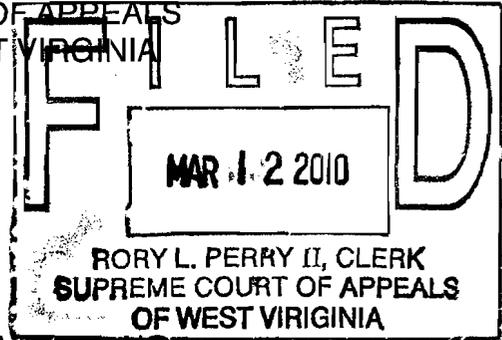


IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA



JORDAN SHAVER,
Petitioner,

v.

PETITION/APPEAL NO. _____

HERSHEL MULLINS,
Respondent.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

Parties

1. The petitioner, Jordan Shaver, is the defendant in a felony criminal case (Case No. 10-F-45), now pending in Monongalia County Magistrate Court, charging him with Second Degree Sexual Assault, a violation of West Virginia Code §61-8B-4.
2. The respondent, Hershel Mullins, is the judicial officer of the Magistrate Court of Monongalia County, West Virginia, who is presiding over this case and who made the ruling from which the petitioner is seeking relief.

Jurisdiction

3. This Court has original jurisdiction, pursuant to West Virginia Constitution, art. VIII, §3, and West Virginia Rules of Appellate Procedure, Rule 14, to hear a petition for a writ of mandamus against the inferior judicial officer.

Procedural Background

4. The preliminary hearing on this felony criminal case was originally scheduled for February 2, 2010, postponed to March 5, 2010, then continued again to April 29, 2010.

Facts

5. The defendant obtained a subpoena and served it, in person, on Christine Neilan, the adult alleged victim of the charged sexual assault.
6. Before the preliminary hearing began, Assistant Prosecuting Attorney Gail Vorhees made an oral motion, asking Magistrate Mullins to prohibit the defendant from calling Ms. Neilan and to immediately excuse her from attendance at the hearing.
7. The magistrate granted that motion over the defendant's objection.
8. At the defendant's request, the preliminary hearing was again postponed until April 29, 2010, to allow the defendant to seek relief from the ruling.

Legal Authority

9. The defendant "may cross-examine adverse witnesses and may introduce evidence" at a preliminary hearing, pursuant to Rule 5.1, West Virginia Rules of Criminal Procedure for the Magistrate Courts (WVRCrP-MC).
10. In the case of *Peyatt v. Kopp*, 189 W.Va. 114, 428 S.E.2d 535 (1993) this Court essentially upheld the Circuit Court's ruling that compelling the testimony of the 5 and 6 year old alleged victims of a sexual assault by subpoena imposed an unreasonable burden on the witnesses because of their age and the traumatic effect it would have on them.
11. There is no authority interpreting the "unreasonable burden" element of Rule 5.1(a) with respect to an adult alleged victim.
12. An appeal subsequent to the preliminary hearing would not provide adequate relief as the matter will be moot after the case is presented to the grand jury in May 2010.
13. The ruling is clearly erroneous as a matter of law.

14. The issue is one of utmost importance in the administration of justice generally.

15. The issue is capable of repetition yet evading review because errors in the conduct of preliminary hearings are mooted by the action of the grand jury.

WHEREFORE, the defendant asks the Court to issue a rule to show cause why a writ of mandamus should not issue, and, ultimately, to issue a writ requiring Magistrate Mullins to permit the defendant to call the subpoenaed, adult alleged victim of sexual assault at the preliminary hearing to rebut the State's evidence of probable cause.



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MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY PETITION FOR WRIT OF MANDAMUS

Pursuant to West Virginia Constitution, article VIII, §3, and West Virginia Rules of Appellate Procedure, Rule 14, the defendant, Jordan Shaver, requests that the Court issue a rule to show cause why a writ of mandamus should not issue against Magistrate Hershel Mullins of Monongalia County, requiring him to allow the defendant to present the testimony of a witness he subpoenaed to testify at the preliminary hearing of this case.

The preliminary hearing was originally scheduled for February 2, 2010. It was postponed, based on the defendant's request for more time to subpoena witnesses. It was rescheduled for March 5, 2010, at 1:00 p.m. At that time, the magistrate made the ruling from which the petitioner is seeking this relief. The preliminary hearing has now been re-scheduled to April 29, 2010. The grand jury will meet during the first week of May, 2010, in Monongalia County, and the issue raised in this petition will be moot. The defendant is asking the Court to exercise its original jurisdiction because a favorable ruling for the defendant in the circuit court would allow the prosecutor to "run out the

clock" by appealing the decision and timing the filing and prosecution of the appeal so that the matter can not be addressed before the scheduled preliminary hearing.

The defendant obtained a subpoena and served it, in person, on Christine Neilan, the adult alleged victim of the charged second degree sexual assault. Ms. Neilan is a freshman at W.V.U., from Somerset, Pennsylvania. The accused is an 18 year old student of West Virginia Wesleyan College, from Pine Bush, New York, who was visiting Morgantown for the weekend. The alleged second degree sexual assault occurred at about 2:30 a.m., on the Mountain Lines Campus PM bus (infamously known as "the drunk bus"), while the bus was traveling from downtown Morgantown to Towers dormitory. After Ms. Neilan returned to the dorm, she reported the alleged sexual assault. She claims that the forcible sexual intrusion occurred while she rode the bus, although she was traveling in the company of, and seated beside, at least two (2) other friends, and the bus had many other passengers, who were completely unaware that anything unusual was occurring.

The defendant's counsel asked the prosecutor to cooperate in securing the alleged victim's appearance, by agreeing for her to appear or by accepting service of a subpoena at the prosecutor's office from sheriff's process department. The prosecutor declined to cooperate. The only identifying information available, the alleged victim's name, was misspelled (Nellan) in the criminal complaint and in the attached narrative report of Detective Hasley. Nevertheless, the defendant was able to identify Ms. Neilan and locate her to serve the subpoena. She was served with the cooperation of the director of the Evansdale Residential Complex (Towers), which is her official place of

residence here in West Virginia, although neighboring residents of the dorm told the defendant's investigator that she never stays there.

The alleged victim came to the magistrate court on the appointed day and time, checked in, and then went somewhere to wait, per the instruction of the prosecutor. Before the preliminary hearing began, Assistant Prosecuting Attorney Gail Vorhees made an oral motion, asking Magistrate Mullins to prohibit the defendant from calling Ms. Neilan and to immediately excuse her from attendance at the hearing. The magistrate granted that motion over the defendant's objection, but, at the defendant's request, the preliminary hearing was again continued to April 29, 2010, to allow the defendant to seek relief from the ruling.

The defendant "may cross-examine adverse witnesses and may introduce evidence" at a preliminary hearing, pursuant to Rule 5.1, West Virginia Rules of Criminal Procedure for the Magistrate Courts (WVRCrP-MC). It is axiomatic that the defendant can compel the attendance of witnesses by subpoena, and it is unprecedented for the magistrate to prohibit the testimony and excuse a witness even before any other evidence has been taken. There is no precedent, rule of procedure or statute that categorically shields the alleged victim of sexual assault from being compelled to testify at any stage of the prosecution which was instigated by her complaint.

The defendant acknowledges the admissibility of hearsay evidence regarding the alleged offense, if the criteria set out in Rule 5.1(a) WVRCrP-MC are satisfied. One element of the foundation is proof of "a substantial basis for believing . . . [t]hat it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing." Rule 5.1(a)(3),

WVRCrP-MC (emphasis added). The rule is silent regarding the effect of the State asserting that an unreasonable burden exists in behalf of a witness who has been subpoenaed by the defense.

Strictly speaking, the "unreasonable burden" element of Rule 5.1(a) has only been interpreted in the context of determining whether the admission of hearsay was appropriate. See *Peyatt v. Kopp*, 189 W.Va. 114, 428 S.E.2d 535 (1993). In that case the child victims (between the ages of 5 years and 6 years) of an alleged sexual assault were subpoenaed. The circuit court granted the State's motion to quash the subpoenas of the children, based on its finding that:

there was a substantial basis for the magistrate to believe that it would impose an unreasonable burden on the children to testify at the preliminary hearing because of their young age and the traumatic effect it would have on them to testify at that time.

Id. at 189 W.Va. 119, 428 S.E.2d 540.

However, this question has never been presented for review as it pertains to an adult alleged victim of sexual assault. Moreover, the State made no showing of how or why the alleged victim's appearance would be burdensome.

The defendant asked the magistrate not to excuse the witness and to reserve judgment on the motion at least until the State presented its witnesses, but the magistrate assured counsel that the presentation of evidence would not change his mind.

The defendant is seeking relief from this Court by way of an extraordinary writ. An appeal subsequent to the preliminary hearing would not provide adequate relief. The prosecutor stated - on the record, and with complete assurance - that she will

present the case to the grand jury and obtain an indictment regardless of the outcome of the preliminary hearing. Relying on the cynical, but rarely disputed, adage that the grand jury would indict a ham sandwich, it is reasonable to assume that there will be no occasion for a preliminary hearing if the matter is not resolved by this Court before the rescheduled preliminary hearing on April 29, 2010. The ruling is clearly erroneous as a matter of law, and the issue is one of utmost importance in the administration of justice generally. It would be beneficial for both the State and the criminal defense bar to have a precedent on this issue.

The defendant recommends that the Court consider a balancing of interests and obligations in interpreting the "unreasonable burden" element of Rule 5.1(a), WVRCrP-MC. As a result of an uncorroborated accusation of sexual assault - which allegedly occurred on a well-lighted bus, with more than a dozen potential eye-witnesses, none of which saw or heard anything unusual - the defendant was required to post a \$75,000 surety bond, in order to secure the privilege of pre-trial release, so that he could continue his schooling and enjoy the relative freedom of being on bond until the final disposition of this case. He had to employ an attorney. It goes without saying that the stress and anxiety he is experiencing is substantial, considering the burgeoning growth of Orwellian consequences for sexual assault convictions, including lengthy prison sentences, followed by sex offender registration, potentially life-long supervised release, perennial polygraph examinations, as well as economically and socially crippling limitations on freedom of movement and association. Balanced against the devastating consequences that may flow from a sexual assault charge, the comparative "burden" of requiring an adult alleged victim to appear and respond to questions about her

accusation, is relatively slight. The seeming presumption that psychological harm will result from a court appearance is patronizing and demeaning. The State has not provided a factual basis to sustain the implied presumption that the entire cohort of adult alleged victims of sexual offenses must be deemed incapable of appearing in court without suffering some harm. Alleged sexual assault victims already have significant protections, specifically in the form of the rape shield (West Virginia Code § 61-8B-11) and more generally in the power of the court to protect witnesses from being abused, degraded, humiliated or badgered by counsel.

In conclusion, the defendant asks the Court to grant its petition for a writ of mandamus requiring Magistrate Mullins to permit the defendant to call the subpoenaed, adult alleged victim of sexual assault at the preliminary hearing to rebut the State's evidence of probable cause.



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Respondent.

CERTIFICATE OF SERVICE

I, David W. Frame, hereby certify that I served the foregoing "Emergency Petition For Writ Of Mandamus" and "Memorandum Of Law In Support Of Emergency Petition For Writ Of Mandamus" on the respondent, Hershel Mullins, and the State of West Virginia for mailing true copies to the respondent and the Prosecuting Attorney of Monongalia County, West Virginia and the Attorney General's Office, on the 11th of March, 2010, as addressed below:

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Gail Vorhees, Esq.
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Morgantown, WV 26505

Hershel Mullins, Magistrate
265 Spruce St.
Morgantown, WV 26505

Darrell McGraw, Esq.
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