No. 35520 – *State of West Virginia v. Dennis R. Gibson*

FILED
October 28, 2010
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., dissenting:

Every member of this Court agrees that domestic violence is a scourge on society, one that should be forthrightly addressed by the law. However, I respectfully disagree with the majority opinion's conclusion that *W.Va. Code*, 61-2-28(d) [2004] is "clear and unambiguous." I believe that the statute is poorly drafted, vague and should be thoroughly rewritten by the Legislature.

As it is currently written, *W.Va. Code*, 61-2-28(d) can be given two reasonable interpretations. *W.Va. Code*, 61-2-28(d) states:

> Any person who has been convicted of a third or subsequent violation . . . of this section . . . is guilty of a felony if the offense occurs within ten years of a prior conviction of any of these offenses . . .

The circuit judge read this statute to mean that only prior convictions occurring within 10 years may be considered in deciding whether a person is guilty of a third offense. The majority opinion, however, reads this statute to say that if the current third offense occurs within 10 years of any *one* of the prior convictions, then the current offense can be a third-offense felony.

I believe that the majority opinion is wrong because of the long-standing, *constitutional* rule that criminal statutes are always to be construed *against* the State, not in favor. Our rule in reading criminal statutes is well established: "Penal statutes must be

strictly construed against the State and in favor of the defendant." Syllabus Point 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). *See also*, Syllabus Point 1, *Myers v. Murensky*, 162 W.Va. 5, 245 S.E.2d 920 (1978) ("Ambiguous penal statutes must be strictly construed against the State and in favor of the defendant."); Syllabus Point 2, *State v. Riley*, 158 W.Va. 823, 215 S.E.2d 460 (1975) ("Penal statutes are strictly construed against the state and favorably for the defendant."); Syllabus Point 1, *State v. Larkin*, 107 W.Va. 580, 149 S.E. 667 (1929) ("It is a general rule that a penal statute will not be extended by construction, but must be limited to cases clearly within its language and spirit.").

The circuit court correctly found that *W.Va. Code*, 61-2-28(d) is vague, ambiguous, and subject to different reasonable interpretations. I therefore respectfully dissent from the majority's opinion.

I am authorized to state that Justice McHugh joins in this dissent.