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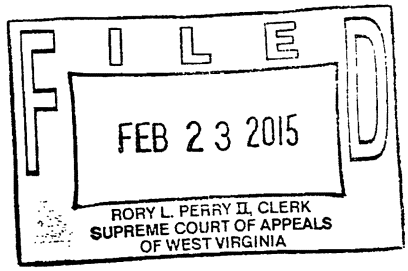
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Ron Baumgardner, Cabell County Magistrate,
Respondent Below, Petitioner

vs.) No. 14-1162
(Cabell County Case No. 14-C-579)

Megan Davis, Petitioner Below, Respondent

PETITIONER'S BRIEF

STATE OF WEST VIRGINIA

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ASSIGNMENT OF ERROR

1. The circuit court erred in finding that the State does not have a right to move to dismiss of a felony criminal charge before a preliminary hearing is held over objection of the accused if the State may still present the matter to the grand jury.

STATEMENT OF THE CASE

On August 4, 2014, a warrant was issued for the arrest of Respondent for the felony offense of "Conspiracy to Commit Delivery of a Controlled Substance". Joint App. at 4. The criminal complaint alleges that on July 23, 2014, Respondent arranged a drug transaction between a cooperating individual and another individual. Id.

On August 21, 2014, counsel for Respondent informed the State that he believed Respondent's criminal charge stemmed from a series of events that counsel for Respondent characterized as "entrapment". Id. at 22. At that time, the State requested that the investigating officers review case materials to determine the veracity of the entrapment allegations. Id.

On August 22, 2014, Respondent appeared for her preliminary hearing. Id. On that date, the charges against Defendant were dismissed on motion of the State. Id. at 5. The State's requested the dismissal in order to review the case until the State was in a position to decide whether to present the matter to the grand jury. Id. at 22-23. Over Respondent's objection, Petitioner granted the State's motion. Id.

On that same day, Respondent filed her Petition for Writ of Mandamus in Cabell County Circuit Court, alleging that the State and Petitioner had unlawfully deprived Respondent of her purported right to a preliminary hearing. Id. at 6, 7-21. On August 25, 2014, the State, on behalf of Petitioner, filed a response. Id. On October 17, 2014, Cabell County Circuit Judge F. Jane Hustead held a hearing on the Petition for Writ of Mandamus. Id. at 52.

On October 23, 2014, a Final Order was entered by Judge Hustead. Id. In its Final Order, the circuit court found that there was "no case law directly applicable to the facts of the case". Id. at 54. The circuit court further found that Respondent was entitled to a preliminary hearing as a matter of right, that the State may only dismiss a criminal charge with prejudice, and

that the State may not dismiss a criminal charge in order to directly present the matter to the grand jury. Id. at 54-55.

On the same date, the State filed an Application for Stay of Execution of Order, which was granted by Judge Hustead. Id. at 6. On October 30, 2014, the State filed its Notice of Appeal. Id.

SUMMARY OF ARGUMENT

The circuit court erred in finding that the State does not have a right to move to dismiss of a felony criminal charge before a preliminary hearing is held over objection of the accused if the State may still present the matter to the grand jury.

Under Rule 16(a) of the Rules of Criminal Procedure for Magistrate Court and pursuant to the constitutional powers of the prosecuting attorney, a prosecutor may dismiss a felony charge in magistrate court. *State ex rel. Skinner v. Dostert*, 166 W.Va. 742, ___, 278 S.E.2d 624, 632 (1981). A felony charge that is dismissed in magistrate court may still be presented to the grand jury for indictment. W.Va. Code § 62-2-1; R. Crim. P. Mag. Ct. 5.1.

"The only purpose of a preliminary hearing is to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury." *Guthrie v. Boles*, 261 F.Supp. 852, 855 (N.D.W.Va. 1967). If the State moves to dismiss charges against the accused before the preliminary hearing, and if such motion is granted, there is no reason to have a preliminary hearing as the accused is no longer being held for action by a grand jury. Therefore, the statutory right to a preliminary hearing only applies when the accused is being held for action by a grand jury and does not apply when the charges are dismissed by the State before the preliminary hearing.

WHEREFORE, your Petitioner prays this Honorable Court to reverse the decision of the circuit court and remand this case to the circuit court with instructions to dismiss Respondent's Petition for Writ of Mandamus.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner states that oral argument is necessary pursuant to the criteria in Rule 18(a). Petitioner further states that the case should be set for a Rule 20 argument, as this case involves an issue of first impression.

ARGUMENT

I. Question Presented

1. Does the State does have a right to move to dismiss of a felony criminal charge before a preliminary hearing is held over objection of the accused if the State may still present the matter to the grand jury?

II. Jurisdiction

The West Virginia Constitution confers appellate jurisdiction upon the Supreme Court of Appeals for proceedings in mandamus. W.VA. CONST. art. VIII, § 3.

III. Standard of Review

"The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is *de novo*." Syl. pt. 1, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995). However, the West Virginia Supreme Court of Appeals will "review a circuit court's underlying factual findings under a clearly erroneous standard." *Id.* at 63, 464 S.E.2d at 581.

IV. The circuit court erred in finding that the State does not have a right to move to dismiss of a felony criminal charge before a preliminary hearing is held over objection of the accused if the State may still present the matter to the grand jury.

Respondent filed a Petition for Writ of Mandamus, alleging that Petitioner and the State illegally deprived respondent of a preliminary hearing. Joint App. at 7-8. Respondent

stated that she had an unconditional statutory right to a pre-indictment preliminary hearing, and that the State had "no discretion to dismiss the charge before a pre-indictment preliminary hearing". Id at 10-13. Respondent claimed that the State's decision to dismiss the charge was "completely personal, unilateral and arbitrary". Id at 14. Respondent therefore claimed that Petitioner abused his discretion in granting the dismissal of the charges against her. Id. at 15. While Respondent conceded she had no constitutional right to a preliminary hearing, she asserted that "there is a serious argument that the deprivation of a pre-indictment preliminary hearing when statutorily guaranteed violates [Respondent's] 5th and 14th Amendment Rights to Due Process". Id. at 18. Respondent's argument before the circuit court also focused on deprivation of the discovery byproduct of a preliminary hearing – not the actual purpose of a preliminary hearing. Id. at 34-37

The State, on behalf of Petitioner, responded by pointing out that the purpose of a preliminary hearing is to determine whether there is probable cause to hold a defendant – in jail or on bond – until the case is presented to the grand jury. Id. at 23, 37-38 (citing *Guthrie v. Boles*, 261 F.Supp. 852, 855 (N.D.W.Va. 1967)). The State also noted that it needed additional time to review its case and surrounding circumstances of the drug transaction, and was not in a position to proceed within the 20-day time limit to give the accused a preliminary hearing. Joint App. at 23, 38-39. The State did not deem it necessary for the petitioner to continue to be under formal charge and subject to the conditions of bond until the case (and cases surrounding the case against Respondent) could be investigated and a decision made about presenting the matter to the grand jury. Id. at 23. For these reasons, the State requested, and Petitioner granted, a motion to dismiss the charges against Respondent without prejudice over Respondent's objections. Id. at 22-23.

In its Final Order, the circuit court found that there was "no case law directly applicable to the facts of the case". Id. at 54.[1] The circuit court even acknowledged that it has been "common practice" in Cabell County to dismiss a case before a preliminary hearing and directly present the matter to the grand jury at a later date. Id. at 39. However, the circuit court found that Respondent was entitled to a preliminary hearing as a matter of right, that the State may only dismiss a criminal charge with prejudice, and that the State may not dismiss a criminal charge in order to directly present the matter to the grand jury (or any other reason) over the objections of the accused. Id. at 40-41, 54-55.

a. State Has Right to Dismiss Felony Criminal Charge in Magistrate Court

Under Rule 16(a) of the Rules of Criminal Procedure for Magistrate Courts, the State "may move to dismiss a complaint, and if the magistrate grants the motion the prosecution thereupon shall terminate."[2] "[T]he decision to move to dismiss or to *nolle prosequi* a criminal warrant is a proper exercise of prosecutorial authority which may not be invaded by an extra judicial order." *State ex rel. Skinner v. Dostert*, 166 W.Va. 742, ___, 278 S.E.2d 624, 632 (1981). This prosecutorial discretion flows from the fact that "[t]he prosecuting attorney is the constitutional officer charged with the responsibility of instituting prosecutions and securing

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[1] Petitioner agrees with the circuit court's holding below that this case presents a question of first impression. Joint App. at 54. Petitioner has been unable to find precedent from this (or any other) court on the issue of whether the State may dismiss a felony charge before a preliminary hearing is held over objection of the accused if the State may still present the matter to the grand jury.

[2] This rule mirrors its counterpart, Rule 48 of the Rules of Criminal Procedure.

convictions on behalf of the State of those who violate the criminal law." *Id.* at ___, 278 S.E.2d at 630 (citing W.VA. CONST. art. IX, § 1; W.Va. Code § 7-4-1; *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974)).

It is unquestioned that the State has a right to dismiss a felony criminal charge in magistrate court, as to hold otherwise would render Rule 16(a) meaningless concerning felonies. As no mention is made in Rule 16(a) that it applies to misdemeanors alone, and as this Court has never held that Rule 16(a) only applies to misdemeanor cases, Petitioner argues that Rule 16(a) is applicable to felony cases, such as the charges against Respondent below.

There are several reasons that a prosecutor may wish to dismiss a criminal complaint before a preliminary hearing, even if the State intends to present the case to a grand jury at a later date, including but not limited to (1) believing further investigation of the case is needed and warranted; (2) not wishing a defendant to be held on bond – and subject to bond revocation – until an indictment can be sought; (3) controlling and economizing the potential backlog of cases that are bound over and awaiting grand jury presentment; and/or (4) unavailability of witnesses to appear within the timeframes of Rule 5(e) of the Rules of Criminal Procedure for Magistrate Court (or a reasonable extension thereof). The trial court's ruling has the effect of limiting this discretionary exercise of prosecutorial authority.

b. State May Present Case Dismissed in Magistrate Court to Grand Jury

Although the circuit court acknowledged the authority of a prosecutor under Rule 16(a) to dismiss a felony charge in its Final Order, the circuit court sought to circumscribe the State's prosecutorial discretion by holding that the State may only dismiss a felony charge with prejudice before a preliminary hearing is held. Joint App. at 55. The circuit court admitted that it

had no legal precedent to support its decision. *See* Joint App. at 54 (stating that there was no controlling precedent and that this Court "has never addressed" whether the State may dismiss a felony charge before indictment and subsequently seek an indictment).

The State has a right to present a matter to the grand jury regardless of whether or not a preliminary hearing is held or the result of any such hearing. W.Va. Code § 62-2-1; R. Crim. P. Mag. Ct. 5.1. In magistrate court, a case may be dismissed on motion of the State under Rule 16(a), by the magistrate for undue delay or the State's failure to appear under Rule 16(b), or if the magistrate determines that the charge against the accused is not supported by probable cause under Rule 5.1.

The effect of the circuit court's ruling below is that a felony charge dismissed by a magistrate under Rule 16(b) or 5.1 does not preclude the prosecution from presenting the case to the grand jury, but a dismissal by the prosecutor under Rule 16(a) does preclude presentation to the grand jury.[3] Further, the circuit court's ruling below has the effect of making a magistrate able to prevent the grand jury from considering a felony presentment. Nothing in the West Virginia Constitution, the West Virginia Code, or the West Virginia Court Rules gives a magistrate such power, and to hold that a magistrate may bind the hands of the grand jury would usurp the constitutional power of the grand jury as the sole arbiter of who should or should not be indicted for felony offenses. *See* W.VA. CONST. art. III, § 4; W.Va. Code §§ 52-2-1, *et seq*, 62-2-1, *et seq*.

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[3] Rule 5.1 provides, in relevant part, that "[t]he discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense."

The circuit court erred in holding that the State may only dismiss a felony charge with prejudice before a preliminary hearing is held, and that the State may not present a case so dismissed to the grand jury. This holding is inconsistent with W.Va. Code § 62-2-1 and Rule 5.1, is without precedent, and usurps the power of the grand jury. Further, this holding could lead to a situation where the State could not ask for a dismissal without prejudice under Rule 16(a), but could have the case dismissed by either not showing up for the hearing under Rule 16(b) or failing to present any evidence at the preliminary hearing under Rule 5.1.

c. Right to Preliminary Hearing Contingent on Continued Detention or Bond

There is no constitutional right to a preliminary hearing under the federal or state constitution. *State ex rel. Rowe v. Ferguson*, 165 W.Va. 183, ___, 268 S.E.2d 45, 47 (1980) (citations omitted).[4] "The *only* purpose of a preliminary hearing is to determine whether there is sufficient evidence against an accused *to warrant his being held for action by a grand jury*." *Guthrie* at 855 (emphasis added). *See also*, *Plyott v. Kopp* 189 W.Va. 114, 428 S.E.2d 535 (1993); *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973); *Rowe* at ___, 268 S.E.2d at 49-50. Further, "West Virginia . . . has statutorily provided a limited purpose preliminary hearing, generally designed to ascertain whether there are reasonable grounds to believe that a crime has been committed; whether there is probable cause to believe the accused committed it; and *to determine the propriety and amount of bail in case the accused is held to answer the action of a grand jury*". *Id.* (emphasis added).

[4] Petitioner acknowledges that a person who is arrested and is to be held for the grand jury is entitled to a preliminary hearing under W.Va. Code § 62-1-8 and R. Crim. P. Mag. Ct. 5.

The reason for a preliminary hearing was partially because, traditionally, "grand jurors only met at intervals of every three or four months, and that a defendant, without the right to test the probable cause basis for his detention, thus might be unreasonably detained." *Rowe*. at ___, 268 S.E.2d at 50. Although discovery is a byproduct of the preliminary hearing, this Court has "accorded a liberal right of discovery to a criminal defendant once he has been indicted and, as a consequence, the discovery aspect of a preliminary hearing is of diminished importance." *Id.*

Because the purpose of a preliminary hearing is to determine whether there is sufficient evidence to have a defendant bound over to the grand jury, a defendant is entitled to a preliminary hearing only if the State seeks to have said defendant bound-over to the grand jury. As the traditional function of the preliminary hearing is for the accused to challenge the probable cause for her arrest and continued detention (or being held on bond), therefore hoping to secure her release, an accused who has her case dismissed by the State before the preliminary hearing is in the same position as if she had won her preliminary hearing. Thus, from the perspective of the accused, the purpose of the preliminary hearing is fulfilled if the State dismisses a case before a preliminary hearing and releases the accused from custody and/or bond. Further, an accused cannot *compel* the State to prosecute her case if the State does not wish to proceed, as to hold otherwise would place prosecutorial discretion (at least partially) in the hands of defendants rather than prosecutors.

CONCLUSION

WHEREFORE, your Petitioner prays this Honorable Court to reverse the decision of the circuit court and remand this case to the circuit court with instructions to dismiss Respondent's Petition for Writ of Mandamus.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Ron Baumgardner, Cabell County Magistrate,
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vs.) No. 14-1162
(Cabell County Case No. 14-C-579)

Megan Davis, Petitioner Below, Respondent

CERTIFICATE OF SERVICE

I, Joe M. Fincham II, do hereby certify that a true and accurate copy of the foregoing PETITIONER'S BRIEF was served upon A. Courtenay Craig, counsel for Respondent Megan Davis, by first-class mail, this the 20th day of January, 2015.

STATE OF WEST VIRGINIA

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