IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

STATE OF WEST VIRGINIA **RESPONDENT**

vs **CASE No. 19-1046**

RONALD WARD **PETITIONER**

CASE NUMBERS BELOW
19-F-8 AND 19-F-37
CIRCUIT COURT OFSUMMERS COUNTY

BRIEF OF PETITIONER

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STATEMENT OF FACTS

Petitioner Ronald Ward was driving on State Route 20 near Talcott, Summers County, West Virginia on November 26, 2018, when he was stopped by Deputy J.C. Wheeler. The deputy recognized Petitioner from a prior contact and knew that Petitioner's driver's license was revoked for driving under the influence. During the traffic stop Dep. Wheeler noted that the truck being operated by Petitioner did not have mandatory insurance, correct registration or valid MVI sticker; however, it did contain a firearm and small amount of what the deputy believed to be methamphetamine, a controlled substance. When the deputy discovered that Petitioner also had a 2006 felony conviction from Clinton County, Indiana, Petitioner was charged with a violation of West Virginia Code 61-7-7(b), "Felon in Possession of a Firearm". Ultimately the jury believed that the firearm was in the possession of Petitioner and he was convicted.

The 2006 conviction was used as a predicate felony offense in the indictment herein was for a violation of Indiana Code Section IC 35-48-4-6.1 which states, in part:

> Sec.6.19(a) A person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesses methamphetamine (pure or adulterated) commits possession of methamphetamine, a Class D felony, except as provided in subsection (b). (App.19)

West Virginia also has a code section outlawing the simple possession of methamphetamine and it is 60A-4-401(c). That describes the simple possession of methamphetamine as a misdemeanor punishable by no more than 180 days in jail and fine.

PROCEDURIAL HISTORY AND ISSUE FOR APPEAL

Petitioner Ward was indicted by the March 2019 term of the Summers County Grand Jury and charged with a felony violation of West Virginia Code 61-7-7: Felon in Possession of a Firearm. (App. 12-14) Other counts in the indictment were for misdemeanor driving offenses and misdemeanor possession of a controlled substance. The misdemeanor charges are not the subject of the appeal herein. The driving charges resulted in convictions; however, those matters have been resolved by a "time served" sentence and the convictions were not affected by any error. (App. 2-4) The misdemeanor charge of possession of a controlled substance was dismissed by the trial court at the conclusion of the State's case.

The Felon in Possession of a Firearm charge was the subject of Petitioner's "Motion to Strike Count 1 of the Indictment" filed on May 12, 2019 (App. 20-22). In that motion and the hearing of that motion, Petitioner argued that the first count of the indictment was defective for 2 reasons:

1) Inartful drafting rendered the charge so vague as to fail to advise Petitioner of the nature and degree of the charges; and
2) Use of the predicate felony conviction from the State of Indiana was improper as the out of State conviction would not have considered a felony und er West Virginia law.

The State did not make a written response to the above described motion. After hearing the trial court took the motion under the advisement then issued an opinion on June 7th in

which Petitioner's "Motion to Strike Count 1 of the Indictment" was granted on the first ground which alleged defective drafting. The trial court's written opinion did not mention or resolve the second issue as to determining the grade of the offense for purposes of charging "Felon in Possession of a Firearm". (App. 23-25)

The State thereafter represented the charge" Felon in Possession of a Firearm" in violation of West Virginia Code 61-7-7(b) to the July Term of the Grand Jury, which returned a one count indictment to that charge. That case was designated 19-F-37. (App. 15)

Still seeking a ruling on the use of the prior Indiana conviction as the predicate offense, Petitioner filed a motion with short memorandum of law entitled "Motion to Dismiss". (App. 26-28). The State did not a response to this second motion. The motion was argued on July 27, 2019, after which the trial court took the motion under advisement. The lower court's "Order Denying Motion to Dismiss" was issued on October 2, 2019 and rested on statutory construction: holding that the word "shall" in the statute meant "shall" and that it need not look any further. (App. 29-32).

Indictment Nos. 19-F-8, containing the misdemeanor charges unaffected by the first dismissal motion and order, and 19-F-37 were consolidated for trial which was had on October 11, 2019. The jury returned guilty verdicts on all charges deliberated by them. Petitioner filed a

"Motion for Judgement of Acquittal" based on prior arguments he made prior to and during trial regarding the use of the Indiana conviction being deemed a felony for purposes of the "Felon in Possession of a Firearm".

Prior to sentencing and in a timely manner, the State filed an Information charging him with a second offense enhancement under the Habitual Offender Act, West Virginia Code 61-11-18 and 19. (App. 16-18). After time to consult with counsel, Petitioner admitted that he was the same person previously convicted in Summers County case 13-F-22. That case used as the predicate offense to designate Petitioner a second time offender was a conviction for attempt to commit a felony. That attempt conviction was pleaded down from a 2013 charge of "Felon in Possession of a Firearm" based on the very same 2006 Indiana conviction now at issue before this Honorable Court.

At the November 1, 2019 hearing the trial court denied Petitioner's "Motion for Acquittal" and Petitioner was sentenced to a determinate sentence of 5 years, which sentence was enhanced under the Habitual Offender Act with another 5-year sentence to constitute a 10-year determine sentence. The misdemeanor traffic convictions were also sentenced that day to time served meaning that Petitioner's 10-year flat prison term began on November 1st (App. 2-4).

It is from the trial court's denial of two motions to dismiss the gun charge and the Motion for Judgement of Acquittal that Petitioner now appeals.

ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS TO DISMISS BASED ON THE STATE'S USE OF THE INDIANA CONVICTION AS A PREDICATE OFFENSE VOIDING PETITIONER'S RIGHT TO POSSESS A FIREARM

STANDARD OF REVIEW

The issue before the Court is entirely a matter of law and as such the standard of review is *de novo*. State v Brandon B., 624 S.E.2d 761 (W.Va. 2005)

ARGUEMENT OF LAW

The trial court erred by denying Petitioner's motions to dismiss based on the State's use of the Indiana conviction as a predicate offense voiding petition's right to possess a firearm. In 2006 Petitioner was convicted in the State of Indiana of the simple possession of methamphetamine. Had that conviction been in the West Virginia it would have been classified a misdemeanor violation of 60A-4-401(c). The question squarely before this Honorable Court is this: Is it the criminal conduct that matters or is it the label or grade affixed to the conduct?

Fortunately, it is a question that has been before the State Supreme Court on several occasions in several contexts and the answer to the question has consistently been that the law

looks to the conduct and that the West Virginia courts should use the offense grade—felony, juvenile or misdemeanor-- used in this State, rather than the label affixed by some foreign jurisdiction.

A. OUT OF STATE CONVICTIONS USED IN HABITUAL OFFENDER PROCEEDINGS

In the context of determining what out of State convictions can be used as an enhancement under the Habitual Offender Act, this Court has held that:

> Where a defendant has been convicted of a crime in another jurisdiction, which defendant in West Virginia would have been treated as a juvenile offender, such prior conviction may not be used in subsequent proceedings to enhance the defendant's sentence pursuant to the West Virginia Habitual Criminal Statute. W.Va.Code, 61-11-18, 19. Syllabus pt. 2. State ex rel. Justice v Hedrick, 350 S.E.2d 565 (W.Va. 1986).

The principal laid down in the Justice case applies in the instant case even though Petitioner was not a minor at the time of the Indiana conviction. The law is that an out of State felony conviction may not be used as an enhancement unless the underlying conduct would be a felony in our State. State ex rel. Butler v Hoke,No.11-0866, 2012WL 3091082 (W.Va. May 29, 2012):

> The Court has held that in occasions where jurisdictions do not classify crimes in the same manner "it would seem proper that laws of this State should be considered in determining the grade of the crime for which there have been former convictions. quoting Justice, Id at 568

In the present case the State used the out-of-State conviction for the grounds for Petitioner's disqualification to possess a firearm. However, if Petitioner had committed the same conduct in West Virginia he would not be so disqualified. It makes little sense to conclude that the Legislature's goal in passing W.Va. Code 61-7-7 was to place a different burden on persons convicted of a crime depending on which State the crime is committed. A more sensible reading of the relevant statutory scheme is that the Legislature means to keep prevent certain criminals from possessing a firearm regardless of where the criminal conduct occurred.

West Virginia is not alone in examining the conduct leading to an out of State conviction to determine the grade—felony or misdemeanor—of the offense in State. At least several States have this proper for purposes of enhancing the penalty under a habitual offender scheme:

Alabama Criminal Court of Appeals stated that . . .

> "[T]his Court placed emphasis on the 'conduct' made the basis of the prior conviction, rather than where it occurred, or when it occurred This Court, therefore, made the triggering mechanism not whether another jurisdiction might have punished the prior offense by imprisonment for more than one year, but whether Alabama considered the prior 'conduct' so blameworthy as to merit more than one year's imprisonment."
>
> Mitchell v. State, 579 So.2d 45 (Al. 1991)

Louisiana and South Dakota hold likewise. See State v Godfrey, 32 So. 1020 (la. 2010);

and State v Roedder, 923 N.W.2d 537 (S.D.2019).

A person convicted in a foreign jurisdiction of simple possession of a controlled substance is in no way more dangerous than a person convicted of possession of the very same controlled substance in West Virginia. Accordingly, a person whose foreign conviction is labelled a felony should have the same gun rights in West Virginia as a person convicted of the same conduct but in our State.

B. OUT OF STATE CONVICTIONS USED IN OTHER TYPES OF ENHANCEMENTS

Out of State convictions are used for enhancement in at least two other types of cases in State courts: domestic violence and driving under the influence. Logically, and in accordance with the law set forth above, this Honorable Court has held that it is the conduct leading to conviction and not the labels applied by the foreign jurisdictions that matter.

In the area of domestic violence there are stepped penalties whereby subsequent offenses subject one to increasing penalties. W. Va. Code 61-2-28. On occasion the State desires to use an out of State conviction to enhance the penalty faced by the defendant. The State Supreme Court of Appeals had to determine the use and boundaries of out of State domestic violence convictions in State v Hulbert, 544 S.E.2d 919 (W.Va. 2001). In Hulbert the Court determined that foreign convictions could be used to enhance the grade or degree of punishment in domestic violence cases and the Court also determined which foreign

convictions could be used. Therein the Court adopted an elements test: the State could use the out of State convictions if the elements of the foreign conviction are the same as the elements in our State law. This looks to the conduct behind the out of State and if the same, then the prosecution could use it.

The same element test has also been used in driving under the influence cases and the elements test was adopt in that area. State ex rel. Conley v Hill, 487 S.E.2d 344 (W.Va. 1997). The lesson the areas of domestic violence and DUI is that courts should not accept the foreign conviction uncritically, but rather it should examine if the underlying conduct would be treated the same here. In the matter now before the Court the Indiana conviction should be examined and be the criminal conduct expressed in the conviction be given no additional weigh due to the geography of the criminal conduct.

RELIEF REQUESTED

Petitioner respectfully requests that this Honorable Court hear his appeal and reverse Petitioner's conviction and dismiss the criminal charges against Petitioner.

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CERTIFICATE OF SERVICE

I, Scott A. Ash, counsel for Petitioner, do hereby certify that I have made service of the foregoing "Petitioner's Brief" and Appendix by placing the same in a stamped envelope and mail the same by first class post to the following persons on the 20th day of February 2020:

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