



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT NO: 13-1266

VIRGIL EUGENE SHRADER

PETITIONER/APPELLANT

V.

STATE OF WEST VIRGINIA,

RESPONDENT/APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
MERCER COUNTY, WEST VIRGINIA**

(08-F-117)

REPLY BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

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ARGUMENT

I. Petitioner Did Not Violate His Plea Agreement and Was Not Afforded the Benefit of His Plea Bargain

It is well recognized that while a defendant may receive benefit from a plea agreement, significant rights are surrendered in the process. As a result of the defendant's surrender of those rights, the benefit of his bargain is inviolable. "Because a plea agreement requires a defendant to waive fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous standards of both promise and performance." State ex. Rel. Brewer v. Starcher, 195 W.Va. 185, 192, 465 S.E.2d 185, 192 (1995).

There can be no dispute that the plea agreement in this matter was violated. The only question is, by whom? If the violation was by petitioner, then the trial court's action was proper. If however, petitioner did not violate the agreement, then the trial court necessarily violated the agreement and denied petitioner the benefit of his plea bargain.

The petitioner and respondent have fundamentally opposing views of the process by which this case preceded. According to the respondent's view, the matter was a straightforward affair, albeit one doomed from failure from the outset. According to respondent, the only demand placed upon petitioner was to tell the truth and participate in the counseling. However, respondent's view is overly simplistic and ignores the clear progression in this matter in which ultimately, the petitioner's best interest plea notwithstanding, the court demanded admission and contrition of petitioner.

The plea agreement, in each of each of its iterations required the petitioner to undergo a sexual offender psychiatric evaluation and to abide by "such treatment recommendations as may be contained in said evaluation." (App.7, 84) Unfortunately, none of the evaluations reviewed and utilized by the court made its way into the court file. Therefore, the specific recommendations are not available for review. It is safe to assume however from the discussions on the record that a treatment program was required under the plea. (App. 66-67) There is no evidence that the requirement of the recommendation was that treatment be successfully completed, although a course of treatment with Mr. Brzezinski was successfully completed

It is clear that petitioner did consistently attend his treatment. Although, the responses which petitioner provided to questions proffered by treatment providers subsequent to Mr. Brezinski were not pleasing to those providers, there is no evidence that such responses were given in bad faith. Such responses were also consistent with petitioner's plea.

There is no evidence that petitioner ever failed to attend a single session of treatment or that petitioner refused any aspect of the treatment process. In fact, petitioner's compliance was verified by a number of sources. What petitioner did not do was make admission to offense conduct, choosing instead to maintain the position taken in his no contest, best interest, plea.

If petitioner's failure in treatment was based upon a refusal to attend counseling, which clearly it was not, there would be no question that he had violated the terms of the conditions imposed and should not receive the benefit of his plea bargain.

If, however, petitioner's failure was due to his refusal to make admission to offense conduct then this would be in direct conflict with the terms of his plea agreement.

If the failure was because petitioner had not been honest and forthright, then the alleged failed polygraph examinations are central to the finding and their absence from the record and the lack of confrontation.

Examination of the transcripts of various hearings over the course of the five-year period between the plea and the revocation clearly displays a course wherein the trial court judge became progressively disenchanted with the plea that he had accepted and the lack of the requirement of defendant's admission. The case at bar clearly exhibits the difficulty presented by a best interest plea in a case involving charges of sexual offenses. No doubt a portion of the treatment provider community considers treatment without an admission impossible. However, the fundamental fact is the court accepted a plea agreement with a full understanding of the difficulties inherent in the plea, given the circumstances.

Petitioner's conduct and position remained consistent virtually throughout, changing only when he was essentially instructed by the court that admission was his only hope to avoid incarceration. "I would suggest, if he would like to, that he admit those things and see what that guy's polygraph says about his answer to that." (App. 182).

Perhaps the single greatest difference between the period of the plea and the end of the process with the revocation is the retirement of Assistant Mercer County Prosecutor Deborah Garten.

At the outset, on more than one occasion, Ms. Garten assured the court of the wisdom of the plea agreement from the state's standpoint. However, by 2013, Ms. Garten had retired and the prosecutors representing the State had no real sense of the benefit the State had acquired in striking its deal with petitioner.

Petitioner was provided a plea under which he was permitted to enter a no contest, best interest, plea with a deferred adjudication. Contrary to the courts statements on several occasions, as well as respondent's assertions, petitioner's plea did not require an admission, and he made none.

In its brief, respondent highlights an exchange between the court and counsel for petitioner in which the court inquired as to why petitioner took the plea if he felt he had done nothing wrong. Counsel's response indicated that in light of the evidence the plea was thought to be in his client's best interest. However, examination of the particulars of the plea agreement make clear the attraction of the plea. Under the plea, petitioner had the opportunity, without making any admission to not only to significantly reduce his exposure to the penitentiary but to also have the potential to have no conviction whatsoever at the end of the process. This was literally an offer which the petitioner could not refuse. On the other hand, the plea bargain was very much a benefit to the state as evidenced by the statements of Ms. Garten, a seasoned prosecutor with a reputation for taking a hard line in sexual assault cases.

The respondent characterizes the condition imposed by the court as being only that petitioner be "open, honest and forthright." At the same time, the respondent downplays the utilization of the polygraph examinations as central to the court's finding that petitioner had not complied with the court's conditions. However, without the polygraph examinations, there is no evidence or indication whatsoever that petitioner was not being "open, honest and forthright."

In the absence of direct evidence of petitioner's dishonesty, the only way the court could have reached its conclusion would be to equate petitioner's continued denial of offense conduct with dishonesty. Such an approach is problematic for obvious reasons. First and foremost, it reaches a dispositive conclusion without supporting evidence. However, it is equally troubling because, by its assumption, it precludes the possibility that petitioner did not, in fact, engage in the offense conduct, and that his plea was undertaken as a true best interest plea, by which it was not necessary that he admit such conduct.

Of course, the respondent must necessarily argue the validity of the court's action without reliance on the polygraph examinations. The total lack of evidence of record concerning those results would make reliance on the polygraphs suspect, as well as raise serious issues as to petitioner's confrontation rights as noted in petitioner's initial brief.

To the extent that respondent argues that the petitioner's failure was the failure to complete a treatment program, such argument ignores the fact that petitioner completed a program of treatment with William Brezinski, which spanned a period of

two years. To say that petitioner violated the court's conditions because he could not, or did not, complete a treatment program is simply not true.

Petitioner reiterates his positions as set for in his initial brief, and asserts that the trial court erred in finding that he violated the terms of his plea agreement and further erred in denying him the benefit of his plea agreement.

II. The Notice of Revocation Provided Petitioner Was Constitutionally Deficient

Respondent argues that petitioner received effective notice of the revocation despite the lack of a petition setting forth the claimed violations. Respondent asserts that the constellation of information discussed at prior hearings, particularly the hearing on July 11, 2013, provided petitioner with ample information to satisfy any notice requirements.

Respondent cites to State v. Fraley, 163 W.Va. 542, 258 S.E.2d 129 (1979), as support for its position on this point. However, examination of the Fraley, decision actually indicates support for petitioner's position. The single syllabus point in the case notes that the due process clause of the 14th Amendment to the United States Constitution "requires that before a final hearing in a probation revocation proceeding, the accused be given written notice of claimed probation violations." [emphasis added] Fraley, at Syllabus Pt. The syllabus point also goes on to specify that the required written notice is ideally contained in the revocation petition, but that it could also be in another form, so long as it contained specification for allegations upon which revocation was sought.

In applying these principles to the facts before it, the Fraley, court noted that previous authority did not specify the form which written notice must take. The court went on to find that Fraley had been given sufficient written notice by the production of transcripts of a preliminary hearing, which were given to counsel, and which "reflected the evidence with specificity." It was also noted that that same information was contained in a hearing examiner's summary. 163 W.Va. at 545, 258 S.E.2d at 129.

Unlike Fraley, here respondent points to no documents or writings which can be seen as sufficient substitute for allegations contained in a proper petition. Without such adequate substitute, and therefore no written notice, petitioner's due process rights have been violated.

III. Credit for Pre-Plea Home Confinement is Available to Petitioner

Respondent argues that credit for home confinement for time served on home confinement is simply not available, and therefore cannot be the basis of any abuse of discretion on the part of the trial court. Respondent points to this court's decision in State v. Barnett, 12-0116, 2013 WL 949522 (W.Va. Mar. 12, 2013, Memorandum Decision), as dispositive as to this issue. However, the Barnett case and State v. Hughes, 190 7 W.Va. 518, 476 S.E.2d 189 (1996), to which it cites, notwithstanding, the provisions of subsection (b) of West Virginia Code §62-11B-11 clearly states that "upon conviction of a person, the Circuit Court, Magistrate Court or Municipal Court may, in its discretion, grant credit for time spent on all home incarceration as a condition of bail toward any sentence imposed, if the person is found to have complied

with the terms of the bail." Therefore, the statutory language makes clear that even though the period of home confinement was pre-plea or plea-sentence, it is still available for credit for time served on home confinement at the discretion of the court.

To be clear, petitioner does not argue that he is entitled to credit for his home confinement time as a matter of right, as it is clearly within the discretion of the trial court to grant such credit under the statute. Rather, petitioner's argument was that the trial court had abused its discretion in that respect.

CONCLUSION

FOR THESE REASONS, AS WELL AS REASONS SET FORTH IN PETITIONER'S INITIAL BRIEF, PETITIONER WHEREFORE RESPECTFULLY REQUESTS THE RELIEF SOUGHT BE GRANTED.

VIRGIL EUGENE SHRADER,
By Counsel,



Derrick W. Lefler

CERTIFICATE OF SERVICE

I, Derrick W. Lefler, counsel for Appellant, do hereby certify that I have served a true copy of the foregoing Brief of Appellant to the Supreme Court of Appeals of Southern West Virginia, via Federal Express Mail Services, addressed to said counsel as follows, on this the 28th day of May, 2013:

Laura Young
Assistant Attorney General
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

A handwritten signature in black ink, appearing to read 'D. Lefler', written over a horizontal line.

DERRICK W. LEFLER