

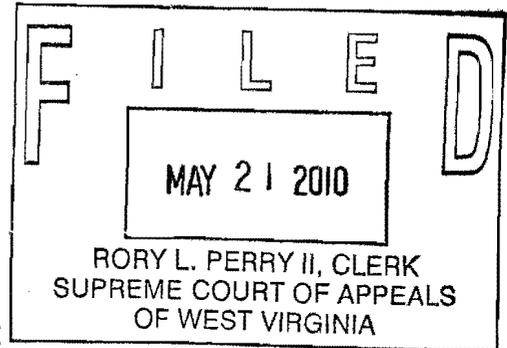
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Plaintiff,**

vs.

Number: 35520

**DENNIS R. GIBSON,
Defendant.**



**DEFENDANT'S BRIEF AS TO
CERTIFIED QUESTION
FROM THE CIRCUIT COURT OF FAYETTE COUNTY**

NANCY S. FRALEY
West Virginia Bar No. 5764
Fayette County Public Defender's Office
102 Fayette Ave.
Fayetteville, WV 25840
(304) 574-2583
Counsel for
DENNIS R. GIBSON

TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF RULING4

II. STATEMENT OF FACTS5

III. PLAINTIFF'S ASSIGNMENT OF ERROR 6

The Trial Court Erred In Finding That Both of the Prior Convictions
of Domestic Battery or Domestic Assault Must Occur Within Ten
Years of an Offense Alleged to be a Third Offense Domestic Batter
or Domestic Assault.

IV. STANDARD OF REVIEW 6

V. ARGUMENT 6

VI. CONCLUSION10

VII. CERTIFICATE OF SERVICE11

INDEX OF AUTHORITIES

STATUTES:

West Virginia Code §17C-5-2(m) 8, 9

West Virginia Code §61-2-9 7

West Virginia Code §61-2-28 4, 6, 7, 8, 9

West Virginia Code §61-3A-4(e) 8, 9

CASE LAW:

Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573,
466 S.E.2d 424 (1995).....6

Myers v. Murensky, 162 W.Va. 5, 245 S.E.2d 920 (1978).....8

State ex rel Cooper v. Caperton, 196 W.Va. 208, 407 S.E.2d 162 (1996).....6

State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001) 9, 10

State v. McCain, 211 W.Va. 61, 561 S.E.2d 783 (2002)9

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

vs.

Number: 35520

DENNIS R. GIBSON,

Defendant.

**DEFENDANT'S BRIEF AS TO
CERTIFIED QUESTION**

Comes now the Defendant, Dennis R. Gibson, by counsel, Nancy S. Fraley, and does timely file with this Court, his Defendant's Brief, as to the Certified Question from Fayette County, West Virginia which this Court has accepted for review.

I. KIND OF PROCEEDING AND NATURE OF RULING

On the 11th day of December, 2009, an Order was entered Certifying to this Court a question concerning West Virginia Code §61-2-28(d). The question in simplest terms is, for a person to be charged with third offense Domestic Battery or Domestic Assault, as defined by West Virginia Code §61-2-28(d), do the two prior convictions and the incident which gives rise to the present prosecution, both have to occur within ten years of the charged offense. The Court below answered this question in the affirmative, however, certified the question to this Court.

II. STATEMENT OF FACTS

On September 8, 2009, the Fayette County Grand Jury returned an indictment against Dennis R. Gibson, your defendant, for “third offense domestic battery”. That indictment alleged that the respondent made physical contact of an insulting or provoking nature with a family/household member, after having been previously convicted of domestic battery on February 2, 2004 and of domestic battery on June 29, 1998.¹ Discovery was provided by the State at the time of Mr. Gibson’s arraignment on September 19, 2009, including the documents which show that on February 2, 2004, your Respondent pled no contest to first offense domestic battery with the sentence of a one hundred dollars (\$100.00) fine plus court costs, and that on June 29, 1998, your Respondent pled guilty to first offense domestic battery with the sentence of twenty-four (24) hours in jail, and a fifty (\$50.00) fine plus court costs. Following arraignment, motions were filed on the Respondent’s behalf including a Motion in Limine to suppress and disallow the State from mentioning the prior conviction of the Respondent, for domestic battery conviction on June 29, 1998. When the Court became aware of this Motion in Limine he asked the parties to submit proposed orders to address the question.

¹ The entire charging language within the indictment reads:

The Grand Jurors of the State of West Virginia, in and for the body of the County of Fayette, upon their oaths, and now attending the said Court, present that DENNIS R. GIBSON, on or about the 5th day of May, 2009, in the said County of Fayette, committed the offense of “third offense domestic battery” in that he did unlawfully, feloniously and intentionally make physical contact of an insulting or provoking nature with Stephanie N. Adkins, a family/household member, by striking her in the facial area with his fist, striking her in the stomach and arms, pulling her hair and/or pushing her to the ground, after having been previously convicted of the offense of domestic battery on February 2, 2004, in the Magistrate Court of Fayette County, West Virginia; and after having been previously convicted of the offense of domestic battery on June 29, 1998, in the Magistrate Court of Fayette County, West Virginia, against the peace and dignity of the State. W.Va. Code §61-2-28(d)

which has now been certified to this Court. The ultimate outcome is the December 11, 2009 Order from which the State appeals and which is attached to this Response.

III. PETITIONER'S ASSIGNMENT OF ERROR

The Trial Court Erred In Finding That Both of the Prior Convictions of Domestic Battery or Domestic Assault Must Occur Within Ten Years of an Offense Alleged to be a Third Offense Domestic Batter or Domestic Assault.

IV. STANDARD OF REVIEW

The question raised calls for the interpretation of a statute, which is a legal determination, and is subject to de novo review. State ex rel Cooper v. Caperton, 196 W.Va. 208, 407 S.E.2d 162 (1996) and Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

V. ARGUMENT

Where did this language found in West Virginia Code §61-2-28 come from? In a preliminary search of the statutes which criminalize domestic violence nation wide, your Defendant could not find similar language. Some states such as Florida and Arkansas enhance based upon whether or not the violence occurs in the presence or hearing of a child, Wyoming, Michigan, Ohio and Maine do not appear to have any type of time

limitation for prior offenses. Kansas imposes clearly, a time frame of five years.² Nevada clearly imposes a time frame of seven years.³ Respondent could locate no criminal code which calls for a particular time frame for one offense and not another if that is in fact what the Legislature was attempting to do in West Virginia Code §61-2-28(d).

West Virginia Code §61-2-28(d) provides that a person who has been convicted of third or subsequent violation of domestic battery, as defined in subsection (a) of that statute, or domestic assault as defined in subsection (b) of that statute, or of West Virginia Code §61-2-9, [the standard malicious wounding, unlawful wounding, battery and assault statute], and if the victim was a family, intimate partner or household member, or has previously been granted a pretrial diversion for any of the above offenses, or any combination of such convictions or diversions is guilty of a felony if the offense occurs within ten years of a prior conviction of any of these offenses. It is fair to say that the lion's share of the language within this statute is spent outlining the various individuals who constitute 'family, intimate partner or household member'. A secondary focus is on what type of convictions and diversion agreements should be used for enhancement. Does the language "if the offense occurs within ten years of a prior conviction of any of these offenses refer back to the types of convictions which may be used or does this language mean that the ten year statute of limitation which is contained refers to only one

² See K.S.A. 1999 Supp. 21-3412(c)(3): If, within five years immediately preceding commission of the crime, a person is convicted of a violation of this crime a third or subsequent time under circumstances which constitute a domestic battery ...

³ See 1997 Nev. Stat., ch.476 §1, at 1799: For the third and any subsequent offense within the immediately preceding seven years...

of the two required offenses necessary to enhance what would normally be a misdemeanor to a felony? There is no clear answer.

The Petitioner's position is that the language within this statute is not unclear or ambiguous, the State and the Court below disagree.

West Virginia has three statutes which allow for the enhancement of misdemeanor behavior to felony status based upon prior convictions which occurred within a certain time period, driving under the influence of alcohol, shoplifting and domestic battery. The driving under the influence of alcohol statute, found in West Virginia Code §17C-5-2(m), is clear, "...the following convictions are to be regarded as convictions under this section: any conviction...which occurred within the ten-year period immediately preceding the date of arrest in the current proceeding". The shoplifting statute found in West Virginia Code §61-3A-4(e), is clear, "In determining the number of prior shoplifting convictions..., the court shall disregard all such convictions occurring more than seven years prior to the shoplifting offense in question." The domestic violence statute found in West Virginia Code §61-2-28, is not clear.

The State was correct, therefore, in citing Myers v. Murensky, 162 W.Va. 5, 245 S.E.2d 920 (1978). In that case, which was considering the negligent homicide statute as it existed at that time, this Court noted that the statute being reviewed had two possible meanings, that (then as now) the Court did not have the benefit of legislative history as to

the legislature's attended meaning, and therefore the ambiguous statute was to be strictly construed against the State and in favor of the defendant.⁴

To find West Virginia Code §61-2-28(d) to be ambiguous and therefore subject to being strictly construed, would also be consistent with the direction provided in syllabus point 2. of State v. McCain, 211 W.Va. 61, 561 S.E.2d 783 (2002) which calls for a statute to be read and applied in accord with the spirit and purpose of the law in general. As outlined above to read West Virginia Code §61-2-28(d) to require that both prior convictions, to be used for purposes of enhancement, be within ten years of the current allegation, would be consistent with the time frames provided for generally within West Virginia Code as evidenced in West Virginia Code §17C-5-2(m) and West Virginia Code §61-3A-4(e).

Finally, for this Court to find either that the language within West Virginia Code §61-2-28(d) is ambiguous and therefore should be strictly construed against the State or that the language already requires that both convictions must have been secured within the ten year time frame, would be consistent with this Court's rulings in State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001). This case is the only West Virginia Supreme Court case which has dealt directly with West Virginia Code §61-2-28(d). The Court found, absent any language concerning out of State convictions, that out of State convictions for crimes of domestic violence may be used for purposes of enhancement: "We reach this conclusion by looking at what the Legislature and this Court have said in

⁴ Myers v. Murensky, 162 W.Va. 5, 245 S.E.2d 920 (1978) syllabus point 1. quoted by this Court again in State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002) syllabus point 3.

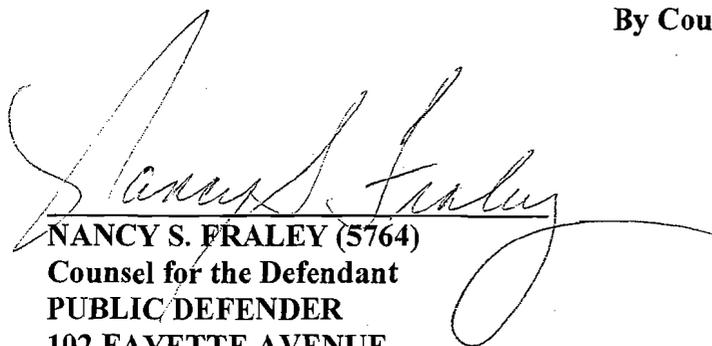
the matter of enhanced penalties for another societal ill – driving a motor vehicle under the influence of drugs or alcohol.” State v. Hulbert, *id.*, at 222.

CONCLUSION

Therefore, for the reasons raised by this response and those outlined in the attached Order, a prior conviction or diversion, of domestic violence may only be used for purposes of enhancement if it occurred within ten years of current alleged offense.

The ruling of the Circuit Judge as to this Certified Question was proper.

DENNIS R. GIBSON
By Counsel

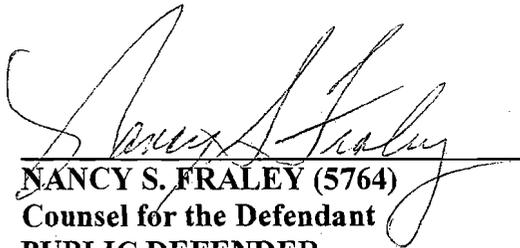


NANCY S. FRALEY (5764)
Counsel for the Defendant
PUBLIC DEFENDER
102 FAYETTE AVENUE
FAYETTEVILLE, WV 25840
(304) 574-2583

CERTIFICATE OF SERVICE

I, Nancy S. Fraley, Counsel for the Defendant Dennis R. Gibson, do hereby certify that a true copy of the foregoing DEFENDANT'S BRIEF AS TO CERTIFIED QUESTION was provided by hand delivery on the 21st day of May, 2010, to:

Carl L. Harris
Fayette County Prosecuting Attorney
108 East Maple Avenue
Fayetteville, WV 25840



NANCY S. FRALEY (5764)
Counsel for the Defendant
PUBLIC DEFENDER
102 FAYETTE AVENUE
FAYETTEVILLE, WV 25840
(304) 574-2583