

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

**State of West Virginia ex rel. Kay Deakins,
Petitioner Below, Petitioner**

vs) No. 11-1272 (Mercer County 11-C-392-OA)

**Honorable Michael Flanigan, Magistrate,
Respondent Below, Respondent**

FILED

June 25, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kay Deakins, by counsel Natalie N. Hager, appeals the Circuit Court of Mercer County's order dated August 31, 2011, affirming the magistrate court's order denying petitioner a trial by jury. Magistrate Michael Flanigan, by counsel Thomas W. Rodd, has filed his response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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 was arrested on charges of obstructing a police officer, assault on a police officer, and battery on an officer. She was informed by the magistrate on duty during arraignment that she had twenty days to request a jury trial in writing, but she refused to sign the arraignment form. Counsel was appointed the day after her arraignment, but he failed to move for a jury trial within the twenty days required by West Virginia Code § 50-5-8(b). Petitioner first requested a jury trial almost ninety days after her arraignment, and that request was denied as untimely. Petitioner hired retained counsel, who requested a jury trial upon his initial appearance, and that request was also denied as untimely. Petitioner then had another attorney appointed, who also requested a jury trial, but likewise, that request was denied. Petitioner then filed a writ of prohibition or mandamus to the circuit court, seeking to require the magistrate to convene a jury for her trial. The writ was denied by the circuit court, after the circuit court found that petitioner failed to file a timely jury trial demand and did not provide the magistrate court with any notice or motion requesting a hearing pursuant to Rule 26(b) of the West Virginia Rules of Criminal Procedure for the Magistrate Courts based on unavoidable cause for her delay in filing her jury trial demand. The circuit court points out that although petitioner has a right to trial by jury, that right may be waived if petitioner fails to request a jury trial in writing within 20 days of arraignment or appointment of counsel pursuant to W.Va. Code § 50-5-8(b).

On appeal, petitioner now argues that a writ of mandamus and/or a writ of prohibition is her only legal remedy. She argues that while she was presented with arraignment paperwork, she refused to sign the same, including the form that contained the procedural requirements for request of a jury trial. Petitioner further argues that her initial appointed counsel failed to file a request for a jury trial. She also argues that she has demonstrated unavoidable cause for the delay in filing her demand for a jury trial, and that the appointment of new counsel should restart the twenty-day period in which to file a demand for a jury trial.

Respondent argues that petitioner was personally informed at her arraignment of the twenty-day time limit, and, although she refused to sign the documents, she has not argued that she did not receive them. There is no question that petitioner failed to file within twenty days, and respondent argues that petitioner failed to show “unavoidable cause” in the delay in filing pursuant to Rule 26(b) of the Rules of Criminal Procedure for the Magistrate Courts, which would have allowed her to extend the twenty-day time limit. In fact, respondent notes that petitioner never filed a Rule 26(b) motion to attempt to extend the time for filing her demand for a jury trial.

Having reviewed the circuit court’s well-reasoned “Order Denying Petition for Writ of Prohibition and/or Mandamus” and finding no error, this Court fully incorporates and adopts said order, dated August 31, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm the circuit court’s decision.

Affirmed.

ISSUED: June 25, 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