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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 23-318 – *State v. Andrew Miller*

Armstead, Justice, dissenting:

Petitioner Andrew Miller ("Petitioner") and the State agree that the circuit court erred by permitting the prosecutor to briefly cross-examine Petitioner about his post-arrest silence during Petitioner's trial. The State argued that this error was harmless and highlighted what it deemed to be "overwhelming evidence" demonstrating that Petitioner shot the victim. The majority disagrees with the State's argument, concluding that the error was not harmless beyond a reasonable doubt. Therefore, the majority vacates Petitioner's convictions for felony malicious wounding, wanton endangerment, and felon in possession of a firearm. I disagree with the majority's conclusion[1] and believe that this case is similar to *State v. Hoard*, 248 W. Va. 428, 889 S.E.2d 1 (2023), and *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47 (1996). In *Hoard* and *Marple*, this Court weighed brief references to a defendant's post-arrest silence against overwhelming evidence of guilt, and found harmless error.

Additionally, I would reject Petitioner's second assignment of error in which he asserts that the State failed to establish that he had two qualifying offenses to justify the imposition of the recidivist life sentence.[2] Our recidivist statute, West Virginia § 61-11-

[1] I commend the majority for thoroughly analyzing the evidence and clearly explaining its conclusion that the error was not harmless. While the majority opinion is thorough and well-written, I disagree with its ultimate conclusion that the error in this case requires reversal of Petitioner's convictions.

[2] Because the majority reversed and vacated Petitioner's convictions based on his first assignment of error, it did not address Petitioner's second assignment of error.

18, provides that a person who has "been twice before convicted . . . of [certain crimes] punishable by confinement in a penitentiary shall be sentenced to . . . life" in prison upon a third conviction. *Id.* Petitioner had been convicted and sentenced on two felony offenses prior to his convictions in the instant case. Therefore, the recidivist life sentence was properly imposed against him. In arriving at this conclusion, I agree with the State's argument that this Court should overrule *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978), because it is inconsistent with the plain language of our recidivist statute.

A. Harmless Error

I agree with the majority's finding that the circuit court erred by allowing the prosecutor to question Petitioner about his post-arrest silence. As the majority notes, impeaching a defendant at trial with his or her post-arrest silence violates the defendant's due process rights under both the United States and West Virginia Constitutions. *See* Syl. Pt. 1, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977); *Doyle v. Ohio*, 426 U.S. 610 (1976). While the State concedes that it was error for the circuit court to permit the prosecutor to question Petitioner about his post-arrest silence, this is not the end of the inquiry. Instead, this Court has applied our harmless error test under these circumstances. "[H]armless error [is] firmly established by statute, court rule and decisions as salutary aspects of the criminal law of this State." Syl. Pt. 4, in part, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). The United States Supreme Court has recognized that "[m]ost errors, including constitutional ones are subject to harmless error analysis." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Where there is "grave doubt" regarding

the harmlessness of errors affecting substantial rights, reversal is required. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). As Justice Cleckley noted, "[h]armless error analysis in the appeal of a criminal case asks not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered . . . was surely unattributable to the error." *State v. Marple*, 197 W. Va. at 53, 475 S.E.2d at 53 (internal citation omitted). In conducting a harmless error analysis, the inquiry is fact specific. *See State v. Blake*, 197 W. Va. 700, 709, 478 S.E.2d 550, 559 (1996) ("Assessments of harmless error are necessarily content-specific.").

My review of the specific facts of this case reveals that the State introduced overwhelming evidence that Petitioner shot the victim, Mr. Goard ("victim"). First, the victim testified that Petitioner shot him. The victim described in detail the events leading up to the shooting, the shooting itself, and what he did after Petitioner shot him. Further, the State showed that Petitioner had a motive for shooting the victim because the two were involved in a drug dispute prior to the shooting. Petitioner's girlfriend, Ms. Dotson, testified that she got into an argument with Petitioner over her possibly giving the victim a bag of drugs. Ms. Dotson also testified that while she was in the bathroom and did not see the shooting, she heard Petitioner ask the victim about the drugs and then heard a gunshot. It is undisputed that immediately after the shooting, Petitioner fled the scene and was questioned by police officers who noted that he matched the description of the suspected shooter and that he gave the officers a fake name. Police later found a gun with Petitioner's DNA on it in the area where the officers stopped him.

Weighing this evidence against the brief questioning regarding Petitioner's post-arrest silence, I would find that the error was harmless. I believe this finding is consistent with our recent *Hoard* decision, in which this Court found harmless error where the State made brief references to the defendant's post-arrest silence during the trial. In *Hoard*, the Court found that "the brevity of [the] references, coupled with the overwhelming evidence," meant that the "error was harmless." 248 W. Va. at 438, 889 S.E.2d at 11. Similarly, in *Marple*, this Court affirmed a defendant's conviction where the investigating officer commented on the defendant's post-*Miranda* silence. *Marple*, 197 W. Va. at 53, 475 S.E.2d at 53. In *Marple*, this Court noted that the officer only made a "few remarks" and that the post-Miranda silence was never used during closing argument. *Id.* Weighing the brief remarks against the substantial evidence establishing the defendant's guilt, the Court in *Marple* concluded that the "jury would have reached the same verdict absent the post-*Miranda* silence testimony[.]" 197 W. Va. at 54, 475 S.E.2d at 54.

Consistent with *Hoard* and *Marple*, and in view of the overwhelming evidence introduced by the State, I would find that the error was harmless because I believe the jury would have reached the same verdict absent the post-arrest silence testimony because the evidence demonstrated that (1) the victim identified Petitioner as the shooter; (2) Ms. Dotson heard Petitioner and the victim arguing about drugs right before the shooting; (3) Petitioner fled the scene immediately after the shooting; (4) Petitioner was detained by police officers after fleeing the scene and gave the officers a fake name; and (5) a gun with Petitioner's DNA on it was found in the area where the officers detained

him. Weighing this evidence against the brief questioning about Petitioner's post-arrest silence, I find no reversible error.

Because I would have affirmed Petitioner's convictions in the instant case, I will proceed to address Petitioner's second assignment of error.

B. Recidivist Issue

After the jury convicted Petitioner of felony malicious wounding, wanton endangerment, and felon in possession of a firearm, the State filed a recidivist information alleging that Petitioner had two prior felony convictions. During the recidivist trial, the State presented evidence that Petitioner pled guilty to burglary, wanton endangerment with a firearm, kidnapping, and conspiracy to commit first-degree murder on February 26, 2010, in the Circuit Court of Raleigh County, West Virginia. The Raleigh County crimes occurred on May 7, 2009. Petitioner was sentenced for these offenses on April 12, 2010. Next, the State presented evidence that Petitioner was convicted and sentenced for attempted first-degree murder with a firearm on April 19, 2010, in the Circuit Court of Kanawha County, based on an offense that Petitioner committed in April of 2009. The recidivist jury found that Petitioner had been convicted of these prior offenses, and the circuit court imposed a recidivist life sentence.

On appeal to this Court, Petitioner argues that the State did not establish that he had two qualifying offenses sufficient to justify the imposition of the recidivist life sentence. He states that he committed his second offense before his first offense's conviction and sentence were final; thus, Petitioner asserts that under this Court's holding

in *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571, the circuit court erred by imposing a recidivist life sentence. In syllabus point one of *McMannis*, the Court held:

> Where a prisoner being proceeded against under the habitual criminal statute remains silent or says he is not the same person who was previously convicted and sentenced to the penitentiary offense or offenses alleged in the information, a circuit court has no jurisdiction to impose an enhanced sentence under the statute where the State fails to prove beyond a reasonable doubt that each penitentiary offense, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence. W.Va.Code §§ 61-11-18, 19.

Id.

The State concedes that under this Court's holding in *McMannis*, the recidivist statute does not apply to Petitioner. However, the State argues that *McMannis* was wrongly decided and not supported by the plain language of the recidivist statute. According to the State:

> *McMannis* read an additional requirement into the recidivist statute: requiring each offense to be committed "subsequent to each preceding conviction and sentence." . . . *McMannis* was wrong in 1978 and remains wrong now: it ignores the statutory text and context of the recidivist statute, and the legislative purpose it invoked to rewrite the statute does not support that outcome, either. Reliance interests are also particularly low in this area where the precedent governs simply how severe punishment may be, instead of giving West Virginians notice what conduct is—or is not—criminal. So, the stare decisis factors weigh in favor of overturning *McMannis* to avoid giving defendants like [Petitioner] a technical out that the recidivist statute does not support.

This issue, whether *McMannis* was wrongly decided, requires an examination of the recidivist statute, West Virginia Code § 61-11-18. This Court has held

that in deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995); *see also* Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). Additionally, this Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

The recidivist statute provides, in relevant part:

> (d) When it is determined, as provided in § 61-11-19 of this code, that **the person has been twice previously convicted** in the United States of a crime punishable by imprisonment in a state or federal correctional facility which has the same or substantially similar elements as a qualifying offense, **the person shall be sentenced to imprisonment in a state correctional facility for life**: Provided, That prior convictions arising from the same transaction or series of transactions shall be considered a single offense for purposes of this section: Provided, however, That the most recent previous qualifying offense which would otherwise constitute a qualifying offense for purposes of this subsection may not be considered if more than 20 years have elapsed between: (1) The release of the person from his or her term of imprisonment or period of supervision resulting from the most recent qualifying offense or the expiration of a period of supervised release resulting

> from the offense; and (2) the conduct underlying the current charge.

W. Va. Code § 61-11-18(d) (emphasis added).[3]

The first step in analyzing this statute is determining whether the plain language resolves the inquiry or whether the statute is ambiguous. This Court has previously recognized that our recidivist statute is "plain and unambiguous." *State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 647, 474 S.E.2d 573, 577 (1996). *See also State ex rel. Appleby v. Recht*, 213 W. Va. 503, 519, 583 S.E.2d 800, 816 (2002). I agree and believe that the plain, unambiguous language of our recidivist statute should be applied as written: if the defendant has been twice previously convicted of a qualifying offense, and subsequently commits a third qualifying offense, he or she falls within the scope of West Virginia Code § 61-11-18.

The Court in *McMannis* went beyond the plain language of West Virginia Code § 61-11-18 and held that before a circuit court may impose the recidivist enhancement, the State must prove beyond a reasonable doubt "that the second conviction for a penitentiary offense was for an offense committed after the first conviction and

[3] This language is contained in the current version of West Virginia Code § 61-11-18. While the recidivist statute has been revised multiple times since *McMannis* was decided in 1978, the key language in the statute providing that a recidivist life sentence applies to a person convicted of a third felony who has been "twice previously convicted," has remained consistent across the multiple versions of the statute. When *McMannis* was decided in 1978, West Virginia Code § 61-11-18 provided, in relevant part: "When it is determined, as provided in section nineteen hereof, *that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary*, the person shall be sentenced to be confined in the penitentiary for life." (Emphasis added).

sentence on a penitentiary offense, and that the principal penitentiary offense was committed after the second conviction and sentence on a penitentiary offense." *McMannis*, 161 W. Va. at 442, 242 S.E.2d at 575. In so ruling, the Court in *McMannis* committed a number of errors. First, it did not identify any ambiguity in the statute, nor did it explain why it was departing from the unambiguous language of the statute to include an additional requirement that is clearly not contained in the statute's plain language. As set forth above, this Court has repeatedly held that our duty is to apply the plain language of a statute and that a statute is only open to construction if its meaning is ambiguous. The Court's ruling in *McMannis* failed to adhere to this rule. In fact, the Court in *McMannis* entirely omitted *any* discussion of the actual language of West Virginia Code § 61-11-18. Instead, the Court concluded that

> the primary purpose of the statute is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses. The statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice, as the case may be, on a penitentiary offense. If the deterrent purpose of the statute is to be furthered, it is essential that the alleged conviction or convictions, except for the first offense and conviction, were for offenses committed after each preceding conviction and sentence.

161 W. Va. at 441, 242 S.E.2d at 574-75.

Again, the Court in *McMannis* did not cite any portion of the actual language contained in West Virginia Code § 61-11-18 to support its conclusion. Instead, the Court added a judicially created mandate to the statute by finding that this additional requirement would deter felony offenders from committing subsequent felony offenses. This Court has

previously recognized that we must apply a statute's plain language, rather than "attempt to make it conform to some presumed intention of the Legislature not expressed in the statutory language." *Cart v. Gen. Elec. Co.*, 203 W. Va. 59, 63 n.8, 506 S.E.2d 96, 100 n.8 (1998). Similarly, this Court has held that "[i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." Syl. Pt. 11, *Brooke B. v. Ray*, 230 W. Va. 355, 738 S.E.2d 21 (2013). If the Legislature intends for the recidivist statute to contain the additional requirement included by *McMannis*, it is free to add this language to West Virginia Code § 61-11-18. However, this Court may not read into West Virginia Code § 61-11-18 that which it does not say. Indeed, the Legislature has amended the recidivist statute multiple times since *McMannis* was decided and it has never added such language to the statute.

Further, the instant case illustrates why *McMannis's* holding, in addition to being unsupported by West Virginia Code § 61-11-18's plain language, does not accomplish the purported deterrent effect it was meant to serve. Petitioner "persisted in criminality" after having been convicted of two felonies in 2010. Despite being convicted and sentenced on two prior felonies in 2010, he continued to engage in criminal activity and was convicted of multiple felonies in the instant matter in 2022. The clear deterrent effect the Legislature intended in order to combat such continuing criminal activity is served by the plain language of the recidivist statute, i.e., if a person with two felony

convictions commits an additional felony, he or she is subject to a life sentence. I do not see how the additional requirement *McMannis* added to the statute furthers this purpose. Instead, the additional *McMannis* requirement would spare defendants, like Petitioner herein, from facing a life sentence under the recidivist statute based on a technicality. Under *McMannis*, because a defendant commits a second felony before the conviction and sentence for the first felony is final, the defendant only has one qualifying offense. This result defeats, and indeed is in direct conflict with, the purpose of the recidivist statute.

With all of the foregoing in mind, I acknowledge that *McMannis* was decided in 1978 and has not been overruled. In general, "the doctrine of *stare decisis* requires this Court to follow its prior opinions." *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W. Va. 73, 83, 726 S.E.2d 41, 51 (2011) (Davis, J., concurring, in part, and dissenting, in part). This Court has recognized that

> [s]tare decisis . . . is a matter of judicial policy. . . . It is a policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted.

Woodrum v. Johnson, 210 W. Va. 762, 766 n. 8, 559 S.E.2d 908, 912 n. 8 (2001) (internal quotations and citations omitted). In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), Justice Cleckley observed that "a precedent-creating opinion *that contains no extensive analysis of an important issue is more vulnerable to being overruled* than an opinion which demonstrates that the court was aware of conflicting decisions and gave at

least some persuasive discussion as to why the old law must be changed." 194 W.Va. at 679 n. 28, 461 S.E.2d at 185 n. 28 (emphasis added).

As previously stated, *McMannis* did not engage in *any* analysis of the actual language contained in our recidivist statute. It did not declare that the statute was ambiguous, nor did it explain why the Court failed to apply the statute's plain language and, instead, added an additional requirement to the statute that the Legislature did not include. Under these circumstances, I believe that *McMannis* is one of the "rare case[s] when it clearly is apparent that an error has been made." *Woodrum*, 210 W. Va. at 766 n. 8, 559 S.E.2d at 912 n. 8. Therefore, I believe *McMannis* should be overruled.[4]

C. Conclusion

Based on all of the foregoing, I would find that the error in this case related to Petitioner's post-arrest silence was harmless beyond a reasonable doubt. Further, I would have affirmed Petitioner's life sentence that was imposed pursuant to our recidivist statute and, in doing so, I would overrule *McMannis*. Therefore, I respectfully dissent.

[4] While I believe this Court should overrule *McMannis*, I also recognize that it is within the purview of the Legislature to consider whether West Virginia Code § 61-11-18 should be amended to explicitly reject the Court's ruling in *McMannis*.