

No. 25171 -- State of West Virginia v. James A. Fox

Starcher, J., dissenting:

As I stated in my dissent to *State v. Morris*, ___ W.Va. ___, ___ S.E.2d ___ (No. 24714, October 2, 1998)(*per curiam*), I am in full agreement with Justice Cleckley's assessment of *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994). Justice Cleckley, in his dissent to *Hopkins*, said bluntly: "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.

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) of the *West Virginia Rules of Evidence* was designed to keep such fundamentally unfair evidence of other crimes away from the jury, allowing the jury to focus 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 is relevant to the defendant's penalty, not the defendant's guilt of a particular criminal act on a particular day. Therefore, when an accused is charged with a second-, third-, or subsequent-offense crime, then the evidence of prior convictions should be bifurcated, and presented to the jury only after the accused is found guilty of the underlying charged crime.

Because *Hopkins* reached an unfair result, and because its holding was "a torture of sound legal reasoning," 192 W.Va. at 496, 453 S.E.2d at 330, I would overrule

that opinion and grant the defendant in this case a new trial. As I stated in my dissent to *State v. Morris, supra*, 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 all of its unfair aspects.

I therefore respectfully dissent.