IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0574

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

ALEX HOLDEN,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Alex Holden ("Petitioner"), raises one assignment of error: that the circuit court erred by granting the State's motion to dismiss Petitioner's indictment without prejudice.

STATEMENT OF THE CASE

On March 1, 2016, law enforcement in Parkersburg, West Virginia, initiated a traffic stop after observing the driver of a vehicle, Holly M. Miller ("Ms. Miller"), to be talking on her cellular telephone. (App. at 1). According to the criminal complaint, during the traffic stop Ms. Miller appeared "extremely nervous," an assisting canine unit provided a positive indication for the presence of controlled substances in the vehicle, and a search of the vehicle and occupants revealed fifteen individually wrapped packages of suspected heroin in Ms. Miller's underwear. (*Id.* at 2). The search also revealed that Petitioner, the only passenger in this vehicle, had $312.00 in cash on his person. (*Id.*). On May 18, 2017, a Wood County grand jury returned an indictment charging both Petitioner and Ms. Miller with one count of possession of heroin with the intent to deliver, one count of possession of fentanyl with the intent to deliver, and two counts of conspiracy to possess a controlled substance (heroin and fentanyl, as contained in Counts 1 and 2 of the indictment) with the intent to deliver. (*Id.* at 3-4).

The matter was set for a joint trial of both Petitioner and Ms. Miller on November 14, 2017; Ms. Miller had, however, for unrelated reasons, become incarcerated in Franklin County, Ohio, and was not scheduled for release until November 28, 2017.[1] (App. at 6). On November 9, 2017, the State moved to continue the case based on Ms. Miller's incarceration; the motion was then considered at a November 13, 2017. (*Id.* at 6, 9). At some point prior to that hearing, Petitioner

[1] Petitioner asserts Ms. Miller's projected release date of November 28, 2017 "turned out to be grossly in error," (Pet'r's Br. at 2), but the record is silent as to whether the State's representation concerning Ms. Miller's projected date of release was indeed a miscalculation or was, instead, rendered erroneous by actions of authorities in Ohio over which the State of West Virginia has no control.

moved to sever the joint trial based on Ms. Miller's absence, but the circuit court declined to entertain the motion to sever as neither Ms. Miller nor her counsel were present at the November 13 hearing. (*Id.* at 8-9). At that hearing, the circuit court granted the State's motion to "continue the trial set for November 14, 2017, for reasons set forth more fully upon the record" and noted Petitioner's objection to this. (*Id.* at 9). However, the order following the hearing also details that "counsel for [Petitioner] moved the [Circuit] Court to set trial in the next term of Court, without objection from the State, the Court GRANTS [Petitioner]'s motion. Tr[ia]l date will be reset at the motion hearing when all parties are available." (*Id.*).

The circuit court held a motions hearing on January 18, 2018, at which Ms. Miller's counsel appeared, and heard Petitioner's motion to sever the joint trial. (App. at 10-11). This motion was denied "[b]ased upon information before the [Circuit] Court[,]" and the trial date was set for April 24, 2018. (*Id.*). On April 23, 2018, the State moved to dismiss the indictment without prejudice as it related to Petitioner, as it was "unable to prosecute this Defendant [(Petitioner)] without testimony from his codefendant 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." (*Id.* at 12).

On April 24, 2018, the parties appeared before the circuit court to address the State's dismissal motion, to which Petitioner objected and instead requested the indictment be dismissed with prejudice. (App. at 13). At the hearing, Petitioner cited that he would be prejudiced by the State's motion because it gives the State a "tactical advantage" over him. (Hrg. Tr., Apr. 24, 2018 at 3:8-12, 4:7-10).[2] Petitioner supported this contention by arguing that the State "could have had [Ms. Miller] here today under the Agreement on Detainers between the State of Ohio and the State

[2] The transcript of the April 24, 2018 Hearing is included in the Appendix prepared by Petitioner, but it has not be consecutively paginated consistently with the remainder of the Appendix. Accordingly, citations to that transcript are to the original, internal pagination.

of West Virginia" and that this denied Petitioner his "right to have a fast and speedy trial, or one without unreasonable delay." (Hrg. Tr., Apr. 24, 2018 at 4:23-24, 5:1-5.)

The State responded that "[o]bviously . . . the State is not attempting to obtain some tactical advantage over [Petitioner,]" explaining further that Petitioner and Ms. Miller are codefendants charged as co-conspirators, and that the State had already begun the process of returning Ms. Miller to West Virginia for the trial. (Hrg. Tr., Apr. 24, 2018 at 6:9-17.) The State also recognized that Ms. Miller's incarceration was "not due to anything that the State [of West Virginia] itself has done to keep her away from trial," and that "[i]n fact, we're attempting to have her returned here so that this case can proceed to trial." (Hrg. Tr., Apr. 24, 2018 at 6:16-22.) Additionally, the State pointed out that because they were already beginning the process of securing Ms. Miller's presence for trial, they were "not asking for this case to be put on hold until 2019[,]" the anticipated release date for Ms. Miller. (Hrg. Tr., Apr. 24, 2018 at 6:15-16.) At the conclusion of the proceedings, the circuit court noted that Petitioner was not in custody pending trial, and granted the State's motion to dismiss the indictment without prejudice as it related to Petitioner. (Hrg. Tr., Apr. 24, 2018 at 6:23-24, 7:2-5); *see also* (App. at 13).

It is from this order that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

Petitioner has failed to prove that this Court should disturb the lower court's decision to dismiss his indictment without prejudice. The State, exercising its prosecutorial discretion, determined that proceeding with Petitioner's joint trial without his codefendant would be futile, and provided this specific reasoning to the circuit court in making its motion for a dismissal of Petitioner's indictment without prejudice. Though the State could have availed itself of the agreement on detainers, this is entirely within the discretion of the State—and moreover, the State

actually had exercised this right and requested Ohio send Ms. Miller to West Virginia, but did not secure her presence in time for the April 24, 2018 trial. As such, the State properly moved to dismiss the indictment without prejudice, and the circuit court properly granted the motion based upon the State's articulated reasons. Petitioner's contention that the circuit court should have denied the State's motion to dismiss the indictment fails, and this assignment of error should be dismissed as meritless.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this matter as the issues presented in this appeal have been authoritatively decided. The claims asserted in Petitioner's brief are without merit, and the facts and issues are fully presented in the record and briefs on appeal. W. Va. Rev. R. App. P. 18(a). Accordingly, a memorandum decision affirming the circuit court's order is appropriate in this matter. W. Va. Rev. R. App. P. 21(c).

STANDARD OF REVIEW

> This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's "clearly erroneous" standard of review is invoked concerning the circuit court's findings of fact.

Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009); *see also State v. Davis*, 205 W. Va. 569, 578, 519 S.E.2d 852, 861 (1999).

ARGUMENT

The circuit court correctly granted the State's motion to dismiss Petitioner's indictment.

"'The attorney for the state may by leave of court file a dismissal of an indictment, information or complaint, and the prosecution shall thereupon terminate. . . .'" Syl. Pt. 1, in part, *State v. McWilliams*, 177 W. Va. 369, 352 S.E.2d 120 (1986) (quoting W. Va. R. Crim. P. 48(a)).

In proposing a dismissal, the prosecution must give specific reasons "so that the trial court judge can competently decide whether to consent to the dismissal." *Myers v. Frazier*, 173 W. Va. 658, 668, 319 S.E.2d 782, 793 (1984); *see also State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 753, 278 S.E.2d 624, 632 (1981). "Most courts 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[,]" a standard which is the same public interest standard found in Rule 11 of the West Virginia Rules of Criminal Procedure. *Myers*, 173 W. Va. at Syl. Pt. 12, in part, 319 S.E.2d at 786.

In *Myers*, the circuit court asked the State to justify a plea agreement with two separate defendants, and in support of each agreement (which provided the dismissal of certain charges), the State repeatedly explained that "there is a case sufficient to warrant prosecution" and that the State believed it "had a case against [the defendants]." 173 W. Va. at 670 n.17, 319 S.E.2d at 794 n.17. However, the State voiced a "general" belief "that a dismissal of criminal charges would effectuate the efficient and proper administration of justice" because it had "generally" determined "that the case is difficult and might be lost." *Id.* at 670, 319 S.E.2d at 794. This Court found such generalities to be insufficient to support dismissal of charges in the context of plea bargaining, and stated that "[w]hat 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." *Id.*

Here, the prosecutor clearly stated the salient facts and specific reasons for its motion to dismiss: that Petitioner's codefendant with whom he would be jointly tried (as Petitioner's motion to sever was denied) was unavailable at the time of the April 24, 2018 trial. (App. at 12). The State proffered not that its "case is difficult and *might* be lost," but rather that without the codefendant's

presence, the State was "unable to proceed at this time." (*Id.*). This is more than the general uncertainty of litigation cited by the prosecutor in *Myers*, *see* 173 W. Va. at 670, 319 S.E.2d at 794. Here, the State explained that without the testimony of Ms. Miller,[3] it would be unable to prosecute the case against Petitioner. (App. at 12). Thus, the State satisfied the standard outlined in *Myers* and Petitioner's argument that the State has not met its burden must fail. It is well within a circuit court's discretion—acting in its capacity as guarantor of the public's interest in the fair administration of justice—to allow the State to dismiss cases it has determined it *cannot* win, rather than to subject a criminal defendant to a jury trial.

Additionally, Article IV of the Interstate Agreement on Detainers, codified in West Virginia Code § 62-14-1, *et seq.*, provides that

> (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. . . .

W. Va. Code § 62-14-1 (emphasis added). In other words, should a requesting State so choose, it will be entitled to receive its target prisoner after at least thirty days. However, there is no affirmative obligation that a State make such a request. *Id.* ("That there shall be a period of thirty

[3] To the extent Petitioner argues "the reasons given by the prosecutor for the need for a dismissal were illusory and of no consequence[,]" (Pet'r's Br. at 11), it is true that were a hypothetical trial to occur, Ms. Miller may have invoked her Fifth Amendment right to stand silent at trial and not offer testimony against her own interest; however, it is equally true that she might have elected at trial to testify—and the State cannot know which she will do in preparing a case for a jury. *See, e.g.*, *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988); *Cf.*, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981) (holding that a criminal defendant has a right to testify on her own behalf); W. Va. Code § 57-3-6. Moreover, if Ms. Miller were to take the stand, this Court has held "a criminal conviction can be obtained on the uncorroborated testimony of an accomplice." Syl. Pt. 1, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). Conversely, Ms. Miller would have to be present in the courtroom to testify, as Petitioner is correct that he would have a Sixth Amendment right to confront her in court, rather than accept law enforcement's summary of whatever statements she made at the arrest (which do not appear in this record). *See, e.g.*, *Bruton v. United States*, 391 U.S. 123 (1968).

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.").

Here, the record shows that the State believed Ms. Miller would be released on or about November 28, 2017, and by April 23, 2018, realized Ms. Miller remained incarcerated in Ohio. (App. at 6-7, 12). The record also reveals that the State had undertaken efforts to secure Ms. Miller's attendance at trial prior to the newly set trial date of April 24, 2018, but those effort had not yet borne fruit. (Hrg. Tr., Apr. 24, 2018 at 6:14-17) (Assistant Prosecutor: "[Ms. Miller] is now – the [detainer] process has begun to bring her back here. We're not asking for this case to be put on hold until 2019. In fact, we're attempting to have her returned here so that this case can proceed to trial."). In *State ex rel. Forbes v. McGraw*, 183 W. Va. 144, 148, 394 S.E.2d 743, 747 (1990), this Court upheld a magistrate's dismissal of a criminal complaint with prejudice where "the State refused to present its evidence" on the charges, despite the fact the State had its witnesses present on-site and available to testify, and the physical evidence was already in the courtroom. There, this Court emphasized that this ruling does "not suggest that dismissal with prejudice for failure to prosecute or testify is proper in every case." *Id.* Here, the State's key witness (also Petitioner's codefendant) was not present on-site and available to testify, but rather incarcerated pending at least the sending state's approval under the Interstate Agreement on Detainers. *See* W. Va. Code § 62-12-1.

Petitioner's complaint that "[h]e has not caused a continuance[4] and trial 'sometime in 2019' is an indefinite continuance and would unlawfully delay his trial beyond three terms of court

[4] Perhaps with the exception of requesting a trial date be set in the next term as memorialized in the circuit court's order following the November 13, 2017 hearing. (App. at 9) ("Whereupon, counsel for the Defendant, Alex Holden [(Petitioner)], moved the Court to set trial in the next term of Court, without objection from the State, the Court GRANTS Defendant's motion").

after the term of his indictment[,]" (Pet'r's Br. at 6), is similarly unavailing, as 1) the State was moving for a dismissal, not a continuance, on April 24, 2018 (App. at 12); 2) the State, in requesting the dismissal, clearly represented that it was "not asking for this case to be put on hold until 2019," (Hrg. Tr., Apr. 24, 2018 at 6:15-16); and 3) Petitioner received his requested relief: the case was not indefinitely held past three terms,[5] but rather, the case was dismissed on the State's motion. (App at 13).

Petitioner contends the State gained a tactical advantage by dismissing the indictment, and supports this contention by arguing that "[s]ince 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" and that dismissing the case affords them an indefinite opportunity to negotiate a plea with Ms. Miller. (Pet'r's Br. at 12). To the extent that additional time to negotiate a plea agreement can be construed as providing the State a tactical advantage, it is important to recognize that operation of the three-term rule would not have required either a trial or dismissal of Petitioner's case at the time the State sought dismissal. *See note 5, supra.* That is, because Petitioner was indicted in the May 2017 Term of Court, even absent the dismissal, the State would have had until the conclusion of the May 2018 Term of Court (i.e., until September 2018) to negotiate a plea with Ms. Miller. In other words, the State *already* had more time—at least 5 more months in fact—to negotiate with Ms. Miller without needing to move to dismiss the case.

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[5] West Virginia Code § 62-3-21 provides that

> [e]very person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial[.]"

Terms of Court begin, "for the county of Wood, on the second Monday in January, May, and September." W. Va. Trial Ct. R., 2.04.

As for Petitioner's contention that "[d]uring 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," (Pet'r's Br. at 13), he presents no factual support for this claim, and a review of the transcript simply does not support this allegation. Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure requires that Petitioner's brief

> must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on . . . The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. *The Court may disregard errors that are not adequately supported by specific references to the record on appeal.*

(emphasis added). While this Court "liberally construe[s] briefs in determining issues presented for review, issues . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal." *State v. LaRock,* 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996); *see State v. Lilly,* 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995) ("appellate courts frequently refuse to address issues that appellants . . . fail to develop in their brief"); *see also State v. Allen,* 208 W.Va. 144, 162, 539 S.E.2d 87, 105 (1999) ("In the absence of supporting authority, we decline further to review this alleged error because it has not been adequately briefed."). This Court previously has found issues asserted on appeal to have been waived as a result of a petitioner's failure to comply with Rule 10(c)(7). *See, e.g., Evans v. United Bank, Inc.,* 235 W.Va. 619, 629, 775 S.E.2d 500, 510 (2015) (observing that petitioner's argument failed to meet requirements of Rule 10(c)(7), and concluding, therefore, "the issue has been waived for purposes of appeal."). For this reason, the State will not now address any argument Petitioner has that a ***dismissal*** of his indictment somehow impacted his speedy trial rights.

Accordingly, Petitioner's assignment of error—that the circuit 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" (Pet'r's Br. at 1)—is without merit, and should be dismissed.

CONCLUSION

The rulings of the circuit court should be affirmed and Petitioner's requested relief denied in full.

Respectfully Submitted,

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