No. 27459 - State of West Virginia v. Richard Lee Graham

FILED
January 5, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Starcher, J., concurring:

I concur because the evidence is strong that this defendant has serious physical and psychological problems and needs care and intensive treatment -- both to protect society, and to protect the defendant. The circuit judge's commendable creative sentence is a serious and appropriate step in this direction, and I simply would not tamper with that sentence.

However, in considering the trial that led to the defendant's appropriate sentence, I write separately to note my continuing dismay at the erosion of the integrity of our criminal processes, an erosion that the majority blindly approves.

In a criminal trial, evidence of "prior bad acts" is usually so unfairly prejudicial that we don't let it go before the jury, unless there's a special reason for its admission under *W.Va. Rule of Evidence* 404(b) -- for example, to show plan or motive, etc. As I stated in my dissent in *State v. McIntosh*, ___ W.Va. ___, ___ S.E.2d ___, No. 26849, 2000 WL 966149, July 14, 2000:

> Where a defendant *admits* touching a child on their sexual areas, but *denies* that the touching was for a sexual purpose, other instances of clearly non-accidental sexual touching might be admissible under 404(b) -- to show the defendant's actual plan or motive. That appears to be the case in the *Yager* case cited by the majority, where the court held that such evidence was admissible "to establish that it was no accident that [the defendant] touched the victim's penis." But in the instant case, the defendant *denied* all touching, so his motive was not a separate issue. Under these circumstances "other crimes" evidence should not be admissible under 404(b).

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> One could write a dissertation on how Rule 404(b), *McGinnis* [193 W.Va. 147, 455 S.E.2d 516 (1994)], and now *Edward Charles L.* [183 W.Va. 641, 398 S.E.2d 123 (1990)] have become a "runaway train" in some of our courts, when judges are tempted to abandon their proper gatekeeper role by over-zealous prosecutors. We have moved far away from the original purpose for permitting such evidence. The standard now seems to be: Will it help the prosecutor?

In most cases, as soon as a jury hears about a defendant's prior sex offense, a defendant is dead meat. Why even have a trial? I await the day when this Court can stops this runaway train. We can and will apply common sense to this currently confused area of law. When that happens, criminal trials in sex offense cases will be conducted fairly and in accord with the rules of evidence.