

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-620

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**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

vs.) No. 23-620

**THOMAS M. VALENTINE,
Defendant Below, Petitioner**

**FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
CASE NOS. 22-F-274 and 23-F-82
HON. DAVID R. JANES**

PETITIONER'S APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

- I. The Circuit Court Erred in Denying the Defendant's Rule 29 Motion for Judgment of Acquittal following the close of the State's case-in-chief.**

- II. The Circuit Court Abused its Discretion by Imposing a Life Sentence Under the Recidivist Statute as it Violates the Proportionality Principle of the West Virginia Constitution.**

STATEMENT OF THE CASE

On February 10, 2022, Brandon Clyde, a deputy with the Marion County Sheriff's Department, observed a vehicle traveling on the High-Level Bridge in Fairmont, Marion County, West Virginia, with a brake light that was not operational. The officer got behind the vehicle and ran the license plate. The plate was returned as being a Chevrolet Tracker but was displayed on a Jeep Commander. A.R., Vol. 4, Pg. 110, Ln. 17 – Pg. 111, Ln. 3. The officer conducted a traffic stop on the vehicle and made contact with the driver and Petitioner herein, Thomas Valentine. The Petitioner advised that the vehicle belonged to his cousin and that he did not have an operator's license. A female passenger was also identified as Crystal Haggerty and a search was done on both names. A.R., Vol. 4, Pg. 112, Lns. 6-20. Permission to search the vehicle was requested but denied by the Petitioner. A.R., Vol. 4, Pg. 113, Lns. 21-24.

The officer deployed his K9 and performed an open-air sniff of the vehicle which resulted in a positive indication on the passenger side door, where Ms. Haggerty was seated. A.R., Vol. 4, Pg. 115, Ln. 5 – Pg. 117, Ln. 4. Upon searching the vehicle, Deputy Russell Garrett located a .45 caliber handgun in the center console of the vehicle (A.R., Vol. 4, Pg. 61, Lns. 15-23), a zippered pouch in the glove compartment of the passenger side of the vehicle containing drug paraphernalia, small plastic bags, and a set of scales. A.R., Vol. 4, Pg. 65, Ln. 2 - Pg. 69, Ln. 21.

Deputy Garrett then continued his search in the rear passenger compartment and located a black backpack. Inside of the backpack the Deputy located seven baggies with different substances in it. Five of the bags contained various quantities of methamphetamine, one bag contained cocaine, and another bag contained a substance initially believed to be heroin. A.R., Vol. 4, Pg. 70, Lns. 7-18. Deputy Garrett then testified that the backpack contained a piece of mail addressed

to Thomas Valentine but neither Deputy Garrett nor any of the other deputies saw fit to either photograph or secure the piece of mail as evidence. A.R., Vol. 4, Pg. 70, Ln. 19 – Pg. 71, Ln. 4. See also A.R., Vol. 4, Pg. 82, Ln. 11 – Pg. 85, Ln. 10. In fact, neither the black backpack nor the piece of mail with Thomas Valentine's name on it is even mentioned in the official narrative report of the investigation. A.R., Vol. 4, Pg. 85, Ln. 11 – Pg. 86, Ln. 5. Lastly, neither the search of the vehicle nor the alleged statement of the Defendant regarding the firearm were recorded. There was no bodycam footage and no audio recordings made of the Defendant. A.R., Vol. 4, Pg. 86, Ln. 6 – Pg. 87, Ln. 13.

Deputy Clyde's testimony later confirmed the earlier testimony of Deputy Garrett in that there was no mention of a black backpack or any personal items inside of it in the official narrative report. A.R., Vol. 4, Pg. 137, Lns. 2-23. Deputy Clyde also confirmed that there was no video or audio recording of the search, the vehicle or the interaction with Thomas Valentine- and also that no drugs or drug paraphernalia were located on Mr. Valentine's person. A.R., Pg. 137, Ln. 24 – Pg. 139, Ln. 3.

With regard to the firearm, it was stipulated prior to trial that the Defendant was a prohibited person. At trial, the owner of the vehicle, State's witness Lakeisha Watkins, testified that, at the time that she permitted Mr. Valentine to use her car, the vehicle contained some of her personal possessions. Ms. Watkins recalled that there was some electronic equipment (speakers, scanner, etc.) as well as her ex-boyfriend's handgun. Ms. Watkins testified that she had forgotten that the firearm was in the vehicle until it became an issue after the traffic stop on February 10, 2022. A.R., Vol. 4, Pg. 103, Ln. 1 – Pg. 104, Ln. 5.

The Defendant was arrested and charged with multiple offenses which were later the subject of an indictment by the October 2022 Grand Jury for Marion County. A.R., Vol. 1, Pgs.

007 – 011. The indictment included the following: Count I, Conspiracy to Manufacture, Deliver or Possess with Intent to Manufacture or Deliver not less than Five Grams but fewer than Fifty Grams of Methamphetamine; Count II, Possession with Intent to Deliver a Controlled Substance (Methamphetamine); Count III, Conspiracy to Commit a Felony Controlled Substance Offense; Count IV, Possession with Intent to Deliver a Controlled Substance (Cocaine); Count V, Possession with Intent to Deliver a Controlled Substance (Heroin); Count VI, Use or Presentment of a Firearm in the Commission of a Felony; Count VII, Carrying a Concealed Firearm by Prohibited Person; and Count VIII, Possession of a Firearm by a Prohibited Person. Counts I and V were later amended upon Motion of the State- without objection from the Defendant. A.R., Vol. 1, Pgs. 024-025 and Pgs. 028-029. Count IV was dismissed by the State following its case-in-chief. A.R., Vol. 4, Pg. 153, Lns. 1-7.

The jury trial at which the foregoing testimony was elicited was held on March 29, 2023, and March 30, 2023, after which the Petitioner was convicted of Counts I, II, III, V, VII, and VIII. See Trial Order at A.R., Vol. 1, Pgs. 030 – 034. The State of West Virginia then filed a Recidivist Information on or about April 17, 2023, alleging that the Petitioner had previously been convicted on or about the 8th day of August, 2019, in the Circuit Court of Marion County, West Virginia, in Case No. 19-F-180 of the felony offense of Fleeing in a Vehicle with Reckless Disregard for the Safety of Others and on or about the 6th day of February, 2019, in the Circuit Court of Marion County, West Virginia, in Case No. 18-F-8 of the felony offense of Strangulation. A.R., Vol. 2, Pgs. 005 -007.

A jury trial was held on the Recidivist Information on August 18, 2023, and the Petitioner was convicted in connection therewith. See Trial Order, A.R., Vol. 2, Pgs. 013 - 015 On September 21, 2023, the Petitioner was sentenced as follows: In Case No. 22-F-274, a definite term of five

(5) years for Count I; not less than one (1) year nor more than fifteen (15) years for Count II; a definite term of five (5) years for Count III; not less than one (1) year nor more than fifteen (15) years for Count V; a definite term of five (5) years for Count VII; and for Count VII (for which the Recidivist Information was filed in Case No. 23-F-82) life with eligibility for parole after fifteen (15) years. Counts I, II, III and V were ordered to run concurrently. Counts VII and VIII were also ordered to run concurrently but consecutive to Counts I, II, III and V. A.R., Vol. 2, Pgs. 016 – 020.

It is from that Order that the Petitioner now appeals.

SUMMARY OF ARGUMENT

I. The Circuit Court abused its discretion in denying the Defendant's Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial. The State of West Virginia failed to present evidence at trial which established the prima facie elements of the crimes with which the Defendant was charged in this matter. More specifically, with regard to Counts I, II, III, and V, the State failed to establish that the Petitioner conspired with another individual, nor possessed any of the substances found in the subject vehicle with the intent to deliver the same. With regard to Counts VII and VIII, the State failed to establish that the Petitioner was knowingly in possession of a firearm at the time of the traffic stop at issue in this matter.

II. The Petitioner challenges his life sentence under the recidivist statute as being disproportionate to the qualifying offenses alleged in the Information. The Information alleges that the Petitioner was previously convicted of Fleeing in a Vehicle with Reckless Disregard for the Safety of Others and Strangulation. The Petitioner alleges that the Circuit Court erred by imposing a sentence that violated the proportionality principle set forth in Article III, Section 5 of the West Virginia Constitution.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a)(4), the Petitioner submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. The Circuit Court Erred in Denying the Defendant's Rule 29 Motion for Judgment of Acquittal following the close of the State's case-in-chief.

For those attorneys who have had the honor of practicing in Division II of the Circuit Court of Marion County, we are accustomed to the manner in which Rule 29 motions are handled at the close of the State's case-in-chief. The jury is generally excused to the jury room and the Court announces that, with regard to any defense motions upon the close of the State's evidence, the Court finds that the prima facie elements for the offenses contained in the Indictment have been met, and that any such motion is denied. The Court notes the objection and exception by the defense and states that either counsel may place further objections on the record with the Court Reporter while the trial stands in recess.

In this particular instance, the Court was understandably concerned about the need to have the matter to the jury the next morning due to some pre-existing obligations of some jurors the following afternoon. A.R., Vol. 4, Pg. 153, Ln. 18 – Pg. 154, Ln. 6. In the rush to get through the charge before the end of the day, neither the Court nor counsel realized that the Court had not made its usual findings with regard to Rule 29 motions. It wasn't until the transcript had been prepared during the appeal process that undersigned counsel realized the omission. The only mention of those motions occurred as follows: "Count IV is dismissed. The state rests. Reserve a spot on the record for any appropriate motions at this time, which we'll discuss out of the hearing of the jury." A.R., Vol. 4, Pg. 153, Lns. 7-9.

Upon returning from a short break, the Court went directly into the jury charge. Upon finishing the charge, the Court adjourned for the day and closing arguments were presented the following morning. Subsequent to the deliberations of the jury, the Defendant was convicted of convicted of Counts I, II, III, V, VII, and VIII. A.R., Vol. 4, Pg. 225, Ln. 23 – Pg. 227, Ln. 21.

"A motion for judgment of acquittal challenges the sufficiency of the evidence." *State v. Houston*, 197 W.Va. 215, 229, 475 S.E.2d 307, 321 (1996) (citing Franklin D. Cleckley, 2 Handbook on West Virginia Criminal Procedure 292 (2d ed. 1993)). Once the trial Court has ruled upon any such motion brought under Rule 29, this Court has previously held that "[t]he Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla*, 227 W.Va. 492, 497, 711 S.E.2d 562, 567 (2011) (citing *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

More specifically, this Court has set forth the test governing a claim of insufficient evidence on appeal as follows, in Syllabus Points 1 and 3 of *State v. Guthrie*, 461 S.E.2d 163, 194 W.Va. 657 (1995):

1. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecuting, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

3. A criminal defendant challenging the sufficiency of evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a

jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

In Case No. 22-F-274, the Indictment alleged the following offenses as to the Petitioner: Count I, Conspiracy to Manufacture, Deliver or Possess with Intent to Manufacture or Deliver not less than Five Grams but fewer than Fifty Grams of Methamphetamine; Count II, Possession with Intent to Deliver a Controlled Substance (Methamphetamine); Count III, Conspiracy to Commit a Felony Controlled Substance Offense; Count IV, Possession with Intent to Deliver a Controlled Substance (Cocaine); Count V, Possession with Intent to Deliver a Controlled Substance (Heroin); Count VI, Use or Presentment of a Firearm in the Commission of a Felony; Count VII, Carrying a Concealed Firearm by Prohibited Person; and Count VIII, Possession of a Firearm by a Prohibited Person.

In the instant case, the Petitioner, driving a borrowed vehicle, had a passenger, identified as Crystal Haggerty, who was inside of the vehicle at the time of the traffic stop. There was no evidence presented as to the relationship between the Petitioner and Ms. Haggerty. When the K9 hit on the vehicle during the “free air sniff”, it did so on the passenger side where Ms. Haggerty and her belongings were situated. After finding the illegal substances in the vehicle, both the Petitioner and Ms. Haggerty were charged with three (3) counts of Possession with Intent to Deliver a Controlled Substance¹. There was no testimony at trial from the investigating officers that established how the drugs first entered the car, which occupant had control of them, nor anything that would show that either occupant had the intent to distribute the drugs to any other

¹ Ms. Haggerty was subsequently released on bond, failed to show for further proceedings, and to this day, has an outstanding capias for her arrest.

individual. What was established, however, is that the drugs were located in or near the passenger compartment and that Thomas Valentine did not have any drugs or drug paraphernalia on his person. It was also established that the investigation yielded no electronic messages or cell data which would indicate a conspiracy between the Defendant and Ms. Haggerty, nor the participation or intent to participate, of Thomas Valentine in the delivery of any illegal substance.

With regard to the possession of illegal substances, the evidence adduced by the State at trial failed to support the conviction for those charges. This Court has previously held that:

In West Virginia mere physical presence on premises in which a controlled substance is found does not give rise to a presumption of possession of a controlled substance, but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance.

The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant 's dominion and control.

State v. Dudick, 158 W.Va. at 630, 213 S.E.2d at 460, Syl. Pts. 3 and 4; *State v. Plante*, No. 19-0109 (W. Va. Nov 19, 2020).

Analyzing the evidence adduced at trial with that guidance in mind, one can only reach the conclusion that the totality of the evidence was insufficient to sustain a conviction on any charge of conspiracy or intent to deliver on the part of Thomas Valentine.

With regard to the firearm, testimony was elicited from witness Lakeisha Watkins, the owner of the vehicle which was being driven by the Petitioner at the time of the traffic stop. Ms. Watkins testified that Mr. Valentine had been using her vehicle with her permission and that the

firearm found in the console of the vehicle belonged to a former boyfriend of hers. She testified that she did not inform the Petitioner that there was a firearm in the vehicle because she had forgotten about it until he was arrested.

Just as with the issue of conspiracy to deliver or intent to deliver illegal substances, the evidence adduced at trial is wholly inadequate to warrant a conviction for the firearm charges. The Petitioner was acquitted by the jury of Use or Presentment of a Firearm During the Commission of a Felony, yet found guilty of Possession of a Firearm by a Prohibited Person and Carrying a Concealed Firearm by a Prohibited Person.

Assuming *arguendo* that the State was proceeding on a constructive possession argument for the firearm- just as it did with the illegal substances, it would have been required to prove that the Defendant had knowledge of the firearm and that the firearm was within his dominion and control. The only mention of the Defendant's knowledge of the firearm came in the testimony of Deputy Garrett when he testified that he somehow gleaned from his conversation with the Defendant that he had knowledge of the firearm:

Q. You said that you were discussing the firearm with Mr. Valentine and he acknowledge [sic] it being in the vehicle; correct?

A. Yes. Based upon my conversation with him, he knew it was in the vehicle. He denied being the owner of the firearm, but, yeah, he knew it was there.

A.R., Vol. 4, Pg. 86, Lns. 19-24.

This spurious, uncorroborated and apparently presumptuous testimony- that was not recorded in any manner whatsoever- is the only mention that the Defendant had knowledge of the firearm and it should not be enough to convict him of either Count VII or Count VIII of the Indictment.

In sum, the facts as elicited at trial are inconsistent with the guilt of the Petitioner as to each of the Counts of the Indictment. As such, the Circuit Court erred in not addressing or, alternatively, presumptively denying the Rule 29 Motion for Judgment of Acquittal.

II. The Circuit Court Abused its Discretion by Imposing a Life Sentence Under the Recidivist Statute as it Violates the Proportionality Principle of the West Virginia Constitution.

In the instant matter, the Recidivist Information alleged, and the jury found, that the Petitioner had previously been convicted on or about the 8th day of August, 2019, in the Circuit Court of Marion County, West Virginia, in Case No. 19-F-180, of the offense of Fleeing in a Vehicle with Reckless Disregard for the Safety of Others, a felony offense pursuant to the provisions of W.Va. Code 61-5-17(f), punishable by confinement in a state correctional facility. The Information further alleged that the Defendant was previously convicted on or about the 6th day of February, 2019, in the Circuit Court of Marion County, West Virginia, in case No. 18-F-8, of the offense of Strangulation, a felony offense per the provisions of W.Va. Code 61-2-9D, punishable by confinement in a state correctional facility. A.R., Vol. 2, Pgs. 005 – 006.

The Petitioner now alleges that the conviction in 19-F-180 is not a conviction that involves (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. For that matter, the Possession of a Firearm by a Prohibited Person and Carrying a Concealed Firearm by a Prohibited Person, if examined under a fact-specific inquiry, would fail to meet that standard as well. Admittedly, the offense is now listed as a “qualifying offense” in W.Va. Code § 61-11-18 (amendments effective June 5, 2020). Given the fact that the statute was

not amended until after the conviction in Case No. 19-F-180 occurred, the Petitioner alleges that it is necessary to examine this Court's prior analyses of qualifying and/or triggering offenses.

This Court has previously held that "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Additionally, this Court first recognized our recidivist statute as "among the most draconian in the nation" in *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205(1981). Nonetheless, it has upheld the statute on numerous occasions against constitutional challenges. *Id.* at 536, 276 S.E.2d at 213; see, e.g., *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980) (cruel and unusual punishment/proportionality challenge); *Martin v. Leverette*, 161 W. Va. 547, 244 S.E.2d 39 (1978) (equal protection challenge).

It reiterated the *Wanstreet* holding, in *State v. Hoyle* 242 W. Va. 599, 836 S.E.2d 817 (2019), as follows:

"While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syllabus Point 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). *Hoyle*, 242 W. Va. at 603, 836 S.E.2d at 821, Syl. Pt. 10.

Following *Wanstreet*, the Court adopted the following test to use in ascertaining whether a life recidivist sentence is appropriate under a constitutional proportionality challenge:

"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*, 167 W.Va. 830, 831, 286 S.E.2d 234 (1981); *State v. Kilmer*, 240 W. Va. at 186, 808 S.E.2d at 868, syl. pt. 3. *State v. Gaskins*, No. 18-0575 (W. Va. Jun 25, 2020).

Most recently, this Court held that

[f]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019); *State v. Gaskins*, No. 18-0575 (W. Va. June 25, 2020).

The Petitioner alleges that the prior convictions set forth in the Recidivist Information do not meet the requirements of the test set forth in *Hoyle*. As such, it does not meet the proportionality requirement as required by Section III, Article 5 of the West Virginia Constitution and this Court's application of that provision in *Vance* and its progeny.

As a result of the foregoing the Petitioner alleges that the Circuit Court erred by imposing a sentence that violated the proportionality principle set forth in Article III, Section 5 of the West Virginia Constitution.

CONCLUSION

The Circuit Court improperly failed to address, and seemingly implicitly denied, the Defendant's Rule 29 motion where it was abundantly clear that the State had failed to establish the elements necessary to sustain a conviction on each of the counts presented in the Indictment in Case No. 22-F-274. The Circuit Court committed further error in imposing a life sentence in connection with the Recidivist Information filed in Case No. 23-F-82 as it violates the mandated principles of the West Virginia Constitution. The foregoing rulings constitute an abuse of discretion and should, therefore, be reversed by this Honorable Court.

THOMAS M. VALENTINE,
Petitioner,
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Docket No. 23-620

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

vs.) No. 23-620

**THOMAS M. VALENTINE,
Defendant Below, Petitioner**

CERTIFICATE OF SERVICE

I, Christopher M. Wilson, Counsel for the Petitioner, do hereby certify that a true and actual copy of the foregoing “Petition for Appeal” was filed in accordance with the protocols governing e-filing for the Supreme Court of Appeals of West Virginia, and that a copy has been provided to the Respondent accordingly.

/s/ Christopher M. Wilson
Counsel for Petitioner