No. 33213 – *State of West Virginia ex rel. Keith O'Dell McCourt v. The Honorable Jack Alsop, Judge of the Circuit Court of Webster County*

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OF WEST VIRGINIA

Albright, Justice, concurring:

I concur with the majority's ultimate holding that the writ should not be granted based upon the absence of reliable evidence indicating that the lower court had knowledge of the Appellant's location during the period in which he was absent from this jurisdiction. In reaching its conclusion, the majority relies in part upon the syllabus point adopted in *State v. Carter,* 204 W.Va. 491, 513 S.E.2d 718 (1998), which reads as follows:

> Pursuant to W.Va.Code § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor *and arraigned in a court of competent jurisdiction*, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute.

204 W.Va. at 491, 513 S.E.2d at 718 (emphasis supplied).

I write separately because I believe that the syllabus point is imprecise in requiring *arraignment* rather than requiring that the defendant be "*held to a court of competent jurisdiction for trial.*" The three-term statute, West Virginia Code § 62-3-21 (1959) (Repl. Vol. 2005), reads as follows:

> Every person charged by presentment or indictment with a felony or misdemeanor, and *remanded to a court of competent jurisdiction for trial*, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him, if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment. trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment.

W.Va. Code § 62-3-21 (emphasis supplied).

An historic investigation of this Court's evaluations of the three-term rule reveals the reason that the holding in *Carter* is imprecise. The statutory use of the phrase "remanded to a court of competent jurisdiction for trial" has generated considerable controversy and interpretation efforts by this Court. A brief synopsis of those discussions is helpful to this analysis.[1] As early as 1904, in *State v. Kellison*, 56 W.Va. 690, 47 S.E. 166

[1]It is also of interest to recognize that the Code of 1899, section 25, chapter (continued...)

(1904), *overruled on other grounds by State ex rel. May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964), this Court observed that the phrase "remanded to a court of competent jurisdiction" was no longer consonant with our criminal practice. *Id*. at 692, 47 S.E. at 167. The Court explained its conclusion as follows:

> The word "remanded" in said section is not consistent with the present statutory provisions relating to procedure in felony cases. Since the necessity of a preliminary examination as a prerequisite to trial has been dispensed with, and indictments are no longer found in courts having no jurisdiction to try on charges of felony, the expression is inaccurate. But under the Code of 1860, and the statutes as they existed prior thereto, it was consistent with other provisions and only applied to persons in custody or under recognizance. Hence, it can only apply under such conditions now, and is to be construed as if it read "held" for trial instead of "remanded" for trial. In Virginia the statute, as amended, so reads. *Kibler v. Com*., 94 Va. 804 [26 S. E. 858].

Id. at 692, 47 S.E. at 167. In syllabus point one of *Kellison*, this Court held as follows:

> The fact that the record in a felony case shows that more than three terms of the court have passed without a trial, after the finding of the indictments, affords no ground for the discharge of the accused, under section 25 of chapter 159 of the Code [of 1899], from prosecution for the offense with which he is charged. It must further appear that he has been held for trial, as well as charged with the crime, for such period,

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[1](...continued)
159, included a slightly different version of the phrase under scrutiny, specifically providing that the person had to be "remanded to a circuit court for trial." As later explained by this Court in *Ex parte Bracey*, 82 W.Va. 69, 95 S.E. 593 (1918), all criminal jurisdiction of this state was exercised by the circuit courts at the time of enactment of this statute. *Id*. at 72, 95 S.E. at 595.

without a trial.

In *Dudley v. State*, 55 W.Va. 472, 47 S.E. 285 (1904), this Court examined the three-term rule with regard to a defendant who had been held in custody during three terms of court and explained as follows:

> The only excuse given for not trying the petitioner as required in this section is because he had been illegally recommitted to the penitentiary by order of the Governor. It is not claimed that he could not have been tried as he was in the custody of the law and under order of the court, but that the court and prosecuting attorney were laboring under the belief that he was legally confined in the penitentiary for his former offense, and that would render it unnecessary to try him under the second indictment. The petitioner was not afforded the opportunity to insist on a speedy trial, but was illegally held in custody, and if the indictment had remained a live indictment on the docket, while the State was illegally holding him, he might well insist that he should be discharged under the foregoing section, as his illegal detention does not come within any of its provisions, and he might well claim, as he was subject to the order of the court that he was being held to answer the pending indictment against him, as this was the only legal cause for his detention. . . . Had he been brought into court, he would have had the right to have demanded a speedy trial or a dismissal of the indictment, and the court may not do that in the absence of the prisoner which it could not do were he present.

55 W.Va. at 474-75, 47 S.E. at 286-87; *see also State v. Gregory*, 143 W.Va. 878, 105 S.E.2d 532 (1958) (emphasizing that word "remanded," as used in statute, has been construed to mean "held").

In *State ex rel. Farley v. Kramer,* 153 W.Va. 159, 169 S.E.2d 106 (1969), *cert. denied,* 396 U.S. 986, this Court held that the state may reindict an accused for the same offenses upon which previous indictments were originally returned against an accused, when the original indictments were dismissed as void within the time constraints of the three-term rule. In interpreting the exact language of the statute, the *Farley* Court explained as follows:

> The statute involved in this case applies to a person charged by presentment or indictment with a felony or misdemeanor, "and remanded to a court of competent jurisdiction for trial * * * ." The word "remanded" means "held" to a court of competent jurisdiction "for trial." If there is no pending presentment or indictment for a felony, obviously the accused is not held for trial.

153 W.Va. at 173, 169 S.E.2d at 115;[2] *see also State ex rel. Shorter v. Hey,* 170 W.Va. 249,

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[2]Prior to amendments in 1975, Virginia utilized a three-term rule similar in structure to the statute in this state. It included language tying the deadline to the time period in which the accused was being "held" in any court for trial. *See Knott v. Commonwealth,* 211 S.E.2d 86 (1975) (discussing Code § 19.1-191, Virginia's predecessor speedy trial statute). Under such language, simply being incarcerated qualified as being held for trial under the statute. *Id.* at 87-88. Utilizing that statute, the Virginia court, in *Sands v. Commonwealth,* 1871 WL 4872 (Va. 1871), explained as follows:

> If the court be in session, he can be said to be held in court for trial, only from the time he is delivered into the custody of the court. If the court be not in session, and the accused is committed to jail, he cannot be said to be held in court for trial until after the session of the court begins; for, during the vacation of a court a party cannot be said to be held in court for trial.

1871 WL at *11.

294 S.E.2d 51 (1981); *State ex rel. Whytsell v. Boles*, 149 W.Va. 324, 141 S.E.2d 70 (1965).

In *State ex rel. Sutton v. Keadle*, 176 W.Va. 138, 342 S.E.2d 103 (1985), this Court stated as follows: "It is apparent from the language of the three-term statute that it begins to run at the term subsequent to the term that the indictment or presentment is returned to a court of competent jurisdiction." 176 W.Va. at 141, 342 S.E.2d at 106 (footnote omitted). This Court's opinion in *Keadle* overruled *Ex parte Hollandsworth*, 93 W.Va. 543, 117 S.E. 369 (1923), by explaining that if a defendant is incarcerated in one county and there are criminal charges pending against him in another county, the State in the county in which the charges are pending must exercise reasonable diligence to secure the defendant's return for trial. Otherwise, the time during which the defendant is incarcerated will be counted in the determination of whether he has been deprived of his statutory right to a speedy trial. *Keadle*, 176 W.Va. at 144, 342 S.E.2d at 109. Thus, it should be clear that actual arraignment is not required in every factual situation to invoke the protection of the three-term rule.

Reviewing the *Carter* decision in light of these preceding cases, it appears that the phrase "remanded to a court of competent jurisdiction for trial" may not have been afforded its proper meaning in *Carter*. In *Carter*, this Court addressed the issue of whether the three-term rule was violated when the defendant was not tried within three terms of court after he was indicted. He had been in continuous federal custody until he was secured by the State and had been brought before the circuit court for arraignment. He was tried during the next term of court following his arraignment. Although the legislature did not mention "arraignment" in the three-term statute, *Carter* set forth a standard which necessitates an arraignment as one of the two requirements. In my view, such addition constitutes an attempt by this Court to append parameters upon the legislative use of the phrase "remanded to a court of competent jurisdiction for trial." Indeed, the declared requirements of the statute for triggering the running of the three terms are expressed in the conjunctive, and it is clear that the legislature thereby required something more than a mere indictment or presentment as the trigger for the three-term rule. There must also be a remand to a court of competent jurisdiction for trial, which this Court has interpreted to mean the "holding" of the defendant. Thus, this Court's syllabus point in *Carter*, articulating an arraignment as a necessary triggering event, is not precisely accurate. Although an arraignment may be a typical manner in which a defendant is brought before the jurisdiction of a court and held by that court, it is not the only manner in which a defendant could be held subsequent to indictment and prior to trial.

In summary, while the issue of interpretation of the phrase is not the dispositive issue in this case, I write separately to punctuate the fact that the statute requires two particular things for the triggering of the three-term rule. Those elements are (1) the indictment or presentment, and (2) remand to a court of competent jurisdiction for trial, clearly defined by this Court to mean "held to a court of competent jurisdiction for trial." The element of "arraignment" was appended by this Court in *Carter* and is imprecise and inconsonant with what I perceive to be the intent and proper application of the statute under our precedents decided before *Carter*.