IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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No. 33213

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FILED
February 22, 2007
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.,
KEITH O'DELL McCOURT,
Petitioner

v.

THE HONORABLE JACK ALSOP,
JUDGE OF THE CIRCUIT COURT OF WEBSTER COUNTY,
Respondent

ORIGINAL PROCEEDING IN PROHIBITION

WRIT DENIED

Submitted: January 23, 2007
Filed: February 22, 2007

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE ALBRIGHT concurs in part, dissents in part and reserves the right file a separate opinion.

SYLLABUS BY THE COURT

1. "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, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

2. "Pursuant to W. Va. Code § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the

failure to try the accused is caused by one of the exceptions enumerated in the statute." Syl., *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998).

Per Curiam:

In this original jurisdiction matter, the petitioner, Keith O'Dell McCourt, asks this Court to enter an order prohibiting the Circuit Court of Webster County, West Virginia, from conducting further proceedings in the underlying case wherein he was indicted for sexual assault in the second degree. The petitioner contends that the Circuit Court should have dismissed the indictment and discharged him from further prosecution because the State violated his constitutional right to a speedy trial.[1] Specifically, the petitioner asserts that the State took no action in the case between his indictment in September 1994 and his ultimate arrest and arraignment upon the charge in 2006. The petitioner argues that, therefore, his right under *W.Va. Code*, 62-3-21 (1959), to be brought to trial in Webster County within three terms of court following the term of indictment was violated. This Court has recognized that statute as this State's legislative declaration of what ordinarily constitutes a speedy trial within the meaning of the federal and State constitutions.

This Court has before it the petition for a writ of prohibition, the response of the State of West Virginia, all matters of record and relevant authorities. Upon careful examination, and as more fully discussed below, this Court concludes, *inter alia*, that,

[1] U.S. Const. amend. VI, provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial [.]" Similarly, W. Va. Const. art. III, § 14, provides, in part: "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be . . . public, without unreasonable delay [.]"

inasmuch as the petitioner left the jurisdiction of this State and did not appear before the Circuit Court as required during the period in question, no violation of *W. Va. Code*, 62-3-21 (1959), occurred, and his right to a speedy trial was not violated. Consequently, the Circuit Court is not exceeding its legitimate powers in allowing the case to go forward, and the petitioner's requested relief in prohibition is denied.

I.

Factual and Procedural Background

The petitioner allegedly sexually assaulted a male individual at knife point on July 5, 1994, in Webster County, and a warrant for his arrest was issued on July 8, 1994. On September 6, 1994, the petitioner was indicted for the offense by a Webster County grand jury. The indictment alleged that the petitioner committed sexual assault in the second degree, a felony under *W. Va. Code*, 61-8B-4(a)(1) (1991), by means of forcible compulsion. The case was styled *State of West Virginia v. Keith O'Dell McCourt*, case no. 94-F-24 (Webster County).

The record indicates that the petitioner was living in the Commonwealth of Virginia. On September 7, 1994, the Prosecuting Attorney of Webster County sent a letter by certified mail notifying the petitioner that he was to appear in the Circuit Court on September 12, 1994, for arraignment and the posting of bond. The letter, sent to the

petitioner in care of an individual by the name of Becky Gaylor in Waynesboro, Virginia, was returned unclaimed. Bench warrants for the petitioner's arrest were issued on September 12, 1994, January 18, 1995, May 8, 1995, January 18, 1996, May 22, 1996, and September 9, 1996. According to the State, the Circuit Court, thereafter, entered a general order granting bench warrants in each subsequent term of court for the petitioner's arrest.

In March 2006, the petitioner was detained in Webster County for driving under the influence of alcohol and driving upon a suspended license. That event resulted in his arrest with regard to the 1994 indictment when his name was matched with records of unserved warrants maintained by the Webster County Office of Emergency Services. The Circuit Court conducted an arraignment upon the indictment on May 1, 2006, and the petitioner entered a plea of not guilty to the sexual assault charge. Although the petitioner was released upon $50,000 bond, he was found in violation thereof for consuming alcohol.

Relying upon *W. Va. Code*, 62-3-21 (1959), the petitioner filed a motion to dismiss the indictment and to be discharged from further prosecution because of the failure of the State to bring him to trial between his 1994 indictment and 2006 arrest. Following a hearing conducted on May 12, 2006, the Circuit Court entered an order on July 14, 2006, denying the motion and scheduling the case for trial. The Circuit Court did not set forth specific reasons in the order for the denial of the motion. However, the Court stayed further

proceedings to allow the petitioner an opportunity to pursue his request for relief in prohibition in this Court.[2]

II.

Standard of Review

This Court has original jurisdiction in prohibition proceedings pursuant to Art. VIII, § 3, of The Constitution of West Virginia. That jurisdiction is recognized in Rule 14 of the West Virginia Rules of Appellate Procedure and in various statutory provisions. *W. Va. Code*, 51-1-3 (1923); *W. Va. Code*, 53-1-2 (1933). In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W. Va. 163, 130 S.E. 111 (1925), as follows: "The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Syl. pt. 1, *State ex rel. Brison v. Kaufman*, 213 W.Va. 624, 584 S.E.2d 480 (2003); syl. pt. 1, *State ex rel. Laura R. v. Jackson*, 213 W. Va. 364, 582 S.E.2d 811 (2003); *State ex rel. Murray v. Sanders*, 208 W. Va. 258, 260, 539 S.E.2d 765, 767 (2000); *State ex rel. Barden and Robeson Corporation v. Hill*, 208 W. Va. 163, 166, 539 S.E.2d 106, 109 (2000). *See also*, *W. Va. Code*, 53-1-1 (1923).

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[2] The petition for a writ of prohibition was filed on August 28, 2006. On October 26, 2006, this Court issued a rule to show cause why relief should not be granted. The State filed a response on November 3, 2006.

In the case to be determined, the petitioner does not contend that the Circuit Court of Webster County lacks jurisdiction to bring him to trial under the 1994 indictment. Rather, the petitioner suggests that he did not waive his right to a speedy trial within the context of *W. Va. Code*, 62-3-21 (1959), and that, at this point, the Circuit Court is exceeding its authority in allowing the case to go forward. In that context, a more specific standard concerning prohibition is applicable. As syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), holds:

> 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. 1, *State ex rel. Blake v. Hatcher*, 218 W. Va 407, 624 S.E.2d 844 (2005); syl. pt. 1, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004); syl. pt. 2, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997). *See also*, 15 M. J., *Prohibition* § 14 (Matthew Bender & Co. 2006); 72A C.J.S. *Prohibition* § 22 (2004).

III.

Discussion

The petitioner contends that his constitutional right to a speedy trial was violated because the State failed to bring him to trial between his 1994 indictment and 2006 arrest. In that regard, the petitioner relies upon *W. Va. Code*, 62-3-21 (1959), which provides, subject to various exceptions, that a defendant in a criminal case is entitled to discharge from prosecution if three regular terms of court conclude, following the term of indictment, without a trial. As stated above, this Court has recognized that statute as this State's legislative declaration of what ordinarily constitutes a speedy trial within the meaning of the federal and State constitutions.[3] As *W. Va. Code*, 62-3-21 (1959), provides in relevant part:

> Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his

[3] Syllabus point 1 of *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981), holds: "Whereas *W. Va. Code*, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is *W .Va. Code*, 62-3-21, rather than *W. Va. Code*, 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of *U.S. Const.*, amend VI and *W. Va. Const.*, art. III, § 14. *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 538, 120 S.E.2d 504, 506 (1961) [*overruled on other grounds*, syl. *State ex rel. Sutton v. Keadle*, 176 W. Va. 138, 342 S.E.2d 103 (1985)]." Syl. pt. 2, *State ex rel. Brum v. Bradley*, 214 W. Va. 493, 590 S.E.2d 686 (2003); syl. pt. 1, *State v. Young*, 167 W. Va. 312, 280 S.E.2d 104 (1981).

> insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict [.][4]

The petitioner asserts that he cannot be held accountable under the statute for the terms of court between his 1994 indictment and 2006 arrest because he was incarcerated in the Commonwealth of Virginia "for a period of years shortly after the return of the indictment in 1994." He further asserts that law enforcement authorities in West Virginia failed to determine his whereabouts and failed to seek temporary custody of him from Virginia in order to offer him a speedy trial in Webster County. The petitioner maintains, therefore, that his right to be brought to trial within the time specified in *W.Va. Code*, 62-3-21 (1959), was violated and that the Circuit Court should have dismissed the 1994 indictment and discharged him from further prosecution. On the other hand, the State emphasizes that, following the initial arrest warrant and indictment, it tried to secure the presence of the petitioner before the Circuit Court by way of the certified letter sent to Virginia and by obtaining numerous bench warrants for his arrest. According to the State, it had no knowledge that the petitioner had been incarcerated in Virginia.

[4] Pursuant to Rule 2.14. of the West Virginia Trial Court Rules, the annual terms of the Circuit Court of Webster County begin on the second Monday in January and on the first Monday in May and September.

The petitioner's request for extraordinary relief in prohibition under this Court's original jurisdiction is undermined by the fact that none of the matters of record submitted to this Court mentions the petitioner's incarceration in Virginia. Rather, those documents refer solely to proceedings conducted in the Circuit Court of Webster County upon the indictment for sexual assault. Although the petition for a writ of prohibition asserts that the petitioner was incarcerated in Virginia "for a period of years shortly after the return of the indictment in 1994," neither the Virginia conviction, the facility where the petitioner was maintained, nor the dates of incarceration and release are set forth. Certainly, the petitioner was not in the Commonwealth of Virginia when he was detained in Webster County for driving under the influence of alcohol and driving upon a suspended license. In its response filed herein, the State indicates that the petitioner's Virginia criminal record was brought out through the testimony of the petitioner's father during the May 12, 2006, hearing upon the petitioner's motion to dismiss. However, no transcript of that hearing has been made a part of this proceeding. Upon the information before us, therefore, this Court cannot conclude that the petitioner has made a "clear case" for relief in prohibition. *See, State ex rel. Vineyard v. O'Brien*, *supra*.

Nor is relief in prohibition appropriate upon the merits of the petitioner's assertion of a speedy trial violation. The record supports the position of the State that, following the issuance of the initial arrest warrant and the return of the indictment, the State attempted to secure the petitioner's presence by sending the certified letter concerning

arraignment and bond and by consistently obtaining bench warrants for the petitioner's arrest during the period in question. The petitioner's whereabouts were unknown until he was found in Webster County in 2006. As stated above, the record before this Court contains no documents concerning the petitioner's incarceration in Virginia. Moreover, the petitioner has submitted no evidence in the form of exhibits or testimony to the effect that the State, throughout the intervening years, had the resources and technology to have reasonably determined his whereabouts.

In syllabus point 6 of *State v. Drachman*, 178 W. Va. 207, 358 S.E.2d 603 (1987), this Court held: "Under the Sixth Amendment speedy trial right, the prosecution has a duty to seek the return of a prisoner *known* to be incarcerated out of state." (emphasis added) As noted in the *Drachman* opinion, that duty has been recognized by this Court in the context of the statutory three term rule. 178 W. Va. at 212, 358 S.E.2d at 608. In *State ex rel. Stines v. Locke*, 159 W. Va. 292, 220 S.E.2d 443 (1975), for example, the defendant's claim of a speedy trial violation was upheld under the provisions of *W. Va. Code*, 62-3-21 (1959), where the State was aware of his incarceration in Michigan but failed to pursue temporary custody of him pursuant to the interstate Agreement on Detainers, *W. Va. Code*, 62-14-1 (1971), *et seq*.

Neither *Drachman* nor *Stines* resolve the question of the State's obligation, in the first instance, to investigate whether a criminal defendant *may* be incarcerated in another

jurisdiction. Those cases merely suggest that, when a criminal defendant's incarceration in another jurisdiction is known, this State is required to take reasonable action in order to afford the defendant an opportunity for a speedy trial upon the charge at hand. Here, nothing in the record shows that the State knew of the petitioner's whereabouts or of any incarceration in Virginia prior to his detention in 2006 upon the traffic violations. Following his arrest upon the indictment thereafter, he was promptly provided with counsel, arraigned upon the sexual assault charge and provided with a trial date. *See*, *State v. Fender*, 165 W. Va. 440, 268 S.E.2d 120 (1980), noting as follows concerning an alleged transgression of the three term rule under *W. Va. Code*, 62-3-21 (1959): "[T]he record does not reveal whether the State was aware of the defendant's out-of-state incarceration in the federal institution. If it was not aware, its duty to exercise reasonable diligence to seek his return would not begin." 165 W. Va. at 447, 268 S.E.2d at 124.

Finally, the petitioner's assertion that the statutory three term rule was violated fails in view of the fact that he was not arraigned upon the indictment until May 1, 2006. In *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998), the defendant was indicted for malicious assault in October 1994. Thereafter, a delay occurred because the defendant was in federal custody. He was not arraigned upon the indictment until 29 months later, on March 6, 1997. He was convicted at trial in July 1997. Rejecting the defendant's claim that *W. Va. Code*, 62-3-21 (1959) had been violated, this Court, in *Carter*, held that the three term rule did not apply until he was arraigned on March 6, 1997, after which he was timely

brought to trial. As the opinion states: "Three terms of court did not pass without trial following indictment and arraignment; therefore, the three term rule was not violated." 204 W.Va. at 495, 513 S.E.2d at 722. The syllabus point in *Carter* holds:

> Pursuant to W. Va. Code § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor *and arraigned* in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute.

(emphasis added) *State ex rel. Games-Neely v. Sanders*, 637 S.E.2d 598, 605 n. 16 (W. Va. - 2006); syl. pt. 1, *State v. Damron*, 213 W. Va. 8, 576 S.E.2d 253 (2002). As stated in *Damron*: "[A]ppellant in this case was promptly tried after his arraignment. Thus, the State complied with the three-term rule." 213 W. Va. at 13, 576 S.E.2d at 258.

Here, the petitioner was arraigned on May 1, 2006, and scheduled for trial, all shortly after he was located in Webster County upon the traffic violations. The order of the Circuit Court entered on July 14, 2006, stayed further proceedings to allow the petitioner an opportunity to pursue his request for relief in prohibition in this Court. Under those circumstances, and in view of *Carter*, *Games-Neely* and *Damron*, this Court finds no violation of the three term rule set forth in *W. Va. Code*, 62-3-21 (1959).

IV.

Conclusion

Upon all of the above, we find no violation of the petitioner's right to a speedy trial in the context of *W. Va. Code*, 62-3-21 (1959). Accordingly, the Circuit Court of Webster County is not exceeding its legitimate powers in allowing the case to go forward, and the petitioner's request for relief in prohibition is denied.

Writ Denied