No. 31326 State of West Virginia v. Tony Dean Arbaugh, Jr.

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring, in part, and dissenting, in part.

I concur in the extraordinarily well-reasoned, compassionate, and legally sound separate opinion by Justice Albright. I write separately to shed some further light on the *bipolar opinion* of the Court in this case — an eleven-page *per curiam* opinion with its twenty-page dissent.

I write to express my amazement and displeasure with the personal attacks that the author of the dissent has made upon the articulation of the facts and law and the conclusions in the *per curiam* opinion.

For a random sample of these remarks from the dissent, consider:

> . . . the majority eviscerates the law to effectuate its own personal view of a proper outcome in this case. . . .
>
> . . . . the majority usurps the legislature's power . . . .
>
> . . . . the majority has arrogated to itself the substantive power to define . . . .
>
> The majority would do well to remember that . . . power is the "very definition of tyranny."
>
> . . . . the majority's facts are, *as far as they go*, accurate.

(Emphasis added.)

> . . . . the surest way to convey misinformation is to tell the strict truth.

> . . . . I turn to the flaws in the majority's application of [the rule].
>
> ***D. The majority opinion places itself above the law and "breaks down one of the necessary conditions of a decent society" by reading its personal desires into the law.***

(Bold italics in original.)

> . . . . the majority has bent, stretched, ignored and distorted law and facts . . . .
>
> . . . . the majority's opinion is a "wolf in sheep's clothing," for [its] rationale is no more than . . . [its own] *subjective* judgment . . . .

(Brackets and italics in original.)

> . . . . the majority substitutes its own judgment for that of the circuit court . . .
>
> The majority reneges on our commitment . . . .
>
> I continue to believe that "[i]f we destroy the law's integrity in the pursuit of some goal, however worthy, we break down the necessary conditions of a decent society."

Incredible.

While I agree with the result of the *per curiam* opinion, I am not happy with the gratuitous license that the author of the dissent took in the twenty-page dissent that was filed on the heels of the *per curiam* opinion to ridicule and belittle the legal analysis in the *per curiam* opinion. Using twisted logic, the dissent erroneously casts the *per curiam* opinion as appearing to attempt to wreck our State's jurisprudence, not fully disclosing all of the facts,

misapplying fairly simple law, and singling out an outstanding trial judge for a spanking. None of this is true, and the author of the dissent knows that no justice of this Court would consider even drafting such an opinion – even if that justice personally disagreed with the ultimate result.

During oral argument of this case, in subsequent discussions, and prior to any opinion being written (or at least being circulated), there was a search by this Court for some way within the bounds of existing law to prevent a less-than-twenty-year-old person from facing an up-to-thirty-five-year sentence — for behavior that last occurred prior to his fifteenth birthday, and for more recent misbehavior, consisting of not complying with conditions of probation: smoking marijuana, drinking alcohol, not attending counseling sessions, not accepting authority, etc.

The fact is that a maximum penal sentence was ultimately imposed as a result of, solely the latter activities.

To me, a decent society is where a *child* who has been sexually victimized for years, and who becomes seriously disordered — but who does work in structured situations to improve — gets our *help*, and not a thirty-five-year prison sentence.[1]

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[1]For another reason why the taxpayers of our State should not be supporting this young man in our prison system for up to the next thirty or more years, I refer you to recently expressed remarks by Chief Justice Elliot Maynard. In addressing the need for reducing our prison and jail population, he said "I intend, this year, to work very hard to establish a community corrections system statewide that will help with the rate of incarceration problems. . . . What it does mean is finding alternatives to just straight 'lock them up, throw away the key and forget them.'" Kay Michael, "The Honorable Elliott E. Maynard 2004 — Court Improvement," *The West Virginia Lawyer* P. 20 (Jan. 2004). I applaud this effort.

In writing separate opinions, I have personally tried to avoid making what I consider to be the most glaring errors of the dissent in the instant case — that is, including in an opinion harsh, apocalyptic, hyperbolic, and personal attacks on the integrity and motivations of other members of this Court. I will adhere to that principle in this opinion. I wish that the dissenters had done the same.

It is noted that I joined in the other separate opinion that has been filed in this case. Herein I fully subscribe to the remarks contained in that opinion.

Therefore, for the reasons stated, I concur in the result of the majority opinion, but I dissent and dissociate myself from the rationale of the reasoning subscribed to by its author. I cannot say that any other justice joins me in my separately stated views of this *bipolar opinion*; however, I am satisfied that if Judge Marmaduke Dent (West Virginia Supreme Court 1893-1904) were on this Court today, he would share my views and join with me in this writing.[2]

[2]See *Hartigan v. Board of Regents of West Virginia University*, 49 W. Va. 14, 38 S. E. 698 (1901) (dissenting opinion), John Phillip Reid, *An American Judge* 103-106 (1968).