Concurring Opinion, Case No.22077 State of West Virginia v. Mark Wayne Phalen

No. 22077 - State of West Virginia v. Mark Wayne Phalen

Cleckley, Justice, concurring:

I concur only to point out my objection to the use of State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978), as the appellate standard for reviewing an insufficiency of the evidence assignment of error. In my judgment, Starkey is incorrect when it states that "[t]o warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, in part, State v. Starkey, supra. This standard, "manifestly inadequate and that consequent injustice has been done" (hereinafter referred to as the "manifest injustice" standard), is too high of an evidentiary standard and conceivably could be unconstitutional.

The "manifest injustice" standard is to be used only in collateral proceedings such as a habeas corpus action when dealing with assignments of error other than insufficiency of the evidence or when the defendant has failed to preserve the issue in the trial court by not making a motion for judgment of acquittal under Rule 29 of the West Virginia Rules of Criminal Procedure. In United States v. Stevens, 817 F.2d 254, 255 n.1 (4th Cir. 1987), the Fourth Circuit correctly articulates the proper use of the "manifest injustice" standard:

"As to all the arguments concerning the sufficiency of the evidence, we note in

passing that defendant made no motion for judgment of acquittal, Rule 29, Fed.R.Crim.P., and our examination is technically limited to determining whether or not manifest injustice would occur." (Citation omitted).

See also Lockhart v. United States, 183 F.2d 265 (4th Cir. 1950). As gleaned from the Fourth Circuit, the "manifest injustice" standard is more appropriate for "plain error" situations under Rule 103(d) of the West Virginia Rules of Evidence; Rule 51 of the West Virginia Rules of Civil Procedure, and Rule 52 of the West Virginia Rules of Criminal Procedure. Justice Miller, the author of the Starkey opinion, lifted "the manifest injustice" objectionable language from Syllabus Point 1 of State v. Bias, 156 W. Va. 569, 195 S.E.2d 626 (1973). A fair reading of Bias and Starkey suggests that the only time a conviction should be interfered with by an appellate court is when there is a total lack of evidence of the defendant's guilt or the defendant has proved his innocence. (See footnote 1) Of course, at the time Bias was decided the applicable standard for appellate review in this country was the "total lack of evidence" standard. See Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L.Ed.2d 654 (1960). Today, "[t]he test to determine the 'sufficiency' of evidence is no longer the 'total lack of evidence' test. The test now is whether a reasonable fact-finder must have a reasonable doubt." 2 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure at 292 (2nd ed. 1993). (Citations omitted). Accordingly,

"[i]n Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), a majority of the court took the position that the sufficiency of evidence to support a state criminal conviction is an issue that may be litigated in federal habeas corpus proceedings. Although it found the evidence sufficient in the case before it . . . it concluded that the traditional test of Thompson . . . was inadequate to protect against violations of the reasonable doubt requirement. It announced that federal habeas relief is required if the federal court finds 'that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' [443 U.S. at 324, 99 S. Ct. at 2791- 92, 61 L.Ed.2d at 576-77. (Footnote omitted).]" 2 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 12- 2(C)(2) at 449-50 (3rd. ed. 1994).

I conclude by suggesting that this Court overrule Starkey and insert in its place language consistent with Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); to- wit: on appeal of a criminal conviction, this Court must consider the evidence in the light most favorable to the prosecution and ask whether any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt.

Because I believe that the evidence under the above standard was sufficient to support the verdict, I concur.

Footnote: 1

I believe there is more than a linguistic difference between "actual innocence" and a finding that no rational juror would have convicted the defendant under a reasonable doubt analysis. The "rational juror" standard is akin to the "clearly erroneous" standard that we use to review most trial and factual decisions from a lower court. The standard of "actual innocence" was approved by a majority of the United States Supreme Court in Sawyer v. Whitley, ___ U.S. ___, ___, 112 S. Ct. 2514, 2517, 120 L.Ed.2d 269, 277-78 (1992). Although Sawyer used both these standards, and sometimes interchangeably, it is clear that in the context of death eligibility cases "actual innocence" is a much narrower concept than that envisioned by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).