No. 33203 *State of West Virginia ex rel. Stephanie Sue Gibson v. Honorable John S. Hrko, Judge of the Circuit Court of Wyoming County, and G. Todd Houck, Prosecuting Attorney for Wyoming County, West Virginia*

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OF WEST VIRGINIA

Starcher, J., concurring in part, dissenting in part:

I concur with the majority that a writ of prohibition should be denied in this case, although I do so for different reasons than those stated in the majority opinion.

It is clear that the procedures for executing a plea agreement, as set forth in *W.V.R.Cr.P.* Rule 11(e), were not followed by either the prosecutor or counsel for the defendant. However, verbal agreements can be and are enforceable in appropriate circumstances. *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983). But the perils of verbal agreements are clearly illustrated in this case – including uncertainty and a tainted judicial process.

In the present case, both the prosecutor and defense counsel admit that *an agreement* was reached. It is also clear that the agreement included a requirement that the petitioner cooperate and provide assistance to the state in the prosecution of the petitioner's co-defendant/husband. In exchange for cooperation and assistance, the petitioner was to be given "immunity." Therefore, converse to the reasoning and discussion set forth in the majority opinion, the issue is not whether an enforceable agreement was reached, or whether it required cooperation, or even whether it required the granting of immunity. Instead, the issue – the dispute – is the scope and extent of the immunity to be given the petitioner. The petitioner argues that in exchange for her cooperation, she was to be granted full immunity

and the charges against her were to be dismissed. The state maintains that it offered only limited use immunity, and never agreed to dismiss the charges against the petitioner.

The state does not dispute that the petitioner, in accord with her agreement, cooperated and did everything that was asked of her. Petitioner's cooperation included being debriefed by the prosecutor and law enforcement, giving a statement that incriminated her co-defendant, and appearing daily at the courthouse during co-defendant's trial, as requested by the state, to testify if called upon. Petitioner's testimony was ultimately not required because the co-defendant reached a plea agreement with the state prior to the conclusion of his trial, thus obviating the need for petitioner's testimony.

This is not an uncommon outcome of cases involving two or more defendants where one defendant agrees to cooperate with the state. In fact, it often is a prosecutor's hoped-for outcome that a non-cooperating defendant – faced with the knowledge that a co-defendant is prepared to offer evidence against him – will decide to enter into a plea agreement and end the case. Therefore, the cooperation of a co-defendant is a clear benefit to the state and not speculative as the majority opinion concludes.

Nonetheless, I concur with the results in this case because I believe it is clear *from the record* that the agreement actually offered never required dismissal of the charges against the petitioner. But I also believe, *based on common sense*, that both petitioner and her counsel were genuine in their belief that dismissal of the charges against the petitioner was a part of the agreement. I believe this because I see no reason or benefit to the petitioner from the agreement, absent a belief by her that she would benefit from it. As the agreement

actually stands, the petitioner waived her fundamental right not to cooperate with the state, gave a damning statement against her spouse, and was to testify against him at his trial, if called. She was to do this for a benefit to her of what – use immunity only? Where is the benefit to the petitioner in this agreement? I see none, nor can I envision any seasoned criminal defense attorney recommending such an agreement.

While I concur with the outcome, I strongly dissent to the reasoning stated in the majority opinion. The majority opinion concludes, in part, that "[w]ithout testifying at trial, [petitioner] had no reason to expect enforcement of any alleged plea agreement because she was unable to perform her end of the deal." This reasoning is problematic for two reasons.

First, the majority opinion's conclusion that ". . . [petitioner] was unable to perform her end of the deal" is completely unsubstantiated. An agreement between the state and the petitioner was reached. That agreement required the petitioner to perform by: (a) being debriefed by the state, (b) showing up at all required court appearances, and (c) testifying against her co-defendant if she was called upon by the state.

We know from the record in this case that the petitioner was debriefed, that she did show up at the courthouse daily during her co-defendant's trial, and that the state *did not* call her to testify because her testimony ultimately became unnecessary when the co-defendant reached his own plea agreement during the trial and pled guilty. The conclusion in the majority opinion that the ". . . [petitioner] was unable to perform her end of the deal" is not factually accurate. That the petitioner's testimony was not needed does not mean

petitioner was not able to and did not perform, as the majority concludes. The petitioner *did* "perform" by doing all that was required and asked of her.

The second, and even more troubling, aspect of the majority opinion is the conclusion that because the petitioner had not fully performed the agreement, she "had no reason to expect enforcement." I am concerned that this language may be construed by prosecutors, in instances when a defendant's cooperation is no longer needed by the state, as a green light to renege on agreements when a defendant has done all that was asked of them.

I also strongly disagree that the state can be relieved of a plea agreement under facts and circumstances found in this case. I believe that the majority opinion's language is too broad, and the majority has – at a minimum – created uncertainty in the enforceability of plea agreements, and done so in a manner completely unnecessary to decide this case. It will be obvious to the defense bar that they must now anticipate that a door has been opened for prosecutors to withdraw from plea agreements in situations such as those presented by this case. To avoid a similar result, the defense bar should hereafter require the inclusion of language in a plea agreement that anticipates such situations.

Finally, I also want to discuss another aspect of this case, one that was not fully vetted in the majority opinion. It is that the state's negotiations in this case may have tainted the judicial process. I say this because the agreement in this case resulted in a defendant waiving fundamental rights while receiving absolutely no benefit for herself. On the other hand, the state benefitted from the agreement. Had *W.V.R.Cr.P.* Rule 11(e) been properly

followed and the agreement brought before the court for review, uncertainty of the terms within the agreement likely would have been discovered.

Unfortunately, in this case the petitioner received nothing from the state in exchange for having waived her fundamental rights, and there is little relief that we can give her for having waived those rights. This is troubling.

The record reflects that the trial judge *also* was troubled by the state's negotiations with the petitioner. The trial judge said:

> In this case negotiations with the State have tainted the process. I will not enforce the plea bargain agreement and turn your client loose, but I will not be a party to a mockery of our judicial process. I am the keeper of justice . . ..[1]

I agree with the trial judge that the state's negotiations with the petitioner and her counsel have tainted the process. I also believe that the results of negotiations are still likely to infringe upon the petitioner's ability to receive a fair trial. While the trial judge has prohibited the prosecutor from using any information obtained in debriefing the petitioner, neither the prosecutor, his investigators or law enforcement officers involved in the case, can unlearn or unhear that which was learned or heard *only* as a result of the agreement reached with the petitioner. Nor can the state give back to the petitioner the benefit it realized from her cooperation – having a more clear picture of the events that occurred and the influence

[1]The trial judge denied the state the right to use any information obtained as a result of the negotiations against the petitioner. He said, "I can't allow the State to make an agreement and then say that it didn't exist and use the fruits that they have garnered during the agreement."

of her cooperation on the decision of petitioner's co-defendant to execute a plea agreement of his own, and then plead guilty.

Accordingly, while I concur with the result of this case, I dissent to the reasons assigned by the majority in its opinion.