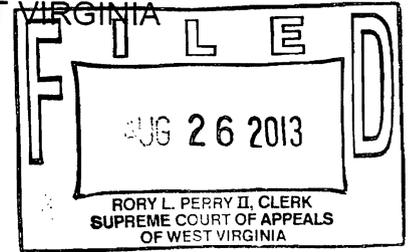


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0572



State of West Virginia, Plaintiff,
Below, Respondent

V.)

Appeal from a final order
Of the Circuit Court of Kanawha
County (13-M-2476)

Beth Bennett, Defendant,
Below, Petitioner

PETITIONER'S BRIEF

Counsel for Petitioner, Beth Bennett

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN ACCEPTING THE PETITIONER'S GUILTY PLEA.
2. THE CIRCUIT COURT ERRED IN IMPOSING A SENTENCE NOT AUTHORIZED STATUTE.
3. THE CIRCUIT COURT ERRED IN PROSECUTING THE PETITIONER AS THE MATTER WAS NOT PROPERLY BEFORE THE COURT.

STATEMENT OF THE CASE

This matter involves a criminal conviction under West Virginia Code §18-8-2, commonly referred to as a truancy conviction. Ms. Bennett and her husband, Justin, are the parents of Nathan Bennett. Last year, Nathan was a first grader at Anne Bailey Elementary School in St. Albans, West Virginia. On or about October 8, 2012, the Bennetts received notice that their child had 5.5 unexcused absences from school (Appendix, Volume 1, page 1). On October 22, 2012, Ms. Bennett sent a letter and documentation to the Director of Attendance, Jennifer Lilly, to address the unexcused absences (Appendix Volume 1, pages 2-6). She then called Jennifer Lilly on October 23, 2012, and was assured that everything was taken care of. Ms. Bennett never received another notice of unexcused absence from school, nor was she afforded a meeting with the principal or designated representative of the school as required by county policy prior to being charged with truancy. The State claims, however, that a letter dated November 19, 2012, was sent to the Bennetts by Ms. Lilly advising them that Nathan had 9 unexcused absences (Appendix, Volume 1, pages 17 and 22). The November letter also purportedly set up a meeting with the Assistant Attendance Director and an Assistant Prosecutor to discuss the truancy issues.

The Bennetts claim they did not receive said letter.

On April 10, 2013, Ms. Bennett received a summons to appear in court for truancy charges (Appendix, Volume 1, page 8). Said summons listed 15.5 unexcused absences. Her husband, Justin, also received a summons for truancy charges against him. Ms. Bennett submitted various medical and parental excuses, reducing the number of unexcused absences to only 5. Ms. Bennett met with the principal, Robert Somerville, on April 18, 2013, to discuss Nathan's absences. He verified that Nathan had only 5 unexcused absences. Ms. Bennett then met with Jennifer Lilly, the attendance director, on April 19, 2013, at which time she was advised that the legal limit for unexcused absences was 5. By this point, Nathan had only 5 unexcused absences.

On April 24, 2013, Ms. Bennett appeared before Judge Louis Bloom for her truancy hearing. Ms. Bennett was unrepresented. Fred Giggenbach was the prosecuting attorney. Upon information and belief, the attendance director, Jennifer Lilly, explained to Mr. Giggenbach that there were only 5 unexcused absences. He stated that if there were only 4, he would dismiss the case, but since Ms. Bennett had 5 unexcused absences, she would have to be treated the same as everyone else. He further stated to Ms. Bennett that if she or her husband plead guilty, the charges would be dropped against the other parent. Mr. Giggenbach testified on the record that he had explained to the Petitioner that if one parent pled, he would move to dismiss the other one (Appendix, Volume 2, page 27, lines 1-4). Criminal charges were dropped as to Mr. Bennett (Appendix, Volume 2, page 29, lines 2-4).

During the hearing, Ms. Lilly testified that there were only 5 unexcused absences and that Nathan, the subject child, had zero absences since receiving the summons (Appendix, Volume 2,

page 28, lines 9-11). Ms. Bennett testified that there were only five (5) unexcused absences. She further testified that the child had been ill and suffered from mono in November (Appendix, Volume 2, page 28, line 5-6). The Court replied that “Five is the magic number” (Appendix, Volume 2, page 28, lines 12-13), then accepted her plea of guilty. Judge Bloom accepted Ms. Bennett’s guilty plea and sentenced Ms. Bennett to pay a \$50 fine, along with \$160.80 in court costs, 90 days probation and 5 days community service (Appendix, Volume 2, page 28, lines 23-24 and page 29, lines 1-2).

On May 10, 2013, the Petitioner, through counsel, filed a Motion for Reconsideration of Sentence (Appendix, Volume 1, page 13-15). Said Motion for Reconsideration of Sentence was denied (Appendix, Volume 1, page 76). On May 28, 2013, the Petitioner, through counsel, filed a Motion For Stay of Execution of Sentence (Appendix, Volume 1, page 77-78), which was also denied (Appendix, Volume 1, page 79-80). On May 31, 2013, the Petitioner filed a Motion for Stay of Execution with the Supreme Court of Appeals of West Virginia. Said Stay of Execution of Sentence was granted.

SUMMARY OF ARGUMENT

West Virginia Code §18-8-1a states that a child over the age of 6 must be enrolled and attend school. West Virginia Code §18-8-1(d) states a child is exempt from compulsory school attendance for physical incapacity. The evidence presented to the lower court against the Petitioner was that her son had five (5) unexcused absences and that the child had been absent from school for various illnesses or other physical incapacities. Accordingly, the Petitioner was not guilty of truancy. When the Petitioner entered a plea of guilty, the court had a duty to insure

that there was a factual basis for the plea. The evidence on the record demonstrated that there was not a factual basis for the plea of guilty.

Furthermore, if even the Petitioner had been guilty of truancy, the sentence imposed was not authorized by statute. The penalty for truancy is specifically stated in the code and the lower court imposed a sentence not stated therein.

Lastly, the Petitioner did not receive a written legal notice in regards to those absences in excess of 5.5, nor was she afforded a conference prior to the filing of truancy charges. Therefore, this matter had not matured for hearing before the court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner hereby waives oral argument. Oral argument under REV. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ACCEPTING THE PETITIONER'S GUILTY PLEA.

Based on the record, the lower Court erred in accepting the Petitioner's guilty plea. "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

West Virginia Rules of Criminal Procedure, Rule 11(f). Accordingly, prior to accepting the Petitioner's plea of guilty, Judge Bloom should have made an inquiry into the facts of the case and the evidence presented to determine if the Petitioner was in fact guilty of violating West Virginia Code §18-8-2.

To determine if the Petitioner is guilty of truancy, first requires an examination of West Virginia Code §18-8-1, et seq, which outlines the requirements for compulsory school attendance. West Virginia Code §18-8-1a states “ Pursuant to West Virginia Code §18-8-2, “any person who, after due notice, shall fail to cause a child or children under eighteen years of age in that person's legal or actual charge to attend school in violation of the provision of this article or without just cause, shall be guilty of a misdemeanor...”. West Virginia Code §18-8-1 sets forth exemptions to the compulsory attendance, of which section (d) applies to this matter. “A child is exempt from the compulsory school attendance requirement set forth in section one-a of this article if the requirements of this subsection, relating to physical or mental incapacity, are met. Physical or mental incapacity consists of incapacity for school attendance and the performance of school work. In all cases of prolonged absence from school due to incapacity of the child to attend, the written statement of a licensed physician or authorized school nurse is required.” West Virginia Code §18-8-2 states that “any person who, after receiving due notice, shall fail to cause a child or children under eighteen years of age in that person's legal or actual charge to attend school in violation of the provisions of this article or without just cause, shall be guilty of a misdemeanor...”. West Virginia Code §18-8-4(b) states that a parent shall be served written notice by the attendance director in the case of five total unexcused absences, and that if the parent does not comply with the provisions of this article that a complaint may be filed. It

should be noted, however, that as to exemptions to the compulsory school attendance, no where in the code does it define “prolonged” absence. Additionally, and more importantly, no where in the code does it state a specific number of absences are allowed or that a specific number of absences constitute truancy. Furthermore, there is no reference to any other legislation, county school policies, or West Virginia State school policies. The statute simply states that children over the age of 6 must be enrolled in school and in attendance unless they meet one of the numerated exemptions or for “just cause”. “Just cause” is not defined.

State and County school policies render no further guidance and actually create some confusion as to what constitutes truancy. The legislature has set forth various policies in regards to student attendance which are located in 126 CSR 81, and is commonly referred to as West Virginia Board of Education Policy 4110. Upon review of 126 CSR 81, no where within the legislation does it specifically spell out how many unexcused absences constitutes truancy. It states, however, that a written notice of absences will be mailed to the parents or guardians after five (5) total unexcused absences. Somewhat contrary to that, however, is Kanawha County Board of Education Policy 19.12 which states that “Excessive absenteeism and tardiness shall be referred to the County Attendance Director or Assistant Attendance Director for appropriate legal action. Parents/guardian shall be contacted by written legal notice when the student accumulates five (5) consecutive or ten (10) total unexcused absences in a school year.” But, again, the Kanawha County Policy does not state at what point a child is considered truant.

Petitioner was verbally told by both the Principal of Ann Bailey Elementary School and by Attendance Director, Jennifer Lilly, that her son could have five (5) unexcused absences. Additionally, the West Virginia State Board of Education Department verbally states that it

interprets the legislation as stating that students are allowed 5 unexcused absences, and that a student is truant upon the sixth unexcused absence. Pursuant to that interpretation, the Kanawha County Board and its employees, verbally and through various attendance policy handouts, relay to the parents that their children may have up to and including five (5) unexcused absences and that truancy constitutes 6 unexcused absences.

Obviously, the code and various policies create some confusion and do not clearly set forth the number of absences that are required to be in violation of West Virginia Code §18-8-2. However, “penal statutes must be strictly construed against the State and in favor of the defendant.” Syl. Pt. 3, *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E. 2d 482 (1970). In order for the Petitioner to be in violation of the compulsory school attendance statute, her failure to send her child to school must be in violation of §18-8-2, and §18-8-2 must be strictly construed against the State. In applying a strict interpretation to the code, the Petitioner’s failure to send her child to school was not in violation of §18-8-2, as her child’s absences fell under one of the exemptions listed in West Virginia Code §18-8-1. As the statute does not define “prolonged” absence, it is unclear whether the Petitioner would be required by statute to provide a physician’s excuse. Furthermore, no where in the statute does it specify a number of absences that constitute a violation of the code.

In the subject case, the minor child missed school primarily due to illness or health related matters. Physician excuses were provided for many of the subject child’s missed days. Parent excuses were provided for others. All excused absences would have fallen within the exemption to compulsory school attendance. After all excuses were turned in to the school, the Attendance Director determined that there were 5 days of unexcused nonconsecutive absences.

According to the Attendance Director for Kanawha County Schools and the Principal of Ann Bailey Elementary school where the student attended school, 5 unexcused absences was acceptable and did not warrant truancy.

At the hearing in the matter, Judge Bloom heard testimony from both the Petitioner and Attendance Director Jennifer Lilly that the student had 5 unexcused absences from school. He made no further inquiry into the absences, and made no inquiry into the 5 unexcused absences and why they were considered unexcused. Without such as inquiry, he could not accept the Petitioner's guilty plea. Had Judge Bloom conducted a proper inquiry as required by West Virginia Criminal Rules of Procedure Rule 11(f), into the factual basis of the absences of the subject child, he would have known that the Petitioner was not in violation of the statute. Judge Bloom did not inquire as to the nature of the five (5) unexcused absences and whether or not, they may have fallen under an exemption to the compulsory school attendance rule as codified in West Virginia Code §18-8-2.

Additionally, The West Virginia Board of Education and the Kanawha County Board of Education historically have treated **more than** 5 unexcused absences as truancy. Accordingly, they relay that information to the parents of the students, and the parents, particularly the Petitioner in this matter, relied upon that information. The Petitioner testified that after turning in doctors' notes and parent notes, the child had only 5 unexcused absences (Appendix, Volume 2, page 27, lines 23 and 24, and page 28, lines 1-2). The director of attendance, Jennifer Lilly, also testified that the Petitioner turned in doctor's excuses and had brought the unexcused absences down to only 5 unexcused absences (Appendix, Volume 2, page 28, lines 9-11). Their testimony was undisputed. To be guilty of truancy, per county policy, the child must have more

than 5 unexcused absences.

Therefore, according to the above, the lower Court failed to make a proper inquiry prior to accepting the Petitioner's guilty plea and furthermore, erroneously accepted the Petitioner's plea of guilty to violating West Virginia Code §18-8-2.

II. THE CIRCUIT COURT ERRED IN IMPOSING A SENTENCE NOT AUTHORIZED STATUTE.

If the Petitioner's guilty plea was proper, and she was indeed guilty of truancy, the sentence imposed by the lower court was in error as it was not authorized by the statute. W. Va. Code §18-8-2 states "Any person who, after receiving due notice, shall fail to cause a child or children under eighteen years of age in that person's legal or actual charge to attend school in violation of the provisions of this article or without just cause, shall be guilty of a misdemeanor, and shall, upon conviction of a first offense, be fined not less than fifty nor more than one hundred dollars together with the costs of prosecution, or required to accompany the child to school and remain through the school day for so long as the magistrate or judge may determine is appropriate." "The general rule supported by the weight of authority is that a judgment rendered by a court in a criminal case must conform strictly to the statute which prescribes the punishment to be imposed and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void." Point 1, Syllabus, *State ex rel. Boner v. Boles*, 148 W. Va. 802, 137 S.E.2d 418 (1964), *overruled on other grounds by State v. Eden*, 163 W. Va. 370, 256 S.E.2d 868 (1979), citing Point 3, Syllabus, *State ex rel. Nicholson*

v. Boles, 148 W. Va. 229.

Ms. Bennett's sentence, however, was a \$50 fine, court costs of \$160.80, 90 days probation, and 5 days of community service (Appendix, Volume 2, page 12). The Code allows for a fine and court costs OR the parent may be required to attend school. The sentence the Petitioner received is clearly not allowed by W. Va. Code §18-8-2, and is, therefore, in error.

Additionally, W. Va. Code §18-8-2, further states that a judge may delay a sentence for a period of sixty school days provided the child is in attendance everyday during the sixty-day period. The testimony on the record was that the child had only 5 unexcused absences that were due to illness, and had not missed any more school since March 7, 2012. Furthermore, the mother had no criminal history. This was the perfect scenario to delay a sentence and Judge Bloom abused his discretion by failing to give Ms. Bennett that opportunity.

III. THE CIRCUIT COURT ERRED IN PROSECUTING THE PETITIONER AS THE MATTER WAS NOT PROPERLY BEFORE THE COURT.

This matter was not properly before the court. West Virginia Code §18-8-2 requires that a parent receive "due notice" and Kanawha County Board of Education Attendance Policy 19.12 states: "parents/guardian shall be contacted by written legal notice when the student accumulates five (5) consecutive or ten (10) total unexcused absences in a school year. A conference shall be required within ten (10) days to resolve any problems contributing to the absences. Continued absences after a legal notice has been served may result in legal action against the parents/guardian or the student in the event the student is 18 years old or older." Ms. Bennett did not receive a legal notice in October of 2012 indicating that her son had 5.5 days of unexcused non-

consecutive absences. Ms. Bennett provided the required documentation to have these absences excused. According to the school attendance records, her son then accumulated 15.5 days of unexcused absences. She did not receive a written legal notice in regards to those absences, but received a summons on April 10, 2013. At that time, the Petitioner met with both the school principal and the attendance director in regards to the absences. After meeting with both of them, her son's unexcused absences only totaled 5 unexcused absences.

As the Petitioner did not receive due notice as outlined in the code, this matter had not matured for hearing before the court and a hearing in this matter should not have occurred.

CONCLUSION

The Petitioner's conviction and sentencing should be reversed, and this matter should be remanded for further proceedings.


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Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I, G. Wayne Van Bibber, counsel for the Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **Petitioner's Brief** to Benjamin F. Yancey, III, Esq., this 21st day of August, 2013 by depositing the same in the U. S. Mail, postage-paid, and via fax to the following:

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