No. 35140 - State of West Virginia v. David Harold Eilola

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OF WEST VIRGINIA

Davis, C.J., dissenting:

In this case the defendant, through acts of domestic violence and terror, cut his wife's throat, stabbed her in the face and other parts of her body, poured kerosene over her entire body, and attempted to set her on fire. As a result of the savage crimes committed against the victim, the trial court sentenced the defendant to consecutive terms of imprisonment that totaled not less than 9 nor more than 15 years imprisonment. Under this Court's decision in *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006), the defendant would not be eligible for parole until after he served 9 years in prison, even though he had almost two years of pretrial incarceration. The majority opinion has unwisely chosen to overrule *Middleton* so that the defendant will be eligible for parole after serving roughly 7 years. In this regard, the majority opinion overruled *Middleton* because that opinion would allow the defendant to be eligible for parole at the same time as a "hypothetical" defendant who received the same sentence, but was out on bail prior to his conviction. The majority opinion found that *Middleton* was not "fair" to indigent defendants who are unable to post bail while awaiting prosecution. For the reasons outlined below, I strongly dissent from the

majority opinion because it is not "fair" to the victim of this savage domestic violence and terror.

A. Understanding Why the Trial Court Imposed Consecutive Sentences on the Defendant

When defendants receive multiple convictions, trial judges in this State have wide discretion in deciding whether to impose concurrent or consecutive sentences. *See State v. Allen*, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999) ("As for the circuit court's decision to impose consecutive, rather than concurrent, sentences, we likewise find no abuse of discretion. At this juncture, however, we wish to emphasize that, while the members of this Court, had we been sentencing Allen for his numerous misdemeanor convictions, would not necessarily have ordered his sentences to run consecutively, this disagreement, standing alone, does not necessitate a reversal of the sentences imposed by the trial court. "); Syl. pt. 3, *Keith v. Leverette*, 163 W. Va. 98, 254 S.E.2d 700 (1979) ("When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively."). Moreover, this Court has recognized that "'[c]onsecutive sentences are an appropriate mechanism for imposing a distinct punishment for each of two criminal acts.'" *State v. Holcomb*, 178 W. Va. 455, 462, 360 S.E.2d 232, 239 (1987) (quoting *United States v. Lustig*, 555 F. 2d 751, 753 (9th Cir. 1977)).

In the instant proceeding, the defendant was convicted of five offenses and sentenced as follows: attempted first degree murder – 3 to 15 years; malicious assault – 2 to 10 years; arson – 2 years; violation of domestic violence protective order – 1 year; and domestic battery – 1 year. Under its discretionary authority, the trial court could have imposed concurrent sentences for each conviction. If that had been done, the defendant collectively would have received a sentence of 3 to 15 years. Under a concurrent sentence the defendant would have been eligible for parole after 3 years. However, the trial court elected to impose consecutive sentences for each conviction under consecutive sentences. The defendant would not be eligible for parole until after serving 9 years imprisonment.

The trial court did not show the defendant mercy by imposing concurrent sentences because the defendant failed to show any remorse, and because of the terror the defendant imposed on the victim. This is to say that the trial court took into consideration what was fair to the victim in deciding what punishment was appropriate for the defendant.

The record in this case showed that the victim had filed for divorce from the defendant in February 2006. On March 13, 2006, while the divorce was pending, the victim obtained her second domestic violence protective order against the defendant. After receiving the second protective order, the victim went home. Shortly after returning home, the victim watched television with her son's girlfriend, Jacqueline Stanley. The victim

testified during the trial that, while she was watching television, the defendant forced his way into the home. After entering the home, the defendant forced Ms. Stanley to leave and thereafter attacked the victim. The victim described the attack as follows:

Q. Okay. What happened then?

A. . . . And then he came after me and pushed me down on the couch, and he started to – he started to – he started to cut my throat. And I fought with him, you know, he held me down, and he was trying to, uh, stop my hands from – he was trying to get my hands in his grip with his left arm that he had across my chest.

Q. What were you doing with your hands at that time?

A. Well, I was pushing the knife away and trying to stop him from cutting me. He cut me once, and I pushed him away, and he came at me again. And it was like a sawing cutting. And then he ran out the door.

Q. Did he say anything to you as he was sawing or cutting at your throat?

A. Nothing.

Q. Did you feel anything when he was sawing and cutting at your throat?

A. Terror. I thought I was going to die.

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Q. When the attack ended, what did you see David Eilola do?

A. He went out the front door.

Q. And what was going through your mind at this point?

A. Find my cell phone. . . .

Q. Did you find your cell phone?

A. No. I never found it. I got up off the couch, and I was looking for it. And a couple of minutes later he came through the front door again, and this time he had the gas can with him.

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Q. Did you say anything to him?

A. I just said, “David, don’t do this.” I said, “What are you doing? Don’t do this.”

Q. And what was his response when you said, “David, don’t do this?” What did he do?

A. He splashed -- He threw the gas across the living room into the kitchen, and then he splashed it over the chair, and then he came towards me, and he splashed it up towards me. And I said, “My God, David, don’t do this.” And then he walked right up to me and he held it over the top of my head, and he just poured it all over me.

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Q. . . . [W]hat happened after he splashed the gas on you?

A. I tried to run out the front door, and he knocked me down. And I was on my back by the front door, and he was holding me down again across the top of my chest. And he took-- he took a lighter out of his pocket, and he leaned over me and he lit the carpet beside me.

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Q. Okay. What was going through your mind at this point?

A. I’m going to go up in flames.

Q. And what happened then?

A. I – He lit the carpet down by where my hand was, and I batted it out and just – I just kept begging him to please don't do this, don't do this to me. . . . And he just – he went to light the carpet [again], but he didn't. And he just stopped.[1]

It is quite obvious that the victim's testimony of the brutal terror she endured at the hands of the defendant was a primary reason for the trial court's imposition of consecutive sentences. The consecutive sentences represented the trial court's beliefs that the defendant did not deserve to be released early from prison and that the physical and emotional injury to the victim demanded that the defendant not be released early. *See State v. Tyler*, 211 W. Va. 246, 251-52, 565 S.E.2d 368, 373-74 (2002) ("Even where victims have not been harmed during armed robberies, this Court has considered the emotional damage suffered by the victim.").

B. The Decision in Middleton Was Fair to Victims of Domestic Violence and Other Crimes

As previously indicated, under the decision in *Middleton* the defendant would not be eligible for parole until after serving 9 years in prison. The majority opinion believed that the application of *Middleton* to the defendant was unfair, because (1) he was indigent

[1]The record indicates that the defendant left the home without burning the victim to death. Thereafter, the defendant fled to the state of Arizona, where he eventually was arrested and returned to West Virginia.

and not able to use his presentence incarceration to shorten his parole eligibility date[2] and (2) a hypothetical defendant who was out on bail prior to trial, and received the same type of sentence, would be eligible for parole at the same time as the defendant. Assuming, as contended by the majority, that this situation is unfair, there is no state or federal constitutional violation because of this "unfairness."

The majority opinion fails to realize that many things involved with criminal prosecutions are not fair to defendants. No criminal justice system exists which is completely fair in all respects to every defendant. For example, two defendants conspire to commit a crime, one defendant is indigent and the other is not. The defendant who is not indigent enters a plea of guilty and receives a sentence of probation. The indigent co-conspirator is convicted at trial and is sentenced to imprisonment. Is that situation fair? Again, two defendants commit separate murders. One defendant, who is indigent, is convicted and sentenced to life with the possibility of parole. The second defendant, who is not indigent,

[2]The majority opinion is disingenuous to the extent that it believes only poor or indigent defendants cannot post bail. There are defendants who are not indigent but who cannot post bail simply because it is set too high. In fact, in the instant case the defendant initially retained counsel and did not qualify as an indigent. It was only during the course of pretrial litigation that the defendant fired his retained counsel, because of a dispute over the amount of money needed for the defendant to have a psychiatric evaluation. Only after the defendant fired his retained counsel did the defendant qualify for court-appointed counsel. Further, the record indicates that the defendant's initial bail was $50,000. The defendant, through retained counsel, sought to have bail reduced to $10,000, which request was denied by the trial court.

is convicted and sentenced to life without the possibility of parole. Is this situation fair? I could go on by illustrating a multitude of examples that are not fair in criminal prosecutions. *See State v. Booth*, 224 W. Va. 307, 685 S.E.2d 701 (2009) (finding defendant's 80 year sentence for robbery was not disproportionate to the sentences received by his co-defendants, namely 1 to 5 years and 1to 50 years); *State v. Riley*, 201 W. Va. 708, 500 S.E.2d 524 (1997) (defendant sentenced to 32 years for second-degree murder); *State v. McKenzie*, 197 W. Va. 429, 475 S.E.2d 521 (1996) (defendant sentenced to 5 to 15 years for second-degree murder). However, in the final analysis, the state and federal constitutions determine what type of "unfairness" will be prohibited in criminal prosecutions. *See State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004) ("Disparate sentences for codefendants are not per se unconstitutional." (citation omitted)). There is no authority under the state or federal constitution that prohibited the "unfairness" that the majority believes *Middleton* inflicts on indigent defendants.

The decision in *Middleton* was premised on the fairness to victims of crime, and, in the instant case, to a victim of domestic violence and terror. As previously stated, under *Middleton* the defendant would have to serve 9 years in prison before he would be eligible for parole. Considering the terror that the victim endured in this case, fairness to the victim demanded that this defendant sit in prison for at least 9 years before he was released.

The majority opinion has blatantly rejected the concept of fairness for a victim of domestic violence and terror and has decided that the law of West Virginia must focus instead upon fairness to a defendant who sliced a woman's throat, stabbed her face, poured kerosene on her, and attempted to burn her alive. I readily admit that if I have to choose between fairness to a victim of violent terror and fairness to the perpetrator of violent terror, I would choose fairness to the victim every day of the week.

C. The Majority Opinion Rewards Criminal Defendants Who Cannot Post Bail

In order to understand how the majority opinion now rewards criminal defendants, I must first provide an example of how *Middleton* operated before it was overruled. The effect of the *Middleton* opinion was that of allowing a defendant to have less time on parole. For example, assume that two defendants have the same consecutive sentences of 1 to 5 years and 2 to 5 years. Moreover, one defendant was out on bail before sentencing, while the other defendant was in jail for one year before sentencing. Both defendants are eligible for parole after three years, and both are given parole. Pursuant to W. Va. Code § 62-12-18 (1997) (2004), a defendant must be sentenced to parole for the maximum period left on the sentence. Thus, under *Middleton*, the defendant who was in jail for one year before sentencing will be placed on parole for 6 years, but the other defendant would be on parole for 7 years (this hypothetical does not include good-time credit that the defendants may have accrued). Under this situation, the indigent defendant obtains the

benefit from being locked up prior to sentencing, and the person who was out on bail is penalized for getting out on bail prior to sentencing. I say penalized because a person on parole is not totally free. Under W. Va. Code § 62-12-17 (2004), strict conditions are placed on defendants who are on parole.

To be clear, the *Middleton* decision allowed a defendant to use presentence incarceration only once. That was for the purpose of shortening the aggregated maximum term of consecutive sentences. The majority opinion, by overruling *Middleton*, allows a defendant to use presentence incarceration *twice*. In the instant case, the defendant will use his presentence incarceration to make him eligible for parole almost two years before he should be eligible. Then, the defendant will use the presentence incarceration to shorten his time on parole by almost two years before it should expire. While I am certain the defendant appreciates the majority's get-out-of-jail free card, the defendant's ex-wife[3] must now wrestle with the nightmares of wondering if the defendant will attack her again upon his early release from prison.

For the reasons outlined, I respectfully dissent.

[3]The victim is now divorced from the defendant.