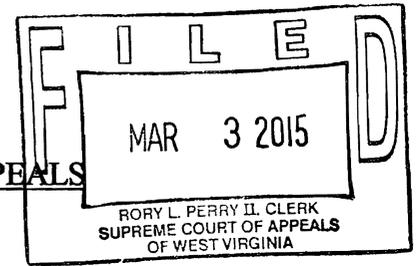


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



Ron Baumgardner, Cabell County Magistrate,
Respondent Below, Petitioner

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

vs.)

Megan Davis,
Petitioner Below, Respondent.

RESPONDENT'S BRIEF

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March 2, 2015

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JURISDICTION

This Court has jurisdiction of appellate review for final decisions from final judgments of West Virginia Circuit Court proceedings according to West Virginia Revised Rule of Appellate Procedure 5. “(a) Applicability: [t]his rule governs all appeals from a circuit court final judgment or other appealable order in a civil or criminal case as set forth in West Virginia Code § 58-5-1. The Cabell County Circuit

Court entered a Final Order on October 23, 2014. The State of West Virginia filed a Notice of Intent to Appeal the Circuit Court's Order on or about November 3, 2014. The State's appeal originates from the Court's grant of Ms. Davis' Petition for Writ of Mandamus requiring she have a preliminary, if she so chose, in the felony case below.

This Court has jurisdiction to hear this matter because the Magistrate Court refused to assume jurisdiction under West Virginia law, the Circuit Court ruled that way, and the State appealed. "We, therefore, conclude that if a preliminary hearing has not been held within a reasonable time following the defendant's arrest on an offense which must be brought to the grand jury, he is entitled to enforce his statutory right to a preliminary hearing under *Code*, 62-1-8 [1965], by a mandamus proceeding in the circuit court against the committing magistrate court." State v. Hon. Alfred E. Ferguson; 268 S.E.2d 45 (W.Va 1980).

We have clearly established that where a statute confers jurisdiction on an inferior tribunal and that tribunal refuses to assume jurisdiction, mandamus is a proper remedy to compel it to exercise such jurisdiction. In Syllabus Point 1 of Robertson v. Wrath, 132 W.Va. 398, 52 S.E.2d 239 (1949), this point was made: "When a court of limited jurisdiction erroneously refuses to assume jurisdiction conferred upon it by a valid statute, mandamus is the proper remedy to compel it to exercise such jurisdiction."

Magistrate Courts have jurisdiction of felony cases to the extent they can hold a preliminary hearing to determine probable cause. See West Virginia Rules for Criminal Procedure for Magistrate Courts Rules (5), (5.1) and, West Virginia Code § 62-1-8. It is therefore clear the Respondent had a right to compel the pre-indictment preliminary hearing before the Magistrate Court.

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, *State 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.

STATEMENT OF THE CASE AND FACTS

On August 4, 2014, a warrant was issued for Ms. Davis for “Conspiracy to Commit Delivery of a Controlled Substance.” The alleged crime took place on July 23, 2014. The complaint states “On 7/23/14, the Defendant arranged the sale of 16 grams of a leafy green substance between a cooperating individual and another individual. The sale was for \$75 dollars and it occurred at Baltimore Street and Irvine Avenue. The leafy green substance field-tested positive for marijuana. (See Pg. 4 of Joint Appendix).

Ms. Davis was given a \$100,000 cash only bond. She could not make bond for the first ten days. She was given an own recognizance bond on or about August 14, 2014 at her initial preliminary hearing date because her defense counsel was out of town.

After speaking to Ms. Davis, defense counsel ascertained, the cooperating individual went to Ms. Davis’ home and asked her to sell him marijuana. Ms. Davis told the cooperating individual she did not sell marijuana. The individual left and returned later asking her again. Ms. Davis said the same thing. Ms. Davis eventually said the cooperating individual should talk to her neighbor and introduced the two. That was the extent of her involvement.

Upon learning the circumstances of the alleged crime, Ms. Davis's defense counsel, A. Courtenay Craig, approached Prosecutor Joe Fincham on August 21, 2014 stating the case appeared to be entrapment. (Id. at Pg. 22). According to Mr. Fincham, he then approached officers to review case files and investigate the entrapment allegations. Id.

On August 22, 2014, Ms. Davis appeared for her preliminary hearing. Upon telling Prosecutor Fincham Ms. Davis wanted to exercise her right to a preliminary hearing, Prosecutor Fincham stated he would be moving to dismiss the case for direct indictment. (Id. at Pg. 5) Ms. Davis' defense counsel immediately objected stating Ms. Davis had a right to a preliminary hearing before indictment. Prosecutor Fincham claimed Ms. Davis had no such right. The State also claimed the dismissal was for further review of the case. (Id. at Pgs. 22-23) Defense counsel objected to the dismissal stating, even if the State believed there was further investigation needed, it was the Defendant's right to ascertain the existence of probable cause at a timely preliminary hearing. The Magistrate ruled in favor of the State dismissing the complaint for direct indictment. (Id. at Pg. 5)

Ms. Davis filed a Writ of Mandamus on August 22, 2014, the same day the criminal complaint was dismissed, alleging she had been unlawfully deprived of her right to a preliminary hearing. (Id. at 6, 7-21) On August 25, 2014, the State, on behalf of the Petitioner, filed a response. (Id. at Pgs. 22-25) On October 17, 2014, Cabell County Circuit Judge Jane Husted held a hearing on the Petition for Writ of Mandamus. (Id. at Pg. 52)

On October 23, 2014, a Final Order was entered by Judge Husted. (Id. at Pgs. 52-56) In its Final Order, the court ruled there was no case law specifically on point regarding a dismissal for direct indictment. (Id. at Pg. 54) The circuit court further found Ms. Davis was entitled to a

preliminary hearing as a matter of right, that the prosecuting attorney's office may only dismiss a felony criminal charge with prejudice at the preliminary hearing stage and the State may not dismiss a felony charge in order to directly present it to the grand jury, or to gain a tactical advantage over the defendant, or to merely circumvent the defendant's right to a preliminary hearing. (Id. at Pgs. 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 Pg. 52-56) On October 30 2014, the State filed its Notice of Intent to Appeal. (Id. et al)

SUMMARY of ARGUMENT

The Petitioner is entitled to a pre-indictment preliminary hearing as a matter of statutory right. W. Va. Code, 62-1-8, our statute which provides for a preliminary hearing, states in part: "If the offense is to be presented for indictment, the preliminary examination shall be conducted by a justice of the county in which the offense was committed within a reasonable time after the defendant is arrested, unless the defendant waives examination." Rule 5(c) of the West Virginia Rules of Criminal Procedure states in pertinent part: "[i]f the offense is to be presented for indictment, a defendant is entitled to a preliminary hearing unless waived." Ms. Davis did not waive her right rather the magistrate abused his discretion by dismissing the charge for "direct" so the prosecution could more thoroughly investigate its case. Peyatt v. Kopp, 428 S.E.2d 535, 537 (W.Va. 1993), states in pertinent part: "[w]here an accused has been arrested, he is entitled to a preliminary hearing as a matter of *right* if the hearing can be held prior to the return of an indictment. In this instance, the Assistant Prosecuting Attorney filed the Motion to dismiss the charge to allow law enforcement to further review the case, avoid time deadlines and to deprive Ms. Davis an opportunity to have a meaningful preliminary hearing as guaranteed by statute

which is a violation of due process. Ms. Davis has a right to challenge the findings of probable cause at a preliminary hearing, by confronting witnesses and invoking her right to a hearing at this critical stage.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case warrants oral argument as it appears this is a case of first impression in West Virginia and it is a fundamental right of all defendants to a preliminary hearing in a felony case, if held before indictment. As Judge Hustead stated in the hearing on Petition for Writ of Mandamus, the practice of dismissal for direct indictment is a time honored practice in Cabell County. (Id. at Pgs. 39-40) It is also regularly done in other counties as well.

ARGUMENT/QUESTION PRESENTED

DID THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT RULED THE DEFENDANT IS ENTITLED TO A PRELIMINARY HEARING AS A MATTER OF RIGHT AND THE STATE MAY NOT DISMISS THE CASE FOR DIRECT INDICTMENT, TO GAIN A TACTICAL ADVANTAGE OR THE DEFENDANT OR MERELY TO CIRCUMVENT THE DEFENDANT'S RIGHT TO A PRELIMINARY HEARING.

The Petitioner is entitled to a pre-indictment preliminary hearing as a matter of statutory right. W. Va. Code § 62-1-8, our statute which provides for a preliminary hearing, states in part:

"If the offense is to be presented for indictment, the preliminary examination shall be conducted by a justice of the county in which the offense was committed within a reasonable time after the defendant is arrested, unless the defendant waives examination."

Shall is mandatory language according to West Virginia Code. As we stated in syllabus point one of Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 300 S.E.2d 86 (1982): "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." The prosecutor has

no discretion to request a dismissal from the Magistrate without a waiver from the defendant because the right to pre-indictment preliminary hearing is statutorily conferred upon the defendant and only she can waive the right. (See above) The statute does not say “unless the defendant waives or the prosecutor waives it for her by dismissing the charges.” If the defendant consents, then the prosecutor can request a dismissal. The prosecutor cannot move to dismiss merely to deprive the Petitioner of her statutory right.

The Petitioner did not waive the preliminary hearing rather she specifically requested one. *See* W. Va. Const, art. III, § 17 (“The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.” (Emphasis added)). The Protections of West Virginia Code § 62-1-8 can only be exercised in the limited time before indictment. Once a defendant is indicted, the right to challenge probable cause at a preliminary hearing ends.

Furthermore, Rule 5(e) of the West Virginia Rules of Criminal Procedure states in pertinent part: “[i]f the offense is to be presented for indictment, a defendant is entitled to a preliminary hearing unless waived.” The prosecutor in this case, Joe Fincham, intended to present this case to a grand jury because: 1.) it is a felony and must be presented to a grand jury according to the West Virginia Constitution, Article III, Section 4 of the West Virginia Constitution provides in pertinent part: “No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury.....”

and;

2.) the Motion to Dismiss clearly states dismiss for direct. It is clear the Petitioner has a right to a pre-indictment preliminary hearing and only she may waive that right.

And finally, in Peyatt v. Kopp, 428 S.E.2d 535, 537 (W.Va. 1993), the Court stated: “[w]here an accused has been arrested, he is entitled to a preliminary hearing as a matter of *right* if the hearing can be held prior to the return of an indictment. There had been no indictment returned in that term of court and a preliminary hearing was statutorily required.

None of these authorities may be read to the exclusion of the others because to determine legislative intent one must view all the authorities governing the subject. “Statutory constructionrequire[s] us to read statutes relating to the same subject *in pari materia*. E.g., State ex rel. Miller v. Locke, 162 W.Va. 946, 253 S.E.2d 540 (1979); Snodgrass v. Sission's Mobile Home Sales, Inc., 161 W.Va. 588, 244 S.E.2d 321 (1978); State v. Reel, 152 W.Va. 646, 165 S.E.2d 813 (1969). It is clear the West Virginia Legislature statutorily mandated a pre-indictment preliminary hearing and the West Virginia Supreme Court agreed.

"A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith."

Syllabus Point 5, State v. Snyder, 64 W.Va. 659, 63 S.E. 385 (1908)." Syl. Pt. 1, State ex rel. Simpkins v. Harvey, 172 W.Va. 312, 305 S.E.2d 268 (1983), superseded by statute on other grounds as stated in State ex rel. Hagg v. Spillers, 181 W.Va. 387, 382 S.E.2d 581 (1989).' Syl. Pt. 2, State ex rel. Hall v. Schlaegel, 202 W.Va. 93, 502 S.E.2d 190 (1998)." Syllabus Point 11, Rice v. Underwood, 205 W.Va. 274, 517 S.E.2d 751 (1998).

Therefore, reading all the authorities on the subject together and assessing them as a whole, the Petitioner is entitled to a pre-indictment preliminary hearing as a matter of right. No position by the Magistrate Court supports the notion it may dismiss the preliminary hearing on motion of the prosecutor because it is the Petitioner's right to have such a hearing before an indictment is returned.

"There can be little question that the 1965 amendments were designed to enhance the defendant's right to a preliminary hearing by creating a positive duty in *Code*, 62-1-8 [1965], to conduct a reasonably prompt preliminary hearing once the defendant has been arrested on an indictable offense. This construction accords with the traditional purpose of the preliminary hearing, to enable the accused to challenge the probable cause for his arrest. The statutory duty in *Code*, 62-1-8 [1965], is mandatory: "[T]he preliminary examination shall be conducted ... within a reasonable time ... unless the defendant waives examination."

There is no other way to interpret these statutes. They are clear on their faces. 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." Syl. pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). Furthermore, to agree with the State's position a felony criminal charge may dismissed in magistrate court for direct presentment means West Virginia Code § 62-1-8 would be meaningless because there would be no way to enforce the statutory right to a preliminary hearing if the Prosecutor's office chose to dismiss the charge. "It is always presumed that the legislature will not enact a meaningless or useless statute." Syl. Pt. 4, Hardesty v. Aracoma—Chief Logan No. 4523, Veterans of Foreign Wars of the United States, Inc., 147 W.Va. 645, 129 S.E.2d 921 (1963). Therefore, "our rules of statutory construction require us to give meaning to all provisions in a statutory scheme [.]" Community Antenna Serv., Inc. v. Charter Communications VI, LLC, 227 W.Va. 595, 604, 712 S.E.2d 504, 513 (2011). To that end, this Court has held: A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject

matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syl. Pt. 5, State v. Snyder, 64 W.Va. 659, 63 S.E. 385 (1908).

Assistant Prosecuting Attorney, Joe Fincham, had no discretion to dismiss the charge for direct indictment when Ms. Davis is entitled to a pre-indictment preliminary hearing, did not consent to the dismissal, did not waive the preliminary hearing, and the Prosecutor's reason for dismissal was improper. This Court has emphasized that prosecutorial discretion must be "bounded by the law." State ex rel. Hamstead v. Dostert, 173 W.Va. 133, 138, 313 S.E.2d 409, 414 (1984). While the prosecutor has discretion in the control of criminal cases, he must exercise that discretion so as to fulfill his duty to the people. W.Va. Const. art. 3, § 2. The courts of the State are open to all who seek redress of grievances. W.Va. Const. art. 3, § 17. As criminal offenses are offenses against the State which must be prosecuted in the name of the State, W.Va. Const. art. 2, §§ 6, 8; W.Va.Code § 62-9-1 (1977 Replacement Vol.); Moundsville v. Fountain, 27 W.Va. 182 (1885), the prosecutor, as the officer charged with prosecuting such offenses, has a duty to vindicate the victim's and the public's constitutional right of redress for a criminal invasion of rights. The "spirit of the law" has long been and it has long held that "[t]he public has rights as well as the accused, and one of the first of these is that of redressing or punishing their wrongs". Ex parte Santee, 2 Va.Cas. 363 (1823).... The prosecutor, like any other executive officer, must have sound reasons for his actions.

Similarly in Syllabus Point 2 of State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (W.Va.1979), we stated, "The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W.Va. Const., art. 2, § 2; art. 3,

§ 2; art. 9, § 1." This Court has also recognized that, ultimately, "[f]ailure of the prosecutor to perform the duties imposed by W.Va.Code § 7-4-1 would make him liable under W.Va. Const. art. 9, § 4; W.Va.Code § 6-6-7 (1979 Replacement Vol.); and W.Va.Code § 11-1-5 (1974 Replacement Vol.)." Syl. pt. 5, in part, State ex rel. Skinner v. Dostert, supra.

In West Virginia, one important limitation upon prosecutorial discretion with respect to the determination of whether to bring charges and what charges will be brought is contained in West Virginia Code § 7-4-1, which provides that when a prosecutor "has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender" (Emphasis added). As we recently stated in Syllabus Point 7 of , Hodge v. Ginsberg, 303 S.E.2d 245 (W.Va.1983): "It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syllabus Point 1, Nelson v. Public Employees Insurance Board, W.Va., 300 S.E.2d 86 (1982)." Similarly, in Syllabus Point 2 of Thomas v. Firestone Tire & Rubber Co., 266 S.E.2d 905 (W.Va.1980), this Court stated: "The word 'any,' when used in a statute, should be construed to mean any." The only limitation upon the prosecutor's duty to bring criminal charges when information is received that any crime has been committed in his county is the requirement that the proceedings instituted and prosecuted be "necessary and proper."

When we speak of "prosecutorial discretion," we are speaking of what course of conduct is "necessary and proper" given the circumstances in a particular case. With respect to the determination of whether to seek an indictment, the ultimate criterion must be whether, in the prosecutor's professional judgment, it appears from the evidence that there is probable [173 W.Va. 139] cause to

believe that an offense has been committed and that the defendant has committed it. See West Virginia Code of Professional Responsibility DR 7-103(A) (1982 Replacement Vol.): "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." It has been noted that, "A probable cause standard ... is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings." American Bar Association Standards for Criminal Justice, Standard 3-3.9 Comment at 3-55 (1980). The utility of the "probable cause" standard in the prosecutor's determination of whether to seek an indictment in a particular case is evidenced by its use at the preliminary hearing stage of the criminal process. See West Virginia Code § 62-1-8 (1977 Replacement Vol.). With respect to the determination of whether to seek an indictment and what indictment will be sought in a particular case, the probable cause standard represents the line of demarcation between prosecutorial discretion and prosecutorial duty. A magistrate had already signed a criminal complaint finding probable cause.

Given the prior showings the legislature intended to confer statutory rights upon defendants regarding pre-indictment preliminary hearings, the prosecutor's discretion usurped the statutory rights granted to Ms. Davis. This argument corrects that. It makes the simple case that preliminary hearings -- where the accusations are submitted to a magistrate, who would then find there was sufficient evidence for the allegations to go forward -- are an essential and longstanding part of due process. The overwhelming majority of states require preliminary hearings or indictments, recognize their importance in protecting against arbitrary prosecutions.

The prosecutor's decision to dismiss for "direct indictment" (sic) was purely arbitrary and improper. In Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the United States Supreme Court said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Ms. Davis and her counsel do not know why the assistant prosecutor cancelled the preliminary hearing for sure but the reason cited is not a valid basis for doing so and is, as such, completely personal, unilateral, arbitrary and denied meaningful access to the courts. There is no way this Court can find a valid legal reason to support the prosecutor's decision. "As a corollary to this rule and in order to guide the court in determining whether to consent to a *nolle prosequi*, we said in State ex rel. Skinner v. Dostert, 166 W.Va. 743, 278 S.E.2d 624, 632 (1981), that the prosecutor must give the court his reasons for recommending a *nolle prosequi*:

"[T]he prosecutor has a duty to support his action with reviewable reasons and since the court entertaining the motion to dismiss is entitled to have all of the relevant facts of the case before it rules on the motion, the prosecutor must have a knowledge of all the circumstances surrounding the case before he can *legitimately* move for a *nolle prosequi*."

There was no reviewable reason given for the dismissal. All the Motion to Dismiss said was "dismiss for direct" (sic). The prosecutor's reasons for dismissal were improper because his only true reason was to avoid the Petitioner's statutory right to a pre-indictment preliminary hearing until further investigation could be conducted. It is well known the Cabell County Prosecutor's Office does not believe defendants have a statutory right to preliminary hearing. These unilateral dismissals have

occurred for years. Again, the statute confers a limited right to a preliminary hearing before indictment. The right may only be exercised before an indictment is returned. Conversely, the prosecution is in no way disadvantaged by holding a preliminary hearing. If the magistrate finds probable cause, the case is bound over for consideration to the grand jury. If the magistrate finds no probable cause, the State may further investigate and then present the case before the grand jury as many times as it likes.

The Magistrate abused his discretion when he dismissed the pre-indictment preliminary hearing for “direct” (sic) because he could not competently grant said Motion based on the facts, in lieu of a waiver by the Petitioner, when the Petitioner is entitled to such hearing by law, and the decision was not consonant with the public interest in the fair administration of justice. The requirement that a dismissal of criminal charges requires the consent of the court is incorporated into Rule 48(a) of the West Virginia Rules of Criminal Procedure, which basically follows Rule 48(a) of the Federal Rules of Criminal Procedure. There is ample federal and state authority for the proposition that under such rule, specific reasons must be given by the prosecutor for the dismissal so that the trial court judge can competently decide whether to consent to the dismissal. See, e.g., United States v. Ammidown, 497 F.2d 615, 620 (D.C.Cir.1973); United States v. Salinas, 693 F.2d 348, 352 (5th Cir.1982); United States v. Derr, 726 F.2d 617, 619 (10th Cir.1984); United States v. Doe, 101 F.Supp. 609, 611 (D.Conn.1951); United States v. Shanahan, 168 F.Supp. 225, 229 (S.D.Ind.1958); United States v. Becker, 221 F.Supp. 950, 953 (W.D.Mo.1963); United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F.Supp. 483, 486 (S.D.N.Y.1964); United States v. Butler, 486 F.Supp. 1285, 1294 (E.D.Tex.1980), rev'd sub nom., United States v. Hamm, 659 F.2d 624 (5th Cir.1981) (en banc).

Moreover, most of the foregoing courts also hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in

the fair administration of justice. See also United States v. Perate, 719 F.2d 706, 710 (4th Cir.1983); United States v. Cowan, 524 F.2d 504, 512 (5th Cir.1975), cert. denied, 425 U.S. 971, 96 S.Ct. 2168, 48 L.Ed.2d 795 (1976); United States v. Dupris, 664 F.2d 169, 174 (8th Cir.1981); United States v. Weber, 721 F.2d 266, 268 (9th Cir.1983); United States v. Del Vecchio, 707 F.2d 1214, 1216 (11th Cir.1983); United States v. Hastings, 447 F.Supp. 534, 537 (E.D.Ark.1977); United States v. N. V. Nederlandsche Combinatie Voor Chemische Industrie, 428 F.Supp. 114, 117 (S.D.N.Y.1977).

As demonstrated previously, the Legislature has conferred statutory rights to defendants regarding pre-indictment preliminary hearings. The magistrate must follow the law. Magistrate Baumgardner did not follow the law rather he merely granted the prosecution's vague, improper and illegal Motion to Dismiss. There is no way a decision that is contrary to West Virginia law and the intent of the legislature is consonant with the public interest in the fair administration of justice, particularly when Ms. Davis did not waive the right at the initial preliminary hearing.

The failure to provide Ms. Davis with a pre-indictment preliminary hearing constituted plain error. The plain error doctrine of W. Va. R. Crim. P. 52(b), whereby the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court[.]” Syl. pt. 4, in part, State v. Grubbs, 178 W.Va. 811, 364 S.E.2d 824 (1987). “By its very nature, the plain error doctrine is reserved for only the most egregious errors. In order “[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. pt. 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The West Virginia Rules of Criminal Procedure and the West Virginia Code specifically protect a defendant's rights regarding pre-indictment preliminary hearings. Granting the Motion to Dismiss merely for alleged further investigation or "direct" (sic) and without a waiver denied Ms. Davis' statutory rights to a preliminary hearing. Therefore, there was error and it was plain.

The error affected the Petitioner's substantial right. The Petitioner has a statutory right to a pre-indictment preliminary hearing and it is a critical stage of the proceedings. Preliminary hearing is a "critical stage" of the proceedings. Desper v. State, 318 S.E.2d 437 (W.Va. 1984). The defendant is allowed to challenge the finding of probable cause by confronting witnesses, cross-examining them, and invoking her right to a hearing.

The decision to dismiss seriously affects the fairness, integrity, or public reputation of the judicial proceedings because it denied the Respondent her statutory right to a preliminary hearing which is illegal in light of legislative intent. Furthermore, the fact the Cabell County Prosecutor's Office does not recognize the right to a preliminary hearing shows that the public reputation of the judicial proceedings/preliminary hearings are seriously at issue because it appears the Cabell County Magistrate Court, as a whole, is regularly depriving defendants pre-indictment preliminary hearings on the uniformed, erroneous, and illegal whims of the prosecuting attorney's office in violation of West Virginia Law. Two petitions for writ of mandamus for this same violation were filed by this same defense counsel in two months. This is a practice the West Virginia Supreme Court of Appeals frowns upon, "We are troubled that the defendant's right to a hearing after arrest and before indictment was so flagrantly disregarded; however, the cure for that is a writ of mandamus before indictment and not reversal after conviction." State v. White, 280 S.E.2d 114, (W.Va. 1981)

And finally, while the petitioner has no constitutional right to a preliminary hearing, [i]nitially, we observe that a preliminary hearing in a criminal case is not constitutionally required. (Gerstein v. Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S.Ct. 854 (1975); Coleman v. Alabama, 399 U.S. 1, 26 L. Ed. 2d 387, 90 S.Ct. 1999 (1970), there is a serious argument that the deprivation of a pre-indictment preliminary hearing when statutorily guaranteed violates the Petitioner's 5th and 14th Amendment Rights to Due Process. "When a preliminary hearing is provided, however, certain constitutional protections attach" Coleman v. Alabama, 399 U.S. 1, 26 L. Ed. 2d 387, 90 S.Ct. 1999 (1970); Lycans v. Bordenkircher, 159 W.Va. 137, 222 S.E.2d 14 (1975). The right to a meaningful hearing, confrontation and due process are rights that should attach at a "critical stage" of a felony proceeding. The preliminary hearing is the first adversarial undertaking in the case.

The State provided procedure for holding a pre-indictment preliminary hearing and any deprivation of that right denies the Petitioner access to the courts. In other words, once the state confers the statutory right to a pre-indictment preliminary hearing, State actors deprive the Petitioner, at the very least, of due process when they illegally dispatch with the conferred statutory right. Clearly, the prosecutor is obliged to participate in the prosecution of criminal charges in his or her county. "One who accepts a public office does so cum onere, that is, he assumes the burdens and the obligations of the office as well as its benefits, subjects himself to all constitutional and legislative provisions relating to the office, and undertakes to perform all the duties imposed on its occupant; and while he remains in office he must perform all such duties." Perry v. Coffman, 148 W.Va. 608, 137 S.E.2d 5 (1964). The Cabell County Prosecutor's Office and the Cabell County Magistrates must follow all the laws not ignore those they find inconvenient.

Given the fact West Virginia Code, West Virginia Rules of Criminal Procedure and West Virginia case law all support the notion a defendant is entitled to a pre-indictment preliminary hearing as a matter of right, the circuit court's decision protecting that right cannot amount to an abuse of discretion. The circuit court's ruling was correct. The prosecutor's motion to dismiss and the magistrate's decision to grant that motion were improper.

CONCLUSION

WHEREFORE, the Respondent, Megan Davis, respectfully requests the Court deny the State's Petition for Appeal and uphold the ruling of the circuit court below and issue a decision stating, once and for all, the unilateral practice of dismissing criminal complaints to avoid a preliminary hearing be abolished unless the defendant agrees to that dismissal by waiving the right to a preliminary hearing and for any other further relief this Court deems just and equitable..

Respectfully Submitted and Approved,

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Ron Baumgardner, Cabell County Magistrate,
Respondent Below, Petitioner

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

vs.)

Megan Davis,
Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I, A. Courtenay Craig, counsel for the Respondent, A. Courtenay Craig, hereby certify that a true and correct copy of the foregoing Respondent's Brief has been served upon the following via hand delivery and/or United States Mail on this the 2 day of March 2, 2015.

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