

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

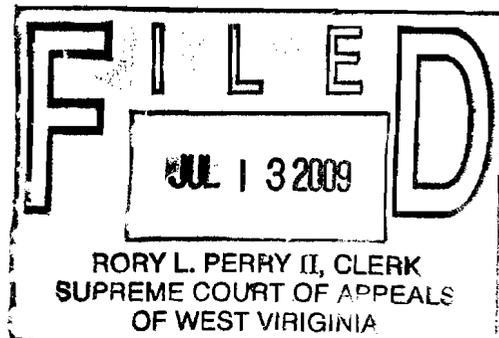
STATE OF WEST VIRGINIA,

V.

Supreme Court No. _____
Circuit Court No. 96-F-42
(Greenbrier)

BILLY RAY MCLAUGHLIN
Petitioner,

BRIEF OF JEFFREY L. FINLEY
AS AMICUS CURIAE



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TABLE OF CONTENTS

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.....1

FACTS.....2

QUESTIONS.....2

AUTHORITIES RELIED UPON.....3

ARGUMENT.....7

 I. BURDEN SHIFTING.....8

 II SAME JURY.....10

 III SAME EVIDENCE11

CONCLUSION.....12

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Jeffrey L. Finley, hereinafter Finley, was indicted by the May 2003 Cabell County Grand Jury. The indictment charged him with a count of murder and two counts of second degree sexual assault in the March 22, 1999, murder of ninety two year old Mabel Hetzer who was found in her home with the body exhibiting signs of sexual assault.

The trial was bifurcated and the guilt phase concluded on September 29, 2004, with the jury returning a verdict of guilty on all three counts. The penalty phase began on October 12, 2004. Finley wore civilian clothes to the guilt phase of his trial, but the trial court denied his motion to wear civilian clothes to the penalty phase. Finley appeared before the jury in standard bright orange jail attire during the penalty phase. The jury did not recommend mercy, and Finley was sentenced to life imprisonment without parole to be served consecutively to two sentences of ten years to twenty five years on each of the two second degree sexual assault convictions also to be served consecutively to one another. This Court accepted Finley's appeal only to consider whether Finley was denied due process when required to appear at his penalty phase trial in jail attire.

This Court reversed the penalty phase determination but did not order a new trial on guilt by its decision on November 16, 2006. See State v. Finley, 219 W.Va. 747, 639 S.E. 2d. 839 (2006). Finley's penalty phase re-trial has not been held because the trial court and counsel have been unable to decide how to proceed.

FACTS

Most of the material facts are set forth above. In addition to those, the evidence is clear that no firearm was used by the person who caused the death of Mabel Hetzer.

QUESTIONS

I.

WHETHER OR NOT CHAPTER 62, ARTICLE 3, SECTION 15, WEST VIRGINIA CODE UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PERSUASION ON THE ISSUE OF MERCY TO THE DEFENDANT IN THE PENALTY PHASE OF THE CASE?

II.

IS IT REQUIRED FOR THE JURY, WHICH DETERMINED GUILT, BE THE SAME JURY THAT DETERMINES THE ISSUE OF MERCY IN A FIRST DEGREE MURDER CASE GIVEN THE LANGUAGE OF W.VA. CODE 62-3-15?

III.

IS THE PROSECUTION LIMITED IN THE MERCY STAGE OF A BI-FURCATED TRIAL TO THE PRESENTATION OF EVIDENCE INTRODUCED IN THE GUILT STAGE OF THE TRIAL AND REBUTTAL EVIDENCE PRESENTED BY THE DEFENDANT?

2.

AUTHORITIES RELIED UPON

U.S.C.A. Const. Amend. 5, provides in part that: "No person shall.....be deprived of life, liberty or property without due process of law.....".

U.S.C.A. Const. Amend. 14, provides in part that:....."No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

Const, Art. 1, Section 1, provides that: "The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land."

Const, Art.3, Section 10, provides that: "No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

Const, Art.3, Section 14, provides that: "Trials of crimes and misdemeanors, unless otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character of the accusation, and be confronted with the witness against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defence; and there shall be awarded to him compulsory process for obtaining witnesses in his favor."

W.Va. Code, Section 61-2-2 (1965), provides that: "Murder of the first degree shall be punished by confinement in the penitentiary for life."

W.Va. Code, Section 62-3-15 (1994), provides that: " If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or the second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve [Sections 62-1-12, et. seq.], chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years: Provided, however, That if the accused pleads guilty of murder of the first degree, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if the person had been found guilty by the verdict of a jury and the jury had recommended mercy, except that, notwithstanding any provision of said article twelve or any other provision of this code to the contrary, such person shall not be eligible for parole until he or she have served fifteen years.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000), it was held that the Sixth Amendment to the federal constitution does not permit a defendant to be exposed to the maximum he would receive if punished according to the facts reflected in the jury verdict alone even if the state characterizes additional findings as sentencing factors.

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), provides that any penalty, a fine, imprisonment or the death penalty could be unfairly applied. The vice ...is not the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.

Butcher v. Miller, 212 W.Va. 13, 21, 561 S.E.2d 89,97 (2002), provides that a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.

Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 207, 406 S.E.2d 425, 433 (1991), provides that the determination of whether a defendant should receive mercy is so crucially important that justice for both the state and the defendant would be best served by a full presentation of all relevant circumstances without regard to strategy on the merits.

State v. Finley, 219 W.Va. 747, 639 S.E. 2d 839 (2006), provides that where an issue on appeal from the circuit court is clearly a question of law or involving interpretation of a statute, the court will apply a de novo standard of review.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), provides that some factors that should be considered by the trial court when a motion for bifurcation is made are whether limiting instructions to the jury would be effective; whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; whether evidence would be admissible on sentencing but not on the merits, or vice versa; whether either party can demonstrate unfair prejudice or disadvantage by bifurcation; whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and whether bifurcation would unreasonably lengthen the trial (citing 62-3-15).

State v. Rygh, 206 W.Va. 295, 524 S.E. 2d 447 (1999), provides that discretionary trial management bifurcation in a murder prosecution does not itself expand or alter the scope of admissible evidence to include evidence that has been historically inadmissible in murder cases.

There is no distinctive burden of proof or burden of production associated with the jury's mercy/no mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding. In making its overall verdict in unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on- and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination. We would anticipate that the defendant would ordinarily proceed first in any bifurcated mercy phase.

We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against the defendant, in the absence of the defendant opening the door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

State v. Stamm, 222 W.Va. 276, 664 S.E.2d 276, 664 S.E.2d 161 (2008), provides that the prosecution may not pass to the defendant the burden of proving a material element of an offense. The defendant has no burden to prove mitigation, excuse or justification in a first degree murder case, 664 S.E.2d at 165, footnote 4.

Women's Health Center of West Virginia, Inc. v. Panepinto, 191 W.Va. 436, 446 S.E. 2d 658 (1993) provides that the due process clause contained in the West Virginia Constitution is more protective of individual rights than is its federal counterpart.

ARGUMENT

The standard of review to be applied by the Court in deciding questions of law or interpretation of a statute like the ones presented in the petition filed herein is a de novo one. State v. Finley, 219 W.Va 747, 639 S.E.2d (2006).

BURDEN SHIFTING

Finley asserts that Chapter 62, Article 3, Section 15, West Virginia Code is unconstitutional for two reasons. The first one of these is that a jury in West Virginia has the unfettered discretion to impose the West Virginia equivalent of a death penalty-life imprisonment without parole. A life sentence is imposed when a jury does not recommend mercy. Since the statute provides no guidelines to the jury when making a recommendation of mercy, it may be imposed in an arbitrary and capricious manner. "It would seem incontestable that the death penalty (life imprisonment without parole) inflicted on one defendant is unusual if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices", Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

As mentioned above, the plain language of W.Va. Code, Section 62-3-15, provides in pertinent part that "Provided, That the jury may, in their discretion, recommend mercy."(emphasis added). Moreover, the statute has been construed by this court to mean what it plainly provides. State v. Miller, 178 W.Va. 618, 622, 363 S.E.2d 504, 508 (1987).

The statute does not provide for aggravating factors that might be used by the jury to make a mercy/no mercy recommendation as required by death penalty states like Arizona.

In such states, the legislature has provided for aggravating factors and mitigating factors that should be considered when making such a determination. Considerations of due process require that those factors must be decided by a jury by a post Apprendi-Ring court. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The West Virginia due process clause is even more protective of individual rights than is the due process clause of the federal constitution. Women's Health Center of West Virginia, Inc. v. Panepinto, 191 W.Va. 436, 446 S.E.2d 658 (1993).

As there is no guarantee provided by statute in West Virginia that a life sentence will not be imposed in an arbitrary and capricious manner at the retrial of Finley's sentencing/penalty phase, it cannot pass constitutional scrutiny.

Finley's sentence was set aside insofar as his murder sentence is concerned. The Circuit Court of Cabell County has never before been faced with the situation in which it now finds itself. The conviction has been allowed to stand and the sentence for other charges also is undisturbed. Finley has been awarded a new sentencing or penalty phase trial only. The dictum of this court set out in the footnotes in State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999), provides some guidance. The court suggests that the defendant should go first in any bifurcated mercy phase of the trial. That is, the court suggests in Rygh, supra, that the statute burdens the defendant with production of the evidence.

Such a reading of the statute would render it unconstitutional since considerations of due process require that the burden not be placed on the defendant to “show mitigation, excuse or justification in a First Degree Murder case”. State v. Stamm, 222 W.Va. 276, 664 S.E.2d 161 (2008).

II.

SAME JURY

Finley asserts that the plain meaning of the language of Chapter 62, Article 3, Section 15, West Virginia Code, requires that the same jury that determines guilt must also fix the punishment. Or, at the very least, in a post Furman world and in a case in the same posture as Finley’s, the jury that fixes punishment must hear the same evidence as the jury that fixed guilt. That is, if this Court is not inclined to over rule its earlier decision in State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006) allowing the jury verdict of guilt to stand, the trial court should require that the State provide the sentencing jury with exactly the same evidence considered by the jury that determined guilt. How else can a jury fix punishment without acting arbitrarily and capriciously in violation of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346(1972)?

The Circuit Court has proposed in Finley's case that transcripts of the trial testimony be provided to a sentencing phase jury. Finley has objected to such procedure on the basis that the jury would not have the same opportunity to observe the demeanor of such witnesses as the first jury, thus depriving him of the opportunity to confront his accusers as guaranteed by Const, Art, 3, Section 14.

III..

SAME EVIDENCE

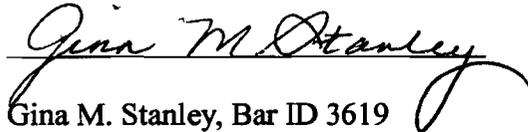
May the State introduce otherwise inadmissible evidence, like the character of the defendant, on the issue of punishment during a first degree murder trial? State v. Rygh, 206 W. Va. 295, 524 S.E.2d 447 (1999), correctly suggests that the answer is no. "We emphasize that the possibility of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against the defendant, in the absence of the defendant opening the door to permit narrowly focused impeachment or rebuttal evidence from the prosecution". Rygh, supra. Another rule might totally chill the right of the defendant to present evidence in mitigation of punishment, a violation of the both state and federal due process clauses.

CONCLUSION

Question No. 1 certified to this court must be answered affirmatively. Chapter 62, Article 3, Section 15, West Virginia Code, is unconstitutional if read any other way. Question No. 2, must also be answered affirmatively because any other reading of the statute will render it unconstitutional for that reason, too. This court has already answered Question No. 3 when it decided Rygh, supra.

Respectfully submitted by

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing motion and brief upon counsel for Billy Ray McLaughlin this 13th day of July, 2009, by depositing a copy of the same in the United States mail, postage prepaid, and addressed to the persons listed below:

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