IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Case No.: 18-1132
Circuit Court No.: 18-F-82
Mingo County, West Virginia

CHRISTOPHER MILLS,

Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

It is a misdemeanor for a felon to possess a firearm unless the prior offense was violent. Then, the possession is a felony. The court below ruled after-the-fact that Petitioner's Kentucky wanton endangerment conviction was violent.

Does the State violate the Due Process Clause's void for vagueness doctrine by making the degree of Petitioner's guilt contingent upon a judicial determination that cannot be known prior to committing the offense?

STATEMENT OF THE CASE

Petitioner pleaded guilty to W. Va. Code 61-7-7(b), felon in possession of a firearm, in Mingo County.[1] Per his conditional plea agreement, he appeals the court's order denying his motion to dismiss the indictment.[2] Whether felon in possession is a misdemeanor or felony depends upon a subjective, after-the-fact judicial determination that is unknowable prior to its commission.

a. Police stopped Petitioner's car and discovered a gun in his possession.

On June 12 2018, a Mingo County Sherriff's deputy stopped Petitioner's car for a traffic violation.[3] The officer then investigated Petitioner and his passenger for a weapons complaint reported nearby in Pickletub Hollow.[4] He removed the occupants from the car, searched, and handcuffed them.[5]

The passenger told the officer that prior to pulling the car over, Petitioner had thrown a firearm from the vehicle.[6] With the passenger's help, the police found the gun, and matching ammunition in Petitioner's pocket.[7]

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[1] A.R. 55–57.
[2] A.R. 54, 55.
[3] A.R. 6.
[4] A.R. 7.
[5] A.R. 6–7.
[6] A.R. 7.
[7] *Id.*

b. The State charged Petitioner for aggravated felon in possession of a firearm on the theory that his prior Kentucky wanton endangerment conviction was a "crime of violence against the person of another."

The officer learned that Petitioner had a prior wanton endangerment conviction in Kentucky.[8] Based on this felony, the State charged Petitioner as being a prohibited person in possession of a firearm.[9]

In West Virginia, whether felon in possession of a firearm is a felony or misdemeanor depends upon the nature of the prior offense. Any prior felony conviction subjects a defendant to simple possession and a misdemeanor jail sentence between ninety days and one year.[10] However, if the prior felony is a "crime of violence against the person of another[,]" then the defendant is guilty of aggravated felon in possession, a felony, that could result in five years imprisonment.[11]

West Virginia law does not define or enumerate crimes of violence for purposes of the felon in possession statute.[12] Without guidance, the State alleged that the wanton endangerment conviction was a "felony crime of violence against the person of another" and charged Petitioner with aggravated possession.[13]

c. Petitioner moved to dismiss, arguing that the State's felon in possession theory was void for vagueness. The circuit court denied the motion.

Petitioner pleaded not guilty and moved to dismiss the indictment.[14] In part, he argued the phrase "crime of violence against the person of another," used to aggravate his charge to a felony, was unconstitutionally vague under *Johnson v. United States*.[15] He

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[8] A.R. 8–9; *see also* Ky. Rev. Stat. Ann. § 508.060:

> (1) A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

[9] A.R. 43.

[10] W. Va. Code § 61-7-7(a).

[11] W. Va. Code § 61-7-7(b).

[12] *See* W. Va. Code § 61-7-7.

[13] A.R. 43.

[14] A.R. 45.

[15] *See* A.R. 47–51; *see also Johnson v. U.S.*, 135 S. Ct. 2551 (2015).

argued that here, as in *Johnson*, the statute requires people to guess at what conduct will subject them to aggravated possession since it depends upon a subjective, after-the-fact judicial analysis.[16]

The circuit court denied the motion.[17] The record is silent concerning the specifics of Petitioner's prior wanton endangerment conviction beyond his own candid disclosure to defense counsel that it was a reckless driving incident.[18] The State did not address Petitioner's actual conduct, but posited a bank robbery in which a defendant waves a gun at bystanders as a prototypical wanton endangerment offense.[19]

The Court sided with the State and implicitly denied Petitioner's facial challenge.[20] It admitted its decision was subjective,[21] and this ruling necessarily occurred after Petitioner possessed the firearm.[22] Petitioner then entered a conditional plea.[23]

SUMMARY OF ARGUMENT

Petitioner appeals because basic fairness requires that criminal statutes be concrete enough that a person can know—in advance—what conduct they prohibit. The circuit court ruled—after-the-fact—that Petitioner's wanton endangerment conviction qualified him for aggravated felon in possession. This is too vague to be enforceable. Without objective criteria against which to judge one's conduct, it is impossible to know whether owning a firearm will trigger the felony or misdemeanor offense until the trial court makes its ruling. Any ruling necessarily occurs after the alleged unlawful possession. The lower court's decision therefore "... violates the first essential of due process."[24]

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[16] A.R. 47–51.
[17] A.R. 27, 54.
[18] A.R. 4.
[19] A.R. 25.
[20] A.R. 27, 54.
[21] *Id.*
[22] *Compare* A.R. 54 (hearing date) *with* A.R. 43 (offense date).
[23] A.R. 31, 37–38, 55, 63.
[24] *Johnson*, 135 S. Ct. at 2557 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

STATEMENT REGARDING ORAL ARGUMENT

This case presents a question of first impression. Twenty-six West Virginia cases cite to W. Va. Code § 61-7-7, but this Court has never decided, especially in light of *Johnson*, whether the violent felony enhancement is void for vagueness.[25]

In the absence of guidance, the court below made an after-the-fact ruling that Petitioner's prior offense warranted the aggravated offense. As a result, Petitioner faced the possibility of a felony conviction and five times the maximum sentence he otherwise would have received based upon a factor that, in principle, no one could know prior to his unlawful possession.

Petitioner's conditional plea gives the Court an opportunity to squarely address this issue.[26] He therefore requests a Rule 20 argument and a signed opinion declaring the violent crime enhancement for aggravated felon in possession unconstitutionally vague without legislative intervention.

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[25] *In re T.O.*, 238 W. Va. 455, 796 S.E.2d 564 (2017); *State v. Williams*, 236 W. Va. 130, 778 S.E.2d 579 (2015); *State v. Herbert,* 234 W. Va. 576, 767 S.E.2d 471 (2014); *Hollinghead v. Childers,* 226 W. Va. 714, 704 S.E.2d 714 (2010) (per curiam); *State v. Messer*, 223 W. Va. 197, 672 S.E.2d 333 (2008) (per curiam); *In re Parsons*, 218 W. Va. 353, 624 S.E.2d 790 (2005); *Rohrbaugh v. State*, 216 W. Va. 298, 607 S.E.2d 404 (2004); *Perito v. Cty. of Brooke*, 215 W. Va. 178, 597 S.E.2d 311 (2004); *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003) (overruled by *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014)); *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 572 S.E.2d 891 (2002) (per curiam); *State v. Boyd*, 209 W. Va. 90, 543 S.E.2d 647 (2000); *In re Metheney*, 182 W. Va. 722, 391 S.E.2d 635 (1990) (overruled by *In re Dailey*, 195 W. Va. 330, 465 S.E.2d 601 (1995)); *State v. Green*, No. 17-0985, 2018 WL 6015833 (W. Va. Nov. 16, 2018) (memorandum decision); *State v. Brown,* No. 17-0911, 2018 WL 4944193 (W. Va. Oct. 12, 2018) (memorandum decision); *State v. Bookheimer*, No. 17-0446, 2018 WL 1709107 (W. Va. Apr. 9, 2018) (memorandum decision); *State v. DeFrietas*, No. 16-0990, 2017 WL 4772873 (W. Va. Oct. 23, 2017) (memorandum decision); *State v. Lane*, No. 15-0856, 2016 WL 2979770 (W. Va. May 23, 2016) (memorandum decision); *In re Call*, No. 13-1115, 2015 WL 7628845 (W. Va. Nov. 23, 2015) (memorandum decision); *State v. York*, No. 13-1265, 2015 WL 1881028 (W. Va. Apr. 23, 2015) (memorandum decision); *Prokop v. Francis*, No. 13-1203, 2015 WL 508196 (W. Va. Feb. 6, 2015) (memorandum decision); *State v. Shamblin,* No. 13-1178, 2014 WL 2922804 (W. Va. June 27, 2014) (memorandum decision); *State v. Glaspell*, No. 12-0685, 2013 WL 3184918 (W. Va. June 24, 2013) (memorandum decision); *State v. Stewart*, No. 12-0392, 2013 WL 2157814 (W. Va. May 17, 2013) (memorandum decision); *In re B.N.*, No. 12-0657, 2013 WL 1859160 (W. Va. May 3, 2013) (memorandum decision); *Jarrell v. Plumley,* No. 12-0415, 2013 WL 1707345 (W. Va. Apr. 19, 2013) (memorandum decision).

[26] *State v. Lilly*, 194 W. Va. 595, 606–07, 461 S.E.2d 101, 112–13 (1995) (Cleckley, J., *concurring*) (stating the benefits of conditional pleas); *see also Class v. U.S.*, 138 S. Ct. 798, 803 (2018).

ARGUMENT

The violence enhancement for aggravated felon in possession is too vague to satisfy the Due Process Clause of the Fourteenth Amendment. It prohibits conduct so indeterminate that it is impossible to know in advance whether an unlawful possession will be a misdemeanor or felony.

"No state shall ... deprive any person of life, liberty, or property, without due process of law."[27] "[T]he Government violates this guarantee by taking away someone's ... liberty ... under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[28] "The dividing line between what is lawful and unlawful cannot be left to conjecture ... [a] crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue."[29] A statute that makes it impossible to know in advance what conduct will be criminal, or what the possible penalty could be,[30] "... violates the first essential of due process."[31]

The meaning of the felon in possession statute, and moreover whether the phrase "crime of violence against the person of another" is concrete enough to put people on notice, are questions of law that this Court reviews *de novo*. Here, the circuit court applied the same analysis that the United States Supreme Court declared unconstitutionally vague in *State v. Johnson*.[32] It therefore erred, and this Court should reverse Petitioner's felony conviction.

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[27] U.S. Const. Amend. XIV; *accord.* W. Va. Const. Art. 3, § 10. *See also, e.g., U.S. v. Agurs*, 427 U.S. 97, 107 (1976) (due process analysis congruent between Fifth and Fourteenth Amendment clauses).

[28] *Johnson v. U.S.*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)); *Cf. State v. Lane*, ___W. Va. ___, ___ S.E.2d ___, (W. Va. No. 17-1066, 2019) (Armstead, J., dissenting) (expressing concern for the arbitrary and inconsistent results of the Court's analysis for crimes of violence).

[29] *Connally*, 269 U.S. at 393 (*emphasis added*).

[30] *Johnson*, 135 S. Ct. at 2557 (vagueness doctrine applies to definitions, degrees, and sentences for crimes).

[31] *Johnson*, 135 S. Ct. at 2557 (quoting *Connally*, 269 U.S. at 391).

[32] *Compare id.* (describing categorical analysis) *with* A.R. 27 (imagining victim of ordinary wanton endangerment case).

In *Johnson*, the United States Supreme Court ruled unconstitutional part of a law that enhanced the sentence for the federal felon in possession statute for defendants with three or more prior crimes involving, *inter alia*, "a serious potential risk of physical injury to another."[33] The federal practice had been for courts to envision the "ordinary" conduct involved in the prior offense without regard for the strict elements or underlying facts, and then judge whether that imagined instance involved a risk of harm covered by the statute.[34] The Supreme Court ruled this unconstitutionally vague because, in principle, it was impossible to quantify either the degree of risk the legislature meant to target or the risk posed by a subjective, generic crime imagined by the court after-the-fact.[35] This indeterminacy made it impossible to know in advance what conduct would subject defendants to enhanced penalties.[36]

Here, the circuit court conducted this exact same unconstitutional analysis. It did not take any evidence concerning the actual conduct underlying Petitioner's wanton endangerment conviction.[37] And it only consulted the Kentucky statute's elements to imagine the generic instance of that crime.[38] It even acknowledged its process was subjective.[39] Just like its federal counterpart, this analysis involved so much indeterminacy that no one—not the lawyers and certainly not Petitioner—could know whether his prior conviction would subject him to a misdemeanor or a felony until after the judge ruled. As this cannot occur until after the unlawful possession, the enhancement violates the Due Process Clause of the Fourteenth Amendment.

And the circuit court's approach creates the same problems that the Supreme Court identified in *Johnson*. Criminal laws must be definite enough that people can know in

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[33] *See id.* at 2555.
[34] *See id.* at 2557.
[35] *See id.* at 2557, 2563.
[36] *Id.*
[37] *See* A.R. 27.
[38] *Id.*
[39] *Id.*

advance what conduct they prohibit. That is impossible with the circuit court's subjective, after-the-fact analysis. First, it leaves an essential element of the crime—which must be knowable in advance—up to the circuit court to determine *after* the defendant has engaged in the putatively unlawful conduct. "This important element cannot be left to conjecture, *or be supplied by either the court or jury*. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain[.]"[40]

Second, even if it were within the province of trial courts to proscribe conduct in this after-the-fact manner, the governing standards are unclear. The legislature intended to distinguish violent and non-violent felonies.[41] But any crime could lead to violence; how much potential for physical force separates simple from aggravated felon in possession? What guides a court's discretion in imagining a prototypical instance of crime? In West Virginia wanton endangerment requires a gun, fire, or explosives, and Kentucky does not specify any instrumentality. With such an indeterminate range of prohibited conduct, what is an "ordinary case" of wanton endangerment?[42]

Petitioner can only present these concerns as questions because there are no answers.[43] The felon in possession statute's reach is too indeterminate, and piecemeal case law is an unreliable guide.[44] If anything, West Virginia's felon in possession statute is vaguer than its federal counterpart discussed in *Johnson* because there the Supreme Court had a statutory definition to interpret.[45] West Virginia law simply creates a status—"any

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[40] *Connally*, 269 U.S. at 392.
[41] *Compare* W. Va. Code § 61-7-7(a) *with id.* at (b).
[42] *See* W. Va. Code § 61-7-12; W. Va. Code § 61-2-9c; W. Va. Code § 61-3E-10; Ky. Rev. Stat. Ann. § 508.060.
[43] *See, e.g.*, *Johnson*, 135 S. Ct. at 2557–58 and *U.S. v. Capital Traction Co.*, 34 App. D.C. 592, 596 (D.C. Cir. 1910) (both cases resorting to rhetorical questions to illustrate the uncertainty inherent to unconstitutionally vague criminal laws).
[44] *Compare Johnson*, 135 S. Ct. at 2558 ("[T]his Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.") *with State v. Lane*, ___ W. Va. ___, ___ S.E.2d ___, (W. Va. No. 17-1066, 2019) (Armstead, J., dissenting) (describing West Virginia's violent crime jurisprudence under the habitual offender act as "an inconsistent hodgepodge[.]").
[45] *See Johnson*, 135 S. Ct. at 2555.

person ... [w]ho has been convicted ... of a felony crime of violence"[46]—with no way to know who holds that status until it is too late to inform one's conduct.

Leaving it to courts to guess the violent potential of imagined ordinary cases involves too much indeterminacy to comport with due process.[47] Without legislation to fix this problem, the violent offender clause for aggravated felon in possession is facially invalid.[48]

CONCLUSION

A felon should be able to walk into a lawyer's office and ask whether obtaining a firearm would be a misdemeanor or a felony. In West Virginia, the only honest answer trained lawyers can give is that they don't know—no one can know, until after the trial court makes a subjective, after-the-fact judgment. Petitioner therefore requests that this Court reverse and remand with instructions for the circuit court to vacate his felony conviction.

Respectfully submitted,
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[46] W. Va. Code § 61-7-7(b).
[47] *Johnson*, 135 S. Ct. at 2558 ("By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.").
[48] *See id.*