

FILED

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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:

In this proceeding the majority determined that a sentence of 30 years imposed upon Raymond Richardson for the crime of kidnapping “shock[s] the conscience and is constitutionally impermissible[.]” In view of the fact that the kidnapping was incidental to underlying crimes and the victim’s plea of mercy for Mr. Richardson, I reluctantly concur in the majority’s determination that the sentence was excessive.¹ However, the majority’s

¹My concurrence is reluctant because I continue to be troubled by the egregious context of domestic violence within which these crimes were committed and which details the majority has neglected to mention in its statement of the facts underlying this appeal. According to the statement Ms. Franks gave to police on May 13, 1999, the day of the incidents giving rise to Mr. Richardson’s indictments and convictions at issue herein, the following events transpired:

The first thing that happened was that Raymond and I and another couple went to the Dog Track in Nitro to have dinner and to bet on the dogs. We went back to the other couple’s apartment. Me and my female friend went to the store and to take Raymond’s little cousin home. When we got back Raymond was silent and he had an attitude towards me. I told him that if he was going to have an attitude we should just go home. We went home. He would not get out of the car. He acted as though he was dropping me off. I asked him what was wrong and he would not say anything. I went into the apartment and went straight to bed. About 20 or 30 minutes later he came in through a downstairs window and charged upstairs. I was scared because of the noise then he started beating on me. He was asking why I was cheating on him and why was the window open. At first he was punching me with his fists, kicking me, and biting me. Then he said you are coming with me and we went outside. I had to go. He had me by my neck. At each corner we stopped at he made me remove a piece

of clothing. He did this until I had nothing left on. He started beating me some more. He struck me very hard in the stomach which knocked all the air out of me. Then he beat on me some more. Then he poured gasoline on my legs and kept interrogating me as to who I was cheating with. He said he would burn me up. He walked away then came back. He urinated on me and spit on me. Then he punched me in the head. He kept doing that. I was already on the ground. Then he strangled me.

....

After that he told me . . . to put my clothes back on. As we walked back to the apartment, he said that this was the last time I would see this place. We got back to the apartment he continued to hit me. I finally said that I was cheating just to get him to stop beating on me. He had said if I would just admit it he would stop. He went downstairs then he came back up and laid in the bed. He told me that I could not fall asleep because if he saw me falling asleep he would beat me again. He was lying there half asleep. After all of this had happened it was about 8:00 am. Then he started going on about him not having anything and that he has nothing. He said he should have died with his friend last December. Then he went to break my chain that he bought me on Mother's Day. He cut his finger really bad. He was losing a lot of blood. A friend of his came and knocked on the door. Raymond asked me if he was the one. I said yes. He said when his friend showed up at door again he wanted me to shoot him. When the guy came I pointed Raymond's gun to the other guy's head and he ran. Raymond took the gun back from me then. Raymond then got his keys and left saying he was going to the hospital for his finger. He told me that I better not leave the house or I would not have my two daughters anymore. After he left I stayed in my room and cried. Then Raymond's mother came. She hugged me because she had just learned what had happened. She told me to put some clothes on and she told me to leave with her. I have not heard from Raymond since.

Additional facts that Ms. Franks reported to the detective investigating the incident indicate that she

was treated at CAMC Womens and Childrens Hospital for numerous injuries inflicted upon her. Angela had visible injuries all over her body, including her face, neck, torso, vagina, arms and legs. These injuries

decision to remand this case for the circuit court to impose a specific punishment of 10 years, lacks precedent in this State. For the reasons set out below, I dissent from that part of the decision to require the circuit court to impose a specific sentence.

The Determination of a New Sentence Should Have Been Left to the Discretion of the Trial Judge

It has been recognized that “an appellate court may in *rare instances* not only reverse and remand because of an excessive sentence but may also state specifically what sentence may be imposed.” Franklin D. Cleckley, II Handbook on West Virginia Criminal Procedure, 301 (1993) (emphasis added). The leading case for this proposition is the

included heavy bruising, swelling, abrasions, cigarette burns, and bite marks. . . . The accused [Mr. Richardson] pointed a loaded handgun at Angela and threatened to kill her. . . . The accused burned Angela with cigarettes during his interrogation and grabbed her vagina with his hand causing an abrasion to the right labia. The accused held Angela against her will throughout the night and into the morning and afternoon hours.

Finally, as if these facts are not treacherous enough standing on their own, the record also showed that, at the time of this brutal beating, Ms. Franks was three months pregnant. Fortunately, neither Angela nor her child appear to have sustained any permanent injuries from Mr. Richardson’s reign of terror.

In light of all of these details of the incidents underlying this appeal, then, it is with great reluctance that I concur in the majority’s decision on this point. Nevertheless, I agree with the Court’s conclusion that the circuit court committed error by imposing the maximum sentence upon Mr. Richardson for the kidnapping conviction insofar as such sentence failed to consider that the kidnapping was incidental to the more horrific crimes with which Mr. Richardson had been charged and further failed to consider Ms. Franks’ plea for mercy during his sentencing hearing.

decision in *Yates v. United States*, 356 U.S. 363, 78 S.Ct. 766, 2 L.Ed.2d 837 (1958). In *Yates* the Supreme Court remanded a contempt case for reconsideration of the length of the sentence. On remand, the federal district court imposed the same sentence. The Supreme Court determined that the federal district court's refusal to follow remand instructions warranted imposition of a specific punishment by the Court. The Court did so as follows:

[W]hen in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.

[T]his Court is of the view, exercising the judgment that we are now called upon to exercise, that the time that petitioner has already served in jail is an adequate punishment for her offense.

Yates, 356 U.S. at 366-67, 78 S.Ct. at 768-69.

My research has revealed that this Court has set aside a criminal sentence of imprisonment as excessive or disproportionate in a number of cases. See *State v. David D.W.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 30786, April 21, 2003); *State v. Lewis*, 191 W. Va. 635, 447 S.E.2d 570 (1994); *State v. Davis*, 189 W. Va. 59, 427 S.E.2d 754 (1993); *State v. Barker*, 186 W. Va. 73, 410 S.E.2d 712 (1991); *State v. Miller*, 184 W. Va. 462, 400 S.E.2d 897 (1990); *State ex rel. Boso v. Hedrick*, 182 W. Va. 701, 391 S.E.2d 614 (1990); *State v. Deal*, 178 W. Va. 142, 358 S.E.2d 226 (1987); *State v. Buck (II)*, 173 W. Va. 243,

314 S.E.2d 406 (1984); *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983); *State v. Buck (I)*, 170 W. Va. 428, 294 S.E.2d 281 (1982). However, in each of those decisions this Court remanded the case with instructions that the trial court determine a permissible sentence. That is, in none of those decisions did this Court direct a trial judge to impose a specific sentence. In one of those decisions, *Buck (II)*, this Court expressly declined to exercise its inherent authority to impose a specific sentence.

In *Buck (II)* this Court was asked to determine whether a sentence of 75 years imprisonment was excessive. This Court had previously determined in *State v. Buck (I)*, 173 W. Va. 243, 314 S.E.2d 406 (1984) that the sentence was excessive and remanded the case for resentencing. On remand the trial court again sentenced the defendant to 75 years imprisonment. In *Buck (II)* we again found the sentence was excessive. The defendant asked this Court in *Buck (II)* to instruct the trial court to impose a specific sentence. After citing to the *Yates* decision, we addressed this request as follows:

We decline the defendant's invitation to hold that we have the power . . . by virtue of our inherent supervisory powers to set a reduced sentence for him. Instead, we will once again remand this case for reconsideration of the sentence under the guidelines herein contained. We do, however, conclude that the involved circuit judge should not preside upon the resentencing, and we will, therefore, by an appropriate administrative order designate another circuit judge to handle the resentencing.

Buck (II), 173 W. Va. at 248, 314 S.E.2d at 411. Although the facts of *Buck (II)* presented the rare instance in which an appellate court may impose a specific sentence, we declined to

do so. *See State v. David D.W.*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (No. 30786, April 21, 2003) (“By imposing a total sentence of 1,140 years to 2,660 years in prison upon the appellant in this case, the trial court violated the proportionality principle and abused its discretion. Therefore, we remand this case to the trial court for resentencing within its discretion.”); *State v. Cooper*, 172 W. Va. 266, 274, 304 S.E.2d 851, 859 (1983) (“It would seem that a ten-year sentence [recommended by the probation officer] would be appropriate; however, we remand to the trial court for resentencing according to his best judgment, consistent with this opinion.”).

In the instant case, the majority was not confronted with a trial court that refused to reduce a sentence ordered by this Court. Without such a refusal, no justification existed for the majority to impose a specific sentence in this case. Moreover, the majority decision sends a chilling message to trial judges, *i.e.*, that the majority does not trust trial judges. Nothing in this case warranted stripping the trial judge of its authority to select a permissible sentence on remand. There was no evidence of bias or other impropriety on the part of the trial judge. Further, even if such evidence was shown, the better approach would have been to follow the precedent of *Buck (II)* and appoint a new sentencing judge.² See

²My research uncovered only one case where this Court found a sentence disproportionate and imposed a specific sentence. In *Keenan v. Bordenkircher*, 170 W. Va. 372, 294 S.E.2d 175 (1982) the defendant was an inmate who escaped from prison. After the defendant was caught he had an “administrative” hearing wherein he was found guilty of escape. The defendant was sentenced to 10 years in a punitive segregation facility called North Hall. The defendant challenged the sentence by filing a habeas petition in a circuit

Garrison v. State, 762 P.2d 465, 469 (Alaska App. 1988) (Singleton, J., concurring) (“[I]t is not the appellate court’s function to impose sentence or to specify a specific sentence appropriate for a specific case.”); *State v. Fortes*, 330 A.2d 404, 413 (R.I. 1975) (“[R]eduction of sentence normally ought not to be made by a reviewing court but should be left on remand to the sentencing court. We agree that the trial court is better equipped than this court to handle this phase of the administration of justice. Therefore, we remand the cause to the Superior Court rather than determine here the appropriate sentence which would be within the bounds of discretion.”).

In view of the foregoing, I concur in part and dissent in part.

court. The circuit court denied relief. On appeal to this Court we found the ten year sentence was disproportionate. Insofar as the defendant had served approximately two years in North Hall, we held that “[t]his is adequate punishment and therefore we find that the remainder of his sentence is void.” *Keenan*, 170 W. Va. at 374, 294 S.E.2d at 177.