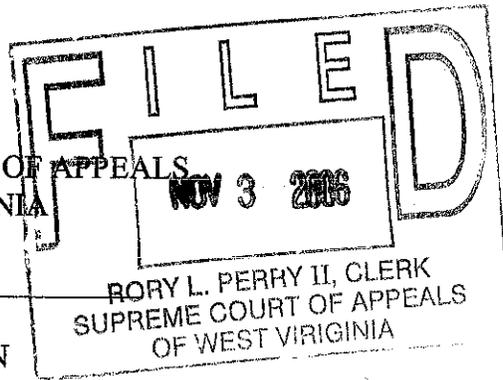


33213

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



CHARLESTON

STATE EX. REL. KEITH ODELL McCOURT,

Petitioner,

Vs.

Case No. 33213

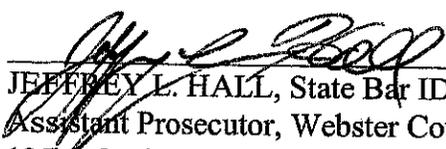
THE HONORABLE JACK ALSOP, Judge of
the Circuit Court of Webster County, West Virginia,

Respondent.

From the Circuit Court of
Webster County, West Virginia
Case No. 94-F-24

**STATE'S RESPONSE TO PETITIONER'S
PETITION FOR WRIT OF PROHIBITION**

State of West Virginia, by counsel,


JEFFREY L. HALL, State Bar ID# 4354
Assistant Prosecutor, Webster County
137 S. Main St.
Webster Springs, WV 26288
(304) 847-7164

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

By Order entered on July 17, 2006, Judge Jack Alsop, Circuit Court of Webster County, denied Petitioner's motion to dismiss the September, 1994 Indictment returned against Petitioner for one count of Second Degree Sexual Assault. Trial on this Indictment was set for August 22, 2006, but has been continued pending this Court's decision on his Writ of Prohibition seeking to preclude any trial against Petitioner on grounds the same is barred by his right to a speedy trial.

STATEMENT OF FACTS

On July 8, 1994, a Warrant for Arrest of the Petitioner was issued by a Magistrate, charging the Petitioner with one count of Second Degree Sexual Assault. The crime was alleged to have occurred on or about July 5, 1994.

Petitioner was not arrested at the time the warrant was issued, but evidence presented at the May 12, 2006 hearing before Judge Alsop on the defendant's Motion to Dismiss Indictment shed light on why the local authorities likely could not apprehend the Petitioner. The only witness to testify at the hearing was Petitioner's father, who confirmed on cross-examination by State's counsel the criminal arrest and conviction record of his son, the Petitioner.

According to that record, Petitioner was charged on July 12, 1994 with the misdemeanor crime of Possession of Marijuana in Bridgewater, Virginia (Rockingham General District Court), which he was subsequently convicted of said charge on February 11, 1995. Apparently, Petitioner left the jurisdiction of this State within one week after the perpetration of the alleged crime here in Webster County.

Petitioner's father did not dispute that Petitioner apparently resided in the State of Virginia both prior to and after the date of the alleged crime in Webster County. Petitioner has

felony convictions in Virginia dating as early as 1988 (Abduction/Grand Larceny, June 30, 1988, eight year sentence; Threaten to Burn Structure, September 19, 1991, no sentence listed), as well as several misdemeanor convictions in Virginia (Concealment, April 1, 1994; Accessory After the Fact, March 23, 1995) both before and after the date of the crime alleged in Webster County. Also, his record shows felony convictions in Virginia on June 19, 1995 (Break and Enter, Conspiracy, Grand Larceny), all of which followed the issuance of the Warrant for Arrest, and the subsequent September, 1994 Grand Jury Indictment.

The fact of Petitioner's absconding to Virginia and committing crimes thereat was unknown to law enforcement in Webster County. When Petitioner failed to appear for arraignment at the calling of the docket for each term of court from January, 1995 through the September, 1996 term of court, the trial judge issued bench warrants for the arrest of the Petitioner. Subsequent to the September, 1996 term of court, Judge Alsop instituted a general calling of the docket, and Petitioner's name was called in open court each term subsequent to September, 1996 until his arrest in Webster County on March 24, 2006. A general order was issued granting the State's request for continued bench warrants against Petitioner each term of court. These general orders do not appear in the underlying file, but rather are contained in the Order accompanying each and every Court Docket issued from January, 1997 through January, 2006 (the term prior to Petitioner's arrest).

According to his father's testimony at the May 14, 2006 hearing on the motion to dismiss, Petitioner kept in contact with his Webster County residing father, and his father on different occasions noticed the Petitioner's name on the court's docket published in Webster County's only newspaper of general circulation. The local Circuit Clerk has always published the Court's docket once each term of Court dating prior to the Indictment herein. That docket, which contains the previously referred to continuing bench warrant order against Petitioner, was published

with Petitioner's name along with all others against whom bench warrants were issued. Petitioner's father conveniently could not recall if he ever told the Petitioner about his name appearing in the Local newspaper.

In or about 2001, the current Prosecuting Attorney instituted a local warrant log with the Webster County Office of Emergency Services. All unserved arrest warrants, as well as all bench warrants issued by the Circuit Court (including that of the Petitioner herein) were kept on a list at said Office. On March 24, 2006, when Petitioner was arrested in Webster County for DUI, Second Offense, that warrant log was checked, but since the bench warrant for Petitioner was over 10 years old, the arresting officer hesitated to arrest Petitioner on the bench warrant until he conferred with the Prosecuting Attorney. After so conferring, Petitioner was arrested on the outstanding bench warrant and subsequently arraigned on the 1994 Indictment on May 1, 2006. Petitioner was released on a \$50,000.00 surety bond. On May 14, 2006 (by Order entered July 17, 2006), Petitioner's Motion to Dismiss the Indictment was denied.

Subsequent to the May 14, 2006 hearing on the motion to dismiss, Petitioner's bond was revoked on May 23, 2006 for certain bond condition violations committed by Petitioner on May 16, 2006. Bond was re-instated in the amount of \$200,000.00, but Petitioner has yet to be able to post the same and remains in custody awaiting trial on the Indictment. Trial has been continued pending this Court's ruling on the Writ of Prohibition.

POINTS AND AUTHORITIES RELIED UPON

West Virginia Code §62-3-21 (2005 Repl. Vol.).

State ex. rel. Smith v. DeBerry, 120 S.E.2d 504 (W.Va. 1961).

DISCUSSION OF LAW

Petitioner complains that his speedy trial rights under the West Virginia Constitution and his right to a trial within three regular terms of court after the Indictment would be violated if the trial court's order setting trial herein is not overruled. He further complains that the record supports his assertion that "there was no action, fault, or failure on the defendant's part, to prevent him from being brought to trial..." Such assertions belie the record herein.

An accused may not count in his favor in determination of right to discharge under statute permitting discharge of defendant under indictment where not brought to trial within three terms of court any term of the court which occurred in part during time he was outside the jurisdiction of the court. *Syllabus Pt. 3, State ex. rel. Smith v. DeBerry*, 120 S.E.2d 504 (W.Va. 1961). Petitioner was under the jurisdiction of the Virginia courts at the time the Indictment herein was returned. He was further under the Virginia courts' jurisdiction for several years following the finding of the Indictment herein according to his father's testimony, who testified that Petitioner was incarcerated in Virginia due to the offenses he committed in Virginia in 1994 and 1995.

Petitioner absconded from the jurisdiction of the Webster County Circuit Court without the knowledge of the Webster law enforcement authorities. The delay in bringing him to trial is directly related to his actions in leaving West Virginia. Furthermore, based on the testimony of Petitioner's father, who was in contact with Petitioner on a regular basis, and who was aware that Petitioner's name continued to appear in the local newspaper in the listing of the Court docket, it is plausible to suggest that Petitioner himself was aware he had a pending case here in Webster County, but chose, after his release from the jurisdiction of the Virginia courts, not to return to Webster County until he was arrested after committing a DUI, Second Offense in Webster County in March 24, 2006, at which time he was arrested on the outstanding *capias*. Under these facts, *West Virginia*

Code §62-3-21 (2005 Repl. Vol.) should not be interpreted to permit a defendant to abscond from a jurisdiction to avoid trial.

RELIEF REQUESTED

Wherefore, the State of West Virginia prays that this Court sustain the Order denying Petitioner's Motion to Dismiss the Indictment.

Submitted this 2nd day of November, 2006.

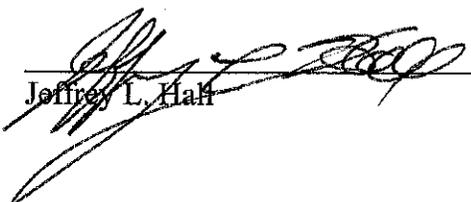
State of West Virginia, by counsel,



JEFFREY L. HALL, State Bar ID# 4354
Assistant Prosecutor, Webster County
137 S. Main St.
Webster Springs, WV 26288
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CERTIFICATE OF SERVICE

I, Jeffrey L. Hall, counsel for the State of West Virginia, to hereby certify that I served a copy of the foregoing STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION upon the Honorable Jack Alsop, Judge of the Circuit Court of Webster County, by mailing a copy of the same to him, addressed to him at the Webster County Courthouse, Webster Springs, WV 26288, and upon Hunter Simmons, counsel for Petitioner, by mailing a copy of the same to him, addressed to him at 47 West Main Street, Buckhannon, WV 26201, on this the 2nd day of November, 2006.



Jeffrey L. Hall