No. 24714 -- State of West Virginia v. Helen Morris, a.k.a. Helen King

Starcher, J., dissenting:

In *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), this Court held that prior shoplifting convictions are elements of the crime of third-offense shoplifting, and are therefore admissible before the jury. I am in full agreement with Justice Cleckley when he said, in his dissent to *Hopkins*, "I think this case is wrong." 192 W.Va. at 495, 453 S.E.2d at 329 (Cleckley, J., concurring in part and dissenting in part). The majority opinion, in following *Hopkins*, is also wrong in the present case.

The majority opinion in this case and in *Hopkins* simply ignores Rule 404(b) of the *West Virginia Rules of Evidence.*[1] It is undeniable that a jury will be more inclined to convict once they hear that a defendant has previously been convicted of similar conduct. Rule 404(b) was designed to keep such evidence of other crimes away from a jury, thus focusing the jury on the proper question: did the defendant commit the crime with which he is currently charged? Whether a defendant was previously convicted of similar conduct goes to the defendant's penalty; this evidence should not be admissible to show that "if he did it before, he must have done it this time."

As Justice Cleckley cogently stated in *Hopkins*, "prior convictions are not elements of the current charge; they are elements of penalty enhancement." *Hopkins*, 192 W.Va. at 496, 453 S.E.2d at 330. Therefore, the trial in second- or third-offense

[1]Rule 404(b) was similarly given short shrift in *State v. Cozart*, 177 W.Va. 400, 352 S.E.2d 152 (1986). In footnote 1 of *Cozart*, this Court held that previous convictions of driving under the influence of alcohol are admissible to show the defendant is currently guilty of a third offense of driving under the influence of alcohol.

shoplifting cases should be bifurcated, and evidence of prior convictions should only be admitted into evidence if and after guilt has been found on the underlying offense.

In footnote 1, the majority opinion suggests that because *Hopkins* was "decided just four years ago," this Court is bound by *stare decisis* and cannot revisit and overrule *Hopkins*. The binding effect of a judicial opinion on future generations should not be based on the number of years that have passed since the opinion was issued by a Court, but rather should be found in the strength of the Court's reasoning in the opinion, and the fairness of its result.

Because *Hopkins* reached an unfair result, and because its holding was "a torture of sound legal reasoning," *Id*., I would overrule that opinion and grant the defendant in this case a new trial. I am confident that the unfair approach adhered to in *Hopkins* cannot stand continued scrutiny. I therefore urge the bar to continue to present similar bifurcation issues to this Court, so that we will have ample occasion to consider the issue and examine its fundamental unfairness.

I therefore respectfully dissent.