

OCT 3 2011

**In the Supreme Court of Appeals  
of  
West Virginia**

Docket No. 11-0784

**STATE OF WEST VIRGINIA**, Plaintiff Below,  
Respondent,

v. Appeal from a final order of  
Case No. 09-F-50 & 10-M-1  
Preston County Circuit Court

**JOHN A. HARTMAN**, Defendant Below,  
Petitioner.

**Respondent's Brief**

William C. Means (WV Bar No. 8578)  
Senior Assistant Prosecuting Attorney  
106 West Main Street, Suite 201  
Kingwood WV 26537

(304) 329-1885

[wmeans@prestoncountywv.org](mailto:wmeans@prestoncountywv.org)

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....i

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT .....1

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....2

ARGUMENT.....2

    The misdemeanor information and the felony indictment were properly consolidated to facilitate a unitary trial and avoid double jeopardy. ....2

    A.    The matter before this Court is procedural, not constitutional. ....2

    B.    *State ex rel. Forbes v. Canady* does not support, but rather contradicts, the Appellant’s position, and the *dicta* therein upon which the Appellant relies is outdated. ....3

CONCLUSION.....5

## TABLE OF AUTHORITIES

### Cases

*State ex rel. Shiflett v. Rudloff*, 213 W. Va. 404, 582 S.E.2d 851 (2003)

*State ex rel. Watson v. Ferguson*, 166 W. Va. 337, 274 S.E.2d 440 (1980)

*Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)

*State v. Bruffey*, 207 W. Va. 267, 531 S.E.2d 332 (2000)

*State ex rel. Forbes v. Canady*, 197 W. Va. 37, 475 S.E.2d 37 (1996)

### Rules

Rule 7(a) of the West Virginia Rules of Criminal Procedure

Rule 8(a) of the West Virginia Rules of Criminal Procedure

Rule 2 of the West Virginia Rules of Criminal Procedure

Rule 19(a)(4) of the West Virginia Rules of Appellate Procedure

### Constitutional Provisions

Section 4 of Article III of the West Virginia Constitution

Section 5 of Article III of the West Virginia Constitution

## STATEMENT OF THE CASE

The crimes of which the Appellant was convicted occurred on August 10, 2009. The Appellant was arrested shortly thereafter and, throughout these proceedings, he remained incarcerated in lieu of bail. Accordingly, his case was presented at the next convening of the Preston County Grand Jury, *i.e.*, on October 20, 2009. The Grand Jury indicted the Appellant on felony charges of *Burglary* and *Malicious Assault of an Elder Person* (namely George Hartman). No later than November 20, 2009, the Appellant's counsel had actual notice that the State intended to file an additional charge against the Appellant for misdemeanor *Domestic Assault* of Eileen Hartman. (See, State's Notice of Intent to Introduce Evidence Which is Subject to In Camera Hearing, dated November 20, 2009; see, also, Motion Hearing Transcript, dated December 3, 2009.) The filing of the misdemeanor *Information* was delayed until January 2010, pending the outcome of the Appellant's forensic evaluation. After the Appellant was found to be competent, the trial of this case was set and occurred in February 2010, during the same term of Court that the indictment was returned and one month before the next convening of the Preston County Grand Jury.

## SUMMARY OF ARGUMENT

Pursuant to Section 4 of Article III of the West Virginia Constitution and Rule 7(a) of the West Virginia Rules of Criminal Procedure, felony charges must be presented to a grand jury, but misdemeanors may be prosecuted in the circuit courts by either indictment or information. Rule 8(a)(2) of the West Virginia Rules of Criminal Procedure requires a single *prosecution*, not a single charging document. Accordingly, it

was not error for the Court to permit the filing of a misdemeanor information and then consolidate the indictment and the information into a single prosecution.

The State has a duty to bring an incarcerated person to trial as expeditiously as possible. *See, e.g., State ex rel. Shiflett v. Rudloff*, 213 W. Va. 404, 409, 582 S.E.2d 851, 856 (2003). Similarly, pursuant to Rule 2 of the West Virginia Rules of Criminal Procedure, West Virginia's circuit courts are obliged to construe criminal procedure rules in such a way as to eliminate unnecessary delay. A superseding indictment would have resulted in nothing more than unnecessary delay.

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

This case involves a narrow issue of law suitable for oral argument pursuant to Rule 19(a)(4) of the West Virginia Rules of Appellate Procedure.

#### **ARGUMENT**

THE MISDEMEANOR INFORMATION AND THE FELONY INDICTMENT WERE PROPERLY CONSOLIDATED TO FACILITATE A UNITARY TRIAL AND AVOID DOUBLE JEOPARDY.

##### **A. The matter before this Court is procedural, not constitutional.**

Consistent with Section 4 of Article III of the West Virginia Constitution, the Appellant was not tried for any felony except those presented to the grand jury for indictment, nor has there been any allegation that such a violation occurred. Consistent with Section 5 of Article III of the West Virginia Constitution, the Appellant was not twice put in jeopardy of life or liberty for the same offense, nor has there been any

allegation that such a violation occurred. *State ex rel. Watson v. Ferguson*, 166 W. Va. 337, 344, 274 S.E.2d 440, 444 (1980), makes it clear that joinder issues are procedural, not constitutional, except to any extent that constitutional issues are specifically implicated.

Where the issue on an appeal from the circuit court is a question of law or involves the interpretation of a statute, the standard of review is *de novo*. *Syl. Pt. 1, Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). To the extent that a question of law arises from the interpretation of a criminal procedure rule, this Court has applied the same standard – see, e.g., *State v. Bruffey*, 207 W. Va. 267, 531 S.E.2d 332 (2000). Apart from issues of construction, procedural matters are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. *Id.*

**B. *State ex rel. Forbes v. Canady* does not support, but rather contradicts, the Appellant's position, and the *dicta* therein upon which the Appellant relies is outdated.**

The Appellant's argument relies heavily upon *State ex rel. Forbes v. Canady*, 197 W. Va. 37, 475 S.E.2d 37 (1996). However, the nature of that case is entirely different from the case now before this Court. In *Forbes*, the Court was considering the State's petition for a writ of prohibition against the lower court's dismissal of an indictment. More specifically, Mr. Forbes had been prosecuted on misdemeanor charges in magistrate court before being indicted on felony charges. Accordingly, even though the Court spent considerable time talking about joinder rules, the holdings in *Forbes* and its seminal case – *i.e.*, *State ex rel. Watson v. Ferguson*, 166 W. Va. 337, 274 S.E.2d 440

(1980) – focused on requiring a unitary trial for multiple offenses arising out of the same transaction “in order to avoid the harassment and anxiety of multiple trials.” *Forbes*, 197 W. Va. at 43 (citing *Watson, supra.*) In the present case, unlike *Forbes*, there were no misdemeanor charges filed in magistrate court. The misdemeanor charge here was filed in the circuit court, and was filed there in adequate time to facilitate a unitary trial. Jeopardy had not yet attached. Thereby, the problem that *Forbes* and *Watson* sought to avoid was avoided in the present case.

As for the discussion in *Forbes* about the mandatory joinder rule, it should be noted that the decision in *Forbes* was rendered in June 1996. The Appellant relies upon comments in that opinion about the prosecution using a single charging document. However, after this opinion was rendered, Rule 8(a) of the West Virginia Rules of Criminal Procedure was amended in September 1996. The updated version of Rule 8(a) is applicable to the present case and, while Rule 8(a)(1) *Permissive Joinder* speaks of a single indictment or information, Rule 8(a)(2) *Mandatory Joinder* is conspicuously different. It does not speak of a single charging document; it requires a single **prosecution**. No West Virginia case has yet addressed the distinction between these subsections of the rule. However, applying the fundamental maxim “noscitur a sociis,” one may ascertain the meaning of the word “prosecution” by reference to other words associated with it, namely the comparison – or rather contrast – between the subsections of Rule 8(a). By further applying the maxim, “expressio unius est exclusio alterius,” a reader may logically conclude that, by knowingly choosing different terms, the drafters of these subsections intended different meanings. If, then, the term “prosecution” does not imply a unitary charging document, what does it require? A unitary trial (or plea or other

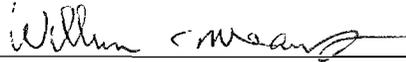
disposition) consistent with the purpose of *Forbes* and *Watson*. In other words, it requires exactly what happened in the present case – the avoidance of delay, and more importantly, the avoidance of double jeopardy.

### CONCLUSION

For the foregoing reasons, the Respondent requests that the instant appeal be denied.

Respectfully submitted,

State of West Virginia,  
By Counsel.



William C. Means (WV Bar No. 8578)  
Senior Assistant Prosecuting Attorney  
106 West Main Street, Suite 201  
Kingwood WV 26537

(304) 329-1885

[wmeans@prestoncountywv.org](mailto:wmeans@prestoncountywv.org)

**In the Supreme Court of Appeals of West Virginia**

**No. 11-0784**

**State of West Virginia,  
Plaintiff below, Respondent,**

**v.**

**John A. Hartman,  
Defendant below, Petitioner.**

**Certificate of Service**

I, William C. Means, Senior Assistant Prosecuting Attorney of Preston County, West Virginia, hereby certify that on the 20<sup>th</sup> day of September 2011, I served a true copy of the foregoing **Respondent's Brief**, in the Matter of **State of West Virginia vs John A. Hartman**, on Richard H. Lorenson and Benjamin F. Yancey via first class mail addressed as follows:

**Richard H. Lorenson, Esquire  
WV Public Defender Services  
Appellate Advocacy Division  
One Players Club Drive, Suite 301  
Charleston, WV 25311**

**Benjamin F. Yancey III, Esquire  
Office of the Attorney General  
State Capitol  
Building 1, Room W-435  
Charleston, WV 25305**

  
William C. Means – WV State Bar #8578  
Senior Assistant Prosecuting Attorney  
Preston County Prosecutor's Office  
106 West Main Street – Suite 201  
Kingwood, WV 26537  
Office: 304/329-1885 Fax: 304/329-0372