

FILE COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0972

STATE OF WEST VIRGINIA,

Respondent,

v.

JAY FOLSE,

Petitioner.

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RESPONDENT'S BRIEF

Appeal from the November 1, 2021, Order
Circuit Court of Monongalia County
Case No. 21-MAP-12

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I. INTRODUCTION

Respondent State of West Virginia, by counsel, Mary Beth Niday, Assistant Attorney General, respectfully responds to Jay Folsie's ("Petitioner's") Brief filed in the above-styled appeal.

II. ASSIGNMENTS OF ERROR

Petitioner, by counsel, advances two assignments of error in this appeal:

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.

(Pet'r Br. 1.)

III. STATEMENT OF THE CASE

A. Magistrate Court Case No. 19-M31M-03409.

On July 31, 2019, Petitioner was arrested and charged by Criminal Complaint with Disorderly Conduct, in violation of West Virginia Code § 61-6-1B; Obstruction, in violation of West Virginia Code § 61-5-17(a); and Trespassing, in violation of West Virginia Code § 61-3B-4. (App. 10–15.) The charges stemmed from Petitioner's presence at a meeting of the Board of Governors in the West Virginia University Mountain Lair Rhododendron Room after having been previously served with an order prohibiting him from entering upon any real property of West Virginia University. (App. 11, 13, 15–16.) On July 31, 2019, a West Virginia University employee contacted law enforcement upon observing Petitioner at the meeting and Patrolman Carnell King responded to the call, at which time he asked Petitioner multiple times to leave the premises. (App. 11, 13, 15–16.) Petitioner refused to leave and became argumentative with Officer King such that Officer King had to place Petitioner in an escorted position in an attempt to remove him from the

room. (App. 11, 13, 15.) At that time, Petitioner became combative, swinging his arm to actively resist Officer King and flipping backwards from the chair where he was seated. (App. 11, 13, 15.) After Petitioner flipped from his chair, Officer King was able to gain control of Petitioner by pinning him down and arresting him. (App. 11, 13, 15.) Petitioner essentially then surrendered by yelling for Officer King to stop and agreeing to stop resisting his arrest. (App. 11, 13, 15.) Petitioner was arraigned in the Magistrate Court of Monongalia County and released on bond. (App. 5–6.)

Petitioner moved to transfer the matter from the Magistrate Court of Monongalia County to the Circuit Court of Monongalia County on August 9, 2019. (App. 6.) The record indicates that the State objected to Petitioner’s request and the matter was never transferred to the Circuit Court. (App. 6, 93, 95.)

On August 30, 2019, the State requested that the Magistrate Court include as a specific term and condition of Petitioner’s release on bond that he “not have any contact with any employee of West Virginia University, directly or indirectly.” (App. 16.) The State further requested on September 5, 2019, that Petitioner be prohibited from contacting any West Virginia University employee except for its general counsel, Seth Hayes. (App. 6.) The State explained that Petitioner had several matters pending in other courts against West Virginia University and the latter restriction would prevent future incidents between Petitioner and employees of West Virginia University. (App. 6, 49.) The docket reflects that a hearing on the State’s motions was scheduled on September 6, 2019 (App. 6), at which hearing the Magistrate Court granted the State’s motions and imposed the requested additional conditions of bond (App. 49).

On November 7, 2019, the State further moved to revoke Petitioner’s bond alleging that Petitioner violated his conditions of bond when new charges were filed against him on November

5, 2019, in Mercer County, West Virginia, alleging Petitioner committed the offenses of Procuring Gas With the Intent to Defraud, Falsely Reporting an Emergency, and Harassing and Threatening Telephone Calls. (App. 18–24.) A Capias Warrant was issued for Petitioner on November 12, 2019, and a bond revocation hearing was scheduled on December 17, 2019. (App. 6–7.)

At the December 17, 2019, bond revocation hearing, Petitioner inquired of the State about a prior plea offer. (App. 51.) Ultimately, Petitioner entered into a no contest plea to one count of Obstructing an Officer and sentenced to jail for a term of ninety days, suspended for a two-year period of unsupervised probation. (App. 25–27, 28–29, 32–34.) As special terms and conditions of his probation, Petitioner was ordered not to “enter or be present on ANY property of West Virginia University” or have any contact with “ANY and ALL employees of West Virginia University except for specified legal counsel.” (App. 29) (emphasis in original). The remaining two charges in the Complaint were dismissed. (App. 31.)

On January 12, 2021, Petitioner filed a *Motion for Dismissal Due to Failure to Provide Speedy Trial [Three Term Rule]*. (App. 36.) Petitioner alleged that he entered a plea on December 17, 2019, without the assistance of counsel; that he then filed an appeal in this case; and, that three terms of court had passed since the entry of his no contest plea. (App. 36.) The State responded to Petitioner’s motion on February 26, 2021, asserting that the Magistrate Court’s docket sheet did not reflect the filing of any appeal within twenty days as required by Rule 20.1 of the West Virginia Rules of Criminal Procedure for Magistrate Courts.¹ (App. 52.)

¹ Petitioner did not make the State’s response part of the record and, consequently, Respondent’s references to the State’s responsive brief and hearing on Petitioner’s motion are to the State’s procedural history section of its *Response to Petitioner Petition for Writ of Mandamus*. (App. 52–53.)

The Magistrate Court conducted a hearing on Petitioner's motion on March 2, 2021. (App. 7, 53.) Apparently, Petitioner asserted that he had mailed an appeal to the Magistrate Court, together with recorded telephone conversations between him and Magistrate Court personnel regarding the status of his appeal. (App. 53.) The State "proffered it had received service of a copy of a Petition for Appeal of Bench Trial from the Petitioner, with a certified service date of January 6, 2020."² (App. 53, n.3.) The Magistrate Court denied Petitioner's motion and no appeal of the decision was filed. (App. 7, 53.)

B. Petition for Writ of Mandamus Case No. 21-C-108.

On April 6, 2021, Petitioner filed a *Petition for Writ of Mandamus* seeking an order directing Magistrate Judge Holepit "to transfer a criminal appeal to Circuit Court." (App. 41–46.) Petitioner asserted that he filed an appeal within twenty days of the plea and sentencing hearing and that the "appeal was filed with Magistrate Sandra Holepit as she was assigned to the case and a copy was mailed to the prosecutor's office." (App. 44.) Petitioner summarized his communications with Magistrate Holepit's office when he called to inquire when the appeal would be docketed. (App. 44.) Petitioner recorded at least one of the telephonic conversations he had with Magistrate Holepit's office. (App. 44.) After repeated phone calls to the office, Petitioner was ultimately told "that either he had no right to an appeal because he signed a plea, that 'Amy' would call him back, or that he should 'call an attorney' to ask when the appeal would be docketed." (App. 44.)

² In addition to the State's proffer that it received Petitioner's Petition for Appeal of Bench Trial on January 6, 2020, the record contains notes that were allegedly included in one of the court files. (App. 37–38.) The notes, however, are handwritten, appear to simply summarize statements presumably made at a hearing, and do not identify their author.

The State filed its *Response to Petitioner's Petition for Writ of Mandamus* on April 30, 2021, arguing that Petitioner failed to establish either a clear, legal right to the relief requested or that the State had a duty to perform. (App. 54.) The State maintained that Petitioner failed to perfect his appeal pursuant to Rule 20.1 of the Rules of Criminal Procedure for Magistrate Courts and West Virginia Code § 50-5-13, and further failed to provide proof that his appeal was filed. (App. 54-56.)

Following a hearing conducted on July 22, 2021, Chief Judge Cindy S. Scott of the Circuit Court of Monongalia County, by Order entered July 28, 2021, ordered that Petitioner had twenty days from the date of the hearing “to file and fully perfect his appeal in the Magistrate Court of Monongalia County” and that “[a]ny further proceedings with respect to the Petitioner’s appeal shall be conducted before the Circuit Court.” (App. 67.)

C. Magistrate Court Appeal Case No. 21-MAP-12.

On July 28, 2021, Petitioner filed in the Magistrate Court of Monongalia County his *Petition for Appeal of Criminal Case*. (App. 7, 69-76.) Petitioner alleged that pursuant to West Virginia Code § 50-5-13, he had “a right to have his appeal heard in Circuit Court and have a trial *de novo*.” (App. 73.) Petitioner further asserted that because he entered a no contest plea, as opposed to being tried without a jury, he is entitled to a trial *de novo* by jury. (App. 74.)

Petitioner filed a *Motion to Dismiss* on August 4, 2021, seeking to dismiss the Obstruction charge on the grounds that the Criminal Complaint lacked probable cause, the charge violated his First Amendment right to freedom of assembly and was overly broad, and the Circuit Court failed to hear the appeal within three terms of court. (App. 78-83.) On August 18, 2021, Petitioner also filed his *Motion to Modify Bond Conditions*. (App. 1, 86.) The docket in this case reflects that a hearing on Petitioner’s *Motion to Change Bond Conditions* was scheduled on August 31, 2021.

(App. 1.) The docket further reflects, however, that a hearing was held on September 3, 2021, on Petitioner's *Motion to Modify Bond Conditions*. (App. 1, 86, 89–103.) The transcript of the hearing reflects that a virtual hearing on the motion to modify was scheduled on August 31, 2021, by the Honorable Phillip D. Gaujot, Circuit Court Judge, but Petitioner, who was appearing telephonically, apparently was unable to hear as he was not responsive to the Circuit Court and the hearing was continued to September 20, 2021. (App. 90–92.) Petitioner called the Judge's office afterward and yelled at Judge Gaujot's assistant shouting that "he was going to lose \$200,000 if the hearing was not held before September 3rd." (App. 92.) The assistant told Petitioner there was nothing she could do and Petitioner hung up the phone. (App. 92.) Petitioner ended up calling back and left an offensive voicemail demanding that the hearing be rescheduled to September 3, 2021. (App. 92.) The matter was ultimately rescheduled to September 3, 2021.

During the hearing, Petitioner requested that his bond conditions be modified to allow him to respond to a civil action pending in federal court in which the presiding judge was an employee of West Virginia University. (App. 95–96.) Petitioner also noted that Chief Judge Scott had already determined that he was entitled to an appeal in circuit court. (App. 96.) Moreover, Petitioner argued that the Circuit Court was able to "dismiss a case for lack of probable cause at any time." (App. 97.)

In response, the State asserted that Petitioner's no contest plea was voluntarily entered and conducted on the record in Magistrate Court to preserve Petitioner "acknowledging the conditions of his plea and understanding all of the rights that he was provided pursuant to the rules." (App. 97–98.) The State continued in its position and asserted that it was "anticipate[d] that at our hearing on September 20th that it will argue that [the] plea was entered and that terminated this case." (App. 98.) The State further asserted that while Petitioner had a right to appeal his conviction to

the Circuit Court, the issue should be “whether or not he voluntarily entered a plea in the underlying case.” (App. 99.) The State acknowledged that Petitioner had raised issues in his brief “regarding the voluntary nature of that plea, which I believe would not be borne out, and will not be borne out at a motion hearing.” (App. 99.) Regarding probable cause, the State noted that Petitioner never raised such an issue prior to the entry of his plea of no contest. (App. 99.)

In reply, Petitioner asserted that he was entitled to a trial *de novo* which did not “mean an appeal in circuit court where you assess the voluntariness of a plea deal.” (App. 100.) The Circuit Court found that based upon Petitioner’s no contest plea to Obstruction, his presently filed motions for change of bond conditions and to dismiss were untimely. (App. 100.) The Circuit Court stated:

I find that this matter came on for hearing on a plea agreement, that the plea agreement was signed by [Petitioner]. Pursuant to that plea agreement, he pled guilty—a no contest plea to obstruction. The other two charges were dismissed. An appeal has—was not timely filed. Therefore, a motion for change of bond conditions and your motion to dismiss is untimely. This matter has been dismissed based upon a satisfactory plea of no contest. This matter, Case Number 19-M-3409 is hereby dismissed.

(App. 100–01.)

Petitioner questioned the Circuit Court’s finding that his appeal was untimely filed and the Court stated that Petitioner “did not appeal from the plea agreement and the no contest plea that you entered. You didn’t file a timely appeal.” (App. 102.) Petitioner disputed the Court’s contention and the Circuit Court advised Petitioner that he could appeal the Court’s order. (App. 102.)

By Order entered November 1, 2021, the Circuit denied Petitioner’s appeal. (App. 86–88.) The Circuit Court noted that the parties appeared on September 3, 2021, for a hearing on Petitioner’s *Motion to Modify Bond Conditions*. (App. 86.) The Circuit Court stated its holding in part as follows:

Upon this Court's review of the record in this matter, and after mature consideration of the proffers of the State and the Defendant at hearing, this Court finds that the Defendant's Motion and his appeal in this matter must be denied, inasmuch as the Defendant previously entered a valid and enforceable plea in this matter on December 17, 2019, in the Magistrate Court of Monongalia County, West Virginia, thus foreclosing any further proceedings on the Defendant's appeal.

(App. 86.) The Circuit Court summarized the procedural history of Petitioner's case and further held:

Based upon its review of the record, and the proffers of the parties at hearing, this Court finds that the satisfactory entry of the Defendant's no contest plea resolved the Defendant's underlying criminal case in Magistrate Court Case No. 19-M31M-03409, and consequently, this matter as well. Accordingly, in light of the Defendant's entry of his no contest plea in 19-M31M-03409, this Court ORDERS that the instant matter, Case No. 21-MAP-12, is hereby DISMISSED.

Notwithstanding the entry of his no contest plea in Magistrate Court, the Defendant has filed motions in this case, including a Motion to Dismiss, and the Motion to Modify Bond Conditions presently before the Court. This Court finds that this matter has been previously adjudicated by the Defendant's entry of his no contest plea in Magistrate Court Case No. 19-M31M-03409, and consequently, these motions are untimely and are therefore DENIED.

(App. 87–88.)

Petitioner appealed.

IV. SUMMARY OF THE ARGUMENT

Petitioner argues that the Circuit Court erred in denying him a *de novo* trial to which he was entitled pursuant to West Virginia Code § 50-5-13 and Rule 20.1 of the West Virginia Rules of Criminal Procedure for Magistrate Courts. (Pet'r Br. 7–13.) The Circuit Court's November 1, 2021, *Order Denying Defendant's Appeal* contains minimal findings of fact and conclusions of law which preclude this Court from undertaking meaningful appellate review. Moreover, the record demonstrates that the parties and the Circuit Court possessed differing opinions as to the nature of the September 3, 2021, hearing. Accordingly, this matter should be remanded for entry

of an order containing findings of fact and conclusions of law sufficient for this Court to conduct meaningful appellate review of the Circuit Court's decision to dismiss Petitioner's appeal.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent disagrees with Petitioner that oral argument is necessary and asserts that this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

VI. STANDARD OF REVIEW

In reviewing a circuit court's decision on appeal, this Court adheres to the following standards of review:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review. Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

State v. Dustin M., No. 20-0255, 2021 WL 3833877, at *2 (W.Va. Supreme Court, Aug. 27, 2021) (memorandum decision) (quoting Syl. Pt. 1, *State v. Meadows*, 231 W.Va. 10, 743 S.E.2d 318 (2013)).

VII. ARGUMENT

In his first assignment of error, Petitioner argues that the Circuit Court erred in denying him a *de novo* trial to which he was entitled pursuant to West Virginia Code § 50-5-13 and Rule 20.1(a) of the West Virginia Rules of Criminal Procedure for Magistrate Courts. (Pet'r Br. 7–13.) Petitioner asserts that under West Virginia Code § 50-5-13, there are three types of appellate review of a magistrate court decision: First, review is limited to the record when a jury trial was held as contemplated under subsections (b) and (c); second, review is a *de novo* trial before a

circuit court as contemplated in subsection (d); and third, review is a limited form of collateral review available to persons represented by counsel at the time of a plea as contemplated under subsection (e). (Pet'r Br. 11–12.) Petitioner asserts that the first two routes are unavailable to him because the matter was resolved in Magistrate Court with a jury trial. (Pet'r Br. 12.) Petitioner, therefore, asserts that he was entitled to a *de novo* trial under West Virginia Code § 50-5-13(e). (Pet'r Br. 12.)

West Virginia Code § 50-5-13(a) provides for an appeal of a magistrate court conviction to a circuit court “as a matter of right by requesting such appeal within twenty days after the sentencing for such conviction.” When an appeal of a magistrate court conviction was obtained by jury, “the hearing on the appeal before the circuit court shall be a hearing on the record.” W.Va. Code § 50-5-13(b). When the conviction was obtained “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.* In such matters tried without a jury, “[t]he exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for appeal and shall be made available to the parties.” W.Va. Code § 50-5-13(d). Subsection (f) allows an appeal from a guilty plea in the magistrate court when the defendant was not represented by counsel. W.Va. Code § 50-5-13(e). Rule 20.1(a) reiterates the substance of § 50-5-13(e) and states, in relevant part: “Except for persons represented by counsel at the time a guilty plea is entered, any person convicted of a misdemeanor in a magistrate court may appeal such conviction to the circuit court as a matter of right.” W.Va. Mag. Ct. R. Crim. P. 20.1(a).

Petitioner, acting without the assistance of counsel, entered a no contest plea to the misdemeanor offense of Obstruction. (App. 25–27, 28–29, 32–34.) His conviction by entry of plea, clearly, was obtained without a jury. Pursuant to West Virginia Code § 50-5-13(b), Petitioner is

entitled to a *de novo* hearing in the Circuit Court of the record from the Magistrate Court.³ The policy considerations behind the requirement of a *de novo* trial are based on the fact that bench trials in magistrate court are not placed on the record and consequently, on appeal, “the magistrate court shall not be a court of limited record.” W.Va. Code § 50-5-8(f). Conversely, jury trials are required to be placed on the record, *see* West Virginia Code § 50-5-8(e), and on appeal the hearing is one on the record. W.Va. Code § 50-5-13(b). The entry of a no contest or guilty plea on the record in magistrate court is treated in a similar manner and decided on the record. *See* W.Va. Code § 50-5-13(b), (d). This Court’s jurisprudence upholds this statutory framework.

In *State v. Garman*, the petitioner, who was represented at the plea hearing was not placed upon the record. No. 13-0433, 2014 WL 1673031, at *1 (W.Va. Supreme Court, Apr. 25, 2014) (memorandum decision). In the absence of a record from the magistrate court, the circuit court, on appeal, heard proffers from the State and the petitioner as to the plea colloquy conducted by the magistrate court and “took judicial notice of the fact that the magistrate did not go over petitioner’s rights with petitioner prior to accepting the no contest plea.” *Id.* at *2. Thus, Petitioner did not receive an actual trial, whether bench or jury, on appeal in the circuit court. Rather, he received a hearing during which the circuit court conducted a *de novo* hearing of the record below as supplemented by the parties’ proffers as to the voluntariness of the petitioner’s plea.

Here, the Circuit Court held a hearing on September 3, 2021, on Petitioner’s *Motion to Modify Bond Conditions*. (App. 86, 89–103.) The *Order Denying Defendant’s Appeal*, entered

³ 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.

following the hearing, clearly states that the Circuit Court reviewed the record in this matter, which consists of the magistrate court record, and gave “mature consideration” to the proffers of the State and Petitioner during the hearing. (App. 86, 87.) After such review, the Circuit Court dismissed Petitioner’s motion and appeal, finding that Petitioner’s no contest plea in the magistrate court was “valid and enforceable.” (App. 86.) The Order contains minimal findings of fact as they relate to the filing of the charges against Petitioner and his entry of a no contest plea in the magistrate court. (App. 86–87.)

The Circuit Court’s minimal findings and conclusions preclude this Court from undertaking meaningful appellate review. “This Court has found, in various contexts that meaningful appellate review of the decision of a lower court sitting without a jury may occur only when specific findings of fact and conclusions of law are contained in the appellate record.” *Louden v. West Virginia Dep’t of Env’t Prot.*, 209 W.Va. 689, 694, 551 S.E.2d 25, 30 (2001). “Without findings of fact and conclusions of law, this Court is unable to determine the basis for the court’s decision and whether any error has occurred.” *Mullins v. Mullins*, 226 W.Va. 656, 662, 704 S.E.2d 656, 662 (2010).

Moreover, in reading the Circuit Court’s Order contemporaneously with the transcript of the September 3, 2021, hearing transcript, it is clear that the Circuit Court and the parties’ thoughts were misaligned as to the purpose of the hearing. Both the Order and the transcript indicate that the hearing was to consider Petitioner’s Motion to Modify Bond Conditions. (App. 86, 89.) Petitioner explicitly addressed his motion on the record and explained why he believed he was entitled to have his conditions of bond modified. (App. 95–97.) At one point during the hearing, Petitioner referred to the proceeding as “the motion hearing.” (App. 97.) Similarly, the State believed that the appeal was scheduled to be heard on September 20, 2021, as reflected by the

following statement: “The State still takes the position and anticipates that at our hearing on September 20th that it will argue that that plea was entered and that terminated this case.” (App. 98.) Despite these statements, the Circuit Court addressed Petitioner’s appeal at the end of the hearing in a very summary fashion and dismissed it. (App. 100–02.)

In view of the Circuit Court’s minimal findings of fact and conclusions of law, and the parties’ misunderstanding as to the purpose of the September 3, 2021, hearing, this matter should be remanded for entry of an order containing findings of fact and conclusions of law sufficient for this Court to conduct meaningful appellate review of the Circuit Court’s decision to dismiss Petitioner’s appeal.⁴

VIII. CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court find that additional findings of fact and conclusions of law are warranted of the Circuit Court’s November 1, 2021, Order Denying Defendant’s Appeal and remand for the limited purpose of the Circuit Court’s entry of an order containing findings of fact and conclusions of law sufficient for this Court to conduct meaningful appellate review is appropriate.

⁴ Because Respondent is asking the Court to remand this matter to the Circuit Court for entry of an order containing more detailed findings of fact and conclusions of law, Respondent does not address the merits of Petitioner’s second assignment of error.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,
By Counsel,

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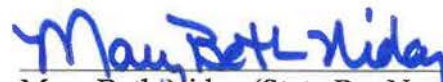
JAY FOLSE,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, April 28, 2022, and addressed as follows:

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