

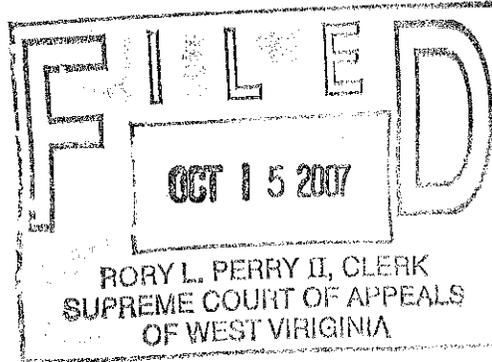
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WV SUPREME COURT CASE NO. 07-2826

RONALD W. HOLCOMB,

PETITIONER,

v.



**THE HONORABLE WILLIAM SADLER,
9TH CIRCUIT COURT JUDGE,**

RESPONDENT.

NOTE OF OPPOSITION TO ISSUANCE OF A RULE

State of West Virginia,
By Counsel,
Timothy D. Boggess
Prosecuting Attorney for Mercer County
Mercer County Prosecuting Attorney
1501 West Main Street
Princeton, WV 24740

Comes now State of West Virginia, by Mercer County Prosecuting Attorney, Timothy Boggess, and, for reasons set forth below, notes its opposition to issuance of a Rule to Show Cause in the above styled Petition seeking a Writ of Prohibition under the original jurisdiction of this Honorable Court.

STATEMENT OF FACTS AND NATURE OF RULING BELOW

Petitioner, Ronald Holcomb, was indicted in June 2007 for causing the death of Brooklyn Holcomb, his 5 year old daughter. The child's body bore the evidence of a sustained beating inflicted before she succumbed to head injuries.

During her hospitalization and at the medical examiner's office, scrapings were taken from beneath Brooklyn's fingernails in case she was able to make any defense that left trace evidence of the attacker. Those scrapings were transferred to the State Forensic Laboratory (hereinafter "State Lab") in due course along with the prosecution's request that the same be tested for DNA.

The State Lab called the prosecution before performing the requested test to advise that the test would necessarily consume the sample. The State Lab was instructed to delay testing until the Petitioner could be informed and be heard, if he so desired. Petitioner was informed that day and filed his Motion for Injunctive Relief which was heard by the Respondent Court on August 27, 2007. The trial court, after full opportunity for hearing, entered the attached Order.

DISCUSSION OF LAW

Petitioner is not entitled to a writ of prohibition. Writs of prohibition only issue when a lower court acts without jurisdiction or exceeds its legitimate powers. Syl.pt 1 in State ex rel. Caton v Sanders, 215 W.Va. 755, 601 S.E.2d 75 (2004). As jurisdiction is clearly established without objection the question then becomes whether the trial court exceeded its legitimate powers.

Discovery issues prior to trial are clearly within the sound discretion of the trial court. State v Bennett, 176 W.Va. 1, 339 S.E.2d 213 (1985). A writ of prohibition will only issue if the trial court abuses its discretion and the abuse is so flagrant as to make an appeal inadequate. State ex rel. Edwards v Narick, 164 W.Va. 632, 264 S.E.2d 851(1980).

In the instant case, the Respondent Court makes sound use of its discretion and issued an order congruent with established law. The fact that the trial court "got it right" is clearly established by applying the facts in this case to the factor test established by this Court in State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d12 (1996):

"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 a oft repeated error or manifests persistent disregard for either procedural or substantive law; (5) whether the lower tribunal's order raise 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 be issued. 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.

The first and second factors are intertwined in the matter herein. Clearly, if the fingernail scraping sample is to be tested and there is any inculpatory or exculpatory evidence to be produced, then the sample will not be available for further testing. However, Petitioner does not show any damage or prejudice in permitting the State Lab to perform the testing. That the trial court does not presume corruption on the part of the State Lab personnel does not indicate a "flagrant" abuse of discretion on behalf of the judge. The Order entered below preserves Petitioner's rights regarding the sample as much as possible. Some lab will test the evidence and absent some showing that the

State Lab cannot or will not produce a reliable result, the Petitioner did not make a case for the relief requested below or in this Court.

The third factor—the one to be “given substantial weight” — is whether there is clear error in the lower court’s ruling. The issue before the Court is not one of first impression and prior rulings of the Court suggest the correctness of the ruling below. In State v Thomas, 187 W.Va. 686, 421 S.E.2d 227 (1992), this Honorable Court ruled on exactly the same situation of too little sample to permit multiple testing: “ ...[W]e accept the general proposition that the State does not commit a violation when it, in good faith, uses up the entire sample in performing a necessary scientific test. With that ‘right’ comes a responsibility: the State must put the defendant in as nearly identical a position as he would have been in had he had been able to perform an independent test.” The trial court ruling herein requires the State Lab to preserve as much of the sample as is possible.

The ruling in Thomas has been revisited by the Court in State v. Crabtree, 198 W.Va.620,482 S.E.2d 605(1996) and State v Jarvis, 199 W.Va.38, 483 S.E.2d 38 (1997), without waiver from the proposition that “When the government performs a complicated test on evidence that is important to the determination of guilt, and in doing so destroys the possibility of an independent replication of the test, the government must preserve as much documentation of the test as is reasonably possible to allow for a full and fair examination of the results by the defendant and his experts.” Syl.Pt.3

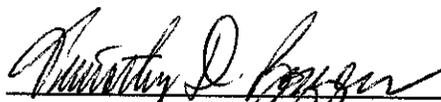
The Order below is an exact reflection of the current law and does not constitute an abuse of discretion. The trial court applied the law to the facts and “got it right”.

The fourth factor is whether the lower tribunal’s order is an oft repeated error and the fifth factor is whether the order in question raises novel and important issues. The cases cited above establish that the order of which Petitioner complains is not an error and is in accord with the well established law announced by the State High Court.

CONCLUSION

For the above stated reasons, the State notes its opposition to said Petition and requests that the Court decline to issue a Rule.

STATE OF WEST VIRGINIA,
BY COUNSEL,

A handwritten signature in cursive script, appearing to read "Timothy D. Boggess", is written over a horizontal line.

TIMOTHY D. BOGGESS
PROSECUTING ATTORNEY

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 11th day of October, 2007, the foregoing *Note of Opposition to Issuance of a Rule* was served upon the following by forwarding a true and exact copy thereof as indicated to the following:

The Honorable William J. Sadler, Judge
Mercer County Courthouse
1501 W. Main Street
Princeton, WV 24740
**Via Hand Delivery*

Henry L. Harvey, Esquire
Joseph Harvey, Esquire
1604 W. Main Street
Princeton, WV 24740
**Via Hand Delivery to their designated box located in the Circuit Clerk's Office*

STATE OF WEST VIRGINIA,

By Counsel,


TIMOTHY D. BOGCESS
PROSECUTING ATTORNEY