State of West Virginia
Supreme Court of Appeals

State of West Virginia
Plaintiff below, Respondent

vs.) No. 11-0170 (Marion County 09-F-177, 10-F-2)

Dennis Terrell Evans
Defendant below, Petitioner

FILED
September 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner appeals his conviction by jury in the Circuit Court of Marion County of one count of wanton endangerment involving a firearm and the associated five year term of imprisonment. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition.

This Court has considered the petition 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 petition and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review 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.

The petitioner challenges the circuit court's deferral in ruling on his motion to dismiss the multiple counts of wanton endangerment with which he was charged. Petitioner argues that, by allowing the state to proceed at trial with two separate counts of wanton endangerment and a single count of attempted first degree murder pending, the circuit court violated his state and federal constitutional rights against double jeopardy. Petitioner alleges that the two charges of the same offense are duplicative because he engaged in a single act, and that the attempted murder charge is further duplicative of the wanton endangerment charges. Petitioner argues that he was impermissibly prohibited from putting on a defense to the charge of attempted murder without also addressing the wanton endangerment charge, and that the various charges against him were simply an attempt to achieve multiple punishments for a single act in violation of the United States Supreme Court's *Blockburger* test, as adopted by this Court in *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Petitioner was eventually convicted of one count of wanton endangerment as a result of his twice discharging a firearm at the victim on a public street in a residential neighborhood. "[A] double jeopardy claim [is] reviewed *de novo*." Syl. Pt. 1, in part, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996).

To begin, the United States Supreme Court has established the appropriate test for determining when a defendant may be convicted of multiple offenses for a single action, and this Court has adopted the same. "'[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Syl. Pt. 4, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992) (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)). However, this Court has also made it clear that "[t]he test of *Blockburger v. United States*... is a rule of statutory construction. The rule is not controlling where there is a clear indication of contrary legislative intent." Syl. Pt. 5, *Id.* In the instant matter, it is important to note that this Court has previously held that "[b]y enacting... W.Va.Code, 61-7-12, there can be no doubt that the Legislature was directing its attention to the increasing problem of the illegal use of firearms. The intent is clear that the Legislature wanted to assure lengthy prison sentences for gun-toting offenders..." *State v. Sears*, 196 W.Va. 71, 78, 468 S.E.2d 324, 331 (1996). Clear from this language is the fact that the legislative intent behind the crime of wanton endangerment is to deter the wanton use of a firearm, which is separate and distinct from the legislative intent behind the enactment of the first degree murder statute. For this reason, the petitioner's constitutional rights against double jeopardy were not violated.

As to petitioner's argument that the multiple counts of wanton endangerment violated his constitutional rights against double jeopardy, it is important to note that petitioner discharged his firearm twice. While petitioner analogizes to a prior holding wherein this Court found that, in the context of battery convictions, each blow upon a single victim in one contemporaneous transaction cannot serve as a basis for multiple convictions of battery, the Court does not consider this analogous to petitioner's actions. *State v. Rummer*, 189 W.Va. 369, 393, 432 S.E.2d 39, 63 (1993). The plain language of West Virginia Code § 61-7-12 makes it clear that each shot fired constitutes a separate violation because each individual gunshot "creates a substantial risk of death or serious bodily injury to another." For these reasons, the petitioner's rights against double jeopardy were not violated by the inclusion of both multiple counts of wanton endangerment and attempted first degree murder.

For the foregoing reasons, we find no error in the decision of the circuit court and the conviction is hereby affirmed.

Affirmed.

ISSUED: September 13, 2011

CONCURRED IN BY:

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

DISSENTING:

Justice Menis E. Ketchum