The Defender

VOLUME 12, ISSUE 1 MARCH 2011

INSIDE THIS ISSUE:

From the Executive Director's Char 1

West Virginia Supreme Court Update 2

CLE Information 5

Legislative Update 6

From The Executive Director's Chair

On January 3, 2011, I was honored to be appointed as the Acting Executive Director of West Virginia Public Defender Services. Trying to fill the shoes of Jack Rogers, who essentially built the present PDS system, is an nigh-impossible task. Having spoken with and worked alongside so many of you over the past several years, I look forward to a continuing positive relationship with the dedicated attorneys serving West Virginia's indigent defendants.

However, the more things change, the more they stay the same. As in past years, we faced a budget shortfall for the remainder of the fiscal year. We submitted a request for a supplemental funding appropriation of $11,500,000 for court-appointed attorneys for the remainder of FY 2011. The Legislature acted promptly in granting our request, and the supplemental funding bill (S.B. 620) was approved by the Legislature on the final day of the Regular Session (March 12, 2011). The bill was signed by Governor Earl Ray Tomblin and the funds became available on March 28, 2011. We are grateful to our Legislature and the Governor for acting promptly on the funding.

Random Notes…

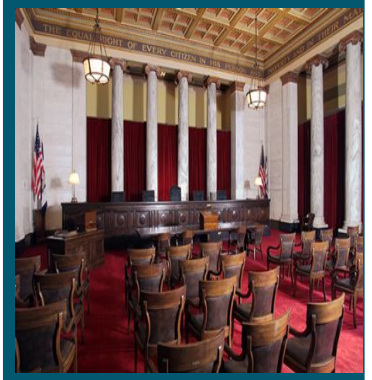
Not to dwell on unpleasant matters, but in 2010 an Eastern Panhandle attorney and her office manager were convicted of federal wire and mail fraud and conspiracy charges in connection with a scheme to defraud WVPDS through the submission of fraudulent information on court-appointed vouchers. The false information included duplicate entries, entries for work which was not performed and reimbursement for false travel expenses.

Our Agency receives reports of suspected voucher fraud from throughout the State, and as the sole funding agency for indigent criminal defense we have a serious commitment to investigate such misconduct. Our Agency will coordinate with the Legislative Committee on Special Investigations, law enforcement and the West Virginia State Bar to investigate these matters. Voucher fraud is not common, but when it occurs it is harmful to the entire indigent defense funding system. Every dollar paid for false claims is one less dollar available for reimbursement for the dedicated hard work that the vast majority of you put in for your clients.

On a more positive note, we are also very excited about the current testing of our on-line voucher submission system. Developed in conjunction with WVInteractive and the West Virginia Office of Technology, this new system will permit faster submission and checking of court-appointed vouchers. We hope to be on-line with this system by the end of the year.

In closing, I want to say that I look forward to the challenge of building upon the fantastic work accomplished by Jack Rogers and the staff here at WVPDS. I encourage all of you to feel free to contact me with your thoughts and concerns.

Russell S. Cook
(304) 558-3905
Russell.S.Cook@wv.gov



West Virginia Supreme Court Update

All West Virginia Supreme Court opinions may be reviewed online at www.state.wv.us/wvsca/opinions.htm

State v. Berry, No. 35501 – January 20, 2011 – Davis, J. (*Raleigh – Burnside*)

The appellant was indicted in connection with the December 2006 shooting deaths of a girlfriend and a male acquaintance. The victims were shot in the parking lot of the young woman's apartment complex. The indictment alleged alterative theories of premeditated murder and murder by lying in wait.

The appellant was convicted of both murders and sentenced to two consecutive life-without-mercy sentences. On appeal, the appellant alleged (1) the trial judge should have disqualified himself from the case because of a lengthy prior marriage to the prosecutor in the case; (2) the appellant was improperly prohibited from presenting mitigating evidence regarding his social anxieties; (3) there was insufficient evidence to support convictions for first degree murder by "lying in wait"; and (4) the trial court erroneously admitted duplicative gruesome photos of the victims.

Held: The Court determined that the appellant had waived the disqualification issue by failing to object to the issue before the circuit court. The Court further commented that even had the issue not been waived, a prior unpublished order of the Court in another case had stated that the prior marriage between the prosecuting attorney and the judge did not require disqualification.

In regard to the mitigation evidence issue, the Court held that the appellant, in choosing to proceed with a unitary rather than a bifurcated trial, had essentially waived his opportunity to present evidence on his "social anxiety" issues. The trial court had determined that the appellant could not present such evidence for guilt-phase issues in the unitary trial. The appellant had then attempted to renew his motion for a bifurcated trial during the middle of the trial but his motions were denied on the grounds of timeliness.

The Court also rejected the appellant's argument that that the evidence was insufficient to support a conviction for murder by "lying in wait". Noted the appellant's concession that the evidence was sufficient to support a conviction for premeditated murder, the Court held that when a defendant is prosecuted on alternative theories of first degree murder, a conviction will stand provided that there is sufficient evidence to establish guilt beyond a reasonable doubt on either of the theories.

Finally, the Court determined that while there may have been harmless error in the State's decision to use numerous duplicative photographs of the victims, the trial court's determination that the photographs were relevant did not constitute an abuse of discretion.

Affirmed.

State v. Murray, No. 35448 – January 20, 2011 – ***Memorandum Order***

The appellant was convicted of first degree (felony) murder and several other charges. The State alleged that the appellant and two other men broke into a home and attacked the occupants in a dispute over a marijuana purchase. The appellant argued on appeal that the jury was improperly instructed as to the concerted action principle; that the trial court had failed to instruct the jury as to the appellant's intent in relation to the underlying felony in the felony murder; and that the evidence was insufficient to justify the jury's verdict.

Held: The Court rejected each of these contentions, finding (1) the evidence presented at trial regarding the appellant's actions during his codefendant's attempted entry of the victim's home was sufficient to justify an instruction on the concerted action principle; (2) the appellant's proffered jury instruction requiring the jury to find that he had a specific intent to commit the underlying felony was an erroneous statement of the law; and (3) the evidence was sufficient to allow the jury to find that the appellant had knowingly assisted his codefendant's and that he had acted as a principal in the second degree in the burglary of the home.

Affirmed.

State v. White, No. 35529 – February 10, 2011 – Davis, J. (*Jackson – Evans, J.*)

The appellant was convicted of first degree murder and conspiracy to commit a felony. The State alleged that the appellant and Roseann Osborne had conspired to murder Muhamed Mahrous, the husband of Ms. Osborne. The State presented evidence that Ms. Osborn arranged to meet her husband at a park, where he was attacked with a hammer by the appellant. The State argued that the motive for the murder was a romantic affair between the appellant and Ms. Osborne.

On appeal the appellant argued (1) that the trial court had failed to strike two jurors who demonstrated bias during voir dire; (2) the evidence was insufficient to sustain the convictions; (3) evidence was improperly seized from a cellular telephone; (4) statements of his co-conspirator, Ms. Osborne, should not have been admitted; and (5) the trial court had improperly denied his motion for a new trial based on violations of *Brady v. Maryland*.

Following Mr. Mahrous killing, the truck that Ms. Osborn had driven to the park (which was registered in Mr. Mahrous' name) was seized and searched pursuant to a search warrant. A cellular telephone was found in the truck and an examination of the call records showed calls made to the appellant, and a subsequent search warrant for the appellant's phone records indicated fifty -nine calls telephone calls between the appellant and Ms. Osborn on the day of the killing. The appellant argued that once the phone had been seized, a separate search warrant was required to lawfully search its contents.

Held: The Court rejected this argument and, in a new syllabus point, held that when a vehicle is search pursuant to a valid search warrant, an additional search warrant is not required to search the contents of items that are seized, including cellular telephones.

The Court also rejected the remainder of the appellant's arguments, holding (1) there was no indication or evidence that the two questioned jurors would have been biased or prejudiced; (2) the evidence was sufficient to sustain the appellant's convictions for both first degree murder and conspiracy, in that there was ample evidence of both premeditation and an agreement between the appellant and Ms. Osborn to kill the victim; (3) statements made by Ms. Osborn to a friend regarding her desire to kill her husband and the circumstances of the killing were properly admitted under Rule 801(d)(2)(E) of the Rules of Evidence; and (4) records disclosed to the appellant after the trial regarding domestic violence petitions filed in North Carolina, and a videotape obtained from a security camera located near the scene of the killing, were not improperly withheld by the State and therefore did not constitute a violation of *Brady v. Maryland*.

Affirmed.

Lawyer Disciplinary Board v. Albright, No. 35282 – February 11, 2011

The respondent attorney was the subject of seven separate disciplinary complaints filed by former clients. The complaints alleged various acts of misconduct by the attorney, including failure to adequately communicate with clients, failure to diligently pursue the interests of the clients, failure to keep the clients informed of the status of their cases, failure to provide accurate accountings of services rendered, failure to return unused retainers and failure to respond to requests for information from the Office of Disciplinary Counsel.

The Lawyer Disciplinary Board's Hearing Panel Subcommittee (HPS) found that the respondent had committed the reported violations and recommended a three-month suspension of the respondent's law license, along with other sanctions.

Held: The Court noted that the allegations against the respondent were essentially undisputed, and focused on possible sanctions for the misconduct. The Court acknowledged the mitigating factors cited by the respondent, including the death of his father and the respondent's expressed remorse. However, the Court determined that the aggravating factors of the respondent's previous disciplinary record (*State ex rel. Office of Disciplinary Counsel v. Albright*, 225 W. Va. 105, 690 S.E. 2d 113 (2009)), and his experience in the legal field warranted a more severe sanction than the three-month suspension recommended by the HPS.

The Court imposed a one-year suspension of the respondent's law license, along with requirements that he be required to petition for reinstatement; make restitution to two of the clients; that his practice be supervised for two years after reinstatement; that he complete additional CLE hours in ethics prior to reinstatement; reimburse the LDB for costs; and that he meet with ad follow the recommendations of a licensed psychologist.

License Suspension and other Sanctions.

In Re: Cecil T., No. 35659—March 10, 2011

The appellant foster parents sought review of an order of the circuit court denying termination of the appellee father's parental rights.

Shortly after completing an improvement period on an initial abuse/neglect petition, the appellee was incarcerated for federal firearms violations. The child was subsequently adjudicated to be an abused/neglected child.

At the disposition hearing, the circuit court held that the appellee's incarceration, standing alone, was insufficient to show an ability to correct the conditions of abuse following his release.

Held: The Court reversed this decision, holding that when incarceration is the sole factor in a parent's ability to remedy conditions of abuse/neglect, the court must evaluate the best interests of the child in light of the circumstances surrounding the parent's incarceration and the need for permanency for the child.

Citing the appellee's inability to care for the child, the brief period that the child was in his custody, the lack of other appropriate care for the infant and the overriding need for a permanency plan, the Court held that the circuit court had erred in denying termination of the appellee's parental rights.

Reversed and Remanded.

State v. Proctor, No. 35647 –April 1, 2011—Per Curiam (*Kanawha—Kaufman, J.) (George Castelle and Justin Collin, Kanawha PD Office, for Appellant*)

The appellant pleaded guilty to two felony sexual offenses involving his fiancée's daughter. The appellant was sentenced to consecutive prison sentences of 5 to 25 years on the charge of first degree sexual abuse charge and 10 to 20 years on the charge of sexual abuse by a parent, guardian or custodian.

Following his sentencing, the appellant filed a motion for reconsideration, which was denied by the court on November 23, 2009.

On appeal the appellant argued (1) that the court had erred in denying his reconsideration motion due to material misstatements of fact in the police report, the presentence report and a forensic psychological evaluation prepared prior to the sentencing, and (2) that convictions for both first degree sexual abuse and sexual abuse by a parent, guardian or custodian constituted a violation of double jeopardy.

Held: In regard to the appellant's first assertion, the Court, after reviewing the alleged misstatements in the various reports, determined that the appellant had failed to object to the factual issues during the proceedings. The Court held that the appellant's failure to object to the questioned material constituted a waiver of his right to assert the issue on appeal.

The Court also rejected the appellant's double jeopardy argument. The appellant acknowledged that the issue had been decided by the Court in *State v. Gill*, 187 W. Va. 136, 416 S.E. 2d 253 (1992), but argued that the case was improperly decided.

After reviewing *Gill* and its progeny and discussing the double jeopardy implications, the Court determined that the appellant had waived the assignment of error.

The Court held that the appellant had not raised the double jeopardy issue during the entry of his guilty plea, nor had he raised the issue during his sentencing proceeding. The Court noted that the appellant's only argument regarding the sentencing was an argument for concurrent rather than consecutive sentences.

Affirmed.

Miller, Comm'r of DMV v. Hare, No. 35560—April 1, 2011—McHugh, J. (*Kanawha—Bloom*)

The appellee was arrested in December 2008 for driving under the influence of alcohol. He requested an administrative hearing on the revocation of his license and requested that the arresting officer be subpoenaed to the hearing.

The hearing was scheduled for April 15, 2009. On the date of the hearing, the arresting officer failed to appear. The hearing examiner denied the appellee's motion for dismissal and rescheduled the hearing.

The appellee filed a petition for a writ of prohibition with the circuit court to prevent the appellant from conducting another hearing. The appellee argued that the hearing examiner exceeded his authority by rescheduling the hearing without the filing of a continuance request from the officer or any party to the hearing.

The court granted the appellee's request and issued an order prohibiting the second hearing. The court also subsequently awarded the appellee over $3,000 in attorneys fees to reimburse him for the cost of the writ of prohibition.

On appeal, the DMV argued that the hearing examiner had the authority to *sua sponte* reschedule the hearing.

Held: The Court agreed with the DMV and reversed the circuit court. The Court held that W. Va. Code §17C-5A-2 (c) and 91 C.S.R. § 1-3.8.3 authorize the DMV to *sua sponte* continue or postpone an administrative hearing to secure the attendance of "essential personnel".

Because the appellee had requested the attendance of the officer, the Court held that the hearing examiner was obligated to secure his attendance at the hearing.

The Court rejected the appellee's argument that there is a disparate result when a driver fails to attend a hearing as opposed to an officer's failure to attend the hearing. The appellee had argued that a driver's failure to appear at the hearing automatically results in the reinstatement of the revocation,; therefore, an officer's failure to appear should result in the automatic reinstatement of the license.

The Court also reversed the circuit court's award of attorney's fees, finding that the court had misinterpreted the Court's prior decision in *David v. Commissioner of Motor Vehicles*, 219 W. Va. 493, 637 S.E. 2d 591 (2006). The Court held that the grant of attorneys' fees in *David* was premised on the grounds that the DMV had improperly relied on an "emergency rule" in granting a continuance.

Reversed and remanded.

WEST VIRGINIA PUBLIC DEFENDER SERVICES

2011 PUBLIC DEFENDER CONFERENCE

JUNE 16 & 17, 2011

Conference Center at The Resort at Glade Springs

(877) 378-9604

Daniels, West Virginia

West Virginia Public Defender Services will be sponsoring its annual Public Defender Conference on Thursday and Friday, June 16 & 17, 2011 at the Conference Center at Glade Springs Resort, Daniels, West Virginia. The Conference is open only to public defenders and private criminal defense counsel.

This Conference will feature a number of speakers and address a wide variety of topics pertinent to the criminal defense practitioner. To see the TENTATIVE AGENDA please go to www.wvpds.org (Criminal Law Research Center).

There will be a **$ 100.00 non-refundable registration fee for private criminal defense counsel**. Please register as soon as possible, as the number of participants is limited.

Continuing Legal Education Certification: The Conference has been submitted to the West Virginia State Bar for CLE certification. The Conference will average approximately **11.0** total hours of CLE credit, including approximately **1.2** hours in ethics/law office management (totals subject to minimal change).

Make checks payable to **West Virginia Public Defender Services** and mail along with your registration form.

2011 Annual Public Defender Conference
Glade Spring Resort, Daniels, West Virginia
June 16 & 17, 2011

# of Persons Attending _____ at $100.00 each Amount Enclosed $ _____

_____
Name

_____
Mailing Address

_____
City/State/Zip

_____
Phone and Fax numbers

_____
E-mail address

MAIL NO LATER THAN JUNE 8, 2011 TO:
West Virginia Public Defender Services
Criminal Law Research Center
Attention: Erin Fink
One Players Club Drive Suite 301
Charleston, West Virginia 25311

(304) 558-3905 phone

Brochure and other information online at:
www.wvpds.org

West Virginia Legislature—An Update on the 2011 Regular Session

The First Regular Session of the 80th Legislature adjourned on March 18, 2011 after completion of the Budget Bill (H.B. 2012).

Among the bills passed during the session were two bills addressing funding for WVPDS. H.B. 2012 provided $ 31,853,009 in funding for fiscal year 2012, with $18,216,605 provided for public defender corporations and $12, 223, 115 designated for court appointed fees.

The Legislature also approved a supplemental funding bill for fiscal year 2011 (S.B. 620), which provided $11,500,000 to ensure payment for vouchers for the remainder of this fiscal year.

Among some of the notable bills enacted during the session included bills addressing:

* the creation of new misdemeanor offenses of unlawful restraint in the first and second degree;

* the creation of a new criminal offense of picketing or disrupting funerals;

* reinstitution of the former provision that an inmate serving a life sentence may only be considered for parole once every three years; and

* new provisions regarding the issuance of investigative subpoenas in cases of alleged crimes against children.

A list of some of the relevant legislation is included on the following page.

SB 60	Relating to certain supervisory duties of circuit probation officers	Approved by Governor 3/18/11 - Senate Journal	**Effect from passage** - (March 4, 2011)
SB 61	Relating generally to juvenile drug courts	Approved by Governor 3/18/11 - Senate Journal	**Effective Ninety Days from Passage** - (June 2, 2011)
SB 93	Relating to escape from custody of Director of Juvenile Services	Approved by Governor 3/30/11 - House Journal	**Effective Ninety Days from Passage** - (June 8, 2011)
SB 186	Relating to issuing subpoena to aid in criminal investigations involving certain crimes against minors	Approved by Governor 3/31/11 - House Journal	**Effective Ninety Days from Passage** - (June 9, 2011)
SB 213	Relating to crimes using computers, telephones and electronic devices	To Governor 3/22/11 - Senate Journal	Completed Legislation awaiting Governor's signature
SB 216	Modifying definition "imminent danger to physical well-being of a child"	Approved by Governor 4/1/11 - Senate Journal	**Effective Ninety Days from Passage** - (June 5, 2011)
SB 256	Requiring sex offenders verify e-mail and online identities	Approved by Governor 3/18/11 - Senate Journal	**Effective Ninety Days from Passage** - (June 5, 2011)
SB 328	Relating to issuance, disqualification, suspension and revocation of driver's licenses	Approved by Governor 3/31/11 - House Journal	**Effective Ninety Days from Passage** - (June 9, 2011)
SB 461	Providing criminal penalty for violating restraining order entered upon conviction for stalking or harassment	Approved by Governor 3/30/11 - House Journal	**Effective Ninety Days from Passage** - (June 9, 2011)
HB 2001	Providing that inmates serving life sentences shall be considered for parole only once every three years	Approved by Governor 2/3/11 - House Journal	**Effective from passage** - (January 25, 2011)
HB 2362	Increasing penalties for financial exploitation of an elderly person or incapacitated adult	To Governor 3/31/11 - House Journal	Completed Legislation awaiting Governor's signature
HB 2451	Relating to victim impact statements	To Governor 4/4/11	Completed Legislation awaiting Governor's signature
HB 2505	Adding synthetic cannabinoids and hallucinogens and stimulants to the Schedule I list of controlled substances (K2)	To Governor 3/21/11 - House Journal	Completed Legislation awaiting Governor's signature
HB 2539	Authorizing the West Virginia State Police to enter into agreements for certain forensic services with the Marshall University Forensic Science Center	Approved by Governor 3/30/11 - House Journal	**Effective Ninety Days from Passage** - (June 10, 2011)
HB 2750	Adding consideration of sexual assault in issuing an order to temporarily or permanently end a parent-child relationship	Approved by Governor 3/18/11 - Senate Journal	**Effective Ninety Days from Passage** - (June 7, 2011)
HB 2864	All relating to the creation of a misdemeanor crime of unlawful restraint in the first and second degree	Approved by Governor 3/24/11	**Effective Ninety Days from Passage** - (June 9, 2011)
HB 3054	Relating to DNA data collection	To Governor 3/28/11 - Senate Journal	Completed Legislation awaiting Governor's signature
HB 3105	Providing immunity from civil or criminal liability for first responders who use forced entry to a residence	To Governor 3/31/11	Completed Legislation awaiting Governor's signature
HB 3143	Relating to penalties for causing injury or death to certain animals used by law enforcement	To Governor 3/31/11 - House Journal	Completed Legislation awaiting Governor's signature
HB 3144	Creating a criminal offense and adding misdemeanor criminal penalties for picketing or disrupting funerals	Approved by Governor 4/1/11 - Senate Journal	**Effective Ninety Days from Passage** - (June 10, 2011)
HB 3205	Reducing jail sentence for successful completion of education and rehabilitation programs	Approved by Governor 3/18/11 - Senate Journal	**Effect from passage** - (March 9, 2011)

To view the full text of the enrolled bills, please visit the West Virginia Legislature website at http://www.legis.state.wv.us/ .

West Virginia Public Defender Services

One Players Club Drive
Suite 301
Charleston, West Virginia 25311

Phone: 304-558-3905
Fax: 304-558-1098
Voucher Processing Fax:
304-558-6612
www.wvpds.org

THE DEFENDER is a quarterly publication of West Virginia Public Defender Services

Russell Cook - Acting Executive Director
Robert Ferguson, Jr. - Secretary of Administration
Earl Ray Tomblin - Governor

Criminal Law Research Center:
Russell Cook - Director
Erin Fink - Administrative Assistant

www.wvpds.org