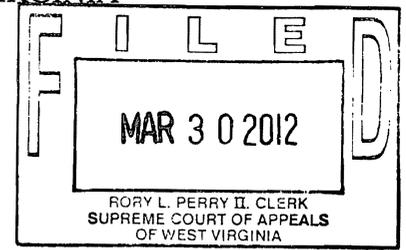


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Ex rel.  
MYRON DEWAYNE DANIELS,  
Petitioner



12-0180

Supreme Court No. ~~11-1047~~

Circuit Court No. 05-MISC-265  
(Kanawha)

WILLIAM FOX, WARDEN,  
St. Mary's Correctional Center  
Respondent.

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PETITIONER'S BRIEF

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## ASSIGNMENTS OF ERROR

- I) The Habeas Court erred (1) in ruling that severing counts of an indictment allow those counts to be considered separate convictions under the habitual criminal statute, W. Va. Code § 61-11-18, and (2) in failing to vacate petitioner's plea bargain as it cannot be legally fulfilled.
- II) The habeas court erred in failing to void petitioner's robbery conviction and sentence even though the habeas court made findings of law and conclusions of fact that require reversal, apparently ruling that reversal was unnecessary as petitioner would still be serving a life sentence on the other robbery count.

## STATEMENT OF THE CASE

Myron Daniels was wrongfully sentenced to two recidivist life sentences for two convictions for charges in the same indictment convictions that were finalized on the same day. He was also denied his right to appeal one of the convictions as no transcript of his jury trial exists.

On February 22, 1996, Myron Daniels was indicted by the Kanawha County Grand Jury for seven felonies. (App. at 3-8.) Only counts one and three, both alleging aggravated robbery, are relevant to the petition for writ of habeas corpus and this appeal. These two counts were severed, and on October 9, 1996, Daniels was found guilty by a jury as to count one of the indictment. (App. at 13.)

On June 14, 1999, pursuant to a plea bargain Daniels pled guilty to count three. (App. at 17.) He also pled guilty to a recidivist information as to both counts. (Id.) Daniels was then sentenced to two life sentences to be served concurrently by order entered June 14, 1999. (Id.) The record indicates that Daniels wished to appeal his jury conviction as to count one of the indictment as the right to appeal was specifically struck from a list of rights Daniels' waived pursuant to his plea bargain. (App. at 15) No notice of intent to appeal or transcript request was filed. Daniels raised this issue in a motion filed on June 7, 2005. (App. at 32-3.)

Habeas counsel, after a long search, was unable to obtain a full transcript. Eventually, the Office of the Clerk of the West Virginia Supreme Court of Appeals

informed counsel that the transcripts and court reporter notes do not exist as the raw data was not given to the circuit clerk for safekeeping. (App. at 108).

Daniels filed his post-conviction pro-se petition for a writ of habeas corpus on September 25, 2006. (App. at 57.)The amended petition was filed by habeas counsel on April 30, 2009. After a counsel change, several hearings, and filed memoranda the issues were narrowed to the issue that Daniels was illegally sentenced to two life sentences, and that Daniels was denied his right to appeal due to the lack of a transcript. The case was submitted on the pleadings on February 5, 2011. On January 24, 2012, the habeas court entered an order fully denying the petition, holding that since the two robbery counts were severed the two recidivist sentences were proper, and that since at least one concurrent life sentence (for count three) was valid it did not need to vacate the conviction for count one. (App. at 131.) Daniels appeals from this order.

## SUMMARY OF ARGUMENT

Petitioner maintains (1) that the plea bargain must be vacated as it can not be legally fulfilled, and that (2) his conviction via jury trial must be vacated as he was denied his right to appeal this conviction because there is no transcript. The plea bargain cannot be fulfilled because it treats the two felony convictions as separate convictions for recidivist purposes when the law is clear they are to be treated as the same conviction.

For a felony to be considered a separate conviction for recidivist purposes it must occur after the conviction and sentence for a prior felony. A person with no prior felonies who commits three felonies before being convicted of any of the three is not eligible for enhancement under the habitual criminal statute as these are considered one felony for that purpose. It is very clear that in the case where two felonies are charged in the same indictment those felonies are counted the same for recidivist purposes because obviously one cannot have been committed after the conviction and sentence for another.

In this case, the offenses were from the same indictment, but were severed and resolved (one by trial, one by plea) separately. They were, however, sentenced on the same day. The habeas court found this severance to be significant and a valid basis for treating these two convictions separately. This ruling has no basis in law; the habeas court cites no authority to support this conclusion. This ruling is contrary to the well-settled state of the law as it pertains to recidivist convictions.

As these two robbery convictions are to be by law considered the same conviction for recidivist purposes, a plea bargain that includes the provision that there will be two

recidivist life sentences imposed cannot legally be fulfilled. The plea offer in this case contains the standard provision that if any part of the agreement is later held void by any court, the parties return to where they were before the plea. In this case, that would be after the jury conviction on count one.

However, the jury conviction for count one should also be vacated. No transcript of this trial exists, which makes it impossible for petitioner to appeal his conviction. It is well-settled that the remedy for the state's failure to produce a transcript (assuming no extraordinary dereliction, which petitioner does not allege) is either a new trial or appealing on the basis of a reconstructed record. Given the inability to construct the entire transcript years after the fact, defendant requested a new trial.

The habeas court did not appear to disagree with this analysis. However, it declined to formally void this conviction and sentence, apparently because the habeas court refused to void the plea bargain, and as such petitioner would be serving a life sentence anyway. This is not a legally sound basis for refusing to vacate a conviction.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

As this case involves assignments of error in the application of settled law, Petitioner requests oral argument under Rule 19 and believes a memorandum decision appropriate.

## ARGUMENT

- I.) **The Habeas Court erred (1) in ruling that severing counts of an indictment allow those counts to be considered separate convictions under the habitual criminal statute, W. Va. Code Ann. § 61-11-18, and (2) in failing to vacate petitioner's plea bargain as it cannot be legally fulfilled.**

This assignment of error presents a question of statutory interpretation and is thus a question of law subject to a de novo review. See Syl. Pt. 3, State v. Vance 207 W.Va. 640, 535 S.E.2d 484 (2000).

The law regarding when an offense must be committed for it to be considered a separate offense for the purposes of the habitual criminal statute is well-settled. For an offense to be considered a separate, distinct offense for the purposes of the recidivist statute, that offense must be committed after conviction and sentence for any prior offense being used for enhancement purposes. See Moore v. Coiner, 303 F. Supp. 185, 188-9 (N.D.W. Va. 1969); see also State v. McMannis, 161 W. Va. 437, 442, 242 S.E.2d 571, 575 (1978) (“This requires a showing that the second conviction for a penitentiary offense was for an offense committed after the first conviction and sentence on a penitentiary offense, and that the [third] penitentiary offense was committed after the second conviction and sentence on a penitentiary offense”).

This rule finds its basis in the public policy of deterrence, which “requires the alleged convictions (except the first) be for offenses committed after each preceding conviction and sentence.” State v. Crabtree, 198 W. Va. 620, 635, 482 S.E.2d 605, 620 (1996). Crabtree also points out the seemingly obvious: when two crimes are charged in the same indictment it is impossible for one to have been committed after the conviction and sentence for the other. Id.

Thus, only one felony of a set of felonies can be enhanced. See Syl. Pt., Turner v. Holland, 175 W. Va. 202, 332 S.E.2d 164 (1985). (“In the absence of some express language in our recidivist statute, W. Va. Code § 61-11-18, authorizing criminal convictions returned against the defendant at the same time to be separately enhanced by a prior felony, it may not be done and only one enhancement is permissible.”). In Turner, 175 W. Va. 202, the felony convictions were returned on the same day. Id. That is also the situation here.

As odd as it may seem, given the jury trial for count one and the plea of guilty for count three were some three years apart, the convictions were finalized on the same day. (App. at 17.) Under the rules of criminal procedure, a “judgment of conviction must set forth... the sentence.” W. Va. R. Crim. P. 32(d). When directly appealing a conviction, the order appealed from is not the verdict, but the sentencing order. A conviction is not final until sentence is handed down, and petitioner was sentenced on both counts on June 14, 1999. (Id.) Thus, the two convictions for armed robbery were finalized on the same day.

Even if both convictions did not occur on the same day, one could not be used to enhance the other. Turner cites McMannis in support of its holding; McMannis states that as long as an offense is committed before the conviction for an earlier offense, they are the same offense for recidivist purposes. Turner, 175 W.Va at 203, 332 S.E.2d at 166 (citing McMannis, 161 W. Va. 437, 242 S.E.2d 571). This is consistent with the policy of deterrence: “to deter those who have been convicted of felonies from committing subsequent offenses.” Turner, 175 W. Va. at 203; 333 S.E.2d at 165. For a sentence to have deterrent effect upon future conduct, the sentence must have been handed down

first. In the present case, both robbery counts were brought under the same indictment, so it is indisputable that Daniels was not convicted of one offense before commission of the other.

Despite this, the habeas court ruled that since these counts were severed and tried on separate dates, rather than tried together, they are separate felonies for the purpose of the habitual criminal statute and were both properly enhanced to sentences of life in prison. (App. at 131.) No case was cited in support of this legal finding, and since the final order for both convictions were entered on the same day, Turner clearly applies and only one conviction can be enhanced.

As only one of the convictions can be legally enhanced to a life sentence, the plea bargain cannot be legally fulfilled. In this case, both robbery convictions were brought under the same indictment, making two separate recidivist sentences plainly illegal, and therefore the terms of the plea bargain cannot be fulfilled. “If the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand.” Syl. Pt. 1, State ex rel. Morris v. Mohn, 165 W. Va. 145, 267 S.E.2d 443 (1980). Also, “[a] plea agreement that provides for an illegal sentence is invalid and must be vacated.” State ex rel. Gessler v. Mazzone, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002) (per curiam) (citing State ex rel. Morris v. Mohn, 165 W. Va. 145, 267 W.Va. 443). That Daniels agreed to this arrangement has no effect as “the legislature has the primary right to define crimes and their punishments... courts cannot set punishments that are inconsistent with the statutory penalties.” State v. Wilson, 226 W. Va. 529, 534-5, 703 S.E.2d 301, 306-7 (2010).

Because it resulted in an illegal sentence, the plea bargain cannot be fulfilled as a matter of law and must be vacated. Paragraph five of the plea letter setting out the terms of the plea agreement dictates that “If this plea agreement shall be vacated or set aside by any state or federal court, the parties shall be returned to their original positions as though this plea agreement has not been entered into.” (App. at 90); See State ex rel. Gessler, 212 W.Va at 374, 572 S.E.2d at 897 (per curiam) (“a plea agreement that cannot be fulfilled based upon legal impossibility must be vacated in its entirety, and the parties must be placed, as nearly as possible, in the positions they occupied prior to the entry of the plea agreement”).

The habeas court did not directly address this issue as it found that the two recidivist life sentences were proper. Because levying two life sentences here is not legal, the plea bargain must be vacated and Petitioner’s conviction on count three and sentences for both counts one and three must be vacated and the case remanded.

**II.) The habeas court erred in failing to void petitioner’s robbery conviction and sentence for lack of an appeal even though the habeas court made findings of fact and conclusions of law that require reversal, apparently ruling that reversal was unnecessary as petitioner would still be serving a life sentence on the other robbery count.**

As the non-existence of the trial transcript is not disputed, this assignment of error presents the legal question of what the proper remedy is for the lack of a transcript. Therefore it is subject to a de novo standard of review. See Syl. Pt. 3, State v. Vance 207 W.Va. 640, 535 S.E.2d 484 (2000).

In West Virginia, the constitutional right to petition for appeal is virtually absolute. It “cannot be destroyed by counsel’s inaction or by a criminal defendant’s delay in bringing such to the attention of the court, but such delay on the part of defendant may

affect the relief granted.” Syl. Pt. 8, Rhodes v. Leverette, 160 W. Va. 781, 239 S.E.2d 136 (1977); Syl. Pt. 1, Billotti v. Dodrill, 183 W. Va. 48, 394 S.E.2d 32 (1990). A defendant will be unconditionally released only when “the state has been extraordinarily derelict.” Syl. Pt., Johnson v. McKenzie, 160 W. Va. 385, 235 S.E.2d 138 (1977).

The right to a transcript is part of this constitutional right to appeal. Billotti at Syl. Pt. 3; Rhodes at Syl. Pt. 1. Despite the evident failure of the court reporter to follow proper procedure leading to the loss of the raw transcript data, trial counsel’s failure to timely request these transcripts forces petitioner to concede that the state has not been “extraordinarily derelict.” However, this merely rules out Daniels’ unconditional release. He still has the “option of appealing on the basis of a reconstructed record or of receiving a new trial.” Syl. Pt. 2, State ex rel. Kisner v. Fox, 165 W. Va. 123, 267 S.E.2d 451 (1980). In this case, Daniels opts for the new trial as recreating the record is impossible given the amount of time that has passed..

The habeas court’s ruling on this ground appears to agree with petitioner’s factual and legal conclusions and cites case law favorable to same. However, the habeas court failed to void the conviction for count one and remand for a new trial, instead saying “Even if the Court were to grant Petitioner’s demand for a new trial as to Count One of Felony Indictment 96-F-34, the sentence for Count Three of the same indictment must stand.” (App. at 133-4.)

To support this, the habeas court cites Varney v. Superintendent, West Virginia Penitentiary, 164 W. Va. 420, 264 S.E.2d 472 (1980). Syllabus Point two of this case states: “One who has been convicted of two crimes, one of which convictions has been declared void, will be relieved of punishment for such void conviction, but he must serve

the term provided by statute for the valid conviction.” Id. The habeas court seems to use this case as a basis for not voiding the conviction for count one of the indictment, even though the syllabus point specifically says that although there may be another sentence to serve, this does not mean the conviction at issue is not void. Id.; See also Syl. Pt. 3, State ex rel. Mundy v. Boles, 148 W. Va. 752, 137 S.E.2d 240 (1964)(“Where a person is serving concurrent sentences... for separate crimes... and the sentence rendered for one of the crimes is void, which warrants release from confinement... upon proper application for a writ of habeas corpus... the granting of the writ in such case does not authorize the release of such person... because he must still serve the sentence for the other crime...”).

The habeas court apparently is applying what is known as the “concurrent sentence rule.” This rule states:

[ W]here a defendant receives concurrent sentences on plural counts of an indictment, and where the conviction on one count is found to be good, a reviewing court need not pass on the validity of the defendant’s conviction on another count... [as long as] there is no substantial probability that the unreviewed conviction will adversely affect the defendant’s right to parole or expose him to a substantial risk of adverse collateral consequences.

State ex. re. State ex rel. Blake v. Chafin, 183 W. Va. 269, 271-2, 395 S.E.2d 513, 515-6 (1990)(quoting United States v. Truong Dinh Hung, 629 F.2d 908, 931 (4th Cir. 1980)).

This “concurrent sentence rule” has been soundly rejected by this Court:

Although there may be occasions where the validity of one sentence has been upheld in review and the review of a separate conviction will not alter the circumstances of defendant’s confinement, a defendant is still entitled to a ruling on the merits when post-conviction habeas corpus relief is sought. **A court cannot summarily dismiss a petition relying upon the concurrent sentence rule, since we refuse to adopt that rule.**

Id. at Syl. Pt. 1 (emphasis added).

While the habeas court did not specifically cite the “concurrent sentence rule,” it clearly adopted the logic behind it: that, assuming the conviction and sentence for count three to be valid, voiding the conviction for count one would not change Petitioner’s incarceration status. Petitioner disagrees with both the premise (that the conviction for count three is valid) and the conclusion, that if it were it would allow the court to avoid voiding a clearly illegal conviction and sentence for count one<sup>1</sup>. The inability to appeal due to the lack of a transcript requires that Petitioner’s conviction for aggravated robbery under count one of the indictment be vacated and the case remanded for a new trial.

### CONCLUSION

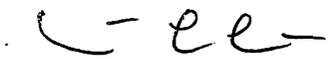
For the reasons stated in assignment of error one, Petitioner is entitled to have his plea bargain vacated, and with it the conviction for aggravated robbery under count three and the recidivist life sentences for both counts one and three. As to assignment of error two, Petitioner is entitled to have his conviction for aggravated robbery under count three vacated. In sum, all of Petitioner’s convictions and sentences must be vacated and the case remanded to the trial court for new trials on all counts.

Respectfully submitted,

Myron D. Daniels  
By Counsel

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<sup>1</sup> Petitioner also contends that having one life sentence instead of two would positively affect his chances of being granted parole.



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CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on this 30th day of March, 2012, a copy of the foregoing Response Brief on Behalf of the Petitioner was sent via U.S. Mail to counsel for respondent, Michelle Bishop, Assistant Attorney General, 812 Quarrier Street, 6<sup>th</sup> Floor Charleston, WV, 25301.



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