IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, Plaintiff Below,

Respondent

Vs.) No. 18 – 0574

Alex Holden, Defendant Below,

Petitioner

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

A. Procedural History

The Petitioner, Alex Holden, and his co-defendant, Holly M. Miller, were jointly indicted by the State of West Virginia on May 8, 2017, in Wood County Circuit Court Case No: 17-F-168. (App. pps. 3-4). The Indictment charges each Defendant with one count each of Possession with Intent to Deliver a Controlled Substance (heroin) and Possession with Intent to Deliver a Controlled Substance (fentanyl). (App. pps. 3-4). The Indictment also charges each Defendant with one count of Conspiracy for each charge of possession with intent. (App. pps. 3-4).

The alleged drugs were found in plastic baggies inside the underwear of the co-Defendant, Holly Miller, during a traffic stop in Parkersburg on March 1, 2016. (App. pps. 1-2). No drugs were found on Mr. Holden. Subsequent testing of the items seized by the West Virginia State Police revealed only heroin, however, and no fentanyl.

Mr. Holden was arraigned on May 25, 2017 and trial was scheduled for September 6, 2017. (App. p. 5). Ms. Miller was never served or arraigned. That trial was continued to November 14, 2017 on the motion of the State, and over the objection of Mr. Holden, on the ground that they had not yet located Ms. Miller.

On November 6, 2017, Mr. Holden filed his Motion to Sever Defendants so that he could proceed to trial in Ms. Miller's absence on November 14, 2017. (App. p. 8). In that Motion, Mr. Holden, based on previous representations from the State, alleged that Ms. Miller could not be located. However, he soon learned that the State of West Virginia had become aware of her location when they filed their Motion to Continue Trial on November 9, 2017. (App. p. 9). In that Motion, the State moved for a continuance "on the ground that Defendant Holly M. Miller is currently incarcerated in Franklin County, Ohio and will be there until November 28, 2017." (App. p. 6). Her projected release date turned out to be grossly in error and the State of West Virginia had not made an effort under the Agreement on Detainers to procure her for trial.

Both the Motion to Sever and the Motion to Continue were scheduled to be heard on November 13, 2017. (App. p. 9). However, the lower court refused to hear the Motion to Sever because neither Ms. Miller nor her counsel were present and rescheduled the same for January 18, 2018. (App. p. 9). The lower court was not so strict with the State, however. Despite the fact that a motion to continue is a "critical stage of the proceeding" at which a criminal defendant is constitutionally entitled to be present, the lower court overlooked her absence, as well as the absence of her counsel, for the purpose of considering and granting the State's Motion to Continue over Mr. Holden's objection. (App. p. 9).

Although the State of West Virginia was aware no later than November 9, 2017, and perhaps earlier than that, of Ms. Miller's incarceration in Ohio, they had made no effort by November 14th to exercise their rights under the Agreement on Detainers codified in West Virginia Code §§ 62-14-1 et seq., to procure her attendance at trial.

The hearing on the Motion to Sever Defendants was heard on January 18, 2018. (App. p. 10). The State of West Virginia objected to the severance and the lower court denied the motion. At that same hearing, the court rescheduled the defendants' trial for April 24, 2018, over three (3) months away. (App. p. 10).

Between November 9, 2018 and April 24, 2018, the State of West Virginia failed to exercise its rights under the Agreement on Detainers to procure Ms. Miller's attendance at trial. As a result, the State filed its Motion to Dismiss without prejudice on April 23, 2018, one day before trial. (App. p. 12). Said Motion stated:

> "Came this 22nd day of April, 2018, Pat LeFebure Prosecuting Attorney, in and for the State of West Virginia, and moves the Court to dismiss the above styled case. The State is unable to prosecute this Defendant without testimony from his co-defendant Holly Miller. Ms. Miller is incarcerated in Ohio and will not be released until sometime in 2019, therefore the State is unable to proceed at this time.
>
> Whereupon, the state requests this Court to dismiss the above styled case without prejudice based upon Ms. Miller's continued incarceration." (App. p. 14).

A hearing was held on the Motion to Dismiss on April 24th, 2018. (App. p. 13) Mr. Holden appeared in person, with Counsel, prepared to proceed to trial. Counsel objected to the Motion and demanded trial but the lower court granted the Motion to Dismiss, without prejudice. (App. p. 13).

In their Motion and during the hearing, the State failed to explain how Ms. Miller's presence would assist them at trial or how they could even utilize her as a witness. No plea agreement had been reached which would allow them to call her as a witness and she was

obviously protected against testifying by her Fifth Amendment right against self-incrimination. Mr. Holden contends that it would not have been beneficial to the State to have her at trial.

B. Statement of Facts

On March 1, 2016, Mr. Holden and Ms. Miller traveled in her vehicle together from Columbus, OH to Parkersburg, WV. (App. pps. 1-2). Ms. Miller drove and Mr. Holden rode in the front passenger seat. (App. pps. 1-2). While in Parkersburg, Ptlmn. B.B. Elliot of the Parkersburg Police Department observed Ms. Miller talking on her cell phone while she was driving and initiated a traffic stop. (App. pps. 1-2). While speaking with Ms. Miller, Ofcr. Elliot observed her to be "extremely nervous, with her hands shaking as she attempted to obtain requested information." (App. pps. 1-2). Her hands were shaking profusely, she was breathing heavy and she had fluctuation in her voice when asked simple questions. (App. pps. 1-2).

Officer Elliot noted no such observations regarding Mr. Holden.

Due to Ms. Miller's behaviors, a K-9 unit performed a sniff on the vehicle and made a positive indication. (App. pps. 1-2). A search of Ms. Miller revealed a clear plastic baggy in her underwear containing 15 individually wrapped packages of suspected heroin. (App. pps. 1-2). No drugs or contraband were found on Mr. Holden, just $312.00 in cash. (App. pps. 1-2)

Subsequently, during questioning and after her arrest, Ms. Miller claimed that Mr. Holden gave her the drugs and told her to put them in her underwear or he would kill her when Officer Elliot initiated the traffic stop. However, Officer Elliot did not make note of any furtive movements in the vehicle which he observed after initiating the stop.

Nevertheless, both Ms. Miller and Mr. Holden were charged as set forth above.

SUMMARY OF ARGUMENT

1. **THE LOWER COURT ERRED BY GRANTING THE STATE'S MOTION TO DISMISS WITHOUT PREJUDICE AS THE PETITIONER WAS PRESENT AND PREPARED FOR TRIAL AND THE DISMISSAL WAS NOT CONSONANT WITH THE PUBLIC INTEREST IN THE FAIR ADMINISTRATION OF JUSTICE AS THE STATE'S ALLEGED INABILITY TO PROCEED TO TRIAL WAS A RESULT OF THEIR OWN LACK OF DILIGENCE.**

In relevant part, Rule 48(a) of the West Virginia Rules of Criminal Procedure (R. Cr. P.) states:

> "The attorney for the state may by leave of court file a dismissal of an indictment...and the prosecution shall thereupon terminate..."
>
> "The requirement that a dismissal of criminal charges requires the consent of the court is incorporated into Rule 48(a) of the West Virginia Rules of Criminal Procedure. There is ample federal and state authority for the proposition that under such rule, specific reasons must be given by the prosecutor for the dismissal so that the trial court judge can competently decide whether to consent to the dismissal..." **Myers v. Frazier**, 173 W.Va. 658, 319 S.E.2d 782 (1984).
>
> "The decision in Myers also held that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice. **State v. Scott**, 233 W.Va. 12, 754 S.E.2d 588 (2014).

In this case, the prosecutor failed to give the lower court sufficient or specific reasons to dismiss the case.

First, the State claimed that Ms. Miller was unavailable for trial. This was not accurate. The only reason she wasn't at trial is because the State of West Virginia repeatedly failed to avail itself of its rights under the Agreement on Detainers from at least November 9, 2017 to

April 24, 2018. The State could have obtained temporary custody during that time period to bring both Ms. Miller and Mr. Holden to trial or even thereafter.

Second, the State claimed in its Motion that "The State is unable to prosecute this Defendant without testimony from his co-defendant, Holly Miller." However, Ms. Miller was a co-defendant and, therefore, not available as a witness to the State. The State had no ability to compel her to testify and there was no plea agreement in place in which she had agreed to testify against Petitioner herein.

Third, the State admitted in its Motion to Dismiss that Ms. Miller "will not be released until sometime in 2019, therefore the State is unable to proceed at this time." The parties were indicted in May, 2017 and Petitioner has been present and prepared for trial on each trial date. He has not caused a continuance and trial "sometime in 2019" is an indefinite continuance and would unlawfully delay his trial beyond three terms of court after the term of his indictment. In addition, the state was not "unable" to proceed to trial. They could have commenced trial and called their available witnesses. The truth is, they were just unable to win.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that this case is appropriate for Rule 19 argument as it involves assignments of error in the application of settled law and an unsustainable exercise of discretion where the law governing that discretion is settled.

ARGUMENT

1. **THE LOWER COURT ERRED BY GRANTING THE STATE'S MOTION TO DISMISS WITHOUT PREJUDICE AS THE PETITIONER WAS PRESENT AND PREPARED FOR TRIAL AND THE DISMISSAL WAS NOT CONSONANT WITH THE PUBLIC INTEREST IN THE FAIR ADMINISTRATION OF JUSTICE AS THE STATE'S ALLEGED INABILITY TO PROCEED TO TRIAL WAS A RESULT OF THEIR OWN LACK OF DILIGENCE.**

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>
> "In light of the foregoing law, we conclude that general statements by a prosecutor that a dismissal of criminal charges would effectuate the efficient and proper administration of justice are not specific enough to support the dismissal. Nor is it sufficient for a prosecutor to generally conclude that the case is difficult and might be lost, because uncertainty is inherent in any litigation. What is needed from a prosecutor is a statement of the salient facts and specific reasons that would provide a trial court with some basis for concluding that the dismissal of criminal charges is warranted..." **Myers v. Frazier**, infra.

A. **Ms. Miller was not unavailable for trial and the state admitted they could not successfully prosecute the Petitioner without her**.

In its Motion to Dismiss, the State literally admitted that "The State is unable to prosecute this Defendant without testimony from his co-defendant Holly Miller." (App. p. 12). This statement was not true. The Petitioner was present for court on both November 17, 2017 and April 24, 2018. He was prepared for trial on both occasions and objected to both the continuance and the dismissal. The State of West Virginia voluntarily chose not to proceed to trial on both occasions despite the fact that they could call their available witnesses and obtain a verdict. They simply didn't want to and did not think they could win. That is not the equivalent of being "unable to prosecute this Defendant." It is the equivalent of not being able to convict him if forced to trial. However, as this Court said in Myers, *infra*, it is not sufficient "for a prosecutor to generally conclude that the case is difficult and might be lost," which is precisely what happened here.

Moreover, the failure of the State to have Ms. Miller present and ready for trial was a direct result of their own negligence. The State was aware of Ms. Miller's incarceration in Ohio no later than November 9, 2017, but did nothing to procure her attendance at trial on either November 9, 2017 or April 24, 2018, a period of over five (5) months.

West Virginia Code § 62-14-1 et seq. codifies the Agreement on Detainers in West Virginia. The State of Ohio is a party to the Agreement pursuant to O.R.C. 2963.30 et seq. (App. pps. 15-17). Article IV of said Agreement states in relevant part:

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: Provided, further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Article V provides in relevant part:

"(a) In response to a request made under Article III or IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had..."

Accordingly, the State of West Virginia could have and should have obtained custody of Ms. Miller for trial at any time after they became aware of her incarceration. That includes the time period after they filed their Motion to Dismiss. (Now, however, there is no pending indictment and the State has voluntarily surrendered their rights under the Agreement on Detainers rather than obtain temporary custody of Ms. Miller for trial during the time after they filed their Motion to Dismiss in lieu of filing it). They clearly did not have to wait for her release "sometime in 2019" to obtain custody of her for trial.

During the hearing on the Motion to Dismiss, the State alleged that they had begun the process of obtaining Ms. Miller under the "I.E.D." process (whatever that is). However, that claim makes no sense and is not supported by any evidence. First, if that were true, they would have had no need to dismiss the case or wait "until sometime in 2019." Second, as set forth above in W.Va. Code, 62-14-1, the "I.A.D." process begins when the "court having jurisdiction of such indictment...shall have duly approved, recorded and transmitted the request" for temporary custody for the purposes of trial. No such request appears of record and the assistant prosecuting attorney who appeared at the hearing on the State's Motion to Dismiss didn't even know there had been such a motion filed. Petitioner contends that said assistant prosecutor was mistaken in her claim that the I.A.D. process had begun.

Therefore, the Order of the lower court granting the Motion to Dismiss was improvident because 1) the State has now lost its ability to procure Ms. Miller for trial, 2) it denied Mr. Holden his right to a speedy trial without unreasonable delay and 3) it caused the delay between indictments to count against the State for purposes of speedy trial.

B. Unavailability of Ms. Miller as a Witness for the State at a Joint Trial

The Motion to Dismiss was based on the false predicate that Ms. Miller was available to the State as a witness against Mr. Holden. She wasn't. Obviously, Ms. Miller was a co-defendant. As such, she was entitled to her Fifth Amendment right against self-incrimination and could not be forced to testify.

> "The Fifth Amendment to the United States' Constitution provides, in relevant part, that 'no person shall be compelled in any criminal case to be a witness against

himself...' The corresponding provision of the West Virginia Constitution states, 'nor shall any person, in any criminal case, be compelled to be a witness against himself...' W.Va. Cpnst. Art. III, § 5." State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (W.Va. 1998).

In addition, there was no plea agreement in place under which Ms. Miller had agreed to testify against Mr. Holden and the State made no representation that there was.

Accordingly, the reasons given by the prosecutor for the need for a dismissal were illusory and of no consequence to the State's ability to prosecute Mr. Holden. They could have proceeded to trial on either occasion and been in no better or worse position than they would have been with or without her presence. Instead, they chose to deliberately and indefinitely delay Petitioner's trial until "sometime in 2019" or even thereafter. The Petitioner is entitled to greater certainty and due process than that.

Therefore, the State of West Virginia did not provide a "statement of salient facts and specific reasons that would provide a trial court with some basis for concluding that the dismissal of criminal charges is warranted" as required by Myers, *infra*.

C. Attempt to Gain a Tactical Advantage.

The State of West Virginia obviously believed Ms. Miller when she claimed, after her arrest, that Petitioner told her to put the drugs in her underwear. But they have no other evidence he even had knowledge of the presence of the drug. Without Ms. Miller's plea and testimony, they have no factual basis or evidence for proceeding against Petitioner. However, as aforesaid, the State could not compel her to testify but they also could not introduce her statement to the police at a joint trial.

"We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them. We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high...

Here, the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Since the State could not compel Ms. Miller to testify or use her statement against Petitioner in a joint trial, their only remaining option is to offer Ms. Miller a plea agreement under which she would agree to testify against Petitioner. They had nearly a year to do so but failed to negotiate such an agreement. There isn't even any evidence they tried. Dismissing the case affords them an indefinite and additional opportunity to negotiate such a plea and thereby obtain a tactical advantage over Petitioner.

This Court has stated that an attempt to gain a tactical advantage is a legitimate consideration in determining whether to grant a prosecutor's motion to dismiss.

"The circuit court's mandamus order expresses the concern that a prosecutor might seek the dismissal of a criminal complaint to gain an improper tactical advantage over a defendant. While this is a legitimate consideration, the solution is not to provide a preliminary hearing to a person who is no longer facing a pending criminal charge...Instead the remedy lies with the magistrate court's responsibility to ensure that a dismissal is consonant with the public interest in the fair administration of justice. If a magistrate finds that an improper motive lies behind a prosecutor's motion to dismiss, the magistrate should deny the motion." State v. Davis, 782 S.E.2d 423 (W.Va. 2015).

D. Prosecutor's Claim that Motion to Dismiss Should be Granted, At Least in Part, Because Petitioner Had Not Demanded a Speedy Trial.

During the hearing on the Motion to Dismiss, the State attempted to justify the dismissal, in part, on the ground that the Petitioner had not demanded a speedy trial. This argument is specious for two reasons.

One, the trial dates in November, 2017 and April, 2018 were both after the term of court at which the Petitioner was indicted. Therefore, it was not incumbent on the Petitioner to demand a speedy trial to protect his rights. That rule applies only to the demand for trial at the term of court at which the Petitioner is indicted. In addition, the Petitioner was present and prepared for trial on both occasions.

Second, the State's position fundamentally misconstrues the long-standing jurisprudence of this State regarding speedy trial rights after the term of indictment.

> "This State has long followed the minority rule that it is the duty of the prosecution to provide a trial without unreasonable delay rather than the duty of the accused to demand a speedy trial." State ex rel. Holstein v. Casey, 164 W.Va. 460, 265 S.E.2d 530 (1980).

Whether Petitioner did or didn't demand a speedy trial should have been irrelevant to the lower court. In any event, Petitioner demanded trial on every occasion that he could in opposition to the State's motions to continue and dismiss. His actions or inactions in no way

entitled the State to a dismissal for an indefinite period of time in deprivation of his right to a speedy trial.

E. The Dismissal was not Consonant With the Public Interest in the Fair Administration of Justice.

> "The prosecutor has a duty to support his action with reviewable reasons and since the court entertaining the motion to dismiss is entitled to have all the relevant facts of the case before it rules on the motion, the prosecutor must have a knowledge of all the circumstances surrounding the case before he can legitimately move for a *nolle prosequi*...
>
> Moreover, most of the foregoing courts also hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice." Myers v. Frazier, *infra.*

The prosecution did not inform the court of all of the relevant considerations as set forth herein. Therefore, the lower court did not have knowledge of all the relevant facts and circumstances surrounding the Motion to Dismiss.

In addition, the State of West Virginia chose to jointly indict Petitioner and Ms. Miller. The State, on several occasions, sought and received joint trial dates. The State actively opposed Petitioner's Motion to Sever. The State actively opposed Petitioner's demands for trial. The State continuously failed to exercise its rights under the Agreement on Detainers. The State consistently appeared for trial not prepared to proceed. Finally, the State failed to negotiate a plea agreement with Ms. Miller to allow her to testify against Petitioner. After all of that, the State chose to seek an indefinite delay of Petitioner's trial and an open-ended continuance. The State caused itself the harm which led to the unnecessary Motion to Dismiss and actually

benefitted from it. When the full import of all of these acts and omissions came home to roost, the State sought and received a dismissal without prejudice and what essentially amounts to an indefinite continuance.

Even at the time of trial on April 24, 2018, the State could have asked for a continuance to a date certain, and within the Petitioner's speedy trial rights, and then exercised its rights under the Agreement on Detainers and obtained temporary custody of Ms. Miller for trial. Again, they elected to forego those rights.

CONCLUSION

Under all of the above circumstances, the granting of the Motion to Dismiss without prejudice was not consonant with the public interest in the fair administration of justice. The ruling of the lower court should be modified to show a dismissal with prejudice as to Petitioner's case.

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