

No. 30786: State v. David D. W.

FILED

April 21, 2003

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

Maynard, Justice, concurring:

I concur with the majority's decision to remand this case for resentencing. While I agree with the majority's determination that a sentence of 1,440 to 2,660 years constitutes cruel and unusual punishment, I also believe the defendant is a very dangerous sex offender who poses a clear and present danger to society in general, and to children in particular, and he will similarly be a very real threat to children if he is ever released in the future. In fact, in my view, he should never be released. This defendant committed 152 sexual offenses against his seven-year-old child. His actions were heinous and revolting to say the least and deserve the most serious punishment.

This case illustrates the difficulty in sentencing a defendant who has committed multiple serious offenses. In such cases, there is a great temptation to make a strong statement about how horrible the crimes are by imposing an extremely long or draconian sentence. For example, suppose you are the judge and you have before you a drunk driver with previous DUI convictions and a revoked driver's license. One afternoon, while drinking and driving yet again, he collides with a loaded school bus. A fiery crash ensues and forty children are burned to death. If you are the sentencing judge, how do you punish this driver? The sentence for driving

under the influence and causing a death in West Virginia is one to ten years in prison. W.Va. Code § 17C-5-2 (2001). Do you impose upon him forty concurrent sentences of one to ten years or do you give him forty consecutive sentences of one to ten years? How about twenty consecutive sentences of one to ten years? Given the number of offenses and the harm, what is the appropriate sentence? What if, on the other hand, the driver has never been in trouble before, is a leader in his community and church, and this is his first DUI? Should that make a difference? How do you fairly punish him and also meet society's need for justice? These are truly difficult and very troubling problems for judges at all levels.

By statute and case law, these decisions are wisely left to the sound discretion of the trial judge, and frankly, I do not like to tamper with that discretion. In fact, I believe that an appellate court should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion. Nonetheless, the sentence imposed upon the defendant in this case shocks the conscience and simply cannot stand. Therefore, I believe that the majority's decision to remand for resentencing is appropriate and correct. However, I would not be shocked if the defendant is given a combination of sentences approximating life in prison when he is resentenced, not just to punish him but to protect society. On remand, if I were the sentencing judge in this case, I would impose a life sentence on this individual, not to send a message or for retribution, but to protect children and the public from the defendant and given the extreme nature of the harm inflicted on the child victim in this case, the large number of felony offenses he has committed, and the certainty that this defendant will be a

repeat and persistent offender if he is ever released.

Accordingly, for the reasons set forth above, I must reluctantly concur with the majority's decision in this case.