STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE EX REL. LARRY F. PARSONS,
EXECUTIVE DIRECTOR OF THE
WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY AUTHORITY,
Petitioner

v.) 11-0693

HONORABLE MICHAEL THORNSBURY,
JUDGE OF THE CIRCUIT COURT OF MINGO
COUNTY, Respondent

FILED
June 23, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This case arises from an "Emergen[c]y Writ of Prohibition/Writ of Habeas Corpus"[1] filed by Larry Parsons, Executive Director of the West Virginia Regional Jail Authority and Correctional Facility Authority, against the Honorable Michael Thornsbury, Judge of the Circuit Court of Mingo County ("the Respondent Judge").[2] The Petitioner seeks

[1]By the time this Court issued the rule to show cause in prohibition on April 22, 2011, the alleged detention that was the basis for the Petitioner's writ of habeas corpus had resolved, as the Petitioner's supplemental pleading reveals that "[a]t approximately 3:00 p.m. on this date [referring to April 21, 2011], the Court's Bailiffs came to the holding area where these officers were held and advised them that they were now free to leave." That the correctional officers were no longer allegedly "detained without lawful authority" resolved any need to issue a writ of habeas corpus. W. Va. Code § 53-4-1 (2008).

[2]The Petitioner also filed a "Motion for Expedited Relief," requesting the Court to expedite the matter and to "order the release of officers Anthony Elkins, Zachary Bassham and Richard Powers."

194

to prohibit the enforcement of three contempt orders entered on April 21, 2011, against three individuals who were acting as correctional officers for the West Virginia Regional Jail Authority and Correction Facility Authority (sometimes referred to as "WVRJA"). Following the filing of the petition and accompanying attachments, as well as a supplemental pleading,[3] the Court issued a rule to show cause. In the Court's Order issuing the rule to show cause, the Court directed the Respondent Judge to file a response and a transcript of all the proceedings. The Respondent Judge timely filed a response, including the transcripts of the proceedings requested by the Court, an affidavit from Ronnie Martin, a bailiff, as well as surveillance videotape taken by cameras at the Mingo County Courthouse of the contempt proceedings and other areas in the courthouse. Likewise, the Petitioner timely filed a reply, which included affidavits from the three correctional officers. Having carefully reviewed the record provided and the written arguments of the parties, the matter is now mature for consideration.

Upon consideration of the foregoing and the relevant decisions of the Respondent Judge, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

I.

The Petitioner alleged that on April 21, 2011, the Respondent Judge "unlawfully detained West Virginia Regional Jail Authority . . . Transportation Officers preventing the West Virginia Regional Jail Authority from fulfilling its lawful duties." The Petitioner further averred that "[b]y order from the bench, Judge Thornsbury has arrested and detained Southwestern Regional Jail staff, including the Transportation Supervisor, by holding them in contempt of court for delivering 20 inmates to Mingo County Court in two separate transportation runs."[4]

The Petitioner also filed a "Supplemental Pleading," in which he stated that he had been "provided with the following relevant and pertinent information" about the case. In that document, the Petitioner stated that Officer Elkins and Bassmam were "ordered handcuffed and detained by Judge Michael Thornsbury in open court, and on the record

[3]On the same day the petition was filed with the Court, the Respondent Judge filed his initial response to both the petition and the supplemental pleading.

[4]It is important to note the correctional officers who were held in contempt, Anthony Elkins, Zachary Bassham and Sgt. Richard Powers, were not parties to the Petition for Writ of Prohibition.

charged with contempt. Approximately two hours later, Sgt. Richard Powers was similarly detained." The Petitioner further stated that

> [a]t approximately 3:00 p.m. on this same date, the Court's Bailiffs came to the holding area where these officers were held and advised them that they were now free to leave. The Judge's Clerk and Secretary further advised Sgt. Powers that they were free to leave, provided that they each pay a fifty dollar ($50.00) fine no later than Monday, April 25, 2011.

Despite the Petitioner's allegations of handcuffs, arrests, and detentions, surveillance videotape from the courthouse in Mingo County provided by the Respondent Judge shows that the correctional officers were never placed in handcuffs and appear to have moved freely throughout the courthouse. A review of the videotape reflects that the officers were never placed in holding cells. Additionally, a review of the two transcripts from the contempt proceedings for the three officers reveals that the Respondent Judge told Officers Elkins and Bassmam to "Get your check books out. It's Fifty Dollars ($50.00) each. If you show up late with my prisoners again it's ten (10) days each and that applies to any transport officer who does that. Do you understand?" The Respondent Judge offered an almost identical directive to Sgt. Powers when he appeared before the Respondent the same day. There were three separate contempt orders[5] entered by the Respondent Judge on April 21, 2011, for Anthony Bassman, Richard Powers, and Anthony Elkins, respectively. The orders provided that each individual was "in direct Contempt of Court for failure to transport prisoners in a timely manner in direct violation of the Courts' Order[.]" The Order also reflects the fifty dollar fine imposed by the Respondent Judge and sets forth that the fine must be paid by April 25, 2011.

In addition to the videotape, the Respondent Judge submitted to the Court in his response an affidavit from Ronnie Martin, bailiff for the Circuit Court of Mingo County.

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[5]The Respondent Judge originally entered three separate orders styled "Contempt Order," wherein the Respondent Judge found each individual in contempt for "appearing in Court late which is a violation of the Courts [sic] transportation order and delaying the Judicial process." None of the orders set forth any fines or other sanctions. Thereafter, on the same day, the circuit court entered three additional orders entitled "Direct Contempt Order." These orders, as mentioned *supra*, included the fines imposed by the Respondent Judge. These orders were followed by the entry by the Respondent Judge of three orders entitled "Corrected Direct Contempt Order," which were also entered on April 21, 2011. The only "correction" appears to be a type-written, instead of handwritten, date that the order was entered.

Mr. Martin stated he did have the correctional officers' weapons secured before they entered the courtroom. The Respondent Judge confirmed the removal of the officers' weapons, stating in his initial response that the correctional officers "were not permitted to bring their weapons into the courtroom per court procedure."[6] Mr. Martin further stated that

> [a]t no point were the officer's [sic] placed under or [sic] arrest, told that they were under arrest, told that they were being placed in custody, they were never placed in a cell, and no handcuffs and/or shackles were ever used on the officers. After being taken into the courtroom, the officers were found in contempt, and at that time I was ordered to escort them to the Mingo County Circuit Clerk's Office to pay their fines that were issued to them. At that time the officer's [sic] advised me that they did not have the money with them to pay the fines and we all went back down to the holding area, which is the regular working area for all correction officers, where they sat down and starting using the telephone.
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> I then went back to the courtroom to help with the rest of the arraignment. When I arrived back upstairs, Sgt[.] Richard Powers was sitting in the jury room. The Judge asked me if the regional jail had transported the prisoners back, and I advised no, that they were still downstairs. At that time, Judge Thornsbury instructed me to go down and tell the correctional officers that they had until Monday to pay their fines, and that they were free to go to do their normal duties. Myself [sic] and Sgt[.] Powers then went to the holding area, and I advised all correctional officers of what the judge had said.

In his affidavit, the bailiff also stated that the officers advised him that they wanted what the judge had said in writing before they left and that they were waiting to hear back from a supervisor.

In the Petitioner's reply, the Petitioner's counsel "concedes that the transcript does not contemplate jail time; however, the Correctional Officers were advised by Court Officers that they were not free to go, and were under constant observation by Court Officers." The Petitioner also attaches affidavits from each correctional officer held in

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[6]It is unclear from the record submitted before the Court if the removal of the correctional officers' weapons was the result of a general policy. In the Respondent Judge's "Response to Petition for Writ of Prohibition," he further states that "as a security measure, the jail employees were requested to temporarily surrender their weapons before entry into the courtroom." The Petitioner does not offer any evidence to refute the Respondent Judge's statement that the correctional officers were requested to surrender their weapons temporarily because of "court procedure" or as a "security measure."

contempt. Regarding the contempt proceeding, Sgt. Powers states the Respondent advised him that he "needed to pay a 50(fifty) dollar fine, I do not recall him telling me about jail time. At that time, I was placed under arrest and Judge Thornsbury told Court Marshall, [sic] Martin to escort me back to the holding area with the others." He further stated that he "was not certain if I could leave or not." Then, he stated that he was asked by the Court Marshall [sic] what he was going to do with the inmates and when he said that all his people were at the courthouse, "knowing that Officer Elkins' weapon was seized, I was certain that we were not free to go." Sgt. Power stated that it was not until 3:00 p.m. that they were advised by the Respondent Judge that they were free to leave. Sgt. Powers further stated that he "telephoned the Judge's Clerk who advised me it was ok to go so long [sic] we pay the 50 (fifty) dollar fine by Monday."

Zachary Bassman stated in his affidavit that "Judge Thornsbury ended [the contempt hearing] by stating, 'Ok, fifty dollar fine or ten days in jail, you can pay the Clerk. If you don't have a check or cash, maybe someone can loan you the money." A review of the transcript of the hearing, however, contradicts Mr. Bassman's affidavit as follows:

> THE COURT: Get your check books out. It's Fifty Dollars ($50.00) each. If you show up late with my prisoners again it's ten (10) days each and that applies to any transport officer who does that. Do you understand that?
> CORRECTIONAL OFFICER ELKINS: Yes, Your Honor;
> CORRECTIONAL OFFICER BASSMAN: Yes, sir;
> THE COURT: Spread the message, and I thought it was spread far, widely and clearly last time. Obviously, the Regional Jail is like talking to that wall right there. They think they answer to nobody. Well, they do answer. They do answer. I answer, as all these lawyers do, as the other defendants do, so Fifty Dollars ($50.00) each. Take your checks now. If you want to borrow it from somebody you can, and, let me tell you, the very next time it comes over there I'm not doing the Fifty Dollar ($50.00) option. It will be ten (10) days and you will go back without your weapons and you will go back to the Regional Jail in a holding cell in custody, and make that clear to every transport officer over there, and when Mr. Powers gets here it's going to be painfully clear to him.
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> . . .
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> THE COURT: All right, Your contempt orders are here. I've signed them. You'll get a copy of them. You can pay your Fifty Dollars ($50.00) to the Clerk. . . .

Mr. Bassman further states in his affidavit that "[t]he Bailiff then escorted us to the Clerk and never left us. I was never free to leave, I was just told if I did not pay a fifty dollar fine, I would spend ten days in jail."

Anthony Elkins, in his affidavit, stated that he was not free to leave because he did not have fifty dollars to pay his fine. He stated that he told the court bailiff, Mr. Martin, that he had no way of paying his fine. Mr. Elkins stated that the bailiff told him that "Judge Thornsbury ordered him to place us in handcuffs and put us in a holding cell," but that the bailiff and another officer said that they were not going to do that. Mr. Elkins stated that he was never left alone, "there was always a Court Marshall [sic] guarding me, and my weapons and equipment were not returned." Contrary to this statement, the videotape reveals that the correctional officers were not always with a "court marshal," were at times left alone, and were free to use the telephone. Mr. Elkins stated that the Mingo County Sheriff and other people offered to pay his fine, "but I feel it is unethical for me to accept money while acting in the course of my public duties, so I declined." Mr. Elkins said that after being detained approximately five hours, Mr. Martin told them that they were free to leave.

II.

The Petitioner argues in his petition that the Respondent Judge abused his discretion in summarily imposing sanctions upon the individual correctional officers for transporting inmates from the regional jail in an untimely manner. The Petitioner maintains that the correctional officers were handcuffed, arrested, detained, and fined by the Respondent Judge.[7] Before the Petitioner's argument can be addressed, however, the Court must address the Respondent Judge's contention that the Petitioner lacks standing to bring the instant petition as standing is a jurisdictional requirement. "Standing is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b), at 21 (Supp. 2004). The Petitioner did not offer any response to the standing argument.

In syllabus point six of *State ex rel. Linger v. County Court of Upshur County*, 150 W. Va. 207, 144 S.E.2d 689 (1965), the Court held:

[7]While the Petitioner modified his argument in his reply to the response filed by the Respondent Judge to whether it was an abuse of discretion to fine and detain the correctional officers, the Petitioner did nothing to correct the inaccurate statements in the petition that the correctional officers had been arrested and handcuffed.

> As a general rule any person who will be affected or injured by the proceeding which he seeks to prohibit is entitled to apply for a writ of prohibition; but a person who has no interest in such proceeding and whose rights will not be affected or injured by it can not do so.

Id. at 208, 144 S.E.2d at 692. Here, the rights of the Petitioner, Mr. Parsons as the Executive Director of the West Virginia Regional Jail Authority and Correctional Facility Authority, are not "affected or injured by" the Respondent Judge's orders imposing fines against the three correctional officers, none of whom were included as parties in the petition for writ of prohibition. *Id*. Neither are the rights of the WVRJA "affected or injured by" the Respondent Judge's orders. *Id*. Succinctly stated, because there is a lack of any showing by the Petitioner that the Petitioner's rights are affected or injured by the Respondent Judge's order, the Petitioner lacks standing to bring the instant writ of prohibition. Therefore, the rule to show cause in prohibition is dismissed as improvidently granted.

Even though the Court could end this decision with the determination that the Petitioner lacks standing, there is an important ancillary matter involving the facts of this case that the Court must address. In deciding to issue the rule to show cause, the Court focused upon the Petitioner's allegations that the Respondent Judge had handcuffed, arrested and detained the correctional officers. Once the Respondent Judge filed his response, however, neither surveillance videotape nor transcripts of the contempt hearings before the Court were consistent with the claims involving arrests of the correctional officers, handcuffs and detentions. Further, the Petitioner does not refute, in any way, the accuracy of the videotape and the transcripts from the contempt hearings.

Disturbing to the Court, however, was that in the Petitioner's reply, other than a concession by the Petitioner and his counsel that "the transcript does not contemplate jail time[,]" there was no attempt made by the Petitioner or his attorney to correct the blatant misrepresentations of critical facts that led this Court to issue the rule to show cause in the first instance. For example, while the Petitioner represented to the Court that the correctional officers were handcuffed, it is clear from the videotape and the transcript of the proceedings that none of the correctional officers were ever placed in handcuffs. While this Court refrains from exercising its own contempt of court powers in this action to impose sanctions against the Petitioner and his counsel,[8] it would behoove the Petitioner, his counsel, and all

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[8]*See State v. Robertson*, 124 W. Va. 648, 651-52, 22 S.E.2d 287, 290 (1942)("The power of this Court to punish for contempt is inherent in the very nature of things, and without it we would be unable to function as a court and enforce our orders, decrees and (continued...)

parties filing documents before this Court that contain plain misrepresentations of fact to immediately correct those misrepresentations when the factual record does not support the facts as represented by the party and are simply inaccurate.[9]

The inaccurate statements presented to this Court by the Petitioner is another basis for why this Court improvidently issued the rule to show cause. The Respondent Judge correctly argues that a writ of prohibition should not issue if there exists an adequate, alternative remedy of an appeal. Even though the Petitioner also lacks standing to pursue an appeal on behalf of the correctional officers, the correctional officers have the right to pursue an appeal of the Respondent Judge's orders.[10] When the inaccurate statements are excised

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[8](...continued)
mandates. Statutory provisions, Code 1931, 61-5-26, assuming to limit courts in punishing for contempt, were never meant to apply and do not apply to this Court. *State v. Frew & Hart*, 24 W. Va. 416, 49 Am. Rep. 257. We are, therefore, free to take such action and impose such penalties as are necessary to make our orders and decrees effective, and to uphold our prestige and authority.").

[9]West Virginia Rule of Professional Conduct 3.3 imposes upon lawyers a duty of candor toward a court as follows:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal;
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> . . .
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> . . .
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [relating to confidentiality of information]."

[10]*See Kessel v. Leavitt*, 204 W. Va. 95, 118, 511 S.E.2d 720, 743 (1998), *cert. denied*, 525 U.S. 1142 (1999)(stating that "'[t]raditionally, courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third (continued...)

from the petition, a writ of prohibition was not the correct means to address whether the Respondent Judge abused his discretion in fining the correctional officers under the provisions of West Virginia Code 61-5-26 (2010).[11]

The Court previously has held:

> 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

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[10](...continued)
parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.' *Snyder v. Callaghan*, 168 W.Va. 265, 279, 284 S.E.2d 241, 250 (1981) (emphasis added) (citation omitted).") (Emphasis in original deleted).

[11]West Virginia Code § 61-5-26 (2010) provides, in relevant part, that

> The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases: . . . (c) misbehavior of an officer of the court, in his official character; . . . (d) disobedience to or resistance of any . . . person, to any lawful . . . order of the said court.

Id. According to the statute, there is some limitation regarding the punishment that a circuit court can impose. *See id.* (providing that "[n]o court shall, without a jury, for any such contempt as is mentioned in subdivision (a) of this section, impose a fine exceeding fifty dollars, or imprison more than ten days."). Morevoer, if a circuit court seeks to imprison an individual under the foregoing statutory provision, then the law enunciated by the Court in *Hendershot v. Hendershot*, 164 W. Va. 190, 263 S.E.2d 90 (1980), must be followed. In *Hendershot*, this Court held in syllabus point two that "Article III, Section 14 of the West Virginia Constitution prohibits imprisonment without a jury trial in a criminal contempt proceeding." *Id.* at 190, 263 S.E.2d at 91, Syl. Pt. 2.

> 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, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). This Court has also held that:

> Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.

Syl. Pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973). Further, "'[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1.' Syllabus point 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)." Syl. Pt. 1, *State ex rel. Sims v. Perry*, 204 W. Va. 625, 515 S.E.2d 582 (1999).

The three correctional officers had the remedy of an appeal available as they were not directed to pay those fines immediately, but were given a reasonable amount of time. The correctional officers also could have sought a stay pending appeal. Consequently, the imposition of sanctions for criminal contempt as provided by West Virginia Code § 61-5-26 (2010) was correctable on appeal because all that the Petitioner argues is a simple abuse of discretion, which is not properly the subject of a writ of prohibition.

III.

Having found the rule to show cause was improvidently granted in this case, the case is dismissed from the docket of the Court.

Dismissed as Improvidently Granted.

ISSUED: June 23, 2011

CONCURRED IN BY:

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