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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON



STATE OF WEST VIRGINIA

RESPONDENT

vs

CASE No. 19-104

RONALD WARD

PETITIONER

CASE NUMBERS BELOW
19-F-8 AND 19-F-37
CIRCUIT COURT OF SUMMERS COUNTY

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
ARGUMENTS	1-3
CONCLUSION	3

TABLE OF AUTHORITIES

A. STATUTE

1. WEST VIRGINIA CODE 61-7-7 p1

B. CASE LAW

1. Israel v WV Secondary School Activities Commission, 388 S.E.2d 480 (W.Va. 1989)
..... 2
2. STATE v HULBERT, 544 S.E.2d 919 (W.Va. 2001) 1
3. STATE ex REL. BUTLER v HOKE, No.11-0866, 2012WL3091082 2
4. STATE ex REL. CONLEY v HILL, 487 S.E.2d 344 (W.Va. 1997) 1
5. STATE v HARGUS, 753 S.E.2d 893 (W.Va. 1989)2
6. STATE ex REL. JUSTIN v HEDRICK, 350 S.E.2d 565 (W.Va. 1986) 1
7. STATE v LAWSON, 22 S.E.2d 643 (W.Va. 1942)2

A. ALTHOUGH THE ISSUE OF DETERMINING THE "GRADE" OF AN OUT-OF-STATE CONVICTION UNDER W.VA. CODE 61-7-7 IS NOVEL, THIS COURT HAS SET THE PRECEDENCE FOR HOW TO DETERMINE THE GRADE OF AN OUT-OF-STATE OFFENSE

As the specific statute governing the application of W.Va. Code 61-7-7 has not been ruled on by this Honorable Court, you have ruled on the application of the proper use of out-of-state convictions in other statutory schemes. All Petitioner requests is that preceding cases be applied to his case. As set forth in the previously filed "Petitioner's Brief", this Court has consistently ruled that a foreign conviction may not be used to enhance a sentence or as a predicate to a crime unless the facts underlying the foreign conviction would be a crime in this state.

In the statutory scheme governing driving under the influence of alcohol the prosecution may not use an out-of-state conviction to enhance the charge unless such conviction has the same or similar elements. State ex rel. Conley v Hill, 487 S.E.2d 340 (W.Va. 1997).

The same is true for domestic violence cases. State v Hulbert, 544 S.E.2d 919 (W.Va. 2001).

Under the Habitual Offender Act, W.Va. Code 61-11-18 and 19, it is clear that:

- 1) Convictions from other states that would not constitute a felony in West Virginia may not be used as an enhancement; State ex rel. Justice v Hedrick, 350 S.E.2d 565 (W.Va. 1986);
and
- 2) West Virginia law is the law used to determine whether an out of state act would

constitute a felony. State v Lawson, 22 S.E.2d 643 (W.Va.1942); State ex rel. Justice v Hedrick, supra.; see State ex rel. Butler v Hoke, Memorandum Opinion, No.11-0866 (May 29, 2012).

In its brief the State of West Virginia suggests, at p. 8, that Petitioner seeks to revise the statute. This is not true. All Petitioner seeks is to have the long-settled law applied to his case.

B. EQUAL PROTECTION REQUIRES THAT PETITIONER BE TREATED THE SAME AS A PERSON WHOSE PRIOR CONVICTION FOR SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE WAS IN STATE

"Equal Protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." Israel v West Virginia Secondary School Activities Commission, 388 S.E.2d 480 (W.Va.1989); see State v Hargus 753 S.E.2d 893, 900 (W.Va. 2013). Petitioner is presently serving a 10-year prison sentence whereas if his conviction for simple possession of a controlled substance had been in West Virginia rather than in Indiana it would not have been a crime for him to possess a firearm. Clearly, Petitioner has been treated in a most disadvantageous manner.

Is it fair to say that he is "similarly situated" to a person with the same in-state predicate offense? There is no difference between the acts underlying the Indiana felony and the West Virginia misdemeanor. Only the grade of the offense differs. It is not logical to believe that

people convicted of that drug offense in Indiana should have different gun rights than one who bears a West Virginia conviction for the same wrongdoing.

The State urges a classification based on the geography of the crime, but there is no rational reason to do so. Indiana possessors of a controlled substance cannot be presumed to be more dangerous than West Virginia possessors of a controlled substance. When a fundamental right such as possession of a firearm is at stake the State should not be able to arbitrarily and capriciously to create a distinction to the detriment of Petitioner.

CONCLUSION

For the above stated reasons, and others appearing to the Court, Petitioner respectfully requests that the Court reverse his conviction and direct the trial court to enter a dismissal with prejudice.

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CERTIFICATE OF SERVICE

I, Scott A. Ash, counsel for Petitioner, do hereby certify that I have made service of the foregoing "Petitioner's Reply Brief" placing the same in a stamped envelope and mail the same by first class post to the following persons on the 29th day of April 2020:

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