

The Defender

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From The Executive Director's Chair

It has been a great run, a really great run.

I am retiring as of 31 December 2010. The number of major projects still undone makes me reluctant to leave but I am ready for someone else to take the reins. Hourly rates for appointed counsel need to rise; the long-delayed web billing system should be implemented; more Public Defender offices should be opened; the public needs to be better informed of the need for this service; and of course, funding should be stabilized.

The projected deficit over the next 18 months is over \$25,000,000; the current budget is \$31,826,606, including funds necessary to run this office. Without a concerted effort to support this essential Constitutionally-required function, I predict a return to chronic deficits resulting in 3-6 months without payment to private counsel. The Bar and the Court should support funding as the cornerstone of our Constitutional liberties and freedoms. A society which treats the poor and misbegotten in unjust and unfair ways cannot long preserve those liberties and freedoms.

With every legislative session, costs are added to this

system, but in over twenty years as head of this agency, we have received three fiscal notes (excepting bills to expand the Public Defender system). Over one third of our costs are now in the areas of abuse and neglect and juvenile defense, most of which were added by legislative action. Hundreds of new misdemeanors have been created, mandatory sentences imposed and sentences lengthened, all adding to costs.

Still, progress has been steady. Since December 1989 (when I was appointed), the number of Public Defenders has risen from ten to one hundred twenty-six. Support staff increased from five to over eighty. The total number of offices increased from four to twenty-three. The cumulative cost avoidance (compared with private counsel costs) exceeds \$150,000,000. The number of claims processed for private attorneys and others has increased by over 50% at its peak, with cost reductions peaking at nearly \$1,500,000. Due to the dedication of our staff and some technological improvements, processing time has been significantly reduced (if we were continuously fully-funded, the turnaround time for payment could be five business days). Funding increased from ap-

proximately \$6,500,000 to over \$50,000,000 during the temporary "surge" of older claims (counting supplemental funding). An expanded continuing education effort has averaged ten presentations per year, with many materials available free of charge on our web site www.wvpds.org. PDS appellate representation has increased.

Not as much as I wanted, but not bad.

Most importantly, I have had the honor and privilege to work with some of the finest attorneys and support staff in West Virginia, including my own office staff. Miscareants are not easy to represent. The public seldom understands why a defense is necessary. I am humbled by the dedication and devotion of most of the persons whom we fund, both Public Defenders and private counsel. Support staff in your offices do unsung and often heroic things to protect clients' interests. Public Defender Boards serve without pay. I applaud your efforts and thank you most sincerely for all that you have done. I know your dedication and integrity will continue to result in upholding the most basic of our Constitutional rights.

Thanks for your friendship, your support and your hard work. I will miss you all. It really has been a great run.



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Supreme Court
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West Virginia Supreme Court Update

State v. Spears, No. 35437 – September 16, 2010 – *Memorandum Order*

Following the appellant's sexual assault conviction, he was granted post-conviction bond and registered as a sex offender. During his initial registration interview he was asked if he owned any motor vehicles and he replied in the negative. During a follow-up registration interview, he was asked if he had access to motor vehicles. Upon his admission to having such access he was indicted for failing to provide notice of a change in his registration status.

The appellant argued (and the State conceded) that due to the nature of the question at the initial interview he had not concealed his access to a motor vehicle during his initial interview and that there was insufficient evidence to support his conviction. The Court acknowledged this concession, reversed the appellant's conviction and ordered the indictment dismissed with prejudice.

State v. Jessica Jane M., No. 35441 – September 16, 2010 – Per Curiam (*Ohio – Mazzone, J*)

Following allegations by her daughter to a foster parent, the appellant and her boyfriend were indicted in January 2008 for numerous sexual offenses. The appellant's daughter alleged that the appellant had sexually abused her and had assisted her boyfriend in other sexual assaults upon the child. At the appellant's trial in October 2008, the child (R.M.) testified that her mother had sexually assaulted her and had held her down while the boyfriend had committed similar acts. The State also presented the testimony of several witnesses, including the child's foster mother, Child Protec-

tive Services worker, and treating physician, each of whom testified to physical findings and as to statements made by R.M. regarding the abuse.

The appellant was convicted and sentenced to a lengthy prison term. On appeal, she argued that the trial court had erred by (1) permitting R.M.'s foster mother to testify to statements made to her by the child; (2) prohibiting the appellant from asking whether R.M. had had sexual relations with other men; (3) denying a defense request to inquire into R.M.'s competency to testify; and (4) denying a defense motion to disqualify the prosecuting attorney's office due to an alleged conflict of interest.

Held: The Court rejected the appellant's arguments that the foster mother's testimony was inadmissible hearsay and violated *Crawford v. Washington*. The Court held that it was not an abuse of discretion to admit R.M.'s statements, noting that similar statements were admitted in other cases not to prove the truth of the matters asserted but merely to demonstrate why the testifying witness sought treatment for the child. The Court also noted that R.M. had testified at trial, and observed that *Crawford* applies only to cases where the declarant does not provide in-court testimony.

The Court also affirmed the trial court's determination that defense counsel's question to R.M. – "How many different men did you have sex with?" – violated West Virginia's rape shield law. The defense had made the inquiry because of information provided prior to trial that R.M. had allegedly falsely accused other persons of sexual assaulting her in the past. The Court noted that the appellant had failed to request a pretrial hearing to address the allegedly

false allegations as required in *State v. Quinn*, 200 W. Va. 432, 490 S.E. 2d 34 (1997), and cited *Quinn's* requirement that proponents of such evidence must present "strong and substantial proof of actual falsity" in order to cross-examine on such matters.

The Court also determined that the trial court had conducted a sufficient examination to determine R.M.'s competency to testify, and concluded with a determination that contacts between the appellant and one of the prosecutors in the case in a prior unrelated domestic violence case did not create an appearance of impropriety.

Affirmed.

State v. Sharp, No. 35303 – September 16, 2010 – Per Curiam (*Cabell – Cummings, J.*)

The appellant was indicted by a Cabell County grand jury in September 2008. The indictment charged that the appellant had sold crack cocaine to an undercover police officer in November of 2007. At trial, one of the police officers testified that the appellant had sold them one "chunk" of crack cocaine valued at twenty (\$20.00) dollars. The appellant was convicted and sentenced to a term of imprisonment. On appeal he argued (1) that the evidence was insufficient to support his conviction because the State had failed to prove that the crack cocaine tested at the state police lab was the same material he had sold to the undercover officers, and (2) that the trial court had erred by denying his motion for a mistrial based on improper testimony by one of the police officers.

Held: The Court rejected the appellant's argument that testimony from a forensic chemist that she had received and tested "chunks"

conflicted with the undercover officer’s testimony that they had received only a single “chunk” from the appellant and therefore indicated that she had not tested the same material. The Court noted that there was nothing in the record to indicate that the chemist had tested the wrong evidence, that the State had established a sufficient chain of custody for the evidence, and that the jury could have inferred that the single chunk could have broken apart at some point.

The Court similarly rejected the appellant’s argument that he was entitled to a mistrial due to improper testimony that he had a prior criminal record and had previously been incarcerated. One of the police officers testified that after reviewing a videotape of the drug transaction, he had reviewed a book of mug shots and that another officer had “worked in the jail years ago”, and were thus able to identify the appellant. The Court noted that these statements were improper but harmless, citing the non-constitutional nature of the evidence and the strength of the remaining evidence against the appellant.

Affirmed.

Lawyer Disciplinary Board v. Wasser.
No. 34742 – September 16, 2010 – Per Curiam

The respondent attorney was admitted to the West Virginia bar in October 2000. The respondent was also licensed to practice law in Maryland and several other jurisdictions. In 2008 allegations arose in Maryland that the respondent had misappropriated in excess of \$90,000 from a client trust account and had converted the funds to his personal use. The respondent was subsequently disbarred in Maryland, Virginia and several federal courts.

After reviewing the provisions for reciprocal disciplinary proceedings, the Court determined that the respondent’s West Virginia law license should also be annulled. The Court noted that the respondent had failed to demonstrate that any of the four exceptions permitting a lesser disciplinary sanction set forth in *Lawyer Disciplinary Board v. Post*, 219 W.Va. 82, 631 S.E.2d 921 (2006) were applicable in his case. The Court also cited the nature of the respondent’s conduct and respondent’s attempt to shift responsibility for his conduct onto a former officer manager.

Law License Annulled.

In Re: Chevie V., No. 35443 – September 23, 2010 – Davis, C.J. (*Marshall – Hummel, J.*)

Abuse and neglect proceedings were instituted against the mother and father of Chevie V. after the child was discovered with multiple suspected cigarette burns on her body. The child’s mother moved the court for permission to hire an expert witness to rebut any expert testimony offered by the State as to the source of the injuries. The court entered an order approving the request.

The mother’s attorney subsequently requested reimbursement of fees and expenses paid to the expert, and the court entered an order requiring the Department of Health and Human Resources (“DHHR”) to reimburse the attorney. The DHHR objected, arguing that payment for such experts was the responsibility of West Virginia Public Defender Services (“WVPDS”). The court denied the DHHR’s motion for relief and the DHHR appealed.

The Court affirmed the circuit court, holding that pursuant to the specific statutory authority of West Virginia Code §49-7-33(2002), the DHHR is obligated to pay for expert witness services in abuse and neglect cases. However, the Court reversed the circuit court’s determination that the DHHR was obligated to pay such experts at the rate established by WVPDS, and held that the DHHR could establish a fee schedule in accordance with the current Medicaid rate.

Affirmed in part, Reversed in part, and Remanded.

State v. VanHoose, No. 35483 – October 14, 2010 – Per Curiam (*Cabell – Ferguson, J.*)

The appellant was arrested in March 1998 and charged with two counts of first degree murder following the shooting deaths of two men inside the appellant’s apartment. The appellant’s wife initially claimed responsibility for the shootings, stating that she had shot the men when they had entered the apartment and begun attacking the appellant. The appellant later provided a statement to the police that he had shot the men after they had attacked his wife inside the apartment.

The appellant was indicted in September 1998 for two counts of first degree murder. The appellant’s trial was delayed on several occasions over the next two years. Many of the delays were

based on the State’s intent to use the testimony of the appellant’s wife, who had filed for divorce. Because the appellant would not waive the spousal testimony privilege, the State sought several continuances to permit the divorce to become final. The appellant objected and made several requests for a speedy trial.

The appellant’s divorce was finalized in April of 2000. Following several months of motions and arguments regarding the finality of the proceedings, on September 7, 2000 the appellant entered a conditional guilty plea to a count of first degree murder and an additional count of second degree murder and was sentenced to life (with mercy) and a suspended consecutive sentence of forty (40) years. The appellant reserved the right to challenge the trial court’s rulings on the speedy trial issue.

Over the next several years a number of attorneys were appointed to assist the appellant in perfecting his appeal. The appellant subsequently filed two habeas corpus petitions with the circuit court, challenging the court’s ruling on his speedy trial claims and alleging a denial of his right to appeal. In April 2009, the court denied the appellant’s habeas petition and resentenced the appellant for appeal purposes.

On appeal the appellant argued that he had been denied a speedy trial under the one-term and three term rules codified in W. Va. Code §§62-3-1 and 62-3-21, and that he had received ineffective assistance of appellate counsel based on counsel’s failure to file an appeal.

Held: The Court held that the appellant had not been denied a speedy trial. The Court evaluated the appellant’s assertion under the four-part test set forth in *State v. Foddrell*, 171 W. Va. 54, 297 S.E. 2d 829 (1982). While noting the passage of substantial time between the appellant’s indictment and his plea, the Court determined that the State’s desire to use the testimony of the appellant’s spouse (the only eyewitness to the shootings and the person originally accused of the killings) constituted valid reasons for the continuances obtained by the State. The Court also held that while the appellant had timely asserted his rights to a speedy trial, he had not been prejudiced by the delay.

The Court also rejected the appellant’s argument



that his initial trial counsel had failed to file an appeal in a timely fashion. The Court denied the State's contention that the appellant's subsequent appeal rendered the issue moot, but held that any delay by the appellant's initial appellate counsel was occasioned by counsel's attempts to obtain transcripts necessary for the appeal. (The Court also cited the appellant's post-conviction decision to challenge the speedy trial through habeas corpus proceedings, rather than through re-sentencing/appeal procedures).

Affirmed.

State v. Mahood, No. 35463 – October 14, 2010 – Per Curiam (*Jackson – Evans, J.*)

The appellant was convicted of first degree murder in connection with the August 2007 death of his wife at the couple's Jackson County home. The appellant argued that his wife had apparently sustained injuries while away from the home and had died after returning home. The State alleged that the appellant had murdered his wife, and presented forensic evidence indicating that an altercation had occurred within the home. The State also presented testimony from the medical examiner indicating that the victim's head injuries were such that she could not have been able to drive or walk after sustaining the injuries. The State also offered testimony from acquaintances of the couple, who contradicted the appellant's statements to the police that he had been at home on the day of his wife's death.

The appellant's primary contention on appeal was that the State had introduced improper evidence of bad character through the testimony of one of the appellant's acquaintances, who testified that she had had a sexual relationship with the appellant while the appellant was married to the victim. The appellant's attorney objected to the testimony and moved for a mistrial. The court denied the motion and advised the jury to disregard the evidence of the extramarital affair.

Held: The Court rejected the appellant's argument that the testimony was prejudicial enough to deny him a fair trial. The Court noted that the evidence was mentioned on only one occasion and that the trial court had sustained the appellant's objection and provided a curative instruction. Citing the

"overwhelming" evidence offered by the State, the Court found insufficient prejudice to justify a mistrial.

Affirmed.

State v. Harris, No. 35464 – October 18, 2010 – Per Curiam (*Ohio – Recht, J.*)

The appellant was indicted along with three other individuals for multiple counts of abduction and sexual assault in connection with two unrelated sexual assaults. One of the victims (D.M.) testified that she had been sexually assaulted by the appellant and three other men while in a hotel room. The other victim (J.L.) had no recollection of the assault, but a witness testified that the appellant and two other men had sexually assaulted the woman while she was unconscious.

The appellant was convicted of the charges involving J.L. and was sentenced to multiple sentences for conspiracy, abduction with intent to defile, two counts of aiding and abetting sexual assault and a single count of sexual assault in the second degree. He received a prison term on each count, and the sentence for abduction with intent to defile was enhanced to a life sentence based on the appellant's prior felony record.

On appeal the appellant alleged (1) the court had failed to grant his motion to sever the charges involving the separate victims; (2) evidence was improperly excluded under the rape shield statute; and (3) that he was sentenced improperly.

Held: Regarding the appellant's severance argument, the Court held that the trial court had correctly determined that severance was unnecessary, because evidence of the allegations involving each victim would have been admissible in a separate trial for the other charges. The Court noted that the lower court had conducted a hearing pursuant to *State v. McGinnis*, 193 W. Va. 147, 455 S.E. 2d 516 (1994) and had ruled that evidence of the

allegations involving D.M. would be admissible in a trial of the offense involving J.L. and vice versa.

The Court also rejected the appellant's argument that evidence was improperly excluded under the rape shield law, noting that the appellant's brief had failed to specifically describe the excluded evidence.

The Court also denied the appellant's argument that the imposition of a life sentence under the recidivist statute, in addition to the consecutive sentences imposed for the remaining offenses, constituted an improper sentence. The Court noted that under *State v. Housden*, 184 W. Va. 171, 399 S.E. 2d 882 (1990) it is not improper to impose consecutive sentences for multiple convictions when one of the convictions is subject to recidivist enhancement.

Affirmed.

State v. Gilman, No. 35297 – October 18, 2010 – Per Curiam (*Logan – Perry, J.*)

In January 2006 authorities discovered the body of Mary Pelfry on a remote hillside in Logan County. The body had been burned and covered with straw and a piece of tin. While canvassing the scene, police approached the appellant, who lived on property adjacent to the crime scene. Despite being told no details of the scene by the officers, the appellant asked the officers if they were there about "the burnt girl". The appellant voluntarily accompanied the officers to the police station, where he provided a statement with various inconsistent details. He left the police station but returned several days later to recover two knives that had been confiscated from him at the prior interview. During this second visit he was *Mirandized*, signed a waiver of his Miranda rights, and provided another statement. During this statement, however, he asked the interviewing officer to get him a lawyer. When the officer indicated his inability to comply with this request (because the appellant had not yet been charged with a crime), the appellant asked to speak to a State Trooper, to whom he made a statement admitting to

beating Ms. Pelfry to death after a sexual encounter.

At trial the appellant argued that his confession was a false confession; that he was not with the victim when she died; and that another individual, Ada Sloane, had admitted killing the victim. The jury rejected his alibi defense and convicted the appellant of second degree murder.

The appellant asserted on appeal (1) that his confession should have been suppressed because it was involuntary; (2) there was insufficient evidence to sustain the conviction; (3) that it was discovered during the trial that a member of the jury was the minister who had performed the victim’s memorial service; and (4) the prosecutor had made improper statements during closing argument.

Held: The Court rejected each of these contentions and affirmed the conviction. The Court held (1) that the appellant’s statement to the police was entirely voluntary, as he had voluntarily arrived at the police station to recover seized property and that the appellant was not in police custody at the time of the statement; (2) the evidence of the appellant’s guilt (the appellant’s confession along with corroborating observations by the police) was sufficient to sustain the conviction; (3) the questioned juror, who was eventually removed from the jury and replaced with an alternate, did not specifically recall performing the victim’s service; and (4) that the appellant had waived his right to challenge a statement by the prosecutor by failing to object to the statement.

Affirmed.

State v. Smith, No. 35489 – October 27, 2010 – Per Curiam (*Ritchie – Holland, J.*)

Appellant was indicted for attempted murder, two counts of malicious assault and wanton endangerment in connection with the shooting of his next door neighbor. The appellant and the neighbor had engaged in a lengthy disagreement, which culminated in a September 2007 attack by the appellant on the victim in the victim’s driveway. The attack was electronically recorded on the appellant’s home security system and obtained by the neighbor via a wireless surveillance system.

The appellant was convicted and sen-

tenced to an effective sentence of 12 to 35 years imprisonment. On appeal the appellant alleged (1) the trial court had erroneously denied his motion to disqualify the prosecuting attorney due to the prosecutor’s alleged knowledge of the victim’s dangerous reputation and role in the chain of custody of the video of the shooting; (2) disproportionate sentences; (3) denial of his motion for a new trial; (4) insufficient evidence to sustain the attempted first degree murder conviction; and (5) failure to suppress the video of the shooting.

Held: The Court first addressed the appellant’s argument for disqualification of the prosecutor, noting that the appellant had asserted that the prosecutor had been advised by the appellant prior to the incident of the victim’s dangerous nature and would thus be needed to testify to these facts. The Court noted that the appellant had failed to obtain a ruling on the second motion or attempt to call the prosecutor to the stand, and that even if he had done so he was not entitled to disqualification. The Court reviewed the record and indicated that the appellant had been able to obtain the desired testimony from other witnesses.

The Court also rejected the appellant’s other claims, holding (1) the sentences imposed were within statutory limits and were not based on any impermissible factors; (2) the trial court correctly denied the appellant’s motion for a new trial, on the grounds that it was filed more than four months past the ten-day deadline set forth in Rule 33 of the Rules of Criminal Procedure; (3) the evidence of the appellant’s attack on his neighbor with a hammer and a shotgun was sufficient to support the verdict of attempted first degree murder; and (4) that even if the appellant had a privacy interest in the images taken from his security system, the prohibitions against unreasonable searches and seizures do not apply to searches by private individuals who are not acting as agents for the State.

Affirmed.

State v. Gibson, No. 35520 – October 28, 2010 – Benjamin, J. (*Fayette - Hatcher, J*) (*Nancy Fraley, Fayetteville Public Defender, for Defendant*)

The defendant was indicted for felony third offense domestic battery. The indictment alleged that the defendant had been previously convicted of domestic battery on June 29, 1998 and

February 2, 2004.

The defendant challenged the use of the 1998 conviction for enhancement purposes, arguing that the domestic battery statute only permitted the use of convictions which had occurred within ten years of the most recent allegation. The trial court certified the following question to the Court:

Must both of the two prior convictions for criminal acts of domestic violence [as defined and obtained in accord with West Virginia Code § 61-2-28], which are alleged within an indictment charging a current allegation of domestic violence as a third offense felony, have been obtained against a defendant within ten years of said current allegation, for said prior convictions to be properly used to charge the current allegation of domestic violence as a third offense felony?

Held: The Court answered the question in the negative, holding in a new syllabus point that a defendant can be charged with third offense domestic battery provided that one of the prior convictions has occurred within ten year preceding the newest charge. The Court rejected the defendant’s argument (which was adopted by the dissent) that the statute requires both convictions to have occurred within the time period.

Certified Question Answered.



State v. Cook, No. 35465 – October 28, 2010 – Per Curiam (*Kanawha – Berger, J.*)

The appellant was indicted for numerous sexual offenses alleged to have occurred in the early 1990's, while the appellant was the minister of a church. The allegations against the appellant were not reported until August 2007, when one of the alleged victims contacted the State Police. Two other alleged victims came forward over the next month, and the appellant was arrested on September 3, 2007. (An additional alleged victim came forward the following day). The appellant was indicted on multiple counts of third degree sexual assault and sexual abuse by a parent, guardian or custodian. He was subsequently convicted on several counts of sexual assault and sexual abuse and sentenced to serve twenty to sixty years imprisonment.

The appellant's primary contention on appeal was that the delay of 15 to 17 years between the commission of the alleged acts and the filing of criminal charges constituted prejudicial preindictment delay. The appellant argued that the delay was prejudicial because he was denied the opportunity to present the testimony of four potential witnesses who had died prior to the indictment, and also argued that many records and other documents vital to his defense were missing.

Held: The Court rejected the appellant's argument, noting that the appellant was required to show "actual prejudice" resulting from the preindictment delay. The Court determined that the appellant's grounds for prejudice regarding the loss of witnesses and documents were not adequately supported on the record, and that a proponent of such evidence must demonstrate not only the contemplated testimony but the impact of such testimony. Determining that the appellant had failed to demonstrate that his defense was "meaningfully impaired", the Court found no error in the trial court's decision refusal to grant the appellant's motion to dismiss the indictment.

The Court also rejected (1) the appellant's argument that a twelve-month delay between his arrest and the issuance of the indictment violated his right to a speedy trial; (2) the appellant's contention that he was improperly subjected to a broader definition of "custodian" than that which was in

effect at the time of the offenses was erroneous; (3) the argument that the 20 to 60 year sentence was not disproportionate; and (3) the appellant's assertion of cumulative error.

Affirmed.

State v. Edmonds, No. 35474 – October 28, 2010) – Per Curiam (*Kanawha – Berger, J.*) (*Jason Parmer, Kanawha Public Defender, for Appellant*)

The appellant was indicted for seven counts of sexual abuse by a parent, guardian, custodian or person in a position of trust under W. Va. Code §61-8D-5(a) (2005). The State alleged that the appellant, who was related to various officials at a church and Christian school, had several instances of sexual contact with a sixteen-year-old female who was a student at the school.

During the trial the appellant argued that the State had presented no evidence that he was in a position of trust in relation to the student. The appellant also argued that the young woman was not under his care, custody or control at the time of the sexual encounters. The trial court determined that these issues were matters of fact for the jury to determine and denied the appellant's motion for dismissal.

The appellant was convicted on three counts and sentenced to ten to twenty years imprisonment. On appeal the appellant argued that there was insufficient evidence for the jury to find that he was in a "position of trust" to the victim or that the victim was in his "care, custody or control" at the time of the incidents.

Held: The Court rejected the appellant's arguments. The Court noted testimony indicating that the appellant, because of his relationship with school officials, was constantly at the school and performed maintenance work around the facility. The Court also noted that he had been listed as an

"Assistant Youth Pastor" in church documents and had actively assisted students with school work. The Court therefore determined that there was sufficient evidence for the jury to find that the appellant was a person in a "position of trust" to the student.

The Court also determined that the State had presented sufficient evidence for the jury to conclude that the appellant exercised "custody and control" over the victim. The Court cited testimony describing the sexual encounters, indicating that the appellant had specifically directed the victim to perform certain actions.

Affirmed.

State v. Wilson, No. 35276 – November 3, 2010 – Per Curiam (*Braxton – Facemire, J.*)

The appellant was convicted of conspiracy to deliver a controlled substance. Based upon his conviction, the State filed a recidivist information to which the appellant entered a guilty plea. The trial court sentenced the appellant to one to five years on the conspiracy charge and a determinate five years for the recidivist charge. On appeal the appellant asserted (1) that the trial court should not have permitted the trial testimony of two witnesses due to the State's late disclosure of the witnesses, and (2) that the determinate five year sentence on the recidivist charge was an improper sentence under the recidivist statute.

Held: The Court rejected the appellant's argument regarding late disclosure of witnesses. The Court noted that the witnesses were the appellant's co-defendant (who had entered a guilty plea only a few days before the appellant's trial) and the confidential informant. The Court adopted the State's argument that the appellant was not prejudiced by the disclosure of these witnesses, because (1) the appellant had been aware of the identity of the confidential informant for

approximately two months prior to the trial, having deduced the identity when provided an opportunity to listen to the tape recording of the drug transaction, and (2) the appellant was aware of the possibility of testimony from his co-defendant, whose cooperation was obtained and promptly disclosed just before the appellant's trial.

The Court determined, however, that the five-year sentence imposed upon the appellant for the recidivist conviction was erroneous. The Court noted that under W. Va. Code §61-11-18(a), a five-year definite sentence may be imposed upon persons whose original sentence is for a definite term of years. For persons who have been sentenced to an indeterminate sentence, the statute provides that the minimum term shall be doubled.

Noting that the appellant's sentence on the conspiracy charge was an indeterminate sentence of one-to-five years, the Court held that the five-year sentences was therefore illegal and vacated the appellant's guilty plea on the recidivist charge.

Affirmed in part, reversed in part and remanded.

State v. Longerbeam, No. 35472 – November 18, 2010 – Per Curiam (*Jefferson – Sanders*)(*Joel Weinstein and John Adams*, 23rd Circuit PD Office, for Appellant)

The appellant was indicted for five counts of sexual abuse by a parent, guardian, custodian or "person in a position of trust" under W. Va. Code §61-8D-5(a). The State alleged that the appellant and his wife went to the home of his wife's sister to assist in finding a lost pet, and that while at the home the appellant had touched one of his nieces in a sexual manner. The appellant was subsequently convicted of a single count of sexual abuse and sentenced to ten to twenty years imprisonment for that offense. On appeal, the appellant argued that the State had failed to prove that he fit into one of the defined enhancement classes under §61-8D-5(a).

Held: After noting that the appellant was neither a parent nor guardian of the alleged victim, the Court first examined whether the appellant qualified as a "custodian" of the child. The Court held that the appellant did not qualify as a custodian, because neither the appellant nor his wife had "actual physical possession or care or custody" of the child on either a full-time or part-time basis. The Court rejected the State's argument that

the appellant and his wife voluntarily became custodians upon their arrival at the home, noting that the children had been left with an older sister for safekeeping, who took charge and immediately ordered the appellant to leave the home upon discovering his conduct.

The Court also determined that the appellant could not be classified as a "person in a position of trust" in relation to the alleged victim. The Court rejected the State's argument that the familial relationship between the appellant and his niece, standing alone, qualified the appellant as a "person in a position of trust". The Court also noted that prior instances of supervision also did not qualify the appellant as such a person under the statute, and that the record had failed to demonstrate that anyone had charged the appellant with supervisory duties over his niece on the date of the incident.

Finding that the State had failed to prove that the appellant qualified under one of the statutory descriptions in §61-8D-5(a), the Court held that the trial court erred in denying the appellant's motion for acquittal.

Reversed.

State v. Williams, No. 35477 – November 18, 2010 – Per Curiam (*Mercer – Aboulhoshn*)

The appellant was convicted in 2007 for Attempt to Commit First Degree Sexual Abuse and was placed on probation. One of the conditions of the appellant's probation was that he have no contact with anyone under the age of eighteen. In early 2009 a petition was filed to revoke the appellant's probation for being in the company of two underage girls and the appellant was incarcerated. An attorney was appointed for the appellant on the probation revocation charge and he was released from custody his final revocation hearing. The appellant reported to the local State Police detachment to comply with the terms of his sexual offender registration, and while at the detachment he was questioned about his contact with the girls. The appellant waived his Miranda rights and provided an inculpatory statement to the officer admitting to a sexual encounter with one of the girls.

The appellant was later indicted for third degree sexual assault. He filed a motion to suppress his confession, arguing that his Sixth Amendment right to counsel was violated by the officer's interrogation at a time when he was represented by counsel on the probation revocation charge. The trial court denied the motion and the appellant subsequently entered into a conditional guilty plea, preserving the right to challenge the court's ruling on his suppression motion.

On appeal the appellant argued that the police interrogation was "effectively the same matter" as the probation violation case for which his right to counsel had attached. The State responded that while the right to counsel may have attached for the issues in the probation revocation motion, it had not yet attached as to the subject matter of the interrogation – whether the appellant had committed specific sexual offenses.

Held: The Court noted that the Sixth Amendment right to counsel arises when "adversary judicial proceedings" have been initiated regarding a *specific* case or issue. Citing *State v. Wilder*, 177 W. Va. 435, 352 S.E. 2d 723 (1986), the Court observed that the right to counsel is offense-specific, and therefore applies only when formal charges have been initiated regarding a particular offense. The Court held that because formal charges had not yet been filed regarding the sexual assault allegations, the appellant's right to counsel had not yet attached and there was no error in the admission of his confession.

Affirmed.

State ex rel. Tristen K. v. Janes, No. 35718 – November 17, 2010 – *Memorandum Order* (*Marion – Janes*)

The guardian *ad litem* for Tristen K. filed a petition for a writ of prohibition to prohibit the enforcement of an order granting a ninety-day pre-adjudicatory improvement period to the child's biological parents. The guardian argued that the pre-adjudicatory improvement period would unnecessarily delay the adjudication of the underlying abuse/neglect proceeding, which had already been delayed on several occasions.

The Court noted that because the lower court had set the adjudicatory hearing for a date in late November 2010, the issues raised by the guardian were moot. The Court did, however, express its concerns as to the necessity for prompt scheduling and adjudication of abuse/neglect cases.

Phillips v. Division of Motor Vehicles, No. 35436 – November 18, 2010
– Per Curiam (*Kanawha – Bloom*)

The appellant was cited in the State of Virginia for reckless driving for driving eighty-five miles per hour in a sixty-five mile per hour zone. He subsequently pleaded guilty to a reduced charge of “improper driving”, and the State of Virginia provided an abstract of conviction to the appellee. Upon receipt of the abstract, the appellee categorized the appellant’s conviction as “Hazardous Driving” under W. Va. Code §17C-6-1(a) and assessed three points against the appellant’s driving record. The appellant challenged this assessment by a writ of prohibition in the circuit court, but the court denied the appellant’s request for removal of the “hazardous driving” designation.

The appellant argued that because “improper driving” was the least restrictive moving violation in Virginia, the comparable West Virginia charge should have been the less restrictive speeding violation found in W. Va. Code § 17C-6-1(j) (2003), i.e., driving less than ten miles per hour over the speed limit on a restricted access highway.

Held: The Court noted that under the Driver License Compact, when an out-of-state conviction involves an offense which does not specifically equate with a West Virginia offense, the appellee may construe the foreign statute in accordance with offenses which are “of a substantially similar nature” with a West Virginia offense. The Court noted that the Virginia “improper driving” offense contains no speed restrictions, and that without such restriction the Court could not determine that the circuit court’s decision that the offenses were “substantially similar” was erroneous.

Affirmed.

State v. Eilola, No. 35140 – November 23, 2010 – Benjamin, J. (*Kanawha – Canady, J.*)

The appellant was arrested on March 29, 2006 for a number of violent offenses. Unable to post bond, he re-

mained incarcerated through his trial, when he was convicted of several offenses. He was sentenced to multiple consecutive sentences for an effective sentence of no less than six (6) nor more than twenty-seven (27) years. The appellant’s sentencing order mandated that he be given credit for 495 days of time served and that the time be applied against his initial sentence (a 3-15 year sentence for attempted murder). The State requested that this order be corrected to comply with *State v. Middleton*, 220 W. Va. 89, 640 S.E. 2d 152 (2006) which required that credit for time served be deducted from the “back end” of a sentence, rather than applying such credits towards a defendant’s parole eligibility date.

The circuit court agreed with the State and issued an amended sentencing order, stating that the 495 days of time served were to be deducted from the “maximum aggregated sentence”, and set an effective sentence date of August 6, 2007. The appellant challenged this ruling, arguing that the trial court’s refusal to give him credit for time served in calculating his parole eligibility date violated equal protection.

Held: The Court noted that no statute, rule or regulation expressly excluded pretrial credit for time served from the calculation of parole eligibility. After reviewing the prior cases and acknowledging the supportive provisions of the Model Penal Code, the Court held that for the purposes of determining parole eligibility, credit for time served should be applied to the aggregate *minimum* term of all of the combined consecutive sentences. The case was remanded for entry of an order adjusting the appellant’s effective sentencing date to March 29, 2006.

Reversed and Remanded.

Ullom v. Division of Motor Vehicles, No. 34864 – November 23, 2010 – Benjamin, J. (*Marshall – Karl, J.*)

In June 2006 the appellee was found seated in a vehicle parked

along a highway in front of a closed driveway entrance. The vehicle’s park lights were on but the engine was not running and there was no indication of any emergency situation. A passing police officer initiated a “road safety check” and, after speaking with the appellee and administering field sobriety tests, arrested the appellee and charged her with driving under the influence.

The appellee unsuccessfully challenged the subsequent revocation of her driver’s license by the appellant. Upon review, the circuit court found that the officer did not have reasonable suspicion to make an investigatory stop of the appellee and that there was insufficient admissible evidence to establish that the appellee had committed the offense of driving under the influence.

Held: After reviewing the general provisions concerning vehicle stops, the Court considered whether the officer’s stop and interrogation of the appellee fit within any exception to the general warrant requirement. The Court discussed the “community caretaker” doctrine, which permits a police officer, separate from their duties to investigate criminal activities, to engage and interact with the public in a “community safety and welfare” capacity. The Court noted that West Virginia had never formally adopted it as a valid exception to the warrant requirement. In a new syllabus point, the Court adopted the doctrine and set forth four requirements for application of the doctrine. In applying the doctrine to this case, the Court determined that the police officer’s “road safety check” was a valid exercise of the “community caretaker” doctrine, and that any evidence flowing from the officer’s stop of the appellee was properly considered.

The Court also agreed with the appellant that it was improper for the circuit court to consider the effect of the appellee’s acquittal in its’ decision. The Court noted (and the appellee conceded) that the acquittal had occurred after the administrative revocation hearing, and as such the DMV could not have afforded any weight or consideration to the outcome of the criminal case.

Reversed and Remanded.

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