# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**George Van Wagner,**
**Petitioner Below, Petitioner**

**vs.) No. 11-1131** (Berkeley County 11-C-432)

**The Honorable Harry Snow, Berkeley County Magistrate, and Christine M. Riley, Assistant Prosecuting Attorney,**
**Respondents Below, Respondents**

**FILED**
**July 3, 2012**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

## MEMORANDUM DECISION

Petitioner George Van Wagner, pro se, appeals the July 21, 2011, order of the Circuit Court of Berkeley County denying his petition for a writ of mandamus to compel Magistrate Snow and Prosecutor Riley (collectively "respondents") to afford him with a new preliminary examination. Respondents, by Christopher C. Quasebarth, their attorney, filed a response, to which petitioner filed a reply.

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.

Petitioner has been charged with one felony count of embezzlement. Petitioner's preliminary examination was conducted on May 11, 2011, by Magistrate Snow, who found probable cause to bind him over to the circuit court. Prosecutor Riley appeared for the State at the preliminary examination. Petitioner represented himself, waiving his right to counsel.

On May 27, 2011, petitioner filed a petition for a writ of mandamus in the circuit court to compel respondents to afford him with a new preliminary examination due to alleged deficiencies in the May 11, 2011, hearing. In its subsequent order, the circuit court assumed without deciding that respondents were properly served with petitioner's petition on June 10, 2011.[1] On July 5, 2011,

[1] Copies of petitioner's petition and the summons were sent to respondents via certified mail; however, "Restricted Delivery?" was not marked on either of the certified mail cards. *See* . . . . . Rule 4(d)(1)(D), W.V.R.C.P. ("Service upon an individual other than an infant, incompetent

petitioner filed a motion for default judgment despite the fact that the summons gave respondents thirty days to file their response, "exclusive of the day of service." Respondents filed a response in opposition to the petition for a writ mandamus and the motion for default judgment on July 11, 2011, which respondents assert was thirty days from June 10, 2011, under this Court's procedural rules.

As previously noted, the circuit court assumed without deciding that service was properly made on June 10, 2011. The circuit court determined, however, that "[p]etitioner's July 7, 2011[,] motion for default judgment is still premature," and the circuit court concluded that it was appropriate to decide petitioner's petition on the merits.

The circuit court relied on *Desper v. State*, 173 W.Va. 494, 318 S.E.2d 437 (1984), to identify petitioner's rights, and Magistrate Snow's duties, at the May 11, 2011, preliminary examination. Syllabus Point Two of *Desper* held the following:

> In challenging probable cause at a preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, a defendant has a right to cross-examine witnesses for the State and to introduce evidence; the defendant is not entitled during the preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable cause issue, and the magistrate may properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit.

The circuit court found that while Magistrate Snow may have made rulings unfavorable to petitioner's case, there was no showing that those rulings were without cause and that "the Court sees no abuse of . . . discretion." The circuit court found that petitioner had no clear right to have his proffered documents admitted, "especially upon a finding by the magistrate that they are not relevant."[2] The circuit court further determined that petitioner's complaint that witnesses were not sequestered lacked merit because petitioner made no showing that he asked for sequestration.[3] *See* Rule 5.1(a), W.V.R.Crim.P. ("*On motion of either the state or the defendant*, witnesses shall be separated and not permitted in the hearing room except when called to testify.") (Emphasis added.).

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person, or convict may be made by: . . . (D) The clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, *and delivery restricted to the addressee*.") (Emphasis added.).

[2] According to his petition, petitioner wanted to introduce 1,000 pages of documents at the preliminary examination.

[3] According to petitioner's petition, the State's witnesses at the preliminary examination were the investigating officer and the complaining witness.

The circuit court likewise determined that petitioner offered no evidence to support his claim that he was never given an opportunity to review a "mysterious profit/ loss statement."

The circuit court, in its order, also found that petitioner's petition lacked merit in regard to Prosecutor Riley:

> While a prosecuting attorney does fill a quasi-judicial role, there is a great degree of discretion given to these officers to their service to the State of West Virginia. Petitioner has not shown a clear legal right to have his case dismissed or shown how the prosecuting attorney is legally obligated to agree with his view of the facts. Furthermore, Petitioner has the remaining protections of the grand jury and potential review by a jury at trial, where he may present his case and see if those twelve persons agree with his view of the facts. A writ of mandamus is entirely unnecessary for such a claim against the prosecuting attorney.

## SERVICE OF PETITIONER'S PETITION AND WHETHER PETITIONER'S MOTION FOR DEFAULT JUDGMENT WAS PREMATURE

Like the circuit court, this Court will assume for purposes of decision that respondents were properly served with petitioner's petition on June 10, 2011. Petitioner argues that the circuit court erred in finding that his motion for default judgment, filed on July 5, 2011, was premature and that the court should have addressed his motion. Respondents assert that their response in opposition to the petition for a writ mandamus and the motion for default judgment, the filing date of which was July 11, 2011, was filed thirty days from June 10, 2011. After careful consideration, the Court concludes that the circuit court did not err in determining that petitioner's motion for default judgment was filed prematurely.

## WHETHER THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S PETITION FOR A WRIT OF MANDAMUS

The standard for determining whether the issuance of a writ of mandamus is necessary was set forth in Syllabus Point Two, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969): "A writ of mandamus will not issue unless three elements coexist–(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Petitioner argues that he has a clear right to a preliminary examination that is fundamentally fair, that respondents have a legal duty to ensure that he is afforded due process, and that he has no other adequate remedy to correct a flawed preliminary examination. Petitioner asserts, *inter alia*, that he informed Magistrate Snow of the relevancy his proffered documents both at the preliminary examination and prior to the hearing. Respondents argue that petitioner fails to demonstrate any factual or legal basis that Magistrate Snow abused the discretion afforded to him under *Desper*, *supra*, in how he conducted

petitioner's preliminary examination. Respondents assert that petitioner alleges no factual basis that he demonstrated to Magistrate Snow that the 1,000 pages he wanted to proffer were relevant to the probable cause issue.

Moreover, respondents correctly assert that a preliminary examination is merely a probable cause hearing. "[A] preliminary examination is not a trial upon the issue of a criminal defendant's guilt." *Desper*, *supra*, 173 W.Va. at 501, 338 S.E.2d at 445; *Peyatt v. Kopp*, 189 W.Va. 114, 117, 428 S.E.2d 535, 538 (1993) (same). To contest his actual guilt or innocence, petitioner must wait until his trial. Therefore, this Court concludes that the circuit court did not err in denying petitioner's mandamus petition to compel the holding of a new preliminary examination.

For the foregoing reasons, we find no error in the decision of the circuit court and its July 21, 2011, order denying petitioner's petition for a writ of mandamus is affirmed.

Affirmed.

**ISSUED:** July 3, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

**NOT PARTICIPATING:**
Justice Brent D. Benjamin