No. 23044 - State of West Virginia v. Roberto Jose Lopez

Workman, J., dissenting:

This case portrays the increasing use of per curiam opinions to alter the law as it currently exists in West Virginia while declining to enunciate the change in a new syllabus point. It illustrates an evolving problem that this Court should correct. Although this is not the first example of this phenomenon, it is the one least justified. In the past some good reason has existed. It has occurred where there has been a "compromise" decision. It has occurred when the membership of the Court has been in a state of flux, with all the accompanying philosophical shifting, and a "temporary" court had the good judgment to recognize that it was not the time to make major policy changes in the law. None of those phenomenon are present here.

The majority opinion presents, however, more than a procedural lapse. It strikes at the heart of our stare decisis doctrine. For unexplained reasons, the majority opinion attempts to alter the law by not discussing the existing syllabus point most closely applicable to the issues at hand. In Wagner v. Hedrick, 181 W. Va. 482, 383 S.E.2d 286 (1989), we held: "Although injured persons being treated

in a hospital emergency room are entitled to Fourth Amendment protections, the degree of privacy they are reasonably entitled to expect may be diminished by the circumstances[1] under which they are brought into the hospital. Id. at 483, 383 S.E.2d at 287. I believe the Wagner standard should not only have been discussed but also applied in this case. But, more importantly, the majority's refusal to even discuss our most relevant precedent will inevitably create confusion in our lower courts.

The Fourth Amendment to the United States Constitution and Article 3, § 6 of the West Virginia Constitution "protect[] people from unreasonable government intrusion into their legitimate expectations of their privacy." United States v. Place, 462 U.S. 696, 706-07, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983). Whether a defendant has standing to challenge a search under our Constitution depends upon two factors: (1) whether one demonstrated by his conduct a subjective expectation of privacy, and (2) whether society is prepared to recognize

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In Hedrick, the defendant arrived at the emergency room of the hospital as a result of being involved in a motorcycle accident. 181 W. Va. at 484, 383 S.E.2d at 287. Similarly, in the instant case the Appellant went to the hospital on his own. There was not state involvement in the circumstances under which either of these Appellant's go to the hospital.

that expectation as reasonable. Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). Before applying these requirements to the present case, I note the evidentiary burden borne by a defendant seeking to suppress evidence on Fourth Amendment grounds. If a party moves to suppress evidence obtained as a result of an allegedly unconstitutional search, he or she has the obligation to demonstrate a subjective expectation of privacy that society is prepared to recognized as reasonable. This precept stems from the general rule that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth amendment rights were violated by the challenged search and seizure." Rakas v. Illinois, 439 U.S. 128, 131 n. 1, 99 S.Ct. 421, 424, n.1 58 L.Ed.2d 387 (1978); State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993); State v. Tadder, 173 W.Va. 187, 313 S.E.2d 667 (1984).

I turn to the question of whether this Appellant has met the two requirements for standing to challenge the search. As to the first half of the standing inquiry, the Appellant's personal, subjective expectation of privacy was unclear. A subjective expectation of privacy is a question of intent which may be inferred from words, acts, and other objective facts. Although the treatment he sought is one in which participants usually do not seek privacy in their clothes that are removed, the fact of medical treatment cannot, in itself, be dispositive of the

subjective expectation. For purposes of discussion, I will assume the Appellant has demonstrated a subjective intent to retain the privacy interest of his clothes.

Regardless, of the Appellant's subjective expectations, he plainly fails the second half of the standing test; that is, he did not assert an expectation of privacy that society is prepared to recognize as reasonable. "If the inspection by the police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." Illinois v. Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983). The Appellant contends that when his clothing was removed at the hospital and placed in a bag by nurses, he retained a legitimate expectation of privacy in the clothes. I do not believe he did.

The Appellant's clothing was with the hospital personnel. It is reasonable to believe that a patient seeking treatment for burns would expect hospital personnel to examine and take control of the clothing that were worn by him at the time the burns were obtained. See United States v. McKennon, 814 F.2d 1539, 1544 (11th Cir. 1987) ("Extenuating circumstances can erode the reasonableness of a privacy

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The record is unclear as to exactly how the nurses come into possession to the clothes, but the Appellant in no way demonstrated that he entrusted them with the hospital personnel with any expectation of privacy.

expectation to the extent that the interest is not constitutionally protected"). In any event, the clothes were in legal possession of the hospital personnel. No limitations were placed on their use by the Appellant. The law is that a bailee in legal possession and control of personal items has a legitimate expectation of privacy in the items possessed. The hospital personnel had control of the clothes and the authority to exclude other's access to the clothes. The hospital personnel also had the authority to allow others access to the items in their lawful possession. By committing the clothes to the possession and control of hospital personnel without placing limitations on the bailee, the Appellant assumed the risk of that the hospital personnel would allow authorities access to the clothes. Cf. United States v. Jacobsen, 466 U.S. 109, 117, 104 S.Ct. 1652, 1658-59, 80 L.Ed.2d 85 (1984) ("It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."); United States v. Mithun, 923 F.2d 631, 634 n.3 (8th Cir.), cert. denied, 502 U.S. 869, 112 S.Ct. 201, 116 L.Ed.2d 161 (1991) ("[The defendant] assumed the risk that hotel employees would discover the contraband and reveal the information to the authorities.").

Although the Appellant did not intend for the nurse to turn over the clothes to the authorities, he voluntarily gave the hospital personnel the ability to do so. To be clear, there is no reasonable expectation of privacy in situations such as these because the defendant's privacy is contingent in large measure on the decision of another. Decisions of either the defendant or the hospital personnel define the extent of the privacy involved. Thus, undergirding the rule set forth in Hedrick is the notion that a hospital patient's clothing is held to a lower protection of privacy under Fourth Amendment analysis. The lower expectation of privacy results from the ready access to the clothing by hospital personnel. It is reasonable to recognize that the hospital personnel had the right to permit inspection by the police in their own right and that the defendant has assumed the risk that a nurse or other hospital personnel might permit clothing to be inspected by the police. Because the "nature of the transaction hardly supports a reasonable inference that [defendant] took normal precautions to maintain his privacy," Rawling v. Kentucky, 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980), I conclude that the Appellant did not have an objectively reasonable expectation of privacy in his clothes.

Both the holding and rationale of Hedrick, a case where the facts are extremely analogous to those in the instant case, support my conclusion. With the exception that the defendant in Hedrick had been given the opportunity to have his

clothing "secured" by hospital personnel, they are almost identical. Id. at 488, 383 S.E.2d at 292. The defendant declined this opportunity, choosing instead to keep the clothes in a container under his hospital bed in a place in which he certainly could be said to have possibly anticipated perhaps even more personal security and more of an expectation of privacy than the Appellant in the instant case. Id. at 485, 383 S.E.2d at 289. As we pointed out in Hedrick,

> **Any expectation of privacy which Wagner [the defendant] may have had could not be termed "reasonable" because he was in a hospital emergency room, one which may people had access to and in which many people, particularly medical personnel, were constantly moving around. The area was freely accessible to law enforcement officers, and Trooper Pinion had a right to be there that night by virtue of his duty to investigate this particular accident. It is apparent that Wagner had very little control over what happened in the emergency room area and that he and his personal effects could be placed wherever the hospital staff chose to put them.**

Id. at 487, 383 S.E.2d at 291.

In is evident in the instant case that both the law and the facts of Hedrick are dispositive of the issues raised sub judice. It is inconceivable how the majority concluded that the Appellant here had more of an expectation of privacy than did the defendant in Hedrick. In light of our factual discussion in Hedrick, the record in the instant case is devoid of any evidence that the Appellant had more control

over the what occurred with the nurses at the nurses station than did the defendant in Hedrick. See id.

Even assuming that the Appellant had maintained a reasonable expectation of privacy beyond that expressly recognized in Hedrick, still the majority erroneously suggests that "this Court cannot conclude that it was "'plain view.'" In my judgment, the seizure of the clothes by the police fits squarely within the plain view doctrine because the object's incriminating character was immediately apparent. The majority, however, incorrectly focused its plain view analysis solely on that fact that "the testimony of Detective Smartwood . . . unequivocally shows that the defendant's clothing was not in plain view at the time the officers arrived at the nursing stations." This focus is centered upon the fact that the clothing was not within the officer's sight. As Justice Cleckley states in his treatise on criminal procedure: "The plain view doctrine encompasses more than simply seeing contraband. For an object to be in plain view it must be obvious to the senses but need only reveal itself in a characteristic way to one of the senses." 1 Franklin D. Cleckley Handbook on West Virginia Criminal Procedure at 304-05 (1993) (citing United State v. Norman, 701 F. 2d 295 (4th Cir. 1983); United States v. Haynie, 637 F.2d 227 (4th Cir. 1980)). It appears from the trial court's ruling at the suppression hearing that when the clothes were offered to the officer's by the

nurses, the clothing "had obvious evidentiary value, in that they, apparently, emanated a smell of petroleum product which was immediately apparent, by the testimony, apparent to the senses." The decision of the United States Supreme Court in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) teaches us that it was not unconstitutional for the officer to look inside the bag of clothing. As the plurality said in Brown: "… there is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy." 460 U.S. at 740, 103 S.Ct. at 1542.

Once the officer smelled the "petroleum product" coming from the clothes, and given the circumstances of the defendant's hospitalization, it was not unreasonable for the officer to seize the clothes without a warrant. "Whether or not the discovery was inadvertent, the warrantless seizure of evidence of crime in plain view is [not] prohibited by the Fourth Amendment…" Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 2304, 110 L.Ed.2d 112 (1990); see also State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991). Under these circumstances, the trial court did not err in determining that the clothing could have properly been seized under plain view by virtue of the officer's smelling the gasoline emanating from the clothing.

Nevertheless, however one views this issue, let's at least agree that if we alter or expand on established law, we should write a syllabus point.

The second area of concern is this Court's decision regarding the admissibility of the Appellant's statement at trial. The trial court ruled that the statement was admissible on the grounds that the Appellant was not in custody when his statement was taken. The Appellant acknowledges in his brief before this Court that: "there was no arrest. Officer Smartwood made it clear in both the suppression hearing and in his testimony at the trial that the Appellant was not under arrest or placed under arrest at the time of their interrogation at Winchester

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[2]Furthermore, it also appears that the Appellant may have waived his Fourth Amendment right because the record reflects that the officers took the clothing to the Appellant, who identified them as the clothing he had been wearing and who made no objection to the officer's taking the clothing. Although the record is unclear as to whether the Appellant was specifically asked if the officers could retain his clothing, the translation of the statement makes it clear that the Appellant was willing to cooperate with the officers. In fact, Officer Milholland specifically asked if he could search the Appellant's residence for other items, and the Appellant consented to that search. See State v. Buzzard, 194 W. Va. 544, 461 S.E.2d 50 (1995) (indicating that an individual can waive his Fourth Amendment right).

Hospital." (emphasis in original). The majority, however, proceeds to agree with the Appellant's contention that the statement was not voluntarily given and was admitted in violation of his constitutional right against self-incrimination.

The problem with the majority's analysis is that to get to the admissibility of the confession on self-incrimination grounds, the statement must arise out of a custodial interrogation. Absent custodial interrogation, the Miranda rights are not triggered. In State v. Bradshaw, 193 W. Va. 519, 457 S.E.2d 456 (1995) we stated that:

> **To the extent that any of our prior cases could be read to allow a defendant to invoke his Miranda rights outside the context of custodial interrogation, the decisions are no longer of precedential value. As the Supreme Court recognized in Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297, 307 (1980), "[i]t is clear . . . the special procedural safeguards outlined in**

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[3]Even if we were to assume the Appellant was in custody when he gave the statement, and also that the statement given was inadmissible under Miranda, the trial court's decision still should be affirmed, under harmless error analysis. Rule 52 of the Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Id.; see Syl. Pt. 20, State v. Thomas, 157 S.E.2d 640, 203 S.E.2d 445 (1974) ("Errors involving deprivation of constitutional rights will be regarded as harmless only if there is not reasonable possibility that the violation contributed to the conviction."). It is indeed difficult to comprehend how the admissibility of the Appellant's exculpatory statement which supported the Appellant's defense that he did not commit the crimes with which he was charged could affect the Appellant's substantial rights. Consequently, given the majority's conclusion regarding the voluntariness issue, the trial court's decision in this matter should have been found to be harmless error. See id.

> **Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." We believe the same reasoning applies where a defendant is being interrogated, but he is not in custody. The "inherent compulsion" that is brought about by the combination of custody and interrogation is crucial for the attachment of Miranda rights. Our refusal to extend the Miranda/Edwards protections to noncustodial interrogation is consistent with the goals of Miranda. . . .**

193 W. Va. at ___, 457 S.E.2d at 467 (citation omitted). Moreover, the initial determination of whether the Appellant was in custody is based on "'the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being question.'" State v. Hopkins, 192 W. Va. 483, 453 S.E.2d 317, 320-21 (quoting Stansbury v. California, 114 S.Ct. 1526, 1529 (1994).

In the instant case, the evidence affirmatively established that the Appellant was not in custody during the taking of the statement. The Appellant was at the hospital of his own volition. He was in a least a semi-private area and was under no restraint. Further, medial personnel were free to enter and exit his room. The officers neither touched nor attempted to restrain him in manner. Only two officers and the interpreter were in the room throughout the interview and the Appellant was advised that he was not under arrest and could leave if he so

desired. Our cases have consistently held: "Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go." Syl. Pt. 2, State v. Mays, 172 W.Va. 486, 307 S.E.2d 655 (1983). Syl. Pt. 3, State v. Jones, W.Va. , S.E.2d (1995). Although the Appellant argued that he was not free to leave as long as he had only the hospital gown to wear, that is clearly insufficient to render him to be "in custody." "[T]he mere fact that the [Appellant] did not feel free to leave the [hospital room] does not mean that the police seized him." Florida v. Bostick, 501 U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). When a person is in a hospital bed receiving medical treatment "and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." Id. Whatever compulsion existed to keep the Appellant from leaving resulted from his medical condition and not from coercive police conduct. See INS v. Delgado, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). Consequently, the trial court's determination that the Appellant was not in custody should have been upheld.

Accordingly, based on the foregoing reasons, I dissent.

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[4]I cannot leave this case without several other comments. I would uphold the

admission of the gun as circumstantial evidence, rather than directing the trial court to reconsider the relevancy of the gun on retrial of the defendant. The majority is correct is stating that Rule 402 of the West Virginia Rules of Evidence provides that "[a]ll relevant evidence is admissible . . . ." Id. Moreover, the majority correctly states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id. Further, the majority correctly relies upon our recent examination of Rule 401 in McDonald v. McCammon, 193 W. Va. 229, 455 S.E.2d 788 (1995), where we stated that

> **[u]nder Rule 401, evidence having any probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard favoring a broad policy of admissibility. For example, the offered evidence does not have to make the existence of a fact to be proved more probable that not or provide a sufficient basis for sending the issue to the jury.**

Id. at 236, 455 S.E.2d at 795.

Although the Appellant argued that the gun was irrelevant because there was no proof of his ownership or possession of the gun, the record clearly established that the fire was set subsequent to a fight between Mr. Chaparro, Mr. Cajero and Mr. Lopez over a gun. Mr. Chapparro refused to return the gun. The Appellant and Mr. Cajero were outside the building prior to the fire. The Appellant was seen running, on fire, from the building. Mr. Chaparro was in the building at the time of the fire and was injured as a result of the fire. Shortly after the fire erupted, a handgun was found outside the building near the source of the fire.

Certainly, applying the law regarding relevancy of evidence to the above-mentioned facts, the gun was properly admitted as circumstantial evidence relative to the circumstances leading up to the crime. It is disingenuous for the majority to suggest that the State failed to establish that the gun lacked "any probative value." See id. Once again, however, whatever view one takes, the issue is here on appeal. Why no resolve it so that if the case is reversed, the trial

court might have guidance on it.

Finally, I take issue with the majority's failure to resolve the admissibly of the gruesome photographs. The law is straightforward on this issue and it is of no benefit to either the State or the Appellant to leave this issue unresolved. See State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994).