

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

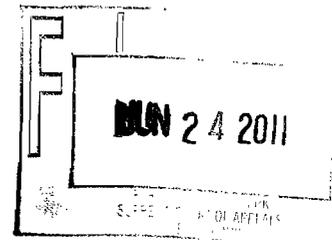
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STATE OF WEST VIRGINIA

VS.

Appeal from a final order  
of the Circuit Court of Raleigh  
County (08-F-92-H & 08-F-370-B)

DAVID D. GRIFFY



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**Petitioner's Brief**

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### ASSIGNMENT OF ERROR

The Circuit Court erred in that under Rule 11 of the West Virginia Rules of Criminal Procedure, if the Court rejects the plea agreement, the Court shall on the record, inform the parties of this fact, advise the Petitioner personally in open court or, on a showing of good cause, in camera, that the Court is not bound by the plea agreement, afford the Petitioner the opportunity to withdraw the plea, and advise the Petitioner that if he or she persists in a plea of guilty or a plea of nolo contendere, the disposition of the case may be less favorable to the Petitioner than that contemplated by the plea agreement. This procedure was not followed by the lower Court, thus creating a great deal of confusion as to the original plea agreement.

### STATEMENT OF THE CASE

The Petitioner, David D. Griffy was indicted January 14, 2008 and September 8, 2008. (See Appendix 1 and 8)

In January 2010 negotiations were initially begun with John W. Gallaher, Jr., an assistant prosecuting attorney with the Raleigh County Prosecuting Attorney's Office. On February 24, 2010 counsel for the Petitioner received a plea letter from Raleigh County Assistant Prosecuting Attorney John W. Gallaher, Jr., setting out the State's plea offer. (See Appendix 5) On March 24, 2010 counsel for the Petitioner mailed a counter plea offer letter to Raleigh County Assistant Prosecuting Attorney John W. Gallaher, Jr. (See Appendix 5) After this correspondence, counsel was referred to Chief Deputy Prosecuting Attorney, Tom Truman as to all matters pertaining to the Petitioner, David D. Griffy. Within a day of the April 23, 2010 plea hearing, counsel received, *for his signature*, an Order "Accepting Defendant's Plea. (See Appendix 5) The next day, counsel received a second Order "Accepting Defendant's Plea. There was no signature line for Petitioner's counsel, Charles B. Mullins II and this Order "Accepting Defendant's Plea and the Plea had already been

entered in the Circuit Court of Raleigh County on April 27, 2010. (See Appendix 5)

There exist Two (2) Orders “Accepting Defendant’s Plea,” both prepared by the State. The first Order *accepts* the Petitioner’s Plea offer as set out in the Petitioner’s counter plea letter sent to Mr. Gallaher on March 24, 2010; it waives the pre-sentence investigation and sentences the Petitioner per the *original* Plea Agreement. All pursuant to **Rule 11(e)(1)(C)** of the **West Virginia Rules of Criminal Procedure**. This Order is unsigned by all parties involved and was sent to counsel for his signature. (See Appendix 5) The second Order, entered on April 27, 2010, *also accepts* the Petitioner’s Plea offer as set out in the Petitioner’s counter plea letter sent to Mr. Gallaher *but*, pursuant to **Rule 11(e)(1)(B)** of the **West Virginia Rules of Criminal Procedure**, the Order however, orders a pre-sentence investigation to be conducted and sets the matter for a sentencing hearing on July 16, 2010. The second Order is *only* signed by Tom Truman, Raleigh County Chief Deputy Prosecuting Attorney and His Honor, Robert A. Burnside, Jr., Judge, Raleigh County Circuit Court. There is *no* signature line for Petitioner’s counsel, Charles B. Mullins II. (See Appendix 5)

On July 16, 2010 a Sentencing Hearing (See Appendix 4) was held. Counsel for the Petitioner moved the Court that there was a *binding* plea agreement for Two (2) “consecutive alternative sentences of One (1) year.” The State remarked “that it did not believe that the matter was submitted under **Rule 11(e)(1)(C)** of the **West Virginia Rules of Criminal Procedure**.” (See Appendix 4) Even though the *signed* April 27, 2010 Order “Accepting Defendant’s Plea” is pursuant to **Rule 11(e)(1)(B)** of the **West Virginia Rules of Criminal Procedure** (See Appendix 5) The Petitioner’s motion for a specific sentence was denied.

On November 8, 2010, the Petitioner filed a Rule 35 Motion for Reconsideration of Sentence (See Appendix 5) setting out the grounds as stated above. On February 14, 2011 a hearing on said Motion was held before the Honorable Robert A. Burnside, Jr. The court heard argument on said motion. During this hearing counsel asks that the plea be withdrawn. Said request was denied without further discussion by the Court, thus not following Rule 11 procedure for the denial of the withdrawal of a plea by the Court. Therefore, the Court requested submission of correspondence from counsel setting out instances within the transcript of the April 23, 2010 and July 16, 2010 hearings as to this matter. Counsel complicated with the Court's request. The court further ruled that it would hold the matter in abeyance until delivery of the said correspondence, at which point the court would make a decision without additional oral argument.

The Court replied in a memorandum dated February 23, 2011. (See Appendix 7) The Court denied said Rule 35 Motion for Reconsideration of Sentence.

#### SUMMARY OF ARGUMENT

The Circuit Court erred in that under Rule 11 of the West Virginia Rules of Criminal Procedure, if the Court rejects the plea agreement, the Court shall on the record, inform the parties of this fact, advise the Petitioner personally in open court or, on a showing of good cause, in camera, that the Court is not bound by the plea agreement, afford the Petitioner the opportunity to withdraw the plea, and advise the Petitioner that if he or she persists in a plea of guilty or a plea of nolo contendere, the disposition of the case may be less favorable to the Petitioner than contemplated by the plea agreement. This procedure was not followed by the lower Court, thus creating a great deal of confusion as to the original plea agreement.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that oral argument pursuant to Rule 18(a) is necessary.

Petitioner also asserts that this matter should be set for Rule 19 Argument, because whether that this improper instruction was misleading, confusing and incorrectly states the law and that this improper instruction deprived the Petitioner his fundamental right to a fair and impartial trial under the law is a matter involving assignments of error in the application of settled law and this case involves a narrow issue of law. A memorandum decision is not appropriate.

The minimum time limit is sufficient.

## ARGUMENT

The Circuit Court erred procedurally as to Rule 11 of the West Virginia Rules of Criminal Procedure as it pertains to the withdrawal of a plea, thus creating a great deal of confusion as to the original plea agreement.

Rule 11 of the West Virginia Rules of Criminal Procedure states:

**(a) Alternatives.**

**(1) In general.**

A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

**(2) Conditional pleas.**

With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

**(b) Nolo contendere.**

A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

**(c) Advice to defendant.**

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that the defendant has the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, the right against compelled self-incrimination, and the right to call witnesses; and

(4) That if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false swearing.

**(d) Ensuring that the plea is voluntary.**

The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendant or the defendant's attorney.

**(e) Plea agreement procedure.**

**(1) In general.**

The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the state will do any of the following:

(A) Move for dismissal of other charges; or

(B) Make a recommendation or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) Agree that a specific sentence is the appropriate disposition of the case; or

(D) Agree not to seek additional indictments or informations for other known offenses arising out of past transactions.

The court shall not participate in any such discussions.

**(2) Notice of such agreement.**

If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A), (C), or (D), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

**(3) Acceptance of a plea agreement.**

If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

**(4) Rejection of a plea agreement.**

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if he or she persists in a plea of guilty or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

**(5) Time of plea agreement procedure.**

Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

**(6) Inadmissibility of pleas, plea discussions, and related statements.**

Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) A plea of guilty which was later withdrawn;

(B) A plea of nolo contendere;

(C) Any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

**(D)** Any statement made in the course of plea discussions with an attorney for the state which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible:

**(i)** In any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it; or

**(ii)** In a criminal proceeding for false swearing if the statement was made by the defendant under oath, on the record, in the presence of counsel.

**(f) Determining accuracy of 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.

**(g) Record of proceedings.**

A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea, including any plea agreement, and the inquiry into the accuracy of a guilty plea.

**(h) Harmless error.**

Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

In the case before the Court, we are concerned with the distinction between a Rule 11(e)(1)(B) plea and a Rule 11(e)(1)(C) and the lack of procedure by the Circuit Court in all the confusion as to the withdrawal of the plea by the Petitioner.

The agreement in this case essentially imposed an obligation upon the State to make a specific recommendation as to an appropriate sentence on the charges as is provided for by Rule 11(e)(1)(B).

The Supreme Court of Appeals of West Virginia, in *State v. Cabell*, 176 W. Va. 272; 342 S.E.2d 240; 1986 W. Va., set forth the standard of review in stating:

“Rule 11(e)(2) provides that the terms of the agreement must be placed on the record and establishes the procedure that the circuit court must follow, depending on the type of plea

agreement that has been reached between the State and the accused. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in Subdivisions (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in Subdivision (e)(1)(B), *the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw his plea.*" (emphasis added) The latter was omitted by the Circuit Court as to the Petitioner's rights to withdraw the plea.

In accordance with this rule, the Petitioner is to be made aware in open court that if the Court does not accept the plea he may not withdraw the plea once it is entered.

The Court further stated that:

"The last sentence in Rule 11(e)(2) emphasized above provides with respect to this type of agreement that the court "shall advise" the defendant that if the court does not accept the prosecutor's sentencing recommendation, the defendant nevertheless has no right to withdraw his plea. The circuit court did not comply with this requirement."

The Court went on to state that:

"We have not been confronted with this factual situation before, but the notice requirement of our Rule 11(e)(2) is identical to the federal rule, as amended in 1979, and several United States Courts of Appeals have dealt with this issue. The Fourth Circuit in *United States v. Iaquina*, 719 F.2d 83, 85 (4th Cir. 1983), considered this point, reversed the defendants' convictions, and remanded the case to afford them an opportunity to plead again:

To ensure that defendants fully understand the consequences of a type (B) agreement, Rule 11(e)(2) was amended, effective August 1, 1979 to provide that when the plea agreement is type (B), 'the court *shall* advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.' (emphasis added).

Whereas the lower court is not required to deliver word for word the guidance necessary by Rule 11(e)(2), it is obliged to a large extent to inform the defendant of and establish that the defendant comprehends the warning within.

In *Iaquinta* the district court merely "informed the defendants that it was not bound by any recommendations," the Supreme Court declined to maintain that such an instruction significantly "informs" a defendant that he or she has no right to withdraw his or her plea if the court does not accept the sentencing recommendations. Moreover, the circuit court in this case never attempted to establish whether the defendant understood that he was without that right.

The Court went on further to state that:

"Rule 11(e)(2) clearly, precisely, and unequivocally requires that the court *shall* advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea' (emphasis added)." Due to the confusion as to a Rule B plea or a Rule C plea, the circuit court did not fulfill its procedural obligation as to this directive.

A comparable conclusion was arrived at in *United States v. Burruezo*, 704 F.2d 33 (2d Cir. 1983).

The language of *Burruezo*, is as follows:

"This clarifying amendment was believed necessary because of a conflict in the cases dealing with recommendations under subsection (e)(1)(B). Some courts treated a refusal to abide by a recommendation as a rejection of the plea agreement, which required that a defendant be given an opportunity to withdraw his plea . . . . The majority view, however, was that since a subsection (e)(1)(B) agreement is merely a recommendation, there was no agreement to 'accept' or 'reject' under the Rule and a defendant need not be given the opportunity to withdraw his plea." (Citations omitted).

The Supreme Court of Appeals of West Virginia, in *State v. Stone*, 200 W. Va. 125; 488 S.E.2d 400; 1997 W. Va. states:

If the circuit court accepts the plea provisionally, and if the sentence recommendation is not approved at the sentencing hearing, "the court must give the defendant the right to withdraw his or her plea."

The Court goes on to say that:

"Unless the factual evidence is clear that no substantial rights have been disregarded, the harmless error rule of Rule 11 of the West Virginia Rules of Criminal Procedure should not be applied. Although most of the federal cases follow the remedy of permitting the defendant to plead anew, the Supreme Court of Appeals of West Virginia has found more practical the approach of remanding the case either to allow the defendant to plead anew or to grant specific performance so that the sentence comports with the reasonable understanding and expectations of the defendant as to the sentence for which he bargained."

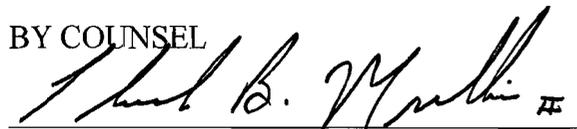
CONCLUSION

The Circuit Court erred in that under Rule 11 of the West Virginia Rules of Criminal Procedure, if the Court rejects the plea agreement, the Court shall on the record, inform the parties of this fact, advise the Petitioner personally in open court or, on a showing of good cause, in camera, that the Court is not bound by the plea agreement, afford the Petitioner the opportunity to withdraw the plea, and advise the Petitioner that if he or she persists in a plea of guilty or a plea of nolo contendere, the disposition of the case may be less favorable to the Petitioner than contemplated by the plea agreement. This procedure was not followed by the lower Court, thus creating a great deal of confusion as to the original plea agreement, thus allowing the Petitioner to withdraw his plea.

The Circuit Court's order denying the Petitioner' "Rule 35 Motion for Reconsideration of Sentence," should be reversed, and this matter should be remanded so as to allow the Petitioner "to plead anew or to grant specific performance so that the sentence comports with the reasonable understanding and expectations of the Petitioner as to the sentence for which he bargained" and for such other and further general relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,  
DAVID D. GRIFFY,  
PETITIONER,

BY COUNSEL



CHARLES B. MULLINS II  
COUNSEL ON PETITION OF APPEAL

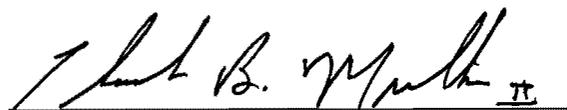
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CERTIFICATE OF SERVICE

I, Charles B. Mullins II, hereby certify that I have this the 23<sup>th</sup> day of June, 2011, by hand delivery and/or United States Mail, postage prepaid, mailed a true and accurate copy of the foregoing "PETITIONER'S BRIEF" upon the following Counsel:

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