No. 30592 - State of West Virginia v. Robert Joel McCraine

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

Davis, J., concurring, in part; and dissenting, in part:

Robert Joel McCraine challenged his convictions for third offense DUI (felony) and driving while his license was revoked (misdemeanor). The majority opinion reversed both convictions. The majority opinion concluded that the felony and misdemeanor charges should have been severed, with the felony being tried in circuit court and the misdemeanor being tried in magistrate court. I concur in this ruling because that issue was controlled by *State ex rel. Games-Neely v. Sanders*, 211 W. Va. 297, 565 S.E.2d 419 (2002). The majority opinion also concluded that "knowledge" of a revoked license should be an element of the misdemeanor offense. I likewise concur in that ruling. Finally, the majority opinion has ruled that it is mandatory for trial courts to bifurcate the substantive charge of an offense from the status element of the offense. For the reasons set out below, I dissent from the majority's resolution of the latter issue.

A. Bifurcation Should Not Be Mandatory for a Status Element

In *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999), this Court was asked to determine whether trial courts were required to accept a defendant's stipulation to the status element of an offense so as to prohibit a jury from hearing evidence regarding the status element. We resolved the issue in syllabus point 3 of *Nichols*, in part, by ruling that

"[i]f a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s)."

Additionally, *Nichols* addressed the very rare instance wherein a defendant challenges being identified as the person having committed the status element offense. *Nichols* was hesitant to force a defendant in such a situation to have a unitary trial. However, *Nichols* was also cognizant of the fact that rarely do defendants ever have a legitimate basis to assert that they are not the person identified as having been convicted of a status element offense. Confronted with the rarity of such a challenge, the Court determined in *Nichols* that an opportunity for a bifurcated trial should exist for those rare instances when a legitimate status offense challenge could be made. Consequently, we held in syllabus point 4 of *Nichols*, in part, that:

> The decision of whether to bifurcate these issues is within the discretion of the trial court. In exercising this discretion, a trial court should hold a hearing for the purpose of determining whether the defendant has a meritorious claim that challenges the legitimacy of the prior conviction. If the trial court is satisfied that the defendant's challenge has merit, then a bifurcated proceeding should be permitted. However, should the trial court determine that the defendant's claim lacks any relevant and sufficient evidentiary support, bifurcation should be denied and a unitary trial held.

The Court's majority has now overruled *Nichols'* discretionary bifurcation. The majority's opinion in this case requires mandatory bifurcation whenever a defendant requests bifurcation. As a result of the majority decision, every defendant convicted of an

offense having a status element should now be strongly motivated to demand a bifurcated trial. I so conclude because a defendant will have nothing to lose by requiring the State to have a separate jury determine the issue. I have little doubt in further concluding in an overwhelming majority of all such cases, defendants will not prevail. Consequently, the majority's decision has encouraged a terrible waste of judicial resources. Simply put, the majority is clogging an already overburdened judicial system. In an attempt to support their position, the majority decision asserts that the *Nichols* approach, which requires a defendant to provide evidence of a meritorious claim to convince a judge to permit a bifurcated proceeding, "provides the State with the advantage of previewing the criminal defendant's evidence on a material issue" and is therefore unfair. This is a legally unsupportable justification.[1]

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[1]I have found no court in the country that requires mandatory bifurcation of the status element of an offense. In fact, prior to this Court's adoption of the position taken in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), that permits stipulation of the status element of an offense, it was mandatory for status elements to go to the jury in a unitary trial. In *Nichols* we determined that *Old Chief's* stipulation requirement was a fair and judicious balance of the rights of a defendant and the state. In adopting the stipulation mechanism, this Court clearly understood that *Old Chief* did not impose a constitutional rule on states. In other words, we could have rejected *Old Chief*. *See State v. Ball*, 756 So. 2d 275, 278 (La. 1999) ("We conclude that *Old Chief* is not controlling and decline to follow it[.]"). In adopting *Old Chief*, the Court in *Nichols* went further and addressed an issue that *Old Chief* did not address. That is, we carved out a procedure in which a trial judge had discretion to permit bifurcation and a separate trial on the status element of an offense. No other court that has adopted *Old Chief* permits bifurcation and separate trials for the status element of an offense. The reason that no court has seen the need to permit bifurcation, is because of the extremely rare possibility that a defendant will ever have a meritorious claim of mistaken identification in an abstract showing the defendant was previously convicted of a crime.

A good illustration of how *Nichols* is consistent with exiting law can be found by looking at the alibi defense. Under the existing court rules, should a defendant seek to use the affirmative defense of alibi, the defendant is required to provide the prosecutor with certain information before trial. Under Rule 12.1(a) of the Rules of Criminal Procedure a defendant, prior to trial, must inform the prosecutor of "the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi." Further, if a defendant fails to make such a disclosure, under Rule 12.1(d) "the court may exclude the testimony of an undisclosed witness offered by such party as to the defendant's absence from . . . the scene of the alleged offense."[2] In other words, I fail to see how a

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[2]Moreover, the requirement in *Nichols* was consistent with the requirement imposed by Justice Cleckley in *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). That is, under *LaRock* a defendant in a first degree murder prosecution does not have an automatic right to bifurcate the issue of guilt from the issue of mercy. In syllabus point 5 of *LaRock*, Justice Cleckley imposed the following burden on a defendant seeking bifurcation:

> The burden of persuasion is placed upon the shoulders of the party moving for bifurcation. *A trial judge may insist on an explanation from the moving party as to why bifurcation is needed.* If the explanation reveals that the integrity of the adversarial process which depends upon the truth-determining function of the trial process would be harmed in a unitary trial, it would be entirely consistent with a trial court's authority to grant the bifurcation motion.

(Emphasis added.) Under *LaRock*, this Court established discretionary bifurcation on the issue of guilt and mercy. *See* Syl. pt. 4, *LaRock* ("A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy."). The majority's decision to require mandatory bifurcation and trial of the status element of an offense has implicitly overruled *LaRock's* discretionary bifurcation in first degree murder prosecutions.

defendant is prejudiced by having to present legitimate evidence to a trial judge that he/she is not the person named in a document as having been convicted of a prior offense when there is no prejudice in requiring a defendant to give the State information that the defendant will use at trial to show that he/she was not at the scene of a crime.

Under *Nichols*, trial courts were allowed to screen out frivolous challenges to identification in status element offenses. As I indicated, I believe that in the vast majority of such cases the challenges will be frivolous. Unfortunately, the majority opinion has turned logic on its head by instituting separate jury trials for frivolous challenges to identification in status element offenses.[3]

B. The Majority Decision Completely Disregards Stare Decisis

In syllabus point 2 of *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974), this Court held:

> An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity

[3]In fact, the evidence in this case established that Mr. McCraine has no legitimate basis to challenge the issue of whether he was the person named in the prior convictions. His real challenge was that one of his prior convictions should be set aside because he did not knowingly waive his right to counsel. This was purely a legal question for the trial court. The trial court ruled against Mr. McCraine on this issue. This Court properly affirmed that ruling.

in the law.

See also Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202, 112 S. Ct. 560, 563, 116 L. Ed. 2d 560 (1991) ("[W]e will not depart from the doctrine of stare decisis without some compelling justification.") (citation omitted). It has been aptly noted that "[c]asting aside well-settled law for no reason other than to substitute judge-made law is particularly reprehensible in the area of criminal law where clarity and fairness are overriding concerns." *State v. Anderson*, 212 W. Va. 761, ___, 575 S.E.2d 371, 377 (2002) (Albright, J., concurring). The majority decision to overrule *Nichols* is reprehensible. Moreover, "[t]he author of the majority opinion has, in effect, 'stood stare decisis on its ear.'" *A & M Props, Inc. v. Norfolk S. Corp*., 203 W. Va. 189, 197, 506 S.E.2d 632, 640 (1998) (Starcher, J., dissenting).

"As a general rule, the principle of stare decisis directs us to adhere . . . to the holdings of our prior cases[.]" *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S.Ct. 3086, 3141, 106 L. Ed. 2d 472 (1989) (Kennedy, J., concurring and dissenting). *See also Banker v. Banker*, 196 W. Va. 535, 546 n.13, 474 S.E.2d 465, 476 n.13 (1996) ("Stare decisis is the policy of the court to stand by precedent."). "Stare decisis rests upon the important principle that the law by which people are governed should be 'fixed, definite, and known,' and not subject to frequent modification in the absence of compelling reasons." *Bradshaw v. Soulsby*, 210 W. Va. 682, 690, 558 S.E.2d 681, 689 (2001) (Maynard, J., dissenting), quoting *Booth v. Sims*, 193

W. Va. 323, 350 n.14, 456 S.E.2d 167, 194 n.14 (1995).

No compelling reason existed to overrule *Nichols*. The majority opinion did not provide *any* legitimate justification for ignoring stare decisis and overturning *Nichols*. As I have pointed out, *Nichols* imposed no prejudice on a defendant by requiring the defendant to present credible evidence to the trial court before precious judicial resources were expended in a separate trial to determine if a defendant was, in fact, the same person named in a prior conviction.

For the reasons given, I concur in part and dissent in part. I am authorized to state the Justice Maynard joins me in this separate opinion.