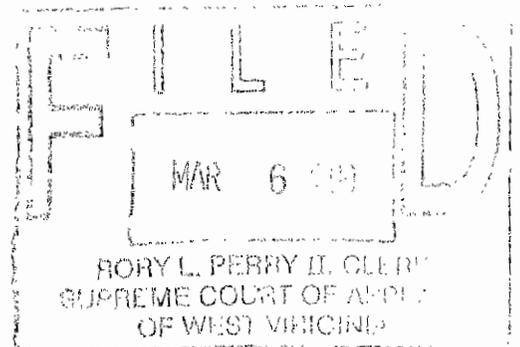


NO. 34811

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA



State ex rel. Jason W. [REDACTED],

Petitioner,

VS.

CIRCUIT COURT OF MERCER COUNTY
CASE # 08-F-143-DK

The Honorable David W. Knight,
Senior Status Judge,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Counsel for Petitioner:
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Princeton, WV 24740

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Exhibit 2 - Transcript of Hearing, January 27, 2009 2,5,6

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Exhibit 6 - Pediatrics, "Genital Anatomy in Pregnant Adolescents: 'Normal' Does not mean 'Nothing Happened'," Vol. 113, No. 1, January, 2004. 5

I. ISSUE PRESENTED

Petitioner respectfully petitions this Honorable Court to issue a rule to show cause why a writ of prohibition should not be awarded pursuant to W.Va. Code § 53-1-1 *et. seq.* and Rule 14 of the West Virginia Rules of Appellate Procedure, to prohibit the Mercer County Circuit Court from requiring a child sexual assault victim to undergo a pelvic examination to determine whether her hymen is disturbed. This Court has original jurisdiction to hear this Petition pursuant to the above referenced code section and rule.

II. STATEMENT OF FACTS AND NATURE OF PROCEEDINGS.

Jason and Jeffrey W█████ were indicted by the February, 2008, term of the Mercer County Circuit Court for molesting their sister, J.W. The State's evidence would be that Jason was the first to abuse J.W., and later Jeffrey began; the assaults started in Arizona and continued when the family moved to West Virginia. The indictment charges Jason with four instances of first degree sexual assault between February, 2003, and May, 2005, and one count of incest for that time period. The indictment further charges Jeffrey with two counts of first degree sexual assault between March, 2004 and September, 2005, and one count of incest for that time period. At the present time, J. W. is age 15, Jason is age 24 and Jeffrey is age 23.

The abuse was first reported to the authorities when J.W. disclosed to her counselor, Lawrence Richmond, who was seeing her for ADHD. At this time, she only identified Jason and denied any abuse on the part of Jeffrey. Later, when she was in therapy for Jason's sexual abuse, she also identified Jeffrey. Jeffrey has denied the allegations; Jason has admitted digital penetration only.

On January 13, 2009, Jason W█████ filed a Motion To Permit Physical Examination ". . . to determine if there is any physical evidence that this 15-year-old (J.W.) has had repeated traumatic intercourse" (Exhibit 1, Paragraph 4, Page 2). A hearing on said Motion was held before

The Honorable David W. Knight, Senior Status Judge, on January 27, 2009 (Exhibit 2). Relying on State v. Delaney, 417 F.2d 903 (W.Va. 1992), the defense argued that repeated sexual intercourse with her brother for years would "probably" leave some physical evidence, and, coupled with her conflicting statements as to Jason W. [REDACTED] involvement, the defense should be entitled to an order requiring J.W. to submit to a gynecological evaluation (Exhibit 2, p. 4). Petitioner contended that such an examination would be intrusive and offensive, the last act of sexual misconduct occurred in September, 2005 (over three years previously), and, in the event the hymen was disturbed, there was no means of determining the perpetrator (Id., pp. 6 and 7). Petitioner further argued that Jason W. [REDACTED] had failed to show how the results of the examination could be probative, and, when weighed against the intrusiveness of the examination, his motion should be denied (Id.).

The Court reasoned that a pelvic examination would not be that intrusive for a 15 year old girl, and it was the same kind of examination that the State would have obtained in the case of a recent, quickly reported sexual assault. As the abuse began when J.W. was a young child, Respondent believed she had "matured a lot since then" (Id., pp. 16 and 17).

Noting that the trial was scheduled for early the following week, Jason W. [REDACTED] attorneys requested a continuance (Id., p.19). The court did not grant that motion in hopes that an examination of J.W. could be accomplished quickly and the trial proceed as scheduled (Id., pp. 19 and 20). This same date Petitioner filed an order reflecting his ruling (Exhibit 3).

Respondent was notified early the following week that the examination had not taken place so, instead of a trial, on February 3, 2009, the parties had another pretrial hearing (Exhibit 4). Petitioner announced its intent to seek a writ of prohibition to prevent the court's requiring J.W. to undergo a pelvic examination, and Respondent then scheduled the next trial date so as to allow sufficient time for the State to file its Petition. Since the examination had not been accomplished per

the prior court order, Respondent issued another order with greater specificity (Exhibit 5).¹

III. ASSIGNMENT OF ERROR

That the Respondent cannot enter an order directing a victim to undergo a physical examination absent a compelling need or reason.

IV. ARGUMENT

A. STANDARD FOR ISSUING WRIT

Pursuant to West Virginia Code § 53-1-1 *et. seq.*, "(t)he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter and controversy, or, having such jurisdiction, exceeds its legitimate powers." This Petition is not premature and is the only remedy available to Petitioner because, in its current posture, this criminal case cannot proceed to trial until such time as the child victim is forced to undergo a pelvic examination.

As required in State, ex rel. Hoover v. Berger, 483 S.E.2d 12 (W.Va. 1996), and approved in State, ex rel. Youngblood v. Sanders, 575 S.E.2d 864 (W.Va. 2002), this Court has a five point standard for issuing writs of prohibition stemming from allegations that the lower court exceeded its authority. Firstly, this Court will determine whether the party seeking the writ has no other adequate means to obtain the desired relief. Proceeding to trial will be contingent upon J.W. undergoing this examination.

Secondly, this Court must determine whether Petitioner will be damaged or prejudiced in a

¹Pursuant to that order, J.W. is scheduled to see Dr. Jamette Huffman, on March 30, 2009.

way that is not correctable on appeal. Petitioner contends that nothing can cure the humiliation of requiring a 15 year old to undergo a gynecological examination if she wants to proceed to trial to face her accusers. Indeed, there is no guaranty that the child would agree to submit to the examination and, if she refused, it is assumed that the State could not proceed against the defendants.

Thirdly, it is necessary to examine whether the lower court's order is clearly erroneous as a matter of law. Surely, it must be conceded that Respondent did not apply a compelling need or reason test to the defense motion.

Fourthly, this Court must determine whether the lower court's order is an oft repeated error or manifests persistent disregard for procedural or substantive law. Petitioner submits this point of review is inapplicable.

Fifthly, this Court must examine whether the lower tribunal's order raises new and important problems or issues of law of first impression. Petitioner believes that Jason W [REDACTED] has misinterpreted State v. Delaney, and the court's granting of his motion to permit a physical examination will have a chilling affect on the prosecution of child sexual assault cases. If the lower court's order is found appropriate, the only thing that would bar an automatic physical examination in a sexual assault case would be a child's tender age.

B. RESPONDENT FAILED TO APPLY A COMPELLING NEED OR REASON TEST

Citing State v. Ramos, 553 A.2d 1059, 1062 (R.I. 1989), this Court adopted a "compelling need or reason test" set forth by the Supreme Court of Rhode Island as follows:

The practice of granting physical examinations of criminal witnesses must be approached with upmost judicial restraint and respect for an individual's dignity. In determining whether to order an independent medical examination, the trial justice should consider (1) the complainant's age, (2) the remoteness in time of the alleged criminal incident to the proposed examination, (3) the degree of intrusiveness and humiliation associated with the procedures, (4) the potentially

debilitating physical effects of such an examination, and (5) any other relevant considerations.

In the instant case, Respondent focused on J.W.'s age and found that she was 15 and had ". . . matured a lot since this case started" (Exhibit 2, p. 17). The Respondent has never met J.W., he has never reviewed her therapy records, and he has no way of knowing if she has matured in the time since her brothers left home and the molestation stopped. All the lower court knew was that J.W. is now 15. He apparently agreed with defense counsel that ". . . every female is going to undergo (pelvic examinations) repeated times during her lifetime" (Id., p. 5) because Respondent found that the defense was not ". . . asking for anything out of the ordinary . . ." (Id., p.16).²

When examining the second factor in the compelling need or reason test, the lower court was not concerned that J.W. had last been assaulted over three years before the proposed examination despite the fact that this factor was the most persuasive in State v. Delaney. In that case, the State's expert had testified that physical symptoms of sexual assault can dissipate in as little as six months, and several years had passed since the victims in Delaney had been sexually assaulted. Thus, as reasoned by this Court, any evidence of the assault would have long ago disappeared. Of course, Jason W█████ took the position that J.W.'s hymen is evidence and he is entitled to determine if it has been disturbed (Exhibit 2, p. 4). If this was a compelling legal argument, would it not have been addressed in Delaney? The young victims in that case had all alleged sexual intercourse, so the presence or absence of a hymen should have the same significance as in J.W.'s case.³

The third factor to examine per Delaney is the degree of intrusiveness and humiliation

²Although it should not be germane to this argument, the victim's advocate in Petitioner's office spoke to J.W.'s parents following the January 27, 2009, hearing and learned that she has never undergone a pelvic examination (Exhibit 4, p.22).

³In point of fact, a study published in PEDIATRICS, Vol. 113, No. 1, January, 2004, pp. e67-e69 (Exhibit 6) illustrated the fact that definitive findings of penetration are rare (only two of thirty-six pregnant subjects were found to have penetration trauma).

associated with a pelvic examination. While J.W. did not testify at the pretrial hearing, it really was unnecessary. Obviously the examination is intrusive and would be humiliating to anyone who has not experienced it. Apparently, both defense counsel (Exhibit 2, p.5) and the court (Id., p.16) felt that women are going to undergo this examination routinely throughout their lives, so it was not unreasonable to subject J.W. to such a procedure in connection with her sexual assault case.

When examining the fourth factor in Delaney, Petitioner would concede that the examination would not result in any debilitating physical effects although it certainly might cause significant emotional effects. As defense counsel noted, there should be no ". . . long term effects other than the embarrassment of having to undergo it" (Exhibit 2, p.5).

The Delaney factors are not all inclusive as evidenced by the Court's recognition that there may be other relevant considerations. Jason W [REDACTED] justifies the need for a gynecological evaluation of his sister based upon the fact that she did not immediately identify him as one of her sexual offenders. There are many reasons why children disclose abuse in bits and pieces, why they sometimes leave out pertinent information, why they may even recant, etc. These are all issues for trial. Indeed, it would be an exceedingly rare case in which there were not inconsistencies in a victim's testimony. It is wholly illogical to pretend that a pelvic examination is needed because there are inconsistencies in a victim's statements.

V. CONCLUSION

It is respectfully submitted that a writ of prohibition is not premature in this case and is the only remedy available to Petitioner. If the facts of this case meet a compelling need or reason test, it would be difficult to envision a case that would not meet the test; pelvic examinations of children would become routine. With little or no rationale, Jason W [REDACTED] was able to convince the lower court that a gynecological evaluation is not out of the ordinary for a 15 year old child, and it is perfectly

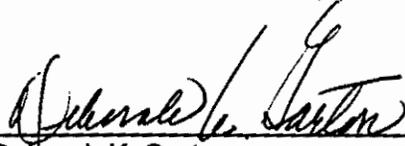
reasonable to subject a sexual assault victim to such an examination to determine if her hymen is disturbed. This argument does not remotely come within the prevue of Delaney.

WHEREFORE, Petitioner prays that this Court issue a rule to show cause, stay the gynecological evaluation of J.W. pending this Court's ruling and grant a Writ of Prohibition to prohibit the Respondent from requiring such an evaluation in advance of the State proceeding to trial.

Respectfully submitted,
DEBORAH K. GARTON

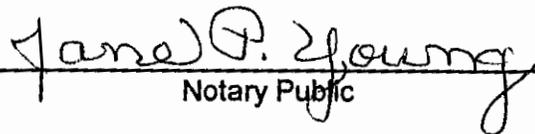
VERIFICATION

I, DEBORAH K. GARTON, counsel for the Petitioner, Jason W [REDACTED] after being duly sworn according to law, depose and say that the facts and allegations contained in the foregoing Petition for Writ of Prohibition are true, so far as they are therein stated to be upon information and belief, I believe them to be true.



Deborah K. Garton

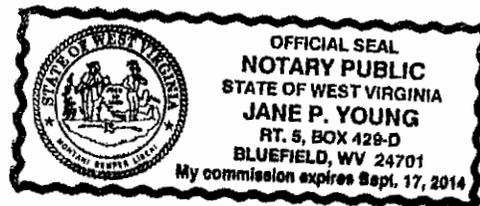
Taken, sworn to and subscribed to before me this 4th day of March, 2008, by Deborah K. Garton.



Notary Public

My commission expires:

Sept. 17, 2014



MEMORANDUM OF PERSONS TO BE SERVED

The persons to be served the rule to show cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows, to-wit:

The Honorable David W. Knight, Senior Status Judge
332 Old Bluefield Road
Princeton, WV 24740

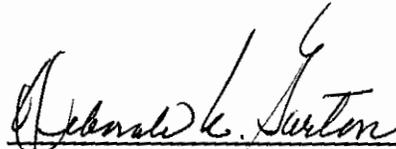
Jamette Huffman, D.O.
403 12th Street Extension
Princeton, WV 24740

CERTIFICATE OF SERVICE

I, DEBORAH K. GARTON, attorney for the Petitioner, State ex rel. Jason W. [REDACTED], hereby certify that I served a true copy of the Petitioner's Petition for Writ of Prohibition on the 4th day of March, 2009, by first-class mailing to last-known addresses, postage prepaid to the following:

The Honorable David W. Knight, Senior Status Judge
332 Old Bluefield Road
Princeton, WV 24740

William Flanigan, Esq.
Sanders, Austin, Flanigan & Flanigan
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Deborah K. Garton