No. 32875 – *State of West Virginia ex rel. Pamela Jean Games-Neely v. Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, and Jason Eric VanMetre*

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OF WEST VIRGINIA

Starcher, J., dissenting:

This case is about a West Virginia prosecuting attorney who seeks to stop the enforcement of a statutorily-mandated circuit court order for the extradition of a defendant from West Virginia to Virginia. The defendant was charged with criminal conduct in both Virginia and West Virginia, but had been admitted to bail only on the West Virginia charges. The defendant was being held in a West Virginia jail in default of bond on a fugitive warrant based on the Virginia charges.

I disagree with the majority for several reasons.

First, the majority allows a prosecuting attorney to trump a valid order of a circuit court which was mandated by our extradition statute. In my opinion, allowing a decision of a prosecuting attorney to trump a circuit court order is contrary to our historical jurisprudence. I am also of the opinion that such practice is in no way suggested by the language of the *Uniform Criminal Extradition Act* ("the Act").

Second, I believe the statute relied upon by the majority was not intended to vest in the prosecuting attorney the power, acting alone, to decide questions relating to waiver of extradition. Historically, the statute was intended to prevent the act of extradition from constituting a waiver of jurisdiction or pardoning of the defendant by the asylum state.

Third, I believe that the majority opinion renders a portion of our statute meaningless, thereby violating one of the most basic principles of statutory construction – that the Legislature will not enact a meaningless statute.

Finally, the majority decision may lead to absurd results in other factual scenarios, thereby violating another rule of statutory construction.

To better understand my four objections, let us first look at the statute that was misconstrued by the majority opinion. *W.Va. Code*, 5-1-11 [1999] states, in relevant part, as follows:

> (b) Any person arrested in this state charged with having committed any crime in another state . . . may waive the issuance and service of the . . . [governor's warrant of arrest] . . . by executing or subscribing in the presence of a judge . . . a writing which states that he consents to return to the demanding state: Provided, That before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights . . . .
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> If and when such consent has been duly executed it *shall* forthwith be forwarded to the office of the governor . . . . The judge *shall* direct the officer having such person in custody to deliver forthwith such person to the . . . demanding state . . . Provided, That nothing in this subdivision shall be deemed . . . to limit the powers, rights, or duties of the officers . . . of this state.
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> (d) Nothing in this article contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for an offense committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any offense committed within this state, nor shall any proceedings had under this article which result in, or fail to result in, extradition, be

> deemed a waiver by this state of any rights, privileges or jurisdiction in any way whatsoever.

(Emphasis added.)

The underpinnings of our law relating to extradition are found in the Art. IV, § 2 of the *United States Constitution*, which states, in part:

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. . . .

In 1793 Congress enacted statutes to provide the machinery for execution of this constitutional provision. However, since the federal law did not cover every conceivable scenario which could arise in the context of extradition, the states were left free to enact laws not inconsistent with the *United States Constitution* and the federal law.

Because, over the years various states had developed different laws relating to extradition, a Uniform Criminal Extradition Act was promoted and eventually enacted in some form by most states.[1] West Virginia enacted the Act in 1937, and the Legislature from time-to-time has amended the Act.[2] Presently, fifty-one states and territories of the United

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[1]The revised Uniform Criminal Extradition Act was approved by the National Conference of Commissioners on Uniform State Laws, and the American Bar Association, in 1936. It was derived from a prior Uniform Criminal Extradition Act. The revised 1936 Act has since been superseded by the Uniform Extradition and Rendition Act (1980) which was proposed by the National Conference of Commissioners of Uniform State Laws. However, only North Dakota to date has enacted the 1980 version. Volume 11, *Uniform Laws Annotated*, Criminal Law and Procedure, Appendix I, page 291.

[2]*See W.Va. Code*, 5-1-7 though 5-1-13 [1999].

States have adopted some form of the Act.[3]

The Act was promoted to remove some of the impediments in extradition proceedings. Prior to the adoption of the Act, in some states extradition operated as a *waiver of jurisdiction* by the asylum state. An example of this principle prior to the Act is found in *In Re Whittington*, 34 Cal. App. 344, 167 P. 404 (1917). In *Whittington*, the petitioner was arrested in Texas for a crime committed in Texas. Texas subsequently honored a requisition from the governor of California for custody of the petitioner to answer to a charge of murder in California. After being taken to California, the California murder case was dismissed. Texas then sought the return of the petitioner to answer the charges pending in Texas. The petitioner resisted being returned to Texas, and the question presented to the California court was whether the petitioner had "fled from justice" so as to fall within the provisions of *U.S. Constitution,* Art. IV, § 2 – thereby subject to being returned to Texas. The California court held that because the petitioner did not voluntarily leave the state of Texas, he could not be considered a "fugitive from justice." Therefore, since there was no authority for Texas to regain custody, Texas, in releasing the petitioner to California, was deemed to have *waived jurisdiction* to its right to have the petitioner returned to Texas.[4]

Also, prior to the Act, in some jurisdictions extradition was considered as

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[3]*See* Report of the National Conference of Commissioners on Uniform State Laws, current through 2004 annual meeting. 11 U.L.A. Crim.Law and Proc. (Master ed., cum. annual pocket part 1908).

[4]*See also People ex rel. Barrett v. Bartley*, 383 Ill. 437, 50 N.E.2d 517 (1943).

constituting a *pardon*, or surrender of jurisdiction, by the asylum state. *See Ex parte Guy*, 41 Okla. Crim. 1, 269 P. 782 (1928). In *Guy*, the petitioner was tried, convicted and sentenced on a drug offense in Oklahoma. The Oklahoma governor released the petitioner to federal authorities. The release order specifically reserved to Oklahoma the right to have the petitioner brought back to Oklahoma to serve the remainder of his Oklahoma sentence. The federal authorities tried, convicted and sentenced the petitioner. When the Oklahoma authorities attempted to have the petitioner returned to Oklahoma, the action was challenged. The Oklahoma court held that Oklahoma's releasing the prisoner to the federal authorities was, in effect, a *pardon* exercised pursuant to Oklahoma's constitution, despite the conditions in the order for his return.

It was problems created by *waiver of jurisdiction* and *pardon* principles, as well as other differences between states, that eventually led to the drafting and ultimate passage of the Act by most states.

It is clear that the portion of the Act found in *W.Va. Code*, 5-1-11(d) was designed to prevent the waiver of jurisdiction and the pardon principles from adversely affecting an asylum state's right, power or privilege to try the demanded person for an offense committed in the asylum state. I find nothing that suggests, as the majority holds, historical or otherwise, that the language of this statute was designed to give a prosecuting attorney the sole and ultimate authority in deciding whether or not a waiver of extradition would result in the person being turned over to the authorities of a demanding state. *W.Va. Code*, 5-1-11(d) should be read and applied as preserving the state's right to proceed with the

prosecution of a defendant after he has been extradited to a demanding state and later returned to an asylum state.

The majority opinion correctly cites to the following principle of statutory construction in Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959):

> When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

The majority, however, does not consider corollary principles of statutory construction which I believe also apply to this case. In Syllabus Point 5, *Fruehauf v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975), we stated:

> Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

We also have said that "[i]n construing a statute, significance and effect must, if possible, be given to every section, clause, word, or part of the statute." *See State v. General Daniel Morgan Post No. 548, V.F.W.*, *supra*. The majority opinion either failed to consider or ignored these principles of statutory construction.

By failing to apply these principles, the majority ignores completely the second paragraph of *W.Va. Code*, 5-1-11(b) which reads, in part, as follows:

> If and when such consent [waiver] has been duly executed it *shall* forthwith be forwarded to the office of the governor of this state and be filed by him in the office of the secretary of state. *The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state*, and shall deliver or cause to be delivered to such agent or agents a copy of such consent. . . .

(Emphasis added.)

Our Court has also said: "It is always presumed that the legislature will not enact a meaningless or useless statute." Syllabus Point 4, *State of West Virginia ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, V.F.W.*, 147 W.Va. 645, 129 S.E.2d 921 (1963). *See also* 73 Am.Jur.2d *Statutes* 172. The Legislature clearly stated in *W.Va. Code*, 5-1-11(b), *supra*, that a copy of a waiver of extradition "shall forthwith be forwarded to the office of the governor." The governor has the right under the statute to refuse to surrender a person who is requisitioned by the authorities in a demanding state.[5] Given the presumption that the Legislature will not enact a meaningless or useless act, it is clear that these provisions should be construed as giving *the governor*, *not the prosecuting attorney*, the opportunity to refuse

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[5]*See W.Va. Code*, 5-1-9 (j) (2002).

> If a criminal prosecution has been instituted against the person under the laws of this state and is still pending, the governor, in his or her discretion, either may surrender him or her on demand of the executive authority of another state or hold him or her until he or she has been tried and discharged or convicted and punished in this state . . .

See also W.Va. Code, 5-1-11(f), which states:

> Nothing in this section shall be construed to limit the authority of the governor, at his or her own instance, to refuse to honor an extradition demand from another jurisdiction.

extradition where a waiver is involved. The majority opinion, contrary to *Hardesty v. Aracoma-Chief Logan*, *supra*, would render these provisions of the act requiring the forwarding of the waiver to the governor a meaningless act.

Equally disturbing, and perhaps more so, is that under the majority's opinion, a circuit judge order issued pursuant to the mandatory language of *W.Va. Code*, 5-1-11(b) is now subservient to the wishes of the prosecuting attorney. Surely the drafters of the *Uniform Criminal Extradition Act* never intended such a result.

Finally, I dissent from the majority opinion because permitting a prosecuting attorney to trump a statutorily-mandated order of a circuit judge may lead to absurd results in some cases. We said in Syllabus Point 2 of *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938):

> Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce an absurdity, will be made.

Suppose that a person is charged with a misdemeanor property crime in this state. Suppose further that the same person is charged with a more serious offense – say murder, kidnaping, sexual assault of a minor, or aggravated robbery – in a demanding state. Suppose also that witnesses in the case in the demanding state were elderly or sick with terminal illness. Finally, assume that the prosecuting attorney in this state insisted, as the majority opinion would allow, upon first trying the misdemeanor property crime before allowing the person to be extradited. Under such circumstances, the person could escape conviction in the demanding state if critical evidence became unavailable on the more serious

offense due to the unreasonable position of our state's prosecuting attorney.

Continuing with the same example, suppose the governor was contacted as the statute requires, and suppose that the governor expressly consented to the extradition upon waiver of extradition by the defendant. The majority decision suggests that the demand by the prosecuting attorney would not only trump the mandatory order of the circuit court providing for extradition upon waiver, but also would trump the express consent of the governor. The drafters of the Act never envisioned such results.

A more reasonable construction of the statute would be to require the circuit court, absent intervention by the governor, to resolve any disagreements between the prosecuting authorities in this state and a demanding state.

The latest Uniform Extradition and Rendition Act[6] was approved by the National Conference of Commissioners on Uniform State Laws in 1980. The commentary to the new Act suggests that disputes may arise between the prosecuting authorities of demanding and asylum states. In discussing the circumstances, such as the instant case, the commentary states that "presumably the prosecutors of the asylum and demanding states would then discuss which warrant would proceed first." The comment does not, however, say how to resolve a dispute in the event that the prosecutors cannot agree.

The most rational approach, and the one most consistent with our jurisprudence, is when a prosecuting attorney of the asylum state and a prosecuting attorney

[6]To date adopted only in North Dakota, *see* n.1.

of the demanding state cannot agree on a decision as to whether or not to extradite, absent intervention by the governor, our circuit judges should make the final determination. Such decisions by circuit judges would serve as little more than docket management decisions, which are made every day by circuit judges. Clearly, in this case the circuit judge was aware that when the Virginia case was completed, the local prosecuting attorney could regain custody of the defendant under *W.Va. Code*, 5-1-11 (1999) and try the defendant in West Virginia. It should be the circuit judge's call – not the prosecuting attorney's call – as to whether or not the defendant should be released to a demanding state.

West Virginia has highly-qualified general jurisdiction judges. Our circuit judges are quite capable of serving as intermediaries between the prosecuting officials of our state and a demanding state in the extradition waiver process. Resolving disputes is what our circuit judges do.

Finally, what has happened in this case is exacerbated by the fact that the fugitive was already admitted to bail on the West Virginia charges. The effect of the majority decision is to allow a West Virginia prosecuting attorney to hold a defendant in a West Virginia jail for a crime allegedly committed in another state, even though he has made bond on his West Virginia crime. Sadly, this is likely the result that our state prosecuting attorney wanted, if for no other reason than to pressure the defendant into a plea.

Respectfully, I dissent.