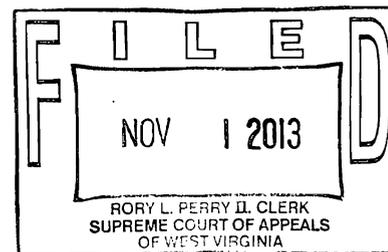


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, ex rel  
BRYAN D. THOMPSON,  
Petitioner



V

Case No.: 13-1036

THE HONORABLE JOSEPH  
C. POMPONIO, JR., JUDGE and  
EUGENE M. SIMMONS as  
PROSECUTING ATTORNEY for  
POCAHONTAS COUNTY,  
WEST VIRGINIA,  
Respondents

RESPONSE OF EUGENE M. SIMMONS  
TO BRYAN THOMPSON'S WRIT OF PROHIBITION

Comes now the State of West Virginia by and through her Prosecuting Attorney in and for Pocahontas County, West Virginia for the State's Response to the Petition for Writ of Prohibition filed herein by Bryan D. Thompson.

- I. STATEMENT OF THE CASE: That in or about October of 2007 the Petitioner was Indicted by the October term of the Grand Jury of the Circuit Court of Pocahontas County by a multiple count Indictment charging the Petitioner with the felonies of Conspiracy to Commit a Felony and Delivery of a Controlled Substance;
  1. That about that point in time the Defendant absented himself from the jurisdiction of West Virginia and remained at large for a period of years until he was located in the State of Florida, subsequently arrested and returned to the State of West Virginia;
  2. That in or about January of 2009 Donna Meadows Price assumed the office of Prosecuting Attorney of Pocahontas County, West Virginia. What followed in the next four (4) years was a tragedy as the said Donna Meadows Price was, and is, simply stated, incompetent;

3. That routinely during the four (4) years in which Donna Meadows Price was Prosecuting Attorney of Pocahontas County criminal defendants saw their charges simply dismissed, felonies negotiated down to misdemeanors and multiple count felony indictments negotiated down to one (1) count pleas;
4. Often times, as here, not only did Donna Price agree to allow the Defendant to plead guilty to one (1) of the two (2) counts for which the Defendant stood indicted, but additionally agreed to "...dismiss the pending charge of Breaking and Entering against the Defendant", and even agreed that "...any motion by the Defendant for parole will not be objected to by the State of West Virginia.";
5. Thereafter, the Defendant appeared before the Honorable Joseph C. Pomponio, Jr., Judge of the Circuit Court of Pocahontas County, West Virginia sitting in Lewisburg, Greenbrier County (it should also be noted that Donna Price routinely scheduled hearings in cases where the actions of the Prosecutor were questionable or simply shameful in Greenbrier County in Order to minimize any potential publicity or disclosure with regard to such questionable negotiations and pleas), there the Defendant appeared before Judge Pomponio and tendered an oral plea of guilty on July 26, 2012 at which time the Court orally accepted the Defendant's plea;
6. A review of the transcript of the July 26, 2012 hearing discloses that at no time did the Defendant or his Counsel raise an issue with regard to the denial of the Defendant's speedy trial rights as set forth in the Defendant's Petition filed with this Court; and, it is clear from the documents and transcripts herein that the plea entered by the Defendant was not entered "in return for the dismissal of the pending bound-over charges from Magistrate Court" as alleged by the Defendant in this Petition but in exchange for the dismissal of the second count of the Indictment for which he stood charged, the

agreement of the State not to oppose parole for the Defendant, as well as the added benefit of Donna Price agreeing to dismiss the pending Breaking and Entering charges;

7. In point of fact, at the Defendant's sentencing held on July 26, 2012 also the date the Court accepted the plea, the Defendant waived presentence investigation, and the Court sentenced the Defendant to a term of incarceration of one (1) to five (5) years and thereafter suspended such incarcerated sentence and placed the Defendant on probation;
8. As a result of the agreement between Donna Price and the Defendant the Defendant received substantial benefit of his bargain plus added bonuses;
9. In January of 2013, Eugene M. Simmons entered upon the Office of Prosecuting Attorney of Pocahontas County, West Virginia and immediately commenced to review the tortured history of the criminal justice system in Pocahontas County over the tenure of Donna Price;
10. What Mr. Simmons and his Assistant Bob Martin found was distressing at best and more akin to a tragedy. The ineptitude and incompetence of Donna Price was seen in just about every single file in the office. Firstly, the computer system in the Prosecutor's Office (for which there was a data storage contract) was swept clean of all file materials of all files maintained by the Prosecutor's Office prior to December 31, 2012. The only manner in which the newly elected Prosecutor and his Assistant could ascertain the status or history of any file was by reference to the paper files. Unfortunately, here again, those files were in total disarray;
11. The elected Prosecutor and his Assistant however were able to discern that Donna Price simply did not know how to perform the duties and responsibilities of a Prosecuting Attorney. During her tenure, the records disclose that there were only three (3) jury

trials conducted before the Circuit Court in the four (4) years of Donna Price's tenure. The records disclose that literally hundreds of felonies and serious misdemeanor cases were simply dismissed either outright and voluntarily by the Prosecutor or as a result of inaction and the languishing of such cases upon the docket of the Courts of Pocahontas County. In those cases where there had been some attempt at prosecution there was a systematic practice by Donna Price of plea bargaining multiple felonies to single felony pleas; misdemeanor pleas for single felony or two (2) felony cases; the overextended use of diversion agreements; and, a general failure to make presentments of felonies to a Grand Jury;

12. When cases were presented to a Grand Jury by Donna Price each and every count of each and every Indictment were facially defective, legally defective, replete with typing and grammatical errors, or contained interlineations and even misstated the Defendant's name in the body of the Indictment. Donna Price failed to attend to the most rudimentary task of the Prosecutor's Office and systematically failed to prepare Orders with regard to motions, sentencing, dispositions, etc. for presentation and entry by the Circuit Judges;
13. Against this background, the newly elected Prosecuting Attorney and his Assistant examined the case of the Defendant Bryan D. Thompson. Upon examination of the file and its contents and particularly the plea agreement and Order it was discovered that the Plea Agreement and Orders in this case are no different than the overwhelming majority of cases handled by Donna Price. Specifically, an examination of page two (2) of the written agreement demonstrates hand written additions, interlineations and hand written corrections on that page alone. Again, on that page of the Plea Agreement which specifically was a Plea Agreement relating to the drug charges (07-F-14) the State

agreed to dismiss the delivery felony count of the Indictment; “to dismiss the pending **charge** of Breaking and Entering against the **Defendant**”; and, “that any motion by the defendant for parole will not be objected to by the State of West Virginia.”;

14. The new Prosecutor and his Assistant took the position that the Plea Agreement dealt with the instant Indictment and by the dismissal of one (1) felony of a two (2) felony count Indictment was of substantial benefit to the Defendant. Added to that, the Defendant received a further substantial benefit by the State, in essence, agreeing to a Motion for Parole for the Defendant and that the dismissal of the pending **charge** of Breaking and Entering was far beyond the bargained for consideration. The State further took the position that the language of the agreement did not include terminology relating to whether or not such dismissal was with or without prejudice;
15. Given that the Defendant had received more than a substantial benefit from the agreement and in the absence of any clarification as to whether or not such dismissal was with or without prejudice the new Prosecutor and his Assistant determined to proceed with an Indictment. Additionally, upon an examination of the transcript of the change of plea hearing which was held before the Circuit Court on July 26, 2012 gave no further clarification. At the change of plea hearing the Court inquired of the State as follows: “Does the State move to dismiss the pending breaking and entering, count III of the indictment?” In response thereto Donna Price responded as follows: “Yes, Your Honor, I do. Pursuant to the agreement, I’d move to dismiss Count II – or Count III, I’m sorry of 07-F-14, and the outstanding pending matter of the breaking and entering. Case numbers have not been assigned, but it will be incorporated into this when that has been determined and filed with this Court.” Such prattle was typical and routine for Donna Price when in Court. Finally, the Court states: “All right, thank you. The Court

dismisses the pending breaking and entering charge against the defendant in Count III of the indictment from the active docket.” The Order entered by the Court on that date states: “The pending matters in Pocahontas County, to-wit: 11-F-12 and 11-F-13 having been dismissed upon the State’s motion.” Again, no mention of the dismissal being with or without prejudice. Additionally, 11-F-12 and 11-F-13 were the Magistrate Court numbers assigned to the Criminal Complaint in Magistrate Court which sets forth two (2) charges wherein charge one (1) is a violation of W.Va. Code, §61-3-12 which is entry of a building other than a dwelling and charge two (2) is Grand Larceny in violation of W.Va. Code, §61-3-13(a);

16. Thereafter, the Court heard two (2) separate Motions to Quash which the Court denied based upon the States’ argument that the record fails to disclose whether or not the dismissal of the “breaking and entering charge” was a dismissal with or without prejudice;

17. Finally, the State finding no law in West Virginia with regard to criminal actions and the requirement of the words “with” or “without prejudice” determined to dismiss Count I of the pending Indictment against the Defendant which contains the charge of entry of building other than dwelling. This was done even though the State believes and contends that the initial agreement to dismiss had to have been with prejudice. Given the fact that every single reference to the “pending charges” was to the **charge** of breaking and entering the State believes that there is absolutely no basis for challenge to the Grand Larceny charge contained in Count II of the presently pending Indictment against the Defendant.

II. STATEMENT OF LAW: The Petitioner/Defendant below presents to this Court the following questions:

1. "Did the Judge of the Circuit Court of Pocahontas County improperly deny the Petitioner's Motions to Quash and For Specific Performance of a Plea Bargain which would have barred the Prosecuting Attorney from seeking an Indictment on charges dismissed as a result of a Plea Agreement made with his predecessor in office?";

2. The State contends that the proper issues are as follows:

A. In a criminal case, does the record have to disclose whether or not pending criminal charges not joined with, associated with or connected with in any way to a Plea Agreement that arises out of a separate pending Indictment need to specify that such dismissal was with or without prejudice?

B. In the instant case, does the repeated and specific reference to the pending **charge** as a breaking and entering charge apply to a criminal complaint pending in Magistrate Court charging Entry of Building Other than Dwelling and Grand Larceny?

C. Under the undisputed facts of this case, does the dismissal of Entry of Building other than Dwelling count of the presently pending Indictment moot the issue raised by the Petitioner/Defendant below in his Petition for Writ of Prohibition?

III. RELIEF REQUESTED: The State of West Virginia believes that the former Prosecuting Attorney of Pocahontas County, West Virginia through her incompetence and unquestioned history of malfeasance, misfeasance and nonfeasance in that office not only failed to properly prepare documents; properly inform the Court as to the full nature of the Plea Agreement reached in the instant case; but, failed to inform the Court or show in any way how the Plea Agreement in this case was in any way consistent with the public interest in the fair administration of justice. The Plea Agreement in this case dealt with drug charges

arising out of a two (2) count Indictment wherein the Defendant was allowed to plead guilty to one (1) count of that Indictment and was guaranteed probation or parole. In point and in fact this Defendant was on the date he entered his plea sentenced and then discharged and released on probation. All, as promised by the former Prosecuting Attorney Donna Price. As such, the Defendant clearly received the benefit of his bargain particularly in light of the fact that the entire purpose for the Plea Agreement in this case was a resolution of the then pending Indictment charging the Defendant with conspiracy to distribute drugs and the distribution of drugs. As such, the Defendant cannot complain that he did not, by these two (2) factors alone not receive the full benefit of his bargain. However, this Defendant further asks that this Court grant him the additional bonanza of the dismissal of the presently pending Indictment charging him in Count I of Entry of a Building other than a Dwelling and in Count II with Grand Larceny. What could possibly have been the bargained for exchange on behalf of this Defendant for such a bonus? Such is in no consonant with the public interest in the fair administration of justice. Myers v. Frazier, 173 W.Va. 658, 319 S.E. 2d 782. Simply stated, in this case this Defendant gave up or gave nothing in exchange for the dismissal of the pending charges.

Additionally, nowhere in the record, documents, pleadings or otherwise does there appear any statement by the Defendant, the Defendant's Counsel, the former Prosecutor, nor the Court as to whether or not the dismissal was with or without prejudice. As such, the State believes that the State acted properly in indicting the Defendant in the present Indictment. However, the State did *nolle* Count I of the presently pending Indictment and that such there is no basis for prohibition as to the presently pending charge of Grand Larceny as set forth in the presently pending Indictment. There is nothing in the record anywhere which relates to the dismissal of a Grand Larceny charge. Quite to the contrary,

each and every statement, representation or written matter refers to the Breaking and Entering charge (the State notes, not illegal entry charge) but nowhere, absolutely nowhere is there a reference to a Grand Larceny charge.

The State urges the Court to dismiss the Defendant's Petition for Writ of Prohibition as moot; and, that the State be allowed to proceed in its prosecution of this Defendant for Grand Larceny as charged in Count II of the presently pending Indictment; and, that the State be granted such other relief as the Court may deem proper.

EUGENE M. SIMMONS  
By Counsel

A handwritten signature in black ink, appearing to read "R. P. Martin", written over a horizontal line.

ROBERT P. MARTIN  
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CERTIFICATE OF SERVICE

I do hereby certify that on this 31<sup>st</sup> day of October 2013 I served a true and correct copy of the foregoing RESPONSE OF EUGENE M. SIMMONS TO BRYAN THOMPSON'S WRIT OF PROHIBITION upon J. STEVEN HUNTER, Counsel for Defendant, BRYAN D. THOMPSON, by faxing a true and correct copy to the following number: (304) 645-4064.



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