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West Virginia Supreme Court of Appeals Original Jurisdiction

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Davis and Palmer: West Virginia Supreme Court of Appeals Original Jurisdiction

appellate court comes too late and usually will be disregarded."[1376]

K. Recusal of Justice

Justice McHugh stated in *State ex rel. Hash v. McGraw*[1377] that

> [t]he administrative actions of the Chief Justice of the Supreme Court of Appeals of West Virginia in a particular case do not necessarily represent a pecuniary or personal interest that would affect the Chief Justice's impartiality, nor render the Chief Justice incapable of hearing the same case in a judicial capacity.[1378]

L. Unpublished Opinions

Justice McHugh stated in *Pugh v. Workers' Compensation Commissioner*[1379] that "[u]npublished opinions of this Court are of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of *res judicata*, collateral estoppel, or law of the case."[1380]

M. Interlocutory Orders

Justice McHugh stated in *State ex rel. Arrow Concrete Co. v. Hill*[1381] that "[o]rdinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to West Virginia Rules of Civil Procedure 12(b)(6) is interlocutory and is, therefore, not immediately appealable."[1382]

XXI. WEST VIRGINIA SUPREME COURT OF APPEALS ORIGINAL JURISDICTION

A. Writ of Mandamus

Justice McHugh held in *West Virginia Board of Education v. Hechler*[1383] that "[m]andamus may be used to attack the constitutionality or validity of a statute

1376 *Id.* at Syl. Pt. 1.

1377 376 S.E.2d 634 (W. Va. 1988).

1378 *Id.* at Syl. Pt. 2.

1379 424 S.E.2d 759 (W. Va. 1992).

1380 *Id.* at Syl. Pt. 3.

1381 460 S.E.2d 54 (W. Va. 1995).

1382 *Id.* at Syl. Pt. 2.

1383 376 S.E.2d 839 (W. Va. 1988).

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or ordinance."[1384]

In *State ex rel. Robinson v. Michael*,[1385] Justice McHugh held that "[a] writ of mandamus will not lie to compel the prosecuting attorney to represent a party in a civil contempt action arising out of the failure by a party to comply with a divorce decree which orders support payments."[1386]

Justice McHugh stated in *Graf v. Frame*[1387] that "[o]rdinarily, in mandamus proceedings, costs [and reasonable attorney fees] will not be awarded against a public officer who is honestly and in good faith endeavoring to perform his duty as he conceives it to be."[1388]

The issue in *Vance v. Ritchie*[1389] involved the appropriateness of a mandamus action to compel institution of condemnation proceedings. Justice McHugh ruled that

> [a]n action in mandamus to compel the State Commissioner of Highways to institute condemnation proceedings and pay a property owner just compensation for damage done to his or her real property as a result of road work conducted by the State Department of Highways or agents thereof is within the contemplation of *W.Va. Code*, 14-2-2(b) [1976] relating to "[a]ny proceeding for injunctive or mandamus relief involving the taking, title, or collection for or prevention of damage to real property" which establishes proper venue in the "circuit court of the county in which the real property affected is situate."[1390]

The case of *Staton v. Hrko*[1391] called upon Justice McHugh to address several matters pertaining to mandamus. The court held that "[a]ll factual allegations properly pleaded in the petition for a writ of mandamus which are not denied in the answer are deemed to be admitted."[1392] It was said that "[t]he procedure in effect before the adoption of the Rules of Civil Procedure in 1960 is applicable to extraordinary proceedings such as mandamus proceedings."[1393] Justice McHugh noted that "[a] statute in effect prior to the Rules of Civil Procedure and which still applies to a mandamus proceeding is *W.Va. Code*, 57-4-1

1384 *Id.* at Syl. Pt. 4.

1385 276 S.E.2d 812 (W. Va. 1981).

1386 *Id.* at Syl. Pt. 7.

1387 352 S.E.2d 31 (W. Va. 1986).

1388 *Id.* at Syl. Pt. 5 (alteration in original).

1389 358 S.E.2d 239 (W. Va. 1987).

1390 *Id.* at Syl. (alteration in original).

1391 379 S.E.2d 159 (W. Va. 1989).

1392 *Id.* at Syl. Pt. 1.

1393 *Id.* at Syl. Pt. 2.

[1931]. Under this statute depositions are authorized or permitted to be taken."[1394] The court further indicated that "[s]pecial circumstances exist, authorizing the taking of a deposition in an action not covered by the Rules of Civil Procedure, when the knowledge of a particular matter rests wholly with the person or persons to be deposed, especially when accompanied by the likelihood of hostility or interest."[1395] *Staton* concluded that

> [m]andamus lies when a court or other tribunal, based upon a misapprehension of the law, refused to exercise certain jurisdiction or discretion because the court or other tribunal believed that it did not possess such jurisdiction or discretion. In that situation mandamus lies to compel the court or other tribunal to exercise the jurisdiction or discretion but does not ordinarily lie to direct the manner in which to exercise discretion.[1396]

Justice McHugh said in *State ex rel. Lambert v. Cortellessi*[1397] that

> [m]andamus lies to compel a county commission to "give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees" of a county officer, as required by *W.Va. Code,* 7-7-7, as amended, where the county commission has arbitrarily fixed the overall budget of a county officer without having consulted with the county officer as to the amount of funds which is "reasonable and proper" for the performance of the statutory duties of his or her office.[1398]

The court also ruled that "[w]here a county commission arbitrarily fixes a county officer's budget without complying with the provisions of *W.Va. Code,* 7-7-7, as amended, the county commission is responsible for the county officer's reasonable attorney's fees incurred in a mandamus proceeding to compel compliance with that statute."[1399]

Justice McHugh held in *Pell v. Board of Education of Monroe County*[1400] that

> [p]ursuant to *W.Va. Code,* 18-5-13 [1990], a county board of education has the authority to close and consolidate schools.

1394 *Id.* at Syl. Pt. 3.

1395 *Id.* at Syl. Pt. 4.

1396 Staton, 379 S.E.2d at Syl. Pt. 5.

1397 386 S.E.2d 640 (W. Va. 1989).

1398 *Id.* at Syl. Pt. 1.

1399 *Id.* at Syl. Pt. 5.

1400 426 S.E.2d 510 (W. Va. 1992).

West Virginia Law Review, Vol. 102, Iss. 5 [2002], Art. 25

> However, mandamus will lie to control a county board of education in the exercise of its discretion upon a showing of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of the law. If a comprehensive educational facilities plan has been developed by a county board of education, approved by the state board of education, submitted to a regional educational services agency, granted approval for funding on a priority basis by the state school building authority, satisfied all requirements for approval, notice, and hearing pursuant to *W.Va. Code,* 18-5-13a [1991], and contracts have been entered into to begin implementation of such plan, then it is arbitrary and capricious for a county board of education, with no articulated reasons, to take action that would cause the plan to not be implemented or to replace such plan with an alternative plan, where such action would place in jeopardy the possibility of obtaining the approved funding.[1401]

B. Writ of Prohibition

The case of *State ex rel. Maynard v. Bronson*[1402] involved the issuance of a writ of prohibition in the context of dismissed indictments. Justice McHugh indicated that

> [p]rohibition is not a proper remedy to challenge the dismissal of indictments by a judge of a circuit court acting pursuant to the West Virginia Agreement on Detainers, *W.Va. Code,* 62-14-1, *et seq.*, where the judge of the circuit court had jurisdiction of the subject matter in controversy, and nothing in the record indicates that the judge exceeded his legitimate powers."[1403]

Justice McHugh relied on the decision in *Hinkle v. Black,*[1404] to address writ of prohibition issues in *State ex rel. Oldaker v. Fury.*[1405] *Oldaker* stated that

> [i]n determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial,

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1401 *Id.* at Syl. Pt. 2.

1402 277 S.E.2d 718 (W. Va. 1981).

1403 *Id.* at Syl.

1404 262 S.E.2d 744 (W. Va. 1979).

1405 317 S.E.2d 513 (W. Va. 1984).

> clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.[1406]

Justice McHugh restated the holding of *Oldaker* in the single syllabus of his decision in the case of *Ash v. Twyman.*[1407]

Justice McHugh stated in *Peyatt v. Kopp*[1408] that "[p]rohibition does not lie against a prosecuting attorney to restrain him from presenting a case to a grand jury where the prosecuting attorney, in performing his statutory duties, has probable cause to believe that a criminal offense has been committed and that the defendant committed the offense."[1409]

C. *Certified Questions*

In *Kincaid v. Mangum*[1410] Justice McHugh held:

> When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W.Va. Code,* 51-1A-1, et seq. and *W.Va. Code,* 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.[1411]

D. *Writ of Habeas Corpus*

Relying on *State ex rel. Pingley v. Coiner,*[1412] Justice McHugh held in *State ex rel. J.D.W. v. Harris*[1413] that "[h]abeas corpus lies to secure relief from conditions of imprisonment which constitute cruel and unusual punishment in violation of the provisions of Article III, Section 5, of the Constitution of West Virginia and of the Eighth Amendment to the Constitution of the United

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1406 *Id.* at Syl.

1407 Syl., Ash v. Twyman, 324 S.E.2d 138 (W. Va. 1984).

1408 428 S.E.2d 535 (W. Va. 1993).

1409 *Id.* at Syl. Pt. 2.

1410 432 S.E.2d 74 (W. Va. 1993).

1411 *Id.* at Syl. Pt. 3.

1412 186 S.E.2d 220 (W. Va. 1972).

1413 319 S.E.2d 815 (W. Va. 1984).

West Virginia Law Review, Vol. 102, Iss. 5 [2002], Art. 25

States."[1414]

In *Bowman v. Leverette*,[1415] Justice McHugh was called upon to examine the use of habeas corpus to challenge a conviction based upon prior federal and state supreme court decisions that prohibited shifting the burden of proof on an element of an offense to a defendant. The *Bowman* court held that

> *W.Va. Code,* 53-4A-1(d) [1967] allows a petition for post-conviction habeas corpus relief to advance contentions or grounds which have been previously adjudicated only if those contentions or grounds are based upon subsequent court decisions which impose new substantive or procedural standards in criminal proceedings that are intended to be applied retroactively.[1416]

Bowman went on to address prior precedents on shifting the burden of proof to the defendant and held that "[t]he decisions in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and State v. O'Connell, [163] W.Va. [366], 256 S.E.2d 429 (1979), do not require full retroactive application."[1417]

Justice McHugh held in *State ex rel. Dye v. Bordenkircher*[1418] that "[w]hen a stay of proceedings under *W.Va. Code,* 62-7-2 [1931], is in effect the proper method of seeking bail pending appeal is by a petition for habeas corpus to this Court."[1419]

XXII. CONSTITUTIONAL LAW

A. *Retroactive Application of Constitutional Pronouncements*

Justice McHugh indicated in *Kincaid v. Mangum*[1420] that "[w]hen this Court issues an interpretation of the W.Va. Const. which was clearly not foreshadowed, and when retroactive application of the new interpretation would excessively burden the government's ability to carry out its functions, then the new constitutional interpretation will apply prospectively."[1421]

1414 *Id.* at Syl. Pt. 2.

1415 289 S.E.2d 435 (W. Va. 1982).

1416 *Id.* at Syl. Pt. 1.

1417 *Id.* at Syl. Pt. 2.

1418 284 S.E.2d 863 (W. Va. 1981).

1419 *Id.* at Syl. Pt. 3.

1420 432 S.E.2d 74 (W. Va. 1993).

1421 *Id.* at Syl. Pt. 5.