

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia ex rel. Kay Deakins,
Petitioner Below, Petitioner**

vs) No. 11-1272 (Mercer County 11-C-392-OA)

**Honorable Michael Flanigan, Magistrate,
Respondent Below, Respondent**

FILED

June 25, 2012

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

MEMORANDUM DECISION

Petitioner Kay Deakins, by counsel Natalie N. Hager, appeals the Circuit Court of Mercer County's order dated August 31, 2011, affirming the magistrate court's order denying petitioner a trial by jury. Magistrate Michael Flanigan, by counsel Thomas W. Rodd, has filed his response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was arrested on charges of obstructing a police officer, assault on a police officer, and battery on an officer. She was informed by the magistrate on duty during arraignment that she had twenty days to request a jury trial in writing, but she refused to sign the arraignment form. Counsel was appointed the day after her arraignment, but he failed to move for a jury trial within the twenty days required by West Virginia Code § 50-5-8(b). Petitioner first requested a jury trial almost ninety days after her arraignment, and that request was denied as untimely. Petitioner hired retained counsel, who requested a jury trial upon his initial appearance, and that request was also denied as untimely. Petitioner then had another attorney appointed, who also requested a jury trial, but likewise, that request was denied. Petitioner then filed a writ of prohibition or mandamus to the circuit court, seeking to require the magistrate to convene a jury for her trial. The writ was denied by the circuit court, after the circuit court found that petitioner failed to file a timely jury trial demand and did not provide the magistrate court with any notice or motion requesting a hearing pursuant to Rule 26(b) of the West Virginia Rules of Criminal Procedure for the Magistrate Courts based on unavoidable cause for her delay in filing her jury trial demand. The circuit court points out that although petitioner has a right to trial by jury, that right may be waived if petitioner fails to request a jury trial in writing within 20 days of arraignment or appointment of counsel pursuant to W.Va. Code § 50-5-8(b).

On appeal, petitioner now argues that a writ of mandamus and/or a writ of prohibition is her only legal remedy. She argues that while she was presented with arraignment paperwork, she refused to sign the same, including the form that contained the procedural requirements for request of a jury trial. Petitioner further argues that her initial appointed counsel failed to file a request for a jury trial. She also argues that she has demonstrated unavoidable cause for the delay in filing her demand for a jury trial, and that the appointment of new counsel should restart the twenty-day period in which to file a demand for a jury trial.

Respondent argues that petitioner was personally informed at her arraignment of the twenty-day time limit, and, although she refused to sign the documents, she has not argued that she did not receive them. There is no question that petitioner failed to file within twenty days, and respondent argues that petitioner failed to show “unavoidable cause” in the delay in filing pursuant to Rule 26(b) of the Rules of Criminal Procedure for the Magistrate Courts, which would have allowed her to extend the twenty-day time limit. In fact, respondent notes that petitioner never filed a Rule 26(b) motion to attempt to extend the time for filing her demand for a jury trial.

Having reviewed the circuit court’s well-reasoned “Order Denying Petition for Writ of Prohibition and/or Mandamus” and finding no error, this Court fully incorporates and adopts said order, dated August 31, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm the circuit court’s decision.

Affirmed.

ISSUED: June 25, 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

11-1272

COPY

NOTED CIVIL DOCKET

AUG 31 2011

JULIE BALL
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
KAY DEAKINS,

PETITIONER,

V.

CASE NO.: 11-C-392-OA

HONORABLE MICHAEL FLANIGAN,
MAGISTRATE,

RESPONDENT.

**ORDER DENYING
PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS**

On the 19th day of August, 2011, came the Petitioner, by counsel, Natalie Hager, the Respondent, by her Prosecuting Attorney, Scott Ash, and Magistrate Michael Flanigan, all for a hearing on the Petitioner's *Petition for Writ of Prohibition and/or Mandamus* pursuant to West Virginia Code § 55-1-1 et seq., wherein the Petitioner specifically requests this Court to prohibit Magistrate Michael Flanigan to try her criminal cases without a jury and/or to compel Magistrate Flanigan to grant her demand for a jury trial. No testimony was presented, however, the Court heard preliminary arguments by counsel concerning the sole issue of the Petitioner's timeliness (or lack thereof) of a jury demand in magistrate court as well as a brief history of the case.

WHEREUPON, the Court took the matter under advisement for purposes of issuing an Order following deliberations concerning the arguments and pleadings of the parties as well as pertinent legal authority. Based upon consideration of the aforementioned, the Court does hereby conclude that the Petitioner's *Petition* should be **DENIED**. In support thereof, the Court **FINDS** and **CONCLUDES** as follows:

Applicable Law

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded

its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 486 (2001)(internal citations omitted).

"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 clear 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." Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538 (1969).

Issue Presented

At issue is the Petitioner's right to have her misdemeanor charges tried before a jury. Although this is a constitutional right, this right may be waived if a defendant fails to request a jury trial in writing within twenty days of arraignment or appointment of counsel per W. Va. Code § 50-5-8(b).¹

¹ A defendant in any criminal trial for a misdemeanor offense triable before a magistrate has the right to demand that the matter be tried with a jury, and the defendant shall be advised of the right to trial by jury in writing. A demand by the defendant for a jury trial must be made in writing not later than twenty days after the defendant's initial appearance before the magistrate: Provided, That in the case of an indigent for whom counsel is to be appointed, the twenty-day period shall not commence to run until counsel is appointed. Failure to demand within such time constitutes a waiver of the right to trial by jury.

FINDINGS OF FACT

The Petitioner was arraigned by Magistrate Rick Fowler on April 22, 2010. The initial appearance paperwork, Petitioner's Exhibit A, indicates that Magistrate Fowler informed the Petitioner of her right to a jury trial and that she must request same in writing no later than twenty days. The Petitioner refused to sign the paperwork during her arraignment. According to magistrate court records, Mr. Derrick Leffler was appointed to represent the Petitioner on April 23, 2010. On May 10, 2010, the Petitioner, by counsel, moved to continue the status conference for the misdemeanor offenses. By letter dated July 15, 2010, the Petitioner, by counsel, filed a request for jury trial. The request for jury trial was made eighty-three days after the Petitioner's initial appearance, or eighty-four days after appointment of counsel. On August 4, 2010, the Petitioner's newly retained counsel, Mr. Thomas Czarnik, filed a jury demand. On September 8, 2010, Mr. Czarnik failed to appear at the status conference, however, the State moved to set the matter for a jury trial, and same was denied for being untimely. On January 13, 2011, the Petitioner filed a motion to continue the status conference. On January 27, 2011, Mr. Czarnik filed a motion to withdraw as the Petitioner's counsel. As a result, the State filed a motion to continue the status conference on February 11, 2011 in order to permit the magistrate court to appoint new counsel for the Petitioner. Mr. Christopher Bledsoe was appointed counsel, however, he advised the magistrate court of a conflict on March 7, 2011. On May 13, 2011, the Petitioner's current counsel was appointed to represent her on her misdemeanor offenses. On May 13, 2011, the Petitioner's current counsel filed a written jury demand on the Petitioner's behalf. Again, on July 26, 2011, Magistrate Flanigan denied the Petitioner's request for jury trial for being untimely.

The Petitioner did not file a Rule 26(b) motion for unavoidable cause in the delay of filing the jury demand in magistrate court.

Discussion

The Petitioner, by counsel, argues that the twenty-day deadline in which to file a written jury demand in magistrate court should be renewed after appointment of new counsel. Clearly, the Petitioner desired a jury trial, and she should not be denied same just because her first appointed counsel failed to file the written request within the twenty day deadline. Further, the Petitioner argues that she demonstrated the unavoidable cause² by trusting in her attorney to file a timely demand for jury trial.

The Respondent counters that this matter has already been addressed by the West Virginia Supreme Court of Appeals. Even though counsel for a criminal defendant fails to file a timely request for a jury trial, if the defendant was advised of this important right during her initial appearance in writing, the defendant's inaction in advising the magistrate court of her jury demand constitutes a waiver of her right to have her offenses tried by a jury.³ Moreover, the

² Rule 26(b) of the Rules of Criminal Procedure for the Magistrate Courts of West Virginia states: Except as provided in section (c), below, any time limit which has been set by these rules, by the magistrate, or by statute, may be extended in the following circumstances:

- (1) If all parties to the case agree in writing to the extension;
- (2) If the existing period has not expired, upon a showing of good cause;
- (3) If the time period has expired, upon a showing of unavoidable cause.

Prior to ruling upon a request for an extension, the magistrate shall make a reasonable effort to notify all other parties and provide them with an opportunity to respond to the request.

³ Both the Petitioner and the Respondent cited *State ex rel. Ring v. Boober*, 200 W. Va. 66 (1997), wherein the Supreme Court of Appeals ultimately found that despite a defendant having been appointed counsel, and counsel fails to file a written request timely, the informed inaction on part of a defendant to make a timely request for jury trial in magistrate court constitutes waiver of right to a jury trial.

Petitioner herein did not file a Rule 26(b) request for extension of the twenty-day deadline for unavoidable cause for the untimely jury demand.⁴

CONCLUSIONS OF LAW

It appears to this Court that the case law and the applicable statutory authority is clear: the Petitioner did not file a timely jury trial demand and further, did not provide the magistrate court with any notice or motion requesting a Rule 26(b) hearing on unavoidable cause for her delay in filing her jury trial demand. Although the Petitioner filed her petitions for writ of prohibition and/or mandamus, this Court was not presented with any evidence of unavoidable cause. Additionally, this Court cannot find that Magistrate Flanigan's denial of the Petitioner's request for a jury trial was clearly erroneous; indeed, Magistrate Flanigan followed the law precisely. Accordingly, neither a writ for prohibition or mandamus will be issued in this matter. Because the Petitioner failed show the necessary requirements for this Court to issue the extraordinary writs, the Court will not entertain the Petitioner's argument that upon appointment of new counsel, the twenty-day deadline to file a written request for jury trial runs again. The pertinent legal authority is silent on such an issue, and further, such matters fall under the auspices of the legislature.

Ruling

WHEREFORE, on the basis of the above, the Court does hereby **ORDER, ADJUDGE**, and **DECREE** as follows:

- (1) The Petition for Writ of Prohibition and/or Mandamus is hereby **DENIED**;
- (2) There being nothing further, this action shall be **DISMISSED** and **STRICKEN** from the docket of this Court.

⁴ Again, both the Petitioner and the Respondent cite *State ex rel. Callahan v. Santucci*, 210 W. Va. 483 (2001), where the Supreme Court of Appeals held that the defendant therein provided adequate notice to the magistrate court to hold a Rule 26(b) unavoidable cause hearing concerning the defendant's failure to file a timely jury request.

- (3) The Clerk is directed to forward a copy of this Order to Natalie Hager, Esq., counsel for the Petitioner; to Scott Ash, Esq., Prosecuting Attorney; and to Magistrate Flanigan.

ENTERED this 31st day of August, 2011.



OMAR J. ABOULHOSN, CHIEF JUDGE
9th Judicial Circuit of Mercer County