

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

Docket Nos. 35478 & 35483

STATE OF WEST VIRGINIA,
Plaintiff (Appellee),

v.

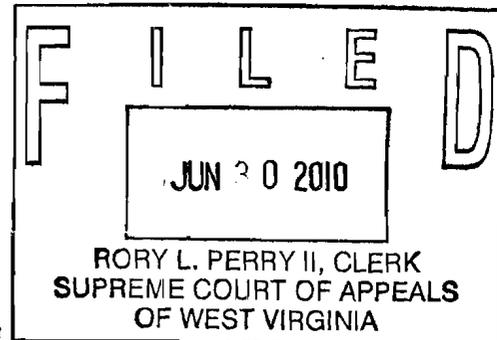
Appeal from the:
Circuit Court of Cabell County, West Virginia
Case Nos.: 98-F-240 and 02-C-561

MEREDITH LEE VANHOOSE,
Defendant (Appellant).

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S BRIEF

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APPELLANT'S REPLY TO KIND OF PROCEEDING,

NATURE OF THE RULING BELOW AND STATEMENT OF THE CASE

As stated in Appellant's Brief, notwithstanding Appellant's numerous motions for a speedy trial, the trial court imprisoned the Appellant for approximately 900 days, all because the Appellant did not waive his marital privilege against adverse spousal testimony. After being imprisoned by the trial court from March 30, 1998 to September 7, 2000, the Appellant, having lost all hope of ever receiving a trial, acquiesced and entered a conditional plea under W. Va. R.Cr.P., Rule 11(a)(2), reserving his right to appeal said plea under contentions of violation of his state and federal rights to a speedy trial, including those rights under W. Va. Code § 62-3-1 and W. Va. Code § 62-3-21, West Virginia's "One-Term Rule" and "Three-Term Rule." Further, Appellant was appointed appellate counsel on September 25, 2000, and at various times thereafter. However, until this present appeal, no appeal was ever filed.

On April 9, 2009, Appellant's habeas corpus petition 02-C-561 was heard by the Circuit Court of Cabell County, West Virginia. By order entered April 30, 2009, the Appellant was resentenced in case number 98-F-240, and Appellant's habeas corpus petition was denied and dismissed. In Appellant's Petition for Appeal, Appellant sought review of the violations of Appellant's state and federal constitutional rights to a speedy trial and challenged the order denying and dismissing Appellant's habeas corpus petition.

APPELLANT'S REPLY TO

STATEMENT OF THE FACTS

Appellant disputes the facts as presented to the Court in the State's brief, but asserts that a discussion of the discrepancies therein is not determinative of the issues on Appeal. Therefore Appellant reasserts his statement of the facts as previously stated.

APPELLANT'S REPLY TO THE STATE'S ARGUMENTS REGARDING
APPELLANT'S ASSIGNMENTS OF ERROR

1. The State's Response

Petitioner argued no prejudice outside of the violation of the rule itself and no remedy exists for violation of one-term rule without a showing of prejudice. Moreover, the one-term rule applies only to the term of indictment. Appellant did not assert his speedy trial rights under the one-term rule until after the term of indictment had passed.

Appellant's Reply

Appellant was not limited to assert his right to speedy trial within the term of court of the indictment as propounded by the State.

2. The State's Response

Appellant's refusal to waive the privilege in light of the fact that he claimed his wife was the real killer and he was actually innocent of the crimes he was charged with committing, operated to entice or keep away a material witness under an enumerated exception to the three-term rule.

Appellant's Reply

West Virginia Code § 57-3-3 codifies the spousal testimonial privilege and Appellant was within his right to invoke a privilege provided to him by the laws of the state.

3. The State's Response

This claim was mooted by the granting of Appellant's direct appeal by this Court. Moreover, this Court has crafted no remedy for ineffective assistance of appellate counsel outside direct review with the assistance of competent appellate counsel.

Appellant's Reply

The State's Response disregards previous holdings of this Court in which this Court held that under certain conditions, the remedy for a claim of ineffective assistance of counsel to prosecute a timely appeal is unconditional discharge.

ARGUMENT

Standard of Review

"Where the issue on an appeal from the circuit court is clearly a question of law ... involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 2, *Thomas v. Morris*, 687 S.E.2d 760, 762 (W. Va. 2009), *citing* Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

A. Appellant demanded his right to a speedy trial and his exercise of said right was not limited to the term of court of his indictment.

Appellant maintains his argument that he was denied his state and federal constitutional right to a speedy trial under West Virginia's "One-Term Rule" (W.Va. Code § 62-3-1), a violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5th, 6th and 14th Amendments of the United States Constitution, and Appellant's rights under said statute.

The trial court, by order of December 30, 1999, denied Appellant's request for a speedy trial. Said order held that:

It is the court's opinion that West Virginia Code § 62-3-1 does not allow for a motion for speedy trial beyond the term in which the defendant was indicted. Instead, the court finds that the speedy trial issue is now governed by West Virginia Code § 62-3-21 and the law set forth in *Shorter v. Hey*, 294 S.E.2d 51 (W. Va. 1981).

Appellant reasserts his prior argument in that the Supreme Court of Appeals of West Virginia has held, contrary to the trial court's ruling:

[t]o confine W. Va. Code, 62-3-1, to the term in which the indictment is returned would virtually negate the right because of the liberal good cause for continuance policy we have adopted under this statute. If there were no mechanism for a defendant to demand a prompt trial after the term of the indictment, then his only recourse would be to wait until the end of the period allowed by the three-term rule, which marks the outside limit of the

defendant's right to a speedy trial in this state.

Good v. Handlan, 342 S.E.2d 111, 116 (W. Va. 1986); see also, State v. Spence, 388 S.E.2d 498, n. 7 (W. Va. 1989); Keller v. Ferguson, 177 W. Va. 616, 355 S.E.2d 405 (1987).

Therefore, it is Appellant's argument that his assertion and his demand for a speedy trial were not limited to the term of his indictment, as held by the trial court. The issue then becomes whether the Appellant was prejudiced by the delay because W.Va. Code, 62-3-1, unlike W.Va. Code, 62-3-21, does not provide a remedy for violations of the rule. "[T]here is more flexibility in the remedy for a one-term rule violation than for a three-term rule violation." Id. at 115.

In Syllabus Point 4 of Shorter, we stated what had to be proven in order for a violation of W.Va. Code, 62-3-1, to justify a dismissal of an indictment:

"Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to W.Va. Code, 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to W.Va. Code, 62-3-1, only in furtherance of the prompt administration of justice."

Id.

Appellant argues that he was prejudiced by the liberal granting of continuances for the prosecution, which was evidenced by his being incarcerated for 900 days awaiting trial. The trial court found "good cause" for granting the prosecutor's continuances based on Appellant's assertion of his statutorily given right of spousal privilege.¹ However, repeatedly granting continuances based on Appellant's refusal to waive a privilege or right in order to assert another constitutional right amounts to an abuse of discretion that would negate the fundamental purpose of W. Va. Code § 62-3-1.

Appellant argues that the court's ruling was erroneous as the one-term rule clearly

¹ A more detailed argument concerning Appellant's spousal privilege right follows.

extends beyond the term of indictment without requiring Appellant to show prejudice. “[W]here the legislature has determined, as has ours, that a delay without good cause beyond the term of an indictment is a denial of the speedy trial rule, there is no need for the defendant to show, or for the court to assess, actual prejudice.” State ex rel. Holstein v. Casey, 265 S.E.2d 530, 534 (W. Va. 1980). Further, as this Court concluded in Good: “W. Va. Code, 62-3-1, is not limited to the term of court at which an indictment is returned, but is applicable to any term of court in which an accused asserts his right to a prompt trial. Where such right is asserted, the accused must be tried during that term unless good cause can be shown for a continuance.” Good, 342 S.E.2d at 116. Appellant maintains that the only reason the court found good cause to continue his trial was due to Appellant’s divorce not being finalized — a reason the court used in at least three hearings. Nonetheless, Appellant maintains that his extended incarceration awaiting trial was clearly prejudicial and the denial of his right to a speedy trial amounts to reversible error.

B. Appellant was entitled to the Spousal Testimonial Privilege as codified in West Virginia Code § 57-3-3 and exercising his rights did not act to entice or keep away a material witness under the enumerated exceptions to the “Three-Term Rule.” Delays based on Appellant’s exercise of his rights should be attributable to the State.

a. West Virginia’s Spousal Privilege

The laws of West Virginia afford certain privileges to husband and wife. W. Va. Code § 57-3-3 states:

In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by anyone.

Appellant argues that the law and judicial precedent on this point are well settled. This Court has held that “West Virginia Code § 57-3-3 prohibits adverse testimony of one spouse against another, absent consent, in a criminal trial.” State v. Bailey, 179 W. Va. 1, 5, 365 S.E.2d 46, 48 (1987). See also State v. Clay, 135 W. Va. 618, 64 S.E.2d 117 (1951); State v. Jarrell, 191 W. Va. 1, 442 S.E.2d 223 (1994); State v. Bradshaw, 193 W. Va. 519, 457 S.E.2d 456 (1995); State v. Hrko, 220 W. Va. 574, 648 S.E.2d 338 (2007). There are certain exceptions, however, such as in cases of “. . . a prosecution for an offense committed by one against the other or in a case against the child, father, mother, sister, or brother of either of them.” State v. Bohon, 211 W. Va. 277, 280, 565 S.E.2d 399, 402 (2002). Under the statute, the “. . . privilege may be claimed by either the witness-spouse or the defendant spouse.” State v. Evans, 170 W. Va. 3, 4, 287 S.E.2d 922, 923 (1982). Appellant was well within his rights to invoke the spousal privilege and prevent his wife from testifying against him at any trial. The State decided to proceed with the arrest and indictment of Appellant with full knowledge of Appellant’s marital status and statutory spousal privilege. Not until after Appellant’s indictment and after an assistant prosecutor and a police detective visited Appellant’s spouse in Kentucky did Appellant’s spouse file for divorce. Notwithstanding these facts, the privilege against adverse spousal testimony applies to married persons who are in the process of getting a divorce. Id. at 7, S.E.2d at 924. The State even asserted they were prepared to proceed to trial at a hearing held on January 6, 1999, prior to Appellant’s wife filing for divorce. Therefore, Appellant reiterates that any delay in his trial proceedings should be clearly attributable to the State and not to Appellant.

b. Reply to The State’s Spousal Privilege Argument

The State, in its brief, cites Trammel v. U.S., 445 U.S. 40, 100 S. Ct. 906, 63 L.Ed. 2d 186 (1980) as persuasive authority in support of their argument that the marital privilege could be

exploited in cases such as the one *sub judice*. Appellee Br. p. 19. The State admits that Trammel is not controlling authority in this case, based on the facts. This Court, however, in reference to Trammel held that “the Supreme Court . . . was free to modify the privilege against spousal testimony as long as ‘reason and experience’ supported such a change. However, that change only affects cases conducted in jurisdictions in which the Federal Rules of Evidence or the Common law rules concerning privileges apply.” Evans at 5. The Court, given the opportunity to accept Trammel’s holding as the law of West Virginia, held that “. . . the contents of the privilege against spousal testimony are controlled by *W. Va. Code, 57-3-3* [1923]. Should ‘reason and experience’ dictate a change in that statute, it is up to our legislature to draft and pass appropriate modifications.” Id. Trammel was decided in 1980 and in the 30 years since that decision, the legislature has not adopted the changes as held by the Trammel decision. Therefore, the status of the spousal privilege in West Virginia is as reported previously in this brief.

c. Other Jurisdictions

The State cites to other jurisdictions in effort to persuade this Court to modify the spousal privilege as provided for by W. Va. Code § 57-3-3. Appellant will now address those jurisdictions in greater detail.

i. Minnesota

Minnesota statute § 595.02 provides:

Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

(a) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his

consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other or against a child of either or against a child under the care of either spouse, nor to a criminal action or proceeding in which one is charged with homicide or an attempt to commit homicide and the date of the marriage of the defendant is subsequent to the date of the offense, nor to an action or proceeding for nonsupport, neglect, dependency, or termination of parental rights.

The Supreme Court of Minnesota held that, under the statute, “. . . parties to a marriage cannot testify for or against each other without the other’s consent . . . “ State v. Gianakos, 644 N.W. 2d 409, 416 (Minn. 2002).

In Gianakos, a couple involved in a romantic relationship were implicated in a robbery of a motel. After the robbery, the couple married, at least in part to invoke the marital privilege. After the marriage, the couple learned the identity of the state’s primary witness against the couple, and the witness disappeared, later to be found murdered. The couple were indicted on both robbery and murder. The wife eventually pleaded guilty and testified against her husband, over his marital privilege objection. At the trial level, the trial court ruled that the wife “. . . could testify against [husband] relying principally on federal case law recognizing exceptions to the marital privilege on grounds that the marriage was not entered into in good faith and that the couple was engaged in joint criminal activity.” Id. at 413. In response to a “sham marriage” exception argued for by the state, the Minnesota Supreme Court held that “[i]n no case have we ruled that a marriage is not worthy of the protection of the marital privilege, a statutory rule engrained in our state’s jurisprudence well over a century ago.” Id. at 418. The court likewise refused to accept a “joint participant” exception and held that “[i]t is simply too great a departure from over 100 years of this court’s jurisprudence to adopt an exception to the marital privilege of

this nature.” Id. at 419. As in the present case, Minnesota had, in the marital privilege statute, certain enumerated exceptions that would allow a spouse to testify against the other spouse.

The State cites the dissenting opinion in Gianakos (see 644 N.W.2d at 420) in support of their position and in effort to persuade this Court to alter the marital privilege statute when the legislature has chosen not to do so. The dissenting opinion in the case is not the law of Minnesota and should not be adopted in West Virginia. The Minnesota statute, much like W. Va. Code § 57-3-3 provided for exceptions to the spousal privilege and the Supreme Court of Minnesota opined that “[w]e have not adopted such an exception and we decline to do so, preferring instead to defer a policy determination of this nature to the legislature. . . .” Gianakos at 420.

ii. Pennsylvania

The State next turns to Pennsylvania to find support of their position in regard to the marital privilege. 42 Pa. CSA § 5913 provides in pertinent part that

Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse except that there shall be no such privilege:

* * *

(2) in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them;

* * *

(4) in any criminal proceeding in which one of the charges pending against the defendant includes murder, involuntary deviate sexual intercourse or rape.

Again, like West Virginia Code § 57-3-3, Pennsylvania’s marital privilege statute provides specific, enumerated exceptions to the marital privilege. Pennsylvania’s spousal communications privilege is 42 Pa. CSA § 5914, which provides “[e]xcept as otherwise provided

in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.

The State cites Commonwealth v. Spetzer, 813 A.2d 707 (2002), in support of their proposed change in the marital privilege in West Virginia. In Spetzer, the defendant raped his stepdaughter on numerous occasions, as well as what could only be described as abuse to his wife. The defendant, through the course of his criminal activity involving his stepdaughter, admitted his actions to his wife. He even attempted to get his wife to arrange a time when he could engage in another sexual encounter with both of his wife's daughters. His wife reported his intentions to the Pennsylvania State Police and agreed to wiretap her telephone conversations with him. In this instance, the Pennsylvania Supreme Court did hold as stated by the State in its brief that ". . . the communications in this case cannot be deemed confidential under the § 5914 privilege" Id. at 720. Spetzer involved Pennsylvania's marital communication privilege, not the spousal testimony privilege as argued in the present case.

Appellant argues that in his case, there are no questions concerning the spousal communications privilege and that this court should not look to a Pennsylvania court interpreting a Pennsylvania statute dealing with spousal communications in support of the State's desired change in the spousal testimony privilege as codified in W. Va. Code § 57-3-3. Appellant argues that, like W. Va. Code § 57-3-3, 42 Pa. CSA § 5913 is the codification of Pennsylvania's spousal testimony privilege. Additionally, like W. Va. Code § 57-3-4, 42 Pa. CSA § 5914 is the codification of Pennsylvania's spousal communication privilege. This is not the same privilege and should not be discussed as if it is. The State is again off-point in the case cited and the argument made from that case.

iii. Ohio

The State finally turns to Ohio in an effort to support its position. Ohio's spousal testimony privilege as well as spousal communications privilege is contained in Ohio Revised Code § 2945.42 which provides in pertinent part:

Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other, bigamy, or failure to provide for, neglect of, or cruelty to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age. A spouse may testify against his or her spouse in a prosecution under a provision of sections 2903.11 to 2903.13, 2919.21, 2919.22, or 2919.25 of the Revised Code for cruelty to, neglect of, or abandonment of such spouse, in a prosecution against his or her spouse under section 2903.211 or 2911.211, of the Revised Code for the commission of the offense against the spouse who is testifying, in a prosecution under section 2919.27 of the Revised Code involving a protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code for the commission of the offense against the spouse who is testifying, or in a prosecution under section 2907.02 of the Revised Code for the commission of rape or under former section 2907.12 of the Revised Code for felonious sexual penetration against such spouse in a case in which the offense can be committed against a spouse. Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of the witness. Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or rape or the former offense of felonious sexual penetration in a case in which the offense can be committed against a spouse, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age, violation of a protection order or consent agreement, or neglect or abandonment of a spouse under a provision of those sections. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist.

Again, like in W. Va. Code § 57-3-3, Ohio's statute provides for exceptions. Unlike West Virginia's statute, Ohio's statute provides reference to specific code sections of criminal acts that are specifically exempted from the privilege.

The State cites State v. Bryant, 56 Ohio App.3d 20, 564 N.E.2d 709 (1988), a case from Ohio's Sixth District Court of Appeals in support of its position that West Virginia should alter the spousal privilege. However, Appellant argues that Ohio's law is clear in that Ohio's Supreme Court has held that "[t]he R.C. 2945.42 privilege belongs to the nontestifying spouse." State v. Perez, 124 Ohio St.3d 122, 138, 920 N.E.2d 104, 125 (2009) *citing* State v. Savage, 30 Ohio St.3d 1, 2, 506 N.E.2d 196 (1987). "Thus '[s]pousal privilege cannot be waived unilaterally and allows a defendant to prevent his or her spouse from testifying . . . unless one of the statute's exceptions applies.'" Id.

Appellant argues that, like Ohio, West Virginia's statute provides a privilege to the non-testifying spouse to keep his or her spouse from testifying against him or her, with certain exceptions.

d. Invoking a Right Does Not Amount to Enticing or Keeping a Material Witness Away, Within an Enumerated Exception to the Three-Term Rule.

Appellant's position is that the State went to great lengths to argue for a change in West Virginia's spousal privilege, all of which was done to attribute the State's violation of the three-term rule to Appellant. Appellant has now refuted the State's arguments in relation to the marital privileges provided him by the laws of the state of West Virginia. The result is that West Virginia Code § 57-3-3 provided Appellant with a spousal privilege that he chose to invoke. The State knew of both the privilege and Appellant's use thereof, yet the State informed the trial court on January 6, 1999 that it was prepared to go to trial. Even using the State's timeline contained in its brief, it was not until the fifth term of court after the State said it was prepared

for trial, wherein Appellant entered his conditional plea. Clearly, this is beyond the three-term rule of W. Va. Code § 62-3-21. Appellant argues that the cause of the delay cannot be attributed to him and therefore should be attributable to the State. W. Va. Code § 62-3-21 specifically says that unless an enumerated reason is found:

Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there by three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial. . . .

Appellant reiterates that the trial court, in this situation, clearly stepped beyond the enumerated reasons found in W. Va. Code § 62-3-21 when it ordered a continuance predicated on good cause. Therefore, Appellant argues, pursuant to W. Va. Code § 62-3-21, he should be forever discharged from the prosecution of the offense.

C. Appellant's claim of ineffective assistance of appellate counsel may be remedied by this Court and, as the State incorrectly asserts, is not mooted by the granting of this present appeal.

Appellant was denied his state and federal constitutional rights to effective assistance of counsel when appellate counsel failed to file an appeal on Appellant's behalf. After Appellant pleaded guilty on September 7, 2000, Appellant was appointed appellate counsel, George Beter, on September 25, 2000. However, until this present appeal, no appeal was ever filed on Appellant's behalf.

A defendant in a criminal case has an absolute right to offer a petition for appeal. "An indigent criminal defendant has a right to appeal his conviction. He also has a right to a copy of the trial court record, including the transcript of testimony, without cost to him." Rhodes v. Leverette, 239 S.E.2d 136, 139 (W. Va. 1977). Appellant had neither an appeal filed on his behalf nor did he receive a timely copy of his trial record and transcripts.

The State's Response asserts there is no remedy available upon a finding of ineffective assistance of appellate counsel, however, the State disregards this Court's previous decision in which this Court held that under certain conditions, the remedy for a claim of ineffective assistance of counsel to prosecute a timely appeal is unconditional discharge. In habeas corpus proceedings involving a claim of ineffective assistance of appellate counsel in failing to prosecute a timely appeal where there has been an extraordinary dereliction on the part of the state, the appropriate remedy is unconditional discharge. Sartin v. Bordenkircher, 165 W. Va. 859 (1980).

In Sartin, this Court held that in determining whether the state had been extraordinarily derelict, the Court should look to:

[T]he clarity and diligence with which the relator has moved to assert his right of appeal; the length of time that has been served on the underlying sentence measured against the time remaining to be served; whether prior writs have been filed or granted involving the right of appeal; and the related question of whether resentencing has occurred in order to extend the appeal period.
Rhodes, at Syl. Pt. 6.

In Sartin, appellate counsel, George Beter, who was also Appellant's appellate counsel, failed to prosecute a timely appeal. As in Sartin, substitute appellate counsel was appointed but did not file an appeal. Appellant diligently attempted to perfect his appeal as evidenced by several letters of correspondence with counsel, the court, and the State Bar. Appellant filed his habeas corpus petition in 2002 in an attempt, among other things, to bring the fact to the attention of the state that appellate counsel should have been appointed and an appeal should have been filed. Appellant is indigent and is of limited educational means and has no way by which to perfect an appeal other than to repeatedly plead with the state to appoint him appellate counsel. The state failed to subsequently appoint appellate counsel until upon Appellant's

habeas corpus hearing in 2009, the Appellant was resentenced, and current counsel perfected Appellant's appeal before this Court. The Appellant lingered in jail for over nine years while the state failed to appoint subsequent appellate counsel to perfect an appeal which was bargained for in Appellant's original plea. When Appellant pleaded to the charges for which he is jailed, Appellant had been asserting all along that the state had violated his constitutional right to a speedy trial and that upon appeal, Appellant could bring this fact to the attention of this Court. For over nine years, the state has been derelict in its duty as bargained for by the Appellant and by the state. Therefore, Appellant seeks unconditional discharge from his confinement as the remedy for the state's dereliction.

CONCLUSION

The law in the state of West Virginia is clear and unambiguous.

W.Va. Code § 57-3-3 states:

In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by anyone.

W. Va. Code § 62-3-21 states:

Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there by three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial. . . .

As this Court stated in Thomas v. Morris, a statutory provision which is clear and

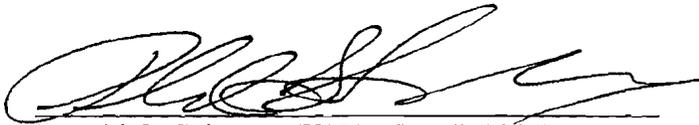
unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect. See also Syl. Pt.2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951), Syl. Pt. 1, Sowa v. Huffman, 191 W.Va. 105, 443 S.E.2d 262 (1994).

The trial court stated, “[t]his Court can only grant a continuance beyond the January 2000 Term without running afoul of the defendant’s constitutional right to a speedy trial for reasons enumerated in West Virginia Code § 62-3-21.” (12/30/99 Order at 5-6.) In September 2000, Appellant had been in jail for approximately 900 days and was still awaiting a “speedy” trial. Instead of being protected by his statutory and constitutional rights, the Appellant was blamed for the repeated delays in going to trial and was forced to endure the continued demands by the trial court that the Appellant waive these rights by granting a no-fault divorce to his wife, thus allowing her to testify in the proceedings before the trial court. The trial court repeatedly made it clear to the Appellant that he would sit in jail until he waived his statutory and constitutional rights. In response to Appellant’s defense counsel’s objection to the court’s response that Appellant would remain incarcerated until Appellant waived his spousal privilege, the trial court stated, **“Sure. Well, it’s not fair. It’s not fair.”** (6/29/99 Tr. at 14.)

PRAYER FOR RELIEF

For the foregoing reasons, Appellant respectfully requests that this Honorable Court dismiss Appellant’s plea and sentence, release the Appellant from his incarceration, and pursuant to West Virginia Code § 62-3-21, forever discharge the Appellant from prosecution and award Appellant such other relief this Honorable Court deems just and appropriate.

RESPECTFULLY SUBMITTED,
MEREDITH LEE VANHOOSE,
By Counsel



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

Docket Nos. 35478 & 35483

STATE OF WEST VIRGINIA,
Plaintiff (Appellee),

v.

Appeal from the:
Circuit Court of Cabell County, West Virginia
Case Nos.: 98-F-240 and 02-C-561

MEREDITH LEE VANHOOSE,
Defendant (Appellant).

CERTIFICATE OF SERVICE

I, Ronald G. Salmons, counsel for the Appellant, Meredith Lee Vanhooose, do hereby certify that I have served true copies of this Appellant's Brief in Reply to Appellee's Brief upon the following by certified mail this 30th day of June, 2010:

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