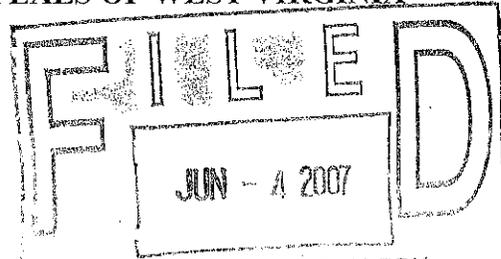


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
EX REL LYNN A. NELSON,
PROSECUTING ATTORNEY OF
MINERAL COUNTY, WEST VIRGINIA,
PETITIONER,



v.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
Mineral County Criminal Action No. 07-M-2
Supreme Court Docket No. _____

THE HONORABLE ANDREW N. FRYE, JR., JUDGE
21st JUDICIAL CIRCUIT,
RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Now comes your Respondent, the Honorable Andrew N. Frye, Jr., being in receipt of the Petitioner's *Writ of Prohibition* filed before this Court in the above referenced matter, and would respectfully request that this Court REFUSE the Writ for the following reasons:

1. **IN LIGHT OF THIS COURT'S DECISION IN STATE OF WEST VIRGINIA V. GREEN, THE ACTIONS OF THE DEFENDANT, JAMES BUTLER, JR., IN THE UNDERLYING CASE DO NOT CONSTITUTE A CRIME UNDER W.VA. CODE § 17C-5-1(a).**

Recently this Court engaged in an analysis of the negligent homicide statute, particularly what type of conduct constituted "reckless disregard for the safety of others," in State of West Virginia v. Green, ___ W.Va. ___, ___ S.E.2d ___, (2007). In the Green decision, this Court ruled that "[o]ur negligent homicide statute, W.Va. Code § 17C-5-1, requires the driving of '[a] vehicle in reckless disregard of the safety of others,' and this means that more than negligence is required." Syl. pt. 4, in part, State v. Green. In that case, Ms. Green violated two

provisions of traffic law by both operating her vehicle above the speed limit and failing to keep a proper watch. The Court found that neither technical traffic violation was serious enough to meet the threshold of "reckless disregard".

The facts of the present case, although no less tragic, are perhaps less egregious than the Green scenario. Mr. Butler was operating his log truck in a turn at a speed over the recommended speed, but not over the lawful speed limit for the highway, when presumably the load of logs shifted while Mr. Butler navigated a turn causing the log truck to overturn and propel its load of logs into oncoming traffic where the logs landed on top of and/or struck the vehicle operated by Melissa Pennington. The State Police Reconstructionist estimates that the Butler vehicle was traveling at a speed between 32 and 41 mph at the time of the accident. Neither the police report nor the Reconstructionist's report allege that the load of logs was improperly secured as a contributing factor to the accident.

Although Mr. Butler's actions were negligent, they do not rise to the level articulated by the Court in State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837(1979) and clarified by the Green decision of "negligence so gross, wanton, and culpable as to show a reckless disregard for human life." The timing of the indictment (January 9, 2007) and the release of the Green decision (February 21, 2007) does not excuse the State's action of indicting Mr. Butler without evidence of recklessness because the Vollmer decision was still good, albeit largely ignored, case law.

Taking all the State's evidence as true, the State simply cannot rise above the technical traffic violation as a basis for the recklessness and the Court has refused this type of proof as a basis for a conviction. Accordingly, this same evidence is not enough for an indictment because under West Virginia law, Mr. Butler has not committed the crime of negligent homicide.

2. DISMISSAL WITH PREJUDICE IS APPROPRIATE BECAUSE THE INDICTMENT CANNOT BE CURED BY REPRESENTATION TO THE GRAND JURY INASMUCH AS MR. BUTLER DID NOT COMMIT A CRIME UNDER W.VA. CODE § 17C-5-1.

Because no crime was committed under West Virginia law, allowing the State to represent this indictment would not be appropriate and dismissal with prejudice is proper. Most all of this Court's decisions with regard to insufficient indictments are generally allowed to be represented to the grand jury with the defect cured. However, under the circumstances of this case, the defect – no crime committed - cannot be cured; therefore, the case should not be represented to the grand jury. Accordingly, dismissal with prejudice is proper in this matter.

3. JUSTICE IS SERVED BY DISMISSAL OF THE INDICTMENT.

The Petitioner makes several arguments appealing to the principles of access to the Courts for the victims and an opportunity to more fully litigate this matter. Make no mistake; the Respondent fully recognizes the tragedy of the loss of Ms. Pennington's life under the circumstances of this case and sympathizes with the family's loss. However, the Pennington family can certainly have their day in Court on the civil side.

The Respondent's duty is to make sure that the Defendant is afforded his rights as guaranteed by West Virginia law. Certainly justice is not served by allowing an individual to be indicted for a crime and stand trial for a crime when no crime has been committed. The State cannot get around this fact – as is apparent from the summation of facts presented in the *Writ of Prohibition*, inasmuch as none of this information rises to the standard required by this Court for a negligent homicide conviction.