IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

_____

No. 22495

_____

STATE OF WEST VIRGINIA EX REL.
R. L.,
Petitioner

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,
Respondents

Writ of Prohibition

WRIT DENIED

Submitted: November 1, 1994
Filed: December 8, 1994

Scot S. Dieringer, Esq.
Clarksburg, West Virginia
Attorney for the Petitioner

Steven R. Bratke, Pro Se
Court-Appointed Special Prosecutor
for the State of West Virginia
McNeer, Highland & McMunn
Clarksburg, West Virginia

JUSTICE NEELY delivered the Opinion of the Court.
CHIEF JUSTICE BROTHERTON did not participate.
RETIRED JUSTICE MILLER sitting by temporary assignment.
JUSTICE CLECKLEY concurs, and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "By application to the circuit judge, whose duty is to insure access to the grand jury, any person may go to the grand jury to present a complaint to it. W.Va.Const. art. 3, § 17." Syllabus Point 1, State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981).

2. In cases where a grand jury returns an indictment based on a citizen's complaint and presentation, the attestation of the prosecuting attorney to the grand jury foreperson's signature is not required and the lack of such attestation, standing alone, is insufficient grounds for dismissal of an otherwise authentic indictment. The attestation requirement of W. Va. Code 62-9-1 [1931] does not apply in cases where the prosecuting attorney did not present the complaint to the grand jury. To the extent that our holding in this case contradicts our holdings in 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. DeBoard, 119 W. Va. 396, 194 S.E. 349 (1937), and State v. Burnette, 118 W. Va. 501, 190 S.E. 905 (1937), they are overruled.

Neely, J.:

R.L. seeks to prohibit his further prosecution under an indictment issued by the Harrison County Grand Jury during its May 1993 term because the indictment, although signed by the grand jury foreperson, did not contain the attestation of the Prosecuting Attorney of Harrison County to the signature of the grand jury foreperson as required by W. Va. Code 62-9-1 [1931]. The indictment against R.L. was sought, not by the prosecuting attorney but, by S.D.W., a private citizen who alleges that approximately seventeen years ago, when she was five years old, R.L. sexually assaulted her. Because the proceedings in this matter resulted from a private citizen's presentation to the grand jury and no other irregularities appear, we find the prosecuting attorney's attestation of the grand jury foreperson's signature is not required when the indictment was sought from the grand jury by a private citizen if the indictment

[1]Consistent with our practice in cases involving sensitive matters, we use initials rather than full names. See Matter of Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991); David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989).

[2]The indictment charged: "That . . .[R.L.], on the _____day of _____, 1976, in the said County of Harrison, did unlawfully, feloniously, wilfully and intentionally subject one . . . [S.D.W.] to sexual contact, by forcible compulsion and without her consent, in violation of West Virginia Code 61-8B-6, against the peace and dignity of the State."

is otherwise attested to by the foreperson of the grand jury. To the extent our holding in this case contradicts our holdings in 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. DeBoard, 119 W. Va. 396, 194 S.E. 349 (1937), and State v. Burnette, 118 W. Va. 501, 190 S.E. 905 (1937), they are overruled.

I

In 1992, S.D.W. told a boy friend that she had been sexually abused as a child by R.L., the former husband of her now deceased sister. The boy friend told a relative of S.D.W. who, in turn, requested the police investigate the allegations. According to Sergeant Walker, the investigating officer who testified before the grand jury, and S.D.W., the alleged abuse occurred in the Spring/Summer of 1976 during family visits when S.D.W., who was then five years old, was left alone with R.L., her brother-in-law. Allegedly in several separate incidents, R.L. kissed and rubbed S.D.W. on the mouth, neck, chest and stomach. S.D.W. also alleges that on several occasions while both were wearing clothes, R.L. touched her with his penis and pressed himself against her vaginal area.

Except for S.D.W. and R.L., there were no other witnesses. When S.D.W. matured, she told her boy friends about the incidents to explain her aversion to being touched. At the request of the prosecuting attorney's office, S.D.W. went to a therapist who found that S.D.W. exhibits symptoms similar to those of a sexually abused person. S.D.W.'s description of the alleged abuse has remained constant.

Just before the September 1992 grand jury term, Sergeant Walker reported the results of his investigation to the prosecuting attorney's office. Because of the workload of the prosecuting attorney's office, the prosecuting attorney decided that there was insufficient time to study and consider the report and, therefore, he did not present this matter during the September 1992 grand jury term. Before the May 1993 grand jury term, S.D.W., at the prosecuting attorney's request, began seeing a therapist; however, by the May 1993 grand jury term, the prosecuting attorney had not received any information from the therapist. When S.D.W. 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."

Because the prosecuting attorney did not plan to present this matter during the May 1993 grand jury term, S.D.W. appeared before the grand jury and presented her complaint. The grand jury returned an indictment charging R.L. with sexual abuse in the first degree. The indictment was signed by the grand jury foreperson, and on the reverse side thereof, the Clerk of the Circuit Court of Harrison County certified that the indictment was "a true copy of the indictment entered in the above-styled action on the 6th day of May, 1993." However, the prosecuting attorney did not attest to grand jury foreperson's signature.

On 7 June 1993, the prosecuting attorney moved to recuse his office from prosecuting this case and requested the appointment of a special prosecutor. On 28 June 1993, the circuit court granted the recusal motion and appointed Steven Bratke as special prosecutor. On 12 July 1994, R.L. filed a motion to quash or dismiss the indictment because the indictment lacked the attestation of the prosecuting attorney. After the circuit court on 8 August 1994 denied R.L.'s motion to dismiss the indictment, R.L. petitioned this

[3]On 19 April 1993, the Circuit Court of Harrison County issued an administrative order outlining the procedures to be followed by a person wishing to appear before a Harrison County Grand Jury. The petition does not allege any irregularities concerning these procedures.

Court to prohibit further prosection of the underlying case against him.

II

We have long recognized the right of every person to seek redress through the courts. The W. Va. Constitution, art. 3, § 17 guarantees that "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." In State ex rel. Skinner v. Dostert, 166 W. Va. 743, 753, 278 S.E.2d 624, 631 (1981), we noted that "[t]he 'spirit of the law' has long been and it has been long held that '[t]he public has rights as well as the accused, and one of the first of these is that of redressing or punishing their wrongs'. Ex parte Santee 2 Va.Cas. 364 (1823)." Skinner also recognized that "the prosecuting attorney is vested with discretion in the control of criminal causes, which is committed to him for the public good and for the vindication of the public interest. [Citations omitted.]" Skinner, 166 W. Va. at 752, 278 S.E.2d at 631.

Vesting discretion in the prosecuting attorney does not foreclose a citizen's right to seek redress through the courts for personal wrongs. Indeed, "the grand jury must be open to the public for the independent presentation of evidence before it." State ex rel. Miller v. Smith, 168 W. Va. 745, 753, 285 S.E.2d 500, 504 (1981)(prosecuting attorney should not attempt to influence the grand jury by means other than presentation of evidence or giving court supervised instructions). In order to insure the accessibility of the grand jury to citizens, in Syl. pt. 1, Miller, we stated:

> By application to the circuit judge, whose duty is to insure access to the grand jury, any person may go to the grand jury to present a complaint to it. W.Va.Const. art. 3, § 17.

See Myers v. Frazier, 173, W. Va. 658, 679, 319 S.E.2d 782, 804 (1984); Powers v. Goodwin, 170 W.Va. 151, 158, 291 S.E.2d 466, 473 (1982); Cogar v. Strickler, 570 F.Supp. 34, 35-36 (S.D.W.Va. 1983).

Recently in Harman v. Frye, 188 W. Va. 611, 621, 425 S.E.2d 566, 576 (1992)(citizens must bring their complaints first to the prosecuting attorney or the appropriate law enforcement agency), we reaffirmed our holding in Syl. pt. 1 of Miller and stated that "the grand jury must be open to the public as a matter of constitutional right." In Harman, we ordered the appointment of

a special prosecutor in order to avoid a potential conflict of interest in criminal cases involving cross-warrants and thus allowed the prosecuting attorney to fulfill "the duty of prosecuting all crimes, including misdemeanors." Harman, 188 W. Va. at 621, 425 S.E.2d at 576.

In this case, R. L. maintains that the indictment issued by the May 1993 grand jury is defective and should be dismissed because the prosecuting attorney did not attest to the grand jury foreperson's signature. In support of his contention R. L. notes that W. Va. Code 62-9-1 [1931] uses the word "shall" to indicate the necessity of the prosecuting attorney's attestation. W. Va. Code 62-9-1 [1931], which prescribes the general form for indictments, states, in pertinent part:

> All indictments in this State, if procured, found and returned in all other respects as provided by law, shall be sufficient if in the following form:
>
> . . .
>
> [A generalized or skeleton form is provided.]
>
> Found upon the testimony of _____, duly sworn in open court to testify the truth and sent before the grand jury this the _____ day of _____, 19__.
>
> (Signed) _____
> Prosecuting Attorney.
>
> Said indictment shall have legibly indorsed on the reverse side thereof the words "State of West Virginia versus _____ Indictment for a _____ (Felony or Misdemeanor, as the case may be).

> _____Foreman of the Grand Jury. Attest: _____, Prosecuting Attorney of _____, county, West Virginia." [Emphasis added.]

The first lines of W. Va. Code 62-9-1 [1931] indicate that prescribed outlined indictment form is not indispensable and that an indictment "adopting different phraseology will be good if essential elements are properly set forth." State v. Burnette, supra, 118 W. Va. at 504, 190 S.E. at 906. However, because of the legislature used the word "shall" in connection with the signature of the grand jury foreperson and the attestation of the prosecuting attorney, State v. Burnette, 118 W. Va. at 504, 190 S.E. at 907, concluded "an indictment. . . not carrying on its back the indorsement of the prosecuting attorney, is fatally defective on motion to quash." See also Syl. pt. 2, State v. Davis, supra ("the endorsement [of the grand jury foreperson] and attestation [of the prosecutor] are sufficient if they appear on the face of the indictment"); State v. Huffman, supra, 141 W. Va. at 71, 87 S.E.2d at 551 (purpose of the requirement "is to identify and authenticate the indictment and to prevent the substitution or the use of" a non-authentic indictment); Syl. pt. 7, State v. DeBoard, supra.

In this case, R.L. seeks to use a procedural safeguard, namely, the prosecuting attorney's attestation, to defeat a true

indictment returned by the grand jury. In the underlying case, the prosecuting attorney did not present the charges against R.L. to the grand jury; rather, S.D.W., a private citizen, presented her complaint to the grand jury. After the indictment was returned by the grand jury, the prosecuting attorney's office recused itself and a special prosecutor was appointed. Although the attestation of the prosecuting attorney helps to prevent the use of a non-authentic indictment, this attestation requirement cannot be used to trump a citizen's constitutional right to go to the grand jury and present a complaint to it. Therefore, we hold that in cases where a grand jury returns an indictment based on a citizen's complaint and presentation, the attestation of the prosecuting attorney to the grand jury foreperson's signature is not required and the lack of such attestation, standing alone, is insufficient grounds for dismissal of an otherwise authentic indictment. The attestation requirement of W. Va. Code 62-9-1 [1931] does not apply in cases where the prosecuting attorney does not present the complaint to the grand jury. To the extent that our holding in this case contradicts our holdings in State v. Davis, supra, State v. Huffman, supra, State v. Burnette, supra, and State v. DeBoard, supra, they are overruled.

For the above stated reasons, the writ of prohibition requesting dismissal of the indictment against R.L. is denied.

Writ denied.