

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 19-0142
(Circuit Court No.: 18-F-241)
(Harrison County, West Virginia)

MARK A. WILSON, JR.

Petitioner.

MAY 22 2019

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. The trial court erred by refusing to instruct the jury on fleeing in a vehicle as a lesser included offense because it is impossible to flee in a vehicle with reckless indifference without first fleeing in a vehicle.
- II. The trial court's flight instruction was an abuse of discretion in this case because there was no flight after the charged crime. Petitioner committed one act of flight that began on the interstate and ended when he escaped on foot.

STATEMENT OF THE CASE

The trial court sentenced Petitioner to a term of not less than 1 nor more than 5 years after a jury convicted him of fleeing with reckless indifference. The trial court's giving of a flight instruction, and refusal to instruct on a lesser included offense impeded the fact finding mission of the jury and warrants a new trial.

- a. **Trooper Jones, the only witness, testified that Petitioner led him on a high speed chase that ended when Petitioner abandoned his vehicle and escaped on foot.¹**

On October 8, 2017, Trooper Jones was traveling on interstate and spotted Petitioner driving a multicolored pickup truck with a DOH license plate. A. R. 119. As Trooper Jones passed Petitioner's vehicle, he noticed the driver pull the hood of his sweatshirt over his head. *Id.* Because the plates did not look like they belonged on the truck, Trooper Jones got behind the Petitioner and "ran the plates through dispatch." *Id.* Dispatch found no record of the plates, and Trooper Jones activated his lights to stop the truck. *Id.*

Petitioner exited the interstate, turned at a stop sign, and accelerated. *Id.* Trooper Jones activated his lights, sirens, and dash camera to give chase. *Id.* During the pursuit, Petitioner

¹ Most of the pursuit was captured on Trooper Jones's dashcam and was introduced into evidence. The appendix includes a copy of the video on page 351.

drove up to 30 m.p.h. over the speed limit. A. R. 121-23. Trooper Jones testified that Petitioner drove left of center on multiple occasions, almost caused a head on collision, did not stop at stop signs, and drove through a yard. A. R. 122. Petitioner eventually took the pursuit off road by ramming and driving through fences and gates. A. R. 123-24. At this point, multiple police officers had joined the chase. A. R. 129. When Petitioner was unable to ram through a gate, Trooper Jones and several other officers exited their vehicles to apprehend him. A. R. 133, 351. When Petitioner broke through the gate, Trooper Jones returned to his vehicle, but he briefly lost sight of Petitioner. By the time Trooper Jones caught up to the vehicle, Petitioner had abandoned it in a field and escaped on foot. A. R. 124, 351. Trooper Jones found Petitioner's wallet, identification card, and mail near the truck. A. R. 130-32. According to the VIN number, Petitioner registered the truck. A. R. 134.

Several days later, Petitioner, a registered sex offender, reported to the State Police Detachment in Fairmont to remove his truck from the sex offender registry. A. R. 134. The Trooper who updated Petitioner's sex offender registry recognized the truck as the same vehicle involved in the pursuit and contacted Trooper Jones. *Id.* Trooper Jones traveled to the Fairmont Detachment and attempted to interview Petitioner. A. R. 135. Petitioner declined the interview but made incriminating statements. *Id.* He asked whether his father could pay for the damage to make everything go away, and he informed Trooper Jones that "the plate was not stolen" but found on a vehicle behind his father's house. A. R. 136. Trooper Jones also observed that Petitioner had a black eye and was "covered from head to toe, hands, face and everything with scratches and scrapes as though he just ran through the woods or some briars." A. R. 137.

During the September 2018 term of court, Petitioner was charged by indictment with Fleeing in a Vehicle with Reckless Indifference to the Safety of Others, Felony Destruction of

Property, and Misdemeanor Destruction of Property. A. R. 207-09. Prior to trial, the circuit court held Petitioner's statements were voluntary and dismissed both destruction of property charges without prejudice. A. R. 45, 60.

b. Petitioner's theory of defense admitted flight but disputed that it was with reckless indifference.

During opening statements, Petitioner disputed the element of "reckless indifference to the safety of others." He asked the jury to focus on his actions during the chase that did not put others at risk or only put him at risk. For example, using his turn signal, slowing down for oncoming traffic, and leaving main roads in favor of less traveled back roads. A. R. 113.

Petitioner's cross examination of Trooper Jones, the only witness, continued to dispute the "reckless indifference to the safety of others" element. Petitioner argued that the chase presented minimal danger because of the light traffic. A. R. 138. Petitioner never tried to ram any vehicles or police cruisers. A. R. 138-40. Petitioner argued that he slowed down and pulled off to the side of the road because a truck was coming the other way. A. R. 139. He elicited testimony that the police call off vehicle pursuits if there is imminent danger to the officer or public. A. R. 141. He disputed that there was almost a head on collision with a street sweeper because it did not swerve. A. R. 142. Finally, the damage to Petitioner's truck from driving through fences was evidence that he got off main roads and away from the public. A. R. 143.

During closing arguments, Petitioner conceded flight in a vehicle but disputed the "with reckless indifference to the safety of others" element. Petitioner's first statement during closing argument was "[a]gain, it appears that [the State] and I disagree as to what reckless indifference means." A. R. 163. Petitioner then proceeded to argue that while his driving may have been reckless, the evidence showed it was not with indifference to the safety of others. A. R. 163-64. Petitioner reiterated this argument in his motion for judgment of acquittal. A. R. 184-86.

c. Petitioner objected to the flight instruction because the indictment charged fleeing.

While arguing jury instructions prior to closing arguments, the State offered a flight instruction:

The Court instructs the jury that evidence of flight by the defendant is competent, along with other facts and circumstances on the defendant's guilt, but the jury should consider such evidence of flight with caution since such evidence has only a slight tendency to prove guilt.

The jury is further instructed that the farther away the flight is from the time of the alleged commission of the offense the less weight it will be entitled to, and the circumstances should be cautiously considered since flight may be attributed to a number of reasons other than the consciousness of guilt.

A. R. 158-59. The State argued that the instruction was proper because Petitioner left the scene of the crime when he abandoned his truck and fled. Petitioner objected, and argued the instruction was unnecessary because the indictment charged Petitioner with fleeing. A. R. 147-48. The Petitioner further argued against the instruction because there was no notice of the State's intent to use evidence of flight after the fact and, because there was no pretrial hearing regarding the flight evidence. Ultimately, the State moved to withdraw the instruction. The trial court stated that there was no hearing because neither party requested one, denied the State's motion to withdraw the instruction, and ruled that the instruction would be given. *Id.*

d. The trial court denied Petitioner's motion to instruct the jury on fleeing in a vehicle as a lesser included offense.

After ruling on the flight instruction, the trial court asked whether there was a lesser included offense. A. R. 148. The State argued that the evidence presented did not warrant a lesser included. A. R. 148-49. Petitioner responded that it "would be a regular fleeing without reckless indifference to others." A. R. 149. The trial court ruled for the State and held that there was no factual basis for the lesser included offense. *Id.*

SUMMARY OF ARGUMENT

The State charged Petitioner with fleeing in a vehicle with reckless indifference. Yet, the trial court denied Petitioner's motion for the lesser included offense of fleeing in a vehicle because there was "no factual basis" for it. *Id.* The law regarding lesser included offenses is well settled. It is reversible error for a trial court to not instruct a jury on a lesser included offense if the offense is included in the greater offense, there is evidence to establish the lesser offense, and there is an evidentiary dispute regarding an element unique to the greater offense. *State v. Davis*, 205 W. Va. 569, 573, 519 S.E.2d 852, 856 (1999) citing Syl. Pt. 1, *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65 (1985); Syl. Pt. 2, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982). As a matter of law, fleeing in a vehicle is a lesser included of fleeing with reckless indifference by virtue of its elements. It is impossible to commit the crime of fleeing with reckless indifference without also committing the crime of fleeing in a vehicle. Trooper Jones's testimony, and Petitioner's defense strategy to admit fleeing in a vehicle proved the factual basis for the lesser offense. The evidentiary dispute regarding an element of the greater offense was demonstrated in Petitioner's defense which exclusively attacked the reckless indifference element not contained in the lesser offense.

The trial court also gave a flight instruction because Petitioner escaped on foot after abandoning his vehicle. The instruction correctly stated the law: flight after the commission of a crime is evidence of consciousness of guilt. However, it was error to give the instruction in this case. When Petitioner abandoned his vehicle and escaped, he was not committing a separate act of fleeing that showed a consciousness of guilt. His flight was one continuous attempt to avoid capture that began in his vehicle and ended when he escaped. By giving the jury a flight instruction, the trial court told the jury it could find Petitioner guilty of fleeing with reckless

indifference because he fled after abandoning his vehicle. A latter stage of flight is not evidence of guilt for an earlier stage of the same flight.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 19 argument and signed opinion as the law regarding lesser included offenses, and flight instructions is well settled; however, this Court has not ruled whether a flight instruction is proper when the charged crime contains an element of fleeing.

ARGUMENT

I. The trial court committed reversible error when it denied Petitioner's motion for a jury instruction on the lesser included offense of fleeing in a vehicle.

A trial court must instruct the jury on a lesser included offense if a two prong test is met. First, is "the lesser offense . . . by virtue of its legal elements or definition included in the greater offense." *State v. Davis*, 205 W. Va. 569, 573, 519 S.E.2d 852, 856 (1999) citing Syl. Pt. 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985). Second, is there "evidence which would tend to prove such lesser included offense." *Id.* Additionally, there must be an "evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense . . ." Syl. Pt. 2, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982). The Supreme Court of the United States explained that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *State v. Neider*, 170 W. Va. 662, 665, 295 S.E.2d 902, 905 (1982) citing *Sansone v. United States*, 380 U.S. 343, 350 (1965).

The trial court denied the lesser included offense because it lacked a factual basis. A. R. 149. The crimes listed in the obstruction statute, including fleeing and fleeing with reckless indifference, share a common core element: fleeing. The greater offenses build on that core element by adding aggravating facts/elements. A vehicle is added to fleeing, reckless

indifference is added to fleeing in a vehicle, etc. The facts and elements are inextricably intertwined and the greater offense cannot be committed without first committing the lesser offense. A factual basis for the greater offense presupposes the lesser included offense. Thus, the trial court's finding of insufficient facts ruled on the elements as well as the facts. Whether a lesser offense instruction is warranted by virtue of its elements is a question of law that this Court reviews *de novo*, questions of fact are reviewed for clear error. *See* Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

a. Fleeing in a vehicle is a lesser included of fleeing with reckless indifference by virtue of its elements.

As a matter of law, fleeing in a vehicle is by its definition and elements a lesser included of fleeing in a vehicle with reckless indifference as “[i]t is impossible to commit the greater offense without first having committed the lesser offense.” Syl. Pt. 1, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982) citing Syl. Pt. 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981). Fleeing in a vehicle does not include any elements not found in fleeing with reckless indifference. *W. Va. Code* § 61-5-17(e); *W. Va. Code* § 61-5-17(f). On the other hand, fleeing with reckless indifference includes every element of fleeing in a vehicle. *Id.* The only difference between the two offenses is that the greater offense includes the element of “operat[ing] the vehicle in a manner showing a reckless indifference to the safety of others . . .” *Id.* Thus, as a matter of law, fleeing in a vehicle is a lesser included of fleeing with reckless indifference. Given the nature of the elements, the trial court’s finding of a factual basis for the greater offense necessarily includes a factual basis for the lesser offense.

b. The trial court's finding of an insufficient factual basis for a lesser included offense is clearly erroneous.

Despite the intertwinement of elements and facts, the trial court held that there was no factual basis for fleeing in a vehicle as a lesser included offense. A. R. 149. This holding presents clear error and requires reversal of Petitioner's conviction. The factual basis to prove the lesser offense was established during the trial. The pursuit was caught on video, Petitioner's identification card and mail were found near the abandoned truck, the truck was registered in Petitioner's name, Petitioner made incriminating statements, and most importantly, Petitioner's defense admitted fleeing but disputed "with reckless indifference." A. R. 130-36, 351. This is sufficient evidence to establish the lesser offense and it was clear error to rule otherwise.

A factual basis for a lesser offense is not missing if the State presents a strong case for the greater offense. It is missing, for example, when the defense requests a larceny instruction, but the facts only show that the defendant robbed a victim at knife point. *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982). It is also missing if a defendant requests an instruction on involuntary manslaughter as a lesser included offense of first degree murder when the defense during trial was innocence. *State v. Davis*, 205 W. Va. 569, 519 S.E.2d 852 (1999). Petitioner did not argue identity or alibi. Therefore, there was "evidence which would tend to prove such lesser included offense." *State v. Davis*, 205 W. Va. 569, 573, 519 S.E.2d 852, 856 (1999) citing Syl. Pt. 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Finally, Petitioner's defense established an evidentiary dispute of the "reckless indifference to the safety of others" element. To the extent the trial court ruled otherwise, the ruling is clear error. During Petitioner's opening statement, cross examination of Trooper Jones, motion for judgment of acquittal, closing argument, and renewed motion for judgment of

acquittal, he admitted to fleeing in a vehicle but disputed that the fleeing was with reckless indifference to the safety of others. A. R. 113, 138-43, 146, 163-64, 184-86.

- II. Petitioner's flight was a single act that began in his vehicle and ended after he escaped on foot. The trial court's flight instruction erroneously told the jury it could consider the latter stages of Petitioner's flight as consciousness of guilt for the beginning stages of his flight. This Court should hold that it constitutes error to give a flight instruction if the charged offense contains an element of fleeing.**

The trial court gave a flight instruction because Petitioner abandoned his vehicle during the pursuit and escaped on foot. A. R. 147. As early as 1888, and as recently as March 2019, this Court recognized that evidence of flight *after* the commission of a *different* crime is admissible as consciousness of guilt. *State v. Koontz*, 31 W. Va. 127, 5 S.E. 328, 329 (1888); *State v. Chester*, No. 18-0140, 2019 WL 1224684, at *2 (W. Va. Mar. 15, 2019) (memorandum decision). In other words, "flight is an admission by conduct." 2 McCormick On Evid. § 263 (7th ed.). The instruction given by the trial court mirrored the language approved in *State v. Payne*. *State v. Payne*, 167 W. Va. 252, 267-68, 280 S.E.2d 72, 81 (1981). However, it was an abuse of discretion to give the instruction in this case. Petitioner's flight was a single event. The instruction that a latter stage of Petitioner's flight was evidence of guilt for an earlier stage of the same flight confused the jury and commented on the weight of the evidence. Even if Petitioner's flight on foot warranted a flight instruction, the trial court committed error by not delineating the different instances of fleeing in its instruction.

- a. When Petitioner abandoned his vehicle and escaped on foot it was a continuation of his flight that started on the interstate. A court cannot divide a police chase into distinct stages and instruct a jury to use a latter stage as evidence of guilt for an earlier stage.**

The cases regarding flight instructions show clear distinctions between the charged criminal conduct and the flight. The charged conduct occurs first, it is factually distinct from the flight, and it is the motivation for the flight. The flight necessarily occurs after the commission of the charged conduct, constitutes a separate act, and is motivated by the charged conduct. For example, this Court has held flight admissible as evidence of guilt after the commission of

murder, forgery, robbery, malicious wounding, sexual assault, and aiding and abetting first degree murder.²

In contrast, Petitioner's flight was a single criminal episode that started in a vehicle and ended after he escaped on foot. Petitioner's escape after abandoning the truck was not an independent and separate action from his flight in the truck. He was not fleeing from the scene of his "flight crime." The "flight crime scene" moved with Petitioner and did not end when he changed his means of flight from vehicular to pedestrian. Nor did the fact that the police temporarily lost sight of Petitioner's vehicle break the chain of flight. *See* A. R. 351. The police continued their pursuit and Petitioner continued his flight. Additionally, Petitioner's motive did not change during the entire flight. He was singularly concerned with avoiding capture from the time Trooper Jones tried to stop him on the interstate until he successfully escaped after abandoning his truck.

The general rule is that courts cannot comment on evidence. *West Virginia Rules of Criminal Procedure*, Rule 30; Syl. Pt. 3, *State v. Spadafore*, 159 W. Va. 236, 220 S.E.2d 655 (1975); Syl. Pt. 2, *State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979). Flight instructions are an exception to this rule as they inherently comment on evidence of flight. *Fenelon v. State*, 594 So. 2d 292, 294 (Fla. 1992) (holding that a flight instruction "provides an exception to the rule that the judge should not invade the province of the jury by commenting on the evidence or indicating what inferences may be drawn from it."). However, because Petitioner's flight was one continuous act, the flight instruction was an abuse of discretion; it addressed an element of the offense as opposed to the offense in general. A court cannot comment on the evidence by "[singling] out for emphasis a part of the evidence tending to establish a particular fact." *Graves v. Commonwealth*, 65 Va. App. 702, 711, 780 S.E.2d 904, 908 (2016). The trial court's instruction told the jury that the latter stage of Petitioner's flight could be used as evidence of his

² *State v. Deskins*, 181 W. Va. 112, 380 S.E.2d 676 (1989) (per curiam); *State v. Mayle*, 136 W. Va. 936, 69 S.E.2d 212 (1952); *State v. Spence*, 182 W. Va. 472, 388 S.E.2d 498 (1989); *State v. Jennings*, 178 W. Va. 365, 359 S.E.2d 593 (1987) (per curiam); *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982); *State v. Harper*, 179 W. Va. 24, 365 S.E.2d 69 (1987).

guilty conscious regarding the earlier stage of his flight. In other words, the latter stage of Petitioner's flight was an admission by conduct of the earlier stage of the same flight. This is an impermissible comment on the evidence and the legal equivalent of a circular definition; a crime cannot prove itself.

According to the Oregon Appellate Court, “[w]hen the basis of a crime with which a person is charged is flight . . . the prejudice of the trial court's pointing out evidence of flight is obvious.” *State v. Girard*, 34 Or. App. 85, 89–90, 578 P.2d 415, 417–18 (1978). *See also Graves v. Commonwealth*, 65 Va. App. 702, 711, 780 S.E.2d 904, 908 (2016) (holding flight instruction was abuse of discretion when underlying charge is fleeing from law enforcement). Based on this obvious prejudice, the *Girard* court held that a flight instruction was reversible error when the charged conduct was escape. *Id.* This Court should do the same. The instruction commented on the evidence, confused the jury, and prejudiced the petitioner.

b. Even if the trial court can divide Petitioner's single episode of flight into separate stages, the trial court's failure to delineate those stages in its instruction constitutes reversible error.

In a typical case, there is no need to inform the jury which instance of flight the flight instruction references; flight always begins after the commission of the charged crime and is factually unique. The typically clear distinction between the charged crime and the fleeing is absent in this case. Even if it was proper to instruct the jury that Petitioner's flight on foot evidenced consciousness of guilt for his flight in a vehicle, the trial court had a duty to explicitly delineate the two instances of flight in its instruction. However, the trial court did not instruct the jury to consider the foot flight as evidence of guilt for the vehicle flight. Instead, the trial court instructed the jury on the elements of fleeing in a vehicle with reckless indifference, and almost immediately thereafter, instructed the jury that evidence of flight has a “slight tendency to prove guilt.” Petitioner's single episode of flight, that the trial court did not delineate for the jury, cannot constitute both the charged crime, and an admission of the charged crime by conduct.

The flight instruction's failure to delineate which stage of Petitioner's flight can be used as evidence of a guilty conscious renders it an impermissible comment on the evidence. Petitioner's flight cannot prove he is guilty of fleeing.

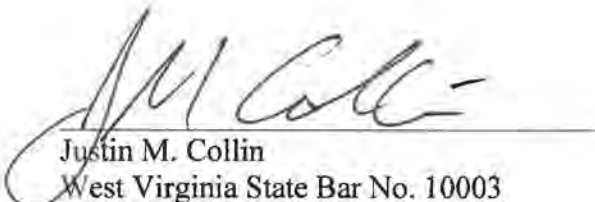
CONCLUSION

The trial court committed reversible error in two instances. It did not instruct the jury on a lesser included offense, and it gave a flight instruction when there was no evidence of flight independent of the charged crime. This Court should reverse Petitioner's conviction and grant him a new trial.

Respectfully submitted,

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