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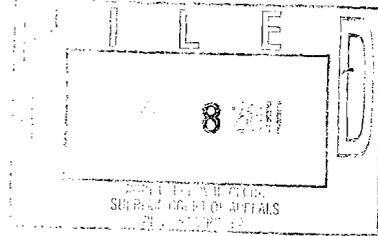
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,)
Plaintiff below, Petitioner,)**

vs.)

**TIMOTHY J. JUDGE,)
Defendant below, Respondent.)**

No. 11-0089



**APPEAL FROM THE CIRCUIT COURT OF TYLER COUNTY
HON. DAVID W. HUMMEL, JR., CHIEF JUDGE**

BRIEF OF THE PETITIONER

On behalf of the State of West Virginia, Petitioner:

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TABLE OF CONTENTS

Table of Authorities 1

Assignment of Error 2

Statement of Case 3-5

Summary of Argument 6-7

Statement Regarding Oral Argument and Decision 7

Argument

It is a crime under W. Va. Code § 15-12-8 for a person required to register as a sexual offender to fail to re-register within three (3) business days of such person’s release from an ensuing period of confinement, notwithstanding the fact that such person was properly registered prior to his or her commitment to jail.

..... 8-12

Conclusion 12

TABLE OF AUTHORITIES

WEST VIRGINIA CASES:

Haislop v. Edgell, 215 W.Va. 88, 593 S.E.2d 839 (2003)

Hensler v. Cross, 210 W. Va. 530, 558 S.E.2d 330 (2001)

State v. Grimes, 226 W. Va. 411, 701 S.E.2d 449 (2009)

WEST VIRGINIA STATUTES:

W. Va. Code § 15-12-2

W. Va. Code § 15-12-3

W. Va. Code § 15-12-4

W. Va. Code § 15-12-8

WEST VIRGINIA CODE OF STATE RULES

W. Va. C.S.R. § 81-14-17

ASSIGNMENT OF ERROR

It was error for the Circuit Court to dismiss the indictment herein, because a person commits a criminal violation of W. Va. Code § 15-12-8 when such person knowingly fails to register as a sexual offender within three (3) days of his or her release from confinement in jail, notwithstanding the fact that such person was properly registered prior to his or her commitment to jail, and notwithstanding the fact that such commitment was a result of some charge or conviction other than a person's qualifying conviction under W. Va. Code § 15-12-2(e)(1) and § 15-12-4.

STATEMENT OF CASE

The Respondent herein, Mr. Timothy J. Judge, was indicted by the October 2010 Term of the Grand Jury, sitting in the Circuit Court of Tyler County. The Grand Jurors found a one-count indictment against him, alleging that he had committed the felony offense commonly known as "failure to register as a sexual offender," in violation of W. Va. Code § 15-12-8 and § 15-12-2(e)(1). (R. 2). This offense was alleged to have occurred on or about May 13, 2010. Id. Subsequent to Respondent's arraignment in the Circuit Court, Petitioner filed its response to Respondent's discovery requests. The responsive material mainly consisted of the contents of the file maintained by the West Virginia State Police regarding Respondent's status as a sexual offender. (R. 14-68).

Respondent, by counsel, filed a written motion to dismiss the indictment on December 6, 2010. (R. 3). That motion generally alleged that the indictment ought to be dismissed because none of Respondent's required registry information had changed at any relevant time, other than having been incarcerated in jail. Id. Petitioner filed a written response to the motion to dismiss on December 10, 2010. (R. 5). In its response, Petitioner represented to the Circuit Court that it would prove at trial that Respondent was briefly incarcerated in the North Central Regional Jail from on or about May 7, 2010 to May 8, 2010. Id. Petitioner further represented that it was prepared to

prove Respondent was a person required to register under W. Va. Code § 15-12-1 *et seq.* for his life, and that he did not in fact register or re-register with the West Virginia State Police within three business days of his release from jail on May 8, 2010. (R. 6). Petitioner asserted it would offer a document entitled "Notification of Sex Offender Responsibility," dated April 15, 2010, which was signed by Respondent, which states "I must register within three (3) days of release from an institution." (R. 6, 14). This document is a form used by the West Virginia State Police. (R. 14).

On December 23, 2010, the Circuit Court held a hearing to address Respondent's motion to dismiss. (R. 69, Transcript of hearing). After taking into consideration the written materials of the parties, as well as argument thereon, the Circuit Court was of the opinion that although it was not error to seek the indictment, it should be dismissed. (Tr. 2, 8). The Circuit Court apparently anchored its decision to a comparison of W. Va. Code § 15-12-3 to § 15-12-2(e)(1), and decided that § 15-12-2(e)(1) did not stand for the proposition that a person commits an offense if a person does not register or re-register within three business days after having been involuntarily committed to an institution, such as jail. (Tr. 5-7). Petitioner essentially took the position that since W. Va. Code § 15-12-4 provides that a person's duty to maintain his or her registry information ceases altogether "during ensuing periods of incarceration," the obvious view of the State Police as expressed in the

"Notification of Sex Offender Responsibility" form is consistent with § 15-12-2(e)(1) and a failure to re-register upon release constitutes an offense under § 15-12-8. On January 12, 2011, Petitioner filed a Notice of Appeal in the office of the Clerk of this Court pursuant to Rev. R.A.P. 5(b). Pursuant to W. Va. Code § 58-5-30, Petitioner maintains that the appeal in this case by the State of West Virginia is proper, inasmuch as it is an appeal from a judgment dismissing an indictment.

SUMMARY OF ARGUMENT

The issue presented in this appeal is purely a question of law, and the argument of Petitioner thereon may be simply summarized. Petitioner maintains that because a person required to register under W. Va. Code § 15-12-2 as a sexual offender is essentially not registered during ensuing periods of confinement, such a person has a duty to re-register within three (3) business days of his or her release from confinement. W. Va. Code § 15-12-2(e)(1), § 15-12-4. A person failing to do so commits an offense under W. Va. Code § 15-12-8. Petitioner's position is clearly consistent with the position taken by the West Virginia State Police, whose duty it is to administer the sexual offender registry. State Police form "170-N," which is used during registration, states "I must register within three (3) days of release from an institution." This form was presented to and executed by Respondent in this case. (R. 14). The annual notice the State Police transmits to registrants states "Your registration stops if you are incarcerated and you are required to re-register within 3 days of your release." (e.g., R. 15).

Respondent was indicted by a grand jury and charged with committing a violation of W. Va. Code § 15-12-8(c). He is alleged to have committed that offense because he did not re-register within three (3) business days of having been released from the North Central Regional Jail on May 8, 2010. The Circuit Court held this indictment bad because it was of the opinion that it did not

allege an offense. The Circuit Court has held as a matter of law that even if Petitioner can prove all things alleged in the indictment beyond a reasonable doubt, no crime was committed. Petitioner maintains before this Court that there is error in this decision because it is the result of an incorrect interpretation of the relevant statutes. The Circuit Court's decision should be reversed. Petitioner, therefore, has sought appeal to this Court pursuant to the Revised Rules of Appellate Procedure, which became effective December 1, 2010.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner states that although the issues presented herein appear to be novel, all such issues involve narrow questions of law and should be suitable to be heard on this Court's Rule 19 docket. Petitioner does not believe that this Court's disposition hereof should be by memorandum decision because the issues presented herein appear to be novel.

ARGUMENT

It is a crime under W. Va. Code § 15-12-8 for a person required to register as a sexual offender to fail to re-register within three (3) business days of such person's release from an ensuing period of confinement, notwithstanding the fact that such person was properly registered prior to his or her commitment to jail.

West Virginia's "Sex Offender Registration Act" ("Act") assumed its present format in 1999.¹ The constitutional validity of the Act as a regulatory statute itself was tested and upheld by Hensler v. Cross, 210 W. Va. 530, 558 S.E. 2d 330 (2001) and Haislop v. Edgell, 215 W.Va. 88, 593 S.E.2d 839 (2003). Sections 2 through 7 and 9 through 10 of the Act deal with the mechanism of the registry itself, while Section 8 is a penal statute designed to define violations of the Act's requirements and provide criminal punishments for failure to abide by those requirements. A cursory reading of this Act makes it clear, however, that each section must be read together in order to make sense of their provisions and also to establish the elements of a criminal violation under Section 8.

This Court undertakes a *de novo* review of orders dismissing indictments. See, e.g., Syl. Pt. 1, State v. Grimes, 226 W. Va. 411, 701 S.E.2d 449 (2009). The indictment found in this case charged Respondent with having committed

1

The Act was moved to Chapter 15 in 1999 (explained in Haislop, supra, 215 W. Va. at 92, 593 S.E.2d at 843). All citations to Chapter 15, Article 12 herein are relevant to the last amendments thereof in 2000 and 2006.

the offense of "Failure to Register as a Sexual Offender" under Section 8(c) of the Act. (R. 2). Petitioner represented to the Circuit Court that at a trial, it believes it would prove beyond a reasonable doubt the following:

- A. Respondent is a person required to register for life due to a prior conviction for the offense of "Sexual Abuse In the Third Degree" (W. Va. Code § 61-8B-9) involving a minor (W. Va. Code § 15-12-2(b)(1) and § 15-12-4(a)(2)(E));
- B. Respondent was committed to the North Central Regional Jail for an unrelated incident on or about May 7, 2010, and released May 8, 2010;
- C. May 8, 2010 fell on a Saturday;
- D. Respondent did not re-register as a sexual offender with the State Police within three (3) business days of his release on May 8, 2010 (W. Va. Code § 15-12-2(e)(1)); and
- E. Respondent knew he was required to do so, which can be proven by the "Notification of Sex Offender Responsibility" form, or form "170-N" which Respondent executed on April 15, 2010 (R. 14).

No one disputes the fact that Respondent was in all respects properly registered immediately prior to his incarceration in May of 2010. The issue in this case is whether he can be prosecuted for not having re-registered within

three (3) business days of his release on May 8, 2010, when none of his information had changed, other than having been committed to jail. In light of this, the Circuit Court essentially held that the indictment did not allege an offense because even if the State could prove beyond a reasonable doubt A through E above, he did not commit a crime thereby. The Circuit Court focused on W. Va. Code § 15-12-2(e)(1), which it stated "reads together along with the original sentencing." (Tr. 6). The last sentence of § 15-12-2(e)(1) reads as follows:

"Any person having a duty to register for a qualifying offense shall register upon conviction, unless that person is confined or incarcerated, in which case he or she shall register within three business days of release, transfer or other change in disposition status." Emphasis supplied.

The Circuit Court also suggested that Petitioner may have sought an indictment pursuant to W. Va. Code § 15-12-3, which deals with change in registry information and requires a registrant to register any changes in pertinent information within ten (10) days. (Tr. 6-7). In doing so, the Circuit Court suggested that this provision spoke directly to a situation where a person had **involuntarily** changed his or her address. (Tr. 7). Petitioner cannot find any language to that effect in § 15-12-3.

Your Petitioner submits that the key to this issue lies in W. Va. Code § 15-12-4(a), which provides:

"A person required to register under the terms of this article shall continue to comply with this section, except during

ensuing periods of incarceration or confinement"
(Emphasis supplied).

This statute plainly means that a person's registration stops while such a person is incarcerated or otherwise under some involuntary commitment. Since a person has no duty to maintain registry information while under such a disability, his or her registration is effectively stopped or terminated upon incarceration or commitment. See, e.g., R. at 15, "Annual Notice." If a person's registration has stopped thereby, such a person is essentially put in the same position as he or she was in when initially registered. And in the posture of **initial** registration, it is beyond question that § 15-12-2(e)(1) applies and the three business day time frame is imposed upon release from an institution. This is the position of the Petitioner in this case. It is also the position of the State Police as is shown by its own forms and notices, as well as W. Va. C.S.R. § 81-14-17.3.

Petitioner acknowledges that there is an apparent gap or disconnect in the statutory language of § 15-12-2 and the State Police's rule and forms. However, if the Circuit Court is correct, Petitioner would argue that § 15-12-4(a)'s declaration that a person is not required to maintain registry information during ensuing periods of incarceration or confinement has no meaning. Either a person has to re-register after an ensuing period incarceration within three days of release or not at all, as long as no other information changed. Petitioner asks this Court to adopt the interpretation which permits it to proceed upon the

indictment. The responsibility of maintaining registration lies with the person required to register. A required registrant who is scrupulously following directions would have done more than it is alleged the Respondent failed to do in this case, because such a person would have been following the actual directions of the State Police. Respondent did not do so in this case, and, had this matter been permitted to proceed to trial, Petitioner also believes it would have been proven that Respondent made absolutely no attempt to do so.

CONCLUSION

The Circuit Court's interpretation of the Sex Offender Registration Act is incorrect. The indictment found herein should not have been dismissed. Guidance is needed from this Court on this issue due to the lack of authority interpreting and applying the provisions of the Act. The order appealed from should be reversed.

Respectfully submitted,

**State of West Virginia
Petitioner**



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CERTIFICATE OF SERVICE

I, D. Luke Furbee, Prosecuting Attorney for Tyler County, West Virginia, do hereby certify that I have made service of the foregoing BRIEF OF PETITIONER upon the Respondent, Timothy J. Judge, by mailing a true and exact copy thereof unto his counsel, Public Defender Corporation for the Thirteenth Judicial Circuit, at address of P.O. Box 2827, Charleston, West Virginia, 25330-2827, this 27th day of April, 2011.



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