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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-1046

STATE OF WEST VIRGINIA,

Respondent,

v.

RONALD WARD,

Petitioner.



RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA

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I. ASSIGNMENTS OF ERROR

Petitioner Ronald Ward ("Petitioner") argues a single assignment of error: that the trial court erred in denying Petitioner's motion to dismiss based on the State's use of an Indiana felony conviction as a predicate offense voiding Petitioner's right to possess a firearm.

II. STATEMENT OF THE CASE

This case arises from a traffic stop of Petitioner, wherein a Deputy pulled Petitioner over and, during the ensuing search of the car, found a gun. A.R. 26. A passenger in the vehicle indicated that the firearm belonged to Petitioner. A.R. 26.

Thereafter, Petitioner was indicted by a Summers County Grand Jury on March 5, 2019, on six counts: possession of a firearm by a prohibited person 2nd offense, based on his prior conviction of possession of methamphetamine; driving revoked for DUI 2nd offense, with the first offense being on April 13, 2011; driving a motor vehicle on a public highway with no insurance; improper registration; possession of a controlled substance, to-wit methamphetamine; and, driving suspended for DUI. A.R. 12-13.

Petitioner moved to strike Count 1 of the indictment, arguing that it was "so vague as to fail to clearly state a particular crime." A.R. 21. This motion was granted on June 7, 2019. A.R. 23. Although it is not clear from the appendix record, it appears the deficiencies in the indictment were fixed and Petitioner was indicted a second time on Count 1. A.R. 26.

Petitioner filed a motion to dismiss the subsequent indictment on July 27, 2019. A.R. 26. Petitioner argued that although his prior conviction was a Class D felony in Indiana, where he was convicted, the charge of possession of a controlled substance in West Virginia is not a felony, but instead is a misdemeanor. A.R. 26. Therefore, Petitioner argued that said conviction cannot be used to prohibit him from possessing a firearm pursuant to West Virginia Code § 61-7-7(b). A.R.

27. In support, Petitioner cites to law governing the use of out of state convictions under the Habitual Criminal Statute. A.R. 27-28.

A hearing was held on the motion to dismiss on August 23, 2019. A.R. 35. Petitioner argued that in the case of the Habitual Criminal, or recidivist, statute, the West Virginia Supreme Court of Appeals considers the grade of the offense in West Virginia and does not defer to the grade of the offense in the convicting state. A.R. 36. Petitioner argued that the “general principle” found in the West Virginia Supreme Court of Appeals recidivist cases should be applied herein to this statute. A.R. 37. In response, the State argued that none of the law cited by Petitioner is applicable to West Virginia Code § 61-7-7(b), as all the cited cases relate to the recidivist statute. A.R. 38. The State further argued that a plain reading of this statute shows its purpose: that anyone convicted of a felony in any jurisdiction is not allowed to possess a firearm. A.R. 39. The court took the issue under advisement, but did deny Petitioner’s contemporaneous bond request, as he was on bond when the criminal acts alleged herein occurred. A.R. 42-43.

The circuit court denied the motion to dismiss by Order dated October 2, 2019, holding that the purpose behind the unlawful possession of a firearm by a felon statute is different from that of the Habitual Criminal Statute, and, thus, the Petitioner’s reliance upon recidivist law was misplaced. A.R. 29-31. The court found that the purpose of the statute under which Petitioner was charged is to prohibit all convicted felons from possessing firearms and that the statutory construction makes clear that it applies to all convicted felons, no matter where the conviction occurred, regardless of whether similar conduct is considered a felony in West Virginia. A.R. 31-32.

Petitioner was convicted, following an October 8, 2019, trial by jury, of the felony offense of Possession of a Firearm by a Prohibited Person and the misdemeanor offenses of Driving

Revoked for DUI 2nd Offense and Driving Suspended. A.R. 2. On October 11, 2019, Petitioner appeared for arraignment on the State's Information seeking enhancement of Petitioner's sentence under the recidivist statute. A.R. 2. Petitioner waived his right to a jury trial and admitted he was the same person previously convicted of a felony offense of Attempted Possession of a Firearm by a Person Prohibited. A.R. 2. The court denied Petitioner's motion for probation or other alternative sentence, and denied the motion for post-conviction bond. A.R. 3. The court also denied Petitioner's motion for judgment of acquittal. A.R. 4. Petitioner was thereafter sentenced to ten years for his felony conviction of Possession of a Firearm by a Prohibited Person, which represented a determinate period of five years for the conviction and an additional five-year enhancement pursuant to West Virginia Code § 61-11-18. A.R. 4. Petitioner was sentenced to time served on the misdemeanor convictions of Driving Suspended and Driving Revoked for DUI 2nd offense. A.R. 4.

Petitioner's sentencing hearing was held on November 1, 2019. A.R. 46. Petitioner moved for judgment of acquittal based on the same argument in his motion to dismiss; namely, that the court cannot use a felony conviction from another jurisdiction that would be considered a misdemeanor offense in West Virginia. A.R. 48. Petitioner also moved for probation or an alternative sentence such as home confinement. A.R. 48. Petitioner argued that he has numerous health issues causing problems for him while incarcerated. A.R. 50. The court noted that Petitioner had numerous prior arrests. A.R. 50. The State argued that it moved for recidivist enhancement based on Petitioner's long history of arrests, including firearm possession charges, drug charges, DUIs, and a fugitive from justice warrant. A.R. 51. The State also noted that Petitioner incurred additional charges after the current ones, while he was on bond. A.R. 52. Those charges included additional charges for possession of methamphetamine as well as another firearms possession.

A.R. 52. Further, Petitioner had home confinement revoked after drug paraphernalia was found. A.R. 52. The State, therefore, asked for the maximum sentence. A.R. 53. The court sentenced Petitioner to five years of incarceration, which was then enhanced by the recidivist enhancement to ten years. A.R. 53. The Sentencing Order in this matter was filed on November 4, 2019. A.R. 2.

III. SUMMARY OF ARGUMENT

Petitioner argues for a re-interpretation of West Virginia Code § 61-7-7; however, as this code provision is plain and unambiguous, there is no reason to interpret it. The legislative intent behind West Virginia Code § 61-7-7 was clearly to keep convicted felons from possessing firearms, and the provision states specifically that a felony “in any jurisdiction” may be used as a predicate offense. Petitioner relies upon inapplicable interpretations of other code provisions, and, since there is no need to interpret West Virginia Code § 61-7-7, the circuit court’s plain language interpretation should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of Review.

“‘Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.’ Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)” Syl. Pt. 1, *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017).

B. Petitioner was properly found to be a felon convicted of a prior drug offense, making his conviction under West Virginia Code § 61-7-7(b)(2) proper.

Petitioner's single assignment of error is that the circuit court erred in denying Petitioner's motions to dismiss based on the State's use of the Indiana felony conviction as a predicate offense. Pet'r Br. 5. Petitioner argues that because possession of methamphetamine is a misdemeanor in West Virginia, the felony conviction in Indiana should not be a valid predicate offense sufficient to allow him to be convicted of being a prohibited person in possession of a firearm. Pet'r Br. 5-6.

Petitioner was convicted of violating the following provision:

(a) Except as provided in this section, no person shall possess a firearm, as such is defined in section two of this article, who:

(1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

Any person who violates the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$100 nor more than \$1,000 or confined in the county jail for not less than ninety days nor more than one year, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, any person:

(1) Who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another or of a felony sexual offense; or

(2) Who has been convicted in this state **or any other jurisdiction** of a felony controlled substance offense involving a Schedule I controlled substance other than marijuana, a Schedule II or a Schedule III controlled substance as such are defined in sections two hundred four, two hundred five and two hundred six, article two, chapter sixty-a of this code and who possesses a firearm as such is defined in section two of this article shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years or fined not more than \$5,000, or both. The provisions of subsection (f) of this section shall not apply to persons convicted of offenses referred to in this subsection or to persons convicted of a violation of this subsection.

W. Va. Code § 61-7-7 (emphasis added). Petitioner's predicate offense of possession of methamphetamine occurred in the state of Indiana, and he was convicted pursuant to Indiana Code 35-48-4-6.1, which makes possession of methamphetamine a Class D felony. Despite Petitioner's

contentions to the contrary, he was properly convicted of the felony charge of being a prohibited person in possession of a firearm, and the sentencing order herein should be affirmed.

- 1. This Court has found that the purpose of West Virginia Code § 61-7-7 is clear and that Petitioner is precisely the category of criminal the Legislature deemed too dangerous to possess a firearm.**

A review of this Court's findings regarding the legislative purpose behind West Virginia Code § 61-7-7 demonstrates that Petitioner is the type of person the West Virginia Legislature had in mind when enacting this code provision. This Court has stated that

[t]he West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the 'Right to Keep and Bear Arms Amendment.'

Syl. Pt. 2, *Perito v. Cty. of Brooke*, 215 W. Va. 178, 597 S.E.2d 311 (2004), quoting Syl. Pt. 4, *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988). Further, this Court has recognized that "[t]he right to bear arms is not absolute." *Perito*, 215 W. Va. at 182, 597 S.E.2d at 315. The *Perito* Court found that "[t]he obvious purpose of W. Va. Code § 61-7-7 is to guard the public safety." *Id.* at 183, 597 S.E.2d at 316. The legislature chose to guard the public safety by limiting the right of convicted felons, such as Petitioner, to own firearms. Consequently, "the Legislature is plainly within its authority to regulate the possession or ownership of firearms by individuals who have been convicted of a felony." *Id.* at 184, 597 S.E.2d at 317.

Likewise, the federal court has examined this code provision and determined that convicted felons may not possess firearms. See *United States v. Herron*, 38 F.3d 115, 118 (4th Cir. 1994) ("Based on the whole of West Virginia law, we conclude that § 61-7-7 'expressly provides' that a convicted felon may not possess a firearm."). As Petitioner is a convicted felon, the legislative

intent is obviously that he should not possess a firearm. Therefore, the sentencing order in this matter should be affirmed.

2. **Since the legislative intent and statutory language are clear, there is no reason for this Court to further interpret West Virginia Code § 61-7-7, and the circuit court was correct in simply applying the statute as written.**

It is axiomatic that “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. Pt. 4, *Perito*, 215 W. Va. 178, 597 S.E.2d 311, *quoting* Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959). In the present case, West Virginia Code § 61-7-7 is clear and unambiguous. This code provision demands that any person “[w]ho has been convicted in this state or **any other jurisdiction** of a felony controlled substance offense involving a Schedule I controlled substance other than marijuana, a Schedule II¹ or a Schedule III controlled substance” is guilty of a felony should he or she possess a firearm. W.Va. Code § 61-7-7 (emphasis added). There is no need for this Court to interpret the provision, because it is clear that the Legislature intended that anyone convicted of any felony in any jurisdiction be banned from possessing a firearm.

This Court has reiterated this meaning, stating as follows:

West Virginia Code § 61-7-7 (2000) (Repl.Vol.2000), which prohibits certain persons from possessing firearms and provides a procedure for restoring the ability to possess firearms, applies to all individuals who have been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. . . .

Syl. Pt. 6, *Perito*, 215 W. Va. 178, 597 S.E.2d 311. In *Perito*, this Court even affirmed the use of West Virginia Code § 61-7-7 after a felon was unconditionally pardoned for his prior felonies. *Id.*

¹ Methamphetamine is a Schedule II drug.

This Court found that the legislative intent showed that this provision applied to all those convicted of applicable felonies, even if those felonies were pardoned; thus, it stands to reason that the legislature also intended this provision apply to individuals convicted of felonies in other jurisdictions, since the code section specifically notes convictions in “any other jurisdiction.”

The *Perito* Court explored West Virginia Code § 61-7-7 in depth, eliciting the following discussion:

West Virginia Code Section 61-7-7(a) withholds the right to possess a firearm from any person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” This language is plain. In similarly plain language, W. Va. Code § 61-7-7(c) provides the procedure for restoring that right in spite of the existence of a conviction. There exists no additional clause excluding from the scope of this statute convictions that have been subject to a pardon. If the Legislature had desired to exclude from the provisions Section 61-7-7(c) those individuals whose convictions had been pardoned, it could easily have done so.

215 W. Va. at 183, 597 S.E.2d at 316. As noted above, had the legislature intended to limit the relevant code provision to only convictions that are felonies in West Virginia or to exclude felony convictions obtained outside of the state, it could easily have done so. Since it did not, this Court should find, again, that the language of West Virginia Code § 61-7-7 is plain and needs no further interpretation. Since this code provision is clear and unambiguous, and the plain language of the statute allows for conviction under this provision using an out-of-jurisdiction felony conviction as the predicate offense, the circuit court’s order should be affirmed.

3. The case law relied upon by Petitioner is inapplicable to West Virginia Code § 61-7-7, and this Court should not succumb to Petitioner’s proposed revisions of the statute.

Petitioner’s argument below, as well as his petition herein, is premised on Habitual Offender proceedings law promulgated by this Court as well as other courts. Pet’r Br. 6-7. However, the two cases cited are wholly inapplicable to West Virginia Code § 61-7-7. As the

circuit court noted, however, while both code provisions must be subjected to strict construction, West Virginia Code § 61-7-7 “shows a clear intent to enforce the plain statutory language – in this case, the prohibition of *all* convicted felons from possession [of] firearms.” A.R. 31-32 (emphasis in original).

Petitioner asks this Court to modify the statutory language of West Virginia Code § 61-7-7 from its clear provision that a felony “in any jurisdiction” is sufficient to convict under the statute, to Petitioner’s interpretation that a predicate felony must also be qualified as a felony under West Virginia law. This Court, however, has stated that “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Syl. Pt. 5, *Perito*, 215 W. Va. 178, 597 S.E.2d 311, *quoting* Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152, 386 S.E.2d 650 (1989). Furthermore, “[i]t 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.” Syl. Pt. 11, in part, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013).” Syl. Pt. 6, *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017). Interpreting the statute as Petitioner advocates would be akin to a complete revision of said statute, and would add language that does not appear in the statute. The plain meaning of the statute is clear, and any revisions or interpretations are unnecessary.

As this Court has repeatedly stated, “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). Syl. Pt. 2, *King v. West Virginia's Choice, Inc.*, 234 W.Va. 440, 766 S.E.2d 387 (2014).” Syl. Pt. 3, *Butler*, 239 W. Va. 168, 799 S.E.2d 718. Importantly, this Court has stated:

A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.

Syl. Pt. 4, *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) *citing* Syl. Pt. 1, *State ex rel. Holbert v. Robinson*, 134 W.Va. 524, 59 S.E.2d 884 (1950). Therefore, this Court should rely on the plain meaning of the statute in this matter, and a plain reading shows that the legislature intended felony convictions “in any jurisdiction” to be sufficient as predicate offenses under West Virginia Code § 61-7-7.

As noted above, Petitioner relies upon this Court’s interpretation of the West Virginia Habitual Criminal Statute, West Virginia Code § 61-11-18 and 19. Pet’r Br. 6. Likewise, Petitioner attempts to rely upon other statutory interpretations, such as domestic violence and driving under the influence case law. Pet’r Br. at 8-9. This case law, however, is inapplicable to West Virginia Code § 61-7-7. This Court has stated that “[s]tatutes relating to different subjects are not in *pari materia*.” Syl. Pt. 2, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) (citations omitted). Since Petitioner’s case law is inapplicable, and since the statute in question is not subject to judicial interpretation, this Court should affirm the findings of the circuit court.

VI. CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to affirm the circuit court’s sentencing order.

Respectfully Submitted,

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Respondent,

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CERTIFICATE OF SERVICE

I, Andrea Nease Proper, counsel for the State of West Virginia, do hereby certify that on the 30th day of April, 2020, I caused a true copy of the foregoing Response Brief be served on all parties by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each.

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