

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 21-0972



**State of West Virginia,
Respondent,**

v.

**(An appeal of a final order of the
Circuit Court of Monongalia
County, Case No.: 21-MAP-12)**

**Jay Folsie,
Petitioner.**

PETITIONER'S REPLY BRIEF

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

Counsel for the Petitioner, Jay Folsie

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by dismissing the Petitioner's appeal of his magistrate court conviction following an uncounseled plea agreement by denying him the *de novo* trial to which he was entitled pursuant to W. Va. Code §50-5-13, and other applicable relief.
2. The Circuit Court erred by failing to make any findings on collateral claims raised in the Petitioner's Petition for Appeal and/or Motion to Dismiss: (a) that his speedy trial rights were violated, and (b) that his charges lacked any probable cause.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is suitable for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure as it implicates constitutional questions relating to the Circuit Court's ruling (or rather failure to rule) on the collateral issues raised by the Petitioner below. Alternatively, Rule 19 argument is appropriate as this matter involves an unsustainable exercise of discretion by the lower court in a matter of settled law. Resolution by signed opinion is appropriate, or alternatively, by a "limited circumstances" memorandum decision remanding the matter to the lower court.

ARGUMENT

1. The Petitioner is entitled to a trial on his charges, before the Circuit Court *de novo*, and not merely a hearing on the voluntariness of his plea.

The Respondent has taken the position that the Petitioner, by virtue of having his convictions obtained without a jury, and as an unrepresented defendant, "is entitled to a *de novo* hearing in the Circuit Court on the record from Magistrate Court." (Respondent's Brief, at 10-11). As support for this position, the Respondent cites to *State v. Garman*, No. 13-0433 (W.Va.

April 25, 2014) (memorandum decision). However, *Garman* is an exemplar of the type of review available to *represented* defendants who enter guilty pleas in magistrate court. The appellant in *Garman*, as described by the Respondent, received a hearing on the voluntariness of his plea. This is the type of relief contemplated in W. Va. Code §50-5-13(e), which applies to represented defendants:

(e) Notwithstanding any other provision of this code to the contrary, there shall be no appeal from a plea of guilty where the defendant was represented by counsel at the time the plea was entered: Provided, That the defendant shall have an appeal from a plea of guilty where an extraordinary remedy would lie or where the magistrate court lacked jurisdiction.

Id.

The Respondent's position is curious in light of footnote 3 of the Respondent's Brief, on page 11, which states:

Petitioner argues that he is entitled to an appeal to the circuit court pursuant to West Virginia Code § 50-5-13(e), which provides an appeal exception to defendants represented by counsel and who entered a guilty plea where “an extraordinary remedy would lie or where the magistrate court lacked jurisdiction.” The language of this subsection, however, indicates that the exception is intended as a means for counseled defendants who entered a plea in magistrate court to appeal their conviction. Because Petitioner's right to appeal was pursuant to West Virginia Code § 50-5-13(b), subsection (e) is inapplicable to him.

(Respondent's Brief at 11, footnote 3).

It is difficult to square the Respondent's assertion that the Petitioner is entitled only to *Garman* style hearing on whether his plea was voluntary – a question that clearly falls within the scope of an extraordinary remedy as envisioned by subsection (e) – while maintaining that subsection (e) is inapplicable to him. It should be noted that this Court in *Garman* explicitly recognized that the case was controlled by subsection (e):

The circuit court recognized that West Virginia Code § 50-5-13(e) [2008 Repl. Vol.] and Rule 20.1(a) of the Rules of Criminal Procedure for Magistrate Courts ordinarily bar an appeal by a criminal defendant who, with the assistance of counsel, pleads guilty in magistrate court. However, because petitioner asserted that his plea was involuntary and in violation of his due process rights, the circuit court held a hearing to take evidence on the circumstances of the entry of the plea. As set forth below, the circuit court ultimately determined that the plea was voluntary and, therefore, denied the petition for appeal.

Garman, at *2 (footnote omitted).

To the contrary, the Respondent admits that the Petitioner's appellate rights are governed by subsection (b)¹ (Respondent's Brief, at 11, footnote 4), while attempting to argue around what that subsection actually implies by analogizing *Garman*, a wholly distinguishable and inapposite case. W. Va. Code §50-5-13(b) provides that:

(b) In the case of an appeal of a criminal proceeding tried before a jury, the hearing on the appeal before the circuit court shall be a hearing on the record. **In the case of an appeal of a criminal proceeding tried before the magistrate without a jury, the hearing on the appeal before the circuit court shall be a trial de novo, triable to the court, without a jury.**

Id.

What is the meaning of “trial de novo, triable to the court, without a jury”? It certainly does not mean the “*de novo* hearing” of the sort that occurred in *Garman*, which is the theory espoused by the Respondent. Instead, it clearly means an actual *de novo* bench trial, not merely a hearing on the record. A review of *State v. Bergstrom*, 196 W.Va. 656, 474 S.E.2d 586 (W. Va. 1996), which discusses the amendment of W. Va. Code §50-5-13, demonstrates that the modification of the statute served to eliminate the unqualified right to a jury on an appeal of a

¹ The Petitioner maintains that he is also entitled to the sort of review encompassed by subsection (e) in addition to a trial *de novo*. There is no logical reason that a defendant should have the opportunity to be heard on issues that constitute grounds for extraordinary relief – such as speedy trial or lack of probable cause as asserted by the Petitioner below – if he were to have had counsel at the time of his plea, but then lose that opportunity as a penalty for being unrepresented.

magistrate court conviction, not to eliminate trials on appeal altogether.

This Court examined the term “trial *de novo*” and its implications in *State ex rel. Decourcy v. Dent*, 807 S.E.2d 834 (W. Va. 2017), in the context of the statute governing civil appeals in magistrate court, W. Va. Code §50-5-12, which is significantly parallel to W. Va. Code §50-5-13 governing criminal appeals. *Decourcy* demonstrates that a trial *de novo* is a fresh opportunity to present evidence unconstrained by the prior record. *Id.*, at 837-839. *Decourcy* is clearly at odds with the Respondent's solution to the question posed in this case. The Petitioner is entitled to a new trial before the Circuit Court. There is no other remedy that will comport with the statute. Therefore, the Petitioner respectfully requests that the Circuit Court's order dismissing the appeal be vacated and the matter be remanded for further proceedings, including a *de novo* trial on the Petitioner's charges.

2. The Petitioner is entitled to relief on his collateral claims.

The Respondent has elected not to respond to the Petitioner's second assignment of error concerning his collateral claims. (Respondent's Brief at 13, footnote 4). Rule 10(d) of the West Virginia Rules of Appellate Procedure dictates, in relevant part, that: “Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.” Both argument subsections in the Petitioner's Brief concerning the collateral claims conclude with the following request: “The Circuit Court's failure to consider or grant relief on this issue constitutes reversible error, and this Court should remand the matter for a judgment discharging the prosecution, or for further consideration.” (Petitioner's Brief, at 16, and 19). The Petitioner asserts that the record demonstrates sufficient


grounds for dispositive relief based on the violation of speedy trial and lack of probable cause. The Respondent has not responded substantively to that allegation. The Petitioner requests that this Court not ignore this assignment of error as urged by the Respondent, but instead grant relief including dismissal of the underlying criminal prosecution.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court vacate the order of the Circuit Court denying the Petitioner's appeal, and remand the matter for a de novo trial and further consideration of the Petitioner's collateral claims, or to order the dismissal of the underlying criminal matter based upon the collateral claims, or grant any other relief the Court deems just and proper.

Respectfully submitted,

JAY FOLSE, Petitioner,
By counsel,



Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
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CERTIFICATE OF SERVICE

On this 18th day of May, 2022, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Brief by U.S. Mail to Mary Niday, 1900 Kanawha Blvd. East, State Capitol, Building 6, Suite 406, Charleston, WV 25305.



Jeremy B. Cooper
WV State Bar ID 12319
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