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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25-556 – *State ex rel. State of West Virginia v. The Honorable Thomas Fast, Judge of the Circuit Court of Fayette County, and Michael Dougan*

WOOTON, Justice, dissenting:

I respectfully dissent, as the majority opinion violates our time-honored standard of review: that "a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, in part, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)); *see also In re E.A.*, No. 24-710, 2025 WL 3083909, at *2 (W. Va. Nov. 4, 2025) (memorandum decision) ("To the extent that the petitioner argues that this Court should reweigh the evidence, we note that the weighing of evidence is the exclusive task of the circuit court as the finder of fact and will not be disturbed on appeal. *See In re D.S.*, 251 W. Va. 466, [472], 914 S.E.2d 701, 707 (2025) ('We ... do not reweigh the evidence.')")). In this case, the majority concludes that the circuit court's findings of fact, particularly with respect to the specificity required under a *Facemire* analysis,[1] were clearly erroneous – indeed, *flagrantly* erroneous, in the majority's words – and that the State was therefore denied its right to prosecute the petitioner.

[1] *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009)

In that latter regard, I find it difficult to conceive of a circumstance where the State, in the absence of any attempt whatsoever to justify its delay, has a right to prosecute twelve-year-old charges where the only possible adult witnesses for the defense lacked mental capacity, by virtue of brain cancer, to testify by deposition (Mrs. Dougan)[2] and died before trial (both Mr. and Mrs. Dougan). In 2011, the petitioner would could have mounted a strong defense to the charges against him. In 2023, he could not.

The majority's emphasis on the specificity the law demands is well taken under *Facemire*. Certainly, a defendant may not rest on "dimming memories" or "garden variety" complaints about the passage of time, and the expected content of a missing witness's testimony—together with its impact on the defense—must be shown with specificity. *See State v. Cook*, 228 W. Va. 563, 569, 723 S.E.2d 388, 394 (2010); *State v. Jessie*, 225 W. Va. 21, 30, 689 S.E.2d 21, 30 (2009). This Court reaffirmed as much in *Frank A. v. Ames*, 246 W. Va. 145, 866 S.E.2d 210 (2021), where conclusory allegations of lost evidence, unaccompanied by the names of unavailable witnesses or the substance of their anticipated testimony, failed to establish actual prejudice. Id. at 171-72, 866 S.E.2d at 236-37. We have found that defendants fail to meet their burden of showing actual prejudice when they offer little more than the fact that witnesses have died or that memories have faded. *See Cook*,

[2] Amazingly, the majority cites Mrs. Dougan's deposition testimony as "evidence that could be offered [at trial] . . . as she gave a deposition in this case before her demise concerning the allegations made against the Respondent[,]" without mentioning the circuit court's finding that as a result of her advanced brain cancer she was "significantly less capable of accurately recalling specific times, dates, and places" and therefore even her videotaped deposition cold not serve as an adequate substitute."

228 W. Va. at 569, 723 S.E.2d at 394; *Jessie*, 225 W. Va. at 30, 689 S.E.2d at 30. But that is not the case here, as the circuit court, by contrast, made specific findings, after a full evidentiary hearing and a detailed review of Mrs. Dougan's deposition, that the two identified adult custodians occupied a unique vantage point within the household and that their firsthand perceptions could not be reconstructed from the other, then-juvenile, residents. Whether those findings reflect the most persuasive reading of the record is not the question before us; whether they find support in the record is, and they do.

In my view, the circuit court's analysis in this case, which followed a full evidentiary hearing, was faithful to the admonition of *Facemire* that "[d]imming memories and the passage of time alone are insufficient" to establish "the level of prejudice necessary to show the denial of due process[,]" and that where the prejudice stems from the unavailability of witnesses, "the defendant must identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish to the court's satisfaction that he has made serious attempts to locate the witness; and . . . show that the information the witness would have provided was not available from other sources." *Id.* at 603, 678 S.E.2d at 856 (quotation marks and citation omitted). Here, the circuit court made specific findings about two clearly identified witnesses, Mr. and Mrs. Dougan, whose status as the household's adult custodians during the period of the alleged abuse placed them in a unique position to observe whether abuse occurred or was reported. The court found that Mr. Dougan's testimony "would have been both relevant to the criminal trial and unique to his own observations and knowledge as an adult parent and custodian" and "cannot be

duplicated or cobbled together from the testimony of other witnesses." The court further found with respect to Mrs. Dougan, that she was a custodian "in a position of trust" with firsthand knowledge of the home and the children, and further that her videotaped deposition was not an adequate substitute for her live testimony. *See supra* note 2.

As required by *Facemire*, the witnesses were identified, the expected content of their testimony was described, the witnesses were indisputably unavailable because both are deceased, and the court found that their knowledge was unavailable from other sources because it was grounded in each witness's own perceptions as an adult custodian. The State's counter argument, that the petitioner established only what the witnesses "might" have said and that their knowledge could be supplied by other household members, goes to the weight of the evidence, not to the legal sufficiency of the circuit court's findings. The court considered and rejected the State's alternative witness theory, finding that the unique observations of the two adult custodians could not be reconstructed from household members who were children at the time. Under the clearly erroneous standard, this Court does not reweigh the persuasive quality of the evidence on a petition for prohibition, and the existence of possible competing inferences from the evidence does not create a clear error of law.[3] *See, e.g.*, *State v. Grimes*, 226 W. Va. 411, 419, 701 S.E.2d 449, 457 (2009)

[3] I acknowledge that the anticipated testimony of Mr. and Mrs. Dougan, although exculpatory, would have been subject to impeachment: although they would have reported that R.C. never reported any abuse to them and that they never witnessed anything suspect or improper, the State would counter with evidence showing that the 2011 abuse and neglect petition alleged that R.C. did report the abuse to Mrs. Dougan. Nonetheless, the comparative weight to be afforded competing evidence is a judgment which lies within the

(upholding the circuit court's findings of fact because there was some support in the record); *State v. Holden*, 243 W. Va. 275, 284, 843 S.E.2d 527, 536 (2020) (declining to disturb a circuit court's dismissal ruling and refusing to presume error where the record contained no contradictory facts). The circuit court here conducted a full evidentiary hearing and its determination that prejudice exists rested upon facts established at the hearing and reasonable inferences to be drawn therefrom. In this extraordinary proceeding, the dispositive question is not whether this Court would weigh the evidence the same way – the majority clearly would not – but whether the circuit court applied the wrong legal test or made findings unsupported by the record.

In summary, we have held that "'[t]he right to a trial without unreasonable delay is basic in the administration of criminal justice and is guaranteed by both the State and federal constitution. U.S. Const. Amend. VI; W. Va. Const., Art. 3, § 14.' Syl. Pt. 1, *State v. Foddrell,* 171 W. Va. 54, 297 S.E.2d 829 (1982)." *Holden*, 243 W. Va. at 276, 843 S.E.2d at 529, Syl. Pt. 3. Although neither the Legislature, by statute, nor this Court, by case law, has established any bright-line rules governing pre-indictment delay, it would be disingenuous to suggest that an unjustified, decades-long delay in bringing charges does not put a criminal defendant at a severe disadvantage. In that regard, I am astonished at the majority's seeming acceptance of case law from other jurisdictions to the effect that the unavailability of defense witnesses after a lengthy pre-indictment delay can never satisfy

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discretion of the circuit court, and this Court's disagreement about the weight of the evidence does not establish clear legal error.

the actual prejudice standard, that such unavailability can never support a finding of "the level of prejudice necessary to establish a due process violation[.]" and that "[t]he standard for pre-indictment delay is nearly insurmountable, especially because proof of actual prejudice is always speculative." (Citations omitted). At least until today, this has not been the law in West Virginia. I am heartened only by the fact that the majority has relegated this discussion to a footnote rather than elevating it to a syllabus point.

In this case, the circuit court's findings of fact, and the inferences drawn therefrom, were "plausible in light of the record viewed in its entirety[,]"[4] and the court's analysis faithfully followed the multi-part analysis of *Facemire* in every respect. For these reasons, I respectfully dissent.

[4] *See Tiffany Marie S.*, 196 W. Va. at 225-26, 470 S.E.2d at 179-80, Syl. Pt. 1, in part.