**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2007 Term**

**No. 33203**

**FILED**
**February 15, 2007**
**released at 3:00 p.m.**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL.**
**STEPHANIE SUE GIBSON,**
**Petitioner,**

**V.**

**HONORABLE JOHN S. HRKO,**
**JUDGE OF THE CIRCUIT COURT OF**
**WYOMING COUNTY, AND G. TODD HOUCK,**
**PROSECUTING ATTORNEY FOR**
**WYOMING COUNTY, WEST VIRGINIA,**
**Respondents.**

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**PETITION FOR WRIT OF PROHIBITION**

**WRIT DENIED**

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**Submitted: January 9, 2007**
**Filed: February 15, 2007**

**Wilbert A. Payne**
**Beckley, West Virginia**
**Attorney for the Petitioner**

**G. Todd Houck**
**Prosecuting Attorney**
**Pineville, West Virginia**

**The Opinion of the Court was delivered PER CURIAM.**

**JUSTICE STARCHER concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.**

**JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.**

## SYLLABUS BY THE COURT

1. "'Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953)." Syllabus point 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

2. "'West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain.' Syllabus Point 5, *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984)." Syllabus point 2, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984).

3. "'Most courts have held that in the absence of some express constitutional or statutory provision, a prosecutor has no inherent authority to grant immunity against prosecution.' Syllabus Point 16, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984)." Syllabus point 6, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987).

4. "Specific performance of a plea bargain is an available remedy only when the party seeking it demonstrates that he has relied on the agreement to his detriment

and cannot be restored to the position he held before the agreement." Syllabus point 1, *State v. Wayne*, 162 W. Va. 41, 245 S.E.2d 838 (1978), *overruled on other grounds by State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983).

**Per Curiam:**

The petitioner, Stephanie Sue Gibson (hereinafter "wife" or "Mrs. Gibson"), seeks a writ of prohibition to enforce a plea agreement and to prohibit a trial. On appeal, Mrs. Gibson argues that the circuit court committed error in failing to enforce her plea agreement. Based upon the parties' arguments, the documents and briefs filed with this Court, and the pertinent authorities, we affirm the decision by the circuit court. Accordingly, we deny the writ of prohibition.

## I.

## FACTUAL AND PROCEDURAL HISTORY

The petitioner, Stephanie Sue Gibson, is married to Billy Gibson (hereinafter "husband" or "Mr. Gibson"). Mr. Gibson burglarized the home of an elderly man, and severely beat and robbed him. The State alleged that Mrs. Gibson was the driver and lookout during the commission of the crime. She was charged with accessory in the commission of burglary, aggravated robbery, and malicious wounding. Upon her arrest, Mrs. Gibson gave a statement implicating her husband as the perpetrator of the crimes, and she further attempted to absolve herself of the crime by providing an alibi defense.

Billy Gibson's trial was set for August 21, 2006, and the prosecuting attorney suspected that Mr. Gibson intended to waive spousal immunity. The prosecution and Mrs. Gibson, along with her counsel, worked out an oral agreement. According to these

negotiations, Mrs. Gibson had agreed to testify against her husband if he did not assert the spousal privilege. Then if, during her testimony, Mrs. Gibson asserted her 5th Amendment right against self-incrimination, the prosecutor had agreed to offer her immunity in exchange for her testimony, pending the trial court's approval thereof.[1] At oral argument before this Court, the prosecution referred to this immunity as use immunity, meaning that anything testified to by Mrs. Gibson while on the stand could not be used against her at a later proceeding. However, after the jury selection process began, Billy Gibson entered into a plea agreement to malicious wounding. The other charges against Mr. Gibson were dismissed. Thus, Mrs. Gibson was not afforded the opportunity to testify against her husband.

Thereafter, on September 8, 2006, Mrs. Gibson appeared in circuit court for a status hearing.[2] Her attorney requested that the State honor its offer of immunity and dismiss the indictment. The State refused, citing the fact that dismissal was never contemplated and because Mrs. Gibson's part of the deal for immunity had not been executed since she did not testify against her husband due to his peremptory plea agreement. The circuit court agreed with the State and reasoned that plea agreements are unilateral contracts where one party makes a promissory offer and the other party accepts by performing an act

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[1]Mrs. Gibson alleges that a component of the agreement was that all charges against her would be dropped. The State disagrees and alleges that dismissal was never discussed.

[2]Mrs. Gibson was being held in jail pursuant to a guilty plea entered on unrelated misdemeanor charges.

to fulfill the contract. In this case, the trial court reasoned that Mrs. Gibson performed no act as she did not testify against her husband because his plea agreement preempted the need for her testimony. Thus, the circuit court refused to enforce the plea agreement, but found that negotiations with the State tainted the process. Consequently, the trial court prohibited the State from introducing any evidence derived from Mrs. Gibson or her attorney during plea negotiations. Mrs. Gibson now seeks a writ of prohibition from this Court asking that the plea agreement be enforced and that a trial be prohibited.

## II.

## STANDARD OF REVIEW

This matter comes before this Court as a writ of prohibition. It has been stated that "'[p]rohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953)." Syl. pt. 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Further guidance is provided as follows:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not

> correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *id*. Mindful of these applicable guidelines, we will now consider the substantive issues raised herein.

## III.

## DISCUSSION

On appeal to this Court, Mrs. Gibson argues that the plea agreement should be enforced because she detrimentally relied on the offer of immunity and that the charges should be dismissed. She acknowledges that she did not testify against her husband; however, that was through no fault of her own that he decided to enter a plea agreement prior to her opportunity to take the stand. She further speculates that her presence at trial, along with the knowledge that she was going to testify against him, is what compelled her husband to enter into a plea.

The State responds by contending that the circuit court was correct in refusing to enforce the plea agreement. Because Mr. Gibson entered a guilty plea, Mrs. Gibson was

never called to testify, which prevented her from being offered use immunity for her testimony. The State avers that a plea agreement never existed, but rather, that a conditional offer of immunity existed if approved by the circuit court and if Mrs. Gibson testified. However, the State also argues that Rule 11 grants the trial court discretion in accepting or refusing a plea bargain, and the judge was within his bounds to deny the plea agreement, especially because the State also objected. Significantly, the State avers that Mrs. Gibson's testimony was always tenuous because her husband held the power to decide whether she testified based on whether he asserted his spousal privilege.[3]

In this case, Mrs. Gibson avers that she entered into a valid plea agreement that should be enforced. To analyze this case, we must determine if an enforceable plea agreement existed. Under Rule 11 of the West Virginia Rules of Criminal Procedure, the procedure for a plea agreement is as follows:

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[3]Pursuant to W. Va. Code § 57-3-3 (1923) (Repl. Vol. 2005),

> In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but *neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other* except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by anyone.

(Emphasis added).

> *(e) Plea Agreement Procedure. –*
>
> (1) *In general.* – The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the state will do any of the following:
>
> (A) Move for dismissal of other charges; or
>
> (B) Make a recommendation or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) Agree that a specific sentence is the appropriate disposition of the case; or
>
> (D) Agree not to seek additional indictments or informations for other known offenses arising out of past transactions.
>
> The court shall not participate in any such discussions.

We note that nowhere in the facts of this case is it argued that Mrs. Gibson was planning on entering a guilty plea or a plea of nolo contendere to any charges. In fact, she never incriminated herself during any statements made to police. After her arrest, she gave a voluntary statement implicating her husband and absolving herself of any involvement in the commission of the crime. During discussions with the prosecuting attorney regarding a possible grant of immunity, Mrs. Gibson offered a witness who would further incriminate her husband and support her alibi defense. The intent of any agreement with Mrs. Gibson was

to elicit incriminating evidence against her husband and then to offer her immunity for any testimony implicating herself, subject to circuit court approval. Thus, there was no plea agreement, *per se*, for the circuit court to enforce. *See generally State ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 305 S.E.2d 268 (1983) (standing for the proposition that a defendant cannot compel performance of plea bargain agreement unless he enters plea of guilty or otherwise acts to his substantial detriment in reliance on the agreement), *overruled on other grounds by State ex rel. Hagg v. Spillers*, 181 W. Va. 387, 382 S.E.2d 581 (1989).

However, even assuming *arguendo* that there was a valid plea agreement, we have previously held that a trial court is under no obligation to accept such an agreement. *See* W. Va. R.Crim.P. 11 (recognizing court's obligation to inquire into the accuracy of a guilty plea and satisfaction that there is a factual basis for the plea); Syl. pt. 2, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995) (holding "[t]here is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plead."). Further, "[i]f a plea agreement has been reached by the parties . . . . the court may accept or reject the agreement[.]" W. Va. R.Crim.P. 11(e)(2). In light of the foregoing, we have expressly held that "'West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain.' Syllabus Point 5, *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984)." Syl. pt. 2, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984). Thus, even assuming that a plea

agreement had been reached, the circuit court was under no obligation to accept the agreement.

Moreover, it is significant that the offer of a grant of immunity was never presented to the trial court for its determination as to its appropriateness. The applicable statute states:

> In any criminal proceeding no person shall be excused from testifying or from producing documentary or other evidence upon the ground that such testimony or evidence may criminate or tend to criminate him, if the *court* in which he is examined is of the opinion that the ends of justice may be promoted by compelling such testimony or evidence. And if, but for this section, the person would have been excused from so testifying or from producing such evidence, then if the person is so compelled to testify or produce other evidence and if such testimony or evidence is self-criminating, such self-criminating testimony or evidence shall not be used or receivable in evidence against him in any proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence shall not be prosecuted for the offense in regard to which he is so compelled to testify or furnish evidence, and he shall have complete legal immunity in regard thereto.

W. Va. Code § 57-5-2 (1923) (Repl. Vol. 2005) (Emphasis added). We have previously held that "'[m]ost courts have held that in the absence of some express constitutional or statutory provision, a prosecutor has no inherent authority to grant immunity against prosecution.' Syllabus Point 16, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984)." Syl. pt. 6, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987). The State proffered that it intended to ask the trial court to grant immunity to Mrs. Gibson if she plead the 5th Amendment and

then testified. However, because her testimony was not needed, permission for immunity was neither sought nor granted. The trial court had no responsibility to enforce a conditional offer of immunity that was never brought to fruition.

Mrs. Gibson argues, however, that she relied on the agreement to her detriment and that she cannot be placed in a similar position as she was prior to the negotiations. In a prior decision of this Court, it was found that the alleged plea negotiations constituted more of a discussion as opposed to an actual agreement. *See State v. Wayne*, 162 W. Va. 41, 245 S.E.2d 838 (1978), *overruled on other grounds by State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983). In the *Wayne* decision, we observed that

> [w]hile we recognize a plea bargain agreement may be specifically enforced in some instances, . . . , that remedy is not available unless the party seeking specific performance demonstrates he has relied on the agreement to his detriment and cannot be restored to the position he held before the agreement. However, mere negotiation cannot be transformed into a consummated agreement merely by an exercise of the defendant's imagination. While we do not require that a plea bargain agreement be written, although that is the far better course, we do require substantial evidence that the bargain was, in fact, a consummated agreement, and not merely a discussion. Court approval, whether formal or informal is advised.

*Id.*, 162 W. Va. at 42-43, 245 S.E.2d at 840-41 (internal citations and footnotes omitted). In *Wayne*, this Court found that no agreement had been reached because "[n]o written bargain appears in the record; the terms of the alleged agreement are not developed; the defendant has given no evidence of reliance; and, the defendant has not shown that his position was

irrevocably altered." *Id.* 162 W. Va. at 43, 245 S.E.2d at 841. To that end, this Court held as follows: "[s]pecific performance of a plea bargain is an available remedy only when the party seeking it demonstrates that he has relied on the agreement to his detriment and cannot be restored to the position he held before the agreement." Syl. pt. 1, *id.*

In the present case before this Court, Mrs. Gibson asserts that she relied on the agreement to her detriment and that it is impossible to restore her to the position she held prior to any plea discussions. We disagree. Without testifying at trial, Mrs. Gibson had no reason to expect enforcement of any alleged plea agreement because she was unable to perform her end of the deal. While she claims that her presence at trial is what forced her husband to enter into a plea agreement, such a claim is unfounded. It was always within Mr. Gibson's right to assert his spousal privilege and prevent his wife from testifying. Thus, her presence at trial could not have forced him to plead when he could have prevented her testimony if he wished.

Also, Mrs. Gibson claims that she cannot be returned to the same position she was prior to the alleged offer of immunity because of statements made to the prosecution. However, this is not true because she never implicated herself as a result of her statements. Her statements to the police after she was arrested, as well as her statements to the prosecutor during plea negotiations, only implicated her husband. In both cases, she provided herself an alibi defense. Even if she had incriminated herself during discussions with opposing

counsel, the circuit court already ruled to exclude any evidence gleaned as a result of the plea negotiations. Therefore, Mrs. Gibson can be fully returned to the position she held prior to plea discussions. The circuit court's refusal to enforce the alleged plea agreement should be upheld, and Mrs. Gibson should be allowed to proceed to trial.

## IV.

## CONCLUSION

For the foregoing reasons, we affirm the circuit court's decision to refuse the plea agreement. Accordingly, the writ of prohibition is denied.

Writ Denied.