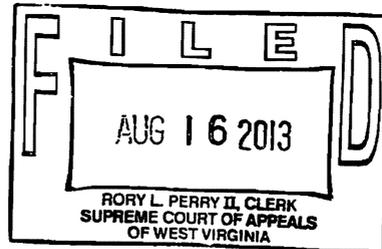


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13- 0733



**STATE OF WEST VIRGINIA ex rel.
STATE OF WEST VIRGINIA,**

Petitioner,

v.

**THE HONORABLE ROBERT A. BURNSIDE, JR.,
Judge of the Circuit Court of Raleigh County,
West Virginia, and RICHARD E. HARDISON, JR.,
Criminal Defendant below and Real Party in Interest here,**

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

**Timothy J. LaFon, Esq.
Ciccarello, DelGuidice & LaFon, PLLC
State Bar No. 2123
1219 Virginia St., East, Suite 100
Charleston, WV 25301
Telephone: 304-343-4440
Fax: 304-343-4464
E-mail: TLafon@cdblww.com
*Counsel for Respondent***

TABLE OF CONTENTS

	<u>Page</u>
I. QUESTIONS PRESENTED	1
II. STATEMENT OF CASE	1
III. SUMMARY OF ARGUMENT	3
IV. STATEMENT REGARDING ORAL ARGUMENT	4
V. ARGUMENT	4
A. THE TRIAL COURT INTERPRETED AND APPLIED THE PLAIN MEANING OF A CLEAR, UNAMBIGUOUS STATUTE WITHOUT AN ABUSE OF DISCRETION NOR BEING CLEARLY ERRONEOUS AS A MATTER OF LAW.	
B. THE TRIAL COURT DID NOT FLAGRANTLY EXCEED ITS LEGITIMATE POWERS OR WAS THE TRIAL COURT CLEARLY ERRONEOUS AS A MATTER OF LAW WHEN APPLYING THE PLAIN MEANING OF THE STATUTE AT ISSUE.	
VI. CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Fruehauf Corp. v. Huntington Moving & Storage Co., 159 W.Va. 14, 217 S.E.2d 907 (1975) . . . 5

In re Estate of Lewis, 217 W.Va. 48, 614 S.E.2d 695 (2005) 5

State v. Boatright, 184 W.Va. 27, 399 S.E.2d 57 (1990) 5

State ex rel. Hoover v. Berger, 199 W. Va. at 14-15, 483 S.E.2d 14-15, Syl. Pt. 4 8, 9, 10

State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968) 4

State ex rel. Morgan v. Trent, 195 W.Va. 257, 465 S.E.2d 257 (1995) 4

State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977) 8,9

West Virginia Dept. of Health and Human Resources ex rel. Wright v. David L., 453 S.E.2d 646,
192 W.Va. 663 (W.Va., 1994) 7

STATUTES:

W. Va. Code §53-1-1 8

W.Va. Code §62-1D-1 1, 2, 5, 7

W. Va. Code §62-1D-3 7

W. Va. Code §62-1D-6 2, 6

W.Va. Code §62-1D-9(d) 2, 5, 6

18 U.S.C. § 2515 6, 7

I.

QUESTIONS PRESENTED

Should this Court issue a writ of prohibition prohibiting the trial court from suppressing evidence obtained unlawfully by the State in violation of the West Virginia Wiretapping and Surveillance Act, §62-1D-1, et. seq., when: (1) the trial court interpreted and applied the plain, unambiguous meaning of the statute at issue, and, (2) where the trial court did not flagrantly exceed its legitimate powers by a clearly erroneous interpretation and application of the statute as a matter of law, and, where the trial court did not even commit a simple abuse of discretion?

II.

STATEMENT OF CASE

On April 6, 2012, the Raleigh County Sheriff's Department and the Beckley City Police Department employed a confidential informant/cooperating individual, ("C.I."), in an attempt to purchase drugs from the defendant, Richard E. Hardison, Jr., a lawyer licensed to practice law in this state. The ("C.I.") had been an acquaintance of the defendant's for over a year, as well as a client of the defendant at the time of the alleged incident. After hundreds of solicitous text messages and telephone calls by the ("C.I.") to the defendant, law enforcement officers equipped the "C.I." with an audio/video recording device to record the communications with the defendant in his private law office, while the ("C.I.") solicited the defendant to "help him out" by finding someone to purchase cocaine from for the ("C.I.").

The law enforcement officers never obtained a warrant or judicial order to surreptitiously enter the defendant's law office and record the defendant's communications in his private law

office. In fact, the law enforcement officers did not even try to obtain a warrant or judicial order to enter the defendant's private law office and record communications of the defendant.

Of note, the petitioner improperly states that "[i]t is undisputed that the sale (as well as the taping of the sale) occurred in Attorney Hardison's office." It is undisputed that the acts or occurrences giving rise to the alleged transfer and the audio recording occurred in the defendant's private office in his place of employment, his law office. Although the ("C.F") was equipped with an audio/video recording device, the video recording malfunctioned. Nevertheless, the ("C.I."), an agent of the State, entered the defendant's private office contained within the defendant's law office and recorded communications of and from the defendant.

The petitioner misleads the Court as to the amount of the alleged drug transaction by referring to the ("C.I.'s") solicitous statement to the defendant requesting "two 8-balls approximately five hundred dollars of . . . cocaine[.]" In fact, the alleged drug transaction was for approximately .93 of a gram of cocaine and not two 8-balls. The petitioner disregards the procedural safeguards for privacy rights of intercepted communications and blindly attaches a copy of the unlawfully obtained transcript to its petition.

Despite the State's felonious violation of W. Va. Code §62-1D-1, et. seq., the State indicted the defendant on one count of delivery of a schedule I controlled substance, to-wit cocaine, and conspiracy to commit a felony offense of delivering a schedule I controlled substance, to-wit cocaine. The defendant filed a "Motion to Suppress Evidence Obtained Illegally in Violation of W. Va. Code, 62-1d, et. seq., the "Wiretapping and Electronic Surveillance Act", as required by W. Va. Code §62-1d-6." More specifically, the defendant asserted that the State and/or its agent, the ("C.F"), violated W. Va. §62-1D-9(d), by using a device designed to intercept communications

by being placed or installed in such a manner to intercept communications emanating from the place of employment of an attorney at law, licensed to practice law in this state.

The Honorable Robert Burnside granted the defendant's Motion to Suppress stating that "the defendant's is right about this."

Currently, there will be another pre-trial motions hearing to hear additional motions in this case prior to trial. The defendant intends to file additional Motions to be addressed by the Circuit Court, such as: (1) a Motion to Dismiss for Violation of the Defendant's Due Process Rights, and, (2) a Motion to Suppress Evidence Obtained In Violation of the Defendant's Fourth (4th) Amendment Rights. Upon information and belief, the case is to be tried in the September 2013 term of the Raleigh County Circuit Court, however, there has not been a trial date set.

III.

SUMMARY OF ARGUMENT

The petitioner's Petition for a Writ of Prohibition should be denied for failing to meet its burden, under *State v. Lewis*, that the trial court flagrantly exceeded its legitimate powers by a clearly erroneous interpretation and application of the statute as a matter of law. Furthermore, the statute at issue is clear and unambiguous, and, the trial court reasonably interpreted the plain meaning of the statute at issue, and did not substantially abuse its discretion. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court", although the trial court did not even commit a simple abuse of discretion. Therefore, a the petitioner's Petition for a Writ of Prohibition should not lie.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the plain language of the statute at issue is clear and unambiguous, and, the Honorable Judge Robert Burnside's reading and interpretation of said statute clearly reflects the legislative intent and purpose of said statute, the trial court's order is not clearly erroneous as a matter of law. Therefore, oral argument under Rev. R.A.P. 18(a) is not necessary to determine whether the trial court significantly abused its discretion in interpreting and applying the statute at issue, 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.

V.

ARGUMENT

A. THE TRIAL COURT INTERPRETED AND APPLIED THE PLAIN MEANING OF A CLEAR, UNAMBIGUOUS STATUTE WITHOUT AN ABUSE OF DISCRETION NOR BEING CLEARLY ERRONEOUS AS A MATTER OF LAW.

"Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). Although the statute at issue is clear and unambiguous, this Court has stated that "[i]n construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant." Syllabus point 5, *State ex rel. Morgan v. Trent*, 195 W.Va. 257, 465 S.E.2d 257 (1995).

"Courts always endeavor to give effect to the legislative intent, but a statute that is clear and

unambiguous will be applied and not construed.” Syllabus Point 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).” Syllabus Point 1 of *State v. Boatright*, 184 W.Va. 27, 399 S.E.2d 57 (1990). “Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.” Syllabus Point 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975).” Syl. Pt. 3, *In re Estate of Lewis*, 217 W.Va. 48, 614 S.E.2d 695 (2005). Therefore, the State’s petition for a Writ of Prohibition should be denied as statute at issue is clear and unambiguous, and, the State attempts to persuade the Court to focus on the words “to place or install”, without reviewing the West Virginia Wiretapping and Surveillance Act in its entirety to ascertain the legislative intent.

In the present case, West Virginia Code, §62-1D-1, et. seq., also known as the West Virginia “Wiretapping and Electronic Surveillance Act,” sets forth the law in the State of West Virginia regarding the interception of communications by a recording device. The Act prohibits the interception of communications unless a warrant is approved by a designated judge, or, where the purpose of the electronic interception fits within a well-defined exception.

Simply stated, the State is prohibited from the warrantless interception of communications of a person unless there is an exception relieving the State’s requirement of obtaining prior judicial authorization. In this case, the State never attempted to obtain a warrant, or, judicial order. However, irrespective of the exceptions to the warrant requirement, W.Va. Code §62-1D-9(d) specifically prohibits the use of any device used to intercept communications in such a manner as

to intercept communications emanating from an attorney at law's office.

W.Va. Code §62-1D-9(d) of the West Virginia Wiretapping and Electronic Surveillance Act, states the following:

(d) An otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this article does not lose its privileged character. *Provided, That* when an investigative or law-enforcement officer, while engaged in intercepting wire, oral or electronic communications in the manner authorized by this article, intercepts a wire, oral or electronic communication and it becomes apparent that the conversation is attorney-client in nature, the investigative or law-enforcement officer shall immediately terminate the monitoring of that conversation: **Provided, however, That notwithstanding any provision of this article to the contrary, no device designed to intercept wire, oral or electronic communications shall be placed or installed in such a manner as to intercept wire, oral or electronic communications emanating from the place of employment of any attorney at law, licensed to practice law in this state.** (*Emphasis added*).

W.Va. Code §62-1D-6 of the West Virginia Wiretapping and Electronic Surveillance Act, states the following:

§62-1D-6. Admissibility of evidence.

Evidence obtained, directly or indirectly, by the interception of any wire, oral or electronic communication shall be received in evidence only in grand jury proceedings and criminal proceedings in magistrate court and circuit court: Provided, That evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding. (*Emphasis added*).

The exclusionary provision set forth in W.Va. Code §62-1D-6 are similar to 18 U.S.C. § 2515. 18 U.S.C. § 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

(Emphasis added)

18 U.S.C. § 2515 has been interpreted time and time again to be clear and unambiguous and withstanding scrutiny. Similarly, in *West Virginia Dept. of Health and Human Resources ex rel. Wright v. David L.*, 453 S.E.2d 646, 192 W.Va. 663 (W.Va., 1994), our Court stated that:

We find it is insignificant that this case does not involve the interception of wire communications, i.e., telephone lines, in that 18 U.S.C. § 2511(1)(a) specifically applies to "any wire, oral, or electronic communication[.]" (Emphasis added). Similarly, we find W.Va.Code, 62-1D-3(a)(1), is clear and unambiguous and it, too, prohibits this type of conduct. Therefore, any recordings of conversations made in violation of W.Va.Code, 62-1D-3(a)(1), and 18 U.S.C. § 2511(1)(a) are inadmissible under W.Va.Code, 62-1D-6, and 18 U.S.C. § 2515.

Lastly, as stated in W.Va. Code §62-1D-1, the definition of an electronic device is:

(d) "Electronic, mechanical or other device" means any device or apparatus (i) which can be used to intercept a wire, oral or electronic communication or (ii) the design of which renders it primarily useful for the surreptitious interception of any such communication. There is excepted from this definition:

(1) Any telephone or telegraph instrument, equipment or facility or any component thereof: (a) Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business or by an investigative or law-enforcement officer in the ordinary course of his duties; or

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal; or

(3) Any device used in a lawful consensual monitoring including, but not limited to, tape recorders, telephone induction coils, answering machines, body transmitters and pen registers.

As set forth in the definition for an "electronic device", our legislature specifically contemplated a "body wire" when drafting the West Virginia Wiretapping and Electronic

Surveillance Act. Our legislature provided a one-party consent exception to the warrant requirement for a lawful consensual monitoring; however, by using the proviso, “Provided, however, That notwithstanding any provision of this article to the contrary, . . .”, the legislature specifically intended to exclude from its exceptions a situation where the State uses a device to intercept communications emanating from the place of employment of an attorney at law. Clearly, the sanctity of privacy reasonably expected in a place of employment of an attorney at law and more so in an attorney’s private office was contemplated and considered by our legislature when drafting this Act.

Therefore, the foregoing statute and its definitions are clear and unambiguous, and were properly interpreted and applied by the trial court in this case, without an abuse of discretion or clearly erroneous application of said statute as a matter of law. The petitioner’s petition for a Writ of Prohibition should not lie as the plain meaning of the statute should be accepted without resorting to rules of statutory interpretation, or, other public policy arguments.

B. THE TRIAL COURT DID NOT FLAGRANTLY EXCEED ITS LEGITIMATE POWERS OR WAS THE TRIAL COURT CLEARLY ERRONEOUS AS A MATTER OF LAW WHEN APPLYING THE PLAIN MEANING OF THE STATUTE AT ISSUE.

In order for a writ of prohibition to issue, substantial weight is given to whether the lower tribunal's order is clearly erroneous as a matter of law. *State ex rel. Hoover v. Berger*, 199 W. Va. at 14-15, 483 S.E.2d 14-15, Syl. Pt. 4.

This Honorable Court has stated that “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1; Syl. pt. 2, *State*

ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977); Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994).

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented. (*Emphasis added*)

Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992).

In *State ex rel. Hoover v. Berger*, this Court, when considering a Writ of Prohibition where the trial court is alleged to exceeded its legitimate powers, stated:

this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4., 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, the State may satisfy the first factor, under the analysis set forth in *State ex rel. Hoover v. Berger*, that the "party [State] seeking the writ has no other adequate means, such as direct appeal, to obtain the relief desired", since the State would not have an appeal if the defendant were acquitted at trial. However, the statute at issue is still clear and unambiguous, and, the trial court's order is not clearly erroneous as a matter of law. The State violated statute when it proceeded

without a warrant “by using a device to intercept communications emanating from the place of employment of an attorney to licensed to practice law in this state.

Furthermore, the trial court’s ruling in this case is clearly not “erroneous as a matter of law”, nor, is the Trial Court’s order an “oft repeated error or manifests persistent disregard for either procedural or substantive law.” In addition, the Trial Court’s order does not raise “new and important problems or issues of law of first impression.” Thus, the third, fourth and fifth factors enunciated in *State ex rel. Hoover v. Berger, Id.*, are absent under the Hoover analysis. Therefore, the State’s petition for a Writ of Prohibition should be denied.

VI.

CONCLUSION

Based upon the foregoing, the Petitioner’s Petition for a Writ of Prohibition should be denied.

Respectfully Submitted,

**Richard E. Hardison, Jr.
Respondent,**

By Counsel



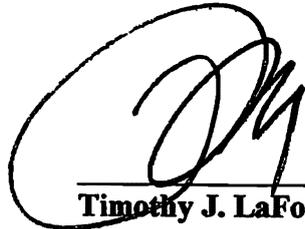
Timothy J. LaFon
Ciccarello, DelGuidice & LaFon, PLLC
State Bar No. 2123
1219 Virginia St., East, Suite 100
Charleston, WV 25301
Telephone: 304-343-4440
Fax: 304-343-4464
E-mail: TLafon@cdl.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Timothy J. LaFon, Esq. of Ciccarello, DelGuidice & LaFon, PLLC, counsel for the Respondent, Richard E. Hardison, Jr., certify that on this 16th day of August, 2013, I served the **“Respondent’s Response in Opposition To Petitioner’s Writ of Prohibition”** upon the petitioner, Scott E. Johnson, Senior Assistant Attorney General for the State of West Virginia, by mailing a true and accurate copy thereof in the U.S. Mail, first class postage pre-paid, addressed as follows:

**The Honorable Robert A. Burnside, Jr.
Judge, Circuit Court of Raleigh County
Raleigh County Judicial Center
222 Main Street
Beckley, WV 25801**

**Scott E. Johnson
Sr. Assistant Attorney General
812 Quarrier St., 6th Floor
Charleston, WV 25301**



Timothy J. LaFon