No. 30247 -- State of West Virginia v. William Braham

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Maynard, Justice, concurring in part, and dissenting in part:

I agree with the majority that the admission of deposition testimony of a witness constituted grounds for reversal of the appellant's conviction. Also, I agree that the appellant had the right to present circumstantial evidence linking his issuance of bad checks to the bar's alleged failure to pay him his winnings on illegal machines. However, I do not agree that the State's evidence of intent to defraud was insufficient to establish a criminal violation, and that the appellant cannot be retried. Therefore, I would reverse and remand for a new trial.

After reading the majority's summary treatment of the issue, I am still at a loss as to the Court's specific reasoning for finding that the evidence below was insufficient. The applicable portion of the opinion cites no law, fails to supply any real analysis, and reaches the inconclusive decision that "[a] jury *might* find that in such a situation the appellant did not have the requisite criminal or fraudulent intent to support a conviction." (Emphasis added). The flip side of the coin is that, presented with all the evidence, a jury *might* find fraudulent intent. In which case, the evidence is not insufficient.

This Court has not dealt extensively with the code section at issue, W.Va. Code § 61-3-24d (1995), under which the appellant was prosecuted. This code section is similar to W.Va. Code § 61-3-24 (1994) which says in pertinent part, "If a person obtains from another by any false pretense, token or representation, with intent to defraud, any money, goods or other property which may be the subject of larceny. . . [s]uch person is guilty of larceny." Concerning a comparison of these two code sections, we have held, "Every element necessary for a conviction of larceny by false pretense under West Virginia Code § 61-3-24 (1994) (Repl.Vol.2000) is also an element for conviction of larceny by fraudulent scheme under West Virginia Code § 61-3-24d (1995) (Repl.Vol.2000)." Syllabus Point 8, *State v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (2001). Accordingly, I believe that we can look to case law applying or interpreting W.Va. Code § 61-3-24 to aid in our reading of W.Va. Code § 61-3-24d.

In Syllabus Points 1 and 2 of *State v. Augustine*, 114 W.Va. 143, 171 S.E. 111 (1933), this Court held:

> 1. The giving of a check is, in itself, a representation that the accused has money or credit with the drawee to the amount of its face value.
>
> 2. A case in which the giving of a check, with request to withhold presentment for one week, amounted, under the circumstances, to a false representation, within the meaning of Code 1931, 61-3-24.

According to W.Va. Code § 61-3-24d(a), at issue in this case, "Any person who willfully

deprives another of any money, goods, property or services by means of fraudulent pretenses, representations or promises shall be guilty of the larceny thereof." The facts of this case indicate that the appellant represented, *i.e.* by the giving of several checks, that he had money with the drawee to the amount of the face value of the checks. "A statement, or claim, or document, is 'fraudulent' if it was falsely made . . . with the intent to deceive." Black's Law Dictionary 662 (6th ed. 1990). The facts further indicate that when the appellant cashed the checks at the bar, he did not have money in the bank to cover the checks. Therefore, I see no reason why a jury could not reasonably infer from this evidence that the appellant "willfully" deprived the bar of money or services by means of fraudulent representations.

As noted above, the majority states, and I agree, that the appellant had a right to elicit circumstantial evidence linking his issuance of bad checks to the fact that the bar would not pay him his illegal winnings. If the majority is suggesting, which is by no means clear, that the appellant was merely trying to collect on a just debt, I understand that we have case law that says that a person cannot be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt justly due him. *State v. Williams,* 68 W.Va. 86, 69 S.E. 474 (1910). However, the appellant's intent would still be a question for the jury after it was presented with all the relevant evidence.

I suspect, however, that the explanation for the majority's decision cannot be found in its truncated reasoning in the body of the opinion but rather in the opinion's lone

footnote. In that footnote, the majority admonishes the prosecutor below for treating a poor, hapless gambler who "gets in too deep" in the same fashion as a professional car thief or con artist. In other words, the majority reverses the conviction and bars retrial because it would not have brought the case in the first place.

In my opinion, this Court should not impose its own policy preferences on the prosecutors of this State, and it certainly should not decide cases based on those preferences. Prosecutorial discretion is a treasured hallmark of the American judicial system. It is a function of the executive and not the judicial branch of government. And that is the way it should be! Determinations concerning whom to charge with a crime, whether to charge, and what to charge are prosecutorial decisions and should never be made by judges in a free society. In this case, the majority chides a prosecutor for the proper exercise of his or her function, specifically alleging that he or she charged too aggressively. What is to prevent this Court in the next case from complaining that a prosecutor is too soft and urging stronger and harsher criminal prosecutions of a particular class of offenders, *i.e.*, drug dealers, wife beaters, child sex offenders, or any other type of offender that is very unpopular in our society? In short, judges should judge and prosecutors should prosecute.

Because I would have reversed the appellant's conviction and remanded for a new trial, I concur in part and dissent in part.