

NOTED DOCKET  
DATE: FEB 24 2021  
MICHAEL J. STOVER  
CLERK CIRCUIT COURT  
WYOMING COUNTY

**STATE OF WEST VIRGINIA  
WYOMING COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA**

**V.**

**2015-F-56**

**OSCAR ROSS COMBS, SR.**

**WEST VIRGINIA SUPREME COURT OF APPEALS DOCKET NO. 18-0445**

**ORDER PER HEARING REQUESTED  
BY THE WEST VIRGINIA SUPREME COURT OF APPEALS  
PURSUANT TO THE THREE TERM RULE**

On the 14th day of December, 2020, this matter came before this Court pursuant to an Order of the West Virginia Supreme Court of Appeals on Oscar Ross Combs, Sr's appeal. The Supreme Court remanded for an immediate hearing concerning the issue of the three term rule. Following review hearing subsequent to the Remand, this Court finds that petitioner is entitled to no relief pursuant to the three term rule and accordingly, for reasons set forth below, this Court upholds the prior conviction with Order with this Order returned to the West Virginia Supreme Court of Appeals for further opinion concerning this matter and other issues upon appeal.

**FINDINGS OF FACT**

Defendant Oscar Ross Combs was convicted of first degree murder and

sentenced to imprisonment in the penitentiary for life without the possibility of parole. Upon appeal, this matter was reversed and remanded for further action by the West Virginia Supreme Court of Appeals with a Memorandum Decision to ~~instructing the Wyoming County Circuit Court to conduct~~ "an immediate hearing to determine applicability of the three-term rule and continued delays in commencing trial."

Subsequently, pursuant to WV Code §62-3-21, "Every 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, unless the failure to try him was caused by insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused."

The procedural history of this case is as follows:

**MAY 2015 TERM** Oscar Ross Combs was indicted in the May 2015 term by the Wyoming County Grand Jury for the charge of first degree murder of Theresa Ford. Trial was initially set in that term for August 17, 2015. The trial

was subsequently continued by the parties. It is established law that the Indictment term within which trial is not held does not count toward determination of the three term rule.

**OCTOBER 2015 TERM** - This was the first full term after the defendant's indictment. Trial was set for January 25, 2016 and was continued jointly by the parties. Trial was reset April 1, 2016 at docket setting while remaining in the October 2015 term during docket setting on the record of this Court without objection by the State or the Defense. This term would not count concerning the three term rule.

**FEBRUARY 2016 TERM**-Trial was set for April 1, 2016 and was continued jointly by the parties. A written order was generated continuing the matter. Trial was rescheduled by agreement of the parties for July 26, 2016 while the February 2016 term was underway during docket setting on the record of this Court without objection by the State or the Defense. This term would not count concerning the three term rule.

**MAY 2016 TERM**-Trial was set for July 26, 2016. A continuance motion was filed by the State and this Court found good cause to grant said motion. Trial was reset to November 14, 2016 during docket setting on the record of this Court without objection by the State or the Defense.

**OCTOBER 2016 TERM**-Trial was set November 14, 2016 continued by a joint continuance Trial was reset to April 3, 2017 while still in the October 2016 term of court

during docket setting on the record of the Court without objection by the State or the Defense. This does not count concerning the three term rule.

**FEBRUARY 2017 TERM**-Trial was set April 3, 2017, however, parties had a ~~hearing on the State's Motion on this day concerning 404(b) evidence based upon Oscar~~ Ross Combs' conviction of First Degree murder and Robbery and sentence of Life without Parole plus 80 years in Mercer County had major implications for both sides and trial was continued to April 10, 2017 allowing April 3, 2017 as the day to argue the motion. However, the motion hearing was not completed on April 3, 2017 and the parties agreed to complete the motion hearing and parties agreed to continue the trial until the next term. Trial was reset to September 18, 2017 while remaining in the February 2017 term during docket setting on the record of the court without objection from the State and the Defendant. This does not count concerning the three term rule.

**May 2017 term**- Motion for 404(b) hearing with both parties present on July 20, 2017 and this Court granted the States motion allowing the Mercer County Conviction to be brought into evidence in the trial in chief and giving both sides adequate time to prepare for the Trial that subsequently commenced September 18, 2017 and Defendant was convicted.

The purpose of the three term rule under WV Code §62-3021 is to give the Defendant a right to a speedy trial and prevent a defendant from languishing for a period of time in prison, with the charges hanging over the defendant's head, or both. As such,

this Statute is to ensure that the State diligently pursues its case against a defendant.

*Good v. Handlan*, 176 W. Va. 145, 149, 342 S.E. 2d 111, 115 (1986) (gathering authorities and noting that “under the three-term rule, we have held that it is the duty of the State to provide a trial without unreasonable delay and an accused is not required to demand a prompt trial as a prerequisite to invoking the benefit of this rule.”); *State ex rel. Waldron v. Stephens*, 193 W.Va. 440, 442, 457 S.E. 2d 117, 119 (1995)(noting that “in syllabus point 2 of *State v. Carrico* 189 W.Va. 40, 427 S.E. 2d 474 (1993), we held that “it is the three-term rule, W.Va. Code §62-3-21 (1959) which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution.”); *Town of Star City v. Trovato*, 155 W.Va. 253, 257, 183 S.E. 560, 562 (1971)(noting that the purpose of §62-3-21 “is to assure the defendant a speedy trial”). As this Court has recognized on a number of occasions, “the three-term rule provides that a post-indictment delay cannot be much longer than a year without an act on the Defendant’s part to extend the term between indictment and trial. *State ex rel. Murray v. Sander*, 208 W.Va. 258, 262, 539 S.E. 765, 769 (2000); see also Syl. Pt. 1, *State v. Damron*, 213 W.Va. 8, 10, 576 S.E.2d 253, 255 (2002); (When an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the

statute.”)(quoting Syllabus *State v. Carter*, 204 W.Va. 491, 513 S.E. 2d 718 (1998)). This rule-the product of a statutory command-while intertwined with a criminal defendant’s constitutional right to a speedy trial, is generally considered to provide a greater level of protection than the text of the constitution itself. See *Lewis v. Henry*, 184 W.Va. 323, 326, 400 S.E. 2d 567, 570 (1990)(referring to W.Va. Code §62-3-21 as the “statutory method of guaranteeing the constitutional right to a speedy trial”). Thus, if a defendant is not tried timely, the remedy under the W. Va. Code is a dismissal of the indictment with prejudice.

With W. Va. Code §62-3-21 in mind, there are four exceptions to the three term rule which apply to the matter at hand: First, the term in which the indictment is returned does not count. *State v. Fender*, 165 W.Va. 440, 446, 268 S.E. 2d 120, 124 (1980)(citing *State ex. rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961)(“In computing the three-term rule we do not count the term at which the indictment is returned.”) see also *Raleigh v. Coiner*, 302 F. Supp. 1151, 1154 (N.D. W. Va. 1969)(noting the same); *Handlan*, 176 W. Va. At 152, 342 S.E. 2d at 118 (“As we have earlier noted, the term at which the indictment is returned is not counted under the three-term statute, W.Va. Code, 62-3-21, according to our cases.”); *State v. Adkins*, 182 W.Va. 443, 445 n.4, 388 S.E. 2d 316, 319 (1989)(noting that “the statute provides that the term in which the indictment is brought is not counted in the three term calculation.”).

Second, agreed continuances **DO NOT** count toward the three term rule .

*Handlan*, 176 W. Va. at 153, 342 S.E. 2d at 118 (“Since the May 1985 term was continued by agreement of the parties, it cannot be counted and, consequently, the relator has failed to show three terms excluding the term of the indictment that are countable under W.Va. Code, 62-3-21.”); *State v. Jordan*, NO. 13-0616, 2014 WL 1672951, at \*2 (W.Va. Apr. 25, 2014)(memorandum decision).

Third, when a criminal defendant delays trial, the term does not count, “Any term at which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three terms in favor of discharge from prosecution under the provisions of Code, 62-3-21, as amended.” Syl. Pt. 3, *Fender*, 165 W. Va. At 441, 268 S.E.2d at 121 (quoting Syl. pt 2, *State ex rel. Spadafore v. Fox*, 155 W. Va. 674, 186 S.E. 2d at 48,”that a defendant cannot prevent trial from being held and then insist on that term counting toward the three term limit.” Similarly, in *Adkins*, 182 W. Va at 445 n.4, 388 S.E. 2d at 319, this Court reiterated that “where the defendant ‘instigates a proceeding which forces a continuance of the case at a particular term of court, he will not be permitted to take advantage of the delay thus occasioned.” (quoting *Spadafore*, 155 W. Va. At 674 186 S.E. 2d at 836.) Again quoting *Spadafore*, the *Adkins* Court stated, “it has generally been held that the phrase ‘on the motion of the accused’ does not require a formal motion to be made by the defendant.” *Adkins*, 182 W. Va. at 445 n.4, 388 S.E. 2d at 319. More recently, in *Jordan*, this Court expressed that the term in which a circuit court addressed a



petitioner's motion to dismiss did not count toward the limit. *Jordan*, 2014 WL 1672951 at \*2.

Fourth, "where a court does not have time for disposition of motions or pleas filed by the accused and a term passes as a result thereafter, such term cannot be counted as one of the three terms under the provisions of Code, 62-3-21, as amended." *State v. Bias*, 177 W.Va. 302, 316, 352 S.E.2d 52, 66 (1986)(citations omitted); see also *Adkins*, 182 W.Va. at 445 n.4, 388 S.E. 2d at 319 (Finally, in *Spadafore*, this Court reiterated that "where a court does not have time for the disposition of motions or pleas filed by the accused and a term passes as a result thereafter, such term cannot be counted as one of the three terms under the provisions of Code, 62-3-21, as amended.")(internal citations omitted).

It is the opinion of this Court that West Virginia Code §62-3-21 was not violated. As specified below, the defendant was tried within three qualifying terms of court following his initial indictment.

**MAY 2015 TERM** Oscar Ross Combs was indicted in the **May 2015** term by the Wyoming County Grand Jury for the charge of first degree murder of Theresa Ford. Trial was initially set in that term for August 17, 2015. The trial was subsequently continued by the parties. It is established law that the Indictment term within which trial is not held does not count toward determination of the three term rule, e.g., *Handlan*, 176 W.Va. At 152, 342 S.E.2d at 118; *State v. Ballenger*, No. 16-0986, 2017 WL 5632824, at \*3 (W. Va. No. 22, 2017); and it is



undisputed that this term of court does not count toward the three term rule..

**OCTOBER 2015 TERM** - This was the first full term after the defendant's indictment. Trial was set for January 25, 2016 during docket setting on record in this court during the October term. The defendant did not object to resetting the trial during docket setting so this court granted a rescheduling. The defendant emphasizes the fact he did not file the motion to continue or cause any delay but this argument affords him no solace as trials that are continued from one term of court to the next without objection by the defendant do not count toward the three term rule. *See, e.g., State v. VanHoose*, 227 W.Va. 37, 49, 705 S.E. 2d 544, 556 (2010). The term of court, therefore, is excused and does not count toward the three term rule.

**FEBRUARY 2016 TERM**-Trial was set for April 1, 2016 and was continued jointly by the parties with a written order generated continuing the matter. Trial was rescheduled by agreement of the parties for July 26, 2016 while the February 2016 term was underway during docket setting on the record of this Court without objection by the State or the Defense. The term of court, therefore, is excused and does not count toward the three term rule.

**MAY 2016 TERM**-Trial was set for July 26, 2016. A continuance motion was filed by the State and this Court found good cause to grant said motion. Trial

was reset to November 14, 2016 during docket setting on the record of this Court without objection by the State or the Defense.

**OCTOBER 2016 TERM**-Trial was set November 14, 2016 continued by a joint continuance Trial was reset to April 3, 2017 while still in the October 2016 term of court during docket setting on the record of the Court without objection by the State or the Defense Trial was set for Jan. 25, 2016 during docket setting on record in this court during the October term. The defendant did not object to resetting the trial during docket setting so this court granted a rescheduling. Again, the defendant emphasizes the fact he did not file the motion to continue or cause any delay but this argument affords him no solace as trials that are continued from one term of court to the next without objection by the defendant do not count toward the three term rule. *See, e.g., State v. VanHoose*, 227 W.Va. 37, 49, 705 S.E. 2d 544, 556 (2010). The term of court, therefore, is excused and does not count toward the three term rule.

**FEBRUARY 2017 TERM**-Trial was set April 3, 2017, however, parties had a hearing on the State's Motion on this day concerning 404(b) evidence based upon Oscar Ross Combs' conviction of First Degree murder and Robbery and sentence of Life without Parole plus 80 years in Mercer County had major implications for both sides and trial was continued to April 10, 2017 allowing

April 3, 2017 as the day to argue the motion. However, the motion hearing was not completed on April 3, 2017 and the parties agreed to complete the motion hearing and parties agreed to continue the trial until the next term. Trial was reset to September 18, 2017 while remaining in the February 2017 term during docket setting on the record of the court without objection from the State and the Defendant. The 404(b) could not be set in the three weeks remaining in the term due to the court's trial calendar and congested docket. The defendant blames the State exclusively for the delay of trial to the following term of court, but where a term passes as a result of the court's docket, such term cannot be counted as one of the three terms under provisions of W. Va. Code § 62-3-21. *Bias*, 177 W. Va. At 316, 352 S.E. 2d at 66. Therefore, this term of court was excused.

**May 2017 term-** Motion for 404(b) hearing with both parties present on July 20, 2017 and this Court granted the States motion allowing the Mercer County Conviction to be brought into evidence in the trial in chief and giving both sides adequate time to prepare for the trial that subsequently commenced September 18, 2017 and Defendant was convicted.

Under West Virginia law, the only term of court that could possibly be deemed as unexcused for purposes of the three term rule is the State's request for

continuance in the May term of 2016. The rest are clearly excused. The defendant was timely convicted of First Degree Murder.

In addition to there being no violation of W.Va. Code §62-3-21, the Defendant's conviction is affirmed in that the factors set forth in *Foddrell*, 171 W.Va. 54, 297 SE 2d 829, in denying relief. The West Virginia Supreme Court of Appeals recognized in *State v. Carrico*, 189 W. Va. 40, 427 S.E. 2d 474 (1993), that the statutory three-term rule is not the only mechanism for assessing speedy trial standards. As *Carrico* explained, "In other cases discussing the right to a speedy trial we have focused on the standards enunciated in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972): A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay (3) the defendant's assertion of his rights and (4) prejudice to the defendant. The balancing of conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial. Syl pt. 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982). *Carrico*, 189 W. Va. at 44, 427 S.E. 2d at 478; see also *State v. Hinchman*, 214 W.Va. 624, 629-30, 591 S.E. 2d 182, 187-88 (2003); *Jordan*, 2014 WL 1672951, at \*1.

As applied herein, the defendant in consideration of these factors was not denied the right to a speedy trial. Simply put the reasons for delay were reasonable as the defendant contributed to delay by requesting a continuance directly or indirectly with agreed to continuances including no objections to moving trial dates. It is also concluded for the reasons for delay were significant and necessary under the circumstances of a complex 404(b) motion involving bringing up the prior Mercer Co convictions of First Degree Murder and Robbery.

Thus, based upon proper continuances agreed and not objected to and the *Foddrell* factors, the defendant's rights were not violated pursuant to W. Va Code §62-3-21.

Subsequently, no objections were ever raised and each trial setting in the next term before each term had expired without any motions of the three term rule or objections to continue, all which were agreed. Case law is quite clear if the Defendant benefit or did anything to initiate it, the rule does not apply. Herein, the Defendant's counsel initiated or agreed to the motions of continuances. The Defendant's counsel speaks for his client and thus, when a continuance is agreed to by both parties, this cannot be considered against the state in determining if the three term rule applies.

It has been the practice of this Court to conduct a docket setting before each

and every term of court. Cases are routinely set for trial. The State cannot request a matter to be summarily continued without motion. It would have to be jointly with Defense counsel or a trial will go as scheduled. The State cannot simply add or moves trials without agreement of the parties or trial will be commenced by this court.

The Court directs the Circuit Clerk to distribute attested copies of this Order to the following:

Micheal Cochrane  
Wyoming County Prosecuting Attorney  
PO Box 462  
Pineville, WV 24874

Thomas H. Evans, Attorney at Law  
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Oceana, West Virginia 24870

Timothy P. Lupardus, Attorney at Law,  
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**WEST VIRGINIA SUPREME COURT OF APPEALS  
CLERK'S OFFICE  
1900 KANAWHA BLVD E  
CHARLESTON, WV 25305**

DATE: 2/22/21

ENTER:

Warren R. McGraw

JUDGE WARREN R. MCGRAW  
WYOMING CO CIRCUIT COURT

A TRUE COPY, ATTEST.  
MICHAEL J. STOVER, CLERK

This the 24<sup>th</sup> day of Feb., 2021

By: K. C. Cochrane

Deputy

Micheal Cochrane  
Micheal Cochrane, Esq.  
State Bar ID Number 8216  
Prosecuting Attorney for Wyoming County