STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
January 25, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia,
Plaintiff Below, Respondent,

vs.) No. 22-667 (Logan County CC-23-2022-F-2)

David Bumgarner,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner David Bumgarner appeals the order of the Circuit Court of Logan County, entered on July 20, 2022, sentencing him to imprisonment for four years upon his conviction of escape of a person in the custody of an officer, in violation of West Virginia Code § 61-5-10.[1] Upon our review, we determine that oral argument is unnecessary and that a memorandum decision is appropriate. See W. Va. R. App. Proc. 21.

In 2021, Mr. Bumgarner was placed on home confinement as a condition of his bond while awaiting prosecution on the felony charge of transportation of prohibited items onto the grounds of a jail. *See* W. Va. Code § 61-5-8. At the same time, he was reinstated to bond (with an attendant condition of home confinement) for an unrelated felony charge, possession of a firearm by a prohibited person. *See* W. Va. Code § 61-7-7. Approximately one month later, Mr. Bumgarner's home confinement officer gave him permission to leave the home for errands. While Mr. Bumgarner was away for errands, officers were notified that his electronic monitoring device had been "cut." They searched Mr. Bumgarner's home where they found Mr. Bumgarner's discarded monitoring device. Mr. Bumgarner was arrested three days later by a Division of Natural Resources officer who found him in a remote area. Mr. Bumgarner was indicted in 2022 (after release from federal custody) on the single charge of escape of a person in the custody of an officer. At trial, Mr. Bumgarner admitted that he removed his device, but asserted that he did so because he had, five years earlier, been subjected to violence by the West Virginia State Police, and he feared that police planned to harm him again.[2] At the conclusion of the trial, Mr. Bumgarner was convicted and sentenced as described above.

[1] Petitioner appears by counsel Joe Spradling. Respondent State of West Virginia appears by Attorney General Patrick Morrisey and Assistant Attorney General Gail V. Lipscomb.

[2] Mr. Bumgarner's claim that he was previously the victim of excessive force was based on his testimony alone. A West Virginia State Police trooper testified that officers used reasonable force to subdue Mr. Bumgarner after officers attempted to serve a warrant in May 2017, prompting Mr. Bumgarner to run from them. After Mr. Bumgarner asserted that he was mistreated by officers,

On appeal, Mr. Bumgarner asserts three assignments of error. He argues that the circuit court gave an improper jury instruction, improperly limited defense counsel's mention of "duress" in counsel's closing argument, and substituted its own view of the evidence for that of the jury. These arguments are set forth in a brief—which is just more than seven pages in length—that contains no citations to the appendix record on appeal, and that offers a statement of the case with scant facts related to the first assignment of error, and none apparently related to the second or third assignments of error. In an Administrative Order entered on December 10, 2012, Re: Filings That Do Not Comply With the Rules of Appellate Procedure, the then-Chief Justice of this Court specifically noted in paragraph 7 that

> [b]riefs with arguments that do not contain a citation to legal authority to support the argument presented and do not "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal" as required by rule 10(c)(7)

are not in compliance with this Court's rules. Petitioner has failed to present this Court with a brief that meets these standards.

In the interest of justice, we have reviewed the appendix record on appeal for details relevant to the asserted assignments of error, despite the presentation of those assignments in unsupported and conclusory fashion. We have found no error.

In short, Mr. Bumgarner argues that each "assignment[] of error in this case revolve[s] around the right of a criminal defendant to assert an affirmative defense at trial if the defendant adduces sufficient evidence to raise a reasonable doubt as to the intent to commit a crime." He did not illegally abscond, he argues, because he suffered duress borne of "fear of bodily harm from the State Police." Mr. Bumgarner argues, with respect to all his assignments of error, that the circuit court failed to give the appropriate jury instruction or otherwise conduct the trial in consideration of our holding set forth in Syllabus Point 1 of *State v. Tanner*, 171 W. Va. 529, 301 S.E.2d 160 (1982)[3]:

> In general, an act that would otherwise be a crime may be excused if it was done under compulsion or duress, because there is then no criminal intent. The compulsion or coercion that will excuse an otherwise criminal act must be present, imminent, and impending, and such as would induce a well-grounded apprehension

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the State Police conducted an internal investigation. The investigation concluded with a finding of no wrongdoing on the part of officers and no disciplinary action.

[3] We note that "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. . . ." Syl. Pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). Based on the trial evidence, and for the reasons described herein, we find that the circuit court did not abuse its discretion in refusing to give a jury instruction crafted using the language of *Tanner*.

> of death or serious bodily harm if the criminal act is not done; it must be continuous; and there must be no reasonable opportunity to escape the compulsion without committing the crime. A threat of future injury is not enough.

As noted above, Mr. Bumgarner has failed to cite evidence supporting the possibility that he was under duress when he removed his monitoring device. On the day that Mr. Bumgarner removed his monitoring device, West Virginia State Police officers arrived at his home to assist the Federal Bureau of Investigations in the execution of an arrest warrant. Mr. Bumgarner testified that he was in a passing car when officers arrived, and he told the car's driver to "just go on by." Mr. Bumgarner had absolutely no interaction with officers on that day. Moreover, he testified that he returned to his home after officers left but did not contact his home confinement officer or his local sheriff's office, though he "ain't got no problem" with county law enforcement officers. Were he in fear of West Virginia State Police officers, he certainly had a reasonable opportunity in the three days leading to his arrest to contact his home confinement officer or another official. Considering Mr. Bumgarner's own testimony that he did not fear county law enforcement officers, there is no evidence that he was under "continuous" duress or that he lacked a "reasonable opportunity to escape the compulsion without committing the crime." *See id*. The trial evidence showed that Mr. Bumgarner simply escaped from the custody of his home confinement officer, and the circuit court did not err with respect to Mr. Bumgarner's assignments of error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: January 25, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn