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

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OF WEST VIRGINIA

Maynard, C.J., dissenting:

The last thing this case needs is another separate opinion. Nevertheless, I now write separately, in spite of the fact I joined Justice Davis's dissent, because I am deeply concerned that the several opinions extant in this case, the majority and two concurrences, might cause confusion about the law to be applied regarding probation grants following sentencing under the Youthful Offender Act, W.Va. Code § 25-4-6 (2001 Repl. Vol.). In the interest of brevity and judicial economy, I have decided to respond only to the first concurring opinion that was filed-the one that actually reaches the merits of the case.

The first concurring opinion cites the general probation statute, W. Va. Code §§ 62-12-1 to -24 (2000 Repl. Vol.), to support its analysis. However, I believe the probation at issue in this case is controlled by the Youthful Offender Act. While the general probation statute and the Youthful Offender Act both deal with probation and can be read together, *State v. Richards*, 206 W. Va. 573, 575 n.4, 526 S.E.2d 539, 541 n.4 (1999) (citing *State v. Reel*, 152 W. Va. 646, 651, 165 S.E.2d 813, 816 (1969)), "'the two statutory schemes do not coincide in all areas and are, no doubt, the embodiment of separate legislative purposes.'" *Id.*, 526 S.E.2d at 541 n.4 (quoting *State v. Martin*, 196 W. Va. 376, 380 n.3, 472 S.E.2d 822, 826 n.4 (1996) (per curiam)). We have therefore observed that "if there were some

discrepancy between the two statutes, § 25-4-6 is the more specific and thus controlling law on this subject." *Id.*, 526 S.E.2d at 541 n.4.[1] Because the general probation statute does not contain the same bar to re-awarding probation after revocation as does § 25-4-6 of the Youthful Offender Act, the Youthful Offender Act is the controlling statute in this case and the outcome in this case should be controlled by Syllabus point 4 of *State v. Richards*, 206 W. Va. 573, 526 S.E.2d 539 (1999), the sole Syllabus of *State v. Patterson*, 170 W. Va. 721, 296 S.E.2d 684 (1982), and the sole Syllabus of *State v. Martin*, 196 W. Va. 376, 472 S.E.2d 822 (1996) (per curiam). Thus, I do not find the concurring opinion's reliance on the general probation statute to be the correct analysis. Further, I think the approach outlined herein is the analysis and method currently used and understood by circuit judges in West Virginia in Youthful Offender sentencing situations. Based upon these considerations, I respectfully dissent.

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[1]The rule that a more specific statute controls over a more general statute when the two are in conflict is not a novel point of law unknown to the author of the concurring opinion. Indeed, my brethren have applied this point of law in a previous majority opinion finding that:

> Because the grandparent act is *specific legislation* drafted and adopted for the express purpose of addressing the issue of visitation, its provisions must necessarily be viewed as controlling when a question arises regarding the application of another code provision with regard to the issue of grandparent visitation.

State ex rel. Brandon L. v. Moats, 209 W. Va. 752, 759, 551 S.E.2d 674, 681 (2001) (emphasis added). The concurring opinion makes no effort to show why the reasoning in *Brandon L.*, applying the more specific statute, does not equally have force here where the Youthful Offender Act's probation provision is more specific than the general probation act upon which the concurrence relies.

Having dissented to the law, I now write to state a policy concern of mine regarding this case and others similarly situated. I believe that sentencing, and especially whether to grant probation or not, is usually best left to trial judges. This is so for several reasons. Chief among them is the fact that the trial judge sees the defendant in person, interacts with him or her, can see the defendant's demeanor and attitude, and observes a hundred other subtle factors which enable the trial judge to determine the defendant's remorse or lack thereof. Since this Court never sees the defendant, we cannot make the same crucial observations. Therefore, absent some truly horrible mistake, I would leave criminal sentencing and probation decisions to the sound discretion of our very wise trial judges.