No. 32976 - *State of West Virginia ex rel. Robert L. McCabe v. Evelyn Seifert, Warden, Northern Correctional Center and the West Virginia Division of Corrections Parole Services*

FILED
November 29, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

My genuine dismay and concern with the majority opinion in this case is founded on three grounds: (1) the majority's seeming surrender of this Court's constitutionally bestowed power in habeas corpus matters; (2) the majority's use of legerdemain in order to find a viable issue moot; and (3) the majority's refusal to settle the recurring question of whether the avenue of a writ of coram nobis is still open in a criminal context.

1. Constitutional Grant of Authority

In West Virginia, the authority of this Court and the circuit courts to issue writs of habeas corpus is granted by our State Constitution in Article VIII, Sections 3 and 6.[1] In this state's Post-Conviction Habeas Corpus Act, West Virginia Code Chapter 53, Article 4A,

[1]W.Va. Const. art. VIII, § 3 ("The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus . . . ."); W.Va. Const. art. VIII, § 6 ("Circuit courts shall have original and general jurisdiction . . . of proceedings in habeas corpus . . . ."); *see also* W.Va. Const. art. III, § 4 ("The privilege of the writ of habeas corpus shall not be suspended.").

the Legislature undertook to *supplant*, not merely supplement, that authority by boldly reciting in the Post-Conviction Habeas Corpus Act that the Act

> comprehends and takes the place of all other common law and statutory remedies, including, but not limited to, the writ of habeas corpus ad subjiciendum provided for in article four [§§ 53-4-1 et.seq.] of this chapter, which have heretofore been available for challenging the validity of a conviction or sentence and shall be used exclusively in lieu thereof[.]

W.Va. Code § 53-4A-1(e) (1967) (Repl. Vol. 2000). The majority opinion in this case represents an abject surrender of this Court's power to define the common law limits of the writ of habeas corpus, to which surrender I strongly and adamantly object.

The majority tells us that it is not deferring to the language of the Post-Conviction Habeas Corpus Act. Such deference is indeed improper because the people of this state, speaking through our constitution, expressly and unambiguously placed oversight of matters involving restraints on liberty directly within the jurisdiction of the state courts. Addressing the significance of this direct entrustment by the people in our constitution, this Court in *State ex rel. Burgett v. Oakley*, 155 W.Va. 276, 184 S.E.2d 318 (1971), considered earlier decisions of this Court:

> In the case of *Donaldson v. Voltz*, 19 W.Va. 156 (1881), in declaring certain legislative restrictions placed upon the exercise of the exemption provided in Article VI, Section 48, null and void, this Court recognized that this constitutional provision authorized the legislature to enact certain regulations, but said:

> "* * * Where a Constitution establishes a right but has not particularly designated the manner of its exercise, it is within the constitutional limits of the legislative power to adopt all necessary regulations in regard to the time and mode of exercising it, which are *reasonable and uniform and designed to secure and facilitate the exercise of such right.* Such a construction would afford no warrant for such an exercise of the legislative power, as under the pretense of regulating should subvert or destroy the right itself. (Emphasis added.)"
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> In the case of *Buskirk v. Judge of Circuit Court*, 7 W.Va. 91, decided in 1873, Judge Haymond said:
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> "The writs of *habeas corpus*, *mandamus* and prohibition are highly esteemed and appreciated by the intelligent and patriotic of all free, well regulated governments, and the absence and denial of them, as remedies to the citizen has ever been a source of well founded grief and lamentation by the same class in governments of oppression and despotism. So strong has been the regard and appreciation of the people of this State for these writs they have not been content to leave them . . . dependent upon mere act of the Legislature, but they have . . . made them constitutional writs . . . . * * * I am clearly of opinion that it was not the purpose or intention of the Legislature in enacting that section to prohibit this court from hearing application for, and awarding writs of . . . *habeas corpus* . . . ."

155 W.Va. at 279-80, 184 S.E.2d at 320 (emphasis in original). As a result of this discussion, it was held in syllabus point two of *Burgett* that:

> The intent of the Post-Conviction Habeas Corpus Act, Code, 53-4A-1 *et seq.*, as amended, was to liberalize, rather than restrict, the exercise of the writ of habeas corpus in criminal cases.

The majority in the case at hand says it recognized this holding from *Burgett*. However, since the conclusion reached by the majority is in direct conflict with the *Burgett* holding, I surmise from the majority's discussion that it reached its conclusion on what is the unreasonable ground that parole poses no infringement on individual liberty except in narrow circumstances attacking specific conditions imposed during the parole period. The history of habeas corpus and its application by courts in other jurisdictions does not limit the writ to such a narrow scope.

2. Continuing Viability of Issue Raised

The majority held Appellant's claim for relief from a sentence of imprisonment moot because Appellant has been released from prison and placed on parole. While the majority asserted that it was not basing its decision on any distinction between incarceration and parole, it acknowledged that Appellant's complaint questioned the proper termination date for his parole supervision – which were he to be again imprisoned for parole violation, would also be the date of termination of his sentence of imprisonment. It is clearly disingenuous to find this issue moot when the termination date thus has vigor as a critical component of the conditions of parole. This type of fancy footwork to circumvent the issue raised would be funny if it were not so serious.

The writ of habeas corpus was long ago dubbed the "great writ" by the United States Supreme Court in *Ex Parte Bollman*, 4 Cranch 75, 95 (1807). In the case of *Peyton*

v. Rowe, 391 U.S. 54, 58 (1968), the Supreme Court explained the purpose of the writ of habeas corpus in the following way: "The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny." (Footnote omitted.) The court in *Peyton* went on to observe that due to its lofty purpose the writ of habeas corpus is "both the symbol and guardian of individual liberty."

In the context of a post-conviction collateral attack, this Court has never held as a point of law that actual or implied incarceration is required to demonstrate judicially cognizable impingement of liberty in order to invoke habeas jurisdiction of the courts. Indeed, we have expressly acknowledged "that many state and federal courts have determined that parole or probation is sufficient restriction of freedom to warrant a writ [of habeas corpus] be issued." *Kemp v. State*, 203 W.Va. 1, 2 n. 3, 506 S.E.2d 38, 39 n. 3 (1997).[2] Other courts have explained the basis of our *Kemp* comment. For example, the Supreme Court of Washington in *Monohan v. Burdman*, aptly summarized the reasons for permitting parolees to pursue habeas corpus actions regardless of the substance of the actual challenge raised by explaining that:

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[2]The following cases support this acknowledgment: *Jones v. Cunningham*, 371 U.S. 236 (1963); *In re Sturm*, 521 P.2d 97 (Cal. 1974); *Schooley v. Wilson*, 374 P.2d 353 (Colo. 1962); *Carnley v. Cochran*, 123 So. 2d 249, *rev'd on other grounds*, 369 U.S. 506 (Fla. 1960); *Baier v. State*, 419 P.2d 865 (Kan. 1966); *Thoresen v. State*, 239 A.2d 654 (Me. 1968); *State ex rel. Atkinson v. Tahash* 142 N.W.2d 294 (Minn. 1966); *State v. Gray*, 406 S.W.2d 580 (Mo. 1966); *Garnick v. Miller*, 403 P.2d 850 (Nev. 1965); *Commonwealth ex rel. Ensor v. Cummings*, 215A.2d 651 (Pa. 1966); *Ex Parte Elliott*, 746 S.W. 2d 762 (Tex Crim. 1988); *Monohan v. Burdman*, 530 P.2d 334 (Wash. 1975).

> [T]he restrictions, limitations, and conditions attached to the usual parole status constitute a form of "custody" . . . because a parolee, unlike the ordinary citizen is subject to supervision by his parole officer, limited in his mode, manner, and place of living and travel, restricted as to his associates and type of employment, and subject to reincarceration in the event of a breach of any conditions of his parole. Thus he is not a free man in the commonly accepted sense.

530 P.2d at 336-37. A similar litany of restrictions on liberty was recited by the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972), and the high court added dimension to the level of restraint on freedom a parolee may encounter in one of its more recent decisions. In *Samson v. California*, 126 S.Ct. 2193 (2006), the Supreme Court examined the constitutionality of a California law requiring a candidate for parole to provide advance consent to warrantless search and seizure for any or no reason by a law enforcement officer as a condition for release on parole. In reaching the conclusion that parolees are not protected under the Fourth Amendment against suspicionless searches by law enforcement, the high court observed that "parolees enjoy even less of the average citizen's absolute liberty than do probationers." *Id*. at 2198.

On the other hand, I appreciate that the right of a parolee to seek post-conviction relief through habeas corpus is not universally recognized, (*see* Andrea G. Nadel, *When is a Person in Custody of Governmental Authorities for Purpose of Exercise of State Remedy of Habeas Corpus – Modern Cases*, 26 A.L.R. 4th 455, 466 (1983)). However, the

raw numbers on each side of this issue is not a determinative factor in this debate considering the constitutional dimension habeas corpus has in this state.

The judicial authority granted – and the concomitant duty imposed – for habeas corpus proceedings under the West Virginia Constitution state simply and plainly the constitutional priority of our Court's jurisdiction to address cases in which any person duly alleges and seeks a remedy for material impediments to that person's liberty. The majority labors under the mistaken belief both that the Legislature can, and that the Legislature in fact intended to, deprive a citizen of the habeas corpus remedy to end an alleged material restraint on one's liberty arising out of the status of being on parole. The majority misses the point that parole imposes material infringements on otherwise constitutionally protected liberty interests.

3. Writ of Coram Nobis

The majority failed once again to answer a simple – if somewhat obscure – pleading question that has been left unanswered in our courts since the West Virginia Rules of Civil Procedure became effective nearly fifty years ago: When the writ of coram nobis was abolished in civil cases in 1960,[3] did the writ survive for use in criminal cases? Rather than give a forthright answer to this question, the majority suggested Appellant might have

[3]*See* W.Va. R. Civ. P. 60 (b).

relief from a clear sentencing error by filing "a motion" in a lower court.[4] I see no good reason for this Court to keep sidestepping this question.[5]

To be clear, this dissent has nothing at all to do with letting parolees go free. The heartfelt concern I raise is that the majority is being less than faithful and resolute in living up to the responsibility entrusted to the judiciary by the people of this state for review by habeas corpus where significant impediments to liberty interests are alleged. As long as freedoms may be unlawfully curtailed, the people of this state have said through their constitution that there is a right to seek vindication of those freedoms in the judicial system by means of habeas corpus. Accordingly, I dissent from the majority's refusal to fulfill the sacred obligation entrusted to the courts in this case.

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[4]In addition to finding this "solution" unnecessarily circuitous, I also fail to understand under what authority the lower court will act on such a motion since the majority has both dismissed the issue as moot and refused to resolve the question regarding writs of coram nobis.

[5]The vitality of the writ of coram nobis in the context of post-conviction remedies has been expressly questioned in footnotes of this Court's opinions since 1995. *See State v. Eddie Tosh K.*, 194 W.Va. 354, 363 n. 10, 460 S.E.2d 489, 498 n. 10 (1995); *Kemp v. State*, 203 W.Va. 1, 2 n. 4, 506 S.E.2d 38, 39 n. 4 (1997); *State ex rel. Richey v. Hill*, 216 W.Va. 155, 162 n. 10, 603 S.E.2d 177, 184 n. 10 (2004).