IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET 23-155

SCA EFiled: May 03 2023
09:52AM EDT
Transaction ID 69943450

State of West Virginia ex rel.
State of West Virginia,
Petitioner,

vs)

The Honorable Susan Tucker,
Judge of the Circuit Court of Monongalia
County, Jennifer L. and David F.,
Respondents.

RESPONSE BRIEF

DAVID F. and
JENNIFER L.,
Respondents, By Counsel

KEVIN T. TIPTON (WV Bar #8610)

TIPTON LAW OFFICES
1399 Stewartstown Road, Suite 230
Morgantown, WV 26505
(304) 366-9900
(304) 366-9902 (fax)
TiptonLaw@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

Statutes

RESPONDENTS' STATEMENT OF THE CASE

By in large, the Respondents concur with the Petitioner's *Statement of the Case.* That said, Respondents believe that there does need to be some clarification.

Regarding their respective preliminary hearings, both Respondents had preliminary hearings on separate dates. David F. had his preliminary hearing first during which time the prosecutor knowingly and intentionally argued a caselaw that does not exist. More specifically, the prosecuting attorney convinced Magistrate Sandy Holepit that "bodily injury" includes "psychological harm" which is obviously false per current West Virginia caselaw. As counsel never anticipated such a misrepresentation of the current caselaw by the state's attorney, he was not able to counter it at the time.

That said, prior to Jennifer L.'s preliminary hearing, knowing that the State was making an argument that was completely contrary to the current caselaw, counsel filed a motion to dismiss the criminal complaint along with a brief and a copy of the current caselaw directly rebutting the State's false misrepresentations to the Court. After a very brief hearing, the magistrate took judicial notice of the officer's previous testimony at David F's preliminary hearing and ultimately granted the motion to dismiss, finding that the evidence presented failed to establish probable cause to bind Jennifer L's case over to grand jury.

Regardless, the State chose to indict the Respondents in October 2021. Interestingly enough, the State chose to call the DHHR worker to testify at grand jury and not the investigating/arresting officer who had appeared at the two previous preliminary hearings. (A.R. 15) The Petitioner references the fact that the grand jury transcript and the testimony therein was never "referenced" or "argued" to the lower court. This is because neither counsel nor the lower court had a copy of the grand jury transcript as it is standard practice not to produce same until at least ten (10) days before trial. Regardless, had the transcript been available, it would not have helped the State in the least

because it contains instances of false testimony that would have easily been rebutted by using the sworn testimony from the underlying abuse and neglect case.

The Petitioner contends that "the State noted that it intended to present the testimony of Dr. Saar and Barbara Nelson in the criminal case, who would each opine that psychological trauma or emotional abuse can result in physical impairment so as to meet the definition of bodily injury." However, the Court had already heard from Dr. Saar and Barbara Nelson on these issues, and one would assume their testimony wouldn't be different. More importantly, W.Va. Code §§61-8D-3(a) and 61-8D-4(a), two of the statutes under which the Respondents were indicted, requires ***actual*** "bodily injury," not the possibility of it.

Interestingly, in its statement of the case, the Petitioner states that "[t]he Respondent Defendants relied upon the companion abuse and neglect case to support the lack of findings of physical abuse, ***even specifically noting there was no testimony regarding any type of physical injury in the abuse and neglect case[.]"*** (Petitioner's Brief, p. 3) This is misleading, at best. Yes, the Respondents argued that there was no evidence of physical abuse in the underlying abuse and neglect case. However, it goes further than that. The State's own witness, in the abuse and neglect case, testified that there was no evidence of physical harm. More specifically, the State's investigating CPS worker, Breeana Cunningham testified as follows:

Mr. Tipton:	Okay. Do you have any evidence whatsoever that any of these children ever suffered any physical harm as a result of this parent project or parenting program? That's a very specific question, evidence of physical harm?
Ms. Cunningham:	**I would say as far as like marks or bruises or anything from this, no.**

(S.A.R. Transcript of January 14, 2021, Preliminary Hearing, p. 15) (emphasis added)

Later, in the same hearing, counsel pressed the issue of "physical injury" to any of the children. It was at this time, counsel was admonished for asking the question again and the Judge, herself,

reiterated the fact that there was no physical injury that ever resulted from the discipline. More specifically:

> Mr. Tipton: Well, to your knowledge, okay, how many times, and please tell the Court, how many times that he's told you that he has suffered physical injury from implementation of "The Parent Project.?"
> Court: **She's already answered that she doesn't have any evidence of any physical injury, Kevin**.
>
> (S.A.R. Transcript of January 14, 2021, Preliminary Hearing, pp. 31-32) (emphasis added)

Moreover, the State argues that sitting on the bucket caused "difficulties with one of the child's (sic) bowels." (Petitioner's Brief, p. 4; A.R. 51-52). Notably, there was never a single expert who testify that sitting on the bucket caused any issues with the child's bowels. This claim was complete speculation, unsupported by any evidence whatsoever.

Finally, the Respondents agree that the Court did dismiss all counts of each indictment. The Court had an ***intimate*** knowledge of the State's evidence. The Court had heard days upon days of testimony and evidence, even when the State was trying to prove aggravating circumstances in the abuse and neglect case. The Court applied the evidence it had heard and considered to the very strict language of the statutes and correctly determined that it failed to prove the allegations against the Respondents. To that end, the Court did not commit clear error and the Writ should thus be denied.

STATEMENT REGARDING ORAL ARGUMENT

Respondents believe this case is suitable for oral arguments under Rule 19 as it: (1) involves assignments of error in the application of settled law; (2) involves claims of unsustainable exercise of discretion where the law governing that discretion is settled; and (3) involves a narrow issue of law.

ARGUMENT

1. Relief in prohibition is not appropriate and should be denied.

Respondents agree, the State may seek a writ of prohibition under certain circumstances, but none of those circumstances exist here. More specifically, the lower court did not abuse its legitimate powers and while the lower court certainly deprived the State of its opportunity to prosecute the Respondents, the Judge's actions were not "flagrant," as the decision to dismiss was thought out and supported by the mountains of evidence that she already had before her.

I. No other adequate means to obtain relief.

Respondents agree that the State has no other adequate means to obtain relief because direct appeal is not available.

II. The Judge did not exceed her legitimate powers under the circumstances in this case.

The Petitioner argues that since the indictments in this case "were supported by adequate facts," the lower court's dismissal was clearly erroneous and that a writ should issue to cure the error.

For this Court to make that determination, it is imperative that we evaluate the "facts" and the testimony that was given at the grand jury.

First of all, again, the investigating officer did not testify, but rather the CPS worker, Gregory Gales. This is especially troublesome because Mr. Gales' testimony was half-true, at best, despite being present during all of the testimony and evidence presented during the abuse and neglect case. The investigating officer obviously wasn't.

To that end, Mr. Gales gave some very troublesome testimony, under oath, before the grand jury in this matter. Testimony that was led by a prosecutor who had already intentionally misrepresented case law, as an officer of the court, to the magistrate at David F.'s preliminary hearing.

More specifically, Mr. Gales testified about how the kids would have spent 24 hours straight in the tent as part of the TEASPOT. This testimony was false and definitely meant to mislead the

grand jury. More specifically, the issue of the tent and TEASPOT came up several times during the abuse and neglect case and the evidence was drastically different.[1] For instance, Mr. Gales testified at grand jury as follows:

> Pros. Atty: This child was sent there for 24 hours straight beginning, for example, 8 a.m. in the morning to 8 a.m. the next day.
> Witness Gales: Yes
> (A.R. 18)

However, this testimony was not consistent with the evidence during the abuse and neglect proceedings. More specifically:

> Ms. Ray: Okay. And you don't take a book or a fishing pole or anything to do. I mean, we're talking just staying in a tent, right, for 24 hours?
> David F.: Oh, I'm glad you asked, no, that never happened
> Ms. Ray: Well, I get bathroom breaks, but –
> David F.: No, he was not in a tent for 24 hours
>
> ***
>
> David F. The tent is a place that A.F. would sleep sometimes when he was in a TEASPOT.
> Ms. Ray: Okay
> David F.: So, he would be in a tent from when he went to bed to when he woke up.
> Ms. Ray: So, where was he during the day then if he was on a 24-hour punishment?
> David F.: Sometimes during the day the tent also was a place where he spent a time out. Sometimes during the day he also spent time in the tent, as an alternative to being on the bucket.
> Ms. Ray: Okay
> David F.: So, this concept that he ever spent 24 hours in a tent is fiction.
>
> (S.A.R. Transcript of July 22, 2021, Disposition Hearing, pp. 42-43)

So, again, there was unrebutted evidence during the abuse and neglect proceedings indicating that none of the children ever spent 24 hours straight in the tent, as testified to, under oath, by Mr. Gales.

[1] None of the children ever testified during the abuse and neglect proceeding. Only hearsay evidence was presented, even after the Respondent parents testified, rebutting most of the allegations.

Mr. Gales again misled the grand jury about the children, A.F. specifically, not being allowed to have their shoes when in the tent. More specifically:

> Pros. Atty: Did A.F. also disclose to the officer whether or not he was allowed to have any comfort items, such as a book, a flashlight, or even shoes?
> Mr. Gales: No.
> Pros. Atty: He was not allowed to have shoes?
> Mr. Gales: He was not allowed to have those items.
>
> (A.R. 20)

However, as before, this was not completely accurate information given to the grand jury. In fact, this issue came up at during the abuse and neglect case, when the State's own expert witness, Barbara Nelson, testified:

> Barbara Nelson: Occasionally he [A.F.] said he was allowed to have a sleeping bag. But for the most part he was not allowed to have anything when he was in the tent, just the clothing he had. ***And at times his shoes were taken*** away so he couldn't run away[.]
>
> (S.A.R. Transcript of June 25, 2021, Disposition Hearing, p. 27)

In addition, Mr. Gales testified before the grand jury that A.F. disclosed to him that he would have to sit on the open end of a 5-gallon bucket, the longest time being 12 hours. (A.R. 22) However, again, this wasn't accurate or consistent with the sworn testimony during the abuse and neglect proceedings. To that end, the evidence was as follows:

> GAL Lyons: Okay. And what was the general time that – what were your limits:
> David F.: So, the general bucket time turned out to be about four hours, I will say that. But, again, he didn't spend four hours consecutively on the bucket, nor did he spend four hours on the bucket during that four-hour bucket time.
> GAL Lyons: Okay. But he was on – the bucket time was four hours?
> David F.: Generally, yes.
> GAL Lyons: Okay. Was it ever 12 hours?
> David F.: Once

***

David F.: So, I do regret ever having – but he did it on (sic) sit on the bucket for that 12 hours. I got him off as often as I could. It still was a 12 hour time, because he had earned it, which I would not say now, because that's different. You're asking me what I did then.

(S.A.R. Transcript of July 22, 2021, Disposition Hearing, pp. 32-33)

Later, in that same hearing, the prosecuting attorney continued questioning the Respondent David F. about the "bucket." That exchange went as follows:

Pros. Atty: Okay. So you say he did not sit consistently. Do you remember, in your observation as his father, the longest that A.F. had sat on the bucket?

David F.: I would say consecutively maybe two hours, cause every two hours we got him off the bucket for sure. We tried to get him off the bucket every hour.

(S.A.R. Transcript of July 22, 2021, Disposition Hearing, pp. 68)

Again, this testimony was unrebutted by the State.

Finally, as for "bodily injuries," consistent with his prior embellishment of the truth, Mr. Gales testified that A.F. had suffered "red marks and bruises" on his bottom area and thighs. (A.R. 22) However, this was *wholly inconsistent* with the sworn testimony of Brianna Cunningham during the abuse and neglect proceedings, when she testified as follows:

Mr. Tipton: Okay. Do you have any evidence whatsoever that any of these children ever suffered any physical harm as a result of this parent project or parenting program? That's a very specific question, evidence of physical harm?

Ms. Cunningham: **I would say as far as like marks or bruises or anything from this, no.**

(S.A.R. Transcript of January 14, 2021, Preliminary Hearing, p. 15)
(emphasis added)

It is noteworthy, as this court can see, the remaining portions of the grand jury transcript consists almost entirely of "psychological abuse," which again has nothing to do with any of the charges for which the Respondents faced in the indictment.

In sum, the Court had heard all the necessary testimony and "adequate facts" to make her determination that the State did not possess the evidence it needed to carry an indictment in this case. To that end, the Court, in the interest of judicial economy and justice, correctly dismissed the indictments in this case. In other words, given everything the Judge knew and had learned through days of testimony, the dismissal was clearly "consonant with the public interest" and "in the fair administration of justice."

c. The evidence presented to the grand jury was almost wholly inconsistent with the evidence presented during the abuse and neglect proceedings.

As already shown, herein, CPS Supervisor Gregory Gales' testimony was tremendously misleading and obviously biased. In fact, again, there were instances where his testimony was wholly inconsistent with the evidence of his own worker, Breanna Cunningham. So, to that end, Respondents would argue that the evidence was "willfully and intentionally fraudulent." Had counsel for the Respondents had a copy of the grand jury transcript when he argued the dismissal, these facts would have certainly been raised. To that end, had the grand jury transcript been available at that time, it would only have made the matter worse for the State, certainly not any better.

The current case does, in fact, state that "[i]n reviewing the evidence for sufficiency to support the indictment, the court must be certain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense." Syl. Pt. 7, *State ex rel. Pinson v. Maynard,* 181 W.Va. 662, 383 S.E.2d 844 (1989). However, this analysis is usually done when the Judge does not have such an intimate knowledge of the facts and evidence before the case is presented to the grand jury. Here, the Court knew exactly what the evidence was – what the state had and what it didn't have. The Petitioner states that "the children have already made statements regarding the substantial physical pain they endured as a result of the unorthodox discipline in this case." Those "statements" are merely hearsay. And, when the children never testified and when contrary evidence was presented by the parents, the State presented no evidence in rebuttal. The Petitioners further

contend that "the evidence presented to the grand jury was that the children . . . were made to sit on the rims of buckets, which left bruising and caused pain." Again, this has already been shown to be false testimony when compared to testimony that had been heard by the lower court in the previous abuse and neglect case. No shoes. Again, only on a few occasions to prevent the child from running away. Sitting on a bucket for up to 12 hours. Again, false and misleading. This Court has held that circuit courts can "peek behind the vehicle of an indictment to assess evidence presented to the grand jury … [when] fraud exists." *State v. McCoy*, No. 19-0894, 2021 WL 4935749 at *7 (W.Va. Supreme Court, Oct. 13, 2021)(memorandum decision). Here, Respondents clearly argue that a fraud was committed upon this grand jury and had all of the facts and truthful testimony been given, the outcome would have most certainly been different. Again, the Court knew the real evidence, not some biased, half-true testimony given to the grand jury. That knowledge put the lower court – and this case – in a much different position. And, when the lower court considered that evidence and applied it to each and every statute under which the Respondents were indicted, it made the easy decision that the State's evidence was insufficient.

More specifically, the Respondents were indicted for *Child Abuse Resulting in Bodily Injury* in Counts I and II of the Indictment, in violation of W.Va. Code §61-8D-3(a). More specifically, the Defendants are alleged to have abused two of their three children, causing "significant physical pain, illness or *imprint* of physical condition." (A.R. 32-34)[2]

As for the "bodily injury" component of the statute, it is clear that the injury must have been caused by the abuse and existing at the time the charges are lodged. Here, the State hung its hat, at the preliminary hearing stage, on the contention that "bodily injury" encompassed the "psychological

[2] Nowhere in W.Va. Code §61-8D-3, in its entirety, does the phrase "imprint of physical condition" appear. Likewise, a search of that very term in Fastcase results in absolutely zero results. Even a simple Google search of that phrase does not result in anything remotely resembling a criminal statute. Simply put, quite shockingly, the prosecuting attorney is simply making up statutory language.

trauma" suffered by the children. In fact, as stated before, at the preliminary hearing for *State v. David Fosbroke* held on August 9, 2021, the assistant prosecuting attorney adamantly and unequivocally represented to Magistrate Sandy Holepit, on the record and as an officer of this Court, that West Virginia caselaw existed that specifically held that "psychological harm" was included in bodily and/or physical injury. This statement was patently false and a complete misrepresentation of the law.

On the contrary, this Court has held, unequivocally, in Syllabus Point 2 of *State v. Hartshorn*, that "psychological injury is not a 'serious bodily injury' under W.Va. Code 61-8B-3(a)(1)(i)." The *Hartshorn* court goes on to say that "until the West Virginia Legislature defines a serious personal injury expansively to include 'mental anguish or trauma' this Court feels that it would be improvident to enlarge upon the statutory definition of a serious bodily injury. The statute is very specific in its definition of 'serious bodily injury' and it excludes psychological injury." *Id.*

"It is one of the pillars of our criminal law that penal statutes must be construed most strongly against the state and in favor of the defendant." *Id.*; citing Syllabus Point 2, *State v. Ball*, 164 W.Va. 588, 264 S.E.2d 844 (1980). "Therefore, because *expressio unius est exclusio alterius*, we are led to hold that a psychological injury is not a 'serious bodily injury' under W.Va. Code 61-8B-3(a)(1)(i) [1976]." *Id.*

At the preliminary hearing, the assistant prosecuting attorney essentially argued that the Court should ignore the black letter law, **both statute and caselaw**, because *Hartshorn* is an old opinion and adopt her position despite the fact that is absolutely contrary to current, valid caselaw. The fact that *State v. Hartshorn* is a 1985 case means absolutely nothing. The case remains good law in the state of West Virginia and is ***controlling*** on this Court and all other courts in the State.

In addition, the assistant prosecuting attorney argued that *Hartshorn* "clearly pertains to sexual assault cases;" hence, it should be ignored for that reason. However, she obviously misses the point. More specifically, the West Virginia Supreme Court held, in 1985, that "psychological injury is not a

'serious bodily injury' under W.Va. Code §61-8B-3," which, at the time, was a sexual abuse statute. However, where the State misses the point is that the Defendants are charged under the current code, W.Va. Code §61-8B-3 and 4, respectively, which refers the Court to the *Sexual Offenses* portion of the West Virginia code for guidance on the definition of "bodily injury."

The State further argued that *Hartshorn* refers to "serious bodily injury" and not simple "bodily injury." However, this argument fails for two reasons. First, *Hartshorn* refers also to "bodily injury" in the very body of the opinion on more than one occasion. Second, and more importantly, it is completely nonsensical to say that psychological injury is not included in "serious bodily injury" in a case where the victim was brutally raped, but say that it is included in "bodily injury" in a case where a child was made to sit on a bucket or sleep in a tent.

All that said, the lower court took the evidence that it knew the State had, i.e., testimony from a CPS worker where she stated, unequivocally, that there was no evidence of physical injuries, and decided that the state could not prove "bodily injury" as required under the statute in Counts I and II of the indictment. Moreover, since the "bodily injury" must have been proximately caused by and existing at the time the charges were lodged, whether psychological trauma can lead to "bodily injury" is irrelevant under the current law. Given all that, the Court made the easy decision to dismiss Counts I and II of the indictments.

The Defendants were also charged with *Child Neglect Creating Risk of Serious Injury* in Counts III and IV of their respective indictments in violation of W.Va. Code §61-8D-4(c). More specifically, the were accused of "gross neglect creating a substantial risk of serious injury." Notably, the State chose to leave the term "bodily" out of the indictment language. W.Va. Code §61-8D-1(6) defines "gross neglect" as "reckless or intentional conduct, behavior or inaction by a parent, guardian or custodian that evidences a clear disregard for a minor child's health, safety or welfare."

"'Serious bodily injury' means bodily injury which creates a substantial risk of death, which

causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ." W.Va. Code §61-8B-1(10); see also State v. McDaniel, 238 W.Va. 61, 792 S.E.2d 72 (2016).

First, again, the State left "bodily" out of the indictment language. Presumably, this is because they know there was never a risk of serious "bodily" injury as she has consistently hung her hat on "psychological" harm or injury. That said, as stated, the lower court heard all the evidence that the State had in this regard and the lower court knew that there was absolutely no evidence that would support any verdict in this case, under any standard of proof, much less beyond a reasonable doubt, that the Respondents grossly neglected their children to the point that they were at a substantial risk of dying, suffering serious and prolonged disfigurement, or anything else. Moreover, there is no evidence ever presented that the Respondents exhibited such a "clear disregard" for their children's health, safety or welfare. Given such, the lower court had no choice but to dismiss Counts III and IV of the indictments.

Finally, the Defendants were charged in Counts V and VI with *Child Neglect Causing Bodily Injury* in violation of W.Va. Code §61-8D-4(a). For all the reasons set forth herein, specifically as they relate to Counts I and II, the lower court dismissed those counts as well.

d. The lower court did not err by considering the evidence presented during the abuse and neglect proceedings.

The Petitioners contend that the lower court erred by considering the mountain of evidence it had heard in the underlying abuse and neglect matter but submits no case law or authority in support of that argument.

The Petitioner contends that the prosecuting attorney does not have to "present every piece of evidence obtained in every case" as if to say the prosecuting attorney has a "smoking gun" in her possession. That is nonsense. This prosecuting attorney spent ***days*** trying to prove aggravating

circumstances in the abuse and neglect case. She presented every bit of evidence she could to prove that, and she failed.

Furthermore, Petitioner continuously beats the drum that the Respondents stipulated to engaging in corporal punishment of their children which resulted in physical abuse. Unfortunately, for them, the statutes under which the Respondents were indicted require much more than that. First, they require proof of "bodily injury." For instance, even if the prosecutor was "holding back," how does she get around the sworn testimony of the CPS worker who testified that there was no evidence of physical injury? Why didn't Gregory Gales tell the grand jury that during his sworn testimony?

Again, the statutes go far beyond "physical abuse" and require much more than that. If they didn't, nearly every respondent in an abuse and neglect case would be indicted for multiple felonies.

For all the reasons set forth herein, the Respondents respectfully pray that the Petitioner's Writ be denied; that they be awarded their fees and costs associated with defending said Writ; and for such other relief as this Court deems just and proper.

JENNIFER L and
DAVID F.,
Respondents, By Counsel

KEVIN T. TIPTON (WV Bar #8610)

TIPTON LAW OFFICES
1399 Stewartstown Road, Suite 230
Morgantown, WV 26505
(304) 366-9900
(304) 366-9902 (fax)
TiptonLaw@gmail.com