No. 11-1644 – State ex rel. McGraw v. King

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

Workman, Justice, dissenting:

I disagree with the majority's summary dispensation of this case inasmuch as I believe that petitioner presented a new and important issue of first impression which was properly before this Court, it needs to be resolved on the merits. The Legislature has clearly vested the Attorney General with investigatory powers which are critical to the protection of West Virginia citizens; an analysis of and guidance regarding the proper procedures for utilizing that power was unquestionably warranted. Accordingly, I dissent.

In the instant case, the Attorney General initiated an investigation into the debt collection practices of Fast Auto Loans, Inc., Community Loans of America, Inc., and Robert I. Reich [hereinafter "respondents"] upon receipt of complaints by citizens of West Virginia calling their activities into question. In particular, the Attorney General alleges that he has been provided with information indicating that respondents have been engaged in debt collection practices in the state of West Virginia including unlawful debt collection telephone calls to West Virginia residents, unlawful disclosure of information regarding the West Virginia residents' indebtedness to employers and relatives, and unlawful threats and accusations of fraud against West Virginia citizens. The Attorney General has information

indicating that the respondents have also entered the state to repossess property which secures the loans underlying the debt collection.

In accordance with the authority granted to him pursuant to W. Va. Code § 46A-7-104, the Attorney General issued a subpoena duces tecum to respondents. W. Va. Code § 46A-7-104, in pertinent part, provides:

> (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 . . . make an investigation to determine if the act has been committed and, to the extent necessary for this purpose . . . may subpoena witnesses, compel their attendance, 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 . . .*
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> (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. . . .
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> (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.

(Emphasis added).

The Attorney General argues that the statute fully empowers him to issue subpoenas *duces tecum* and that such power is unfettered by any procedural mechanisms; he argues that a

simple "minimum contacts" analysis is all that is required to subject an out-of-state resident to the subpoena power of the Attorney General as set forth in the statute. He further contends that he followed the statute by first issuing the subpoena and, when respondents failed to provide the materials sought, then applying to the circuit court to compel compliance.

Significantly, respondents appear to fully concede that their actions bring them within the investigatory powers of the Attorney General. In their brief, respondents state that they "do not dispute that W. Va. Code § 46A-7-104 grants the attorney general investigative powers, but rather contend that–like everyone else–the attorney general has to use proper procedures in issuing his subpoenas." Rather, respondents contend that the Attorney General did not follow the proper procedure to subpoena documents from Georgia, where the documents responsive to the subpoena *duces tecum* were held. Respondents argue that the Attorney General must "domesticate" his administrative subpoena *duces tecum* in Georgia and comply with Georgia procedural requirements.

The circuit court summarily agreed with respondents that the subpoena *duces tecum* must be domesticated in Georgia to be enforceable and therefore, the Attorney General failed to satisfy the fifth prong of the requirements set forth in Syllabus Point 1 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) to obtain "judicial backing" for enforcement of administrative subpoenas. Syllabus Point 1 provides, in part:

> 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.

Id. However, in concluding that the subpoena must be domesticated in Georgia, the circuit court cited no authority (nor do the respondents provide any on appeal) indicating that a pre-litigation, investigatory administrative subpoena *duces tecum* is subject to the same mechanisms for issuance of subpoenas and subpoenas *duces tecum* to non-residents in the course of litigation governed by our Rules of Procedure, especially given our separate, specific statute on the Attorney General's powers in this regard. In fact, the absence of any authority for respondents' and the circuit court's proposition is glaring and highlights the danger of the majority's refusal to analyze this matter on its merits.[1] In fact, respondents refer

[1]The circuit court's order states that "[g]eneral principles of territorial jurisdiction and state sovereignty dictate that a forum state's subpoena power does not extend beyond its borders." The circuit court then inexplicably cites to *Guthrie v. Am. Broad. Companies, Inc.*, 733 F.2d 634, (4th Cir. 1984) which appears wholly inapplicable. Most obviously, the subpoena at issue in *Guthrie* was issued in the course of civil litigation. As a result, the decision therein deals exclusively with interpretation of the Federal Rules of Civil Procedure and the extra-territorial service of subpoenas among Federal districts–all of which are governed by uniform federal law and rules of civil procedure. *Guthrie* does not address a statutory grant of authority to perform investigatory functions and issue extra-territorial subpoenas. Moreover, *Guthrie* simply cannot be fairly read to stand for the broad and simplistic proposition that "a forum state's subpoena power does not extend beyond its borders."

In addition to *Guthrie*, the circuit court (and the respondents on appeal) cite to self-serving Georgia statutes regarding Georgia's process for issuance of subpoenas as well as a 1983 Georgia criminal case regarding whether a criminal defendant's request to secure

to the issue before the circuit court as a "quotidian procedural issue." Such a gross oversimplification demonstrates either a complete failure to grasp the issue or a disingenuous attempt to reframe or obfuscate it. Certainly, were the questions presented so commonplace and fundamental, it would seem that respondents and the circuit court would have been better able to provide this Court with clear and authoritative precedent demonstrating the correctness of the circuit court's action. *See supra* n.1.

In contrast, both petitioner and the *amicus curiae* provided this Court with the only persuasive authority squarely on point, all of which supports the petitioner's proposition that the circuit court clearly erred. The seminal case on this issue, *Silverman v. Berkson*, 661 A.2d 1266 (1995), contains a thorough and scholarly analysis of the precise issue presented herein. In *Silverman*, the New Jersey Supreme Court determined that an out-of-state resident was subject to the subpoena power of its Bureau of Securities. The court found that the appropriate analysis arises from the principles of long-arm jurisdiction and that a "minimum

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out-of-state witnesses was pretext for a continuance. The court therein made passing reference to Georgia's "Uniform Act to Secure the Attendance of Witnesses from Without the State"–a statute applicable to criminal prosecutions and grand jury proceedings. Ga. Stat. Ann. § 24-10-90. This "authority" is as unhelpful as *Guthrie*. The issue presented *sub judice* was not what Georgia requires with respect to issuance of subpoenas. Rather, the issue is quite simply whether the West Virginia Attorney General, in the exercise of his statutory investigatory obligations and power, is required to comply with Georgia process and procedure to effectuate proper and enforceable service of a subpoena *duces tecum* on a Georgia resident. The lower court simply *presumed* that the Attorney General was so required and launched into a discussion of the Georgia requirements and the Attorney General's failures in that regard.

contacts" analysis was the procedural safeguard necessary for issuance of the subpoena. *Id.* at 426, 431. The court noted, however, that the power to subpoena an out-of-state resident does not "inevitably follow" from the body of jurisprudence regarding long-arm jurisdiction, but that the "measures of sovereign power are ultimately the same." *Id.* at 425. The court stated: "The concepts of 'jurisdiction to prescribe' ('the authority of a state to make its law applicable to persons or activities') and 'jurisdiction to adjudicate' ('the authority of a state to subject particular persons or things to its judicial process') are closely linked. *Id.* As a result, the court found that an investigatory administrative subpoena issued to those who had purposefully avail themselves of the new Jersey securities market was "consistent with principles of due process." *Id.* at 432. Both Indiana and Massachusetts have applied like reasoning to administrative subpoenas issued to non-residents by their Attorney General and Secretary of the Commonwealth, respectively. *See Everdry Marketing and Management, Inc. v. Carter,* 885 N.E.2d 6 (Ct. App. Ind. 2008) and *Galvin v. Jaffe,* 2009 WL 884605 (Mass. Super. 2009).[2] Respondents herein provided no on-point authority to the contrary.

[2]Although both *Everdry* and *Galvin* involved additional facts permitting the courts to analyze and conclude that the out-of-state residents had consented to the jurisdiction of the issuing states, the courts nevertheless undertook an alternative analysis of whether issuance of the subpoenas, in absence of consent, would comport with due process. *Everdry* at 11-15; *Galvin* at *9-12. Both courts determined that consent notwithstanding, the non-residents' minimum contacts with the issuing state required them to comply with the subpoena. *Everdry* at 15; *Galvin* at *11.

Turning now to the majority's decision in this case, it correctly states that this Court has held:

> In determining whether to entertain and issue the writ of prohibition . . . 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 useful starting point for determining whether a discretionary writ of prohibition should issue.*

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)(emphasis added). However, we have further held that "all five factors need not be satisfied[.]" *Id.* The majority addresses only the first factor–availability of another remedy–and goes no further, denying the writ on that basis alone.[3]

As this Court made plain in *Hoover*, availability of another remedy is but one factor to be considered and that the factors themselves are merely a "starting point." The issue presented in petitioner's writ is of significant importance to the citizens of West

[3]I recognize that the majority disapproved of the fact that the extraordinary office of prohibition was not utilized by the Attorney General until he had permitted the deadline for filing his notice of intent to appeal to lapse. However, an analysis of all the *Hoover* factors might reflect that prohibition nevertheless could lie.

Virginia. However, the majority's opinion leaves unanswered the question of whether an out-of-state company can purposefully avail itself of the State of West Virginia, but escape the investigatory purview of the Attorney General by simply refusing to cooperate with an administrative subpoena *duces tecum*, despite the fact that the face of W. Va. Code § 46A-7-104 certainly seems to reflect a legislative intent to provide the Attorney General with direct investigatory powers.

As illustrated above, the issue in the case strikes at the very core of the Attorney General's investigative powers. In the current age, consumerism no longer exists exclusively on street corners or with local vendors and businesses. Technological consumerism has blurred–if not completely erased–state boundaries, making the Attorney General, who is charged with protecting the consumers of this State, wholly unable to protect our citizens unless he has the ability to bring out-of-state businesses within his reach. Unquestionably, the means and methods of the Attorney General's obligation to investigate unlawful practices of out-of-state business calls into question complex issues of comity and the sovereignty of the states. These are weighty issues to which respondents and the circuit court below gave cursory commentary without any substantive analysis. As such, I believe it is the obligation of this Court, before summarily dismissing this matter on procedural grounds, to give consideration to the significance of this issue which demands substantive resolution.

Therefore, for the reasons stated above, I respectfully dissent.