STATE OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS

IN VACATION

Committee on Legal Ethics of the
West Virginia State Bar, Petitioner

vs.) No. 18181

James A. Esposito, Respondent

On a former day, to-wit, July 15, 1988, came the petitioner, the Committee on Legal Ethics of the West Virginia State Bar, by Jack Marden, its attorney, and presented to the Court its petition for rehearing of the above-referenced proceeding, in order to request that costs of processing the above-referenced proceeding be awarded to the petitioner. Thereafter, on July 26, 1988, came the respondent, James A. Esposito, and presented to the Court his response in opposition thereto.

The Court having considered the petition and response is of opinion to, and doth hereby, deny the prayer of the petition.

DONE IN VACATION of the Supreme Court of Appeals, this 31st day of August, 1988.

Thomas J. McHugh, Chief Justice

Darrell V. McGraw, Jr., Justice

Thomas B. Miller, Justice

William T. Brotherton, Jr., Justice

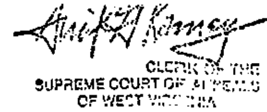
Received the foregoing order this 31st day of August, 1988, and entered the same in Order Book 98.

Ancil G. Ramey
Clerk, Supreme Court of Appeals

A True Copy

Attest [signature]
Clerk, Supreme Court of Appeals

Per Curiam:


FILED
JUL 1 1988
CLERK OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Committee on Legal Ethics of the
West Virginia State Bar

No. 18181 vs.

James A. Esposito

Pursuant to article VI, section 25 of the by-laws of the West Virginia State Bar, the Committee on Legal Ethics of the West Virginia State Bar presented a verified complaint, praying for the annulment of James A. Esposito's license to practice law in West Virginia. The Court issued a rule to show cause on November 10, 1987, returnable January 12, 1988. Mr. Esposito did not submit any evidence in this matter, therefore, the Court relies on the verified complaint filed by the State Bar.

On October 6, 1987, while suspended from the practice of law, Esposito pled guilty to perjury charges, 18 U.S.C. 1623 [1976], in the United States District Court for the Northern District of West Virginia and was sentenced to four years imprisonment to run concurrently with previous convictions. 18 U.S.C. § 1623 (1976) states, in pertinent part:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury . . .) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or

> uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> . . . .
>
> (c) In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

The Committee notes that article VI, section 23 of the State Bar by-laws imposes upon the Court a duty to annul the license of an attorney convicted of a crime involving moral turpitude. In Re Smith, 158 W. Va. 13, 206 S.E.2d 920 (1974); In Re West, 155 W. Va. 648, 186 S.E.2d 776 (1972). Crimes involving fraud or attempted fraud are "consistently and uncontrovertedly recognized as involving moral turpitude." In Re West, 155 W. Va. 648, 650, 186 S.E.2d 776, 777 (1972).

Under the statute, Esposito, under oath or declaration, knowingly provided false information which was

material to a court proceeding. Perjury, as defined by 18 U.S.C. 1623 falls squarely within the definition of a crime involving moral turpitude. Matter of Meisnere, 471 A.2d 269 (D.C. App. 1984); In Re Rothrock, 25 Cal.2d 588, 154 P.2d 392 (1945); State v. Butterfield, 169 Neb. 119, 98 N.W.2d 714 (1959); In Re Bixby, 31 Wash.2d 620, 198 P.2d 672 (1948). See also annot., 40 A.L.R.3d 169.

In view of the uncontroverted fact that Esposito pled guilty to perjury, a crime involving moral turpitude, the Court does hereby follow the recommendation of the Committee on Legal Ethics and annul James A. Esposito's license to practice law in the State of West Virginia.

No. 18396 - Committee on Legal Ethics of the West Virginia State Bar v. George R. Triplett

FILED
MAR 29 1989
CLERK OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Miller, Justice, dissenting:

We have traditionally stated that the scope of appellate review is confined to those issues decided at the trial level except where the lower court lacked jurisdiction to act in the first instance. This has coalesced into the language reflected in Syllabus Point 2 of Duquesne Light Co. v. State Tax Dep't, ___ W. Va. ___, 327 S.E.2d 683 (1984): "'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syllabus Point 2, Sands v. Security Trust Co., 143 W.Va. 522, 102 S.E.2d 733 (1958)."

Here the question of the constitutionality of the black lung fee statute could have been raised below, but it was not. Because the issue was not raised below, there is no factual record developed. The ex parte affidavits filed as attachments to the amicus brief of Jane Moran are, to my mind, woefully inadequate to predicate the factual conclusion reached by the majority.

Furthermore, the majority's reliance on Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985), is completely misplaced. I find, contrary to the majority's statement, slip op. at 7, that Walters does not set "clear, bright line standards." What Walters did

was to uphold the ten dollar fee statutorily authorized for a lawyer or agent who represented a veteran who was seeking veteran's benefits. It did so chiefly because it began with this fundamental legal proposition:

> "Judging the constitutionality of an Act of Congress is properly considered '"the gravest and most delicate duty that this Court is called upon to perform."' Rostker v. Goldberg, 453 U.S. 57, 64 [69 L. Ed. 2d 478, 486, 101 S. Ct. 2646, 2651] (quoting Blodgett v. Holden, 275 U.S. 142, 148, 276 U.S. 594, 72 L. Ed. 206, 48 S. Ct. 105 (1927) (Holmes, J.)), and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." 473 U.S. at 319, 87 L. Ed. 2d 232, 105 S. Ct. at 3188.

The Supreme Court's bottom line in Walters was that there was no factual showing that the fee system deprived veterans of due process under Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976):

> "We accordingly conclude that under the Mathews v. Eldridge analysis great weight must be accorded to the Government interest at stake here. The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities. See Parham v. J.R., 422 U.S., at 608, n.16, 61 L. Ed. 2d 101, 99 S. Ct. 2493. It would take an extraordinarily strong showing of probability of error under the present system--and the probability that the presence of attorneys would sharply diminish that possibility--to warrant a holding that the fee limitation denies claimants due process of law. We have no hesitation in deciding that no such showing was made out on the record before the

District Court." 473 U.S. at 326, 87 L. Ed. 2d at 236, 105 S. Ct. at 3192.[1]

In this case, I simply do not believe that such an "extraordinarily strong showing" has been made based on the generalized ex parte affidavits filed with this Court.[2] Here the main complaint by the several affiants is not so much the amount of the fee received, but the delay in receiving fees because of the backlog of black lung cases. I know of no court which has seized on this fact to void a fee system.

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[1]Mathews v. Eldridge, 424 U.S. at 335, 47 L. Ed. 2d at 33, 96 S. Ct. at 903, formulated this set of factors to determine the appropriate due process requirements:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

[2]In Walters, the Supreme Court was confronted with similar generalized assertions about the unfairness of the administrative procedures in the Veteran's Administration and made this telling comment:

> "Anecdotal evidence such as this may well be sufficient to support a finding by a judge or jury in litigation between private parties that a particular fact did or did not exist. But when we deal with a massive benefits program provided by Congress in which 800,000 claims per year are decided by 58 regional offices, and 36,000 claims are appealed to the BVA, it is simply not the sort of evidence that will permit a conclusion that the entire system is operated contrary to its governing regulations." 473 U.S. at 324 n.11, 87 L. Ed. 2d at 235 n.11, 105 S. Ct. 3191 n.11.

Finally, there appears to me to be a lamentable lack of due process extended to the Department of Labor, which now finds its attorney's fee mechanism declared unconstitutional without ever having the opportunity to be heard before this Court announced its decision.

I am authorized to state that Justice McHugh joins me in this dissent.