

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

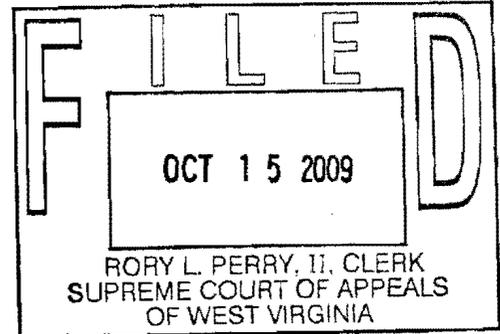
State ex rel. Lincoln Stuart Taylor,
Petitioner

v.

Hon. David R. Janes,
Judge of the Circuit Court of Marion County,
Respondent

State of West Virginia's Reply to Petitioner's Petition for Writ of Prohibition and
Writ of Mandamus.

Comes now the State of West Virginia, by and through Special
Prosecuting Attorney of Marion County, Daniel B. Dotson, III, and respectfully
requests that the Court does deny both the Petition for a Writ of Prohibition and
Writ of Mandamus. The State of West Virginia attaches her response to
Petitioner's Motion in Limine actions and incorporates it herein.



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel. Lincoln Stuart Taylor,
Petitioner

v.

Hon. David R. Janes,
Judge of the Circuit Court of Marion County,
Respondent

STATE'S MEMORANDUM FOR DENIAL OF WRIT OF PROHIBITION AND
WRIT OF MANDAMUS.

I. The Procedural Posture of This Case.

The State does not dispute the Defendant/Petitioner recitation of the history of the case and the rulings of Honorable Judge Janes, as to the Defendant/Petitioner's motion in limine. However, the State does dispute the Defendant/Petitioner's claim that the Defendant/Petitioner's rights have been violated under the double jeopardy clauses of the United States and State of West Virginia Constitutions. It should be noted this matter is set for trial in Marion County, for the weeks of the 18th and the 25th of January, 2010.

II. Jurisdiction

The State admits that this Court has original jurisdiction to consider both writs filed on behalf of the Defendant/Petitioner.

III. Standard of Revision

In determining whether to grant prohibition when a Court is not acting in excess of the jurisdiction, this adequacy and other available remedies, such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to **correct only substantial, clear-cut legal errors, plainly in contravention of clear statutory, Constitutional, or common law mandates which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.** Syl. Pt.1 Hinkle v. Black, 164 W.va. 112, 262 S. E. 2nd 744(1979). The State wholly denies that the Defendant/Petitioner meets this test.

IV. Factual and Procedural History

The statute incorporates by reference the trial courts ruling (attached herein) and the State's reply to Defendant's motion to dismiss.

V. Double Jeopardy Grounds and Basis For Relief By the Defendant/Petitioner.

The State wholly resists the Defendant/Petitioner's writs to dismiss under double jeopardy.

The United States Supreme Court handed down an opinion on June 18, 2009, in Yeager v. United States, __ U. S. __129 S. Ct. 2360, __L. Ed2d__(No.

-67), in which the court held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts, does not affect the acquittals preclusive force under double jeopardy. Again the State would reference the trial Court's order of August 13, 2009.

The Defendant/Petitioner submitted to the trial Court on August 12, 2009, the case of State ex rel. Zirk v. Muntzing, 146 W. Va. 878, 122 S. E. 2d 851 (1961).

Zirk was indicted for murder and conspiracy. However, the conspiracy charge was leveled under, W. Va. Code 61-6-7, commonly referred to as the "Redman" statute. The Supreme Court held that since Zirk was acquitted of conspiracy, the prosecution for murder constituted double jeopardy.

In this case at bar, the Defendant/Petitioner was acquitted of conspiracy under WV Code 61-10-31. As alluded to by the trial Court, the penalties for the "Redman" Conspiracy under 61-6-7 would be the same as murder in the first degree. This is totally distinguishable from the Defendant/Petitioner's case. The charge of conspiracy under 61-10-31 of which the Defendant/Petitioner was acquitted, carries an indeterminate sentence of not less than 1 nor more than 5 years.

Further, the "Redman" Conspiracy charge in which the ruling in, Zirk v. Muntzing, was based, was declared unconstitutional in 1977. State v. Postelwait, 161 W. Va. 54, 239 S. E. 2d. 734 (1977).

Based upon the foregoing and the entire record and the attachments, the Defendant/Petitioner's motion for writs of Prohibition and Mandamus are without merit.

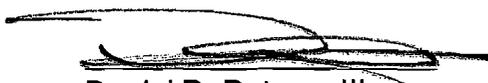
VII.

1. State's reply to Defendant motion in limine.
2. Trial courts under of August 13, 2009.

PRAYER

The State of West Virginia by and through, her Special Prosecuting Attorney, moves this honorable court to deny Petitioner's motion for Writ of Prohibition and Writ of Mandamus.

State of West Virginia
By Counsel



Daniel B. Dotson, III
Special Prosecuting Attorney Marion County
P. O. Box 811
Ripley, WV 25271
WV State Bar # 5499

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

CASE NO. 07-F-204

LINCOLN TAYLOR

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE

Comes now the State of West Virginia, by and through, her special prosecuting attorney of Marion County, Daniel B. Dotson, III, and respectfully resists the Defendant's Motion in Limine in essence a motion to dismiss.

INTRODUCTION

Defendant's recitation contained in his introduction is not in dispute.

STATE'S RESPONSE

The State totally disagrees with the Defendant's reasoning that Yeager, bars the Prosecution of the Defendant on the grounds of double jeopardy.

On the contrary, Yeager holds that "The fact that the jury hung was a logical wrinkle that made it impossible for the court to decide with any certainty what the jury necessarily determined."

This is the exact same issue before the bar. Although, Yeager, dealt with an acquittal on fraud counts and a hung jury on the insider trading counts, this is totally analogous to a hung jury on the murder charge and an acquittal on the conspiracy charge.

The Defendant asserts that there is only one logical conclusion, that by the jury acquitting the Defendant of Conspiracy that the Defendant did not shoot the deceased.

To the contrary, by acquitting on the Conspiracy the jury may have concluded that the Defendant acted alone in shooting the victim to death.

However, by even raising a question as what to what the jury might have been pondering, is precisely what Yeager, holds a Court cannot do. The summation of Yeager, is that a trial Court cannot look behind a jury's verdict. In order for that Court to agree with the Defendant's logic, it would have to be able to read the minds of twelve citizens of Marion County. This is something no Court can do and even if it could, Yeager, specifically forbids it under double jeopardy and collateral estoppel.

Wherefore, the State asks the Court to deny Defendant's motion and to grant the State any other relief it deems meet and just.

Respectfully,

A handwritten signature in black ink, appearing to read "Daniel B. Dotson, III", written over a horizontal line.

Daniel B. Dotson, III
Special Prosecuting Attorney
WV State Bar #5944

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS.

CASE NO. 07-F-204

LINCOLN STUART TAYLOR,

DEFENDANT.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO PRECLUDE ALL
EVIDENCE AND ARGUMENT THAT SUGGESTS IN ANY WAY THAT THE
DEFENDANT, LINCOLN TAYLOR, SHOT AND KILLED DERRICK OSBORNE
UNDER PRINCIPLES OF DOUBLE JEOPARDY INCLUDED IN THE STATE AND
FEDERAL CONSTITUTIONS

On the 14th day of July, 2009, came the State of West Virginia, by Daniel B. Dotson, III, Special Prosecuting Attorney for Marion County, and came the defendant, Lincoln Stuart Taylor, in person and by Martin P. Sheehan, his attorney, for hearing on the defendant's Motion in Limine to Preclude All Evidence and Argument that Suggests in any way that the Defendant, Lincoln Taylor, Shot and Killed Derrick Osborne Under the Principles of Double Jeopardy Included in the State and Federal Constitutions previously filed herein by Mr. Sheehan on behalf of the defendant. Whereupon, the Court heard the arguments of counsel both in support of and in opposition to the defendant's motion and subsequently reviewed the State's Response to Defendant's Motion in Limine and Defendant's Reply to State's Response to Motion to Limine subsequently filed herein. The Court has also reviewed the entire court file and the cases cited by the parties in their memoranda.

2009 AUG 13 PM 2 18
BARBARA A. CORE
CIRCUIT CLERK
CIRCUIT CLERKS OFFICE

RECEIVED & FILED
IN

As they relate to the issues presented to the Court in the defendant's motion in limine, the facts of this case are undisputed.

The defendant, Lincoln Stuart Taylor, was indicted in Case No. 07-F-204 by the Marion County Grand Jury on October 2, 2007 and charged in Count I of that indictment with first degree murder in the death of Derrick Osborne. In Count II of that indictment, Mr. Taylor was charged with conspiracy to commit the murder of Mr. Osborne. By order entered herein on April 14, 2008, the State dismissed the conspiracy count against Mr. Taylor. On June 6, 2008, Mr. Taylor was re-indicted, in Case No. 08-F-77, for conspiracy to commit the murder of Mr. Osborne. The 2008 indictment alleges that the overt act committed in furtherance of the conspiracy was the shooting of Mr. Osborne by Mr. Taylor.

Mr. Taylor's first trial was commenced on September 15, 2008 and was terminated on September 18, 2008 by the Court declaring a mistrial because of juror misconduct.

Mr. Taylor's second trial was commenced on November 10, 2008. On November 21, 2008, the trial jury returned an unanimous verdict finding Mr. Taylor "not guilty" of conspiracy to commit murder as charged in Case No. 08-F-77. However, the jury was unable to reach a verdict on the charge of murder in the first degree in Case No. 07-F-204 and the Court again declared a mistrial. Following a postponement of Mr. Taylor's trial for murder in the Court's February 2009 term, Mr. Taylor's trial is now scheduled to commence on Monday, August 24, 2009. Mr. Taylor's motion in limine seeks to preclude at that trial all evidence and argument that suggests that Mr. Taylor shot and killed Mr. Osborne.

On June 18, 2009, the Supreme Court of the United States published its opinion in Yeager v. United States, ___ U.S. ___, 129 S.Ct. 2360, ___ L.Ed. 2d ___ (No. 08-67), in which the Court held that an apparent inconsistency between a jury's verdict on acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause.

In his motion in limine, Mr. Taylor suggests that his acquittal for conspiracy following the November 2008 trial establishes that one of the elements of the offense of conspiracy has not occurred and that the jury's verdict means either that there was no agreement to kill Mr. Osborne or that Mr. Taylor was not the shooter. The defendant's analysis of the trial concludes that his acquittal means, pursuant to the holding of Yeager v. United States, *supra*, that the jury must have decided that Mr. Taylor did not shoot Derrick Osborne, and that the overt act alleged in the conspiracy was not proven.

The State argues in its response to the motion that this Court may not and cannot look behind the jury's verdict to determine whether, by acquitting Mr. Taylor of conspiracy, the 2008 jury concluded either that Mr. Taylor was not the shooter or that he was not a party to an agreement to shoot Mr. Osborne.

While this Court acknowledges that the facts in Yeager are similar to the facts in this case and that the Yeager decision is persuasive, it is also of the opinion that Mr. Taylor's case is ultimately distinguishable from Yeager.

Although this Court is not overly familiar with the crime of insider trading (it being a federal offense), it appears that Justice Stephens and the majority are of the opinion that fraud, (of which Yeager was acquitted) is a predicate to insider trading (the counts on which

Yeager's jury hung). In other words, one cannot be guilty of insider trading unless one is also guilty of fraud. In West Virginia, conspiracy to commit murder (of which Mr. Taylor was acquitted) is not a predicate to the offense of murder in the first degree (the offense on which the jury hung in Mr. Taylor's November 2008 trial). One could, of course, be convicted of murder in the first degree without first committing the offense of conspiracy to commit murder.

As recalled in its Yeager opinion, in Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court explained that "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, it "cannot again be litigated" in a second trial for a separate offense. *Id.*, at 443. Consequently, the Ashe opinion requires that courts "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." And, as Yeager now requires, "to identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." Accordingly, the Yeager court concluded that "if the possession of insider information was a critical issue of ultimate fact in all of the charges against [Yeager], a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element."

This Court acknowledges that Mr. Taylor's acquittal of conspiracy leads to issue preclusion as a component of double jeopardy. However, as Mr. Taylor concedes, "issue preclusion need not inevitably lead to a complete bar to prosecution on any theory."

Upon its thorough review of the record in this case, this Court is unable to determine which issue was necessarily decided in Mr. Taylor's favor by the jury in its verdict of acquittal of the conspiracy charge against him and, accordingly, which issue should be precluded in Mr. Taylor's impending trial as a component of double jeopardy.

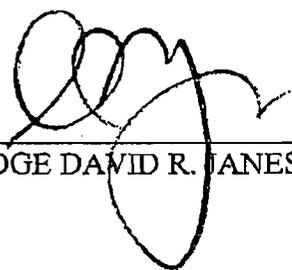
Finally, On August 12, 2009, the Court received correspondence from Mr. Sheehan in which he suggested that the Court also consider, prior to ruling on Mr. Taylor's motion in limine, the case of State ex rel. Zirk v. Muntzing, 146 W.Va. 878, 122 S.E. 2d 851 (1961), in which the Supreme Court of Appeals of West Virginia held that, under the facts of that case, since Zirk had been indicted for murder and for conspiracy to murder and had been acquitted of conspiracy, the subsequent prosecution for murder constituted double jeopardy. Zirk's prosecution was under the "Red Men" statute (West Virginia Code § 61-6-7), providing that if the death of any person should result from a conspiracy everyone engaged in the conspiracy is guilty of murder in the first degree. This Court is of the opinion that Zirk is also distinguishable from the facts in this case, Zirk being prosecuted under West Virginia Code § 61-6-7 and the Court in Zirk concluding that the "the punishment to be inflicted and the sentence to be imposed would be identical in the trial of the indictment for murder as it would have been if [Zirk] had been convicted, instead of acquitted, in the trial of the indictment for conspiracy to commit murder." Zirk at 882. Such is not the case here, as the punishments to be inflicted and the sentences to be imposed upon Mr. Taylor, should he have been convicted of both murder in the first degree, a violation of West Virginia Code § 61-2-1, in Case No. 07-F-204, and of conspiracy to commit murder, a violation of West Virginia Code § 61-10-31, in Case No. 08-F-77, would have been vastly

different.

For all of the foregoing reasons, it is accordingly ORDERED that the defendant's Motion in Limine to Preclude All Evidence and Argument that Suggests in Any Way That the Defendant, Lincoln Taylor, Shot and Killed Derrick Osborne Under Principles of Double Jeopardy Included in the State and Federal Constitutions is hereby DENIED. The defendant's objections and exceptions to the Court's ruling are noted and preserved.

The Circuit Clerk of Marion County is hereby directed to provide a certified copy of this order to Martin P. Sheehan, Esquire, at his address: Sheehan & Nugent P.L.L.C., 41 15th Street, Wheeling, West Virginia 26003; and to Dan Dotson, Esquire, Assistant Prosecuting Attorney of Jackson County, at his address: Post Office Box 811, Ripley, West Virginia 25271.

ENTER: 8/13/09



JUDGE DAVID R. JANES