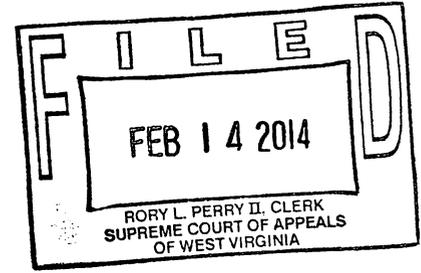


ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0572



Beth Bennett
Petitioner

V.

State of West Virginia,
Respondent

PETITIONER'S REPLY BRIEF

Now comes the Petitioner, Beth Bennett, by and through counsel, G. Wayne Van Bibber and Maggie K. Wall, The Law Offices of G. Wayne Van Bibber & Associates, PLLC, and pursuant to Rule 10(g) of the Rule of Appellate Procedure, files this Reply Brief.

STATEMENT OF THE CASE

This matter involves a criminal conviction under West Virginia Code §18-8-2, commonly referred to as a truancy conviction. Ms. Bennett and her husband, Justin, are the parents of Nathan Bennett. Last year, Nathan was a first grader at Anne Bailey Elementary School in St. Albans, West Virginia. On or about October 8, 2012, the Bennetts received notice that their child had 5.5 unexcused absences from school (Appendix, Volume 1, page 1). On October 22, 2012, Ms. Bennett sent a letter and documentation to the Director of Attendance, Jennifer Lilly, to address the unexcused absences (Appendix Volume 1, pages 2-6). She then called Jennifer Lilly on October 23, 2012, and was assured that everything was taken care of. Ms. Bennett never received another notice of unexcused absence from school, nor was she afforded a meeting with

the principal or designated representative of the school as required by county policy prior to being charged with truancy. The State claims, however, that a letter dated November 19, 2012, was sent to the Bennetts by Ms. Lilly advising them that Nathan had 9 unexcused absences (Appendix, Volume 1, pages 17 and 22). The November letter also purportedly set up a meeting with the Assistant Attendance Director and an Assistant Prosecutor to discuss the truancy issues. The Bennetts claim they did not receive said letter.

On April 10, 2013, Ms. Bennett received a summons to appear in court for truancy charges (Appendix, Volume 1, page 8). Said summons listed 15.5 unexcused absences. Her husband, Justin, also received a summons for truancy charges against him. Ms. Bennett submitted various medical and parental excuses, reducing the number of unexcused absences to only 5. Ms. Bennett met with the principal, Robert Somerville, on April 18, 2013, to discuss Nathan's absences. He verified that Nathan had only 5 unexcused absences. Ms. Bennett then met with Jennifer Lilly, the attendance director, on April 19, 2013, at which time she was advised that the legal limit for unexcused absences was 5. By this point, Nathan had only 5 unexcused absences.

On April 24, 2013, Ms. Bennett appeared before Judge Louis Bloom for her truancy hearing. Ms. Bennett was unrepresented. Fred Giggenbach was the prosecuting attorney. Upon information and belief, the attendance director, Jennifer Lilly, explained to Mr. Giggenbach that there were only 5 unexcused absences. He stated that if there were only 4, he would dismiss the case, but since Ms. Bennett had 5 unexcused absences, she would have to be treated the same as everyone else. He further stated to Ms. Bennett that if she or her husband plead guilty, the charges would be dropped against the other parent. Mr. Giggenbach testified on the record that

he had explained to the Petitioner that if one parent pled, he would move to dismiss the other one (Appendix, Volume 2, page 27, lines 1-4). Criminal charges were dropped as to Mr. Bennett (Appendix, Volume 2, page 29, lines 2-4).

During the hearing, Ms. Lilly testified that there were only 5 unexcused absences and that Nathan, the subject child, had zero absences since receiving the summons (Appendix, Volume 2, page 28, lines 9-11). Ms. Bennett testified that there were only five (5) unexcused absences. She further testified that the child had been ill and suffered from mono in November (Appendix, Volume 2, page 28, line 5-6). The Court replied that “Five is the magic number” (Appendix, Volume 2, page 28, lines 12-13), then accepted her plea of guilty. Judge Bloom accepted Ms. Bennett’s guilty plea and sentenced Ms. Bennett to pay a \$50 fine, along with \$160.80 in court costs, 90 days probation and 5 days community service (Appendix, Volume 2, page 28, lines 23-24 and page 29, lines 1-2).

On May 10, 2013, the Petitioner, through counsel, filed a Motion for Reconsideration of Sentence (Appendix, Volume 1, page 13-15). Said Motion for Reconsideration of Sentence was denied (Appendix, Volume 1, page 76). On May 28, 2013, the Petitioner, through counsel, filed a Motion For Stay of Execution of Sentence (Appendix, Volume 1, page 77-78), which was also denied (Appendix, Volume 1, page 79-80). On May 31, 2013, the Petitioner filed a Motion for Stay of Execution with the Supreme Court of Appeals of West Virginia. Said Stay of Execution of Sentence was granted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Order of this Honorable Court, this matter is scheduled for oral argument

under Rule 20 of the Rules of Appellate Procedure on Tuesday, March 25, 2014.

ARGUMENT

A. Standard of Review

The Standard of Review was properly cited by the Respondent.

B. The court erred in accepting the Petitioner's guilty plea.

Based on the record, the lower Court erred in accepting the Petitioner's guilty plea as it did not make a satisfactory inquiry as to whether there was a factual basis for the plea. The Petitioner was being charged with violating the compulsory school attendance statute. W. Va. Code §18-8-1a requires all children after their sixth birthday to be enrolled and attend school. W. Va. Code §18-8-2 states "any person who, after receiving due notice, shall fail to cause a child or children under eighteen years of age in that person's legal or actual charge to attend school **in violation** of the provisions of this article **or** without just cause, shall be guilty of a misdemeanor." The exemptions to compulsory school attendance are outlined in W. Va. Code §18-8-1. The exemption relevant to this case is found in subsection(d), which states:

A child is exempt from the compulsory school attendance requirement set forth in section one-a of this article if the requirements of this subsection, relating to physical or mental incapacity, are met. Physical or mental incapacity consists of incapacity for school attendance and the performance of school work. In all cases of **prolonged absence** from school due to incapacity of the child to attend, the written statement of a licensed physician or authorized school nurse is required. (Emphasis added)

Accordingly, in order for Ms. Bennett to be guilty of violating W. Va. Code §18-8-2, her child's absences must be in violation of article 8. If, however, Ms. Bennett's child's absences met one

of the enumerated exemptions to compulsory school attendance, she is not in violation of article 8. In order to determine if Ms. Bennett's child's absences met one of the enumerated exemptions to compulsory school attendance, the Court must make certain factual inquiries.

Ms. Bennett did admit that her son had accumulated 5 unexcused absences, but she has not admitted that the absences were in violation of W. Va. Code §18-8-2. Instead she stated that her child was absent from school due to illness, which is one of the enumerated exemptions to school attendance. The Court, however, did not inquire as to these illnesses and the dates of the unexcused absences or whether these absences were consecutive in nature. The Court asked the Petitioner "why is your child not going to school" (App. at 60), to which the Petitioner explained that she had excuses and parent notes and that only five unexcused absences remained (Id. at 61). The Court then asked "why has your child missed so much?" (App. at 61). Ms. Bennett replied "He's been ill and he had mono in November" (Id). The Court made no further inquiry. The Court did not inquire as to the nature of the illness to determine whether it would have exempted the child from compulsory attendance. The Court did not even inquire as to whether the absences due to mono had been excused or if they were a part of the 5 unexcused absences. Without further inquiry from the Court, the Court could not determine if the Petitioner had violated the compulsory attendance statute. Without the factual basis to support the guilty plea, the Court erred by accepting her guilty plea.

The Respondent claims that Ms. Bennett was required by W. Va. Code §18-8-1(d) to provide a written statement by a licensed physician or authorized school nurse. That is incorrect. The statute states that a doctor or nurse excuse is required for a **prolonged absence**. Although the statute fails to define "prolonged absence", by its very definition of the word, a solitary

absence on 5 occasions would not rise to the level of “prolonged absence” triggering the requirement of a doctor or nurse excuse. The record is unclear, however, as to whether the 5 unexcused absences were consecutive or spread out over a period of months. This is more evidence that the lower Court did not make a sufficient inquiry as to the nature of the child’s illness or the dates of his absence to sufficiently determine if the child was exempt from compulsory school attendance.

It should also be noted that nowhere in W. Va. Code §18-8-1(d) does it state a number of days that a child is allowed to miss from school. The statute does not state that you get 4 absences or 5 absences or 6 absences. The statute makes no reference to a specific number of excused or unexcused absences. It simply states that a child is exempt from school attendance if a physical or mental condition makes the child incapable of attending school and doing the school work. Nowhere in W. Va. Code §18-8-2, the statute used to convict Ms. Bennett, does it state a number of days that a child is allowed to miss from school. The only time “5 days” is referenced is in W. Va. Code §18-8-4, which deals with the duties of the attendance director. Upon five total unexcused absences, the attendance director shall serve written notice of the absences. The parent is then afforded 10 days to meet with the principal or other representative to discuss and correct the circumstances causing the inexcusable absences. If, and only if, after receiving the notice and being afforded the 10 days to discuss and correct the circumstances, the parent(s) does not comply, then shall the attendance director make complaint before a magistrate. A parent still has to be proven guilty and the mere fact that an attendance director has a duty to serve written notice after five total unexcused absences, does not in and of itself convict a parent of truancy.

Respondent also cites a memorandum opinion, *In re J.S.*, 12-0567, 2013 WL 500166 (W. Va. Feb. 11, 2013) in support of the State's case that the acceptance of the guilty plea was not in error. *In re J.S.* deals with W. Va. Code §49-1-4(15)(C), part of the State's Child Welfare Statute, and the finding that a minor child is a "status offender" based upon the child being habitually absent from school without good cause. It defines when a child can be deemed a "status offender" but it does not mention 5 days, or any amount of days. It simply states "who is habitually absent from school without good cause."

In the case at hand, Ms. Bennett is not appealing a ruling that her child is a status offender. Her child has not been deemed a status offender pursuant to W. Va. Code §49-1-4(15)(C), nor is the State's Child Welfare statute a part of this matter at all. Ms. Bennett is appealing her conviction under the compulsory school attendance statute, W. Va. Code §18-8-2, as she is not guilty of violating said code section. In the present case, there was no finding that the subject child's absences from school were without good cause. To the contrary, Ms. Bennett testified on the record that her child was absent from school due to illness.

In re J.S. makes reference to W. Va. Code §18-8-4(b) which outlines the duties of the attendance director. Although W. Va. Code §18-8-4(b) states that 5 unexcused absences triggers the duty of the attendance director to send written notice to the parents of the student, the code section does not require that the attendance director cause the parent to be charged with truancy.

C. Statutory Sentence

W. Va. Code §18-8-2 states that upon conviction of a first offense, the Defendant shall be fined not less than fifty nor more than one hundred dollars together with the costs of prosecution, OR required to accompany the child to school and remain through the school day for so long as

the magistrate or judge may determine is appropriate. The magistrate or judge may delay the sentence for a period of sixty school days and if the child is in attendance for the sixty-day period, the sentence may be suspended. Ms. Bennett was ordered to pay fines and court costs, both of which were within the statute, but also ordered to probation and 5 days community service which are not part of the penalty listed in the statute. The Respondent states that the general probationary statute allows for the Court ordered probation. However, “the general rule supported by the weight of authority is that a judgment rendered by a court in a criminal case must conform strictly to the statute which prescribes the punishment to be imposed and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void.” Point 1, Syllabus, *State ex rel Boner v. Boles*, 148 W. Va. 802, 137 S. E.2d 418 (1964), *overruled on other grounds by State v. Eden*, 163 W. Va. 370, 256 S. E. 2d 868 (1979), citing Point 3, Syllabus, *State ex rel. Nicholson v. Boles*, 148 W. Va. 229.

Furthermore, the Respondent fails to address that the lower Court also sentenced Ms. Bennett to 5 days community service. No where in the statute does it allow the court to order community service. The Code allows for a fine and court costs OR the parent may be required to attend school. The sentence the Petitioner received is clearly not allowed by W. Va. Code §18-8-2, and is, therefore, in error.

Additionally, W. Va. Code §18-8-2, further states that a judge may delay a sentence for a period of sixty school days provided the child is in attendance everyday during the sixty-day period. The testimony on the record was that the child had only 5 unexcused absences that were due to illness, and had not missed any more school since March 7, 2012. Furthermore, the

mother had no criminal history. This was the perfect scenario to delay a sentence and Judge Bloom abused his discretion by failing to give Ms. Bennett that opportunity.

D. The matter was not properly before the Court.

West Virginia Code §18-8-2 requires that a parent receive “due notice”. Furthermore, W. Va. Code §18-8-4 requires the attendance director to serve written notice to the parent(s). The Respondent argues that §18-8-4 requires the attendance director to make a complaint to the local magistrate upon five or more unexcused absences. But §18-8-4 clearly states that the attendance director FIRST has to give the parent(s) written notice and afford the parent(s) 10 days to report to the school, and that it is only after a parent fails to comply that the attendance director is to make a complaint to the magistrate.

Ms. Bennett did receive a legal notice in October of 2012 indicating that her son had 5.5 days of unexcused non-consecutive absences. Ms. Bennett provided the required documentation to have these absences excused. According to the school attendance records, her son then accumulated 15.5 days of unexcused absences. She did not receive a written legal notice in regards to those absences, but received a summons on April 10, 2013. At that time, the Petitioner met with both the school principal and the attendance director in regards to the absences. After meeting with both of them, her son’s unexcused absences only totaled 5 unexcused absences.

As the Petitioner did not receive due notice as outlined in the code, this matter had not matured for hearing before the court and a hearing in this matter should not have occurred.

CONCLUSION

The Petitioner’s conviction and sentencing should be dismissed.

Counsel for Petitioner, Beth Bennett



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CERTIFICATE OF SERVICE

I, G. Wayne Van Bibber, counsel for the Petitioner, do hereby certify that I have served a true and exact copy of the foregoing **Petitioner's Brief** to counsel for Respondent, Julie A. Warren, Esq., this 13 day of February, 2014 by depositing the same in the U. S. Mail, postage-paid, and via fax to the following:

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