No. 24897- State of West Virginia ex rel. Mervin Henson and Karen Henson v. West Virginia Department of Transportation

Starcher, Justice, dissenting:

I disagree with the majority's opinion that the Hensons failed to meet the requirements necessary for a writ of mandamus to be issued. The majority is correct in reiterating that the appropriate recourse for property owners, whose property is damaged by the Department of Transportation ("DOT"), is to compel eminent domain proceedings by filing a petition for a writ of mandamus against the DOT.[1]

The majority opinion rests on the Hensons' failure to introduce evidence to "establish a set of facts that show that the appellee has taken or damaged their property. . . ." ____ W.Va. at ____, ____ S.E.2d at ____ (Slip op. at 5). However, the majority inexplicably ignores the fact that the circuit court never permitted the Hensons to introduce any evidence. Thus, the majority faults the Hensons for failing to do what the circuit court would not permit them to do.

According to their brief, the Hensons were prepared at the show cause

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[1]As this Court has held:

> If a highway construction or improvement results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner [DOT] has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.

Syllabus Point 1, *State ex rel. Griggs v. Graney*, 143 W.Va. 610, 103 S.E.2d 878 (1958).

hearing to present witnesses and photographic evidence to establish that the DOT had "altered the drainage system by paving and widening the roadway and by blocking one of the drainage pipes. . . ."

The majority is applying the wrong standard to establish the Hensons' burden. This Court has stated:

> Where a petitioner seeks in a mandamus proceeding to compel the State Road Commissioner [DOT] to institute proceedings to ascertain damages to private property allegedly caused by the State Road Commissioner in a highway construction or improvement, the clear legal right which the petitioner must show is not that there has been damages or what the amount of damages is, but that there is *reasonable cause to believe that these question should be resolved by a judge* and a jury of freeholders in the county in which the property is located.

Syllabus Point 2, *State ex rel. Phoenix Insurance Company v. Ritchie,* 154 W.Va. 306, 175 S.E.2d 428 (1970) (emphasis added). The majority's opinion would require that the Hensons prove their damages prior to obtaining a writ of mandamus. Clearly under *Phoenix, supra.,* that is not a burden the Hensons must shoulder in the mandamus proceeding. In *Orlandi v. Miller,* 192 W.Va. 144, 147, 451 S.E.2d 445, 448 (1994) (*per curiam),* we stated:

> To be entitled to mandamus relief, the parties seeking such relief are not required to establish that they will ultimately recover damages in the requested condemnation proceeding. They must only show that they have suffered probable damage to their private property.

I do agree with the majority that before a writ will be issued, property

owners must show a clear legal right to the relief sought. However, as we have held,

> . . . it would not be appropriate or legally permissible for the Court to undertake in these proceedings in mandamus to consider and adjudicate the questions which may arise upon proper pleadings and proof in subsequent proceedings in eminent domain.

State ex rel. French v. State Road Commission, 147 W.Va. 619, 621, 129 S.E.2d 832-33 (1963).

Facts similar to those in the instant case occurred in *State ex rel. Smeltzer v. Sawyers*, 149 W.Va. 641, 142 S.E.2d 886 (1965). In *Smeltzer*, the petitioner sought a writ of mandamus to compel the state road commissioner to institute eminent domain proceedings against the petitioner so as to ascertain compensation for some damage caused to petitioner's house.

The petitioner, in *Smeltzer*, alleged that the damage to her house had been caused by water draining onto her property. The state road commissioner denied the allegations, claiming that the petitioner was at fault for not properly maintaining the drainpipe located on petitioner's property. In *Smeltzer*, this Court stated that there was "some doubt in the minds of the members of this Court as to whether the damage alleged in the petition and testified to by the petitioner in her deposition is caused by [the respondent]. . . ." *Smeltzer*, 149 W.Va. at 643, 142 S.E.2d at 889.

Despite doubts about the sufficiency of evidence in *Smeltzer*, this Court granted the petitioner a writ of mandamus so that the "petitioner may have her day in court, but it will be incumbent upon her to prove by a preponderance of the evidence,

beyond mere speculation or conjecture, that her property had been damaged and that the proximate cause of such damage was the [respondent] . . . ." *Smeltzer,* 149 W.Va. at 644-645, 142 S.E.2d at 889.

The majority opinion also failed to discuss the lower court's holding that the Hensons were, as a matter of law, not entitled to claim damages for personal property. The circuit court cited as authority for its ruling *State ex rel. Firestone Tire and Rubber Co. v. Ritchie,* 153 W.Va. 132, 168 S.E.2d 287 (1969), a case that suggests that a party cannot recover for damages to personal property in an eminent domain proceeding. We expressly held in *G.M. McCrossin, Inc. v. West Virginia Board of Regents,* 177 W.Va. 539, 355 S.E.2d 32 (1987), contrary to *Firestone, supra,* that "the statutory eminent domain procedure can, in the appropriate case, be utilized to set compensation for personal property." *McCrossin,* 177 W.Va. at 545, 355 S.E.2d at 38. The circuit court was, therefore, clearly wrong to state that there is no legal authority to entitle a party to recover for damage to personal property in an eminent domain proceeding.

In summary, I believe the circuit court was wrong to deny the writ of mandamus as a matter of law and that this wrong was simply carried forward by this Court's decision in denying the writ because the Hensons failed to "establish a set of facts that show that the appellee [had] taken or damaged their property." For these reasons I respectfully dissent.