No. 31405 - State of West Virginia v. Edwin Mack Taylor

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting, joined by Chief Justice Maynard:

"What makes a decision 'judicial' and not an exercise in raw power is its discipline: principled decision-making after careful attention to precedent and persuasive argument and close application to fully-developed facts." *Davis v. Moore*, 772 A.2d 204, 237 (D.C. 2001) (Ruiz, J., concurring in part and dissenting in part). Here, the majority finds that the probative value of habitual drug use to show motive to commit a property crime is inadmissible as its probative value is outweighed by its prejudicial effect. Because this conclusion ignores, distorts, and misapplies precedent, ignores the factual content and context of the State's 404(b) evidence, effectively overrules an opinion of this Court, and threatens our carefully-crafted law under Rule 404(b), I dissent.

A. The majority has ignored well-established precedent.

Although not cited by the majority, we have consistently said that Rule 404(b) "is an 'inclusive rule' in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition." *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990). *Accord State v. Nelson*, 189 W. Va. 778, 784, 434 S.E.2d 697, 703 (1993); *State v. Lola Mae C.*, 185 W. Va. 452, 459, n.14, 408 S.E.2d 31, 38 n.14 (1991). Additionally,

"[i]n reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect." *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). *Accord State v. LaRock*, 196 W. Va. 294, 312, 470 S.E.2d 613, 631 (1996); *State v. Williams*, 198 W. Va. 274, 279, 480 S.E.2d 162, 167 (1996) (per curiam). Thus, "[t]he balancing of probative value against unfair prejudice is weighed in favor of admissibility[.]" *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631. *Accord State v. McIntosh*, 207 W. Va. 561, 567, 534 S.E.2d 757, 765 (2000) (per curiam).

Finally, syllabus point 3 of *LaRock* holds that

> It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

Application of this law compels affirming the convictions, as I now shall illustrate.

B. The majority tortures the law and facts to find that the

circuit court's ruling violated Rule 403.

The majority faults the circuit court's conclusion that the probative value of the evidence was not substantially outweighed by its unfairly prejudicial effect.[1] While recognizing review of this issue is limited to an abuse of discretion, the majority proceeds to completely misapply this standard. Under abuse of discretion review, we do not substitute our judgment for the circuit court's. *Burdette v. Maust Coal & Coke Corp.*,159 W. Va. 335, 342, 222 S.E.2d 293, 297 (1976) (per curiam); *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 377, 175 S.E.2d 452, 457 (1970), *overruled on other grounds by Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002). Instead, we ask only if the circuit court ignored a material factor deserving substantial weight, relied on an improper factor, or made a serious mistake in weighing the material factors. *State v. Calloway*, 207 W. Va. 43, 47, 528 S.E.2d 490, 494 (1999). Determining whether a circuit court made a serious mistake in weighing the material factors is "limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that [the lower court] can be said to have abused its discretion." *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. A decision is "arbitrary and irrational" only if it "cannot be supported by reasonable argument." 1 Stephen A. Satzburg, et al., *Federal Rules of Evidence Manual* § 403.02[19] at 403-43 (8th ed. 2002). Hence, "Appellate Courts will check to see that the Trial Court

[1]I will not belabor that we have already found drug use/motive evidence legitimate and relevant in *State v. Johnson*, 179 W. Va. 619, 371 S.E.2d 340 (1988), so that the first two prongs of syllabus point 3 of *LaRock* are met.

has *conducted* a balancing process. The *result* of a careful balancing process will not itself be second-guessed." *Id*. § 403.02[19] at 403-44 (footnotes omitted). "The Appellate Court will not reverse a Rule 403 decision simply because the Appellate Judges would have ruled differently had they been trying the case." *Id.* § 403.02[19] at 403-43 (footnote omitted). The majority disregards the limited nature of our review and substitutes a *de novo* standard under the guise of not "rubber stamping" the circuit court's ruling. Applying the proper standard of review in a proper manner leads to the conclusion the circuit court should be affirmed.

Here, the circuit court's conclusion comports with *State v. Johnson*, 179 W. Va. 619, 371 S.E.2d 340 (1988). The majority's attempts to distinguish *Johnson* because the drug use in that case related predominantly to the co-conspirators is insupportable because we specifically identified in *Johnson* that "[e]vidence that the defendant had used drugs with his co-conspirators was . . . admissible to show motive for commission of the crimes charged." *Id*. at 627, 371 S.E.2d at 348. *See also Woodrum v. Johnson*, 210 W. Va. 762, 766, 559 S.E.2d 908, 912 (2001) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252, 273 (1996))). Moreover, we examined *Johnson* in *State v. Miller* and concluded that *Johnson's ratio decendi* was that the *defendant's* drug use was admissible to show motive:

> In the *Johnson* case, the state was permitted to introduce evidence not only of the defendant's drug usage but evidence that the defendant tended to purchase drugs with stolen money. The reason the trial court allowed such evidence to be admitted was that it provided a motive for the defendant's participation in the robbery for which he was on trial.

184 W. Va. 492, 499, 401 S.E.2d 237, 244 (1990) (per curiam) (citations omitted). Thus, since the circuit court's decision comports with *Johnson*, and a number of other cases finding that such drug use motive is admissible under Rule 403,[2] I cannot consider the circuit court's decision arbitrary and irrational. Therefore, I would apply *Johnson* and find "the probative value of the other crime evidence in this case was not outweighed by the possible prejudicial effect on the jury." 179 W. Va. at 627, 371 S.E.2d at 348 (footnote omitted).

Moreover, the majority's finding that Mr. Taylor's drug use was inadmissible because it occurred four months before the crimes charged in this case is both legally flawed and factually erroneous. We have held that "[a]s a general rule remoteness

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[2]*See, e.g.*, *United States v. Bitterman*, 320 F.3d 723, 727 (7th Cir. 2003) (evidence of defendant's drug habit to show motive for armed robbery did not violate Rule 403); *United States v. Cartagena-Merced*, 986 F. Supp. 698, 704 (D.P.R. 1997) ("We do not find the possible collateral prejudice Defendant . . . may suffer by the Fed. R. Evid. 404(b) evidence [of drug offenses] sufficient to outweigh the government's legitimate purpose in proving the motive of the bank robbery."); *State v. Feliciano*, 256 Conn. 429, 454, 778 A.2d 812, 828 (2001) (similar)).

goes to the weight to be accorded the evidence by the jury, rather than to admissibility." Syl. pt. 6, *State v. Gwinn*, 169 W. Va. 456, 288 S.E.2d 533 (1982). As we observed in *State v. McIntosh*,

> "[r]emoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Rule 404(2) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible."

207 W. Va. 561, 573, 534 S.E.2d 757, 769 (2000) (per curiam) (citation omitted).

The majority is factually wrong in claiming the evidence was four months old. While the State explained that it limited Mr. Taylor's drug use to a four month period, what the majority misses is that this four months *was not* the four months leading up to the break-ins; rather, it was the month or two prior to the break-ins, the month of December when the break-ins occurred; and the month of January when Mr. Taylor traded the goods he stole from Grant County Mulch and Schell Farms. At most, the State introduced evidence of Mr. Taylor's drug use only in the one or two months leading up to the break-ins.[3] Consequently, I do not find *State v. Walker*, 188 W. Va. 661, 669, 425 S.E.2d 616, 624 (1992), authority for the majority's conclusion, because the case *sub judice* did not

[3]In the *in camera* hearing, the circuit court found Mr. Taylor's July 2000 drug conviction admissible. The State, however, chose not to introduce this evidence at trial.

involve evidence that was four months old.[4]

The circuit court's ruling is justifiable on yet another ground. The State's case was circumstantial. A circumstantial case favors admitting motive evidence since motive evidence "is of great probative force in determining guilt, especially in cases of circumstantial evidence[.]" 22 C.J.S. *Criminal Law* § 34 at 40 (1989). Significantly, there is a higher tolerance for the risk of prejudice in cases where the evidence is "particularly probative." *United States v. Rivera*, 6 F.3d 431, 443 (7th Cir. 1993).[5]

Finally, the non-West Virginia cases the majority cites are unpersuasive. For

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[4]Of course, an added factor of consequence in *Walker* was that the four month old threat--which would normally be used to prove premeditation--was not directed to anyone in particular. Thus, the four months in *Walker*, *along with the other circumstances*, contributed to the lessening of the probative value of the threat. Here, however, the drug abuse evidence went to prove motive, *i.e.*, that Mr. Taylor's habitual drug use caused him to disregard the law and steal things to pay for his habit. Even if the drug use evidence was four months old, its admission would not be an abuse of discretion. *See Bitterman*, 320 F.3d at 727 (evidence of defendant's five year old drug habit admissible). *Cf. United States v. Sturmoski*, 971 F.2d 452, 459 (10th Cir. 1992) (six month old evidence that witness observed drug making paraphernalia admissible over remoteness challenge). Indeed, the longer a defendant used drugs the stronger would be the defendant's need to obtain drugs and the more probative the evidence of drug use.

[5]I cannot let it go unnoticed that, while the majority points out that some of the "hard drugs" use by Mr. Taylor were methamphetamines as a basis to show the prejudicial nature of the State's evidence, methamphetamines were some of the drugs involved in *Johnson.* 179 W. Va. at 623, 371 S.E.2d at 344.

example, the majority cites *State v. Mazowski*, 337 N.J. Super. 275, 776 A.2d 1176 (App. Div. 2001). However, not only does *Mazowski* contradict *Johnson*, at least one court has not found *Mazowski* to be persuasive enough to be followed. In *State v. Crawley*, 633 N.W.2d 802, 807-08 (2001), the Iowa Supreme Court recognized that *Mazowski* creates controversy over whether drug use motive evidence is too prejudicial to be admissible. The Iowa Supreme Court, however, rejected *Mazowski* finding that, even had the defense objected, evidence of the defendant's drug use to show the motive to commit forgery of checks to obtain money to purchase drugs was not too prejudicial to be admitted under Rule 403. *Crawley*, 633 N.W.2d at 808.

The majority's citation to *People v. Jones*, 119 Mich. App. 164, 168, 326 N.W.2d 411, 412-23 (1982), is misplaced as *Jones* actually supports the State. *Jones* recognized that drug use/motive evidence has a strong prejudicial effect. Unlike the majority, however, the *Jones* court did not stop its analysis with this observation. Rather, it went on to conclude that such evidence is admissible if the State shows relevance by establishing "(1) that defendant was addicted at or near the time of the offense and, therefore, compelled to obtain the drug, and (2) that defendant lacks sufficient income from legal sources to sustain his or her continuing need for heroin." *Id.* at 168, 326 N.W.2d at 413. *Jones* went on to state that "*[w]ithout such a foundation*, evidence of heroin use should be excluded from proof of motive, as its prejudicial effect substantially outweighs its probative value." *Id*. at 168-69, 326 N.W.2d at 413 (emphasis added). Here,

the 404(b) evidence showed Mr. Taylor was unemployed and a habitual user of methamphetamine, an expensive [6] schedule II drug,[7] at the time of the Grant County Mulch and Schell Poultry break-ins. Thus, the State's 404(b) evidence provided the necessary foundation to establish the relevance of Mr. Taylor's habitual drug use and to avoid a Rule 403 violation.[8]

The majority's reliance on California cases is misplaced as well. In

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[6]Methamphetamine prices in West Virginia range from $150.00 a gram to $1,600.00 an ounce. Dep't of Justice, National Drug Intelligence Center, *West Virginia Drug Threat Assessment* (Aug. 2003), *available at* http://www.usdoj.gov/ndic/pubs5/5266/meth.htm#Top.

[7]W. Va. Code § 60A-2-206(d)(2) (Repl. Vol. 2000) (Supp. 2003) A schedule II drug is one having a high potential for abuse which may lead to severe psychic or physical dependance. *Id*. § 60A-2-205 (Repl. Vol. 2000).

[8]Although we normally do not cite unpublished opinions, *Henry v. Benyo*, 203 W. Va. 172, 176 n.3, 506 S.E.2d 615, 619 n.3 (1998), I would be remiss if I did not point out that in *People v. Flint*, No. 232534, 2002 WL 857606 (Mich. Ct. App. Apr. 30, 2002), the appellate court found that the following evidence (similar to the evidence here) met *Jones* so that the trial court's exclusion of this evidence constituted error:

1. A number of people saw the defendant use cocaine;

2. The defendant bought cocaine three times per week;

3. The defendant tested positive for cocaine and lost his job within five or six weeks of the murder;

4. The defendant tried to borrow money within six months before the murder, and,

5. The defendant tried to sell items the week before the murder.

Id. at * 3-*5

California drug habit is admissible to show motive only if the motive of the charged crime is to directly obtain drugs or to violate the Health and Safety Code. *People v. Cardenas*, 31 Cal. 3d 897, 906, 647 P.2d 569, 573 (1982). The basis for this approach is that habitual drug usage tends only to "'remotely or to an insignificant degree . . . prove a material fact in the case . . . .'" *Id*. at 906, 647 P.2d at 573 (citation omitted). In *Johnson* we did not rely on California law. We did, however, cite to certain other jurisdictions including the United States Court of Appeals for the Seventh Circuit. 179 W. Va. at 627, 371 S.E.2d at 438 (citing *United States v. Cyphers*, 553 F.2d 1064 (7th Cir. 1977)). The Seventh Circuit has implicitly rejected the underlying premise of the California cases that drug use and property crime motives are too insignificant to prove a fact in a case by finding that "the drug use and the crime at issue [of bank robbery] . . . have a significant relationship because the act [of drug use is] the motive underlying the crime of bank robbery." *United States v. Brooks*, 125 F.3d 484, 500 (7th Cir. 1997). Likewise, we relied on Georgia authority in *Johnson*, 179 W. Va. at 627, 371 S.E.2d at 483 (citing *Carruth v. State*, 182 Ga. App. 786, 357 S.E.2d 122 (1987)), and the Georgia Court of Appeals has found that "a reasonable factfinder could infer a connection between the armed robbery [and] the purchase of cocaine . . . . The association between the high cost of drugs and the need for funds to purchase them is well recognized." *Chergi v. State*, 234 Ga. App. 548, 549, 507 S.E.2d 795, 796 (1998). *See also Crawley*, 633 N.W.2d at 808 (finding a logical relationship between forgery and drug use since the motive for the forgery was to obtain funds to buy drugs). The majority's reliance on *Cardenas* is simply unavailing in light of

Johnson and the subsequently developed case law from other jurisdictions upon which *Johnson* relied. *See also* Hon. Mark B. Simmons, *Simmons California Evidence Manual* § 1:32 (2002-2003 ed.) (observing that "despite [*Cardenas's*] holding, evidence of drug addiction has not been rejected uniformly in cases in which the object of the robbery has been money.")

Finally, I disagree that this is one of those cases where no limiting instructions could have mitigated the evidence of Mr. Taylor's habitual drug use. Indeed, we found such instructions to be efficacious in *Johnson*. 179 W. Va. at 627, 371 S.E.2d at 348. This result is in accord with a number of other jurisdictions. *See, e.g., Bitterman*, 320 F.3d at 727 ("Moreover, as the judge gave the jury a limiting instruction (regarding the heroin testimony) to this effect, we are not convinced that the potential prejudice from such evidence outweighed its probative value."); *Cartagena-Merced*, 986 F. Supp. at 704-05 (similar); *State v. Feliciano*, 256 Conn. 429, 454, 778 A.2d 812, 828 (2001). Moreover, a limiting instruction is particularly effective in mitigating evidence of a defendant's habitual drug use when the evidence (such as that here) does "not involve acts of violence that could have shocked or otherwise influenced the jury." *Feliciano*, 256 Conn. at 454, 78 A.2d at
828.

C. The majority opinion effectively overrules State v. Johnson and

leaves this Court's 404(b) jurisprudence in serious doubt.

The majority disagrees with the circuit court's decision and, in order to reverse, ignores, distorts, and misapplies precedent, contradicts the record and, in practical effect, overrules *State v. Johnson*. The majority has blithely disregarded the observation that "'[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'" 2 *Weinstein's Federal Evidence* § 403.02[2][d] at 403-22 (2d ed. 2003) (footnote omitted).

As one of the members of this Court has previously commented,

> I see absolutely no justification for disregarding our deep-rooted dedication to the principle of stare decisis in circumstances such as these where the law is clear. Casting aside well-settled law for no reason other than to substitute judge-made law is particularly reprehensible in the area of criminal law where clarity and fairness are overriding concerns.

State v. Anderson, 212 W. Va. 761, 767, 575 S.E.2d 371, 377 (2002) (per curiam) (Albright., J., concurring). Further, since all four prongs of syllabus point 3 of *LaRock* have been met in this case and the majority still reverses, I fear that the majority opinion will metastasize beyond simply this case and hazard all of our carefully crafted Rule 404(b) jurisprudence, much of which was authored by former Justice Franklin D. Cleckley, one of the foremost scholars in criminal law in the entire country. Thus, I dissent. I am authorized to state that Chief Justice Maynard joins me in this dissenting

opinion.