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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 23-390—*State of West Virginia v. Jason Swindler*

TRUMP, Justice, dissenting:

The majority in this case finds that the petitioner's arraignment on his recidivist information was untimely because it was conducted in the term of court after he was convicted. To reach this conclusion, the majority applies the 1943 version of West Virginia Code § 61-11-19 which required a recidivist arraignment to occur in the same term of court as that in which the defendant was convicted. However, West Virginia Code § 61-11-19 was amended in 2020. Since its amendment, it authorizes a recidivist arraignment to occur no later than the next term of court after conviction. Because the 2020 amended version of West Virginia Code § 61-11-19 was in effect a year before the petitioner's felony conviction, it applies to the petitioner's case, the majority errs and I must respectfully dissent.

The Petitioner was indicted on February 26, 2020, for crimes occurring in January of 2020. The Legislature amended West Virginia Code § 61-11-19 in S.B. 765 on March 7, 2020, with an effective date 90 days from passage or June 5, 2020. The Petitioner was convicted on June 10, 2021, and the recidivist information was filed June 15, 2021. The Petitioner was arraigned on the recidivist information on June 22, 2021. The majority asserts that the triggering date for which recidivist statute applies (the 1943 version or the 2020 version) was the time of the petitioner's criminal offenses in January 2020. I believe the majority is incorrect.

While a recidivist proceeding is "integrally connected with the underlying qualifying criminal conviction[,]" *State ex rel. Delligatti v. Cohee*, No. 22-921, 2023 WL 3676890, at *2 n.5 (W. Va. May 26, 2023) (memorandum decision), recidivist proceedings are "separate, independent, and discretionary proceedings from the underlying criminal conviction." *Appleby v. Warden, N. Reg'l Jail & Corr. Facility*, 595 F.3d 532, 539 n.7 (4th Cir. 2010). *See also Spencer v. Texas,* 385 U.S. 554, 566 (1967) ("Some jurisdictions deal with the recidivist issue in a totally separate proceeding, *see, e.g., Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L.Ed.2d 446 [(1962).]");[1] *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 511, 583 S.E.2d 800, 808 (2002) (per curiam) (recognizing "the separate nature of the recidivist proceeding" under West Virginia Code § 61-11-19). These distinctions are dispositive of the issue in this case.

The Petitioner's recidivist information was filed on June 15, 2021. This constituted the triggering date for arraignment upon the information and commencement of the recidivist proceeding, and the controlling law governing the recidivist proceeding at that point was not the 1943 version of West Virginia Code § 61-11-19 (which had ceased having effect on June 4, 2020), but the 2020 version of that statute (which was effective on June 5, 2020, and had been in effect a year). Accordingly, the Petitioner was timely

[1]In *Oyler,* the United States Supreme Court addressed the constitutionality of West Virginia Code § 61-11-19 on due process and equal protection grounds. *See Oyler,* 368 U.S. at 449.

arraigned on his recidivist information in this case under the 2020 version of West Virginia Code § 61-11-19. Thus, the majority errs in reversing the Petitioner's recidivist sentence.

The majority asserts, however, that application of the 2020 recidivist arraignment provision to the petitioner would affront ex post facto principles.[2] This is also incorrect.

The very first predicate to trigger ex post facto review is that the legislation challenged must be retrospective. "To fall within the ex post facto prohibition, a law must be retrospective-that is, 'it must apply to events occurring before its enactment[.]'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citations omitted).[3] A law that is not retrospective is not ex post facto. *See, e.g*, *Lewis v. Class*, 565 N.W.2d 61, 66 (S.D. 1997) (footnote omitted) ("We conclude that the 1986 amendment . . . is not retrospective and therefore does not violate the ex post facto clauses."); *United States v. Lozano*, 138 F.3d 915, 916–17 (11th Cir. 1998) ("We agree with every circuit to address the issue that the 'aggravated felony'

[2]Article I, § 10, clause 1 of the United States Constitution provides: "No State shall . . . pass any . . . ex post facto law[.]" "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981). Like the United States Constitution, the West Virginia Constitution contains an ex post facto limitation. W. Va. Const. Art. III, § 4 ("No . . . ex post facto law . . . shall be passed.").

[3]While a recidivist proceeding is not triggered until there has been a conviction on a substantive offense, "[a] statute is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox v. Hart*, 260 U.S. 427, 435 (1922).

provision of U.S.S.G. § 2L1.2 is not retrospective and, therefore, is not ex post facto."). The application of the 2020 amendments to the petitioner's 2021 recidivist arraignment are not retrospective because the 2020 amendments were effective at the time of the filing of the petitioner's recidivist information and the subsequent recidivist arraignment.[4] Therefore, ex post facto principles are simply not implicated. But, even if the 2020 amendments were retrospective, the amendments would still not violate ex post facto principles.

> A procedural change in a criminal proceeding does not violate the *ex post facto* principle found in the *W. Va. Const*. art. III, § 4 and in the *U.S. Const*. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

[4]The majority observes that the State conceded that application of the 2020 amendments to West Virginia Code § 61-11-19 would be retrospective. But the parties cannot dictate to us an erroneous construction of the law. """When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."""" *State v. Blake*, 197 W. Va. 700, 706 n.10, 478 S.E.2d 550, 556 n.10 (1996) (quoting *United States Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc*., 508 U.S. 439, 446 (1993) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)); *see also Daily Press, Inc. v. Commonwealth*, 739 S.E.2d 636, 640 n.6 (Va. 2013) ("[W]e do not allow parties to define Virginia law by their concessions."); *Polk v. State*, 271 N.E.3d 151, 155 n.2 (Ind. Ct. App. 2025) ("[A] party's concession in a brief is not binding on our Court in our own assessment of the law and the facts.").

Syl. Pt. 7, *State ex rel. Collins v. Bedell*, 194 W. Va. 390, 460 S.E.2d 636 (1995).[5] The majority finds that application of the 2020 amendments would have deprived the petitioner of a defense and, as such, would have violated his ex post facto rights. I believe that this is incorrect. The 2020 amendment to West Virginia Code § 61-11-19 extending the time within which a defendant may be arraigned on a recidivist information did not deprive the defendant of a defense; rather, it merely altered the procedure by which the recidivism case against the petitioner could proceed—and that does not deprive a defendant of a "defense" to a sentence under ex post facto principles.

A "defense" for purposes of ex post facto principles relates to matters that alter the elements of a crime or which a defendant may plead as justification or excuse for a crime. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands

[5]The 2020 amendments to West Virginia Code § 61-11-19 dealing with arraignment were clearly procedural in that they merely changed the method for determining when a recidivist sentence could be imposed. *See Dobbert v. Florida*, 432 U.S. 282, 293–94 (1977) ("In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed[.]"). We have recognized repeatedly that West Virginia Code § 61-11-19 is a procedural provision. *See, e.g.*, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 527 n.3, 276 S.E.2d 205, 209 n.3 (1981) ("W. Va. Code, 61-11-19, contains the procedural provisions for invoking the recidivist penalties found in W. Va. Code, 61-11-18."); *State v. Jones*, 187 W. Va. 600, 604, 420 S.E.2d 736, 740 (1992) ("the procedural section of our recidivist statute, W. Va. Code, 61-11-19 (1943)"); *State v. Christian*, No. 15-1003, 2016 WL 3136852, at *2 n.1 (W. Va. June 3, 2016) (memorandum decision) ("While West Virginia Code § 61-11-18 contains the recidivist statute's substantive provisions, West Virginia Code § 61-11-19 sets forth the procedural requirements for imposing a recidivist sentence.").

the scope of a criminal prohibition after the act is done."); *United States v. De La Mata*, 266 F.3d 1275, 1286 (11th Cir. 2001) ("Only statutes withdrawing defenses related to the essential elements of a crime, or to matters which a defendant might plead as justification or excuse fall into this latter category [prohibiting the deprivation of defense to a crime]."); *United States v. Morgan*, 845 F. Supp. 934, 943 (D. Conn. 1994) (holding that "only statutes that withdraw defenses relating to the definition of a crime, or that involve matters that a defendant might plead as justification or excuse, fall into th[e defense limitation of the ex post facto clause]."), *aff'd on other grounds*, 51 F.3d 1105 (2d Cir. 1995); *United States v. Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993) ("Only statutes withdrawing defenses related to the definition of the crime, or to the matters which a defendant might plead as justification or excuse [deprive one charged with a crime of a defense available according to law at the time of commission of the act]."). The legislature's 2020 amendment to West Virginia Code § 61-11-19 relating to arraignment simply did not deprive the petitioner of a justification or excuse for his conduct; it merely altered the procedure for how the case could proceed in the effort of the State to prove the petitioner was a three-time offender. The fact that this included an expansion of the court's jurisdiction based upon when the petitioner was arraigned does not make out an ex post facto violation. *Cf. Taylor v. Garaffa*, 57 M.J. 645, 651 (N-M. Ct. Crim. App. 2002) (the "mere alteration of an inferior court's maximum jurisdiction cannot constitute . . . a[n ex post facto] violation."). As such, applying the 2020 amendments to the Petitioner would not violate ex post facto principles.

For the foregoing reasons, I respectfully dissent to the majority's opinion. I would also affirm the petitioner's life sentence as a recidivist.