IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2012

FILED
June 12, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-1644

STATE OF WEST VIRGINIA EX REL: DARRELL V. MCGRAW, JR., ATTORNEY GENERAL
Plaintiff Below, Petitioner

V.

THE HONORABLE CHARLES E. KING, JR., JUDGE, CIRCUIT COURT OF KANAWHA COUNTY; FAST AUTO LOANS INC., a Virginia corporation; COMMUNITY LOANS OF AMERICA, INC., a Georgia corporation; and ROBERT I. REICH, President and Chief Executive Officer of Fast Auto Loans, Inc., and Community Loans of America, Inc.
Defendants Below, Respondents

Petition for Writ of Prohibition
Civil Action No. 11-MISC-206
WRIT DENIED

Submitted: April 25, 2012
Filed: June 12, 2012

Darrell V. McGraw
Attorney General
Norman Googel, Esq.
Assistant Attorney General
Charleston, West Virginia
Attorneys for Petitioner

David Allen Barnette, Esq.
Stephen R. Crislip, Esq.
Vivian H. Basdekis, Esq.
Jackson Kelly, PLLC
Charleston, West Virginia
Attorneys for Respondents

Anthony J. Majestro, Esq.
Powell & Majestro, PLLC
Charleston, West Virginia
Attorney for Amici Curiae Attorneys General

The opinion of the Court was delivered PER CURIAM.

JUSTICE WORKMAN dissents, and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "In order to obtain judicial backing for the enforcement of an administrative subpoena, the agency must prove that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. If these requirements are satisfied, the subpoena is presumably valid and the burden shifts to those opposing the subpoena to demonstrate its invalidity. The party seeking to quash the subpoena must disprove the facts and evidence the presumed relevance and purpose of the subpoena." Syl. pt. 1, *SER Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

2. "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. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 4, *SER Hoover v. Berger* 199 W. Va. 12, 483 S.E.2d 12 (1996).

3. "Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari." Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

Per curiam:

The petitioner, Darrell V. McGraw, Attorney General for the State of West Virginia, seeks a writ of prohibition directed to the respondent, Charles E. King, Jr., Judge of the Circuit Court of Kanawha County, to enjoin enforcement of the August 15, 2011, order herein dismissing the petitioner's action seeking enforcement of certain investigative subpoenas issued against the respondents, Fast Auto Loans, Inc., a Virginia corporation; Community Loans of America, Inc., a Georgia corporation; and Robert I. Reich, the president and chief executive office of both corporations. After careful review of the record presented, the briefs and arguments of the parties as well as the brief of the *amici curiae*[1] we deny the requested writ of prohibition for the reasons contained herein.

I.

FACTUAL AND PROCEDURAL HISTORY

[1]This Court recognizes and appreciates the contributions to the consideration of this case made by *amici curiae*, consisting of the Attorneys General of Arkansas, Arizona, Colorado, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Idaho, Maryland, Massachusetts, Missouri, Montana, Nevada, New Mexico, New Hampshire, North Dakota, Oklahoma, South Dakota, Vermont, Washington, the West Virginia Education Association, as well as the West Virginia Division of Financial Institutions and the Office of Consumer Protection for the State of Hawaii.

The petitioner, Darrell V. McGraw, is the Attorney General for the State of West Virginia. Respondent Charles E. King, Jr., is a judge of the Circuit Court of Kanawha County. Respondent Fast Auto Loans, Inc. (hereinafter "FAL"), is a Virginia corporation. Respondent Community Loans of America, Inc. (hereinafter CLA) is a Georgia corporation. Respondent Robert I. Reich (hereinafter "Reich"), is the chief executive officer of both FAL and CLA and is a resident of the state of Georgia.

FAL and CLA are non-resident corporations that do not have offices or places of business in West Virginia. Their business consists of loaning money to people who own motor vehicles. The loan is secured by a lien on the borrower's motor vehicle. These types of loans are often referred to as "title loans." It is the position of the Attorney General that these loans are not authorized by West Virginia law, that West Virginia residents obtain these loans in Virginia, and that FAL and CLA attempt to collect on some of the delinquent title loans in West Virginia.

The Attorney General's Consumer Protection Division received three complaints by West Virginia residents regarding the collection of these title loans provided by respondents, FAL and CLA. The complaints were not about the loans themselves; rather the complaints were about telephone calls seeking information from and about the debtors. The first complaint was received on February 16, 2007. The second complaint was received

on March 16, 2009, by a father whose daughter, a resident of Virginia, was the recipient of the respondent FAL's loan. The final complaint was received on September 9, 2010. The manner of the calls, according to the Attorney General, violated the West Virginia Consumer Protection Act (W. Va. Code § 46A-1-101, *et seq.*)

These complaints triggered an investigation by the Attorney General into the legality of these collection calls. As part of his investigation, the Attorney General on March 2, 2011, issued an administrative subpoena *duces tecum* to the respondents, seeking disclosure of documents regarding loans made to West Virginia residents.[2] The authority of the Attorney General to issue this type of investigative subpoena may be found in W. Va. Code § 46A-7-104(1) (1974).[3] The subpoena requested compliance with the disclosure of

[2]The subpoena *duces tecum* was double-spaced and 11 pages in length. It asked for 29 enumerated items, including but not limited to documents relating to all civil actions filed against the respondents by any state or federal regulatory agency; all communications between the respondents and the Federal Trade Commissioner ("FTC"), Federal Deposit Insurance Corporations ("FDIC"), the Internal Revenue Service ("IRS") or any other state or federal loan regulators; a diagram of the corporate organization of the respondents; details about each loan made to West Virginia residents, including the amount of each loan, the interest on each loan, the fees associated with each loan and the amount actually collected on each loan; all forms used in making, approving, generating, processing, servicing or collecting on each loan as well as a list of all West Virginia residents who accounts are, or have ever been, delinquent.

[3](1) If the attorney general has probable cause to believe that a person has engaged in an act which is subject to action by the attorney general, he may, and shall upon request of the commissioner, make an investigation to determine if the act has been committed and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, (continued...)

documents by March 21, 2011. This investigative subpoena *duces tecum* was served upon the respondents by certified mail, return receipt requested. FAL's subpoena was mailed to an address in Georgia. Neither FAL nor CLA responded to the subpoenas with documents. Instead, each had asked for more time, to April 4, 2011, to respond to the State's requests.

---

[3](...continued)
adduce evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, records, documents or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

(2) If the person's records are located outside this State, the person at his option shall either make them available to the attorney general at a convenient location within this State or pay the reasonable and necessary expenses for the attorney general or his representative to examine them at the place where they are maintained. The attorney general may designate representatives, including comparable officials of the state in which the records are located, to inspect them on his behalf.

(3) Upon failure of a person without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the attorney general may apply to the circuit court of the county in which the hearing is to be held for an order compelling compliance.

(4) The attorney general shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this chapter.

On April 5, 2011, the respondents filed the affidavit of Terry E. Fields, the chief financial officer of FAL. This affidavit stated that FAL was not registered to transact business within West Virginia. Further, Mr. Fields testified that FAL did not have any offices or employees within this state. The respondents indicated that it was their position that they were under no obligation to produce the documents requested by the Attorney General in the investigative subpoena.

On April 28, 2011, the Attorney General filed in the Circuit Court of Kanawha County an action seeking enforcement of the previously issued subpoena *duces tecum*. On April 28, 2011, the respondent, Judge Charles E. King, Jr., issued a Rule to Show Cause directed to FAL, CLA and the respondent, Robert I. Reich, setting a hearing for June 8, 2011, on the issue of whether the respondents needed to comply with petitioner's request for documents. The respondents filed a response indicating that the subpoena *duces tecum* was invalid and moved that it should be quashed because the Attorney General ignored procedural requirements for the issuance of an out-of-state subpoena. The respondents contended that the Attorney General should have attempted to domesticate the subpoena in the state of incorporation or residence for each respondent instead of merely mailing the self-issued subpoena to the respondents. The respondents also raised the issue of whether the Attorney General was properly before the West Virginia courts for enforcement.

A hearing was held before the respondent Judge King on June 8, 2011. At the conclusion of the hearing the circuit court requested that each party submit proposed findings of fact, conclusions of law and a proposed order for the court's review and entry. On August 15, 2011, the circuit court ruled that the investigative subpoena was procedurally defective and therefore invalid, and denied the petitioner's request for enforcement of the subpoena.

In denying the petitioner's request for judicial enforcement of the subpoena, the circuit court held that the petitioner had failed to abide by the requirements for issuance of and service of subpoenas on out-of-state entities. Citing Syl. pt. 1, *State ex. rel. Hoover v. Berger*, 199 W. Va. 14, 483 S.E.2d 12 (1996), the circuit court found that in order to obtain judicial enforcement of the investigative subpoena, the petitioner had to prove five "tightly drawn" requirements, including (1) that the subpoena was issued for a legislatively authorized purpose; (2) that the information sought is relevant to the authorized purpose; (3) that the information sought is not already in the petitioner's possession; (4) that the information described is adequately described and (5) that proper procedures were employed in issuing the subpoena.

The circuit court reasoned that it was only after these factors were satisfied that the subpoena could be determined to be presumptively valid, shifting the burden to the

respondent to show why the subpoena is not enforceable. Quoting again from *Hoover*, the circuit court found that "West Virginia courts are 'particularly sensitive to claims of administrative subpoena 'abuse,'" and when such a claim is raised, the circuit court must perform its "gatekeeper function" and provide "meaningful judicial oversight" and "careful scrutiny" to determine if the subpoena is entitled to judicial backing. *Hoover* at 18-19.

The circuit court found that the sole issue before it was whether the petitioner had employed proper procedures in issuing the administrative investigative subpoena to the respondents. The order noted, *inter alia*, that if the Attorney General could not demonstrate that the subpoena was procedurally sound, the subpoena would be invalid and could not be enforced by the circuit court. The circuit court ruled that the subpoena could not withstand scrutiny because the procedural requirements for issuing a valid out-of-state subpoena *duces tecum* were not met.

The Attorney General did not file a direct appeal to this Court from the order of August 15, 2011. On December 5, 2011, the petitioner filed a Petition for Writ of Prohibition, seeking the stop the enforcement of the circuit court's order.

II.

STANDARD OF REVIEW

In Syllabus Point 4 of *Hoover*, 199 W. Va. 14, 483 S.E.2d 12, we explained that

> 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. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Using this standard of review, we examine the Attorney General's request for a writ of prohibition.

III.

DISCUSSION

In his petition to this Court the Attorney General raised five distinct questions of law, all going to the merits of whether the circuit court should have enforced the investigative subpoena issued by the Attorney General.[4] The respondents argue that these questions are improperly before this Court, and that the sole issue for review is whether the

---

[4]The petitioner's original five questions were as follows:

1. Whether a Virginia lender who makes loans to West Virginia residents secured by titles to their motor vehicles that engaged in "debt collection" practices that allegedly violate the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. § 46A-1-1, et seq., (i.e. harassing consumers by telephone, disclosing debts to family members, friends, references, employers; contacting third parties) has engaged in sufficient minimum contacts for due process purposes to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?
2. Whether a Virginia lender that files liens with the West Virginia Division of Motor Vehicles against the titles of vehicles owned by the West Virginia residents to secure its loans has engaged in sufficient minimum contacts for due process purposes such as to submit itself to the to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?
3. Whether a Virginia lender that files liens with the West Virginia Division of Motor Vehicles against the titles of vehicles owned by West Virginia residents to secure its loans has engaged in sufficient minimum contacts for due process purposes such as to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?
4. Whether the WVCCPA, specifically W. Va. Code § 46A-7-104, authorizes the Attorney General to issue an investigative subpoena requiring production of documents from an out-of-state lender that has made loans to West Virginia residents and engaged in allegedly unlawful debt collection activities when the lender's records are located out of state?
5. Whether a circuit court in West Virginia has jurisdiction to enforce an investigative subpoena issued by the Attorney General pursuant to W. Va. Code § 46A-7-104 for the records of a lender that engaged in allegedly unlawful debt collection activities here when the company or its records are located out of state?

circuit court was correct when it ruled that the Attorney General had failed to utilize the proper procedure when it issued and served the administrative investigative subpoenas upon the out-of-state respondents.

We agree with the respondent that the five questions posed by the Attorney General exceed the scope of our review in an original jurisdiction extraordinary remedy proceeding. The underlying order issued by Judge King clearly framed the issue facing him as whether the Attorney General issued a procedurally sound subpoena to the respondents. Relying upon the *Hoover* analysis the circuit court found that the petitioner made procedural missteps in executing and serving the subpoenas upon the out-of-state respondents. An appeal of that decision to this Court would have allowed this Court to rule on the propriety of that ruling. However, the proceeding before us is no an appeal on the merits, but rather a petition for writ of prohibition.

This Court looks with disfavor upon the use of the extraordinary writ process to address problems which should have been handled by an appeal. The writ of prohibition is truly an extraordinary remedy, one which should be reserved for extraordinary cases. We have held that

> Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or

certiorari."

Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

Whether there was another adequate remedy available to the Attorney General is a factor in determining whether to issue a discretionary writ of prohibition. We held in *Hoover*:

> 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. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *Hoover v. Berger, ibid.*

In the instant case, there was another adequate remedy clearly available to the Attorney General; i.e., the filing of a direct appeal to this Court. A direct appeal is a more appropriate remedy available to address the perceived error in the lower court's order. The

petition for writ of prohibition is not a substitute for an appeal. We therefore deny the requested writ of prohibition.

IV.

CONCLUSION

Because the petitioners had another adequate remedy, that being an appeal of the order of the Circuit Court of Kanawha County, we deny the issuance of the writ of prohibition.

Writ denied.