

No. 29290—Irene Walker v. John Doe

FILED
January 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
January 14, 2002
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SUPREME COURT OF APPEALS
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McGraw, C.J., concurring in part and dissenting in part:

I continue to take issue with the Court’s holding in *Dalton v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2000), and therefore dissent to the result reached in this case. As I pointed out in my dissent to *Dalton*, there is no sound basis for concluding that *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997), had the effect of overruling prior law, as “*Hamric* was the very first case in which this Court was required to address the ultimate reach of the “physical contact” requirement contained in W. Va. Code § 33-6-31(e)(iii).” *Dalton*, 208 W. Va. at 324, 540 S.E.2d at 541 (McGraw, J., dissenting). Thus, *Hamric* should be applied retroactively, as is this Court’s common practice where issues of statutory interpretation are resolved in the first instance. *Id.*

I agree, however, with the majority’s stance concerning the precedential effect of this Court’s per curiam opinions. Yet, it bears emphasizing that while syllabus point two of the majority opinion correctly states the general rule concerning the proper method of enunciating new points of law, the fact remains that matters of first impression are often resolved by this Court in its per curiam opinions, as when broad and undisputed principles of law are employed to decide more discrete legal issues. *E.g.*, *State v. Euman*, — W. Va. —, — S.E.2d —, slip op. (No. 29700 Nov. 28, 2001) (per curiam) (holding that W. Va. Code § 17B-4-3(b) (1999) permits prosecution for driving while revoked for DUI based upon out-of-state license revocation); *Rogers v. Albert*, 208 W. Va. 473, 541 S.E.2d 563 (2000) (per

curiam) (concluding that Rule 1(b) of the Administrative Rules for the Magistrate Courts of West Virginia does not facially violate constitutional right to prompt presentment); *Central West Virginia Reg'l Airport Auth. v. West Virginia Pub. Port Auth.*, 204 W. Va. 514, 513 S.E.2d 921 (1999) (per curiam) (holding that Central West Virginia Regional Airport Authority is not an “affected public agency” within meaning of W. Va. Code § 17-16B-6(b)(15) (1996)).

As I explained in *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748 (1999), “while per curiam opinions are not necessarily definitive statements regarding the law of this jurisdiction, they are nevertheless part of the common law, and are certainly binding upon all of the lower courts absent a conflict with other controlling authority, or until expressly modified or overruled by this Court.” *Id.* at 138 n.1, 516 S.E.2d at 761 n.1 (McGraw, J., dissenting). Significantly, Article VIII, § 4, ¶ 3 of the West Virginia Constitution, which requires the Court to write opinions in appellate cases, makes no distinction between opinions rendered per curiam and those that are penned by individual members of the Court. Nor does a per curiam opinion’s failure to formally include a newly-forged legal principle in its syllabus relegate such rule to the status of mere dictum. *See Miller v. Huntington & Ohio Bridge Co.*, 123 W. Va. 320, 329, 15 S.E.2d 687, 692 (1941) (“the ruling of the court . . . , while not carried into the syllabus, is nevertheless law rather than *dicta*, if there be a distinction between the two”). Thus, a new point of law articulated in a per curiam opinion cannot be ignored based simply upon the form of the opinion that encompasses it.