No. 35272 – State of West Virginia ex rel. Marshall County Commission and Marshall County Communication 911 v. Phyllis H. Carter, Administrative Law Judge, West Virginia Human Rights Commission and John R. Briggs

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OF WEST VIRGINIA

Workman, Justice, concurring:

The majority's decision is correct and well-reasoned. I write separately to reiterate that the Separation of Powers Doctrine and a lengthy body of case law make it absolutely clear that judicially-created rules relating to the function of the judicial branch of government, such as the West Virginia Rules of Evidence, will always trump any legislatively-created statutes.

The Separation of Powers Clause of the West Virginia Constitution provides, in relevant part, that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]" W.Va. Const. art. 5, § 1. Moreover, in Syllabus Point 1 of *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981), this Court reiterated the principle that: "Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Furthermore, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of

government into the traditional powers of another branch of government." *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982). *See, e.g., State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003) (finding statute that gave legislature a role in appointing members of the West Virginia Economic Grant Committee violated Separation of Powers Clause); *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995) (finding statute which permitted administrative regulations to die if legislature failed to take action violated Separation of Powers Clause); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding statute naming legislative officers to State Building Commission violated Separation of Powers Clause).

It has long been well-settled that this Court "shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W.Va. Const. art. 8, § 3. Likewise, "[u]nder article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law." Syllabus Point 1, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988).

In the instant case, the underlying issue surrounds a potential conflict between

a legislatively-created statute and rules on admissibility of evidence promulgated by this Court in the Rules of Evidence and case law. That conflict is created by the Appellant seeking to have this Court hold that the statute at issue trumps a judicial decision as to the admissibility of evidence. Although the statute at issue here is valid and not in and of itself intrusive into judicial powers, the interpretation which Petitioners seek to have this Court adopt would violate the Separation of Powers. This Court has made it abundantly clear through numerous prior decisions that statutes that conflict with rules and principles promulgated by this Court as to the admissibility of evidence will be invalidated. *See, e.g.*, *Games-Neely ex rel. West Virginia State Police v. Real Property*, 211 W.Va. 236, 565 S.E.2d 358 (2002) (invalidating a statute that was in conflict with Rule 60(b)); *West Virginia Div. of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999) (invalidating a statute that was in conflict with W. Va. R. Evid., Rule 702); *Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994) (invalidating a statute that was in conflict with W. Va. R. Evid., Rule 702); *Williams v. Cummings*, 191 W.Va. 370, 445 S.E.2d 757 (1994) (invalidating a statute that was in conflict with Trial Court Rule XVII); *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994) (invalidating a statute that was in conflict with W. Va. R. Evid., Rule 702); *State v. Davis*, 178 W.Va. 87, 357 S.E.2d 769 (1987), *overruled on other grounds* by *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994) (invalidating a statute that was in conflict with W. Va. R.Crim. P., Rule 7); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute that was in conflict with W. Va. R.App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W.Va. 422, 306 S.E.2d 233 (1983) (holding that

legislature could not enact law regulating admission to practice and discipline of lawyers); *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) (invalidating statutes that conflicted with the Court's administrative rules setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge); *Laxton v. National Grange Mut. Ins. Co.*, 150 W.Va. 598, 148 S.E.2d 725 (1966) (invalidating a statute that conflicted with W. Va. R. Civ. P. Rule 11), *overruled on other grounds* by *Smith v. Municipal Mut. Ins. Co.*, 169 W.Va. 296, 289 S.E.2d 669 (1982); *Montgomery v. Montgomery*, 147 W.Va. 449, 128 S.E.2d 480 (1962) (invalidating a statute that conflicted with W. Va. R. Civ. P., Rule 80); and Syllabus Point 5, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.").

The majority cites Syllabus Point 7 of *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), which provides, in part, that "[t]he West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts." Writing for the Court in *Derr*, Justice Franklin Cleckley, West Virginia's pre-eminent authority on evidence, stated: "These rules constitute more than a mere refinement of common law evidentiary rules; they are a comprehensive reformulation of them." Justice Cleckley further explained:

> As the United States Supreme Court declared in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, ----, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469, 479 (1993), the Federal "Rules occupy the field." (Citation omitted). A similar construction has been given to the West Virginia Rules. *See Wilt v. Buracker*, 191 W.Va. 39, 44, 443 S.E.2d 196, 201 (1993), cert. denied, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994) (citing the United States Supreme Court's determination that the *Frye* rule, *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923), was inconsistent with Rule 702). Thus, the Rules of Evidence impliedly repeal prior decisional admissibility rules that have not been codified.

192 W.Va. at 177-178, 451 S.E.2d at 743-744. The Court in *Derr* further provided:

> Again, referring to the Federal Rules of Evidence, the United States Supreme Court in *United States v. Abel*, 469 U.S. 45, 51-52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450, 457 (1984), quoted the Reporter's comment for the Advisory Committee which drafted the Rules and stated: "'In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided...." In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.' [Citation omitted]."

Id.

In the case at hand, the dissent primarily focuses on the fact that W.Va. Code § 6-9a-5 (1999), does not allow for inspection of notes taken during executive session meetings, and that "the majority opinion essentially eviscerates a governing body's ability to freely discuss anything–no matter how embarrassing it might be to a public employee–behind closed doors." This, however, is **not** the result of the majority's opinion.

It is important to point out that the order complained of by the petitioners simply directs them to produce for *in camera* inspection by the administrative law judge an audio recording of an executive session meeting in which the petitioners discussed hiring an applicant to fill one of two vacancies in the Marshall County Communication 911 Department. The ALJ did not order that the audio recording be released to the public. The majority correctly explains that nothing in its opinion "impedes the purpose for which the Legislature enacted the executive session exception to the Open Governmental Proceedings Act." The majority opinion simply reaffirms the rights of litigants in civil actions "to discover potentially relevant evidence of unlawful conduct arising from an executive session of a government body." This decision will have no bearing on the operation of executive sessions as governmental bodies will still be able to freely discuss and consider all relevant and necessary information required to conduct government business during a meeting which qualifies as an executive session closed meeting under the law.

Therefore, in light of a very consistent and lengthy line of case law supporting the judicial branch's authority as the final arbiters of the admissibility of evidence in a legal proceeding, I respectfully concur.