

20-0234



**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA**

vs.

**CASE NO.: 20-F-105
JUDGE SUSAN B. TUCKER**

TIMOTHY MICHAEL CONNOR, II,

Defendant.

ORDER OF CERTIFICATION

TIM ARMSTEAD, Chief Justice:

The Honorable Susan B. Tucker, Division 1 of the 17th Judicial Circuit of the State of West Virginia, pursuant to WEST VIRGINIA CODE §58-5-2, respectfully requests that the Supreme Court of Appeals of West Virginia exercise its discretion to answer the following questions:

- 1) Whether the following phrase in WEST VIRGINIA CODE §60A-4-416(b) is unconstitutionally vague: "Any person who, while engaged in the illegal use of a controlled substance with another"?

Answer: Yes.

- 2) Whether the undefined phrase "seek medical assistance" in the context of WEST VIRGINIA CODE §60A-4-416(b) provides an adequate standard for adjudication?

Answer: No.

It is this Court's opinion that there is no controlling appellate decision, constitutional provision, or statute delineated in the WEST VIRGINIA CODE that answers these questions. Accordingly, this Court concludes that the questions are appropriate for certification under WEST VIRGINIA CODE §58-5-2.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On January 10, 2020, the Grand Jurors of the State of West Virginia, in and for the citizens of Monongalia County, upon their oaths, charged Timothy Michael Conner, II ("Mr.

Conner" or "Defendant") with Failure to Render Aid Resulting in Death in violation of WEST VIRGINIA CODE §60A-4-416(b).

The case arises out of actions that occurred on March 28, 2019 in Morgantown, Monongalia County, West Virginia. That evening, Shane Cebulak ("Mr. Cebulak") drove his vehicle to pick up Mr. Conner. Thereafter, Mr. Cebulak stopped at an apartment complex, went inside, and purchased heroin from two unknown males. Mr. Conner remained in the vehicle.

Mr. Cebulak engaged in the illegal use of heroin and after began exhibiting signs of overdose. According to Mr. Conner, he did not partake in the use of illegal substances. Mr. Conner called Joseph Choma ("Mr. Choma"), a man Mr. Conner believed to be a nurse and informed him that Mr. Cebulak was overdosing. According to the State of West Virginia, Mr. Choma was not a nurse.

Mr. Conner drove Mr. Cebulak to Mr. Choma's residence. While driving Mr. Cebulak, Mr. Conner drove by two hospitals, two fire departments, and one police department. He did not stop at any of these places. Upon arrival at his destination, Mr. Conner parked the vehicle near Mr. Choma's residence and went inside. Mr. Choma disputes that Mr. Conner went inside the residence.

At that time, according to the Defendant, Mr. Cebulak was alive and breathing. The State of West Virginia represents that Mr. Conner instructed Mr. Choma not to call anyone and indicated that he could not call 911 because he was on parole.

Mr. Choma telephoned his girlfriend, Amy Dolin ("Ms. Dolin"), who was in South Carolina and she called 911 to report an overdose at approximately 8:55 p.m. 911 then

contacted Mr. Choma. Mr. Choma stated that he could hear the person breathing but it sounded like snoring and the person was slumped over in the passenger seat and appeared to be dying. Police, Fire, and EMS personnel arrived at the location but were unable to locate the described vehicle or Mr. Cebulak. Mr. Choma returned inside his residence and told Mr. Conner that emergency personnel did not find Mr. Cebulak and that he must have regained consciousness, got up, and left.

Approximately two hours later, Mr. Choma took his dog out for a walk and discovered Mr. Cebulak in the vehicle. At 10:54 p.m., Mr. Choma called 911. Mr. Choma informed 911 that he did not believe Mr. Cebulak was breathing. The State of West Virginia indicates that law enforcement reported that when found, Mr. Cebulak's body was positioned with his head on the passenger floorboard and his feet between the driver and passenger seats elevated. Additionally, Mr. Cebulak's pants were partially down and his genitals were exposed.

On August 20, 2019, Detectives with the Morgantown Police Department traveled to Harrison County, West Virginia to meet with Mr. Conner during his regularly scheduled meeting with his parole officer. These events led to the indicted charge against Mr. Conner.

On February 10, 2020, Jared T. Moore, counsel for Mr. Conner, submitted a Motion to Dismiss Indictment Based Upon W. Va. Code §60A-4-416(b) Being Unconstitutionally Vague. The State of West Virginia through Prosecuting Attorney Perri Jo DeChristopher submitted State's Response to Defendant's Pre-Trial Motions on February 20, 2020. Thereafter, Mr. Conner submitted Defendant's Reply to State's Response to Defendant's Motion to Dismiss Indictment Based Upon W. Va. Code §60A-4-416(b) Being Unconstitutionally Vague. On February 21, 2020, this matter came before this Court for

hearing. The undersigned indicated that Mr. Conner's Motion to Dismiss warrants this Court submitting an Order to the Supreme Court of Appeals of West Virginia certifying questions. Thereafter, the hearing concluded with the ruling held in abeyance.

ANALYSIS

WEST VIRGINIA CODE §60A-4-416(b) was enacted during the 2017 legislative session. To date, the Supreme Court of Appeals of West Virginia has not had the opportunity to interpret the same. The United States Supreme Court has addressed the factors that determine if a law is vague. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). The Supreme Court of Appeals of West Virginia heard this issue in *State v. Flinn*, 208 S.E.2d 538, 158 W. Va. 111 (1974). In that case, the Supreme Court of Appeals of West Virginia ruled that a "criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." *Id.* at Syl. Pt. 1.

In the instant case, the first certified question seeks to shed light on the ambiguity of what circumstances must exist to constitute using a controlled substance. Specifically, does the statute apply to people personally *using* a controlled substance, or does it apply to those who are merely *physically present* when another is using a controlled substance? The phrase "Any person who, while engaged in the illegal use of a controlled substance with another," as delineated in the statute, fails to give notice to a person under specific circumstances of what would make a person subject to punishment under the code section. At the February 21, 2020 Hearing, the State of West Virginia acknowledged that it had no affirmative evidence that the Defendant was personally using a controlled substance while with Mr. Cebulak on March 28, 2019.

The second certified question requests that the Supreme Court of Appeals clarify what suffices as “seek medical assistance” as stated to in the statute. As written, the phrase “seek medical assistance” is susceptible to differing subjective interpretations, which precludes the public from knowing what the law requires of citizens of the State of West Virginia in similar circumstances. For example, does “seek medical assistance” mean calling 911, transporting the person in need of assistance to a medical facility, or some other specific behavior?

This Court acknowledges that the Supreme Court of Appeals of West Virginia may reformulate these questions pursuant to WEST VIRGINIA CODE §58-5-2.

Accordingly, pursuant to WEST VIRGINIA CODE §58-5-2 and Rule 17(a) of the *West Virginia Rules of Appellate Procedure*, it is hereby **ORDERED** that this action is stayed until such questions have been decided and the decisions thereof certified back to this Court. The parties are **DIRECTED** to prepare a joint appendix of the record sufficient to permit review of the certified questions.

Therefore, it is further **ORDERED** (1) that the questions stated above be, and the same hereby are, certified to the Supreme Court of Appeals of West Virginia, and (2) that the Clerk of this Court forward to the Supreme Court of Appeals of West Virginia, under the official seal of this Court, a copy of this Order.

The names and addresses of counsel of record are the following:

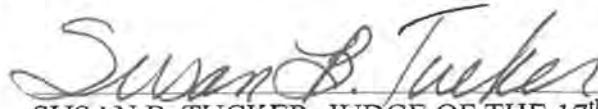
Perri Jo DeChristopher
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75 High Street, Suite 11
Morgantown, WV 26505
Counsel for the State of West Virginia

Jared T. Moore
The Moore Law Firm, PLLC

62A High Street
Morgantown, WV 26505
Counsel for Defendant Timothy Michael Connor, II

The Clerk of this Court shall provide a copy of this Order to all counsel of record.

Entered this 13th day of March 2020.



SUSAN B. TUCKER, JUDGE OF THE 17th JUDICIAL CIRCUIT

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit
Monongalia County State aforesaid
the attached ORDER is a true copy
Order made and entered by said Co.



Mar. 13, 2020

38

Friend

CASE#: **20-F-105**

Sub Code:

Date Opened: 01/16/2020

Date Printed: 03/17/2020

JUDGE: SUSAN B. TUCKER

Plaintiff: **STATE OF WEST VIRGINIA**
vs
Defendant: **TIMOTHY M. CONNER**

Pro Attorney: PERRI DECHRISTOHER

Def Attorney: JARED MOORE

<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
1	01/09/2020	INDICTMENT: Failure to Render Aid Resulting in Death				
2	01/09/2020	Jared Moore as counsel				
3	01/09/2020	CLERK				
4	01/09/2020	PROSECUTING ATTORNEY				
5	01/09/2020	MAGISTRATE 19-M31F-404	\$50,000 NP			
6	01/09/2020	COURT SECURITY FUND				
7	01/09/2020	LAW ENFORCEMENT TRAINING				
8	01/09/2020	COMMUNITY CORRECTION				
9	01/09/2020	CFIF - Felony Fee				
10	01/09/2020	RJ PARTIAL REIMBURSEMENT				
11	01/09/2020	TEEN				
12	01/09/2020	CVC - per felony count				
13	01/09/2020	REGIONAL JAIL AUTHORITY				
14	01/09/2020	CFIF				
15	01/13/2020	D-Motion for Discovery				
16	01/16/2020	TRANSPORT ORDER: Huttonsville transport 1-21-20, 9:30 for hrg				
17	01/21/2020	Notice to Defendant of Criminal Trial Rights/Duties				
18	02/06/2020	ORDER (1-21-20): trial week of 2-4-20: hrg 1-27-20, 9:30 am				
19	01/22/2020	D-Motion to Continue Trial Scheduled for Feb 4				
20	01/23/2020	TRANSPORT ORDER: Huttonsville transport for hrg 1-27-2020, 9:30 am				
21	01/30/2020	S-Req for Discovery/Inspection				
22	01/30/2020	S-Disclosure of Info				
23	02/03/2020	D-1st Motion for Supplemental Discovery				
24	02/05/2020	ORDER (1-27-20): trial week of 3-3-20: hrg 2-24-20, 9:30 am				

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<u>Page</u>	<u>Date</u>	<u>Memorandum</u>	<u>Account#</u>	<u>Earned</u>	<u>Collected</u>	<u>Balance</u>
25	02/10/2020	D-Notice of Hrg on Motion to Dismiss (2-21-2020, 11:30 am)				
26	02/10/2020	D-2nd Motion for Supplemental Discovery				
27	02/11/2020	S-Supplemental Disclosure (911 calls etc)				
28	02/10/2020	D-Motion in Limine to exclude evid of def's parole status at time of				
29	02/10/2020	alleged offense				
30	02/10/2020	D-Motion to Dismiss Indictment based upon WV 60A-4-416(b) being				
31	02/10/2020	Unconstitutionally Vague				
32	02/11/2020	TRANSPORT ORDER: St.Mary's transport 2-21-20, 11:30 am				
33	02/12/2020	S-supplemental Disclosure				
34	02/19/2020	D-Notice of Motion Hrg (2-21-20, 11:30 am)				
35	02/20/2020	D-Reply to State's Response to Def's Motion to Dismiss Indictment				
36	02/20/2020	based upon WV Code 60A-4-416(b) being unconstitutionally vague				
37	02/20/2020	S-Response to Def's Pre-Trial Motions				
38	03/13/2020	ORDER OF CERTIFICATION TO THE SUPREME COURT				