

IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA

SCA EFiled: Nov 13 2023  
01:48PM EST  
Transaction ID 71384895

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DOCKET NO. 23-469  
(Underlying Criminal Action: 02-F-43,  
Circuit Court of Jefferson County)

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RICHARD W. PAGE,

*Petitioner,*

v.

STATE OF WEST VIRGINIA,

*Respondent.*

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PETITIONER'S BRIEF

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## **ASSIGNMENT OF ERROR**

- I. The Circuit Court Committed Reversible Error When It Held that the Defendant Was Not Permitted to Withdraw from the 2003 Proposed Plea Agreement by Mutual Consent of the Parties Prior to Formal Acceptance, Formal Entry and Prior to Sentencing.**

## **STATEMENT OF THE CASE**

This case stems from a burglary that occurred in 2001 in Jefferson County, West Virginia. In September 2002, Petitioner, Richard Page, was indicted on one count of Burglary, in violation of W.Va. Code § 61-3-11, and one count of Petit Larceny, in violation of W.Va. Code § 61-3-13. (J.A. 001).

Subsequently, the Petitioner, by counsel, negotiated a plea agreement with the State of West Virginia to resolve the pending charges. Under the proposed plea agreement, Petitioner would plead guilty County 1 of the Indictment, Burglary, and Count 2, Petit Larceny, would be dismissed. The agreement contemplated a binding sentence of not less than one (1) nor more than fifteen (15) in the state penitentiary but suspended in favor of five (5) years of supervised probation. (J.A. 013).

On February 21, 2003, the Petitioner appeared in the Circuit Court of Jefferson County, Judge Thomas Steptoe, Jr., presiding to present the proposed plea agreement to the court.<sup>1</sup> The agreement was set forth on the record at which time the Court engaged Petitioner pursuant to *Call v. McKenzie* and Rule 11 of the West Virginia Rules of Criminal Procedure.<sup>2</sup> (J.A. 013). A written guilty plea form was executed, but the court deferred acceptance or rejection of the plea at that

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<sup>1</sup> Counsel for Petitioner has not been able to locate a written or signed copy of the 2003 plea agreement. Counsel for the Petitioner in 2003, James Kent, is deceased.

<sup>2</sup> Counsel for Petitioner has attempted to locate a transcript of this hearing by contacting numerous court reporters assigned to Judge Steptoe in February 2003. After a check of individual records and the courthouse records, no transcript was located.

time. (J.A. 012). Following the hearing, a *Plea Proposal Order* was entered by the court requesting a presentence investigation report and setting the matter for a hearing on March 27, 2003. In its Order, the court indicated it would either accept or reject the binding plea at such time. (J.A. 0123).

Following the February 21, 2003, plea proposal hearing, this matter took an unexpected turn of events. Petitioner was arrested in the State of Maryland on an old warrant and later sentenced to a term of incarceration of approximately two (2) year. As a result, he was not present for the March 27, 2003, hearing on the Court's acceptance or rejection of the proposed plea agreement. A capias was issued but it appears it was never served or entered in the NCIC database. (J.A. 015). The Court acknowledged Petitioner's detainment at the March 27, 2003, hearing. (J.A. 116). Petitioner was later unconditionally released from incarceration in the State of Maryland because a detainer was not lodged against him. Whether due to a mistaken belief his case was resolved or a faulty memory, Petitioner went on about his life following his release from incarceration. Petitioner would have several encounters with law enforcement over the years and was never informed of or detained on the capias warrant issued in 2003.

In January 2023, Petitioner was visiting his son in Shepherdstown, West Virginia. He was pulled over by law enforcement for a minor traffic offense (rolling stop at a stop sign). At that time, law enforcement was notified by dispatch of the 2003 outstanding capias warrant and detained Petitioner. On January 30, 2023, Petitioner, by counsel, appeared before the Circuit Court for a hearing to set bond. (J.A. 067). By agreement, the Petitioner was granted a Five-Thousand Dollar (\$5,000.00) personal recognizance bond and this matter was reset for April 17, 2023. (J.A. 073).

During the April 17, 2023, status hearing the parties discussed the procedure aspects of the case, the binding nature of the plea, whether it was truly entered or accepted by the court in 2003,

and possible alternative resolutions. (J.A. 77-88). The parties, and the Circuit Court, appeared to agree that entering the 2003 felony conviction was unjust. (J.A. 88-90).

On May 31, 2023, the parties appeared before the Circuit Court and tendered a negotiated resolution via a plea agreement. (J.A. 7, 93-100). Pursuant to the agreement between the parties, the Petitioner would plead guilty to one count of Petit Larceny, in violation of W.Va. Code § 61-3-13(b). The State would recommend that the Petitioner be sentenced to a fine and/or community service in an amount to be determined by the Court. Petitioner was free to argue for any lawful sentence except for a deferred adjudication. Importantly, the agreement further provided that the Petitioner shall be permitted to withdraw from his 2003 plea to burglary and said charge would be dismissed as a part of the plea agreement. (J.A. 7-9). Following the plea being set forth on the record, the Circuit Court ordered an abbreviated presentence investigation report and set this matter for plea and sentencing on July 7, 2023. This hearing would later be continued until July 12, 2023, at the request of counsel.

Based upon representations made in previous hearings and the plea agreement tendered on May 31, 2023, the parties appeared before the Circuit Court for what they believed was a plea and sentencing hearing on one count of Petit Larceny. This would turn out not to be the case. In a sharp turnaround from the Circuit Court's previous statements on the record, it found that the binding nature of the plea agreement in 2003 took away the ability of either party to modify or back out of the agreement. (J.A. 106). The only solution was for the Circuit Court to accept or reject the plea and sentence the Petitioner in accordance with the terms of the 2003 plea agreement. The Circuit Court chose to accept the 2003 plea agreement and the Petitioner stood convicted of felony burglary. He was sentenced to not less than one (1) nor more than fifteen (15) years in the State penitentiary, which was suspended in favor of five (5) years of supervised probation. (J.A. 111).

Petitioner now appeals the Circuit Court's refusal to allow him to withdraw from the 2003 proposed plea agreement after mutual consent of the parties and prior to acceptance or rejection of the plea agreement on the record by the court.

### **SUMMARY OF THE ARGUMENT**

This case presents the Court with one sole issue. Namely, did the Petitioner, by agreement with the State or individually, have the right to withdraw from the 2003 proposed binding plea agreement that was never formally accepted, never formally entered, and prior to sentencing. Over the objection and agreement of the parties, the Circuit Court incorrectly held that neither party had the right to withdraw from the 2003 plea agreement because of its binding nature.

This Court's jurisprudence does not specifically address the issue of a parties right to right to withdraw from a binding plea agreement prior to acceptance, rejection, and sentencing. However, this Court has held that a criminal defendant has the right to withdraw from a plea agreement prior to sentencing for any just or fair reason. Petitioner asserts that the lack of a record from 2003, the length of time that had passed, and the agreement of the State to permit Petitioner to withdraw from the 2003 plea agreement satisfied any fair or just reason permitting his withdrawal.

Based upon negotiations with the State, the Circuit Court's statements on the record, the Petitioner did not file a formal motion to withdraw from the 2003 plea agreement. The Petitioner did, however, make such a request on the record during multiple status hearings. Despite the agreement of the parties, Petitioner would ultimately be sentenced under the terms of the 2003 proposed plea agreement.

### **STATEMENT REGARDING ORAL ARGUMENT**

None of the issues presented are of first impression to the Court. The facts and legal arguments are adequately presented in the briefs and the record on appeal; thus, the decisional process will likely not be significantly aided by oral argument. Should the Court determine, however, that oral argument would be helpful in the disposition of this case, the Petitioner respectfully requests a Rule 19 argument.

### **STANDARD OF REVIEW**

“Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court's ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under the clearly erroneous standard. Second, in contrast, the circuit court's articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed de novo.” *State v. Shrader*, 234 W.Va. 381, 765 S.E.2d 270 (W. Va. 2014) (citing Syl. Pt. 1, *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995)).

Finally, a trial court’s decision on a motion under Rule 32(e) of the West Virginia Rules of Criminal Procedure will be disturbed only if the court has abused its discretion. Syl. Pt. 2, *Duncil v. Kaufman*, 183 W.Va. 175, 394 S.E.2d 870 (1990).



## **ARGUMENT**

### **I. The Circuit Court Committed Reversible Error When It Held that the Defendant Was Not Permitted to Withdraw from the 2003 Proposed Plea Agreement by Mutual Consent of the Parties Prior to Formal Acceptance, Formal Entry and Prior to Sentencing.**

The sole issue before this Court is whether the court below erred when it accepted Petitioner's 2003 binding conditional guilty plea after the parties had agreed to vacate the 2003 plea agreement. Petitioner asserts that the court below erred when it determined that not only did the Petitioner not have the right to withdraw from the plea prior to acceptance and sentencing, but further, that the parties could not agree to jointly withdraw from the 2003 plea agreement. This Court's jurisprudence does not provide a definitive answer.

Rule 11(e) of the West Virginia Rules of Criminal Procedure provides, in part, that:

*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 information for other known offenses arising out of past transactions. The court shall not participate in any such discussions.

*Notice of such agreement.* - If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A), (C), or (D), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

In this case, the 2003 proposed plea agreement was negotiated under Rule 11(e)(1)(c). When a C-type agreement is involved, a circuit court has one of three options: (1) accept the agreement; (2) reject the agreement; or (3) defer a decision pending a presentence investigation. It is clear from the 2003 “*Plea Proposal Order*” that the Circuit Court in 2003 proceeded under option three (3). Unlike its Federal counterpart, Rule 11 of the West Virginia Rules of Criminal Procedure does not provide for an automatic mechanism for withdrawal from a plea agreement prior to acceptance.<sup>3</sup> Rather, Rule 32(e) of the West Virginia Rules of Criminal Procedure provides that “[i]f a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea if the defendant shows any fair and just reason.”

In compliance with Rule 32(e), this Court has held that “[i]n a case where the defendant seeks to withdraw his guilty plea before sentence is imposed, he is generally accorded the right if he can show any fair and just reason.” Syl. Pt. 1, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980); *See also State v. Harlow*, 176 W.Va. 559, 346 S.E.2d 350 (1986). This is because in “[i]n the ordinary situation, the withdrawal of the guilty plea prior to sentencing places both parties in their original position and enables the State to try the defendant on all charges.” *Id.* A limiting

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<sup>3</sup> Rule 11(d)(1) of the Federal Rules of Criminal Procedure provides the following:

A defendant may withdraw a plea of guilty or nolo contendere:

- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:
  - (A) the court rejects a plea agreement under 11(c)(5); or
  - (B) the defendant can show a fair and just reason for requesting the withdrawal.

factor courts should consider is whether the State will suffer substantial prejudice if the plea is withdrawn after entry but prior to sentencing. *Id.*

Unlike either *Harlow* or *Olish*, the plea in this case had not been accepted or rejected by the trial court in 2003. Rather, on February 26, 2003, the Circuit Court entered a “*Plea Proposal Order*” and set the matter out for a pre-plea investigation report. (J.A. 013). In its Order, the Circuit Court held that “the Court does defer acceptance or rejection of said plea agreement.” *Id.* Additionally, the Order indicated that the Court engaged the Petitioner in a dialogue regarding the matters set forth in *Call v. McKenzie*, *State v. Cabell*, and Rule 11 of the West Virginia Rules of Criminal Procedure. *Id.* Unfortunately, no record can be found of the February 21, 2003, plea proposal hearing and counsel for the Petitioner in 2003 is now deceased. Furthermore, no written copy of the 2003 plea agreement exists, and Petitioner recalls very little of the events of February 21, 2003.

Based upon the lack of record, the length of time that had passed, the available NCIC report, and the 2003 file, the parties negotiated a new agreement to resolve this matter. (J.A. 007). Pursuant to the May 31, 2023, plea agreement, Petitioner would plea guilty to one count of Petit Larceny, in violation of W.Va. Code 61-3-13(b). *Id.* The State would recommend a fine and/or community service and the Petitioner would be free to argue for any lawful sentence except for a deferred adjudication. *Id.* Importantly, the Petitioner would be permitted to withdraw from the 2003 plea agreement by mutual consent of the parties.<sup>4</sup> *Id.* Thus, there was absolutely no

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<sup>4</sup> A common inclusion into any plea agreement in the 23<sup>rd</sup> Judicial District provides that if the defendant from the date of signing should commit or be arrested from for committing any felony or misdemeanor up to and including the date of sentencing, then this agreement may terminate and deemed null and void at the discretion of the State. Because a copy of the 2003 plea agreement cannot be located, it is uncertain if this clause pertains to this case. If so, it could certainly grant

prejudicial impact on the State by permitting Petitioner to withdraw from the 2003 proposed plea agreement. The parties presented the agreement to the Circuit Court on May 31, 2023, and it was set out for an abbreviated presentencing report. (J.A. 94).

On July 12, 2023, the parties appeared for what they believed was plea and sentencing on the 2023 plea agreement. That would not be the case. Rather, the Court disregarded the renegotiated plea agreement and sentenced Petitioner under the terms of the 2003 plea agreement. In doing so, the Circuit Court held the following:

I'm not sure that either party has the ability to tell the Court once and order is - - a binding plea is entered, either party has the authority to tell the Court not to make a decision on whether to reject or accept that plea. It's binding on both the parties. It's in the form of a contract, and it's just left to the Court to determine whether to accept or reject it.

(J.A. 106).

When presented with the undeniable fact that the plea had never been accepted or entered by the Court, the Court held that:

Well, it's the nature of a binding plea. It's what the rules allow for a binding plea. They simply don't allow the defendant to back out of the plea once it's - -once it's binding and sent to the Court for determination as to whether it should be accepted or rejected. That's - -that's beyond party's power. It's my position, it bound the parties power to back out of it at that point. It is what binding means.

(J.A. 108). This is in stark contrast to the Courts' earlier statements on the record leading up to the renegotiated plea agreement. For example, the Court previously stated "[w]ell, .... you're the State, it's really your call on what you wish to do at this point. The Court has *never accepted* this binding plea and so I assume the state would withdraw from it as well. (J.A. 088). In response, the State

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the State the right to withdraw and/or terminate the plea in its entirety based on the Petitioner's failure to appear and subsequent criminal offenses.

indicated that, “I think sentencing him on felony conviction would be almost a miscarriage of justice, given everything that’s happened.” *Id.*

This, along with other statements, made by the Court during the proceedings essentially authorized, if not encouraged, the parties to come back before the Court with a newly revised resolution. Specifically, the Court stated the following:

The Court’s view, there are many grounds to distinguish this case from other circumstances that might create a moral hazard that would incentivize people from fleeing while a binding plea is in the breast of the Court. But pretty clearly, the purpose of submitting a binding plea to the Court is to await the Court’s agreement to be bound by the terms.

And here apparently in 2003, the Court did not express its intent to be bound by the terms and thus we’re kind of outside the norm of a typical circumstance. And so I think that what I’m going to do is I can’t impose an agreement on the parties, it’s not my role, but I’m going to set it for another status, which will allow the State time to ascertain to the best it can if there is any outstanding restitution, to hold open the possibility for the parties to discuss either pretrial diversion or a misdemeanor plea of some type, that’s up to the State and to the defense as to what they can agree upon. And from my perspective, if there’s no restitution, I would be pleased to see some community service, and I’d be satisfied with that.

(J.A. 090). It was based upon this dialogue on the record that the parties actively worked towards an acceptable resolution between the State and the Petitioner. It also prevented the Petitioner from filing a formal motion to withdraw from the plea agreement because of the agreement of the parties, and what he believed was acceptance by the Circuit Court. If that was not the case, Petitioner would have clearly filed a motion to withdraw from the plea agreement and requested an evidentiary hearing to further develop the record below.

Ultimately, the Circuit Court took the position that a binding plea that had neither been formally accepted nor entered, prohibited the parties from jointly withdrawing from said agreement. Petitioner argues that the binding component of the plea agreement, the actual sentence resulting from the agreement, did not contractually bind him prior to formal entry, prior to formal

acceptance, and prior to sentencing. *See State ex rel, Brewer v. Starcher*, 195 W.Va. 185, 193 465 S.E.2d 185, 193 (1995) (“the whole design on an agreement under Rule 11(e)(1)(c) is to control sentencing.”) Another concerning issue, the absence of a record from the 2003 plea proposal hearing prohibits meaningful review of what Petitioner was informed of during the hearing and what, if anything, he was informed of regarding the binding nature of the plea. He is certainly does not recall those events twenty (20) years later.

Based upon the foregoing, the Petitioner respectfully requests that this Court hold that he was entitled, by agreement or individually, to withdraw from the 2003 proposed binding plea agreement prior to formal acceptance on the record, prior to formal entry, and prior to sentencing regardless of the binding nature of the sentencing component of the 2003 proposed plea agreement.

#### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner respectfully requests that his 2003/2023 conviction for burglary be reversed and remanded with instructions that the parties have the right to withdraw from the tendered 2003 proposed plea agreement. In the alternative, Petitioner respectfully requests that this matter be reversed and remanded to allow the Petitioner to file a formal motion to withdraw and further develop the record in this matter with a new judge presiding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, J. Daniel Kirkland, Esq., do hereby certify that I have served a true and accurate copy of the foregoing, ***PETITIONER’S BRIEF***, upon the individuals listed below via the West Virginia Supreme Court of Appeals E-Filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

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