No. 30968 - State of West Virginia ex rel. John H. Shifflet v. Edward Rudloff, Administrator of the Eastern Regional

FILED

May 8, 2003

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

Davis, J., dissenting:

In this original jurisdiction proceeding the petitioner, John H. Shifflet, (hereinafter referred to as "Mr. Shifflet"), sought release from his confinement at a regional jail by means of a writ of habeas corpus. The majority opinion purported to grant Mr. Shifflet habeas relief. However, the majority opinion also indicated that he could not be released from confinement. I believe that the disposition reached by the majority opinion is legally unsound. Therefore, for the reasons set out below, I dissent.

A.

A Remedy must Exist for Violation of the Two-Term Rule

Mr. Shifflet argued that his indictment for bank robbery should be dismissed and he should be released from jail because he was incarcerated for over a year before he was indicted. West Virginia Code § 62-2-12 (1923) (Repl. Vol. 2000) requires an incarcerated suspect to be indicted "before the end of the second term of the court, at which he is held to answer."[1] The State conceded that the two-term rule

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[1]W. Va. Code § 62-2-12 (1923) (Repl. Vol. 2000) states:

> A person in jail, on a criminal charge, shall be discharged from imprisonment if he be not indicted before the end of the second term of the court, at which he is held to answer, unless it appear to the court that material witnesses for the State have been enticed or kept away, or are prevented from attendance by sickness or inevitable accident, and except also that, when a person in jail, on a charge of having committed an indictable offense, is not indicted by reason of his insanity at the time of committing the act, the grand jury shall certify that fact to the court;

was violated. However, the State also argued that the issue was moot and therefore the petition should be dismissed. The majority opinion determined that, while the issue was moot, the petition should not be dismissed as Mr. Shifflet's right to be indicted within two terms of court was an "issue of great public interest [that] should be examined[.]"[2] I disagree. I do not believe that the late indictment rendered the case moot. As I explain below, the majority opinion found the issue before the Court moot because of an erroneous interpretation of the relevant case law.

My research has revealed that this Court has directly addressed the application of the two-term rule on only one previous occasion. That decision is *Ex parte Blankenship*, 93 W. Va. 408, 116 S.E. 751 (1923) (discharging prisoner because of violation of statute). The majority opinion, relying upon *Blankenship*, concluded that a violation of the two-term rule *does not* discharge a suspect from prosecution on an indictment issued during an illegal incarceration. Consequently, under the majority's

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whereupon the
court may order him to be sent to a state hospital for the insane, or to be discharged.

West Virginia Code § 62-2-12 is commonly referred to as the two-term rule.

[2]In syllabus point 1 of *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989), the Court established the test for determining whether to address a moot issue:

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

ruling a late indictment suffices to keep a suspect incarcerated pending trial.

In *Blankenship*, the defendant was incarcerated in violation of W. Va. Code § 62-2-12. Further, no indictment was pending at the time he sought habeas relief. This Court granted Mr. Blankenship's requested relief. Additionally, the Court observed that the State could seek an indictment against the defendant after his release. In essence, *Blankenship* makes clear that a remedy exists for the violation of the two-term rule. The remedy is release from incarceration.

The majority opinion has, inartfully and by way of a footnote, expanded *Blankenship* to mean that a late indictment can cure a violation of the two-term rule and thereby preclude release from incarceration.[3] I do not believe *Blankenship* should have been so expanded. Support for my position is found in the jurisdiction of the State of Virginia.

A case similar to the instant case was decided by the Virginia Supreme Court in *Hall v. Commonwealth*, 78 Va. 678 (1884), *overruled on other grounds by Glover v. Commonwealth*, 10 S.E. 420 (Va. 1889). The defendant in *Hall* was incarcerated in violation of Virginia's two-term rule[4] for the crime of horse stealing. After the indictment was issued, the defendant sought release and to have the indictment dismissed. The trial court denied the relief. The defendant was tried and convicted. On

[3]As I will discuss *infra*, the writ issued by the majority in this case cannot be exercised by Mr. Shifflet.

[4]West Virginia's two-term rule, contained in W.Va. Code § 62-2-12, was taken verbatim from the statutes of Virginia.

appeal, the defendant argued that the trial court erred in its ruling on the violation of the two-term rule. The Virginia Supreme Court agreed with the defendant and held that "there being no excuse for said failure to indict, the prisoner was entitled to his discharge."[5] *Hall*, 78 Va. at 678.

Taking the decisions in *Hall* and *Blankenship* together, I believe those cases stand for the following three propositions. First, a violation of the two-term rule is not cured by a later indictment. Second, a late indictment may be dismissed and a suspect released when there has been a violation of the two-term rule. Third, dismissal of an indictment for a violation of the two-term rule does not preclude the State from seeking another indictment on the same charge. To reach a different result, as did the majority opinion, would render the two-term rule virtually unenforceable so long as the state obtains an indictment subsequent to violating the rule. That is, to do "otherwise would allow a wrong to be inflicted for which no remedy exists." *Farley v. Sartin*, 195 W. Va. 671, 676-677, 466 S.E.2d 522, 527-528 (1995). Such a disposition is contrary to the "familiar maxim of the law that there is no wrong without a remedy[.]" *Clifton v. Clifton*, 83 W. Va. 149, 150, 98 S.E. 72 (1919). *See also State ex rel. Affiliated Constr. Trades Found. v. Vieweg*, 205 W. Va. 687, 701, 520 S.E.2d 854, 868 (1999) (Workman, J., concurring) ("As law students, we learn that in the law, for every wrong there is a remedy."); *Tanner v. Rite Aid of West Virginia, Inc*., 194 W. Va. 643, 651 n.12, 461 S.E.2d 149, 157 n.12 (1995) ("It is the business of the law to remedy wrongs . . ., even at the expense of [dismissing an indictment and releasing a prisoner], and it is a pitiful confession of incompetence on the part of any court of justice to deny

[5]The Virginia Supreme Court ultimately reversed the conviction because of insufficiency of evidence to prove the defendant was guilty of horse stealing.

relief on such grounds."); *Wallace v. Wallace*, 155 W. Va. 569, 575, 184 S.E.2d 327, 331 (1971) ("'The maxim, "Ubi Jus, ibi remedium", liberally translated, declares that a legal wrong is the resultant of the violation of a legal right, for which the law provides a remedy." (citation omitted)). Because the majority has rendered the violation of W. Va. Code § 62-2-12 a wrong without a remedy, I must dissent from their interpretation of the statute and relevant case law.

B.

The Majority Granted a Meaningless Writ

The majority opinion stated that a violation of the two-term rule occurred "and so we must grant the requested writ of habeas corpus." However, in footnote 2 of the majority opinion the writ granted was rendered meaningless. The footnote opines that "we recognize that our holding may have little practical value for Mr. Shifflet, as he may now be incarcerated on the basis of the January 7, 2003 indictment." Assuming, for the sake of argument, that I agreed with the majority that the case was rendered moot because of the late indictment, I cannot agree with issuing a meaningless writ. Had I adopted the majority's position of mootness, I would have denied the writ.

Mr. Shifflet did not ask this Court to issue a meaningless writ. Mr. Shifflet sought a writ that released him from confinement. Indeed, that is the essence the writ. *See Lance v. McCoy*, 34 W.Va. 416, 421, 12 S.E. 728, 729 (1890) ("[T]hat great writ of the common law, stand[s] always ready, prompt, and adequate to vindicate personal liberty."). "As has been frequently said, this is the great writ of liberty, and is available . . . whenever one is unlawfully restrained of his liberty." *Wright v. Wright*, 78 W. Va.

57, 60, 88 S.E. 606, 607 (1916). Moreover, "the great writ, which any citizen deprived of his liberty without due form of law may command, should in no case be [issued without full force and effect]." *State ex rel. Mays v. Brown*, 71 W. Va. 519, 530, 77 S.E. 243, 248 (1912) (Robinson, J., dissenting). As previously noted by this Court, "[i]n cases of this character, equity will, by [the great writ], prevent the present wrong and provide a remedy which can reach the whole mischief and secure the rights of all, both for the present and future[.]" *Arnold v. Board of Education of Capon Dist., Hampshire County*, 110 W. Va. 32, 156 S.E. 835, 836 (1931). In summary, no remedy is available from the writ issued by the majority. Mr. Shifflet was entitled to a writ that released him from jail and caused the indictment to be dismissed without prejudice.

For the reasons set out above, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.