

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Appellee**

v.) No. 35536 (Grant County No. 09-MAP-1)

**Josh Lee Hedrick,
Defendant Below, Appellant**

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This case is before this Court upon the appeal of Josh Lee Hedrick from orders entered in the Circuit Court of Grant County upholding his misdemeanor conviction, following a jury trial in magistrate court, of willfully obstructing or impeding Joshua Ryan Reid in the act of lawfully fishing. The pertinent statute, *W.Va. Code*, 20-2-2a [1986], states that a person “may not willfully obstruct or impede the participation of any individual in the lawful activity of hunting, fishing or trapping.” According to the State, Hedrick violated the statute when he seized four trout from Reid who was fishing in a nearby stream. Reid held a valid fishing license with the required trout stamp and was on neighboring property with permission from the owners.

On August 27, 2009, the circuit court entered an order suspending a ten day jail sentence imposed by the magistrate and, instead, directed Hedrick to pay a \$200 fine and complete 24 hours of community service. The conviction and the payment of court costs, however, were upheld by the circuit court pursuant to orders entered on August 31, 2009, and September 23, 2009. Hedrick’s sentence has been stayed pending further appeal.

This Court has conducted a careful review of this matter and, for the reasons set forth below, is of the opinion that Hedrick should have been granted a judgment of acquittal following the trial in magistrate court. Accordingly, the orders of August 27, August 31 and September 23, 2009, are vacated, and this case is remanded to the circuit court for the entry of a judgment of acquittal.

I.

The incident between Hedrick and Reid occurred along an unnamed stream immediately below Poor Farm Spring near the community of Cabins in Grant County. The stream results from the substantial output of water from the Spring and flows in a southerly direction a short distance to a culvert, at which point the stream passes under State Route 28/55 and continues on as a tributary of the North Fork of the South Branch of the Potomac River. The stream is relatively narrow near the Spring. During the trial, Reid indicated that he reeled in a fish six or seven feet from the stream's midpoint.

The property on the western side of the stream between Poor Farm Spring and State Route 28/55 was owned by Kenneth A. and Rosalie E. Phares, and a portion of their boundary line extended approximately two feet into the streambed. However, the balance of the land in the vicinity of the Spring, including the streambed, was owned by Hedrick's parents. That ownership was subject to a right-of-way owned by the State which the record indicates was the predecessor of State Route 28/55. Various documents of title submitted by the parties reveal, nevertheless, that the waters of the Spring were for the benefit of all tracts in the area.¹

On the other side of State Route 28/55, along the stream to the south, the Hedrick family owned a large tract on which they operated a commercial resort and conference center. The enterprise included a lodge, several rental cabins and a pay-to-fish pond commonly stocked with trout. A portion of the stream was diverted into the pond. Hedrick, responsible for business concerning the pond, was also a hunting and fishing guide.

On October 3, 2008, Hedrick and his cousin, John Harper, an employee of a trout hatchery, placed an unknown number of trout in two tubs in the streambed near the Spring. Hedrick had purchased the trout as fingerlings (very small) from West Virginia University

¹ In spite of the boundary line in the streambed, this case is different from the situation in *Ours v. Grace Property, Inc.*, 186 W.Va. 296, 412 S.E.2d 490 (1991), in which this Court held that, where ownership of the land underlying an artificial or man-made lake is clear and distinct, "the owner of a portion of the lake bed has the exclusive control and use of the water above the portion of the lake bed which he owns." 186 W.Va. at 300, 412 S.E.2d at 494. This Court indicated in *Ours* that riparian rights, i.e., rights concerning property located on the bank of a waterway, do not ordinarily attach to artificial bodies of water. 186 W.Va. at 301, 412 S.E.2d at 495. In the present case, water emanating from Poor Farm Spring created a free-flowing stream and natural tributary of the waterways beyond.

and had raised them to maturity over a four year period. Hedrick, with Harper's assistance, intended to spawn the trout the following day to replenish the commercial pond. The trout placed in the tubs included at least one golden trout and at least one rainbow trout. Harper testified that the golden trout and the rainbow trout were quite large, with the rainbow trout weighing up to seven and a half pounds. The tubs, extending above the water level, were secured to the streambed and covered with nets fastened with bungee cords. At 10:00 a.m. the following day, October 4, 2008, the tubs and nets were checked, and it was determined that nothing had been disturbed.

That afternoon, Hedrick and Harper returned to the site and observed Reid standing on the Phares' property by the stream. Harper testified that Reid was fishing. Hedrick saw a golden trout in distress in the stream and then noticed that the nets were "pulled to the side." As Hedrick approached, Reid pulled a metal stringer out of the water and quickly retreated toward the Phares' driveway. The stringer held the distressed golden trout, a rainbow trout and two other fish. As Hedrick drew closer, Reid dropped the stringer. Hedrick removed the four fish from the stringer and attempted to revive them in the stream. During these events, a heated exchange of accusations took place between Hedrick and Reid. Hedrick threw the empty stringer into a tree. Reid spit on Hedrick and tried unsuccessfully to overturn the tubs. Reid then dropped large rocks in the tubs in an attempt to kill or injure the trout therein. Hedrick placed an emergency call on his cell phone, and, soon after, Grant County Deputy Sheriffs and Conservation Officers from the West Virginia Division of Natural Resources arrived at the scene.

II.

On October 17, 2008, Hedrick was charged in the Magistrate Court of Grant County with willfully obstructing or impeding Reid in the lawful activity of fishing. The controlling statute, *W.Va. Code*, 20-2-2a [1986], states in its entirety:

A person may not willfully obstruct or impede the participation of any individual in the lawful activity of hunting, fishing or trapping. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the county jail for not less than ten days nor more than one hundred days or both fined and imprisoned. Also, any person convicted of a subsequent violation of this section shall be fined not more than one thousand dollars or imprisoned in the county jail not more than one year or both fined and imprisoned. For the purpose of this section a subsequent violation is one which had occurred within two years of any prior violation of this section and which arises out of a separate set of

circumstances. Any person convicted of any violation of this section shall be liable to the person, whom they interfered with, for all costs and damages resulting therefrom and if such offender holds a West Virginia hunting, fishing or trapping license at the time of conviction, such license shall be revoked.

See also, West Virginia Code of State Regulations § 58-23-3.1.7 (2008) (providing for the revocation of a fishing license for a violation of W.Va. Code, 20-2-2a).

A jury trial was conducted in July 2009. The State emphasized that on October 4, 2008, Reid held a valid fishing license with the required trout stamp. Reid maintained that he had been fishing from the Phares' property, with permission, for approximately one and a half to two hours and had caught the four trout with a rod and reel. He stated that, after hooking the golden trout and the rainbow trout, it took him one minute or less to reel each one to the margin of the stream. He denied taking any trout from the tubs and asserted that he pulled the nets away only when he later attempted to turn the tubs over. Moreover, Reid submitted evidence that there were trout in the stream other than those placed in the tubs by Hedrick and Harper. Finally, Rosalee Phares and Kim Mallow, Reid's mother, were on the Phares' property prior to the incident and testified that, before leaving for work, they noticed that Reid had caught two fish.

Hedrick insisted, however, that Reid took the trout from the tubs and placed them on his stringer. Hedrick asserted that he purchased the trout from West Virginia University, raised them over a four year period, and on October 4, 2008, retrieved them from Reid in a nonviolent manner. Referring to the golden trout, Hedrick testified: "I knew that the goldie had come out of the tub right away because I knew I only have very few golden trout at that time and I knew exactly which one it was." Moreover, Harper, stating he was a life-long fisherman, testified that it was unlikely that Reid caught the trout in the manner claimed. Harper further testified: "[T]he guy come off the bank in to the spring and grabbed a stringer full of fish. Two of the fish I knew come out of that tub, because I put them there, they was a golden trout and they was a big rainbow trout. Both of them was ready to spawn."

The jury found Hedrick guilty of violating the statute, and Hedrick was sentenced to ten days in jail and directed to pay court costs. The Magistrate denied Hedrick's post-trial motions, and an appeal was filed in the Circuit Court of Grant County. As stated above, the circuit court, on August 27, 2009, entered an order suspending the jail sentence and, instead, directed Hedrick to pay a \$200 fine and complete 24 hours of community service. The conviction and the payment of court costs, however, were upheld by the circuit court as reflected in orders entered on August 31, 2009, and September 23, 2009. The circuit court concluded that the evidence of the State was sufficient to allow the case to proceed to a jury verdict. The appeal to this Court followed.

III.

Hedrick contends that in retrieving the trout he did not “willfully obstruct or impede” Reid in any manner and that the evidence of the State to the contrary is insufficient as a matter of law. In that regard, Hedrick correctly cites *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), for the standard of review to be applied by this Court. Syllabus point 1 of *Guthrie* holds:

The function of the appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

See, State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999) (citing *Guthrie*, reversing a conviction of murder of the second degree for insufficient evidence and remanding for the entry of a judgment of acquittal).²

Accordingly, viewing the evidence in the light most favorable to the prosecution the evidence at trial was sufficient for the jury to determine that Reid, who held a valid fishing license with the required trout stamp, had been lawfully fishing from the Phares’ property on the day in question. Consequently, the present inquiry must concern the actions of Hedrick and whether the evidence was sufficient to conclude that he willfully obstructed or impeded

² Hedrick’s contention concerning the sufficiency of the evidence, and the Circuit Court’s statements and conclusions in that regard, constitute the sole issue discussed in the brief Hedrick filed in this Court, even though other assignments of error were set forth in his petition for appeal. Syllabus point 6 of *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981), holds: “Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.” *Covington v. Smith*, 213 W.Va. 309, 317 n. 8, 582 S.E.2d 756, 764 n. 8 (2003) (citing *Addair* and comparable authority); *Belcher v. King*, 96 W.Va. 562, 568, 123 S.E. 398, 400 (1924) (Error assigned in the petition concerning instructions, but not insisted on or mentioned in the brief, was regarded as abandoned and would not be considered.). *See also, Morgan v. Price*, 151 W.Va. 158, 166, 150 S.E.2d 897, 902 (1966) (“A plaintiff in error bears the burden of showing error in the judgment of which he complains.”). Accordingly, the other assignments listed in Hedrick’s petition for appeal are deemed waived.

Reid by taking or retrieving the four trout from the stringer. Stated differently, this Court must resolve whether the evidence of the State was sufficient to raise Hedrick's conduct to the level of a criminal violation, or whether the State's evidence, instead, suggested a dispute over possession of wildlife, as to which Hedrick's conduct was actionable.³

While not dispositive of this matter, we note that the circuit court's order mitigating Hedrick's sentence stated:

[I]t was reasonable for the Defendant to believe he was the victim of a petit larceny of his fish. The Court finds that while agitated he did not become physically aggressive to anyone during this incident and conformed himself to appropriate behavior.

Another aspect to be considered is the statute itself. While this Court does not seek in these circumstances to determine the full intent of the West Virginia Legislature in enacting *W.Va. Code*, 20-2-2a [1986], it is fair to say that the statute is contemporaneous with legislation in many other states enacted in response to interference by animal rights activists and environmentalists with persons lawfully engaged in hunting, fishing and similar activities. Challenges to the validity of such legislation are commonly on First Amendment grounds. See, Frank J. Wozniak, Annotation, *Validity and Construction of Statutes Prohibiting Harassment of Hunters, Fishermen, or Trappers*, 17 A.L.R.5th 837 (1994).

The express language of *W.Va. Code*, 20-2-2a [1986], however, does not refer to animal rights activists or environmentalists. Nor has the word "willfully," found in the statute, been precisely defined in connection with the criminal laws of this State.

³ The circumstances in this case call to mind former remedies, traces of which are found in current practice. Historically, the unlawful taking of fish belonging to another was subject to common law forms of action, which, in this State, were abolished or merged into one form of action under the West Virginia Rules of Civil Procedure. The remedies at common law included replevin [providing for the redelivery of a specific chattel with the effect of discouraging "parties from redressing themselves by their own act or invading the rights of others," 6A M.J., *Detinue and Replevin* § 20 (2008)] and trover [providing for the recovery of damages for the wrongful conversion of specific chattel, 19 M.J., *Trover and Conversion* § 2 (2009)]. With regard to suits initiated as replevin or trover concerning fish, see, for example, *Pennsylvania R. Co. v. Bank of U.S.*, 214 A.D. 410, 212 N.Y.S. 437 (1925) (replevin); *Southern Express Co. v. Fant Fish Co.*, 12 Ga. App. 447, 78 S.E. 197 (1913) (trover); and *McLean v. Isbell*, 44 Mich. 129, 6 N.W. 210 (1880) (trover).

In *State v. Saunders*, 219 W.Va. 570, 638 S.E.2d 173 (2006), a case involving a felony conviction for violating the West Virginia Solid Waste Management Act, this Court suggested that the term “willful” refers to conduct that is intentional, rather than incidental or involuntary. 219 W.Va. at 575, 638 S.E.2d at 178. Long before *Saunders*, however, the Supreme Court of the United States, in *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), noted:

[W]hen used in a criminal statute, [willfully] generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

290 S.Ct. at 394-95, 54 S.Ct. at 225, 78 L.Ed. at 385 (internal citations omitted).⁴

Subsequently, in *Bryan v. United States*, 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998), the Supreme Court of the United States, in a case concerning the illegal sale of firearms, observed that the word “willfully” is said to be a word of many meanings “whose construction is often dependent on the context in which it appears” and that, as a general matter, “when used in the criminal context, a ‘willful’ act is one undertaken with ‘a bad purpose.’” 524 U.S. at 191, 118 S.Ct. at 1944-45, 141 L.Ed.2d at 204-05. *See also*, 22 C.J.S. *Criminal Law* § 50 (2006) (Although the term ‘willful,’ as used in criminal statutes, is a word of many meanings, its definition can include acts done deliberately or intentionally.).

As stated in Hedrick’s brief, and as implied by the circuit court in modifying Hedrick’s sentence, Hedrick could not have willfully obstructed or impeded Reid, within the meaning of *W.Va. Code*, 20-2-2a [1986], if the circumstances reasonably demonstrated to Hedrick that Reid was a thief.

In *Commonwealth v. Haagensen*, 900 A.2d 468 (Pa. Commw. Ct. 2006), the Commonwealth Court of Pennsylvania considered a statute making it unlawful to “intentionally obstruct or interfere with the lawful taking of wildlife.” The statute further provided that a violation would occur when a person “intentionally or knowingly . . . blocks, impedes or otherwise harasses another person who is engaged in the process of lawfully taking wildlife or other permitted activities.” Haagensen was found guilty of several violations of the statute because she shouted at, or reprimanded, various hunters for

⁴ *Murdock* was overruled, in part, on other grounds in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

trespassing on her property or for hunting too close to a nearby road. In reversing the convictions, the Commonwealth Court stated:

Haagensen believed, either rightly or wrongly, that the “victims” here were engaging in the *unlawful* taking of wildlife, and Haagensen merely sought to warn the hunters not to trespass on her property or hunt illegally near her farm
* * * Because the Commonwealth’s evidence fails to support a finding that Haagensen acted with the *intent* to interfere with the *lawful* taking of wildlife, the trial court erred in concluding that the Commonwealth sustained its burden of proof.

900 A.2d at 475. (emphasis in original)

In the matter now contested, it is undisputed that Reid committed acts of misconduct in spitting on Hedrick and throwing rocks into the tubs. Nevertheless, assuming for the sake of argument that Hedrick wrongfully took the trout from Reid’s stringer prior to Reid’s actions, the circumstances demonstrate a controversy over possession, rather than a criminal act on the part of Hedrick. This Court is of the opinion that the evidence of the State, at trial, was insufficient to establish a criminal violation of *W.Va. Code*, 20-2-2a [1986].

IV.

Hedrick’s conviction and sentence are vacated, and this case is remanded to the circuit court for the entry of a judgment of acquittal. *Cook, supra*, 204 W.Va. at 604, 515 S.E.2d at 140.

Vacated and Remanded.

ISSUED: June 21, 2011

**Concurred in by Chief Justice Margaret L. Workman
and Justice Menis E. Ketchum**

**Justice Brent D. Benjamin concurs and reserves the right
to file a concurring memorandum.**

**Justice Robin Jean Davis and Justice Thomas E. McHugh dissent
and reserve the right to file a dissenting memorandum.**