No. 31326 – *State of West Virginia v. Tony Dean Arbaugh, Jr.*

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, J., concurring, joined by Starcher, J. and McGraw, J.:

I concur in the result reached by the majority but disassociate myself from the majority opinion insofar as it has been construed by the dissent filed in the case to justify treating the rule-making power of this Court as capable of altering the punishments imposed by legislative enactment for crimes, or capable of impermissibly changing the statutorily mandated conditions under which courts may lawfully grant probation. Davis, J. dissent at 2. I especially disassociate myself from any effort that may be gleaned from the majority opinion to, in the words of the dissent, "place[] itself above the law and 'break[] down one of the necessary conditions of a decent society' by reading its personal desires into the law." Davis, J., dissent at 17-18.

The Grounds for Concurrence in the Result

I concur in the result reached by the majority because:

1. Pursuant to West Virginia Code § 62-12-10, a judge, having determined that one or more conditions of probation have been violated, **"may** revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed, and order that sentence be executed. . . . If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that the probationer

serve his sentence, the court or judge may, except when the violation [of probation] was the commission of a felony, again release him on probation." (Emphasis added.)

2. Nothing in our law **requires the revocation of probation** and imposition of sentence after the Court learns of one or more probation violations.

3. The circumstances of this case require that, if probation was to be actually revoked for the multiple probation violations appearing from the record, the only sentence available to the court upon revocation was fifteen to thirty-five years in prison.

4. The defendant was subjected to sexual abuse by family members and at least one teacher, **the abuse dating from the age of reason**, that is from age seven or eight. *As a direct result of these attacks,* the defendant, at or about age fourteen, "acted out," committing against his younger half-brother the same types of sexual crimes of which he himself had been a victim in prior years.

5. At age fifteen the defendant was charged with delinquency as a result of this conduct and forthwith transferred to the adult jurisdiction, thus requiring that the defendant be treated as an adult and not afforded treatment as a juvenile.

6. It appears that, by reason of the seriousness of the crime involved, the transfer to adult jurisdiction was mandatory under West Virginia Code § 49-5-10, the applicable juvenile justice statute. Thus the statute, at that point, required adult criminal prosecution for his conduct and, as punishment, potential imprisonment for fifteen to thirty-five years, rather than treatment as juvenile.

7. As horrible as defendant's underlying crimes might have been, especially in terms of their impact on the half-brother victim and defendant's relationship with other well-behaved members of his family, a possible thirty-five-year term of imprisonment at defendant's age and in these circumstances cries out for close scrutiny under every principle of justice.

8. The record before us does not disclose that anyone – the State or any private party – has fully diagnosed the impact of and remedies necessary to guide this defendant from the nightmare of childhood sexual abuse, through his own disgusting, but youthful, criminal conduct, past all the anger and frustration generated in him by these events, to the point where the defendant overcomes his own apparently stubborn reluctance to fully cooperate in his recovery. I am satisfied that another effort, short of prison, is more likely to gain the defendant's adherence to society's norms of behavior than is thirty-five years in prison.

9. The record does demonstrate that the trial court attempted at least three available alternatives and that the defendant, to some substantial degree, succeeded in improving his conduct for varying periods of time in some structured situations.

10. The probation violations upon which the execution of this fifteen to thirty-five year sentence was predicated may be summarized as: (1) alcohol and marijuana abuse, (2) lack of anger control, (3) lack of respect for authority, (4) failure to take advantage of all counseling opportunities and (5) failure to observe the administrative rules for probation.

11. Under the provisions of West Virginia Code § 62-12-9, a court may modify the conditions of probation at any time, including requiring intermittent or continuous confinement in jail for up six months.

12. Under the painful circumstances of this case, I believe the trial court should have used the defendant's application for a reduction of sentence to further explore every available alternative to requiring the continued execution of the fifteen to thirty-five year sentence applicable to this case.

13. The trial court originally granted probation for a five-year term running from September 12, 2000, to September 11, 2005; hopefully, time remains to successfully turn this young man around without more prison time.

14. In addition to possibly requiring some jail time, continuous or intermittent, the court has at its disposal an opportunity to enroll the defendant in the program offered by Youth Systems Services, predicated on the articulated belief that the defendant "can be saved and can be brought around to a pro-social life."

15. The operative decision of a majority of this Court to reverse and remand "with directions" means simply that the lower court should, at this time, reverse its decision to revoke the defendant's probation and consider and adopt, before the term of probation expires, alternative means of attempting to secure the defendant's adherence to the norms of society, including further consideration of the Youth Systems Services option, additional jail time and any other community-based alternative, leaving always the option, if these efforts fail, of requiring the execution of the long sentence of incarceration required by the defendant's conviction.

It is easy to fathom the total frustration the trial court might well have felt in once again considering the defendant's recalcitrant behavior – given the many opportunities for rehabilitation previously extended to the defendant and lost by his erratic conduct. Notwithstanding that quite understandable frustration, the defendant's age and the miserable circumstances of his past life combine to strongly suggest that "a possible thirty-five year term of imprisonment . . . cries out for close scrutiny under every principle of justice."

The Grounds Stated in Dissent

Those who dissent from this decision suggest that it is necessary to construct a confrontation between legislative intent in the Youthful Offender Act, West Virginia Code § 25-4-1, *et seq.*, and the constitutional rule-making power of this Court. The dissent first grounds its claim on syllabus point 4 of *State v. Richards*, 206 W. Va. 573, 526 S.E.2d 539 (1999), and *State v. Patterson*, 170 W. Va. 721, 296 S. E.2d 684 (1982), asserting that this Court has previously determined that *if probation is revoked after enrollment in the youthful offender program, the trial court has no option other than to require execution of the sentence applicable to the crime for which probation was granted.* Such an assertion gives the cited cases an inappropriately rigid reading. In *Richards*, the trial court had imposed *a harsher sentence* after the revocation of sentence than it had imposed beforehand. Although syllabus point four of *Richards* does not expressly capture the controlling factual circumstances of the case, *Richards*, read in context, simply prohibits the execution of a *harsher* sentence after revocation of probation than any sentence earlier imposed but suspended incident to the grant of probation. *Patterson* is even less persuasive. In that case, the defendant speciously claimed that he was unaware that he might be sentenced to prison if he violated probation. In the *Patterson* opinion, Justice Harshbarger disposed of that claim based upon the clear evidence in the case that the defendant had been fully advised of the harshest consequences of violating probation. Neither of the cases cited in the dissent truly assist the Court on the facts of this case.

The next assertion in the dissent is that by utilizing Rule 35 of the West Virginia Rules of Criminal Procedure to effect a further term of probation for the defendant the majority undertakes to unconstitutionally alter the *substantive* law enacted by the Legislature specifying penalties for crimes by an improper utilization of the rule-making power vested by the Constitution in this Court to alter the "*substantive*" law of the State. There follows a long discussion of the distinction between *substantive* and *procedural* law, which proves ultimately unrewarding and largely irrelevant.

Stripped to the bone, the dissent argues that once probation is revoked and a sentence ordered executed, the trial courts are without jurisdiction to later grant probation, and that any attempt to utilize Rule 35 of the West Virginia Rules of Criminal Procedure to effect such a result unconstitutionally infringes on the prerogative of the Legislature to define the penalties attached to conviction of particular crimes because such action amounts to an attempted amendment of substantive law. Tying this argument to the Youthful Offender Act by reliance on *Richards* and *Patterson*, discussed above, does not cure the fatal defects in the argument which are readily apparent for the reasons next discussed.

West Virginia Code § 62-12-3 expressly limits the authority of the trial courts to suspend execution of a sentence and place a defendant on probation to a period ending no more than sixty days after a defendant has actually been imprisoned. On the other hand, Rule

35(b) expressly defines a "reduction of sentence" to include "[c]hanging a sentence from a sentence of incarceration to a grant of probation" and provides further that:

> A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or **probation is revoked,** or within 120 days after the entry of a mandate by the supreme court of appeals upon the affirmance of a judgment of a conviction or **probation revocation** or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or **probation revocation.** The court shall determine the motion within a reasonable time. . . .

Rule 35(b), W.Va. R. Crim. P. (emphasis added).

First, it is readily apparent that West Virginia Code § 62-12-3, allowing a legislatively determined sixty-day period after imprisonment for reconsideration of a sentence, West Virginia Code § 62-12-10, expressly allowing release on probation even after prior probation violations have been declared by the trial court, and Rule 35, expressly treating a change of sentence from incarceration to probation as a "reduction of sentence," combine to equip the trial courts, *inter alia*, with the discretion to set aside an earlier revocation of probation, suspend further execution of the sentence of incarceration, and re-institute a term of probation. There is nothing in the Youthful Offender Act that suggests any legislative intent whatever to deprive the trial courts of that discretion in cases where that sentencing alternative has been utilized. Moreover, nothing in our case law – including *Richards* and *Patterson* – requires such an awkward result.

Second, if this Court's treatment of Rule 35 in this case constitutes a constitutionally impermissible intrusion into the Legislature's sentencing powers, then the provisions of Rule 35, allowing reconsideration of sentencing decisions within a variety of one-hundred-twenty-day time limitations – **clearly in excess of the sixty day limitations found in West Virginia Code § 62-12-3** – have been in violation of the constitution since first adopted February 1, 1985, nearly twenty years ago.

Either the dissent is dead wrong in its assertion that the application of Rule 35 in this case undertakes a constitutionally impermissible intrusion upon the Legislature's power to define punishments for crimes, or the usage of Rule 35 at any time more than sixty days following actual imprisonment, as provided for in West Virginia Code § 62-12-3, is likewise constitutionally impermissible. I am utterly unable to agree with such a result. Especially in light of the long and stable history of Rule 35 in our jurisprudence, the rule is, in my view, a wholly proper exercise of this Court's constitutional power to "promulgate rules for all cases and proceedings, civil and criminal, . . . relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law." W. Va. Const. art VIII, § 3. Rule 35 is broad enough in its thrust and intent to permit the trial court in this case to reconsider, within the court's range of discretion, not only the sentencing options in the case, but the underlying decision of whether revocation of probation was appropriate under all of the circumstances, or whether, in the alternative, some change in the prior conditions

or term of probation would better serve the public interest. The dissent has manufactured a needless constitutional confrontation, all utterly unnecessary in the circumstances.

Above the Law

The justices who dissent from this Court's decision perceive that the majority opinion seeks to "place[] itself above the law and 'break[] down one of the necessary conditions of a decent society' by reading its personal views into the law." Davis, J., dissent at 17-18. I cannot fathom why the dissenters would choose such a **personal** and **cutting** means of expressing their disapproval of the majority opinion. Likewise, I am struck by the much more extensive recital of the defendant's alleged misdeeds while on probation, which appears with devastating effect in the dissenting opinion, compared to the considerably less emotional recital of those misdeeds appearing in the majority opinion. Suffice it to say that regardless of which version of the facts one reads, the case still boils down to the fact that defendant was sentenced to fifteen to thirty-five years for alcohol and drug use, mixed with some pretty nasty rejection of authority. I do not believe that the recital of the facts contained in either the majority or dissenting opinions demonstrates that incarceration for up to thirty-five years is preferable to another effort to bring the defendant "around to a pro-social life."[1]

[1]It is noted that incarceration in prison costs about $20,000 per year per convict. In the circumstances of this case, an investment of a year or so in a final effort to salvage this defendant from a long life in prison – at a cost to taxpayers of up to $700,000 (continued...)

"Abuse of discretion," as a term of art, has a harsh ring. As noted, the frustration of the trial judge in his dealings with the defendant is entirely understandable. In my view, the abuse of discretion in this case does not proceed fundamentally from any defect in those efforts. However, contrary to those who dissent, I believe the revocation of probation and execution of sentence constituted an abuse of discretion in all of the circumstances surrounding this case. The ruling here appealed proceeds not from the trial judge's understandable frustration, but from the fact that our law required this case to be treated from its inception as an adult crime. In light of the life experiences of this defendant, that treatment led, more or less inexorably, to a decision to incarcerate this defendant for up to thirty-five years under statutory provisions that, on their face, do not fully accommodate the reality that the underlying crimes in this case were committed by a person barely fourteen years of age who is considered unlikely to re-offend, a person who has been a victim himself of equally or perhaps worse crimes, a person who has demonstrated some ability to improve in a structured situation, albeit not completely, a person whose probation was revoked for violations of probation much less serious than the underlying crimes. Finally, I am mindful of the potential for this young defendant, who was initially sexually victimized at such a tender age, to again be sexually victimized if it is necessary to continue his incarceration. Our law provides at least one more opportunity for the defendant to rehabilitate himself.

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[1](...continued)
– is worthwhile for obviously practical reasons. It is my fervent hope that if the defendant is given this "last chance," he will grasp and make the most of it.

Again, the case "cries out for close scrutiny under every principle of justice." Bypassing that probably last opportunity would clearly be a miscarriage of justice. As Justice Starcher has remarked in pondering this case:

> A decent society is where a *child* who has been sexually victimized for years, and who becomes seriously disordered – but who does work in structured situations to improve – gets our *help*, not a thirty-five year prison sentence.

As the author of this concurring opinion, I am authorized to say that Justice Starcher and Justice McGraw join in this opinion.