

Per Curiam:

State of West Virginia ex rel.
O. C. Spaulding, Prosecuting Attorney
for Putnam County,

No. 20853 v.

Honorable Clarence L. Watt, Judge
of the Circuit Court of Putnam County,
and Mark J. McClelland

In this original proceeding in prohibition the relator, the State of West Virginia, prays that this Court prohibit the respondent, Clarence L. Watt, Judge of the Circuit Court of Putnam County, from providing respondent Mark J. McClelland with a new trial on certain criminal charges. The State claims that respondent McClelland has not made an adequate showing for a new trial and that, given the particular circumstances of the case, the judge does not have jurisdiction to grant a new trial. After reviewing the documents filed and the questions presented, this Court agrees and grants the relator the relief sought.

On November 16, 1989, a grand jury in Putnam County returned an indictment charging Mark J. McClelland with twenty-two felony counts of sexual abuse in the first degree. The indictment grew out of an investigation of allegations that Mr. McClelland had, on numerous occasions, sexually assaulted his five-year-old stepdaughter and his seven-year-old stepson.

After the return of the indictment, counsel for respondent McClelland filed motions for discovery. In response to the motions, the State provided Mr. McClelland with the criminal investigation report in the case, a report which contained all material which the State had in its possession. The State also provided him with a copy of a taped video statement given by the alleged victims. The motions for discovery did not request information relating to the specific dates of the alleged incidents leading to the indictment, and at no time did respondent McClelland request by bill of particulars, or by any other motion, specific dates when the alleged acts occurred.

During trial, the two children who were allegedly victimized testified that they had been sexually assaulted every time they visited the respondent McClelland's residence. They were unable to remember the specific dates. To establish the dates, the State called the father of the victims, who testified that he had personally reviewed his work records and that he had determined that the children had visited the respondent McClelland's residence on eleven occasions during the time frame set forth in the indictment.

In the course of the trial, defense counsel moved for a mistrial, alleging that the State had failed to provide the respondent McClelland with the eleven dates of the visits of the children with

respondent McClelland. The State took the position that respondent McClelland had never asked for the specific dates and that if the information had been requested, the State would have attempted to provide it. The State also represented that the dates had been definitively ascertained only immediately prior to trial.

The trial court denied respondent McClelland's motion for mistrial, and on March 16, 1990, the jury convicted him on nine of the charges and acquitted him on two others.

After being convicted, respondent McClelland, on March 31, 1990, filed a motion for a new trial. In that motion, and in a supporting affidavit, he did not aver that the State had withheld evidence. Instead, he attacked the credibility of the State's witness regarding the dates.

On April 16, 1990, the trial court denied the motion for a new trial and on June 5, 1990, sentenced Mr. McClelland to two consecutive fifteen-to-twenty-five-year terms in the penitentiary and to seven fifteen-to-twenty-year terms, which were to run concurrently with the first two terms.

After the motion for a new trial was denied, defense counsel, on June 8, 1990, filed a notice of intent to appeal in the Circuit

Court of Putnam County. The motion did not assign as error the withholding of evidence by the State.

On February 11, 1991, defense counsel filed a second motion for a new trial. That motion alleged newly discovered evidence, but again did not allege that the State had withheld evidence.

On November 20, 1991, nine months after the filing of the second motion for a new trial, and one year and eight months after the conviction, the trial judge issued a letter opinion which held that the respondent was entitled to a new trial on the basis of newly discovered evidence. The judge found that, months prior to the commencement of trial, the State possessed definite and precise dates on which the crimes of sexual assault were allegedly committed and concluded that this evidence impeached the credibility of the State's witness regarding the dates.

In the present proceeding, the State, which is seeking to prohibit the new trial, argues that in order to obtain a new trial on the ground of newly discovered evidence, a defendant must show that new evidence has been discovered since trial, that he had previously made a diligent effort to ascertain and secure the new evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. Further, the evidence must be new and material, not merely cumulative, and it must be of such

a nature as ought to produce the opposite result of a second trial on the merits. Lastly, the State claims the purpose of the evidence should not be solely to discredit or impeach a witness on the opposite side. The State argues that the defendant's showing in the present case did not meet these standards.

This Court agrees with the State's assertions, for the Court has stated that:

"A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side."

Syllabus, State v. Frazier, 162 W.Va. 935, 253 S.E.2d 534 (1979), quoting, Syllabus Point 1, Halstead v. Horton, 38 W.Va. 727, 18 S.E. 953 (1894). See also, State v. Catlett, ___ W.Va. ___, 376 S.E.2d 834 (1988).

The Court has also indicated that, "A new trial on the ground of after-discovered evidence is very seldom granted and the circumstances must be unusual or special." Syllabus point 9, State v. Hamric, 151 W.Va. 1, 151 S.E.2d 252 (1966).

In the present case, the respondent McClelland advanced as newly discovered evidence, evidence to challenge the veracity of the children's father's statements as to when the children visited respondent McClelland's residence. It appears that the sole purpose of the evidence proffered was to discredit or impeach the children's father. During trial both child witnesses testified in detail as to the manner in which the defendant sexually assaulted and abused them, and they testified that the assaults occurred every time they visited the respondent McClelland's residence. Further evidence showed the jury when the children visited the residence. It is clear from the verdict that the jury believed that the children were sexually assaulted by respondent McClelland when they visited his residence.

This Court believes that there was substantial evidence in the case that the children involved in the case were assaulted every time they visited respondent McClelland's residence, and that even though the new evidence might have cast some doubt on the exact hours or precise dates of the visits, it would not have shown that the visits did not occur within the time frame involved in the case. The evidence was proffered principally to discredit or impeach the

children's father, and overall it was, and is, not of such a nature as ought to produce an opposite result at a second trial on the merits.

The Court notes that the motion for a new trial in this case on the basis of newly discovered evidence was filed after the defendant had filed a notice of intent to appeal and after an appeal was pending in this case.

Rule 33 of the West Virginia Rules of Criminal Procedure provides, in relevant part, that:
A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

In view of the fact that an appeal was pending in respondent McClelland's case and that the case had not been remanded, the Court believes that the trial judge exceeded his jurisdiction when he granted a new trial.

It is rather clear that prohibition will lie where an inferior tribunal proceeds in a cause where it has no jurisdiction, or, where having jurisdiction, it exceeds its legitimate powers. Cowie v. Roberts, 173 W.Va. 64, 312 S.E.2d 35 (1984); Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953).

It is, therefore, Adjudged and Ordered that a writ of prohibition be, and the same hereby is, issued prohibiting the respondent Judge of the Circuit Court of Putnam County from affording Mark J. McClelland a new trial on the charges which are involved in this matter. It is further Adjudged and Ordered that the said judge proceed in the manner provided by law with the disposition of respondent McClelland on the convictions rendered.

An attested copy of this order shall have the same legal effect as a formal writ of prohibition.