No. 12-0433 – *State v. George K.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Justice Ketchum, dissenting:

The circuit court committed George K. to a mental health facility for fifty years and ruled that it could maintain jurisdiction over him during this time.[1] The circuit court found that the offenses he was charged with violating, third degree sexual assault pursuant to W.Va. Code § 61-8B-5, and sexual abuse by a custodian pursuant to W.Va. Code § 61-8D-5, involved "an act of violence against a person."

George K. has an IQ of 60. He was charged with having sexual intercourse on two occasions with the fifteen-year-old daughter of his girlfriend. She was six weeks from the age of consent when the sexual intercourse occurred. There is no allegation that the sexual intercourse between George K. and the fifteen-year-old girl involved the use of force, threats, or physical violence. It was consensual except for the fact that she was six weeks away from the age of consent. Because neither of the offenses George K. was charged with violating requires violence as an element of the offense, and because there was no actual evidence of physical violence or forcible compulsion, George K. argues that the circuit court erred by ruling that the charged offenses involved "an act of

[1] Fifty years is the maximum period of confinement George K. would have faced had he been convicted on all of the charges against him. If George K. attains competency during this fifty year term, he can be made to stand trial on the charges against him. W.Va. Code § 27-6A-3(h) provides, in part, that "[a] defendant shall remain under the court's jurisdiction until the expiration of the maximum sentence *unless the defendant attains competency to stand trial and the criminal charges reach resolution or the court dismisses the indictment or charge*." (Emphasis added).

violence against a person" and by committing him to a mental health facility for a fifty years.

The phrase "an act of violence against a person" is contained in W.Va. Code § 27-6A-3(h) which states, in part:

> If at any point in the proceedings the defendant is found not competent to stand trial and is found not substantially likely to attain competency, and *if the defendant has been indicted or charged with a misdemeanor or felony in which the misdemeanor or felony does involve an act of violence against a person,* then the court shall determine on the record the offense or offenses of which the person otherwise would have been convicted, and the maximum sentence he or she could have received.

(Emphasis added).

The phrase "an act of violence against a person" is unambiguous and should be afforded its plain meaning. *Black's Law Dictionary* defines "violent offense" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." *Black's Law Dictionary* at 1188 (9th ed. 2009). This Court has held that in deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995); *see also* Syllabus Point 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.").

Neither of the charged offenses, third degree sexual assault and sexual abuse by a custodian, include "an act of violence" as an element of the offense. W.Va. Code § 61-8B-5(a)(2) states:

> (a) A person is guilty of sexual assault in the third degree when: . . .
>
> (2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

W.Va. Code § 61-8D-5(a) states:

> (a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in a correctional facility not less than ten nor more than twenty years, or fined not less than $500 nor more than $5,000 and imprisoned in a correctional facility not less than ten years nor more than twenty years.

Because these offenses do not require an act of violence and because there is no allegation that George K. used *any* forcible compulsion, much less extreme physical force, forcible rape, or assault and battery with a dangerous weapon, the circuit court

should have ruled that the charged offenses did not involve "an act of violence against a person."

The Legislature has addressed "violence" in the context of sexual offenses. The Sex Offender Registration Act, W.Va. Code § 15-12-2(i), states that a "sexually violence offense" means:

> (1) Sexual assault in the first degree as set forth in section three, article eight-b, chapter sixty-one of this code or of a similar provision in another state, federal or military jurisdiction;
>
> (2) Sexual assault in the second degree as set forth in section four, article eight-b, chapter sixty-one of this code or of a similar provision in another state, federal or military jurisdiction;
>
> (3) Sexual assault of a spouse as set forth in the former provisions of section six, article eight-b, chapter sixty-one of this code, which was repealed by an Act of the Legislature during the 2000 legislative session, or of a similar provision in another state, federal or military jurisdiction;
>
> (4) Sexual abuse in the first degree as set forth in section seven, article eight-b, chapter sixty-one of this code or of a similar provision in another state, federal or military jurisdiction.

The Legislature did not include third degree sexual assault or sexual abuse by a custodian in its list of "sexually violent offenses."

The circuit court and the majority opinion rely largely on this Court's holding in *State ex rel. Spaulding v. Watt*, 188 W.Va. 124, 423 S.E.2d 217 (1992). In *Spaulding*, the State sought to compel the trial court to revoke the defendant's post-conviction bail after he was convicted of nine counts of first degree sexual assault against

his five-year-old stepdaughter and his seven-year-old stepson. The issue in *Spaulding* was the meaning of "violence to a person" within the context of a post-conviction bail statute, W.Va. Code § 62-1C-1(b). The Court determined that

> the word "violence" in our post-conviction bail statute is not limited by the adjective "physical." There can be no dispute that even in the absence of any significant physical trauma, sexual assaults on young children result in severe emotional and psychological harm.

188 W.Va. at 126, 423 S.E.2d at 219. The Court in *Spaulding* held in Syllabus Point 1 that "[t]he offense of first degree sexual assault under W.Va. Code, 61-8B-3(a)(2) (1984), involves violence to a person and is, therefore, subject to the provisions of W.Va. Code, 62-1C-1(b) (1983), with regard to post-conviction bail."

The Court's holding in *Spaulding* is clearly distinguishable from the present case. *Spaulding* dealt with the first degree sexual assault of a five-year-old and a seven-year-old. The present case involves third degree sexual assault and sexual assault by a custodian involving a fifteen-year-old who stated that the sexual intercourse was consensual. Considering *Spaulding* and the Sex Offender Registration Act, W.Va. Code § 15-12-2(i), together, both this Court and the Legislature agree that first degree sexual assault involves an act of violence against a person. Because George K. was charged with third degree sexual assault and sexual assault by a custodian, this Court's ruling in *Spaulding* is not applicable to the present case.

Finally, as the majority noted, if the circuit court had ruled that the charged offenses did not involve "an act of violence against a person," George K. nevertheless could have been committed pursuant to an involuntary civil commitment. If the circuit

court had determined that the charged offenses did not involve "an act of violence against a person," it would have proceeded under W.Va. Code § 27-6A-3(g), which provides:

> (g) If at any point in the proceedings the defendant is found not competent to stand trial and is found not substantially likely to attain competency and if the defendant has been indicted or charged with a misdemeanor or felony *which does not involve an act of violence against a person, the criminal charges shall be dismissed. The dismissal order may, however, be stayed for twenty days to allow civil commitment proceedings to be instituted by the prosecutor pursuant to article five* [§ 27-5-1 et seq.] *of this chapter.* The defendant shall be immediately released from any inpatient facility unless civilly committed.

(Emphasis added). As set forth in this statute, the method for procuring an involuntary civil commitment is set forth in W.Va. Code §§ 27-5-1 to -11. Specifically, W.Va. Code § 27-5-2(a) states that:

> (a) Any adult person may make an application for involuntary hospitalization for examination of an individual when the person making the application has reason to believe that the individual to be examined is addicted, as defined in section eleven, article one of this chapter, or is mentally ill and, because of his or her addiction or mental illness, the individual is likely to cause serious harm to himself, herself or to others if allowed to remain at liberty while awaiting an examination and certification by a physician or psychologist.

An individual can remain involuntarily committed as long as the person poses a danger to himself or to others. *See* W.Va. Code § 27-5-4(k).

Based on all of the foregoing, I respectfully dissent.