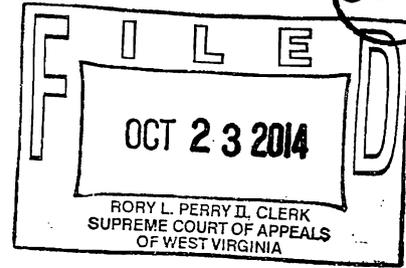


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-00981



**State of West Virginia ex rel.,
Scott R. Smith, Prosecuting Attorney
of Ohio County, West Virginia,**

Petitioner,

v.

**Honorable David J. Sims, Judge of
the First Judicial Circuit, and
J.Y.,**

Respondents.

**RESPONDENT'S ANSWER TO
PETITION FOR WRIT OF PROHIBITION**

Counsel for J.Y.

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STATEMENT OF THE CASE

On September 23, 2013, the juvenile was charged by juvenile petition, with the offense of “Possession of a Deadly Weapon on an Educational Facility” in violation of W.Va. Code § 61-7-11a(b)(1). (App. 3). At the time of the incident, the juvenile was twelve (12) years old and the victim of ongoing bullying. Said bullying was reported to the school and “all the school did was make the bully worse.” (App. 21) Following a forensic psychological evaluation, J.Y. was found not competent to stand trial and not likely to regain competency. The unchallenged evaluation described the juvenile as having the mental age of a nine (9) year old. (App. 7-14). The Court also concluded that the offense was not “an act of violence against a person.” On March 6, 2014, the matter was dismissed pursuant to W.Va. Code § 27-6A-1, *et seq.* (App. 15-22).

SUMMARY OF ARGUMENT

The Circuit Court did not act outside of its jurisdiction or abused its legitimate powers so flagrantly that the State was deprived of its right to prosecute the case or deprived of a valid conviction, when it determined the juvenile was not charged with an “act of violence” and dismissed the juvenile petition pursuant to W.Va. Code § 27-6A-3.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues before the Court should be adequately presented by the briefing process, therefore no oral argument is necessary. If the Court determines that oral argument is necessary, counsel is more than willing to present argument.

STANDARD OF REVIEW

Respondent agrees with the Petitioner that 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 (1992).

ARGUMENT

I. THE PETITION FOR WRIT OF PROHIBITION SHOULD BE DISMISSED FOR NOT BEING TIMELY FILED.

State v. Lewis, 188. W.Va. 85, 95 (1992), requires a Writ of Prohibition to be “promptly presented.” The current Petition for Writ of Prohibition was filed September 30, 2014. The Order that is the subject of the Petition was filed on March 6, 2014, over six months before the filing of the Petition. This can by no means be considered “promptly presented.” It is true that the State filed a Notice of Appeal within thirty (30) days from entry of the Order. However, the appeal was dismissed by this Court on September 17, 2014. Extraordinary remedies are handled by the Court on an expedited basis. The failure to file the proper action by which to have this issued reviewed has denied the Respondent the right to have the Petition heard on an expedited basis. As such, it should be dismissed as not being “promptly presented.”

II. THE CIRCUIT COURT DID NOT ABUSE ITS AUTHORITY WHEN IT DISMISSED THE JUVENILE PETITION PURSUANT TO W.VA. CODE § 27-6A-3.

The State contends the circuit court abused its powers in dismissing the juvenile petition against the Respondent, J.Y. “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 (1992). “This Court has recognized that there is “a very narrow avenue by which the State may seek review” of criminal matters by writ of prohibition. State ex rel. Clifford v. Stucky, 212 W.Va. 599, 601, (2002). Additionally, we have held that “ [a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” State ex rel. Games-Neely v. Overington, 230 W.Va. 739, 747 (2013). The State’s Petition for Writ of Prohibition does not address any of these factors nor make any argument in reference to whether this case is appropriate to be decided via a Writ of Prohibition. This case is not appropriate under the narrow avenue by which the State may seek review in this matter.

Due to the uncontested finding of the circuit court, J.Y. was not competent to stand trial and not likely to obtain competency, the State was not deprived of a valid conviction as the juvenile is unable to be convicted. Therefore, the State must have been deprived of its right to prosecute the case. However, this too, is not the case because of the uncontested finding that the juvenile is unlikely to obtain competency.

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.”

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12 (1996). When analyzing these factors, the State does have adequate means to obtain the desired relief. Pursuant to W.Va. Code § 27-6A-3(g), after the circuit court dismissed the juvenile petition, the Order was held for twenty (20) days to allow for the State to seek a civil commitment order. Under said civil commitment, an individual can remain involuntary committed as long as he poses a danger to himself or others. This would have accomplished the same relief the State seeks here, to have the juvenile committed. Neither is the issue complained of an “oft repeated error that manifests disregard for either procedural or substantive law” nor one that “raises new or important problems or issues of law of first impression.”

The State relies entirely on its argument that the circuit courts order was an error of law. The State contends that this Court’s recent ruling in State v. George K., ___ W.Va. ___ (2014), requires granting of the requested writ and a finding that the offense with which J.Y. was charged is “an act of violence against a person” and placing the juvenile under the Court’s jurisdiction until the age of twenty-one (21). However, George K. is distinguishable from this matter in several facets.

George K., decided after the decision in this matter, dealt with an adult charged with third-degree sexual assault and sexual abuse by a custodian. After multiple evaluations, George K. was found not competent to stand trial and unlikely to gain competency. The circuit court found that George K. was charged with “an act of violence against a person” and placed him under the jurisdiction of the court to be committed to a mental health facility. In affirming the decision, this Court found that W.Va. Code does not define “act of violence against a person” and that it is ambiguous. The Court

indicated there was a dual purpose in W.Va. Code § 27-6A-1, *et seq.* – “treatment of the individual and protection of the public.” The Court ultimately determined

[a]n “act of violence against a person” within the meaning of W.Va. Code § 27-6A-3 (2007) encompasses acts that indicate the incompetent defendant poses a risk of physical harm, severe emotional harm, or severe psychological harm to children.

Syllabus Point 2, State v. George K., ___ W.Va. ___ (2014).

The analysis in George K. dealt almost exclusively with sexual offenses against children. Sexual offenses require interaction with an identifiable victim. The risk of severe emotional or psychological harm is great due to the victim’s memory of the offense. The same is not true of “Possession of a Deadly Weapon on an Educational Facility.” The State concedes “Possession of a Deadly Weapon on an Educational Facility” is a strict liability offense and that it does not require any intent to cause harm. Nor does it require any interaction with another individual. The offense simply regulates where a deadly weapon can be possessed.

Moreover, although George K. seemingly applies a categorical analysis, the State concedes the same is not appropriate here and that “Possession of a Deadly Weapon on an Educational Facility” should not always be deemed to be a crime of “violence against a person.” As George K. lays out a categorical approach, the State concedes the offense should not be categorical defined as an offense involving an “act of violence against a person.” Petition for Writ of Prohibition, 11. When making a determination on a case-by-case basis, the trial court is in a unique position to evaluate the evidence in the matter and should not be overturned unless clearly erroneous.

J.Y. did not brandish the firearm, did not carry the weapon on his person, did not make any specific threats to or against anyone, and there is no evidence that any other

student actually saw the firearm before it was discovered. Had he brandished the weapon or made a specific threat, the offense could be classified as an offense of “violence against a person.” This is because of the real possibility of emotional or psychological harm to others around. The same risk is not involved in this matter.

Placing J.Y. under the jurisdiction of the court for up to ten (10) years will not serve either function of treating J.Y. or protecting the public. A year has passed without the juvenile showing any other signs of aggressive behavior. His incompetency is based on his developmental delays and not by a medically treatable mental illness. As such, the only treatment to aid J.Y. is intense and individual education, for which he does not need housed in an institution. As Judge Sims wrote so eloquently,

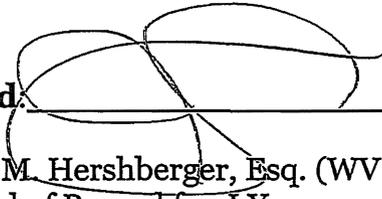
[i]n the age of Columbine and Sandy Hook, the easy and politically correct result in this case would be for the Court to simply define the offense of Possession of a Deadly Weapon on Premises of an Educational Facility “an act of violence against a person” and proceed to institutionalize [J.Y.] for the foreseeable future. This would undoubtedly make the masses happy. However, West Virginia law does not support such a conclusion and to reach such a conclusion would be to engage in what is derisively known as a “result oriented decision.”

(App. 21). Judge Sims considered all of the evidence and made a decision based on a variety of factors. The circuit court’s decision was not “clearly erroneous as a matter of law” and as such, the Writ of Prohibition should be denied.

CONCLUSION

The State has failed to show that a Writ of Prohibition should be granted in this matter. It has failed to address the specific points enumerated for consideration of a Writ of Prohibition. Further the circuit court did not abuse its legitimate powers such 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. As such, the writ should be denied.

Signed:

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal stroke, positioned above a solid horizontal line.

Justin M. Hershberger, Esq. (WV Bar #10370)
Counsel of Record for J.Y.

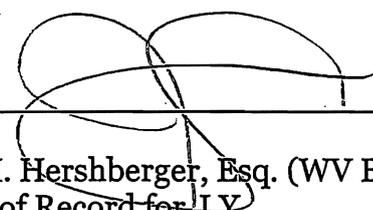
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2014, true and accurate copies of the foregoing **Respondent's Answer** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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Signed: _____


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