No. 33203 – *State of West Virginia ex rel. Stephanie Sue Gibson v. Honorable John S. Hrko, Judge of the Circuit Court of Wyoming County, and G. Todd Houck, Prosecuting Attorney for Wyoming County, West Virginia*

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OF WEST VIRGINIA

Albright, Justice, concurring:

While I agree with the result reached by the majority on the facts of this case, I write separately to emphasize several points. This case highlights the need for defense attorneys to have their clients, whenever possible, enter into a written plea agreement and to promptly seek the approval of the trial court as to the terms of the agreement. While plea agreements do not need to be in writing to be enforced,[1] by reducing the terms of the agreement to writing the potential for eventual disagreement over the terms of the agreement is greatly reduced. And, while there is no guarantee that the trial court is going to approve a specific plea agreement, the Appellant in this case clearly would have been in a better position had there been an actual written plea agreement.

The trial court fully appreciated the fact that the State had likely benefitted by entering into plea negotiations with the Appellant.[2] And the trial court was careful not to

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[1]*See State v. Wayne*, 162 W.Va. 41, 42, 245 S.E.2d 838, 840 (1978), *overruled on other grounds by State v. Kopa*, 173 W.Va. 43, 311 S.E.2d. 412 (1983) (recognizing that written plea agreements are preferred where possible).

[2]In explanation of its decision to deny the State the right to use any information (continued...)

allow the State to benefit from what it referred to as a "tainted" process. By this, the trial court was referring to the probable correlation between the discussions the State had with Appellant which culminated in her agreement to testify against her husband and likely played a pivotal role in her husband's decision to enter into a plea agreement. That the trial court had serious concerns about the way things evolved in this case is evidenced by his statement, which appears on the record twice: "I will not be a party to a mockery of our judicial process."

Intuitively, the trial court recognized that Appellant's husband's entry of a plea agreement was prompted, if not compelled, in some fashion by Appellant's willingness to testify against her husband at trial. With the entry of Appellant's husband's plea agreement, the need for Appellant to testify against him was removed. The obliteration of the need for Appellant to testify, however, should not correspondingly rob Appellant of a benefit from the bargain that was purportedly struck with the State. To do so strikes me as wholly inequitable. Allowing the State to benefit from its negotiations with Appellant, while denying Appellant any correlative benefit when the plea agreement arguably resulted as a direct result of her efforts simply seems unjust.

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[2](...continued)
obtained from Appellant during their negotiations, the trial court stated: "I can't allow the State to make an agreement and then say that it didn't exist and use the fruits that they have garnered during the agreement."

Assuming that the evidence supported the trial court's intuitive recognition that the State benefitted from the inchoate agreement of Appellant to testify, I would have had to dissent from the majority's ruling in this case[3] had the agreement between the State and Appellant been reduced to writing and approved by the trial court. However, based on the absence of a written plea agreement in this case that was approved by the trial court, I cannot disagree with the result reached by the majority. Accordingly, I respectfully concur.

[3]Assuming, of course, that the majority's ruling would remain the same.