No. 29636 - State of West Virginia v. Herman R. Palmer

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OF WEST VIRGINIA

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Davis, J., dissenting:

The majority opinion reversed Mr. Palmer's conviction and sentence for third-offense driving while his license was suspended or revoked for driving under the influence. The majority concludes that the indictment was fatally flawed because it failed to articulate that Mr. Palmer's prior convictions involved DUI-related revocations. I believe the indictment in this case was sufficient. Therefore, the conviction and sentence should not have been disturbed. For the reasons set forth below, I respectfully dissent.

A. The Indictment Was Sufficient

Mr. Palmer alleged that the indictment against him did not apprise him of the charge for which he was convicted and sentenced. Justice Cleckley clearly enunciated that "the sufficiency of an indictment is determined by practical rather than technical considerations." *State v. Miller*, 197 W. Va. 588, 599, 476 S.E.2d 535, 546 (1996). *See State v. Wallace*, 205 W. Va. 155, 161, 517 S.E.2d 20, 26 (1999) ("The sufficiency of a criminal indictment is measured in practical, common sense terms[.]"). Moreover, "[n]o particular form of words is required . . . so long as the accused is adequately informed of the nature of the charge and the elements of the offense are alleged." *State v. Hall*, 172 W. Va. 138, 143-44, 304 S.E.2d 43, 48 (1983). Finally, "[a]n indictment as drafted is presumed sufficient if it tracks

the statutory language, cites the elements of the offense charged, and provides the other essential details, such as time, place, and persons involved, to provide adequate notice to the defendant." *State v. Miller*, 197 W. Va. 588, 600, 476 S.E.2d 535, 547 (1996).

For the majority opinion to find the indictment fatally insufficient, it had to take pertinent language of the indictment out of context and analyze that language in isolation. In doing so, the majority opinion concluded that the indictment did not apprise Mr. Palmer of the basis of the two prior driving offenses. I find the majority's method of analysis to not only be illogical; but, further use of such an analysis may result in the invalidation of every indictment issued by a grand jury. The proper analysis for an indictment is to look at it as a whole. An indictment is "not fatal, where from the whole thereof the meaning is made clear to a person of ordinary intelligence." Syl. pt. 1, *State v. Ruble*, 119 W. Va. 356, 193 S.E. 567 (1937).

The indictment in this case was sufficient so as not to even require Mr. Palmer to file a bill of particulars.[1] In making my analysis of the indictment in this case, I do so with the understanding that an

[1]To the extent that an indictment omits nonfatal information, a defendant may seek that information by filing a bill of particulars under Rule 7(f) of the West Virginia Rules of Criminal Procedure. *See State v. Meadows*, 172 W. Va. 247, 254, 304 S.E.2d 831, 838 (1983) ("[A]ny lack of specificity with regard (continued...)

"[a]ssessment of the facial sufficiency of an indictment is limited to its 'four corners[.]'" Syl. pt. 2, in part, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999).

The pertinent language of the statute under which Mr. Palmer was indicted, W. Va. Code § 17B-4-3(b), states:

> Any person who drives a motor vehicle on any public highway of this state at a time when his or her privilege to do so has been lawfully revoked for driving under the influence of alcohol . . . is . . . for the third or any subsequent offense . . . guilty of a felony[.]"

Under the language of this statute, at a minimum, an indictment must allege (1) a person, (2) driving, (3) while his/her license was revoked, (4) for DUI, (5) on two or more previous occasions.

In reading the "four corners" of the indictment in this case, it provides that Mr. Palmer was being charged with driving a motor vehicle "at a time when his privilege or driver's license to operate a motor vehicle had been lawfully revoked for driving under the influence of alcohol[.]" The indictment then sets out the dates and courts where the two prior DUI convictions occurred.[2] Our cases have made clear

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[1](...continued)
to details in an indictment are discoverable upon a proper motion for a bill of particulars."). We have long recognized that "[a] bill of particulars is for the purpose of furnishing details omitted from the accusation or indictment, to which the defendant is entitled before trial." *State v. Counts*, 90 W. Va. 338, 342, 110 S.E. 812, 814 (1922). *See also State v. Zain*, 207 W. Va. 54, 66, 528 S.E.2d 748, 760 (1999); *State v. Meadows*, 172 W. Va. 247, 254, 304 S.E.2d 831, 838 (1983).

[2]*See* Syl. pt. 3, *State v. Loy*, 146 W. Va. 308, 119 S.E.2d 826 (1961) ("An indictment alleging a prior conviction for the purpose of augmenting the sentence to be imposed, is sufficient, as to such prior conviction, if it avers the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identifies the person so (continued...)

that "[a]n indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." Syl. pt. 3, *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983). *See also* Syl. pt. 7, *State v. Zain*, 207 W. Va. 54, 528 S.E.2d 748 (1999); Syl. pt. 8, *State v. Bull*, 204 W. Va. 255, 512 S.E.2d 177 (1998).

The majority opinion contends that the indictment does not state "that these previous convictions pertained to a DUI-related suspension or revocation." However, by placing the language in its proper context, the indictment does, in fact, apprise Mr. Palmer that he was being charged with driving while his license was revoked for DUI on two previous occasions in Berkeley County.

For the reasons stated herein, I respectfully dissent from the majority decision. I am authorized to state that Justice Maynard joins me in this dissenting opinion.

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[2](...continued)
convicted as the person subsequently indicted.").