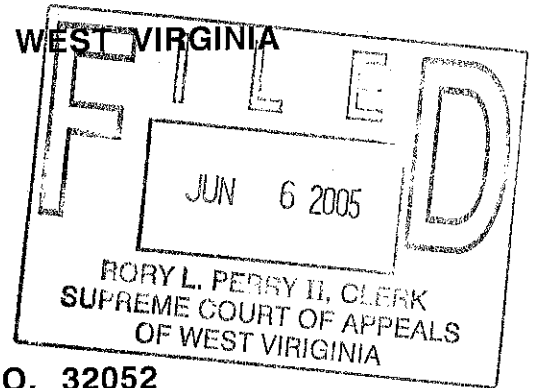


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff below,
Appellee,



v.

DOCKET NO. 32052

JACQUIN B., Defendant Below, Appellee
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Appellant.

JOINT BRIEF OF THE STATE OF WEST VIRGINIA
AND COUNSEL FOR JACQUIN B.

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I. STATEMENT OF THE CASE

This juvenile delinquency matter came before the Juvenile Division of the Circuit Court of Brooke County, West Virginia pursuant to West Virginia Code § 49-5-1-et. seq. The parties were the petitioner, an officer of the Weirton, West Virginia City Police Department, represented by the Assistant Prosecuting Attorney of Brooke County, West Virginia and the respondents, Jacquin B., a child under the age of eighteen and his mother, represented by the First Judicial Circuit Public Defender Corporation.

The parties presented an agreed adjudication and disposition to the Juvenile Division of the Circuit Court of Brooke County, West Virginia. The Court accepted the agreement.

The West Virginia Department of Health and Human Resources now prays that this Court reverse the disposition below and order that the matter be remanded for the convening of an MDT.

II. STATEMENT OF THE FACTS AND PROCEEDING BELOW

Prior to a scheduled hearing, the Petitioner, the Assistant Prosecuting Attorney, the Court's Juvenile Probation Officer, the juvenile respondent, together with his mother and his counsel met to discuss a resolution. Upon the request and recommendation of the mother of the juvenile respondent and the Petitioner, and with the agreement and concurrence of the juvenile respondent, his counsel, the Juvenile Probation Officer of the court and counsel for the petitioner, on June 16, 2004, the parties presented an agreed adjudication and disposition to the Court below. No representative from the West Virginia Department of Health and Human resources was present at that scheduled hearing and the presentation to the Court of the agreed adjudication and disposition.

The Court, pursuant to the agreement, ordered that the Juvenile respondent be placed at George Junior Republic, Grove City, Pa., there to complete a program designed for his rehabilitation. On June 21, 2004 that placement was effected.

Following the initial psychiatric evaluation, George Junior Republic prepared monthly Individual Service Plans for the treatment of the juvenile. Further, subsequent to the juvenile's placement, MDTs in September 2004, December 2004 and January 2005, with the Department of Health and Human Resources present and participating, unanimously recommended the juvenile's continued placement at George Junior Republic until such time as he had reached a participation level indicating his readiness for release.

In January 2005, the Juvenile Respondent successfully completed the program designed for his rehabilitation at George Junior Republic, was released and returned to his mother's home. None of the parties to the agreement has appealed the agreed adjudication and disposition.

III. ISSUES PRESENTED

I. Whether the West Virginia Department of Health and Human Resources has standing to appeal on behalf of the juvenile respondent, contrary to the wishes of the juvenile respondent and his mother, on the basis that no Multi-Disciplinary Team Meeting considered the juvenile's placement.

II. Whether the agreed adjudication and disposition of the Juvenile by the Juvenile Division of the Circuit Court should be reversed on the basis that the West Virginia Department of Health and Human Resources had no input into that disposition.

IV. TABLE OF AUTHORITIES

West Virginia Code § 7-4-1

West Virginia Code § 49-5D-3a

State ex. rel. Hamstead v. Dostert, 173 W.Va 133 (1984).

State ex. rel. Skinner v. Dostert, 166 W.Va. 743 (1981).

Code of Professional Responsibility 7-13

V. ARGUMENT

The West Virginia Department of Health and Human resources seeks to usurp the well settled mantle of prosecutorial discretion and authority of the Office of the Prosecuting Attorney in the prosecution of juvenile offenders. In State ex. rel. Skinner v. Dostert, 166 W.Va. 743 (1981), this Court recognized that, "The duty to prosecute is qualified, however, in that the prosecuting attorney is vested with discretion in the control of criminal causes, which is committed to him for the public good and for the vindication of the public interest." In State ex rel. Hamstead v. Dostert, 173 W.Va. 133, the Court addressed the same issue:

Part of the rationale behind this prosecutorial discretion is attributable to the prosecutor's unique role in the criminal justice system. As is stated in Ethical Consideration 7-13 of our Code of Professional Responsibility:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because; (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. . .

State ex rel. Hamstead v. Dostert, 173 W.Va. 133, 138-139 (1984).

This court has recognized that "[w]hen we speak of 'prosecutorial discretion' we are speaking of what course of conduct is 'necessary and proper' given the circumstances of a particular case." State ex rel. Hamstead v. Dostert, 173 W.Va. 133, 138 (1984). The West Virginia Department of Health and Human Resources would attempt to enforce a broad and sweeping policy requiring that the Department be permitted to approve a prosecutor's considered decision and further be permitted to

interfere with the prosecutor's discretion counter to well settled principles of law. As to the propriety of interference with prosecutorial discretion relating to plea agreements:

As a general rule, the existence of discretion requires its exercise. When a court establishes a broad policy based on events unrelated to the individual case before it, no discretion has been exercised. When dealing with issues as fundamental as a person's freedom or imprisonment, our judicial system must give every case independent consideration.

State ex rel. Hamstead v. Dostert, 173 W.Va. 133, 146 (1984)(citing United States v. Miller, 722 F. 2d 562 (9th Cir. 1983)).

West Virginia Code § 7-4-1 calls upon the prosecuting attorney to do those things which are "necessary and proper", an empowering statute that recognizes the need for discretion in the exercise of that power. The West Virginia Department of Health and Human Resources would have this Court reduce a publicly elected official into a mere ministerial functionary. Such a step is not only unnecessary and demeaning to public officials who are already politically accountable, it also ignores the long judicial tradition of refusing to interfere with the discretionary decisions of other branches of government. The Department should not be permitted to second guess prosecutorial decisions. A rule that permitted the Department to do so would constitute an impermissible intrusion into what is properly the domain of the elected official.

Nor should the Department be permitted to interfere with the attorney client relationship between a juvenile respondent and his lawyer. The Public Defender Corporation served Jacquin B. and his mother well. Jacquin's mother wanted him to go to George Junior Republic for treatment. Jacquin recognized his need for treatment and wanted to go to George Junior Republic. Having reviewed the plethora of charges

against his client, the overwhelming evidence against him, having considered the near certainty that his client would be sent to the West Virginia Industrial Home for Youth upon his conviction, and convinced that placement at George Junior Republic was in his client's best interest, and at the urging of his client and his client's mother, counsel for the juvenile struck and agreement. Neither the juvenile, his mother nor his attorney seek to rescind that agreement. All remain convinced that the agreement struck was fair, proper, in the best interests of the juvenile and in the best interests of justice.

The Department now seeks to interpose itself between the respondents and their attorney. Rather than seeking a petition in mandamus (a more proper remedy), or more simply making a polite request for an MDT, the Department now seeks, on behalf of the juvenile to appeal a properly negotiated and found admission and disposition.

An MDT would make no difference. All in the exercise of sound professional judgment, the Assistant Prosecuting Attorney, the Court's Juvenile Probation Officer, Counsel for the juvenile, the juvenile's mother and the juvenile himself unanimously agreed that the juvenile should be permitted to participate in the George Junior Republic program. The Court found that the agreement was fair, proper and in the best interest of the juvenile and in the best interests of justice. Further, finding that no similar facility was available in the State of West Virginia, the Court properly approved the agreement. Experienced and qualified experts considered the best interests of the juvenile recognizing there are no equivalent facilities available in the State of West Virginia in formulating their recommendation to the Court.

It is true that an MDT can be a valuable resource in a determination of the proper treatment program for a troubled young person and for a young person in

trouble. In cases where there is no agreement as to disposition; in cases where there is controversy regarding the best course; in cases where all known resources must be brought to bear to aid the court in a dispositional determination, an MDT can make valuable recommendations. Courts may and do rely upon information gleaned and recommendations from MDT reports.

MDT reports are only, however, recommendations to the court. The court may accept an MDT proposal, or upon a determination as to why the court chooses not to follow the recommendation presented, reject it. West Virginia Code §49-5D-3a.

VI. CONCLUSION

Because neither the juvenile herein, his mother, nor his counsel seek to appeal his admission to the delinquency petition; because neither the juvenile, his mother, nor his counsel seek to appeal the disposition ordered; because the Petitioner, the Assistant Prosecuting Attorney, the Court's Juvenile Probation Officer, the Counsel for the juvenile, the mother of the juvenile, and the juvenile himself each and all urged the court to accept the agreement; because the juvenile has successfully completed the dispositional program and has been released; because an MDT would have made no difference in the disposition ordered and because the West Virginia Department of Health and Human Resources has other and more proper remedies available; counsel for the Petitioner State of West Virginia and counsel for the juvenile respondent and his mother respectfully move this Court to deny the appeal of the West Virginia Department of Health and Human Resources.

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