No. 30733 -- State of West Virginia v. Millard J. DeWeese

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

Maynard, Justice, dissenting:

I believe the majority has confused two separate legal doctrines and gone too far by extending the fruits of the poisonous tree doctrine to physical evidence discovered as a result of a statement obtained in violation of the prompt presentment rule. The fruits of the poisonous tree doctrine was first announced by the United States Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.E.2d. 441 (1963). In *Wong Sun*, the defendant's fourth amendment rights were violated when the police arrested him in his home without probable cause or reasonable grounds to do so. In making the arrest, the police found narcotics. The Supreme Court held that the narcotics which were derived from the illegal arrest must be excluded from the defendant's trial as "fruits of the poisonous tree." 371 U.S. at 488, 83 S.Ct. at 417, 9 L.E.2d at 455.

This Court explained in *State v. Bradshaw*, 193 W.Va. 519, 540, 457 S.E.2d 456, 477 (1995), that "absent a constitutional violation, the 'fruits of the poisonous tree' doctrine has no applicability." In the case *sub judice*, there was no constitutional violation.

At most, there was violation of the prompt presentment rule which is clearly not

constitutionally based.

The right of prompt presentment is derived from W.Va. Code § 62-1-5(a)(1) (1997) which provides that:

> An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

Also, Rule 5(a) of the West Virginia Rules of Criminal Procedure mandates that "[a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made." "Both § 62-1-5 and Rule 5(a) are analogues of Federal Rule of Criminal Procedure 5(a) [and] . . . [t]he Supreme Court has made clear that neither Federal Rule 5(a) nor the exclusionary rules underpinning it are constitutionally required." *Rogers v. Albert*, 208 W.Va. 473, 477, 541 S.E.2d 563, 567 (2000), *citing Gallegos v. Nebraska*, 342 U.S. 55. 72 S.Ct. 141, 96 L.Ed. 86 (1951). Consequently, "the right to prompt presentment is not constitutionally guaranteed outside the context of a warrantless arrest, but rather exists as a statutory and procedural right." *Rogers*, 208 W.Va. at 477, 541 S.E.2d at 567.

In light of the above, I can find no basis for extending the fruits of the poisonous tree doctrine to physical evidence derived from a statement that was obtained as

a result of a violation of the prompt presentment rule. Simply put, there was no constitutional violation with respect to the statement the defendant gave to the police in this case. Therefore, the majority should not have applied the fruits of the poisonous tree doctrine to a violation of the prompt presentment rule.

I also believe that the majority has gone too far by excluding evidence obtained during a polygraph examination simply because the defendant was not given the *Miranda* warnings immediately before the test was administered. Mind you, the defendant had already been given *Miranda* warnings four times before the polygraph, and his lawyer was present! Apparently, for the majority, this is not good enough. The majority needlessly creates a bright-line rule requiring that *Miranda* warnings be given <u>immediately</u> before any polygraph examination. In my opinion, a consideration of the totality of the circumstances is all that is necessary to determine whether statements made by a criminal suspect during a polygraph examination were given freely and voluntarily.

In this case, as stated above, the defendant was given the *Miranda* warnings at least four times before he took the polygraph. While he was not given the *Miranda* warnings immediately before the polygraph examination, the record establishes that the defendant was fully aware of his rights and voluntarily agreed to take the test. In that regard, the record shows that the defendant's counsel was present and indicated to the police officer administering the test that it was not necessary to advise the defendant yet again of the

Miranda warnings. Given these facts, I find no basis for suppressing the statements the defendant made during the polygraph examination.

The majority opinion needlessly creates additional hurdles for law enforcement officers in their efforts to protect law-abiding citizens from very dangerous criminals. The evidence in this case indicates that the defendant, along with two friends, beat the victim to death while he was lying in bed. There was testimony at trial that the defendant climbed onto the bed, straddled the victim, and punched him at least eight times. The jury properly convicted this violent defendant of first-degree murder without mercy. Now, thanks to the majority opinion, the State has to go back and try the defendant all over again.

Accordingly, for the reasons set forth above, I respectfully dissent.