

IN THE
WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WV

35437
DOCKET NUMBER: ~~091263~~

DEAN CRAIG SPEARS,

APPELLANT,

VS.

STATE OF WEST VIRGINIA,

APPELLEE.

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL

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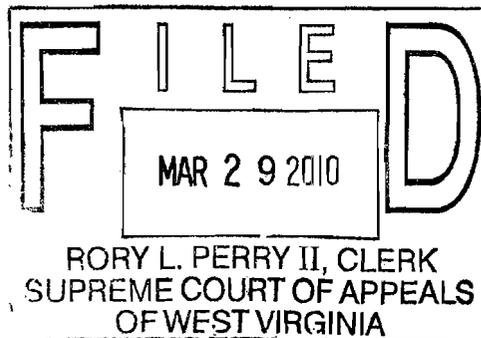


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§ 81-14-9 5, 6,

§ 81-14-13 5, 8, 9

I. KIND OF PROCEEDING AND RULING OF LOWER TRIBUNAL

The Appellant was convicted of the offense of “Failing to Provide Notice of Changes in Sex Offender Registration” as defined by *W.Va. Code* § 15-12-8 as the result of a finding of guilty by the lower tribunal in a bench trial conducted on the 18th day of March, 2009.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Appellant was found guilty of one count of “Second Degree Sexual Assault” as defined by *W.Va. Code* § 61-8B-4 after a trial by jury in the lower tribunal in the matter of 07-F-226-DS held on the 24th, 25th, and 26th day of October, 2007. The Appellant filed a petition of appeal to this Honorable Court on or about the 20th day of November, 2008, and said appeal was refused 4-1 on the 22nd day of January, 2009. After refusal of the Appellant’s petition of appeal, the Appellant was sentenced to a term of imprisonment of ten (10) to twenty-five (25) years as required by statute.

While the Appellant was petitioning this Court for appeal, the Appellant was granted a post-conviction bond with the condition of home confinement. As a result of being convicted of sexual assault in the second degree, the Appellant was required to register as a sex offender with the West Virginia State Police. The Appellant completed the registration requirement by reporting to the Princeton, Mercer County, West Virginia detachment of the West Virginia State Police on or about the 11th day of January, 2008. *Tr.* at 7. When the Appellant reported to the local detachment of the West Virginia State Police as required by statute, the Appellant spoke with Trooper Hess¹. During this meeting between Trooper Hess and the Appellant, Trooper Hess

¹ It should be noted that Trooper Hess no longer works for the West Virginia State Police, and is employed at the West Virginia State Capitol as a security guard or something of the sort. Trooper Hess was unable to properly perform as an officer of the West Virginia State Police. These facts are referenced on several occasions during the trial in this matter.

completed West Virginia State Police Form 170N². While Trooper Hess interviewed the Appellant various pieces of information were obtained relating to the Appellant as required by statute; however, when asked by Trooper Hess if the Appellant owned any motor vehicles, the Appellant answered that he did not own any motor vehicles, and this was correct because the Appellant did not own or have a motor vehicle registered in his name with the West Virginia Department of Motor Vehicles or with the department of motor vehicles in any other state; therefore, the Appellant truthfully answered this question as it was posed to him by Trooper Hess.

As a result of various delays in the process of the Appellant's petition of appeal, the Appellant was required to participate in a second sex offender registration interview with the West Virginia State Police in January of 2009.³ During this second interview with the West Virginia State Police, the Appellant met with Corporal James Long.⁴ Based upon Corporal Long's extensive experience of conducting interviews of convicted sexual offenders for the purposes of completing West Virginia State Police Form 170N, Corporal Long was able to obtain information that the Appellant had been operating a motor vehicle since sometime in December of 2007. *Tr.* at 31. As a result of Corporal Long's determination that the Appellant had been operating a motor vehicle which had not been reported to the West Virginia State Police in the Appellant's interview that was conducted by Trooper Hess in January of 2008, the Appellant was

² NOTE: Form 170N is a form utilized by the West Virginia State Police to collect information relating to individuals who have been convicted of a sexual related offense.

³ NOTE: Due to a delay in receiving the transcripts relating to the Appellant's conviction for the underlying offense, the period in which the Appellant was allowed to appeal was extended an additional four months.

⁴ NOTE: Corporal James Long completes the majority of the sexual offender interviews at the Princeton Detachment of the West Virginia State Police and considers this part of his duties as a "quasi-assignment." *Tr.* at 26.

charged with "Failure to Provide Notice of Changes in Sex Offender Registration" as defined by *W.Va. Code* § 15-12-8, and was indicted of this charge by the February, 2009 term of the Mercer County, West Virginia, Grand Jury. Although, Corporal Long testified that the Appellant failed to properly report that he had been operating a motor vehicle owned by another individual(s), Corporal Long did testify that the Appellant appeared to be forthright and honest. *Tr.* at 32.

The aforementioned indictment was rendered based upon Corporal Long's determination that the Appellant was operating a motor vehicle that was co-owned by the Appellant's mother and fiancée, and said vehicle was owned by the Appellant's mother and fiancée since the 17th day of November, 2007. Obviously, the Appellant had been operating the aforementioned motor vehicle when he was interviewed by Trooper Hess in January of 2008; however, the Appellant did not disclose his operation of said motor vehicle because he was not asked of his operation of any motor vehicle by Trooper Hess. *Tr.* at 59. Although the Appellant did not disclose to Trooper Hess that he operated any motor vehicles because he was not asked by Trooper Hess if he did operate a motor vehicle owned by anyone else, the Appellant did disclose to his Probation Officer that he did operate a motor vehicle. *Tr.* at 45. The Appellant's Probation Officer had been supervising the Appellant since the 7th day of January, 2008. *Tr.* at 44.

As a condition of the Appellant's bond while he was awaiting trial on the underlying criminal matter, and while the Appellant's underlying criminal matter was being appealed to this Court, the Appellant was on home confinement. During the Appellant's period of home confinement, which began sometime on or before June of 2007, the Appellant was required to report to home confinement officials on a frequent basis. *Tr.* at 39. While the Appellant was on home confinement, the Appellant made the home confinement staff aware that he was operating

the vehicle at issue. *Tr.* at 40. Furthermore, the Appellant was forthright and honest with the staff of the home confinement program. *Tr.* at 40.

As a resolution of the indictment which initiated this matter, the Appellant waived his right to a jury trial, and a non-jury trial was held within the lower tribunal on the 18th day of March, 2009. At the conclusion of the non-jury trial, the lower tribunal found the Appellant guilty providing materially false information and sentenced the Appellant to a period of incarceration of one (1) but not more than five (5) years as required by *W.Va. Code* § 15-12-8. The lower tribunal ran this sentence concurrently with the sentence previously given to the Appellant in 07-F-226-DS. While the lower tribunal was sentencing the Appellant, the following commentary was made by the lower tribunal concerning its verdict and sentence in this matter:

THE COURT: Well, let me tell you what I'm going to do. I'm going to run - - I'm going to sentence you to one to five years in the penitentiary, order that it run concurrent with the other one, because I don't think he had any - - I mean, you had - - I think for the most part he did a good job on this. But technically, that's the requirement. And - - and it's a no - - and it - - but I really do wish we'd look at that form.

As a matter of fact, once we adjourn, I'm getting all of the probation people together because they obviously didn't understand my direction to them on what I meant for them to tell people. You know, not to go read the rule, not go - - where do we get a CSR, you know?

And another thing that happened here is you had somebody that wasn't experienced going over the form with him. Corporal Long would have got that information, because he would have gone through and explained it to him. I guess obviously, the other gentleman didn't do that. I mean, I assume that that's what happened here. Because the reason that I think that is, when Mr. Spears was asked these questions by other people, particularly by probation, he gave them the information. So, I mean, it's almost like it's

unfair to an extent, but sometimes the law is unfair. But the way I even it up for you is I run it concurrent.

Tr. at 69-70.

III. STANDARD OF REVIEW

In the case at bar, the Appellant is petitioning this Court for Appeal based upon arguments relating to the lower tribunal's interpretation of provisions of West Virginia law, specifically sections of the *W.Va. CSR*; therefore, the appropriate standard of review for this tribunal to apply is a *de novo* standard. *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138 (1995). Also, the Appellant is challenging the lower tribunal's final order and ultimate disposition which requires this tribunal to apply an abuse of discretion standard in its review. *Burgess v. Porterfield*, 196 W.Va 178 (1996).

IV. ARGUMENT

- A. **The lower tribunal failed to comply with *W.Va. CSR § 81-14-9* when it sentenced the Appellant in the underlying criminal offense.**
 - B. **The West Virginia State Police failed to comply with *W.Va. CSR § 81-14-13* after the Appellant was convicted of an offense which registration was required by statute.**
- A. **The lower tribunal failed to comply with *W.Va. CSR § 81-14-9* when it sentenced the Appellant in the underlying criminal offense.**

The lower tribunal failed to comply with *W.Va. CSR § 81-14-9* when it sentenced the Appellant in the underlying criminal offense. *W.Va. CSR § 81-14-9* established the responsibilities of the sentencing court when an individual is convicted of a sexual related offense that requires registration upon the sex offender registry, and states in pertinent part as follows:

- 9.1. At the time the person is convicted of the crimes set forth in 6.1 of this procedural rule, the sentencing court shall:
 - 9.1.a. Inform the person so convicted of the requirements to register imposed by this article and shall further by interrogation of the defendant or his or her counsel that the defendant has received notice of the provisions of this article and that the defendant understands said provisions.
 - 9.1.b. Have the person sign in open court, a statement acknowledging that the person understands the requirements imposed by the Act.

W.Va. CSR § 81-14-9.

This portion of the *W.Va. CSR* clearly states that it is the responsibility of the lower tribunal at the time of a defendant's conviction of a crime which requires registration as a sexual offender that the person sentenced understands the requirements of registration with the State Police in open Court. Furthermore, this provision of the *W.Va. CSR* mandates that the defendant sign an acknowledgment of his, or her, understanding of the registration requirements.

In the case at bar, this procedure was not followed. Although the Appellant was informed by the lower tribunal that he was required to register with the West Virginia State Police as a sex offender, the Appellant was not given any information pertaining to the specifics related to the registration process, nor was the Appellant directed to sign any form of acknowledgment of his awareness or understanding of the registration requirements.

During the non-jury trial in this matter, the lower tribunal addressed the issues pertaining to individuals who are required to register as sex offenders and this discussion is as follows:

THE COURT: But, I mean, I've set up here and I've preached and preached and preached, and nobody listens, and I'm so frustrated with that, because here we go again. And somebody needs to come up with a bonehead form - - bonehead form that basically, - - I mean, it's got to be at the coloring book level, for these defendants, you know, so that

you can go through them. Because most of these people - - and I don't know, - - I mean I'm not saying this about Mr. Spears, but if you look at the common denominator of most of these people that are involved in this, they're not smart. Okay. And - - and that's - - I mean, so I guess ignorance of the law is no excuse.

Tr. at 12 -13.

The lower tribunal has attempted in the past to address the issues pertaining to the registration requirements of sex offenders by directing its probation officers to explain the requirements to defendants, and the lower tribunal explained its efforts in these situations by stating:

THE COURT: Well, I'm not - - I'm really not so much frustrated with them as I am frankly with my own people, because I thought I made it abundantly clear to the probation officers so that this would not happen anymore, that they were to tell these people in - - in at least common denominator language what they had to do, okay. Because this isn't a game to try to convict people, is it? I mean that's what we want to do. It's not even a game. It's deadly serious business as that little girl in Florida's family knows. So I take these things very seriously. You know, I mean, I'm torn on this.

...

You know, I'm just - - I just - - I really wish from an apology standpoint that we would come up with the - - like I said, and it's not your all's obligation to do that. When I say you all, I mean, it's not the troopers' obligation, it's the lawyers obligation for somebody to come up with that for you all. That's why I think we need to look at it, but I really wish we would come up with some sort of a - - and I say it and I don't mean this derogatorily, but you know, when I went to the army many years ago, we had problems

with literacy. And all the maintenance manuals we had and all of the gunnery manuals we had on tanks were cartoons. When you went through and looked at, I mean, it was a cartoon on how to fix things. That's how - - that's the level that it was at. That's the level we need to be here.

Tr. at 66 - 68.

During the non-jury trial in this matter, the lower tribunal obviously recognized the problem with the procedures for sex offender registration; however, the lower tribunal stated that it has repeatedly lectured its probation officers on the need to prepare defendants, such as the Appellant, on the importance of registering as a sex offender when required by law instead of recognizing that it is required to assure defendants understand the requirements. Clearly, in the case at bar the lower tribunal failed to meet the mandates set forth in the *W.Va. CSR* in regards to the Appellant's requirements to register as a sex offender.

B. The West Virginia State Police failed to comply with *W.Va. CSR* § 81-14-13 after the Appellant was convicted of an offense which registration was required by statute.

The West Virginia State Police failed to comply with *W.Va. CSR* § 81-14-13 after the Appellant was convicted of an offense which registration was required by statute. *W.Va. CSR* § 81-14-13 states in pertinent part the following:

13.2. The registration of sex offenders shall include on the registration form(s) designated by the Superintendent:

...

13.2.i. Make, model, year, color, and license number of all vehicles including any travel trailer, fold down camping trailer, house trailer, or motor home the person has registered or to which he has regular access;

W.Va. CSR § 81-14-13.

Clearly these provisions of the *W.Va. CSR* require that the State Police collect information from individuals who are required to register information pertaining to any and all vehicles they either may own or have access to on a regular basis.

In the case at bar, the West Virginia State Police failed to meet the aforementioned requirements when they failed to obtain information relating to the vehicle the Appellant was operating which was owned by his fiancée and his mother. The reasoning as to why the West Virginia State Police failed to obtain this information and the Appellant did not intentionally or knowingly provide false information to the West Virginia State Police is based upon the fact that the Appellant provided information pertaining to the vehicle at issue to his probation officer and to his home confinement officer. Also, the Appellant's home confinement officer testified at the non-jury trial that the Appellant had always been forthright and honest with him. *Tr.* at 41. Moreover, testimony was presented at the non-jury trial in this matter that the Appellant's probation officer was aware that the Appellant was operating the vehicle at issue in this matter. *Tr.* at 45.

Given that the Appellant's home confinement officer and probation officer were each aware that the Appellant was operating the vehicle at issue, it is easy to conclude that the West Virginia State Police failed to comply with the directive issues in *W.Va. CSR § 81-14-13* pertaining to collecting information regarding the vehicle at issue from the Appellant. Therefore because the West Virginia State Police failed to perform their required duty, the Appellant was convicted of failing to register as a sex offender based upon a theory of "ignorance of the law is no excuse." *Tr.* at 68. Based upon the West Virginia State Police's failure to follow mandate of

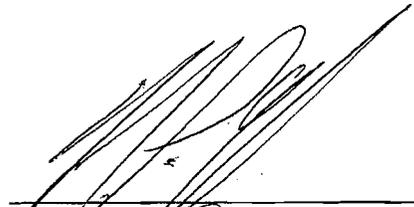
the *W.Va. CSR*, the Appellant was wrongfully convicted.

V. CONCLUSION AND RELIEF SOUGHT

In the case at bar, the Appellant was convicted for "Failing to Provide Notice of Changes in Sex Offender Registration" as defined by *W.Va. Code* § 15-12-8 upon the conclusion of a non-jury trial held within the lower tribunal. Clearly, the Appellant was denied the mandates set forth in the applicable provisions of the *W.Va. CSR* when he completed the requirements made of him as the result of being convicted for the crime of sexual assault in the second degree. Given that the Appellant was not properly informed by the lower tribunal of his requirements as a convicted sex offender, and that the West Virginia State Police failed to perform its required duties, the Appellant's conviction in this matter should be set aside by this Court.

Respectfully submitted,

Dean Craig Spears,
By Counsel

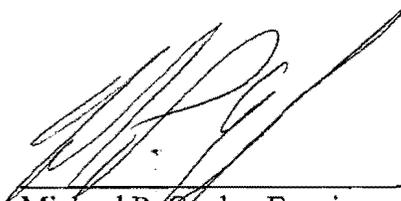


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CERTIFICATE OF SERVICE

I, Michael P. Cooke, Esquire, Counsel for Appellant, hereby certify that on the 29th day of March, 2010 I have filed one original and nine copies of the foregoing **APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL** in the Office of the Clerk of the West Virginia Supreme Court of Appeals, by U.S. Mail, First Class, postage prepaid. Also, a copy of this the **APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL** has also been served upon the following parties by depositing a true copy of the aforementioned documents in the U.S. Mail, First Class, postage prepaid addressed as below on the 29th day of March, 2010.

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