In the Circuit Court of Jefferson County, West Virginia

State of West Virginia, Plaintiff,	)	
vs.)	)	Case No. CC-19-2018-F-15
KEVIN TRAVIS COSTELLO, Defendant	)	

SENTENCING ORDER

Defendant has been convicted of three separate felonies. The question presented is whether a resulting, statutorily-mandated life sentence is unconstitutionally disproportionate, ultimately rendering such sentence unlawful.

The Supreme Court of Appeals has provided varied guidance on the issue, which requires some logical reconciliation. In 2007, in the case of *State ex rel. Daye v. McBride*, 658 S.E.2d 547, 222 W.Va. 17 (W. Va. 2007), the Supreme Court considered a third-strike life sentence imposed upon a gentleman who had thrice been convicted of drug felonies. The Supreme Court did not specifically analyze whether the punishment was unconstitutionally disproportionate, but nevertheless upheld the sentence, issuing the following directive in Syllabus Point 3:

> Where an accused is convicted of an offense punishable by confinement in the penitentiary and, after conviction but before sentencing, an information is filed against him setting forth one or more previous felony convictions, if the jury find or, after being duly cautioned, the accused acknowledges in open court that he is the same person named in the conviction or convictions set forth in the information, the court is without authority to impose any sentence other than as prescribed in Code, 61-11-18, as amended. Syllabus Point 3, *State ex rel. Cobb v. Boles,* 149 W.Va. 365, 141 S.E.2d 59 (1965). (Emphasis added.)

The *Daye* Court explained "any sentence imposed, after the successful completion of the procedures prescribed in W.Va. Code, 61-11-19 (1943), which does not comport with W.Va. Code, 61-11-18 (2000) is an *illegal* sentence."658 S.E.2d at 552 (emphasis in the original).

But in 2017, without expressing overruling the *Daye* and *Cobb* line of cases, the

Supreme Court found a circuit court committed legal error in imposing a life sentence in comport with W.Va. Code § 61-11-18, after successful completion of the procedures prescribed in W.Va. Code § 61-11-19. In the case of *State v. Kilmer*, 808 S.E.2d 867 (W. Va. 2017), the Supreme Court reversed a life sentence imposed for a third-strike felony conviction (unlawful assault), when the defendant's two prior felony strikes were each for third-offense driving while license revoked for driving under the influence. In Syllabus Point 3, the *Kilmer* Court reiterated:

> The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute. Syllabus Point 7, *State v. Beck*, 286 S.E.2d 234, 167 W.Va. 830 (1981)

Thus, it would appear a circuit court has no power to impose anything other than a life sentence on a third-strike felon under W.Va. Code § 61-11-18 (as interpreted by *Daye* and *Cobb*), and yet a court still risks reversal in doing so under *Kilmer* and *Beck*. To resolve the apparent conflict, this Court finds that it has no power to sentence a third-strike felon to anything other than life in prison under W.Va. Code §§ 61-11-18, 19, unless such sentence is unconstitutionally disproportionate. *See* Syl. Pt. 2, in part, of *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009) ("It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions.*") In other words, this Court must sentence Defendant to life in prison, if such sentence is within constitutional bounds, even if the Court believes a lesser sentence is more appropriate.

Upon review of the record in this matter, this Court cannot find that a life sentence is unconstitutionally disproportionate under the circumstances of Defendant's case, considering his consistent criminally dangerous conduct. Accordingly, Defendant is sentenced to life in prison as required by W.Va. Code § 61-11-18 for the following reasons.

Escalation of Criminal Misconduct Creating Risk of or Causing Serious Bodily Harm or Death

Defendant, born on December 14, 1977, is currently forty-one years old. His first reported criminal convictions (including larceny, vandalism and trespassing) occurred when he was just eighteen years old. See Pre-Sentence Investigation Report, filed February 6, 2019 (Doc. No. 385). When he was nineteen years old, he obtained his first conviction for possession of a controlled substance (marijuana). *Id.*

On September 7, 2000, when Defendant was twenty-two years old, he obtained his first felony conviction for possession with intent to distribute cocaine. The conviction was obtained pursuant to Defendant's plea agreement to resolve a federal indictment, wherein he stipulated that his relevant conduct for sentencing purposes would include 315 grams of cocaine base, three kilograms of marijuana, and eighty-seven grams of cocaine HCL. *See United States v. Costello* Plea Agreement, State's Exhibit 9B in Recidivist Trial (Doc. No. 410-13). Defendant was originally sentenced to 121 months in federal prison (*see* September 15, 2000 Judgment in *United States v. Costello*, State's Exhibit 9C in Recidivist Trial (Doc. No. 410-14). The federal sentence was later reduced to ninety-seven months (see April 11, 2001 Amended Judgment in *United States v. Costello*, State's Exhibit 9D in Recidivist Trial (Doc. No. 410-15). As part of the sentence, the District Court recommended Defendant participate in the Bureau of Prisons 500 hour drug abuse program. *Id.*

Defendant's first felony conviction demonstrates that within the first five years of his adult life, his criminal behavior had escalated from property crimes and simple possession of a non-narcotic, controlled substance to participation in distribution of a substantial amount of a Schedule II, narcotic (*i.e.* cocaine). Cocaine's designation as a Schedule II drug indicates that the State Board of Pharmacy has found that the substance has high potential for abuse, and although it has currently accepted medical use in treatment in the United States or currently accepted

medical use with severe restrictions, abuse of the substance may lead to severe psychic or physical dependence. *See* W.Va. Code § 60A-2-205.

Whether a drug offense constitutes a crime of actual or threatened violence, creating a risk of bodily harm or death, requires a case specific review. In *State ex rel. Boso v. Hedrick*, 182 W.Va. 701, 391 S.E.2d 614 (W. Va. 1990) (*per curiam*), the Supreme Court overturned a third-strike life sentence imposed upon a defendant who had been convicted of delivery of a controlled substance, breaking and entering, and night-time burglary. In finding the sentence unconstitutional, the Supreme Court noted the residence defendant burglarized was unoccupied and further found "[n]either delivery of a controlled substance nor breaking and entering is per se a crime of violence." *Boso*, 182 W.Va. at 709; *see alsoDaye*, *supra*, 658 S.E.2d at 553, (upholding a third-strike life sentence for three drug felonies but opining "since many of the offenses under the Uniform Controlled Substances Act are relatively minor and involve little or no danger to others, they may be inappropriate for the more severe treatment under *W.Va. Code*, 61-11-18 (2000) and *W.Va. Code*, 61-11-19 (1943)).

This Court agrees that a significant number of drug offenses fall outside the scope of conduct that can accurately be described as "violent" in terms of creating risk of serious bodily injury or death. For example, the defendant in *Boso* was convicted of delivering twenty grams of marijuana. That amount only fractionally exceeds the amount of less than fifteen grams of marijuana that would entitle a first time offender to a dischargeable misdemeanor as set forth in W.Va. Code § 60A-4-401(c) and § 60A-4-407. Moreover, despite the obvious adverse health effects of smoking any substance, this Court is unaware of any deadly overdose epidemic arising from the use and distribution of marijuana. In sum, defendant *Boso*'s delivery of twenty grams of marijuana involved little or no danger to others.

In contrast, Defendant Costello's first felony involved the distribution of over 400 grams

of cocaine base/HCL in addition to 3,000 grams of marijuana.*See United States v. Costello* Plea Agreement, State's Exhibit 9B in Recidivist Trial (Doc. No. 410-13). This Court cannot ignore the substantial amount of cocaine involved in the crime nor the significant risk of serious bodily injury or death that the distribution of cocaine creates. Although not the current impetus of the overdose epidemic arising from opioid distribution, cocaine use can result in serious bodily injury or death. *See e.g. U.S. v. McNutt*, 960 F.2d 144 (1st Cir., 1992) (explaining "a jury could have found that [defendant's] collapse in his home resulted from a cocaine overdose" in light of testimony from a nurse that she believed defendant may have overdosed on cocaine and further testimony that defendant had "slumped over" after several visits to the bedroom where the cocaine was found and was "[s]haking and foaming at the mouth" before collapsing.); *Blair v. State*, 481 So.2d 1279, 11 Fla. L. Weekly 235 (Fla. App., 1986) (discussing medical expert testimony that a cocaine overdose could not be entirely ruled out as the cause of death in the case, and that when injected, cocaine enters the bloodstream rapidly and, if it causes a cardiopulmonary arrest, will do so shortly after the lethal dose is administered); and *Nykiel v. Bor. of Sharpsburg Police Dep't*, 778 F.Supp.2d 573 (W.D. Pa., 2011) (multiple experts opining a cocaine overdose contributed to plaintiff's death).

Defendant's participation in the distribution of a large amount of a dangerous narcotic elevates the risk that recipients of the poison will suffer serious bodily injury or death from an overdose and enables end users to create additional danger to others, for example, by driving under the influence of the controlled substance. Although Defendant may not have specifically intended any bodily injury or death to arise from his drug-dealing, he nevertheless significantly elevated the danger to society by participating in the distribution of a large amount of a potentially lethal narcotic. His behavior in this regard is not unlike third-offense driving under the influence, which does not require any specific intent to cause physical harm or actual

causation of harm, but has been found by the West Virginia Supreme Court to constitute a crime of violence for third-strike recidivist purposes.

In *State ex rel. Appleby v. Recht*, 583 S.E.2d 800, 213 W.Va. 503 (W. Va. 2002) (*per curiam*), Defendant Appleby contested the imposition of a third-strike life sentence based on proportionality grounds when his predicate, operative felonies were one unlawful assault and two, third-offense DUIs. The Supreme Court rejected Appleby's argument that driving under the influence is not a serious crime and that imposition of a life sentence on the basis of such a crime would violate the proportionality guarantees of the federal and state constitutions. The Supreme Court explained:

> "The dangers inherent in driving on the public streets while under the influence of an intoxicant are obvious." *State v. Luke*, 995 S.W.2d 630, 638 (Tenn.Ct.Crim.App.1998). In short, "operating an automobile while under the influence is reckless conduct that places the citizens of this State at great risk of serious physical harm or death." *State ex rel. State v. Gustke*, 205 W.Va. 72, 81, 516 S.E.2d 283, 292 (1999). . . We have little trouble in finding that driving under the influence is a crime of violence supporting imposition of a recidivist sentence. "A conviction for driving under the influence is a serious conviction warranting consideration in the calculation of a defendant's criminal history category." *United States v. Julian*, 112 F.3d 511 (4th Cir.1997) (*per curiam*) (unpublished) (text available in Westlaw).
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> 583 S.E.2d at 813. (Emphasis added, footnotes omitted.)

The *Appleby* Court continued to reason:

> Mr. Appleby cites us federal statutory immigration law that excludes driving under the influence convictions from the definition of crimes of violence. He also asserts that crimes with an intent component are more culpable than crimes of recklessness and punishment should be measured accordingly. We take exception to both of these contentions.
>
> We reject the application of federal immigration law. To the extent that any federal law should guide us, we think a more appropriate measurement for a crime of violence is that contained in the United States Sentencing Guidelines. United States Sentencing Guideline § 4B1.2, application note 1, provides "Other offenses are included as `crimes of violence' if (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted ... by its nature, presented a serious potential risk of physical injury to another." Consistent with our reasoning in *Gustke*, the federal courts have recognized that, "the very nature of the crime of DWI [Driving While Intoxicated] presents a `serious risk of physical injury' to others, and makes DWI a crime of violence."

United States v. DeSantiago-Gonzalez, 207 F.3d 261, 264 (5th Cir.2000) (citation omitted). Furthermore, a "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an `intent to kill.'" *Tison v. Arizona*, 481 U.S. 137, 157, 107 S.Ct. 1676 1688, 95 L.Ed.2d 127, 144 (1987). Thus, we do not find Mr. Appleby's arguments persuasive.

583 S.E.2d at 813-14. (Footnote omitted.)

Depending on the nature and quantity of the controlled substance, which is the subject of a crime, this Court finds that certain drug offenses can be appropriately considered crimes of violence under the logic employed by the *Appleby* Court. The Court also takes note that delivery of a controlled substance currently remains on the short list of enumerated felonies supporting a felony murder conviction, suggesting that the Legislature continues to deem such criminal conduct as inherently creating a risk of death. *See* W.Va. Code§ 61-2-1 and *Kees v. Lakin Correctional Center*, W.Va. Supreme Court Docket No. 17-1111, Memorandum Decision issued November 21, 2018 (upholding a defendant's 2005 felony murder conviction and life sentence based on delivery of a controlled substance causing fatal overdose, despite the 2017 enactment of W.Va. Code § 60A-4-416(a), entitled "Drug delivery resulting in death", specifically providing for a sentence of three to fifteen years in prison).

In Defendant Costello's case, his first felony conviction involved distribution of a large amount of a known toxic substance, which at a minimum, constitutes reckless conduct that places citizens at risk of serious physical harm or death. Accordingly, this Court finds Defendant's first felony conviction is a crime of violence for recidivist purposes.

After satisfying his ninety-seven month sentence for his first felony conviction, Defendant's reckless conduct escalated, continuing to show indifference to the value of human life. If Defendant took advantage of the Bureau of Prisons 500 hour drug abuse program, it did not change his behavior. On December 30, 2011, Defendant was arrested when the car in which he was traveling from Maryland to West Virginia was pulled over and he was found to be in

possession of three bags of heroin. Defendant subsequently plead guilty to possession with intent to distribute heroin. *SeeMaryland v. Costello* Certified Conviction Records, State's Exhibit 8 in Recidivist Trial (Doc. No. 410-11). According to the criminal complaint in the matter, Defendant advised the arresting officer that he had been selling heroin for several months and would get his "friends" to drive him to and from Baltimore almost every day, paying them with heroin for the service. *Id.*

Defendant's second felony conviction demonstrates that within just a few years after his release from a lengthy term in federal custody, his criminal behavior escalated from distribution of a Schedule II narcotic (cocaine) to distribution of a Schedule I narcotic (heroin). It is beyond cavil that the opioid epidemic has wreaked havoc on our society, ruining or extinguishing countless lives in the process. Instead of correcting his behavior after his first drug conviction and sentence, Defendant began distributing an even more dangerous drug. If nobody died from the heroin Defendant distributed into the community, it was the result of sheer fortuity. Under the guidance provided by *Appleby, supra*, this Court finds Defendant's conviction for possession with intent to distribute heroin is a crime of violence for recidivist purposes. Defendant's first two felony convictions demonstrate that Defendant is predisposed to participate in dangerously reckless conduct, despite an extensive period of correctional confinement following his first conviction.

In *Maryland v. Costello*, Defendant Costello initially received a sentence of twenty-five years in prison with all but ten years suspended. *See* Certified Conviction Records, State's Exhibit 8 in Recidivist Trial (Doc. No. 410-11). Unfortunately, Defendant's Maryland sentence was amended in December of 2015, and Defendant was prematurely released back into society with the entire remainder of his twenty-five year sentence suspended in favor of supervised probation with a condition of drug rehabilitation. *Id.* During this time of supervision and less

than two years after his release, Defendant committed the instant crime, wherein the violent risks that his prior criminal conduct created were tragically realized, nearly taking a young child's life and apparently causing lasting injury as a consequence of the traumatic skull fracture the child suffered in the ensuing car wreck. Instead of just creating a risk of violence by dealing drugs, Defendant became the perpetrator of actual violence.

Defendant characterizes his current crime as an "accident", but the Court disagrees. Defendant purposefully chose to ingest a drug he described as really "good" and drive on public highways, causing a severe physical injury to another person. Notably, Defendant's trial testimony indicated that the week before the wreck, after his fiancée and pre-teen son had retired to their beds, he had used the same batch of heroin and thus, he was aware of the heightened potency of the drug when he took it while driving on the day of the wreck. Therefore, the resulting harm he caused cannot appropriately be described as accidental. He purposely consumed an abnormally toxic substance with which he was intimately familiar and intentionally operated a vehicle, demonstrating reckless disregard for the value of human life. This Court easily finds Defendant's third felony conviction for driving under the influence causing serious bodily injury is a crime of actual violence and gives this third felony the primary emphasis in the recidivist analysis per *Beck, supra.*

Ineffective Prior Terms of Incarceration

The United States Supreme Court has long viewed both incapacitation and deterrence as rationales for recidivism statutes. "[A] recidivist statute['s] ... primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel* v. *Estelle,* 445 U. S. 263, 284 (1980); *Harmelin v. Michigan,* 501 U.S. 957, 999, 111 S.Ct. 2680, 2685-2686, 115 L.Ed.2d 836 (1991) (KENNEDY, J.,

concurring in judgment) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"); *State ex rel. Williams v. Riffe*, 127 W. Va. 573, 577, 34 S.E.2d 21, 23 (1945) ("Law enforcement in the name of the State primarily is for the safety and well-being of the people as a whole and the punishment of the individual offender is for the purpose of deterring others from committing like offenses").

In Defendant's case, his prior ninety-seven month federal sentence and twenty-five year Maryland sentence were both insufficient to deter or rehabilitate him from further misconduct. Rather, as discussed above, the level of known harm caused by Defendant's criminality actually increased following his prior periods of incarceration. The Court cannot help but observe that the tragedy caused by Defendant in the instant case would not have occurred if he had not been released early from his initial ten years with fifteen years suspended sentence in Maryland.

It is also relevant to note that the imposition of a life sentence upon a third-strike felon in West Virginia renders them eligible for release on parole after fifteen years. *See* W.Va. Code §62-12-13. Thus, depending on Defendant's behavior while incarcerated, he could conceivably be released after serving a lesser amount of time than the sentence of twenty-five years related to his second felony (of which the approximately twenty-two years remaining could still presumably be imposed upon him by Maryland for his violation of supervised probation).

Conclusion

In sum, Defendant's criminality has established a pattern of dangerous misconduct that has either created the threat of physical harm or death (*e.g.* his first two felonies) or actually caused serious bodily injury (*e.g.* his third felony). He has been unpersuaded to change by lesser periods of incarceration followed by supervised release. Under these circumstances, the Court cannot say that a life sentence with possibility of parole after fifteen years is unconstitutionally

disproportionate to his crimes. At some point in the history of a criminal, the interest in affording that person a second (or third chance) at liberty after a brief period of incarceration is outweighed by the interest in protecting society at large. Defendant Costello's repeated and increasingly reckless behavior has decidedly tipped the scales in favor of protecting society, effectively dictating his own sentencing order in this case. Even if this Court believed some lesser sentence is appropriate in this case, which it does not, absent a finding of unconstitutionality, the Court is without authority to impose it.

Having found a life sentence with possibility of parole is within the constitutional bounds of proportional punishment for Defendant's crimes in accordance with *Appleby* and *Kilmer*, *supra*, the Court is bound to sentence Defendant to life in prison pursuant to *Daye* and *Cobb* and W.Va. Code § 61-11-18.

The Defendant is ordered to pay restitution (in an amount to be set by further Order in this matter), a fine in the amount of $1,000.00 and the costs of this action while incarcerated pursuant to W.Va. Code §25-1-3 *et seq.*, and any remaining amount within one year upon release from incarceration to the Jefferson County Circuit Clerk located at the physical address of 119 North George St, STE 100, Charles Town, West Virginia, and the mailing address of P.O. Box 1234, Charles Town, WV 25414.

Defendant's effective sentencing date is July 24, 2017.

The Defendant having caused his own removal from the courtroom at sentencing, the Court advised Defendant, through his legal counsel, of Defendant's appeal rights.

Lastly, after consideration of the all of the evidence adduced during the Defendant's two jury trials (including particularly the recorded telephone calls of the Defendant at the Eastern Regional Jail), the Defendant's false testimony at his third felony trial, as well as the Defendant's obdurate refusal to listen to the sentence imposed by this Court and consequent

removal from the courtroom during sentencing, it is apparent that the Defendant lacks remorse and introspection and that he has failed to accept responsibility for his actions. Defendant profoundly and perhaps permanently injured a two year old child and caused inexpressible grief to the child's father who witnessed the catastrophic injuries to his son. Despite having caused this devastation, Defendant did not utter not a single word of remorse or acceptance of responsibility at sentencing.

Let it also not be forgotten that the Defendant's dangerously deceptive and selfish behavior harmed his own family too; despite knowing of his fiancée's adamant opposition to illegal drug use and while still under legal supervision for his second felony, the week before committing his third felony the Defendant surreptitiously brought poison into his own home where he lived with his fiancée and their young son and consumed a portion of it while they slept. One week later, Defendant's craving for opiates inflamed, he consumed more of this poison while driving into Harpers Ferry and committed his third felony. As a result, he now leaves behind a fiancée without financial support to raise their pre-teen son, effectively fatherless, and again, without a word of apology or remorse to his own family at his sentencing.

Having sentenced the Defendant to fifteen years to life imprisonment, it is this Court's hope that the West Virginia Department of Corrections avoids repeating Maryland's mistake in releasing the Defendant without being first well and truly confident that the Defendant will not recidivate. Public safety demands no less.

The Clerk shall deliver a copy of this Order to all counsel of record and retire this matter from the active docket of this Court.

It is so ORDERED and ADJUDGED.

/s/ David Hammer
Circuit Court Judge
23rd Judicial Circuit