
NO. 35437

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

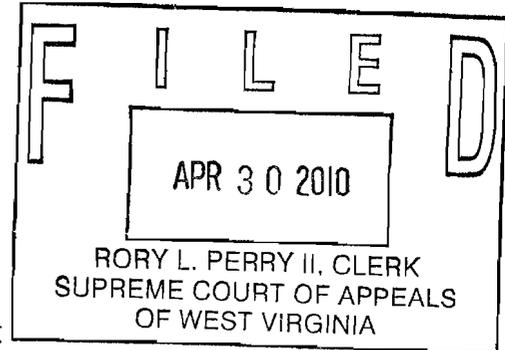
STATE OF WEST VIRGINIA,

Plaintiff Below, Appellee,

v.

DEAN CRAIG SPEARS,

Defendant Below, Appellant.



BRIEF OF THE APPELLEE,
STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

BARBARA H. ALLEN
MANAGING DEPUTY ATTORNEY GENERAL
STATE BAR ID NO. 1220
STATE CAPITOL, ROOM E-26
CHARLESTON, WEST VIRGINIA 25305
304-558-2021

Counsel for Plaintiff Below, Appellee

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I.

INTRODUCTION

This case was prosecuted in good faith and tried before a judge who grappled with the seeming unfairness of the law and attempted to fashion a remedy for it.

Notwithstanding these circumstances, after careful consideration of the entire record, the transcript of proceedings and the applicable law, the State concludes that the Appellant was wrongfully convicted of violating W. Va. Code § 15-12-8. What the Appellant violated, if anything, was a regulation specifying the responsibilities of the West Virginia State Police, not the responsibilities of a sex offender required to register. The State respectfully submits that the Appellant's conviction should be reversed and the case remanded to the circuit court for dismissal of the indictment.

II.

STATEMENT OF THE CASE

This is an appeal by the Appellant, Dean Craig Spears, from his conviction in the Circuit Court of Mercer County, West Virginia, of a violation of W. Va. Code §15-12-8. Specifically, the Appellant, being required to register as a sex offender for life by virtue of his conviction for sexual crimes committed against a child, was charged with “. . . the offense of ‘Failure to Provide Notice of Changes In Sex Offender Registration’ by unlawfully, knowingly and feloniously failing to provide a change in information, to-wit: failing to provide information about the automobile he operated regularly, as required by the Sex Offender Registration Act” (Reproduced Record, p. 1.) He was convicted following a bench trial, the court finding that although there was no evidence the Appellant was ever asked about his use (as opposed to his ownership) of a vehicle,

ignorance of law is no excuse. I mean, you’d have somebody that was out drinking and they’d say well, you know, I didn’t know it was .08 or whatever, I was drinking – they don’t know that. Well, so technically, Mr. Spears, I mean, I have no choice. I find you guilty of this beyond a reasonable doubt.

(Reproduced Record, Transcript, p. 68.)

Immediately thereafter, the court sentenced the Appellant to a concurrent term of imprisonment, stating that “. . . it’s almost like it’s unfair to an extent, but sometimes the law is unfair. But the way that I *even it up for you* is I run it concurrent.” (Reproduced Record, Transcript, p. 70.)

The reason the court felt that the conviction was “almost like it’s unfair,” and the reason the court felt compelled to “even it up,” was because of the uncontradicted testimony that the Appellant was not asked the right question at his initial interview with then-Trooper Hess, and that every time

he *was* asked the right question by others, including Corporal Long and Probation Officer Kimberly Moore, he gave truthful information.

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 gentlemen (Trooper Hess) 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.

(Reproduced Record, Transcript, p. 70.)

III.

STATEMENT OF THE FACTS

On October 26, 2007, the Appellant was convicted of one count of sexual assault in the second degree, following a trial by jury on a five count indictment: two counts of first degree sexual assault, one count of incest, and two counts of second degree sexual assault.¹ (Reproduced Record, Jury Verdict Form) He was sentenced to a term of imprisonment of ten to twenty-five years, and ordered to register as a sex offender.

Obedient to the requirement that he register, the Appellant reported to the West Virginia State Police Detachment on January 11, 2008, at which time he was interviewed by Trooper Hess. Additionally, he reported when required to the Mercer County Probation Department, including (in relevant part) on January 15, 2008. Following delays in the normal appeal process, the Appellant

¹The first degree sexual assault charges and the incest charges involved one time frame (1980), while the second degree sexual assault charges involved another (2006).

reported again to the West Virginia State Police Detachment on January 6, 2009, at which time he was interviewed by Corporal Long.

The Appellant's indictment arose from his initial report to the West Virginia State Police on January 11, 2008. The Appellant's undisputed testimony, which was seemingly accepted as true by the court below,² was that Trooper Hess asked him if he owned a car. He (the Appellant) answered no, which was true, and the matter was dropped. The "Sex Offender Registration and Verification" form which was filled out by Trooper Hess at the time of the interview (Reproduced Record, Exhibit No. 2) is ambiguous at best; it provides, in relevant part:

If registrant has; vehicle, employer, school, training facility, internet account, conviction or information that will not fit in the space provided – list the information on a supplemental form. Print the name, DOB, and SSN at the top of the supplemental. The supplemental form must be signed and verified with a thumbprint and should be attached to the completed initial registration.

Habitable Real Property _____ *None* _____

Complete Address _____

Vehicle Make _____ *None* _____

Critically, on January 14, 2008, four days after his interview by Trooper Hess, the Appellant was interviewed by Mercer County Adult Probation personnel. As evidenced by the "Monthly Supervision Report" filled out at the time of the interview, this time the Appellant wasn't asked

²Reproduced Record, Transcript, pp. 69-70: "And another thing that happened here is you had somebody [Trooper Hess] 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.*" (Emphasis supplied.)

whether he owned a car; he was asked “do you drive.” The Appellant responded that he did, and he described the car to which he had access. (Reproduced Record, Monthly Supervision Report.)

On January 6, 2009, the Appellant again reported to the West Virginia State Police Detachment, at which time he was interviewed by Corporal Long. Both the Appellant and Corporal Long testified that this time the Appellant was asked whether he had access to a vehicle, to which he responded that he did; and this time the “Sex Offender Registration and Verification” form read:

Habitable Real Property _____ *None* _____

Complete Address _____

Vehicle Make ___ *Chevrolet* ___ Model ___ *Impala* ___ Year ___ *2004* ___ Color
___ *White* ___ License ___ *DHW463*

About a month later, on February 10, 2009, the Appellant was indicted for “. . . unlawfully, knowingly and feloniously failing to provide a change in information, to-wit: failing to provide information about the automobile he operated regularly. . . .” W. Va. Code § 15-12-8. The indictment charged that the crime was committed between January 11, 2008 and January 6, 2009.

Following a bench trial held on March 18, 2009, the Appellant was convicted and sentenced to a term of imprisonment of 1-5 years, such term set to run concurrent with the 10-15 year term imposed on the underlying conviction. (Reproduced Record, Order of Mar. 18, 2009.) The court specifically noted that in his view, the crime was essentially a strict liability offense and that he “ha[d] no choice” but to find the Appellant guilty. (Reproduced Record, Transcript, p. 68.) He went on to opine that the situation was “almost like it’s unfair to an extent, but sometimes the law is unfair”; and that “the way I even it up for you is I run [the sentence] concurrent.” (Reproduced Record, Transcript, p. 70.)

IV.

THE STATUTES AT ISSUE

This is a case of first impression under the charging statute, W. Va. Code § 15-12-8(c), which provides in relevant part:

(c) Any person required to register for life pursuant to this article who knowingly provides materially false information or who refuses to provide accurate information when so required by the terms of this article, or who knowingly fails to register or knowingly fails to provide a change in any required information as required by this article, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than one nor more than five years. Any person convicted of a second or subsequent offense under this subsection is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than ten nor more than twenty-five years.

The information required by Chapter 15, Article 12, is found at W. Va. Code § 15-13-2(e), which provides:

(e) In addition to any other requirements of this article, persons required to register under the provisions of this article shall provide or cooperate in providing, at a minimum, the following when registering:

(1) The full name of the registrant, including any aliases, nicknames or other names used by the registrant;

(2) The address where the registrant intends to reside or resides at the time of registration, the name and address of the registrant's employer or place of occupation at the time of registration, the names and addresses of any anticipated future employers or places of occupation, the name and address of any school or training facility the registrant is attending at the time of registration and the names and addresses of any schools or training facilities the registrant expects to attend: Provided, That a post office box or other address that does not have a physical street address of residence may not be provided in lieu of a physical residence address.

(3) The registrant's social security number;

(4) Ages and names of any children in the household of the registrant, and any children currently living or subsequently born to the registrant;

(5) A brief description of the offense or offenses for which the registrant was convicted; and

(6) A complete set of the registrant's fingerprints.

Nowhere in Chapter 15, Article 12, is there any mention of vehicle ownership, vehicle access or vehicle use as "required information." Vehicle ownership, access or use appears only in a regulation, 81 C.S.R. 14-13, **Responsibilities of the State Police**.

13.1. The state police detachments shall serve as the local law enforcement agency that actually administers the registration procedures upon the person required to be registered.

13.2. The registration of sex offenders shall include on registration form() 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 or she has regular access;

* * *³

V.

ISSUES

1. Whether the Appellant can be convicted of failing to provide information that is required not by the charging statute, W. Va. Code § 15-12-8, but by a regulation, 81 C.S.R. 14-13.2.i, that details the responsibilities of the West Virginia State Police.

³In 81 C.S.R. 14-17, **Responsibilities of Those Persons Required to Register**, there is a requirement that "[w]ithin three business days of conviction or entering of a guilty plea, the person shall physically appear at a State Police Detachment in the county of residence and supply information necessary to complete registration form(s) and *comply with the procedures in 13.3 of this procedural rule* providing that the person is not incarcerated." 81 C.S.R. 14-17.4.a (emphasis supplied).

2. Assuming arguendo that the Appellant could be charged under § 15-12-8, whether the State provided that the Appellant's offense was knowing.

3. Whether Issues No. 1 and 2 can be reached by this Court under the plain error doctrine.

VI.

ARGUMENT

1. Whether The Appellant Can Be Convicted Of Failing To Provide Information That Is Required Not By The Charging Statute, W. Va. Code § 15-12-8, But By A Regulation, 81 C.S.R. 14-13.2.i, That Details The Responsibilities Of The West Virginia State Police.

There is no principle of criminal law more fundamental than this: that before any person can be punished for the violation of a statute, his conduct must be plainly and unmistakably proscribed by that statute.

As set forth above, the statute under which the Appellant was convicted, W. Va. Code § 15-12-8, required him to register and, in the course of registering, to provide the information specifically set forth in W. Va. Code § 15-12-2(e). Nowhere in either of these statutes – and indeed, nowhere in Chapter 15, Article 12 – is there any requirement that a convicted sex offender provide information about vehicles he owns and/or drives.

Also as set forth above, information about vehicles is set forth only in a regulation, 81 C.S.R. 14-13.2.i, which details certain responsibilities of the State Police, including the responsibility to include certain information in its registration form or forms. The form developed by the West Virginia State Police, *see pp. 4-5, infra*, is completely ambiguous as to whether the information about vehicles concerns only vehicles that are owned by the registrant. Thus, if anyone dropped the ball here it was the West Virginia State Police, which developed an ambiguous form; and Trooper

Hess, who, while assisting the Appellant in filling out the form, asked the Appellant only whether he owned a vehicle, not whether he had the use of one.⁴

Pursuant to the underlying theory of this prosecution, to-wit, that failure to provide any information set forth in 81 C.S.R. 14 is a criminal offense under W. Va. Code § 15-12-8, if Trooper Hess had neglected to take a right thumb print of the Appellant as required by 81 C.S.R. 14.13.2.q, the Appellant could have been charged with failure to provide his thumb print.

2. Assuming Arguendo That The Appellant Could Be Charged Under § 15-12-8, Whether The State Provided That The Appellant's Offense Was Knowing.

The court below concluded that although the evidence was undisputed that the Appellant was never asked whether he had the use of a vehicle, only whether he owned one, he could still be prosecuted because “ignorance of law is no excuse.” (Reproduced Record, Transcript, p. 68.) The court went on to analogize the situation to a DUI case, where

you'd have somebody that was out drinking and they'd say well, you know, I didn't know it was .08 or whatever, I was drinking – they don't know that. Well, so technically, Mr. Spears, I mean, I have no choice. I find you guilty of this beyond a reasonable doubt. (Id.)

The court's analogy does not hold up to analysis. West Virginia's DUI statutes, W. Va. Code §§ 17C-5-2 through 8, clearly define the prohibited offense and require no scienter. In contrast, the registration statute at issue, W. Va. Code § 15-12-8, does not clearly define the prohibited offense, as it contains no mention of or reference to any requirement of providing vehicle information, and specifically requires as an element of the offense that the offense be done knowingly.

⁴This is an undisputed fact, as the court below so found.

Under West Virginia law, “[a] person acts knowingly with respect to a material element of an offense when: (1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” Syl. Pt. 1, *State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996). In the instant case, there was not one shred of evidence that the Appellant’s failure to provide information about the vehicle he used, but did not own, was a knowing act or omission; further, there was not one shred of evidence from which this element of the offense could be inferred. As the court below conceded,

... you had somebody [Trooper Hess] 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 [Trooper Hess] 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 that I even it up for you is I run it concurrent.

(Reproduced Record, Transcript, pp. 69-70.)⁵

3. Whether Issues Nos. 1 And 2 Can Be Reached By This Court Under The Plain Error Doctrine.

The State finds itself in the peculiar position of not only arguing issues on behalf of the Appellant, but also arguing that this Court should reach those issues under the plain error doctrine.

⁵In the court’s defense, the concluding argument of defense counsel did not squarely address this issue; rather, counsel argued that the West Virginia State Police’s procedures for collecting information are faulty and that the State hadn’t proved its case beyond a reasonable doubt.

“To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity or public reputation of the judicial proceedings.” Syl. Pt. 3, *State v. Martin*, No. 35224 (W. Va., April 21, 2010); Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

With respect to the first prong of the plain error test, as detailed in the preceding arguments, the court below erred in convicting the Appellant of an offense where his (the Appellant’s) conduct was not clearly proscribed by the charging statute; and in convicting the Appellant of an offense where the State failed to prove an element thereof. The Appellant cannot fairly be said to have waived this error, as there is no “. . . affirmative evidence in the record which establishes beyond a reasonable doubt that [he] intentionally relinquished or abandoned [his rights].” Syl. Pt. 5, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998), quoted in *State v. Martin, supra*, Slip Opinion at 7.

With respect to the second prong of the plain error test, the error was plain under existing law. It is beyond dispute that one can only be charged with a crime where the offense is clearly proscribed by law. See, e.g., *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 262, 465 S.E.2d 257, 262 (1995), discussing the rule of lenity:

The rationale for the rule of lenity is to preclude ‘expansive judicial interpretations [that] may create penalties for offenses that were not intended by the legislature.’ *State v. Brumfield*, 178 W. Va. 240, 246, 358 S.E.2d 801, 807 (1987). See also *State v. Choat*, 178 W. Va. 607, 616, 363 S.E.2d 493, 502 (1987). The United States Supreme Court made this observation in *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1002, 108 L.Ed.2d 132, 140 (1990): ‘[The rule of lenity] serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.’

Further it is beyond dispute that one can only be convicted of a crime where the State has proved each and every element of the offense beyond a reasonable doubt. *See, e.g.,* Syl. Pt. 7, *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994), where this Court reaffirmed the long established rule 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. . . .”

With respect to the third prong of the plain error test, it is beyond dispute that the error affected the Appellant’s substantial rights, specifically, his right not to be charged with or convicted of violating a procedural regulation entitled “Responsibilities of the State Police”; and his right not to be convicted of an offense where the State fails to put on any evidence to support a material element of the crime, specifically, that he acted knowingly. The fact that the court below ran the sentence concurrently does not cure the error or render it harmless.

Finally, with respect to the fourth prong of the plain error test, to permit the Appellant’s conviction to stand in this case would affect the fairness, integrity or public reputation of the proceedings. The Appellant is not a sympathetic figure; he’s a convicted sex offender serving a sentence of 10-25 years in the underlying case. None of this makes him ineligible for due process or equal protection of the law.

VII.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the State confesses error and prays that the Appellant's conviction be reversed and the case remanded to the Circuit Court of Mercer County for dismissal of the indictment.

Respectfully submitted,

STATE OF WEST VIRGINIA
Appellee,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



BARBARA H. ALLEN, State Bar I.D. No. 1220
MANAGING DEPUTY ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, WV 25305
304-558-2021

CERTIFICATE OF SERVICE

I, Barbara H. Allen, hereby certify that a copy of the within "Brief of Appellee, State of West Virginia" was served on the individuals set forth below, by first-class mail addressed to their respective office addresses, on this the 30th day of April, 2010:

To: Michael P. Cooke, Esquire
Law and Commerce Building
307 Federal Street, Suite 219
P.O. Box 2091
Bluefield, WV 24701

Scott Ash, Esquire
Assistant Prosecuting Attorney of Mercer County
120 Scott Street, Suite 200
Princeton, WV 24740


BARBARA H ALLEN