STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent,

vs) No. 101539 (Kanawha County 07-F-549)

Ray William Justis, Defendant Below,
Petitioner

FILED
June 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ray William Justis appeals seeking the reversal of his recidivist conviction. The State filed a timely summary response.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on March 3, 2011. This Court has considered the parties' briefs and the record on appeal. 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.

On February 20, 2008, a jury found petitioner guilty of felony daytime burglary, misdemeanor battery, and misdemeanor domestic battery. On February 22, 2008, the State filed a recidivist information pursuant to West Virginia Code § 61-11-18(c) and § 61-11-19 asserting that petitioner was previously convicted of three felonies: breaking and entering in 1984, non-aggravated robbery in 1991, and conspiracy to distribute and possession with intent to distribute marijuana in 1997.

A recidivist jury trial was held on October 20, 2008. Petitioner unsuccessfully objected to the prosecutor's request to inform the jury of petitioner's daytime burglary conviction, which was the felony conviction that triggered the application of the recidivist statute. The circuit court allowed the jury to be so informed because the purpose of the recidivist proceeding was to determine the sentence for this burglary.

The jury found that petitioner was the same person convicted of the prior felonies. Accordingly, pursuant to West Virginia Code § 61-11-18(c), the circuit court sentenced petitioner to life imprisonment with the possibility of parole for his daytime burglary conviction. The court imposed jail terms for the misdemeanor convictions and ordered that the misdemeanor sentences run concurrently with each other and concurrently with the burglary sentence.

Petitioner argues that it was error for the jury to be told of the daytime burglary conviction because it is not an element of proof in the recidivist statutes, West Virginia Code § 61-1-18 and § 61-1-19. He relies upon our holding in *State v. Wyne*: "[u]nder *W.Va. Code*, 61-11-19 (1943) a recidivist proceeding does not require proof of the triggering offense because such triggering offense must be proven prior to the invocation of the recidivist proceeding." Syl. Pt. 3, in part, *State v. Wyne*, 194 W.Va. 315, 460 S.E.2d 450 (1995). Petitioner adds that his triggering offense was irrelevant to the issue before the jury, which was whether petitioner is the same person who was convicted of the prior felonies, and it was unduly prejudicial because it portrayed him as a felon.

The State responds that evidence of the triggering or principal offense is an essential element of proof because the State must prove beyond a reasonable doubt that the offense was committed subsequent to each preceding conviction and sentence. *E.g.*, *State v. McMannis*, 161 W.Va. 437, 441-442, 242 S.E.2d 571, 575 (1978). The State also argues that there was overwhelming evidence of identity in this recidivist case – three probation officers and petitioner himself provided testimony that petitioner was the person convicted of the prior felonies.

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983); Syl. Pt. 1, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999). Although our holding in *Wyne* stated that a recidivist proceeding "does not require proof" of the triggering offense, we did not hold that it is reversible error to inform the jury of the triggering conviction. Moreover, even if it was error to so inform the jury, any such error was harmless because there was more than enough evidence, including petitioner's own testimony, to prove that he was the same person convicted of the prior felonies. *See*, Syl. Pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979) (setting forth standard for harmless error).

We find no abuse of discretion and affirm the recidivist conviction.

Affirmed.

ISSUED: June 15, 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