No. 25924 - State of West Virginia v. Timothy Ray Cline

FILED
December 10, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
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Davis, J., concurring in part, dissenting in part:

This case had a straightforward resolution. The defendant was duly convicted of a first offense, driving on a suspended license. He was sentenced to 48 hours incarceration and fined $250.00, as was authorized under the statute in effect on the date of the offense. The majority affirmed the conviction and fine. I have no argument with that aspect of the majority opinion and therefore concur in that part of the opinion.

However, the majority opinion has gone one step further by reversing the incarceration sentence. The reversal is based on the grounds that W. Va. Code § 2-2-8 permits the defendant to elect between the penal statute in force on the date of his offense and the penal statute in force after sentencing. On this issue, I must depart from the majority and its interpretation of W. Va. Code § 2-2-8. In my judgment, the unwarranted and unprecedented interpretation given by the majority to W. Va. Code 2-2-8 sets the stage for voiding countless criminal sentences.

W.Va. Code § 2-2-8 Applies Only When A Final Judgment Is Rendered After the Effective Date Of A New Statute

The circuit court entered a final judgment against the defendant on August 10, 1998. On the date that the final judgment order was entered, W. Va. Code § 17B-4-3(a) authorized the punishment to be imposed by the circuit court. However, in 1999, the Legislature amended W. Va. Code § 17B-4-3(a) to remove the incarceration punishment. The amended version of the statute took effect on April 7, 1999.

In this appeal, the defendant argued that he had a "right" to be sentenced under the new version of the statute.[1] The majority has agreed with the defendant. In doing so, the majority concluded that under W. Va. Code § 2-2-8, the Legislature provided defendants with the "right" to make an election between new and repealed penal statutes. Any fair reading of the statute clearly indicates that the defendant's case does not fall within the meaning of W. Va. 2-2-8, which reads:

> The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specially provided; and that if any penalty or punishment be mitigated by the new law, such new law may, with the consent

[1]The most obvious flaw in this argument is that the circuit court could not sentence the defendant under the new statute, because the new statute was not in existence at the time of sentencing.

> of the party affected thereby, be applied to *any judgment pronounced after it has taken effect*.

(Emphasis added)

As I read this statute, a defendant has a right to elect between being sentenced under a new or repealed statute *only when* the sentence is imposed "after" the new law has taken effect. The majority has taken this simplistic and unambiguous statute and ruled that a defendant has a right to elect between being sentenced under a new or repealed statute, even though the new statute took effect after the judgment was rendered. This twisted interpretation of the statute now permits every defendant, currently sentenced and incarcerated, to seek resentencing under any new and more lenient statute enacted after his or her sentence has been imposed. This is absolutely illogical. "To give [a] new statute retroactive effect in these circumstances would stretch the concept of retroactivity beyond any known case or principle." *White v. Gosiene*, 187 W. Va. 576, 582, 420 S.E.2d 567, 573 (1992). The real difficulty with the majority's decision is that we recently explained the full extent of the retroactive application of this statute in syllabus point 6 of *State v. Easton*, 203 W. Va. 631, 510 S.E.2d 465 (1998) (Davis, C.J.):

> When a criminal defendant is convicted of a crime and the penal statute defining the elements of the crime and prescribing the punishment therefor is repealed or amended *after his/her conviction of the crime but before he/she has been sentenced therefor*, the sentencing court shall apply the penalties imposed by the statute in effect at the time of the offense, except where the amended penal statute provides for lesser penalties. If the amended penal statute provides lesser penalties for the

> same conduct proscribed by the statute in effect at the time of the offense, the defendant shall have an opportunity to elect under which statute he/she wishes to be sentenced, consistent with the statutory mandate contained in W. Va. Code § 2-2-8 (1923) and our prior directive set forth in Syllabus point 2 of *State ex rel. Arbogast v. Mohn*, 164 W.Va. 6, 260 S.E.2d 820 (1979).

(Emphasis added.)

This Court has never interpreted W. Va. Code 2-2-8 as permitting a defendant to elect between new and repealed sentencing statutes when the new statute took effect after his or her sentence was imposed. *See State ex rel. Arbogast v. Mohn*, 164 W. Va. 6, 11, 260 S.E.2d 820, 823-824 (1979) ("W.Va. Code § 2-2-8 clearly provides for the application of mitigated penalties to *a judgment rendered after the effective date of a statutory amendment* upon the election of the party affected."). *See e.g.*, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981); *Gibson v. Bechtold*, 161 W. Va. 623, 245 S.E.2d 258 (1978); *State v. Gregory*, 143 W. Va. 878, 105 S.E.2d 532 (1958); *State v. Mason*, 141 W. Va. 217, 89 S.E.2d 425 (1955); *State v. McClung*, 116 W. Va. 591, 182 S.E. 865 (1935).[2] The majority

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[2]Obviously, the spurious argument can be made that a case does not become final until the appellate decision is rendered or the appeal period has expired. We rejected this argument in *State ex rel. Miller v. Bordenkircher*, 166 W. Va. 169, 172, 272 S.E.2d 676, 678 (1980) (per curiam), wherein we stated:

> To now conclude that petitioner is entitled to be set free, when he committed the crime of which he was convicted over twenty-four months before the new law went into effect *and was convicted and sentenced some fifteen months before the old law was repealed*, flies in the face of reason.

decision in this case has opened a pandora's box by completely disregarding the existing law of this State. I am, therefore, compelled to respectfully dissent from this aspect of the majority decision.

(Emphasis added.)