

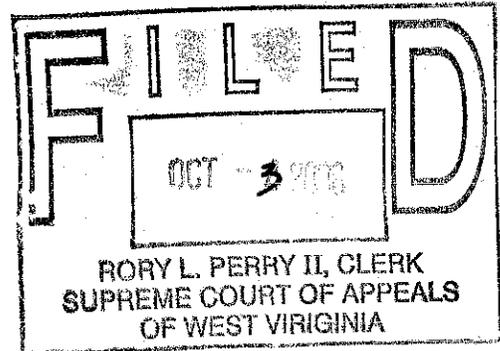
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE, ex rel, STEPHANIE SUE GIBSON,

Petitioner

v.

CASE NO. BELOW: 05-F-80



**THE HONORABLE JOHN S. HRKO
WYOMING COUNTY CIRCUIT JUDGE,
G. TODD HOUCK, PROSECUTING ATTORNEY
WYOMING COUNTY, WEST VIRGINIA,**

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

The State of West Virginia, by and through its Prosecuting Attorney, G. Todd Houck, files the foregoing response to the previously filed Petition to Enforce Plea Agreement and Prohibit a Trial of Petitioner, which was filed on behalf of the Petitioner, Stephanie Sue Gibson.

Statement of the Case

The Petitioner and Petitioner's husband were both indicted by a Wyoming County, West Virginia Grand Jury on October 3, 2005, for burglarizing and severely beating an 87 year old gentleman. The Petitioner, Stephanie Gibson was indicted as an accessory before the fact in the commission of the following crimes: burglary, aggravated robbery and malicious wounding.

On August 21, 2006, Judge John S. Hrko initiated the trial of the husband, Billy Gibson. The Petitioner, Stephanie Gibson was listed as a potential state witness. If the husband did not assert spousal privilege, the Petitioner, Stephanie Gibson would have been expected to testify in accordance with a statement she gave law enforcement. The statement is attached hereto as Exhibit 1.

During the *voir dire* in the husband's trial, the State and the Petitioner, Stephanie Gibson discussed the mechanics of the Petitioner's testimony against her husband. It was anticipated that if spousal privilege was not asserted, the Petitioner Stephanie Gibson, herself would then assert her 5th Amendment privilege against self incrimination. Once asserted, the State would afford the Petitioner, Stephanie Gibson immunity for any

incriminating testimony she may have offered in the trial against her husband. During the *voir dire* segment of the husband's trial, the husband entered into a plea agreement, and pled guilty to malicious wounding.

On September 22, 2006, the Petitioner moved the Court to enforce a Plea Agreement and prevent the State from proceeding to trial against the Petitioner. The Court denied the Petitioner's motion to enforce a plea agreement. The Order is attached as Exhibit 2.

The Court reasoned that it was unable to determine whether the Petitioner, Stephanie Gibson was a material witness against her husband, pursuant to *W. Va. Code* §57-3-3. This code section would have completely prevented the Petitioner from testifying had the husband asserted his spousal privilege. Therefore, Mrs. Gibson's trial performance was always under the control of her husband.

Because Mr. Gibson entered a guilty plea, Petitioner was never called to testify, which prevented the Petitioner from being granted immunity for her testimony. As a protection, the Court prohibited use of any evidence obtained from Petitioner, calling that evidence "fruits of the poisonous tree." Hearing Transcript is attached as Exhibit 3.

Legal Authority

Rule 11 of the *West Virginia Rules of Criminal Procedure* grants a trial court discretion to accept or refuse a plea bargain. The Circuit Court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes to plead. *State v. Waldron*, 218 W.Va. 450, 624 S.E.2d 887 (2005); *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 397 (1995).

In criminal cases husband and wife shall be allowed, and subject to the rules of evidence governing witnesses, may be compelled to testify on behalf of each other, but neither may be compelled, nor without the consent of the other. . . *W. Va. Code* § 57-3-3.

The concept of a unilateral contract presumes acts performed by all parties. It is not based on a willingness to cooperate. "Agreement to exchange cooperation for transactional immunity are governed by traditional principles of contract law." *U. S. v. McHan*, 101 F.3d 1027 (4th Cir 1996). *First National Bank of Gallipolis v. Marietta Manufacturing Company*, 151 W.Va. 636, 153 S.E.2d 172 (1967). "The concept of unilateral contract [is] where one party makes a promissory offer and the other *accepts by performing an act rather than making a return promise.*" (emphasis

only accept and complete the contract by testifying. As the Court pointed out, the Petitioner's performance as a material witness was tenuous given her husband's spousal privilege and ultimately the husband's entry of a plea. It was speculation on the part of the Petitioner to assume that her husband decided to plead guilty because the Petitioner was a State witness. For all practical purposes, the husband did not have to worry about any testimony from the Petitioner, Stephanie Gibson, since he could have asserted the spousal privilege. Mr. Gibson literally controlled whether his wife testified. The fact that he would waive this privilege was always a concern to the State, indicating that she would either recant her statement or provide exculpatory information for her husband.

In denying the motion to enforce the plea agreement, the Court correctly concluded that Mrs. Gibson did not complete the terms of the agreement, and since her testimony was only speculative, the State could not be required to enforce it. However, in order to protect Mrs. Gibson's rights and standing in her own trial, the Circuit Court prohibited the State from using any information or evidence it obtained in discussions with Mrs. Gibson during any plea negotiations. *Hanson, supra.*

supplied).

“The State is entitled to prosecute a defendant upon his failure to cooperate under the terms of an immunity agreement. It is not entitled to use his statements obtained as a result of such agreement against him in prosecuting him for crimes originally covered by the immunity grant.” *State v. Hanson*, 181 W.Va. 353, 382 S.E.2d 547 (1989).

Issue

In accordance with West Virginia Code § 53-1-1, did the Circuit Court of Wyoming County abuse or exceed its legitimate power when it denied the Petitioner’s motion to enforce a plea agreement?

Argument

The Wyoming County Circuit Court did not abuse nor exceed its legitimate power when it denied the Petitioner’s motion to enforce a plea agreement. Clearly this issue is of a subject matter and controversy for which a circuit court has jurisdiction. *Waldron, supra*.

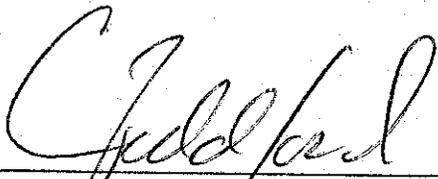
The State’s offer of immunity was in the form of an unilateral contract. The promissory offer was made and the Petitioner, Stephanie Gibson could

Relief Sought

For the foregoing reasons, Respondent prays that the Petition for Writ of Prohibition be dismissed so that the October 10, 2006, trial may proceed.

Respectfully Submitted,

STATE OF WEST VIRGINIA



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Certificate of Service

I certify that I have served the attached Response and Exhibits upon the following persons below by delivering a true copy thereof by First Class Mail, postage prepaid, this 3rd day October, 2006.

The Honorable John S. Hrko
Wyoming County Courthouse
PO Box 581
Pineville WV 24874

Honorable Darrell McGraw
Attorney General
West Virginia State Capitol
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Charleston WV 25305

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Attorney for Petitioner
340 S. Fayette St.
Beckley WV 25801



G. Todd Houck, Prosecuting Attorney

List of Exhibits

- Exhibit 1. Defendant's statement to police
- Exhibit 2. Order of September 22, 2006
- Exhibit 3. Transcript of Hearing to Enforce Plea Agreement