No. 22495 - State ex rel. R.L. v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, and Steven R. Bratke, Court-Appointed Special Prosecuting Attorney for the State of West Virginia

Cleckley, Justice, concurring:

I concur with the majority that the unsigned indictment was not fatally flawed and that the writ of prohibition should be denied in this case. However, I believe a different approach is necessary to prevent this problem from recurring. Although I reach the same result, in order to provide some additional appellate guidance for future cases, I expand on the majority's holding. The majority holds "the attestation of the prosecuting attorney to the grand jury foreperson's signature is not required" in cases "where a grand jury returns an indictment based on a citizen's complaint and presentation[.]" Syllabus Point 2, in part.

Instead of holding that the prosecuting attorney's attestation is not needed in this case, I believe a better approach, and one consistent with West Virginia precedent, is to rely on our prior cases[1] holding that such attestation must appear on the

[1]See State v. Davis, 178 W. Va. 87, 357 S.E.2d 769 (1987); State v. Huffman, 141 W. Va. 55, 87 S.E.2d 541 (1955); State v. De Board, 119 W. Va. 396, 194 S.E. 349 (1937); State v. Burnette, 118 W. Va. 501, 190 S.E. 905 (1937).

indictment pursuant to W. Va. Code, 62-9-1 (1931), and to order the prosecuting attorney to sign the indictment.

Significantly, the prosecuting attorney was involved with this case before it was brought before the grand jury. D.W.S., the victim, went to see a therapist upon the direction of the prosecuting attorney's office. The prosecuting attorney's office did not bring the matter before the September, 1992, grand jury because it did not have sufficient time to study the report of Sergeant Walker and prepare a presentation. As the majority states: "When D.W.S. presented the matter to the May 1993 Grand Jury, the prosecuting attorney maintained that he 'has never refused to act' and 'that this matter will be presented after we get the information to proceed, which should have already been provided.'" ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 3). (Emphasis added). However, for reasons not clear to this Court, the prosecuting attorney refused to attest to the grand jury foreperson's signature on the indictment.

"The prosecuting attorney is the constitutional officer charged with the responsibility of instituting prosecutions and securing convictions on behalf of the State of those who violate the criminal law. W. Va. Const. art. 9, § 1; W. Va. Code § 7-4-1

[1971]." State ex rel. Skinner v. Dostert, 166 W. Va. 743, 750, 278 S.E.2d 624, 630 (1981). Certainly, the prosecuting attorney is vested with certain discretion, as we stated in Skinner:

> "The prosecuting attorney, in his sound discretion, may refrain from prosecuting a cause or, having commenced a prosecution, may move the dismissal of a cause, when in good faith and without corrupt motivation or influence, he thinks that the guilt of the accused is doubtful or not capable of adequate proof. See generally, Annot., 155 A.L.R. 10; 63 Am.Jur.2d, Prosecuting Attorneys § 26 (1972)." 166 W. Va. at 752, 278 S.E.2d at 631.

Nonetheless, the prosecuting attorney does not command unbridled discretion. In State ex rel. Ginsberg v. Naum, 173 W. Va. 510, 512, 318 S.E.2d 454, 455-56 (1984), we state:

> "Prosecutors are charged with the duty to prosecute all violators of state criminal laws in their counties. W. Va. Code, 7-4-1 states:
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> > "'It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender. (Emphasis supplied.)'

[2]See State ex rel. Hamstead v. Dostert, 173 W. Va. 133, 313 S.E.2d 409 (1984) (detailed discussion of prosecutorial discretion).

> 'Shall' is mandatory and makes it a prosecutor's non-discretionary duty to institute proceedings against persons when he has information giving him probable cause to believe that any penal law has been violated." (Emphasis in original; citations noted).

Based on the foregoing principles, the prosecuting attorney lacked discretion to refuse to attest to the authenticity of the indictment charging the defendant with sexual assault, after it was returned by a grand jury which found probable cause. The prosecuting attorney has a "nondiscretionary duty to act upon this

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[3]Courts must apply this statement within reason. We recognize that antiquated laws remain which are inappropriate to enforce.

> "It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs. Moreover, some violations occur in circumstances in which there is no significant impact on the community or on any of its members. A prosecutor should adopt a 'first things first' policy, giving greatest attention to those areas of criminal activity that pose the most serious threat to the security and order of the community." ABA Standards for Criminal Justice Prosecution Function and Defense Function, Investigation for Prosecution Decision 73 (3rd ed. 1993).

[4]"State ex rel. Hamstead v. Dostert, 173 W. Va. 133, 313 S.E.2d 409 (1984); State ex rel. Skinner v. Dostert, 166 W. Va. 743, 278 S.E.2d 624 (1981). Cf., Syllabus Point 1, Nelson v. West Virginia Public Employees Insurance Board, 171 W. Va. 445, 300 S.E.2d 86 [(1982)] (discussing the mandatory character of the word 'shall' in statutes)."

probable cause[.]" State ex rel. Hamstead v. Dostert, 173 W. Va. 133, 139, 313 S.E.2d 409, 415 (1984). Therefore, the circuit court should have ordered the prosecuting attorney to sign the indictment to attest to its authenticity. I do not believe that the prosecuting attorney should be able to nol pros (nolle prosequi) simply by refusing to sign the grand jury's indictment. The concurring opinion in United States v. Cox, 342 F.2d 167, 179 (5th Cir.), cert denied 381 U.S. 935, 85 S. Ct. 1767, 14 L.Ed.2d 700 (1965), states:

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[5]I do not believe, however, it would be wise to order the prosecuting attorney to prosecute a case. The judiciary simply lacks the capacity to monitor whether a prosecuting attorney is in good faith presenting a case. However, where the prosecuting attorney is unwilling to discharge his responsibilities under W. Va. Code, 7-4-1, the circuit court should proceed pursuant to W. Va. Code, 7-7-8 (1987), to replace the prosecuting attorney temporarily. See State ex rel. Preissler v. Dostert, 163 W. Va. 719, 260 S.E.2d 279 (1979); State ex rel. Goodwin v. Cook, 162 W. Va. 161, 248 S.E.2d 602 (1978).

Indeed, had I been a member of this Court when cases such as Ginsberg were decided, I would have dissented. For a circuit court to order the prosecuting attorney to proceed in a case that he has declined would "invest prosecutorial power in the judiciary, power which under the Constitution is reserved for the executive branch of government." United States v. Cox, 342 F.2d 167, 179 (5th Cir.) (concurring opinion), cert. denied, 381 U.S. 935, 85 S. Ct. 1767, 14 L.Ed.2d 700 (1965). I believe that when a prosecuting attorney violates W. Va. Code, 7-4-1, the remedy is replacement or impeachment not mandamus. Also, I am unconvinced that the West Virginia legislature intended to withdraw the normal prosecutorial discretion in W. Va. Code, 7-4-1. Using the word "shall" in the context of a general discussion of prosecutorial duties is insufficient to evince a legislative purpose to bar the exercise of executive discretion in the prosecution of criminal cases. See generally Moses v. Kennedy, 219 F.Supp. 762 (D.D.C. 1963).

> "The grand jury may be permitted to function in its traditional sphere, while at the same time enforcing the separation of powers doctrine as between the executive and judicial branches of the government. This can best be done, indeed, it is mandatory, by requiring the United States Attorney to assist the grand jury in preparing indictments which they wish to consider or return, and by requiring the United States Attorney to sign any indictment that is to be returned. Then, once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward."

I am persuaded by the above reasoning. The signature of the prosecuting attorney, together with that of the grand jury's foreperson is a formal effective initiation of a prosecution. The indictment immediately triggers the right of a defendant to a speedy trial, the right to counsel where it has not already attached, and the right to discovery under Rule 16 of the West Virginia Rules of Criminal Procedure. Thus, a defendant is not likely to be prejudiced by any further delay.

Accordingly, I would remand this case to the circuit court with these directions.

[6]See Massiah v. U.S., 377 U.S. 201, 84 S. Ct. 1199, 12 L.Ed.2d 246 (1964).