

FILED

December 12, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Maynard, Justice, concurring:

I reluctantly concur with the majority decision to deny the reinstatement of Governor Moore's license to practice law and with the majority's rationale for its decision. I write separately simply to express the fact that I am troubled by what may be claimed or perceived by some as unequal treatment of Governor Moore based solely on political considerations.

Any fair analysis requires that we compare the case of Governor Moore to the case of W. Bernard Smith. After his election in 1960, Governor W.W. Barron appointed Smith, a licensed attorney, to the position of State Welfare Commissioner, a cabinet level position. Smith was thereafter elected to the State senate from Logan County. Like many former Barron department heads, Smith was later indicted for bribery. In a 1970 trial, witnesses told of delivering bags of cash to Smith and others at the Capitol. Smith was tried twice and both trials ended in a hung jury. In 1971, Smith was acquitted of a federal perjury charge. Later that year, he and four other Logan politicians, called "the Logan County Five," were found guilty of violating Section 241 of Title 18 of the United States Code which made it unlawful to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or the laws of the United States.

The indictment charged that . . . Smith and his codefendants caused “fraudulent and fictitious votes to be cast * * * all with the purpose and intent that said illegal, fraudulent, and fictitious ballots would be counted, returned and certified as a part of the total vote cast * * *.” In other words, he was charged with “stuffing” the ballot box with fraudulent and fictitious ballots.

In re Smith, 158 W.Va. 13, 16, 206 S.E.2d 920, 922 (1974).

As a result of his conviction, Smith served a term in federal prison, he was expelled from the Senate, and his law license was annulled. In 1979, Smith petitioned for reinstatement of his law license. A subcommittee of the Committee on Legal Ethics of the West Virginia State Bar recommended that the petition be denied. Despite this recommendation, in *In re Smith*, ___ W.Va. ___, 585 S.E.2d 602 (1980), this Court, in a 3 to 2 decision, granted Smith’s petition for reinstatement and gave him back his law license. Justices Miller and McGraw dissented.¹

A fair but casual observer who compares the facts of the Smith and Moore cases would be hard pressed to find any genuinely significant differences in the two cases that would justify granting Smith’s petition for reinstatement of his law license while denying Governor Moore’s petition. Governor Moore and Smith both held offices of high public trust

¹The facts concerning Bernard Smith were drawn from “*Logan Five*” *Defendant Dead At 64*, The Charleston Gazette, April 17, 1995, at 1A; *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974); and *In re Smith*, ___ W.Va. ___, 585 S.E.2d 602 (1980).

- Moore a congressman and governor and Smith serving as W.Va. Commissioner of Welfare and a State senator. Both were convicted of federal felonies, serious crimes involving violations of the public trust, and both were incarcerated in federal prisons. Both had a myriad of other charges which did not result in convictions. Both continued to assert post-conviction that they were innocent or had been the victim of some miscarriage of justice which resulted in a wrongful conviction. And each man, upon his release from federal prison, resumed vigorous political activity in support of chosen candidates and issues.

Frankly, a fair-minded person may conclude that the only real difference in the Bernard Smith case and the Arch Moore case is that Arch Moore is a Republican and Bernard Smith was a Democrat who could deliver thousands of Democratic votes on election day. And, oh yes, Smith got his law license back and Arch Moore did not.

A few years ago, this Court considered and rejected adopting a rule that would deny to every convicted felon a law license. The Court chose rather to continue to consider felon applicants on a case-by-case basis. I voted for the proposed rule to bar all felons from receiving a law license precisely because of situations like the instant one. In fairness, and all other things being equal, if the rule is to be applied on a case-by-case basis, then Bernard Smith must be the yardstick by which this Court judges all other lawyers. In other words, Bernard Smith is the standard of comparison.

Based on the Bernard Smith standard, and utilizing the case-by-case approach chosen by the Court, the conduct of an applicant seeking a law license must be weighed against the conduct of Bernard Smith, a man to whom this Court gave a law license. Logically, how could one deny a law license to, or disbar a person, whose conduct is less egregious than, or equally egregious to, the conduct for which Smith's license was originally annulled? For this very reason, I have voted to give law licenses to applicants whose conduct, while very unsavory and improper, did not rise to the level of Smith's wrongdoing. In short, if Smith was allowed to practice, so, in fairness, must they.

Notwithstanding the foregoing, today I vote with the majority on this unanimous vote with the understanding that with this decision, we finally have an opportunity to depart from the Smith standard. Now, when comparing new cases to decided cases, we fairly can point to this case as a reply to those who would cry foul. Now the standard can be based on fundamental notions of what is right, what is best for the public, what is best for the legal profession, and what is fair. In the end, I believe that the key to responding to any charges of unequal treatment of Governor Moore lies in the answer to one simple question: Would this Court, as it is constituted today, restore Bernard Smith to the practice of law? I know the high standards of the judges with whom I sit, and I am very confident that the answer to this question would be a resounding NO!

It is my belief that the Smith case has long infected our jurisprudence in this

area, and the cure is harsh and unpleasant. But the simple fact is that years ago, W. Bernard Smith absolutely should have been denied reinstatement, and so must Governor Moore today. Judges make decisions every day that they strongly dislike or find extremely distasteful. This decision is certainly at the top of the list for me. It is really difficult for me to reconcile the glaring differences in this Court's treatment of the Moore and Smith cases. I tell myself if there is truly any injustice in these two cases, the injustice was in the outrageous partisan favoritism shown to Bernard Smith years ago when his license was wrongfully restored. On the other hand, I also am absolutely morally certain that there is no partisanship in this decision by the Court today.

Certainly enough has been said at this point, but I cannot lay this pen aside without expressing the sadness and regret many West Virginians feel about this tragedy. And it is a tragedy. Governor Moore is a war hero who was horribly wounded in combat fighting for this country in World War II. If you erase, just for a minute, his now very public failings, and look at his tremendous accomplishments as a congressman and governor, they are truly remarkable. But this case is not about those things. Rather, it is about what is best for the Bar, the judicial system, and the people of West Virginia. Accordingly, for the reasons set forth herein, I respectfully concur with the unanimous decision of this Court.