No. 22531 - STATE OF WEST VIRGINIA v. HENRY DONOVAN BUZZARD

Fox, Judge, dissenting:[1]

I respectfully dissent to the majority opinion, not because it incorrectly states the law, for it does not. Indeed, it provides significant guidance to both the bench and bar as to the proper application of the criminal law relating to consent.

Pursuant to an administrative order entered by this Court on 18 November 1994, the Honorable Fred L. Fox, II, Judge of the Sixteenth Judicial Circuit, was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing 1 January 1995 and continuing through 31 March 1995, because of the physical incapacity of Justice W. T. Brotherton, Jr. On 14 February 1995 a subsequent administrative order extended this assignment until further order of said Court.

Rather, I dissent because, having properly stated and substantially clarified the law of consent, the majority then proceeds to substitute its judgment for that of the trial court on a purely factual determination, i.e., whether the entry of the law enforcement officers into the defendant's motel room was consensual.

Without question, the evidence of the defendant's "voluntary consent" to the entry of his room was sparse. Sheriff Fields testified that the defendant, responding to the Sheriff's knock, ". . . let us in." The defendant, on the other hand, said "[t]hey forced theirself [sic] in on me."

As set forth in the majority opinion, the issue of ". . . whether a consent is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." As a result of the companion cases of co-defendants, there were several in camera suppression hearings which dealt with the consent issue in this case, during which the trial court heard and observed the individual witnesses and, presumably, formed an opinion as to the accuracy and truthfulness of their testimony. Appellate courts have no equal basis for judging the witnesses' testimony, inasmuch as they have only the transcribed, "cold" record at their disposal. These suppression hearings also afforded the trial court the opportunity to assess the

totality of the circumstances, again, an opportunity not so easily assumed by appellate courts.

The majority points out that the circuit court failed to discuss its consideration of the criteria set forth in syllabus point 3 of the majority opinion, and, indeed, no such discussion was undertaken on the part of the judge. However, this does not mean that the various relevant criteria were not, in fact, considered. And I am somewhat concerned by the ever-increasing requirement placed upon trial courts, by appellate courts, to elucidate upon their rulings on factual questions. Such a requirement is particularly burdensome since trial courts, in addition to facing ever-increasing dockets, must also consider factors such as speedy-trial rights, time standards, and

the economical and efficient use of juries. But realizing that, absent such elucidation as to fact-finding, it is many times difficult for a reviewing appellate court to determine if the trial court's ruling on a question of fact was appropriate under the evidence, I begrudgingly accept this crescive responsibility.

However, in the instant case, the question of fact was a fairly simply one, and its resolution depended almost entirely on "who you believe." The trial court heard the witnesses and found more credible the State's evidence that the officers had been "let . . . in," as opposed to the defendant's evidence that "they forced theirself (sic) in on me." The failure to individualize each of the six criteria in syllabus point 3 should not be fatal to the trial court's factual determination.

He heard the witnesses, he assessed their credibility, he determined what was the totality of the circumstances, and he found the defendant had voluntarily consented to the Sheriff's entry.

On the whole record, I am not disposed to conclude, as does the majority, that the State "failed to present sufficient evidence to support a finding on whether the Appellant consented to the officers' entry." I am even less disposed to hold that the trial court's finding of fact on this issue was "clearly wrong." I need not point out that there is a substantial difference between questioning the basis for the ruling of a trial court and finding that it was clearly wrong.

Bottom line: in the instant case, it was the trial court's call, properly made. I would, therefore, validate the seizures and sustain the convictions.