No. 29810 - State of West Virginia v. Chester Chanze

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OF WEST VIRGINIA

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Davis, C.J., dissenting:

The defendant in this case, Chester Chanze, was convicted of petit larceny by a magistrate court jury. Mr. Chanze appealed to the circuit court. As a result of an inadequate appellate record, the circuit court provided Mr. Chanze with a *de novo* bench trial. At the conclusion of the bench trial, the circuit court affirmed the petit larceny conviction. On appeal to this Court, the majority opinion reversed the circuit court's ruling and remanded the case for a new trial in magistrate court. For the reasons set fourth below, I dissent from the majority opinion as being inconsistent with W. Va. Code § 50-5-13(c)(5) (1994) (Repl. Vol. 2000) and *State v. Bergstrom*, 196 W. Va. 656, 474 S.E.2d 586 (1996), and as not being supported by *State ex rel Kisner v. Fox*, 165 W. Va. 123, 267 S.E.2d 451 (1980).

A. Application of W. Va. Code § 50-5-13(c)(5)

When this case was presented to the circuit court as an appeal, the magistrate court record was defective in its entirety and did not allow for a meaningful review by the circuit court. Faced with this dilemma, the circuit court judge had two options: (1) remand the case for another trial in magistrate court[1] or (2) conduct a bench trial in circuit court. In this

[1]The authority to remand for a new trial, because of a defective appellate record, is (continued...)

case, the circuit court judge chose to conduct a bench trial. The authority for conducting a new trial in circuit court, because of an insufficient magistrate court trial record, is found at W. Va. Code § 50-5-13(c)(5) (1994) (Repl. Vol. 2000), which 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.

(Emphasis added).

The majority opinion has chosen to interpret W. Va. Code § 50-5-13(c)(5) in a manner that precludes the authority of circuit court judges to conduct a new trial when

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[1](...continued)
found in W. Va. Code § 50-5-13(c)(4)(C)(1994)(Repl. Vol. 2000), which states:

> (4) The circuit court may take any of the following actions which may be necessary to dispose of the questions presented on appeal, with justice to the defendant and the state:
>
> . . . .
>
> (C) Remand the case for further proceedings, with instructions to the magistrate.

confronted with a totally defective magistrate court trial record. This limitation imposed by the majority opinion is wrong. W. Va. Code § 50-5-13(c)(5) expressly provides that a circuit court judge has the authority to conduct a new trial "[i]f the circuit court finds that a record for appeal is . . . inadequately developed[.]" It is erroneous for the majority opinion to hold that a "defective magistrate court trial record" is not equivalent to an "inadequately developed" record for the purposes of an appeal when both such records are so fatally flawed as to prejudice the accused's right to a full and fair determination of his/her guilt or innocence.

An "inadequately developed" record is one that does not permit a circuit court to determine whether a defendant was validly convicted. Therefore, W. Va. Code § 50-5-13(c)(5) authorizes the circuit court to conduct a new trial. Common sense also dictates that a "defective magistrate court trial record" does not permit a circuit court to determine whether a defendant was validly convicted. Thus, heeding this common sense, it is obvious that "a defective magistrate court trial record" also warrants a new trial in circuit court pursuant to the authority of W. Va. Code § 50-5-13(c)(5).[2]

B. State v. Bergstrom Controls this Case

[2]The true problem with the position taken by the majority opinion is that it summarily dismissed the application of W. Va. Code § 50-5-13(c)(5) without any legal analysis. In effect, the majority opinion simply held that the statute does not apply. No analysis. End of story. Obviously, the terse treatment of the statute was necessary because the majority opinion wanted to reach a result that was not supported by the applicable statutory law.

The record in this case is quite clear. Mr. Chanze failed to demonstrate any substantive error in his *de novo* bench trial before the circuit court. In other words, Mr. Chanze is guilty of petit larceny beyond a reasonable doubt. Nevertheless, the majority opinion has decided to give Mr. Chanze a third bite at the apple because of a defective magistrate court trial record. Such a decision is ludicrous because the dispositive record, for an appeal to this Court, was the record created during the circuit court bench trial. This basic point was made clear by the Court in *State v. Bergstrom*, 196 W. Va. 656, 474 S.E.2d 586 (1996) (per curiam).[3]

Bergstrom involved a defendant who was convicted by a jury in magistrate court of making harassing telephone calls. At the time of the defendant's conviction, magistrate court proceedings were not required to be recorded because defendants were entitled to a jury trial on appeal to the circuit court. However, after the defendant appealed to the circuit court, the Legislature amended the applicable statute so as to require recordation of magistrate court jury trials. The Legislature also amended W. Va. Code § 50-5-13 to allow specific types of review by circuit courts.

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[3]Another most glaring deficiency in the majority opinion is the complete omission of any meaningful discussion regarding the impact of *Bergstrom* on the instant case. Although *Bergstrom* was a per curiam opinion, the Court's decision addressed the precise issue presented in the instant case and, thus, is worthy of consideration herein. *See* Syl. pt. 3, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001) ("Per curiam opinions have precedental value as an application of settled principles of law to facts. . . . The value of a per curiam opinion arises in part from the guidance such decisions can provide[.]").

In response to the amendment of W. Va. Code § 50-5-13, the circuit court in *Bergstrom* decided to provide the defendant with a bench trial because no record of the jury trial existed. The circuit court ultimately affirmed the defendant's conviction. On appeal to this Court, the defendant contended that he was entitled to a jury trial when he appealed to the circuit court. This Court disagreed with the defendant and we approved of the procedure used by the trial court in *Bergstrom.* Explaining our decision, we stated: "In the case before us, the circuit court had no record of the magistrate court proceedings and, therefore, conducted a trial *de novo*, albeit without a jury. Such an action is expressly condoned by [W. Va. Code] § 50-5-13(c)(5)." *Bergstrom*, 196 W. Va. at 659, 474 S.E.2d at 589.

We further held in *Bergstrom* that W. Va. Code § 50-5-13(c)(5) allows a circuit court to conduct a bench trial when no record of a magistrate court jury trial exists.

The *Bergstrom* decision was not an unsound aberration; it was grounded upon common sense that was expressed as follows:

> Moreover, any concerns raised by the lack of electronic recordation at the magistrate court level were alleviated when the circuit court conducted a de novo bench trial which was electronically transcribed. Further, the circuit court's action also provided Appellant with a full record for purposes of appellate review.

Bergstrom, 196 W. Va. at 659, 474 S.E.2d at 589. Thus, the decision in *Bergstrom* recognizes that, for appeals to this Court, it is the circuit court record, not the magistrate court record,

that is relevant. That is, *Bergstrom* understood that a *de novo* bench trial in circuit court renders meaningless the underlying magistrate court proceeding.

C. State ex rel. Kisner v. Fox is Inapplicable

The majority opinion relied upon this Court's earlier decision in *State ex rel. Kisner v. Fox*, 165 W. Va. 123, 267 S.E.2d 451 (1980), to reverse and remand the instant case. However, *Kisner* does not support the result reached by the majority herein.

In *Kisner*, the defendant was convicted of sexual assault in the first degree. The defendant was unable to appeal his conviction because of an error that prevented reproduction of the trial transcript. Consequently, the circuit court decided to grant the defendant a new trial. The defendant sought a writ of prohibition to stop the retrial and have the charge against him dismissed. This Court denied the writ of prohibition and approved of the circuit court's decision to grant a new trial. In so doing, the Court held, in Syllabus point 2, 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.

165 W. Va. 123, 267 S.E.2d 451.

The majority opinion has misapplied this holding in *Kisner* so as to require a new

trial in magistrate court. In this regard, the majority of my brethren have failed to consider the unique problem presented when the record of a circuit court trial is forever lost as compared with the difficulty attending an inadequate magistrate court record. In the first described situation, it is necessary to require a new trial in circuit court because the Supreme Court of Appeals cannot conduct a new trial given its limited, rather than general, jurisdiction. In contrast, circuit courts have general jurisdiction and thus are appropriate tribunals in which to require the conduction of a new trial. The present appeal, however, is concerned not with an absent circuit court record, but with a defective magistrate court record. Consequently, the holding in *Kisner* has no application to the faulty magistrate court record at issue in the case *sub judice* because circuit courts are constitutionally empowered to conduct new trials. Accordingly, a circuit court does not need a magistrate court trial record because it has the authority to conduct new trials and to ensure the creation of an adequate record for appeal to this Court. The majority's attempt to treat these two disparate scenarios as if they were a distinction without a difference is simply wrong.

Kisner is a sound opinion. However, *Kisner* is limited to an appeal from a circuit court to the Supreme Court. Applying *Kisner* to an appeal from a magistrate court to a circuit court is illogical and creates uncertain ambiguities in the previously settled law on this point.

For the reasons stated, I dissent. I am authorized to state that Justice Maynard

joins me in this dissenting opinion.