

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Plaintiff,**

v.

**MICHAEL PAUL CONN,
Defendant.**



**Case No.: 14-F-512
Judge Paul T. Farrell**

**ORDER CERTIFYING QUESTION TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

On the 20th day of April, 2021, the State of West Virginia, by counsel, Assistant Prosecuting Attorney Owen Reynolds, appearing in person; and the Defendant, Michael Conn, appearing by Microsoft Teams, and by his counsel, Jeremy B. Cooper, also appearing by Microsoft Teams, came before this Court for a hearing scheduled on the Defendant's "Petition for Writ of Error *Coram Nobis* and Motion in Arrest of Judgment and for Dismissal of the Indictment," to which the State has filed a response.

The Court, having considered the written submissions and arguments of the parties, hereby ORDERS that a question of law arising from the issues presented in this case be certified to the Supreme Court of Appeals of West Virginia, based upon the following:

FINDINGS OF FACT AND PROCEDURAL HISTORY

In January of 1998, the Defendant was charged in indictment 98-F-39 with multiple counts of 3rd Degree Sexual Assault. On July 28, 1998, the Defendant entered a guilty plea to one count of 3rd Degree Sexual Assault before Hon. Alfred E. Ferguson. On August 26, 1998, the Defendant filed a motion to withdraw that plea, apparently because he did not want to enter a plea that would require him to register as a sex offender under the law in effect at that time. A new plea agreement was reached, and the Defendant entered a guilty plea to information 98-F-

161, Attempt to Commit an Assault during the Commission of a Felony. That plea was entered on August 28, 1998, and the defendant was sentenced to 1-3 years in the Department of Corrections. During the August 28, 1998 plea hearing, the prosecutor proffered that the evidence the State would prove at trial “would be that on or about August the 20th, 1997, that the defendant, Michael Conn, did actually have intercourse with a juvenile, [T.E.], who was under the age of sixteen and less – and more than four years difference between their ages.”

In 2000, the West Virginia Legislature amended the sexual offender registry requirements, which were stated explicitly to apply both prospectively and retroactively. After this change, the Defendant was instructed to register as a sex offender following his release on parole in 2001. The Defendant was subsequently reincarcerated for a parole violation, and filed a petition for post-conviction habeas corpus relief in 2003, 03-C-1067, contesting this registration.

Following the Circuit Court's initial denial of the habeas petition, the Supreme Court of Appeals of West Virginia considered this matter in a motions conference on September 14, 2005, and remanded for the Circuit Court to make written findings of fact concerning whether the Defendant's 1998 conviction was sexually motivated. The matter was then returned to the Supreme Court on a mandamus petition seeking enforcement of the prior remand order on the motions docket of March 16, 2006, with that mandamus petition being granted unless sooner mooted. Thereafter, a hearing was held on May 19, 2006 before Judge Ferguson, at which time he made written findings that the 1998 offense was sexually motivated, based upon the State's proffer at the August 28, 1998 plea hearing. The Defendant appealed this ruling to the Supreme Court, which refused to hear the appeal by order entered October 11, 2006.

In 2014, the Defendant was charged in the currently contested indictment 14-F-512, with six counts of Failure to Register as a Sex Offender or Provide Notice of Registration Changes.

Following an apparent failure to appear at arraignment, a warrant was issued in December of 2014, and executed on May 25, 2017. The defendant then entered a no contest plea to two counts of Failure to Register on January 9, 2018, and was sentenced to two 1-5 year sentences to run consecutively. The Defendant then filed his instant request for relief in March of 2021, seeking to vacate his convictions and to dismiss his indictment, on the theory that he should have only been required to register for ten years, and was therefore no longer required to register as a sex offender at the time the indictment alleged that he violated his registration requirements.

STATUS OF STAY IN CIRCUIT COURT

The Defendant's request for relief, entitled "Petition for Writ of Error *Coram Nobis* and Motion in Arrest of Judgment and for Dismissal of Indictment" was submitted post-conviction, and, in fact, the Defendant has already discharged his sentence imposed as a result of his convictions. The Court is refraining from making a final determination on the Defendant's request for relief until the Supreme Court of Appeals of West Virginia has acted on this Certified Question; however, there are no other matters occurring or set to occur that would require a stay.

LEGAL ISSUES IN QUESTION

This matter turns on the meaning of W. Va. Code §15-12-1, *et. seq.* (2013) of the West Virginia Code, otherwise known as the West Virginia Sexual Registration Act ("the Act"). The Act, in W. Va. Code §15-12-4(a)(2) requires lifetime registration for registrants who, among other factors not relevant to this case, are convicted of qualifying offenses against minors. Registrants who do not meet those criteria are only required to register until "10 years have elapsed since the person was placed on probation, parole, or supervised or conditional release" pursuant to W. Va. Code §15-12-4(a)(1).

A "qualifying offense" is defined in W. Va. Code §15-12-2(e)(1), as any offense listed in

W. Va. Code §15-12-2(b), which also includes attempts to commit the listed offenses. The parties agree that “Assault During Commission of a Felony” is not listed in W. Va. Code §15-12-2(b). However, the State contends that a conviction with a finding under W.Va. Code § 15-12-2(c), which states that “[a]ny person who has been convicted of a criminal offense where the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article,” is also a qualifying offense. The parties agree that the Defendant had originally been charged with “3rd Degree Sexual Assault,” before pleading guilty to “Assault During Commission of a Felony” via information and plea agreement, and that the Circuit Court made written findings of sexual motivation based on those underlying allegations. The parties also agree that the victim in the Defendant's 1998 conviction was a minor, which was stated on the record by the Circuit Court.

CERTIFIED QUESTION

Is the defendant’s 1998 conviction for “Attempt to Commit an Assault during the Commission of a Felony,” under W.Va. Code 61-2-10, which was found by the Circuit Court to be a sexually motivated crime against a minor, a qualifying offense under the West Virginia Sex Offender Registration Act, W.Va. Code 15-12-1 *et seq.*, which would require the defendant to become a registered sex offender for life?

Circuit Court's Answer: _____.

Pursuant to W. Va. Code §58-5-2, and Rule 17 of the Rules of Appellate Procedure, the Court ORDERS the above question to be CERTIFIED to the Supreme Court of Appeals of West Virginia. The Court further ORDERS that the parties confer and prepare a Joint Appendix sufficient to permit review of these questions in accordance with Rule 17(a)(1) of the West Virginia Rules of Appellate Procedure.

Pursuant to West Virginia Rule of Appellate Procedure 17(a)(2), the Circuit Clerk is

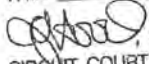
directed to transmit this Order and a list of the docket entries in this case to:

Edythe Nash Gaiser, Clerk
Supreme Court of Appeals of West Virginia
State Capitol Bldg. Room E-317
1900 Kanawha Boulevard East
Charleston, West Virginia 25305

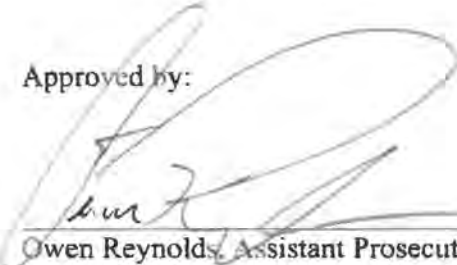
The Circuit Clerk is also directed to provide certified copies of this order to Owen Reynolds, Esq., Cabell County Assistant Prosecuting Attorney; and to Jeremy Cooper, Esq., counsel for the Defendant.

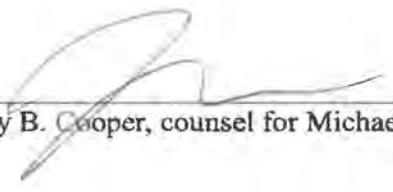
ENTER this ___ day of _____, 2021.

/s/PAUL T. FARRELL

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAY 04 2021 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS _____
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Approved by:


Owen Reynolds, Assistant Prosecuting Attorney


Jeremy B. Cooper, counsel for Michael Conn