

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS

CRIMINAL ACTION NO 14-F-48

JUDGE LORENSEN

Christopher Wyche

AMENDED SENTENCING ORDER

BERKELEY COUNTY
CLERK OF COURT
2015 AUG 19 PM 4:21
VIRGINIA H. SHERWOOD

This matter came on for hearing this 3rd day of August 2015, upon the papers and pleadings had herein, upon the appearance of the defendant, in person and by his counsel, Kim Crockett, and upon the appearance of the State of West Virginia by Pamela Jean Games-Neely, Prosecuting Attorney for Berkeley County, West Virginia.

Whereupon, the Court asked the parties if there was any legal reason why the parties could not proceed to sentencing. The parties inquired about the Court's ruling on the motion to dismiss count three of the habitual offender information which was taken under advisement after the finding that this defendant was the same person who had been previously convicted twice. The Court announced that it had issued the order which may have not reached the parties as of this date. In essence, the Court found the argument of the defense more convincing and does dismiss count three. As a result the defendant is not eligible for the life enhancement, but is eligible for a lower enhancement. The State does note its exception and objection.

Whereupon, the parties advised that there was no legal reason why the Court could not now proceed to sentencing. The Court inquired if the parties had received the pre sentence report. Both parties acknowledged that they had received the report and had no objections.

The Court then heard the statement of the defendant, the victims'

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statements from the sister, mother, brother, and surviving victim.

The Court also heard the arguments of counsel. The Court having been fully informed does place its sentencing findings upon the record which are incorporated herein.

Accordingly, it is ORDERED that the defendant, Christopher Wyche, having been found guilty by a jury of the offense of voluntary manslaughter, a felony, shall be sentenced to the penitentiary house of this state for a period of not less than fifteen years, there to be dealt with according to law.

It is ORDERED that the defendant, Christopher Wyche, having been found guilty by a jury of the offense of wanton endangerment, a felony, shall be sentenced to the penitentiary house of this state for a period of five years with an additional five years as a sentencing enhancement, for a total of ten years, there to be dealt with according to law.

It is ORDERED that the defendant, Christopher Wyche, having been found guilty by a jury of the offense of felon in possession of a firearm, shall be sentenced to the penitentiary house of this state for a period of five years there to be dealt with according to law.

It is ORDERED that these sentences shall run consecutively.

CONVICTION DATE: January 22, 2015

SENTENCING DATE: August 3, 2015

EFFECTIVE SENTENCING DATE: July 29, 2014

It is ORDERED that the defendant shall pay court costs within one year of his release.

It is ORDERED that the defendant shall pay to the sister of the victim, Amber Bobbett, of 2690 McCullough Blvd., Apt 532, Bleden, MS 38826 ,for costs of the family attending trial in the amount of \$450.11 payable through the Clerk of this Court. This restitution may be taken from inmate accounts according to law with the total sum being completely paid within one year of

his release. The objection of the defendant to the payment of this restitution is noted.

It is ORDERED Dorothy Edmund and Amber Bobbett, 80 McGee Road, Columbus, MS 39701, the mother and sister of the victim for ambulance costs in the amount of \$760.71 payable through the Clerk of this Court. This restitution may be taken from inmate accounts according to law with the total sum being completely paid within one year of his release.

The defendant was notified of his right to appeal his conviction. The Court does APPOINT Kim Crockett as counsel for appellate purposes.

The Court notes the exception and objection to the defendant of all adverse rulings.

The defendant is remanded to the Regional Jail Authority until an agent or representative of the West Virginia Division of Corrections does appear to transport the defendant to a Department of Corrections Facility.

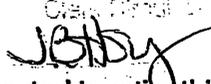
Defense counsel advised the Court that the defendant has requested to have his religion listed as Rastafarian in the jail and correctional system. The State advised the Court that she has no position in this matter and that there is a regulation available with both of those agencies which should address this matter. The Court has no opinion as to the classification but will visit the matter further if necessary upon defense pleadings, but does note that the State has no objection.

The Clerk shall enter this order as of this date and shall forward copies to all counsel of record, probation office, Regional Jail Authority, West Virginia Department of Corrections, West Virginia Probation and Parole



JUDGE OF THE CIRCUIT COURT OF BERKELEY
COUNTY, WEST VIRGINIA

PREPARED BY:
Pamela Jean Games-Neely
Prosecuting Attorney for Berkeley County
Bar no. 1332

EST
Virginia M. Pitt
Clerk, Circuit Court


The Clerk is directed to retire this action from the active docket and place it among causes ended.

380 West South Street, Suite 1100
Martinsburg, West Virginia 25401
304-264-1971

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

CHRISTOPHER WYCHE,

Defendant.

CASE NO, 14-F-48
Judge Lorensen, Div. VI

2015 JUL 31 PM 3:51
BERKELEY COUNTY
CLERK
VIRGINIA H. SMITH, CLERK

ORDER GRANTING MOTION TO DISMISS PARAGRAPH 3 OF RECIDIVIST INFORMATION

Defendant Christopher Wyche moves to dismiss Paragraph 3¹ of the Recidivist Information because the prior conviction is not classified as a felony in West Virginia. At the recidivist trial, the jury found that Mr. Wyche previously was convicted of accessory after the fact to robbery in North Carolina. In fact, Mr. Wyche pled guilty to being an accessory after the fact to a robbery in North Carolina. Although North Carolina classifies accessory after the fact to robbery as a felony, West Virginia classifies accessory after the fact to robbery as a misdemeanor. At issue is whether this prior conviction may be used as a prior felony conviction under West Virginia's Habitual Criminal Statute.

¹ Paragraph 3 of the Recidivist Information states:

That CHRISTOPHER R. WYCHE, on August 24, 2011, was convicted in Onslow County, North Carolina, Superior Court Case No. 10CRS053969 of the felony offense of Accessory after the Fact to Robbery with a Dangerous Weapon: that the commission of the offense occurred on or about June 11, 2010, that said offense was punishable by confinement in a penitentiary or state correctional facility; and that on August 24, 2011, he was sentenced for his conviction.

This paragraph was sometimes referred to "Count II" at trial and in other documents because it was the second of two prior convictions at issue in the recidivist trial. For clarity, this prior conviction will be referred to Paragraph 3 throughout this Order.

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Mr. Wyche, citing *Justice v. Hedrick*, argues that his prior conviction for accessory after the fact to robbery in North Carolina may not be used as a prior felony in a recidivist proceeding because:

Whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, *W. Va. Code*, 61-11-18, -19 [1943], depends upon the classification of that crime in this State.²

Because accessory after the fact to robbery is a misdemeanor in West Virginia, Mr. Wyche argues that his prior conviction should be classified as a misdemeanor for the application of the Habitual Criminal Statute. Therefore, Mr. Wyche contends, Paragraph 3 should be dismissed.

In response, the State argues that it is insufficient to simply compare the states' classifications of crimes, but must also analyze the criminal statutes, the elements of the crimes, and the underlying facts. The State comes to the conclusion that because Mr. Wyche was purportedly at the scene of the robbery, under West Virginia law, Mr. Wyche would have been convicted, not as an accessory after the fact, but as an aider and abettor of the crime.

First, is an analysis of the underlying facts of the case should be examined. Next is an analysis of the elements of accomplice liability under West Virginia and North Carolina law. In conclusion, Paragraph 3 is **DISMISSED**.

- I. For the purpose of a recidivist case, it is improper to prognosticate the outcome of how a case would have resulted in West Virginia based on the underlying facts of a case; rather it is proper to compare the elements of the crime defendant was convicted of with the elements of West Virginia crimes.**

Although the State notes that the Habitual Offender Statute does not require that an out of state felony also be a felony under West Virginia law, *Justice v. Hedrick* clearly holds that the

² Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 54, 350 S.E.2d 565, 565-66 (1986)

classification of crimes in West Virginia is what determines a felony for the purposes of the West Virginia Habitual Offender statute.³ Both the State and Mr. Wyche agree that *Justice v. Hedrick* applies here, and that West Virginia's classification determines whether the prior conviction was a felony for the purpose of penalty enhancement. Both the State and Mr. Wyche further agree that accessory after the fact to a robbery in North Carolina is a felony, but in West Virginia is a misdemeanor. Thus, Mr. Wyche argues his North Carolina conviction may not be considered a felony for recidivist enhancement in West Virginia.

The State cites *Hulbert*, a third offense domestic battery case, for the notion that because the underlying elements of the crime are not the same, the Court must look to the facts of the case:

An out-of-state conviction may be used as a predicate offense for penalty enhancement purposes under subsection (c) of West Virginia Code § 61-2-28 (1994) (Repl.Vol.2000) provided that the statute under which the defendant was convicted has the same elements as those required for an offense under West Virginia Code § 61-2-28. When the foreign statute contains different or additional elements, it must be further shown that the factual predicate upon which the prior conviction was obtained would have supported a conviction under West Virginia Code § 61-2-28(a) or (b) in order to invoke the enhanced penalty contained in subsection (c).⁴

The State argues that because West Virginia's accessory after the fact requires an additional element, then the court must look to the police report and pleadings to evaluate the underlying facts of what Mr. Wyche would have been convicted of in West Virginia. According to the State, the following should be used as evidence to find that Mr. Wyche was in fact a principal in the second degree (aider and abettor) to the North Carolina robbery: 1) the finger print card for the arrest, and 2) charging documents against Wyche that charged him with attempted robbery with a dangerous weapon, assault with a deadly weapon, felony conspiracy,

³ *Justice v. Hedrick*, 177 W. Va. 53, 54, 350 S.E.2d 565, 565-66 (1986).

⁴ Syl. Pt. 4, *State v. Hulbert*, 209 W. Va. 217, 544 S.E.2d 919 (2001).

felony larceny, and possession of firearm. The state argues that because of those documents Mr. Wyche must have been at the scene of the crime and not simply an accessory after the fact.

What the State misses is that *Hulbert* required factual findings in order to protect a defendant's due process right. In fact, it would be a violation of Mr. Wyche's due process and right to confront witnesses to retroactively convict Mr. Wyche of aiding and abetting a robbery on the basis of some hearsay evidence that was never admitted into evidence in the North Carolina case. Thus, it is proper in this case to look only at the elements of accomplice liability in West Virginia and North Carolina to determine what crime in West Virginia is committed by the *elements* of accessory after the fact in North Carolina.

Mr. Wyche was charged with a host of crimes in North Carolina, but only pled guilty to one, accessory after the fact to robbery. Mr. Wyche admitted only to assisting the absolute perpetrator of a robbery evade apprehension by the police. He did not admit to assisting the absolute perpetrator in the commission of the robbery. As is shown below, the additional element of being absent from the crime scene does not automatically cause someone to incur further liability, and if in fact it was a necessary element of accessory after the fact in West Virginia, then Mr. Wyche's conviction in North Carolina would fall into a West Virginia loophole where accessories after the fact who witnessed a crime are immune from liability.

II. The lack of presence at the scene of a crime is not an element of accessory after the fact in West Virginia.

The states argument is as follows: Premise 1 - No one present at the scene of a crime can be an accessory after the fact. Premise 2 - Wyche was at the scene of the crime. Conclusion - Wyche cannot be an accessory after the fact and must be an aider and abettor. The State's argument rests on the proposition that a person present at the scene of a crime may not be an

accessory after the fact. The following table displays the elements of accomplice offenses in North Carolina and in West Virginia:

	Accessory After the Fact		Accessory Before the Fact		Aiding and Abetting	
	WV ⁵	NC ⁶	WV ⁷	NC ⁸	WV ⁹	NC ¹⁰
1	Principal (P) committed felony.	P committed felony.	P committed felony	P committed felony	P committed felony	P committed felony
2	Defendant (D) knowing that P committed felony,	D, knowing that P committed felony,	D procured, counseled, commanded, incited, assisted or abetted,	D counseled, procured, commanded, encouraged or aided	D procured, counseled, commanded, incited, assisted or abetted	D counseled, procured, commanded, encouraged or aided
3	Received, relieved, or assisted P to escape arrest or punishment,	assisted P in efforts to avoid arrest, detection, and punishment.	another to commit a felony,	another to commit a felony	another to commit a felony	another to commit a felony
4	<i>and D was not present at time of crime?</i> ¹¹		and D not present at crime	and D Not present at crime	and D present at crime	And present at crime

In support, the State cites *Bradford* “to be an accessory after the fact one must prove he was not present when the crime was committed.”¹² The only evidence that the state offers is that

⁵ W. Va. Code § 61-11-6; *State v. Jones*, 161 W. Va. 55, 58, 239 S.E.2d 763, 766 (1977) overruled on other grounds by *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980).

⁶ N.C. Gen. Stat. § 14-7; *State v. Overman*, 284 N.C. 335, 200 S.E.2d 604 (1973).

⁷ W. Va. Code § 61-11-6; Syl. Pt. 6, *State v. Hicks*, 229 W. Va. 44, 46, 725 S.E.2d 569, 571 (2011).

⁸ N.C. Gen. Stat. § 14-5.2; *State v. Graham*, 303 N.C. 521, 279 S.E.2d 588 (1981).

⁹ W. Va. Code § 61-11-6; Syl. Pt. 6, *State v. Hicks*, 229 W. Va. 44, 46, 725 S.E.2d 569, 571 (2011); *State v. Mullins*, 193 W. Va. 315, 317, 456 S.E.2d 42, 44 (1995).

¹⁰ N.C. Gen. Stat. § 14-5.2; *State v. Graham*, 303 N.C. 521, 279 S.E.2d 588 (1981).

¹¹ *State v. Bradford*, 199 W. Va. 338, 345, 484 S.E.2d 221, 228 (1997).

¹² *State v. Bradford*, 199 W. Va. 338, 347, 484 S.E.2d 221, 230 (1997).

Defendant was present at the crime scene. The state then concludes that because Mr. Wyche was at the crime scene then Mr. Wyche was not only not an accessory after the fact, but because he was there, he was also an aider and abettor.

But if absence from the scene is a necessary element of accessory after the fact, failing to prove it (or even proving the opposite) does not turn accessory after the fact into aiding and abetting; it turns it into no crime at all. Presence at crime scene plus accessory after the fact does not equal aiding and abetting, because there must be a concerted action or common goal of completing the crime. In other words, as one would expect the more serious crime of aiding and abetting is not a lesser included offense of accessory after the fact, a less serious offense.

The point in *Bradford* was that “[a]ccessory after the fact to murder is not a lesser included of Murder,” and that a person can be both a second degree principal to a crime (aider or accessory before the fact), *and* an accessory after the fact.¹³ The Court’s full statement is that “to be an accessory after the fact one must prove he was not present when the crime was committed and also must prove that he assisted the principal perpetrator by one of the above enumerated acts.”¹⁴ Thus, what really distinguishes principals from accessories after the fact is the lack of shared criminal intent at the time of the crime. *Bradford* ignored the longstanding notion that “mere presence at the scene of the crime, even with knowledge of the criminal purpose of the principal in the first degree, is not, alone, sufficient to make the accused guilty as a principal in

¹³ *State v. Bradford*, 199 W. Va. 338, 340, 484 S.E.2d 221, 223 (1997).

¹⁴ *State v. Bradford*, 199 W. Va. 338, 347, 484 S.E.2d 221, 230 (1997).

the second degree.”¹⁵ The West Virginia Supreme Court in a long line of cases has steadfastly held that

[m]erely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator.¹⁶

Whether someone is at a crime scene has no bearing on whether the person is an accessory after the fact, it only makes it more likely that the person aided the perpetrator. Accessory after the fact is not based on where the defendant is at the time of the crime, it is whether the defendant assists the perpetrator in escaping arrest or punishment.

Presence alone is no defense to a charge of accessory after the fact. In other words, innocent witnesses at the time of the crime are not forbidden from becoming accessories after the fact. The difference is between aiding the crime and evading the time. In the case of a robbery it is the difference between the stick-up and the cover-up.

The South Carolina Supreme Court sewed up the presence at a crime scene loophole to accessory after the fact in *State v. Collins*.¹⁷ In *Collins*, two friends, Collins and Houston, went into a convenience store, and unbeknownst to Collins, Houston robbed, shot, and killed the clerk.¹⁸ When Collins saw what happened he ran next door to his uncle’s house to get help.¹⁹ Collins then lied to police about who shot and killed the clerk in order to protect his friend.

¹⁵ *State v. Fortner*, 182 W. Va. 345, 356, 387 S.E.2d 812, 823 (1989)

¹⁶ *Id.* at syl. Pt. 9; Syl. Pt 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972); Syl., *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 (1930); See also *Smith v. United States*, 306 F.2d 286 (D.C. Cir. 1962).

¹⁷ *State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998). For a detailed discussion of the case see Susannah Rawl Cole, *Sewing Up the Loophole in Accessory After the Fact Crimes*, 50 S.C. L. Rev. 901 (1999).

¹⁸ *State v. Collins*, 329 S.C. 23, 25 495 S.E.2d 202, 203 (1998).

¹⁹ *Id.*

Subsequently, Collins came clean and admitted that Houston was the killer.²⁰ At trial, the Court granted a directed verdict for Collins on the charges of attempted robbery, murder and possession of a deadly weapon during a violent crime.²¹ After being convicted of accessory after the fact the South Carolina Supreme Court overruled its precedent requiring absence from the scene to be convicted of accessory after the fact, but also overturned Collins's conviction because the new rule if applied retroactively would violate ex post facto and due process protections.²²

CONCLUSION

West Virginia's classification of crimes applies to Mr. Wyche's prior conviction for accessory after the fact to robbery. Because absence from the crime scene is not an element to accessory after the fact in West Virginia, the elements in the West Virginia and North Carolina statutes are identical. Because the elements are the same, no further analysis is needed and West Virginia's classification applies. West Virginia classifies accessory after the fact to robbery as a misdemeanor. Thus, for the purposes of this recidivist action, Mr. Wyche's North Carolina conviction for accessory after the fact to robbery is classified as a misdemeanor.

Paragraph 3 of the Recidivist Information is **DISMISSED**.

The Clerk shall enter this Order as of the date written below and shall transmit attested copies to all counsel and parties of record.

²⁰ *Id.*

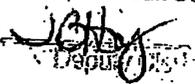
²¹ *Id.* 329 S.C. at 25 495 S.E.2d at 204.

²² *Id.* at 27-28, 495 S.E.2d at 205 (overruling *State v. Hudgins*, 319 S.C. 233, 460 S.E.2d 388 (1995); *State v. Whitted*, 279 S.C. 260, 262 S.E.2d 388 (1983); *State v. Plath*, 279 S.C. 260, 284 S.E.2d 221 (1981)).

ENTER this 31 day of July, 2015.


MICHAEL B. LORENSEN, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

ATTEST
Virginia M. Sina
Clerk Circuit Court


Deputy

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA

VS

CRIMINAL ACTION NO 14-F-48

JUDGE LORENSEN

CHRISTOPHER WYCHE

BERKELEY COUNTY CIRCUIT CLERK
2015 AUG - 4
A 7: 35
VIRGINIA M. SIMPSON
CLERK

AMENDED HABITUAL OFFENDER JURY TRIAL HEARING ORDER

This matter came on for hearing this 12th day of June, 2015, upon the papers and pleadings had herein, upon the appearance of the defendants, in person, and his counsel, Kim Crockett, respectively, and upon the appearance of the State of West Virginia by Pamela Jean Games-Neely, Prosecuting Attorney for Berkeley County, West Virginia.

Whereupon a jury of twelve persons were empaneled and heard the presentation of evidence and the arguments of counsel. At the conclusion of the said presentation, argument and instructions the twelve person jury was returned to their jury room for deliberations.

Whereupon, the Court was advised that the jury had reached a verdict. The parties were assembled before the Court and the jury was returned to the courtroom from their deliberation room. The Court inquired of the foreperson if a verdict had been reached to which the foreperson responded in the affirmative. The Court directed that the verdict form be handed to the Clerk and read as signed by the foreperson.

The Verdict read: We, the members of the jury, find the defendant, Christopher Wyche:

Count one

We, the jury, **do find** the Defendant, Christopher R. Wyche, is the same person

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who, on February 3, 2010, was convicted of Possession with Intent to Sell and Deliver Cocaine, a crime punishable by confinement in the penitentiary, and was sentenced on February 3, 2010, in Onslow County, North Carolina Superior Court Case No. 09CRS057913.

Count two

WMC
8-3-15
We, the jury, **do find** the Defendant, Christopher R. Wyche, is the same person who on August 24, 2011, was convicted of Accessory after the Fact to Robbery with a Dangerous Weapon, a crime punishable by confinement in the penitentiary, that occurred on July 11, 2010, in Onslow County, County, North Carolina, Superior Court cas no. 10CRS053969 and the Defendant was sentenced on August 24, 2011 which was prior to the commission of the offense in Berkeley County Circuit Court Case no. 14-F-48.

The Court asked the parties if they desired to inspect the jury form and both reviewed and accepted the verdict form as proper. The Court then inquired if the parties desired to have the jury polled. The defendant elected to have the jury polled.

The Clerk read the poll of the jury and each acknowledged in the affirmative that the verdict was his/her verdict.

The Court ORDERED the verdict form filed and dismissed the jury.

The Court ORDERED that motions shall be filed within ten days of this date with the hearing to occur on the said motions on the 23rd day of March, 2015 at 3:00 p.m.

The Court ORDERED that the State submit its brief regarding the North Carolina conviction within fourteen days of this date and defense respond within two weeks.

The Court ORDERED that sentencing shall be scheduled for the 3rd day of August, 2015 at 3:30 p.m.

The defendant was remanded to the Eastern Regional Jail.

The Clerk shall enter this order as of this date and shall forward copies to all counsel of record, to the probation office, to the Eastern Regional Jail.

JUDGE OF THE CIRCUIT COURT OF

WEST

Virginia M. Sims
Clerk Circuit Court

[Handwritten signature]

BERKELEY COUNTY, WEST VIRGINIA

PREPARED BY:

Pamela Jean Games-Neely

Prosecuting Attorney for Berkeley County

Bar no. 1332

380 West South Street, Suite 1100

Martinsburg, West Virginia 25401

304-264-1971