

33505
NO. 33050

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

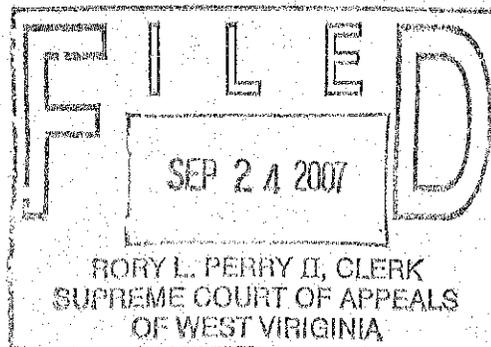
STATE OF WEST VIRGINIA,
Plaintiff Below,

Appellee,

vs.

DAVID GABRIEL STAMM,
Defendant Below,

Appellant.



BRIEF OF APPELLANT
DAVID GABRIEL STAMM

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Defendant Below,

Appellant.

BRIEF OF APPELLANT
DAVID GABRIEL STAMM

PROCEEDINGS BELOW

Law enforcement officials arrested the Appellant David Gabriel Stamm, on December 22, 2005, on a warrant issued in the Magistrate Court of Harrison County, West Virginia, on October 31, 2005, for the felony offense of failure to provide support to a minor child. Magistrate Joyce Purkey¹ arraigned the Appellant on December 22, 2005 and set a surety bond

¹Wood County Magistrate acting for Harrison County.

for him in the amount of five thousand dollars (\$5,000.00).² On December 28, 2005, trial counsel filed a motion to reduce the Appellant's bond to a personal recognizance bond. On January 11, 2006, Harrison County Circuit Court Judge John L. Marks, Jr. conducted a hearing upon the Appellant's motion. At the close of the hearing, Judge Marks modified the Appellant's bond to five thousand dollars (\$5,000.00) personal recognizance. The Appellant was released on a Five Thousand Dollar (\$5,000.00) personal recognizance bond that same date.

After having been bound over for action by a grand jury, the May 2006 Term of the Harrison County Grand Jury indicted the Appellant upon one (1) felony count of failure to provide support to a minor child. On May 8, 2006, Harrison County Circuit Court Judge James A. Matish arraigned the Appellant thereby setting a pre-trial hearing in the matter. At the pre-trial hearing, trial counsel argued several motions before the Court. In particular, trial counsel argued that the statute under which the State indicted the Appellant was unconstitutional. The Court heard counsel's argument, denied the motion, and set the matter for trial. After a jury trial held on June 19, 2006, a Harrison County petit jury convicted the Appellant of the sole felony count of the indictment. The trial court ordered a pre-sentence investigation and set post-trial motions and sentencing for July 28, 2006.

Thereafter, a further hearing was conducted on July 28, 2006, at which time the Court sentenced the Appellant to not less than one (1) nor more than three (3) years in prison. The Court further denied the Appellant's request for a suspended sentence conditioned upon a term of supervised probation. The Court further ordered the Appellant to pay the costs of the

²The Magistrate also set a second surety bond of five thousand dollars (\$5,000.00) for the offense of driving on a suspended license while revoked for driving under the influence.

proceedings as well as restitution in the matter. The Court entered the Sentencing Order on August 11, 2006. Subsequently, trial counsel left her employ with the Public Defender Corporation and the Corporation assigned appellate counsel to the matter. On November 9, 2006, appellate counsel filed a motion to extend the time necessary in order to file the appeal. The trial court granted that motion on November 14, 2006. In December 2006, appellate counsel discovered that a Notice of Intent to File Appeal had not been filed in this matter. Appellate counsel, therefore, requested that the trial court resentence the Appellant. On December 13, 2006, the trial court granted that motion and resentenced the Appellant. This appeal follows.

STATEMENT OF THE FACTS OF THE CASE

On October 30, 2005, the Appellant's ex-girlfriend, Rebecca Roth, went to the Harrison County Sheriff's Department in Harrison County, West Virginia, and filled out a complaint against the Appellant with Deputy Kevin Renzelli (G. J. Tr. 2). According to Deputy Renzelli's testimony, the Harrison County Family Court had ordered the Appellant to pay child support in the amount of one hundred sixty seven dollars and fifty two cents (\$167.52) per month (G. J. Tr. 2). Further, the Appellant had not made payments from October 1, 2004 through the date of her complaint (G. J. Tr. 2 - 3).³ Deputy Renzelli then obtained copies of a computation sheet from the West Virginia Department of Health and Human Resources⁴ as well as the Court Order⁵ from the Harrison County Family Court to verify Ms. Roth's claim. The Support Order bears case

³Deputy Renzelli also testified that the Appellant had not paid the ordered support through March 2006 (G. J. Tr. 3).

⁴Hereinafter referred to as "WVDHHR."

⁵Hereinafter referred to as "Support Order."

number 03-D-544-4 and finds that the Appellant, David Gabriel Stamm, was the father of Elias S. born August 15, 2000. The order further directed the Appellant to pay monthly child support in the amount of One Hundred Sixty Seven Dollars and Fifty Two Cents (\$167.52). This amount was based on income attributed to the Appellant, who appeared *pro se* at the hearing. (Support Order).

Deputy Renzelli then obtained a warrant for the Appellant's arrest for the offense of failure to pay child support to a minor.⁶ Law enforcement officials arrested the Appellant on December 22, 2005⁷ on this offense.⁸ The Appellant was unable to make bond as set by the Magistrate Court of Wood County and was only released after a bond modification hearing before the Harrison County Circuit Court wherein the court modified his bond to a personal recognizance bond.⁹ The Appellant was released on a Five Thousand Dollar (\$5,000.00), personal recognizance bond. He was subsequently bound over to the Grand Jury and was indicted by the May 2006 Term of the Grand Jury on one (1) felony count of Failure to Meet an Obligation to Provide Support to a Minor.¹⁰ Deputy Renzelli was the sole witness who testified before the Grand Jury and his testimony was limited to the fact that the Appellant had not paid child support in over twelve (12) months (G. J. Tr.).

The Court arraigned the Appellant on May 8, 2006. The Court then held a pre-trial

⁶Criminal complaint bearing Case No.: 05-F-776.

⁷See Initial Appearance: Rights Statements.

⁸The Defendant was also arrested for the offense of Driving on a Suspended Licenses while Suspended for Driving under the Influence.

⁹See Agreed Order Modifying Bond dated January 11, 2006.

¹⁰See Indictment.

hearing wherein the Court denied the Appellant's motion to dismiss the indictment.¹¹

At trial, witnesses testified to the events set forth above. At the close of the State's evidence, the Appellant's trial counsel moved for directed verdict or judgment of acquittal in the case stating that the State had failed to demonstrate that the Appellant had the ability to pay the Court ordered support (T. Tr. 107 -113). The State objected to the same (T. Tr. 107 -113). The Court denied the Appellant's motion (T. Tr. 112 - 113).

The Appellant presented evidence in his defense stating that at the time the Family Court had set child support in his case that the Appellant was self-employed and making less than minimum wage (T. Tr. 119-120). The Appellant further testified that he closed his business approximately December 2004 (T. Tr. 120). The Appellant further stated that from January through March 2005 he had moved to Virginia Beach, Virginia in search of employment, but found none (T. Tr. 122). The Appellant then stated that he returned to West Virginia where he lived with his mother and again looked for employment (T. Tr. 123). The Appellant further testified that after moving back to West Virginia he was arrested for Driving Under the Influence and later accidentally shot himself through his hand and into his leg (T. Tr. 123 - 124). The Appellant did then provide testimony as to the extent of his injuries and medical bills as related to this incident (T. Tr. 123 - 129). The Appellant informed the jury that his injuries were such that he could not gain employment commensurate with his skill level¹²

The State did not provide any witnesses to rebut the Appellant's testimony that he was

¹¹See Arraignment Order dated May 8, 2006 and pre-trial hearing transcripts pages 23 - 24.

¹²Appellant also testified that he had dropped out of high school before completion of the same (T. Tr. 122) nor did he obtain his GED (T. Tr. 135).

injured and unable to find employment that would allow him to work given his injuries (T. Tr.).

ASSIGNMENTS OF ERROR AND ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF ALL OF THE EVIDENCE WHERE THE APPELLANT RAISED THE AFFIRMATIVE DEFENSE OF INABILITY TO PAY AND PRESENTED TESTIMONIAL EVIDENCE REGARDING THE SAME, BUT THE STATE FAILED TO PRESENT ANY EVIDENCE SHOWING THE APPELLANT DID HAVE AN ABILITY TO PAY TO REBUT THE DEFENSE PRESENTED BY THE APPELLANT.

West Virginia Code §61-5-29 provides, in part:

“(2) A person who persistent failed to provide support *which he or she can reasonably provide* and which he or she has a duty to provide to a minor by virtue of a court order..(emphasis added).”

The indictment returned against the Appellant in this case cited the language of the statute and states, in part, that the Appellant had been “*...failing to provide support to a minor child which he can reasonably provide...* (emphasis added).

West Virginia Code §61-5-29(3) provides for an affirmative defense of inability to pay and states: “[i]n a prosecution under this section, the defendant’s alleged inability to reasonably provide the required support may be raised only as an affirmative defense, after reasonable notice to the state.”

As a general rule, a defendant can be required to present evidence on the affirmative defenses he asserts as long as the State does not shift to the defendant the burden of disproving any element of the State’s case. The burden of proof placed upon a defendant asserting an

affirmative defense is not high.¹³ In failure to pay child support cases, in order to properly assert an affirmative defense of inability to pay child support, a defendant must present sufficient evidence of the defense in order to shift the burden to the State to prove beyond a reasonable doubt that the defendant did have the reasonable ability to pay.

After the Appellant set forth evidence of his inability to pay child support,¹⁴ the burden of proof shifted back to the State to prove beyond a reasonable doubt that he did have the reasonable ability to pay the court ordered child support. However, the State failed to put forth any evidence of the Appellant's ability to pay, and instead chose to rely upon the Prosecuting Attorney's closing argument¹⁵ that the Appellant did have the ability to work and chose not to do so. The State did not put forward any testimonial or documentary evidence to rebut or counter the Appellant's testimony regarding his injuries, lack of work, or job skills in order to show that he had an actual ability to pay.

¹³State v. Cook, 204 W.Va. 591, 515 S.E. 2d 129 (1999) discussing affirmative defense of defense of another.

¹⁴In this case the Appellant's evidence was his own testimony regarding his injuries as well as his trade skills and educational history.

¹⁵For example, the Assistant Prosecuting Attorney stated the following in his closing: "I think during the voire dire I told you I was a little bit hard of hearing. I was underground for a while. I remember when I was underground, there was a couple of guys that worked the tipple there underground. One guy had one arm. It got tore off by a piece of mining machine. He had one arm and he was down there working. And his buddy had one leg because he got it tore off in the mine. And you should see these two guys going into work, one guy with one arm and one guy with one leg. And there was another guy when I worked on the section that was dying of emphysema. And he'd get off - - off the bus and he'd take about 10 steps and he'd go like this for about five minutes and then he'd take 10 more steps and when he got to a shovel car, he'd sit there and he'd work all day. And I think all of you know if you've worked, that you've had to work when you didn't want to work or you didn't feel like working or you really didn't think you could work, but you did. He's not disabled. He's not getting social security disability" (T. Tr. 160- 161).

The Appellant contends that the State failed to meet its burden of proof in regard to actual evidence of the Appellant's reasonable ability to pay the required support amount, therefore, the Appellant was entitled to a directed verdict.

II. WHETHER WEST VIRGINIA CODE §61-5-29 IS *PRIMA FACIE* UNCONSTITUTIONAL AS IT SHIFTS THE BURDEN OF PROOF OF A MATERIAL ELEMENT OF THE OFFENSE FROM THE STATE TO THE APPELLANT IN THE GUISE OF AN AFFIRMATIVE DEFENSE.

West Virginia case law states that "penal statutes must be strictly construed against the State and in favor of the defendant."¹⁶ Case law further states that, "ambiguous penal statutes must also be strictly construed against the State and in favor of the defendant."¹⁷

West Virginia Code §61-5-29 provides, in relevant part:

"(2) A person who persistently fails to provide support which he or she *can reasonably provide* and which he or she knows he or she has a duty to provide to a minor by virtue of a court or administrative order and the failure results in: (a) An arrearage of not less than eight thousand dollars; or (b) twelve consecutive months without payment of support, is guilty of a felony and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one year nor more than three years, or both fined and imprisoned.

(3) In a prosecution under this section, the defendant's alleged inability to reasonably provide the required support *may be raised only as an affirmative defense, after reasonable notice to the State.*" Emphasis added.

Then Chief Justice Davis stated in Osborne v. U.S., 211 W.Va. 667, 567 S.E.2d 677

(2002):

It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no

¹⁶ State ex rel. Carson v. Wood, *Syl. Pt. 3*, 154 W.Va. 397, 175 S.E. 2d 482 (1970).

¹⁷ State v. Scott, 214 W.Va. 1, 585 S.E.2d 1(2003) citing Myers v. Murensky, *Syl. Pt. 1*, 162 W.Va. 5, 245 S.E.2d 920 (1978).

function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.

The West Virginia Supreme Court of Appeals has stated that, “[i]n a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged, and it is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime or as requiring defendant either to introduce evidence to rebut the presumption or to carry the burden of proving the contrary.”¹⁸

In this instance the Legislature specifically used the phrase “can reasonably provide” in constructing the elements for the offense of Failure to Meet an Obligation to Provide Support to a Minor. The presumption, therefore, is that an element of the offense that the State must prove beyond a reasonable doubt is that a defendant must have had the ability to “reasonably provide” the ordered support during the time frames alleged in the indictment. Here, however, since the Legislature further added Subsection (3) to the statute, thereby making the inability to pay available to a defendant solely as an affirmative defense, the Legislature created constitutional defects within the statute for the following reasons:

A. BY MAKING A DEFENDANT’S ALLEGED INABILITY TO PAY AVAILABLE ONLY AS AN AFFIRMATIVE DEFENSE, AFTER REASONABLE NOTICE TO THE STATE, WEST VIRGINIA CODE §61-5-29 IS UNCONSTITUTIONAL BECAUSE IT CREATES A DE FACTO PRESUMPTION OF AN ABILITY TO PAY IN FAVOR OF THE STATE AND AGAINST A DEFENDANT REGARDING A MATERIAL ELEMENT OF THE OFFENSE.

This Court has ruled that, “[i]n a criminal prosecution, it is constitutional error for a

¹⁸State v. Pendry, 159 W.Va. 738, 227 S.E.2d 210 (1976), *overruled, in part, on other grounds*.

presumption to supply any material element of the crime charged.”¹⁹ Further, in State v. Ball, this Court stated that presumptions, or inferences, in criminal law are viewed with suspicion by this Court.²⁰ Moreover, the Supreme Court of Appeals further opined in State v. Daggett that although they can be a useful tool in allowing a jury to infer an elemental fact from a basic fact that **has** already been established beyond a reasonable doubt, when presumptions or inferences are used improperly, they can allow criminal convictions without meeting the beyond the reasonable doubt standard for the elements of the crime charged.²¹ “Such convictions,” further opined the Court, “violate the constitutional requirements of due process of law.”²²

The Legislature made the defense of inability to pay an affirmative defense thereby shifting the burden of proof to a defendant. Therefore, West Virginia Code §61-5-29, *en toto* creates an inference in favor of the State. For instance, if the defendant does not come forward with some evidence of an inability to pay, then, at least in the eyes of the jury, he does have the ability to pay thus shifting the burden of proof to a defendant of *disproving* an element of the offense charged. This statutory requirement directly violates the principles set forth in Pendry and the cases that followed it.

This case clearly demonstrates that this *de facto* presumption exists. Here, the State during its case-in-chief put forth no evidence of the Appellant’s ability to pay. The Court then

¹⁹State v. O’Connell, 163 W.Va. 366, 256 S.E.2d 429 (1979).

²⁰State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981) citing State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980).

²¹ State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981).

²²Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); In Re Winship 397 U.S. 358, 90 S.Ct. 1068 (1970).

denied the Appellant's motion for a judgment of acquittal at the close of the State's case. During the Appellant's case-in-chief, the Appellant testified regarding his inability to pay the court ordered child support. The State then failed to rebut this testimony. Again, the Court denied the Appellant's motion for a judgment of acquittal at the close of all of the evidence. The State then relied on counsel's arguments during closing to rebut the Appellant's testimonial evidence of his inability to pay.

In Leary v. United States,²³ the United States Supreme Court refined the standards for presumptions in criminal cases stating that "criminal statutory presumptions must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

In this case, the "proved" fact upon which the ability to pay is being based is the fact that a court entered a valid court order against a defendant sometime in the past. However, it is doubtful that anyone can say with *substantial assurance* that the mere fact that a court entered an order directing that child support be paid in a civil case means that same party can now reasonably provide the same court ordered amount. In this case as in many others, individuals can lose jobs, close a business due to economic instability, or obtain an injury that prevents them from continuing in the same physically demanding job that they had in the past. This problem is often compounded when the individual does not have the educational background or job skills necessary to obtain a less physically demanding source of employment. Therefore, the inference from the State is arbitrary and unconstitutional, thereby violating the Appellant's constitutional

²³395 U.S. 6, 89 S.Ct. 1532 (1969).

due process rights.

B. BY MAKING A DEFENDANT'S ALLEGED INABILITY TO PAY AVAILABLE ONLY AS AN AFFIRMATIVE DEFENSE, AFTER REASONABLE NOTICE TO THE STATE, WEST VIRGINIA CODE §61-5-29 IS UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT AS TO A MATERIAL ELEMENT OF THE OFFENSE.

This Court has found that, “[i]n a criminal prosecution, it is constitutional error for a defendant to be forced to bear the burden of either proving or disproving an essential element of the crime.”²⁴ In addition, this Court, in interpreting and applying the *Mullaney* doctrine, concluded in *Pendry, supra*, that *Mullaney, supra*, stood for three general propositions:

- “(1) In a criminal case, the State is required to carry the burden of proving beyond a reasonable doubt every material element of the crime with which the defendant is charged;
- (2) In carrying its burden of proof beyond a reasonable doubt, the State is not entitled to an instruction which requires a jury to accept as proved beyond a reasonable doubt any element of the criminal offense charged and this concept embraces presumptions (more properly inferences) as to which the jury may be instructed; and
- (3) A defendant in a criminal case cannot be required to present evidence either in terms of going forward with the evidence or in terms of bearing the burden of persuasion in connection with any material element of the crime charged.”

However, in making the defense of inability to pay an affirmative defense, the Legislature shifts the burden of proof onto the defendant. In *State v. Cook*,²⁵ this Court held that a defendant can be required to present evidence prove the affirmative defense he asserts as long as the State does not shift to the defendant the burden of disproving any element of the state's case.²⁶ In fact, most affirmative defenses require a defendant to introduce “sufficient” evidence

²⁴*State v. O'Connell*, 163 W.Va. 366, 256 S.E.2d 429 (1979).

²⁵ 204 W.Va. 591, 515 S.E.2d 127 (1999).

²⁶*State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (1999) citing *State v. Daniel*, 182 W.Va. 643, 652, 391 S.E.2d 90, 99 (1990).

of the defense in order to shift the burden back to the State to disprove the defense beyond a reasonable doubt.

Certainly, there is no evidence that the Legislature intended this affirmative defense to be treated any differently in the law from any other affirmative defense. However, therein lies the problem: the Legislature has created an affirmative defense that is simultaneously an element of the offense itself. In order to prove one, for instance the defense of reasonable inability to pay, one must disprove the other, here the statutory element of reasonable ability to pay. This situation is the very idea that the Court prohibited in Pendry and Mullaney: the burden of proving beyond a reasonable doubt an element of the offense. The statute, therefore, unconstitutionally shifts to the defendant, or rather requires the defendant to either introduce evidence to rebut a *de facto* presumption of a reasonable ability to pay or to carry the burden of proving to the contrary.²⁷

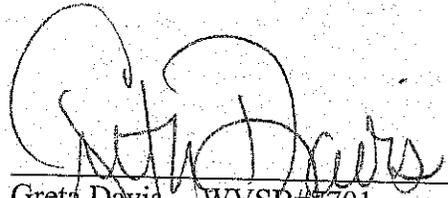
²⁷See also, Bowman v. Leverette, 169 W.Va. 589, 289 S.E.2d 435 (1982).

RELIEF PRAYED FOR

Wherefore, for all of the foregoing reasons, the Appellant respectfully prays for an Order setting aside the Appellant's conviction for the felony offense of failure to meet an obligation to provide support for a minor, the entry of a judgment of acquittal upon the indictment herein, the release the Appellant from any further bail obligations related to this matter and for such other remedies as the Court may deem just and proper.

Respectfully submitted,

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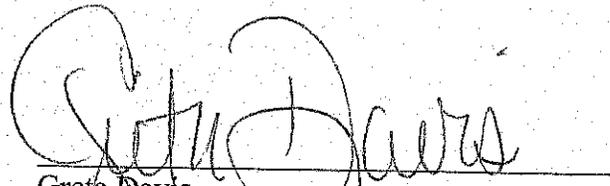
CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Brief of Appellant, David Gabriel Stamm was served upon the State of West Virginia by hand-delivering a copy thereof to

Dawn E. Warfield
Deputy Attorney General
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Kurt W. Hall
Office of the Prosecuting Attorney,
Suite 201, Harrison County Courthouse
Clarksburg, West Virginia 26301

this the 26th day of July, 2007.



Greta Davis
Counsel for Appellant