

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Richard Allen Smith Jr.,  
Petitioner Below, Petitioner**

vs.) **No. 11-1230** (Mineral County 10-P-56)

**Karen Shoemaker, Chief of Police, Keyser,  
West Virginia, and Mineral County Sheriff's  
Department, Respondents Below, Respondents**

**FILED**  
October 19, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Richard Allen Smith Jr., pro se, appeals the July 6, 2011, order of the Circuit Court of Mineral County dismissing his petition for a declaration that the Keyser, West Virginia Police Department and the Mineral County Sheriff's Department had a statutory duty to respond to his requests under the West Virginia Freedom of Information Act ("FOIA"). Respondent Karen Shoemaker, Chief of Police, Keyser, West Virginia ("Police Department"), by John D. Athey, her attorney, filed a summary response. Respondent Mineral County Sheriff's Department ("Sheriff's Department"), by James W. Courier Jr., its attorney, also filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner is an inmate at the United States Penitentiary–McCreary in the Commonwealth of Kentucky. Based on the record, petitioner was convicted in the United States District Court for the Northern District of West Virginia on federal drug and firearm charges. According to his petition for declaratory relief filed in the circuit court under FOIA, the District Court sentenced petitioner to 646 months of imprisonment.

Petitioner made FOIA requests to the Police Department and the Sheriff's Department to disclose to him all records each has of the multi-jurisdictional drug task force investigation which resulted in his federal convictions.<sup>1</sup> The Police Department responded to petitioner's initial request by informing him that "[a]ll records regarding your investigation and subsequent arrest are

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<sup>1</sup> Petitioner made a similar request of the West Virginia State Police in a prior case. When petitioner filed suit against the State Police under FOIA, the circuit court dismissed it. This Court refused petitioner's appeal of the dismissal.

maintained by [the Potomac Highlands Drug and Violent Crime Task Force] and not by our department.” The Police Department did not respond to petitioner’s follow-up requests. The Sheriff’s Department responded to none of petitioner’s requests.

On June 7, 2010, petitioner filed a petition for a declaration that the Police Department and the Sheriff’s Department had a statutory duty to respond to his FOIA requests. The Police Department filed an answer asking that petitioner’s petition be dismissed, stating that it “do[es] not have any records concerning such investigation because the operation was one in which federal agencies conducted the investigation, with the Keyser Police Department and other local agencies simply providing some assistance.” The Police Department further explained that “[a]ny records of the Keyser Police Department’s involvement [with the federal investigation] would be with the agencies who [sic] ran the operation.” Petitioner filed a reply to the Police Department’s answer.

The Sheriff’s Department filed an answer to petitioner’s petition in which the Sheriff’s Department also stated that it “do[es] not have any records concerning such investigation because the operation was one in which federal agencies conducted the investigation” and “[a]ny records of the Sheriff’s Department’s involvement would be with the agencies who [sic] ran the operation.”<sup>2</sup>

Based upon the parties’ pleadings, the circuit court made the following findings:

1. On or about 09/22/99[,] the Keyser Police Department and the Mineral County Sheriffs [sic] Department assisted a Federal Task Force in searching the home of the Petitioner in Keyser, Mineral County, West Virginia.
2. The Petitioner had been the subject of an investigation by the Federal Task Force for narcotics and firearm trafficking.
3. All investigation was done by and all search warrants were obtained by the Task Force.
4. The Keyser City Police and Mineral County Sheriff’s Department were requested only to assist in the execution of the search warrant and turned all information obtained, if any, over to the Task Force.
5. No records of the event were maintained by the Respondents and they have none to provide under [FOIA].

Accordingly, the circuit court dismissed petitioner’s petition.

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<sup>2</sup> Petitioner contends that the Sheriff’s Department never responded to his petition. However, the filing of the Sheriff’s Department’s answer has been confirmed by a review of the case’s docket sheet.

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Petitioner argues that when the circuit court wants to dismiss a case, the plaintiff/petitioner is supposed to have the benefit of all reasonable inferences supporting his factual claims and allegations. Petitioner further argues that FOIA requires a public body to respond to citizens’ requests for public information and that the Police Department and the Sheriff’s Department should not be allowed to arbitrarily deny his FOIA requests. Petitioner asserts that it is incredulous to believe that two departments, which participated in the investigation of petitioner and his subsequent federal conviction, do not have any records pertaining to him. In its response, the Police Department asserts that the circuit court did not err in determining that because it had been an investigation by a federal task force, local departments would not have any records of petitioner’s arrest. In its response, the Sheriff’s Department asserts that it has no records on petitioner to provide to him and argues that the circuit court properly dismissed his petition.

This Court has previously disapproved of inmates’ use of FOIA to evade the rules and regulations that normally apply to them as inmates. “An inmate may not use [FOIA], *W. Va. Code* § 29B-1-1 *et seq.*, to obtain court records for the purpose of filing a petition for writ of habeas corpus.” Syl. Pt. 3, in part, *State ex rel. Wyant v. Brotherton*, 214 W.Va. 434, 589 S.E.2d 812 (2003). Instead, a state inmate is limited to the discovery available to him under the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. While he is a federal inmate, the *Wyant* Court’s rationale is equally applicable to petitioner’s attempted use of FOIA. Petitioner is a federal inmate, and his case is a federal one. If petitioner wants records from the federal investigation that led to his criminal case, he needs to request those records from the District Court, and in so doing, comply with the District Court’s own procedural rules governing post-conviction proceedings. State courts should not grant what petitioner ought to ask of the federal court. Therefore, this Court concludes that the circuit court did not err in dismissing petitioner’s FOIA petition.

For the foregoing reasons, we find no error in the circuit court’s decision and affirm its July 6, 2011, order dismissing petitioner’s petition.

Affirmed.

**ISSUED: October 19, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Thomas E. McHugh