No. 33299 – *State of West Virginia v. Daniel B. Bingman*

**FILED**
**October 29, 2007**
**released at 3:00 p.m.**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

I respectfully dissent from the opinion of the majority of this Court. Indeed, as the majority recognizes, this Court's decision in *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000), specifically governs this case. However, in my judgment, *Boyd* is unabashedly wrong. Prior to *Boyd*, this Court had declared explicitly as follows:

> Where, in a criminal prosecution, a conviction for assault and battery is had under an indictment charging the defendant with the commission of a felony, under Code, 61-2-9, which indictment was not returned within one year after the offense charged in the indictment was committed, *the conviction is barred under Code, 61-11-9, and is void*. . . .

Syl. Pt. 6, in part, *State v. King*, 140 W.Va. 362, 84 S.E.2d 313 (1954) (emphasis supplied). The *King* precept remained steadfast and was applied in *State v. Leonard*, 209 W.Va. 98, 543 S.E.2d 655 (2000), a decision filed by this Court on the same day *Boyd* was filed. In *Leonard*, this Court stated: "Our decision in *King* joined an overwhelming majority of courts that hold a defendant cannot be convicted of a lesser offense upon a prosecution for a greater crime commenced after the statute has run on the lesser offense." 209 W.Va. at 101, 543 S.E.2d at 658.

Despite the *King* assertion that a conviction is void under the identified circumstances, the *Boyd* decision created an exception which permitted a conviction to stand where the defendant requested an instruction on the lesser-included offense. Specifically, syllabus point three of *Boyd* provides as follows: "When a defendant is not indicted within one year of the date on which an offense is committed but requests the circuit court to instruct the jury on a time-barred lesser included offense, the defendant *by that act* waives the statute of limitations defense contained in W.Va.Code § 61-11-9." (Emphasis supplied). The *Boyd* Court reasoned that "[t]o hold otherwise would allow defendants to sandbag trial judges by requesting and approving an instruction they know or should know would result in automatic reversal if given." 209 W.Va. at 94, 543 S.E.2d at 651.

There is merit to that argument regarding legal sandbagging to the extent that the decision to request consideration of a lesser included offense could have been utilized as a trial tactic, with a defendant essentially hedging his bets by seeking the benefit of conviction of a lesser included offense rather than a felony, with the secondary plan to attack the conviction on a statute of limitations claim should the jury take the bait. In that situation, as recognized by *Boyd*, a defendant would essentially be petitioning for consideration of the lesser included offense and thereafter seeking reversal based upon his own invitation. Therein lies the problem identified in *Boyd*. The failing in *Boyd* is not in its identification of the issue but rather in its resolution.

The underlying inconsistency between introducing the possibility of conviction on a lesser included offense and thereafter professing the illegality of the conviction under the statute of limitations has been recognized by a myriad of courts dealing with this situation. In *People v. Nunez,* 745 N.E.2d 639 (Ill. App. 2001), for instance, the court observed that "asking the trial court to consider a lesser included offense might generally be considered a trial tactic[.]" 745 N.E.2d at 646. However, "when that tactic includes a decision to waive the statute of limitations, the record should reflect that the defendant consulted with defense counsel about the decision to waive the statute of limitations and agreed to the waiver." *Id*.

> [W]hen the statute of limitations has expired on that lesser included offense, the trial court may find defendant guilty of that lesser included offense *only when the decision to submit the lesser included offense to the trial judge for consideration and thereby waive the statute of limitations is a product of the defendant's informed consent.* The right to waive the statute of limitations is the defendant's right.

*Id*. (emphasis supplied).

This same principle was acknowledged in *People v. Brocksmith,* 604 N.E.2d 1059 (Ill. App. 1992). "While the proffering of jury instructions might generally be considered a trial tactic, when that decision includes a decision whether to waive a statute of limitation, the defendant must be consulted." 604 N.E.2d at 1066. The *Brocksmith* court specified that "[t]he right to waive the statute belongs to the defendant and *should not be assumed from the action of counsel* in this situation." *Id*. (emphasis supplied). An additional

element in *Brocksmith* was the recognition that the act of waiving the protections of the statute of limitations "cannot be considered a sound trial tactic when defense counsel admittedly did not know that the period had expired. He cannot make a reasoned decision without knowing the facts. Nor can the defendant be deemed to have made a knowing waiver of the period." *Id*. The *Brocksmith* court concluded its analysis with the assertion that "[u]nder these facts, defendant was denied his constitutional right to effective assistance of counsel." *Id*.

In *Cowan v. Superior Court*, 926 P.2d 438 (Cal. 1996), the California court generated a comprehensive discussion of the intricacies inherent in this issue. The court initiated its analysis by examining the critical difference between waiver and forfeiture. "Over the years, cases have used the word loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably.'" 926 P.2d at 440. In the instance of the loss of the right to assert the statute of limitations, the correct principle was held to be waiver, rather than forfeiture.[1]

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[1]*See Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998) (identifying components of establishment of waiver, including demonstrating that party has intentionally relinquished known right.); *Hoffman v. Wheeling Sav. & Loan Assn.*, 133 W.Va. 694, 713, 57 S.E.2d 725, 735 (1950) (" 'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' " (Citation omitted)). *Hoffman* also instructs that "[t]he burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." (continued...)

To remove oneself from the protection of the statute of limitations, one must intentionally relinquish a known right. In *Cowan*, the court observed that the prosecutor was "concerned that if petitioner pleads guilty, he can later challenge the conviction in a habeas corpus petition and assert the statute of limitations." 926 P.2d 443. The court replied that such "concern is understandable," but that its "holding should obviate that concern. A person who waives the statute of limitations, as petitioner seeks to do here, may not later attack the conviction on the basis of that statute of limitations." *Id*. The crucial issue is *ho*w the statute of limitations is waived. In that vein, the *Cowan* court proposed as follows:

> To avoid the problem that arose in this case, we remind trial courts and prosecutors that whenever a defendant seeks to plead guilty to, or a court considers whether to instruct the jury on, a lesser offense, they should determine whether there may be a problem with the statute of limitations regarding that offense. If so, the court should elicit a waiver of the statute as a condition of the guilty plea or giving the instruction. This should be an easy process. The record need merely reflect in some fashion that the defendant is aware that the offense is, or might be, time-barred, and the defendant has waived the statute of limitations.

*Id*. at 443-44. Quite simply, "[t]he court need merely inform the defendant in some fashion that the charge is, or may be, time-barred, and elicit a simple waiver of the bar." *Id*. at 441.

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[1](...continued)
(Citation omitted); *see also Dye v. Pennsylvania Cas. Co.*, 128 W.Va. 112, 118, 35 S.E.2d 865, 868 (1945).

In a concurrence in *Cowan*, Justice Baxter further elucidated the discussion by agreeing with the majority's "conclusion that a defendant ought to be able to waive the statute of limitations and, with the prosecutor's consent, plead guilty to a time-barred lesser offense where the waiver is knowing, intelligent, and voluntary, is made for the defendant's benefit and after consultation with counsel," subject to the limitations of the majority opinion, and where the waiver does not handicap the defense of contravene a public policy. *Id.* at 444, Baxter, J., concurring.

In another concurrence, Justice Chin observed that "[t]o allow defendants to lose the protection of the limitation *accidentally* could mean that persons could languish in prison under judgments that could not have occurred had they merely thought of the statute of limitations in time." *Id.* at 445, Chin, J., concurring (emphasis supplied).

> In addition to being fair, requiring an express waiver of the statute of limitations makes practical sense. Unlike a forfeiture rule, which would imply a waiver on a silent record, requiring an express waiver would ensure a fully developed record. When a defendant seeks to plead guilty to, or have the court instruct on, a time-barred offense, the court, with the assistance of the prosecutor, should take a simple waiver. That way the record is protected. A defendant who expressly waives the statute of limitations cannot later claim he did not know of it. The forfeiture rule would leave the record undeveloped. Whenever the defendant was represented, i.e., most of the time, the defendant could later claim he did not receive effective assistance of counsel, a claim which would be plausible most of the time, meritorious much of the time, and difficult to disprove all the time.

*Id*. The concurrence recognized the very likely potential for an ineffective assistance of counsel claim and the ability, if not responsibility, of a court to avoid that probable result by straightforward action during the early stages of the proceedings.

> If a represented defendant pleads guilty to a time barred offense and thereby forfeits the statute of limitations, but later claims counsel was ineffective, on what basis could a court deny relief? Suppose the defendant requests and receives an instruction of a time barred lesser offense and is convicted of the lesser offense. Later he files a petition for writ of habeas corpus, claiming his attorney never discussed the statute of limitations with him, and if he had known the lesser offense was time-barred, he would never have agreed to requesting the instruction. When the record is silent, the claim would be credible. It would have to be litigated and would often be found meritorious. On the other hand, a simple waiver on the record would settle the matter.

*Id*. at 445-46. The concurrence explained that "a forfeiture rule would lead inevitably to the development of an entirely new jurisprudence. . . . A new subspecialty of ineffective assistance of counsel claims would arise. That development would be neither desirable nor necessary. The simple expedient of taking a waiver will avoid the problem. A silent record aids no one." *Id*. at 446.

An identical conclusion was reached in *State v. Kerby*, 156 P.3d 704 (N.M. 2007), wherein the New Mexico court held: "Based on our review of the various approaches, we hereby adopt the waiver approach and hold that the statute of limitations is a substantive right that may only be waived by a defendant after consultation with counsel, and only if the waiver is knowing, intelligent, and voluntary." 156 P.3d at 709. The *Kerby* court rejected

the forfeiture approach not only because the protection should not be unintentionally lost but also because the forfeiture rule is "an exercise in futility." *People v. Williams*, 981 P.2d 42, 45 (Cal. 1999). As the *Williams* court explained:

> Defendants would usually gain indirectly by claiming ineffective assistance of counsel what a forfeiture rule would prevent them from gaining directly. A forfeiture rule would merely add a step to the litigation. Only those who admitted their guilt right away and did not request an attorney could never gain relief.

*Id*.

The *Kerby* court reasoned that "[i]f we adopted the forfeiture rule in the instant case, Defendant would have a compelling ineffective assistance of counsel claim because he would not have been convicted but for his attorney's failure to raise the statute of limitations defense." 156 P.3d at 710.

> In jurisdictions with a forfeiture rule, in numerous cases involving similar facts, courts have granted post-conviction relief outright on the basis of ineffective assistance of counsel or have remanded for an evidentiary hearing on the issue. Thus, if we adopted the forfeiture rule, we would expend judicial (and executive) resources addressing Defendant's ineffective assistance of counsel claim and ultimately delay the inevitable vacating of Defendant's convictions.

*Id.* (Citations omitted.) The attorney for the defendant in *Kerby* admitted that he failed to consult with the defendant about the statute of limitations because he did not recognize the issue. The court found that the defendant "did not knowingly, intelligently, and voluntarily

waive this defense after consulting with his counsel" and vacated the defendant's convictions. *Id.*

The United States Supreme Court addressed this issue in *Spaziano v. Florida,* 468 U.S. 447 (1984), and held that a defendant in a capital case may be required to waive the statute of limitations as a condition to having the trial court instruct the jury on a lesser included offense. The Court grappled with the issue of whether a defendant is entitled to the benefit of *both* a lesser included offense instruction *and* the defense of an expired period of limitations. The Court explained:

> If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether *Beck* [*v. Alabama*, 447 U.S. 625 (1980)] requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

*Id.* at 456. "In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so." *Id*. at 457. The trial court has explicitly detailed the statute of limitations issue directly to the petitioner, asking if he understood the ramifications of his decision, as follows:

> THE COURT: Do you understand that while the statute of limitations has run on the Court submitting to the jury lesser included verdicts representing the charges of second-degree

> murder and third-degree murder, manslaughter, that you who has the benefit of the statute of limitations can waive that benefit and, of course – and then have the Court submit the case to the jury on the first-degree, second-degree, third-degree and manslaughter.
>
> If you don't waive the statute of limitations, then the Court would submit to the jury only on the one charge, the main charge, which is murder in the first degree, and the sentencing alternatives are as [defense counsel] stated them. Do you understand that?
>
> MR. SPAZIANO: Yes, your Honor.

*Id.* at 457 n. 6. The Supreme Court found that, under those circumstances where the defendant understood the consequences of his actions and refused to waive the statute of limitations, the trial court did not err in refusing to instruct the jury on the lesser included offenses.

The *Boyd* declaration, and consequently the conclusion of the majority herein, is contrary to the reasoned methodology employed by courts addressing this critical criminal right. *Boyd* dictates that the very act of seeking the lesser included instruction is a forfeiture of the rights afforded to a defendant under the applicable statute of limitations. End of inquiry. This restricted view fails to acknowledge that the protections afforded by the statute of limitations in this instance should not be deemed to have been abandoned in the absence of a knowing, voluntary, and intelligent waiver. Moreover, the ramifications of the application of the narrow *Boyd* rule conflict with the basic concepts of judicial economy. As recognized by several cases above, the potential for ineffective assistance of counsel claims

is overwhelming where the *Boyd* rule is applied. Without the informed consent of the defendant, counsel's decision either for or against waiver could ultimately result in a claim of legal malpractice. The predictions of the *Williams* court, examined above, would then come to fruition, and the forfeiture approach would properly be viewed as "an exercise in futility" which simply and unnecessarily "add[s] a step to the litigation." 981 P.2d at 45. Whether viewed from the broad perspective of the fundamental rights of a criminal defendant or the more narrow determination of effective judicial management, the rule adopted by *Boyd* is defective. I therefore respectfully dissent from the application of the *Boyd* rule in this case, and I would reverse the Appellant's conviction.

I am authorized to state that Justice Starcher joins in this dissenting opinion.