IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
April 5, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29810

RELEASED
April 5, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

CHESTER CHANZE,
Defendant Below, Appellant

Appeal from the Circuit Court of Marshall County
The Honorable Mark A. Karl, Judge
Case No. 00-MAP-5

VACATED AND REMANDED

Submitted: January 16, 2002
Filed: April 5, 2002

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JUSTICE ALBRIGHT delivered the Opinion of the Court.
CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS

1. "The failure of the State to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State, will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial." Syl. Pt. 2, *State ex rel. Kisner v. Fox*, 165 W.Va. 123, 267 S.E.2d 451 (1980).

2. When an electronic record of a magistrate court jury trial in a criminal case is so defective that no record or virtually no record is available from which to prepare an appeal or to conduct appellate review, the criminal defendant is entitled to obtain meaningful review of the magistrate court proceedings by informing the circuit court of the faulty record and reconstructing the record or, if reconstruction is impossible, receiving a new trial by jury in magistrate court.

Albright, Justice:

Chester Chanze (hereinafter "Appellant") appeals from the December 20, 2000, final order of the Circuit Court of Marshall County which, following a bench trial on appeal, upheld Appellant's magistrate court conviction of the offense of petit larceny. Appellant contends that the circuit court erred in the appeal of his magistrate court conviction by denying his request for a de novo jury trial despite the fact that, due to an equipment malfunction, there was no electronic record of his magistrate court jury trial for the circuit court to review. As a result of our review of the briefs submitted and the certified record, we vacate the conviction and remand the case for a new jury trial in magistrate court.

I. Factual and Procedural Background

Appellant and another male[1] were arrested on the night of March 7, 1999, based on the suspicion that they removed and carried away a parking meter fine collection box and its contents. Appellant was taken before a magistrate, where he was formally charged by criminal complaint with the offenses of petit larceny, destruction of property and contributing to the delinquency of a minor. During the course of the initial appearance proceedings, Appellant signed an "Initial Appearance: Rights Statement" form which indicated he had been apprised of his rights, including his right to demand a jury trial. Appellant's court-appointed

[1]The male arrested with Appellant was a juvenile.

attorney timely filed[2] a written request for a jury trial, which was received in the magistrate court on March 18, 1999.

A one-day jury trial was held on April 12, 2000, in the Marshall County Magistrate Court, and the proceedings were electronically recorded as required by statute.[3] The jury returned a verdict finding Appellant guilty of petit larceny but not guilty of destruction of property.[4] The petit larceny conviction resulted in Appellant receiving a sentence of up to nine months in jail and a $250.00 fine.

The conviction of petit larceny was appealed to the circuit court by Appellant's trial attorney, who then withdrew for cause as counsel. After appointing a new attorney to handle Appellant's appeal below, the circuit court entered an order on September 12, 2000, establishing a briefing schedule based on the assumption that there was an adequate record on which appellate review could be based. Appellant's counsel subsequently obtained a copy of the jury trial tapes, which were accompanied by a letter dated September 14, 2000, from the circuit court clerk's office, informing Appellant's counsel that the tapes were defective.

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[2]*See* W.Va. Code § 50-5-8(b) (1994) (Repl. Vol. 2000); Mag. Ct. Crim. P. R. 5(c).

[3]W.Va. Code § 50-5-8(e); *see also* Mag. Ct. Crim. P. R. 5(c).

[4]The conviction on appeal to this Court involves the sole charge of petit larceny, inasmuch as the charge of contributing to the delinquency of a minor was dropped at some point before trial and the destruction of property charge was resolved with the jury verdict of not guilty.

Appellant's counsel confirmed that the taped recording was inaudible and could not be used as a basis for appellate review and further determined that reconstruction of the record was not possible. Consequently, Appellant informed the circuit court of the problem and filed a motion for a new trial on September 26, 2000. In support of his motion, Appellant asserted that due to the extensive defect of the magistrate court record he had a right to elect to have a new trial pursuant to the holding in *State ex rel. Kisner v. Fox*, 165 W.Va. 123, 267 S.E.2d 451 (1980). At the October 3, 2000, hearing on the motion, Appellant specifically requested that the magistrate court conviction be reversed and the case be remanded to magistrate court for a new jury trial. The circuit court ruled on the motion for a new trial at an October 20, 2000, hearing by stating, "I'm of the opinion that under the Fox case, Mr. Chanze is entitled to a trial. However, I'm also of the opinion that it can only be a bench trial because he had a jury trial." Subsequently, the circuit court stated in an order dated October 20, 2000, that the "defendant is entitled to a trial, but only a bench trial" in circuit court.

The circuit court bench trial was held on December 4, 2000, and resulted in Appellant's conviction for petit larceny. The conviction and reinstatement of the penalty imposed by the magistrate court were incorporated in the December 20, 2000, final order of the circuit court from which this appeal is taken.

II. Standard of Review

To the extent that the issues presented in this case involve questions of law and statutory interpretation, our review is de novo. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Our review of the final order and ultimate disposition by the circuit court is under an abuse of discretion standard, and we review the underlying factual findings of the circuit court using a clearly erroneous standard. Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995). Based on these review criteria, we proceed to the merits of this appeal.

III. Discussion

The singular question raised in this appeal is whether a person convicted of a crime as a result of a jury trial in magistrate court is deprived of the right to a trial by jury when the magistrate court electronic record of the trial is so seriously flawed that appellate review on the record by the circuit court is not possible and the circuit court resolves the dilemma by holding a bench trial de novo.

The State contends that the remedy for magistrate court records which are in any way inadequate for appeal purposes is set forth in subsection (c)(5) of West Virginia Code § 50-5-13. The State further asserts that the circuit court's decision in the instant case to hold a bench trial to resolve the lack of an appellate record is in accord with subsection (c)(5) of

this statute as well as our application of this statutory provision in the per curiam opinion of *State v. Bergstrom*, 196 W.Va. 656, 474 S.E.2d 586 (1996).

West Virginia Code § 50-5-13 sets forth the appeal process involving magistrate court criminal cases and subsection (c)(5) of this statute states:

> If the circuit court finds that a record for appeal is deficient as to matters which might be affected by evidence not considered or inadequately developed, the court may proceed to take such evidence and make independent findings of fact to the extent that questions of fact and law may merge in determining whether the evidence was such, as a matter of law, as to require a particular finding. If the party appealing the judgment is also a party who elected to try the action before a jury in the magistrate court, and if the circuit court finds that the proceedings below were subject to error to the extent that the party was effectively denied a jury trial, the circuit court may, upon motion of the party, empanel a jury to re-examine the issues of fact, or some part or portions thereof.

While this statutory provision sets forth the remedy for certain deficiencies in magistrate court records on appeal, we do not find it to be dispositive of the issue in the case presently before us. The record in the instant case is not "deficient as to matters which might be affected by evidence not considered or inadequately developed" nor did the circuit court find "that the proceedings below were subject to error to the extent that the party was effectively denied a jury trial." W.Va. Code § 50-5-13(c)(5). In summary, West Virginia Code § 50-5-13(c)(5) is simply not applicable. Instead we are presented with the problem of an unintelligible record which is so extensively flawed that counsel, who did not represent Appellant during the

magistrate court trial, was unable to prepare a substantive appeal and on which the circuit court could not conduct appellate review.

We are not aware of, nor have we been directed to, any other statute which provides a remedy for such extensively flawed magistrate court records.[5] However, we note the circuit court's reliance on our conclusions in *State ex rel. Kisner v. Fox*, 165 W.Va. 123, 267 S.E.2d 451 (1980) to find that Appellant was entitled to a new trial. In *Kisner* we had under consideration a situation analogous to the one presently before us in that a transcript of a criminal circuit court trial could not be supplied to the defendant because the court reporter's notes had been lost. This Court observed in *Kisner* that an accurate record is necessary for appeal purposes because the record may contain "[p]rejudicial remarks, hidden issues, and questions relating to the judge's instructions to the jury [which] may [] disclose error substantial enough to reverse the conviction." *Id.* at 126-27, 267 S.E.2d at 453. Pursuant to this reasoning, we held in syllabus point two of *Kisner* that

> [t]he failure of the State to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State, will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial.

[5]Although Rule 17(d) of the Rules of Criminal Procedure for Magistrate Courts recognizes that there may be instances when it would be impossible to record all or part of a magistrate court jury trial electronically, it does not offer a solution to the problem of the resulting lack of record for appeal purposes.

Id. at 123-24, 267 S.E.2d 452.

We have not had the opportunity to discuss the applicability of syllabus point two of *Kisner* to similarly flawed magistrate court electronic records since magistrate courts were not legislatively designated as courts of limited record until 1994, several years after *Kisner* was decided. Although magistrate court records take a different form than circuit court records, the basic reasons for having an accurate and representative record from either tribunal for appellate purposes is the same because, as we recognized in *State ex rel. Collins v. Bedell*, 194 W.Va. 390, 395, 460 S.E.2d 636, 641 (1995) "the circuit court takes on the role of a reviewing court, not unlike this Court, rather than a trial court when a criminal conviction from magistrate court is appealed . . . ." Moreover, due process principles give heightened significance to the record of magistrate court proceedings for appellate purposes. We concluded in *Collins* that the reason state and federal constitutional principles of due process are not offended when a non-lawyer magistrate presides over the only jury trial a criminal defendant is entitled to receive is because the statutory scheme which sets forth this process also "provides meaningful review on appeal" by enabling "the reviewing court on appeal to ensure that a defendant was given a fair trial." *Id.* at 399, 460 S.E.2d at 645. Essential to providing meaningful review on appeal of a jury trial which results in a criminal conviction is a record of the proceedings in which the jury was involved. When this Court has been presented with an appeal involving a criminal jury trial from circuit court in which no record of the proceedings below were available for review, we have returned the matter to the circuit

court for a new trial by jury. *See, e.g., State v. Neal*, 172 W.Va. 189, 304 S.E.2d 342 (1983). We see no reason that the same process should not be followed by the circuit courts when presented with a magistrate court appeal lacking a sufficient record.

Accordingly, we hereby extend the essence of our ruling in *Kisner* to magistrate court records by holding that when an electronic record of a magistrate court jury trial in a criminal case is so defective that no record or virtually no record is available from which to prepare an appeal or to conduct appellate review, the criminal defendant is entitled to obtain meaningful appellate review of the magistrate court proceedings by informing the circuit court of the faulty record and reconstructing the record or, if reconstruction is impossible, receiving a new trial by jury in magistrate court.

Based on this holding, we find that Appellant's circuit court conviction must be vacated because the circuit court erred as a matter of law by not remanding this case to magistrate court for a new jury trial.

IV. Conclusion

For the reasons stated in this opinion, the December 20, 2000, order of conviction entered by the Circuit Court of Marshall County is vacated, and the case is remanded to the circuit court for entry of an order directing a new jury trial in magistrate court on the charge of petit larceny.

Vacated and remanded.