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Volume 76 | Issue 2 Article 11

February 1974

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Recommended Citation

Steven E. Deems, *Criminal Procedure--Habeas Corpus--Waiver of Relief under the West Virginia Post-Conviction Habeas Corpus Act*, 76 W. Va. L. Rev. (1974).
Available at: https://researchrepository.wvu.edu/wvlr/vol76/iss2/11

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CRIMINAL PROCEDURE—HABEAS CORPUS—WAIVER OF RELIEF UNDER THE WEST VIRGINIA POST-CONVICTION HABEAS CORPUS ACT

The petitioner was tried for murder in the Circuit Court of Kanawha County under an indictment which charged that he "feloniously, wilfully, maliciously, deliberately, and unlawfully did slay, kill, and murder one Henry Russell."[1] The jury returned the following verdict: "[W]e the jury find John Wayne Ford Guilty in the within indictment as charged."[2] Although the jury verdict did not specify the degree of murder, the court imposed a life sentence for first degree murder. The jury's failure to specify the degree of murder was brought to the attention of petitioner's counsel.[3] Counsel, however, failed to seek amendment of the verdict, and judgment was entered. Petitioner sought a writ of habeas corpus in order to overturn his conviction. *Held,* writ denied. Even though the West Virginia Code requires that the jury shall specify the degree of murder in its verdict,[4] the petitioner "intelligently and knowingly failed to advance [this deficiency] on direct appeal" as required by the West Virginia Post-Conviction Habeas Corpus Act[5] and, therefore, waived his right to relief under the Act. The court further held that even though the verdict did not state the degree of murder, the fact that the murder occurred during the commission of a robbery precluded a verdict of second degree murder. Relying on the record from the trial court, the court determined that if error had been committed, it was not prejudicial. *Ford v. Coiner,* 196 S.E.2d 91 (W. Va. 1972).

The major issue confronting the court in *Ford* was whether the West Virginia Post-Conviction Habeas Corpus Act is available to a petitioner seeking relief from sentencing on a faulty verdict. The

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[1]Ford v. Coiner, 196 S.E.2d 91, 92 (W. Va. 1973).

[2]*Id.* at 93.

[3]Although he later changed his mind about having the verdict amended, the prosecuting attorney made the following statement in open court:

> I would ask if an amendment could be made to the verdict, and then poll the jury to make certain that the amendment is correct. As I understand the law, it is "Guilty as charged in the within indictment," that means first degree murder; I would like to have that added to the indictment, "guilty of first degree murder as charged in the within indictment."

196 S.E.2d at 94.

[4]W. VA. CODE ANN. § 62-3-15 (1966) provides: "If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he is guilty of murder of the first or second degree."

[5]W. VA. CODE ANN. § 53-4A-1 (1966).

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Act, instituted to remedy shortcomings in State habeas corpus procedures that forced petitioners into federal courts for relief, was designed to provide a broader basis for habeas corpus relief on the State level. The majority decision severely limits the availability of the Act, even in the area of Constitutional rights. Because of the potential impact of the decision on future cases, the opinion must be examined to determine whether the decision was well-founded upon legal precedent.

In West Virginia, there can be no specific indictment for first degree murder; only a general murder indictment is permitted.[6] The jury is required to determine from the evidence whether the defendant is guilty and, if they so find, to set forth the degree of murder of which he is convicted. Although the jury in *Ford* failed to specify the degree of murder, the trial court examined the evidence and the statutory definition of first degree murder and imposed judgment as if the verdict had read guilty of first degree murder. The majority was "not unmindful"[7] of the code provision which calls for the jury to state the degree of murder in their verdict[8] and of the holdings in *State v. McCoy*[9] and *State v. May*[10] that a verdict in a murder trial which does not specify the degree of murder is fatally defective. Although the majority recognized that the verdict in *Ford* constituted error, it held that such error must be raised on direct appeal, and failure to do so results in a waiver under the Act.[11]

Justice Haden dissented, contending that it is not within the court's power to invade the province of the jury by construing a jury's verdict and entering judgment not in accordance with the

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[6]State v. Skeen, 138 W. Va. 116, 75 S.E.2d 223 (1953).

[7]196 S.E.2d at 94.

[8]W. VA. CODE ANN. § 62-3-15 (1966).

[9]95 W. Va. 274, 120 S.E. 597 (1923). The defendant was sentenced to imprisonment for life on a charge of murder. An assignment of error was based upon a jury verdict which stated: "We the jury agree and find the defendant, J.C. McCoy, guilty as charged within the indictment, and further recommend mercy." The court found the verdict fatally defective because, under the statute dealing with verdicts and sentences in murder cases, a verdict of guilty in a murder case must state whether the defendant is guilty of murder in the first or second degree.

[10]62 W. Va. 129, 57 S.E. 366 (1907). The defendants were convicted of first degree murder for killing an individual by ambush. The appellant was indicted under the general murder indictment, and the jury returned a verdict merely finding the defendant guilty "as charged in the within indictment." The court set aside the judgment and awarded a trial de novo, holding that a verdict which does not establish the degree of murder is fatally defective.

[11]196 S.E.2d at 94.

jury's finding, since such an invasion constitutes a deprivation of the petitioner's constitutional right to trial by jury.[12] The trial court had held that the rule of the *McCoy* and *May* cases, as well as the statute dealing with the verdict and sentence in murder cases, applied only to ordinary murder cases and not to felony-murder cases such as this one. The dissent, however, stressed the mandatory nature of West Virginia Code chapter sixty-two, article three, section fifteen, emphasizing the word "shall" within the statute.[13] Justice Haden felt examination of both *May* and *McCoy*, as well as other cases not cited by the majority, further substantiated this view.[14] However, none of these cases involved a felony-murder, where the degree of murder is determined by its statutory definition.

Ford was tried under the Post-Conviction Habeas Corpus Act.[15] In holding that the petitioner had waived his right to habeas relief, the court cited the following portion of the Act:

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[12]*Id.* at 98 (dissenting opinion).

[13]*Id.* at 96 (dissenting opinion). The text of the statute is set out in note 4 *supra.*

[14]In State v. Hager, 50 W. Va. 370, 40 S.E. 393 (1901), the defendant was convicted of assault with intent to kill. The court affirmed the verdict of the jury, holding that, because specification of the degree of murder attempted is indispensable to the rendition of judgment, the verdict in this case was proper because it contained such specifications. In State v. Davis, 74 W. Va. 657, 82 S.E. 525 (1914), the defendant was convicted of first degree murder. The court affirmed the lower court's judgment, recognizing that the degree of murder must be specified by the jury. The court also held that a jury verdict could be corrected at the request of the court before discharge of the jury and that a second verdict establishing the correct degree would be sustained.

[15]W. VA. CODE ANN. § 53-4A-1 (1966).The West Virginia Post-Conviction Habeas Corpus Act was enacted in 1967 in response to a series of United States Supreme Court cases which permitted institution of habeas corpus proceedings in federal court upon conviction in a state court. These cases permitted federal courts to pre-empt state courts in the handling of certain criminal cases. Gideon v. Wainwright, 327 U.S. 335 (1963), the first of these opinions, held that, under the sixth and fourteenth amendments, an indigent defendant in a state criminal trial is guaranteed the right to counsel unless that right is intelligently waived. Since *Gideon*, the states have followed the rule that the fundamental rights guaranteed by the Bill of Rights are protected against state abridgement by the due process clause of the fourteenth amendment.

The decisions in Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); and Townsend v. Sain, 372 U.S. 293 (1963), established that where a basic federal right, such as the right of an accused against self-incrimination, is at issue, and the state court denies relief on the ground that the accused "intelligently and understandingly" waived the right in question, the state court decision involves a question of federal constitutional law. Because of the presence of a federal question, the federal court is given the right *eo instanti* to make its independent ruling on that question and apply its own standards.

> "For the purposes of this article, a contention or contentions and grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance such contention or contentions and grounds before trial, at trial, or on direct appeal . . . ."[16]

Since the deficiency in the jury's verdict was raised in open court, with petitioner's counsel making no objection, and since the court affirmed the verdict as one of first degree murder, the majority felt that the knowing and intelligent waiver required by the Act had been made, thus precluding any relief.

The dissenting opinion questioned whether the matter of waiver was raised correctly from a procedural standpoint since it was not properly raised as an affirmative defense by the State and the petitioner had been given no opportunity to respond to the defense.[17] More importantly, Justice Haden did not believe a waiver had occurred since the error complained of involved a constitutional right which he considered specifically non-waivable under the Act.[18] While the dissent recognized the knowing and intelligent waiver concept relied on by the majority, Justice Haden pointed out the exception to the waiver principle whereby all contentions are waived, "unless such contention or contentions are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver."[19]

In determining that the exception should have applied in this case, the dissent analyzed the type of right involved, whether the right could be waived, and what test of waiver must be applied. Justice Haden reasoned that the entering of judgment on a faulty verdict denied petitioner's right to trial by jury.[20] This right, protected under both the United States and West Virginia Constitu-

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The West Virginia statute was enacted to meet three goals: (1) To provide a fair and complete adjudication of the rights of an accused in a state court; (2) to provide for timely and final conclusion of criminal litigation; and (3) to protect the legitimate interest of the state in defining and adjudicating crimes within its boundaries and fixing the punishment therefore. 196 S.E.2d at 100.

[16]W. VA. CODE ANN. § 53-4A-1(c) (1966).

[17]196 S.E.2d at 97 (dissenting opinion).

[18]*Id.* at 101 (dissenting opinion).

[19]*Id.* at 99 (dissenting opinion). This provision of the Act was given great weight by the dissent while the majority failed to note it.

[20]*Id.* at 99 (dissenting opinion).

tions,[21] has been recognized as a fundamental right in decisions rendered by the United States Supreme Court[22] and the West Virginia Supreme Court of Appeals.[23]

Gideon v. Wainwright,[24] which guaranteed the right of counsel to an accused in a criminal case, and *Fay v. Noia,*[25] which involved the right to freedom from self-incrimination, both recognized that fundamental constitutional rights can be waived, but held that the waiver cannot be presumed from a silent record or from the silence of the accused. West Virginia has applied a similar test for waiver. In a case involving the right to counsel, the court held that waiver must be made "intelligently and understandingly."[26] Waiver, therefore, will not be presumed from the failure of the accused to request counsel, from his entry of a guilty plea, or by reason of a record silent on the matter of counsel. Indeed, this test of waiver was recognized by the West Virginia court to be applicable in a case dealing with the same type of constitutional denial as was present in *Ford*—the denial of a defendant's right to trial by jury.[27]

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[21]U.S. CONST. amends. VI & XIV; W. VA. CONST. art. III, § 10.

[22]Duncan v. Louisiana, 391 U.S. 145 (1968). Appellant, convicted of simple battery and sentenced to sixty days in prison and a fine of $150, was denied a jury trial because the Louisiana constitution grants jury trials only in cases where capital punishment or imprisonment at hard labor may be imposed. The Louisiana Supreme Court denied certiorari. Appellant sought review, alleging a federal question, and the United States Supreme Court noted probable jurisdiction. The Supreme Court held that trial by jury in criminal cases is fundamental to the American scheme of justice and is guaranteed to the states by the fourteenth amendment in all criminal cases which, were they tried in federal court, would come within the sixth amendment's guarantee of trial by jury. The Court held that the penalty of up to two years in prison for the offense in question was sufficient to subject the case to the mandates of the sixth amendment.

[23]State *ex rel.* Fountain v. King, 149 W. Va. 511, 142 S.E.2d 59 (1965). This case recognized trial by jury as a constitutional right and provided that a person accused of a crime may waive his constitutional right to trial by jury if such waiver is made intelligently and with understanding.

[24]372 U.S. 335 (1963).

[25]372 U.S. 391 (1963).

[26]State *ex rel.* May v. Boles, 149 W. Va. 155, 139 S.E.2d 177 (1964).

[27]State *ex rel.* Fountain v. King, 149 W. Va. 511, 142 S.E.2d 59 (1965). In a trial for felonious assault, Fountain was asked a series of questions to determine if he understood that he had a right to be represented by an attorney, that he had a right to trial by jury, that he could waive these rights and enter a plea. He responded "yes" to each question. He was then informed of the charge and the maximum penalty and asked whether he wished to plead guilty or not guilty. Fountain pleaded guilty. The court held this was an intelligent and understanding waiver of Fountain's constitutional right to counsel.

The American Bar Association recognizes two types of waiver—the foreclosure by judgment waiver and the voluntary relinquishment waiver.[28] The foreclosure by judgment concept requires that claims must be raised at a certain time or in a certain way or else they will be considered waived. Under this test, a party can lose his rights by being silent or by waiting too long to raise the issue. Under the voluntary relinquishment test, a party to a criminal action can intelligently and understandingly forego certain rights if he is actively involved in the relinquishment process. This active, intelligent waiver of a right will be binding, since the party is involved and aware of the fact he is giving up a right and does not waive it by mere silence. While recognizing both types of waiver, the American Bar Association adopted the voluntary relinquishment test rather than foreclosure by judgment in regard to waiver of rights in post-conviction habeas corpus proceedings.

The dissent, in analyzing the recent federal case, *Leftwich v. Coiner,*[29] concluded that this standard was recognized under the West Virginia Act, at least by implication.[30] In *Leftwich,* the American Bar Association standards were cited in regard to jurisdiction for post-conviction relief, and the court concluded that the West Virginia statute enables the Supreme Court of Appeals to accomplish the functions recommended by the American Bar Association standards. Justice Haden reasoned that this impliedly included the recommendations concerning waiver.[31]

If the voluntary relinquishment test had been applied in *Ford,* the court would have found no grounds for waiver. The petitioner made no active, knowing choice to relinquish his right to trial by jury as required by the test. Instead, he merely remained silent in regard to that issue. Examining the intent behind the promulgation of this statute, the fear expressed by Justice Haden that this decision, "ruling that one may silently waive a basic constitutional right," will once more require the federal judiciary to step in and protect the rights of an accused in a criminal case[32] appears to be true. Indeed, this decision could "render the [Post-Conviction Habeas Corpus Act] a vessel empty of the justice it sought to carry."[33]

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[28] A.B.A., STANDARDS RELATING TO POST-CONVICTION REMEDIES §§ 2.1, 6.1, at 87-89 (tentative draft 1967).

[29] 424 F.2d 157 (4th Cir. 1970).

[30] 196 S.E.2d at 102 (dissenting opinion).

[31] *Id.* at 102 (dissenting opinion).

[32] *Id.* at 103 (dissenting opinion).

[33] *Id.* at 104 (dissenting opinion).

The West Virginia Post-Conviction Habeas Corpus Act was enacted to provide a complete forum within the State judicial system to any person incarcerated under a State conviction and to consider, by means of a full hearing, all State and federal constitutional issues in the State court. This intent seems thwarted by the *Ford* decision. The majority appeared more concerned with the procedural aspects of alleged error than with the substance of the contentions and whether the rights involved can be waived. The dissent, on the other hand, considered the substance of the alleged error rather than its form alone and strived to protect, within the framework of a State court proceeding, the constitutional rights of the petitioner. The concern exhibited by Justice Haden seems to be more clearly in line with the spirit behind the Habeas Corpus Act. It is unfortunate that the other members of the court were not convinced by this approach for, indeed, this decision may result in a surge of federal litigation, causing a renewal of the federal courts' pre-emption of the state courts' handling of habeas corpus litigation.

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