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Statutory Construction

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STATUTORY CONSTRUCTION

I. LEGISLATIVE INTENT

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (W. Va. 1983).

Ohio County Commission v. Manchin, 301 S.E.2d 183 (W. Va. 1983).

During the survey period, the West Virginia Supreme Court of Appeals was called upon to determine the legislative intent behind two statutes. In interpreting these two statutes, the court indicated that it would look beyond the mere words on the page to reach a decision that was consistent not only with the intent behind that statute but, more importantly, consistent with the general policy existent in the body of law encompassing that statute.

In *State ex rel. Simpkins v. Harvey*¹ the court addressed issues related to the sentencing of a person convicted of negligent homicide while driving under the influence of alcohol. The court's discussion focused upon the statute imposing penalties against such a driver.

The relator in *Harvey* had been charged with negligently causing the death of another while driving under the influence of alcohol.² A plea bargaining agreement was reached with the state. However, before entering his plea, the defendant (the relator on appeal) requested that a presentence investigation report be prepared to assist in determining whether the defendant should be placed on probation or confined in a youthful male offender center. The trial court denied the request on the ground that the report would be useless since the language of the statute required mandatory sentencing,³ whereupon, the defendant petitioned the state supreme court to order the trial court judge to grant his request.

The court examined the "interrelationship" between the probation statutes,⁴ the Youthful Male Offender Act,⁵ and the statute prescribing the penalties for driving under the influence of alcohol.⁶

The respondent, the Honorable Robert Harvey, Judge of the Circuit Court of Kanawha County, argued that the applicable Code section was a specific enactment imposing mandatory sentencing upon offenders should

¹ 305 S.E.2d 268 (W. Va. 1983).

² W. VA. CODE § 17C-5-2 (1974 & Supp. 1983) (persons driving under influence of intoxicating liquor or drugs).

³ W. VA. CODE § 17C-5-2 provided, in pertinent part:

(1) The sentences provided herein upon conviction of a violation of this article are mandatory and shall not be subject to suspension or probation, except that the court may provide for community service, or work release alternatives, or weekends or part-time confinements.

(This is the language of the section as it read when this case was being decided; it was later amended.)

⁴ W. VA. CODE §§ 62-12-1 to -22 (1977).

⁵ W. VA. CODE §§ 25-4-1 to -7 (1980).

⁶ W. VA. CODE § 17C-5-2 (1974 & Supp. 1983).

control over the general provisions of the probation statutes granting courts probationary power and should also control over the Youthful Male Offender Act.⁷ The court, however, did not find the acts inconsistent.⁸ In fact, in looking at the language of the statute,⁹ the court noted an exception¹⁰ which limited the mandatory language: "[E]xcept that the court may provide for community service, or work release alternatives, or weekends or part-time confinements."¹¹ The court relied on an old West Virginia case in declaring that such an exception or proviso to a penal statute triggered the rule of strict construction.¹² Consequently, the court said the statute must be construed in favor of the defendant.¹³ Hence, the court held that when one of the four alternative sentences was imposed, the restriction against probation or suspension did not apply.¹⁴

Supporting the court's interpretation that the statute's language did not completely bar probation or suspension was its finding that the prevailing purpose of the statute was that of rehabilitation.¹⁵ The court had stated that if the language of a statute is ambiguous, "the court, in ascertaining the legislative intent, should consider the subject matter of the legislation, its purposes, objects and effects in addition to its express terms."¹⁶ The court, however, never made a finding or rendered a statement that the language of the statute was ambiguous. Nevertheless, the court embarked on a discussion of how probation furthered the cause of rehabilitation and was thus "consistent with the rehabilitative thrust of W. Va. Code § 17C-5-2."¹⁷

Having established the availability of probation and suspension, the court then considered whether confinement to a youthful male offender center was an alternative under the provisions of the West Virginia Code.¹⁸ After noting that the four alternatives mentioned in the statute were less restrictive than confinement in the penitentiary, the court stated that "[i]n light of [the] authorized sentencing alternatives, it would require a strained and incongruous

⁷ 305 S.E.2d at 273.

⁸ *Id.*

⁹ See *supra* note 3.

¹⁰ Although worded as an "exception," the court noted that the clause was in the nature of a "proviso." "In traditional terms, an 'exception' is said to restrict the enacting clause of the statute to a particular case, while a 'proviso' is said to remove special cases from the general enactment and provide for them specially." 305 S.E.2d at 273 n.7 (citing 1A SUTHERLAND STATUTORY CONSTRUCTION § 20.22 (1972)).

¹¹ 305 S.E.2d at 273 (quoting part of section 17C-5-2).

¹² *Id.* at 273-74 (citing *State v. Cunningham*, 90 W. Va. 806, 111 S.E. 835 (1922)).

¹³ *Id.* at 274.

¹⁴ *Id.*

¹⁵ *Id.* (citing W. VA. CODE § 62-13-1 (Supp. 1983), which requires that rehabilitation be the primary goal of the West Virginia Penal System).

¹⁶ *Id.* at 273.

¹⁷ *Id.* at 274.

¹⁸ *Id.* at 276.

interpretation of W. Va. Code § 17C-5-2 to conclude that the statute precluded the more restrictive alternative of confinement in a youthful male offender treatment center."¹⁹ Hence, the court applied the rule that it would, whenever possible, construe a statute so as to avoid absurd, inconsistent, unjust, or unreasonable results.²⁰

The major fault with the court's reasoning is that it fails to consider whether the Legislature could have rationally chosen to disregard confinement in a youthful male offender center as an option under section 17C-5-2. If giving effect to the Legislature's intent is as important as the court says it is,²¹ perhaps the intent as expressed on the face of the statute should not be so hurriedly cast aside.²²

The key question concerning the intent of the Legislature took another twist during the 1983 session of the Legislature. Section 17C-5-2 was amended, with the four specified sentencing alternatives being replaced with language allowing the trial court to impose conditions under West Virginia's work release statute.²³ This change would not affect the court's analysis in favor of probation and suspension being available, as the alternative is still expressed in the form of a proviso. However, this second failure by the Legislature to provide for the utilization of youthful male offender centers brings into question the accuracy of the court in second guessing the Legislature on that point. Nonetheless, given the nature of the court's analysis, it is probable that confinement in a youthful male offender center will continue to be an alternative under the amended Code section.

The court was called upon in *Ohio County Commission v. Manchin*²⁴ to construe the language of a section of West Virginia's election code, which provides for a check on an electronic voting machine's accuracy by comparing its totals with a manual count.²⁵ The dispute was whether the statute man-

¹⁹ *Id.* at 277.

²⁰ See, e.g., *Parsons v. Roane County Court*, 92 W. Va. 490, 115 S.E. 473 (1922); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Richardson v. State Compensation Comm'r*, 137 W. Va. 819, 74 S.E.2d 258 (1953); and *State ex rel. McLaughlin v. Morris*, 128 W. Va. 456, 37 S.E.2d 85 (1946).

²¹ *Id.* at 273.

²² A West Virginia jurist from an earlier time had some thoughts on what the court might be perceived to have done here:

It is not within the province of a court, in the course of the construction of a statute, to make or supervise legislation; and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms.

State ex rel. McLaughlin v. Morris, 128 W. Va. 456, 463, 37 S.E.2d 85, 88 (1946) (Haymond, J., dissenting).

²³ W. VA. CODE § 62-11A-1 to -2 (Supp. 1983) (release for work and other purposes).

²⁴ 301 S.E.2d 183 (W. Va. 1983).

²⁵ W. VA. CODE § 3-4a-28(4) (Supp. 1983) provides in part:

During the canvass and any requested recount, at least five percent of the precincts

dated that *votes* on the electronic voting ballots be counted, or just the *ballots* themselves. The Circuit Court of Kanawha County ruled that only the ballots should be counted; the supreme court of appeals reversed.

Justice Miller, writing for the court, found a two-step analysis to be proper in resolving the issues at hand. First, the court should determine if there was any ambiguity in the language of the statute.²⁶ If the statute was not ambiguous, it would be applied as expressed.²⁷ Second, if there was ambiguity, the court should endeavor to interpret the statute by ascertaining the legislative intent.²⁸ This intent could be found by reading the statute as a whole, the court noted.²⁹

The court found an element of ambiguity in the section's meaning.³⁰ It opined that other parts of the section indicated that the Legislature might have taken for granted the meaning it attached to the section.³¹ After raising a few interpretations to point out the ambiguity, the court took up the matter of legislative intent.³² On this point, the court resorted to reading the statute as a whole. Of particular import to the court was its perceived purpose of the statute—to check the accuracy of the machine. It resolved that this end could be better accomplished by comparing the votes of the machine count to a manual count. Hence, reading from the four corners of the statute, the court professed to give effect to its notion of the correct legislative intention.³³

It is curious that the court did not make special mention of the rule of construction by which a court seeks to avoid interpreting a statute so as to produce an absurd or ridiculous result. If the intent of the Legislature was solely to insure accuracy in machine voting, an interpretation finding that the statute required only a counting of the ballots would frustrate that intent and render the statute meaningless.

shall be chosen at random and the ballot cards cast therein counted manually. The same random selection shall also be counted by the automatic tabulating equipment. If the variance between the random manual count and the automatic tabulating equipment count of the same random ballots is equal to or greater than one percent, then a manual recount of all ballot cards shall be required. In the course of any recount, if a candidate for an office shall so demand, or if the board of canvassers shall so elect to recount the votes cast for an office, the votes cast for that office in any precinct shall be recounted by manual count.

²⁶ 301 S.E.2d at 184.

²⁷ *Id.* at 184 (citing *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968)).

²⁸ *Id.* at 185.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 187.

II. TITLES OF LEGISLATIVE BILLS

C.C. "Spike" Copley Garage, Inc. v. PSC, 300 S.E.2d 485 (W. Va. 1983).

During its 1974 session the West Virginia Legislature radically changed the operation of the state's Public Service Commission by enacting an omnibus statute³⁴ which effectively deregulated the business of towing, hauling or carrying wrecked or disabled vehicles in West Virginia.³⁵ In *C.C. "Spike" Copley Garage, Inc. v. PSC*³⁶ declaratory action was brought in the Circuit Court of Kanawha County seeking to have the deregulation provision declared unconstitutional because no mention of that provision was made in the title of the bill. The circuit court granted the relief sought, finding the title of the bill to be constitutionally defective.³⁷

The West Virginia Supreme Court of Appeals, through Justice Neely, affirmed the holding of the lower court. The court took cognizance of the constitutional intent to inform the legislature and the general public of the contents of a legislative proposal.³⁸ It stated a general rule as such: "If the title of an act states its general theme or purpose and the substance is germane to the object expressed in the title, the title will be held sufficient."³⁹ Nevertheless, the court rejected the appellant's argument that the title of the bill gave notice that its subject matter was "'all relating to the organization, composition, authority and operations of the Public Service Commission . . .'"⁴⁰ The court drew a distinction between the title of a bill which appraised all concerned of its "general theme or purpose" and a title which purported to exhaustively list all elements of the bill.⁴¹ The bill in question had a lengthy

³⁴ W. VA. CODE § 24A-2-2a (1980).

³⁵ *Id.*

³⁶ 300 S.E.2d 485 (W. Va. 1983).

³⁷ W. VA. CONST. art. VI, § 30 provides in pertinent part:

No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act.

³⁸ "The purpose of Article VI, Section 30 of the Constitution of West Virginia is to prevent the concealment of the true purpose of an act from the public and the Legislature and to advise the legislators and the public of the contents of the proposed act of the legislature." 300 S.E.2d at 488 (quoting State *ex rel. Davis v. Oakley*, 156 W. Va. 154, 157, 191 S.E.2d 610, 612 (1972)).

³⁹ 300 S.E.2d at 486.

⁴⁰ *Id.* (footnote omitted).

⁴¹ The title to [this bill] is not infirm because it is vague and unspecific, but rather because it is positively misleading. A person reading a title to a bill drawn with the specificity of the title to [this bill] who finds no mention of wrecker services in the title would reasonably conclude that the act did not touch that subject because all the other concerns are set forth with specificity.

Id. at 487.

title⁴² which failed to mention the trucking deregulation. Hence, the court found the title "positively misleading" and effectively deleted the deregulation provision from the bill.⁴³

From the court's analysis it is apparent that a title to a bill must be either of a competent general nature or an exacting recountal of the bill's contents. A title which attempts to give a rundown on the components of a bill and falls short of that will not pass constitutional review.

III. DIPLOMA PRIVILEGE

State ex rel. Quelch v. Daugherty, 306 S.E.2d 233 (W. Va. 1983).

Prompted by the West Virginia Legislature's decision to abrogate the diploma privilege for graduates of the West Virginia University College of Law,⁴⁴ four students of that institution sought a writ of mandamus from the state supreme court to prohibit the Board of Law Examiners from requiring them to successfully pass the bar examination upon graduation.⁴⁵ In granting the writ, the court declared the statute manifesting the Legislature's intent to be void as a breach of the constitutional provision for separation of powers.⁴⁶

The majority's position, as explained by Justice Harshbarger, was based purely upon constitutional grounds. First, the majority announced that it felt constrained by the separation of powers provision set forth in the state constitution.⁴⁷ Second, it noted that the 1974 Judicial Reorganization Amendment to the state constitution had vested judicial power *solely* in the court.⁴⁸ The majority cited earlier authority to the effect that this grant of power included the power to admit and disbar attorneys.⁴⁹ After the Legislature had acted, there was a clear conflict in the law between the amended statute abolishing the diploma privilege and the court rule⁵⁰ retaining it. The

⁴² The length of the title is such that it is not feasible to set it forth here. However, some indication of its tedious nature can be gathered from the fact that approximately 726 words are contained therein. See 1979 W. Va. Acts 98; see also 300 S.E.2d at 486 n.1.

⁴³ 300 S.E.2d at 487.

⁴⁴ W. VA. CODE § 30-2-1 (Supp. 1983).

⁴⁵ *State ex rel. Quelch v. Daugherty*, 306 S.E.2d 233 (W. Va. 1983).

⁴⁶ W. VA. CONST. art. V, § 1 provides:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

⁴⁷ See *Id.*

⁴⁸ W. VA. CONST. art. VIII, § 1 provides, in pertinent part: "The judicial power of the State shall be vested solely in a supreme court of appeals . . ."

⁴⁹ *Carey v. Dostert*, 294 S.E.2d 137 (W. Va. 1982).

⁵⁰ W. VA. CODE, *Code of Rules for Admission to the Practice of Law* Rule 1.020, reprinted in vol. 1A of the W. VA. CODE (1982).

majority concluded that an act of the Legislature intruding upon the constitutionally exclusive domain of the court to admit attorneys was repugnant to the principles in the separation of powers clause.

In his concurring opinion, Justice Neely took a different approach. He questioned the effect of the statute at issue to require graduates of the West Virginia University College of Law to take the bar examination.⁵¹ Rather, Neely took the position that the Legislature, by removing the diploma privilege from the Code, was merely leaving the question to the discretion of the court.⁵² Justice Neely did not dispute the power of the legislature to require the bar examination;⁵³ he just didn't think it had done so with the questioned statute. Reaching the merits of the diploma privilege itself, he was pleased to leave it in place.⁵⁴

Justice Miller, dissenting, agreed with Justice Neely's assertion that the Legislature had the power to require the bar exam.⁵⁵ Furthermore, he found that requiring the exam was the intention of the Legislature.⁵⁶ He argued that the majority had "ignored the familiar postulate that a legislative act relating to the practice of law is not necessarily invalid."⁵⁷ Along this line, he brought up the point that the Legislature itself had first enacted the diploma privilege⁵⁸ and that the court had not formulated a parallel rule until 1973.⁵⁹ Justice Miller does not divulge, however, his perception of the 1974 Judicial Reorganization Amendment's impact on the separation of powers provision found in the constitution. Instead, the justice focused his attention on the merits of the diploma privilege, an analysis that goes more to the question of keeping or discarding the privilege rather than to whether the Legislature had the power to abolish it.

Bryan R. Cokeley

⁵¹ 306 S.E.2d at 236 (Neely, J., concurring).

⁵² *Id.* at 237. While a literal reading of the statute itself might support this conclusion, an analysis of the obvious legislative intent would probably lead to an opposite position.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 237 (Miller, J., dissenting).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 238 (citing 1847 W. Va. Acts 50).

⁵⁹ *Id.*