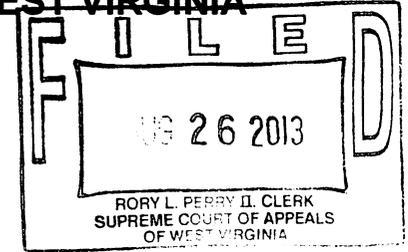


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0433



**STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent**

v.

**Appeal from a Final Order of the Circuit
Court of Preston County (11-F-52)**

**GEORGE A. K., Defendant Below,
Petitioner**

Petitioner's Amended Brief

Submitted by:

Cheryl L. Warman, Esq.
WV Bar # 3928
Counsel for Petitioner
P.O. Box 662
Morgantown, WV 26507-0662
Telephone: (304) 291-1029
Facsimile: (304) 291-3705
E-mail: cwarmanlaw@aol.com

TABLE OF CONTENTS

ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

STANDARD OF REVIEW 5

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

ARGUMENT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<u>Crystal R.M. v. Charlie A.L.</u> , 194 W. Va. 138, 459 S.E.2d 415 (1995)	6
<u>State ex rel. Carson v. Wood</u> , 157 W. Va. 397, 175 S.E.2d 482 (1970)	8
<u>State ex rel. Pinson v. Varney</u> , 142 W. Va. 105, 96 S.E.2d 72 (1956)	10
<u>State ex rel. Spaulding v. Watt</u> , 188 W. Va. 124, 423 S.E.2d 217 (1992)	9
<u>State v. Elder</u> , 152 W. Va. 571, 165 S.E.2d 109 (1968)	8

Statutes and Rules

W. Va. Code § 15-12-1	10
W. Va. Code § 15-12-2(i)	10
W. Va. Code § 27-5-1	5
W. Va. Code § 27-6A-3	8
W. Va. Code § 27-6A-3(g)	5, 11
W. Va. Code § 27-6A-3(h)	1, 2, 3, 4
W. Va. Code § 27-6A-5	4
W. Va. Code § 61-8B-5	1, 7
W. Va. Code § 61-8D-5	1
W. Va. Code § 61-8D-5(a)	6
W. Va. Code § 62-1C-1(b)	9
W. Va. Rev. R.A.P.18(a)	6
W. Va. Rev. R.A.P.20	6

Other

50 Am. Jur., Statutes § 363	10
BLACK'S LAW DICTIONARY 1408 (5 th ed. 1979)	8

I. ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED BY FINDING THAT SEXUAL ABUSE BY A CUSTODIAN AND THIRD DEGREE SEXUAL ASSAULT ARE CATEGORICALLY CRIMES OF VIOLENCE SO AS TO REQUIRE THE PETITIONER, FOUND INCOMPETENT TO STAND TRIAL, TO BE COMMITTED TO A MENTAL HEALTH FACILITY AND SUBJECT TO THE CONTINUING JURISDICTION OF THE COURT FOR A PERIOD EQUIVALENT TO THE MAXIMUM SENTENCE HE WOULD HAVE RECEIVED IF HE HAD BEEN CONVICTED OF ALL THE CRIMES CHARGED IN THE INDICTMENT, PURSUANT TO THE PROVISIONS OF WEST VIRGINIA CODE § 27-6A-3(h).

II. STATEMENT OF THE CASE

This appeal arises from a criminal case in the Circuit Court of Preston County, West Virginia. The defendant (petitioner herein), George A. K., was charged by indictment on June 7, 2011, with four (4) felonies: two (2) counts of sexual abuse by a custodian, in violation of West Virginia Code § 61-8D-5, and two (2) counts of third degree sexual assault, in violation of West Virginia Code § 61-8B-5.¹ (A.R. A2-A3). The alleged victim is S. B., age 15 at the time of the alleged offenses (April or May 2011), and is the daughter of Mr. K.'s live-in girlfriend. Mr. K. was 39 years of at the time of the alleged crimes. The four offenses stemmed from two separate occasions on which Mr. K. and S. B. purportedly had sexual intercourse.

Concerned about apparent intellectual limitations on the part of Mr. K., the undersigned attorney filed a pretrial motion for a forensic psychological evaluation to assess competency to stand trial. That motion was granted and Mr. K. was examined by a Morgantown psychologist, Dr. William Fremouw, who issued a report opining that Mr. K.

¹ References to the Appendix Record--the contents of which were agreed to by the parties--are set forth as "A.R. A__" for Appendix A and "A.R. B__" for Appendix B.

was not competent but that restoration of competency might be possible with training.² (A.R. A4-A10). Accordingly, at a hearing held on August 18, 2011, the circuit court found Mr. K. incompetent to stand trial and committed him to the competency restoration program at William R. Sharpe, Jr. Hospital for an improvement period not to exceed three months. (A.R. A13-A16). On December 1, 2011, the circuit court conducted a hearing at which it extended Mr. K.'s commitment to allow additional time for him to attempt to attain competency, in accordance with the recommendation set forth in a psychiatric report from the hospital dated November 20, 2011.³ (A.R. A17-A18; A19-A25).

Upon receipt of a subsequent report from the hospital⁴ (A.R. A28-A34), the court held another hearing on February 21, 2012 (A.R. B1-B15), during which neither the State nor the undersigned attorney contested the examining psychiatrist's opinion that Mr. K.'s condition was unchanged and that he was not restorable. After hearing representations and arguments of counsel, the court found that Mr. K. was not competent to stand trial and not substantially likely to attain competency within the foreseeable future. Additionally, the court found that the charges against Mr. K. involved acts of violence against a person. Accordingly, pursuant to the provisions of West Virginia Code § 27-6A-3(h)⁵ the court

² Dr. Fremouw determined that Mr. K. has a full scale IQ of 60, which places him at the lower end of the mild mental retardation range, with an intellectual ability less than 1% of the U.S. population. (A.R. A7). No evidence of psychosis was found. (A.R. A6).

³ Bridgette B. Balasko, M.D., opined that Mr. K.'s diagnoses at the time of her evaluation on November 18, 2011, were alcohol dependence in sustained full remission and mild mental retardation, and that he remained incompetent to stand trial but was likely to attain competency in the foreseeable future. Therefore, she recommended a re-evaluation in three months after Mr. K. had received additional competence restoration education. (A.R. A21, A24-A25).

⁴ Natalie Wallace, M.D., in her report dated February 10, 2012, diagnosed Mr. K. as of that date with panic disorder without agoraphobia, alcohol abuse, and mild mental retardation. She further concluded that he did not have a sufficient factual and rational understanding of the proceedings against him, did not have a sufficient present ability to assist his attorney in his own defense, and was not likely to attain competency in the foreseeable future. (A.R. A28).

⁵ West Virginia Code §27-6A-3(h) provides in its entirety as follows:

If at any point in the proceedings the defendant is found not competent to stand trial and is found not substantially likely to attain competency, and if

committed Mr. K. to a mental health facility and further ruled that the court would maintain jurisdiction over him for a period of fifty (50) years, which is the maximum period of confinement if he had been convicted on all charges, or until he regains competency and the criminal charges reach resolution, whichever is sooner. (A.R. A36-A39).

It is from the circuit court's order of February 21, 2012, that this appeal is taken. However, for the sake of presenting a complete procedural record, information about events occurring after entry of the order appealed is included herein. Specifically, on May 21, 2012, the court conducted a "dangerousness" hearing as contemplated by West Virginia Code § 27-6A-3(h), at which time it considered the forensic psychiatric report of Natalie Wallace, M.D., dated March 14, 2012.⁶ The court found, based upon Dr. Wallace's report, that Mr. K. is a

the defendant has been indicted or charged with a misdemeanor or felony in which the misdemeanor or felony does involve an act of violence against a person, then the court shall determine on the record the offense or offenses of which the person otherwise would have been convicted, and the maximum sentence he or she could have received. A defendant shall remain under the court's jurisdiction until the expiration of the maximum sentence unless the defendant attains competency to stand trial and the criminal charges reach resolution or the court dismisses the indictment or charge. The court shall order the defendant to be committed to a mental health facility designated by the department that is the least restrictive environment to manage the defendant and that will allow for the protection of the public. Notice of the maximum sentence period with an end date shall be provided to the mental health facility. The court shall order a qualified forensic evaluator to conduct a dangerousness evaluation to include dangerousness risk factors to be completed within thirty days of admission to the mental health facility and a report rendered to the court within ten business days of the completion of the evaluation. The medical director of the mental health facility shall provide the court a written clinical summary report of the defendant's condition at least annually during the time of the court's jurisdiction. The court's jurisdiction shall continue an additional ten days beyond any expiration to allow civil commitment proceedings to be instituted by the prosecutor pursuant to article five of this chapter. The defendant shall then be immediately released from the facility unless civilly committed.

⁶ Dr. Wallace's report was issued pursuant to the directive set forth in the circuit court's order of February 21, 2012, to assess Mr. K.'s dangerousness risk factors. She opined that at the time of her evaluation (March 9, 2012), Mr. K. continued to meet DSM-IV TR criteria for panic disorder without agoraphobia, alcohol abuse, and mild mental retardation, and that his dangerousness risk factors were such that he would be permitted to progress to a less restrictive Level II-C status at Sharpe Hospital, which would allow him to go off the unit to groups and participate in recreational activities under staff supervision. He did not meet DSM-IV TR criteria for pedophilia. Dr. Wallace's report erroneously refers to the alleged victim as 14 years of age. (A.R. A45-A46).

danger to himself or others and reiterated its previous finding that the offenses alleged were crimes of violence against a person. Therefore, the court continued its prior order of February 21, 2012, requiring Mr. K. to remain under the jurisdiction of the court for fifty (50) years; committed him to the custody of the West Virginia Department of Health and Human Resources (DHHR) for placement at Sharpe Hospital or an equivalent facility; directed the hospital to provide the court with annual written clinical summaries of Mr. K.'s condition; and noted that pursuant to the provisions of West Virginia Code § 27-6A-5 the medical director of Sharpe Hospital may with the consent of the court modify Mr. K.'s placement to a less restrictive environment.

Thereafter, by Order entered September 25, 2012 (A.R. A60), the circuit court filed and provided to counsel two Six-Month Summary/Physical Examination Reports, dated March 14, 2012, and September 18, 2012, along with a cover letter from Cheryl L. France, Clinical Director of Sharpe Hospital, dated September 25, 2012, indicating that there had been no significant change in Mr. K.'s status to warrant discharge. (A.R. A51-A59). Mr. K. remains at Sharpe Hospital, and no further reports have been submitted to the court.

Upon request of the undersigned counsel, for good cause shown, the deadline for perfecting this appeal was extended to December 24, 2012, via a Second Amended Scheduling Order of this Court.

III. SUMMARY OF ARGUMENT

The petitioner contends that neither third degree sexual assault nor sexual abuse by a custodian is a felony that "involve[s] an act of violence against a person" so as to require application of the procedures set forth in West Virginia Code § 27-6A-3(h) for a defendant found not competent to stand trial, i.e., mental health commitment and continuing jurisdiction

by the circuit court for a period equivalent to the maximum sentence the defendant would have received if he had been convicted of all the crimes charged in the indictment. An “act of violence against a person” within the meaning of the statutory scheme addressing competency to stand trial has not been defined by the Legislature, nor has the term been addressed in any interpretive case law issued by this Court in reference to the statutory provisions at issue. If the offenses charged are felonies that do not “involve an act of violence against a person,” West Virginia Code § 27-6A-3(g) mandates a different course of events, namely dismissal of the criminal charges with the option for a twenty-day stay of the dismissal order to allow the prosecutor to institute involuntary civil commitment proceedings pursuant to West Virginia Code § 27-5-1 et seq.⁷

The petitioner’s position is that two separate approaches could be utilized to determine whether either of the offenses charged is a crime of violence. The first is a bright-line, categorical analysis based solely upon the statutory elements of the offenses alleged; whereas the second is a fact-specific examination of the case at bar which would require remand for evidentiary development.

IV. STANDARD OF REVIEW

This Court has held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo

⁷ West Virginia Code § 27-6A-3(g) provides:

If at any point in the proceedings the defendant is found not competent to stand trial and is found not substantially likely to attain competency and if the defendant has been indicted or charged with a misdemeanor or felony which does not involve an act of violence against a person, the criminal charges shall be dismissed. The dismissal order may, however, be stayed for twenty days to allow civil commitment proceedings to be instituted by the prosecutor pursuant to article five of this chapter. The defendant shall be immediately released from any inpatient facility unless civilly committed.

standard of review.” Syllabus Point 1, Crystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under the criteria set forth in Rev. R.A.P.18(a), oral argument is necessary, and because the issue presented in this appeal is one of first impression involving interpretation of a statute, a Rule 20 argument is appropriate.

VI. ARGUMENT

Elements of the Offenses Charged

West Virginia Code § 61-8D-5(a) provides that:

In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony and upon conviction thereof, shall be imprisoned in a correctional facility not less than ten nor more than twenty years, or fined not less than \$500 nor more than \$5,000 and imprisoned in a correctional facility not less than ten years nor more than twenty years.

Clearly an act of violence is not a required element of the offense of sexual abuse by a custodian. To the contrary, the express language of the statute includes circumstances in which force has not been employed against the victim and emotional trauma has not resulted.

Similarly, the crime of third degree sexual assault under West Virginia Code § 61-8B-5, which can be committed in two different ways, does not by its terms involve an element of violent conduct. The provision states:

(a) A person is guilty of sexual assault in the third degree when:

(1) The person engages in sexual intercourse or sexual intrusion with another person who is mentally defective or mentally incapacitated: or

(2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

(b) Any person violating the provisions of this section is guilty of a felony, and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

Proffer of the Underlying Facts

The petitioner further asserts and proffers that a fact-specific analysis of the instant case, if allowed to be developed, would show that the alleged victim, who was six weeks or less from the age of consent at the time of the purported offenses, participated willingly and that no weapons, intimidation, coercion, or threats of any kind were employed. The acts of intercourse, one of which was alleged to have occurred in her bedroom, and the other of which was alleged to have occurred outdoors, were voluntary on the part of the teenager, according to the discovery furnished by the State, and happened because the girl wanted to have a baby. According to her statements, the only persuasion used by the petitioner were his comments to her that he was “horny.”⁸ Unfortunately, because of the

⁸ As the discovery is not evidence, it has not been included in Appendix A.

defendant's mental condition, an intellectual deficit over which he has no control and which cannot be remedied by medication, he is deprived of the opportunity to present any testimony to a jury or to engage in plea bargaining. He is faced with spending in essence a life sentence in Sharpe Hospital or a similar facility, and under the circuit court's ruling there is no mechanism to develop testimony of the underlying facts to show that the crimes alleged did not involve acts of violence.

Case Law Regarding Interpretation of Statutes

This Court has held that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting the rules of interpretation.” Syllabus Point 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 109 (1968). The petitioner asserts that the phrase “act of violence against a person” as used in West Virginia Code § 27-6A-3 is not a term of art, is not ambiguous, and should be accorded its plain, everyday meaning. “Violent offenses” are “[c]rimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon.” BLACK’S LAW DICTIONARY 1408 (5th ed. 1979).

However, if it is necessary to go beyond everyday parlance is assigning a meaning to the term “violence,” a principle of relevance to the instant case is that “[p]enal statutes must be strictly construed against the State and in favor of the defendant.” Syllabus Point 3, State ex rel. Carson v. Wood, 154 W. Va. 397, 175 S.E.2d 482 (1970). The statute under analysis in the case at bar should be regarded as penal because it deprives the petitioner of his liberty by confining him in a locked institutional setting.

“Violence to a Person” in the Context of Post-Conviction Bail Statute

In finding that petitioner K. was charged with crimes involving violence to a person, the circuit court relied upon this Court’s opinion in State ex rel. Spaulding v. Watt, 188 W. Va. 124, 423 S.E.2d 217 (1992). That proceeding was petition for a writ of prohibition in which the State sought to compel the trial court to revoke the respondent’s post-conviction bail after he was convicted of nine counts of first degree sexual assault against his five-year-old stepdaughter and his seven-year-old stepson. At issue was the meaning of “violence to a person” within the context of the post conviction bail statute, West Virginia Code § 62-1C-1(b).

This Court observed that the word “violence” in the statute should encompass more than physical harm, because “[t]here can be no dispute that even in the absence of any significant physical trauma, sexual assaults on young children result in severe emotional and psychological harm.” Spaulding, supra, 423 S.E.2d at 219. In summarizing its analysis, the Court stated:

[W]e decline to resolve the question presented here solely on the ground that physical violence is not an element of the crimes of which [the respondent] was convicted. The fact that the State elected to prosecute first degree sexual assault under W. Va. Code, 61-8B-3(a)(2) (1984), based on the age of the children rather than upon a theory of forcible compulsion, does not mean that the children were not the victims of violence.

Spaulding, supra, 423 S.E.2d at 220. Accordingly, the Court held that the offense of first degree sexual assault involves violence to a person and therefore renders a defendant convicted of that crime ineligible for post-conviction bail.

The petitioner herein asserts that the holding in Spaulding applies only to the crime of first degree sexual assault and should not be generalized to other sexual offenses which have entirely different elements of proof.

Crimes Charged in the Instant Case are not Sexually Violent Offenses as Defined by the Sex Offender Registration Act

The Legislature, in enacting the Sex Offender Registration Act, West Virginia Code § 15-12-1 et seq., explicitly recognized that not all sexual offenses are violent in nature. West Virginia Code §15-12-2(i) categorizes “sexually violent offenses” as: (1) sexual assault in the first degree; (2) sexual assault in the second degree; (3) sexual assault of a spouse; and (4) sexual abuse in the first degree. Notably absent from the list are sexual abuse by a custodian and sexual assault in the third degree, the crimes charged in the instant case.

A guiding principle of statutory construction is set forth in State ex rel. Pinson v. Varney, 142 W. Va. 105, 109-110, 96 S.E.2d 72, 75 (1956) (quoting 50 Am. Jur., Statutes § 363):

Statutes are to be read in *pari materia* and “[w]here it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile law, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions ...” to give force and effect to each if possible.

Therefore, an interpretation of sexual abuse by a custodian and third degree sexual assault as felonies that do not “involve an act of violence to a person” for purposes of the competency statutes is consistent with the exclusion of those crimes from our elected lawmakers’ definition of “sexually violent offenses” within the purview of the sex offender regulatory scheme.

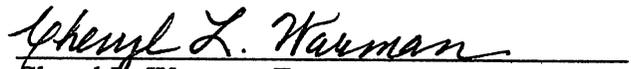
Involuntary Civil Commitment Option

Finally, it is important to note that if the charges against Mr. K. are not characterized as “involving an act of violence against a person” and are therefore dismissed under the provisions of West Virginia Code § 27-6A-3(g), Mr. K. does not automatically walk free. To the contrary, he is subject to involuntary civil commitment proceedings if the State would choose to pursue that option and if mental health experts found that he posed a danger to others.

VII. CONCLUSION

The circuit court’s order committing the petitioner to a criminal commitment of involuntary hospitalization and subjecting him to the continuing jurisdiction of the court for fifty (50) years should be reversed and the matter should be remanded for further proceedings.

Respectfully submitted,



Cheryl L. Warman, Esq.

WV Bar # 3928

Counsel of Record for Petitioner

P.O. Box 662

Morgantown, WV 26507-0662

Telephone: (304) 291-1029

Facsimile: (304) 291-3705

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent

v.

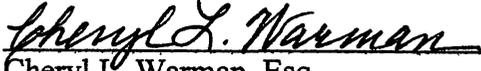
GEORGE A. K., Defendant Below,
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2013, true and accurate copies of the foregoing **Petitioner's Amended Brief** were deposited in the U.S. Mail, postage prepaid, addressed to the following persons:

Laura Young, Esq.
Assistant Attorney General
(Counsel for Respondent)
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
Fax: (304) 558-5833
e-mail: lly@wvago.gov

Melvin C. Snyder III, Esq.
Prosecuting Attorney
106 West Main Street, Suite 201
Kingwood, WV 26537
Telephone: (304) 329-1885
Fax: (304) 329-0372
e-mail: msnyder@prestoncountywv.org


Cheryl L. Warman, Esq.
WV Bar #3928
Counsel for Petitioner