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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 17-0994 – *Christopher J. v. Donnie Ames, Superintendent, Mt. Olive Correctional Complex*

Armstead, Justice, joined by Justice Jenkins, concurring, in part, and dissenting, in part:

The majority in this case has correctly rejected the petitioner's contention that his conviction was based upon false and perjured testimony and his claim that his sentence for the heinous crimes he committed is disproportionate. Accordingly, I concur in the majority's decision affirming the circuit court's final order with regard to these issues. However, the majority then proceeds to substitute its judgment for that of the Legislature and to essentially rewrite W.Va. Code § 61-11-23(b) in such a manner as to render it retroactive when the clear language of the statute and W.Va. Code does not provide for retroactive application. Accordingly, I dissent from the majority's holding as to the question of retroactivity and would affirm the circuit court's well-reasoned determination that W.Va. Code § 61-11-23(b) is to be applied prospectively only.

In order for the Court to look beyond the statute's clear language and seek to interpret legislative intent, the rules of statutory construction require that the statute must be vague and ambiguous. "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."); Syllabus Point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous

and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").

Moreover, the Legislature has clearly, by statute, stated its enactments are not retroactive, unless they specifically provide for retroactivity. "A statute is presumed to be prospective in its operation unless expressly made retrospective." W.Va. Code § 2-2-10(bb) (1988). Recognizing that, this Court has held, "[t]he presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." Syllabus Point 4, *Taylor v. State Comp. Comm'r*, 140 W. Va. 572, 86 S.E.2d 114 (1955).

The majority admits that the plain meaning of the statute provides no "clear, strong and imperative words" that would render it retroactive. Instead, the majority has substituted its own judgement for that of the Legislature and decreed that, "by necessary implication," the Legislature intended to make the statute retroactive. However, there is simply nothing within the text of the statute or any evidence adduced from the record that would support such an "implication." Indeed, the opposite is true. The only reference to the question of retroactivity within the statute is contained within the language of subsection (d) of the statute which states:

> The provisions of this subsection are only applicable to *sentencing proceedings* for convictions rendered after the effective date of this section and do not constitute sufficient grounds for the *reconsideration of sentences* imposed as the result of convictions rendered after the effective date of this section.

W.Va. Code § 61-11-23(d)(2) (2014) (emphasis added). The provisions of subsection (d) that the Legislature unequivocally stated were not to be applied retroactively provide for comprehensive mental health evaluations that a circuit court "shall consider" "prior to the imposition of sentence." W.Va. Code § 61-11-23(d)(1) (2014).

The other provisions of W.Va. Code § 61-11-23, contained in subsections (a), (b), and (c), relate to prohibiting the imposition of a life sentence without parole for juveniles transferred to adult status, the time periods in which such persons can be considered for parole, and the factors which should be considered at sentencing of such persons.[1] However, subsection (d) creates an entirely new requirement that, prior to sentencing of a juvenile who has been transferred to adult status, such person must have a "comprehensive mental health evaluation conducted by an [sic] mental health professional licensed to treat adolescents in the State of West Virginia." W.Va. Code § 61-11-23(d)(1) (2014). It was entirely logical for the Legislature to clarify that such reports are only

[1] West Virginia Code § 61-11-23(a) prohibits the imposition of a life sentence without the possibility of parole if the offender was convicted of an offense punishable by life imprisonment and was less than 18 years of age at the time of the offense. West Virginia Code § 61-11-23(b) contains the parole provisions for juveniles transferred to adult status that are in contention in this matter. These provisions provide for parole eligibility after such juvenile has served fifteen years, regardless of what crime they committed, or how many crimes they committed. *See* W.Va. Code § 61-11-23(b) (2014). West Virginia Code § 61-11-23(c) establishes additional findings a circuit court must make in sentencing a juvenile transferred to adult status. *See* W.Va. Code § 61-11-23(c) (2014). Finally, West Virginia Code § 62-12-13b delineates the factors that the Parole Board must consider when a juvenile who has been transferred to adult status and is serving a sentence becomes parole eligible. *See* W.Va. Code § 62-12-13b (2014).

required for sentencings that take place after the effective date of the statute and that the requirement of such a *newly required* report was not intended to be used as a basis for reconsideration of previously imposed sentences. Such provision in no way gives rise to the implication that the other provisions of W.Va. Code § 61-11-23 were to be applied retroactively.

Contrary to the majority's holding, the only natural "implication" was that the Legislature relied upon West Virginia Code § 2-2-10(bb) (1988) which provides that a statute it adopts "is presumed to be prospective in its operation unless expressly made retrospective." The impact of the majority's decision is that the Legislature, despite the clear statutory presumption that its statutes are prospective unless it expressly holds otherwise, cannot rely on such presumption if the court wishes to read into the statute some contrary "implication." The majority's holding sets a dangerous and warranted precedent and in effect renders West Virginia Code § 2-2-10(bb) meaningless. "It is always presumed that the legislature will not enact a meaningless or useless statute." Syllabus Point 4, *State ex rel. Hardesty v. Aracoma – Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.*, 147 W. Va. 645, 129 S.E.2d 921 (1963).

By its holding, the majority has usurped the authority of the Legislature and has rewritten the clear language of West Virginia Code § 2-2-10(bb), in contradiction of this Court's holding that:

> This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts,

> establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions*.

Syllabus Point 2, *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009). By doing so, the majority has far exceeded its authority:

> It is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.

Syllabus Point 11, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013).

The majority further bases its finding that there was a necessary implication that the Legislature intended West Virginia Code § 61-11-23(b) to apply retroactively on the general discussion that juveniles should be treated differently than adults that was contained in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012).[2] These cases may, in

[2] While the cases cited by the majority may support the premise that juveniles should be treated differently than adults due to their immaturity, such a position must be tempered by the facts of the current case and the risks involved with such immaturity. The record reflects that at the petitioner's sentencing in the present case, the circuit court found, *inter alia*, that based on the evaluation prepared in aid of sentencing:

> "[Petitioner Christopher J.] presents as an immature, impulse-driven, young man lacking empathy and concern for the emotional experiences of others. A person with poor impulse control issues and a lack of forethought would have an even more difficult time avoiding acting out on such a stimulus than other adolescents. They find it is likely that [Petitioner Christopher J.] saw an opportunity in young children [Petitioner Christopher

fact, support the premise that juveniles are different than adults, and such premise may, in turn, support the *passage* of the statutes at issue in this case. Indeed, the record indicates that passage of the statute was, to some degree, a reaction to the holding in *Miller*. Nonetheless, it is a great leap from that premise to the majority's holding that such cases give rise to the "natural implication" that the Legislature intended the statute to apply retroactively. Clearly, the Legislature was aware of the holding in *Miller* and, had it believed such holding called for the retroactive application of the statute, it certainly could have included language enacting the statute to apply retroactively. It did not.

More perplexing is the majority's reliance on language contained in the introduced version of the statute – language that was *not included* in the version of the bill that was adopted by the Legislature. The majority, in support of its holding that the statute

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> J.] baby-sat to meet [Petitioner Christopher J.'s] need for power and control in [Petitioner Christopher J.'s] life. It says in his life. And at the same time meet sexual gratification to a lesser degree. It is unclear at this time whether [Petitioner Christopher J.] is a good candidate for sexual offender treatment as he does not yet accept responsibility for his actions. He has an elevated sense of self and has those antisocial personality characteristics which make him likely to avoid responsibility and blame others.
>
> In the report they felt that it would take at least 25 years of supervision in the penitentiary setting to see whether or not there was an impact of rehabilitation. In essence, they found that because of the nature of the actions, the age of the victims [Petitioner Christopher J.] may never be able to control those impulses and, therefore, remain a risk that – and this is my side of it – would only increase to get – increasingly get more dangerous because as [Petitioner Christopher J.] get[s] older [his] ability to manipulate young people, find [Petitioner Christopher J.] in a position to take advantage of them would increase also so my finding is that [Petitioner Christopher J.'s] antisocial character traits are such that [Petitioner Christopher J. is] an extreme risk to young people and that's why I'm imposing the maximum sentence that can be imposed."

should be applied retroactively, quotes extensive findings related to the treatment of juveniles that were included in the original version of House Bill 4210 as introduced during the 2014 Legislative Session. However, as the majority recognizes in a footnote, these findings were removed from the bill before it was enacted by the Legislature. The fact that the Legislature affirmatively acted to remove the quoted findings during the Legislative process, between the introduction of the bill and its passage, is a clear indication that such findings *were not* reflective of the Legislature's intent. The majority relies on such unadopted findings in an attempt to provide some shred of evidence within the record supporting its finding of a "necessary implication" to overcome the statutory presumption against retroactivity. Such evidence, however, simply does not exist.

Clearly, the statute itself does not contain "clear, strong and imperative words" that the Legislature intended it to apply retroactively, and the record does not support the majority's finding of a "necessary implication" that "the Legislature intended to give the statute retroactive force and effect." Syllabus Point 4, *Taylor v. State Comp. Comm'r*, 140 W. Va. 572, 86 S.E.2d 114 (1955). Therefore, the majority's holding that the statute should be applied retroactively is inconsistent with black letter law, as set forth in W. Va. Code § 2-2-10(bb) (1988), that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective" and is an impermissible encroachment upon the Legislature's authority. Accordingly, I respectfully dissent from the majority's opinion insofar as it provides that West Virginia Code § 61-11-23(b) is to be applied

retroactively to juveniles sentenced as adults before the statute's effective date of June 6, 2014.

I am authorized to state that Justice Jenkins joins in this separate opinion.