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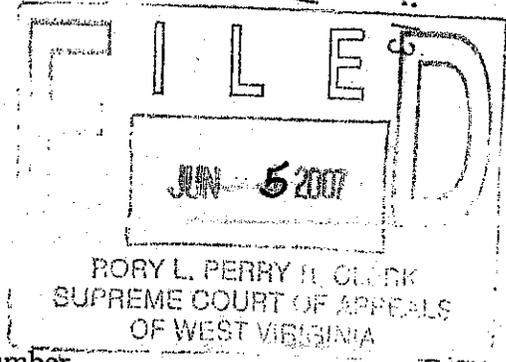
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IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel LYNN A. NELSON,
Prosecuting Attorney of Mineral County, West Virginia,
Petitioner

VS.

THE HONORABLE ANDREW N. FRYE, JR.,
JUDGE, TWENTY-FIRST JUDICIAL CIRCUIT,
Respondent.



Case Number
Mineral County Criminal Action No. 07-M-2

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Comes now James W. Butler, Jr., the Defendant in the above-referenced case, by counsel, and does hereby respond to the Petition for Writ of Prohibition filed in this case. As grounds for this Response, Mr. Butler would say as follows:

On January 12, 2007, Mr. Butler was indicted on one Count of the misdemeanor offense of "Negligent Homicide," a violation of W.Va. Code §17C-5-1(a). The Indictment was related to a motor vehicle accident that transpired on March 31, 2006.

On that date, Mr. Butler was driving a log truck west on Route 50 in Mineral County. He drove into a sharp curve and the load of logs he was transporting suddenly shifted. The log truck tipped over and ejected most of its logs, some of which landed on a vehicle going the other way driven by Melissa Pennington. The roof of the 2005 Toyota Corolla she was driving was crushed. She suffered severe injuries and died later that day.

W.Va. Code §17C-5-1(a), the "Negligent Homicide" statute, states:

When the death of any person ensues within one year as a proximate result of injury received

by the driving of any vehicle anywhere in this state in reckless disregard of the safety of others, the person operating such vehicle shall be guilty of negligent homicide.

The key language in this statute is the phrase "in reckless disregard of the safety of others."

There is not a scintilla of evidence in this case to support a finding that Mr. Butler acted in reckless disregard for the safety of anyone.

The leading (and very recent) Supreme Court of Appeals of West Virginia decision which clarifies the issue of what constitutes reckless disregard for the safety of others is *State v. Green*, Slip Opinion No. 33200, February 21, 2007. In Syllabus Point 5 of that case, the Court declared that

a conviction for negligent homicide must not be premised solely upon the violation of a traffic statute unless the underlying act which constitutes the violation or accompanying circumstances evidence a reckless disregard for the safety of others, characterized by negligence so gross, wanton, and culpable as to show reckless disregard for human life.

In that case, the Defendant was driving a van which collided with a vehicle that was stopped in front of her, apparently preparing to turn left. The Defendant's van collided with the rear of the stopped vehicle, which was pushed out into the left lane. The passenger of that vehicle was killed, as was a motorcyclist who was approaching the vehicle from the opposite direction. The Defendant was charged with and convicted of two Counts of "Negligent Homicide." She appealed the Jury's verdict. She won the appeal.

The Supreme Court of Appeals of West Virginia reasoned:

From this Court's review of the record, in a light most favorable to the State, it is apparent that the [Defendant] failed to keep a proper watch on the highway in front of her, resulting in her inability to avoid a collision with the [victim's] vehicle, in violation of West Virginia Code §17C-6-1(a)....It is likewise apparent that the [Defendant] was operating her vehicle at a speed above the applicable speed limit, in violation of West Virginia Code §17C-6-1(b). *Id.* at p.24.

The Court went on to say:

We are also mindful that the result of the collision was disastrous, capable of giving rise to

fully understandable outrage in a community properly grieving the resulting deaths. However, our inquiry here must focus on the character of the [Defendant's] acts and omissions which produced these horrible results. *Id.* at p: 25.

However, the Court concluded that the record contained "no evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt[.]" *Id.* a p. 25, citing Syl. Pt. 3 of *State v. Guthrie*, 194 W.Va. 657. The Court reversed the convictions and denied a retrial of the case.

The facts of the *Green* case are analogous to the facts of the case at bar. Mr. Butler's conviction hinges upon whether the mere fact that he is accused of exceeding the speed limit at a turn in the road constitutes reckless disregard for the safety of others. In *Green*, the Court said that this (even when coupled with a theoretical second offense of failing to keep a proper watch) was not sufficient evidence to convict someone of "Negligent Homicide."

The results of the accident in this case were, as the Court observed in *Green*, disastrous. No one can deny how terrible this situation is and was. Mr. Butler and the families of both parties will have to deal with the accident and its aftermath for the rest of their lives. However, Mr. Butler's conduct did not rise to the statutorily-required recklessness for the safety of others. Under West Virginia statutory and case law, this matter was rightly dismissed at the hearing held on April 19, 2007, as reflected in the attached Order entered May 9, 2007.

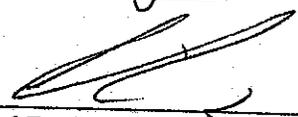
WHEREFORE, the Defendant, Mr. Butler, would pray that this Court DENY THE PETITION FOR WRIT OF PROHIBITION, dismiss this case from its active docket, with prejudice, and place it among the matters ended.

James W. Butler, Jr., Defendant,
By Counsel


Chad B. Cissel
Barr Sites & Cissel
W. Va. State Bar I.D. No. 8524
P.O. Box 220
Keyser, West Virginia 26726
(304) 788-3341

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion to Dismiss Case and Brief in Support thereof upon the State of West Virginia by hand delivering a true copy thereof to Lynn A. Nelson, Prosecuting Attorney for MINERAL County at his office address of 150 Armstrong Street, Keyser, West Virginia 26726, on this 31st day of May, 2007.


Chad B. Cissel

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
PLAINTIFF

VS.

CASE NO. 07-M-2

JAMES BUTLER, JR.,
DEFENDANT

ORDER DISMISSING CASE

On this 19th day of April, 2007, came the State of West Virginia by its Prosecuting Attorney Lynn A. Nelson and came the Defendant in person and by his counsel, Chad B. Cissel.

The Court noted the filing of the Defendant's "Motion To Dismiss" and heard arguments from each side. After hearing the arguments of both sides, the Court concluded that the facts of this case are insufficient to sustain a conviction based upon the recent West Virginia Supreme Court of Appeals ruling in State V. Green, Slip Opinion NO. 33200, February 21, 2007 and therefore orders this matter to be Dismissed with Prejudice. The State objected.

It is the further Order of this Court that the dismissal shall be stayed to allowed the State to file any Appeals or Writs with the West Virginia Supreme Court of Appeals any actions filed by the State shall be filed within thirty days of the entry of this Order.

The Clerk is directed to forward a teste copy of this Order to counsel.

Entered this 9th day of May, 2007.

TESTE COPY


Andrew N. Frye, Jr.
J U D G E


Circuit Court of Mineral County, W. Va.

Copies
L. Nelson
C. Cissel

OFFICE OF
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