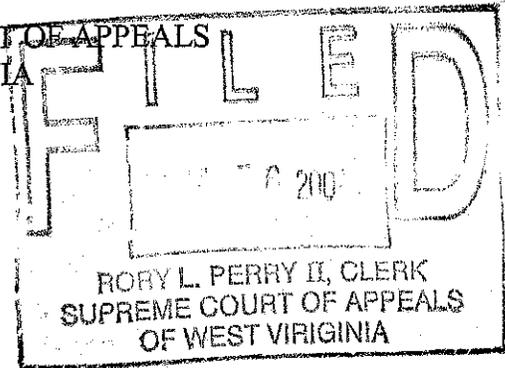


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

STATE EX REL. WALTER W. WEIFORD,
PROSECUTING ATTORNEY,
POCAHONTAS COUNTY, WEST VIRGINIA,
Petitioner,



v.

Appeal Number: _____
(Pocahontas County Circuit Court
Case Number 07-M-AP-02)

THE HONORABLE JOSEPH C. POMPONIO, JR.,
CIRCUIT JUDGE OF THE 11TH JUDICIAL CIRCUIT,
Respondent.

FROM THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

PETITION FOR WRIT OF PROHIBITION

WILLIAM R. VALENTINO
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WVSB# 6502
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(304) 558-2754

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CIRCUIT JUDGE OF THE 11TH JUDICIAL CIRCUIT,
Respondent.

PETITION FOR WRIT OF PROHIBITION

Comes now your petitioner, Walter W. Weiford, Prosecuting Attorney in and for Pocahontas County, West Virginia, by Assistant Attorney General William R. Valentino, pursuant to West Virginia Code § 53-1-1, et seq., and Rule 14(a) of the West Virginia Rules of Appellate Procedure, and hereby moves this Court for an immediate hearing for the issuance of a writ of prohibition thereby prohibiting the respondent Honorable Judge Pomponio, Jr. from enforcing an Order dismissing a criminal action. The petitioner asserts that an immediate hearing is necessary in that, upon information and belief, the party in interest continues to violate the laws of the State of West Virginia but the clearly erroneous Order hinders prosecution of the same. In support thereof, the petitioner submits the following:

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THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is a petition for a writ of prohibition in response to the ruling of the Honorable Joseph C. Pomponio, Jr., Circuit Judge of the 11th Judicial Circuit, that the criminal charge of illegal possession of wildlife in violation of West Virginia Code § 20-2-4 should have been dismissed in the Pocahontas County Magistrate Court based upon the ruling that the accused was a “duly authorized agent” of the Director of the West Virginia Division of Natural Resources and that the provisions of West Virginia Code § 20-2-4 are explicitly inapplicable to the same.

STATEMENT OF FACTS

Joel Rosenthal (the defendant below and hereinafter “Rosenthal”) owns and operates a non-profit corporate entity known as the “Point of View Farm, Inc.” (hereinafter the “Farm.”) Upon information and belief, the Farm was incorporated in the State of Maryland on October 3, 2000. On or around July 16, 2001, Rosenthal applied for a West Virginia Certificate of Authority to transact business within the State of West Virginia, and the proposed purpose of the business was the “[o]peration of an animal sanctuary.” Rosenthal also purports to have submitted an application to the West Virginia Office of Business Registration describing the business of the Farm as the “[c]are and preservation of abandoned and needy wildlife.”¹

On or around August 20, 2001, the Office of the Secretary of State of the State of West Virginia issued a Certificate of Authority to the Farm certifying that the application conforms to the law and authorizing the corporation to conduct business in the State of

¹ For purposes of this writ, the facts of this matter are largely undisputed. It is the application of West Virginia Code § 20-2-4 to a particular corporate entity failing to comply with the rules and regulations of the Division of Natural Resources that is being challenged.

West Virginia. At some point, Rosenthal also ostensibly obtained a business license pursuant to his application. It is axiomatic that such authority is for the conduct of lawful business, not an illegal enterprise, and the entities approving the applications will not reject the same if facially valid.

On or around May 29, 2005, two individuals, James Stoots, Jr. and Shane Harvey, were in possession of a fawn deer which they believed was abandoned. The fawn deer, which is owned and titled to the State of West Virginia pursuant to West Virginia Code § 20-2-3, was delivered to Rosenthal, who intended to provide care to the same. Rosenthal took the deer to his property at the Farm.

On or around August 3, 2005, Rosenthal was cited by the West Virginia Division of Natural Resources, Law Enforcement Division, for illegal possession of wildlife in violation of West Virginia Code § 20-2-4 for being in possession of the fawn deer. The criminal charge proceeded to prosecution in the magistrate court of Pocahontas County.²

After an unsuccessful motion to dismiss the citation, the matter proceeded to a jury trial wherein Rosenthal was convicted. The matter was appealed to the circuit court of Pocahontas County. Rosenthal continuously asserted that his Certificate of Authority and business license authorized the behavior.

Rosenthal, subsequent to this criminal charge but prior to the final order, filed an application with the Division of Natural Resources for a "Scientific Collecting Permit" pursuant to W.Va. Code § 20-2-50 wherein he indicated his intent to create a rehabilitation facility for live wildlife. This request was denied on the grounds that there

² The procedural history was particularly circuitous. Rosenthal was convicted in a bench trial, but subsequently granted a jury trial by the predecessor to the respondent. Rosenthal was again convicted at his jury trial, which led to the appeal before the respondent's court. In other words, by the time of the final Order, Rosenthal had been twice convicted of this offense.

is no legal manner for a person to establish a rehabilitation facility in the State of West Virginia, again providing notice to Rosenthal that he was not acting under the authority of the Division. Ex. 1.

On June 14, 2007, the respondent entered an Order dismissing the citation. The respondent reasoned that Rosenthal's Certificate of Authority and business license created an agency relationship between Rosenthal and the Director of the Division of Natural Resources thus circumventing the provisions of W.Va. Code § 20-2-4.³ In so ruling, the respondent reversed the decision of the magistrate court denying the motion to dismiss.

Upon information and belief, Rosenthal continues to harbor unlawfully obtained wildlife upon his property and continues to solicit persons unknown to deliver the same unto him.

It is from this ruling the petitioner seeks relief.

ASSIGNMENT OF ERROR

- I. **THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE AUTHORITY WHEN IT RULED THAT A WEST VIRGINIA CERTIFICATE OF AUTHORITY AND A BUSINESS LICENSE CREATE AN AGENCY RELATIONSHIP WITH THE DIRECTOR OF THE DIVISION OF NATURAL RESOURCES.**

³ As will be more fully developed below, the proscription against the wholesale possession and captivity of wildlife in W.Va. Code § 20-2-4 is inapplicable to "duly authorized agents" of the Director.

POINTS AND AUTHORITIES RELIED UPON

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<u>SER Farber v. Mazzone</u> , 213 W.Va. 661, 584 S.E.2d 517 (2003)	7
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W. Va. Code § 58-5-30	10
W.Va. Code § 20-1-7(27)	10, 12

STANDARD OF REVIEW

Under West Virginia Code § 53-1-1, this Court has jurisdiction for a writ of prohibition where the inferior court has no jurisdiction over the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers. See, e.g., SER Farber v. Mazzone, 213 W.Va. 661, 584 S.E.2d 517 (2003). As held in Syl. Pt. 1, Martin v. West Virginia Div. of Labor Contractor Licensing Bd., 199 W.Va. 613, 486 S.E.2d 782 (1977), “[t]he standard of appellate review of a circuit court’s order granting relief through the extraordinary writ of prohibition is *de novo*.” *Quoted in* Health Management Inc. v. Lindell, 207 W.Va. 68, 528 S.E.2d 762 (1999).

Further, the law is well-settled in regard to the grounds for issuance of a writ of prohibition:

“In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”

Syllabus Point 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

MEMORANDUM OF LAW

I. THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE AUTHORITY WHEN IT RULED THAT A WEST VIRGINIA CERTIFICATE OF AUTHORITY AND A BUSINESS LICENSE CREATE AN AGENCY RELATIONSHIP WITH THE DIRECTOR OF THE DIVISION OF NATURAL RESOURCES.

A. *Foreign corporations; effect of Certificate of Authority and business license.*

Under W.Va. Code § 31D-3-301, every corporation in the State of West Virginia must engage in a lawful business. Furthermore, the Code is clear that such lawful business, if subject to regulation by another statute, may only incorporate if permitted by, and subject to all the limitations of, the other statute.

A Certificate of Authority for a foreign corporation permits an entity to conduct lawful business within the State of West Virginia. However, a foreign corporation with a valid Certificate of Authority is subject to the same duties, restrictions, penalties and liabilities as a domestic corporation of like character. W.Va. Code § 31E-14-1405(b).

Under the West Virginia Nonprofit Corporation Act, such corporations may be organized for any lawful purpose. W.Va. Code § 31E-3-301.

Thus the guiding principle governing all corporations doing business in the state of West Virginia is that the corporation must engage in some *lawful* enterprise. The same principles apply for the grant of a business license. Such a license does not provide an exemption from adherence to the statutes governing the business endeavor.

B. *State ownership of wildlife; agents of the Director; rehabilitation facilities.*

West Virginia Code § 20-2-3 states that “[t]he ownership of and title to all wild animals, wild birds, both migratory and resident, and all fish, amphibians, and all forms of aquatic life in the State of West Virginia is hereby declared to be in the State, as trustee for the people.” Clearly, the West Virginia Legislature intended the government interest in wildlife to be exhaustive.⁴

The Division of Natural Resources similarly has broad authority to regulate the manner in which wildlife may be taken, killed or obtained pursuant to W.Va. Code § 20-2-4.⁵

The Code further states that “[t]he restrictions in this section do not apply to the [DNR] director or duly authorized agents, who may, in any manner, take or maintain in captivity, at any time, any wildlife for the purpose of carrying out the provisions of this chapter.” W.Va. Code W.Va. Code § 20-2-4. There is no exception for “rehabilitation facilities” for wildlife.⁶ Ex. 2.

Finally, although the respondent found the phrase “duly authorized agent” ambiguous, the Code clearly delineates the nature of the agents of the Director:

In addition to all other powers, duties and responsibilities granted and assigned to the director in this chapter and elsewhere by law, the director is hereby authorized and empowered to ... [d]elegate the powers and duties of his or her office, except the power to execute contracts, to appointees and employees of the division, *who*

⁴ In fact, there is a statutory structure designating a dollar value of wildlife in the event of a person being convicted of a criminal law that results in the destruction or death of wildlife. SEE W.Va. Code § 20-2-5a.

⁵ In relevant part, W.Va. Code § 20-2-4 states “[i]t shall be unlawful to possess any wildlife, or other parts thereof, which have been illegally taken, killed or obtained.”

⁶ There is currently no statute or regulation extant that permits the legal operation of a wildlife rehabilitation facility. Such legislation was considered by the 2006 session of the West Virginia Legislature but failed to emerge from its committee.

shall act under the direction and supervision of the director and for whose acts he or she shall be responsible. [Emphasis added.]

W.Va. Code § 20-1-7(27).

C. *The Circuit Court exceeded its legitimate authority.*

From the authority listed above the ruling of the respondent is puzzling, and it is clear that the decision has lasting implications for the Division of Natural Resources. Unquestionably, the petitioner satisfies most, if not all, of the factors meriting prohibition, as more fully set forth below:

1. **The petitioner has no other adequate means, such as direct appeal, to obtain the desired relief.**

Rosenthal was charged with a criminal offense in the magistrate court of Pocahontas County, West Virginia. It is axiomatic that the government enjoys limited options for appeal of an adverse ruling in a criminal action.

West Virginia Code § 58-5-30 permits a prosecutor to directly appeal the quashing of an indictment by a circuit judge, but it has been held that this statute is inapplicable to criminal complaints initiated in magistrate courts. State v. Walters, 411 S.E.2d 688, 186 W.Va. 169 (1991).

As the petitioner, therefore, cannot file a direct appeal of this action, the first test for issuance of a writ has been satisfied.

2. **The petitioner will be damaged or prejudiced in a way that is not correctable on appeal.**

As evident from the discussion above, the petitioner has no means of direct appeal other than the extraordinary remedy of a writ. The prejudice to the petitioner, however, is substantial.

Almost immediately following the ruling of the respondent, Rosenthal initiated electronic mail to the Division of Natural Resources informing the same of his intention to continue violating the provisions of W.Va. Code § 20-2-4. Ex. 3.

This contumacious disregard for the regulatory authority of the Division of Natural Resources must be addressed and again sets forth grounds for issuance of a writ of prohibition.

3. The lower tribunal's order is clearly erroneous as a matter of law.

This ground is the most important for this Court to consider, and perhaps the most evident from the facts of this matter.

Rosenthal obtained a Certificate of Authority from the State of West Virginia for the operation of an animal sanctuary, and purportedly a business license for the “[c]are and preservation of abandoned and needy wildlife.”

The respondent, in his final Order dismissing the underlying criminal charge, ruled that the Certificate of Authority and business license “provide [Rosenthal] with the necessary authority to be considered a ‘duly authorized agent’ to whom Chapter 20, Article 2, Section 4 of the West Virginia Code is explicitly held inapplicable.” The respondent reasoned that the term “duly authorized agent” was ambiguous and not sufficiently defined in the Code.

The term “duly authorized agent” appears literally hundreds of times within the construct of the West Virginia Code. However, it is much less frequently defined, most likely because the meaning is self-evident. “Duly authorized” should be interpreted as just that, a person known to the principle and authorized to act on his behalf. This

interpretation is consistent with the Director's power to delegate his authority under W.Va. Code § 20-1-7(27).

W.Va. Code § 20-2-4 instructs that "[t]he restrictions in this section do not apply to the director or duly authorized agents, who may, in any manner, take or maintain in captivity, at any time, wildlife for the purpose of carrying out the provisions of this chapter." A simple reading of this provision should reveal that the persons included as "duly authorized agents" would be, *inter alia*, conservation officers and wildlife managers, duly and legally employed by the Division. It would be impossible for the Director of the Division of Natural Resources to be bound by, *and liable for*, the activity of every citizen of the State of West Virginia who obtains a business license to conduct activity in the field of wildlife resources, and this should not be the prevailing rule in Pocahontas County, West Virginia.

It may also be said that neither a Certificate of Authority nor a business license may create an implied agency relationship with a governmental entity:

"The law indulges no presumption that an agency exists; on the contrary a person is legally presumed to be acting for himself and not as the agent of another person; and the burden of proving an agency rests upon him who alleges the existence of the agency." Pt. 3, syllabus, Bluefield Supply Co. v. Frankel's Appliances, Inc., 149 W.Va. 622, 142 S.E.2d 898 (1965).

In order to establish an implied agency relationship, one must show the following:

"One who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship." Pt. 1, syllabus, General Electric Credit Corp. v. Fields, 148 W.Va. 176, 133 S.E.2d 780 (1964).

In this matter, it cannot be said that the Director of the Division of Natural Resources permitted Rosenthal to act as his agent. In fact, Rosenthal should have been

put on notice that he was not acting in the interest of the Director when he was arrested and charged with a criminal offense. *There simply is no legal mechanism for Rosenthal to engage in conduct that provides a rehabilitation facility for West Virginia wildlife.*

It is for these reasons that the respondent's ruling is clearly erroneous and should not be permitted to stand.

4. The lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law.

While it cannot be said that this Order is, as yet, an oft repeated error, it is upon information and belief that Rosenthal continues to violate the law. In the event of his re-arrest, the matter will likely be properly before the respondent yet again, and it is presumed that the ruling will remain the same.

5. The lower tribunal's order raises new and important problems or issues of law of first impression.

It certainly appears that the implied creation of an agency relationship with a director of a governmental entity is an important problem. Should this ruling stand, any person could evade all the rules and regulations set forth by the West Virginia Legislature simply by applying for a business license or Certificate of Authority in a particular field.

For this reason as well, this Court should properly prohibit the enforcement of this order.

REQUEST FOR RELIEF

WHEREFORE, for all of the foregoing reasons and others that may be set forth in a hearing on this matter, the petitioner respectfully requests that this Court issue a rule to show cause why a writ should not be granted prohibiting the Circuit Court from dismissing the underlying criminal misdemeanor in this case, and for such other and further relief as this Court deems proper.

STATE OF WEST VIRGINIA
By Counsel



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CIRCUIT JUDGE OF THE 11TH JUDICIAL CIRCUIT,
Respondent.

CERTIFICATE OF SERVICE

I, William R. Valentino, Assistant Attorney General and counsel for the
petitioner, do hereby certify that on this 6th day of July, 2007 I have placed a true
copy of the foregoing "Petition for Writ of Prohibition" in the United States Mail to:

Mr. Joel Rosenthal
HC 64, Box 136A
Hillsboro, WV 24946



WILLIAM R. VALENTINO
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Charleston, West Virginia 25305

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MEMORANDUM OF PERSONS TO BE SERVED

The following are the names and addresses of those persons upon whom the rule
to show cause is to be served, if granted:

Respondent: Honorable Joseph C. Pomponio, Jr.
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Defendant: Mr. Joel Rosenthal
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Hillsboro, West Virginia 24946

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VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to-wit:

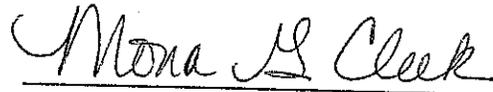
I, William R. Valentino, Assistant Attorney General, being duly sworn, upon my oath say that the factual information contained in the foregoing "Petition for Writ of Prohibition" is true and accurate, except those allegations which are stated to be upon information and belief, which allegations are believed to be true and accurate.



WILLIAM R. VALENTINO
Assistant Attorney General

Taken, subscribed and sworn to before me this 6th day of July, 2007.

My Commission Expires: May 18, 2008



NOTARY PUBLIC

