STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia
Plaintiff Below, Respondent

vs.) No. 11-0084 (Berkeley County 09-M-3)

Steven M. Askin
Defendant Below, Petitioner

FILED
June 17, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner appeals, *pro se*, his conviction by bench trial in the Circuit Court of Berkeley County of eleven counts of the unlicensed practice of law and respective fines of $100.00 per count. The appeal was timely perfected, 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 denial of his divers motion to dismiss the indictment, arguing that he was entitled to dismissal of the charges for the following reasons: because of prosecutorial misconduct; because the indictment violated Article VI, Section 1 and Article V, Section 1 of the West Virginia Constitution and rule of lenity; because West Virginia Code § 30-2-4 is void pursuant to the doctrine of desuetude; and, because his right to due process was violated by the vague and overbroad language of West Virginia Code §30-2-4, under which he was convicted. "This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009).

Failure to Dismiss for Prosecutorial Misconduct

Petitioner first argues that the circuit court committed reversible error by denying his motion to dismiss for prosecutorial misconduct. He alleges that two members of the Berkeley County Prosecutor's Office interjected themselves into his civil proceedings to have his license to practice law reinstated, and therefore had an interest in the outcome of his criminal prosecution beyond the ordinary dedication to see justice done. To support this argument, petitioner relies solely upon the fact that these individuals sent letters to the Office of Disciplinary Counsel in response to requests for public comment on petitioner's reinstatement to the practice of law. The letters contained information the prosecutors received from several defendants alleging that petitioner was conferring with them to provide advice on legal proceedings, despite the fact that his license was annulled. Also addressed were the backlog problems the Berkeley County Circuit Court system continued to suffer due to petitioner training other attorneys on how to create delay through habeas corpus filings. For this reason, petitioner argues that he was entitled to dismissal of the indictment for prosecutorial misconduct. This Court has held that "[u]nder circumstances where it can reasonably be inferred that the prosecuting attorney has an interest in the outcome of a criminal prosecution beyond ordinary dedication to his duty to see that justice is done, the prosecuting attorney should be disqualified from prosecuting the case." Syl. Pt. 2, *Nicholas* v. *Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987) (quoting Syl. Pt. 4, in part, *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981)). In this matter, petitioner can point to no evidence, beyond the letters referenced *supra*, that can form the basis for the reasonable inference that the prosecutor in this matter has an interest in the outcome of this prosecution beyond the ordinary dedication to see justice done. For this reason, the circuit court did not abuse its discretion in denying petitioner's motion to dismiss for prosecutorial misconduct.

Failure to Dismiss for Violations of the State Constitution and the Rule of Lenity

Petitioner argues that his indictment of offenses prohibited by West Virginia Code § 30-2-4 violated Article VI, Section 1 and Article V, Section 1 of the West Virginia Constitution and the rule of lenity. He argues that the violations with which he was charged are, at most, civil violations subject to action by this Court and/or the State Bar's Unauthorized Practice of Law Committee. Further, he asserts that permitting the prosecution to use language from the 1961 promulgation of the *Definition of the Practice of Law* to broaden West Virginia Code § 30-2-4 violates both principles from this Court's decisions and the separation of powers requirements found in the above-cited sections of this State's Constitution.

West Virginia Code § 30-2-4 states that "[i]t shall be unlawful for any natural person to practice or appear as an attorney at law for another in a court of record in this state," and further goes on to criminalize this conduct by stating that "[a]ny person violating the

provisions of this section shall be guilty of a misdemeanor." The Court disagrees with petitioner's assertion of a separation of powers violation. There is no dispute that the Legislature has the inherent authority to proscribe certain behaviors by statute, as they have done by criminalizing the unlicensed practice of law. Similarly, it is undisputed that this Court possesses the inherent constitutional authority to "define, regulate and control the practice of law in West Virginia." Syl. Pt. 1, in part, *State ex rel. Askin v. Dostert*, 170 W.Va. 562, 295 S.E.2d 271 (1982). The Court concludes that the circuit court did not err in denying this count of petitioner's motion to dismiss.

The rule of lenity is inapplicable as petitioner has failed to show how the subject statute is ambiguous such that the same would have compelled dismissal of the indictment. See, Syl. Pt. 5, *State ex rel. Morgan v. Trent*, 195 W.Va. 257, 465 S.E.2d 257 (1995).

Failure to Dismiss for Voiding of Applicable Statute Through Desuetude

Petitioner argues that his inability to find a single published appellate decision in this State where an individual has been prosecuted pursuant to West Virginia Code § 30-2-4 constitutes a voiding of the statute pursuant to the doctrine of desuetude. In order for this doctrine to be applicable, several other factors must be met. Petitioner has failed to show that there was either an "open, notorious and pervasive violation of the statute for a long period," or "a conspicuous policy of nonenforcement of the statute," as required for the doctrine to apply. Syl. Pt. 3, in part, *Committee on Legal Ethics of the West Virginia State Bar v. Printz*, 187 W.Va. 182, 416 S.E.2d 720 (1992). For these reasons, the trial court did not err in denying this count of the motion to dismiss.

Failure to Dismiss for Due Process Violations

Petitioner next argues that the prosecution's reliance on the specific language of West Virginia Code § 30-2-4 to convict him is a violation of both his state and federal due process rights because the language is vague and overbroad. However, petitioner makes no argument as to why the language is vague or overbroad. Per our prior holdings, "[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974). A reading of the plain language of West Virginia Code § 30-2-4 shows that this requirement is met. For this reason, the lower court did not err in denying the motion to dismiss on this count.

Insufficiency of the Evidence

Lastly, petitioner challenges the sufficiency of the evidence against him at trial. The Court notes that petitioner casts this argument in terms of his interpretation of the criminal statute at issue, arguing that the circuit court erred in its interpretation of the statute in question. Petitioner asserts that one must falsely advertise him or herself as a licensed attorney or appear as an attorney in a court of record to be guilty under West Virginia Code § 30-2-4. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Petitioner was shown to have provided legal advice and prepared legal pleadings for several witnesses to file in the Berkeley County Circuit Court. Further, petitioner was shown to have offered services or prepared documents that imply the use or possession of legal knowledge or skill. The State's expert testified that petitioner held himself out as having the requisite knowledge, skill and legal acumen to represent the rights of these people, regardless of whether they knew he was not a licensed attorney. As such, a reasonable trier of fact could have found that the petitioner engaged in the unauthorized practice of law. For these reasons, the prosecution presented sufficient evidence to support the verdict, and this Court finds no error in regard to the circuit court's conviction of petitioner and its imposition of fines in this matter.

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

Affirmed.

ISSUED: June 17, 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