

NO. 35520

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Petitioner,

No. 35520

v.

DENNIS R. GIBSON,  
Respondent.

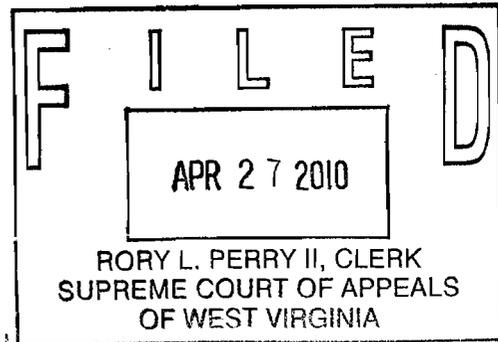
*Plaintiff's Brief*

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FROM THE CIRCUIT COURT OF FAYETTE COUNTY

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POINTS AND AUTHORITIES RELIED UPON

West Virginia Code §61-2-28(d)

West Virginia Code § 17C-5-2

State ex rel Cooper v. Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996)

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

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

State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908)

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

State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968)

L.H. Jones Equipment Company v. Swenson Spreader LLC (2009), Docket No. 34745

**IN THE SUPREME COURT OF APPEALS OF WESTS VIRGINIA  
At Charleston**

**STATE OF WEST VIRGINIA,**

**Plaintiff,**

**v.**

**No. 35520**

**DENNIS R. GIBSON,**

**Defendant.**

**PLAINTIFF'S BRIEF**

Now comes the Petitioner, the State of West Virginia, by its Prosecuting Attorney, Carl L. Harris, and files this Brief in support of its Appeal

**I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL**

On the 11<sup>th</sup> day of December, 2009, the Court entered an Order For Certified Question. The question certified to the Supreme Court of Appeals of West Virginia is "Must both of the two prior convictions for criminal acts of domestic violence [as defined and obtained in accord with West Virginia Code §61-2-28], which are alleged within an Indictment charging a current allegation of domestic violence as a third offense felony, have been obtained against a defendant within ten years of said current allegation, for said prior convictions to be properly used to charge the current allegation of domestic violence as a third offense felony?" The Court answered that question in the affirmative and set for the reasons in the aforesaid Order For Certified Question.

## II. FACTS OF THE CASE

The facts which gave rise to this appeal are as follows:<sup>1</sup>

The September 2009 Fayette County Grand Jury returned an Indictment against Dennis R. Gibson charging him with Third Offense Domestic Battery, a felony, as defined by West Virginia Code §61-2-28(d), with an alleged offense commission date of May 5, 2009. The two prior convictions charged within the Indictment are alleged to have been entered on February 2, 2004 and on June 29, 1998.

For reasons set forth in the Court's Order For Certified Question, the Court reached the conclusion that both prior convictions for domestic battery or domestic assault must have taken place within ten years of the alleged current domestic violence offense.

## III. 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 battery or domestic assault.

## IV. STANDARD OF REVIEW

The standard of review in the interpretation of a statute is a purely legal question and is subject to de novo review. State ex rel Cooper v. Caperton, 196 W.Va. 208, 470 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)

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<sup>1</sup> No Court proceedings other than the Respondent's arraignment have been held and due to the nature of this proceeding and the stipulation of facts a transcript is not necessary.

## V. ARGUMENT

The relevant provision of West Virginia Code § 61-2-28, providing for the prosecution of a third or subsequent offense of Domestic Battery or Domestic Assault is "... (d) Any person who has been convicted of a third or subsequent violation of the provisions of subsection (a) or (b) of this section ... is guilty of a felony if the offense occurs within ten years of a prior conviction of any of these offenses and ..."

there are no time limits imposed by this statute for the prosecution of a second offense Domestic Battery or Domestic Assault. This differs greatly from the provisions of West Virginia Code § 17C-5-2 which provides as follows regarding the time period within which a second, third or subsequent Driving Under the Influence of Alcohol and/or Drugs offense may be prosecuted "... (1) Any conviction under the provisions of subsection (a), (b), (c), (d), (e), (f), or (g) of this section or under a prior enactment of this section for an offense which occurred within the ten-year period immediately preceding the date of arrest in the current proceeding; ..."

The language of the Domestic Battery Statute is clear and not ambiguous. If the current offense occurs within ten years of a previous conviction and it is a third conviction for that offense, only one of the two prior convictions need be within the ten year period. Had the Legislature intended both prior convictions to have been within ten years of the current charge, it could easily have used the same language as used in the Driving Under the Influence of Alcohol and/or Drug statute. The Legislature made no such provision nor did it provide any time limitation regarding the prosecution of a second offense Domestic Battery or Domestic Assault.

In deciding State v. McCain, 211 W.Va. 61, 561 S.E.2d 783 (2002), the Court cited State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908), wherein the Court said "a

statute should be read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in effectuation of the general purpose and design thereof, if its terms are consistent therewith.” In that same case the Court noted that penal statutes are to be strictly construed against the State and in favor of a defendant, citing Myers v. Murensky, 162 W.Va. 5, 245 S.E.2d 920 (1978). In State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968) and L.H. Jones Equipment Company v. Swenson Spreader LLC Docket No. 34745(2009) this Court stated that “where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”

## VI. CONCLUSION

The language contained in West Virginia Code § 61-2-28(d) is not ambiguous and provides for a third offense Domestic Battery or Domestic Assault if one of the two prior convictions for either of those offenses occurred within the ten years of the current alleged domestic violence offense.

  
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**CERTIFICATE OF SERVICE**

I, CARL L. HARRIS, Prosecuting Attorney for Fayette County, do hereby certify that service of the foregoing *PLAINTIFF'S BRIEF* was made by mailing a true copy thereof, by United States mail with postage prepaid, if mailed, to Nancy S. Fraley, Chief Public Defender, 102 Fayette Avenue, Fayetteville, WV 25840 on this 26<sup>th</sup> day of April, 2010:

  
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CARL L. HARRIS