IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-1028

STATE OF WEST VIRGINIA EX REL. SCOTT R. SMITH, Prosecuting Attorney, Ohio County,

Petitioner,

v.

THE HONORABLE MICHAEL J. OLEJASZ, Judge, Circuit Court of Ohio County, and DANNY IVAN MENDOZA, Defendant

Respondents.

PETITION FOR A WRIT OF PROHIBITION

From the Circuit Court of Ohio County,
Case No. 20-F-45

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying the State's motion to continue on the basis that it needed to protect the Defendant's speedy trial rights when the Defendant previously waived those rights?

2. Whether the trial court erred when it entered an order prohibiting the State from calling an expert witness and precluding introduction of the autopsy conducted on the murder victim?

STATEMENT OF THE CASE

Danny Mendoza was indicted by an Ohio County Grand Jury on July 8, 2020, for the First Degree Murder of Joseph Harrison. (A.R. at 4). This Grand Jury was specially convened for this purpose, because the May 2020 Grand Jury was cancelled as a result of COVID-19 safety-precautions implemented by this Court and the Circuit Court of Ohio County. *See* May 6, 2020 Administrative Order, Re: Resumption of Operations, *Supreme Court of Appeals of West Virginia*, *available at* www.courtswv.gov/covid10/ResumptionofOperations-ProtocolsandMap5-6-20.pdf at 2 (last accessed December 28, 2020); (A.R. at 5).

Mendoza was arraigned on July 23, 2020, during the same term of court as his indictment.[1] (A.R. at 6-7). At the arraignment, the State produced its discovery to Mendoza. (A.R. at 6-7; A.R. at 8-328). In relevant part, the State disclosed that it would call a Physician from the Medical Examiner's Office. (A.R. at 13). This disclosure was made pursuant to Rule 16(a)(1)(E) of the West Virginia Rules of Criminal Procedure and the State further indicated that it would be supplemented (as such information became available to the State). (A.R. at 13). During the arraignment, Mendoza, by counsel, indicated to the circuit court that a continuance would likely

[1] The terms of court for the Circuit Court of Ohio County are set forth in Rule 2.01 of the Trial Court Rules. They are: the second Monday of January, May, and September. W. Va. T. Ct. R. 2.01.

be necessary and the State did not object. (A.R. at 7). Consequently, no trial date was set at that time. (*See id.*).

Sure enough, Mendoza requested a continuance of trial. (*See* A.R. at 329-30). On August 31, 2020, the circuit court held a hearing on the matter. (A.R. at 329). The court confirmed with Mendoza's counsel that Mendoza desired to waive both his speedy trial and "term" rights. (*Id.*). The court also engaged in a colloquy with Mendoza, and Mendoza confirmed, under oath, that he desired to waive these rights. (*Id.*). Given this express, voluntary waiver, the circuit court found good cause to continue the case to the following term of court and it did so. (*Id.*).

The court entered a new scheduling order on September 24, 2020 (during the following term of court, W. Va. T. Ct. R. 2.01). (A.R. at 331). Under the terms of this order, the State's discovery disclosures were due on October 8, 2020, a pretrial hearing was set for December 22, 2020, and trial scheduled to begin on January 4, 2021—all which were set to occur during a single term of court, W. Va. T. Ct. R. 2.01. (*Id.*).

On December 18, 2020, in advance of the pretrial hearing, the State filed a motion to continue trial ("Motion to Continue") on the basis that it had not yet received an autopsy report from the Medical Examiner's Office and, concomitantly, did not yet know the specific identity of the physician who would be called to testify regarding the autopsy. (A.R. at 332 ¶ 3). The State further explained in the motion that the autopsy report and related testimony were important for purposes of the case—that Mendoza was charged with first degree murder; that the jury would be asked to make a decision regarding mercy; and the fact that the victim was shot "upwards of six times" would be relevant to these issues. (A.R. at 332-33 ¶ 6). The Defendant ***did not object*** to this Motion. (*See* A.R. at 335).

At a December 22, 2020 Pretrial Hearing, the circuit court considered the motion and denied it. (*See* A.R. at 335).[2] While the circuit court correctly observed that the autopsy report was not yet available to the State (meaning it was impossible for the State to have yet disclosed it), it found that the State failed to establish "good cause" for the continuance. (*Id.*). In fact, and despite Mendoza's express waiver of his speedy trial rights, which included a colloquy conducted by the circuit with Mendoza just four months earlier, the circuit court denied the State's motion on the basis that "this Court is bound by the policy of the law of West Virginia which requires that, without good cause, [the] Defendant's right to a speedy trial be held above all else." (*Id.*). The court also ruled that the State would be prohibited from calling any expert witness to offer testimony regarding the autopsy and could not introduce any photographs from the autopsy, on the basis that the State's disclosure did not comply with the Court's scheduling order. (*Id.*).

SUMMARY OF THE ARGUMENT

The circuit court erred when it denied the State's ***unopposed*** motion to continue trial. The court's stated rationale was its alleged obligation to protect Mendoza's speedy trial rights. (A.R. at 335). But Mendoza had already expressly waived those rights. (A.R. at 329). Accordingly, the circuit court's ruling was based upon a misapplication of the law and cannot stand. The circuit court's attendant ruling—prohibiting the State from introducing any evidence relating to the autopsy—is similarly divorced from the law. The court did not find that the prosecutor violated its scheduling order and, therefore, exclusion of this evidence is not proper under Rule 16(d). For

[2] The State requested a copy of the transcript immediately following the hearing. To date, the hearing has not yet been transcribed. Of course, a court speaks "only through its orders" and, given that the circuit court reduced its ruling to writing, the written order controls. *Legg v. Felinton*, 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006). Consequently, the transcript is not necessary for purposes of resolving this matter.

these reasons, this Court should issue a writ of prohibition and vacate the circuit court's order denying the State's Motion to Continue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The circuit court's error is obvious on the face of its order; accordingly, a writ may be issued on the face of that order and the pleadings alone. Nonetheless, the State also believes oral argument in this matter under Rule 19 will aid this Court in its decisional process, particularly given that this case involves issues of settled law which are narrow in scope, W. Va. R. App. P. 19(a)(1) and (4). Because these issues involve application of settled law, a memorandum decision may be appropriate in this matter under either Rule 19(g)(1) or (3).

ARGUMENT

1. Statement of jurisdiction and writ of prohibition standard.

This Court has original jurisdiction to issue a writ of prohibition to restrain a circuit court from exceeding its legitimate powers. Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). While a petition for a writ of prohibition is not a substitute for a direct appeal or petition for *certiorari* (*see id.*), this Court has recognized that pursuing a writ of prohibition is an available remedy to the State in a criminal proceeding where the trial court abused its legitimate powers to the State's detriment, particularly given that the State does not, as a general matter, possess the right to seek a direct appeal following the disposition of a criminal case. *See State ex rel. State v. Sims*, 239 W. Va. 764, 767, 806 S.E.2d 420, 423 (2017) (quoting Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992)). Whether to grant the petition involves evaluation of a five factor test:

> (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.

Although all five factors need not be satisfied, the third factor (i.e., the existence of clear error as a matter of law), is given substantial weight. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

The first and second factors are easily satisfied in this matter as that the State does not have the ability to pursue a direct appeal or otherwise challenge the circuit court's ruling outside of this proceeding. *See generally Sims*, 239 W. Va. at 767, 806 S.E.2d 420, at 423. The third factor is also satisfied for the reasons discussed below. In short, the circuit court's ruling is erroneous as a matter of law because it based its ruling upon a misapprehension of the law. A circuit court has an obligation to apply the law correctly and the court below did not do so. Finally, the circuit court's ruling raises an important legal issue—the circuit court misapplied a speedy trial protection when there was none and excluded evidence even though the State did not violate Rule 16 or its scheduling order—and issuing a decision correcting this fundamental error will provide guidance to the trial courts of this state. In short, this petition is properly before this Court.

2. Standard of review regarding the circuit court's erroneous denial of the State's motion to continue trial.

This petition for a writ of prohibition is the result of the trial court's erroneous decision to deny the State's motion to continue trial. While review of a circuit court's ruling on such a motion is ordinarily reviewed deferentially, because the ruling is predicated upon a mistake of law—and one involving the constitutional right to a speedy trial—such a ruling should be reviewed *de novo*. *Compare* Syl. Pt. 2, *State v. Bush*, 163 W. Va. 168, 255 S.E.2d 539 (1979) ("[A] motion for

continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion."), *and State v. Halstead*, No. 16-0125, 2017 WL 656994, at *4 (W. Va. Feb. 17, 2017) (memorandum decision) (applying Syllabus Point 2 of *Bush* in the context of a criminal case), *with* Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 107, 468 S.E.2d 719, 722 (1996) (observing that questions of law and questions implicating constitutional rights are reviewed *de novo*). Nonetheless, a writ should be issued even if this Court reviews the lower court's ruling on the State's motion under an abuse of discretion standard because the circuit court abused its discretion.

3. The circuit court engaged in a plain legal error when it denied the State's motion to continue because Mendoza had already waived his constitutional and statutory speedy trial rights.

This case is simple. The State requested a continuance of trial because the autopsy report had not yet been completed by the Medical Examiner's office. (A.R. at 332-34). The motion was unopposed. (A.R. at 335). No one can seriously dispute that the autopsy—both the report itself and testimony flowing from that examination—is critically important in cases of first degree murder where the death is alleged to have been caused by several gunshot wounds. Indeed, even a cursory review of this Court's opinions involving first degree murder convictions establishes that the introduction of an autopsy and testimony from the medical examiner who conducted that autopsy is a common, if not universal, occurrence at such trials. *See, e.g.*, *State v. Richardson*, 240 W. Va. 310, 316, 811 S.E.2d 260, 266 (2018) (prosecution for first degree murder, with introduction of evidence from the victim's autopsy); *State v. Kennedy*, 229 W. Va. 756, 761, 735 S.E.2d 905, 910 (2012) (same); *State v. Jenkins*, 229 W. Va. 415, 422, 729 S.E.2d 250, 257 (2012) (same); *State v. Sapp*, 207 W. Va. 606, 613, 535 S.E.2d 205, 212 (2000) (same). The absence of this critically important evidence—by no fault of the Prosecutor—should have constituted "good cause" to grant the continuance, particularly given that the request was not opposed by the

Defendant *and* because the continuance would not have been in violation of the Defendant's speedy trial rights (which, in any event, had already been expressly waived by him, A.R. at 329-30). This position finds support in the law. *See, e.g., State v. Jeremy S.* -- W. Va. --, --, 847 S.E.2d 125, 135 (W. Va. 2020) (observing that the State's request for a continuance should be granted where "the State's delay in providing the requested discovery was not intentional or oppressive") (quoting and citing *State v. McCartney*, 228 W. Va. 315, 719 S.E.2d 785, 794 (2011)). Rather than grant the State's eminently reasonable request, the circuit court improperly resurrected a right that had already been expressly waived by Mendoza and Mendoza's counsel; a right that was not the circuit court's to resurrect in the first instance. Because the circuit court's ruling constitutes clear abuse and is predicated upon a misapplication of law, a writ should issue.

Both the Federal and State Constitutions guarantee a criminal defendant in West Virginia the right to a speedy trial. U.S. Const. Amend. VI; W. Va. Const. Art. 3, § 14; *see also* Syl. Pt. 3, *State v. Holden*, -- W. Va. --, 843 S.E.2d 527 (W. Va. 2020) ("The right to a trial without unreasonable delay is basic in the administration of justice and is guaranteed by both the State and federal constitution."). Moreover, West Virginia Code § 62-3-21, which this Court has often explained constitutes the Legislature's pronouncement of a defendant's constitutional speedy trial right, provides that a defendant must be tried within three terms of Court. Syl. Pt. 1, *Good v. Handlan*, 176 W. Va. 145, 342 S.E.2d 111 (1986); *see also Lewis v. Henry*, 184 W. Va. 323, 326, 400 S.E.2d 567, 570 (1990) (referring to W. Va. Code § 62-3-21 as the "statutory method of guaranteeing the constitutional right to a speedy trial"). Of course, just like many constitutional rights, a defendant's right to a speedy trial may be waived, in which case these constitutional protections no longer apply. *See generally State v. Morris*, No. 12-1222, 2013 WL 4726621, at *2-3 (W. Va. Sept. 3, 2013) (memorandum decision) (observing various instances upon which a

defendant may waive his or her right to a speedy trial); *State v. Drachman*, 178 W. Va. 207, 213, n.8 358 S.E.2d 603, 609 n.8 (1987) (recognizing that the right to a speedy trial may be waived). *Cf. Montgomery v. Ames*, 241 W. Va. 615, 625, 827 S.E.2d 403, 413 (2019) (noting that "[a]n accused may waive sundry constitutional rights and privileges[.]").

In the case below, Mendoza waived both his statutory and constitutional rights to a speedy trial. (A.R. at 329-30). Despite this unequivocal waiver, the circuit court denied the State's motion to continue trial on the basis that it was constrained to enforce Mendoza's speedy trial rights against the State. (A.R. at 335). But those rights were waived. (A.R. at 329). The circuit court lacked authority to enforce Mendoza's [waived] speedy trial rights against the State. They could not serve as a valid basis for the circuit court to deny the State's motion to continue trial—a motion that was unopposed by the Defense in the first instance.

Even assuming the rights had not been expressly, knowingly, voluntarily, and intelligently waived, the requested continuance would not have come anywhere close to violating Medoza's speedy trial rights. Mendoza waived his right under West Virginia Code § 62-3-1 to be tried in the same term he was indicted. (A.R. at 329-30). As for the three-term rule, Mendoza was indicted during the May term of Court, meaning that term (from the second Monday of May to the day before the second Monday in September) did not count toward the three-term limit. *State v. Fender*, 165 W. Va. 440, 446, 268 S.E.2d 120, 124 (1980) (citing *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961) ("In computing the three-term rule we do not count the term at which the indictment is returned.")). The circuit court, upon the Defendant's own request made during that same term, continued the matter and scheduled trial for the same term. Because the term upon which the defendant is indicted does not count towards the three-term rule *and* because the term upon which a defendant seeks a continuance of trial does not count, it is evident

this term does not count toward the three-term limit. *See Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118 (explaining that continuances made by the defense, or agreed-to by the defense, do not count towards the three-term rule). Thus, zero terms have accrued for purposes of the three-term rule. The salient point is that the animating principle of the court's rationale for denying the State's unopposed request for a continuance was that the Court "[was] bound by the policy of the law of West Virginia which requires that, without good cause, [the] Defendant's right to a speedy trial be held above all else," but that legal conclusion finds no support in the law itself. A circuit court's ruling, divorced from the law, cannot stand. *See State ex rel. Hoover*, 199 W. Va. at 21, 483 S.E.2d at 21.

For these reasons, a writ should issue.

4. The circuit court's determination that the State violated its scheduling order and ruling that the State could not introduce the autopsy or call a medical expert at trial is similarly legally unsupportable.

Once the circuit court determined it was going to deny the State's motion to continue (which, for the reasons outlined above, was legally indefensible), it ruled that the State would not be permitted to introduce the autopsy or call a related medical witness on the basis that its scheduling order had been violated. (A.R. at 335-36). This ruling is legally erroneous because no such violation occurred.

The trial court's scheduling order required the State to produce its discovery to the Defendant by October 22, 2020. (A.R. at 331). In fact, the State had already produced its discovery to the Defendant months earlier—on July 23, 2020. (A.R. at 6-7). This disclosure was done in full compliance with Rule 16, and included ***all*** of the discovery covered by Rule 16 that existed at the time of the production. (A.R. at 6-328).

Rule 16(a)(1)(D) of the Rules of Criminal Procedure addresses the disclosure of reports and examinations (which undoubtedly includes autopsy reports). It provides:

> Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the state, ***the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state,*** and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

W. Va. R. Crim. P. 16(a)(1)(D).

Subsection C, in turn, requires the State to supplement its discovery as additional evidence becomes available. W. Va. R. Crim. P. 16(a)(1)(C). This Rule recognizes, at least implicitly, that evidence does not simply "freeze" and, therefore, because cases develop over time, a party has the right (and the State has the obligation) to supplement its discovery. *Id.* In fact, in accordance with this Rule, the State expressly informed the Defendant that it would supplement its discovery as information from the ME's office became available, *see* A.R. at 13.

The circuit court abused its discretion when it ruled that because it was denying the State's unopposed motion to continue trial, it was also going to preclude introduction of the autopsy and all related evidence. (A.R. at 335-36). It made this determination on the basis that the Medical Examiner's Office failed to comply with the Court's Scheduling Order. (A.R. at 335). But, while the Medical Examiner's Office certainly plays a vital role in virtually every murder case, the Medical Examiner's Office is not a party to the case itself. Instead, Rule 16 applies to the Prosecutor (the "State" in criminal proceedings at the circuit court level) and requires the Prosecutor to disclose evidence that is available to it. W. Va. R. Crim. P. 16(a)(1)(D). The autopsy report did not exist on July 23, 2020 (the time of the State's initial disclosure); did not exist on October 22, 2020 (the scheduling order's deadline for the State's production of discovery); did not exist on December 18, 2020 (when the State filed its motion to continue on this very basis); and

did not exist on December 22, 2020 (when the court ruled from the bench that it was denying the motion to continue, *see* A.R. at 335-36).

It is axiomatic that reports and examinations must first exist in order for them to fall within the scope of Rule 16(a)(1)(D) and for the State to be in a position to produce them to the defense. Otherwise, Rule 16(c)—which requires the State to supplement its discovery—would be rendered meaningless. Notably, the circuit court did ***not*** determine that the State itself violated its scheduling order, meaning it did not have the authority under Rule 16 to exclude this evidence. W. Va. R. Crim. P. 16(d)(2).

In short, the circuit court erred when it determined its scheduling order had been violated. The State produced its discovery to the Defendant months earlier and had a duty (and the right) to supplement its evidence as additional information became available pursuant to Rule 16(C). Thus, there was no violation of the circuit court's order.[3],[4]

In the alternative, the circuit court's discovery deadline improperly constrained the State's ability to develop and produce its evidence in this First Degree Murder trial, particularly given that it freely granted the Defendant's unopposed motion to continue trial, A.R. at 329-30, permitted the

[3] The same is true with respect to the specific identify of the State's expert witness. At Mendoza's arraignment, the State disclosed that it would be calling a physician from the Medical Examiner's office to testify at Mendoza's trial. (A.R. at 13). Rule 16(1)(a)(E) of the West Virginia Rules of Criminal Procedure provides that the State shall disclose its expert witnesses to the Defendant, including the expert's qualifications, along with a summary of the expert's anticipated testimony. The State's disclosure provided that it would call a physician from the Medical Examiner's office, provided the contact information for the office, and informed the Defendant that it would supplement this disclosure with additional information when that information became available to the State. (A.R. at 13).

[4] The autopsy report has since been prepared and provided to the State by the Medical Examiner's Office on December 23, 2020. (A.R. at 337-55). That report, along with the identity of the physician who conducted the autopsy, was immediately disclosed to the Defendant in accordance with Rule 16(c). The defense had that material in hand one business day later. (A.R. at 337).

Defendant to waive his rights to a speedy trial, (*id.*), and then decided to rely on those waived rights in denying the State's unopposed motion to continue trial. (A.R. at 335-36). The trial court allotted less than six months for the State to prepare for trial from the time of Mendoza's arraignment and refused to grant an extension even though one was warranted. (A.R. at 332-36). Against these facts, the State's request for a continuance was reasonable, and the circuit court abused its discretion when it found there was no "good cause" to grant it. *See Jeremy S.* -- W. Va. at --, 847 S.E.2d at 135.

CONCLUSION

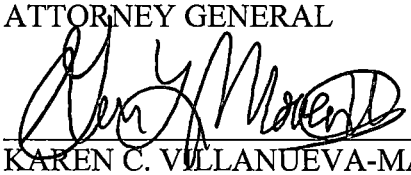
This petition should be granted; a writ should be issued to vacate the circuit court's erroneous denial of the State's motion to continue trial and its decision to exclude the autopsy report and related evidence.

Respectfully Submitted,

STATE OF WEST VIRGINIA
EX REL. SCOTT R. SMITH,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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THE HONORABLE MICHAEL J. OLEJASZ,
Judge, Circuit Court of Ohio County, and
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Respondents.

CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, counsel for the Petitioner, hereby certify that I have served a true and accurate copy of the foregoing "Petition for Writ of Prohibition," along with the accompany "Verification," and "Appendix Record" upon the parties identified above via electronic mail and by placing copies in the United States mail, with first-class postage prepaid, on this day, December 28, 2020, addressed separately to each as follows:

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Judge, Circuit Court of Ohio County, and
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VERIFICATION

I, Scott R. Smith, after first being duly sworn upon oath, respectfully state that I am the Prosecuting Attorney of Ohio County, West Virginia and the Petitioner named in the foregoing Petition for Writ of Prohibition; that I have read the Petition; that I am familiar with the contents of the related Appendix Record; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.

Scott R. Smith
Prosecuting Attorney of Ohio County

Taken, sworn to and subscribed before me this 28th day of December, 2021.

My commission expires: May 26, 2025

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Donna E. Vance
Ohio County Prosecutor's Office
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My Commission Expires May 26, 2025

Donna E Vance
NOTARY PUBLIC