No. 32887 – State of West Virginia v. Matthew Bolen

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

In this case, the majority unnecessarily sets aside the conviction of a child sex offender.

Particularly troubling about this result is that our law by no means compels it. Significantly, the appellant's counsel did not object to the State's references to religion. Under our general rule, such a failure to preserve a trial error means that this Court will not consider the issue on appeal. In the instant case, however, the majority exercises its discretion to recognize the rare exception to our general rule known as plain error. However, I do not believe that the plain error doctrine is applicable under the facts of this case.

As noted by the majority, plain error should be used only where the error seriously affects the fairness, integrity, and public reputation of the judicial process. To me, this means that plain error should generally be recognized only where a defendant's constitutional rights are at issue. In the instant case, however, there is no allegation that the appellant was deprived of a constitutional right. Instead, it is alleged that an evidentiary rule was violated. Therefore, I would not have exercised the Court's discretion to recognize plain error under these facts.

What the majority opinion amounts to in fact is premature habeas corpus relief. The appellant's complaint could have been more fully considered in a habeas corpus hearing in which the appellant could have raised ineffective assistance of counsel for failure to object to the references to religion. Only after a hearing in which evidence was offered could this Court have known why the appellant's counsel failed to object. Perhaps counsel had a certain strategy in mind. Perhaps counsel was sandbagging the State. Perhaps counsel was seeking an advantage on direct appeal. Unfortunately, because of the majority's decision to recognize plain error, we will never know what the appellant's counsel had in mind. What we do know, however, is that, because of the majority's unnecessary decision, a child sex offender is now free and the State must bear the time and expense of retrying him.

Accordingly, for the reasons stated above, I dissent.