STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101205 (Kanawha County 08-F-530, 08-M-92, 08-F-668)

Edward Eugene Smith,
Defendant Below, Petitioner

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Edward Eugene Smith appeals his convictions after a jury trial for felony Possession of a Stolen Vehicle in violation of West Virginia Code § 17A-8-5, misdemeanor Fleeing from the Police on Foot in violation of West Virginia Code § 61-5-17(d), and misdemeanor Fleeing from the Police in a Vehicle in violation of West Virginia Code § 61-5-17(e). Petitioner also appeals the imposition of an enhanced penalty for his recidivist conviction imposed pursuant to West Virginia Code § 61-11-18(a). The State filed a timely response brief.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

I. Facts

At trial, the State presented testimony from Charleston Police Corporal Danny Welch who was the passenger in a police patrol car at about midday on October 28, 2007. Corporal Welch testified that as the patrol car passed a vehicle that was going about ten miles per hour, he made eye contact with the driver of the other vehicle. Corporal Welch testified that he recognized the driver of the other vehicle as the petitioner herein, and he had reason to believe that petitioner did not possess a valid driver's license. Corporal Welch testified that he was able to identify petitioner because he knew him well. Corporal Welch testified that after they made eye contact, petitioner sped up and ran a stop sign. The police activated the patrol car's lights and sirens, turned around, and pursued the other vehicle. The vehicle was found on a nearby street, unoccupied and crashed into a residence. Police searched but could not locate the driver. Police learned that the vehicle had been stolen two weeks earlier.

Petitioner was arrested four days later. Petitioner testified on his own behalf and denied driving the vehicle and denied fleeing police. Petitioner testified that he walks everywhere and does not drive because he is a drug addict, and that police officers were familiar with him because they had previously arrested him for breaking into cars.

II. Sufficiency of the Evidence

In his first assignment of error, petitioner argues that the court erred by not granting his motion for judgment of acquittal because the evidence was insufficient to prove guilt beyond a reasonable doubt. This Court has held as follows:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995); Syl. Pt. 7, *State v. White*, No. 35529, 2011 WL 504760 (W.Va. Feb. 10, 2011). The statute regarding the Possession of a Stolen Vehicle count, West Virginia Code § 17A-8-5, provides as follows:

> Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives, or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony.

Petitioner argues that although the vehicle was stolen, there was no evidence presented that he knew or had reason to believe that it was stolen. Thus, he argues that the State failed to prove every element of the crime. Applying the standard set forth in *Guthrie*, we find no merit in his argument. Petitioner was positively identified by police while driving a car that had been stolen for two weeks. When he made eye contact with the police officer, he sped up and ran a stop sign. He ignored the officer's lights and sirens, fled, crashed the vehicle, and then fled on foot. There was sufficient evidence presented to support the conviction.

Petitioner also argues that West Virginia Code § 17A-8-5 is unconstitutionally vague because it is not clear from the language of the statute whether the State had to prove that petitioner acted with the "intent to procure or pass title" in addition to proving that petitioner "has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken[.]" The State notes that the statute includes the disjunctive "or" meaning that a person can be guilty of this felony if he knowingly possesses a stolen vehicle with intent to procure or pass title, or if he has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken. We find no error.

Petitioner also argues that there was insufficient evidence to convict him of Fleeing from Police on Foot because West Virginia Code § 61-5-17(d) makes it a misdemeanor to intentionally flee a law enforcement officer ". . . who is attempting to make a lawful arrest of the person . . . ." Petitioner argues that Corporal Welch testified that his intent was to stop petitioner in order to confirm that petitioner was driving without a driver's license, and that the officer did not yet know that the vehicle was stolen. We find that it was sufficient that the officers were trying to make a legitimate stop of petitioner based upon the reasonable suspicion that he was driving without a valid driver's license, which is illegal.

III. Ineffective Assistance of Counsel

In his second assignment of error, petitioner argues that his trial defense counsel was ineffective for failing to object and move to strike certain testimony by the police officers; by failing to stop petitioner from testifying about certain things; and by failing to move for a curative instruction regarding petitioner's testimony. This is petitioner's direct petition for appeal from his conviction. This Court's ability to review a claim of ineffective assistance of counsel is limited on direct appeal. Such a claim would be more appropriately developed in a petition for writ of habeas corpus. *See*, Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995); Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Accordingly, we decline to rule on this issue in the context of the direct appeal. If he desires, petitioner may pursue a petition for post-conviction habeas corpus. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

IV. Guilty Plea to Recidivist Information.

After the jury trial, the State filed a recidivist information asserting that petitioner had previously been convicted of a felony. In accordance with West Virginia Code § 61-11-18(a), when a defendant has previously been convicted of one felony, the court shall double the minimum term of an indeterminate sentence on a second felony conviction. Pursuant to a plea agreement, petitioner pled guilty to the recidivist information in exchange for the dismissal of an unrelated charge and a recommendation from the State that his sentences be ordered to run concurrently.

Petitioner argues that before he entered the recidivist plea, the circuit court failed to "duly caution" him as required by West Virginia Code § 61-11-19. Petitioner argues that the

court failed to duly caution him with regard to the proper length of the sentence he faced for pleading guilty to the recidivist information, and failed to duly caution him that he had the right to a trial on the issue of identity.

At the recidivist plea hearing, counsel for both sides stated that the sentence for the instant felony is one to ten years in prison, resulting in an enhanced penalty under the recidivist statute of two to ten years in prison. When pleading guilty to the recidivist charge, petitioner acknowledged his understanding that the court could sentence him to two to ten years for this felony. However, at the subsequent sentencing hearing, the court imposed an enhanced sentence of two to five years for this felony, and ordered that his misdemeanor sentences were to run concurrently. We find no error that prejudiced petitioner's interests. He received the enhanced minimum sentence to which agreed, and he received a maximum term that was less than what he expected. We find no basis to grant petitioner's request that we vacate the enhancement.

Moreover, a review of the transcript of the December 5, 2008, hearing where petitioner entered the recidivist plea shows that the circuit court did expressly advise petitioner of his right to a trial and of his other rights. The court specifically asked petitioner, "do you understand that you're not required to plead guilty, you are entitled to have a jury decide your guilt or innocence on this charge?" Petitioner responded in the affirmative. Petitioner also completed a written statement acknowledging his rights.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh