliver and possession of pseudoephedrine in an altered state. I would have found no need to address this argument as Mr. Finley's statutory interpretation challenge to West Virginia Code section 60A-10-4(d) is dispositive in this case.

[this] chemical[] [is], or [was], commercially distributed[.]" *Id*. In essence, the State's position was that there is altered pseudoephedrine *in* methamphetamine, and accordingly possession of completed methamphetamine necessarily means that one is also in possession of altered pseudoephedrine. The circuit court agreed with the State and denied Mr. Finley's motion to dismiss this charge from the indictment. Thereafter Mr. Finley entered into a conditional plea agreement with the State,[3] wherein he specifically reserved his right to appeal the denial of the motion to dismiss. On appeal to this Court, he presented precisely the same challenge to the statute.

[3] Under the terms of the conditional plea agreement, Mr. Finley entered no contest pleas to: (1) attempt to commit the offense of possession of a stolen vehicle; (2) attempt to commit possession with intent to deliver methamphetamine; and (3) attempt to commit possession of pseudoephedrine in an altered state. In exchange for this plea, if he were to prevail on appeal, he would be permitted to withdraw his no contest pleas to attempt to commit the drug charges and be permitted to instead enter a plea to misdemeanor simple possession.

Mr. Finley's plea to attempt charges under West Virginia Code section 61-11-8 (2020) rather than to the substantive crimes listed in the indictment presented no impediment to this Court's resolution of the purely legal issue before us: the attempt to commit the crime is a lesser included offense of the substantive crime. *See* W. Va. R. Crim. P. 31(c) (stating that a criminal defendant "may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit. . .the offense charged[.]"); *see also State v. Slater*, No. 16-1129, 2017 WL 4772888 (W. Va. Oct. 23, 2017) (memorandum decision) (describing defendant's plea to attempt to commit felony delivery of a controlled substance as a plea to "a lesser-included offense" of that felony); *Ljutica v. Holder*, 588 F.3d 119, 125 (2d Cir. 2009)("Because an attempt to commit a substantive crime is a lesser included offense of that substantive crime . . . the facts that support a conviction for the completed crime also support a conviction for attempt.").

It should be noted that Mr. Finley's entry of his conditional guilty plea and the circuit court's acceptance of the plea were entirely consistent with our established procedure:

> Before accepting a conditional plea under W. Va. R. Crim. P. 11(a)(2), the circuit court and the prosecutor must assure that *the pretrial issues reserved for appeal are case dispositive and are capable of being reviewed by this Court without a full trial*. This requires the circuit court to make specific findings on the record of the issues to be resolved upon appeal and a further specific finding that those issues would *effectively dispose of the indictment* or suppress essential evidence which would substantially affect the State's ability to prosecute the defendant as charged in the indictment.

Syl. Pt. 1, *State v. Hosea*, 199 W. Va. 62, 483 S.E.2d 62 (1996) (emphasis added). Thus, after correctly finding that West Virginia Code section 60A-10-4(d) does not apply where an individual possessed only methamphetamine in its completed form, the majority's task was straightforward: it should have found that the circuit court erred as a matter of law in denying Mr. Finley's motion to dismiss this charge from the indictment as he should have never been charged with this crime. Instead, the majority enters into the thicket of the plain error doctrine, wherein it first determines that the circuit court erred in finding a factual basis to accept Mr. Finley's no contest plea to attempt to possess altered pseudoephedrine. After it finds this error, the majority informs us that "[w]e examine the language of West Virginia Code § 60A-10-4(d) to reach our conclusion regarding the factual basis for the plea." Then, the majority decides that the reason there is no "factual basis" for the conditional plea is that as matter of law,

> [f]or the purposes of West Virginia Code § 60A-10-4(d) (eff. 2012), completed methamphetamine is not "a substance containing ephedrine, pseudoephedrine or phenylpropanolamine or their salts, optical isomers or salts of optical isomers in a state or form which is, or has been altered or converted from the state or form in which these chemicals are, or were, commercially distributed."

The majority's logic is baffling at best. The only way the majority can conclude that the circuit court "erred" in finding a factual basis is by first determining that a possession of methamphetamine is not also possession of a precursor in an altered state, which is a pure legal question.

In this regard, Mr. Finley argued that under West Virginia Code section 60A-10-4(d) the State may not charge an individual under that statute where the accused possessed only methamphetamine in its completed form. Unquestionably, a proper interpretation of the statute, which the majority has now found as a matter of law, compels the conclusion that the circuit court should have granted Mr. Finley's motion to dismiss that charge as a matter of law. The issue is not whether there existed a *factual* basis to accept his plea, but rather whether he should have ever been placed in a position to have to plead to the crime at all. Quite obviously he should not have been.

The posture of this case is not at all unique to this Court, even though the majority suggests otherwise in a footnote.[4] In cases where the circuit court has denied a

[4] Specifically, in footnote eight of its opinion the majority states that

motion to dismiss based on the court's incorrect construction of a statute, the correct procedure would be to reverse and remand with directions to enter an order *dismissing the indictment*. *See State v. Fuller*, 239 W. Va. 203, 800 S.E.2d 241 (2017) (reversing and remanding for dismissal of the indictment against a prostitute upon this Court's determination that West Virginia Code section 61-8-5(b), by its plain language, did not apply to the prostitute, but only to third parties benefitting from the prostitution). Further, on multiple occasions we have reviewed denials of motions to dismiss stemming *from conditional plea agreements* wherein the petitioners raised legal challenges to the statutes under which they were indicted. One such instance can be found in this Court's opinion in *State v. Soustek*, 233 W. Va. 422, 758 S.E.2d 775 (2014). There, the petitioner was indicted on, among other things, an identity theft charge under West Virginia Code section 61-3-54 (2010) based on his action in signing his brother's name on a bail agreement. *Id*. at 424-25, 758 S.E.2d at 777-78. He moved to dismiss that count of the indictment, arguing that he should not have been charged with that crime because a bail agreement did not constitute a "financial transaction." *Id*. at 425, 758 S.E.2d at 778. The circuit court denied the motion,

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> this case arises from a conditional plea based upon the circuit court's denial of Mr. Finley's motion to dismiss a count of the indictment. A circuit court may not grant a defendant's pretrial motion to dismiss an indictment on the basis of the sufficiency of the evidence or whether a factual basis for the indictment exists. *See* W. Va. R. Crim. P. 12(b)(1) (regarding pretrial motions). Therefore, we review Mr. Finley's conviction for plain error based on the factual basis for his plea rather than reviewing the circuit court's order denying Mr. Finley's motion to dismiss, which could not raise such factual issues.

after which the petitioner entered into a conditional plea agreement with the State, specifically reserving the right to appeal the denial of the motion to dismiss. *Id*. The single issue presented to this Court was purely a question of law: did a bail agreement constitute a financial transaction under West Virginia Code section 61-3-54? *Id*. As explained in the opinion, that is a matter of statutory interpretation and nothing more. *Id*. at 426, 758 S.E.2d at 779. This is entirely congruent with the issue presented in the instant appeal, where we are asked to interpret the language of section 60A-10-4(d). There can be no question that had this Court ruled in the petitioner's favor in *Soustek* (which we did not), the result would have been a reversal of the circuit court's denial of the motion to dismiss. That is precisely what should have happened here.

It is clear that *Soustek* is neither an anomaly nor an outlier in our jurisprudence. In the recent case of *State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020), the petitioner was indicted on the charge of being a felon in possession of a firearm under West Virginia Code section 61-7-7(b) (2016). 243 W. Va. at 332, 844 S.E.2d at 103. He moved to dismiss that charge, arguing that the statute was unconstitutionally vague and that his predicate felony (arising from a Kentucky conviction for wanton endangerment) did not constitute a "crime of violence" under the statute. *Id*. at 333, 844 S.E.2d at 104. The circuit court denied his motion and the petitioner subsequently entered into a conditional plea agreement with the State, reserving the right to appeal the circuit court's denial of his motion to dismiss. *Id*. Once again, this Court had no trouble focusing solely on the legal questions put before us: (1) was the statute unconstitutionally vague; and (2)

did a specific conviction under Kentucky law qualify as a "crime of violence" under the statute? *Id*. As explained above, had we ruled in the petitioner's favor, the correct procedure would have been reversal and remand for an order dismissing that charge from the indictment.

One might be tempted to argue that these cases merely misapprehend this Court's Rules of Criminal Procedure, as the majority seems to suggest, *see supra* note 4, but that would be unavailing because the rules themselves *support* our previously rendered decisions. One need only look at Rule 11(a)(2), pursuant to which Mr. Finely entered into his conditional plea agreement:

> With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgement, to review of the adverse determination of *any specified pretrial motion*. A defendant who prevails on appeal shall be allowed to withdraw the plea.

Id. (emphasis added); *see also Hosea*, 199 W. Va. at 63, 483 S.E.2d at 63, Syl. Pt.1. In this case, the record illustrates that Mr. Finley reserved the right to appeal the circuit court's adverse ruling on his pretrial motion to dismiss the charge of possession of altered pseudoephedrine from the indictment. As explained *supra*, such a motion could clearly be resolved without resort to trial because it was based solely upon the interpretation of the statute. Moreover, the issue "effectively dispose[s] of the indictment" because it is abundantly clear that Mr. Finley's motion to dismiss should have been granted. *See id*. Accordingly, our court rules and precedents confirm that this Court had the authority to

rule on the circuit court's denial of Mr. Finley's motion to dismiss, and to reverse that denial and remand for entry of an order properly dismissing that charge from the indictment. The procedure utilized by the circuit court and by this Court in its precedents – rather than the cumbersome procedure utilized by the majority, with its suggestion that any issue of statutory construction can only be raised on a post-trial motion – is wholly consistent with West Virginia Rule of Criminal Procedure 2, which provides that "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.").

The majority's chosen course in its opinion undermines each and every one of these principles by effectively eliminating the conditional plea agreement as a mechanism for challenging a circuit court's ruling on an issue of statutory construction: if a defendant's position on the legal issue is upheld on appeal, then ipso facto he or she did not have a factual basis for entering the plea and the parties are back to Square Zero on remand. As explained by Justice Cleckley, this will assuredly create a backlog of criminal cases for the State. Moreover, both the State and defendants will be forced to go through a jury trial in order to get a resolution of a legal issue that is not dependent upon whether sufficient facts exist for a conviction, resulting in a waste of time, money, and judicial resources. The majority's decision to upend the procedure used in this case – a procedure with which *no one* had a problem – demonstrates a complete lack of respect for the ability

of both the bar and the circuit court to resolve issues in an expeditious, fair, and legally sound manner.

I am also concerned that one reading the majority opinion could easily conclude that the majority is approaching the case in this unorthodox manner in order to leave open the options for what happens on remand. In this regard, the majority's invalidation of the petitioner's conditional guilty plea may well strip him of the *benefit* of that agreement, which was that if he prevailed on appeal he would be permitted to withdraw his pleas to *both* felony drug crimes and enter a plea to misdemeanor simple possession. There is now an open question in this case as to whether that subject conditional plea agreement still stands, though I would strongly suggest that to disregard that agreement at this juncture would severely undermine any confidence future defendants may have in the orderly workings of this state's criminal justice system. Had the majority simply adhered to this Court's precedents as to the manner in which similar legal issues are resolved, the circuit court and the parties would be bound by the terms of the plea agreement and any doubt as to Mr. Finley's final disposition regarding his convictions would be laid to rest.

I turn now to the majority's decision to eschew the established procedures outlined in our rules and our precedents, only to invoke the plain error doctrine to achieve the same ends. Specifically, the majority posits that the circuit court erred in accepting Mr. Finley's no contest plea to attempt to commit possession of pseudoephedrine in an altered state because no factual basis existed for such a plea under West Virginia Rule of Criminal

Procedure 11(f).[5] While I do not disagree that there was no factual basis for Mr. Finley's plea to the crime – how could there be when the State's only evidence was that he possessed completed methamphetamine which is not punishable under the statute? – I fervently disagree that this Court was required to resort to plain error analysis to resolve this matter. As explained above, this Court already had authority to address the circuit court's denial of Mr. Finley's motion to dismiss, and in the face of that authority, the majority's reliance on the plain error doctrine is unjustified, and frankly confusing. It is bound to result in unintended consequences, probably including unnecessary jury trials whose sole purpose will be to put issues of statutory construction in a procedural posture that will allow appeal to this Court. In short, it will inevitably lead to a "waste of prosecutorial and judicial resources." *Lilly*, 194 W. Va. at 606, 461 S.E.2d at 112.

For all of the foregoing reasons, I respectfully concur, in part, and dissent, in part.

[5] Rule 11(f) provides: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."