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14-1162

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2014 OCT 23 P 2:16

MEGAN DAVIS,

Petitioner,

v.

RON BAUMGARDNER,
Cabell County Magistrate,

Respondent.

J.E. HOOD
CIRCUIT CLERK
CABELL CO. WV

Case No.: 14-C-579
JUDGE F. JANE HUSTEAD

FINAL ORDER

On the 17th day of October, 2014, came Petitioner, Megan Davis, in person and by her counsel, A. Courtenay Craig, and the State of West Virginia on behalf of Respondent by Joe M. Fincham II, Assistant Prosecuting Attorney of Cabell County, West Virginia, for a hearing on a writ of mandamus in the above-styled manner. After hearing the representations and arguments of counsel, the Court made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 4, 2014, warrant 14-F-1383 was issued by Cabell County Magistrate Dan Goheen, which alleged Petitioner committed the felony offense of "Conspiracy to Commit Delivery of a Controlled Substance" by arranging the sale of 16 grams of marijuana for \$75 between a cooperating individual and another individual.
2. On August 5, 2014, Petitioner was arrested and arraigned on said warrant, and a cash-only bond of \$100,000.00 was set by Cabell County Magistrate Dan Goheen.
3. Petitioner was continually incarcerated for ten (10) days.
4. On August 15, 2014, Petitioner was granted an own-recognizance bond.

5. On August 21, 2014, counsel for Petitioner informed the State that he believed the pending criminal charge against Petitioner stemmed from a series of events that counsel for Petitioner believed could possibly constitute “entrapment” and that Petitioner had no prior criminal record, after which time the State requested that the investigating officers in this case review the case materials.

6. On August 22, 2014, Petitioner appeared for and demanded a preliminary hearing.

7. On August 22, 2014, the State did not feel it was in a position to proceed with a preliminary hearing, in part because it had not completed its investigation of Petitioner’s allegation of possible entrapment. The State informed Petitioner of its intention to dismiss the charge against Petitioner. The State also informed Petitioner that it may still present the matter to the Cabell County Grand Jury on an unspecified future date.

8. On August 22, 2014, Petitioner proposed that Petitioner could waive her right to a preliminary hearing in exchange for an open-file agreement instead of the dismissal.

9. On August 22, 2014, the State rejected Petitioner’s proposal of an open-file agreement and instead moved to dismiss the charge against Petitioner under Rule 16 of the Rules of Criminal Procedure for Magistrate Court in order to directly present the matter to the Cabell County Grand Jury on an unspecified future date. The State did not request a continuance because the State did not feel that it would be in a position to proceed on this matter within the twenty-day timeframe imposed by Rule 5 of the Rules of Criminal Procedure for Magistrate Court.

10. On August 22, 2014, over the objections of Petitioner, Magistrate Ron Baumgardner granted the State’s motion to dismiss the charge against Petitioner.

11. It is common practice in Cabell County for the State, for various reasons, to dismiss a felony charge against a defendant in order to directly present the matter to the Cabell County Grand Jury without a waiver of preliminary hearing by the defendant.

CONCLUSIONS OF LAW

1. Writ of Mandamus is the proper mechanism to contest failure to provide a preliminary hearing. *See State ex rel. Rowe v. Ferguson*, 268 S.E.2d 45 (W.Va. 1980).

2. There is no case law directly applicable to the facts of the case. The West Virginia Supreme Court of Appeals has never addressed the issue of whether or not a prosecutor may dismiss a felony charge against a defendant before a preliminary hearing can be held without waiver of a preliminary hearing by the defendant and still present the matter to the grand jury for direct indictment.

3. Rule 5(e) of the West Virginia Rules of Criminal Procedure for Magistrate Court applies to the case at bar, in that “a defendant is entitled to a preliminary hearing unless waived”.

4. The word “shall” is mandatory. *See W.Va. Code 62-1-8 and Nelson v. West Virginia Public Employee Insurance Board*, 300 S.E.2d 86 (W.Va. 1982).

5. Petitioner is entitled to a preliminary hearing as a matter of right if the hearing can be held prior to the return of an indictment. *See Peyatt v. Kopp*, 428 S.E.2d 535 (W.Va. 1993). The preliminary hearing is a critical stage of the proceedings. *Desper v. State*, 318 S.E.2d 437 (W.Va. 1984).

6. The only purpose of a preliminary hearing is to determine whether there is sufficient evidence against an accused to warrant his or her being held for action by a grand jury.

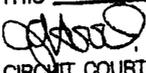
Guthrie v. Boles, 261 F.Supp. 852 (N.D.W.Va. 1967). There is no constitutional right to a preliminary hearing. *Id.*

7. Under Rule 16 of the Rules of Criminal Procedure for Magistrate Courts, the prosecutor has a right to dismiss a criminal charge altogether, but no right to dismiss a felony criminal charge in order to directly present the matter to the grand jury, or to gain a tactical advantage over the defendant, or to merely circumvent the defendant's right to a preliminary hearing. *See State ex rel. Hamstaed v. Dostert*, 173 W.Va. 133, 1338, 313 S.E.2d 409, 414 (1984) (stating that prosecutorial discretion must be "bounded by law"); *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 278 S.E.2d 624, 632 (1981) (stating that a "prosecutor has a duty to support his action with reviewable reasons . . . before he can legitimately move for a *nolle prosequi*"); *United States v. Perate*, 719 F.2d 706, 710 (4th Cir. 1983) (stating that a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice).

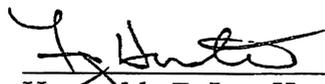
WHEREFORE it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Petitioner is entitled to a preliminary hearing as a matter of right.
2. Petitioner has knowingly and voluntarily chosen to waive that right in exchange for an open-file agreement with the State on these prior charges.
3. Cabell County Magistrate Case No. 14-F-1383 shall remain dismissed.
4. Petitioner is free without bond.

Dated: October 22, 2014

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON OCT 23 2014
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS OCT 23 2014
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ENTER::
ORDER::


Honorable F. Jane Husted

Prepared by:

CRAIG LAW OFFICES



A. Courtenay Craig, Esq. (WVSB #8530)
Counsel for Petitioner Megan Davis
621 Sixth Avenue
Huntington, West Virginia 25701
Telephone: 304-697-4422
Facsimile: 304-699-0016

Approved for entry, with objection:

STATE OF WEST VIRGINIA



Joe M. Fincham II, Esq. (WVSB #11874)
Assistant Prosecuting Attorney of Cabell County
On behalf of Respondent
750 Fifth Avenue, Suite 350
Huntington, West Virginia 25701
Telephone: 304-526-8653

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FILED

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MEGAN DAVIS,

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v.

Case No.: 14-C-579

JUDGE F. JANE HUSTEAD

RON BAUMGARDNER,
Cabell County Magistrate,

Respondent.

ORDER GRANTING STAY OF EXECUTION OF ORDER

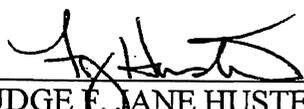
This day came A. Courtenay Craig, counsel for Petitioner, and the State of West Virginia by Joe M. Fincham II, Assistant Prosecuting Attorney of Cabell County, West Virginia, on behalf of Respondent, upon Respondent's Application for a stay of this Court's final Order in this matter.

Upon representations of counsel, this Court was of the opinion to GRANT said Stay of Execution of Order.

Said Stay of Execution of Order shall be effective: (1) until the expiration of the time provided by law for presenting an appeal; and (2) any additional period after an appeal has been perfected pending final disposition of the appeal, unless sooner modified by this Court or by the Supreme Court.

The Clerk of this Court is directed to provide a certified copy of this Order to all counsel of record, including by not limited to: A. Courtenay Craig, counsel for Petitioner; and Joe M. Fincham II, on behalf of Respondent.

ENTER::
ORDER::



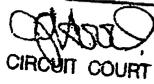
JUDGE F. JANE HUSTEAD

Prepared by:



Joe M. Fincham II, WVSB #11874
Assistant Prosecuting Attorney
On behalf of Respondent
Cabell County Prosecuting Attorney's Office
750 Fifth Avenue, Suite 350
Huntington, West Virginia 25701
(304) 526-8653

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
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ENTERED ON OCT 23 2014
GIVEN UNDER MY HAND AND SEAL OF SAID COURT

THIS OCT 23 2014

JEFFREY E. HOOD, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Approved for entry by:



A. Courtenay Craig, Esq., WVSB #8530
Counsel for Petitioner
621 Sixth Avenue
Huntington, West Virginia 25701
(304) 697-4422