

**State of West Virginia  
Supreme Court of Appeals**

**State of West Virginia,  
Respondent**

**vs.) No. 100929** (Logan County 06-F-111-P)

**Brandon Larue Cox,  
Petitioner**

**FILED**

February 11, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Brandon Larue Cox appeals his conviction for one count of Third Degree Sexual Assault. He was re-sentenced for purposes of appeal on June 28, 2010, and this appeal was timely filed.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court finds no substantial question of law, no prejudicial error, and just cause for affirmance. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner's sole assignment of error is that the circuit court erred by failing to dismiss the indictment in this matter because his trial did not commence within three terms of court as required by West Virginia Code § 62-3-21. This statute provides, in part, as follows:

Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing

to appear according to his recognizance, or of the inability of the jury to agree in their verdict . . . .

The circuit court heard the motion to dismiss on November 8, 2007, and denied the motion by order entered December 5, 2007. The order does not specify the reasons for the denial, and no transcript of this hearing appears in the record on appeal. This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. Syl. Pt. 1, in part, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009).

Petitioner was indicted during the May 2006 Term of the Circuit Court of Logan County. The September 2006, January 2007, and May 2007 Terms of Court passed without a trial. Petitioner was tried during the September 2007 Term of Court. However, it is undisputed that defense counsel had a heart attack on or about April 2, 2007, and thereafter required surgery and extensive recuperation. Although there does not appear to have been any formal motion to continue, defense counsel's serious health condition would have prevented the case from being tried during the remainder of the January 2007 Term of Court, and during part or possibly all of the May 2007 Term of Court. If either one of these terms is not counted, then petitioner was tried within three terms of court. The Court finds that this understandable delay is attributable to the defense.

For the foregoing reasons, we affirm the conviction.

Affirmed.

**ISSUED:** February 11, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh