

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel. Gabrielle M. v. Hon. David R. Janes, Judge, and State of West Virginia

State ex rel. Gabrielle M. v. Janes, No. 16-0167 (W. Va. Oct. 6, 2016) · No. No. 16-0167 (Marion County 15-F-32) · Decided October 6, 2016

SUMMARY

The Supreme Court of Appeals of West Virginia denied a petition for a writ of prohibition seeking to prevent enforcement of an order requiring disclosure of the petitioner’s psychological report to the court and State for sentencing. The majority held that judicial estoppel barred the petitioner from asserting attorney-client privilege and work-product protection after representing that the evaluation would assist the court in sentencing. Justice Benjamin dissented, arguing that judicial estoppel was inapplicable absent bad faith and that disclosure could undermine criminal defense advocacy.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Menis E. Ketchum; Justice Robin Jean Davis; Justice Margaret L. Workman; Justice Allen H. Loughry II; Justice Brent D. Benjamin
JURISDICTION	West Virginia
DECIDED	October 6, 2016
DOCKET	No. 16-0167 (Marion County 15-F-32)
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Original-jurisdiction petition for a writ of prohibition challenging a circuit court order requiring disclosure of the petitioner's psychological report to the court and the State for sentencing.
STANDARD OF REVIEW	A writ of prohibition is discretionary. In cases where the lower tribunal is alleged to have exceeded its legitimate powers rather than lacked jurisdiction, the court considers five factors: availability of another adequate remedy, irreparable prejudice, clear legal error, repeated error or persistent disregard of law, and whether the order raises new and important legal issues. The third factor—clear legal error—is given substantial weight.

PRECEDENTIAL VALUE	Published memorandum decision; majority disposition denies an original-jurisdiction writ of prohibition, while a separate dissent disputes the application of judicial estoppel.
PARTIES	State ex rel. Gabrielle M. v. The Honorable David R. Janes, Judge, State of West Virginia

TOPICS

criminal procedure appellate procedure attorney client privilege work product doctrine remedies

PRACTICE AREAS

criminal procedure appellate procedure evidence privileges extraordinary writs

QUESTIONS PRESENTED

1. Whether the circuit court's order requiring disclosure of the petitioner's psychological report exceeded its legitimate powers so as to warrant a writ of prohibition.
2. Whether attorney-client privilege or the work-product doctrine prevented disclosure of the psychological report after the petitioner represented that the evaluation would be used by the court for sentencing.
3. Whether judicial estoppel may be invoked sua sponte and applied in a criminal proceeding to prevent the petitioner from asserting privilege and work-product protection after obtaining permission to disclose confidential information based on a representation that the resulting report would be provided to the court.

HOLDINGS

1. Judicial estoppel may be invoked sua sponte when the record is sufficient to determine its application, and the doctrine may apply in criminal as well as civil proceedings.
2. The petitioner was judicially estopped from asserting attorney-client privilege and work-product protection over the psychological report because she obtained a favorable ruling allowing disclosure of confidential information to the psychologist after representing that the psychological evaluation would be used by the court for sentencing, then changed position and refused to disclose the report.
3. The writ of prohibition should be denied because the circuit court's disclosure order was not shown to be clearly erroneous as a matter of law under the applicable prohibition factors.

KEY QUOTATIONS

“Judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation.” (at 4)

“It is precisely this type of shenanigan that judicial estoppel cuts off at the knees.” (at 5)

“The Petitioner came to the trial court with a promise to disclose the psychological report to the court, if the court allowed the Petitioner to reveal certain information to the psychologist.” (at 6)

FACTUAL BACKGROUND

The petitioner pleaded guilty to four child-neglect charges involving her two children. Before sentencing, she sought a psychological evaluation and risk assessment and obtained a circuit court ruling allowing her counsel to provide the psychologist with information from the criminal case and a separate child-abuse-and-neglect proceeding. The petitioner represented that the evaluation would assist the court in deciding sentencing and whether probation was appropriate. After the evaluation was completed, she refused to disclose the report, asserting attorney-client privilege and work-product protection, and the circuit court ordered disclosure.

PROCEDURAL HISTORY

The petitioner was charged with two counts of child neglect creating a risk of injury and two counts of child neglect causing injury, and pleaded guilty to all charges. Before sentencing, defense counsel obtained a psychological evaluation and risk assessment after seeking permission to provide the psychologist with case-related and confidential information. The circuit court permitted disclosure of specified information, including police and Department of Health and Human Resources reports, after representations that the evaluation would assist sentencing. When the petitioner later refused to disclose the psychological report, the circuit court ordered disclosure to the court and State. The Supreme Court of Appeals denied the writ of prohibition.

DISPOSITION

writ_denied

CASES CITED

- State v. Edward Charles L., 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990)
- State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996)
- In re Berks Behavioral Health LLC, 500 B.R. 711, 721 (Bankr. E.D. Pa. 2013)
- Schering Corp. v. Mylan Pharm., Inc., No. CIV.A. 09-6383 JLL, 2011 WL 3651343, at *8 (D.N.J. Aug. 18, 2011)
- Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990)
- Whitacre Partnership v. Biosignia, Inc., 358 N.C. 1, 39, 591 S.E.2d 870, 895 (2004)
- Larry V. Faircloth Realty, Inc. v. Public Service Commission of West Virginia, 230 W. Va. 482, 740 S.E.2d 77, 82 (2013)
- Beem v. McKune, 317 F.3d 1175, 1185 (10th Cir. 2003)
- United States v. Hoey, 34 F. App'x 290, 291 (9th Cir. 2002)
- State v. Towery, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996)
- State v. Washington, 142 Wis. 2d 630, 635, 419 N.W.2d 275, 277 (Ct. App. 1987)
- In re C.Z.B., 151 S.W.3d 627, 633 (Tex. Ct. App. 2004)
- Pegram v. Herdrich, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 2154 n.8, 147 L. Ed. 2d 164 (2000)
- Hubbard v. State Farm Indemnity Co., 213 W. Va. 542, 552 n.21, 584 S.E.2d 176, 186 n.21 (2003)

- West Virginia Department of Transportation, Division of Highways v. Robertson, 217 W. Va. 497, 618 S.E.2d 506 (2005)
- Swahn Group, Inc. v. Segal, 183 Cal. App. 4th 831, 847, 108 Cal. Rptr. 3d 651, 664 (2010)
- Quinn v. Sharon Corp., 343 S.C. 411, 416, 540 S.E.2d 474, 477 (Ct. App. 2001)
- Browning v. Levy, 283 F.3d 761, 776 (6th Cir. 2002)
- Reynolds v. C.I.R., 861 F.2d 469, 472 (6th Cir. 1988)
- M. Perez Co. v. Base Camp Condominiums Association No. One, 111 Cal. App. 4th 456, 463, 3 Cal. Rptr. 3d 563, 569 (2003)
- Jarrard v. CDI Telecommunications, Inc., 408 F.3d 905, 915 (7th Cir. 2005)
- Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007)
- John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995)
- United States v. Vaccaro, 115 F.3d 1211, 1216 (5th Cir. 1997)

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