STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Tony Christini, Petitioner Below, Petitioner

vs.) No. 11-1060 (Kanawha County 11-C-581)

The Board of Education of West Virginia, West Virginia School Building Authority, the Board of Education of Monongalia County and Frank Devono, its superintendent, Respondents Below, Respondents

FILED
September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Tony Christini appeals, pro se, the June 14, 2011 order of the Circuit Court of Kanawha County dismissing his petition for a writ of mandamus to compel the respondents to halt the construction project for the new consolidated elementary school for the students of Woodburn Elementary School and Easton Elementary School at the proposed Mileground site. The State Respondents, by Kelli D. Talbott, their attorney, and the County Respondents, by Gregory W. Bailey, their attorney, filed responses to which petitioner filed separate replies.[1]

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

According to the State Respondents, on June 22, 2010, a public hearing was conducted on the closure of Easton Elementary School. The public hearing on the closure of Woodburn Elementary School was conducted on June 24, 2010. Members of the public were permitted to be present, and submitted statements and testimony at the public hearings. County Superintendent Devono informed the State Superintendent of Schools in writing on June 30, 2010, that the public hearings had been completed and all procedural steps had been satisfied with regard to the closures of Easton and Woodburn. Superintendent Devono provided the State Superintendent with a copy of the reasons and supporting data in relation to the closures and consolidation. On August 11, 2010, at a public

[1] The State Respondents are the Board of Education of West Virginia and the West Virginia School Building Authority ("SBA"). The County Respondents are the Board of Education of Monongalia County and Frank Devono, its superintendent.

meeting, the Board of Education of West Virginia unanimously voted to approve the closures and consolidation.

The State Respondents further state that the Monongalia County Board of Education hired an architect to design the new elementary school, and as of the time of the May 20, 2011 hearing before the circuit court, $200,300 had been paid to the architect in fees. Also, approximately $743,664 had been obligated for services rendered by the architect and were scheduled to be paid. On April 15, 2011, an invitation to bid on the site preparation of the school project was published. The site preparation contract was slated to be awarded to Laurita, Inc. in the amount of $2,300,780 by, on or about, May 5, 2011. By the time the circuit court heard petitioner's motion for a temporary restraining order on May 20, 2011, Laurita, Inc. was staging and organizing the equipment to be taken to the site of the new school.

In his petition for a writ of mandamus, petitioner alleged that health and safety concerns about the Mileground site provided a basis for judicial intervention to halt the building of a new school on the site.[2] Petitioner also filed a motion for a temporary restraining order. The State Respondents and the County Respondents filed respective motions to dismiss as their responsive pleadings.[3]

At the May 20, 2011 hearing on petitioner's motion for a temporary restraining order, the circuit court informed the parties that the court desired to hear arguments on the respondents' motions to dismiss. Petitioner did not object and informed the circuit court he had a seven minute written response he would like to read to the court. The circuit court allowed petitioner to read his response.

In granting the respondents' motions to dismiss, the circuit court held that the process for the closure and consolidation of schools was established by West Virginia Code § 18-5-13a and West Virginia Board of Education Policy 6204. The school closure and consolidation process provided a framework for the consideration of a broad range of issues associated with the merits, including health and safety concerns, that must be considered and weighed. The process allows an opportunity for public input upon all such issues. Finally, the process provides for the review and approval of school closures and consolidations by the Board of Education of West Virginia.

The circuit court ruled that "[t]he Court is no more justified in substituting its judgment for that of an elected county board of education upon the issues raised by the Petitioner than other issues that bear upon the wisdom of the decision to close and consolidate schools" and that "[t]he fact that Respondents did not assign the weight to Petitioner's concerns that he would have preferred is not significant." The circuit court held that petitioner's suit was barred by *Pell v. Board of Education of Monroe County*, 188 W.Va. 718, 426 S.E.2d 510 (1992), in which this Court ruled that a school

---

[2] According to petitioner, he has a dependent son.

[3] The State Respondents filed their motion to dismiss on May 16, 2011. The County Respondents' motion was filed earlier, on April 28, 2011.

consolidation/construction project should not be halted once implementation of the project had substantially begun and significant monies had been spent toward the project. *See also State ex rel. Jones v. Board of Education of Ritchie County*, 178 W.Va. 378, 380, 359 S.E.2d 606, 608 (1987) ("Under W.Va. Code § 18-5-13 (1987 Cum. Supp.), the county boards of education have the authority to close or consolidate county schools, and a decision in that regard is a matter within the sound discretion of the board of education.").[4]

The circuit court noted that approximately $3,200,000 had been obligated for contracts and that if the construction project was halted, the County Board of Education stands to lose an $8,618,400 grant from the SBA. The circuit court also held that the doctrine of laches precluded petitioner's petition: "Pursuant to *Pell*, and under the laches doctrine, the stage at which this project now rests precludes the Petitioner from advancing his claims." Petitioner appeals the circuit court's dismissal of his petition to this Court. Work on the school at the Mileground site continues while petitioner's appeal is pending.

WHETHER PETITIONER RECEIVED SUFFICIENT NOTICE
OF RESPONDENTS' MOTIONS TO DISMISS.

Petitioner argues that he should have received notice of hearing on the respondents' motions to dismiss ten days before the hearing because the motions should have been treated as motions for summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure. Contrary to petitioner's contention, however, there is no indication that the circuit court considered matters outside of the pleadings in ruling on the respondents' motions. Therefore, there was no requirement for the circuit court to have treated the respondents' motions as motions for summary judgment.

The respondents argue that petitioner made no objection when the circuit court informed the parties that the court desired to hear arguments on the respondents' motions to dismiss along with his motion for a temporary restraining order at the May 20, 2011, hearing. *See* Syl. Pt. 7, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966) ("Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.") (Internal quotations and citations omitted.). In addition, when the circuit court asked petitioner for a response to the respondents' respective motions to dismiss, he informed the court he had a seven minute written response he would like to read to the court. The circuit court allowed petitioner to read his response. Therefore, this Court

concludes that the respondents are correct that this issue is not appropriate for consideration on appeal.

WHETHER THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER'S

[4] West Virginia Code § 18-5-13 includes school closure and consolidation among the powers generally given to county boards of education. West Virginia Code § 18-5-13a sets forth the procedure for school closures and consolidations.

PETITION FOR A WRIT OF MANDAMUS

Petitioner argues that health and safety concerns about the Mileground site provided a basis for judicial intervention to halt the building of a new school on the site. The respondents argue that decisions made within the province of public agencies charged with the planning and construction of public schools are reviewed only for an abuse of discretion. *See Jones*, supra. The respondents argue that the circuit court properly focused on the status of the ongoing school construction project and the commitment of public resources in determining that petitioner's petition for judicial intervention was untimely filed under *Pell*, supra. The respondents argue that the circuit court also properly applied the doctrine of laches in balancing the interests of the parties.

This Court has previously explained the heavy burden a petitioner undertakes when challenging a discretionary action:

> Because mandamus is a drastic remedy to be invoked only in extraordinary situations, a party seeking such a writ must satisfy three conditions: (1) there are no other adequate means for the party to obtain the desired relief; (2) the party has a clear and indisputable right to the issuance of the writ; and (3) there is a legal duty on the part of the respondent to do that which the petitioner seeks to compel. *See* Syl. Pt. 1, *State ex rel. Billings v. Point Pleasant,* 194 W.Va. 301, 460 S.E.2d 436 (1995). *The issuance of a writ of mandamus is normally inappropriate unless the right or duty to be enforced is nondiscretionary. The importance of the term "nondiscretionary" cannot be overstated-the judiciary cannot infringe on the decision-making left to the executive branch's prerogative.*

McComas v. Board of Education of Fayette County, 197 W.Va. 188, 192-93, 475 S.E.2d 280, 284-85 (1996) (Emphasis added.). After careful consideration of the parties' arguments, this Court concludes that the circuit court did not err in dismissing petitioner's petition.

For the foregoing reasons, we find no error in the decision of the circuit court and its June 14, 2011 order dismissing petitioner's petition for a writ of mandamus is affirmed.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh