No. 22781 -- State of West Virginia ex rel. Clayton Collins v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County

and

No. 22783 -- State of West Virginia ex rel. John Leslie Peeples v. Honorable David W. Knight, Judge of the Circuit Court of Mercer County

Neely, Senior Justice, dissenting:

I dissent in a case where there is no harm to these particular defendants because I believe that a criminal defendant appealing from a proceeding in magistrate court before a non-lawyer judge, should be afforded a statutory right to a jury trial de novo on appeal to the circuit court. Accordingly, I would find that W. Va. Code 50-5-13 [1994], which eliminated the aforementioned right, to be unconstitutional. As stated by the majority, the amendment provides that when there has been a jury trial in a criminal proceeding in a magistrate court, the review on appeal to the circuit court is limited to the record of the magistrate court trial. W. Va. Code 50-5-13(b) [1994]. Furthermore, if the defendant waives the right to a jury trial in a criminal proceeding in magistrate court, then the review on appeal to the circuit court is limited to a trial de novo before a judge, without a jury.

I believe the majority's opinion is just another step in the ongoing trend in American law to abolish the constitutional rights of criminal defendants and to destroy citizens' rights to a jury trial. For an in depth discussion of this alarming and insidious trend, see State v. Rummer, 189 W. Va. 369, 384-403, 432 S.E.2d 39, 54-73 (1993) (Neely, J., dissenting). Rummer involved different issues but the effect of the Court's decision was the same--a further erosion of the civil rights of criminal defendants.

Under the former statutory scheme, the question on appeal from a jury trial before a magistrate was not whether the judgment of the court not of record was correct, but whether the accused is guilty of the offense charged and for which he has been tried. However, as stated by the majority, under the amended statute the circuit court takes on the role of a reviewing court, rather than a trial court. The 1994 amendments penalize criminal defendants exercising their right to a jury trial below by stripping them of their right to a de novo trial on appeal to the circuit court. However, when they graciously and expeditiously waive their right to a jury trial below, they are rewarded with the right to a de novo trial before a lawyer-judge on appeal.

This amounts to an unconstitutional deprivation of due process, based in part on the inherently political nature of our magistrate system. The requirements to be a magistrate in West Virginia are simple: if you are over twenty-one years of age, with a high school education or its equivalent, absent any felony or misdemeanor convictions involving moral turpitude, you, too, can run for election in your county of residence. W. Va. Code 50-1-4 [1992]. There are no preliminary requirements of formal legal education or training.

Basically, without even being asked to walk and chew gum at the same time, a total buffoon can win an election and be rewarded with a four-year term as a magistrate. The mandatory training program for magistrate judges helps smart, interested magistrates, but is largely wasted on dim bulbs or those who don't want to learn. There is nothing fundamentally wrong with the concept of using non-lawyer judges for misdemeanors. However, in the big picture, some due process attaches even to misdemeanor cases.

The Supreme Court of the United States has indirectly addressed the constitutionality of non-lawyer magistrates in the case from Kentucky of North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976), as mentioned in the majority opinion. In

North, the appellant claimed that when incarceration is a possible penalty, due process required that his case initially be tried before a judge with formal legal training, irrespective of whether a trial de novo was available before a lawyer/judge on appeal. The Supreme Court essentially found this argument mooted by the fact that in Kentucky a defendant facing a criminal sentence did have the opportunity "[i]n all instances" to have a trial de novo before a lawyer/judge. North, 427 U.S. at 334 [emphasis added.] Thus, the Court tacitly affirmed the constitutionality of non-lawyer judges based upon the guarantee of a trial de novo on appeal before a lawyer/judge.

In Ludwig v. Massachusetts, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976), decided just two days after the North decision, the Supreme Court again partially relied on the existence of a trial de novo to uphold a state court system when a defendant in a criminal case was initially tried without a jury before a non-lawyer judge, but had the right to obtain a trial de novo by jury on appeal. Thus, in Ludwig the Supreme Court ruled that no due process violation was found.

Our amended statute eliminates the right to a trial de novo on appeal for defendants who exercise their constitutional right

to a jury trial; although, a trial de novo before a judge is preserved for defendants waiving their right to a jury trial below. W. Va. Code 50-5-13(b) [1994], states:

> In the case of an appeal of a criminal proceeding tried before a jury, the hearing on the appeal before the circuit court shall be a hearing on the record. In the case of an appeal of a criminal proceeding tried before the magistrate without a jury, the hearing on the appeal before the circuit court shall be a trial de novo, triable to the court, without a jury.

[Emphasis added.] The mere fact that the 1994 statute provides that all jury trials in magistrate court be electronically recorded, thus theoretically preserving the record for review on appeal, should not be used to disguise the fact that we have effectively eliminated a criminal defendant's right to trial by jury in the presence of a lawyer/judge.

No doubt the majority, as well as the Legislature, rightfully assumes they are highly unlikely ever to be in a position to benefit from the constitutional rights designed to protect criminal defendants. Presumably this explains the haste with which such rights have been diminished or eliminated by this Court and others. See State v. Charles, 183 W. Va. 641, 398 S.E.2d 123 (1990) (Miller, J., dissenting; Neely, J., joining) (creation of "lustful disposition" exception to W.Va.R.Evid., Rule 404(b)). Nonetheless,

I dissent; it is the protection and preservation of constitutional rights that keep the judiciary in business.