

No. 22881 - State ex rel. Omarri Hill v. The Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County: and Larry F. Parsons Administrator, South Central Regional Jail.

Workman, Justice, concurring:

I regret that I must concur in the majority opinion. It is tragic that the murder of a completely innocent young man costs the perpetrator no more than the loss of freedom for a very brief period in his life.

The office of the prosecuting attorney made a grievous error in recommending this lenient disposition for Omarri Hill and indeed in preparing the order which set forth such lenient treatment. It is necessary that that be said clearly, not in the finger-pointing sense, but in order to set the public record straight. Otherwise, we will in all likelihood see the prosecuting attorney himself on the evening news castigating the State Supreme Court as being too soft on criminals.<sup>1</sup> Unfortunately, they did not realize their

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<sup>1</sup>An absurd claim, since according to the Supreme Court Journal

If one looked at only the opinions of the Supreme Court, one might assume it reverses a relatively high percentage of criminal convictions. For example, over the twelve-year period of 1983 to 1994, the Court

mistake until it was time under their recommended order for Mr. Hill to be released, at which time they sought to clothe their position in obscure and dubious constitutional grounds. This Court is without authority to "clean up" mistakes of this magnitude for reasons well-stated in the majority opinion.

It should be made clear that in 1994, when Mr. Hill reached his eighteen birthday, several options were open to the State. The State could have sought the transfer of Mr. Hill to the penitentiary under West Virginia Code § 49-5-16(b) 1982, if such transfer was

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granted some relief, which might have been only partial reversal or remand for correction of sentence, in 49[] percent of the opinions filed in criminal appeals. What this fails to take into account, however, is that the Court grants review in relatively few of the criminal appeals presented for its consideration. For example, since 1990, the Court has never granted more than 1 in 4 criminal appeals in any calendar year, and from 1990-1992 never granted more than 1 in 5 criminal appeals in any calendar year. Consequently, as indicated in the table below, the reversal rate for criminal appeals including summary affirmances, i.e., appeals in which the petition was denied without further review, over the same twelve-year period was only 12%, with no more than 1 in 10 criminal appeals reversed, even partially, since 1990.

2 Supreme Court Journal, July 5, 1995, No. 7, at 24.

<sup>2</sup>West Virginia Code § 49-5-16(b) provides:

No child who has been convicted of an offense under the adult jurisdiction of the circuit court shall be held in custody in a penitentiary of this State: Provided, That such child may be transferred from a secure juvenile facility to a penitentiary after he shall attain the age

appropriate "in the judgment of the commissioner of the department of Corrections and the court which committed such child." Id. The State did not exercise this option. Instead, it sought the transfer of Mr. Hill to a center under West Virginia Code §§ 49-5-16 (b) and 25-4-6 (1975). In a letter dated May 24, 1994, Nicholas J. Hun, Commissioner of the Department of Public Safety and James, J. Ielapi, Superintendent of the W. Va. Industrial Home for Youth recommended the Mr. Hill "serve the remainder of his sentence at a minimum

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of eighteen years if, in the judgment of the commissioner of the department of corrections and the court which committed such child, such transfer is appropriate; Provided, however, That any other provision of this Code to the contrary notwithstanding, prior to such transfer the child shall be returned to the sentencing court for the purpose of reconsideration and modification of the imposed sentence, which shall be based upon a review of all records and relevant information relating to the child's rehabilitation since his conviction under the adult jurisdiction of the court.

<sup>3</sup>Although, as the majority points out, the language as to the judgment of the commissioner no longer exists in the present statute, experience indicates that the commissioner's judgment was generally treated as a recommendation only and the determination of the judge prevailed.

<sup>4</sup>West Virginia Code § 25-4-6 provides, in pertinent part:

Any male youth between the ages of ten and eighteen committed by the judge of any court of competent jurisdiction of any of the causes, and in the manner prescribed in article five [§ 49-5-1 et seq.], chapter forty-nine of this code, may, if such youth is or has attained the age of sixteen, be placed in a center or transferred from the industrial school or like facility to a center and back to such facility by the commissioner of public institutions [corrections], if he deems it proper for the youth's detention and rehabilitation.

security adult facility, such as the Anthony Center in Neola, West Virginia." They further suggested that Mr. Hill service "at least the remainder of the minimum sentence . . . [to] allow more time for adjustment and counseling, as well as time for some type of vocational training to be implemented."

However, the State and the Court did not follow that recommendation, opting for another, more lenient, option outlined in West Virginia Code § 25-4-6. This six-month training option was

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<sup>5</sup>West Virginia Code § 25-4-6 also provides, in pertinent part:

The judge of any court with original criminal jurisdiction may suspend the imposition of sentence of any male youth convicted of or pleading guilty to a criminal offense, other than an offense punishable by life imprisonment, who has attained his sixteenth birthday but has not reached his twenty-first birthday at the time of the commission of the crime, and commit him to the custody of the West Virginia commissioner of public institutions [corrections] to be assigned to a center. The period of confinement in the center shall be for a period of six month, of longer if it is deemed advisable by the center superintendent, but in any event such period of confinement shall not exceed two years. If, in the opinion of the superintendent, such male offender proves to be an unfit person to remain in such a center, he shall be returned to the court which committed him to be dealt with further according to law. In such event, the court may place him on probation or sentence him for the crime for which he has been convicted. In his discretion, the judge may allow the defendant credit on his sentence for time he has spent in the center.

adopted by the circuit court after it was proposed by the State, which now complains about the sentence. The sentence was very specifically set forth in the order prepared by the State.

For sake of completeness, it should be noted that if Mr. Hill fails to meet the conditions of his probation and if his probation is revoked, West Virginia Code § 25-4-6 provides that "he shall be given the sentence he would have originally received had he not been committed to the center and subsequently placed on probation." Id.

The nature of this offense together with the leniency the State and the court below have accorded this Defendant would seem to justify the circuit court in imposing stringent conditions of probation.

As distasteful as I find such a lenient sentence for such a tragic

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When, in the opinion of the superintendent, any boy has satisfactorily completed the center training program, such male offender shall be returned to the jurisdiction of the court which originally committed him. He shall be eligible for probation for the offense with which he is charged, and the judge of the court shall immediately place him on probation. In the event his probation is subsequently revoked by the judge, he shall be given the sentence he would have originally received had he not been committed to the center and subsequently placed on probation. The court shall, however, give the defendant credit on his sentence for the time he spent in the center.

and violent crime, I concur with the majority that we are without authority to alter it.