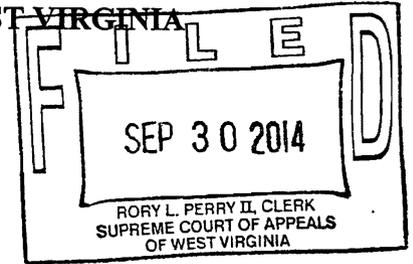


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0981



STATE OF WEST VIRGINIA *ex rel.*
SCOTT R. SMITH, Prosecuting Attorney of Ohio County,

Petitioner,

v.

THE HONORABLE DAVID J. SIMS,
Judge of the First Judicial Circuit,

Respondent.

PETITION FOR WRIT OF PROHIBITION

PATRICK MORRISEY
ATTORNEY GENERAL

CHRISTOPHER S. DODRILL
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 11040
Email: christopher.s.dodrill@wvago.gov
Counsel for Petitioner

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ASSIGNMENT OF ERROR

The Circuit Court exceeded its legitimate powers when it dismissed a juvenile petition based on the erroneous legal determination that a mentally incompetent child did not commit an “act of violence against a person” under West Virginia Code § 27-6A-3 when he brought a deadly weapon to school with the express intent to scare another child.

INTRODUCTION

This is a case about the proper procedure for defendants requiring mental health treatment who pose an express threat to public safety. By this Petition, the State asks this Court to define further the process by which West Virginia trial judges must analyze the nature of crimes charged against defendants deemed incompetent to stand trial and correct an error of the lower court. Under state law, trial judges confronted with a mentally incompetent defendant have two options. If the crime charged did not involve “an act of violence against a person,” then the court must dismiss the charges; but if the alleged crime did involve an act of violence, then the defendant must remain within the jurisdiction of the circuit court for appropriate mental health treatment. The law thus strives to preserve public safety by ensuring that incompetent defendants who pose a risk to public safety receive the treatment they need. Importantly, this regime does not seek to punish the person charged; rather it seeks to protect the public.

STATEMENT OF THE CASE

The underlying facts of this case are not contested. J.Y. was a mentally, physically, and emotionally underdeveloped 12-year-old boy who brought a deadly weapon to school to “scare” an older girl that had been bullying him.¹ As a result, he was charged on September 13, 2013, by

¹ Respondent, a minor, is identified herein by his initials in accordance with Revised Rule of Appellate Procedure 40(e)(1).

a juvenile petition in the Circuit Court of Ohio County with “Possession of a Deadly Weapon on an Education Facility,” a violation of West Virginia Code § 61-7-11a(b)(1). (App. 3.)²

Following a court-ordered psychological evaluation, the Circuit Court found that J.Y. was not competent to stand trial and concluded that his offense was not an “act of violence against a person.” As a result, the court dismissed the juvenile petition against J.Y. under West Virginia Code § 27-6A-1, *et seq.* The sole issue in this appeal is whether the court erred in making that legal determination and consequently dismissing the juvenile petition.

I. J.Y. BROUGHT A DEADLY WEAPON TO SCHOOL TO “SCARE” ANOTHER STUDENT.

On the morning of Friday, September 12, 2013, J.Y. was called to the office of his middle-school principal. The principal had learned from another student that, the prior evening, J.Y. had shown .25-caliber ammunition to other children outside of the local volunteer fire department. The principal confronted J.Y. about the ammunition, and J.Y. admitted to having individual rounds in his pocket, as well as loaded magazines in his school locker. The principal went to J.Y.’s locker and found that J.Y. had not only the loaded magazines, but also a semi-automatic pistol in his backpack. The pistol itself had three rounds in the magazine and one in the chamber, while the other magazine was loaded with seven rounds. (App. 5.)

Police were notified. In response to questioning, J.Y. told an officer that he had taken the pistol from his grandparents’ house and brought it to school in response to bullying incidents that he had suffered. J.Y. said that he wanted to scare a girl that had been bullying him. As a precaution, J.Y. was suspended from school and taken to a juvenile detention center. J.Y. was

² Citations herein to “App. _” refer to the Appendix filed by the Petitioner. The contents of the Appendix, which contain personal identifiers of the juvenile respondent, are filed under seal in accordance with Revised Rule of Appellate Procedure 40(c) because they were sealed in the lower tribunal.

placed on suicide watch there, as he had told a police officer that “he also had the pistol to scare himself and that he was being very emotional.” (*Id.*)

II. THE STATE FILED A JUVENILE PETITION AGAINST J.Y.

The next day, September 13, 2013, J.Y. was charged by a juvenile petition. (App. 3-4.)

The juvenile petition alleged the following:

[J.Y.], a juvenile, on the 13th day of September, 2013, in Ohio County, West Virginia, did commit the offense of ‘Possession of a Deadly Weapon on Premises of an Education Facility’ by unlawfully possessing a firearm or other deadly weapon in or on a public secondary education building, structure, facility or grounds thereof, to wit: by possessing a firearm, which was contained in his school locker, . . . , which the Juvenile admitted bringing onto the school premises, against the peace and dignity of the State and in violation of West Virginia Code § 61-7-11a(b)(1).

(App. 3.) The State attached an affidavit from the responding police officer to the juvenile petition. (App. 5-6.) Following the filing of the juvenile petition, an Ohio County magistrate conducted a preliminary hearing. The magistrate ordered J.Y. to remain in a juvenile facility for psychological evaluation. (App. 1.)

III. J.Y. WAS INCOMPETENT TO STAND TRIAL.

Thereafter, on November 21, 2013, the Circuit Court of Ohio County referred J.Y. for a forensic psychological evaluation under West Virginia Code § 27-6A-1, *et seq.* (App. 1.) That Code chapter requires certain procedures for defendants who may lack sufficient mental capacity to stand trial. In short, if (1) a defendant is not competent to stand trial and is not likely to become competent after three months, and (2) the crime with which he is charged “does not involve an act of violence against a person,” then the charges against the defendant must be dismissed. W. Va. Code § 27-6A-3(g). If the crime does involve an act of violence, then the defendant must remain under the jurisdiction of the circuit court 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.” *Id.* § 27-6A-3(h). Remaining under the court’s jurisdiction means that the court must commit the defendant to the least restrictive mental health facility that will allow for the protection of the public. *Id.*

A forensic psychologist evaluated J.Y. on December 4, 2013. (App. 8.) The psychologist concluded that J.Y. was not competent to stand trial, that he suffered from various emotional disorders, and that he had low emotional development and intelligence. The psychologist determined that J.Y. lacked “a rational, as well as factual, understanding of the proceedings against him.” (App. 9.) Based on J.Y.’s “limited intelligence,” this psychologist opined that J.Y. “is not easily restored or improved” and that “one or two years of education” would be required for him to understand the proceedings. (*Id.*) J.Y. described why he brought the deadly weapon to school: “I took the gun Thursday night. I had the bullets before and I gave [another child] the bullets. I was gonna show it to a girl and scare her.” (App. 12.)

IV. THE CIRCUIT COURT DISMISSED THE JUVENILE PETITION AFTER FINDING THAT J.Y.’S OFFENSE DID NOT INVOLVE “AN ACT OF VIOLENCE AGAINST A PERSON.”

Given J.Y.’s incompetence to stand trial and the psychologist’s opinion that he was unlikely to become competent, the Circuit Court was required to determine whether the offense with which J.Y. was charged—“Possession of a Deadly Weapon on an Education Facility”—involves an “act of violence against a person.” In an order dated March 6, 2014, the court decided that it does not and dismissed the Petition. (App. 15.)

The court based its ruling on the underlying facts of this case. The court concluded that to include an “act of violence,” a crime must have involved some actual, not just potential, violence. Recognizing that “act of violence” was not then specifically defined by statute or by case law, the court noted that a similar term—“offense of violence”—is defined in the state Child

Welfare statute as “an offense which involves the use or threatened use of physical force against a person.” (App. 20 (quoting W. Va. Code § 49-5-10(h).) The court applied this “offense of violence” definition and concluded that J.Y.’s actions were not an “act of violence.” The court based its decision on several factors: J.Y. never brandished the firearm; no one saw the weapon prior to its discovery; and J.Y. never “made any specific threats to, or against, anyone.” (App. 20-21.) The court concluded “that absent any use or threatened use of physical force against a person by [J.Y.], the alleged offense of ‘Possession of a Deadly Weapon on Premises of an Educational Facility’ . . . is not an offense [that] constitutes ‘an act of violence against a person.’” (App. 22.) As a result, the court dismissed the Petition against J.Y.

SUMMARY OF ARGUMENT

Contrary to the Circuit Court’s ruling, a juvenile’s act of bringing a deadly weapon to school to intimidate another student—whether or not violence is in fact used—is an “act of violence against a person” under West Virginia Code § 27-6A-3(g). After the Circuit Court entered its ruling, this Court decided a case that examined the meaning of that term and concluded that an act of violence “encompasses acts that indicate the incompetent defendant poses a risk of physical harm, severe emotional harm, or severe psychological harm to children.” Syl. pt. 2, in part, *State v. George K.*, _ W. Va. __, 760 S.E.2d 512 (2014). This rule applies whether or not the crime expressly contains an act of violence as an element, and it applies even if the victim of the crime was not physically, psychologically, or emotionally harmed.

Although the Circuit Court below did not have the benefit of the *George K.* decision when it made its ruling, this Court has previously held in other contexts that a “crime of violence” can be one in which the mere potential for harm to others exists; a completed act is not required. *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) (per curiam).

The Circuit Court here should have considered not just the lack of *actual* violence that occurred in this case, but also the *potential* for violence that existed in J.Y.'s crime. The court's error in dismissing the juvenile delinquency petition requires that a writ of prohibition be granted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision granting the writ of prohibition is appropriate. *See* Rev. R.A.P. 21.

STANDARD OF REVIEW

Prohibition relief is appropriate when "the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." Syl. pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992). Although this is the standard for criminal cases, the State maintains that it is likewise applicable in juvenile proceedings in which the lower court has dismissed a juvenile petition based on an error of law.

The sole issue in this case is whether J.Y.'s offense constituted an "act of violence against a person" under West Virginia Code § 27-6A-3(h) and thus presents a pure question of law. This Court reviews a circuit court's legal rulings and statutory interpretations *de novo*. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Because the Circuit Court's erroneous ruling deprived the State of the ability to proceed with the juvenile petition against J.Y., a writ of prohibition should issue.

ARGUMENT

A STUDENT’S UNLAWFUL POSSESSION OF A DEADLY WEAPON ON PREMISES OF AN EDUCATIONAL FACILITY WITH THE EXPRESS INTENT TO INTIMIDATE ANOTHER STUDENT IS “AN ACT OF VIOLENCE AGAINST A PERSON” UNDER WEST VIRGINIA CODE § 27-6A-3(H).

I. THIS COURT’S DECISION IN *GEORGE K.* REQUIRES THAT THE CIRCUIT COURT’S DECISION BE REVERSED.

The fundamental flaw in the Circuit Court’s ruling is its failure to focus on the potential for harm inherent in J.Y.’s actions. Decisions from this Court—most notably its June 2014 decision in *State v. George K.*—make clear that “an act of violence against a person” includes not only violent acts causing actual harm, but also acts that carry a risk of violence.

George K.’s facts are not analogous to the facts of J.Y.’s case, but its reasoning nevertheless controls the outcome here. George K. was indicted on charges of third-degree sexual assault of a child and sexual abuse by a custodian. After three psychological evaluations, the circuit court determined that George K., who had an IQ of 60, was incompetent to stand trial and that he was unlikely to gain competence. Proceeding under the direction of § 27-6A-3(h), the court determined that George K.’s offense was “an act of violence against a person” and thus committed him to a mental health facility for the appropriate term. His appeal presented this Court with the question of whether George K.’s crime of third degree sexual assault involved “an act of violence against a person,” since there was no evidence that George K. had used force, threats, or physical violence. *George K.*, 760 S.E.2d at 516-17.

This Court rejected George K.’s argument and affirmed the circuit court’s determination. Pertinent to J.Y.’s appeal, the opinion begins by recognizing that the West Virginia Code does not define the term “act of violence against a person” and that the term is ambiguous. As a result, this Court relied on “the Legislature’s purpose in enacting” § 27-6A-3. *Id.* at 520. Citing the

decision in *State v. Smith*, 198 W. Va. 702, 482 S.E.2d 687 (1996), this Court determined that “there is a dual purpose to § 27-6A-3: treatment of the individual and protection of the public.” *Id.* at 520. From that came the conclusion that “[i]f protection of the public is a purpose of the statute, then the reason for determining whether an act of violence against a person has occurred is prospective due to the risk of recurrence.” *Id.* at 522. “Therefore an ‘act of violence against a person’ within the meaning of W. Va. Code § 27-6A-3 is an act that indicates an incompetent defendant poses a future risk of harm to the public.” *Id.* Furthermore, “acts of violence” under the statute “are not limited to those crimes explicitly listing an ‘act of violence’ as an element.” *Id.* at 523. Additionally, an offense may involve an act of violence even if a victim was not actually harmed. *Id.* at 523-24.

Although *George K.* had not been decided at the time the Circuit Court here rendered its ruling, *George K.* must still be applied in this case on appeal. Determinations under § 27-6A-3 are regulatory rather than penal; they thus do not implicate *ex post facto* concerns. *Id.* at 520 (citing *Smith*, 198 W. Va. at 713, 482 S.E.2d at 698 (holding that commitment statutes are not penal in nature)).

In dismissing J.Y.’s case, the Circuit Court too readily disregarded the potential for violence in J.Y.’s act of bringing a deadly weapon to school to confront a bully. Instead, the court focused only on things that J.Y. did not do, such as brandish the weapon or threaten anyone with it. The fact that J.Y. never brandished his weapon, however, does not remove the potential for violence from his actions, whether physical, emotional, or psychological. Just as a person driving under the influence of alcohol does not need to injure someone to commit a crime of violence, a 12-year-old student possessing a firearm on school grounds with the express intent to intimidate an older child that had been bullying him qualifies as a violent act.

Although the Circuit Court found that J.Y. had not actually brandished the weapon or made any specific threats to other students, the risk for violence was certainly present. J.Y. brought a deadly weapon to school to “show it to a girl and scare her.” Had J.Y. been bullied that day, or if more time had simply elapsed, it is certainly conceivable that he would have brandished the firearm and possibly fired it. The potential for violence and risk of harm to others were present under these facts, and under *George K.*, J.Y.’s offense constituted “an act of violence against a person.”

II. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT “CRIMES OF VIOLENCE” INCLUDE ACTS THAT INVOLVE THE POTENTIAL FOR HARM TO OTHERS.

Notwithstanding *George K.*, past decisions should have likewise compelled a different result in the Circuit Court. Specifically, in cases concerning the proportionality of life recidivist sentences, this Court has held that the term “crime of violence” includes not just crimes that cause *actual* physical harm, but also acts that present the *potential* for harm to others. *See, e.g., State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800 (2002) (per curiam) (concluding that driving under the influence of alcohol is a crime of violence because of the *potential for harm*) (italics added); *State v. Oxier*, 17 W. Va. 431, 369 S.E.2d 866 (1988) (per curiam) (“[O]ur law indicates that crimes involving the *potentiality of violence* fall in the category of those supporting the imposition of a life sentence under the recidivist statute.”) (italics added); *Martin v. Leverette*, 161 W. Va. 547, 555, 244 S.E.2d 39, 43–44 (1978) (stating that burglary is a “serious [crime] and involve[s] the *threat of violence* against persons”) (italics added). The Circuit Court should have applied this reasoning to the facts of J.Y.’s offense.

In *State ex rel. Appleby v. Recht*, for example, this Court recognized that driving under the influence of alcohol is a “crime of violence” for purposes of the constitutionality of a life

recidivist sentence. 213 W. Va. 503, 583 S.E.2d 800 (2002) (per curiam). In determining what constitutes a “crime of violence,” this Court considered the definition of that term used in the United States Sentencing Guidelines. Those federal guidelines provide that an offense is a “crime of violence” if the offense “by its nature, presented a serious potential risk of physical injury to another.” *Id.* at 516, 813 (quoting U.S. Sentencing Guidelines Manual § 4B1.2, app. n.1). The guidelines state that the inquiry is case specific and depends on the conduct “expressly charged.” *Id.* This Court recognized the significant number of deaths caused by drunk driving and that “operating an automobile while under the influence is reckless conduct that places the citizens of this State at great risk of serious physical harm or death.” *Id.* Accordingly, this Court “ha[d] little trouble in finding that driving under the influence is a crime of violence[.]” *Id.* So even without the benefit of the *George K.* decision, the Circuit Court should have applied *Appleby*’s reasoning here and determined that J.Y.’s offense was an “act of violence.”

A finding that J.Y.’s offense constituted an act of violence against a person would further the purpose of § 27-6A-3(h), which is to protect the public. Syl. pt. 4, in part, *State v. Smith*, 198 W. Va. 702, 482 S.E.2d 687 (1996) (“The purpose of West Virginia Code § 27-6A-3 is not to punish someone suffering a mental illness; rather, it is to treat the illness and protect society.”). To that end, the statute distinguishes between those mentally ill offenders who present a danger to the public and those that do not. The “act of violence” requirement ensures that incompetent defendants who present a threat to public safety will stay under the circuit court’s supervision to both obtain treatment and ensure the defendant does not harm anyone else:

Logic dictates that if the Legislature intended these subsections to provide for the protection of the public, then a crime that does not involve an act of violence against a person that therefore allows for the release from supervision of a person deemed incompetent to stand trial . . . must necessarily be a crime that does not indicate that the incompetent defendant poses a future risk of harm to the public.

Similarly, if the crime warrants commitment . . . then the incompetent defendant poses a future risk of harm to the public.

George K., 2014 WL 2695502, at *7.

A child who brings a deadly weapon to school with the express intent to “scare” another child is the very type of defendant this statutory scheme seeks to keep under court supervision. J.Y.’s incompetence underscores the need to protect the public, as J.Y. seemed almost unaware of what he was doing and even scared himself. The circumstances of his offense show a tremendous risk for future harm, and the interests of both J.Y. and the public would be best served by keeping him under the Circuit Court’s jurisdiction.

The relief sought by the State is narrow. Although *George K.* suggests that a categorical approach may be appropriate in some cases (such as sex crimes against children) to determine what offenses constitute an “act of violence against a person,” *see* 2014 WL 2695503, at *8, the State contends that such an approach is not always appropriate and would indeed be inappropriate here. The ultimate goal of the mental competency statute is to protect the public. Reversing the Circuit Court’s determination should not mean that the mere possession of a firearm in a school automatically constitutes an act of violence against a person under West Virginia Code § 27-6A-3(h). Indeed, by its plain terms, the possession offense itself—codified at § 61-7-11a(b)(1)—is a strict liability offense that does not require any intent to cause harm. In this specific case, however, J.Y. expressly intended to intimidate another child with a deadly weapon. It was J.Y.’s intent, not his mere possession of a deadly weapon, that gave rise to the potential for violence in this case. Under these facts and circumstances, J.Y.’s crime presented a serious risk of physical injury to another and thus involved an act of violence against a person.

CONCLUSION

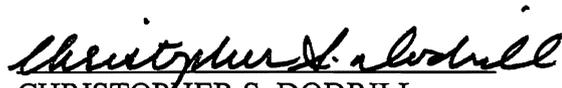
Under the facts presented, J.Y.'s alleged crime constituted an "act of violence against a person," and the juvenile petition against him should not have been dismissed. For the foregoing reasons, a writ of prohibition should issue.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Petitioner,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



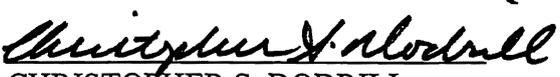
CHRISTOPHER S. DODRILL
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 11040
Email: christopher.s.dodrill@wvago.gov
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the Petitioner, verify that I have served a true copy of "Petition for Writ of Prohibition" upon the Respondent, as well as counsel for the interested juvenile, by depositing it in the United States mail, with first-class postage prepaid, on September 30, 2014, addressed as follows:

Hon. David J. Sims
Judge of the First Judicial Circuit
Ohio County Courthouse
1500 Chapline Street, Room 503
Wheeling, WV 26003

Justin Hershberger, Esq.
Hershberger Law Office
P.O. Box 447
Wheeling, WV 26003


CHRISTOPHER S. DODRILL