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A DIVISION OF WEST VIRGINIA
PUBLIC LEGAL SERVICES COUNCIL
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INTRODUCTION

The Criminal Law Index was prepared by the Criminal Law Research Center of the West Virginia Public Legal Services Council. Special credit goes to Dolores Anderson and Lynn Powell for their thorough and efficient work. Credit for the preparation of the index also goes to the Governor's Committed on Crime, Delinquency, and Correction through which Public Legal Services secured a grant to hire three summer legal interns. The students, Cynthia Kotchek, Douglas McElwee, and Linda Pannell Zarski made substantial contributions to the compiling of this index.

Indexed in the manual are selected cases issued by the West Virginia Supreme Court of Appeals from January 1, 1978 through August 31, 1982. The types of cases selected are those in which Public Legal Services is authorized to provide services, *i.e.*, criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene, *inter alia*. The index is divided into approximately 130 general topics and over300 subtropics. The cases have been cross-indexed throughout the manual according to the issues discussed by the Court.

For ease in using the index we suggest you obtain a four-inch three-ring notebook and a set of dividers. Due to the cost of purchasing and printing dividers, we decided to leave these matters to the individual purchaser. Dividers are an extremely efficient aid and we suggest you take the time initially to set up your notebook so you can use the index with maximum ease.

A note about how to use the index:

In researching a particular topic the reader may encounter two types of references. To illustrate the first type, let us say the reader turns to the subject, CONFESSIONS. No cases are listed under this heading, but instead there are the following reference: See SELF-INCRIMINATION, (p. 827) AND SELF-INCRIMINATION - STATEMENTS BY DEFENDANT, (p. 830). The reader would then turn to these topics to locate cases dealing with confessions.

The second type of reference can be illustrated in the following manner: The reader turns to a particular subject, *e.g.*, APPEAL, and under the sub-topic "Failure to preserve for appeal", "Failure to object", (p. 30) finds the style of a case listed with no summary, but instead a reference to another topic, DENIAL OF A FAIR TRIAL. Upon turning to that topic on page 172 the reader would find a summary of the case which discusses the issue of failure to preserve error for appeal by failure to object.

For example, turn to page 30 of the index. There you will find:

APPEAL

Failure to preserve for appeal

Failure to object

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prison attire, (p. 172) for discussion of topic.

If you turn to page 172 you will find:

DENIAL OF A FAIR TRIAL

Prison attire

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

The summary of an issue in *McMannis* on page 172 also relates to the initial topic of failure to preserve error for appeal by failure to object.

Please note that we have attempted to index all cases handed down by the State Supreme Court within the heretofore mentioned time period which deal with the topic listed. We suggest, however, that because the possibility of omissions always exists in a work of this size, that in doing research you not rely exclusively on the index. If you note an omission or other error, pleas contact our office.

In briefing cases, we have attempted to be as faithful to the language of the Court as possible. However, statements taken out of context may distort the meaning. We therefore suggest that the summary we have written not be used as a substitute for a thorough reading of the case.

Also keep in mind that the slip opinions are subject to the filing of a petition for rehearing under the provisions of Rule 24 of the Rules of Appellate Procedure. During the thirty-day interval during which a petition may be filed, you should inquire of the Clerk of the Supreme Court of Appeals whether a petition for rehearing has been filed if you are relying on a case as authority. These opinions are also subject to formal revision before publication. In many instances we relied on the slip opinions in summarizing the cases indexed, as the cases had not yet been published. Because of the possibility of revision before publication, we again suggest that the summary not be used as a substitute for a thorough reading of the case.

Supplements containing cases issued during September, 1982 and January, 1983 terms of Court will be forth coming as part of your order. It is our intention to continue to supplement the index after each term of the Supreme Court. Notice for subscriptions for future supplements will be given at the time arrangements are made to have them printed.

We welcome any comments or suggestions on this material and any ideas you may have regarding future projects for the research center which will assist you. If you detect an error in this publication, please contact Iris Brisendine at (304) 558-3905; e-mail: ibrisendine@pds.state.wv.us.

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ABUSE AND NEGLECT

Emergency taking

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam)

W.Va. Code § 49-6-3, the emergency taking provision of the West Virginia Child Welfare Act, is constitutional on its face.

W.Va. Code § 49-6-3, the emergency taking provision of the West Virginia Child Welfare Act, and the other sections of article 6, chapter 49 of the West Virginia Code are not inconsistent, relate to the same subject matter, and should, therefore, be read *in pari materia*.

A statute providing for emergency taking must allow such taking only in an emergency situation in which the welfare or the life of the child is endangered and the statute must provide that there be an adjudication of the issues involved as soon as is reasonably possible after the taking. Such adjudication necessarily entails giving notice to the parents and offering them a meaningful opportunity to be heard.

Parens patriae

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam)

Coexistent with the right of a natural parent to due process in matters concerning the custody of his children is the inherent power of the State to intervene to protect the person and property of an infant. This power devolves upon the state under the doctrine of *parens patrial*.

Parental rights

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam)

The right of a natural parent to raise his children is a fundamental right guaranteed by the due process clause of the United States and West Virginia Constitutions.

ABUSE AND NEGLECT

Termination of parental rights

Burden of proof

In the Interest of S.C., 284 S.E.2d 867 (1981) (McHugh, J.)

Syl. pt. 1 - *W.Va. Code* 49-6-2(c) (1980), requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.

In a child abuse or neglect case the burden of proof under *W.Va. Code* § 49-6-2 (1980), is upon the State Department of Welfare to show by clear and convincing proof that conditions existing at the time of the filing of the petition constituted neglect or abuse. That burden does not shift.

Syl. pt. 2 - Even when an improvement period is granted, the burden of proof in a child neglect or abuse chase does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings.

Cross-examination of witnesses

In the Interest of S.C., 284 S.E.2d 867 (1981) (McHugh, J.)

The State Department of Welfare's decision not to offer into evidence reports of two social workers which had been included as part of the petition alleging neglect, or to call the social workers to testify, did not violate the appellant's statutory right pursuant to *W.Va. Code* § 49-6-2(c) (1980) to cross-examine witnesses.

Termination of parental rights (continued)

Custody

State ex rel. McCartney v. Nuzum, 248 S.E.2d 318 (1978) (Miller, J.)

Supreme Court issued writ of mandamus directing trial court to transfer custody of the infant to her natural mother pursuant to a prior order of the Supreme Court.

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

Any error of the trial court in allowing State Department of Welfare to retain temporary custody of child for a period of more than thirty days between preliminary and final hearings was waived since there is no indication that the appellant objected to the motions for continuance or made any attempt to hasten the final hearing.

The welfare of the child is the "polar star" by which the court will be guided in making an award of legal custody.

Due process

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam

Due process prohibits a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child without notice of opportunity to be heard.

West Virginia Department of Welfare ex rel. Eyster v. Keesee, 297 S.E.2d 200 (1982) (Neely, J.)

Syl. pt. 1 - "West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibits a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing." Syl. pt. 2, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Termination of parental rights (continued)

Due process (continued)

West Virginia Department of Welfare ex rel. Eyster v. Keesee, (continued)

W.Va. Code § 49-6-1(b) (1977) mandates that at least ten days notice be given to parents before a hearing to terminate parental rights. Failure to object to defects in the petition and notice does not constitute waiver.

W.Va. Code § 49-6-2 (1980) provides that a meaningful hearing to terminate parental rights require that parents have the right to counsel, the right to present and cross-examine witnesses, and the right to testify in their own behalf.

When defendant mother's parental rights had been terminated and defendant father's parental rights hinged on his ability to find someone other than the natural mother to help him raise the children, the Supreme Court held that the father had been denied the procedural protections of *W.Va. Code* § 49-6-6.

When the trial court terminated the mother's parental rights less than 48 hours after extending her period of custody, without giving adequate notice of the termination hearing, the Supreme Court found the permanent termination to be error.

Finding of fact and conclusion of law

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 6) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Finding of fact and conclusion of law (continued)

In the Interest of S.C., 284 S.E.2d 867 (1981) (McHugh, J.)

Bare statement in the disposition order couched in the language of *W.Va. Code* § 49-6-5(a)(6) (1977) is not sufficient to comply with the requirement of *W.Va. Code* § 49-6-2(c) (1980) that the court make findings of fact and conclusions of law as to whether a child is abused or neglected. The statement is not sufficient even though the evidence did support a finding of neglect.

Although court erred in failing to make specific findings of fact and conclusions of law, the error was considered to be waived since the order was acquiesced in and signed by appellant's counsel, was not objected to, and was assigned as error for the first time on appeal.

Improvement period

In re R.J.M., 266 S.E.2d 114 (1980) (Neely, C.J.)

When parents (1) had permitted the child to come very close to starvation which was only averted by the intervention of outside authorities; (2) had contumaciously declined to follow the advice of qualified physicians and the Department of Welfare after the child's life had been jeopardized; and (3) had negligently or deliberately missed doctor appointments and concealed themselves from representatives of the Department of Welfare, a reasonable person would conclude that permitting the child to return to their custody would threaten the child's life. In a case such as this where in return of the child to the parents might result in their absconding the jurisdiction and removing the child from effective supervision there were compelling reasons to justify the denial of an improvement period.

Where a child is under the age of three, immediate termination without an intervening period employing a less drastic alternative is more reasonable than in other cases since a child of that age has a greater susceptibility to illness, the child is not as irrevocably attached to his parents, and, numerous placement may severely retard the child's ability to form lasting attachments.

Termination of parental rights (continued)

Improvement period (continued)

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

Syl. pt. 3 - Where a court having jurisdiction of child neglect or abuse proceedings denies a motion by the parent or guardian for an improvement period under *W.Va. Code* 49-6-2-(b), the court must state on the record the compelling circumstances warranting the denial of such motion.

The failure of the court to make findings on the record as required by the statute is reversible error. The court did not even state in conclusory language the compelling circumstances existed which justified the denial of the request for an improvement period.

Syl. pt. 4 - Where child neglect proceedings are premised upon a mental condition or illness of the parent which preciously required the parent's hospitalization and during which time the child was not in the custody of the parent, an improvement period may be granted to observe the progress of the parent to determine if he or she is mentally able to care for the child without placing the child in the custody of such parent.

There does not appear to be any justification for disallowing the appellant an opportunity to demonstrate, independent of custody, her ability to café for her child, especially in light of evidence concerning the appellant's improvement as a result of hospitalization, the uncertain nature of her changes for rehabilitation, and the brief period of time between the appellant's release from the hospital and the date of the preliminary hearing during which there was an opportunity to observe the appellant's behavior and reactions in a nonstructured environment.

Termination of parental rights (continued)

Less restrictive dispositions

In re R.J.M., 266 S.E.2d 114 (1980) (Neely, C.J.)

The trial court did not abuse its discretion or deny the appellant due process when it selected the most drastic remedy provided by *W.Va. Code* § 49-6-5 (1977), namely termination of parental rights, because all of the requirements for finding that "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" as se forth in Code § 49-6-5(b) (1977) were met.

Modification of dispositional orders

West Virginia Department of Welfare ex rel. Eyster v. Keesee, 297 S.E.2d 200 (1982) (Neely, J.)

After a disposition other than permanent termination of parental rights has been made, the court may modify its disposition under *W.Va. Code* § 49-6-6, upon a showing of changed circumstances.

West Virginia Department of Welfare ex rel. Eyster v. Keesee, 297 S.E.2d 200 (1982) (Neely, J.)

See ABUSE AND NEGLECT Termination of parental rights, Due process, (p. 3) for discussion of topic.

Right to counsel

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

W.Va. Code § 49-6-2(a) (1980 Replacement Vol.) provides that in neglect proceedings the child "shall have the right to be represented by counsel at every stage of the proceedings . . . " and that [u]nder no circumstances may the same attorney represent both the child and the other party or parties . . .".

ABUSE AND NEGLECT

Termination of parental rights (continued)

Sufficiency of evidence

In re R.J.M., 266 S.E.2d 114 (1980) (Neely, C.J.)

Trial court's findings of fact that the child's illness, malnutrition and abandonment were the result of her parents' refusal to care and provide for the child and that there was reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future as are necessary for the welfare of the child, were amply supported by the evidence.

In the Interest of S.C., 284 S.E.2d 867 (1981) (McHugh, J.)

State Department of Welfare's failure to introduce into evidence at the adjudicatory hearing reports of social workers which had been made a part of the neglect petition, or the testimony of such social workers, is not a basis, standing alone, for finding that the state failed to present clear and convincing proof of neglect.

The State presented sufficient evidence to support a finding of clear and convincing proof of neglect at the time the neglect petition was filed.

Sufficient of neglect petition

State ex rel. McCartney v. Nuzum, 248 S.E.2d 318 (1978) (Miller, J.)

The trial court acted in excess of its powers when it ordered a hearing on the petition for neglect since the petition brought under *W.Va. Code* § 49-6-1 did not show facts which constitute an "abused" or "neglected" child as defined in *W.Va. Code* 49-1-3. Prohibition, therefore, is appropriate to bar further prosecution of the action.

Termination of parental rights (continued)

Sufficient of neglect petition (continued)

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

A juvenile petition which states no facts respecting the improper care or supervision of the parents and contains only conclusory statements is defective.

If the allegations of fact in a child neglect petition are sufficiently specific to inform the custodial of the infant of the basis upon which the petition is brought, and thus afford a reasonable opportunity to prepare a rebuttal, the child neglect petition is legally sufficient.

Syl. pt. 2 - Where a child neglect petition is premised upon the inability of the parents to care for the child due to the parent's mental illness, such petition must set forth specific allegations of fact sufficient to inform the parent of the nature of the condition or conduct which constitutes or is likely to result in neglect in order to satisfy the requirement of *W.Va. Code* 49-6-1(a) (1980 Replacement Volume).

Statements in neglect petition which follow the statutory language and allege that the appellant is unable to provide her daughter with the necessities of life due to her medical condition, do not constitute facts which show neglect of the child and are merely general conclusory statements. In one allegation of fact contained in the petition - that the appellant had been a patient at a state mental hospital from time to time - did not sufficiently inform the appellant of the basis of the neglect charges and was not an allegation of specific conduct constitution child neglect sufficient to support a petition for permanent termination of parental custody under *W.Va. Code* § 49-6-1(a) (1980 Replacement Volume). Since the petition did not state the nature of the appellant's "medical condition," allege that the appellant's treatment at the hospital was unsuccessful, or state any facts which wold give rise to an inference that the appellant's medical condition presented a danger to the mental or physical well-being of the child, the petition was defective.

Termination of parental rights (continued)

Sufficient of neglect petition (continued)

State v. Scritchfield, (continued)

Syl. pt. 2 - Where a child neglect petition is premised upon the inability of the parent to care for the child due to the parent's mental illness, such petition must set forth specific allegations of fact sufficient to inform the parent of the nature of the conditions or conduct which constitutes or is likely to result in neglect in order to satisfy the requirements of *W.Va. Code* § 49-6-1(a) (1980 Replacement Vol.).

If the petition requests permanent termination of parental custody it should specifically allege the inability or refusal of the parent to correct the condition or conduct.

What constituted abuse and neglect

State ex rel. McCartney v. Nuzum, 248 S.E.2d 318 (1978) (Miller, J.)

Syl. pt. 1 - *W.Va. Code* 49-1-3, in defining an "abused" and "neglected" child, is premised on the concept that the person who has the actual custody of a child either directly abuses or neglects the child, or allows the same to occur indirectly as a result of inadequate supervision.

Syl. pt. 2 - *W.Va. Code* 49-1-3, does not apply where the natural parent has not had actual custody of his child and the alleged act of "psychological abuse" is occasioned by his attempt to obtain lawful custody of his child under a court order.

Termination of parental rights (continued)

What constituted abuse and neglect (continued)

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

The definition of "neglected child" contained in *W.Va. Code* § 49-1-3, (1980 Replacement Vol.), includes those children whose well-being is endangered or impaired by the inability of the parent, as a result of a mental condition, to perform the most fundamental and essential of the parental obligations - to feed, clothe, shelter, supervise, educate and provide medical care. Under such circumstances, neglect may be proved upon a showing of an ongoing condition or course of conduct which has been or is likely to be detrimental to the physical or mental well-being of the child and which the parent has been unable or unwilling to correct.

ABUSE OF DISCRETION

In general

Moore v. Starcher, 280 S.E.2d 693 (1981) (McGraw, J.)

Syl. pt. 3 - A circuit court does not exceed or abuse its jurisdiction by requiring a county commission to perform its statutory duty.

Abuse and neglect

In re R.J.M., 266 S.E.2d 114 (1980) (Neely, C.J.)

See ABUSE AND NEGLECT Termination of parental rights, Less restrictive dispositions, (p. 7) for discussion of topic.

Bail

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

See BAIL Post-conviction pending appeal, (p. 81) for discussion of topic.

Bifurcated trial

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

See INSANITY Bifurcated trial, (p. 464) for discussion of topic.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See INSANITY Bifurcated trial, (p. 465) for discussion of topic.

ABUSE OF DISCRETION

Change of venue

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

See VENUE Change of venue, Abuse of discretion, (p. 938) for discussion of topic.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

See VENUE Change of venue, Abuse of discretion, (p. 938) for discussion of topic.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

See VENUE Change of venue, Abuse of discretion, (p. 939) for discussion of topic.

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

See VENUE Change of venue, Abuse of discretion, (p. 939) for discussion of topic.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See VENUE Change of venue, Abuse of discretion, (p. 939) for discussion of topic.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

See VENUE Change of venue, Abuse of discretion, (p. 940) for discussion of topic.

ABUSE OF DISCRETION

Change of venue (continued)

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

See VENUE Change of venue, Abuse of discretion, (p. 940) for discussion of topic.

Competency to stand trial

State v. Myers, 280 S.E.2d 299 (1981) (Per Curiam)

See COMPETENCY To stand trial, (p. 105) for discussion of topic.

Confessions

State v. Mitter, 289 S.E.2d 457 (1982) (McHugh, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Appellate review, (p. 837) for discussion of topic.

State v. Wilson, 294 S.E.2d 296 (1982) (Per Curiam)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Appellate review, (p. 839) for discussion of topic.

Continuance

See CONTINUANCE Abuse of discretion, (p. 121) for discussion of topic.

State v. Pauley, 276 S.E.2d 792 (1981) (Per Curiam)

See CONTINUANCE Competency determination, (p. 123) for discussion of topic.

ABUSE OF DISCRETION

Continuance (continued)

State ex rel. Shorter v. Hey, 294 S.E.2d 51 (1981) (McHugh, J.)

See SPEEDY TRIAL Same term rule, (p. 895) for discussion of topic.

Determination of competency of child witness

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, J.)

See WITNESSES Children, (p. 956) for discussion of topic.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See WITNESSES Children, (p. 958) for discussion of topic.

Discovery

State v. Moran, 285 S.E.2d 450 (1981) (Per Curiam)

See DISCOVERY Nondisclosure, (p. 196) for discussion of topic.

Evidence

Insanity

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

See INSANITY Evidence, Scope of psychiatric testimony, (p. 470) for discussion of topic.

ABUSE OF DISCRETION

Evidence (continued)

Opinion

State v. M.M., 256 S.E.2d 549 (1979) (McGraw, J.)

See EVIDENCE Opinion, Expert witness, (p. 278) for discussion of topic.

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

See EVIDENCE Opinion, Nonexpert witness, (p. 296) for discussion of topic.

Photographs

Bennett v. Walton, 294 S.E.2d 85 (1978) (Per Curiam)

See EVIDENCE Photographs, (p. 298) for discussion of topic.

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

See EVIDENCE Photographs, (p. 299) for discussion of topic.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

See EVIDENCE Photographs, (p. 300) for discussion of topic.

Relevant, remote

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

See EVIDENCE Relevant, Remote, (p. 307) for discussion of topic.

ABUSE OF DISCRETION

Identification

Cross-examination of witnesses

State v. McCourt, 283 S.E.2d 918 (1981) (Per Curiam)

See IDENTIFICATION Suggestive identification, Right to cross-examine witnesses, (p. 415) for discussion of topic.

Indigent's expenses

State ex rel. Foster v. Luff, 264 S.E.2d 477 (1980) (Miller, J.)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 441) for discussion of topic.

Instructions

Coercive

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

See INSTRUCTIONS Coercive, (p. 501) for discussion of topic.

Juvenile

Dispositional hearing

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

See JUVENILE Dispositional hearing, Role of counsel, (p. 573) for discussion of topic.

ABUSE OF DISCRETION

Juvenile (continued)

Transfer hearing

State v. G.B.G., 275 S.E.2d 922 (1981) (Per Curiam)

See JUVENILE Transfer, Factors considered, (p. 610) for discussion of topic.

Nolle prosequi

State ex rel. Skinner v. Dostert, 278 S.E.2d 624 (1981) (McGraw, J.)

See *NOLLE PROSEQUI* In general, (p. 656) for discussion of topic.

Parole

Rowe v. Whyte, 280 S.E.2d 301 (1981) (McHugh, J.)

See PAROLE Appellate review, (p. 661) for discussion of topic.

Presentence report

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

See SENTENCING Pre-sentence report, (p. 876) for discussion of topic.

Probation

State v. Dobbs, 286 S.E.2d 918 (1982) (Neely, J.)

See PROBATION Eligibility for probation, (p. 703) for discussion of topic.

ABUSE OF DISCRETION

Probation (continued)

State v. Godfrey, 289 S.E.2d 660 (1981) (McHugh, J.)

See PROBATION Eligibility for probation, (p. 704) for discussion of topic.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

See PROBATION Eligibility for probation, (p. 704) for discussion of topic.

Severance

State v. Cunningham, 290 S.E.2d 256 (1981) (Neely, J.)

See JOINDER - SEVERANCE AND ELECTION Severance, (p. 530) for discussion of topic.

Surrebuttal

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

"It is within the sound discretion of the trial court in the furtherance of the interests of justice to permit either party, after it has rested, to reopen the case for the purpose of offering further evidence and unless that discretion is abused the action of the trial court will not be disturbed." Syl. pt. 4, *State v. Fischer*, 211 S.E.2d 666 (W.Va. 1974).

In a case for first-degree sexual assault in which defendant relied upon a defense of insanity, it was a abuse of discretion for the trial judge to refuse to reopen for surrebuttal by defendant when the State's expert witnesses at trial testified in a manner inconsistent with his pre-trial testimony.

ABUSE OF DISCRETION

Transfer of case

Hinkle v. Black, 262 S.E.2d 744 (1979) (Neely, J.)

Syl. pt. 2 - *W.Va. Code* 56-9-1 (1939) which provides that a circuit court in which a proceeding has been filed may transfer the proceeding to another circuit for good cause is not inconsistent with Rule 42 b, *W.Va.R.C.P.* which provides that the court in which the first of two or more related actions arising out of the same transaction is pending may order all actions transferred to it.

Syl. pt. 3 - Where a trial court does not abuse its discretion in transferring cases under *W.Va. Code* 56-9-1 (1939) this Court will not prohibit such transfer.

Voir dire

See *VOIR DIRE* Abuse of discretion, (p. 949) for discussion of topic.

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

See *VOIR DIRE* Scope, (p. 950) for discussion of topic.

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

See *VOIR DIRE* Scope, (p. 951) for discussion of topic.

Witnesses

Sequestration

State v. Harriston, 253 S.E.2d 685 (1979) (Harshbarger, J.)

See WITNESSES Sequestration, (p. 970) for discussion of topic.

ABUSE OF DISCRETION

Witnesses (continued)

Sequestration (continued)

State v. Sherman, 260 S.E.2d 287 (1979) (Per Curiam)

See WITNESSES Sequestration, (p. 970) for discussion of topic.

ACCESSORY, AIDING AND ABETTING, PRINCIPAL

In general

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

Defendant could be found guilty of aiding and abetting a principal even though the principal, because of his tender years, was unable under the law to commit a felony.

Without a principal in the first degree there can be no principal in the second degree to aid and abet in the commission of the crime.

An aider and abettor, who was present and assisted in the commission of the crime, may be indicted, convicted and punished whether or not the principal felon is convicted or amenable to justice.

Indictment

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

Applies standard set forth in Syl. pt. 2, *State v. Petry*, 273 S.E.2d 346 (W.Va. 1980), cited below.

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

Syl. pt. 3 - An aider and abettor, known in the law as a principal in the second degree, cannot be convicted upon an indictment found against him solely as a principal in the first degree.

State v. Grimer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Indictment sufficiently charged the crime of accessory before the fact and evidence sustained the conviction.

Indictment (continued)

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Syl. pt. 2 - Although *W.Va. Code* 61-3-1 provides for equal punishment of principals and accessories before the fact, a person may be convicted as an accessory before the fact only if properly indicted as such.

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

Where indictment charges individual with feloniously and burglariously breaking and entering with intent to commit a larceny and continues by stating that the defendant aided and abetted the named individual in the burglary, a principal in the first degree is named and the aider and abettor is amenable to punishment.

State v. Perry, 284 S.E.2d 861 (1981) (Per Curiam)

Applies standard set forth in Syl. pt. 2, *State v. Petry*, 273 S.E.2d 346 (W.Va. 1980), cited below.

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

The court overruled the distinctions among principals in the first degree, principals in the second degree, aiders and abettors, and accessories before the fact at the indictment stage, and held that a general indictment as a principal in the first degree shall be sufficient to sustain a conviction regardless of whether the evidence demonstrates that the defendant was principal, aider and abettor, or accessory before the fact. In that regard, the court overruled: syl. pt. 2, *State v. Jones*, 239 S.E.2d 763 (W.Va. 1977); syl. pt. 7, syl. pt. 9, *State v. Bennett*, 157 W.Va. 702, 203 S.E.2d 699 (1974); syl. pt. 3, *State ex rel. Brown v. Thompson*, 149 W.Va. 649, 142 S.E.2d 711, *cert. denied Brown v. Thompson*, 382 U.S. 940 (1965); syl. pt. 4, syl. pt. 5, *State v. Roberts*, 50 W.Va. 422, 40 S.E. 484 (1901); syl. pt. 2, *State v. Lilly*, 47 W.Va. 496, 35 S.E. 837 (1900). And also overruled: *dicta* expressed in *State v. C.J.S.*, 263 S.E.2d 899, 902 (1980); *State v. Fitch*, 263 S.E.2d 889,

Indictment (continued)

State v. Petry, (continued)

892 (1980); *State v. Nicholson*, 252 S.E.2d 894, 896 (1979); *State v. Grimmer*, 251 S.E.2d 780, 783 (1979); *State ex rel. Muldrew v. Boles*, 151 W.Va. 1033, 1044-45, 159 S.E.2d 36, 44-45 (1967); *Moore v. Lowe*, 116 W.Va. 165, 167, 180 S.E. 1, 1-2 *cert. denied*, 296 U.S. 574, 56 S.Ct. 130, 80 L.Ed. 406 (1935); *State v. Powers*, 91 W.Va. 737, 747, 113 S.E.2d 912, 916 (1922); *State v. Creameans*, 62 W.Va. 134, 136, 57 S.E. 405 (1907).

Syl. pt. 2 - Where under prior case law a criminal defendant was entitled to be indicted as an aider and abettor in order to be convicted as such, well established prohibitions against *ex post facto* changes in either procedural or substantive criminal law require that the defendant be allowed the benefit of the common law rule in effect at the time she was tried.

A general indictment will not prejudice the accused's constitutional right to be fully and plainly informed of the charges against him, in light of our liberalized rules regarding criminal discovery and in light of the rule that any matter known to the prosecution which is obviously exculpatory or relevant and favorable to the defendant must be made available to him.

Instructions

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Instruction which added the words "planned" and "encouraged" to the statutory language of "aid, counsels or procures" did not e expand or change the meaning of the statutory language or the common law definition of an accessory before the fact.

Syl. pt. 4 - The giving of an instruction at the instance of the State which, in effect, tells the jury that a defendant may be found guilty as an accessory before the fact to arson, upon a showing, beyond a reasonable doubt, that the defendant willfully and maliciously planned, counseled, procured, encouraged or caused the burning, is error as such instruction fails to instruct the jury that they would be required to find, beyond a reasonable doubt, that the defendant planned, counseled, and encouraged the one who was in fact the actual perpetrator.

ACCESSORY, AIDING AND ABETTING, PRINCIPAL

Larceny

See LARCENY Accessory, aiding and abetting, principal, (p. 622) for discussion of topic.

Punishment

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

Syl. pt. 1 - An aider and abettor is as criminally responsible for a crime as the principal actor.

The aider and abettor is a principal in the second degree; the actor is a principal in the first degree.

An aider and abettor has committed the crime as much as the principal in the first degree, and is subject to the same punishment as the principal felon.

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

Applies standard set forth in syl. pt. 2, *State v. Lamp*, 254 S.E.2d 697 (W.Va. 1979), cited below.

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

Syl. pt. 2 - A principal in the second degree is punishable as if he were the principal in the first degree and he may be punished as such irrespective of the fact that the principal in the first degree, by reason of his status as a juvenile, may be immune from criminal punishment.

State v. R.A.W., 267 S.E.2d 553 (1980) (Per Curiam)

See LARCENY Accessory, aiding and abetting, principal, (p. 622) for discussion of topic.

ACCESSORY, AIDING AND ABETTING, PRINCIPAL

Variance between indictment and proof

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

The defendant was indicted as a principal in the first degree but the evidence, taken in the light most favorable to the state, proved only that he was a aider and abettor. Applying the law in effect at the time he was tried, the Supreme Court found that the trail judge erred in refusing to grant the defendant's motion for a directed verdict of acquittal due to a variance between indictment and proof.

State v. Nicholson, 252 S.E.2d 894 (1979) (Caplan, C.J.)

Defendant was indicted for being an accessory before the fact, but the evidence proved the defendant's presence at the commission of the crime. There being a material variance between the indictment and the proof, the judgment was set aside.

State v. Perry, 284 S.E.2d 861 (1981) (Per Curiam)

Defendant was indicted as a principal in the first degree but the State's evidence, at best, proved that the defendant served as nothing more than a lookout. Applying the law in effect as the time of the conviction, the Supreme Court found the defendant was entitled to a judgment of acquittal because of the variance between indictment and proof.

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

Syl. pt. 2 - Where under prior case law a criminal defendant was entitled to be indicted as a aider and abettor in order to be convicted as such, well established prohibitions against *ex post facto* changes in either procedural or substantive criminal law require that the defendant be allowed the benefit of the common law rule in effect at the time she was tried.

Defendant was therefore entitled to a directed verdict of acquittal since she was indicted as a principal in the first degree but the evidence showed that she was a principal in the second degree.

Variance between indictment and proof (continued)

Retrial and double jeopardy

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

A directed verdict of acquittal due to a variance between the indictment and proof did not bar a retrial under double jeopardy principles since the acquittal did not arise from any evidentiary insufficiency or any other prosecutorial or judicial bad faith and was not based upon a resolution of some or all of the factual elements of the offense charged.

Where defendant was indicted as a principal in the first degree but the evidence proved only that he aided and abetted in the commission of the offense, the defendant was entitled to a directed verdict of acquittal, but, double jeopardy did not bar a retrial of the defendant upon an indictment charging him as an aider and abettor.

APPEAL

Confession of error

State v. Dotson, 269 S.E.2d 853 (1980) (Per Curiam)

Syl. pt. - Where the parties in an appeal of a criminal case agree to afford the relief sought by the appeal and jointly move [the Supreme] Court to dismiss the appeal pursuant to Rule 25(a) of the Rules of Appellate Procedure, the Court will treat such motion as a confession of error and will reverse the case in accordance with agreement of the parties and remand for further proceedings consistent with that agreement.

State v. Young, 273 S.E.2d 592 (1980) (McGraw, J.)

"In a criminal case where the State confesses error, urges that the judgment be reversed and that the defendant be granted a new trial, [the Supreme] Court, upon ascertaining that the errors confessed are reversible errors and do in fact constitute cause for the reversal of the judgment of conviction, will reverse the judgment and grant the defendant a new trial. Syl. *State v. Goff*, 221 S.E.2d 891 (W.Va. 1976)"; *State v. Cokeley*, 226 S.E.2d 40 (W.Va. 1976).

Disciplinary measures

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

See PRISON CONDITIONS Disciplinary measures, Proportionality, (p. 693) for discussion of topic.

Failure to preserve for appeal

Errors not documented in record

State v. Stewart, 239 S.E.2d 777 (1977) (McGraw, J.)

The Supreme Court cannot consider errors that are not documented in the record. Since the defendants assignment of error did not fairly arise from the record, the Supreme Court could not consider it.

Failure to preserve for appeal (continued)

Failure to argue assignments of error

Addair v. Bryant, 284 S.E.2d 374 (1981) (Miller, J.)

Syl. pt. 6 - Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

Appellant assigned as error, but failed to argue, the failure of the trial court to grant his motion for acquittal notwithstanding the verdict and the failure of the trial court to grant defendant's motion for a mistrial. Absent plain error, which the Supreme Court did not find, or proper argument, these assignments would not be considered.

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Footnote 1 - Assignments of error that are not argued in the briefs on appeal may be deemed waived by the court. Issued raised in petition for appeal but neither briefed nor argued, was considered abandoned.

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

See INSTRUCTIONS Confusing/incorrectly states the law, (p. 505) for discussion of topic.

State v. Moran, 285 S.E.2d 450 (1981) (Per Curiam)

Footnote 1 - Several assignments of error made in appellant's petition for appeal were not argued in his brief and were therefore deemed to be waived.

Failure to preserve for appeal (continued)

Failure to argue assignments of error (continued)

Laurie v. Thomas, 294 S.E.2d 78 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 6, *Addair v. Brant*, 284 S.E.2d 374 (W.Va. 1981), cited above.

Failure to assign reasons

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

Any error concerning evidence of another crime was, under *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), harmless beyond a reasonable doubt in light of the overwhelming weight of the other evidence, and the objection was waived by counsel's failure to make a timely assignment of reasons when specifically asked by the trial judge. Similarly, the objection that the weapons were not listed in the bill of particulars was both harmless and waived.

Failure to object

In the Interest of S.C., 284 S.E.2d 867 (1981) (McHugh, J.)

A litigant may not silently acquiesce to error, and then raise that error as a reason for reversal on appeal.

Although court erred in failing to make specific findings of fact and conclusions of law, the error was considered waived since the order was acquiesced in and signed by appellant's counsel, was not objected to, and was assigned as error for the first time on appeal.

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prison attire, (p. 172) for discussion of topic.

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

"The proceedings of the lower court are presumed to be regular, unless the contrary affirmatively appears upon the record, and objections taken for the first time in the appellate court will not be regarded in any matter of which the court had jurisdiction or which might have been remedied in the trial court if objected to there. IB M.J., Appeal and Error §103 (1967)." *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

When the introduction of other evidence was not objected to at trial, it cannot be considered on appeal.

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

Under the facts of this case, final arguments were not being recorded by the court reporter. During closing arguments counsel for the defendant did not object to certain remarks by the prosecutor, although after closing remarks and after the jury had retired, he did object and this objection was then recorded. The untimeliness of his objection prevented the judge from taking corrective action during the closing arguments.

Timeliness of objection is not absolutely controlling, since the lack of a contemporaneous record to determine if in fact an objection was made will at times be at issue.

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

The general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matter to which he objects and the grounds of his objection.

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

Ordinarily where evidence is introduced at trial without an objection, such matters will not be considered on appeal. In this case, the question of whether a hair analysis comparison test should have been initially subjected to a determination of its scientific accuracy and reliability was not reached. This is because at trial no objection was raised on this point and the expert, after giving his general background as a chemist and his training in hair analysis, was permitted to testify about the examination that he made in regard to hair samples.

State v. Coulter, 288 S.E.2d 819 (1982) (Per Curiam)

In order to take advantage of remarks made during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to instruct the jury to disregard them. *State v. Lewis*, 133 W.Va. 584, 57 S.E.2d 513 (1949).

In this case, even though counsel failed to make a timely objection to the prosecutor's comments, he did object soon after and on this basis the remarks in question were examined.

State v. Critzer, 280 S.E.2d 288 (1981) (Per Curiam)

The defendant made objections throughout the course of the prosecutor's closing argument and requested the trial court to grant a mistrial on the prosecutor's remarks. This was sufficient to preserve the point for appeal.

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Defendant contended it was error to give an instruction about possible verdicts that allowed a verdict of unlawful wounding. The Supreme Court found that the defendant did not object to the instruction and could not assign it as error. Plain error, however, will be noticed if it is necessary to prevent manifest injustice or clear prejudice to a party.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Defendant failed to object to the giving of an instruction at trial and consequently waived his right to assign the matter as error on appeal.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

The failure to arraign was not raised in the trial court but was raised on appeal for the first time. The court found that where there is an opportunity to speak, silence may operate as a waiver of objections to error, and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial.

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

See DENIAL OF A FAIR TRIAL Prosecutor's comments, (p. 179) for discussion of topic.

Prosecutor's comments were not found to be reversible error since they did not give the explicit details of the excluded testimony, they served to focus the jury's attention on evidence that was admitted rather than on the excluded evidence, and the defense attorney saw no reason to object at the time.

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Moran, 285 S.E.2d 450 (1981) (Per Curiam)

When there is an opportunity to speak, silence may operate as a waiver of objections to error and irregularities at the trial which, if reasonably made and presented, might have been regarded as prejudicial.

State v. Nuckolls, 273 S.E.2d 87 (1980) (Neely, C.J.)

See INSANITY Instructions, (p. 473) for discussion of topic.

Defense counsel is entitled to argue the consequences of finding of defendant not guilty by reason of insanity. Any instruction on this issue is a question of trial tactics and the defendant is entitled to any instruction on the subject which correctly states the law. Once the court has given an instruction on this subject which correctly states the law, the defendant is precluded from later assigning it as error unless he objects.

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

Defendant contended on appeal that the court erred in allowing a deputy sheriff to testify that the substance found was marijuana. The Supreme Court found that even though the record revealed there was no adequate foundation for the opinion, no objection was made to the testimony by defense counsel and consequently the point could not serve as a ground of error on appeal.

State v. Scritchfield, 280 S.E.2d 315 (1981) (McGraw, J.)

Any error of the trial court in allowing the State Department of Welfare to retain temporary custody of child for a period of more than thirty days between preliminary and final hearing in child abuse and neglect proceeding was waived since there was no indication that the appellant objected to the motions for continuance or made any attempt to hasten the final hearing.

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Smith, 289 S.E.2d 478 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The defendants challenged the sufficiency of the information upon which the arrest warrants were issued and also contended that they were accorded inadequate jury strikes. In view of the defendant's failure to raise these matters below, they will not be considered for the first time in the Supreme Court.

State v. Trogdon, 283 S.E.2d 849 (1981) (Per Curiam)

"Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syl. pt. 7 of *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956).

The defendant contended that the prosecuting attorney made improper remarks during closing argument. However, no objection was made to these remarks and the trial judge was not afforded an opportunity to correct any possible error during trial.

The defendant waived his right to assign as error the prosecutor's remarks, and the Supreme Court declined to find that they constituted reversible error.

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

Defendant contended that the trial court erred in refusing to give several instructions tendered by the defense. In every instance, however, the record showed that the defendant either did not object to or make argument on the trial court's ruling, argued that the instruction was covered by another, or offered an instruction containing an erroneous statement of law. The Supreme Court found no error since the instructions were founded upon the evidence, correctly stated the law, and fully covered the theory of the defense.

Failure to vouch the record

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

In order to make exclusion of offered evidence available as a ground of error in an appellate court, the record must be so prepared in the court below as to show what the excluded evidence was. There is no presumption as to what answer a witness would have made to a question propounded. It not appearing on the record what the evidence excluded by the trial court would have shown, the Supreme Court found it was unable to review the assignment of error.

Guilty pleas

See GUILTY PLEAS Appeal, (p. 337) for discussion of topic.

Scope of review

See GUILTY PLEAS Appeal, Scope of review, (p. 338) for discussion of topic.

APPEAL

Incorrect conclusions of law

In the Interest of S.C., 284 S.E.2d 867 (1981) (McHugh, J.)

The State Supreme Court of Appeals will reverse a lower court judgment if it appears that such judgment was based on an incorrect conclusion of law.

Interlocutory

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Because both the *in camera* hearing on the voluntariness of the confession and a statutory hearing on the defendant's mental competency are conducted without a jury, the trial court exercises a fact-finding function, and his decision is interlocutory and therefore not appealable not controllable by a writ of prohibition.

Invited error

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

Syl. pt. 2 - An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971).

Jurisdiction of appellate court

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

"The appellate court does not acquire jurisdiction and cannot entertain an appeal unless the appeal petition is filed within the prescribed appeal period." *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1967).

APPEAL

Plain error

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

See APPEAL Failure to preserve for appeal, Failure to argue assignments of error, (p. 29) for discussion of topic.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

The Supreme Court will notice plain error if it is necessary to prevent manifest injustice or clear prejudice to a party.

Where defendant was indicted for armed robbery and the trial court gave instructions which would allow a verdict of unlawful wounding, the Supreme Court did not find plain error since unlawful wounding is a lesser included offense and defendant had sufficient notice that he was accused of wounding the victim.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

"Plain error" rule, which gives discretion to the trial court or Supreme Court to notice plain error in the giving of an instruction was inapplicable where the instruction given, though inartfully worded, was substantially correct.

Probation revocation

State v. Ketchum, 289 S.E.2d 657 (1981) (Miller, J.)

Even though *Sigman v. Whyte*, 268 S.E.2d 603 (W.Va. 1980) recognized that the review of an order revoking probation could be done in a habeas corpus proceeding, this did not preclude the review on direct appeal since article VIII, § 3, of the Constitution of West Virginia and *W.Va. Code* § 58-5-1(f) (1931) provide that the Supreme Court has appellate jurisdiction in cases "involving freedom".

APPEAL

Refusal to docket

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

Syl. pt. 1 - A court's refusal to docket an application for appeal from the judgment of an inferior court is not a final judgment having *res judicata* effect unless the appellate court's rejection of the application for appeal specifically addresses the issues raised by the applicant and finds that the lower court's judgment is plainly right.

When the Court had previously refused to hear an appeal from habeas corpus proceedings, yet no finding as to the correctness of the lower court's judgment was made, and when the appellate filed within the specified time limit after receiving a transcript and resentencing, the presentation of the same issues on appeal did not act as a bar to the proceeding.

State v. Coleman, 281 S.E.2d 489 (1981) (Neely, J.)

Under Rule 14(b) of the new West Virginia Rules of Appellate Procedure, Supreme Court order, made with no notation as to prejudice, would have been without prejudice and the circuit court would have had authority to consider the second mandamus petition.

Review of evidence

See SUFFICIENCY OF EVIDENCE, (p. 914) for discussion of topic.

State v. Farley, 280 S.E.2d 234 (1981) (Per Curiam)

Where the trial court was confronted with conflicting testimony as to whether contraband was in plain view, and it resolved the credibility issue in favor of the state, the Supreme Court could not, from the evidence, say that the court was clearly wrong.

Review of evidence (continued)

Insufficient to permit informed judgment

White v. Bordenkircher, 286 S.E.2d 686 (1982) (Miller, C.J.)

"When the record in an action or suit is such that an appellate court can not in justice determine the judgment that should be finally tendered, the case should be remanded to the trial court for further development." Syllabus pt. 2, *South Side Lumber Co. v. Stone Construction Co.*, 151 W.Va. 439, 152 S.E.2d 721 (1967).

Here, where the habeas corpus appeal record does not contain sufficient facts such that the Supreme Court can in justice determine the judgment that should be finally rendered and the appellant is pursuing a subsequent habeas corpus proceeding in a different circuit court, his appeal will be dismissed since he will still have an opportunity to develop his claim in the subsequent habeas corpus proceeding.

Right to appeal

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

An indigent criminal defendant has a right to appeal his conviction, However, one convicted of a criminal offense is not entitled to a writ of error as a matter of right.

"In general, the right to review in a criminal case pertains merely to the remedy and is not a natural, inherent, or vested right. * * *. In order to obtain a review of a judgment of conviction, accused must resort to the remedies given either by the common law or by statute, and must comply with the procedural requirements prescribed by statute." *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1967).

Right to appeal (continued)

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

W.Va. Const., art. 8, § 4m creates an absolute right for one convicted of a crime to apply for an appeal. A denial of that right constitutes a violation of both federal and state due process clauses and renders the conviction void.

Fisher v. Whyte, 239 S.E.2d 133 (1978) (Neely, J.)

Petitioner was not denied the right to an effective appeal because of the State's failure to provide him the warrant issued for his arrest since he pled guilty to the crime of breaking and entering and therefore waived his right on appeal to challenge any defects in the warrant.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Syl. pt. 1 - An indigent criminal defendant has a right to appeal his conviction. He is also constitutionally entitled to a copy of the trial court record, including the transcript of the testimony, at no cost to him. West Virginia Constitution, Article III, Sections 10 and 17.

Turner v. Haynes, 245 S.E.2d 629 (1978) (Caplan, C.J.)

Applies standards set forth in syl. pt. 1, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977), cited above.

Determination of the merits

Turner v. Haynes, 245 S.E.2d 629 (1978) (Caplan, C.J.)

Syl. pt. 3 - The obligation of a court-appointed attorney to his client is not discharged merely by his informing such client of his determination that an appeal is without merit and frivolous; it is the appellate court, not counsel, after a full examination of all the proceedings, which makes that determination.

Right to appeal (continued)

Failure to or denial of appeal

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.)

"One convicted of a crime is entitled to the right to appeal that conviction and where he is denied his right to appeal such denial constitutes a violation of the due process clause of the state and federal constitutions and renders any sentence imposed by reason of the conviction void and unenforceable." Syllabus, *State ex rel. Bratcher v. Cooke*, 155 W.Va. 850, 188 S.E.2d 769 (1972).

Where the State has not been extraordinarily derelict in its duty to afford the defendant an opportunity to appeal his conviction, such defendant may be resentenced and a new appeal period begun so as to afford him an opportunity to appeal.

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

See INEFFECTIVE ASSISTANCE Failure to appeal, (p. 448) for discussion of topic.

Fisher v. Whyte, 239 S.E.2d 133 (1978) (Neely, J.)

Petitioner was not denied the right to an effective appeal because of the State's failure to provide him the warrant issued for his arrest since he pled guilty to the crime and therefore waived his right on appeal to challenge any defects in the warrant. Since the warrant would not have been germane to any appeal of the guilty plea, the State's failure to provide a copy of such was not sufficiently substantial to support a collateral attack on the conviction.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

See HABEAS CORPUS Relief, (p. 360) for discussion of topic.

Right to appeal (continued)

Failure to or denial of appeal (continued)

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Syl. pt. 8 - The constitutional right to appeal cannot be destroyed by counsel's inaction or by a criminal defendant's delay in bringing such to the attention of the court, but such delay on the part of the defendant may affect the relief granted.

Although the State is constitutionally obliged to appoint effective counsel to assist an indigent criminal in his appeal, once this has been done there rests some responsibility on the indigent criminal to make known to the court counsel's inaction.

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

See INEFFECTIVE ASSISTANCE Failure to appeal, Extraordinary dereliction, (p. 449); INEFFECTIVE ASSISTANCE Failure to appeal, Relief, (p. 450) for discussion of topic.

Turner v. Haynes, 245 S.E.2d 629 (1978) (Caplan, C.J.)

Where court appointed counsel contended that he believed there were no grounds for appeal, wrote to the defendant informing him of such, and informed the defendant that if he still desired to appeal, counsel would inform the circuit court and request that new counsel be appointed, Supreme Court found that counsel did not fulfill his legal obligation and that the defendant was denied his right to appeal and was entitled to relief in habeas corpus.

Right to appeal (continued)

Right to transcript

See TRANSCRIPT Right to transcript, (p. 927); TRANSCRIPT Right to transcript, Failure to provide, (p. 928) for discussion of topic.

Waiver of appeal

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

The right to appeal may be waived.

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

See PLEA BARGAINING Negotiations, (p. 675) for discussion of topic.

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

Once a defendant has been timely and adequately advised of his right to appeal, he may voluntarily, knowingly and understandingly waive that right.

Defendant was found to have knowingly and intelligently waived his right to appeal when 1- counsel discussed the issue with defendant and his parents, 2- the waiver of appeal was made in expectation that pending charges in another county would be dropped and were in fact dropped, and 3- there was no indication in the record of coercion.

APPEAL

Right to counsel

Asbury v. Mohn, 245 S.E.2d 547 (1979) (Harshbarger, J.)

Effective assistance of counsel on appeal is guaranteed through the due process clause of the *W.Va. Constitution*.

Syl. pt. - Counsel is not ineffective when, following directions from his client, he does not appeal the client's criminal conviction, where the client's choice involves no legal judgment that the lawyer should overrule.

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

A defendant has a right to be properly advised of his right to appeal.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

An indigent must be furnished court-appointed counsel to assist him on appeal.

Syl. pt. 2 - An indigent criminal defendant who desires to appeal his conviction has a right, under Article III, Sections 10 and 17 of the West Virginia Constitutions, to the effective assistance of court-appointed counsel on his appeal.

Turner v. Haynes, 245 S.E.2d 629 (1978) (Caplan, C.J.)

Applies standards set forth in syl. pt. 2, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977), cited above.

Right to counsel (continued)

When trial counsel appointed

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

"In all future cases, whenever counsel is appointed in the trial court for an indigent under *W.Va. Code* 62-3-1 [1975] counsel should be informed that he will also be responsible by separate appointment for the appeal if one should be required, and immediately upon the conviction of the defendant and the disposition of post-trial motions, the same counsel should be reappointed to prosecute the appeal unless the trial court for good cause determines that other counsel should be appointed." Syl. pt. 3, *Carter v. Bordenkircher*, 226 S.E.2d 711 (W.Va. 1976).

Scope of review

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

Ordinarily, evidentiary objections of a nonconstitutional nature not shown to have been made in the trial court cannot be considered on appeal.

Unconditional discharge

State v. Simmons, 285 S.E.2d 136 (1981) (Per Curiam)

Where State failed to prove the *animus furandi*, an essential element of the offense of larceny, the conviction was reversed and defendant was unconditionally discharged from custody.

ARRAIGNMENT

Failure to arraign

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Failure of record to show arraignment was harmless error since record shows that defendant was fully advised and fully aware of the nature of the charge against him, that he had effective counsel, that a jury trial was held, that he was not, by such failure, deprived of any constitutional or statutory protections designed to afford him a fair trial, and that circumstances reveal that he received a fair trial.

Syl. pt. 9 - *State v. Moore*, 57 W.Va. 146, 49 S.E. 1015 (1905) and subsequent cases are overruled insofar as such decisions require the record to show an arraignment in every case regardless of the circumstances revealed in such record.

Failure to personally "voice" plea

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Appellant's failure to personally voice her plea was not reversible error since appellant was fully aware of the charges against her and since her p lea of not guilty was entered by her attorney in appellant's presence.

When attorney, in the presence of appellant, entered a plea of not guilty, requirements of law were met and no reversible error was found.

ARREST

Incident to illegal search

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

If the police lack probable cause to search, thereby making the search unlawful, the subsequent arrest of the individual based on the evidence found in the unlawful search is also unlawful.

"An arrest cannot be justified by the fruits of an illegal search." Syllabus point 10, in part, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Jurisdiction of arresting officer

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

Seizure of property by city police officer outside the city limits was justified since officer was investigating larceny that occurred within city limits and continuing his investigation, observed an offense in his presence and could arrest for it. Therefore, the items were seized during a lawful arrest and were admissible.

Prompt presentment

State v. Canby, 252 S.E.2d 164 (1979) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 860) for discussion of topic.

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

Where warrantless felony arrests are made, the fourth amendment requires that, before a person can be subjected to any significant pretrial restraint, a judicial determination of probable cause must be made either before or promptly after the arrest.

Prompt presentment (continued)

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Syl. pt. 1 - The provision of *W.Va. Code* § 62-1-5 [1965] stating that "[a]n officer making an arrest upon a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a justice of the county in which the arrest is made," is hereafter mandatory.

W.Va. Code 62-1-5 [1965] was no doubt intended to be operative where an officer makes an arrest without a warrant for a felony offense not committed in his presence based on probable cause.

State v. Mitter, 289 S.E.2d 457 (1982) (McHugh, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 861) for discussion of topic.

W.Va. Code § 62-1-5 [1965] provides, in part: An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a [magistrate] of the county in which the arrest is made.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 861) for discussion of topic.

State v. Staley, 253 S.E.2d 66 (1979) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 862) for discussion of topic.

ARREST

Warrant requirement

In general

State v. Canby, 252 S.E.2d 164 (1979) (Neely, J.)

Before an arrest, search or seizure may be initiated, a warrant based on a showing of probable cause must be obtained from a neutral magistrate.

A police officer may always make a warrantless arrest for a felony committed in his presence or when there is an outstanding warrant for the individual arrested, although the warrant may not be in the arresting officer's possession.

Warrantless

Felony committed in officer's presence

State v. Canby, 252 S.E.2d 164 (1979) (Neely, J.)

See ARREST Warrant requirement, In general, (p. 50) for discussion of topic.

Home entries

State v. Davis, 294 S.E.2d 179 (1982) (Miller, C.J.)

A warrantless arrest cannot be made of a person in his home unless, in addition to probable cause, there exists some exigent circumstances that precludes the obtaining of a warrant.

Where officers had probable cause for an arrest warrant but failed to obtain one and, instead, went to and into the defendant's house and arrested him upon seeing goods that matched the description of stolen goods, the arrest and seizure of the stolen property were illegal. The state's contention that defendant might flee was not an exigent circumstance justifying warrantless arrest when defendant's partner was jailed and defendant had no way of knowing he had been implicated.

State v. Davis, (continued)

Syl. pt. 2 - A warrantless entry into a person's home either to effect his arrest or to seize his property therein contained violates the Fourth Amendment of the United States Constitution in the absence of probable cause and exigent circumstances.

State v. McNeal, 251 S.E.2d 484 (1978) (McGraw, J.)

In the absence of one of these "jealously and carefully drawn" exemptions, *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514, 1519 (1958), based upon an exigency of the situation making that course imperative, *Mincey v. Arizona*, 437 U.S. 385, 392-395, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153, 158 (1948), the police must obtain an arrest warrant before entering a home to seize a person. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The burden of proving that exigent circumstances made a warrantless arrest imperative is upon those who seek the exception. *Id.* At 455, 91 S.Ct. At 2032, 29 L.Ed.2d at 576.

In the instant case, five police officers descended upon a private residence, kicked the door down, entered and seized the person of the defendant whom they arrested and handcuffed, searched the house and seized a paring knife, and then brought the victim of the crime, the service station attendant, into the house where he identified the handcuffed defendant as the guilty felon.

The police had time and should have gotten a warrant from a neutral and detached magistrate. The arrest was unlawfully made without a warrant. Since evidence obtained as a result of an unlawful search, seizure, or arrest is inadmissible against the accused upon his trial, syllabus point 6, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), the trial court erred in admitting into evidence the knife found on the table beside the defendant when he was unlawfully arrested inside his cousin's house.

Warrantless (continued)

Home entries (continued)

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

In the absence of one of the exemptions to the warrant requirement, the police must obtain an arrest warrant before entering a home to seize a person.

Probable cause and exigent circumstances

In re Betts, 289 S.E.2d 226 (1982) (Per Curiam)

Appellant was sentenced to not more than 15 years in Davis Forestry Camp following an illegal arrest and subsequent confession to a burglary charge. The court held that no exigent circumstances, withing the meaning of syllabus point 2, *State v. Canby*, (cited below), existed; therefore, the arrest was invalid and the juvenile's post-arrest confession was to be excluded.

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, C.J.)

Applies standards set forth in syl. pt. 7, *State v. Craft*, 272 S.E.2d 46 (W.Va. 1980), cited below.

State v. Canby, 252 S.E.2d 164 (1979) (Neely, J.)

Warrantless arrests, based upon a mere showing that probable cause sufficient for the issuance of a warrant exists, are not unreasonable.

Warrantless (continued)

Probable cause and exigent circumstances (continued)

State v. Canby, (continued)

Syl. pt. 1 - In order for police officers to make an arrest without a warrant, they must have had at the time of arrest sufficient reliable evidence that could have made a strong showing of probable cause, and in addition, there must be exigent circumstances, not of the officers' creation, which militate in favor of immediate arrest. In addition, a police officer may always make a warrantless arrest for a felony committed in his presence or when there is an outstanding warrant for the individual arrested, although the warrant may not be in the possession of the arresting officer.

Syl. pt. 2 - The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe.

When officers warned appellant's mother that her son was a suspect and then arrested appellant without a warrant before he could be warned to escape, the Court held that the test for exigent circumstances had not been met, that is, there was not enough evidence from which a reasonable officer could infer a warning, an escape, danger, or destruction of evidence. Furthermore, the officers' information was an unnecessary police-created exigency, and as such was not an exception to the warrant requirement.

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

Syl. pt. 7 - "Probable cause to make an arrest without a warrant exists wen the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that an offense has been committed." Syl. pt. 3, *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973).

Warrantless (continued)

Probable cause and exigent circumstances (continued)

State v. Craft, (continued)

The right to arrest in public without a warrant, based on probable cause that the person has or is about to commit a felony, is the general if not universal rule in this country. In the present case, the police who arrested the defendant without a warrant were aware of the attempted break-in. They had been given a description of the individual seen by a police officer and a similar description by another officer who saw the defendant. The public arrest was therefore supported by probable cause and was lawful.

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

Applies standards set forth in syl. pt. 7, *State v. Craft*, 272 S.E.2d 46 (W.Va. 1980), cited above.

Syl. pt. 2 - An officer, with authority to conserve the peace, may, without a warrant, arrest any person who he, upon probable cause, believes has committed or is committing a felony, though it afterwards appears that no felony was actually perpetrated. Syl. pt. 2, *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973).

Probable cause for an arrest for intoxication can be based upon the arresting officer's observations of the defendant. The lack of conviction does not vitiate the initial probable cause for arrest.

When the car in which defendant was a passenger was stopped for speeding, defendant was arrested for public intoxication. A subsequent search of defendant's person revealed four bags of marijuana, scales, and plastic bags whereupon defendant was placed under arrest for possession of marijuana with intent to deliver. His conviction of possession of marijuana with intent to deliver prompted this appeal on the grounds that there was no probable cause for arrest and that there was insufficient evidence for a conviction of possession with intent to deliver. The Supreme Court found probable cause

State v. Drake, (continued)

for the arrest since the car was validly stopped for speeding, since violation of the town's ordinance against open beer bottles was committed in the officer's presence, and since the officer's observations of the physical demeanor and slurred speech of the defendant, together with the presence of open bottles of beer were sufficient to establish probable cause for public intoxication.

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

If probable cause existed to arrest for a felony, the verdict is irrelevant to the legality of arrest or seizure.

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

It is the rule in West Virginia that police officers may make warrantless felony arrests in public places upon probable cause to believe that the arrested person has committed a felony.

The U.S. Supreme Court has held (in *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 1820, 46 L.Ed.2d 598 (1976) that warrantless arrests may be made in public places upon probable cause and nothing more.

"Probable cause to make an arrest without a warrant exists when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed." Syl. pt. 1, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971).

Warrantless (continued)

Probable cause and exigent circumstances (continued)

State v. Hawkins, (continued)

Under the circumstances of this case, police had probable cause for a warrantless arrest when at the time of the arrest: (1) police knew that defendant's identification bracelet and personalized belt buckle had been found intermingled with victim's identification, blood-stained sheets and clothing and the murder weapon; (2) they knew that defendant lived in the same hotel in which the murder took place; (3) police had heard from an informant that defendant said that he had killed someone.

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Here, the evidence clearly indicated that the police had probable cause to make the arrest at the defendant's residence. The facts and circumstances within the knowledge of the arresting officers were such that a prudent person would have been warranted in believing that a homicide had been committed and that the defendant had committed it.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

Applies standard set forth in syl. pt. 7, *State v. Craft*, 272 S.E.2d 46 (W.Va. 1980), cited above.

According to the 4th amendment, a car cannot be stopped without probable cause, which, in West Virginia, is determined by looking to the facts and circumstances within the knowledge of the arresting officers.

When officers stopped defendant's car merely because defendant asked directions and advice, the Supreme Court held that there was no evidence to support a finding of probable cause.

Warrantless (continued)

Probable cause and exigent circumstances (continued)

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

"The use of a drawn gun by a police officer in making an investigatory stop of a suspected criminal under suspicious circumstances is not enough by itself to convert the investigatory stop to an arrest which would require probable cause at that point."

When suspect was fleeing late at night after an entire day's chase, trooper's use of a gun to stop him was appropriate. Arrest did not occur until the suspect had identified himself and probable cause was established.

Evidence obtained upon search following arrest was admissible since the arrest, though initiated with a drawn bun, was not made until probable cause had been established and was, therefore, lawful.

State v. Stanley, 284 S.E.2d 367 (1981) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Illegal arrest, (p. 843) for discussion of topic.

Reasonableness of detention

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, C.J.)

After the threshold question, "Has seizure occurred?" the question becomes "Was the seizure unreasonable?" The focus of this question becomes the suspicious circumstances that warranted the officer's belief that criminal activity had occurred or was occurring.

Warrantless (continued)

Reasonableness of detention (continued)

State v. Boswell, (continued)

Defendant's actions in turning off lights in his van upon approach of police officer, were at least suspicious enough to warrant the officer's asking for identification, a minimal intrusion upon defendant's privacy, especially when the van was parked in an area with a history of barroom problems and arson. This minimal intrusion coupled with the minimal intensity of the officer's approach, precluded the finding that there had been an initial seizure.

Defendant's voluntary exit from the van, enabling officer to view the marijuana, in no way increased the intensity of the officer's inquiry. There being on initial seizure, the subsequent viewing of the marijuana permitted its seizure under the plain view doctrine, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980). Furthermore, the discovery of marijuana in plain view gave rise to the probable cause necessary to arrest the defendant without a warrant which authorized the further warrantless search as incident to a valid arrest under *Belton*. Thus, the products of seizure were properly admitted into evidence.

A permissible warrantless search requires a lawful stop of the vehicle and the subsequently arising probable cause to believe that the vehicle is carrying contraband or evidence of the commission of a crime.

The mere involvement of a motor vehicle does not automatically negate the requirement of a search warrant unless there is a showing of exigent circumstances.

Warrantless (continued)

Reasonableness of detention (continued)

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

While a police officer's casual observation of an out-of-state license plate would not by itself warrant further investigation, the observation of a plate which does not appear to have come from any other state does. The defendant's license plate had the letters BLMO over the numbers with no other identifying markings. The detention of the defendant for the purpose of investigating his registration and license was reasonable and the evidence seized as a result of such investigation was not tainted.

When a seizure has occurred

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, C.J.)

Syl. pt. 1 - An initial police inquiry which calls into question a seizure of the person issue will ordinarily relate to some criminal investigation procedure and must originate fro some suspicious circumstance involving the defendant. In determining the threshold question of whether the defendant has been seized, we look to the intensity of the initial inquiry. The less intense the initial inquiry the less likely that a seizure will be found. The intensity of the inquiry will determine whether the initial lt threshold of "seizure" has been crossed. This is because the intensity of the inquiry will govern when a reasonable person would believe that he was not free to leave the initial police encounter.

Where the warrantless search of defendant's van was made after an initial arrest for possession of marijuana which was in plain view after the officer had asked for identification of individuals in an already stopped van, the Supreme Court articulate a different standard for determining whether the defendant had been seized in the initial encounter. That standard involved the intensity of the initial inquiry. The less intense the inquiry, the less likely seizure would be found.

ARSON

In general

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Proof of the *corpus delicti* of arson requires that the fire was of an incendiary origin.

Instructions

Accessory, aiding & abetting, principal

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Instructions, (p. 24) for discussion of topic.

Circumstantial evidence

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

See INSTRUCTIONS Circumstantial evidence, (p. 501) for discussion of topic.

Presumption of accident

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Trial court did not err in refusing defendants instruction that when a building is burned, the presumption is that it was caused by an accident rather than by the act of the defendants.

Instructions (continued)

Presumption of accident (continued)

State v. Jones, (continued)

As a general proposition, the mere burning of a building gives rise to a presumption that the fire was caused by accident or natural causes rather than by incendiary origin.

Sufficiency of evidence

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Standard for determining, (p. 922) for discussion of topic.

State v. Yates, 288 S.E.2d 522 (1982) (Per Curiam)

Follows standards set forth in syl. pt. 1 of *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

To sustain an arson conviction, the evidence must show that the fire was of incendiary origin and, where the evidence is circumstantial, that the defendant is connected with the fire.

Where there was evidence to indicate that appellant had entered the premises on the night of the fire and was spotted within 20 minutes of the fire, such evidence was sufficient for the jury to conclude that appellant was personally connected to the fire. The evidence, therefore, was not manifestly inadequate and under the *Starkey* standard, the appellant's conviction was affirmed.

ASSAULT & BATTERY

Evidence

State v. Sacco, 267 S.E.2d 193 (1980) (Per Curiam)

In a malicious or unlawful assault prosecution, the State, if a causal connection is established, is entitled to introduce evidence of the injuries resulting from the assault. In the present case, the record contains medical evidence linking the assault to the victim's heart attack which occurred nine days after the assault. Thus, the evidence of the heart attack was properly admitted.

Evidence of injuries resulting from an assault goes to the permanence of the injuries and need not be specified in the indictment.

Indictment

State v. Furner, 245 S.E.2d 618 (1978) (Harshbarger, J.)

See INDICTMENT Sufficiency, (p. 437) for discussion of topic.

State v. Sacco, 267 S.E.2d 193 (1980) (Per Curiam)

Evidence of injuries resulting from an assault goes to the permanence of the injuries and need not be specified in the indictment.

Instructions

State v. Combs, 280 S.E.2d 809 (1980) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 490) for discussion of topic.

ATTEMPT

Defense

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

There are certain situations where the impossibility of completing the underlying crime may provide a defense to an attempt charge, but in these instances test of impossibility is viewed from the facts known to the accused.

Elements

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Syl. pt. 2 - In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which fails short of completing the underlying crime.

The fact that no injury occurred does not militate against circumstantial evidence establishing criminal intent, since the inability to complete the underlying crime is the hallmark of an attempt.

Here, from the circumstances surrounding the firing of the shotgun, *e.g.*, threats by the defendant immediately preceding the act, the hostile behavior of the defendant, and the shot being directed toward the victim, the Supreme Court found there was nothing to suggest that serious bodily harm or death was not intended.

ATTORNEYS

Attorney - Client

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

When attorney asserted that the attorney conference room at Moundsville provided no privacy for communication with his client and therefore jeopardized his attorney-client privilege, the Court considered the prison's proposal to construct additional rooms a reasonable soul tion.

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

Syl. pt. 2 - In order to assert an attorney-client privilege, three main elements must be present: (1) Both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential.

From the record of an *in camera* hearing, it appears the attorney who testified against the defendant had not been retained or appointed to represent the defendant, but had gone to the jail to see another client. The defendant had his own attorney at this time. Apparently, there were several prisoners in the same area of the jail with the defendant. The attorney stopped to talk with them, and during this conversation the incriminating statement was made.

In the present case, the first and third elements to maintain the privilege were lacking.

Withdrawal

State ex rel. Arbogast v. Mohn, 260 S.E.2d 820 (1979) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Defense counsel's comments, (p. 169) for discussion of topic.

Attorney - Client (continued)

Withdrawal (continued)

Cardot v. Luff, 262 S.E.2d 889 (1980) (Miller, J.)

Syl. pt. - An attorney in a civil case can for good cause terminate the attorney-client relationship. However, before an attorney can unilaterally sever the attorney-client relationship, he must give reasonable notice to his client of his intention to withdraw. If the withdrawal involves a matter pending in court, there is the further requirement that the attorney secure court permission for his withdrawal.

Where attorneys demonstrated good cause for withdrawal, *i.e.*, the clients' failure to pay, but failed to show that they had notified their clients of their decision to withdraw and of the date they intended to apply for withdrawal, their motion for withdrawal was denied.

The attorneys sought a writ of prohibition. The Supreme Court denied the writ of prohibition indicating that the trial court had not exceeded the jurisdiction in refusing the motion to withdraw. The prohibition procedure, according to the Court, was, however, appropriate since the final settlement of the withdrawal issue [was] paramount to the subsequent orderly development of the case thus making the standards set forth in syl. pt. of *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979) applicable.

Where timely notice has been given the client, where the withdrawal will not interfere with the efficient functioning of the court, and where good cause for withdrawal is shown, the court should permit counsel to withdraw.

Attorney - Client (continued)

Withdrawal (continued)

May v. Seibert, 264 S.E.2d 643 (1980) (Harshbarger, J.)

Syl. pt. 1 - A lawyer may always withdraw from representing a client when he is justified in doing so because of (1) refusal by the client to pay agree-upon expenses or fees; (2) conduct by a client that is unlawful, such as subornation of witnesses; (3) demand by a client that the lawyer perform illegally or unprofessionally; (4) the client obviously bringing or defending a suit or other legal activity solely to harass or maliciously injure another, or the claim or defense being not legally defensible; (5) requirement by a client that the lawyer associate with another lawyer with whom he cannot cordially cooperate; (6) physical or mental incapacity of the lawyer; or (7) client's other conduct that makes it unreasonably difficult for the lawyer to effectively do his work.

In these situations the lawyer is entitled to so much of his fee as he has earned.

Syl. pt. 2 - A lawyer who without justification or good cause withdraws from representation may, if his withdrawal works no prejudice to his client, be entitled to all or part of his compensation; but such should be diminished by such reasonable amount as may be paid by the client to another lawyer to complete the work. In determining the amount of the withdrawing lawyer's fee, a court should consider the benefit to the client of his work which includes his contribution to the ultimate result; and should in on event require of the client payment of a total fee exceeding that agreed upon.

Where an attorney undertook to represent a client in a personal injury action and subsequently withdrew when his client failed to accept a proposed settlement (determined by the court to be withdrawal without justification), the attorney was allowed to recover the reasonable value of his services diminished by the amount the client had to pay another lawyer when the client accepted settlement as the same amount the withdrawing attorney had proposed.

ATTORNEYS

Conduct

State ex rel. Askin v. Dostert, 295 S.E.2d 271 (1982) (McGraw, J.)

Syl. pt. 1 - The constitutional authority to define, regulate an control the practice of law in West Virginia is vested in the Supreme Court of Appeals.

Syl. pt. 2 - The common law power of inferior courts to require security for good behavior, as applied to attorneys, is obsolete and has been superceded by the modern organization of judicial power in West Virginia; therefore *W.Va. Code* § 30-2-8 [1923] is of no force and effect.

When the trial court required attorney to post $50 bond pursuant to *W.Va. Code* § 30-2-8 to assure his good conduct for the remainder to the trial, attorney refused and was jailed for contempt. In this habeas corpus proceeding the Supreme Court held that *W.Va. Code* § 30-2-8 was of no force and effect.

W.Va. Code § 50-1-4a is now the statutorily and constitutionally authorized repository of the power to govern the practice of law.

The power of a trial court to require security for good behavior pursuant to *W.Va. Code* § 30-2-8 effectively permits a circuit court to suspend a licensed attorney from practicing law, thus usurping the power of the Supreme Court to regulate the practice of law.

Adequate sanctions for inappropriate attorney behavior lie in the court's power to initiate contempt proceedings under *W.Va. Code* § 61-5-26 and to bring disciplinary action before the committee on legal ethics for violation of the Code of Professional Responsibility. Neither sanction usurps the Supreme Court's jurisdiction to regulate the practice of law because the attorney's due process rights are preserved, thus insuring the propriety of the trial court's action and the attorney's right to an appeal.

Requiring an attorney to post security bond was a violation of due process rights since attorney was required to forfeit constitutionally protected property and liberty interests without standard procedures to prevent arbitrary treatment.

Conduct (continued)

State ex rel. Askin v. Dostert, (continued)

. . . whenever government action infringes upon a person's interest in life, liberty or property, due process requires the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards."

A court cannot order an attorney practicing before it to provide security for his good behavior, and then imprison him when he refuses to do so, without providing some notice of the type of conduct which warrants imposition of the order, and the opportunity for a hearing at which a defense to the alleged misconduct may be presented.

The attorney has a duty to contest adverse views of the trial court in the interest of zealous advocacy and preventing ineffective assistance claims. Here, petitioner's attempt to explain to the court his interpretation of the provisions of Rule 26.2 of the *W.Va.R.Crim.P.* was in the interest of zealous advocacy.

Contempt

See CONTEMPT Attorneys, (p. 112) for discussion of topic.

State ex rel. Askin v. Dostert, 295 S.E.2d 271 (1982) (McGraw, J.)

See ATTORNEYS Conduct, (p. 67) for discussion of topic.

State ex rel. Askin v. Dostert, 295 S.E.2d 271 (1982) (McGraw, J.)

See CONTEMPT Jurisdiction, (p. 117) for discussion of topic.

ATTORNEYS

Court appointments

Sartin v. Bordenkircher, 272 S.E.2d 243 (`980) (Per Curiam)

See APPEAL Right to counsel, When trial counsel appointed, (p. 46) for discussion of topic.

State ex rel. Kerns v. Fox, 268 S.E.2d 65 (1980) (Neely, C.J.)

Two attorneys, employed by a federally funded program, argued they could not accept court appointments. The Supreme Court found that they were not appointed in their capacity as federal employees, but as members of the West Virginia Bar. As members of the Bar, they had a duty to accept such appointments.

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

West Virginia Code § 53-4A-4, the habeas corpus statute, requires the appointment of an attorney where a preliminary writ of habeas corpus is indued and where the petitioner is indigent.

State ex rel. Sowa v. Sommerville, 280 S.E.2d 85 (1981) (Harshbarger, C.J.)

Syl. pt. - Partners and associates of a county prosecutor should accept indigent criminal defense appointments in counties other than that in which the prosecutor serves, only if a defendant has been made aware of the potential conflict and has signed a written consent filed with the court.

See PROHIBITION Appointment of prosecutor's associate to represent defendant, (p. 722) for discussion of topic.

ATTORNEYS

Disbarment

Carey v. Dostert, 294 S.E.2d 137 (1982) (Harshbarger, J.)

Syl. pt. 1 - The constitutional authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals. *State ex rel. Askin v. Dostert*, 295 S.E.2d 271 (W.Va. 1982).

The power to supervise, regulate and control the practice of law includes The power to admit and disbar attorneys.

Syl. pt. 2 - *W.Va. Code*, 30-2-7 and a circuit's common-law power to disbar are obsolete and have been superseded by Code, 51-1-4a, By-Laws of the West Virginia State Bar and the Judicial Reorganization Amendment of our Constitution, Article VIII.

Upon an affidavit filed by attorney's client, the circuit judge issued a rule for attorney to show cause why he should not be disbarred. The Supreme Court reaffirmed its position taken in *State ex rel. Askin v. Dostert*, 295 S.E.2d 271 (W.Va. 1982), that the power to disbar lies solely with the Supreme Court, not with the circuit judge as at common law.

In re Brown, 262 S.E.2d 444 (1980) (Miller, J.)

Syl. pt. 1 - In cases involving a petition for reinstatement where an attorney's license has been annulled, Article VI, Sections 4 and 35 of the By-laws of West Virginia State Bar must be read *in pari materia*.

Syl. pt. 2 - In cases involving reinstatement proceedings, we require, under this Court's supervisory powers, that the Committee on Legal Ethics of The West Virginia State Bar shall hold an evidentiary hearing to enable a record to be made on the issues relating to the petitioner's qualifications to have his license reinstated.

Syl. pt. 3 - Such evidentiary hearing shall be held within 60 days from the date of the receipt of the application for reinstatement, except that for good cause shown the time for hearing may be extended.

Disbarment (continued)

In re Brown, (continued)

The petitioner has the burden of demonstrating his fitness for license reinstatement.

The West Virginia State Bar is created by the Supreme Court and, as such, is subject to the Court's supervision.

Professional responsibility

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

See INEFFECTIVE ASSISTANCE In general, (p. 447) for discussion of topic.

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

See ATTORNEYS Prosecutors, Comments before trial, (p. 72) for discussion of topic.

State v. Pelfrey, 256 S.E.2d 438 (1979) (McGraw, J.)

Where the decision not to move for a mistrial was made solely on counsel's personal interests and completely unrelated to matters of trial tactics or strategy, the Supreme Court found that such a basis for action which substantially affects a client's interests is not only impermissible but violates the most fundamental elements of the relationship of a defense lawyer to the client. The professional judgment of a lawyer should be exercised solely for the bene fit of his client, free of compromising influences, and the lawyer's personal interests should not be permitted to dilute his loyalty to the client.

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

See ATTORNEYS Prosecutors, Counseling with defendant, (p. 73) for discussion of topic.

ATTORNEYS

Prosecutors

Comments before trial

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

The prosecutor had disclosed a considerable portion of his case to the media in advance of trial, which had given the disclosures widespread publicity. This practice violates the Code of Professional Responsibility, DR 7-107 which precludes both prosecution and defense attorneys from trying their case through the public media,

Conduct during trial

See DENIAL OF A FAIR TRIAL Prosecutor's comments, (p. 173) for discussion of topic.

Conflicts

State ex rel. Moran v. Ziegler, 244 S.E.2d 550 (1978) (Neely, J.)

The general rule is that an attorney should not undertake to represent conflicting interests. Therefore, a prosecuting attorney should not attempt to counsel an accused when he is also committed to prosecuting him.

A prosecuting attorney should not participate in a criminal case, if he has acquired, through his professional relationship with the accused, knowledge of facts upon which the prosecution is predicated.

Where there is mere appearance of an attorney-client relationship between the accused and the prosecutor, the general rule regarding conflicting interests applies.

Where the accused contacted an attorney allegedly giving him specific information concerning the crime committed, yet the attorney-client relationship was never established and when, later, the same attorney became a private prosecutor for the accused, the Court found the "appearance" of a prior attorney-client relationship. Thus, that attorney was disqualified as a private prosecutor. Writ of prohibition was awarded.

Prosecutors (continued)

Conflicts (continued)

State ex rel. Sowa v. Sommerville, 280 S.E.2d 85 (1981) (Harshbarger, C.J.)

See ATTORNEYS Court appointments, (p. 69) for discussion of topic.

Counseling with defendant

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

A prosecuting attorney's counseling with a criminal defendant in the absence of the defendant's own counsel as to aspects of the pending prosecution is a breach of the Professional Canons of Ethics and a violation of due process. The harmless constitutional error doctrine applies to determine if the conversation was harmless.

Disqualification

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

Generally, where a prosecutor has a personal interest, as distinguished from his public interest, in convicting an accused, he may be disqualified. This rule is applicable to criminal prosecutions and whether it extends into habeas corpus proceedings is doubtful.

The Supreme Court found that defendant's motion to have the prosecutor removed from the case on the grounds that he was prejudiced against him, was properly rejected. The basis of the alleged prejudice arose from the fact that the appellant had instituted a civil action against the prosecutor in federal court for damages. The Supreme Court found that to the extent the resentencing involved the underlying criminal case, it was apparent that the motion was correctly rejected since the resentencing was controlled by statute.

Prosecutors (continued)

Disqualification (continued)

Moore v. Starcher, 280 S.E.2d 693 (1981) (McGraw, J.)

Syl. 1 - As a rule, the disqualification of a prosecuting attorney operates to disqualify his assistants.

When, in a previous case, the prosecuting attorney had been unable to prosecute a case against a judge, special prosecutors were appointed. In *Moore* the succeeding prosecuting attorney sought a writ of prohibition to prevent the appointment of such special prosecutors because it was procedurally improper. The Supreme Court held that the prosecuting attorney was bound by the previous prosecuting attorney's acquiescence at the time and further that his claim was barred by laches since the special prosecutors had rendered considerable service. The writ was, therefore, denied.

State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (1979) (McGraw, J.)

Before a prosecuting attorney may be disqualified from acting in a particular case and relieved of the duties imposed upon him by the Constitution and by statute, the reasons for his disqualification must appear on the record, and where there is any factual question as to the propriety of the prosecutor acting in the matter, he must be afforded notice and an opportunity to be heard.

When the judge appointed a special prosecutor without a hearing specifying reasons for disqualifying the elected prosecutor, a writ of prohibition was granted. The Supreme Court held that before a prosecutor could be disqualified, he must be afforded notice and an opportunity to be heard.

State ex rel. Moran v. Ziegler, 244 S.E.2d 550 (1978) (Neely, J.)

See ATTORNEYS Prosecutors, Conflicts, (p. 72) for discussion of topic.

Prosecutors (continued)

Disqualification (continued)

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Syl. pt. 4 - Under circumstances where it can reasonably be inferred that the prosecuting attorney has an interest in the outcome of a criminal prosecution beyond ordinary dedication to his duty to see that justice is done, the prosecuting attorney should be disqualified from prosecuting the case. Thus, where the defendant in a criminal prosecution has been convicted previously of a crime committed against the prosecuting attorney, has failed to make court-ordered restitution to the prosecutor, and has been accused of the crime by the prosecuting attorney's secretary, who was the sole witness to the alleged criminal act, the prosecuting attorney should disqualify himself.

Duties

State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (1979) (McGraw, J.)

One who accepts a public office does so *cum onere*, that is, he assumes the burdens and the obligations of the office as well as its benefits, subjects himself to all constitutional and legislative provisions relating to the office and undertakes to perform all the duties imposed on its occupant; and while he remains in such office he must perform all such duties.

The prosecuting attorney's duties emanate from the *W.Va. Const.* art 4, § 6, which provides for the removal from office for misconduct or neglect of duty; art. 9, § 4 provides for the indictment of prosecuting attorneys for ". . . malfeasance, misfeasance, or neglect of official duty . . . ." The prosecutor can be discharged from his duties only by a clear and convincing showing of his failure to fulfill his official responsibilities.

Prosecutors (continued)

Duties (continued)

State ex rel. Robinson v. Michael, 276 S.E.2d 812 (1981) (McHugh, J.)

Syl. pt. 6 - Absent legislation otherwise, the public interest in the enforcement of a non-custodial parent's obligation of support does not create a positive duty on the part of a prosecuting attorney to prosecute a civil contempt action which arises from a failure to comply with a divorce decree which orders support payments.

Thus, writ of mandamus will not lie to compel a prosecuting attorney to represent a custodial parent in a civil contempt proceeding.

State ex rel. Skinner v. Dostert, 278 S.E.2d 624 (1981) (McGraw, J.)

Syl. pt. 4 - "It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is selected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender . . . .: *W.Va. Code* § 7-4-1 (1976 Replacement Vol.).

Syl. pt. 5 (in part) - Failure of the prosecutor to perform duties imposed by *W.Va. Code* § 7-4-1 would make him liable under *W.Va.Const.* Art 9, § 4; *W.Va. Code* § 6-6-7 (1979 Replacement Vol.); and *W.Va. Code* § 11-1-5 (1974 Replacement Vol.).

See *NOLLE PROSEQUI* In general, (p. 656) for discussion of topic.

Prosecutors (continued)

Grand jury

State ex rel. Miller v. Smith, 285 S.E.2d 500 (1981) (McGraw, J.)

Syl. pt. 2 - A prosecuting attorney can only appeal before the grand jury to present by sworn witnesses evidence of alleged criminal offenses, and to render court supervised instructions, *W.Va. Code* § 7-4-1 (1976 Replacement Vol.); he is not permitted to influence the grand jury in reaching a decision, nor can he provide unsworn testimonial evidence.

Syl. pt. 3 - A prosecuting attorney who attempts to influence a grand jury by means other than the presentation of evidence or the giving of court supervised instructions, exceeds his lawful jurisdiction and usurps the judicial power of the circuit court and of the grand jury. Consequently, prohibition will lie to prevent such usurpation of judicial power.

By attempting to influence the grand jury an attorney usurps the power of both the grand jury and the circuit court.

When petitioner sought to appear before the grand jury to present evidence of an alleged malicious wounding by policeman, but the prosecuting attorney used his influence to dissuade the grand jury from entertaining the petitioner's testimony, the Supreme Court held that the prosecuting attorney's actions were beyond his jurisdiction and thus constituted a violation of ethical standards of acceptable prosecutorial behavior.

Special/private

Moore v. Starcher, 280 S.E.2d 693 (1981) (McGraw, J.)

Syl. pt. 2 - The county commission has an unequivocal duty to pay reasonable attorney fees to special prosecutors.

Moore v. Starcher, (continued)

When a specially appointed judge ordered the County Commission to pay special prosecutors for the prosecution of a circuit judge and the appointment of those prosecutors was held to be appropriate, the County Commission's request to prohibit the order requiring payment was denied. The Court held that, according to *W.Va. Code* § 7-7-9 (1976 Replacement Vol.), the County Commission had the duty to pay for special prosecutors when necessary.

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

Syl. pt. 1 - The right to obtain a private prosecutor in this State is not absolute and is subject to judicial control and review. A private prosecutor is subject to the same high standards of conduct in the trial of the case as is the public prosecutor.

In this second-degree murder case the defendant claimed error in that a private prosecutor had been hired to assist the public prosecutor. The ultimate responsibility for permitting the participation of a private prosecutor rests with the trial judge. A private prosecutor is subject to the same high standards of conduct in the trial of the case as is a public prosecutor. There is no arbitrary line as to the degree of participation of the public prosecutor in the trial. The fundamental question is not the extent of the private prosecutor's participation, but whether his actions resulted in prejudicial error to the defendant.

It is not error for the private prosecutor not to disclose the amount of his fee.

A competent public prosecutor should ordinarily not be forced to accept a private prosecutor as an associate.

ATTORNEYS

Prosecutors (continued)

Special/private (continued)

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

Applies standards set forth in syl. pt. 1, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), cited above.

Search of attorneys

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

When the State's evidence consisted only of general assertions that a search was necessary for security, the State failed to establish by a preponderance of the evidence that the warrantless search of attorneys fell within an authorized exception permitting such search. The regulation requiring such search therefore, was, held to be invalid.

BAIL

In general

State v. Gary, 247 S.E.2d 420 (1978) (Miller, J.)

Bail following conviction of a felony is a matter of discretion for the trial court.

The Supreme Court may review the act of the circuit court in regard to bail to determine if there has been an abuse of discretion.

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

There can be no doubt as to the propriety of the writ of habeas corpus to test the question of bail. *State ex rel. Hutzler v. Dostert*, 236 S.E.2d 336 (W.Va. 1977).

In this case, the defendant contended his post-conviction bail was excessive.

Eligibility

See BAIL Post-conviction, Pending appeal, (p. 81); BAIL Post-conviction, Pending habeas corpus, (p. 83) for discussion of topic.

Post-conviction

Pending appeal

Conley v. Dingess, 250 S.E.2d 136 (1978) (Caplan, C.J.)

W.Va. Code 62-1C-1(b), provides for post-conviction bail pending appeal from convictions for offenses not punishable by death or life imprisonment.

Post-conviction (continued)

Pending appeal (continued)

Conley v. Dingess, (continued)

According to *W.Va. Code* 61-2-12, robbery by violence is punishable by not less than 10 years. This Court construes the statute, with the imposition of a minimum sentence but no designated maximum, to mean the offense is punishable by life imprisonment; consequently, one conviction of robbery by violence under 61-2-12 is not eligible for post-conviction bail under 62-1C-1(b).

Habeas corpus petitioner, convicted of robbery by violence, was not eligible for bail pending appeal since 61-2-12, according to this Court, makes that crime punishable by life imprisonment.

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

The bail statute provides certain criteria for fixing bail in *W.Va. Code* 62-1C-3: "The amount of bail shall be fixed by the court or justice with consideration given to the seriousness of the offense charged, the previous criminal record of the defendant, his financial ability, and the probability of his appearance."

In addition to these factors the following factors should be weighed in regard to post-conviction bail: the pendency of other charges against the defendant, the amount of the individual's pretrial bond, the regularity of his pre-conviction appearances, the severity of the sentence imposed, and the likelihood of meritorious grounds for an appeal.

Post-conviction bail is generally less liberally accorded than in the pretrial stage. 8 Am. Jur. 2d Bail and Recognizance § 33 (1963). The primary test still remains the likelihood of the defendant's appearing to answer future proceedings.

Post-conviction (continued)

Pending appeal (continued)

State ex rel. Bennett v. Whyte, (continued)

The rule pertaining to review of bail is to the effect that the trial court's discretion should not be disturbed unless the record reveals an abuse of discretion. *State ex rel. Hutzler v. Dostert*, 236 S.E.2d 336 (W.Va. 1977). Weighing the factors set out for determining post-conviction bail, the trial court abused its discretion in refusing to reduce the relator's bond from $50,000 to $20,000 for two narcotics convictions.

State ex rel. Dye v. Bordenkircher, 284 S.E.2d 863 (1981) (McHugh, J.)

Syl. pt. 3 - When 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 [the Supreme Court of appeals of West Virginia].

State ex rel. Faircloth v. Catlett, 267 S.E.2d 736 (1980) (Harshbarger, J.)

Unless a term of life imprisonment has been imposed by a court upon a convicted armed robber, a trial judge has the discretion to grant post-conviction bail.

In *Conley v. Dingess*, 250 S.E.2d 136 (W.Va. 1978) the Supreme Court had held "that if an offense is punishable by life imprisonment, bail will not be allowed pending an appeal from a conviction." Here, however, the Court overruled that decision indicating that although a convicted armed robber may be sentenced to life, this does not mean armed robbery is an offense punishable by life imprisonment within the meaning of West Virginia Code 62-1C1(b); thus, a person convicted of armed robbery but not sentenced to life imprisonment, may be eligible for post-conviction bail.

Post-conviction (continued)

Pending habeas corpus

Shamblin v. Hey, 256 S.E.2d 435 (1979) (Neely, J.)

The circuit court has jurisdiction to award bail pending final disposition of a writ of habeas corpus.

At the post-conviction review stage there is not even a lingering scintilla of a presumption of innocence. While the Supreme Court has stated that for offenses not punishable by life imprisonment a convicted felon is entitled to reasonable bail pending appeal, *Conley v. Dingess*, 250 S.E.2d 136 (W.Va. 1978), that same rule does not apply in post-conviction habeas corpus. Bail pending the outcome of a post-conviction habeas corpus proceeding is within the sound discretion of the trial judge and under ordinary circumstances that discretion is well informed to deny bail in the absence of extraordinary circumstances. One extraordinary circumstance is if the petitioner will ultimately prevail on the merits of his habeas corpus proceeding and it would be manifestly unjust for him to continue to serve one more day of incarceration as a result of a conviction which made a mockery of justice.

Reduction

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

Following the trial court's refusal to reduce bond the matter should have been brought to the Supreme Court via a habeas corpus for bond reduction. Following conviction, the issue was moot.

Refusal

State v. Gary, 247 S.E.2d 420 (1978) (Miller, J.)

Syl. pt. Where bail is sought and opposed by the State, either as to the right to bail or the amount, the trial court must provide a hearing and a written statement of the reasons for its decisions.

Post-conviction (continued)

Refusal (continued)

State v. Gary, (continued)

The requirement of a hearing when defendant seeks bail but the State opposes it affords the parties an opportunity to defend their positions and also provides the basis for appellate review.

The statement requirement provides a guide to the appellate court as to the trial court's rationale.

BONDSMEN

Liability

State v. Belcher, 285 S.E.2d 147 (1981) (Per Curiam)

Syl. pt. - As a general rule, upon default of the principal in a recognizance conditioned upon his appearance before a court, the surety will be excused from liability on such recognizance only where the default of the principal is caused by the public enemy, the obligee, the law or an act of God. In syl. pt. 3 of *State v. Arrington*, 147 W.Va. 753, 131 S.E.2d 382 (1983).

Where bond stated that criminal defendant would appear before the judge "on the first day of September Special Term . . . and from term to term and time to time, thereafter . . . until the matter is finally terminated", the surety's claim that he was relieved of liability because no default was entered and no judgment was rendered during the indictment term, was without merit.

BREAKING AND ENTERING

Accessory, aiding and abetting, principal

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL In general, (p. 22) for discussion of topic.

See INDICTMENT Accessory, Aiding and abetting, Principal, (p. 432) for discussion of topic.

Indictment

State v. Riley, 282 S.E.2d 623 (1981) (McHugh, J.)

"An indictment for burglary may contain one or more counts for breaking and entering, or for entering without breaking, the house or building mentioned in the count for burglary . . ." *W.Va. Code* § 61-3-12 (1923).

"An indictment may allege burglary and larceny in the same count, and likewise may join charges of breaking and entering and larceny in the same count." Syl. pt. 3, *State v. Varner*, 131 W.Va. 459, 48 S.E.2d 171 (1948).

Instructions

Burden shifting

State v. Goff, 272 S.E.2d 457 (1980) (Miller, J.)

See INSTRUCTIONS Burden shifting, (p. 493) for discussion of topic.

State v. Myers, 245 S.E.2d 631 (1978) (Caplan, C.J.)

See INSTRUCTIONS Burden shifting, (p. 497) for discussion of topic.

Instructions (continued)

Burden shifting (continued)

State v. Whiting, 263 S.E.2d 896 (1980) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 499) for discussion of topic.

Criminal trespass

State v. Gilliam, 289 S.E.2d 471 (1982) (Per Curiam)

In a trial for breaking and entering, defendant claimed on appeal that the trial court erred in refusing to give his instruction on attempted criminal trespass. The Supreme Court held that there was no error, as there was no evidence to support this crime.

Reasonable doubt

State v. Goff, 272 S.E.2d 457 (1980) (Miller, J.)

See INSTRUCTIONS Reasonable doubt, (p. 518) for discussion of topic.

Receiving stolen property

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

A trial might be held on an indictment charging receiving stolen property and the larceny of such goods but the defendant could not be convicted on both. However, this is not authority for the defendant's right to an instruction on receiving stolen property at a trial for breaking and entering. Thus it was not error to refuse to give an instruction on receiving stolen property at a breaking and entering trial, since it is an erroneous instruction.

BREAKING AND ENTERING

Intent

State v. Nicholson, 252 S.E.2d 894 (1979) (Caplan, C.J.)

Intent is an element of the crime of breaking and entering which may be inferred from the circumstances surrounding the crime.

Lesser included offense

State v. Horton, 294 S.E.2d 248 (1982) (Per Curiam)

Unauthorized entry upon enclosed lands is not a lesser included offense in the crime of breaking and entering under the test set forth in *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981).

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

Syl. pt. 2 - Criminal trespass, as defined by *W.Va. Code* 61-3B-2 [1978], is not a lesser included offense of burglary by breaking and entering, as defined by *W.Va. Code*, 61-3-11(a) [1973].

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

The only substantial evidence linking defendant to the commission of the offense was his possession of the stolen goods. The circumstantial evidence rule of *State v. Dobbs*, 259 S.E.2d 829 (W.Va. 1979) was applied by the court. Entwined within the circumstantial evidence rule is the question of the weight to be accorded evidence that the defendant had possession of recently stolen goods.

"Evidence of the exclusive possession by an accused person of recently stolen goods, corroborated by other proper evidence, facts and circumstances tending to prove guilt, may be sufficient to convict the possessor of the theft of such goods, even though the corroborating evidence, facts and circumstances above would be insufficient to support a conviction." Syl. pt. 2, *State v. Etchell*, 147 W.Va. 338, 127 S.E.2d 609 (1962).

Lesser included offense (continued)

State v. Craft, (continued)

Whether in such circumstances the evidence is sufficient to establish the guilt of the accused beyond reasonable doubt is ordinarily a question of fact for the jury.

The corroborating evidence in this case, the fact that the stolen goods were being used in the commission of a subsequent crime and defendant was identified as the one committing the subsequent crime, appeared to be sufficient to sustain the conviction of the defendant for breaking and entering.

A second defendant in this case was found with the first defendant's car which contained stolen tools. The mere presence of a person in an automobile found to contain stolen property may be insufficient to support a conviction for theft, particularly where the defendant is not the owner of the vehicle. There was not sufficient evidence to tie the defendant to the breaking and entering.

State v. Dobbs, 286 S.E.2d 918 (1982) (Neely, J.)

When appellant, wearing a lavender shirt and soiled black pants, was spotted 15 minutes after a breaking and entering where one policeman recognized the defendant and another policeman observed one of the individuals wearing similar attire and when appellant's alibi proved to be false, the court found the evidence sufficient under the *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) test, to sustain the appellant's conviction for breaking and entering.

Lesser included offense (continued)

State v. Horton, 294 S.E.2d 248 (1982) (Per Curiam)

Appellant was convicted of breaking and entering on the basis of fingerprints taken from a toaster oven at the site of the breaking and entering but not identified until matched with fingerprints taken at the site of a second crime, theft of a stereo system, for which appellant had been arrested. Appellant claimed the evidence was insufficient to support the guilty verdict. The Supreme Court held that the fingerprints were sufficiently unique to link the appellant to the crime despite the *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976) holding that "fingerprint evidence, being circumstantial evidence, will not sustain a conviction in a criminal case when such evidence, as presented, is the only evidence linking defendant to the commission of the crime, creates a mere suspicion of guilt, does not prove the actual commission of the crime charged and fails to prove guilt to the exclusion of every reasonable hypothesis of innocence", the rationale being that appellant had never legitimately been in the house, whereas in *Noe* defendant had been. Construing the available evidence in the light most favorable to the prosecution, there was circumstantial evidence upon which the jury might have justifiably found appellant guilty beyond a reasonable doubt.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

In this case, defendant on appeal from his conviction of burglary by breaking and entering, claimed that there was not sufficient evidence to support an inference by the jury that he intended to commit a felony or any larceny in the dwelling house. The Supreme Court found that there were circumstances from which the jury could have properly inferred that the defendant entered the dwelling house with intent to commit larceny. The record when viewed in the light most favorable to the State showed that the defendant, and his friend, smoked marijuana, needed money for gasoline, discussed stealing coins from the victim, took actions to discover whether the house was occupied, entered the house, mistakenly thinking it was unoccupied, then fled when he was observed.

Lesser included offense (continued)

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

"The exclusive possession by an accused person of property recently stolen, either by simple larceny or by theft thereof from a dwelling or other building, is not of itself *prima facie* evidence that the person in whose possession the goods are found is the thief; but such possession is, nevertheless, a strong circumstance to be considered with other evidence, facts and circumstances properly tending to prove the guilt of such person." Syl. pt. 1, *State v. Etchell*, 147 W.Va. 338, 127 S.E.2d 609 (1962).

There is substantial authority for the proposition that where there are other facts and circumstances tending to prove a defendant's guilt, the exclusive possession of recently stolen property that will support an inference of guilt need not be sole possession, but may be joint. Exclusive possession of recently stolen property may include joint possession by two or more persons.

Applying the sufficiency of evidence standard, found in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 129 (W.Va. 1978) in the standard of review section this topic of the outline, there was substantial evidence from which an impartial jury could rationally conclude beyond a reasonable doubt that the defendant was participant in a breaking and entering. The presence of the stolen property in the van was strong circumstantial evidence tending to show defendant's guilt, which could be considered with the other incriminating facts and circumstances in evidence. The defendant was placed in the val at all critical times, both before and after the crime was committed, thus excluding the hypothesis that he was an innocent hitchhiker who joined the other individuals after the crime was committed. Viewing the evidence in the most favorable light to the State, the evidence is not manifestly inadequate or an injustice done.

Variance between indictment and proof

State v. Nicholson, 252 S.E.2d 894 (1979) (Caplan, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

Variance between indictment and proof (continued)

State v. Perry, 284 S.E.2d 861 (1981) (Per Curiam)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

BURDEN OF PROOF/PRESUMPTIONS

See INSTRUCTIONS Burden shifting, (p. 486) for discussion of topic.

BURGLARY

In general

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

Syl. pt. 2 - The crime of burglary is defined in *W.Va. Code*, 61-3-11(a) as: "Burglary shall be a felony and any person convicted thereof shall be confined in the penitentiary not less than one nor more than fifteen years. If any person shall, in the night-time, break and enter, or enter without breaking, or shall, in the adjoining thereto or occupied therewith, of another, with intent to commit a felony or any larceny therein, he shall be deemed guilty of burglary."

Footnote 4 - A dwelling house does not lose its character as a dwelling because its owners only occupy it on a part-time basis. *W.Va. Code*, 61-3-11(c) states a dwelling house may be used as a dwelling regularly or only from time to time.

Accessory, aiding and abetting, principal

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL In general, (p. 22) for discussion of topic.

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 23) for discussion of topic.

BURGLARY

Elements

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

The elements necessary to prove burglary under *W.Va. Code* § 61-3-11(a) (1973) are: (A) (1) in the daytime; (2) breaking and entering; (3) the dwelling house of another; (4) with the intent to commit a felony or any larceny therein. (B) (1) in the night-time; (2) breaking and entering or entering without breaking; (3) the dwelling house of another; (4) with the intent to commit a felony or any larceny therein.

The elements necessary to prove criminal trespass under *W.Va. Code* § 61-3B-2 (1978) are (1) a knowing entry; (2) in a structure or conveyance; (3) without being authorized, licensed or invited.

Intent

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

It is not necessary for the State to prove a completed larceny in order to obtain a conviction for burglary but only that there was an intent to commit a larceny. Under the evidence shown, there was sufficient evidence to show an intent to commit a larceny.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

Syl. pt. 3 - The intent to commit a felony or any larceny is an essential element of the crime of burglary under *W.Va. Code*, 61-3-11(a) (1973). It is well settled, however that such an intent may be inferred by the jury from the facts and circumstances of the case.

Elements (continued)

Intent (continued)

State v. Ocheltree, (continued)

In this case, defendant on appeal from his conviction of burglary by breaking and entering, claimed that there was not sufficient evidence to support an inference by the jury that he intended to commit a felony or any larceny in the dwelling house. The Supreme Court found that there were circumstances from which the jury could have properly inferred that the defendant entered the dwelling house with intent to commit larceny. The record when viewed in the light most favorable to the State showed that the defendant and his friend smoked marijuana, needed money for gasoline, discussed stealing coins from the victim, took actions to discover whether the house was occupied, entered the house mistakenly thinking it was unoccupied, and the fled when discovered.

Indictment

State v. Riley, 282 S.E.2d 623 (1981) (McHugh, J.)

See BREAKING AND ENTERING Indictment, (p. 86) for discussion of topic.

Lesser included offense

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

Syl. pt. 2 - Criminal trespass, as defined by *W.Va. Code*, 61-3B-2 [1978] is not a lesser included offense of burglary by breaking and entering as defined by *W.Va. Code* 61-3-11(a) [1973].

Syl. pt. 4 - All of the elements of larceny are not required to be shown in order to obtain a conviction for burglary. The only element of larceny necessary to be shown for a burglary is the intent to commit the larceny. Thus, under our lesser included offense test, larceny does not become a lesser included offense of burglary.

Lesser included offense (continued)

State v. Louk, (continued)

Defendant on appeal from his conviction of burglary claimed that petit larceny was a lesser included offense under the burglary indictment and the trial court erred in refusing to instruct the jury that a petit larceny verdict was an option which it could consider. The Supreme Court disagreed, finding that larceny is not a lesser included offense of burglary and the court did not err in refusing to give the defendant's instructions on petit larceny.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

Syl. pt. 1 - "An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense." Syl. pt. 7, *State v. Bailey*, 222 S.E.2d 432 (W.Va. 1975), overruled on other grounds, *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401 (W.Va. 1980).

Applies standards set forth in syl. pt. 2, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981).

It is not error for a trial judge to refuse an instruction which would allow a jury to convict of criminal trespass a defendant charged with burglary by breaking and entering.

In this appeal from a denial of his motion to set aside the verdict of guilty of burglary by breaking and entering, defendant claimed that the trial court erred by refusing to give an instruction on criminal trespass as a lesser included offense of burglary by breaking and entering. The Supreme Court found that criminal trespass was not a lesser included offense of burglary and that it was not error to refuse the instruction.

BURGLARY

Sufficiency of evidence

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

In an appeal from a conviction of burglary, defendant claimed that the State's evidence failed as a matter of law to prove that he committed the crime of burglary. The Supreme Court noted that, while the evidence was to some degree circumstantial in regard to the breaking and entering, it was shown that the defendant with others was on the property; that prior to entry on the property the defendant discussed with the others that the house was not occupied; that defendant was seen going toward the farmhouse and returning with certain items that he placed in the trunk of the car; that the owner of the property the next day upon returning to the property saw evidence of a forced entry and missing items. The Supreme Court found that there was no error by the trial court and the judgment of burglary was affirmed.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

See BREAKING AND ENTERING Lesser included offense, (p. 88) for discussion of topic.

COMMUNICABLE TUBERCULOSIS

Due process

Greene v. Edwards, 263 S.E.2d 661 (1980) (Per Curiam)

Syl. pt. 1 - Under *W.Va. Code*, 26-5A-5, persons charged with having communicable tuberculosis must, in a commitment proceeding, be afforded: (1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel; (3) the right to be present, to cross-examine, to confront and to present witnesses; (4) the standard of proof to warrant commitment to be by clear, cogent and convincing evidence; and (5) the right to be verbatim transcript of the proceeding for purposes of appeal.

When the circuit court did not notify defendant of his rights to ve represented by counsel in a confinement hearing under the West Virginia Tuberculosis Control Act, *W.Va. Code* § 25-5A-1, *et seq.*, and counsel was not appointed until after the hearing had begun, yet even the, the court allowed no recess so that defendant and his counsel could confer, the Court ordered the defendant discharged from Pinecrest Hospital. This decision was based upon the *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109 (W.Va. 1974), decision, which set forth due process requirements for persons charged under statutes governing the involuntary hospitalization of the mentally ill (*W.Va. Code* § 27-5-4). Since involuntary commitment under the Tuberculosis Act, *W.Va. Code* § 27-5-4, involved a deprivation of liberty in violation of Article 3, § 10 of the West Virginia Constitution and the fifth amendment to the United States Constitution, the Court held that the *Hawks* due process requirements must extend to persons confined under the Tuberculosis Control Act, (*i.e.*, syllabus point 1). The Court also held that since counsel was not appointed until after the commencement of the commitment hearing, he could not have been prepared adequately, thus, defendant was denied effective assistance of counsel.

Syl. pt. 2 - Timely appointment and reasonable opportunity for adequate preparation are prerequisites for fulfillment of appointed counsel' constitutionally assigned role in representing persons charged under *W.Va. Code*, 26-5A-5, with having communicable tuberculosis.

Appointment of counsel immediately prior to trial denies the defendant effective assistance of counsel as indicated in *State v. Bush*, 255 S.E.2d 539 (W.Va. 1979).

COMPETENCY

Criminal responsibility

See INSANITY Adjudication of criminal responsibility before trial, (p. 463) for discussion of topic.

To enter guilty plea

State ex rel. Kessick v. Bordenkircher, 294 S.E.2d 134 (1982) (Per Curiam)

See COMPETENCY To stand trial, (p. 100) for discussion of topic.

State v. Cheshire, 292 S.E.2d 628 (1982) (McGraw, J.)

See COMPETENCY To stand trial, (p. 102) for discussion of topic.

To stand trial

State ex rel. Kessick v. Bordenkircher, 294 S.E.2d 134 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1975). See *State ex rel. Williams v. Narick*, 264 S.E.2d 851 (W.Va. 1980), cited below.

Petitioner, arrested for an alleged assault of his wife and malicious wounding of his four-month-old daughter, attempted suicide and subsequently was transferred to Huntington State Hospital for psychiatric and psychological evaluation to determine competency to stand trial.

Though the evaluations were received by the court in January, they were not filed until April, after petitioner had been allowed to enter a guilty plea, and were not referred to during the entering of the pleas or during the subsequent sentencing. Furthermore, the guilty plea was entered while petitioner was under the influence of valium and sinequan.

To stand trial (continued)

State ex rel. Kessick v. Bordenkircher, (continued)

In view of these facts and the fact that the petitioner was sent directly to the State Penitentiary rather than to the recommended Huttonsville for psychiatric treatment, the Supreme Court determined that a hearing should have been conducted on the petitioner's competency to stand trial and his competency to enter a guilty plea thus invalidating petitioner's guilty plea.

State ex rel. Walton v. Casey, 258 S.E.2d 114 (1979) (Harshbarger, J.)

Syl. pt. 2 - *W.Va. Code* 27-6A-2(c) requires a court to dismiss criminal charges against a defendant if he is found incompetent to stand trial after six months' court-ordered hospitalization plus an additional three months if requested by hospital staff. The dismissal may be stayed ten days to allow civil commitment proceedings to be instituted pursuant to Code 27-5-1.

State ex rel. Williams v. Narick, 264 S.E.2d 851 (1980) (McGraw, J.)

Syl. pt. 3 - When a trial judge conducts a hearing to inquire into the competence of an accused to stand trial, he sits to hear evidence and to rule preliminarily on a question of fact, and where there is some competent evidence before the court which will support a ruling of competence, the ruling will not be subject to attack. It is only in a case where there has been no evidence supporting a finding of competence that prohibition will lie.

"To be competent to stand trial, a defendant must exhibit a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational, as well as factual, understanding of the proceedings against'." Syl. pt. 2, *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1975).

When conflicting reports concerning petitioner's competency to stand trial were introduced as evidence, the Supreme Court found the evidence sufficient to support a ruling of competency; therefore, the judge did not abuse his power and prohibition was inappropriate.

To stand trial (continued)

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Church*, 284 S.E.2d 897 (W.Va. 1981), cited below.

If a defendant moves for a competency hearing one should be held and the trial judge should make an independent finding upon that issue.

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

In prosecution for armed robbery, failure to have a psychiatric examination conducted was not reversible error because it was not brought to the attention of the court.

State v. Cheshire, 292 S.E.2d 628 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 2, *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1975). See *State ex rel. Williams v. Narick*, 264 S.E.2d 851 (W.Va. 1980), cited below.

Syl. pt. 2 - The test for mental competency to stand trial and the test for mental competency to plead guilty are the same.

If ti is shown by a preponderance of the evidence that the appellant lacks either an ability to consult with counsel or an understanding of the proceeding as set forth in syl. pt. 1 then conviction will be set aside and disposition mad as provided in *W.Va. Code* § 27-6A-2.

A defendant cannot be tried or convicted for a crime while he or she is mentally incompetent.

Since the test for competency to stand trial is the same as the test for mental competency to plead guilty, the procedures provided in *W.Va. Code* § 27-6A-1 and 27-6A-2 apply to both. Generally, these statutes require both a psychiatric or psychological exam when there is a question of competency and a hearing to determine that competency.

To stand trial (continued)

State v. Cheshire, (continued)

Whenever the trial court is made aware of a possible problem with a d defendant's competency, it is an abuse of discretion to deny a motion for psychiatric evaluation.

When appellant underwent two psychological examinations to determine competency to stand trial and to enter a guilty plea but, at the competency hearing the trial court failed to make findings concerning appellant's ability to assist counsel or concerning her understanding of the proceedings, her c conviction was invalid.

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Syl. pt. 1 - A trial judges's failure to make a finding on the issue of a criminal defendant's competency to stand trial within five days after the filing of a report by one or more psychiatrists or a psychologist in compliance with *W.Va. Code* 27-6A-1(d) (1977), will not be considered to be reversible error requiring a new trial absent prejudice to the defendant resulting from such failure.

Syl. pt. 2 - Even though a trial judge does not make a finding on the issue of a criminal defendant's competency to stand trial within five days after the filing of a report by one or more psychiatrists or a psychiatrist and a psychologist, the defendant may request a hearing on that issue under *W.Va. Code* 27-6A-1(d) (1977), at any reasonable time prior to trial.

A preliminary finding of competency under *W.Va. Code* 27-6A-1(d) (1977) is not a prerequisite to a request for a competency hearing.

Defendant was not prejudiced by the trial judge's failure to make a finding of competency in compliance with *W.Va. Code* 27-6A-1(d) (1977) since defendant hd notice of the findings and opinions of the psychiatrist and psychologist who had examined him and did not request a competency hearing at any time prior to trial.

To stand trial (continued)

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

See CONTINUANCE Reasonable opportunity to prepare, (p. 127) for discussion of topic.

Syl. pt. 4 - When a trial judge is made aware of a possible problem with defendant's competency, it is abuse of discretion to deny a motion for psychiatric evaluation. To the extent *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1975), differs from this rule, it is overruled.

There are no "fixed or immutable signs" always dispositive of a defendant's competency to be tried. A person cannot be tried, sentenced or punished while mentally incapacitated.

When circumstances require consideration of information available only in a pretrial psychiatric evaluation, that examination must be given.

State v. Echard, 280 S.E.2d 724 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 4, *State v. Demastus*, 270 S.E.2d 649 (W.Va. 1980).

Defendant had made three suicide attempts while in jail and had committed other violent acts. Under the W.Va. statute for civil commitment of the mentally ill, *W.Va. Code* § 27-5-3 (1979), either incident should have prompted a mental examination; thus, when no exam was ordered, the Supreme Court reversed appellant's conviction and required that his mental competency be tested.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

See APPEAL Interlocutory, (p. 37) for discussion of topic.

To stand trial (continued)

State v. Myers, 280 S.E.2d 299 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 4, *State v. Demastus*, 270 S.E.2d 649 (W.Va. 1980), cited above.

Where motion for mental exam was granted, but defendant initially refused to be tested and there was nothing presented to the court to indicate that defendant was mentally incompetent, the trial court did not abuse its discretion in refusing to require a mental exam.

Although the court can refuse to order a mental exam on the basis that defendant resisted it where there is nothing to suggest incompetency, it is error to defer to the wish of a defendant who opposes a psychiatric exam when there is evidence of incompetency in the record.

COMPULSORY SCHOOL ATTENDANCE

State v. Riddle, 285 S.E.2d 359 (1981) (Neely, J.)

Syl. pt. 4 - There are occasions where the physical and emotional health of a child are in sufficient danger that the state's interest in protecting the child and the child's interest in being protected until such age as the child can make an informed choice about his own religious practices outweigh even the most sincerely held religious convictions of the parents.

W.Va. Code 18-8-1 mandates compulsory school attendance beginning with the seventh birthday and continuing until the sixteenth.

Although Exemption B of this compulsory school attendance statute does provide for the possibility for instruction in the home, it requires such instruction to be conducted by a person or persons who, in the judgment of the county superintendent and county board or education, are qualified to give instruction and to be monitored by the county board of education.

At times the state's interest will override even the most sincerely held religious convictions, consequently these religious convictions are never a defense to total noncompliance with the compulsory school attendance law; however, Exemption B serves as a vehicle for balancing and reconciling all divergent constitutional interests.

Syl. pt. 1 - (In part) No person may disregard the compulsory school attendance law and then raise first amendment, free exercise of religion defenses to a criminal prosecution for violation of that law.

Syl. pt. 5 - (In part) An arbitrary and capricious refusal by the county superintendent and county board of education to grant approval to qualified instructions can be corrected either by an action for declaratory judgment or an action in mandamus.

W.Va. Code 18-8-1, Exemption B, contemplated a qualified instructor, not a correspondence course.

State v. Riddle, (continued)

When parents refused to send their children to school, perceiving school as a pernicious influence violative of sincere religious convictions, but taught their children at home, yet failed to have their home approved under Exemption B, *W.Va. Code* 18-8-1, the Court held that the compulsory school attendance law did not abridge the free exercise of appellants' religion and was not unconstitutional as a violation of their rights under the first and fourteenth amendments.

CONFESSIONS

See SELF-INCRIMINATION, (p. 827) for discussion of topic.

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT (p. 830) for discussion of topic.

CONSPIRACY

Nolle prosequi of co-defendant

Keith v. Leverette, 254 S.E.2d 700 (1979) (Caplan, C.J.)

See *NOLLE PROSEQUI* Co-defendants, (p. 656) for discussion of topic.

Syl. pt. 1 - Where two or more persons are charged in an indictment with conspiracy, the conviction of one of those indicted is not necessarily invalidated by the entry of a nolle prosequi as to one or more of the others so charged.

Where the record reveals, as it does in this instant case, that a *nolle prosequi* of conspiracy charges against all but one of those charged was not based on the merits of the charge, the conviction of the remaining defendant will not be invalidated.

Sentencing

Keith v. Leverette, 254 S.E.2d 700 (1979) (Caplan, C.J.)

Syl. pt. 2 - Conspiracy to inflict bodily injury upon another and felonious assault are two separate and distinct crimes, and one charged with and convicted of both offenses can receive a separate sentence for each crime.

Syl. pt. 3 - When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless sit does so provide, the sentences will run consecutively.

CONTEMPT

In general

Hendershot v. Handlan, 248 S.E.2d 273 (1978) (Caplan, C.J.)

Syl. pt. 1 - A person, although not a party to a proceeding, may be charged with contempt for the violation of a court's order entered therein if he has actual knowledge of such order and is acting in concert or privity with a party.

Syl. pt. 2 - One may be charged with contempt for violating a court's order, of which he has actual knowledge, notwithstanding that at the time of the violation the order had not yet been formally drawn up.

Although petitioner was not a party to the divorce proceeding, he was a witness at the hearing and he had actual notice of the court's decision to award custody to the mother. Petitioner was acting in concert with his son to frustrate the court's order when he absconded with the child; therefore, he may be charged with contempt.

State ex rel. Walker v. Giardina, 292 S.E.2d 633 (1982) (Miller, J.)
[Editor's Note: Opinion was withdrawn because rehearing pending]

Applies to syl. pt. 1, *Hendershot v. Handlan*, 248 S.E.2d 273 (W.Va. 1978), cited above.

Applies to syl. pt. 2, *Hendershot v. Handlan*, 248 S.E.2d 273 (W.Va. 1978), cited above.

Chesapeake and Ohio v. Hash, 294 S.E.2d 96 (1982) (McGraw, J.)

A proceeding to punish for contempt of court, either criminal or civil, is criminal in character.

CONTEMPT

Arrest

Hendershot v. Handlan, 248 S.E.2d 273 (1978) (Caplan, C.J.)

When the father refused to surrender custody to the mother upon a court order and grandparents absconded with the child, grandfather was arrested. Bond was set at $20,000. Grandfather, petitioner, sought a writ of prohibition to bar the circuit judge from further proceedings on the contempt charges on the grounds that he was entitled to notice or hearing before he was arrested. Since petitioner had evaded the authorities before, the Supreme Court held that the arrest and bond, assuring petitioner's presence at a hearing to determine guilt or innocence of contempt was justified.

"When an order of a court has been disobeyed and the case is urgent or the contempt flagrant, the court may issue an attachment in the first instance without the usual antecedent rule." Syl. pt. 1 - *Ex Parte Kirby*, 100 W.Va. 70, 130 S.E. 86 (1925).

The attachment serves the same purpose as the warrant, thus the order directing the attachment merely afforded petitioner an opportunity to be heard, it did not find petitioner guilty.

Justice Miller, concurring in part and dissenting in part, took issue with the court's reasoning concerning the arrest attachment. According to Justice Miller there was nothing in the record to indicate either actual knowledge of the order or concert of activity in violation of the order. He contended: (1) That since a contempt of court, whether civil or criminal, is a criminal proceeding governed by the rules of evidence for criminal trials, there should be a specific factual affidavit underlying the rule to show cause why a person should not be held in contempt; (2) that procedural due process safeguards should govern the issuance of an arrest attachment; (3) that since attachment of a person is arrest, the complaint must contain sufficient facts to support a finding of probable cause that an act of contempt occurred; and, (4) that absent some compelling reason the normal rule to show cause should be issued rather that the arrest attachment.

CONTEMPT

Attorneys

State v. Boyd, 276 S.E.2d 829 (1981) (Miller, J.)

Syl. pt. 1 - A circuit court has no power to proceed summarily to punish for contempt of such court except in the instances enumerated in Code, 1931, 61-5-26. *State ex rel. Arnold v. Conley*, 151 W.Va. 584, 153 S.E.2d 681 (1966).

Syl. pt 2 - The rule with regard to contempt of court by an attorney begins with a recognition, that under our adversary system of justice, zealous advocacy on the part of an attorney must be permitted. Consequently, it is only when his conduct is boisterous or disrespectful to the degree that it constitutes an imminent threat to the administration of justice that summary punishment for contempt will be authorized.

Contemptuous conduct must be committed in the presence of the Court and it must obstruct or interrupt the administration of justice. Also, the obstruction must be imminent, not remote.

State ex rel. Askin v. Dostert, 295 S.E.2d 271 (1982) (McGraw, J.)

See ATTORNEYS Conduct, (p. 67) for discussion of topic.

See CONTEMPT Jurisdiction, (p. 117) for discussion of topic.

Child support

State ex rel. Canada v. Hatfield, 258 S.E.2d 440 (1979) (Per Curiam)

Syl. pt. - The remedy of imprisonment for failure to pay child support should not be enforced except where it appears that the defendant is contumacious.

Child support (continued)

State ex rel. Canada v. Hatfield, (continued)

The evidence establishes that the relator's failure to pay was due to his inability to pay, not his contumacious attitude.

The Court abused its discretion by sentencing relator to imprisonment until he paid his arrearage when the evidence indicated the absence of any ability to pay and purge himself of the contempt.

Civil-criminal distinctions

Hendershot v. Handlan, 248 S.E.2d 273 (1978) (Caplan, C.J.)

Where the purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal.

Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order the contempt is civil.

The same act may constitute both civil and criminal contempt. Contempts may have characteristics of both.

Floyd v. Watson, 254 S.E.2d 687 (1979) (Harshbarger, J.)

There is no clear line of delineation between civil and criminal contempt; however, these can be distinguished by looking to the purpose for which the contempt order was issued.

Civil contempt proceedings do not seek to punish defendant but rather to benefit complainant; whereas criminal contempt proceedings seek to vindicate public authority.

Where the purpose of a court's contempt order was to provide a remedy to complainants, not to vindicate public authority, the contempt was civil.

Civil-criminal distinctions (continued)

Floyd v. Watson, (continued)

If a contempt procedure is criminal in nature, the sentence must be a determinative one, while if it is civil in nature, the sentence must be coercive.

Syl. pt. 1 - Imposition of a fixed term of imprisonment for civil contempt is improper where the contemner is given no opportunity to purge himself of the contempt and thus free himself from imprisonment

Imprisonment as a result of civil contempt proceedings may be for a definite term only if the order allows the contemner to be released from jail as soon as he complies with the order.

When appellants were sentenced to 70 days' imprisonment for failure to comply with the court's specific performance order, the Supreme Court held this punishment to be inappropriate in civil contempt proceedings since the penalty in civil contempt must be coercion, not punishment and since the definite term did not make provision for releases from jail as soon as appellant had complied with the order.

Hendershot v. Hendershot. 263 S.E.2d 90 (1980) (Miller, J.)

Syl. pt. 1 - A contempt will be deemed criminal when a jail sentence is imposed and the contemner is given no opportunity in the sentencing order for immediate release by purging himself of contempt by doing an act which is within his power to accomplish.

State ex rel. Robinson v. Michael, 276 S.E.2d 812 (1981) (McHugh, J.)

Syl. pt. 1 - Whether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate.

Civil-criminal distinctions (continued)

State ex rel. Robinson v. Michael, (continued)

Syl. pt. 2 - Where the purpose is to be served by imposing a sanction is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil.

Syl. pt. 4- Where The purpose to be served by imposing a sanction for contempt is to punish the contemner for an affront to the dignity or authority of the court, or to preserve restore order in the court or respect for the court, the contempt is criminal.

Syl. pt. 5 - The appropriate sanction in a criminal contempt case is an order sentencing the contemner to a definite term of imprisonment or an order requiring the contemner to pay a fine in a determined amount.

The purpose of contempt is either to force compliance with a court order or to punish disrespect of the court.

The purpose to be served by imposing a sanction for contempt determines both whether the contempt is civil or criminal and which type of sanction is appropriate. The civil/criminal distinction does not depend upon the act constituting the contempt.

Where the purpose of the imposition of a sanction for contempt was to compel back support payment to benefit the litigant, the contempt was civil.

The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged, thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order.

Civil-criminal distinctions (continued)

State ex rel. Walker v. Giardina, 292 S.E.2d 633 (1982) (Miller, J.)
[Editor's Note: Opinion was withdrawn because rehearing pending]

Applies standard set forth in syl. pt. 1, *State ex rel. Robinson v. Michael*, 276 S.E.2d 812 (W.Va. 1981), cited above.

Applies standard set forth in syl. pt. 4, *State ex rel. Robinson v. Michael*, 276 S.E.2d 812 (W.Va. 1981), cited above.

Applies standard set forth in syl. pt. 5, *State ex rel. Robinson v. Michael*, 276 S.E.2d 812 (W.Va. 1981), cited above.

Syl. pt. 9 - When a court has reliable information that there has been a deliberate violation of its order by a person having knowledge of its order, the court may in its discretion initiate a criminal contempt proceeding through the prosecuting attorney of the county where the court sits and from which its order issued.

Applying syl. pt. 4, *State ex rel. Robinson v. Michael*, 276 S.E.2d 812 (W.Va. 1981), jailors' disregarding the stay order of Supreme Court was clearly an act of criminal contempt.

The prosecuting attorney cannot be compelled by mandamus to prosecute a civil contempt because there is no legal duty; however, in a criminal contempt proceeding, there is a clear duty.

A judge may not avoid a criminal contempt proceeding by claiming judicial immunity.

Where the judge ordered jailors to disregard Supreme Court's stay of execution order, the Supreme Court determined that there was sufficient probable cause to warrant the issuance of a rule to show cause. Since the action was criminal contempt, a jury trial was required. The case was, therefore, remanded to the Circuit Court of Kanawha County.

Civil-criminal distinctions (continued)

State ex rel. Walker v. Giardina, (continued)

While disobedience of a court order based on advice of counsel is not a defense to a contempt charge, it may be considered in determining the degree of punishment.

Issue of punishment for jailors who disregarded Supreme Court stay order at judge's instruction was reversed for a later term.

Due Process

Chesapeake and Ohio v. Hash, 294 S.E.2d 96 (1982) (McGraw, J.)

Syl. pt. 3 - Before an individual may be committed to jail for contempt of court, he must be personally served with notice of the charge.

While the court's jurisdiction extends far enough to allow it to hold an unincorporated association in contempt of court, incarceration of individual members of that association who have not been named as contemners and have not been personally served with notice is not within the court's jurisdiction.

The criminal contemner is subject to incarceration or fine if he is found guilty of contempt, therefore, he is entitled to fundamental procedure safeguards to ensure that he is not deprived of his liberty of property without due process of law.

Jurisdiction

State ex rel. Askin v. Dostert, 295 S.E.2d 271 (1982) (McGraw, J.)

Syl. pt. 3 - Where a court has jurisdiction to issue a particular order, the fact that such order is erroneous, irregular, or is improvidently rendered, does not justify one in disregarding or violating the order, and then citing the

Jurisdiction (continued)

State ex rel. Askin v. Dostert, (continued)

court's error as a defense to a charge of contempt. Where, however, the court or judge lacks jurisdiction, or is without power or authority to render the order, refusal to comply with such order may not be punished as contempt.

Since the trial court had no authority to order the petition to give security for his good behavior, the petitioner's refusal to comply could not be punished as contempt.

Order by Supreme Court

State ex rel. Walker v. Giardina, 292 S.E.2d 633 (1982) (Miller, J.)
[Editor's Note: Opinion was withdrawn because rehearing pending]

This Court possesses the power to punish a party for contempt of an order executed by this Court.

When the Supreme Court had ordered stay of execution but jailors, at judge's instruction, ignored the order, the Supreme Court held that a "party may not disobey a lawful order of an appellate court because he has been advised to do so by a lower court."

The fact that Supreme Court stay of execution order was communicated orally was of no relevance since parties were aware of the content and authenticity of the order.

A stay order telephonically transmitted was sufficient once its authenticity and contents are acknowledged.

CONTEMPT

Right to jury trial

Hendershot v. Hendershot, 263 S.E.2d 90 (1980) (Miller, J.)

Syl. pt. 2 - Article III, Section 14 of the West Virginia Constitution prohibits imprisonment without a jury trial in a criminal contempt proceeding.

Obedience to court orders can still be effectuated, where parties have been contumacious, through a civil contempt proceeding which includes conditional imprisonment, that is imprisonment based on the condition that the contemner will be freed on agreeing to honor the court order and perform such act to comply with the order as is reasonably within his power to do. A court may also summarily expel a disruptive party or spectator from the courtroom.

In the circumstances of this case, appellant's son was a litigant in a divorce suit. The son was ordered by the trial court to relinquish to his wife the custody of their child. The petition for contempt alleged that the appellant had conspired to remove the child from the state. The trial court sentenced appellant to serve 90 days in jail and fined him $500 for violating the court's order regarding custody of the child. The appellant claimed that article III, § 14 of the *W.Va. Const.* gives an absolute right to a jury trial for all crimes and misdemeanors and that criminal contempt is a crime. The Supreme Court found that art. III, § 14 of the *West Virginia Constitution* prohibits imprisonment without a jury trial in a criminal contempt proceeding where the contemner is sentenced and the sentencing order does not provide him an opportunity to purge the contempt. It is not applicable where the sentencing order contains the condition that the contemner can gain immediate release by purging himself of the contempt by performing an act that is within his power to accomplish.

State ex rel. Walker v. Giardina, 292 S.E.2d 633 (1982) (Miller, J.)
[Editor's Note: Opinion was withdrawn because rehearing pending]

Syl. pt. 8 - The rationale for a jury trial in a criminal contempt proceeding as set out in *Hendershot v. Hendershot*, 263 S.E.2d 90 (W.Va. 1980), was based on Section 14 of Article III of the West Virginia Constitution and, therefore, must be deemed to impose a similar limitation on our criminal contempt power.

Right to jury trial (continued)

State ex rel. Walker v. Giardina, (continued)

". . . if a determinate jail sentence is to be imposed, then a jury trial is necessary and at this point the criminal contempt proceeding is tried like an ordinary criminal trial."

CONTINUANCE

Absence of material witness

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

To warrant a continuance on the basis of the absence of a material witness, it is necessary to show the use of due diligence to procure the attendance of the witness and also the materiality and importance of his evidence to the issues to be tried. *State v. Burdette*, 135 W.Va. 312, 63 S.E.2d 69 (1951).

If the facts upon which the motion for continuance is based are not before the court, and motion must be supported by a sufficient affidavit showing such facts. *Davis v. Walker*, 7 W.Va. 447 (1874). Mere conclusionary statements by the affiant, without more, are not sufficient. *State v. Whitecotton*, 101 W.Va. 492, 133 S.E. 106 (1928).

"A motion for a continuance based on the absence of a material witness is addressed to the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless it is clearly wrong and it appears that such discretion has been abused." Syl. pt. 1, *State v. Chafin*, 156 W.Va. 264, 192 S.E.2d 728 (1972).

In this case, the defendant relied merely upon the hold assertion that a material witness was missing to support his motion for a continuance. Therefore, the denial of a continuance was not an abuse of discretion.

Absence of nonmaterial witness

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

A continuance cannot ordinarily be obtained for the absence of nonmaterial witness.

Abuse of discretion

State v. Alexander, 245 S.E.2d 633 (1978) (Harshbarger, J.)

The granting or denial of a motion for continuance by either party rests in the sound discretion of the trial court; refusal to grant such continuance constitutes reversible error only where the discretion is abused.

Abuse of discretion (continued)

State v. Alexander, (continued)

Here, because of defense counsel's delay in issuing subpoenas, the suppression hearing had to be continued and because of the continuance, the State was not able to prepare its main case for trial before the court term ended. The Supreme Court found the trial court did not abuse it discretion when it granted the continuance, nor improperly deprive defendants of a quick trial.

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

Syl. pt. 2 - A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.

Syl. pt. 3 - Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Trial court decisions about continuances have not been disturbed unless discretion was abused. The decision must have prejudiced the party who asked for the continuance.

State v. Pauley, 276 S.E.2d 792 (1981) (Per Curiam)

Although granting or denial of a motion for a continuance rests in the sound discretion of the trial court, refusal to grant the continuance is reversible error where the court has abused its discretion.

CONTINUANCE

Competency determination

State v. Pauley, 276 S.E.2d 792 (1981) (Per Curiam)

"When a trial judge is made aware of a possible problem with defendant's competency, it is abuse of discretion to deny a motion for [a] psychiatric evaluation . . . ." Syl. pt. 4, in part, *State v. Demastus*, 270 S.E.2d 649 (W.Va. 1980).

Where defense counsel had raised the question of his client's competency to stand trial 30 days before the trial started and had used due diligence in arranging an appointment for his client to see a psychiatrist less than one week following the trial date, the trial court abused its discretion in denying the motion for continuance in conducting the trial without determining defendant's capacity to stand trial.

Evidence

State v. Barker, 289 S.E.2d 207 (1982) (Per Curiam)

"There may be occasions when the denial of a continuance in a criminal trial is so arbitrary as to violate due process, and because of the particular wording in Art. III, § 14 of the *West Virginia Constitution*, that the accused 'shall have the assistance of counsel, and a reasonable time to prepare for his defense' there is, independent of the Due Process Clause in our constitution, a constitutional right to a continuance if the defendant is not accorded a reasonable time to prepare his defense." Syl. pt. 3, *Wilhelm v. Whyte*, 239 S.E.2d 735 (W.Va. 1977).

In this case, after having ruled certain handwriting samples inadmissible because they were not taken under judicial supervision, the judge supervised the taking of samples in accordance with the statute, and proceeded with trial. Clearly, the decision of this novel issue left the defendant without reasonable time to secure a handwriting expert and prepare his defense.

On this appeal, the defendant also contested a writing sample taken just prior to a separate subsequent trial for the same offense but different forged checks. Since this issue had been presented before, it was incumbent upon the parties to be prepared when it arose again at trial.

Evidence (continued)

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

The defendant made a motion for a continuance in order to conduct further psychiatric testing. If the facts upon which the motion for continuance is based are not before the court, the motion must be supported by a sufficient affidavit showing such facts. *Davis v. Walker*, 7 W.Va. 447 (1874) mere conclusionary statements by the affiant, without more, are not sufficient. *State v. Whitecotton*, 101 W.Va. 492, 133 S.E. 106 (1928). No affidavit was filed in support of this motion, and there was no indication of the need for such examination. "Evidence that such examination is needed must be presented to the trial court before the granting of such motion is justified." Syl. pt. 2, *State v. Chafin*, 156 W.Va. 264, 192 S.E.2d 728 (1972).

Exculpatory

State v. Lawson, 267 S.E.2d 438 (1980) (Neely, C.J.)

See SEXUAL ASSAULT Continuance, (p. 885) for discussion of topic.

Late production of discovery

State v. Andriotto, 280 S.E.2d 131 (1981) (Neely, J.)

The defendant maintained that the circuit court abused its discretion when it failed to grant a continuance longer than one week after the State provided a new list of twenty-five additional witnesses whom they indicated they might call. Since the defendant does not allege that any of these witnesses was actually called or that he suffered any actual prejudice as a result of inadequate opportunity to prepare to meet their testimony, this assignment is without merit.

Late production of discovery (continued)

State v. Cunningham, 290 S.E.2d 256 (1981) (Neely, J.)

"The granting of a continuance is a matter within the sound discretion of the trial court, though subject to review, and the refusal thereof is not ground for reversal unless it is made to appear that the Court abused its discretion, and that its refusal has worked injury and prejudice to the rights of the party in whose behalf the motion was made." Syl. pt. 1, *State v. Jones*, 84 W.Va. 85, 99 S.E. 271 (1919).

Late production of court-ordered discovery without a showing of particular harm to the defendant's preparation of the case will not constitute error.

In a trial for armed robbery and sexual assault, defendant was not prejudiced by the late production of the evidence and the trial court did not err in refusing to grant the motion for a continuance, when the defendant knew that the jeans in question were being examined, that the evidence connected with the jeans was consistent with his alibi, and that the evidence was corroborative and not the primary evidence against appellant.

State v. Schrader, 288 S.E.2d 170 (1982) (Neely, J.) (Withdrawn from bound volume because rehearing is pending)

Syl. pt. 1 - When the failure to grant a continuance causes no actual prejudice, such a refusal will not constitute reversible error.

On appeal from a trial for murder, defendant alleged late production of discovery material. The Supreme Court found that there was no error in the trial court's denying the appellant's motion for a continuance, because defendant was not hurried along to trial and denied effective assistance of counsel, and since appellant did not show how his counsel could have been better prepared for trial with earlier discovery.

With respect to the trial court's refusal to grant a continuance, the decision of the trial court in such instances is usually accorded great deference.

Late production of discovery (continued)

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

Petitioner contended that he was denied a fair trial when the Court overruled his motion for a continuance. Grounds for petitioner's motion for continuance were that material required to be turned over under the court's general discovery order had not been produced and that a material witness was absent. The court ruled that "absent some particular showing of how late production of court-ordered discovery has affected the petitioner's right to a fair trial, late production alone will not suffice to reach the constitutional level of denial of fair trial."

Since petitioner gave no specific reasons why late production of evidence denied him a fair trial, and since the absent witness' testimony would have been similar to that given by the petitioner and another witness, the court denied the writ of habeas corpus indicating that had the issue been brought on direct appeal, a less rigid rule regarding late production of discovery would have applied.

Nunc pro tunc

State v. Fender, 268 S.E.2d 120 (1980) (Per Curiam)

The defendant argues that since no order was entered in May 1972 formally granting the continuance motion, it was error for the trial court to enter a *nunc pro tunc* order showing the continuance in January 1976 after he was arrested. The motion for continuance and the other documents relating to it do constitute sufficient memoranda to support the entry of the *nunc pro tunc* order by the trial court.

Reasonable opportunity to prepare

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

See INEFFECTIVE ASSISTANCE Inadequate time to prepare, (p. 455) for discussion of topic.

Reasonable opportunity to prepare (continued)

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

See INEFFECTIVE ASSISTANCE Inadequate time to prepare, (p. 456) for discussion of topic.

The Court abused its discretion and prejudiced the defendant by not granting a continuance where counsel had only a weekend to prepare for trial.

Syl. pt. 4 - The factors relevant in assessing claims of inadequate time to prepare for trial are: the time available for preparation, the likelihood of prejudice from the denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, the availability of discovery from the prosecution, the adequacy of the defense provided at trial, the skill and experience of the attorney, any pre-appointment or pre-retention experience of the attorney with the accused for the alleged crime, and representation of the defendant by other attorneys that accrues to his benefit, whether the plea for more time to prepare for trial is made in good fait, the public interest in a speedy trial of the case, and the time the defendant has been in prison awaiting trial.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Syl. pt. 1 - It is error to refuse a continuance to allow a defendant to obtain evidence which is critical to his defense, the existence of which was discovered only shortly before trial.

Here, the Supreme Court found that twelve and seven days for two lawyers to prepare for armed robbery trial was inadequate since they asked for a continuance to prepare for trial and investigate facts to support motions for change of venue and psychiatric evaluation, and where one of the lawyers was preparing for a murder trial in another county. The Supreme Court found that the defense had to be severely limited because without proper medical evaluation, they could not even plead that the defendant was insane.

A trial judge must consider a lawyer's other commitments when granting or denying a continuance.

Reasonable opportunity to prepare (continued)

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

It was not an abuse of discretion for the trial court to refuse the motion for a continuance because defense counsel did not receive the transcript of *in camera* hearings until the morning of the trial. Defense counsel had not previously filed a timely motion to continue on this basis, so it appears that they were prepared to go to trial without these transcripts.

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

Syl. pt. 3 - There may be occasions when the denial of a continuance in a criminal trial is so arbitrary as to violate due process, and because of the particular wording in Article III, Section 14 of the West Virginia Constitution, that the accused "shall have the assistance of counsel, and a reasonable time to prepare for his defense", there is, independent of the Due Process Clause in our Constitution, a constitutional right to a continuance if the defendant is not accorded a reasonable time to prepare his defense.

Speedy trial

State ex rel. Shorter v. Hey, 294 S.E.2d 51 (1981) (McHugh, J.)

See SPEEDY TRIAL Same term rule, (p. 895) for discussion of topic.

CONTROLLED SUBSTANCES

Constitutionality of statute

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

In a trial for delivery of a controlled substance, defendant argued that the controlled substance statute at the time of his indictment was unconstitutional because it unconditionally delegated legislative powers to an executive agency.

However, since the substance in question, L.S.D. was a Schedule I controlled substance by action of the legislature, and since defendant failed to show that L.S.D. was made a controlled substance as a result of any unconstitutional exercise of authority by the agency, the Supreme Court found that the defendant's argument was without merit.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

Defendant contended the section of *W.Va. Code* 60A-4-401(a) making possession of a controlled substance with intent to deliver a crime to be unconstitutional. But the fact that this section establishes a jury question on the element of intent does not make it constitutionally infirm. All common law crimes require a *mens rea* and what a person intended is always a question for jury determination under all the facts and circumstances. There is no reason to treat a statutory crime any differently.

Delivering

State v. Adkins, 284 S.E.2d 619 (1981) (Harshbarger, J.)

See CONTROLLED SUBSTANCES Indictment, (p. 135) for discussion of topic.

State v. Archer, 289 S.E.2d 178 (1982) (Per Curiam)

See CONTROLLED SUBSTANCES Instructions, Delivering, (p. 138) for discussion of topic.

Delivering (continued)

State v. Ashworth, 292 S.E.2d 615 (1982) (McHugh, J.)

Syl. pt. 3 - Under the circumstances of this criminal case, the evidence was sufficient to sustain the verdict of the jury that the defendant was guilty of the offense of delivery of delivery of marihuana in violation of *W.Va. Code*, 60A-401(a)(1)(ii) [1971], where the evidence indicated that the defendant transferred the marihuana from a third party to an undercover police officer.

Syl. pt. 4 - Where the evidence indicated that the defendant delivered marihuana in violation of *W.Va. Code*, 60A-401(a)(1)(ii) [1971], from a third party to an undercover police officer, a conviction of the defendant under that statute was proper, even though it was not shown by the evidence at trial that the defendant received compensation, pecuniary or otherwise, with respect to the transaction.

". . . 'Delivery' or 'delivery' means the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." *W.Va.Code* 60A-4-401(1)(ii) and 60A-1-101(f) reach conduct of persons in illegal transactions who physically transfer controlled substances from the dealer to another. The culpability of the person who delivers the controlled substance does not depend upon whether that person received compensation.

State v. Barnett, 284 S.E.2d 622 (1981) (Harshbarger, C.J.)

Applies standard set forth in syl. pt. 3, *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978), cited below.

See CONTROLLED SUBSTANCES Sentencing, (p. 145) for discussion of topic.

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 142) for discussion of topic.

Delivering (continued)

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

See CONTROLLED SUBSTANCES Instructions, Delivering, (p. 139) for discussion of topic.

Syl. pt. 3 - Only an "intentional" or "knowing" delivery of a controlled substance is prohibited by statute, although the statute fails to expressly require criminal intent.

The Supreme Court held prospectively that knowledge or intent must be proven by the State in order to convict for the delivery of a controlled substance.

State v. Ellis, 239 S.E.2d 670 (1977) (Neely, J.)

Syl. pt. 4 - Under *W.Va. Code*, 60A-1-101(s) (1971), "constructive transfer" of a controlled substance means the transfer of a controlled substance either belonging to an individual or under his control by some other person or agency at the instance or direction of the individual accused of such constructive transfer.

Defendant's accomplice testified he transferred the marijuana at the defendant's direction. Thus the defendant could have been found guilty as a principal in the first degree.

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Evidence which proves a substance is marijuana is an essential element of the crime of delivering marijuana.

See CONTROLLED SUBSTANCES Sufficiency of the evidence, (p. 146) for discussion of topic.

Delivering (continued)

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 143) for discussion of topic.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

Syl. pt. 4 - Constructive possession of a controlled substance, *W.Va. Code*, 60A-4-401(c), and constructive delivery or possession with intent to deliver a controlled substance, *W.Va. Code*, 60-A-4-401(a), arise from separate offenses.

See CONTROLLED SUBSTANCES Indictment, (p. 135) for discussion of topic.

State v. Trogdon, 283 S.E.2d 849 (1981 (Per Curiam)

See CONTROLLED SUBSTANCES Indictment, (p. 137) for discussion of topic.

State v. Underwood, 281 S.E.2d 491 (1981) (Miller, J.)

See CONTROLLED SUBSTANCES Manufacturing, (p. 141) for discussion of topic.

Entrapment

State ex rel. Paxton v. Johnson, 245 S.E.2d 843 (1978) (Harshbarger, J.)

See ENTRAPMENT Test, (p. 246) for discussion of topic.

Entrapment (continued)

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

See ENTRAPMENT Test, (p. 248) for discussion of topic.

State v. Ashworth, 292 S.E.2d 615 (1982) (McHugh, J.)

See CONTROLLED SUBSTANCES Delivering, (p. 130) for discussion of topic.

See ENTRAPMENT Instructions, (p. 245); ENTRAPMENT Test, (p. 248) for discussion of topic.

Evidence

Chain of custody

State v. Davis, 294 S.E.2d 179 (1982) (Miller, C.J.)

See EVIDENCE Chain of custody, (p. 257) for discussion of topic.

State v. Harriston, 253 S.E.2d 685 (1979) (Harshbarger, J.)

See EVIDENCE Chain of custody, (p. 258) for discussion of topic.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See EVIDENCE Chain of custody, (p. 258) for discussion of topic.

Evidence (continued)

Collateral crime

State v. Adkins, 280 S.E.2d 293 (1981) (Per Curiam)

See EVIDENCE Collateral crimes, (p. 260) for discussion of topic.

State v. Harris, 272 S.E.2d 471 (1980) (Caplan, J.)

See EVIDENCE Collateral crimes, (p. 264) for discussion of topic.

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

See EVIDENCE Collateral crimes, (p. 265) for discussion of topic.

State v. Messer, 277 S.E.2d 634 (1981) (Per Curiam)

See EVIDENCE Collateral crimes, (p. 266) for discussion of topic.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See EVIDENCE Collateral crimes, (p. 268) for discussion of topic.

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

The defendant claims reversible error because the prosecutor in closing argument referred to a set of scales in evidence as having marijuana powder on them, but when the scales were introduced there was no longer any powder on them and the substance there was never shown to be marijuana. The prosecution was arguing that the scales were evidence of defendant's intent to deliver drugs, another charge in the indictment, not evidence of the crime he was convicted on, intent to manufacture. Therefore, defendant was not prejudiced by these remarks and the error was harmless.

CONTROLLED SUBSTANCES

Examination of the substance

State v. Adkins, 280 S.E.2d 293 (1981) (Per Curiam)

A person charged with possession of an illegal drug should be permitted to examine the alleged illegal drug under proper supervision and control.

State v. Davis, 294 S.E.2d 179 (1982) (Miller, C.J.)

The testimony of State's expert witness was enough to establish that the material seized was in fact marijuana under the statutory definition.

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

See EVIDENCE Scientific tests, In general, (p. 310) for discussion of topic.

Opinion

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

See EVIDENCE Opinion, Nonexpert witness, (p. 297) for discussion of topic.

Prejudicial physical evidence

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See EVIDENCE Relevant, Prejudicial, (p. 307) for discussion of topic.

Indictment

State v. Adkins, 284 S.E.2d 619 (1981) (Harshbarger, J.)

Syl. pt. 2 - Cocaine was a Schedule II controlled substance under Uniform Controlled Substances Act, Code, 60A-2-206(4).

Indictment (continued)

State v. Adkins, (continued)

The defendant's indictment alleged that he "unlawfully and feloniously did deliver and possess with intent to deliver a controlled substance, to-wit, cocaine . . . ." Since cocaine is a prohibited substance under the Uniform Controlled Substance Act the indictment is valid.

State v. Barnett, 284 S.E.2d 622 (1981) (Harshbarger, C.J.)

"An indictment which charges a statutory offense is sufficient if it substantially follows the language of the statute and fully and completely informs the defendant of the character and cause of the particular offense charged." Syl. pt. 1, *State v. Taylor*, 130 W.Va. 74, 42 S.E.2d 549 (1947).

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

W.Va. Code 60A-4-401(a) provides: ". . . it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance."

Syl. pt. 1 - An indictment that follows the language of *W.Va. Code* 60A-4-401(a) is sufficient of its face.

Where defendant was indicted for possession of a controlled substance with intent to deliver following the statutory language of *W.Va. Code* § 60A-4-401(a), the indictment was sufficient.

Even though clear standards are not provided for juris to use to decide about intent, *W.Va. Code*, § 60A-4-401(a), is constitutional and an indictment following the statutory language is sufficient without adequate allegations of intent.

Indictment (continued)

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

"An indictment predicated on a statute which specifically makes intent an element of the offense sought to be charged must aver the intent." Syl. pt. 1, *State v. Sprague*, 111 W.Va. 132, 161 S.E. 24 (1931).

"The use of the word 'unlawfully' in an indictment for a statutory offense does not supply essential affirmative allegation of intent where the statute specifically makes intent an element of the offense." Syl. pt. 2, *State v. Sprague*, 111 W.Va. 132, 161 S.E. 24 (1931).

Any indictment which fails to contain a material element of the offense is void.

Indictment for possession of marijuana was void since it failed to allege the statutory element of intent.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See INDICTMENT Sufficiency, (p. 438) for discussion of topic.

State v. Trogdon, 283 S.E.2d 849 (1981 (Per Curiam)

"An indictment for a statutory offense is sufficient if, in charging the offense, it adopts and follows the language of the statute, or uses substantially equivalent language, and plainly informs the accused of the particular offense charged and enables the court to determine the statute on which the charge is founded." Syl. pt. 3, *State v. Slie*, 213 S.E.2d 109 (W.Va. 1975), citing syl. pt. 3, *Pyles v. Boles*, 148 W.Va. 465, 135 S.E.2d 692 (1964).

The defendant argues that the indictment is void because it does not allege or aver that he intentionally delivered marijuana. But the statutory section under which the defendant was charged does not specifically make intent an element of the offense to be charged.

Indictment (continued)

State v. Trogdon, (continued)

The language employed in the indictment substantially follows the language of *W.Va. Code* 60A-4-401(a) [1971] and from that language the trial court could determine that the State was proceeding under that statute. The latter portion of this statute relating to possession "with intent to manufacture or deliver" is a separate offense from the actual manufacture or delivery of a controlled substance.

Instructions

Delivering

State v. Archer, 289 S.E.2d 178 (1982) (Per Curiam)

Footnote - In a trial for delivery of LSD the defendant claimed on appeal that State Instruction 1 gave a list of the elements of the crime, but failed to include intent. Intent was covered in State Instruction 1A, but the better course would have been to include intent in the list of the elements of the crime in Instruction 1, to prevent the jury from being misled.

State v. Barnett, 284 S.E.2d 622 (1981) (Harshbarger, C.J.)

Syl. pt. 2 - In a criminal trial for violation of Code 60A-4-401(a) the jury must be instructed about each element of the crime including intent.

A judge must instruct that the prosecutor must prove beyond a reasonable doubt each element of a crime, specifying the elements. Intent cannot be presumed when it is an element of the crime charged.

Instructions (continued)

Delivering (continued)

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

Although the wording of the controlled substance statute did not require criminal intent for delivery *W.Va. Code* § 60A-4-401: Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver or possess with intent to manufacture or deliver, a controlled substance." The trial court should have instructed on intent and knowledge in a trial for delivery of a controlled substance.

Syl. pt. 3 - [O]nly an "intentional" or "knowing" delivery of a controlled substance prohibited by statute, although the statute fails to expressly require criminal intent.

The Supreme Court held "prospectively that knowledge or intent must be proven by the State in order to convict for the delivery of a controlled substance." They must be proven beyond a reasonable doubt.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

Syl. pt. 5 - It is reversible error for a trial judge to instruct a jury in a criminal trial of a defendant charged with a marijuana violation that the defendant may be found guilty of "possession and delivery of a controlled substance" when such instruction considers "possession and delivery of a controlled substance" as a single offense.

Possession

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

"An erroneous binding instruction is not cured by a correct one." Syl. pt. 2, *State v. Cobb*, 122 W.Va. 97, 7 S.E.2d 443 (1940).

Instructions (continued)

Possession (continued)

State v. Parks, (continued)

Trial court committed reversible in giving an instruction which omitted the essential element that the marijuana be knowingly or intentionally possessed. The fact that the defendant had offered and the court gave a correct instruction did not cure the error.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See CONTROLLED SUBSTANCES Instructions, Delivering, (p. 139) for discussion of topic.

Possession with intent to manufacture or deliver

State v. Barnett, 284 S.E.2d 622 (1981) (Harshbarger, C.J.)

See CONTROLLED SUBSTANCES Instructions, Delivering, (p. 138) for discussion of topic.

Manufacturing

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 143) for discussion of topic.

State v. Trogdon, 283 S.E.2d 849 (1981 (Per Curiam)

See CONTROLLED SUBSTANCES Indictment, (p. 137) for discussion of topic.

Manufacturing (continued)

State v. Underwood, 281 S.E.2d 491 (1981) (Miller, J.)

The term manufacturing in *W.Va.Code* § 60A-1-101(m) is defined to include planting, cultivating and growing marijuana. Defendant had only one marijuana plant growing and claimed he was excepted from the term manufacture by the phrase "except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use." The personal use exception is confined to two of the enumerated activities under the term manufacture, "preparation" and "compounding" and neither of these activities include the growing of marijuana.

Defendant contended *W.Va.Code* § 60A-4-401(a) requires the State to prove not only the act of manufacturing but also that it was for the purpose of distributing or selling. It seems clear that the limiting phrase of this code section "with intent to manufacture or deliver" is confined solely to the offense of possession and does not relate to the other two offenses of manufacturing or delivering.

Possession

State v. Adkins, 280 S.E.2d 293 (1981) (Per Curiam)

See CONTROLLED SUBSTANCES Examination of the substance, (p. 135) for discussion of topic.

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

See CONTROLLED SUBSTANCES Indictment, (p. 137); CONTROLLED SUBSTANCES Instructions, Possession, (p. 139) for discussion of topic.

Possession (continued)

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

Language "knowingly or intentionally to possess" in *W.Va. Code* § 60A-4-401(c) providing that it is unlawful for any person to knowingly or intentionally possess a controlled substance unless obtained pursuant to a valid prescription, requires proof of intent to possess.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See CONTROLLED SUBSTANCES Delivering, (p. 132); CONTROLLED SUBSTANCES Instructions, Delivering, (p. 139) for discussion of topic.

Possession with intent to manufacture or deliver

State v. Adkins, 284 S.E.2d 619 (1981) (Harshbarger, J.)

See CONTROLLED SUBSTANCES Indictment, (p. 135) for discussion of topic.

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

Applies standards set forth in syl. pt. 7, *State v. Frisb*y, 245 S.E.2d 622 (W.Va. 1978), cited above.

Syl. pt. 4 - Most courts have held that possession with intent to deliver a controlled substance can be proven by establishing a number of circumstances among which are the quantity of the controlled substance possessed and the presence of other paraphernalia customarily used in the packaging and delivery of controlled substances.

Possession with intent to manufacture or deliver (continued)

State v. Drake, (continued)

When probable cause was found to sustain arrest and when search of defendant's person was appropriate, the trial court did not err in refusing to suppress the marijuana, scales, and bags as evidence.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

See CONTROLLED SUBSTANCES Constitutionality of statute, (p. 129) for discussion of topic.

Syl. pt. 3 - The question of whether a person possess a controlled substance with intent to manufacture or deliver is a jury question to be determined like other questions of intent from all the surrounding facts and circumstances, and as such intent is a basic element of the offense, it must be proven beyond a reasonable doubt.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

See CONTROLLED SUBSTANCES Indictment, (p. 136) for discussion of topic.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See CONTROLLED SUBSTANCES Delivering, (p. 132) for discussion of topic.

State v. Trogdon, 283 S.E.2d 849 (1981 (Per Curiam)

See CONTROLLED SUBSTANCES Indictment, (p. 137) for discussion of topic.

Possession with intent to manufacture or deliver (continued)

State v. Underwood, 281 S.E.2d 491 (1981) (Miller, J.)

See CONTROLLED SUBSTANCES Manufacturing, (p. 141) for discussion of topic.

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

Applies standards set forth in syl. pt. 3, *State v. Frisb*y, 245 S.E.2d 622 (W.Va. 1978), cited above.

Applies standards set forth in syl. pt. 4, *State v. Drake*, 291 S.E.2d 484 (W.Va. 1982), cited above.

Probation

State v. Barnett, 240 S.E.2d 540 (1977) (Caplan, J.)

See CONTROLLED SUBSTANCES Sentencing, (p. 145) for discussion of topic.

Sentencing

State v. Adkins, 284 S.E.2d 619 (1981) (Harshbarger, J.)

Syl. pt. 1 - A trial court cannot double a defendant's sentence for violation of the Uniform Controlled Substance Act unless the principal offense was committed after a preceding conviction and sentence. Code, 60A-4-408.

The offenses in this case occurred on November 7, 1976, and the defendant was convicted on September 27, 1977. He committed a second offense on November 12, 1976 and was convicted in May, 1977. Therefore the trial court cannot double the defendant's sentence under *W.Va. Code* 60A-4-408.

Sentencing (continued)

State v. Barnett, 240 S.E.2d 540 (1977) (Caplan, J.)

When it was determined that the defendant had been charged with a prior marijuana offense and had previously taken advantage of provisions for probation, the court was under no obligation to apply the provisions of *W.Va. Code* § 60A4-407 which authorized probation for certain initial drug offenses.

State v. Barnett, 284 S.E.2d 622 (1981) (Harshbarger, C.J.)

Syl. pt. 3 - Delivery of two controlled substances as the same time and place to the same person is one offense under our double jeopardy clause. *W.Va. Constitution*, Article III, § 5.

The State may prove delivery of both drugs, but defendant can only be sentenced once.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

See SENTENCING Prejudicial, (p. 878) for discussion of topic.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

See RECIDIVIST Elements, "Conviction", (p. 744) for discussion of topic.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Sentence of one to five years at the West Virginia Prison for Women and a fine of $15,000 for possession of marijuana with intent to deliver was proper even though appellant was a widow having no prior criminal history and was supporting three children.

CONTROLLED SUBSTANCES

Sufficiency of the evidence

State v. Ashworth, 292 S.E.2d 615 (1982) (McHugh, J.)

See CONTROLLED SUBSTANCES Delivering, (p. 130) for discussion of topic.

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 142) for discussion of topic.

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Syl. pt. 5 - In order to determine if there is evidentiary insufficiency that will bar a retrial under double jeopardy principles, such determination is made upon the entire record submitted to the jury and not upon the residual evidence remaining after the appellate court reviews the record for evidentiary error.

Where evidentiary insufficiency in trial for delivery of marijuana arose as a result of the Supreme Court evidentiary rulings on admissibility of polygraph and testimony of witness that substance was marijuana, defendant was not entitled to judgment of acquittal.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 143) for discussion of topic.

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 144) for discussion of topic.

Sufficiency of the evidence (continued)

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Evidence of possession was a jury question.

Evidence, including the seizure of marijuana found in appellant's bedroom and testimony of persons who had purchased marijuana was sufficient to support jury findings.

CRIMINAL TRESPASS

In general

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

The West Virginia criminal trespass statute changes the common law of trespass. It attaches criminal liability to certain acts which may have not have constituted the crime of trespass under the common law.

W.Va. Code 61-3B-3 (1978) does not carry forward the common law requirement that a criminal trespass must constitute a breach of peace. That section also provides, in its second paragraph, for an enhanced penalty where the person who commits the trespass in armed with a firearm or dangerous weapon and intends to do bodily injury to a person in the structure or conveyance at the time the trespass occurs.

Syl. pt. 2 - Criminal trespass, as defined by *W.Va. Code*, 61-3B-2 [1978] is not a lesser included offense of burglary by breaking and entering, as defined by *W.Va. Code*, 61-3-11(a) [1973].

Elements

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

The elements necessary to prove criminal trespass under *W.Va. Code* 61-3B-2 (1978) are : (1) a knowing entry; (2) in a structure or conveyance; (3) without being authorized, licensed or invited.

Instructions

State v. Gilliam, 289 S.E.2d 471 (1982) (Per Curiam)

See BREAKING AND ENTERING Instructions, Criminal trespass, (p. 87) for discussion of topic.

CRITICAL STAGE

In general

Fields v. Whyte, 242 S.E.2d 463 (1978) (Per Curiam)

Syl. pt. 2 - The State may by appropriate proof rebut an allegation made by a criminal defendant that he was absent during a critical stage of the criminal proceeding.

State v. Conley, 285 S.E.2d 454 (1981) (Per Curiam)

Applies standards set forth in syl. pt. 2, *State v. Tiller*, 285 S.E.2d 371 (W.Va. 1981), cited below.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

"(A) critical stage in a criminal proceeding is one where the defendant's right to a fair trial will be affected." *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977).

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

Applies standards set forth in syl. pt. 2, *Fields v. Whyte*, 242 S.E.2d 463 (W.Va. 1978), cited above.

State v. Tiller, 285 S.E.2d 371 (1981) (Miller, J.)

Syl. pt. 2 - A critical stage of a criminal proceeding is where the defendant's right to a fair trial will be affected.

Juveniles

See JUVENILE Critical stage, (p. 571) for discussion of topic.

CRITICAL STAGE

Right to be present/harmless error

Fields v. Whyte, 242 S.E.2d 463 (1978) (Per Curiam)

"The defendant has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." Syllabus pt. 6, *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977).

The affidavits filed by the State showed the defendant was present at the critical stage when the Instructions were read in the judge's chambers. The veracity of the affidavits is not contested. The defendant has failed to establish factually that his constitutional right of presence was violated.

In an original habeas corpus proceeding defendant alleged violations of his constitutional right to be present at all critical stages of his criminal proceedings claiming he was not present when proposed instructions were discussed by the court and counsel. However, when the judge, prosecuting attorney, and defense counsel averred that he was present, the Supreme Court held that defendant failed to establish factually that his constitutional right of presence was violated. Consequently, the issue was not reviewable in this habeas corpus proceeding.

State v. Bradley, 260 S.E.2d 830 (1979) (Neely, J.)

See PRELIMINARY HEARING Right to counsel, (p. 683) for discussion of topic.

State v. Conley, 285 S.E.2d 454 (1981) (Per Curiam)

Defendant's absence from hearing to review sentence could not have affected the fairness of the trial; therefore, defendant's absence was not grounds for assignment of error.

Footnote 2 - Federal courts and the courts of sister state have laid down the rule that the right of a defendant to be present does not extend to post-trial hearings where only questions of law are determined.

Right to be present/harmless error (continued)

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

While pre-trial hearings involving substantial matters of law or the testimony of witnesses are critical, a court's orders involving administrative matters in connection with the criminal proceeding do not require the presence of the accused.

While the right of the defendant to be present during criminal proceedings is absolute, voluntary absence is subject to harmless error analysis. If the defendant shows he was absent during a "critical stage" of the criminal proceedings, the State must prove the absence was harmless beyond a reasonable doubt.

In prosecution for sexual assault, the Supreme Court held that ordering a *capias* to compel previously subpoenaed non-party witnesses to appeal in court to testify was not a critical stage of the criminal proceeding and was harmless to the defense of the absent defendant.

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

Syl. pt. 1 - A defendant in a misdemeanor case has a fundamental right to be present during all critical stages of his trial. *W.Va. Const.* art. 3, § 14.

Since the same liberty and property interests are at stake in both felony and misdemeanor cases, due process requires that the same rights given to a person accused of a felony be given to a person accused of a misdemeanor. Thus, the right to be present during the trial applies equally to persons accused of misdemeanors and persons accused of felonies. Moreover, *W.Va. Const.* art. 3, § 14 recognizes the rights of a defendant in a misdemeanor prosecution to the right to counsel, the right to be informed of such right, and the right to be confronted with witnesses against him. In essence the denial of the right to be present at his own trial is a denial of the defendant's right to confront adverse witnesses.

Right to be present/harmless error (continued)

State v. Eden, (continued)

When defendant was found guilty of reckless driving and fined $50 plus court costs, he filed for a trial *de novo*. Confusion about the exact trial date together with inadequate correspondence with his attorney caused defendant to miss the trial where he was again found guilty and his sentence was increased to 30 days in jail and a fine of $200. On appeal the Supreme Court found that the defendant had a fundamental right to be present and had not waived this right, and that the imposition of the greater sentence was a violation of due process.

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 6, *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977), cited above.

The trial court's removal of the appellant from the courtroom after the return of the verdict and the polling of the jury but before the acceptance of the verdict by the court and the discharge of the jury was ill-advised. Since the only thing which happened in the appellant's absence was that the trial court thanked the jury for its service and complimented the performance of counsel on both sides, the Supreme Court found that the action of the trial court was harmless beyond a reasonable doubt and did not constitute reversible error.

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

Where defendant was not present during three *in camera* conferences that occurred during trial, the most critical of these involving the discussion of the State's objection to the appellant's initial attempts to elicit psychiatric testimony, and where State made no attempt to prove that the absence was harmless beyond a reasonable doubt or show by extrinsic proof that he was in act present, the conviction was reversed.

CRITICAL STAGE

Right to be present/harmless error (continued)

State v. Stout, 285 S.E.2d 892 (1982) (Neely, J.)

See PRELIMINARY HEARING Right to counsel, (p. 683) for discussion of topic.

State v. Tiller, 285 S.E.2d 371 (1981) (Miller, J.)

"Correlative with the constitutional right of confrontation is the right of presence which requires that an accused charged with a felony shall be present in person at every critical stage of a criminal trial where anything may be done which affects the accused; the right of presence, originating in the common law, is secured to an accused by *W.Va. Code*, 62-3-2 (1931)." Syl. pt. 2, *State ex rel. Grob v. Blair*, 214 S.E.2d 330 (W.Va. 1975).

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

Syl. pt. 6 - A pre-trial orientation meeting, held at the beginning of the term with all members of the newly-called jury panel present, is not a critical stage of the trial proceeding requiring the presence of an accused.

Waiver

State v. Tiller, 285 S.E.2d 371 (1981) (Miller, J.)

Syl. pt. 3 - Where a defendant in a noncapital case is free on bail and is initially present at trial, and thereafter voluntarily absents himself after the trial has commenced, and where he has been informed of his obligation to remain during all stages of the trial, then such voluntary absence will be deemed a waiver of his right to be present.

Waiver (continued)

State v. Tiller, (continued)

Trial court's denial of defendant's motion for new trial based upon his absence during various critical stages was not reversible error since defendant had voluntarily absented himself during these stages and since he had been informed of his obligation to attend. This voluntary absence was deemed to be waiver of the right to be present.

CRUEL AND UNUSUAL PUNISHMENT

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE, (p. 731) for discussion of topic.

See PRISON CONDITIONS Cruel and unusual punishment, (p. 688) for discussion of topic.

DEFENSES

Abandonment of the crime

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Abandonment of the crime, (p. 481) for discussion of topic.

Accidental killing

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

See SELF-DEFENSE Instructions, Retroactivity, (p. 824) for discussion of topic.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Accidental killing, (p. 482) for discussion of topic.

Affirmative defense

In general

State v. Alexander, 245 S.E.2d 633 (1978) (Harshbarger, J.)

See DEFENSES Alibi, (p. 157) for discussion of topic.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

The prosecution does not have to initially disprove beyond a reasonable doubt affirmative defenses to a particular crime.

The due process clause does not require that a state refrain from allocating to the defendant the initial burden of introducing some evidence as to his affirmative defenses.

There is a certain latitude for states to set their own standards on proof of affirmative defenses.

Affirmative defense (continued)

In general (continued)

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

The due process clause requires the prosecution to prove beyond a reasonable doubt every essential element of a crime. However, the prosecution need not initially disprove beyond a reasonable doubt those matters which have been traditionally regarded as affirmative defenses to a particular crime.

Under due process principles, state courts and legislature have a certain latitude to set their own standards on proof of affirmative defenses.

Alibi

State v. Alexander, 245 S.E.2d 633 (1978) (Harshbarger, J.)

Alibi is an affirmative defense but does not relieve the prosecution of proving beyond a reasonable doubt the actual presence of the accused at the time and place of the commission of the crime when personal presence is essential thereto.

The alibi defense is not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), so long as the State is not relieved of the ultimate burden of proving beyond a reasonable doubt every material element of the crime, including of course that defendants committed it, which is an armed robbery case, nearly always involves defendants' presence at the scent when the event occurred.

If the state puts on proof that a defendant committed an act at X place, and defendant introduces evidence that he could not have done so because he was at Y place, then the court may properly instruct the jury that defendant had a burden to prove his defense sufficiently to create a reasonable doubt.

DEFENSES

Alibi (continued)

State v. Ayers, 282 S.E.2d 876 (1981) (Neely, J.)

See INSTRUCTIONS Alibi, (p. 485) for discussion of topic.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Alibi, (p. 485) for discussion of topic.

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

See INSTRUCTIONS Confusing/incorrectly states the law, (p. 505) for discussion of topic.

Attempt

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

See ATTEMPT Defense, (p. 63) for discussion of topic.

***Bona fide* claim of right**

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

See ROBBERY Defenses, *Bona fide* claim of ownership, (p. 768) for discussion of topic.

Entrapment

See ENTRAPMENT, (p. 245) for discussion of topic.

DEFENSES

Insanity

See INSANITY, (p. 463) for discussion of topic.

Intoxication

State v. Barker, 287 S.E.2d 497 (1982) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Failure to raise a defense, (p. 454) for discussion of topic.

State v. Brant, 252 S.E.2d 901 (1979) (Neely, J.)

Intoxication can never be used as a defense where it is alleged that there was diminished capacity except where previous exception apply, but can only be used when there is demonstrated a total lack of capacity such that the bodily machine completely fails. Where a weapon is involved it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive antisocial conduct which the voluntary intoxication brought to the forefront.

State v. Keeton, 272 S.E.2d 817 (1980) (Neely, C.J.)

Syl. pt. 2 - Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication.

Voluntary drunkenness does not ordinarily excuse a crime, it may reduce the degree of the crime or negate a specific intent. As a general rule the Supreme Court has held that the level of intoxication must be "such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation."

Intoxication (continued)

State v. Keeton, (continued)

Failure to give some instruction on intoxication when it was the defendant's primary defense is plain error. While ordinarily the court will not consider the failure to give Instructions not properly presented, the problem in this case is so obvious that the trial court should have offered to amend the instruction to conform to well established law, this omission fails within the plain error exception.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

Voluntary drunkenness will not ordinarily excuse a crime. Syllabus pt. 8, *State v. Bailey*, 220 S.E.2d 432 (W.Va. 1975). It was not error for the trial court to refuse to give defendant's instruction to the effect that the state must prove that the defendant must not have been so drunk, or otherwise incapacitated, as to have been incapable of formulating an intent to steal.

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

See INSTRUCTIONS Not supported by the evidence, (p. 515) for discussion of topic.

Self-defense

See SELF-DEFENSE, (p. 820) for discussion of topic.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

See INEFFECTIVE ASSISTANCE Failure to raise a defense, (p. 454) for discussion of topic.

DENIAL OF A FAIR TRIAL

In general

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DUE PROCESS Right to a fair trial, (p. 239) for discussion of topic.

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

Defendant was not denied a fair trial by the actions of deceased's family in their disposal of deceased's gun after a shooting incident. The production of the gun would not have added materially to defendant's defense, and the assignment of error was therefore without merit.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

The court's granting of motion for and issuance of subpoenas *duces tecum* in defendant's absence did not affect defendant's right to a fair trial in a trial for murder in which defendant's defense was insanity.

Conduct of trial judge

See generally, JUDGES Conduct, (p. 532) for discussion of topic.

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

The Supreme Court sets out the law with regard to a trial judge's conduct at trial found in the cases of *State v. McGee*, 230 S.E.2d 832, 835-36 (W.Va. 1976), *State v. Hankish*, 147 W.Va. 123, 126 S.E.2d 42 (1962), and *State v. Starkey*, 244 S.E.2d 219, 226 (W.Va. 1978).

Syl. pt. 4 - A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case. With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury.

Conduct of trial judge (continued)

State v. Burton, (continued)

In the present case, the remarks of the judge were made before the State made any objection, and centered around the selection between the pronouns "you" and "we" by the witness. The defense counsel was trying to impeach the witness' testimony on this issue. This difference, however, did not go to a material issue bearing on the witness' credibility.

The trial court's statement: "In view of the fact that the witness for which we recessed until today to hear has refused to testify unless he was granted immunity, . . . the motion to reopen, or the motion to withdraw the reopening of the State's case is granted, . . ." was not error. No particular prejudicial language was pointed out. Ant there was obviously some need on the part of the court to give an explanation to the jury as to why the witness, who the court had told the jury would appear, was not appearing.

State v. Crockett, 265 S.E.2d 268 (1979) (Caplan, C.J.)

"It is well settled that a trial judge should not comment on the weight of evidence bearing upon any factual matters submitted to the jury for decision and that a violation of this general rule may constitute reversible error." *Ellison v. Wood & Bush Co.*, 153 W.Va. 506, 170 S.E.2d 321 (1969).

"In the trial of a criminal case the jurors, not the court, are the triers of the facts, and the court should be extremely cautious not to intimate in any manner, by word, tone, or demeanor, his opinion upon any fact in issue." Syl. pt. 7, *State v. Perkins*, 130 W.Va. 708, 45 S.E.2d 17 (1947).

In a trial for robbery, where the defendant, her counsel and her only witness were black and the prosecutor, all prosecuting witnesses and the judge and the jury were white, and where the prosecutor mentioned race several times without remonstrance by the court, the factor of race could be relevant. The Supreme Court found that the trial court should have permitted certain comments relating to race, where relevant, and it adamant refusal to permit even a mention thereof was erroneous.

Conduct of trial judge (continued)

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Judge's actual comment which does not go to a material issue bearing on the witness' credibility will not result in reversible error.

In trial for sexual assault, judge's comment concerning the embarrassment of the infant witness did not constitute reversible error since the witness had not made a statement which could be deemed material at the time of the court's comment, and since the comment did not go to the credibility of the witness.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Trial judge's remarks to panel of prospective jurors that it was important for him to relate the "facts: of the case to them was an unfortunate choice of words, but not prejudicial error since the jury was reminded throughout the trial that the indictment was not evidence.

State v. Ellis, 239 S.E.2d 670 (1977) (Neely, J.)

The trial judge's public statement that he was disposed as a matter of principle to sentencing offenders in drug related cases to the penitentiary, rather than placing them on probation did not create bias to justify disqualification. The court's public posture with regard to sentencing did not demonstrate bias against the defendant individually, but rather a judicial philosophy concerning the prevention of drug abuse, rehabilitation of offenders, and deterrence of potential offenders.

Conduct of trial judge (continued)

State v. Foddrell, 269 S.E.2d 854 (1980) (Caplan, J.)

One of the participants in the robbery was described as wearing thick glasses. The defendant was asked to read the small print of a newspaper which he did to show he did not wear glasses and never did. The trial court permitted the introduction of the newspaper but commented that it was being admitted "for the purpose to show that he read the paper without glasses, but the mere fact that he read that I don't think . . . would be proof that he has never worn glasses . . ." The Supreme Court found that the Court's comment did not constitute reversible error.

State v. Gilliam, 289 S.E.2d 471 (1982) (Per Curiam)

In a trial for breaking and entering, the trial judge had asked the prospective jurors on *voir dire* whether they had been the victim of a breaking and entering, and none answered yes. After the jury was empaneled, during a recess, one of the jurors told the judge that an apartment she rented to another person had been broken into. The judge told her that she had answered the *voir dire* truthfully and the woman remained on the jury. The judge did not inform either party of this conversation, and defense counsel learned of it only after the verdict. The Supreme Court held that the trial judge's conduct did not amount to reversible error.

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury. Syl. pt. 4, in part, *State v. Burton*, 254 S.E.2d 129 (W.Va. 1979).

The judge's remarks were addressed to the fact that there was no evidence that the police had utilized any coercive pressure on the defendant to obtain his confession. No contention was made by the defendant at the *in camera* hearing, at trial, or on this appeal that any coercive tactics had been used by the interrogating officer. It is the lack of dispute over these facts that renders this point nonreversible error.

Conduct of trial judge (continued)

State v. Harriston, 253 S.E.2d 685 (1979) (Harshbarger, J.)

Syl. pt. 3 - It is not reversible error for a trial judge, who presided at a deposition proceeding, to exclude from the reading of the report of those proceedings to the jury, his own remarks that were merely introductory to the interrogation by counsel of the deposing witness.

Syl. pt. 4 - Where a trial judge questioned deposing witness at a proceeding over which he presides, and there was no objection to his inquiries at the time nor later when the testimony elicited from the witness was proposed to be read to a jury, and the questions were to clarify the witness' testimony after questioning by counsel, we will not find the questioning to be reversible error.

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

See INSTRUCTIONS Coercive, (p. 501) for discussion of topic.

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

"As a general rule courts are not permitted to comment on the weight of the evidence; however, there is an exception entitling the defendant to an instruction that the uncorroborated testimony of a coconspirator should be received with great caution when such testimony has a tendency to *inculpate* the accused." Syl. pt. 3, *State v. Spadafore*, 220 S.E.2d 655 (W.Va. 1975).

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Defendant alleged that the trial court committed error by admonishing him during direct examination. Supreme Court found that the error was not preserved for appeal in the absence of an objection.

Conduct of trial judge (continued)

State v. Whittington, 284 S.E.2d 363 (1981) (Per Curiam)

The Supreme Court applied Syllabus Pt. 4 of *State v. Wotring*, 279 S.E.2d 182 (W.Va. 1981) to determine if certain comments made by the trial judge were grounds for reversible error. The principle set out, in part, in syl. pt. 4 of *State v. Burton*, 254 S.E.2d 129 (W.Va. 1979), that a trial court has the right to control the orderly process of a trial and may intervene so long as his conduct does not discriminate against or prejudice the defendant's case, was also used in this case.

The Supreme Court found in this instance the objection by the judge on behalf of the State, though not encouraged, was not reversible error.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Syl. pt. 4 - The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded.

Syl. pt. 5 - Although the trial court should refrain from making comments on the credibility of a witness, a comment which does not go to a material issue bearing on the witness' credibility will not result in reversible error.

DENIAL OF A FAIR TRIAL

Cross-examination

State v. Barker, 281 S.E.2d 142 (1981) (Per Curiam)

Defendant argued that the court erred by prematurely dismissing a witness, thereby impairing his right to cross-examination. The State had questioned the witness on direct and defense counsel had cross-examined the witness. Witness dismissals are within trial court discretion, but when there is objection, the better practice is to allow the objecting party to show what matters further examination will bring out and demonstrate possible prejudice, as in this case, does not support a conclusion that defendant was prejudiced. In this case it was further noted that defendant made no motion to subpoena the witness as his own.

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

See WITNESSES Cross-examination, (p. 960) for discussion of topic.

State v. Crockett, 265 S.E.2d 268 (1979) (Caplan, C.J.)

Syl. pt. 1 - A defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses.

In a trial for robbery by violence, the issue of the identity of the perpetrators of the robbery was crucial. The reason for the victim's failure to appear for trial on two prior occasions could have gone to his credibility in testifying against the defendant and would therefore have been proper evidence for the jury to consider. The trial court apparently concluded out of the hearing of the jury that the absence of the witness was due to illness and that defense counsel would not be permitted to make any implication to the jury that the victim was a reluctant witness. Although this ruling was not made in the presence of the jury, the court's interference and limitation of cross-examination at the time demonstrated an unwillingness by the court to allow the defendant to fully present a theory of defense.

Cross-examination (continued)

State v. Crockett, (continued)

In a trial for robbery by violence, the trial judge should not have cut short defendant's cross-examination of a key witness as to whether a description given right after the incident was a description of the lookout at the scene or the actual perpetrator of the robbery, as the identity of the perpetrator was a main issue. The Supreme Court felt while these instances of the trial court's interference with cross-examination may not have amounted to reversible error, the court should not have interfered with cross-examination.

State v. Smoot, 280 S.E.2d 286 (1981) (Per Curiam)

In an attempt to impeach the prosecution's witness, defense counsel on cross-examination asked questions regarding the subsequent statement in which the witness indicated that his July 25, 1977 statement implicating the defendant was untrue. The trial court's failure to allow this statement into evidence for impeachment purposes, especially in light of the witnesses' inability to re collect the circumstances surrounding the crime, prejudiced the defendant's case and constituted reversible error.

State v. Wood, 280 S.E.2d 309 (1981) (Per Curiam)

See WITNESSES Cross-examination, (p. 962) for discussion of topic.

Cumulative effect of errors

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

There may be error which, standing alone, is not sufficient to require a reversal, but that when cumulated with other marginal error, the combined effect may be sufficient to warrant a reversal.

Cumulative effect of errors (continued)

State v. Crockett, 265 S.E.2d 268 (1979) (Caplan, C.J.)

"Where the record of a criminal shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. pt. 5, *State v. Smith*, 193 S.E.2d 550 (W.Va. 1973).

The Supreme Court found that an examination of the record revealed many occasions on which the court erred. While any one of the errors standing alone may not warrant a reversal, the cumulative effect of numerous errors effectively denied the defendant her right to a fair trial.

Defense counsel's comments

State ex rel. Arbogast v. Mohn, 260 S.E.2d 820 (1979) (McGraw, J.)

The defendant argued his case was prejudiced by statements made to the court by his attorney in support of a motion to withdraw from the case. There is no evidence that the remarks of counsel influenced the judge in any way against the defendant. Further, no jury had been empaneled and the statement of counsel had nothing to do with the merits of the case. The record reveals that the defendant, in reply to counsel's statements, denied none of the allegations and was equally unhappy with his attorney. Theses remarks of counsel did not prejudice the defendant's case.

Disclosure of accomplice's guilty plea/representation

State v. Caudill, 289 S.E.2d 748 (1982) (McHugh, J.)

See EVIDENCE Accomplice, Conviction or guilty plea, (p. 253) for discussion of topic.

Disclosure of accomplice's guilty plea/representation (continued)

State v. Ellis, 239 S.E.2d 670 (1977) (Neely, J.)

See EVIDENCE Accomplice, Conviction or guilty plea, (p. 253) for discussion of topic.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

It was contended the trial court erred when it stated in the jury's presence that the co-conspirator testifying at the appellant's trial was represented by the appellant's attorney. The assertion that prejudice flowed from the remark seems to be purely speculative. The dual representation because of counsel's repeated advice to the co-conspirator to assert his Fifth Amendment rights. It is also not without significance that counsel did not object to the statement at the time and made no request for a cautionary instruction or mistrial.

State v. Wood, 280 S.E.2d 309 (1981) (Per Curiam)

Our law is clear that the State may not introduce evidence of a conviction or guilty plea on the part of a co-conspirator or accomplice to prove the guilt of a person subsequently put on trial for committing or participating in the same crime. The defense mad a timely objection to the admission of this evidence and the trial court promptly instructed the jury to disregard the matter, thus it was not prejudiced and not error.

Evidence-prejudicial

See EVIDENCE Prior convictions, (p. 302) for discussion of topic.

State v. Caudill, 289 S.E.2d 748 (1982) (McHugh, J.)

The introduction of evidence of the murders at Caudill's robbery trial was highly prejudicial and could serve no purpose but to inflame the jury.

DENIAL OF A FAIR TRIAL

Instructions

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

See INSTRUCTIONS Presumption of innocence, (p. 516) for discussion of topic.

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 497) for discussion of topic.

Jury venire

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

See JURY Venire, (p. 550) for discussion of topic.

Late production of exculpatory evidence

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

Petitioner contended that he was denied a fair trial when the court overruled his motion for a continuance. Grounds for petitioner's motion for continuance wee that material required to be turned over under the court's general discovery order had not been produced and that a material witness was absent. The court ruled that absent some particular showing of how late production of court-ordered discovery has affected the petitioner's right to a fair trial, late production alone will not suffice to reach the constitutional level of denial of fair trial.

Late production of exculpatory evidence (continued)

Wilhelm v. Whyte, (continued)

Since petitioner gave no specific reasons why the late production of evidence denied him a fair trial and since the absent witness' testimony would have been similar to that given by the petitioner and another witness, the court denied the writ of habeas corpus indicating that had the issue been brought on direct appeal, a less rigid rule regarding late production of discovery would have applied.

Prison attire

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Syl. pt. 2 - A criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire. However, where a criminal defendant is tried in identifiable prison attire without any initial objection, and the offense for which he is tried is prison-related such that the jury necessarily knows from the evidence that he was in prison at the time of the commission of the offense, the error will be deemed not prejudicial under the doctrine of harmless constitutional error.

Syl. pt. 3 - A criminal defendant has no constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire.

Prosecutorial overmatch

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 2 - A trial court is responsible for preventing an oppressive overmatch between prosecutors and defense counsel, such as may occur when the defender is young and inexperienced and the prosecution is by an array of experienced and able lawyers.

DENIAL OF A FAIR TRIAL

Prosecutor's comments

State v. Barker, 281 S.E.2d 142 (1981) (Per Curiam)

The comment objected to was, "If the defendant was so innocent, how come he wold not voluntarily give Detective Smith his handwriting samples if he was so eager to show his innocence? He is supposed to be totally innocent of this." These comments, standing alone, do not mandate a reversal of the final judgment. They are not impermissible comment on defendant's pretrial silence or his failure to testify at trial, and while the statements may have been improper because they were not based on the evidence they were not prejudicial. This conclusion was reached using the *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978) standard which may be found in this section.

State v. Brewster, 261 S.E.2d 77 (1979) (Miller, J.)

"A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney . . . to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. pt. 1, in part, *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978).

Prosecutor's remarks concerning defendant's lack of witnesses were not so prejudicial as to warrant a reversal since the judge had cautioned the jury not to consider the statements in arriving at a verdict.

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978), cited below.

Where defense counsel failed to object to all but one remark made by prosecutor during his closing argument and the one comment objected to, when taken in context, did not clearly prejudice the accused, the conviction could not be reversed.

Prosecutor's comments (continued)

State v. Clark, 292 S.E.2d 643 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 1, *State v. McClure*, 253 S.E.2d 555 (W.Va. 1979), cited below.

The general rule formulated for ascertaining whether a prosecutor's comment is an impermissible reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a reminder that the defendant did not testify.

A prosecutor's statement that evidence is uncontradicted does not necessarily mean that the jury will take it as a comment on the defendant's failure to testify.

A prosecutor's statement that there was no evidence to contradict police officer's testimony concerning defendant's comments after his wife was killed was not a direct reference to defendant's failure to testify; therefore, the prosecutor's statement was not reversible error under *W.Va. Code* § 57-3-6.

Prosecutor's comment that police officer's testimony was uncontradicted was not constitutional error because the remarks was not manifestly intended to be a comment on the failure of the accused to testify and the comment was not of such nature that the jury would necessarily and naturally take it to be so intended.

Article 3, § 5 of the West Virginia Constitution and *W.Va. Code* § 57-3-6, as well as case law, make it reversible error for the prosecuting attorney to expressly comment before the jury upon the failure of the defendant to testify in his own behalf.

Defense's failure to object to prosecutor's remark together with judge's instruction that the jury could drawn no inference from defendant's failure to testify precluded any possibility that the prosecutor's statement contributed to defendant's conviction, thus even if the comment had been constitutional error, it was harmless.

Prosecutor's comments (continued)

State v. Coulter, 288 S.E.2d 819 (1982) (Per Curiam)

Applies standard set forth in syllabus point 1, *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978), cited below.

It cannot be said that the defendant would have been acquitted by an impartial jury if the remarks complained of had not been made.

State v. Critzer, 280 S.E.2d 288 (1981) (Per Curiam)

"The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." Syllabus pt. 3, *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977).

"An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom." Syl. pt. 1, *State v. Moore*, 110 W.Va. 476, 158 S.E.2d 715 (1931).

Syl. pt. 3 - It is improper in this State for a prosecutor to "[assert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of an accused . . . ."

Counsel for the State ordinarily should not characterize an accused as a criminal. Syllabus pt. 3, *State v. Brown*, 104 W.Va. 93, 138 S.E. 664 (1927).

In syllabus pt. 3 of *State v. Vineyard*, 108 W.Va. 5, 150 S.E. 144 (1929), it was held to be error for the prosecutor to express his belief in the veracity of a defense witness.

Prosecutor's comments (continued)

State v. Critzer, (continued)

The defendant was prejudiced by the remarks of the prosecutor and denied a fair trial in this case. The prosecutor injected his personal opinion as to the guilt of the defendant, asserted his belief in the honesty, sincerity, truthfulness, and good motives of his witnesses, while attacking the honesty and veracity of the defendant's witnesses. He argued facts not in evidence. The prosecutor's manifest purpose could only have been to inflame the minds of the jury in order to gain a conviction based on emotions rather than evidence. No Instructions were given to the jury telling them the prosecutor's comments were improper and that they should disregard them. Reversed and remanded for a new trial.

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

Syl. pt. 1 - A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or result in manifest injustice.

In a trial for delivery of a controlled substance, it was not clearly prejudicial nor creating "manifest injustice" for the prosecutor to say in opening statement that it is the prosecutor's role to present the evidence of the State and it is the defense attorney's role to "try and dispute this and present their side." These remarks were found, however, to be potentially misleading. The court ought to have advised the jury that the burden is not upon defendant to disprove the State's case, but the failure of the trial court to give such an instruction or to declare a mistrial was not reversible error, in the context of this case.

Reversible error can occur in closing argument when the prosecutor seeks to inflame the jury and arouse prejudice against the defendant by directing personal attacks upon the defendant.

Prosecutor's comments (continued)

State v. Dunn, (continued)

In a trial for delivery of a controlled substance, it was not reversible error for the prosecutor to remark in closing argument that a policeman infiltrated the drug culture of the county, as the remark was not directed toward the defendant personally and did not result in injustice.

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

The remarks by the prosecutor about the insufficient funds checks in his closing argument were not made to intimate that the defendant was guilty of another offense, but in the context of identifying the checks as a part of the State's identification of the various items of documentary evidence. The prosecutor's remarks were not improper, but even if they were, they would not fall within the rule stated in *State v. Brewster*, 261 S.E.2d 77 (W.Va. 1979), cited above.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

Syl. pt. 5 - Remarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitutes reversible error and defendant is entitled to a new trial.

The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant. Hardly any crime is more likely to be fertile for prosecutorial misconduct than forcible rape. The prosecutor's conduct in this trial. The prosecutor made specific reference to the fact that defendant had not testified and other inflammatory remarks. His conduct constitutes reversible error.

Prosecutor's comments (continued)

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

In a trial for first-degree murder, it was not an improper comment for the prosecutor to mention in his closing comments the fact that defendant did not testify.

State v. Haddox, 276 S.E.2d 788 (1981) (Per Curiam)

The defendant argued that certain comments made by the prosecuting attorney in opening and closing arguments and during the conduct of the trial, when taken cumulatively, denied her a fair trial, and accordingly constituted reversible error.

The most objectionable of the comments was ambiguous and could have been interpreted by a juror either as indicating the prosecuting attorney's personal belief in the accused's guilt, or as indicating the prosecuting attorney's belief that the evidence proved the defendant's guilt. An isolated remark by a prosecuting attorney expressing a personal opinion as to a defendant's guilt is not necessarily reversible error.

"The decision of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom. Syllabus point 2, *State v. Simon*, 132 W.Va. 322, 52 S.E.2d 725 (1949).

These comments do not rise to the level of having denied the defendant a fair trial. "This Court recognized that wide latitude must be given to all counsel in connection with final argument." *State v. Myers*, 222 S.E.2d 300, 306 (W.Va. 1976). Not every improper remark is the basis for a mistrial.

Prosecutor's comments (continued)

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

Syl. pt. 5 - While a prosecutor should not imply the contents of excluded testimony in closing arguments, where the evidence against the accused is overwhelming and the prosecutor's comments in the context of the entire case were so casual that they did not even occasion a timely objection from the defense, this Court will not reverse to cure an error which the defense itself could have cured.

Prosecutor's remarks concerning the possible contents of excluded testimony were improper and crossed the boundary of permissible conduct. However, the Supreme Court did not find that the comments constituted reversible error since the comments served to focus the jury's attention on evidence that was admitted, there was overwhelming evidence against the defendant, and since the defense attorney saw no reason to object.

State v. Kanney, 289 S.E.2d 485 (1982) (Per Curiam)

"The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." Syllabus pt. 3, *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977).

Where the prosecutor expressed his personal opinion as to the guilt of the accused, asserted his personal belief in the honesty, sincerity, truthfulness, and good motives of his witnesses, the Supreme Court held that the prosecutor's comments were both pronounced and persistent and that the cumulative effect upon the jury could not be disregarded as inconsequential, thus the defendant was denied his fundamental right to a fair trial.

Regardless of a criminal defendant's status in life or the probability of guilt, he is entitled to a fair trial in accordance with existing rules and principles of law.

Prosecutor's comments (continued)

State v. Kanney, (continued)

While defense attorney did not object to every statement of the prosecutor, sufficient objection was made to preserve the issue for appeal.

When a prosecuting attorney's closing arguments clearly go beyond the bounds of propriety, the trial court has a duty to intervene to limit and to attempt to correct any impropriety in the interest of ensuring that the defendant receives a fair trial.

State v. Kennedy, 249 S.E.2d 188 (1978) (Neely, J.)

Counsel must keep within the evidence and not make statements calculated to inflame the minds of jurors and tending to induce verdicts warped by prejudice. Th reference by the prosecutor to the defendant as a "pro" and the Deputy Sheriff's testimony that the defendant practically fingerprinted himself are not, standing alone, sufficiently prejudicial to merit reversal.

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

Syl. pt. 1 - "In a criminal case, where the defendant has exercised his right not to testify, statements of the prosecuting attorney, in his argument of the case before the jury, that there had been no denial of the testimony introduced by the State, without specific reference to the failure of the defendant to testify, does not come within the inhibition of Code, 57-3-6 . . . ." Syl. pt. 3, in part, *State v. Simon*, 132 W.Va. 322, 52 S.E.2d 725 (1949).

In a trial for breaking and entering, the court instructed the jury that defendant's failure to take the stand was not an indication of guilt. The prosecution said in closing argument that a State witness was not contradicted, but the Supreme Court found this not to be an improper comment upon the defendant's failure to testify.

Prosecutor's comments (continued)

State v. McCormick, 290 S.E.2d 894 (1981) (Per Curiam)

Applies standard set forth in *State v. Brewster*, 261 S.E.2d 77 (W.Va. 1979), cited above.

The prosecutor's remarks, in this case, were made during closing argument to the effect that the State's witness was at lest six feet two inches tall and the police and prosecutor are smart enough to arrest the right person. These remarks were to matters not in evidence and in response to the defendant's argument that the witness was one of the perpetrators of the crime. The remarks did not rise to the level of reversible error.

State v. Nuckolls, 273 S.E.2d 87 (1980) (Neely, C.J.)

"It is prejudicial error in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify." Syl. pt. 3, *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976).

In trial for murder, the prosecutor's remarks in closing argument, that "I haven't seen her, you haven't seen her, nobody in the courtroom has seen her . . . I want to know what was in Lucille Nuckolls' mind when she killed her husband . . . ." amounted to a comment upon the failure of the defendant to testify and constituted reversible error. The Supreme Court's decision to award a new trial was reinforced by the prosecutor's prejudicial and inflammatory conduct during trial, and his assertion, closing argument, of his personal opinion as to the guilt or innocence of the accused.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

Syl. pt. 5 - A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.

Prosecutor's comments (continued)

State v. Ocheltree, (continued)

In this case, defendant on appeal from his conviction of burglary by breaking and entering, claimed that certain remarks made by the prosecutor in his closing argument denied him a fair trial. The Supreme Court found that in light of the instructions given to the jury to disregard the comment as well as the court's other Instructions in general, the comment did not clearly prejudice the defendant or result in manifest injustice.

State v. Rutter, 252 S.E.2d 899 (1979) (Neely, J.)

Defendant claimed on appeal from his grand larceny conviction that the prosecutor in rebuttal improperly stated that defendant was acting in concert with the illegal actions of another person. The Supreme Court found that the prosecution had presented substantial evidence at trial from which the jury could infer action in concert and the statement was in rebuttal after defense had a chance to interpret the evidence, and the prosecutor was entitled to present his view of the evidence to challenge defendant's affirmative defense. The claim by defendant was found to be without merit.

State v. Scotchel, 285 S.E.2d 384 (1981) (Miller, J.)

"A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. pt. 2, *State v. Brewster*, 261 S.E.2d 77 (W.Va. 1979).

The prosecutor's appeal to the jury in his closing argument to consider their actions in light of the victim's family, does not raise to the level of reversible error.

Prosecutor's comments (continued)

State v. Spicer, 245 S.E.2d 922 (1978) (McGraw, J.)

Syl. pt. 3 - Where the prosecution improperly introduces evidence of other criminal acts as part of the *res gestae* or same transaction beyond that reasonably required to accomplish the purpose for which it is offered, and makes remarks concerning such other crime evidence in argument for the purpose of inflaming the jury, the conviction well be reversed on the ground that the defendant was denied the fundamental right to a fair trial.

The prosecutor's introduction of other crime evidence beyond that necessary to explain or prove the crime charged in the indictment, combined with his remarks particularly in closing argument, was prejudicial and denied the defendant his right to a fair trial. The Supreme Court found that the serious and regrettable problem lurking behind the evidentiary matters in this case was that of overzealous prosecution.

State v. Starcher, 282 S.E.2d 877 (1981) (Per Curiam)

In a criminal trial the State should studiously avoid even the slightest hint as to the defendant's failure to testify.

"It is prejudicial error in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify." Syllabus pt. 1, *State v. Nuckolls*, 273 S.E.2d 87 (W.Va. 1980) Syllabus pt. 3, *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976).

The prosecutor stealthily emphasized that the defendant had not testified and had not revealed his thoughts. The remarks constituted a subtle, prejudicial comment on the defendant's failure to testify and requires reversal of the conviction and a new trial granted.

State v. Trogdon, 283 S.E.2d 849 (1981 (Per Curiam)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 35) for discussion of topic.

Prosecutor's comments (continued)

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

The prosecution in opening argument referred to pieces of evidence which were not later introduced. These included a pipe, a soda case said to contain tiny marijuana plants, a cigar box said to contain marijuana. *Cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980). The *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979) standard for determining if a non-constitutional error is harmless was applied to introduction of this evidence. The most important factor in this instance is the relatively minute place these errors had in the context of the entire trial. These remarks were not emphasized in any way nor were they repeated. The remarks were so far separated from the jury deliberation that they could not have had any substantial impact on the jury.

The prosecutor referred to the "marijuana powder" on the scales in closing argument. This remark was made twice; defense objected both times; it took place just before the jury's deliberations; and, it elicited some qualifying remarks from the trial court. To the extent that the emphasis, repetition, and special instruction might have prejudiced the jury, their attention was directed to a different offense in a three count indictment; defendant was convicted of but one count which was intent to manufacture and not delivery. The defendant was not prejudiced by these remarks and the error was harmless.

State v. Wood, 280 S.E.2d 309 (1981) (Per Curiam)

Disclosure of accomplice' guilty plea by prosecutor, by means of asking accomplice whether he was presently serving a sentence as a result of a guilty plea to charges arising from breaking and entering for which defendant was on trial, was improper but was not prejudicial where defense made a timely objection to admission of such evidence, and trial court promptly instructed jury to disregard the matter.

DENIAL OF A FAIR TRIAL

Right to public trial

State ex rel. Herald Mail Co. v. Hamilton, 267 S.E.2d 544 (1980) (Miller, J.)

Syl. pt. 1 - Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair trial is accorded the defendant.

Syl. pt. 2 - On a closure motion, the ultimate question is whether, if the pretrial hearing is left open, there is a clear likelihood that there will be irreparable damage to the defendant's right to a fair trial. Factors bearing on the issue of irreparable damage include the extent of prior hostile publicity, the probability that the issues involved a the pretrial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem.

See PUBLIC TRIAL, (p. 737) for discussion of topic.

Security precautions at trial

State v. Brewster, 261 S.E.2d 77 (1979) (Miller, J.)

Syl. pt. 3 - A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints.

It is error to try a defendant in physical restraints over his objection without having developed an appropriate record to justify the use of such restraints. This decision overruled syl. pt. 2, *State v. Allen*, 45 W.Va. 65, 30 S.E. 209 (1898), to the extent it is inconsistent with this ruling.

Security precautions at trial (continued)

State v. Brewster, (continued)

Declining to raise the rule against being tried in physical restraints to a constitutional level, the Supreme Court held that forcing a defendant to weal physical restraints at trial, absent a showing of necessity in the record, was error; however, such error would not require an automatic reversal. The Court remanded the case with Instructions to hold an evidentiary hearing applying standards as set forth in Footnote 7, *McMannis v. Mohn*, 254 S.E.2d 805 (W.Va. 1979), to determine if there were sufficient facts to justify trying the defendant in handcuffs.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Applies standard set forth in Syl. pt. 6, *State v. Peacher*, 280 S.E.2d 559 (W.Va. 1981), cited below.

If a uniformed deputy sheriff is to be seated next to the defendant on retrial, an evidentiary record should be made to justify such security procedures. *State v. Brewster*, 261 S.E.2d 77 (W.Va. 1979).

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

Syl. pt. 6 - Although the use of security precautions at a criminal trial is a matter which lies within the sound discretion of the trial judge, an evidentiary hearing should be held to determine whether the circumstances of a case justify greater than normal security precautions at trial. The absence of a record of such evidentiary hearing is not, *per se*, reversible error.

Venue

Keys v. Hey, 260 S.E.2d 837 (1979) (Caplan, C.J.)

See VENUE Change of venue, Jury bias after change, (p. 941) for discussion of topic.

DETAINER

In general

Moore v. Whyte, 266 S.E.2d 137 (1980) (Harshbarger, J.)

Detainer, as defined by our Supreme Court, is a writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. *State v. Arrington*, 147 W.Va. 753, 131 S.E.2d 382 (1963).

In the legislative reports leading to the adoption of the Interstate Agreement on Detainers by the United States Congress, a detainer "is a notification filed with the institution in which a prisoner is serving sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." West Virginia is a party to IAD. The rules of the IAD are not triggered until a detainer is lodged.

Competency

State ex rel. Jones v. Warmuth, 272 S.E.2d 446 (1980) (Miller, J.)

See EXTRADITION Competency, (p. 319) for discussion of topic.

Identification

State ex rel. Gonzales v. Wilt, 256 S.E.2d 15 (1979) Caplan, C.J.)

See EXTRADITION Habeas corpus, (p. 322) for discussion of topic.

Prohibition/habeas corpus

State ex rel. Gonzales v. Wilt, 256 S.E.2d 15 (1979) Caplan, C.J.)

See EXTRADITION Habeas corpus, (p. 322) for discussion of topic.

Prohibition/habeas corpus (continued)

State ex rel. Maynard v. Bronson, 277 S.E.2d 718 (1981) (McHugh, J.)

W.Va. Code § 62-14-1, Art. III, Agreement on Detainers, requires that a prisoner be brought to trial within 180 days of written notice of his place of imprisonment and request for a final disposition of charges against him. When transfer to various prisons caused delays, thus precluding the expeditious disposition of the case and carrying it beyond the 180 days, the Circuit Judge did not exceed his authority in dismissing the Mingo County charges, therefore, prohibition was an inappropriate remedy.

When Mingo County prosecuting attorney initiated detainer proceedings to secure the presence of a prisoner in the U. S. Penitentiary at Leavenworth, Kansas, and subsequent to his return to custody in Mingo County the Judge of the Circuit Court dismissed the Mingo County indictments, the prosecuting attorney sought a writ of prohibition to prevent the dismissal of charges. The Supreme Court held that prohibition was not an available remedy since the judge had acted in accordance with the West Virginia Agreement on Detainers and had not exceeded his legitimate powers.

Three-term rule

State v. Fender, 268 S.E.2d 120 (1980) (Per Curiam)

See EXTRADITION Three-term rule, (p. 324) for discussion of topic.

DISCOVERY

In general

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 23) for discussion of topic.

While it is still the rule that criminal discovery is solely within the discretion of the trial judge with only limited exceptions, facts and details concerning the state's case which are not required to be set forth in the indictment may be discovered by properly applying for a bill of particulars.

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

Defendant contends he was denied effective discovery because seven months passed between arrest and indictment without a preliminary hearing. It is troubling that the defendant's right to a hearing after arrest and before indictment was so flagrantly disregarded; however, the cure for that is a writ of mandamus before indictment and not reversal after conviction. *State ex rel. Rowe v. Ferguson*, 268 S.E.2d 45 (W.Va. 1980).

Incorrect or misleading

State v. Stewart, 239 S.E.2d 777 (1977) (McGraw, J.)

The furnishing of an ultimately accurate list of witnesses three months before trial did not sufficiently prejudice the defendant's case so as to warrant appellate relief on ground that discovery responses furnished to defendant were incorrect and misleading in that the were inconsistent with the evidence brought forth at the trial by the State.

DISCOVERY

Informant

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

Syl. pt. 1 - A common law privilege is accorded to the government against the disclosure of the identity of an informant who has furnished information concerning violations of law to officers charged with the enforcement of the law. However, disclosure may be required where the defendant's case could be jeopardized by nondisclosure.

A balancing test is used to determine if the privilege applies. Balancing the public interest in protecting the flow of information against the individual's right to prepare his defense.

Even where the government has an obligation to identify its undercover informant or agent, its failure to do so will not ordinarily be error if the defense was already aware of the informant's identity. The defendant's prior knowledge of her identity avoids any hypothetical duty upon the State to make disclosure.

State v. McCourt, 283 S.E.2d 918 (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Haverty*, 267 S.E.2d 727 (W.Va. 1980), cited above.

Trial court did not err in refusing to require the government to disclose the name of the informant whose information led to the defendant's arrest since the circumstances of the case did not demonstrate that the defense would have been aided by disclosure or that disclosure was necessary to ensure a fair trial.

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State v. Haverty*, 267 S.E.2d 727 (W.Va. 1980), cited above.

Informant (continued)

State v. Walls, (continued)

Syl. pt. 5 - The general rule is that where the informant has only peripheral knowledge of the crime, his identity need not be disclosed. Where the informant directly participates in the crime, or is a material witness to it, disclosure may be required, particularly where, in a drug related crime, he is the only witness to the transaction other than the defendant and the buyer.

Judicial review board

State v. West Virginia Judicial Review Board, 264 S.E.2d 168 (1980) (Neely, C.J.)

Syl. pt. 2 - Proceedings of the West Virginia Judicial Review Board are governed by the West Virginia Rules of Civil Procedure; consequently, the Board must permit appropriate discovery of Judicial Inquiry Commission members upon proper motion by a party subject to the investigation by the Judicial Review Board.

Under Rule 26(c), West Virginia Rules of Civil Procedure, a protective order may be sought which totally prevents discovery or provides limitations upon the method, the manner, and the scope of the discovery. The Supreme Court found that the Judicial Review Board could narrow the scope of the deposition to protect against undue harassment but could not say that any member of the Commission is totally protected from investigation as a matter of absolute privilege.

A broad protective order which forbids the taking of the Chairman's deposition on the grounds of blanket privilege is improper. Each area of inquiry should be scrutinized, as contemplated in Rule 26(c), West Virginia Rules of Civil Procedure, and a narrowly drawn protective order, if appropriate, entered.

DISCOVERY

Late production

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

See JUVENILE Transfer, Discovery, (p. 599) for discussion of topic.

State v. Ward, 284 S.E.2d 881 (1981) (Per Curiam)

Late disclosure by the prosecution is fatal to its case where such nondisclosure is prejudicial. The late disclosure should be considered prejudicial if it hampered preparation or presentation of the defendant's case. In this case, the trial was not conducted until a month after the late disclosure, and the record fails to demonstrate that defense counsel's preparation or presentation was damaged by the late disclosure.

See CONTINUANCE Late production of discovery, (p. 124) for discussion of topic.

Mental hygiene

Markey v. Wachtel, 264 S.E.2d 437 (1979) (Miller, J.)

See MENTAL HYGIENE Commitment proceedings, Discovery, (p. 645) for discussion of topic.

Nondisclosure

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

"A prosecution that withholds evidence on the demand of an accused, which, if made available would tend to exculpate him, violates due process of law." Syl. pt. 4, *State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973).

Syl. pt. 2 - Where it is incumbent on the State to disclose evidence favorable to an accused, such disclosure to be effective must be made at a time when the disclosure would be of value to the accused.

Nondisclosure (continued)

State v. Adkins, 253 S.E.2d 146 (1979) (Neely, J.)

No actual prejudice was shown in the way of surprise. The witness appeared as an eyewitness on the State's answer to a Bill of Particulars filed for months before trial, and defense counsel had been orally informed by the prosecutor prior to trial that the particular person would be a witness.

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

The core of the doctrine of suppression of evidence is that it relates to some evidence that would be relevant to an issue at trial. It is the duty of the State to turn over exculpatory evidence to defendant.

State v. Brewster, 261 S.E.2d 77 (1979) (Miller, J.)

Interpreting *Wilhelm v. Whyte*, 239 S.E.2d 735 (W.Va. 1977), to require timely objection to late disclosure, the Supreme Court rejected defendant's claim that exculpatory evidence was withheld since defense counsel made no objection to the court until after the trial and made no motion to show how defendant was prejudiced by the late disclosure.

"Before prosecutorial error can occur under the doctrine of suppression of evidence, it must be shown that the evidence, it must be shown that the evidence suppressed would be relevant to an issue at the criminal trial." Syl. pt. 4, *State v. Bollling*, 246 S.E.2d 631 (W.Va. 1978).

Where the alleged exculpatory evidence involved a discrepancy in ballistic reports indicating a question as to whether the bullet found at the scene of the accident matched the gun found in defendant's possession, the Supreme Court held that the evidence must be relevant to an issue at the trial before it could be challenged under the doctrine of suppression of evidence. In this instance, the State relied upon eyewitness testimony and was not required to show that the gun used in the robbery was the same gun found in defendant's possession or that the bullet matched that gun.

Nondisclosure (continued)

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

In a trial for possession of a controlled substance with intent to deliver, firearms were introduced which were found at the same time as the marijuana. The objection that the weapons were not listed in the bill of particulars was both harmless and waived. Harmless, in light of the overwhelming weight of the other evidence. Waived, by counsel's failure to make a timely assignment of reasons when specifically asked by the trial judge.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

Syl. pt. 2 - When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.

In a murder trial where defendant's only defense was insanity, it was prejudicial to defendant's case for prosecution to fail to disclose a booking report even though the appellant had made motions for discovery. The Supreme Court found that the report was prejudicial to the defense of insanity, and was used as rebuttal evidence to disclaim the appellant's insanity defense evidence, and that the surprise use of the report prejudiced the defendant's preparation for trial and constituted reversible error.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Syl. pt. 4 - A prosecution that withholds evidence which if made available would tend to exclude an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.

Nondisclosure (continued)

State v. Hatfield, (continued)

The failure of the State to communicate to defense counsel the ownership of a gun found on the defendant's property occupied by a third party did not constitute exculpatory evidence from a constitutional standpoint.

Applies standard set forth in syl. pt. 2, *State v. Grimm*, 270 S.E.2d 173 (W.Va. 1980), cited above.

The relevant inquiry under the nonconstitutional discovery standard set forth in syl. pt. 2 of *Grimm supra*, is prejudice to the defendant resulting from either surprise on a material issue or where the nondisclosure hampers the preparation and presentation of the defendant's case. The Supreme Court found no error here.

State v. Helmick, 286 S.E.2d 245 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 3, *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978), cited below.

In a trial for murder, a State witness, the chief investigating officer, refreshed his memory with his investigation report the night before testifying, but he did not use it to refresh his memory while testifying. Defense counsel established that the witness had used the report to refresh his memory. The trial court refused defense counsel's motion to receive a copy of the report. Reversible error occurred when the report was not disclosed, as the report was within the State's possession and was required to be disclosed upon proper motion.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

In West Virginia, the obligation upon the prosecution to disclose relevant evidence prior to trial varies with the nature of the evidence and the impact that nondisclosure would have on the trial preparation by the defense.

Nondisclosure (continued)

State v. Milam, (continued)

Failure of the prosecution to reveal a confession by defendant until trial had begun constituted surprise and, because insanity was the main defense, did interfere with defense's preparation for trial.

Failure of prosecution to reveal a confession by defendant until noon recess, after opening statements were presented but before any witnesses had been called, involved more than surprise since insanity was the chief defense relied upon and this issue played an important role in the factual determination of whether the confession was voluntary.

State v. Moran, 285 S.E.2d 450 (1981) (Per Curiam)

"Subject to certain exceptions, pre-trial discovery in a criminal case is within the sound discretion of the trial court; however, after a witness has testified from notes used to refresh his recollection, the defense is absolutely entitled to inspect the notes from which the witness testified and must be given a reasonable opportunity to prepare cross-examination." Syl. pt. 1, *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975).

In a trial for unlawful wounding, defendant claimed on appeal that the trial court erred in refusing to permit defense counsel to see a master police report while the State was putting on its case in chief. Under the circumstances, defense had substantial pre-trial discovery because of defense counsel's representation of a client in a related trial, the police report was not used by any witness to refresh recollection, and there was no representation that the refusal resulted in prejudice or surprise to defendant. The claim of error was found to be without merit.

In the same trial, defendant claimed on appeal that he was not allowed to examine the written statements of two officers until after they had testified on direct examination. The Supreme Court found this claim to be without merit; defense was allowed to examine and use the statements on cross-examination.

Nondisclosure (continued)

State v. Moran, (continued)

Defendant claimed that he was not allowed to inspect an exculpatory pathology rept prior to trial, and the Supreme Court found the claim to be without merit because the report was not deemed e exculpatory, relating only to a fact not in factual dispute, and because the defense did have access to the report on cross-examination.

Defendant claimed that he was prejudiced by his failure to receive the results of a fingerprint analysis, the report showing that there were no fingerprints of value. The Supreme Court found no error, because the defense knew of the results of the fingerprint reports prior to trial, and because the report was made available to counsel in a related trial.

On appeal from the same trial, defendant claimed that he did not receive the results of a test that would have shown whether he had recently fired a firearm. The Supreme Court found no error, as there was no argument that this was prejudicial and as defendant testified at trial that he did fire a weapon during the event in question.

Pretrial discovery is within the discretion of the trial court, and the defense is generally not entitled to a police report unless it has been used at trial to refresh recollection.

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

Syl. pt. 3 - Unless there are compelling circumstances which dictate to the contrary, a criminal defendant, upon proper motion, is entitled, for the purpose of cross-examination, to have any written statements in the State's possession made by a prosecution witness who has testified against the defendant; furthermore, the defendant must be given a reasonable opportunity to study the statements and prepare cross-examination.

Nondisclosure (continued)

State v. Sette, (continued)

While the determination of whether material is exculpatory or not has been allowed to be made by the trial judge, the Court found that defense counsel is the better party in whom to repose this responsibility, insofar as the use of arguably inconsistent prior statements for cross-examination purposes is concerned. The judge in this case had withheld the confession of the chief witness for the prosecution because it was not exculpatory.

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

See JUVENILE Transfer, Discovery, (p. 599) for discussion of topic.

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

Defendant contends he was denied effective discovery because certain items were denied in the requested bill of particulars. There is no evidence in the record that denial of the material requested in the bill of particulars deprived the defense of any exculpatory material, or that it impaired cross-examination, or that the defense was in any way surprised by any prosecution witnesses or the contents of their testimony. Absent a showing of that lack of discovery was prejudicial there is not reversible error. *Wilhelm v. Whyte*, 239 S.E.2d 735 (W.Va. 1977).

Right to

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

See JUVENILE Transfer, Discovery, (p. 599) for discussion of topic.

DISCOVERY

Witnesses' use of notes

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

"[A]fter a witness has testified from notes used to refresh his recollection, the defense is absolutely entitled to inspect the notes from which the witness testified and must be given a reasonable opportunity to prepare a cross-examination." Syl. pt. 1, *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975).

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

See DISCOVERY Nondisclosure, (p. 197) for discussion of topic.

DOUBLE JEOPARDY

In general

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.0

It is a constitutional mandate that one shall not be "twice put in jeopardy" for the same offense.

State ex rel. Johnson v. Hamilton, 266 S.E.2d 125 (1980) (Neely, C.J.)

The constitutional prohibition against double jeopardy has two elements: (1) a protection against multiple trials for the same offense; (2) protection against multiple punishments for the "same offense".

State ex rel. Watson v. Ferguson, 274 S.E.2d 440 (1980) (Miller, J.)

In any analysis of the policies underlying double jeopardy in the area of offense against multiple victims, it must be recognized that the extent of criminal culpability cannot be answered merely by looking at the shortness of the time frame. Some consideration must be given to the defendant's criminal acts and intent, whether or not there were multiple victims, and the wish to enable those victims of the criminal act to individual vindication of the harm done to them. Certainly the degree of culpability, and as a consequence the degree of punishment, must bear some proportion not only to the magnitude of the crime but also to the number of victims involved.

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

The double jeopardy clause originated in the common law.

State v. Hersman, 242 S.E.2d 559 (1978) (Miller, J.)

"The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syl. pt. 1, *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977).

In general (continued)

State v. Myers, (No. 15296, June 17, 1982) (Neely, J.)

Applies standard set forth in syl. pt. 1, *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977). See *State v. Hersman*, 242 S.E.2d 559 (W.Va. 1978), cited above.

The double jeopardy bar against multiple punishments is to prohibit judges from imposing more penalty than the legislature has sanctioned.

The double jeopardy bar against multiple punishments is usually encountered in cases involving greater and lesser included offenses and in cases involving an ongoing criminal scheme. In the first type, legislative intent is examined to determine whether multiple punishment is mandated. If so, multiple punishments pass double jeopardy scrutiny. In the second type, courts look at the evidence to determine whether there have been separate crimes meriting separate punishments.

Where there is legislative intent to permit multiple punishments arising from the same act, multiple punishments are permissible as long as each charge meriting punishment requires at least one piece of evidence that is not needed to prove other charges.

See HOMICIDE Negligent homicide, (p. 201) for discussion of topic.

When defendant was convicted of two counts of involuntary manslaughter following a single automobile accident in which two persons were killed and sentenced to two one-year jail sentences to run consecutively, the Court affirmed the separate convictions and separate punishments thus overruling *Myers v. Murensky*, 245 S.E.2d 920 (W.Va. 1978).

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

Since many statutory crimes are duplicative, it is well established that separate statutory crimes may be the "same offense" under the double jeopardy clause, even though they are not identical in either constituent element or actual proof. Each case ultimately turns upon whether the legislature intended an act to be punished by only one or by more than one statutory provision.

DOUBLE JEOPARDY

Acquittal

State ex rel. Dowdy v. Robinson, 257 S.E.2d 167 (1979) (Neely, J.)

After a judgment acquitting a defendant, retrial on the same offense is not permissible regardless of how erroneous the acquittal may have been.

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, Retrial and double jeopardy, (p. 27) for discussion of topic.

What constitutes an acquittal is not to be controlled by the form of the judge's action but rather whether or not the ruling actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

See STATUTES Statutory construction, In *pari materia*, (p. 908) for discussion of topic.

Acquittal set aside

State ex rel. Kincade v. Spillers, 268 S.E.2d 137 (1980) (Harshbarger, J.)

Syl. pt. 1 - The constitutional prohibitions against putting a person twice in jeopardy for the same offense in *U.S. Const.* amend. V and *W.Va. Const.* art. III, § 5, do not bar reinstatement of a jury verdict of guilty which was followed by entry by the trial court of a judgment of acquittal because of a variance between the proof and indictment, later reconsidered and reversed by the trial court during the same term. In this situation, there is no jeopardy of another trial because anther trial is not required.

A defendant who challenges conviction by appeal or post-verdict motion voluntarily subjects himself to reconsideration of matters that involve jeopardy of his liberty. By so choosing, a defendant waives his double jeopardy rights.

Acquittal set aside (continued)

State ex rel. Kincade v. Spillers, (continued)

In the circumstances of this case, defendant was indicted for burglary, tried and convicted. After motion for a new trial was granted, he was retried and reconvicted. His motion for acquittal because of a variance between the indictment and proof was granted but later revoked by the trial court and he was sentenced. Defendant claimed on appeal that the revocation of his acquittal subjected him to double jeopardy. The Supreme Court found that the defendant was not subjected to anther trial or additional punishment for the same crime for which he was convicted when the trial court revoked the acquittal order. If the State had been statutorily entitled to appeal the acquittal order, reversal would not have offended double jeopardy provisions, even if it resulted in reinstatement of a jury verdict of guilty. Under these circumstances, the reinstatement of the guilty verdict was not barred by double jeopardy principles.

Administrative discipline

Conley v. Dingess, 250 S.E.2d 136 (1978) (Caplan, C.J.)

Syl. pt. 3 - One prosecuted for the crime of escape cannot invoke the defense o double jeopardy on the ground that upon his recapture he was subjected to discipline for such escape by the prison authorities.

Double jeopardy is applicable strictly to criminal not civil proceedings. Administrative disciplinary proceedings for prisoner who escaped were civil, therefore, double jeopardy did not apply.

Conspiracy

Keith v. Leverette, 254 S.E.2d 700 (1979) (Caplan, C.J.)

Syl. pt. 2 - Conspiracy to inflict bodily injury upon another and felonious assault are two separate and distinct crimes, and one charged with and convicted of both offenses can receive a separate sentence for each crime.

DOUBLE JEOPARDY

Controlled substance

State v. Barnett, 284 S.E.2d 622 (1981) (Harshbarger, C.J.)

Syl. pt. 3 - Delivery of two controlled substances at the same time and place to the same person is one offense under our double jeopardy clause. *W.Va. Const.* art. III, § 5.

The Supreme Court stated that Code 60A-4-408(b), the drug dealing recidivist statute, reinforced its opinion that separate convictions and punishments would violate the double jeopardy clause.

The State may prove delivery of both drugs, but defendant can only be sentenced once.

A consolidated retrial on both charges would not offend double jeopardy principles.

Credit-probation/parole

Adkins v. Leverette, 239 S.E.2d 496 (1977) (Miller, J.)

Syl. pt. 2 - The rule in *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977), holding that upon parole revocation the failure to credit time spent on parole to the underlying sentence violates the Double Jeopardy Clause of the West Virginia Constitution, is fully retroactive.

Jett v. Leverette, 247 S.E.2d 469 (1978) (Miller, J.)

See PROBATION Credit on underlying sentence, (p. 700) for discussion of topic.

When defendant claimed credit on his underlying sentence for the time he spent on probation before its revocation, and based this claim on the *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977), holding that Article III, § 5 of the *W.Va. Constitution* required credit on the underlying sentence for time spent on parole where there was a revocation of parole, his claim was denied. The fundamental differences between probation and parole made the *Conner* holding inapplicable.

DOUBLE JEOPARDY

Detention center - youthful offender

State v. Hersman, 242 S.E.2d 559 (1978) (Miller, J.)

Syl. pt. 2 - It is a violation of the Double Jeopardy Clause of the West Virginia Constitution, Article III, Section 5, to fail to credit the time served at a detention center under *W.Va. Code* 25-4-6, when pursuant to this section a prisoner is found unfit to remain at a detention center, is returned to the court which committed him, and is sentenced for the crime for which he has been convicted.

In this case, the defendant spent 343 days at detention centers for an offense which carried confinement in the jail for 180 days. He was then given 90 days in jail. This violates our double jeopardy clause for not giving credit for time spent in the detention centers.

Forgery

State v. Riley, 287 S.E.2d 502 (1982) (Harshbarger, J.)

In *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167 (W.Va. 1979), the same evidence test and the same transaction test were adopted to determine whether double jeopardy rules had been violated. However, this case was pre-*Dowdy*, and *Dowdy* should not be given retrospective application. Double jeopardy rules, in any case, were not violated here under either *Dowdy* or pre-*Dowdy* standards. The only thread common to all these checks was that they were allegedly written on the same check-writing machine. This fact alone is not enough to evoke double jeopardy.

Habeas corpus

Angel v. Mohn, 253 S.E.2d 63 (1979) (Miller, J.)

See HABEAS CORPUS Relief, (p. 360) for discussion of topic.

Habeas corpus (continued)

Unconditional discharge

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Syl. pt. 3 - An unconditional discharge from confinement upon the issuance of a writ of habeas corpus does not ordinarily operate to bar further prosecution under principles of double jeopardy.

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

See INEFFECTIVE ASSISTANCE Failure to appeal, Relief, (p. 450) for discussion of topic.

Homicide

State ex rel. Watson v. Ferguson, 274 S.E.2d 440 (1980) (Miller, J.)

Syl. pt. 2 - Where multiple homicides occur even though they are in close proximity in time, if they are not the result of a single violative act of the defendant, they may be tried and punished separately under the double jeopardy clause of Article III, Section 5 of the West Virginia Constitution.

Felony murder

State ex rel. Hall v. Strickler, 285 S.E.2d 143 (1981) (Harshbarger, C.J.)

Syl. pt. - Federal and State Constitutional double jeopardy principles are violated by serial trials for a greater offense of felony-murder and its lesser included offense of robbery. *U.S. Const.* amend. XIV and *W.Va. Const.* art. III, § 5.

Negligent homicide

See HOMICIDE Negligent homicide, (p. 394) for discussion of topic.

DOUBLE JEOPARDY

Jail time

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

See SENTENCING Credit for time spent in jail/detention center, (p. 872) for discussion of topic.

Joinder

Gilkerson v. Lilly, 288 S.E.2d 164 (1982) (Neely, J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980).

State ex rel. Johnson v. Hamilton, 266 S.E.2d 125 (1980) (Neely, C.J.)

Syl. pt. 2 - Appropriate protection against multiple trials for offenses arising from the same criminal transaction requires, in future cases, joinder for trial at the same time of all counts arising out of the same transaction either in a single indictment with multiple counts or multiple separate indictments; however, the defendant may move for severance of separate offenses and waive a future plea of double jeopardy, and if severance is granted by the Court, after defendant's showing of good cause for such severance, the defendant may be tried separately for each separate offense.

Syl. pt. 3 - Although under double jeopardy principles the proper procedure is a trial of all offenses arising out of the same "criminal transaction" jointly, separate punishments may be imposed for separate offenses arising out of a single criminal transaction.

State ex rel. Hall v. Strickler, 285 S.E.2d 143 (1981) (Harshbarger, C.J.)

"The granting of a motion for severance for prejudicial joinder rests withing the sound discretion of the trial court." *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980), Footnote 10. For indictments charging only greater and lesser included offenses, a defense severance motion should not be granted if the State elects to try the greater offense first.

Joinder (continued)

State ex rel. Watson v. Ferguson, 274 S.E.2d 440 (1980) (Miller, J.)

Syl. pt. 1 - A defendant shall be charged in the same indictment, in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are two or more acts or transactions connected together or constituting parts of a common scheme or plan.

To the extent that *State ex rel. Johnson v. Hamilton*, 266 S.E.2d 125 (W.Va. 1980) set the rule as a constitutional holding, it is disapproved. The new rule regarding joinder is a procedural rule.

Footnote 13 - Offenses which are unknown to the prosecuting attorney or not committed within the same county are not subject to this joinder rule.

State v. Cunningham, 290 S.E.2d 256 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980).

State v. Mitter, 285 S.E.2d 376 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980).

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

The holding of *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980), is procedural, not constitutionally based, and therefore is not retroactive.

Joinder (continued)

State v. Shafer, 284 S.E.2d 916 (1981) (Neely, J.)

Rule that a defendant shall be charged in the same indictment in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character will not be applied retroactively.

Juvenile transfer hearing

See JUVENILE Transfer, Double jeopardy, (p. 600) for discussion of topic.

Larceny

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

Trial court's conclusion that there was insufficient evidence to convict defendant of larceny from the church property did not resolve the larceny count since all events were not part of a "same transaction".

State v. Shafer, 284 S.E.2d 916 (1981) (Neely, J.)

Imposition of separate punishments upon the entry of guilty pleas to four indictments charging defendant with larceny of four separate checks did not violate double jeopardy principles since "same transaction" test would not apply due to the fact that the crime took place at different times, and "same evidence" test would not apply.

DOUBLE JEOPARDY

Lesser included offense

State ex rel. Hall v. Strickler, 285 S.E.2d 143 (1981) (Harshbarger, C.J.)

"It has always been the law that a person cannot be punished for both a lesser included offense and the greater crime when the elements of the first are necessarily included in the elements of the second." *State ex rel. Johnson v. Hamilton*, 266 S.E.2d 125 (W.Va. 1980).

Conviction for a lesser included offense after conviction for the greater crime violates fifth amendment protections as applied by the fourteenth amendment to the States.

Manifest necessity

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.)

When a jury cannot reach a verdict or when there is a manifest necessity for the discharge of the jury, it is well settled in the law that the defendant can again be tried for the offense charged and the defense of "double jeopardy" cannot be successfully employed.

State ex rel. Betts v. Scott, 267 S.E.2d 173 (1980) (Miller, J.)

It can be generally stated that a manifest necessity ground is one which arises from circumstances not within the control of the prosecution or the court.

The introduction of inadmissible evidence by the State does not constitute a ground for manifest necessity so that the trial court could *sua sponte* declare a mistrial and avoid the jeopardy bar. *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730 (1964), *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.Ed.2d 30.

Manifest necessity (continued)

State ex rel. Betts v. Scott, (continued)

The motion for mistrial, in the present case, rested on the fact that the prosecution introduced evidence of the defendant's blood alcohol test, but failed to properly authenticate the test as having complied with the Department of Health methods and standards as required by *W.Va. Code* 17C-5A-5. The doctrine of manifest necessity is not applicable, since this evidentiary error was under the control of the prosecution.

Misdemeanor/magistrate court-felony/circuit court

Gilkerson v. Lilly, 288 S.E.2d 164 (1982) (Neely, J.)

Syl. pt. 3 - In order for a conviction or acquittal in magistrate court for a misdemeanor to bar a subsequent prosecution in circuit court for a felony arising out of the same transaction as the misdemeanor, if the only double jeopardy bar asserted is the "same transaction test" as articulated in *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167, 170 (W.Va. 1979), the defendant must have moved in the magistrate court that his misdemeanor charge be brought by indictment and tried together with the pending felony prosecution in the circuit court.

Petitioner, who was tried on and found guilty of the misdemeanor charge of contributing to the delinquency of a minor challenged the subsequent indictment for breaking and entering on the grounds of double jeopardy under the "same transaction" test as articulated in *Dowdy*. The Supreme Court rejected the claimed grounds holding that the same transaction test alone does not make a conviction or acquittal in magistrate court on a misdemeanor an automatic bar to the prosecution of a felony charge arising out of the same transaction in the circuit court.

DOUBLE JEOPARDY

Mistrial

State ex rel. Betts v. Scott, 267 S.E.2d 173 (1980) (Miller, J.)

Syl. pt. 1 - Where, in a criminal case, the defendant moves for a mistrial on the basis of reversible error not arising from evidentiary insufficiency or prosecutorial or judicial overreach and the mistrial is granted, jeopardy does not ordinarily bar a retrial, because the mistrial motion is equivalent to an appeal based on the same trial error.

The motion for mistrial, in the present case, rested on the fact that the prosecution introduced evidence of the defendant's blood alcohol test, but failed to properly authenticate the test as having complied with the Department of Health methods and standards as required by *W.Va. Code* 17C-5A-5. The defendant's election to seek a mistrial does not bar retrial, since the same result would have occurred on appeal.

State ex rel. Watson v. Ferguson, 274 S.E.2d 440 (1980) (Miller, J.)

Footnote 15 - The inquiry of whether double jeopardy attaches after there is a mistrial break and ends the first trial does not focus on whether the second trial involves the "same offense" that is involved in the trial. The critical question is under what circumstances the first trial aborted and in particular whether it was aborted by reason of prosecutorial or judicial "bad faith", including evidentiary insufficiency.

Nolle prosequi

State v. Cain, 289 S.E.2d 488 (1982) (Per Curiam)

In the present case, the two counts *nolled* were dismissed before the jury in defendant's first trial had been sworn. The Supreme Court concluded the defendant was never placed on trial or in jeopardy on those counts and that his double jeopardy assertion was without merit.

"When a defendant has been convicted and a new trial has been granted him, the prosecution may, with the consent of the trial court, enter a *nolle prosequi* without prejudice to a new indictment or information. *State v. Burke*, 130 W.Va. 64, 42 S.E.2d 544 (1947).

DOUBLE JEOPARDY

Probation

State v. Dawson, 282 S.E.2d 284 (1981) (Miller, J.)

See PROBATION Revocation, Preliminary hearing, (p. 715) for discussion of topic.

Recidivist proceeding

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See RECIDIVIST Double jeopardy, In general, (p. 743) for discussion of topic.

Resentencing

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See SENTENCING Resentencing, Double jeopardy, (p. 879) for discussion of topic.

Retrial

State v. Kelley, 285 S.E.2d 457 (1981) (Per Curiam)

Reversal for trial error does not invoke the prohibition against double jeopardy.

Although admission of appellant's confession as evidence was prejudicial error, since appellant was mentally incapable of knowingly waiving her right to counsel, the right to retrial was not barred by double jeopardy.

DOUBLE JEOPARDY

Retroactivity

Adkins v. Leverette, 239 S.E.2d 496 (1977) (Miller, J.)

See DOUBLE JEOPARDY Credit-probation/parole, (p. 204) for discussion of topic.

See RETROACTIVITY In general, (p. 755) for discussion of topic.

While no direct ruling has been made concerning the effect of the United States Supreme Court ruling on retroactivity upon state court cases involving constitutional standards which are made applicable to the states through the fourteenth amendment, there is the suggestion that the rule may be binding upon the states, thus giving full retroactive application to those federal constitutional standards; however, when the W.Va. case upon which the plea for retroactivity was premised was based upon the double jeopardy clause of the West Virginia Const. art. III, § 5, which is virtually identical to the double jeopardy clause of the fifth amendment, the Court did not resolve the fourteenth amendment issue, but rather determined that while it is true that a state may not interpret its constitutional guarantee below the federal level, nothing prevents a state court from equaling or exceeding the federal standard thereby concluding that *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977), must be retroactive.

Double jeopardy precluded both a second criminal trial and a second punishment for the same offense. Its implications, therefore, are more far-reaching than those constitutional doctrines which are found retroactive because they prevent substantial impairment of the truth-finding function - the standard for determining when retroactivity is appropriate under *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977). Consequently, the *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977), holding that upon parole revocation the failure to credit time spent on parole to the underlying sentence violates the double jeopardy clause of the West Virginia Constitution is fully retroactive.

Retroactivity (continued)

State ex rel. Johnson v. Hamilton, 266 S.E.2d 125 (1980) (Neely, C.J.)

The holding in *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167 (W.Va. 1979), syl. pt. 1, allowing double jeopardy provisions to bar multiple trials for offenses arising from the same transaction is not retroactive.

Defendant killed both father and son and was convicted of killing the son prior to *Dowdy*. Defendant claimed that the subsequent trial for the father's murder was barred by double jeopardy principles, since *Dowdy* had allowed these principles to act as a bar to multiple trials for offenses arising from the same transaction. The Supreme Court, however, held *Dowdy* principles to be prospective only, not retroactive.

State v. Riley, 287 S.E.2d 502 (1982) (Harshbarger, J.)

In *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167 (W.Va. 1979), the "same evidence" test and the "same transaction test" were adopted to determine whether double jeopardy rules had been violated. However, *Dowdy*, should not be given retrospective application.

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

The holding of *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980), is procedural, not constitutionally based, and therefore is not retroactive.

State v. Shafer, 284 S.E.2d 916 (1981) (Neely, J.)

Rule that a defendant shall be charged in the same indictment in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, will not be applied retroactively.

DOUBLE JEOPARDY

Same offense

Gilkerson v. Lilly, 288 S.E.2d 164 (1982) (Neely, J.)

Syl. pt. 2 - The same transaction test for double jeopardy purposes is a procedural rule that is not mandated by either the State or federal constitutions but is in furtherance of the general policy enunciated in the double jeopardy clause.

The court may, for good cause, choose not to apply the procedural rule requiring trial at the same time for all arising out of the same transaction.

State ex rel. Dowdy v. Robinson, 257 S.E.2d 167 (1979) (Neely, J.)

Syl. pt. 1 - in West Virginia the term "same offense" [sic] as used in the double jeopardy provision of *W.Va. Const.*, art 3, § 5 shall be defined by either the "same evidence test" which provides that offenses are the same unless one offense requires proof of a fact which the other does not, or the "same transaction test" which provides that offenses are the same if the grow out of a single criminal act, occurrence, episode or transaction; therefore, whichever test affords the defendant the greater protection must be applied.

Where defendant was indicted for breaking and entering at a particular address but proof adduced at trial indicated a different street address, the trial court sustained defendant's motion for a directed verdict on the grounds that the difference in address constituted a fatal variance between indictment and proof. Defendant challenged a second indictment which was exactly the same as the first, except the street address, contending that he was being tried a second time for the "same offense" in contravention of the double jeopardy clause, *U.S. Const.* amend. V, and *W.Va. Const.* art. 3, § 5.

The Supreme Court adopted both the "same evidence" and the "same transaction" tests whichever affords the defendant greater protection for determining whether the "same offense" was involved and held that clearly, under the "same transaction test" defendant's charges constituted the same offense. Writ of prohibition preventing a retrial was issued even though the trial court erred in directing a verdict of acquittal.

Same offense (continued)

State ex rel. Johnson v. Hamilton, 266 S.E.2d 125 (1980) (Neely, C.J.)

The "same transaction" test does not preclude separate punishments for s separate crimes.

Sexual assault

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

Syl. pt. 2 - Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense.

Double jeopardy principles are resolved "not in mechanical solution relating to proximity in time but rather an analysis of the conduct and intent of the defendant.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

Syl. pt. 4 - Double jeopardy prohibits multiple punishment for the same offense, therefore under our criminal sexual conduct statute, *W.Va. Code*, 61-8B-1 *et seq.* (1976) a single sexual act cannot result in multiple criminal convictions.

Under the facts of this case, there was one continuing sexual offense culminating in sexual intercourse. The sexual contact demonstrated at trial was ancillary to one act of sexual intercourse. It was reversible error for the court to have provided a verdict form permitting: guilty of sexual assault in the second degree *or* guilty of sexual misconduct *or* guilty of assault and battery under count one; guilty of sexual abuse under count two; and guilty of sexual abuse under count three.

The jury should have been instructed that they could find the defendant guilty of any one of the following: guilty of sexual assault in the second degree; guilty of sexual abuse in the first degree; guilty of sexual misconduct; or guilty of assault and battery.

DOUBLE JEOPARDY

Sufficiency of evidence

State ex rel. Betts v. Scott, 267 S.E.2d 173 (1980) (Miller, J.)

Applies standard set forth in syl. pt. 4, *State v. Frazier*, 252 S.E.2d 39 (W.Va. 1979), cited below.

State v. Burks, 267 S.E.2d 752 (1980) (Per Curiam)

Where there was insufficient evidence of the victim's lack of consent or mental incapacity to consent to sustain a conviction for third degree sexual assault, and there was no evidence to support an assault charge, the defendant's conviction was set aside.

The Supreme Court applied syl. pt. 4 of *State v. Frazier*, 252 S.E.2d 39 (W.Va. 1979), cited below, and found the Double Jeopardy Clause forbids a retrial and results in a judgment of acquittal.

State v. Kelley, 285 S.E.2d 457 (1981) (Per Curiam)

No evidentiary insufficiency was found when appellant's confession was admitted in error as evidence; thus, double jeopardy did not act as a bar to retrial.

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Syl. pt. 4 - The Double Jeopardy Clause of the Federal and this State's Constitutions forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.

Syl. pt. 5 - In order to determine if there is evidentiary insufficiency that will bar a retrial under double jeopardy principles, such determination is made upon the entire record submitted to the jury and not upon the residual evidence remaining after the appellant court reviews the record for evidentiary error.

Sufficiency of evidence (continued)

State v. Frazier, (continued)

The Supreme Court incorporated *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978) double jeopardy principles into our own double jeopardy clause in *W.Va. Const.*, art. III, § 5. *Burks*' teaching is that where on appeal the entire record as given to the jury was insufficient to support the conviction, then there is an "evidentiary insufficiency", and the appellant court finds reversible evidentiary error, then this is trial error and the case is reversed and no jeopardy attaches.

When a new evidentiary rule is set adversely to the State's position on appeal, the prosecutor should not be foreclosed from developing a new trial alternative source of proof.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Applies standard set forth in syl. pt. 4, *State v. Frazier*, 252 S.E.2d 39 (W.Va. 1979), cited above.

Under the facts of this case, the State's failure to sustain its burden of showing insanity in a murder trial beyond a reasonable doubt was an evidentiary insufficiency which prevented retrial under State and Federal double jeopardy prohibitions. However, the State was not precluded from initiating involuntary mental commitment procedures.

State v. Rowe, 285 S.E.2d 445 (1981) (Per Curiam)

See INSANITY Retrial, (p. 476) for discussion of topic.

State v. Stanley, 284 S.E.2d 367 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 4, *State v. Frazier*, 252 S.E.2d 39 (W.Va. 1979), cited above.

DOUBLE JEOPARDY

Sufficiency of evidence (continued)

State v. Stanley, (continued)

Where case was reversed because Supreme Court found part of the State's case to have been inadmissible, the State was not barred from presenting alternative evidence to prove its case.

State v. Van Isler, 283 S.E.2d 836 (1981) (McHugh, J.)

See SUFFICIENCY OF EVIDENCE Exclusion of evidence on appeal, (p. 918) for discussion of topic.

State v. W.J.B., 276 S.E.2d 550 (1981) (Miller, J.)

The Supreme Court ruled that the State had failed to prove beyond a reasonable doubt that he defendant did not act in self-defense. Because of the State's failure to carry its burden of proof beyond a reasonable doubt, such evidentiary insufficiency bars a retrial under double jeopardy principles.

Unlawful wounding

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

From a trial culminating in a verdict of unlawful wounding, defendant appealed claiming that the verdict should be set aside because in a later trial for "pistol toting" he was found not guilty. The Supreme Court found that the two jury trials and the two verdicts by different juries were legally unrelated; the fact that the second jury found the appellant not guilty of carrying an unlicenced weapon did not affect the validity of the jury verdict of guilty of unlawful wounding.

DOUBLE JEOPARDY

Variance between indictment and proof

Retrial

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.)

Syl. pt. 2 - Jeopardy, having attached, may be waived by the defendant.

In a subsequent timely trial on the same offense the defendant cannot successfully claim that he is being subjected to double jeopardy.

Syl. pt. 3 - When a defendant's motion for a continuance, regardless of the ground therefor, is granted after jeopardy attaches, he has waived his right to plead former jeopardy in a subsequent trial for the same offense.

Where a defendant moves for a continuance after the jury is sworn, and the motion is granted, he has consented to the discharge of the jury, and this is true regardless of the ground on which the continuance is granted.

State ex rel. Dowdy v. Robinson, 257 S.E.2d 167 (1979) (Neely, J.)

Syl. pt. 2 - *W.Va. Code*, 61-11-14 [1923] is unconstitutional because it provides for multiple prosecution of the same defendant for the same offense after an acquittal in contravention of *U.S. Const.* Amend. V and *W.Va. Const.*, art. 3 § 5.

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, Retrial and double jeopardy, (p. 27) for discussion of topic.

Syl. pt. 2, *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167 (W.Va. 1979) was overbroad and is hereby overruled.

W.Va. Code § 61-11-14 is unconstitutional insofar as it could be read to permit a retrial in a case involving a variance between indictment and proof when the prior acquittal was based in fact on a resolution of some or all of the factual merits of the case.

DOUBLE JEOPARDY

When jeopardy attaches

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.)

Jeopardy attaches upon the swearing of the jury.

"One is in jeopardy when he has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn." *Brooks v. Boles*, 151 W.Va. 576, 153 S.E.2d 526 (1967).

State v. Cain, 289 S.E.2d 488 (1982) (Per Curiam)

Applies standard set forth in *Adkins v. Leverette*, 264 S.E.2d 154 (W.Va. 1980), cited above.

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

Double jeopardy does not attach until the jury is empaneled and sworn.

Work release

State ex rel. Gillespie v. Kendrick, 265 S.E.2d 537 (1980) (Harshbarger, J.)

The defendant's work release privilege was revoked after it was learned he was no longer employed. After a hearing, the trial court ordered the defendant to serve an additional 32 days to compensate for the time he spent out of jail while unemployed.

Time spent serving a sentence does not depend on the manner or location in which it is served. There are, to be sure, different degrees of confinement recognized in any penal system. The fact that some confinements are less restrictive than others should have no bearing in computing the time served on the sentence. *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977).

Work release (continued)

State ex rel. Gillespie v. Kendrick, (continued)

Forfeiture of time spent on work release by imposition of an additional thirty-two days sentence has the direct effect of increasing the time a prisoner must serve on his underlying sentence. It constitutes multiple punishment for the same offense and violates the double jeopardy clause of *W.Va. Const.* art. III, § 5.

DRUNK DRIVING

In general

State v. Thomas, 253 S.E.2d 554 (1979) (Per Curiam)

Syl. pt. 1 - A conviction for a statutory offense which was not a crime at the time of commission will be set aside by this Court.

The statute under which defendant was convicted July 10, 1976, driving while under the influence of intoxicating liquor, was effectively eliminated by amendment May 10, 1976). The State confessed error and the jury verdict was set aside.

Administrative sanctions

Jordan v. Roberts, 246 S.E.2d 259 (1978) (Miller, J.)

Syl. pt. 3 - The administrative proceedings for suspension of a driver's license under *W.Va. Code*, 17C-5A-1, *et seq.*, do not violate this State's Due Process Clause.

The due process standard set out in *North v. Board of Regents*, 233 S.E.2d 411 (W.Va. 1977) is met by the administrative suspension order. There must be "a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence of his own behalf; and unbiased hearing tribunal; and an adequate record of the proceedings."

There is a clear statutory demarcation between the administrative issue on a suspension and the criminal issues on a charge of driving while under the influence. Since the implied consent law permits suspension of a license on a refusal to take the test, the driver may be found not guilty on the criminal charge of driving while under the influence.

State v. Berry, 271 S.E.2d 776 (1980) (Per Curiam)

Applies standard set forth in Syl. pt. 3, *Jordan v. Roberts*, 246 S.E.2d 259 (W.Va. 1978), cited above.

Administrative sanctions (continued)

State v. Berry, (continued)

One is not entitled to consult with counsel before deciding whether to submit to the breathalyzer test, when the issue arises in a purely administrative setting.

The demarcation between administrative and criminal issues found in *Jordan v. Roberts*, cited above, was reiterated.

Arrest on private lot

State v. Ball, 264 S.E.2d 844 (1980) (Neely, C.J.)

W.Va. Code § 17C-2-1 (1972) requires that if Chapter 17C is to apply elsewhere than upon streets and highways a different place must be specifically set forth. In this regard *W.Va. Code* § 17C-5-2 (1976) does specifically refer to another place. Consequently, the charge of driving while under the influence of intoxicating liquors cannot be sustained against the appellant because of the State was unable to show that he was drunk while on a street or highway.

Blood alcohol tests

In general

Jordan v. Roberts, 246 S.E.2d 259 (1978) (Miller, J.)

Syl. pt. 4 - Where the request is made to take the ultimately designated test under the implied consent law and the license by his conduct or words manifests a reluctance to take the test or qualifies his assent to take the test on factors that are extraneous to the procedures surrounding the test, proof of refusal is sufficiently established.

Under *W.Va. Code* § 17C-5A-1, before a license suspension can be upheld it must be shown there was a reasonable ground for the arresting officer to believe that the license was driving while under the influence of intoxicating liquor.

Blood alcohol tests (continued)

In general (continued)

State v. Adams, 247 S.E.2d 475 (1978) (Harshbarger, J.)

Syl. pt. 1 - A criminal defendant's refusal to take tests to determine his state of intoxication per *W.Va. Code*, 17C-5A-1, cannot be commented upon or introduced into evidence by the State at his trial for driving while intoxicated.

To allow evidence to be admitted of a refusal to a blood alcohol test is equivalent to allowing comment by a prosecutor about a defendant's failure to give evidence. There is a clear statutory right to refuse the tests, although to do so may subject one to loss of driver's license for six months.

State v. Berry, 271 S.E.2d 776 (1980) (Per Curiam)

The Supreme Court applied Syl. pt. 4 of *Jordan v. Roberts*, 246 S.E.2d 259 (W.Va. 1978) to determine that refusal to take the breathalyzer test before consulting with a lawyer was equivalent to a refusal to take the test. Thus, the suspension of the appellant's driver's license was affirmed.

One is not entitled to consult with counsel before deciding whether to submit to the breathalyzer test, when the issue arises in a purely administrative setting.

State v. Keeton, 272 S.E.2d 817 (1980) (Neely, C.J.)

See EVIDENCE Scientific tests, Blood tests, (p. 311) for discussion of topic.

DRUNK DRIVING

Due process protection

Jordan v. Roberts, 246 S.E.2d 259 (1978) (Miller, J.)

See DUE PROCESS Forfeiture of property, (p. 234) for discussion of topic.

Syl. pt. 1 - A driver's license is a property interest which requires the protection of this State's Due Process Clause before its suspension can be obtained under the implied consent law. *W.Va. Code*, 17C-5A-1, *et seq.*

Indictment

State v. Boggess, 256 S.E.2d 325 (1979) (Harshbarger, J.)

Syl. pt. - An indictment charging violation of *W.Va. Code*, 17C-5-2, by which a person is charged with a third or subsequent offense within a five-year period of driving while intoxicated, which is a felony, sufficiently identifies the former offenses when it specifies the dates and places of convictions for them.

Penalty

State v. Vandall, 294 S.E.2d 177 (1982) (Per Curiam)

See STATUTES Statutory construction, In general, (p. 908) for discussion of topic.

A prior drunk driving conviction obtained under a municipal ordinance may not be used to enhance the penalty imposed under *W.Va. Code* § 17C-5-2 and a prior drunk driving charge in violation of a municipal ordinance was used to invoke the enhanced penalty provisions of § 17C-5-2, the Supreme Court held that in the absence of a legislative provision relating to convictions in police and mayor's courts as being usable for enhancement of punishment and in view of the traditional strict construction of penal statutes in favor of the defendant, the language of *W.Va. Code* § 17C-5-2(c) limited enhancement provisions to violators of provisions of *that* particular section; therefore, defendant's prior municipal conviction could not be used for enhancement.

DRUNK DRIVING

Prima facie evidence of intoxication

State v. Ball, 264 S.E.2d 844 (1980) (Neely, C.J.)

Syl. pt. 1 - *W.Va. Code*, 17C-5A-5(c) [1968], which provides that one tenth of one percent or more, by weight, of blood-alcohol in the defendant's system shall be admitted as *prima facie* evidence of intoxication, is constitutional since the proven fact that a person had a blood-alcohol concentration of at least one tenth of one percent proves the presumed fact that a person is intoxicated.

Statute

State ex rel. Betts v. Scott, 267 S.E.2d 173 (1980) (Miller, J.)

Syl. pt. 3 - "An act of the Legislature which repeals and simultaneously re-enacts a statute relating to a specific offense does not interrupt the continuous force of such statute, and an indictment thereunder may validly charge a 'second offense', even though the conviction of the alleged 'first offense' occurred prior to such repeal and re-enactment." Syllabus Point 1, *State v. Mason*, 141 W.Va. 217, 89 S.E.2d 425 (1955).

The relator urges that the present drunk driving statute, *W.Va. Code* § 17C-5-2(d), created a new and distinct crime from the former statute, *W.Va. Code* § 17C-5-2(a)(1). Thus he contends his prior offense cannot be considered for purposes of the new statute's second offense provision. The Supreme Court concluded the relevant phrase of the two statutes was synonymous and didn't change the basic elements of the crime or the punishment.

State v. Whittington, 284 S.E.2d 363 (1981) (Per Curiam)

The Supreme Court applied Syllabus pt. 3, in part, of *State ex rel. Betts v. Scott*, 267 S.E.2d 173 (W.Va. 1980) to come to the same conclusion as it had in *Betts*. *W.Va. Code* § 17C-5-2(a) (1966) as re-enacted on May 10, 1976 was not changed either as to the elements of the crime or the punishment. Therefore, the defendant was not convicted though the terms of the indictment against him were couched in the language of *W.Va. Code* § 17C-5-2(a).

DRUNK DRIVING

Validity of prior convictions

Stalnaker v. Roberts, 287 S.E.2d 166 (1981) (Neely, J.)

Syl. pt. - The proper forum for attacking the constitutional validity of a prior traffic offense conviction when that offense is the foundation of adverse administrative action by the commissioner of motor vehicles is the county in which such a conviction was initially rendered if the conviction is a West Virginia conviction, or the state courts of the state in which the conviction was initially rendered if it is an out-if-state conviction. To the extent that *State ex rel. Vance v. Arthur*, 142 W.Va. 737, 98 S.E.2d 418 (1957) and *State ex rel. Lemley v. Roberts*, 260 S.E.2d 850 (W.Va. 1979) are to the contrary, they are overruled.

State ex rel. Lemley v. Roberts, 260 S.E.2d 850 (1979) (Per Curiam)

Syl. pt. 5 - Because the sanctions which may be imposed by the Department of Motor Vehicles on a person convicted of driving while under the influence of intoxicating liquor are increased if he has a prior conviction within the statutorily specified time a collateral attack may be made on the prior or subsequent conviction on constitutional grounds.

DUE PROCESS

In general

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

Supreme Court eschews the rubric of "criminal" versus "civil" in determining what process is fair. The characteristics and ramifications of a proceeding, rather than its label, spawn due process requirements.

The greater the rights infringed by governmental action, the more the due process clause requires.

Tasker v. Mohn, 267 S.E.2d 183 (1980) (Harshbarger, J.)

Basic ingredients of due process are notice which affords an opportunity to prepare a defense and to be heard on the merits.

Thorne v. Roush, 261 S.E.2d 72 (1979) (McGraw, J.)

Inherent in the due process clause of the State Constitution are both the concept of substantive due process and the concept of equal protection of the laws. In order for a statute to withstand constitutional scrutiny under the substantive due process standard, it must appear that the means chosen by the legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary or discriminatory. *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977).

Abuse and neglect

In re R.J.M., 266 S.E.2d 114 (1980) (Neely, J.)

See ABUSE AND NEGLECT Termination of parental rights, Less restrictive disposition, (p. 7) for discussion of topic.

DUE PROCESS

Affirmative defenses

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

See DEFENSES Affirmative defenses, In general, (p. 156) for discussion of topic.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

See DEFENSES Affirmative defenses, In general, (p. 157) for discussion of topic.

Due process does not necessarily require that a state refrain from giving defendant the initial burden of introducing some evidence as to his affirmative defense.

Burden of proof

Presumptions/inferences

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Presumptions in criminal law are viewed with suspicion. Presumptions or inferences can be a useful tool in allowing a jury to infer an elemental fact from a basic fact established beyond a reasonable doubt. However, presumptions, when used improperly, can allow criminal convictions without meeting the beyond a reasonable doubt standard for the elements of the crime charged. Such convictions violate the constitutional requirements of due process of law.

Custody

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam)

See ABUSE AND NEGLECT Parental rights, (p. 1) for discussion of topic.

Custody (continued)

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Due process, (p. 3) for discussion of topic.

West Virginia Department of Welfare ex rel. Eyster v. Keesee, 297 S.E.2d 200 (1982) (Neely, J.)

See ABUSE AND NEGLECT Termination of parental rights, Due process, (p. 3) for discussion of topic.

Delay in sentencing

Ball v. Whyte, 294 S.E.2d 270 (1982) (Neely, J.)

See SENTENCING Time within which sentence must be imposed, (p. 880) for discussion of topic.

Denial of a fair trial

Prison attire

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prison attire, (p. 172) for discussion of topic.

DUE PROCESS

Disciplinary hearings

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

Syl. pt. 1 - Due process requirements for prison disciplinary hearings are: (a) Written notice to the inmate of the claimed violation; (b) Disclosure to him of the evidence against him; (c) Opportunity to be heard and to present witnesses and documentary evidence; (d) The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) A neutral and detached hearing body; (f) A written statement by the fact-finders of the evidence relied on and reasons for discipline; and (g) The right to counsel if the state is represented by a lawyer.

When written notice of charges against inmates failed to mention specific acts with which the prisoner was charged, when times of the violations did not correspond to times of the disturbances, when notices were not adequate to allow defendant's to prepare cases and, when the right to confront and cross-examine adverse witnesses was denied without good cause, yet prisoner's own witnesses were harassed and thus discouraged from testifying, and, more importantly, where the hearing body was anything but neutral and despite the presence of the assistant attorney general, the inmates were not represented by counsel, the Court found that the disciplinary hearing proceedings violated the due process rights of the prisoners. The penalties consequent to the hearings were voided.

Disciplinary hearing violations

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

Due process deprivations which the inmates suffered will be remedied by expunging from inmate records all references to any alleged involvement or charges stemming from the disturbances at Huttonsville on September 3 and 4, 1978, and all good time lost by reason of findings of the disciplinary committee shall be restored.

DUE PROCESS

Evidentiary hearing

Watson v. Whyte, 245 S.E.2d 916 (1978) (Harshbarger, J.)

See YOUTHFUL OFFENDERS ACT Due process, (p. 973) for discussion of topic.

Due process requires that an evidentiary hearing be given prior to an increase in sentence or transfer to a more severe prison environment.

Forfeiture of property

Jordan v. Roberts, 246 S.E.2d 259 (1978) (Miller, J.)

Syl. pt. 1 - A drivers license is a property interest which requires the protection of this State's Due Process Clause before its suspension can be obtained under the implied consent law. *W.Va. Code*, 17C-5A-1, *et seq.*

Syl. pt. 2 - Under procedural due process concepts a hearing must be appropriate to the nature of the case and from this flows the principle that the State cannot preclude the right to litigate an issue central to a statutory violation of deprivation of a property interest.

The standards set out in *North v. Board of Regents*, 233 S.E.2d 411 (W.Va. 1977) are applicable to suspension of a driver's license: ". . . a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence of his own behalf; and unbiased hearing tribunal; and an adequate record of the proceedings." [233 S.E.2d at 417].

State v. 25 Slot Machines, 256 S.E.2d 595 (1979) (Harshbarger, J.)

The circuit court has jurisdiction to order destruction of the property, but notice must be given to those in whose possession the machines were found, and hearing given them if they appear and claim ownership.

DUE PROCESS

Good time credit rights

State ex rel. Gillespie v. Kendrick, 265 S.E.2d 537 (1980) (Harshbarger, J.)

Syl. pt. 2 - Good time credit is a valuable liberty interest protected by the due process clause. *W.Va. Const.* art. III, § 10.

The minimum due process standards must be accorded prisoners with respect to their statutorily created good time credits rights. And the first requirement imposed on a government agency responsible for prisoners, by the federal constitution's Fourteenth Amendment and our State Due Process Clause in *W.Va. Const.* art. III, § 10 is publication of rules and regulations to apprise them of the conduct required for them to earn good time credits.

Incarceration of juvenile status offender

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

See JUVENILE Statutes, Constitutionality, (p. 586) for discussion of topic.

Late production of exculpatory evidence

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

See DISCOVERY Nondisclosure, (p. 192) for discussion of topic.

Late delivery of exculpatory evidence was not a denial of due process where the court acted promptly to hold the witness subject to recall and where the court provided defense attorney's with time to review the report which was not unduly technical, and to prepare questions for the witness.

Nondisclosure of exculpatory evidence

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

See DISCOVERY Nondisclosure, (p. 194) for discussion of topic.

DUE PROCESS

Parole

See PAROLE Due process, (p. 662) for discussion of topic.

Paternity

J.M.S. v. H.A., 242 S.E.2d 696 (1978) (Caplan, C.J.)

See PATERNITY Visitation, In general, (p. 673) for discussion of topic.

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

See PATERNITY Right to counsel, (p. 671) for discussion of topic.

Pleas

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

See GUILTY PLEAS Due process, (p. 338) for discussion of topic.

When a prosecuting attorney counsels "with a criminal defendant in the absence of the defendant's own counsel as to aspects of the pending prosecution", the due process requirements of Article III, Section 14 of the West Virginia Constitution have been violated, *State v. Britton*, 203 S.E.2d 462 (W.Va. 1974).

When the prosecuting attorney counseled a habeas corpus petitioner in the absence of petitioner's counsel, the constitutional issues of *Britton* came into play; thus, the trial court erred in not allowing the hearing to continue to another date so that witnesses who overheard the conversation could be subpoenaed.

DUE PROCESS

Pre-indictment delay

State ex rel. Leonard v. Hey, 269 S.E.2d 394 (1980) (Harshbarger, J)

See PRE-INDICTMENT DELAY In general, (p. 681) for discussion of topic.

Syl. pt. - A delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law, *U.S. Const.* Amend. XIV, and *W.Va. Const.* art. 3, § 10. The presumption is rebuttable by the government.

One facet of a citizen's due process protection is the right to have the government accuse him of a crime within a reasonable time from discovery of its commission and determination reasonably reached, that he or she did the criminal act. It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial, it violates this due process right. Of course, the right itself arises from the substantial prejudice that is presumed to affect a defendant's ability to respond to charges against him when the charges are time worn and stale.

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

See PRE-INDICTMENT DELAY In general, (p. 682) for discussion of topic.

Prejudicial sentencing

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

See SENTENCING Prejudicial, (p. 878) for discussion of topic.

DUE PROCESS

Right to counsel

In general

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

Our state constitutional due process right to counsel requires court appointed attorneys in criminal and civil actions which may constrain one's liberty or important personal rights.

Communicable tuberculosis

Greene v. Edwards, 263 S.E.2d 661 (1980) (Per Curiam)

See COMMUNICABLE TUBERCULOSIS Due process, (p. 99) for discussion of topic.

Effective assistance of counsel

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

Effective assistance of counsel on appeal is guaranteed through the Due Process Clause of the W.Va. Constitution. *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977).

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Effective assistance of counsel on appeal is guaranteed through the Due Process Clause of the West Virginia Constitution, Article III, Section 10.

Paternity

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

See PATERNITY Right to counsel, (p. 671) for discussion of topic.

Right to counsel (continued)

Paternity (continued)

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

See PATERNITY Right to counsel, (p. 672) for discussion of topic.

Youthful offenders

Watson v. Whyte, 245 S.E.2d 916 (1978) (Harshbarger, J.)

See YOUTHFUL OFFENDERS ACT Due process, (p. 973) for discussion of topic.

Right to fair trial

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, at 503, (1976).

Right to transcript

State v. Pettigrew, 284 S.E.2d 370 (1981) (Neely, J.)

See TRANSCRIPT Right to transcript, Failure to provide, (p. 930) for discussion of topic.

Security bond

State ex rel. Askin v. Dostert, 295 S.E.2d 271 (1982) (McGraw, J.)

See ATTORNEYS Conduct, (p. 67) for discussion of topic.

DUE PROCESS

Selection of petit jurors

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

See JURY Venire, (p. 551) for discussion of topic.

Sentencing

Retrial

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

See SENTENCING Retrial, (p. 879) for discussion of topic.

Substantive

Cooper v. Gwinn, (No. 15153, December 18, 1981) (McGraw, J.)

West Virginia Constitution Article 3, Section 10 provides that "no person shall be deprived of life, liberty, or property, without due process of law . . . ." Therefore when the state seeks to deprive any person of this "life, liberty, or property," due process must become effective. As the degree of deprivation increases, the government becomes more responsible to insure operative due process. Since imprisonment is the maximum deprivation of liberty, any case involving imprisonment requires strict scrutiny.

The Republic form of government contemplates the concept of substantive due process which enables the people to reap the benefits of laws as they are legislatively enacted. A guarantee of due process is that people may expect those officials charged with administering the law to administer it for their benefit. This right to benefit of the law as enacted by the Legislature is a fundamental right.

DUE PROCESS

Substantive (continued)

Cooper v. Gwinn, (continued)

"The concept of substantial due process is inherent in the due process clause of the State Constitution, and . . . ' in order for a statutory scheme . . . to withstand constitutional scrutiny under the substantive due process standard, it must appeal that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary and discriminatory." *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977).

Syl. pt. 2 - Inmates incarcerated in West Virginia state prisons [had] a right to rehabilitation established by *W.Va. Code* §§ 62-131-1 and 62-13-4 and enforceable through the substantive due process mandate of Article 3, Section 10 of the West Virginia Constitution.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

See HABEAS CORPUS Scope, (p. 363) for discussion of topic.

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

Footnote 4 - "Substantive due process remains in a viable concept under *W.Va. Const.* art III § 10, and in evaluating whether statutes meet substantive due process requirements, a West Virginia court must adhere to the following basics standard: . . . to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary or discriminatory." Point 1, syllabus, *State v. Wender*, 149 W.Va. 413, 141 S.E.2d 359 (1965).

Transfers

Watson v. Whyte, 245 S.E.2d 916 (1978) (Harshbarger, J.)

Transfers from one penal institution to a more restrictive environment involve a loss of liberty, thus due process protection is required.

Transfers (continued)

Watson v. Whyte, (continued)

An individual has a constitutional right to the least restrictive environment possible consistent with rehabilitation efforts.

Worthless checks

State v. Griffith, 285 S.E.2d 469 (1981) (Harshbarger, J.)

Banks can choose to honor otherwise "worthless checks", and their doing so does not create due process or equal protection rights for check writers whose paper they choose not to cover. A bank's decision to pay a customer's "bad checks" relates to whether a customer has established credit with his bank and not to the statute's constitutionality.

EMBEZZLEMENT

In general

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

"On the trial of one charged with the larceny or embezzlement of goods proof of actual or constructive possession of the goods by the one alleged in the indictment to be the owner thereof is sufficient." Syl. pt. 2, *State v. DeBerry*, 75 W.Va. 632, 84 S.E. 508 (1915).

"The agency of one charged with the embezzlement of money or other property, under [the statute], is sufficiently established, by evidence showing that the agency related to but the single transaction of intrusting the property embezzled to the defendant; no previous relationship of principal and agent is necessary. The agency thus established is within the statute on embezzlement, whether the contact of agency provides for compensation or not." Syl. pt. 3 and 4, *State v. Fraley*, 71 W.Va. 100, 76 S.E. 134 (1912).

Defendant's contention that he converted checks, not money as charged in the indictment, lacked merit since "[a] check on a bank is the subject of embezzlement." *State v. Fraley*, 71 W.Va. 100, 76 S.E. 134 (1912).

Elements

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

"[I]n order to constitute the crime of embezzlement, it is necessary to show, (1) that trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office or place of employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof." Syl. pt. 2, *State v. Moyer*, 58 W.Va. 146, 52 S.E. 30 (1905).

EMBEZZLEMENT

Indictment

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

In both embezzlement and larceny cases it has long been held that a taking is wrongful, not only from the person owning legal title, but also from any person entitled to possession. Defendant alleged the embezzlement was insufficient in charging that he embezzled from Datsun as distinguished from Datsun's purchasers. The court found the indictment validly charged the defendant with embezzling money from Datsun.

ENTRAPMENT

In general

State v. Adkins, 280 S.E.2d 293 (1981) (Per Curiam)

A defendant should not be required to forfeit a possible valid defense nor should the court ignore what could be improper conduct by law enforcement officers merely because the defendant has elected to put the government to its proof by denying factual assertions against him. The above rule is specifically limited to cases in which the State's case in chief injects evidence of entrapment.

State v. Hinkle, 286 S.E.2d 699 (1982) (Harshbarger, J.)

Syl. pt. - When a defendant presents evidence of police conduct amounting to entrapment, and the State fails to rebut that evidence or prove defendant's predisposition to commit the crime charged, a trial judge should direct a verdict for defendant as a matter of law.

Instructions

State v. Adkins, 280 S.E.2d 293 (1981) (Per Curiam)

Syl. pt. 1 Under his plea of not guilty, a defendant in a criminal case is entitled to have the jury consider under proper instructions, every theory of defense to which the evidence or the reasonable inferences to be drawn therefrom may entitle him. There is not need to treat the defense of entrapment as an exception requiring the application of a different rule.

In this case, entrapment was legitimate theory of defense which was supported by sufficient evidence to entitle the defendant to an instruction on the point.

"In a criminal case, even though the defendant denies the commission of the offense, he is still entitled to rely on the defense of entrapment if the State injects evidence of entrapment into the case." Syl. pt. 2, *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976).

Instructions (continued)

State v. Ashworth, 292 S.E.2d 615 (1982) (McHugh, J.)

Syl. pt. 2 - "When the defense of entrapment is asserted, the trial court is required to submit that issue to the jury if the evidence gives rise to questions regarding the readiness of the accused to commit the offense or the extent to which a government agent or informer either induced the accused to commit the crime or afforded him opportunity to commit the crime." Syl. pt. 3, *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976).

Probation revocation

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

See PROBATION REVOCATION Entrapment, (p. 710) for discussion of topic.

Test

State ex rel. Paxton v. Johnson, 245 S.E.2d 843 (1978) (Harshbarger, J.)

Syl. pt. 1 - "'Entrapment, as a defense to criminal prosecution, occurs where the design or inspiration for the offense originates with law enforcement officers who prosecute its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers.' Syllabus No. 3, *State v. Basham*, 223 S.E.2d 53 (W.Va. 1976)." Pt. 1, Syllabus, *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976).

Syl. pt. 2 - "When the defense of entrapment is asserted, the trial court is required to submit that issue to the jury if the evidence gives rise to questions regarding the readiness of the accused to commit the offense or the extent to which a government agent or informer either induced the accused to commit the crime or afforded him opportunity to commit the crime." Pt. 3, Syllabus, *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976).

Test (continued)

State ex rel. Paxton v. Johnson, (continued)

Syl. pt. 3 - "A trial court may find, as a matter of law, that a defendant was entrapped, if the evidence establishes, to such an extent that the minds of reasonable men could not differ, that the officer or agent conceived the plan and procured or directed its execution in such an unconscionable way that he could only be said to have created a crime for the purpose of making an arrest and obtaining a conviction." Pt. 4, Syllabus, *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976).

It is well established that both paid and unpaid informers are government agents if the act on behalf of the government in inducing the commission of a crime. See *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

State v. Ashworth, 292 S.E.2d 615 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 3, *State v. Basham*, 223 S.E.2d 53 (W.Va. 1976), see *State ex rel. Paxton v. Johnson*, 245 S.E.2d 843 (W.Va. 1978), cited above.

The test set forth in *State v. Hinkle*, 286 S.E.2d 699 (W.Va. 1982) requires overwhelming evidence that unconscionable government conduct induced the crime before conviction is prohibited as a matter of law. The government must pass this test before the subjective test, which analyzes the defendant's predisposition to commit a crime, will be used.

It is proper for police officers to afford opportunities for the commission of a crime without jeopardizing the possibility of prosecution.

Where police officer merely asked defendant if he knew where drugs could be acquired, this did not constitute unconscionable government conduct as a matter of law, thus the issue of entrapment was properly submitted to the jury pursuant to the subjective test set forth in *Hinkle*.

Test (continued)

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 3, *State v. Basham*, 223 S.E.2d 53 (W.Va. 1976), see *State ex rel. Paxton v. Johnson*, 245 S.E.2d 843 (W.Va. 1978), cited above.

Inclusion of the sentence, "conduct by a law enforcement officer or its agent merely affording the defendant an opportunity to commit a crime does not constitute entrapment" was not reversible error since it is consistent with the language of Supreme Court decisions.

Police officer who initially called appellant and was told to call back in a few days to obtain drugs and who subsequently purchased drugs in appellant's home, but from someone other than appellant "merely afforded an opportunity for the offense", thus appellant was not entrapped.

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

The critical test is whether the inspiration for the unlawful scheme originates with the police officers or with the accused. The defendant was asked three times by the undercover officer to sell her drugs before acquiescing. It was proper for police officers, in an investigation, to afford opportunities for the commission of a crime.

EQUAL PROTECTION

Good time

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

See GOOD TIME/REDUCTION OF SENTENCE In general, (p. 332) for discussion of topic.

Jury

Selection of petit jurors

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

See JURY Venire, (p. 551) for discussion of topic.

Juveniles

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

See JUVENILE Statutes, Constitutionality, (p. 586) for discussion of topic.

Paternity

J.M.S. v. H.A., 242 S.E.2d 696 (1978) (Caplan, C.J.)

See PATERNITY Visitation, (p. 673) for discussion of topic.

Rational basis

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

See GOOD TIME/REDUCTION OF SENTENCE In general, (p. 332) for discussion of topic.

EQUAL PROTECTION

Recidivist

Selective enforcement

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

See RECIDIVIST Cruel and unusual punishment, Selective enforcement, (p. 740) for discussion of topic.

Right to counsel

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

The right to appoint counsel in the case of indigency comes within the equal protection guarantee of *W.Va. Const.*, art. III, § 17.

Sentencing

Credit for time spent in jail

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

See SENTENCING Credit for time spent in jail/detention center, (p. 872) for discussion of topic.

ESCAPE

Disciplinary measures

Review

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

See PRISON CONDITIONS Disciplinary measures, Proportionality, (p. 693) for discussion of topic.

Punishment

State ex rel. Anderson v. Leverette, 253 S.E.2d 543 (1979) (Harshbarger, J.)

The offense of "escape" described in *W.Va. Code* 62-8-1 is punishable by confinement for an indeterminate term of not less than one nor more than five years after the term the convict is serving. *W.Va. Code* 62-8-2.

EVIDENCE

Accomplice

Admissions or confessions

State v. Adkins, 253 S.E.2d 146 (1979) (Neely, J.)

Syl. pt. 2 - Syl. pt. 1 of *State v. Price and Bruce*, 114 W.Va. 736, 174 S.E. 518 (1934) and syl. pt. 2 of *State v. Bennett*, 157 W.Va. 702, 203 S.E.2d 699 (W.Va. 1974) are expressly overruled because they are overbroad and in that regard incorrectly state the law. The proper rule concerning admissions and confessions of coconspirators in the trial of another conspirator is that the admission or confession of an accomplice standing alone, may not be introduced into evidence against another accomplice as an admission against interest; however, one accomplice may testify against another accomplice about the events surrounding the crime with which the defendant accomplice is charged, about the defendant accomplice's part in that crime, about events leading up to the formation of the conspiracy, and about the part the testifying accomplice played in the conspiracy, (including any incidental admissions) so long as the defendant accomplice has an opportunity to cross-examine the testifying accomplice and the testifying accomplice is called by the State for the purpose of giving detailed testimony and not for the purpose alone of demonstrating that the testifying accomplice has either confessed or pled guilty to participating in the crime with which the defendant accomplice charged.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

Applies standard set forth in Syl. pt. 2, *State v. Adkins*, *supra*, in part, cited above.

Accomplice (continued)

Conviction or guilty plea

State v. Caudill, 289 S.E.2d 748 (1982) (McHugh, J.)

Syl. pt. 3 - In a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the witness-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

State v. Ellis, 239 S.E.2d 670 (1977) (Neely, J.)

Syl. pt. 2 - Syllabus point 5 of *State v. Bennett*, 157 W.Va. 702, 203 S.E.2d 699 (W.Va. 1974) is overruled to the extent that it does not place within the trial court's discretion the question of whether appropriate jury instructions can cure the inadvertent admission into evidence of an alleged coconspirator's or accomplice's acknowledgment of his conviction of or plea of guilty to the same offense for which the defendant is being tried.

Syl. pt. 3 - It is a proper exercise of trial court discretion to deny a defendant's motion for mistrial, based on the mention at trial of the fact of an alleged coconspirator's or accomplice's conviction of or plea of guilty to the same offense for which the defendant is being tried, in circumstances where the trial's continuation will not result in actual prejudice to the defendant.

Here, even with appropriate instructions it was unlikely that the trial court could have satisfactorily overcome the confusion resulting from prosecution's deliberate introduction of inadmissible evidence and later attempts at clarification.

Accomplice (continued)

Conviction or guilty plea (continued)

State v. Wood, 280 S.E.2d 309 (1981) (Per Curiam)

The State may not introduce evidence of a conviction or guilty plea on the part of a coconspirator or accomplice to prove the guilt of a person subsequently put on trial for committing or participating in the same crime. Disclosure of a guilty plea by an accomplice followed by a timely objection and the court's prompt instructions to disregard the matter was not prejudicial.

Corroborated testimony

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

Syl. pt. 3- Where the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction. This rule applies even though the corroborative evidence falls short of constituting independent evidence which supports the alleged ultimate fact that the accused committed the offense charged.

Uncorroborated testimony

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

Conviction for a crime may be had upon the uncorroborated testimony of an accomplice, but in such case the testimony must be received with caution and the jury should, upon request, be so instructed . . . . Syl. pt. 1, *State v. Humphries*, 128 W.Va. 370, 36 S.E.2d 469 (1945).

Accomplice (continued)

Uncorroborated testimony (continued)

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

A criminal conviction can be obtained on the uncorroborated testimony of an accomplice. The defendant is entitled to an instruction that the uncorroborated testimony of a coconspirator should be received with great caution when such testimony has a tendency to inculpate the accused.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

Syl. pt. 1 - A criminal conviction can be obtained on the uncorroborated testimony of an accomplice.

Syl. pt. 2 - Where the accomplice's testimony is uncorroborated, a criminal defendant is entitled to a jury instruction that such testimony should be received with great caution.

Adverse spousal testimony

State v. Evans, 287 S.E.2d 922 (1982) (Neely, J.)

Under *W.Va. Code* § 57-3-3 (1923) the privilege against adverse spousal testimony may be claimed by either the witness/spouse or the defendant/ spouse). Absent a divorce decree entry, the spouse is still considered married and the statute against adverse spousal testimony applies.

Even if a divorce has occurred prior to trial, statements made during marriage are covered by the privilege. *W.Va. Code* § 57-3-4 (1923).

EVIDENCE

Age

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, J.)

See EVIDENCE Hearsay, Business entry, (p. 288) for discussion of topic.

Assertive conduct testimony

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

A police officer testified that at the preliminary hearing when the victim first saw the defendant, "he jumped up and started crying and got scared when he saw him." Testimony may ordinarily be admitted concerning the assertive conduct of a person if the meaning of such conduct is clear and is accompanied by circumstances which afford the conclusion that the conduct is spontaneous in nature.

Best evidence

Blamble v. Harsh, 260 S.E.2d 273 (1979) (Per Curiam)

Syl. pt. 1 - The best evidence rule ordinarily applies to preclude oral testimony where documentary evidence exists. It is not designed to preclude a jury's resolution of conflicting documentary evidence.

Chain of custody

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

Chain of custody requirements do not apply with the same force to nonfungible items which are unique and identifiable in themselves. The fingerprint cards with defendant's name, sex, and race, the signature of the attending officers, the date of the impressions, and the signature of the defendant himself, squarely fall into the category of evidence unique and independently identifiable. Furthermore, there was no suggestion of tampering or susceptibility of tampering, aside from the break in the chain of custody, a break which under the foregoing principle is irrelevant.

Chain of custody (continued)

State v. Beck, (continued)

Syl. pt. 6 - In a criminal trial, a relevant item of evidence may be admitted without the necessity of proving a complete chain of custody, if the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change. The trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition.

State v. Davis, 266 S.E.2d 909 (1980) (McGraw, J.)

To allow introduction of physical evidence into a criminal trial, it is not necessary that every moment from the time evidence comes into the possession of a law-enforcement agency until it is introduced at trial be accounted for by every person who could conceivably come in contact with the evidence during that period, nor is it necessary that every possibility of tampering he eliminated; it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.

Syl. pt. 1 - Before a physical object connected with a crime may properly be admitted in evidence, it must be shown that the object is in substantially the same condition as when the crime was committed. Factors to be considered in making this determination are: (1) the nature of the article; (2) the circumstances surrounding its preservation and custody, and (3) the likelihood of intermeddlers tampering with it.

Footnote 8 - "When an object or article has passed through several hands while being analyzed or examined before being produced in court, it is not possible to establish its identity by a single witness, but if a complete chain of evidence is established, tracing the possession of the object or article to the final custodian, it may be properly introduced in evidence." Syl. pt. 2, *State v. Charlot*, 157 W.Va. 994, 206 S.E.2d 908 (1974).

Chain of custody (continued)

State v. Davis, (continued)

In a prosecution for a drug-related offense, where guilt is primarily dependent upon proof that the substance involved is in fact what it is alleged to be, the chain of custody will ordinarily be sufficient if it traces the path of the exhibit through analysis.

State v. Harriston, 253 S.E.2d 685 (1979) (Harshbarger, J.)

The Court traces the custody of the marijuana and reaches the conclusion that the chain is adequately proved by the State. The only rationale for its conclusion is the citing of *State v. Johnson*, 157 W.Va. 34, 201 S.E.2d 309 (1973).

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Davis*, 266 S.E.2d 909 (W.Va. 1980), cited above. Applying the rule of this case, where the drug was stored in a police locker to which several police officers had access, the chain of custody was not broken and the drug was admissible at trial.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

The Court applied the standard set forth in syl. pt. 1, *State v. Davis*, 266 S.E.2d 909 (W.Va. 1980) to determine whether a sufficient chain of custody had been established by the State. The chain of custody in this case was clearly established through the point of chemical analysis, and it was mere speculation that the marijuana was tampered with between the time of chemical analysis and the defendant's trial.

State v. Risslser, 270 S.E.2d 778 (1980) (Caplan, J.)

A slight discrepancy in the testimony as to the chain of custody does not, standing alone, render evidence unreliable and therefore inadmissible.

Chain of custody (continued)

State v. Risslser, (continued)

Absent any issue of unreliability, the paramount consideration is whether the object sought to be admitted can be traced to the final custodial. Here the chain of custody to the final custodial was unbroken.

State v. Tomey, 259 S.E.2d 16 (1979) (Harshbarger, J.)

The Court applied the standard set forth in syl. pt. 2, *State v. Charlot*, 157 W.Va. 994, 206 S.E.2d 908 (1974) to the admissibility of a shoe which had changed hands several times from the time received until the time of trial. The standard is set out in *State v. Davis*, 266 S.E.2d 909 (W.Va. 1980) of this section.

Collateral crimes

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 3 - Where the accused is charged with being an accessory before the fact to the commission of a felony and the evidence tends to establish that the accused's solicitation of another to commit the principal offense is part of the pattern of criminal conduct devised by the accused and directed toward a particular individual or group of individuals, evidence that the accused procured in the same manner the commission of other crimes against such individual or group of individuals is relevant and admissible to show motive, intent and a common scheme.

Where the evidence of collateral crimes was necessary to explain the appellant's motive and intent to the jury, the admission at trial of such evidence was not error.

When the introduction of other evidence was not objected to at trial, it cannot be considered on appeal.

Collateral crimes (continued)

State v. Adams, 247 S.E.2d 475 (1978) (Harshbarger, J.)

"In a criminal trial, the State cannot introduce evidence, not connected with the crime for which the accused is being tried, for the purpose of showing his bad character, until the accused has first put his own character in issue by attempting to prove a previous good character. Point 1, syllabus, *State v. Graham*, 119 W.Va. 85, 191 S.E. 884." Point 5, syllabus, *State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973).

Evidence regarding defendant's behavior presented by the defendant's former jailer was equivalent to proof of a prior conviction and was, therefore, inadmissible.

State v. Adkins, 280 S.E.2d 293 (1981) (Per Curiam)

The State introduced evidence which showed the defendant had been involved in the sale of a controlled substance prior to the transaction for which he was charged, tending to show a common scheme or plan on the part of the defendant. The evidence of a single isolated sale of a controlled substance for which a person was not charged is not within the common scheme or plan exception. This exception requires that "[T]he commission of the two or more crimes [are] so related to each other that proof of one tends to establish the other."

State v. Barker, 281 S.E.2d 142 (1981) (Per Curiam)

The defendant stole a car and found a checkbook in the glove compartment. Ten days after the theft, a check was drawn on the account. In a trial for forgery, an issue was whether the collateral crime of a car theft could be introduced. Applying the principles set forth in *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) the evidence of the theft was admissible since it was relevant to show how appellant obtained possession of the checks that were forged and uttered.

Collateral crimes (continued)

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

Testimony in a rape case, that the defendant on a previous occasion had brandished a gun, used strong profanity, threatened to shoot a person, and impliedly admitted he had shot other persons was inadmissible under *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

State v. Caudill, 289 S.E.2d 748 (1982) (McHugh, J.)

Syl. pt. 1 - Evidence relating to a crime that a defendant is accused of committing, other than that charged in the indictment for which he is on trial, is not generally admissible to prove the offense for which the accused is on trial.

The introduction of the murders which were so interrelated with the robbery charged as to be "necessary to prove or explain the crime charged", was reversible error. The two murders occurred approximately 28 hours after the robbery and did not tend to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Evidence of other crimes brought out by the State on cross-examination of defendant and defendant's wife, if error, was harmless since there was no repetition of the question so as to unduly emphasize the matter with the jury, the State made no reference to any critical testimony of the defendant, the court found no other error which might give cumulative effect to the error, and the quality of the State's case rested on direct rather than circumstantial evidence.

Collateral crimes (continued)

State v. Compton, 277 S.E.2d 724 (1981) (Per Curiam)

Generally proof which tends to show that the defendant is guilty of another crime at another time, even though the crime is of the same nature as the one charged, is inadmissible for the purpose of showing the commission of the particular crime charged, unless the other crime is an element of or legally connected with the offense for which the defendant is on trial.

The *Thomas* standard used to determine if a trial court had abused its discretion, as set forth in *State v. Messer*, 277 S.E.2d 634 (W.Va. 1981) of this section, was applied in this case. The answer "I guess because he was spending his weekends in jail" was given by a defense witness and was not directly responsive to the prosecutor's question and even after the answer was given, the State did not pursue a line of questioning in connection with why the defendant was spending his weekends in jail. The answer was in general terms and the prosecutor made no mention of it in his closing argument. Therefore, refusing to declare a mistrial was not an abuse of discretion.

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

The attempted breaking and entering of one store was used in the prosecution of the defendant for breaking and entering another store. Applying the exceptions set forth in Syl. pt. 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) the Supreme Court ruled that the evidence was admissible since the objects that were stolen in the first breaking and entering were the tools utilized in the commission of the subsequent offense provided an explanation of the motive.

Since evidence of possession of the stolen goods stemmed from the discovery of the subsequent offense, evidence of the subsequent offense was admissible in that it tended to establish the commission of the first. The identification of the defendant arose from his participation in the second offense while in possession of the stolen goods from the first.

Collateral crimes (continued)

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

Syl. pt. 4 - "The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial." Syl. pt. 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The fourth exception combines two separate concepts. It embraces a situation where the defendant embarks on a plan to commit a series of similar crimes which are interrelated and where, in the proof of a particular crime, the evidence may also tend to establish a related crime with which the defendant has not been charged. Here, the involved checks were an essential link in the State's embezzlement case. That they might have formed an essential element of another crime, that of giving a worthless check, did not foreclose their admissibility.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

In a trial for possession of a controlled substance with intent to deliver, firearms were introduced which were found at the same time as the marijuana. Any evidence of another crime was, under *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), harmless beyond a reasonable doubt in light of the overwhelming weight of the other evidence, and the objection was waived by counsel's failure to make a timely assignment of reasons when specifically asked by the trial judge.

Collateral crimes (continued)

State v. Harman, 270 S.E.2d 146 (1980) (Miller, J.)

Syl. pt. 6 - Where cross-examination of a witness is directed at developing his bias or hostility against a party to the case, the party offering the witness is entitled to rehabilitate him. In this connection, the underlying reasons for the bias or hostility may be shown if the legitimately serve to rehabilitate the witness and are not simply used as a means of introducing inflammatory material into the case.

The Supreme Court was dealing with a matter outside the normal exceptions set out in Syl. pt. 12, *State v. Thomas*, recited in this outline under *State v. Frasher*, 265 S.E.2d 43 (W.Va. 1980).

Here, the trial court did not abuse its discretion in permitting the State's witness to explain on redirect examination the real reasons for her reporting the defendant to the police. The explanation offered by the witness did bring in evidence of a collateral crime, but the incident was not elaborated upon by the witness, nor was it subsequently emphasized by the State in its argument of the case.

State v. Harris, 272 S.E.2d 471 (1980) (Caplan, J.)

The collateral crimes rule condemns not only evidence of other offenses not independently relevant, but also questions, which, although negatively answered, carry with them the insinuation that the accused committed the other crimes. In this, indirect proof or a suggestion of such unrelated crimes by the prosecution or by witness remarks is equally improper for presentation before a jury.

The State's introduction on cross-examination of testimony relating to marijuana allegedly present in he defendant's house on August 27, 1975 had no legal connection to the crime charged in the indictment of unlawful delivery of marijuana in December, 1975.

Collateral crimes (continued)

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

The sole evidence of a collateral crime involved a question on cross-examination by the prosecutor to the defense witness concerning his smoking marijuana with the defendant on prior occasions. The court applied the *State v. Atkins*, 262 S.E.2d 55 (W.Va. 1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980), standards found in the Harmless error - nonconstitutional section of this outline, to determine if this admission was prejudicial. It was concluded that the introduction of this evidence viewed in the circumstances of this case was harmless.

State v. Headley, 282 S.E.2d 872 (1981) (Neely, J.)

In close cases, whether collateral crime is to be excluded or falls within one of the exceptions to exclusion could be decided by the trial court prior to introduction. The Court can then determine if the collateral crimes probative value is outweighed by the risk that admission will create substantial danger of undue prejudice to the defendant. The admission of testimony that the defendant had beaten the victim's mother several days prior to the homicide was too prejudicial to be admitted.

State v. Kennedy, 249 S.E.2d 188 (1978) (Neely, J.)

It is well settled that evidence tending to prove the accused committed offenses unrelated to the one before the Court is generally inadmissible. Indirect proof of a suggestion of such unrelated crimes by prosecution or witness remarks are equally improper for presentation before the jury. The reference by the prosecutor that the defendant was a "pro" and the Deputy Sheriff's testimony that the defendant practically fingerprinted himself were not, standing alone, sufficiently prejudicial to merit reversal.

Collateral crimes (continued)

State v. Messer, 277 S.E.2d 634 (1981) (Per Curiam)

Syl. pt. 2 - "In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to introduce evidence which is relevant and legally connected with the charge for which the accused is being tried." Syl. pt. 16, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

All told, nine of the State's fourteen witnesses testified about marijuana offenses separate and distinct from the specific offense charged in the indictment. Considering the totality of the circumstances, the collateral crime evidence was sufficiently prejudicial to constitute reversible error.

Time is a significant and important factor in determining whether other crime evidence is admissible. In a criminal case proof of another offense chargeable to the defendant is admissible to show motive or intent, if such other offenses is similar and near in point of time to, has come logical connection with, and tends to establish the commission of, the specific offense charged against the defendant, and indicates that such specific offense is part of a system of criminal action. Other crime evidence in this case involved offenses occurring several months before and subsequent to the indictment.

Trial courts are authorized to require advance disclosure by the State of evidence of collateral crimes in order that the Court can make a determination as to the probative value of such evidence and evaluate the danger of undue prejudice to the accused.

Collateral crimes (continued)

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

In prosecution for obtaining money by false pretense, testimony of witness concerning allegedly fraudulent transaction involving defendant and occurring abut one year prior to the transaction in question did not come within an exception to the rule that proof which shows or intends to show that the accused is guilty of the commission of other crimes and offenses at other times is admissible for the purpose the commission of the crime charged unless an element of or legally connected with the offense charged. The introduction of this evidence was not harmless error since the State placed emphasis on the inadmissible evil, there were numerous key factual conflicts which diminished the force of the State's case, and the overall probability of prejudice was too great to ignore.

State v. Nicholson, 252 S.E.2d 894 (1979) (Caplan, C.J.)

Where defendant was charged with being an accessory before the fact to the crime of breaking and entering, evidence of a prior attempt to break and enter in the same neighborhood only a few days prior to the crime charged was admissible since it tended to show plan, design, and a system of criminal action, and had some relevance to motive and intent.

Evidence of collateral offenses which are identical to the crime charged, are near in point in time and tend to show motive or intent or a system of criminal action on the part of the defendant may be admissible. Such evidence should be excluded, however, if the Court finds that its probative value is outweighed by the risk that its admission will create substantial danger of undue prejudice to the defendant.

When evidence of collateral crimes is introduced, the jury must be cautioned by proper instructions that such evidence is not to be considered as establishing guilt of the crime with which the defendant is charged.

The trial court should require the State to disclose in advance, *in camera*, any evidence of collateral crimes it intends to introduce at the trial.

Collateral crimes (continued)

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

The State indicted the defendant for criminal acts committed in July, 1978. At trial, the State introduced evidence to the effect that the defendant committed various criminal acts in June and July, 1978. A defendant shall be charged separately for each alleged crime "of the same or similar character." Consequently, if the State intended at trial to seek convictions of the defendant upon various marijuana violations in June or July, 1978, the State should have charged the defendant separately for each alleged violation. The State did not try to establish an exception to the inadmissibility of collateral crimes as set out in *State v. Frasher*, 265 S.E.2d 43 (W.Va. 1980) of this section. The numerous offenses the State attempted to establish unreasonably denied to the defendant an opportunity to prepare a defense.

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

Syl. pt. 4 - In a criminal case a motion to exclude evidence of collateral crimes, on the ground that the prejudicial effect of the evidence of such crimes outweighs its probative value, is addressed to the sound discretion of the trial court and its rulings will be upheld unless there is a clear showing that its discretion has been abused.

In a trial for being accessory before the fact to murder in the first degree, the State introduced evidence of the collateral and unrelated felony of participation in oral sex between the defendant and the person with whom he plotted to commit the murder. While it can be argued that the intensity of a strength of the motive, the argument is unconvincing, particularly the prejudicial effect of this testimony far outweighed any possible probative value. If the State had been able to demonstrate that this had any reasonable bearing upon the intensity of the emotional relationship and, therefore, upon the strength of the motive, it would have been admissible testimony.

Collateral crimes (continued)

State v. Spicer, 245 S.E.2d 922 (1978) (McGraw, J.)

Syl. pt. 1 - Other criminal act evidence admissible as part of the *res gestae* or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose.

Supreme Court reversed the conviction where trial was so permeated with evidence of criminal acts not charged in the indictment, and prosecutorial comments relating thereto, that the defendant was prejudiced and denied his fundamental right to a fair trial.

State v. Underwood, 281 S.E.2d 491 (1981) (Miller, J.)

Defendant was charged with growing or manufacturing marijuana. A small quantity of marijuana had been found in the defendant's wife's purse. The evidence was sought to be introduced against the defendant. The Court applied the standards set forth in syl. pt. 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, the marijuana could only be remotely viewed as tied to the cultivation of the marijuana plant. There was no testimony even linking the defendant to the other crime. Since the State's case on manufacturing was substantially circumstantial, the error was not harmless.

Collateral crimes (continued)

State v. Ward, 284 S.E.2d 881 (1981) (Per Curiam)

Defendant was charged with being an accessory before the fact to the crime of armed robbery. Evidence pertaining to instructions given by defendant on what to do with the safe after the robbery was claimed to be improperly allowed in as evidence of a collateral crime. The Court applied the standards set forth in syl. pt. 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) to the introduction of this evidence. The safe stolen during the robbery involved in this case unifies the series of crimes out of which the defendant's indictment grew. The evidence that the defendant directed the actions of the robbers after the robbery and that he attempted to open the safe tended to support the direct evidence that he planned the robbery. All crimes involved in the sequence of events are so related to each other that the evidence of each shows a common scheme, and the proof of one tends to establish the others.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

In a trial for unlawful assault, it was not an erroneous injection of other crime evidence to permit testimony of defendant's possible intoxication and assaults on persons other than the victim, when it was impossible for the State to isolate those events from the events connected with trial.

EVIDENCE

Comparative testimony

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

Syl. pt. 3 - It is not improper on cross-examination to direct a witness to specific previous testimony of another witness and ask the witness whether he agrees or disagrees with such testimony. It is objectionable on cross-examination to require a witness to state whether another witness' testimony is true or false, since this is the ultimate question that a jury must decide. The failure to sustain an objection to such improper questioning will not necessarily result in error unless the technique has been used so pervasively and abusively in the cross-examination as to substantially history the witness' testimony on critical trial issues.

State v. Kinney, 286 S.E.2d 398 (1982) (Per Curiam)

Applies standards set forth in syllabus point 3, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979) *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

In a trial for unlawful assault, it was not improper use of comparative testimony for the State to ask defendant on cross-examination whether victim and witness to the crime, whose testimony conflicted with er own, could be mistaken.

State v. Risslser, 270 S.E.2d 778 (1980) (Caplan, J.)

The prosecutor asked a series of questions to the effect of whether or not the defendant thought the testimony of previous witnesses, which was in conflict with his own testimony, was false. This technique, however, was not used to such an extent that it constituted reversible error under *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979). *Cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

Comparative testimony (continued)

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

When defendant was asked by prosecutor whether the testimony of opposing witnesses that conflicted with his won was "incorrect" error was not found.

Confessions

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT, (p. 830) for discussion of topic.

Corroboration

Accomplice

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

While one accomplice ordinarily may not corroborate another, an accomplice's wife usually may do so if she herself is not an accomplice.

Syl. pt. 3 - Where the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction. This rule applies even though the corroborative evidence falls short of constituting independent evidence which supports the alleged ultimate fact that the accused committed the offense charged.

See EVIDENCE Accomplice, Uncorroborated testimony, (p. 255) for discussion of topic.

Corroboration (continued)

Sexual assault

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

See SEXUAL ASSAULT Corroboration, (p. 886) for discussion of topic.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

See SEXUAL ASSAULT Corroboration, (p. 886) for discussion of topic.

Cross-examination

See WITNESSES Cross-examination, (p. 960) for discussion of topic.

Cumulative

State v. Duncan, 283 S.E.2d 855 (1981) (Per Curiam)

In a trial for second-degree murder, defendant claimed on appeal that the trial court erred in not permitting certain testimony regarding his self-defense claim. The Supreme Court found, however, that the testimony would have been cumulative and that the defendant had been allowed to fully develop the point.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

It was not reversible error for trial court to exclude evidence of fa specific instance of the victim's violent behavior since such evidence was cumulative.

EVIDENCE

Electronic surveillance

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

Warrantless electronic recording of a defendant's conversation with the consent of a participant to the conversation who, unknown to the defendant, is acting in concert with the police does not violate the prohibition against unreasonable searches and seizures contained in article 3, § 6 of our state constitution.

Evidence not disputed nor at variance

State ex rel. Canada v. Hatfield, 258 S.E.2d 440 (1979) (Per Curiam)

Evidence should be taken as true when it is not disputed in any material respect nor at variance with the facts or circumstances of the case.

Evidence of guilt of another

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

Syl. pt. 3 - A witness at a criminal trial may testify that he, the witness, and not the defendant was responsible for the crime in which the defendant is on trial.

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

Syl. pt. 5 - For evidence of the guilt of someone other that the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant.

The other person's testimony, in this case, would not have been inconsistent with defendant's guilt, since his admissions related to a different transaction that the one involved in the indictment.

Evidence of guilt of another (continued)

State v. Harman, 270 S.E.2d 146 (1980) (Miller, J.)

For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant.

In the situation where the defense is that someone else committed the crime, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Where the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error.

Here, a license plate number was the only identifying evidence from the scene of the crime. This license number was traced to a person other than the defendant, and one or more of the investigating officers had initially suspected this person of having committed the crime. This evidence was a direct link to someone other than the defendant as the perpetrator of the crime, and was therefore admissible.

Evidence of injury

State v. Sacco, 267 S.E.2d 193 (1980) (Per Curiam)

In a malicious or unlawful assault prosecution the State, if a casual connection is established, is entitled to introduce evidence of the injuries resulting from the assault. In the present case, the record contains medical evidence linking the assault to the victim's heart attack which occurred nine days after the assault. Thus the evidence of the heart attack was properly admitted.

Evidence of injuries resulting from an assault goes to the permanence of the injuries and need not be specified in the indictment.

Evidence of injury (continued)

State v. Scotchel, 285 S.E.2d 384 (1981) (Miller, J.)

Syl. pt. 5 - Under the malicious wounding statute, evidence of the extent of an injury is admissible since under the statute the State must show that the defendant inflicted the injury with an intent to produce a permanent disability or disfiguration.

A scar represents the present actual condition which is related to the issue of intent to cause permanent disability or disfigurement. It is unlike a gruesome photograph which depicts the initial and temporary extent of the wound. In the latter, the shock effect often outweighs the probative value of the evidence.

Exhibits

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

See JURY Deliberations, (p. 543) for discussion of topic.

State v. Kinney, 286 S.E.2d 398 (1982) (Per Curiam)

A bullet extracted from the victim was deemed by the Supreme Court not to be inflammatory, unlike the example of gruesome photographs in the other cases, and was therefore admissible.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

Seven rifles were introduced into evidence which were found inside the store. The investigating officers discovered a locked chain securing the rifle display rack had been forcibly removed and some rifles taken. A proper foundation was laid and the testimony surrounding their admission clearly and accurately portrays the circumstances in which they were found by the officers at the scene. The jury was not misled or prejudiced by the evidence.

EVIDENCE

Expert witness

See EVIDENCE Opinion, Expert witness, (p. 295) for discussion of topic.

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

Syl. pt. 1 - "In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with their theory of them; it is not essential that they should state them as they exist; but the hypothesis should be based on a state of facts, which the evidence in the cause tends to prove." Syl. pt. 7 *Long v. City of Weirton*, 214 S.E.2d 832 (1975) and syl. pt. 7, *Kerr v. Lunsford*, 31 W.Va. 659, 8 S.E. 493 (1888).

Expert's use of mathematical calculations, research, and investigative reports in formulating a hypothesis was not outside the scope of the hypothetical question put to him; therefore, the expert's testimony was admissible as evidence.

Cunningham v. Martin, 294 S.E.2d 264 (1982) (Harshbarger, J.)

Syl. pt. 1 - In civil and criminal cases an expert medical witness who has examined a party may base his testimony on records and documents kept in the regular course of professional care or treatment.

A psychiatrist, in a civil assault, battery, and statutory insult case, based part of his opinion about plaintiff's mental condition on hospital records kept in the ordinary course of business written by other professionals who had treated plaintiff. Because the psychiatrist had himself examined the plaintiff and was able to formulate his own opinions, the rulings of *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976) and *State v. Rhodes*, 274 S.E.2d 920 (W.Va. 1981), allowing such testimony in criminal cases, applied; thus admission of testimony into evidence was not error.

Expert witness (continued)

Middle-West Concrete v. General Insurance Co., 267 S.E.2d 742 (1980) (McGraw, J.)

The testimony of expert witnesses is not exclusive and the jury has the right to weigh the testimony of all witnesses, expert and otherwise.

Papenhaus v. Combs, 292 S.E.2d 621 (1982) (McHugh, J.)

"The testimony of expert witnesses on an issue is not exclusive, and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weigh the testimony of all witnesses, experts and otherwise; and the same rule applies as to the weight and credibility of such testimony." Syl. pt. 2, *Chesapeake & Ohio Railway Company*, 105 W.Va. 555, 144 S.E. 100 (1928).

State v. M.M, 256 S.E.2d 549 (1979) (McGraw, J.)

Syl. pt. 1 - Before a witness is qualified as an expert on the subject of juvenile rehabilitation, that witness must, through training, education or practical experience, possess significant skill and knowledge regarding the rehabilitation of juveniles.

The sheriff and trooper who testified on the chances of a juvenile's rehabilitation, neither possessed education, training nor experience in the field of juvenile rehabilitation.

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

The Supreme Court rule with regard to the scope of psychiatric testimony is a part of the general rule in regard to expert medical testimony which permits such experts to relate test results, the purpose of such tests, and the defendant's reaction to such tests.

Expert witness (continued)

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

[t]he testimony of expert witnesses is not exclusive and the jury has the right to weigh the testimony of all witnesses, experts and otherwise. Syl. pt. 2, *Webb v. Chesapeake & Ohio Railway Company* 105 W.Va. 555, 144 S.E. 100 (1928).

Failure to object

See APPEAL Failure to preserve for appeal, (p. 28) for discussion of topic.

Flight

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

Syl. pt. 6 - In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an *in camera* hearing to determine whether the probative value of such evidence outweighs its possible prejudicial erect.

Flight (continued)

State v. Payne, (continued)

The trial judge should measure the probative value of the evidence by considering whether the facts and circumstances under which the defendant fled indicate a guilty conscience or knowledge. The burden at such hearing is on the State. In considering whether the facts and circumstances of the case indicate a guilty conscience or knowledge, the trial judge should consider whether the defendant was aware of the charge pending against him at the time he fled; was aware that he was a suspect at the time he fled; or fled the scene of a crime under circumstances that would indicate a guilty conscience or knowledge; or otherwise fled under circumstances that would indicate a guilty conscience or knowledge.

In this case, no *in camera* hearing was held on the admission of flight evidence, so it cannot be determined whether such evidence was properly admissible.

Fruits of the poisonous tree

See SEARCH AND SEIZURE Warrant requirement, (p. 802) for discussion of topic.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

The juvenile petitioner and a friend were picked up for breaking and entering upon an anonymous tip given to police. Statements made by the children during their detention led police to realize that the anonymous tip had been given by petitioner's aunt. At a later adjudicatory hearing, the aunt gave the only evidence linking petitioner with the offense. The Supreme Court found that, as the statements made by the children during their detention were declared to be inadmissible (illegally obtained) the subsequent information from the aunt, who had overheard the petitioner and a friend discussing the act, was inadmissible, derivative evidence. The adjudication of delinquency based upon the breaking and entering was reversed and remanded since tainted evidence was improperly introduced.

EVIDENCE

Gruesome photographs

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

Syl. pt. 6 - In order for photographs to come withing our gruesome photograph rule established in *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979), there must be an initial finding that they are gruesome.

Where the trial court concluded as an initial finding that photographs depicting the interior of armed robbery victim's store showing blood stains against a dark wood counter were not gruesome, the *Rowe* rule was not involved.

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Photographs of the victim of a crime are not, *per se* inadmissible.

Gruesome photographs may be admissible where they are of essential evidentiary value to the State's case. Black and white photographs depicting the back of the victim and the entry point of the bullet causing victim to bleed to death, was not gruesome and therefore, it was not error to admit it into evidence.

State v. Clark, 292 S.E.2d 643 (1982) (McHugh, J.)

Applies standard set forth in syllabus point 1, *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979) cited below.

Syl. pt. 3 - Where several gruesome photographs are admitted in evidence with an objection being made only to the least gruesome of such photographs, and where defense counsel during closing argument specifically calls the jury's attention to the other gruesome photographs, which photographs were not objected to when admitted in evidence, this Court will not find the admission of the least gruesome photographs reversible error on the ground of prejudice.

Gruesome photographs (continued)

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

The Supreme Court, in this case, applied the *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979) standard for the determination of whether certain gruesome pictures were admissible. The standard is whether the State showed the pictures to be of essential evidentiary value to its case. The photograph depicted an extremely gruesome scent, and were not of essential evidentiary value. The most obvious reason for their inadmissibility is the fact that they do not depict the condition of the victims at the time of the offense some three months la ter, after they had decomposed. Not even under the pre-*Rowe* standard, which required the photographs accurately depict the victim's condition at the time of the commission of the crime and to be relevant to some issue in the case, were these photographs admissible. The photographs had no probative value and were clearly gruesome and their introduction created reversible error.

State v. Haddox, 276 S.E.2d 788 (1981) (Per Curiam)

The three photographs contested depicted the puncture wounds of victim's body. Applying the *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979) these photographs were not gruesome because they did not depict excessive blood and gore, in fact there was no display of blood but only the puncture wounds. They were not magnified photographs nor did the depict contorted facial expressions. They did not depict the body after autopsy. Since the photographs were not gruesome, the State did not need to demonstrate that they were essential evidentiary value, which is required if photographs are gruesome. It was sufficient for their admission that they had probative value. Each of these photographs related directly to an corroborated some piece of testimonial evidence material to the State's case and consequently there was no error in their admission.

Gruesome photographs (continued)

State v. Headley, 282 S.E.2d 872 (1981) (Neely, J.)

Applying the *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979), that is, whether the photographs are essential to the State's case to a degree which outweighs the risk of prejudice caused by their gruesome appearance, the pictures were admissible. The defendant's defense was not that he had not hit the child at all, but that he had not hit the child very hard. Given that defense, evidence of the extent of the child's injuries was central to the proof of the State's case. It should also be noted that the photographs were black and white, and were, therefore, considerably less gruesome than they would have been in color.

State v. Rowe, 259 S.E.2d 26 (1979) (Harshbarger, J.)

Syl. pt. 1 - Gruesome photographs are not *per se* inadmissible, but they must have something more than probative value, because by the preliminary finding that they are gruesome, they are presumed to have a prejudicial and inflammatory effect on a jury against a defendant. The State must show that they are of essential evidentiary value to its case.

Photographs of a victim are admissible if they are relevant. They may not be admissible if they are revolting or gruesome because their impact may unduly prejudice or inflame a jury. The depiction must be of such a gruesome nature or be cast in such an unfair light that it would tend to cloud an objective assessment of the guilt or innocence of the defendant. By the preliminary finding that the pictures are gruesome, they are presumed to have a prejudicial and inflammatory effect on a jury against a defendant. In order for the State to introduce such photographs it must show that they are of essential evidentiary value to its case.

While rulings about admissibility of photographs must be made when they are offered by the State, such rulings may be changed if a defendant's evidence controverts facts about which the photographs are relevant, making introduction of the photographs in rebuttal, essential to the State's proof.

Gruesome photographs (continued)

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

See EVIDENCE Photographs, (p. 301) for discussion of topic.

State v. Saunders, 275 S.E.2d 920 (1981) (Harshbarger, J.)

Applying the *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979) standard for admission of gruesome photographs, the Supreme Court held the gruesome photographs, in this case, of the victim were inflammatory and should not have been admitted, in that nothing in case or briefs indicated that photographs were essential to the prosecution; there was uncontraverted medical testimony about the cause of death and the body's mutilation, only issue was identity of the killer, yet photographs provided no clue for identifying the assailant, and photographs served no purpose other to inflame the jury.

Handwriting

State v. Barker, 289 S.E.2d 207 (1982) (Per Curiam)

W.Va. Code § 57-2-1 (1923) required that samples written for comparison purposes to be taken under the supervision of a judge.

Footnote 2 - This section has since been changed to eliminate the requirement of judicial supervision of handwriting samples taken for comparison purposes.

State v. Riley, 287 S.E.2d 502 (1982) (Harshbarger, J.)

After the defendant became a suspect in a forgery case, the police obtained writing samples from him while he was in custody on other charges. The handwriting samples obtained expressly for comparison were incorrectly admitted here because they were not obtained under the direct supervision of a judge. Supervision of a judge was required by a provision in *W.Va. Code* § 57-2-1 (1923) (since amended to exclude this provision.)

EVIDENCE

Hearsay

In general

State v. Fraley, 258 S.E.2d 129 (1979) (Harshbarger, J.)

As a probation condition, the defendant was required to make restitution to three named victims. The probation officer testified at the revocation hearing that the victims told him no restitution had been made. This was impermissible hearsay testimony denying defendant the right to confrontation guaranteed under Syllabus Point 12, *Louk v. Haynes*, 223 S.E.2d 780 (W.Va. 1976).

The harmless nonconstitutional error standard is used to determine the extent of harm unless all the evidence offered is hearsay in nature. Then, the standard is the constitutional harmless error standard.

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

The questions directed to the witness involved hearsay statements, since they involved out-of-court admissions made by a third party to the witness and were offered in evidence to prove the truth of the matter asserted and would not be admissible.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 2, *State v. Greenlief*, 285 S.E.2d 391 (W.Va. 1981), cited below.

Evidence presented was not hearsay because it was not offered to prove the truth of the matters asserted, but only to show that such statements were made and affected the defendant's state of mind.

Hearsay (continued)

In general (continued)

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

Syl. pt. 2 - Where it becomes relevant to show that a certain statement was made, regardless of the truth or falsity of the statement or declaration itself, such proof is not hearsay and should be admitted.

The error, if any, which resulted from the trial court's admission of hearsay was cured later placing on the stand the secretary about whom the remarks in the objected to statement were made. The secretary testified first-hand to substantially the same conversation that the other witness had reported.

A witness testified as to a conversation with the victim's six year old sister in which the young child answered that she was upset because her uncle, the defendant, had beaten her. The trial court explained very carefully that the testimony was not admitted for the truth of the matter asserted, that is, it had no bearing on the guilt or innocence of the accused, but was admitted for the purpose of showing what the witness did, the Supreme Court found this testimony was not offered for the truth of the matter asserted, and was thus not hearsay. The principle upon which this finding was based is: "Where it becomes relevant to show that a certain statement or declaration was made, regardless of the truth or falsity of the statement or declaration itself, such proof is not hearsay and should be admitted. It is evidence of what, in some books, is termed a 'verbal truth'." Syllabus Point 4, *State v. Corbin*, 117 W.Va. 241, 186 S.E.2d 179 (1936).

Third party testimony as to an out-of-court identification

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

In a robbery by violence trial, it was not error for the court to admit the testimony of state troopers regarding pre-trial identification by two witnesses when the witnesses testified at trial that they had made a pre-trial identification of the defendant and the witnesses were cross-examined. The trooper's testimony was not hearsay, but original evidence corroborative of the identifier's testimony.

Hearsay (continued)

Third party testimony as to an out-of-court identification (continued)

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

Since both the victim and the police officer were witnesses at the trial, the officer's statements as to the victim's reaction on seeing the appellant at the preliminary hearing were admissible.

Hearsay - exceptions

In general

State v. Williams, 249 S.E.2d 752 (1978) (Neely, J.)

If any statement is clearly unreliable hearsay it is not admissible even though it falls within a specific exception since all exceptions to hearsay are based on the assumption that something about their form or the circumstances surrounding their utterance clothe them with sufficient indicia of reliability to counter the presumption that all hearsay is inherently unreliable. The recognized exceptions are only presumed to be reliable.

Assertive conduct

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

Syl. pt. 5 - Testimony may ordinarily be admitted concerning the assertive conduct of a person if the meaning of such conduct is clear and is accompanied by circumstances which afford the conclusion that the conduct is spontaneous in nature.

A police officer testified that at the preliminary hearing when the victim first saw the defendant, "he jumped up and started crying and got scared." Here, the excited nature of the conduct also affords an analogy to the spontaneous declaration exception to the hearsay rule.

Hearsay - exceptions (continued)

Business entry

Hill v. Joseph T. Ryerson & Sons, Inc., 268 S.E.2d 296 (1980) (Miller, J.)

Syl. pt. 7 - Where, in the course of a business enterprise, systematic record keeping and product labeling are routinely conducted as part of the business methods of the enterprise, the records and product identification fall within the business record exception to the hearsay rule.

Syl. pt. 8 - An employee who is knowledgeable as to the record keeping and product identification process can testify to that process and thus lay the foundation for the admission into evidence of a properly marked or labeled product. The fact that the product has passed into the hands of a consumer or user will not defeat its admissibility as a business record.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

The defendant's age was shown by information obtained from him at the time he was booked. The defendant's claim is that a birth certificate was needed but the information contained in the booking sheet qualified as a business entry.

Declaration against penal interest

State v. Williams, 249 S.E.2d 752 (1978) (Neely, J.)

Syl. pt. 2 - Hearsay evidence which is against the penal interest of the extra judicial declarant is admissible even though it does not fall within a recognized West Virginia exception to the hearsay rule if it possesses sufficient indicia of reliability to satisfy the court that it is trustworthy in accordance with the following rule: A statement has circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general pur-

Hearsay - exceptions (continued)

Declaration against penal interest (continued)

State v. Williams, (continued)

poses of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

In determining whether to allow such statements into evidence the trial court should consider any possible self-interest for the declarant to make the statement, the presence of any evidence tending to corroborate the truth of the statement, and any other factors bearing on the reliability of the evidence proffered.

Dying declarations

State v. Young, 273 S.E.2d 592 (1980) (McGraw, J.)

Syl. pt. 3 - What is required for a dying declaration to be admissible is that the declarant have such a belief that he is facing death as to remove ordinary worldly motives for misstatement. In that regard, the court may consider the totality of the circumstances of motive to falsify and the manner in which the statement was volunteered or elicited.

Syl. pt. 4 - The law pertaining to the admissibility of dying declarations does not require that one in extremis abandon all hope in fatalistic resignation but rater, requires that one believe that he is moving across the inevitable threshold into eternity.

Where there is legal evidence to support the trial court's ruling that the victim was conscious of impending death, the ruling will not be disturbed on review unless clearly wrong.

Hearsay - exceptions (continued)

Former testimony

State v. Goff, 289 S.E.2d 467 (1982) (Per Curiam)

Sworn testimony taken from a former trial or proceeding is admissible if there is: (1) an inability to obtain the testimony of the witness; (2) an opportunity to cross-examine the witness in the former proceeding, and (3) a substantial identity of the parties and the issues.

"Where defendant had been once tried upon a criminal charge, and subsequent to such trial a witness who testified in defendant's behalf disappeared through no fault of defendant, and, although diligently sought by defendant, could not be found so as to testify at a later trial of defendant upon the same charge, the testimony of such witness given at the former trial is properly admissible." Syl. pt. 4, *State v. Sauls*, 97 W.Va. 184, 124 S.E. 670 (1924).

Here, there was a complete identity of parties and issues. The witness testified at an earlier trial at which he would have been subject to cross-examination. The defendant was diligent in his effort to secure the attendance of the missing witness and the testimony of the witness was material to the defendant's defense. Since the testimony was admissible it was reversible error to exclude the testimony.

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

The well-settled rule in West Virginia is that sworn testimony taken from a former trial or proceeding is admissible if there is: (1) an inability to obtain the testimony of the witness; (2) an opportunity to cross-examine the witness in the former proceeding; and, (3) a substantial identity of the parties and the issues.

Where the witness is unavailable by reason of death or insanity or where the witness is beyond the scope of state process or where the whereabouts of the witness are unknown and cannot be discovered by diligent search or where the witness cannot remember, the prior testimony of the witness is admissible in subsequent proceeding.

Hearsay - exceptions (continued)

Former testimony (continued)

State v. R.H., (continued)

Where the prior testimony is sought to be introduced on the ground that the witness' whereabouts are unknown, such evidence is not admissible unless it is shown that diligent efforts to secure the attendance of the witness were unsuccessfully made.

The only evidence that the witness was unavailable was the unsworn statement of the prosecuting attorney regarding an officer's attempt to secure her presence on the morning of the hearing. The officer knocked on her door for ten to fifteen minutes without receiving a response. The Supreme Court found that this did not constitute a diligent search and the State did not lay a proper foundation for the introduction of the witness's previous testimony.

Spontaneous declarations

Bowman v. Barnes, 282 S.E.2d 613 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 2, *State v. Young*, 273 S.E.2d 592 (W.Va. 1980), cited below.

Here, the statement was not spontaneous since it was not the product of a "spontaneous or instinctive utterance of thought", but was a response to a police investigation and was taken down in writing. Consequently, the statement appears to be a "product of premeditation, reflection or design." Moreover, the approximate 45 minute interval in time between the accident but the taking of the statement clearly suggests it was the result of some deliberation and not spontaneous.

Hearsay - exceptions (continued)

Spontaneous declarations (continued)

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

Defendant complained that one of the prosecutor's witnesses testified that shortly after the incident, the victim stated she had been raped. Where the victim's statement was spontaneous and a part of the *res gestae*, it was admissible.

State v. Young, 273 S.E.2d 592 (1980) (McGraw, J.)

Spontaneous exclamations are admitted into evidence as an exception to the hearsay rule on the assumption that a person stimulated by the immediacy of an exciting act and acting under the influence of that act will lack the reflective capacity essential for fabrication.

Syl. pt. 2 - An alleged spontaneous declaration must be evaluated in light of the following factors: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Interrogation alone does not exclude a reply from the *res gestae* but the question should not prompt the answer.

The test for determining whether evidence is part of the *res gestae* is spontaneity, not contemporaneity.

EVIDENCE

Hostile witness

See WITNESSES Hostile, (p. 963) for discussion of topic.

Identification

See WITNESSES Hostile, (p. 963) for discussion of topic.

Immaterial

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.).

In prosecution for obtaining money by false pretense, evidence introduced regarding the physical health of the victims should have been excluded since the evidence had no relation to the crime with which the defendant was charged and was introduced solely to create sympathy for the victim and prejudice the jury against the accused.

State v. Romine, 272 S.E.2d 680 (1980) (Caplan, J.)

In a trial for burglary and rape, the Supreme Court commented that certain State exhibits were not connected with the crime charged and should not have been admitted. "Unless there is some connection between the tendered evidence and the crime charged, the evidence should be refused."

Impeachment

See WITNESSES Impeachment, (p. 963) for discussion of topic.

Infants

See WITNESSES Children, (p. 956) for discussion of topic.

EVIDENCE

Insanity

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

See INSANITY Evidence, Scope of psychiatric testimony, (p. 470) for discussion of topic.

Intent or motive

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

Syl. pt. 4 - A witness in a criminal or civil trial may testify as to his own motive or intent whenever his intent or motive is in issue.

In a murder case, where the sole defense was insanity, it was error for trial court to prevent defendant from testifying regarding her intent to kill the victim, she should have been allowed to state what her intentions were.

Juvenile fingerprints

State v. Van Isler, 283 S.E.2d 836 (1981) (McHugh, J.)

Syl. pt. 2 - The use of a juvenile fingerprint card, or testimony derived from it, as evidence in a criminal trial of the person fingerprinted after that person has become an adult is reversible error because such use of records is not permitted by *W.Va. Code*, 49-5-17 (1978).

Opinion

Expert witness

See EVIDENCE Expert witness, (p. 277) for discussion of topic.

Opinion (continued)

Expert witness (continued)

State v. D.W.C., 256 S.E.2d 894 (1979) (Miller, J.)

Generally, hypothetical questions put to experts which are based on incorrect factual assumptions are improper.

Because the psychiatrist was asked to assume, contrary to his tests and diagnosis, that the juvenile had an active personality and, upon this assumption, to offer an opinion as to his rehabilitative prospects, that opinion was not based in a correct factual premise.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

"In case of homicide caused, in a physical struggle, by strangulation, according to expert and uncontradicted testimony, it is competent for a physician, who at the autopsy conducted by him on the body of deceased shortly after death observed a bruise or scratch on the face of accused, then present, to express, upon the trial, the opinion that such wound was a fresh break in the skin, had fresh blood in it, and was caused by a finger nail." *State v. Gunnoe*, 74 W.Va. 741, 83 S.E. 64 (1914), Syllabus Point 1.

State v. M.M., 256 S.E.2d 549 (1979) (McGraw, J.)

Whether a witness is qualified to express an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused. It was an abuse of discretion to allow a sheriff and trooper to testify as experts on the subject of juvenile rehabilitation, because they neither possessed education, training, nor experience in the field.

Opinion (continued)

Expert witness (continued)

State v. Mitter, 285 S.E.2d 376 (1981) (Miller, J.)

"Opinion evidence of competent experts may be properly called for when the questions presented are of such a nature that persons generally would not be as competent to pass judgment thereon as such experts." Syllabus Point 5, *Norfolk & Western Railway Co. v. Christian*, 83 W.Va. 701, 99 S.E. 13 (1919).

"Expert opinion evidence concerning a matter as to which the jury are as competent to form an accurate opinion as the witness, is inadmissible." Syllabus Point 7 of *Lawrence's Adm'r v. Hyde*, 77 W.Va. 639, 88 S.E. 45 (1916). This rule is based on the general premises that to permit such testimony invades the province of the jury which is the ultimate fact finder. To permit experts to give opinion testimony on the ultimate issue of criminal intent would only serve to unduly confuse and complicate the trial of criminal cases. Such issues are matters which the average juror can understand from the facts surrounding the defendant's conduct at the time the crime was committed based on his own common sense view of human affairs.

The present case, the term "sexual gratification", which is a required element of sexual abuse, is a subjective state of mind similar to the criminal intent required in other crimes. The general rule is the expert opinion cannot be offered as to the subjective intent of an individual.

Nonexpert witness

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

Syl. pt. 2 - "Whether a witness is qualified to state an opinion is a matter which rests within the sound discretion of the trial court and its ruling will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Syllabus point 5, *Jordan v. Bero*, 210 S.E.2d 618 (W.Va. 1974).

Opinion (continued)

Nonexpert witness (continued)

Bennett v. Walton, (continued)

The qualifications of the witness and the foundation of his conclusions are factors determinative of whether or not police officer's opinion should be admitted into evidence and of whether the trial court abuses its discretion in so allowing.

Admitting into evidence police officer's opinion as to the orientation of vehicles involved in crash at time of impact was not an abuse of discretion since under the circumstances the opinion was unobjectionable, relevant and competent.

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Syl. pt. 3 - As a general rule, a person who possesses no special expertise is not qualified to give an opinion in a drug-related case that the substance in question is a prohibited substance.

Here, witness was not asked if he had any detailed knowledge of the physical appearance of marijuana or if he had examined the substance that was allegedly in the cigarette to see if it resembled marijuana. There was a complete absence of any objective factors or any special familiarity with the substance that would give any accuracy to his testimony. The witnesses' testimony was inadmissible.

State v. M.M., 256 S.E.2d 549 (1979) (McGraw, J.)

The opinion of a witness who is not an expert may be given in evidence if he has some peculiar knowledge or more knowledge concerning the subject of opinion that juror are ordinarily expected to have.

EVIDENCE

Original evidence

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

In a robbery by violence trial, it was not error for the court to admit the testimony of a state trooper regarding pre-trial identification by two witnesses when the witnesses testified at trial that they had made a pre-trial identification of the defendant and the witnesses were cross examined. The trooper's testimony was not hearsay but original evidence corroborative of the identifiers' testimony.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

In order to establish his state of mind and his motive for carrying a loaded weapon on the night of the homicide, the defendant testified as to what his brother told him about the character of the victim and the number and type of weapons the victim had at his house.

The evidence the defendant presented is clearly admissible as original evidence. "Where it becomes relevant to show that a certain statement was made, regardless of the truth or falsity of the statement or declaration itself, such proof is not hearsay and should be admitted." Syllabus pt. 2 in part, *State v. Greenlief*, 285 S.E.2d 391 (W.Va. 1981).

Photographs

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *Thrasher v. Amere Gas Utilities Co.*, 138 W.Va. 166, 75 S.E.2d 376 (1953), *Appealed dismissed*, 347 U.S. 910, 74 S.Ct. 478, 98 L.Ed. 1067 (1954). See *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978), cited below.

Admission of photographs taken by defense witnesses depicting the accident and vehicles involved was not abuse of trial court's discretion.

Photographs (continued)

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

"As a general rule photographs of persons, things, and places, when duly verified and shown by intrinsic evidence to be faithful representations of the objects they purport to portray, are admissible in evidence as aids to the jury in understanding the evidence; and whether a particular photograph or groups of photographs should be admitted in evidence rests in the sound discretion of the trial court and its ruling on the question of the admissibility of such has been abused." Syl. pt. 1, *Thrasher v. Amere Gas Utilities Co.*, 138 W.Va. 166, 75 S.E.2d 376 (1953), appealed dismissed, 347 U.S. 910, 74 S.Ct. 478, 98 L.Ed. 1067 (1954).

West Virginia has not adopted the silent witness theory for admissibility of photographs. Under the "pictorial testimony theory", it was error for the trial court not to admit the defendant's proffered photograph of himself. Here, the defendant laid the necessary foundation and attempted to sponsor the photo as a substitute or supplement to his verbal evidence regarding his appearance.

Under the pictorial testimony theory, the photographer who took the picture need not testify to qualify the picture for admissibility.

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

"While photographs may, as a general rule be introduced in evidence to depict scenes material to some issue therein, whether a particular photograph, or groups of photographs, should be admitted in evidence, rests in the sound discretion of the trial court, and its rulings thereon will be upheld unless there is a clear showing that its discretion has been abused." Syllabus pt. 4, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946).

The photographs in the present action tastefully and professionally portray the external injuries of the victim. A review of the record without the photographs brings into question the size, location, and number of bruises suffered by the victim; the photographs answer this question quite well. It is thus clear that the probative value of these photographs outweighs any prejudice alleged by the defendant.

Photographs (continued)

State v. Haddox, 276 S.E.2d 788 (1981) (Per Curiam)

Since the three contested photographs are not gruesome, the state does not need to demonstrate that they are of essential evidentiary value, which is s required if photographs are gruesome. It is sufficient for their admission that they have probative value. Each of these photographs, showing the puncture wounds of the victim, relate directly to and corroborations some piece of testimonial evidence material to the state's case and consequently there is not error in their admission.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

Syl. pt. 3 - To be admissible, photographs must be offered for some relevant purpose and must have probative value which outweighs any prejudicial effect; however, admission of a photograph is a matter largely within the discretion of a trial court and will not be reversed absent a clear showing of abuse of that discretion.

In a trial for sexual assault, it was not error for the trial court to admit photographs of the defendant's appearance at the time of the offense, as introduction is within the discretion of the trial judge. It was stated, however, that introduction of the photographs which showed defendant with long hair and an unkept appearance, while appeared in court in a different guise, was irrelevant and prejudicial, since there was no issue of identification raised and introduction was for the purpose of adding credence to testimony regarding the bizarre nature of the defendant's apartment and his conduct, aimed at exacerbating the prejudices of the jury.

Photographs (continued)

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

The rule in West Virginia is that the introduction of photographs is a matter that is controlled very largely by the discretion of the trial judge and that is particularly true when the objection to their admission rests solely upon their unduly influencing the minds of the jury to the prejudice of the accused. In this case the photographs were introduced for the legitimate purpose of emphasizing the seriousness of the crime and their admission was not error.

Polygraph

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Syl. pt. 2 - Polygraph test results are not admissible in evidence in a criminal trial in this State.

Despite the assertion of the scientific nature of the polygraph test, much depends on the subjective analysis of the test results by its operator. No scientific test conventionally admitted by the courts carries such a high degree of interpretive subjectivity.

Possession of stolen property

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

See BREAKING AND ENTERING Lesser included offense, (p. 91) for discussion of topic.

EVIDENCE

Prior convictions

In general

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

The prosecutor may ask abut prior convictions on cross-examination when their admission has already been elicited by defendant's counsel on direct examination.

Impeachment of character or reputation

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

Applies standard set forth in Syl. pt. 2, *State v. McAboy*, 236 S.E.2d 431 (W.Va. 1977), cited below.

State v. McAboy, 236 S.E.2d 431 (1977) (Miller, J.)

Syl. pt. 2 - Where a defendant elects to place his good character and reputation in issue at a criminal trial, prior convictions may then be introduced to impeach character and reputation.

Impeachment of credibility

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

It was error for the State to impeach the defendant on cross-examination by questioning him in connection with his two prior criminal convictions. But, in viewing the verdict of second degree murder against the backdrop of all the evidence, this error didn't have any prejudicial impact on the verdict. A prosecutor acts at his peril in bringing in evidence of prior convictions, and the case will be reversed unless a clear showing can be made that it meets the stringent harmless error standard set out in this case.

Prior convictions (continued)

Impeachment of credibility (continued)

State v. Baker, 267 S.E.2d 458 (1980) (Per Curiam)

Applies standard set forth in Syl. pt. 1, *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977), cited below.

Ruling in Syl. pt. 1, *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977) applies to all cases that were in the trial stage or in the appellant process on the date it was decided and which had specifically preserved this point.

Before trial, the judge told the defendant if he testified on his own behalf the judge would probably allow the defendant to be cross examined for impeachment purposes as to any prior convictions. This was reversible error.

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

"In the trial of a criminal case, a defendant who elects to testify may have his credibility impeached by showing prior convictions of perjury or false swearing, but it is impermissible to impeach his credibility through any other prior convictions." Syl. pt. 1, *State v. McAboy*, 236 S.E.2d 431 (W.Va. 1977).

This ruling applies to all pending cases where the error was preserved on appeal.

In trial for grand larceny, introduction of evidence of a prior conviction for unarmed robbery in the same county five years earlier was prejudicial and reversible error.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

Applies standard set forth in Syl. pt. 1, *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977), cited below.

Prior convictions (continued)

Impeachment of credibility (continued)

State v. Green, (continued)

Syl. pt. 3 - A grossly erroneous misstatement by counsel or court about the areas of conduct or criminal record that a defendant can be cross examined about if he elects to testify in his behalf, which misstatement may be reasonably considered to have deterred him from testifying, is reversible error.

State v. McAboy, 236 S.E.2d 431 (1977) (Miller, J.)

Syl. pt. 1 - In the trial of a criminal case, a defendant who elects to testify may have his credibility impeached by showing prior convictions of perjury or false swearing, but it is impermissible to impeach his credibility through any other prior convictions.

As to witnesses, the rule is that it rests within the sound discretion of the trial court whether a prior conviction may be shown to impeach his credibility. *State v. Justice*, 135 W.Va. 852, 65 S.E.2d 743 (1951).

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

Syl. pt. 2 - "A defendant in a criminal case is entitled to testify in his own behalf and so long as he does not place his character and reputation in issue, he is entitled to assurance by the court that no prior conviction, save convictions for perjury or false swearing, would be revealed on cross examination."

In a case for first degree murder, the trial judge denied the defendant's motion that, in the event defendant took the stand in his own behalf, the State would not be allowed on cross examination to disclose the defendant's prior criminal record. As *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977) was handed down during the appeal of this case and defendant had preserved the point for appeal, it was reversible error for the trial court to deny the motion.

Prior convictions (continued)

Impeachment of credibility (continued)

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 1, *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977), cited above.

Applies standards set forth in Syl. pt. 2, *State v. McKinney*, 244 S.E.2d 808 (W.Va. 1978), cited above.

Where the threatened use of prior criminal conviction on cross-examination prevented the defendant from taking the stand in his own behalf, reversible error was found.

State v. Sacco, 267 S.E.2d 193 (1980) (Per Curiam)

Applies standard set forth in Syl. pt. 1, *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977), cited above.

The trial court committed error in this case by allowing prosecutor, over defendant's objections, to impeach the defendant through evidence of prior convictions for offenses other than perjury or false swearing.

State v. Toppings, 272 S.E.2d 463 (1980) (Per Curiam)

Applies standard set forth in Syl. pt. 1, *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977), cited above.

McAboy's central point was that evidence of a prior conviction creates a prejudicial inference in the jury's mind. Here the defendant was impeached by a conviction for the same or substantially the same offense as the felony for which he was on trial. There is an obvious and special danger of prejudice present when the impeaching conviction is for the same offense on trial because of the increased risk that the jury will consider the evidence on the substantive question of guilt or innocence rather than just as effecting his credibility. The admission of this evidence was reversible error.

EVIDENCE

Rebuttal

State v. Ward, 284 S.E.2d 881 (1981) (Per Curiam)

Whether the state in a criminal proceeding may introduce further evidence after a defendant has rested his case is a matter within the sound discretion of the trial court, and the exercise of that discretion will rarely be cause for reversal. From an examination of the record it was apparent the witness' testimony was offered to contradict the defendant's statement that he had nothing to do with the planning of the robbery, a legitimate function of rebuttal.

Relevant

Prejudicial

State v. Headley, 282 S.E.2d 872 (1981) (Neely, J.)

See EVIDENCE Collateral crimes, (p. 265) for discussion of topic.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

See EVIDENCE Flight, (p. 279) for discussion of topic.

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

The fact that evidence is prejudicial is not grounds by itself for exclusion, but if the prejudice caused by the evidence outweighs the probative value of the evidence, it should be excluded.

A shirt, seized pursuant to a valid search warrant, was properly admitted as evidence even though its admission may have had prejudicial effect.

Relevant (continued)

Prejudicial (continued)

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellant court unless it appears that such action amounts to an abuse of discretion." Syl. pt. 5, *Casto v. Martin*, 230 S.E.2d 722 (W.Va. 1976), citing syl. pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

The introduction of drug paraphernalia and homegrown marijuana owned by the state's witness was prejudicial error and constituted an abuse of discretion.

In determining if evidence should be allowed in, a balancing test is used weighing the prejudicial effect of evidence against its probative value. In this case, the prejudicial effect of the State's witness' paraphernalia and marijuana clearly outweighed the probative value of such exhibits.

Remote

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Syl. pt. 6 - As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.

There may be instances where the evidence is so remote in time as to be inadmissible, but the decision on remoteness as precluding the admissibility of evidence is generally for the trial court to determine in the exercise of its sound discretion.

"[a]n abuse of discretion is more likely to result from excluding, rather than admitting, evidence that is relevant but which is remote in point of time, place and circumstances, and that the better practice is to admit whatever matters are relevant and leave the question of their weight to the jury, unless the court can clearly see that they are too remote to be material." *Yuncke v. Welker*, 128 W.Va. 299, 365 S.E.2d 410 (1945).

Relevant (continued)

Remote (continued)

State v. Gwinn, (continued)

In prosecution for homicide, State's evidence that appellant's son asked witness three to four hours before the shooting to "move" because he "had to talk to his dad" was relevant on the issue of premeditation and was properly admitted at trial.

Reputation

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Defense counsel's questions regarding the defendant's reputation for truth and veracity, and for being a law-abiding citizen were proper, however, defense counsel's question "would you believe [the defendant] under oath" called for a personal opinion and was improper.

Prosecutor's hypothetical question of reputation of witness called for a personal opinion and was improper.

Since the defendant asked each of his character witnesses their personal opinion regarding his character, the trial court properly permitted the prosecution to cross-examine the witnesses with regard to that opinion. Although question propounded by the prosecution went to the witnesses' opinions of the appellant as a law-abiding citizen, whereas the question asked in direct examination pertained to the witnesses' opinions regarding the appellant's believability under oath, the Supreme Court found that this was too fine a distinction upon which to predicate a claim of reversible error since both inquiries focused on the witnesses' opinions of appellant's character and since the error was mitigated by the fact that only two of the defendant's eleven character witnesses indicated that their opinion would change in response to the prosecution's question.

When a defendant places his character in issue by way of opinion evidence, the credibility of the character witness can be tested by referring to certain things he should have heard that would indicate that the conclusion was incorrect or not sustained.

EVIDENCE

Res gestae

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

Syl. pt. 3 - Events, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae*.

The evidence of prior wounding admitted in this case fall into the *res gestae*. The statement by the victim's son that, "I could hear Mom grunting every time he would hit her." and Dr. Pisano's, a forensic pathologist, gave testimony that there were multiple fresh contusions and abrasions on the victim's body.

"In case of homicide caused, in a physical struggle, by strangulation, according to expert and uncontradicted testimony, it is competent for a physician, who at the autopsy conducted by him on the body of deceased shortly after death observed a bruise or scratch on the face of the accused, then present, to express, upon the trial, the opinion that such wound was a fresh break in the skin, had fresh blood in it, and was caused by a fingernail." Syl. pt. 1, *State v. Gunnoe*, 74 W.Va. 741, 83 S.E. 64 (1914).

Scientific tests

In general

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

See EVIDENCE Polygraph, (p. 301) for discussion of topic.

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

Scientific tests that are relevant to some issue may be admitted into evidence. There must, however, be general acceptance of the scientific principle which underlies the test. Some tests have been widely used over a long period of time, such that their general acceptance in the scientific community can be judicially noticed. Where the scientific test cannot be judicially noticed, its reliability must be demonstrated before the expert can testify concerning the test.

Scientific tests (continued)

In general (continued)

State v. Clawson, (continued)

Beyond the initial issue of the accuracy and reliability of the scientific test is the question of whether accepted test procedures were followed by qualified personnel lin making the test.

Syl. pt. 9 - The necessary foundation before the admission of results of any test are: (1) That the testing device or equipment was in proper working order; (2) that the person giving and interpreting the test was properly qualified; (3) that the test was properly conducted; and (4) that there was compliance with any statutory requirements.

One of the significant problems in the present case is that at no time was the expert asked to describe how comparison characteristics of hair are scientifically determined.

The trial court confronted with this problem should require some *in camera* disclosure of the test results and methodology in order to make an initial determination of whether the expert's testimony should be admitted.

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

The following foundation must be laid before test results are admissible: "1- That the testing device or equipment was in proper working order; 2- that the person giving and interpreting the test was properly qualified; 3- that the test was properly conducted; 4- that there was compliance with any statutory requirements." *State v. Hood*, 155 W.Va. 337, 184 S.E.2d 334 (1971).

While the record revealed that there was no adequate foundation for the opinion that the substance was marijuana, no objection was made to the testimony by defense counsel and consequently the point could not serve as a ground of error on appeal.

Scientific tests (continued)

Blood tests

State v. Keeton, 272 S.E.2d 817 (1980) (Neely, J.)

The breathalyzer test was improperly administered because the officer had not complied with all the requirements of *State v. Hood*, *supra*. But where the defendant seeks to introduce such evidence on his own behalf there is no comparable requirement for strict compliance with the *Hood* test. The breathalyzer test, of course, would be subject to attack by the State because the test was improperly administered.

Independent analysis

State v. Barker, 289 S.E.2d 207 (1982) (Per Curiam)

Where the State has physical evidence that is crucial to the issue of defendant's guilt and that must be subjected to scientific analysis to assist in determining the defendant's guilt, the defendant has the right to have that evidence independently analyzed. *State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973).

Self-incrimination

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT, (p. 830) for discussion of topic.

Sexual conduct

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

Syl. pt. 7 - Evidence regarding sexual predilections or conduct is not admissible at trial unless it is clearly relevant.

Such evidence may be relevant if character is in issue. Such evidence may also be relevant to show bias or interest on the part of a witness during cross-examination.

Sexual conduct (continued)

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

Prior to the enactment in 1976 of *W.Va. Code* § 61-8B-12(b) the reputation of the alleged victim as to chastity before the alleged rape was admissible on the issue of consent in a prosecution for forcible rape.

Footnote 1 - In any prosecution under *W.Va. Code* § 61-8B-12(b) evidence of specific instances of the victim's sexual conduct with persons other that the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, that such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his previous sexual conduct an issue in the trial by introducing evidence with respect there.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

See SEXUAL ASSAULT Constitutionality of sentence, (p. 885) for discussion of topic.

State v. McCormick, 290 S.E.2d 894 (1981) (Per Curiam)

It is reversible error to allow the State to inject the subject of homosexuality into a trial when it is irrelevant and unrelated to the charge against the accused. Annot. 54 A.L.R.3rd 897 § 3(a) (1974).

In this case, the prosecution did not unduly emphasize homosexuality, but touched on it only in the context in which it had been raised by the defendant.

"An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. pt. 2, *State v. Compton*, 277 S.E.2d 724 (W.Va. 1981), quoting syl. pt. 2, *State v. Bowman* 155 W.Va. 562, 184 S.E.2d 314 (1971).

Sexual conduct (continued)

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

An *in camera* hearing is the appropriate procedure to determine whether evidence of a victim's past sexual behavior is relevant and material to an accused' consent defense.

State of mind

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

In some circumstances certain evidence of prior actions and offenses of the victim is admissible in support of a plea of self-defense to a homicide charge to show the defendant's state of mind.

In an appeal from a trial for second degree murder, the record did not fully disclose proof regarding prior actions and offenses of the victim that would have supported the assignment of error. The Supreme Court was unable to ascertain exactly what the rejected evidence was or what it would have proved, and was unable to conclude whether the trial court's rejection of the evidence was proper or if the rejection was improper what possible prejudice might have resulted to defendant.

State v. Dozier, 255 S.E.2d 552 (1979) (McGraw, J.)

In trial for murder where defendant claimed self-defense, defendant would be entitled to elicit testimony about the prior physical beatings she received from the victim so that the jury could fully evaluate and consider defendant's mental state at the time of the commission of the offense.

State of mind (continued)

State v. Gangwer, 283 S.E.2d 839 (1981) (Miller, J.)

Declarations as to the mental state of persons may be admissible where a particular state of mind or emotion is at issue or to show the basis for the subsequent acts of the declarant or in some instances to show memory or belief of a previous happening. However, in the present case, the facts sought to be presented, *i.e.*, the family illness and death, do not represent a declaration that involves the mental state of the defendant at the time of the homicide. The family tragedies were not only remote in time from the homicide but too attenuated to the issues of intent, premeditation and malice.

Sufficiency

See SUFFICIENCY OF EVIDENCE (p. 914) for discussion of topic.

Threats by accused

State v. Young, 273 S.E.2d 592 (1980) (McGraw, J.)

"As a general rule, an expressed intent of an accused to kill a certain person is not pertinent on this trial for killing another, but it may become pertinent and admissible under circumstances showing a connection between the threat and subsequent conduct of the accused . . . ." Syl. pt. 2, (in part) *State v. Corey*, 114 W.Va. 118, 171 S.E. 114 (1933).

It was error for the trial court to admit evidence of a threat made by the accused to another other than the victim of the homicide since the threat was unconnected to the principal event and whatever probative value existed in the testimony was outweighed by its inflammatory and prejudicial effect.

EVIDENCE

Victim - character and reputation

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

As a general rule, evidence of the character or reputation of a deceased victim in a homicide case is inadmissible. However, an exception is made to the general rule in West Virginia where the defendant relies on self-defense.

Normally, evidence of a deceased victim's violent character must be presented in the form of reputation evidence. There are certain situations, however, where prior specific acts of violence on the part of the deceased victim may be shown.

Where the specific acts of violence are so connected with the facts and circumstances surrounding the homicide as to be part of the *res gestae*, such specific acts are admissible, or where the prior specific acts of violence are directed at the defendant, they are admissible.

"In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was at the time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character r reputation of the deceased as a dangerous and quarrelsome man, and also to have prior attacks made by the deceased upon him, as well as threats made to other parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof." Syllabus Point 1, *State v. Hardin*, 91 W.Va. 149, 112 S.E. 401 (1922).

It was not reversible error for trial court to exclude evidence of a specific instance of the victim's violent behavior since such evidence was cumulative.

Wiretapping

See EVIDENCE Electronic surveillance, (p. 274) for discussion of topic.

EX POST FACTO

In general

Adkins v. Bordenkircher, 262 S.E.2d 885 (1980) (Miller, J.)

"[An *ex post facto* law is] any law which was passed after the commission of the offense for which the party is being tried . . . when it inflicts a greater punishment than the law annexed or which alters the situation of the accused to his disadvantage; and . . . no one can be criminally punished in this by the sovereign authority before the imputed offense was committed . . . ." *Ex parte Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890).

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

Both state and federal constitutions prohibit the enactment of *ex post facto* laws by the states. On their face, these provisions prohibit only the enactment of retroactive legislation and do not apply to judicial action. Recent U.S. Supreme Court holdings have noted that even though the *ex post facto* clause is not directed at judicial actions, the *ex post facto* principle is based on a fundamental concept of the constitutional liberty embodied in the due process clause of the fifth and fourteenth amendments. Therefore, due process places a limitation on retroactive judicial applications of statutory enactments which precludes courts from effecting a result which the legislature is barred from achieving by the *ex post facto* clause.

Good time/Reduction of sentence

Adkins v. Bordenkircher, 262 S.E.2d 885 (1980) (Miller, J.)

See GOOD TIME/REDUCTION OF SENTENCE *Ex post facto*, (p. 333) for discussion of topic.

EX POST FACTO

Procedural changes

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

Mere procedural changes which affect only the mode of trial or the rules of evidence and which do not work to the substantial disadvantage of an accused are not customarily held to be within the *ex post facto* prohibition. However, procedural changes can be *ex post facto* depending on their effect on the accused.

Retroactive application of a new punishment which operates to the detriment or material disadvantage of the wrongdoer is within the *ex post facto* prohibition. Therefore, the distinction between those procedural changes which are prohibited by the *ex post facto* principle and those which may be applied retroactively appears to be based on the effect of the alteration on the substantive rights of the accused.

Because statutory changes which for other purposes are characterized as procedural may affect substantive rights of persons accused of crimes or charged with delinquency, a determination of whether those alterations may be applied retroactively must be based upon a particularized inquiry where the changes affects substantive rights of the accused or the juvenile.

Syl. pt. 2 - The 1978 amendments to *W.Va. Code* § 49-5-1 *et seq.* Respecting juvenile proceedings were not intended to apply retroactively to control proceedings which arose from the alleged commission of a criminal act at a time the 1977 Act was in effect.

Statutes

Juvenile

Gibson v. Bechtold, 245 S.E.2d 258 (1978) (McGraw, J.)

See JUVENILE In general, (p. 553) for discussion of topic.

EX POST FACTO

Variance between indictment and proof

State v. Adkins, 289 S.E.2d 720 (1982) (McHugh, J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 22) for discussion of topic.

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

State v. Perry, 284 S.E.2d 861 (1981) (Per Curiam)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 23) for discussion of topic.

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 23) for discussion of topic.

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

EXTRADITION

Competency

State ex rel. Jones v. Warmuth, 272 S.E.2d 446 (1980) (Miller, J.)

Syl. pt. - In an extradition proceeding in order to give meaning to a fugitive's right to test the legality of his arrest on the issue of his identity and presence in the demanding state at the time the crime was allegedly committed, and to give meaning to his right to have legal counsel, it is essential to due process under Article III, Section 10 of the West Virginia Constitution that such person has sufficient mental competency to understand the proceeding and to consult with and assist his counsel in such proceeding.

The trial court need only find that from a preponderance of the evidence the fugitive is competent to consult with counsel since this issue is analogous to the preliminary pretrial finding where insanity is raised in a criminal case. *State ex rel. Williams v. Narick*, 264 S.E.2d 851 (W.Va. 1980).

Constitutional and statutory provisions

Moore v. Whyte, 266 S.E.2d 137 (1980) (Harshbarger, J.)

West Virginia is a party to the Interstate Agreement on Detainers, *W.Va. Code* § 62-14-1. A party state to the Agreement is presumed to know its terms and must comply with it. Article IV(c), of the Agreement requires that a prisoner's trial commence within 120 days of his arrival in the state, unless good cause for a continuance is shown in open court. If art. IV(c) requires the court to dismiss the charge with prejudice. This remedy, dismissal with prejudice, is also provided in art. IV(e) if the state returns the prisoner to the jurisdiction of his original confinement without having tried him. The Interstate Agreement on Detainers rules are not triggered until a detainer is lodged.

Constitutional and statutory provisions (continued)

Moore v. Whyte, (continued)

The State, in this case, lodged a detainer and made a written request for temporary custody of the defendant which activated art. IV and V. Therefore, West Virginia was obliged to try the defendant within 120 days of his arrival, and not return him before he was tried; or it would forfeit its right to try him at all under the indictment. The defendant was kept in this state for nearly two months and returned. This violates art. IV(e). In addition, art. IV(c) was violated because no good cause motion for a continuance was made within 120 days of his arrival. This state by failing to comply must dismiss the charges against the defendant.

Syl. pt. 2 - A writ of habeas corpus *ad prosequendum* is a "written request for tempore custody" under the Agreement on Detainers.

State ex rel. Gonzales v. Wilt, 256 S.E.2d 15 (1979) (Caplan, C.J.)

A governor's grant of extradition is *prima facie* evidence that the constitutional and statutory requirements have been met.

State v. Fender, 268 S.E.2d 120 (1980) (Per Curiam)

Where the state has obtained custody of an accused through the procedure established by the "Agreement on Detainers", *W.Va. Code* § 62-14-1 (1971), trial must be commenced within one hundred twenty days after the prisoner returns to the state, unless a continuance is granted for good cause shown in open court with the accused or his attorney present in court. *Moore v. Whyte*, 266 S.E.2d 137 (W.Va. 1980).

Wooten v. Hatfield, 287 S.E.2d 516 (1982) (Per Curiam)

By the terms of *W.Va. Code* § 5-1-9(a), which establishes the applicable legal procedures when a person is arrested on a governor's warrant, the appellants were entitled to a habeas corpus hearing to challenge the governor's rendition warrant and it was error to have deprived them of that right.

Constitutional and statutory provisions (continued)

Wooten v. Hatfield, (continued)

Furthermore, "[a] habeas corpus proceeding is the only method by which the validity of an extradition warrant issued by the Governor may be tested and the custody by virtue of such warrant may be questioned." Syl. pt. 2, *In re Heck*, 122 W.Va. 175, 7 S.E.2d 866 (1940). The trial court should have considered the hearing as a civil proceeding in habeas corpus.

Fifth amendment protections

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

The fifth amendment privilege against self-incrimination extends not only to those questions which if answered, would in themselves support a conviction, but also to those disclosures that might furnish a link in the chain of evidence or lead to evidence which would be used in the criminal prosecution. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

An extradition proceeding carries with it a sufficient penalty to cause evidence bearing on the issues arising at such hearing to come within the purview of the Fifth Amendment privilege against self-incrimination.

In this case, an admission by the witness of the prior felony conviction goes to his identity as the person who violated parole on the original felony which will be a key issue in the extradition proceeding.

Footnote 5 - *W.Va. Const.*, art. III, § 5 provides at least a coequal coverage in regard to the privilege against self-incrimination.

Habeas corpus

Lott v. Bechtold, 289 S.E.2d 210 (1982) (Per Curiam)

The burden is on the accused of conclusively establishing his absence from the demanding state by clear and convincing proof. *State ex rel. Blake v. Doeppe*, 97 W.Va. 203, 124 S.E. 667 (1924).

Habeas corpus (continued)

Lott v. Bechtold, (continued)

"The courts of this state, on writ of habeas corpus, may ascertain, by proper evidence, if a person who has been arrested for extradition is a fugitive from the justice of the demanding state. If he be not a 'fugitive from justice,' within the meaning of section 2 of article 4 of the Constitution of the United States, he will be discharged from custody." Syl. pt. 1, *State ex rel. Blake v. Doeppe*, 97 W.Va. 203, 124 S.E. 667 (1924).

"To be a 'fugitive from justice,' it is necessary that the person charged as such must have been actually present in the demanding state at the time of the commission of the crime, or, having been there, has then committed some overt act in furtherance of the crime subsequently consummated, and has departed to another jurisdiction. And, if the evidence be clear and convincing that the accused was not personally in the demanding state at the time of the commission of the offense charged, and has committed no prior overt act therein indicative of an intent to commit the crime, or which can be construed as a step in the furtherance of the crime afterwards consummated, he should be discharged." Syl. pt. 2, *State ex rel. Blake v. Doeppe*, 97 W.Va. 203, 124 S.E. 667 (1924).

It is uniformly held that where the evidence is merely conflicting as to the defendant's fugitive status, he is not entitled to discharge in habeas corpus after being apprehended pursuant to an extradition proceeding. *South Carolina v. Bailey*, 289 U.S. 412, 53 S.Ct. 667, 77 L.Ed. 1292 (1933).

State ex rel. Gonzales v. Wilt, 256 S.E.2d 15 (1979) (Caplan, C.J.)

Syl. pt. 2 - The issuance of a warrant by the Governor of the asylum state, regular on its face, makes a *prima facie* case for extradition; however, if the accused presents evidence that he is not the person named in the warrant, the issue of identity is raised and the burden is upon the state to prove identity.

Habeas corpus (continued)

State ex rel. Gonzales v. Wilt, (continued)

"In habeas corpus proceeding instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in the proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers." Syl. pt. 2, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971).

In this case the issue of identity had been raised because the defendant denied he was the person named in the warrant and denied having any of the identifying makings of the person named in the indictment. The burden of proving identity then shifted to the State and the State, not having offered any evidence to refute the evidence of the defendant failed to sufficiently prove the identity of the person named in the warrant.

Wooton v. Hatfield, 287 S.E.2d 516 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971). See *Gonzales* cited above.

"A habeas corpus proceeding is the only method by which the validity of an extradition warrant issued by the Governor may be tested and the custody by virtue of such warrant may be questioned." Syl. pt. 2, *In re Heck*, 122 W.Va. 175, 7 S.E.2d 866 (1940).

EXTRADITION

Procurement of out-of-state defendant

State v. Fender, 268 S.E.2d 120 (1980) (Per Curiam)

There are three methods by which the State may attempt to secure the presence of a defendant who is incarcerated out of state. One method is provided by *W.Va. Code* § 62-14-1 (1979) *et seq.*, the "Agreement on Detainers." Article IV of the agreement provides a mechanism whereby West Virginia prosecutor, who has lodged a detainer against an accused confined in a foreign state subscribing to the "agreement" may procure temporary custody of him for the purpose of providing him a trial.

Another method for obtaining for trial the temporary custody of an out-of-state accused is by the common law writ of habeas corpus *ad prosequendum W.Va. Code* § 5-1-7 (1937), the State extradition law, establishes a third means whereby State authorities may obtain custody of an out-of-state accused for the purpose of affording him a trial.

Right to counsel

State v. Mollohan, 272 S.E.2d 454 (1980) (Neely, C.J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 857) for discussion of topic.

Three-term rule

State v. Fender, 268 S.E.2d 120 (1980) (Per Curiam)

"Three-term Rule", *W.Va. Code* § 62-3-21 (1959) imposes a duty on the State to exercise reasonable diligence to procure temporary custody of an out-of-state accused for the purpose of offering him a speedy trial once his out-of-state whereabouts become known. The failure of the State so to act will cause the terms during which the accused was in out-of-state custody to be chargeable against the State. *State ex rel. Boso v. Warmuth*, 270 S.E.2d 631 (W.Va. 1980). *Boso* established that if the defendant flights the State's attempt to return him for trial he may not claim that the State has failed to act with reasonable diligence.

Three-term rule (continued)

State v. Fender, (continued)

In computing the three term rule the term in which the indictment is returned does not count. *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961).

"Any term at which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three terms in favor of discharge from prosecution under the provision of Code 62-3-21 as amended." Syl. pt. 2, *State ex rel. Spadafore v. Fox*, 155 W.Va. 674, 186 S.E.2d 833 (1972). The defendant's attorney sought and obtained a continuance; therefore, this term is not counted against the state.

The "Three-term Statute" is clear that the failure to appear in court according to a recognizance bond once free from out-of-state confinement tolls the terms between release and appearance.

FAILURE TO OBJECT

See APPEAL Failure to preserve for appeal, (p. 28) for discussion of topic.

FALSE RETURN OF VOTES

Indictment

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

When the State attempts to convict an individual upon proof of a crime which is not charged in the indictment, there is a material variance between the allegation and the proof and the conviction must fail.

Under *W.Va. Code* § 3-9-1, the elements of the offense which the State must allege in the indictment and prove at trial in order to sustain a conviction on the charge of making a false return are 1- the return of the result of the votes cast for a candidate at an election must have been false; 2- such false return must have been made or caused or conspired to have been made by a commissioner of election or a poll clerk; and 3- such official must have known the return to have been false. The manner in which the making of a false return may be accomplished is not specified in the statute, nor need it be alleged by the State in the indictment.

Syl. pt. 1 - An election official indicted upon a charge of knowingly making a false return of the result of the votes cast for a candidate in an election in violation of *W.Va. Code* § 3-9-1 (1979 Replacement Vol.) may be convicted of such offense upon proof by the State that such election official fraudulently, illegally, or deceitfully caused votes to be entered upon a ballot for a candidate for whom the voter did not intend or desire to vote.

Here, the State introduced evidence to prove every essential element of the crime with which the appellants were charged in accordance with the allegations in the indictment and with the bill of particulars, and the jury was entitled to find the appellants guilty of the crime charged in reliance upon the instructions of the trial court.

FORFEITURE OF PROPERTY

See DUE PROCESS Forfeiture of property, (p. 234) for discussion of topic.

State ex rel. White v. Melton, 273 S.E.2d 81 (1980) (Harshbarger, J.)

A warrant authorized a search of the defendant's parents' home for controlled substance and two marked twenty dollar bills. The amount of $12,587 was found, but none of the bills corresponded to the marked currency. Under *W.Va. Code* §§ 62-1A-6 and 62-1A-7 the defendant's parents petitioned for return of the money.

The West Virginia Constitution requires that a warrant describe with particularity the thing to be seized. The parents' constitutional rights were violated by the unreasonable seizure of their money without a warrant, and they are entitled to its immediate return as provided in *U.S. Const.*, Amend. IV made applicable through amend. XIV and *W.Va. Const.* art. III, § 6.

State v. 25 Slot Machines, 256 S.E.2d 595 (1979) (Harshbarger, J.)

See GAMBLING Forfeiture of gambling devices, (p. 331) for discussion of topic.

State v. Konchesky, 272 S.E.2d 452 (1980) (Caplan, J.)

In the absence of allegations and proof of title, legal or equitable any action to recover property must fail. *Swope v. Pageton* Pocahontas Coal Co., 129 W.Va. 813, 41 S.E.2d 691 (1947).

"A person who has knowingly paid money in pursuance of an illegal executed contract may not maintain an action for the money . . ." *Aikman v. City of Wheeling*, 120 W.Va. 46, 195 S.E. 667 (1938). Though this case does not involve a contract, this principle is applicable to the effect that neither the briber nor the bribee may recover the money involved in an unsuccessful attempt to bribe.

State v. Konchesky, (continued)

"Under the modern rule, which is supported by the weight of authority, one cannot maintain an action to recover money paid or property transferred to another person for the purpose of bribing him." *Anno.*, *Bribe - Recovery by Briber*, 60 A.L.R. 2d 1273 at 1274.

FORGERY

Double jeopardy

State v. Riley, 287 S.E.2d 502 (1982) (Harshbarger, J.)

See DOUBLE JEOPARDY Forgery, (p. 205) for discussion of topic.

Evidence

Handwriting

State v. Barker, 289 S.E.2d 207 (1982) (Per Curiam)

See EVIDENCE Handwriting, (p. 284) for discussion of topic.

State v. Riley, 287 S.E.2d 502 (1982) (Harshbarger, J.)

See EVIDENCE Handwriting, (p. 284) for discussion of topic.

GAMBLING

Forfeiture of gambling devices

State v. 25 Slot Machines, 256 S.E.2d 595 (1979) (Harshbarger, J.)

Gambling devices cannot be summarily destroyed unless they are being used for gambling purposes; but the statute makes them *prima facie* illegal because of their inherent nature. Because the slot machines in question are specifically named under the statute as gambling devices they are "subject to forfeiture unless the person named in the information or claiming an interest in the property shows cause why they should not be so forfeited." *State v. Doe*, 227 Iowa 1215, 290 N.W. 518 (1940).

Gambling devices under Code § 61-10-1 are not *per se* illegal. The affidavits by which warrants were issued authorizing seizure established their use for gambling and they therefore are *prima facie* contraband.

The circuit court has jurisdiction to order destruction, but notice must be given to those in whose possession the machines were found, and hearing given them if they appear and claim ownership. The slot machines were being kept or exhibited innocently, not for gambling purposes.

GOOD TIME/REDUCTION OF SENTENCE

In general

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

When the legislature did not intend that the statute *W.Va. Code* § 28-5-28 providing for good time credit to those classes of prisoners who displayed good conduct to be retroactive, it was argued that if the statute were not retroactive, prisoners incarcerated after July 1, 1977, would be denied equal protection of the law. The Court indicated that since "good time credit" was not a fundamental right the legislative decision not to make it retroactive need not be based upon a compelling state interest, the credit was, rather, legislatively created right and deed be tested only by whether it had a rational basis.

Syl. pt. 9 - The Legislature's decision to adopt new and different standards which cannot be applied to prior conduct for awarding of good time credit, provides a sufficient rational basis to uphold the prospective application of *W.Va. Code*, 28-5-28, against a claim that it violates the Equal Protection Clause of the State and Federal Constitutions.

Under *W.Va. Code*, 28-5-28 (1977) two classes of prisoners are entitled to receive good time credit based upon conduct, obedience, and initiative. Effective July 1, 1977, the statute is not retroactive. The statute provides that reductions earned during the month are not credited until the end of the month.

Since the purpose of the statute, *W.Va. Code*, § 28-5-28 (1977) is "to encourage prison discipline", those prisoners who have been paroled are not entitled to its benefit.

Syl. pt. 8 - Commutation of time for good conduct is a right created by the Legislature. It is not recognized as a fundamental right or a part of a constitutional freedom. Consequently, the Legislature's decision to allow good time credit to be awarded under *W.Va. Code* 28-5-28, only after July 1, 1977, need only be tested by whether it has a rational basis under the Equal Protection Clause of the Federal and West Virginia Constitutions.

Those portions of *W.Va. Code* § 28-5-28 (1977) which provide for the classification of prisoners and the reduction of sentence as determined by good time credit, are mandatory and do not violate art. VI, § 1 of the West Virginia Constitution, since the guidelines for implementation are adequate.

GOOD TIME/REDUCTION OF SENTENCE

In general (continued)

Woods v. Whyte, 247 S.E.2d 830 (1978) (Neely, J.)

Under *W.Va. Code*, § 28-5-27 (1923) and 28-5-27a (1951) there are two types of good time available: (1) Law-Allowable Good Time, *W.Va. Code*, § 28-5-27 (1923). This authorizes as much as 10 days per month for inmates who have not violated any prison rules in a given month. (2) Warden's Good Time, *W.Va. Code*, § 28-5-27a (1951). This authorizes the warden to grant additional good time at his discretion which he appears to have set at 4 ½ days per month.

County jails

State ex rel. Gillespie v. Kendrick, 265 S.E.2d 537 (1980) (Harshbarger, J.)

Syl. pt. 1 - County jail prisoners have the statutory right to good time credits and it is mandatory that they be granted their credits if they "faithfully comply with all rules and regulations." Code § 7-8-11 (1963).

Syl. pt. 3 - a county jail prisoner will be presumed to have conducted himself well and will be entitled to the good time credit established unless he has a recorded history of misconduct.

Ex post facto

Adkins v. Bordenkircher, 262 S.E.2d 885 (1980) (Miller, J.)

In the present case, the potential sentences of some of the petitioners were, in effect, lengthened through the application to them of the less beneficial terms of the new good time statute.

Syl. pt. 2 - In order to avoid *ex post facto* principles, *W.Va. Code* 28-5-28 (1977) must be construed to apply to those persons who committed offenses after May 1, 1978, and those individuals presently incarcerated in State penal institutions for crimes committed prior to May 1, 1978, are entitled to good time credit as calculated under *W.Va. Code* 28-5-27 (1931).

Ex post facto (continued)

Adkins v. Bordenkircher, (continued)

Footnote 7: Persons returned on parole violations are entitled to good time credit under the old statute, *W.Va. Code* § 28-5-27 (1931) if the date of the commission of the offense of the returned parolee was before May 1, 1978.

Parole

Woods v. Whyte, 247 S.E.2d 830 (1978) (Neely, J.)

Syl. pt. 2 - The statutes establishing good time credit for inmates, *W.Va. Code* 28-5-27a (1951) and 28-5-28 (1977) were intended by the Legislature to enhance prison discipline and do not contemplate good time credit for parolees.

An original writ of habeas corpus was granted to evaluate parolees' claim that after violation of parole and return to prison their sentences were increased by the amount of good time they would have earned had they remained in custody. This allegation of increased sentence, however, proved to be mistaken since the 14 ½ days per each month of parole were added to the minimum discharge date (calculable by assuming the inmate will earn the maximum of both authorized by *W.Va. Code* 28-5-27 (1923), and Warden's Good Time, which is an additional 4 1.2 days authorized at the Warden's discretion, and not to the full-time date (the date on which the inmate will have completed his maximum sentence). Consequently, relief was denied.

Syl. pt. 1 - In a habeas corpus proceeding where prisoners allege but do not prove that they are being illegally held, relief will be denied.

GOOD TIME/REDUCTION OF SENTENCE

Retroactivity

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

Under settled rules of statutory construction, *W.Va. Code* § 28-5-28, relating to good time, confers a substantive right and therefore is not retroactive.

W.Va. Code § 28-5-28 provides for the classification of prisoners according "industry, conduct, and obedience" and for the computation of good time credit. The statute contains no language from which the Court could infer that the legislature intended its application to be retroactive.

GRAND JURY

Prosecutor's role

See ATTORNEYS Prosecutors, Grand jury, (p. 77) for discussion of topic.

Who may present

State ex rel. Miller v. Smith, 285 S.E.2d 500 (1981) (McGraw, J.)

Syl. pt. 1 - By application to the circuit judge, whose duty is to insure access to the grand jury, any person may go to the grand jury to present a complaint to it. *W.Va. Const.*, art. 3, § 17.

Witnesses

State ex rel. Miller v. Smith, 285 S.E.2d 500 (1981) (McGraw, J.)

Any discussion of evidence before the grand jury by persons not sworn to testify, including the prosecuting attorney, will vitiate an indictment whether the grand jury was actually influenced by the discussion or not.

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Syl. pt. 1 - An indictment will be vitiated where a witness completes his testimony but remains in the grand jury room while other witnesses are testifying and participates in questioning such witnesses.

This is in compliance with the Supreme Court holding in *State v. Wetzel*, 75 W.Va. 7, 83 S.E.2d 68, 1918A Ann. Cas. 1074 (1914).

GUILTY PLEAS

See related topic - PLEA BARGAINING, (p. 674) for discussion of topic.

In general

Gibson v. McKenzie, 259 S.E.2d 616 (1979) (Per Curiam)

See PLEA BARGAINING In general, (p. 674) for discussion of topic.

State v. Barnett, 240 S.E.2d 540 (1977) (Caplan, C.J.)

A guilty plea is a most serious waiver of a constitutional right - the right to a trial by jury, the privilege against compulsory self-incrimination and the right to confront accusers.

In the absence of statutory authority, a court cannot accept a plea of guilty offered or any kind of condition.

Syl. pt. 2 - A guilty plea must manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if conditional.

State v. Boggess, 256 S.E.2d 325 (1979) (Harshbarger, J.)

In driving while intoxicated charge, where the indictment identified the offenses and stated that they were committed within a five-year period, the requirements of *W.Va. Code* § 17-C-5-2 were met, and the fa ct that the dates of previous offenses were not specified was not error; therefore, the guilty plea was not void.

Appeal

State ex rel. O'Neill v. Gay, 285 S.E.2d 637 (1981) (McHugh, J.)

Pursuant to the provisions of *W.Va. Code*, 50-5-13 (1976), a defendant who pleads guilty in magistrate court to a criminal offense may appeal to circuit court, and to obtain such an appeal, the defendant need not allege error committed by the magistrate court.

Appeal (continued)

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

Syl. pt. 1 - A direct appeal from a criminal conviction based on a guilty plea will lie where an issue is raised as to the voluntariness of the guilty plea or the legality of the sentence.

Scope of review

Fisher v. Whyte, 239 S.E.2d 133 (1978) (Neely, J.)

Since the petitioner pled guilty to the crime of breaking and entering, he waived his right on appeal to challenge any defects in the warrant.

Competency to enter guilty plea

State v. Cheshire, 292 S.E.2d 628 (1982) (McGraw, J.)

See COMPETENCY To stand trial, (p. 102) for discussion of topic.

Due process

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

Syl. pt. 2 - Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, in order for a guilty plea to be knowingly and intelligently entered, the defendant must be informed of the elements of the offense charged against him.

Footnote 2 - at 503 - The due process procedure surrounding the taking of a guilty plea are applicable whether the guilty plea is entered with or without a plea bargaining agreement.

GUILTY PLEAS

Ineffective assistance

Gibson v. McKenzie, 259 S.E.2d 616 (1979) (Per Curiam)

Applies standard set forth in Syl. pt. 3, *State v. Sims*, 248 S.E.2d 834 (W.Va. 1978), cited below.

State ex rel. Burton v. Whyte, 256 S.E.2d 424 (1979) (Miller, J.)

Applies standard set forth in Syl. pt. 3, *State v. Sims*, 248 S.E.2d 834 (W.Va. 1978), cited below.

The court reasserted the *Sims* observation that once a guilty plea is entered, the focus is upon the competency of defendant's counsel in advising the guilty plea considering the court's "in limine" ruling and not upon the ruling itself.

Syl pt. 2 - Before an initial finding will be made that counsel acted incompetently with regard to advising on legal issues in connection with a guilty plea, the advice must be clearly erroneous.

When the trial court had ruled "in limine" that the confession was valid and the defendant, subsequently, upon advice of counsel, entered a guilty plea, the validity of the plea was judged from the standpoint of the competency of counsel's advice. The determinative point was whether counsel should have concluded that the legal issue surrounding the confession was so settled that the trial court was manifestly in error in ruling the confession admissible. The court did not find such error.

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

Syl. pt. 2 - The controlling test as to the voluntariness of a guilty plea, when it is attacked either on a direct appeal or in a habeas corpus proceeding on grounds that fall within those on which counsel might reasonably be expected to advise, is the competency of the advice given by counsel.

Ineffective assistance (continued)

State v. Sims, (continued)

Syl. pt. 3 - Before a guilty plea will be set aside, based on the fact that defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact-finding process, if the case had proceeded to trial, and (3) the guilty plea must have been motivated by this error.

Footnote 2 - A claim of incompetency of counsel is not the only basis on which a guilty plea can be undermined. It is a part of the more general rule that requires a guilty plea to be made voluntarily, upon proper advice and with a full understanding of the consequences.

State ex rel. Morris v. Mohn, 267 S.E.2d 443 (1980) (Miller, J.)

Footnote 2 - Applies standard set forth in Syl. pt. 2, *State v. Sims*, 248 S.E.2d 834 (W.Va. 1978), cited below.

It is clear that where a guilty plea is brought about by a promise that is legally impossible to fulfill, not only has the prosecution failed in its duty, but the defense counsel has rendered incompetent advice by not advising the defendant that portions of the plea bargain agreement are not legally fulfill able.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

In *Housden v. Leverette*, 244 S.E.2d 810 (W.Va. 1978) Supreme Court adopted in the 4th Circuit rule that appointment of defense counsel within one day or less of trial or of entry of a guilty plea raises a rebuttable presumption that defendant was denied effective assistance.

Ineffective assistance (continued)

State v. Lane, 285 S.E.2d 138 (1981) (Per Curiam)

See PLEA BARGAINING Breach of agreement, (p. 674) for discussion of topic.

Undue delay in appointment of counsel

Gibson v. McKenzie, 259 S.E.2d 616 (1979) (Per Curiam)

While the Supreme Court does not condone delay in the appointment of counsel where an indigent request it, they knew of no case in which undue delay in the appointment of counsel has vitiated a guilty plea.

Voluntariness of plea

Potter v. Mohn, 256 S.E.2d 763 (1979) (Miller, J.)

Applies standard set forth in Syl. pt. 1, *Riley v. Ziegler*, 241 S.E.2d 813 (W.Va. 1978).

"The fact that a defendant, in open court, at the time of the entry of a plea, stated that it was not coerced or unduly influence by promises although evidential on the issue, does not foreclose inquiry as to its voluntariness." Syl. pt. 4, *State ex rel. Clancy v. Coiner*, 154 W.Va. 857, 179 S.E.2d 726 (1971).

Syl. pt. 3 - The voluntariness of a guilty plea must be tested by the totality of the circumstances surrounding its entry.

Under totality of the circumstances, guilty plea was not entered freely or voluntarily where advice of counsel indicated that successful defense was hopeless and that plea bargain would not be accepted at all if not accepted by both co-defendants, and where bailiff advised defendant's that judge would impose a shorter sentence if defendants pleaded guilty, and defendants were confronted with deciding whether or not to plead guilty during recess of their trial.

Voluntariness of plea (continued)

Pugh v. Leverette, 286 S.E.2d 415 (1982) (McGraw, J.)

"A plea of guilty of a capital crime should be accepted cautiously and not until the court has warned the prisoner and been satisfied that he has acted freely and deliberately after being so admonished and will full knowledge, appreciation, and understanding of the nature and consequences of his confession." Syl. pt. 1, *State v. Hill*, 81 W.Va. 676, 95 S.E. 21 (1918). Where these precautions are not taken, the trial court should permit a withdrawal of the guilty plea.

"An arraignment of a defendant on an indictment charging a felony, if the plea is made in open court by the defendant in person, is sufficient where the person arraigned is identified as the person named in the indictment, is fully advised as to the charge, as to his rights relating to the plea, as to his rights of a jury trial, and of the consequences of his plea, if the defendant intelligently understands and appreciates such advice and consequences." Syl. pt. 2, *State ex rel. Burkhamer v. Adams*, 143 W.Va. 557, 103 S.E.2d 777 (1958).

Circuit judge's admission that it was usual procedure not to advise defendants of rights, nature of charges, or consequences of plea indicated that trial court did not comply with requirements for taking a guilty plea.

When the circuit court failed to insure that defendant's plea was made voluntarily and without coercion, the defendant's conviction was held to be void.

Syl. pt. 3 - West Virginia law, in 1964, required a court accepting a guilty plea: (1) to advise the defendant in open court of the nature of the charge against him, of his right to a jury trial and of the consequences of a guilty plea, (2) to determine whether defendant understood and appreciated this advise, and (3) to ascertain whether the plea was entered voluntarily, without threat or coercion. The failure of the trial court to observe these requirements would have resulted in a void conviction and warrants relief in habeas corpus.

Voluntariness of plea (continued)

Riley v. Ziegler, 241 S.E.2d 813 (1978) (McGraw, J.)

When a trial court explains to a defendant the maximum possible sentence provided by law, such explanation must be accurate and not confusing, misleading or coercive.

Syl. pt. 1 - When a conviction rests upon a plea of guilty, the record must affirmatively show that the plea was intelligently and voluntarily made with an awareness of the nature of the charge to which the plea is offered and the consequences of the plea.

When the trial court asked a misleading question, "You have three one-to-ten charges facing you, you understand that?"; and when the court failed to explain that the indictment for breaking and entering was drawn into two separate counts and that conviction for nighttime breaking and entering precluded conviction for daytime breaking and entering and vice versa, and that even though both counts charged breaking and entering, a verdict of guilty could only be found for breaking and entering or our grand larceny, but not for both, the Supreme Court determined that it was not conclusively established that the guilty plea was "knowing, intelligently and voluntarily made with knowledge of the nature of the charge and the consequences of the guilty plea offered." The guilty plea, conviction, and sentence were voided and set aside.

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

"The fact that a defendant, in open court, at the time of the entry of a plea, stated it was not coerced or unduly influenced by promises, although evidential on the issue, does not foreclose inquiry as to its voluntariness." Syl. pt. 4, *State ex rel. Clancy v. Coiner*, 154 W.Va. 857, 179 S.E.2d 726 (1971).

Voluntariness of plea (continued)

Thomas v. Leverette, (continued)

The concept of voluntariness with regard to a plea of guilty embodies two aspects. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protection he is waiving [cites omitted] or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he actually understood the charge, the plea cannot be voluntary in this latter sense." *Smith v. O'Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941).

When the transcript did not show that defendant was informed that intent was an element of the crime of second-degree murder and where the transcript indicated that there may have been no intent, the court remanded the case for further factual determination in accordance with principals of *Call v. McKenzie*, 220 S.E.2d 665 (W.Va. 1975) and with principles of due process.

The court, under *Call v. McKenzie*, 220 S.E.2d 665 (W.Va. 1975) is required to determine ". . . that the defendant understands the nature and meaning of the criminal charge made against him in an indictment," before a guilty plea will be valid.

State v. Barnett, 240 S.E.2d 540 (1977) (Caplan, J.)

Before accepting a plea of guilty, it is incumbent upon the trial court, *inter alia*, to determine the voluntariness of the plea.

Where defendant's colloquy with the court precluded his guilty plea from being clear, definite and unconditional, the guilty plea was unacceptable and the court should not have acted upon it. Furthermore, the court erred in failing to first determine the voluntariness of the plea as set out in *Call v. McKenzie*, 220 S.E.2d 665 (W.Va. 1975).

Voluntariness of plea (continued)

State v. Boggess, 256 S.E.2d 325 (1979) (Harshbarger, J.)

A trial court's failure to make inquiries concerning the voluntariness of the plea as set forth in *Call v. McKenzie*, 220 S.E.2d 665 (1975) will not always invalidate a conviction.

When it is determined that the defendant understood the nature, meaning, and consequences of the charge made against him in an indictment and when the record indicates that the guilty plea was entered knowingly and intelligently, there is not error, and the plea is not void.

State ex rel. Burton v. Whyte, 256 S.E.2d 424 (1979) (Miller, J.)

Syl. pt. 3 - A guilty plea based on competent advice of counsel represents a serious admission of factual guilt, and where an adequate record is made to show it was voluntarily and intelligently entered, it will not be set aside.

When relator failed to meet the test set forth in Syl. pt. 3, *State v. Sims*, 248 S.E.2d 834 (W.Va. 1978) the court found that it had not been established "by a preponderance of the evidence that his guilty plea was coerced by incompetent advice of counsel.

State v. Lane, 285 S.E.2d 138 (1981) (Per Curiam)

Where procedure outlined in *Call v. McKenzie*, 220 S.E.2d 665 (W.Va. 1975) had been followed by the court in accepting the guilty plea, the appellant's challenge to the sentence on the grounds that his pleas was not voluntary was unsuccessful.

State v. Pettigrew, 284 S.E.2d 370 (1981) (Neely, J.)

Syl. pt. 1 - the subjective but, in hindsight, mistaken belief of a defendant as to the amount of sentence that will be imposed, unsupported by any promises from the government or indications from the court, is insufficient to invalidate a guilty plea as unknowing and involuntary.

Voluntariness of plea (continued)

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

See GUILTY PLEAS Ineffective assistance, (p. 339) for discussion of topic.

Withdrawal of guilty plea

Brooks v. Narick, 243 S.E.2d 841 (1978) (Harshbarger, J.)

See PLEA BARGAINING Specific performance, (p. 677) for discussion of topic.

Pugh v. Leverette, 286 S.E.2d 415 (1982) (McGraw, J.)

See GUILTY PLEAS Voluntariness of plea, (p. 342) for discussion of topic.

State v. Conley, 285 S.E.2d 454 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Olish*, 266 S.E.2d 134 (W.Va. 1980), cited below.

When in an initial plea bargaining arrangement, the State agreed to make no recommendation concerning probation, and subsequently in a hearing to reconsider the sentence, the assistant prosecuting attorney stated that "this guy has had more breaks than he deserves: and opposed the motion to re consider, the Supreme Court held that there was no "manifest injustice" warranting a withdrawal of defendant's guilty plea since the State was not bound to refrain from making a recommendation as to probation at the hearing on the motion to reconsider, since the agreement extended only to the initial sentencing.

Withdrawal of guilty plea (continued)

State v. Olish, 266 S.E.2d 134 (1980) (Miller, J.)

Syl. pt. 1 - In a case where the defendant seeks to withdraw his guilty plea before sentence is imposed, he is generally accorded the right if he can show any fair and just reason.

Syl. pt. 2 - Where a guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice.

If the State will suffer substantial prejudice if the guilty plea is withdrawn prior to the time the sentence is imposed, this is a limiting factor which the court should consider in determining whether to grant the motion to withdraw the guilty plea.

Where, as a result of a plea bargain requiring prosecutor to remain silent on the issue of mercy, defendant had pled guilty to first-degree murder, but prior to sentencing, requested withdrawal of the plea because the prosecutor failed to maintain a neutral position as reflected by the probation officer's presentence report, the Supreme Court found sufficient reason to allow withdrawal of the guilty plea prior to sentencing.

State v. Pettigrew, 284 S.E.2d 370 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 2, *State v. Olish*, 266 S.E.2d 134 (W.Va. 1980), cited above.

When appellant did not meet the test set out in *Olish*, that, where a guilty plea is sought to be withdrawn by a defendant after he has been sentenced, it should be granted to avoid manifest injustice only, the guilty plea was not set aside.

Withdrawal of guilty plea (continued)

State v. Ranski, 289 S.E.2d 756 (1982) (McHugh, J.)

When defendant pled guilty to voluntary manslaughter of her former husband and was sentenced to one to five years in the State penitentiary and subsequently discovered that the sentence, according to an amended *W.Va. Code* § 62-12-13 (1970), should have been three to five years, defendant moved to withdraw the guilty plea based upon the claim that she was not informed of the consequences. The trial court denied the motion and defendant assigned this as error. This assignment of error was found by the Supreme Court to be without merit since the motion contained no reference to the possibility of probation as a factor in the decision to plead guilty, a lengthy interrogation of the defendant had been conducted, the defendant's plea bargain had been fulfilled, and the firearms provisions of the West Virginia Code were not applicable.

Defendant's claim that her guilty plea to voluntary manslaughter was made without a full understanding of the consequences was without merit and the trial court did not err in failing to hold a hearing on defendant's motion to withdraw her plea.

HABEAS CORPUS

In general

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

A court is not required to hold an evidentiary hearing on issues that are without merit.

In an appeal from a partial denial of a writ of habeas corpus by a circuit court, defendant claimed that the circuit court committed error when it refused to allow him to show that the recidivist statute was applied in a selective and discriminatory manner to him and was in violation of the Equal Protection Clause. The Supreme Court found that selective enforcement by the prosecutor of the recidivist statute and the enhanced sentence given thereunder were not *per se* violative of the prohibition against cruel and unusual punishment. It was, therefore, not error for the lower court to refuse to hear evidence on these issues.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

When indued, the writ of habeas corpus *ad subjiciendum* commands one who detains another to bring such person before the court.

Where the term "habeas corpus" is used alone, it is understood to mean the writ of habeas corpus *ad subjiciendum*.

The writ of habeas corpus, because of its broad availability to challenge confinement contrary to the constitution, cannot be limited to a particular form of remedial relief.

Footnote 12 - It is settled law that equitable principles are applicable in habeas corpus proceedings.

HABEAS CORPUS

Abuse and neglect

Custody

State ex rel. Miller v. Locke , 253 S.E.2d 540 (1979) (Per Curiam)

Because the only issue for determination in a habeas corpus proceeding involving the right of parents to custody of their child is the proper custody of the child, and because the custody of the child was restored to his parents before argument in this case, the issue of custody was moot.

Appeal by the state

State ex rel. Paxton v. Johnson, 245 S.E.2d 843 (1978) (Harshbarger, J.)

The circuit court granted the defendant's habeas corpus petition, based on entrapment, voided his conviction, and the State appealed. The Supreme Court of Appeals of West Virginia affirmed the lower court's action.

Appeal from denial of relief

White v. Bordenkircher, 286 S.E.2d 686 (1982) (Miller, C.J.)

See APPEAL Review of evidence, Insufficient to permit informed judgment, (p. 40) for discussion of topic.

Bail

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

There can be no doubt as to the propriety of the writ of habeas corpus to test the question of bail. *State ex rel. Hutzler v. Dostert*, 236 S.E.2d 336 (W.Va. 1977).

Here the failure to follow the mandatory requirement to postpone the sentence increases the severity of defendant's confinement, and in the sense imposes an additional restraint.

Bail (continued)

Pending appeal

Conley v. Dingess, 250 S.E.2d 136 (1978) (Caplan, C.J.)

See BAIL Post-conviction, Pending appeal, (p. 80) for discussion of topic.

Shamblin v. Hey, 256 S.E.2d 435 (1979) (Neely, J.)

See BAIL Post-conviction, Pending habeas corpus, (p. 83) for discussion of topic.

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

See BAIL Post conviction, Pending appeal, (p. 81) for discussion of topic.

State ex rel. Dye v. Bordenkircher, 284 S.E.2d 863 (1981) (McHugh, J.)

See BAIL Post-conviction, Pending appeal, (p. 82) for discussion of topic.

Pending habeas corpus

Shamblin v. Hey, 256 S.E.2d 435 (1979) (Neely, J.)

See BAIL Post-conviction, Pending habeas corpus, (p. 83) for discussion of topic.

Critical stage

Right to be present

Fields v. Whyte, 242 S.E.2d 463 (1978) (Per Curiam)

See CRITICAL STAGE Right to be present/harmless error, (p. 150) for discussion of topic.

HABEAS CORPUS

Cruel and unusual punishment

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

See PRISON CONDITIONS Cruel and unusual punishment, (p.688); PRISON CONDITIONS Remedy, (p. 690) for discussion of topic.

State ex rel. K.W. v. Werner, 242 S.E.2d 907 (1978) (Harshbarger, J.)

See PRISON CONDITIONS Cruel and unusual punishment; (p. 689); PRISON CONDITIONS Remedy, (p. 691) for discussion of topic.

Courts are reluctant to order release as a remedy for violations of the Eighth Amendment; however, the court in *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977) addressed the question of whether and when the release of a habeas corpus petitioner is appropriate. *Rhodes* dealt with the concept of extraordinary dereliction on the part of the State, which cannot be charged until the State has failed to correct the practices after a reasonable time. "There may be individual cases where the abuses are so shocking and extreme and without justification on the part of the State, than an immediate discharge would be warranted." Concurring opinion, Miller, J.)

Extradition

See EXTRADITION Habeas corpus, (p. 321) for discussion of topic.

Failure to or denial of appeal

Fisher v. Whyte, 239 S.E.2d 133 (1978) (Neely, J.)

See APPEAL Right to appeal, (p. 41) for discussion of topic.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

See APPEAL Right to appeal, Failure to or denial of appeal, (p. 43) for discussion of topic.

Failure to or denial of appeal (continued)

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

"In determining appropriate relief in habeas corpus for ineffective assistance of counsel in not prosecuting in a timely appeal, the court should consider whether there is a probability of actual injury as a result of such denial, or alternatively whether the injury is entirely speculative or theoretical, and where the denial of a timely appeal was probably harmless, except in the case of extraordinary dereliction on the part of the State to appropriate remedy is not discharge but such remedial steps as will permit the effective prosecution of an appeal." Syllabus Point 2, *Carter v. Bordenkircher*, 226 S.E.2d 711 (W.Va. 1976).

Extraordinary dereliction on the part of the State sufficient to warrant unconditional release in a habeas corpus proceeding, where the relator's constitutional rights to an appeal have been violated, will largely depend on the facts of the individual case.

Factors to be considered in determining whether there has been extraordinary dereliction are: the clarity and diligence with which the relator has moved to assert his right of appeal; the length of time that has been served on the underlying sentence measured against the time remaining to be served; whether prior writs have been filed or granted involving the right of appeal; and the related question of whether resentencing has occurred in order to extend the appeal period. While extraordinary dereliction on the part of the State does not require a showing of malice or ill will, certainly if such is shown it would be significant factor.

There may exist such extreme abuses on the part of the State as against the constitutional rights of an individual that the only appropriate remedy would be an unconditional discharge coupled with an injunction against further prosecution of the underlying criminal action.

Failure to or denial of appeal (continued)

Rhodes v. Leverette, (continued)

Where defendant's right to appeal was denied since no trial transcript was prepared within the appeal period, and was again denied when counsel failed to prosecute an appeal after the defendant was resentenced, but the defendant, who was knowledgeable of his rights, took no positive action to notify any court that his counsel was not pursuing his appeal until four years after the appointment of counsel, defendant was entitled to discharge from confinement which was stayed thirty days to allow State to resentence the defendant.

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.)

See APPEAL Right to appeal, Failure to or denial of appeal, (p. 42) for discussion of topic.

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

See INEFFECTIVE ASSISTANCE Failure to appeal, (p. 448) for discussion of topic.

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

See INEFFECTIVE ASSISTANCE Failure to appeal, Extraordinary dereliction, (p. 449); INEFFECTIVE ASSISTANCE Failure to appeal, Relief, (p. 450) for discussion of topic.

HABEAS CORPUS

Guilty pleas

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

See DUE PROCESS Pleas, (p. 236) for discussion of topic.

State ex rel. Burton v. Whyte, 256 S.E.2d 424 (1979) (Miller, J.)

When a confession was given without interrogation after defendant voluntarily conferred with a municipal police court judge after requesting counsel but before attaining counsel, the confession was not invalid and denial of writ of habeas corpus was appropriate.

The court goes on to warn that on direct appeal as opposed to habeas, statements or confessions obtained in this fashion will carry a stigma of unconstitutionality.

Failure to make record

Pugh v. Leverette, 286 S.E.2d 415 (1982) (McGraw, J.)

See GUILTY PLEAS Voluntariness of plea, (p. 342) for discussion of topic.

Under present law, the trial court is required to make a record of the proceedings showing that a guilty plea is voluntarily and knowingly made, so failure to make this record is grounds for granting a writ of habeas corpus.

Voluntariness of plea

Gibson v. McKenzie, 259 S.E.2d 616 (1979) (Per Curiam)

See GUILTY PLEAS Ineffective assistance, (p. 339) for discussion of topic.

Guilty pleas (continued)

Voluntariness of plea (continued)

Riley v. Ziegler, 241 S.E.2d 813 (1978) (McGraw, J.)

When the indictment was drawn into two alternative counts of breaking and entering in the nighttime and breaking and entering in the daytime and defendant was sentenced for not less than one year nor more than ten years, yet the trial courts explanation of the maximum sentence was not done in a clear, unambiguous manner, the plea and sentence were set aside and defendant's petition for writ of habeas corpus was successful.

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

See GUILTY PLEAS Ineffective assistance, (p. 339) for discussion of topic.

Ineffective assistance

Inadequate time to prepare

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

See INEFFECTIVE ASSISTANCE Inadequate time to prepare, (p. 455) for discussion of topic.

The matter of refusal of a continuance could be an element in the consideration of inadequate assistance of counsel if counsel were afforded an inadequate amount of time to prepare his case.

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

See INEFFECTIVE ASSISTANCE Inadequate time to prepare, (p. 455) for discussion of topic.

HABEAS CORPUS

Judgments

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

The void portion of a judgment can be attacked in a habeas corpus proceeding, but if there remains a valid portion of the sentence yet to be served, the relator is not entitled to a discharge.

Juveniles

Disposition

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

Footnote 2 - Application of prior law on disposition in trials of juveniles held before the enactment of *W.Va. Code* §§ 49-5-1(a) (1978) and 49-5-10 (1978) will not serve as grounds for either appeal or habeas corpus. If a new trial is awarded on other grounds, then the above code provisions become applicable.

Omnibus hearing

Losh v. McKenzie, 277 S.E.2d 606 (1981) (Neely, J.)

Syl. pt. 1 - An omnibus habeas corpus hearing as contemplated in *W.Va. Code*, 53-4A-1 *et seq*. [1967] occurs when: an applicant for habeas corpus is represented by counsel or appears *pro se* having knowingly and intelligently waived his right to counsel: (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel and, (4) the trial court drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding.

HABEAS CORPUS

Period of review

Pugh v. Leverette, 286 S.E.2d 415 (1982) (McGraw, J.)

"Petition for writ of habeas corpus may be filed at any time after the conviction and imprisonment of sentence and the expiration of time for appeal." *W.Va. Code* § 53-4A-1.

A thirteen-year lapse of time between conviction and request for relief did not bar habeas corpus relief.

Petitioner

Riley v. Ziegler, 241 S.E.2d 813 (1978) (McGraw, J.)

When defendant filed an inartfully styled request for a writ of mandamus, the court appointed counsel and issued a writ of habeas corpus indicating that the "sufficiency of a petition is to be determined by its substance and general character without regard to its name or form."

Prison attire

Accused

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prison attire, (p. 172) for discussion of topic.

Witnesses

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Because there is no constitutional right accorded to a defendant to have his prison witnesses appear at his trial in civilian attire or without physical restraints, the defendant was not entitled to attack his conviction on this basis in a habeas corpus proceeding.

HABEAS CORPUS

Probation revocation

State v. Ketchum, 289 S.E.2d 657 (1981) (McGraw, J.)

Syl. pt. 1 - A probation revocation may be reviewed either by a direct appeal or by a writ of habeas corpus.

Recidivist

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

"A petitioner in a habeas corpus proceeding upon whom imprisonment for an invalid additional period has been improperly imposed under the recidivist statute . . . may be relieved of the void portion of the imprisonment but will not be discharged from serving the maximum additional sentence for any prior conviction." Syl. pt. 2, *State ex rel. Johnson v. Boles*, 151 W.Va. 224, 151 S.E.2d 213 (1966).

While petitioner had not fully served time sentenced for his most recent offense or for a prior conviction, neither of which were improperly imposed, he was not released from confinement on his allegation of ineffective assistance in a habeas corpus proceeding that did void the most recent conviction where ineffective assistance was established.

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Petitioner was awarded writ of habeas corpus and was discharged from further confinement upon the court's finding that recidivist life sentence imposed upon conviction for felony of forgery of a $43.00 check was disproportionate to the nature of this and the prior offenses and was therefore unconstitutional.

HABEAS CORPUS

Relief

Angel v. Mohn, 253 S.E.2d 63 (1979) (Miller, J.)

Relief available under a writ of habeas corpus will be given so as to cure the underlying constitutional error.

In the situation where the relator sought appeal upon the denial of a writ of habeas corpus, the constitutional defect claimed being an erroneous *Pendry*-type instruction, and where the Supreme Court found that the trial court had erroneously applied the doctrine of harmless error to nullify the effect of the instruction, the Supreme Court reversed and remanded, but found that relator should not be given an unconditional discharge until the State is given a chance to decide if it would retry him.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Relief in habeas corpus will be given so as to cure the underlying constitutional error.

In those cases where the constitutional error substantially affects the underlying trial, the relief is a discharge of the relator.

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

The Supreme Court is given broad powers in fashioning the form of relief accorded in a habeas corpus proceeding.

Res judicata

Angel v. Mohn, 253 S.E.2d 63 (1979) (Miller, J.)

The granting of a writ of habeas corpus does not ordinarily operate to bar further prosecutions under principles of double jeopardy.

Res judicata (continued)

Losh v. McKenzie, 277 S.E.2d 606 (1981) (Neely, J.)

Syl. pt. 2 - A judgment denying relief in post-conviction habeas corpus is *res judicata* on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared *pro se* having knowingly and intelligently waived his right to counsel.

Syl. pt. 3 - A waiver of a constitutional right must be knowing and intelligent, that is a voluntary relinquishment of a known right, and if the waiver is conclusively demonstrated on the record at trial or at a subsequent omnibus habeas corpus hearing, the waiver makes any issue concerning the right waived *res judicata* in succeeding actions in habeas corpus.

Syl. pt. 4 - A prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Syl. pt. 3 - An unconditional discharge from confinement upon the issuance of a writ of habeas corpus does not ordinarily operate to bar further prosecution under principles of double jeopardy.

Res judicata (continued)

State ex rel. Morris v. Mohn, 267 S.E.2d 443 (1980) (Miller, J.)

A discharge in habeas corpus does not ordinarily preclude a retrial. In an original habeas corpus proceeding where a guilty plea and subsequent conviction were induced by a plea bargain agreement specifying concurrent state and federal sentencing, the plea bargain agreement was unfulfillable; consequently, the guilty plea and conviction based on such plea were invalid and a writ of habeas corpus was awarded. The state, however, was allowed to proceed to prosecute the criminal charge.

Right to be present at habeas corpus hearing

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

Footnote 1 - There is no requirement that the petitioner be present at all stages of the habeas corpus hearing.

Scope

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

Syl. pt. 1 - *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.

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

Habeas corpus is not a substitute for appeal but will lie to test a denial of a constitutional right.

Scope (continued)

Carrico v. Griffith (continued)

The matters relied upon by appellant, that the trial court erred in refusing a continuance, in permitting the introduction of evidence of an unrelated offense and in refusing to sequester police officers, are fair subjects for appeal, but not habeas corpus.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

See HOMICIDE Instructions, In general, (p. 385) for discussion of topic.

While habeas corpus provides a means of collateral attack upon a conviction due to the conviction's being obtained in violation of State or Federal Constitution, only an error of constitutional dimension is a proper subject for a habeas corpus proceeding, not plain error.

Syl. pt. 2 - "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Point 4, syllabus, *State ex rel. McMannis v. Mohn*, 254 S.E.2d 805 (W.Va. 1979).

Fields v. Whyte, 242 S.E.2d 463 (1978) (Per Curiam)

"The assigned errors in the amended petition do not reach a constitutional magnitude, and are therefore not reviewable in this habeas corpus proceeding." *State ex rel. McGilton v. Adams*, 143 W.Va. 325, 331, 102 S.E.2d 145, 148 (1958).

State ex rel. Burton v. Whyte, 256 S.E.2d 424 (1979) (Miller, J.)

When the validity of a confession was in question and it could not be asserted as a matter of law that competent counsel should have advised defendant to proceed to trial and when it was not demonstrated that the confession formed a substantial part of the State's case, the court's refusal to grant a writ of habeas corpus was appropriate.

Scope (continued)

State ex rel. Burton v. Whyte, (continued)

"While claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for . . . collateral relief.

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Ordinary trial error is not involving constitutional violations will not be reviewed in a habeas corpus proceeding.

State ex rel. Ridenour v. Leverette, 271 S.E.2d 612 (1980) (Per Curiam)

The Post-Conviction Habeas Corpus Act is broad in scope and purpose. The Supreme Court interprets its intent to be to liberalize the use of habeas corpus writs in criminal cases.

Under the facts of this case, it was error for the trial court to require defendant to begin an entirely new proceeding to raise a purely legal question.

Under the facts of this case (where defendant was convicted for murder, he filed a habeas corpus petition with the Supreme Court which was issued and made returnable to the trial court; where his counsel then filed a second habeas corpus petition particularizing claims; where the trial court denied relief and counsel then filed a motion to reverse under the Post-Conviction Habeas Corpus Act) it was error for the trial court to require petitioner to institute an entirely new proceeding to raise a purely legal question.

Sentence review

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Review of sentence, In general, (p. 734) for discussion of topic.

Sentence review (continued)

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Appropriateness of the sentence, (p. 732); PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Disparate sentences, (p. 733); PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Review of sentence, Robbery, (p. 778) for discussion of topic.

Sentencing by judge underage

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

A resentence of petitioner to permit additional time for appeal, by a special judge who had been elected and was under 30 years of age did not render void petitioner's present confinement.

Speedy trial

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

See SPEEDY TRIAL Habeas corpus proceeding, (p. 893) for discussion of topic.

HARMLESS ERROR

Constitutional

Absence of counsel at preliminary hearing

State v. Bradley, 260 S.E.2d 830 (1979) (Neely, J.)

Where the only purpose for the preliminary hearing was to inform defendant of his rights and to inform him regarding bond, but no witnesses were present who should have been subject to cross examination, the State presented no information, and there was no discussion of psychiatric examination, absence of defendant's counsel at the preliminary hearing was harmless error.

State v. Stout, 285 S.E.2d 892 (1982) (Neely, J.)

See PRELIMINARY HEARING Right to counsel, (p. 683) for discussion of topic.

When there was no record of what transpired at the preliminary hearing the Supreme Court remanded the case for determination of whether the absence of counsel at this hearing was harmless error indicating that should the court find harmless error, the verdict would stand; should it find the error not to be harmless with the possibility that the error could be corrected, a new trial would be awarded; and should the court find that the disadvantage to appellant could not be corrected by awarding a new trial, the appellant would be discharged.

Burden-shifting Instructions

Angel v. Mohn, 253 S.E.2d 63 (1979) (Miller, J.)

The practice for the doctrine of harmless constitutional error is that it can be stated beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Constitutional (continued)

Burden-shifting Instructions (continued)

Angel v. Mohn, (continued)

Syl. pt. - The doctrine of harmless constitutional error does not operate to cure a constitutionally impermissible instruction which instructs the jury in a criminal case to accept a presumption as proof beyond a reasonable doubt of any material element of the crime charged, or requires the defendant either to introduce evidence to rebut the presumption or to carry the burden of proving the contrary.

The giving of an instruction presuming first-degree murder from the use of a deadly weapon constituted reversible error.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

In a prosecution for murder, trial court committed reversible error in giving an instruction which permitted essential elements of the crime charged to be proved by use of a presumption and which required the defendant to go forward with proof to establish his innocence.

Jones v. Warden, W.Va. Penitentiary, 241 S.E.2d 914 (1978) (Harshbarger, J.)

Justice Harshbarger, writing for the court does not address the question of whether the harmless error doctrine should be applied when there has been a violation of *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976) by using a presumption to shift the burden of the defendant to prove a material element of the crime. Justice Neely, in a concurring opinion, argues it should apply because of judicial economy. Justice Miller, in a separate concurring opinion argues the harmless error doctrine should not be applied because of the seriousness of the error involved.

Constitutional (continued)

Burden-shifting Instructions (continued)

State ex rel. Wilhelm v. Whyte, 267 S.E.2d 554 (1980) (Per Curiam)

Applies standard set forth in Syl. pt., *Angel v. Mohn*, 253 S.E.2d 63 (W.Va. 1979), cited above.

Where defendant was convicted of second-degree murder, in giving of instruction which presumed intent and malice was reversible error.

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, J.)

Syl. pt. 5 - It is harmless constitutional error when burden-shifting Instructions are given in a trial on a charge of murder if the verdict results in a conviction of less than murder.

The giving of a burden-shifting instruction was not reversible error where jury returned verdict of voluntary manslaughter.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

Syl. pt. 3 - Under the doctrine of harmless constitutional error, the giving of an instruction which states that malice may be presumed from the use of a deadly weapon will not alone be sufficient to reverse a conviction for involuntary manslaughter, since the mere presence of a constitutionally defective instruction not related to the actual verdict maybe deemed, in the absence of any other factors, to have an insubstantial or unimportant effect on the verdict and therefore be harmless beyond a reasonable doubt.

Here, the giving of a *Pendry* instruction was not considered reversible error since the jury returned a verdict of involuntary manslaughter.

Constitutional (continued)

Burden-shifting Instructions (continued)

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

The harmless error standard of review is constitutionally permissible where *Mullaney*, type burden-shifting Instructions have been given, and the verdict results in a conviction of less than murder. An automatic reversal standard of review is inappropriate where a court can confidently declare beyond a reasonable doubt that such instruction in no way contributed to the conviction or affected the outcome of the trial. The case clearly falls within that category.

Confessions/self-incriminatory statements

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

One of the defendant's confessions was admitted in the trial court without the mandatory *in camera* hearing to determine if it was voluntary or not. On remand if the trial court finds the statements are voluntary the verdict will stand. If the statements are found to be involuntary, the verdict will be set aside unless the trial court determines that this constitutional error is harmless beyond a reasonable doubt.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Any alleged error in admitting into evidence inculpatory statement by accused was rendered harmless by the appellant's own admission on direct and the testimony of the appellant's son and brother.

Hearsay

State v. Fraley, 258 S.E.2d 129 (1979) (Harshbarger, J.)

Hearsay becomes constitutional error only when all the evidence offered is of that nature.

Constitutional (continued)

Identification

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

In this case police officers were shown a picture of defendant prior to a recidivist case. No independent basis of identification was shown. The court held because there were a number of other identification witnesses who properly connected the defendant with the prior convictions , the doctrine of harmless constitutional error could be applied.

Prison attire

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prison attire, (p. 172) for discussion of topic.

Prosecutor counseling with defendant

Thomas v. Leverette, 239 S.E.2d 500 (1977) (Miller, J.)

See ATTORNEYS Prosecutors, Counseling with defendant, (p. 73) for discussion of topic.

Prosecutor's comments

State v. Clark, 292 S.E.2d 643 (1982) (McHugh, J.)

See DENIAL OF A FAIR TRIAL Prosecutor's comments, (p. 174) for discussion of topic.

HARMLESS ERROR

Constitutional (continued)

Search and seizure

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

If a consent search was not voluntary, the conviction must be set aside unless the trial court can determine that the evidence introduce was harmless beyond a reasonable doubt.

Standard for determining

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

It is generally thought that a constitutional error, because it involves a more fundamental right, carries greater potential for harm than does a non-constitutional error. The harmless error standard for constitutional error is that the error must be shown to be harmless beyond a reasonable doubt.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

For the doctrine of harmless constitutional error to apply it must be shown to be harmless beyond a reasonable doubt.

Nonconstitutional

Collateral crimes

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Cross-examination of defendant and defendant's wife regarding other crime evidence was not prejudicial where there was no repetition of the question, the State made no reference to the point in closing argument, the question did no relate to any critical testimony of the defendant, and the quality of the State's case rested on direct, rather than circumstantial evidence.

Nonconstitutional (continued)

Collateral crimes (continued)

State v. Evans, 287 S.E.2d 922 (1982) (Neely, J.)

Introduction of defendant's wife's testimony regarding threats made by the accused prior to the homicide was reversible error where the testimony was the focus of attention at several times during the trial.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

In a trial for possession of a controlled substance with intent to deliver, firearms were introduced which were found at the same time as the marijuana. Any evidence of another crime was, under, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), harmless beyond a reasonable doubt in light of the overwhelming weight of the other evidence, and the objection was waived by counsel's failure to make a timely assignment of reasons when specifically asked by the trial judge.

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

The sole evidence of a collateral crime involved a question on cross-examination by the prosecutor to the defense witness concerning his smoking marijuana with the defendant on prior occasions. The court applied the *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980) factors to determine if this admission was prejudicial. It was concluded that the introduction of this evidence viewed in the circumstances of this case was harmless error.

Nonconstitutional (continued)

Collateral crimes (continued)

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

Removing the erroneously admitted evidence of collateral crimes from the State's case, the Supreme Court found that the remaining evidence was sufficient to support a conviction. However, the erroneous admission of evidence of collateral crimes was not harmless error since the State placed emphasis on the inadmissible evidence, there were numerous key factual conflicts which diminished the force of the State's case, and the overall probability of prejudice was too great to ignore.

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

If counsel's failure, once proven, would not have changed the outcome of the case, it is harmless error.

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Failure to make motions, (p. 451) for discussion of topic.

Denial of preliminary probation revocation hearing

State v. Goff, 284 S.E.2d 362 (1981) (Per Curiam)

Failure to hold a preliminary probation revocation hearing was harmless beyond a reasonable doubt where defendant asserted his right for the first time on appeal and Supreme Court found no prejudice.

Nonconstitutional (continued)

Denial of probation

See PROBATION Eligibility for probation, (p. 701) for discussion of topic.

Failure to arraign

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See ARRAIGNMENT Failure to arraign, (p. 47) for discussion of topic.

Hearsay

State v. Fraley, 258 S.E.2d 129 (1979) (Harshbarger, J.)

As a probation condition, the defendant was required to make restitution to three named victims. The probation officer testified at the revocation hearing that the victims told him no restitution had been made. This was impermissible hearsay testimony denying defendant the right to confrontation. The error does not rise to the constitutional level because hearsay becomes constitutional error only when all the evidence offered is of that nature.

The test, in this case, is the harmless, nonconstitutional error test set forth in *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied* 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed. 2d 320 (1980). Under this test the error was absolutely harmless. There was sufficient evidence to support the defendant's probation revocation, and the hearsay testimony that was admitted had no prejudicial effect.

Nonconstitutional (continued)

Instructions

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Syl. pt. 2 - Although it is established in this jurisdiction that the giving of an erroneous instruction raises a presumption of prejudice, it is an equally well established rule that this Court will not reverse a criminal conviction because of an erroneous instruction where it clearly appears from the record that no prejudice has resulted.

In this trial for homicide, it was erroneous given the evidence established, to give an instruction that directed the jury to find defendant guilty of second-degree murder if they found beyond a reasonable doubt that defendant gave the victim a "mortal" wound. However, this error was found to be harmless and not cause for reversal. The jury found defendant guilty of voluntary manslaughter.

Photographs

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

The Supreme Court applied the *State v. Atkins*, 262 S.E.2d 55 (W.Va. 1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980), nonconstitutional harmless error standard to determine if the introduction of certain gruesome pictures was harmless. It found that absent the pictures the state still had sufficient evidence to prove its case, but it cannot be said that the quality of the state's proof was overwhelming. This point was emphasized in *Atkins*. If the case contains a number of substantial key factual conflicts there is an increased probability that the error will be deemed prejudicial. The introduction of the pictures was prejudicial error.

Nonconstitutional (continued)

Prior convictions

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

The State's case was not circumstantial, but consisted of eyewitnesses' testimony. Excluding the erroneous prior convictions evidence, the Supreme Court was of the view that impartial minds would be convinced that the State did prove its case beyond a reasonable doubt.

The second step of the harmless error test is to analyze the impact of the error on the jury verdict. The more tangential the error to the ultimate issue of guilt, the less likely its prejudicial impact. Such factors as whether the error was repeated or singled out for emphasis, if the jury was given a special instruction, the quality of the State's proof, the cumulative effect in the context of the entire trial, and if the error is related to critical testimony of the defendant, will e considered to determine if the error was prejudicial. In the present case the prior convictions were not only stale, but were admitted under a limiting instruction by the court that they could not be considered with respect to the issue of guilt. No special emphasis was given them. No use was made of them in opening or closing arguments. The State's case consisted of eyewitnesses testimony. The key factual elements were not substantially disputed, and the error didn't directly relate to defendant's defense of self-defense. In light of the circumstances of this case the error was harmless.

In a case where evidence is offered by the defendant but rejected at trial, the test for harmless error involves only a single step of weighing the prejudicial impact of the error on the jury verdict.

In a case of nonevidentiary error, the test for harmless error involves only a single step of weighing the prejudicial impact of the error on the jury verdict.

Nonconstitutional (continued)

Prior convictions (continued)

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

In trial for grand larceny introduction of evidence of a prior conviction for unarmed robbery was reversible error where evidence was largely circumstantial and prejudicial since the prior conviction was closely related in time and nature.

State v. Toppings, 272 S.E.2d 463 (1980) (Per Curiam)

In *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977) it was held than prior convictions other than perjury or false swearing are inadmissible evidence for impeachment purposes. The case will be reversed for a violation of *McAboy* unless a clear showing can be made that it meets the stringent harmless error standard set out in *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied* 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed. 2d 320 (1980).

In this case, the State's case was not overwhelming as there was conflicting testimony as to the whereabouts of the defendant at the time of the crime. The defendant's credibility was an important issue. The prejudice present when the conviction used for impeachment is the same as the offense being tried is greater because of the increased risk that the jury will consider the evidence on the substantive question of guilt or innocence rather than just as affecting his credibility.

The State did not meet the stringent harmless error standard.

Nonconstitutional (continued)

Threatened use of prior criminal convictions

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

The *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied* 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed. 2d 320 (1980), harmless nonconstitutional error standard was applied to see if it was reversible error, in this case, where the threatened use of prior criminal convictions on cross-examination prevented the defendant from taking the stand. A determination is, therefore, required as to whether or not the trial court's action in preventing the defendant from taking the stand prejudiced the jury. The first trial on this charge, in which the defendant testified, resulted in a hung jury. The main difference in the two trials is that defendant testified in the first. The trial court's action in violation of the defendant's nonconstitutional right was prejudicial error.

Standard for determining

State v. Atkins, 261 S.E.2d 55 (1979) (Miller, J.), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

Syl. pt. 2 - Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

State v. Church, 284 S.E.2d 897 (198a) (McHugh, J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

Nonconstitutional (continued)

Standard for determining (continued)

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

State v. Evans, 287 S.E.2d 922 (1982) (Neely, J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

State v. Fraley, 258 S.E.2d 129 (1979) (Harshbarger, J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied* 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed. 2d 320 (1980), cited above.

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

Nonconstitutional (continued)

Standard for determining (continued)

State v. Rowe, 259 S.E.2d 26 (1979) (Harshbarger, J.)

Standard of *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied* 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed. 2d 320 (1980), cited above, for determining harmless, nonconstitutional error are set out in Footnote 3 but are not applied in this case.

State v. Toppings, 272 S.E.2d 463 (1980) (Per Curiam)

Applies standards set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert denied*, cited above.

HOMICIDE

Bifurcated trial

State ex rel. Leach v. Hamilton, 280 S.E.2d 62 (1980) (Harshbarger, J.)

Syl. pt. 2 - Code, 62-3-15, permitting a unitary trial procedure rather than a bifurcated one wherein a separate hearing on sentencing would occur, is not unconstitutional.

Since the facts necessary to convince a jury that the accused deserves mercy are ultimately the same facts required to determine guilt or innocence in the main trial, the bifurcated trial is not imperative and the unitary trial is constitutional.

Defenses

See DEFENSES, (p. 156) for discussion of topic.

See INSANITY, (p. 463) for discussion of topic.

See SELF-DEFENSE, (p. 820) for discussion of topic.

State v. Brant, 252 S.E.2d 901 (1979) (Neely, J.)

See DEFENSES Intoxication, (p. 159) for discussion of topic.

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

In a trial in which defendant was convicted of voluntary manslaughter, the Supreme Court found that there was sufficient evidence to support defendant's theories of negligent homicide or involuntary manslaughter.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Accidental killing, (p. 482) for discussion of topic.

Defenses (continued)

State v. Keeton, 272 S.E.2d 817 (1980) (Neely, C.J.)

See DEFENSES Intoxication, (p. 159) for discussion of topic.

Double jeopardy

See DOUBLE JEOPARDY Homicide, (p. 206) for discussion of topic.

Felony-murder

In general

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

Syl. pt. 4 - *W.Va. Code*, 61-2-1, alters the scope of the common law felony-murder rule by confining its application to the crimes of arson, rape, robbery or burglary, or the attempt to commit such crimes.

"Murder" as a classification is for the purpose of categorizing crimes and differentiating degrees of punishment, rather than for defining the elements of crimes grouped as first-degree murder.

State v. Taylor, 285 S.E.2d 635 (1981) (Harshbarger, J.)

The felony-murder rule codified in *W.Va. Code*, 61-2-1, is constitutional.

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

When defendant shot and killed the proprietor of a grocery store while attempting to rob the store, his conviction of first-degree murder based upon the felony murder statute was affirmed and specific performance of a plea bargain agreement that never went beyond discussion stages was not allowed.

Felony-murder (continued)

In general (continued)

State v. Wayne, 289 S.E.2d 480 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Sims* 248 S.E.2d 834 (W.Va. 1978), cited above.

Abandonment of the felony

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Abandonment of the crime, (p. 481) for discussion of topic.

Accidental killing

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Accidental killing, (p. 482) for discussion of topic.

Alibi

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Alibi, (p. 485) for discussion of topic.

Double jeopardy

See DOUBLE JEOPARDY Homicide, Felony murder, (p. 206) for discussion of topic.

Felony-murder (continued)

Elements

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

Syl. pt. 7 - The crime of felony-murder in this State does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies.

State v. Wayne, 289 S.E.2d 480 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Sims* 248 S.E.2d 834 (W.Va. 1978), cited above.

Syl. pt. 2 - the felony-murder statute applies where the initial felony and the homicide are parts of one continuous transaction, and are closely related in point of time, place, and casual connection, as where the killing is done in flight from the scene of the crime to prevent detection or promote escape.

The defendant, in this case, was a principal in the second degree to the crime of robbery of a guard's gun within the penitentiary and involved in a murder outside the penitentiary while obtaining an escape car. The felony-murder rule is applicable to these facts.

Lesser included offense

State ex rel. Hall v. Strickler, 285 S.E.2d 143 (1981) (Harshbarger, C.J.)

Robbery is a lesser included offense of felony-murder if a conviction for the greater offense (felony-murder) could not be had without conviction for the lesser crime (robbery).

HOMICIDE

First and second degree

In general

See HOMICIDE Instructions, First-degree, (p. 390) for discussion of topic.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

The difference between first and second degree murder is whether the homicide was wilful, deliberate, and premeditated.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Syl. pt. 3 - Where there has been an unlawful homicide by shooting and the State produces evidence that the homicide was a result of malice or a specific intent to kill and was deliberate and premeditated, this is sufficient to support a conviction for first degree murder.

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

Syl. pt. 6 - *W.Va. Code*, 61-2-1, enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, starving; (2) by any wilful, deliberate and premeditated killing; (3) in the commission of, or attempt to commit, arson, rape, robbery or burglary.

Instructions

In general

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

Instruction which descried manner in which victim was killed was based upon evidence vividly presented to the jury and even if improper, the remedy to test its propriety was appeal, not habeas corpus.

Instructions (continued)

In general (continued)

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

The giving of an instruction that sets out for the jury (1) the possible verdicts; (2) the elements of the offenses covered in the possible verdicts and with definitions; (3) punishments which may be given after convictions, is helpful and proper. Such an instruction is not error.

In a trial for second-degree murder, it was not error for the court to give a State instruction which stated the possible verdicts, descriptions of the offense and the penalty for each offense.

Burden shifting

See HARMLESS ERROR Constitutional, Burden shifting instructions, (p. 366) for discussion of topic.

Angel v. Mohn, 253 S.E.2d 63 (1979) (Miller, J.)

See INSTRUCTIONS Burden shifting, (p. 486) for discussion of topic.

Arthur v. McKenzie, 245 S.E.2d 852 (1978) (Harshbarger, J.)

See INSTRUCTIONS Burden shifting, (p. 487) for discussion of topic.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

See INSTRUCTIONS Burden shifting, (p. 487) for discussion of topic.

Instructions (continued)

Burden shifting (continued)

Jones v. Warden, W.Va. Penitentiary, 241 S.E.2d 914 (1978) (Harshbarger, J.)

See INSTRUCTIONS Burden shifting, (p. 488) for discussion of topic.

State ex rel. Ridenhour v. Leverette, 271 S.E.2d 612 (1980) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 488) for discussion of topic.

State ex rel. Wilhelm v. Whyte, 267 S.E.2d 554 (1980) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 489) for discussion of topic.

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C. J.)

See INSTRUCTIONS Burden shifting, (p. 489) for discussion of topic.

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, C. J.)

See INSTRUCTIONS Burden shifting, (p. 490) for discussion of topic.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 491) for discussion of topic.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

See INSTRUCTIONS Burden shifting, (p. 492) for discussion of topic.

Instructions (continued)

Burden shifting (continued)

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 492) for discussion of topic.

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 493) for discussion of topic.

State v. Haddox, 276 S.E.2d 788 (1981) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 493) for discussion of topic.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

See INSTRUCTIONS Burden shifting, (p. 494) for discussion of topic.

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

See INSTRUCTIONS Burden shifting, (p. 494) for discussion of topic.

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

See INSTRUCTIONS Burden shifting, (p. 496) for discussion of topic.

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 496) for discussion of topic.

Instructions (continued)

Burden shifting (continued)

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 497) for discussion of topic.

State v. O'Connell, 256 S.E.2d 429 (1979) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 497) for discussion of topic.

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 498) for discussion of topic.

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

See INSTRUCTIONS Burden shifting, (p. 499) for discussion of topic.

State v. Wright, 249 S.E.2d 519 (1978) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 500) for discussion of topic.

State v. Young, 273 S.E.2d 592 (1980) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 500) for discussion of topic.

Felony-murder

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See INSTRUCTIONS Abandonment of the crime, (p. 481) for discussion of topic.

Instructions (continued)

Felony-murder (continued)

State v. Grimmer, (continued)

See INSTRUCTIONS Accidental killing, (p. 482); INSTRUCTIONS Alibi, (p. 485) for discussion of topic.

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

While it is reversible error for a trial court to refuse to instruct a jury on lesser offenses charged in the indictment if there is any evidence in the record to prove such lesser offenses, *Painter v. Commonwealth*, 210 Va. 360, 171 S.E.2d 166 (1969), when the evidence, if believed supports only first degree murder, an instruction omitting all lesser offenses not in any way supported by the evidence is not error. *State v. Wilson*, 145 W.Va. 261, 114 S.E.2d 465 (1960).

When the indictment charged only first degree murder and the State's only theory was murder during an attempt robbery, which is first degree murder according to West Virginia's felony murder statute *W.Va. Code* § 61-2-1 (1923), and the defense maintained that the defendant did not kill anyone, the refusal of an instruction on lesser offenses was proper since the evidence could only indicate first degree murder or complete innocence.

First degree

Gaines v. Leverette, 266 S.E.2d 451 (1980) (Harshbarger, J.)

Where the evidence is consistent with the statutory definition of first degree murder, it is not error to instruct the jury to find the defendant guilty of first degree murder or not guilty. *State v. Wayne*, 245 S.E.2d 838, 842 (W.Va. 1978). The jury's failure to specify in its verdict that they return either first or second degree murder, although not approved, is not reversible error.

Instructions (continued)

Intent

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

An instruction which states that the intent to kill need not exist for any particular period of time prior to the actual event of the killing is proper, and giving of such instruction in a trial for second degree murder is not error.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

When the "Clifford Instruction" is properly read in its entirety, the phrase, "It is not necessary that (the) intention (to kill) should have come into existence for the first time at the time of the Killing" does not contradict the concept of premeditation, an essential element of first-degree murder; further, when a separate State instruction differentiates first and second-degree murder, giving the Clifford Instruction is not error.

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

An instruction indicating that it is not necessary to have intent to kill for any particular length of time prior to the actual killing was consistent and approved with syl. pt. 4, *State v. Schrader*, 288 S.E.2d 170 (W.Va. 1982). (Withdrawn from bound volume because rehearing is pending). Also, where the instructions read as a whole, clearly delineated the critical difference between first and second-degree murder, the instruction was not erroneous.

State v. Wright, 249 S.E.2d 519 (1978) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 500) for discussion of topic.

Instructions (continued)

Lesser included offense

State v. Stalnaker, 279 S.E.2d 416 (1981) (Neely, J.)

A trial court must give an instruction for a lesser included offense when evidence has been produced to support such a verdict.

Malice

State ex rel. Wilhelm v. Whyte, 267 S.E.2d 554 (1980) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 489) for discussion of topic.

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

See INSTRUCTIONS Burden shifting, (p. 489) for discussion of topic.

State v. Clayton, 277 S.E.2d 619 (1981) (Per Curiam)

In the absence of a showing of malice, it is erroneous to instruct the jury regarding either degrees of murder. Syllabus pt. 3, *State v. Hurst*, 93 W.Va. 222, 116 S.E.2d 248 (1923).

In the present case, the jury should not have been instructed on either first or second degree murder since there was no proof of malice.

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

Un a trial for murder, defendant appealed, claiming that a State instruction was an incorrect statement of law because it did not state that malice was a necessary element of first-degree murder. The Supreme Court stated that the deficiency was cured by the content of the instructions as a whole, particularly because another State instruction gave a full and correct statement of all the elements of first-degree murder.

Instructions (continued)

Malice (continued)

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

See INSTRUCTIONS Burden shifting, (p. 499) for discussion of topic.

Manslaughter

State v. Stalnaker, 279 S.E.2d 416 (1981) (Neely, J.)

Syl. pt. 1 - Where there is evidence to support the defendant's theory of voluntary manslaughter, it is error for the trial court to refuse to give a proper instruction presenting such a theory when requested to do so.

In a trial in which defendant was charged with first-degree murder, he introduced evidence of provocation and heat of passion consistent with the lesser offense of voluntary manslaughter. Even though the only evidence on the issue was defendant's own, he was entitled to an instruction for voluntary manslaughter.

Mercy

State v. Headley, 282 S.E.2d 872 (1981) (Neely, J.)

When the defendant fails to offer an instruction on the effect of a recommendation of mercy where one is appropriate, the trial court must give an instruction to the jury which explains that the verdict of guilty of first-degree murder with recommendation of mercy requires the person found guilty spend ten years in prison before he becomes eligible for consideration for parole, and that eligibility for parole in no way guarantees immediate parole after ten years but that parole is given to inmates only after a thorough consideration of their records by the parole board.

Instructions (continued)

Negligent homicide

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

Syl. pt. 1 - Where there is evidence to support the defendant's theory of negligent homicide, it is error for the trial court to refuse to give a proper instruction presenting such a theory when requested to do so.

Premeditation

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

Instruction that told jury premeditation need not exist "for a particular length of time prior to the homicide" and must be proved "to make out a case of murder in the first degree" did not relieve State from proving a necessary element of first-degree murder, and, although not approved by Supreme Court, did not raise a constitutional question and therefore would not serve as a basis for relief in habeas corpus.

State v. Schrader, 288 S.E.2d 170 (1982) (Neely, J.) (Withdrawn from bound volume because of rehearing is pending)

Syl. pt. 4 - When the W.Va. Legislature adopted Virginia' murder statute in 1868, the law was settled that in order to constitute a "premeditated" murder an intent to kill need exist only for an instant.

In an appeal from a murder trial, defendant claimed that the following instruction was incorrect: ". . . to constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist for set length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously. The Supreme Court found, however, supplemented with further instructions concerning second degree murder and voluntary manslaughter, there was no error in giving the instruction.

Instructions (continued)

Premeditation (continued)

State v. Schrader, (continued)

The State is not relieved of any burden of proof. To convict a defendant of willful, deliberate and premeditated murder under *W.Va. Code* 61-2-1 (1923) the state must still prove that the defendant had a conscious intent to kill at the time he executed that intent.

Provocation

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

In a trial for assault, an instruction regarding provocation was not found by the Supreme Court, under *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976) to be erroneous. It did not create or use a presumption; it correctly stated the law; it did not relieve the state on any material element of its burden of proof; it did not shift a burden to defendant. Further, in the defendant's original appeal of his case, the assignment of this error was finally adjudicated. This instruction being acceptable under *Pendry*, the trial judge considering the habeas corpus request was correct in dismissing the contention of error, under *W.Va. Code* 53-4A-1 (1967) *et seq.*. (post-conviction habeas corpus review).

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

It was not error for the trial court to refuse the defendant's instructions on provocation since the evidence adduced at trial did not support theory.

Retrial

See HOMICIDE Retrial, (p. 405) for discussion of topic.

HOMICIDE

Intent

See HOMICIDE Instructions, Intent, (p. 396) for discussion of topic.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

Intent is an essential element in murder, and when sanity is in issue, it is even more important to prove intent beyond a reasonable doubt, rather than by a presumption.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

Intention to kill need not exist for any particular length of time for the act to be willful, deliberate, and premeditated; it is only necessary that the intention initially should come into existence anytime before the homicide. *State v. Burdette*, 135 W.Va. 312, 63 S.E.2d 69 (1951); *State v. Painter*, 135 W.Va. 106, 63 S.E.2d 86 (1950).

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Specific intent to kill is part of premeditation and deliberation for first-degree murder. Proof of premeditation and deliberation will help prove intent. Malice is a form of intent. Malice is an essential element of both first and second-degree murder.

Syl. pt. 3 - Where there has been an unlawful homicide by shooting and the State produces evidence that the homicide was a result of malice or a specific intent to kill and was deliberate and premeditated, this is sufficient to support a conviction for first-degree murder.

State v. Schrader, 288 S.E.2d 170 (1982) (Neely, J.) (Withdrawn from bound volume because rehearing is pending)

Syl. pt. 4 - When the West Virginia Legislature adopted Virginia's murder statute in 1868, the law was settled that in order to constitute a 'premeditated' murder an intent to kill need exist only for an instant. Syl. pt. 7, *State v. Riser*, 294 S.E.2d 461 (W.Va. 1982).

Intent (continued)

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Proof of intent in a criminal case can be developed from the circumstances surrounding the crime. The type of criminal intent required to be proved depends on the degree of murder.

Malice

See HOMICIDE Instructions, Malice, (p. 392) for discussion of topic.

State v. Brant, 252 S.E.2d 901 (1979) (Neely, J.)

Syl. pt. 1 - "Malice is an indispensable element of murder in the second degree; and where, in a trial upon an indictment for murder, there is no evidence showing malice or from which it may be inferred, it is error to instruct the jury that it may find defendant guilty of murder in the second degree and a verdict of conviction based upon such an erroneous instruction will be set aside and a new trial awarded." Syl. pt. 1, *State v. Vance*, 124 W.Va. 126, 19 S.E.2d 221 (1942).

Syl. pt. 2 - Malice may be inferred from the intentional use of a deadly weapon; however, where the State's own evidence demonstrates circumstances affirmatively showing an absence of malice which would make an inference of malice from the use of a deadly weapon alone improper, a conviction for second-degree murder cannot be upheld.

State v. Clayton, 277 S.E.2d 619 (1981) (Per Curiam)

Syl. pt. 2 - "Malice, express or implied, is an essential element of murder in the second degree, and if absent the homicide is of no higher grade than voluntary manslaughter." Syllabus pt. 1, *State v. Galford*, 87 W.Va. 358, 105 S.E. 237 (1920).

Malice (continued)

State v. Clayton, (continued)

In this case the jury should not have been instructed on either first or second degree murder since there was no proof of malice. The defendant had made several attempts to secure police assistance before becoming involved in the fight. The victim was drunk and approaching theft with a chain at the time of the shooting.

State v. Dye, 280 S.E.2d 323 (1981) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 407) for discussion of topic.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

A homicide maliciously committed is murder. *State v. Roush*, 95 W.Va. 132, 120 S.E. 304 (1923).

Malice may be inferred from the intentional use of a deadly weapon, *State v. Brant*, 252 S.E.2d 304 (W.Va. 1979).

Malice may be implied from a deliberate cruel act against another because the act indicates a hear, regardless of social duty, fatally bent on mischief, *State v. Welch*, 36 W.Va. 690, 15 S.E.2d 419 (1892).

Like malice, wilfulness and deliberation may be inferred when a deadly weapon is used. *State v. McCauley*, 130 W.Va. 401, 43 S.E.2d 454 (1947); *State v. Panetta*, 85 W.Va. 212, 101 S.E. 360 (1919). There was evidence that the defendant killed his wife with a deadly weapon, and the jury could have inferred malice.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

The element of malice forms the critical distinction between murder and involuntary manslaughter.

Malice (continued)

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

See HOMICIDE Intent, (p. 391) for discussion of topic.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

Syl. pt. 1 - Malice is an essential element of both first and second degree murder.

Syl. pt. 2 - Where a defendant is the victim of an unprovoked assault and in a sudden heat of passion uses a deadly weapon and kills the aggressor, he cannot be found guilty of murder where there is no proof of malice except the use of a deadly weapon.

Under the *Pendry* standard, it is constitutionally impermissible for the State's instruction to state that malice may be presumed from the use of a deadly weapon and that the defendant must prove that he acted from provocation.

State v. Slonaker, 280 S.E.2d 212 (1980) (Harshbarger, C.J.)

Syl. pt. 2 - A jury instruction about malice should be, that it is essential that malice should have existed for any length of time before the killing, but it is sufficient if malice springs into the mind before the accused did the killing.

Malice may be inferred from the intentional use of a deadly weapon.

Malice cannot be inferred when the evidence affirmatively shows its absence.

Neither malice nor premeditation need exist for any appreciable time before the moment of killing.

An instruction that malice need not exist for any length of time is not reversible.

Malice (continued)

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Malice, a form of intent, is an essential element of both first and second-degree murder. But while second-degree murder requires malice, first-degree murder requires additionally a deliberate and premeditated intent to kill.

In a trial for attempted murder in the second degree, sufficient evidence was proven overall from which a jury could find beyond a reasonable doubt that malice existed when the defendant's hostile actions toward the victim before the shooting, threats directed toward the victim and a shot fired in the victim's direction were demonstrated.

Manslaughter

See HOMICIDE Instructions, Manslaughter, (p. 393) for discussion of topic.

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

Syl. pt. 2 - "A person may be guilty of involuntary manslaughter when he performs a lawful act in an unlawful manner resulting in the unintentional death of another." Syl. pt. 2 of *State v. Lawson*, 128 W.Va. 136, 36 S.E.2d 26 (1945), or where a person engaged in a lawful act, unlawfully causes the death of another.

In a trial in which defendant was convicted of voluntary manslaughter, the defendant's brandishment of a loaded weapon at persons who threatened and used abusive language at him was not *per se* an unlawful and felonious act. The trial court should have given an instruction on involuntary manslaughter.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 408) for discussion of topic.

Manslaughter (continued)

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

"An involuntary manslaughter charge arising from a death resulting from the operation of a motor vehicle requires something more than an act of ordinary negligence or the violation of a motor vehicle statute to sustain the conviction." Syllabus pt. 1, *State v. Vollmer*, 259 S.E.2d 837 (W.Va. 1979).

State v. Myers, (No. 15296, June 17, 1982) (Neely, J.)

The *State v. Vollmer*, 259 S.E.2d 837 (W.Va. 1979), holding that the State could draft charges under either the negligent homicide statute or the involuntary manslaughter statute in a situation involving an automobile accident that resulted in death did not find the *Murensky* limitations of consecutive sentencing also applied to involuntary manslaughter.

State v. Stalnaker, 279 S.E.2d 416 (1981) (Neely, J.)

See HOMICIDE Instructions, Lesser included offense, (p. 392) for discussion of topic.

State v. Vollmer, 259 S.E.2d 837 (1979) (Miller, J.)

Syl. pt. 1 - An involuntary manslaughter charge arising from a death resulting from the operation of a motor vehicle requires something more than an act of ordinary negligence or the violation of a motor vehicle statute to sustain the conviction.

Syl. pt. 3 - Since our involuntary manslaughter crime carries the same elements and the same penalty as our negligent homicide statute [*W.Va. Code* 17C-5-1] in regard to a homicide arising from the operation of a motor vehicle, the State may charge the defendant with either crime.

HOMICIDE

Negligent homicide

Myers v. Murensky, 245 S.E.2d 920 (1978) (McGraw, J.)

See HOMICIDE Negligent homicide, (p. 402) for discussion of topic.

Syl. pt. 3 - This state's negligent homicide statute, *W.Va. Code* § 17C-5-1(a), creates only one criminal offense regardless of the number of deaths proximately caused by the single act of operating a motor vehicle in reckless disregard of the safety of others.

The indictment, in this case, was for two counts charging the defendant with two negligent homicide offenses. It necessarily follows that the indictment is not void, and the trial court may proceed thereon. However, the defendant, if convicted, on either or both counts, shall be guilty of only one offense and shall be subject to only one penalty.

State v. Myers, (No. 15296, June 17, 1982) (Neely, J.)

Syl. pt. 2 - When charged under either the negligent homicide statute, *W.Va. Code*, 17C-5-1 [1981], or the involuntary manslaughter statute, *W.Va. Code*, 61-2-5 [1923], for multiple deaths resulting from a single act, a defendant may receive as man sentences as there were deaths. Syl. pt. 3, *Myers v. Murensky*, 245 S.E.2d 920 (W.Va. 1978) is overruled.

Concluding that it had incorrectly interpreted the legislative intent of *W.Va. Code*, § 17C-5-1(a) the Supreme Court overruled the *Myers v. Murensky* holding that the negligent homicide statute *W.Va. Code* § 17C-5-1(a) created only one criminal offense regardless of the number of deaths caused by the single act of negligent driving. According to the court, the legislative intent was that the punishment reflect the gravity of the crimes' consequences.

Negligent homicide (continued)

State v. Vollmer, 259 S.E.2d 837 (1979) (Miller, J.)

Syl. pt. 2 - Our negligent homicide statute, *W.Va. Code*, 17C-5-1, requires the driving of "[a] vehicle in reckless disregard of the safety of others," and this means that more than ordinary negligence is required. It is compatible with the involuntary manslaughter standard set in *State v. Lawson*, 128 W.Va. 136, 36 S.E.2d 26 (1945).

Syl. pt. 3 - Since our involuntary manslaughter crime carries the same elements and the same penalty as our negligent homicide statute in regard to a homicide arising from the operation of a motor vehicle, the State may charge the defendant with either crime.

Premeditation

See HOMICIDE Instructions, Premeditation, (p. 394) for discussion of topic.

Provocation

State v. Dozier, 255 S.E.2d 552 (1979) (McGraw, J.)

See SELF-DEFENSE Prior acts and offenses of victim, (p. 826) for discussion of topic.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

"A sudden intentional killing with a deadly weapon, by one who is not in any way at fault, in immediate resentment of a gross provocation, is *prima facie* a killing in heat of blood, and therefore, an offense of not higher degree than voluntary manslaughter. When in such case the evidence discloses that no time intervened between the giving of the provocation and the act of killing, within which passion could have subsided and reason regained its dominion and the fatal act itself was not attended by circumstances of extreme cruelty and inhumanity, nor preceded by conduct

Provocation (continued)

from which malice can be inferred, a conviction of murder in the second degree should be set aside and a new trial allowed." Syllabus pts. 10 and 11, *State v. Clifford*, 53 S.E. 981 (W.Va. 1906).

The evidence adduced at trial did not support the appellant's theory of provocation since the appellant's brother rushed the victim's house with an automatic weapon and the appellant held the victim's wife at gunpoint for over ten minutes belies the theory that the victim's alleged assault on the appellant's brother was unprovoked and that the appellant was without fault.

See HOMICIDE Instructions, Premeditation, (p. 394) for discussion of topic.

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Footnote 7 - Provocation is an element that reduces murder to voluntary manslaughter, and covers several types of acts directed against the defendant which would cause a reasonable person to kill. Two concepts are embodied in provocation; (1) that the provocation is of such a nature that it would cause a reasonable person to lose control of himself or herself; and, (2) that the provoked person did indeed lose control of himself or herself. Provocation is not a defense, but is a factor reducing the degree of culpability.

Provocation which consists of unprovoked assault on defendant, who kills the provoker in the heat of passion is a common type of provocation. Usually the degree of culpability is limited to voluntary manslaughter.

Provocation that is so extreme that the defendant reasonably views that he will be killed and so kills the provoker is a rarer type of situation. If self-defense is found in this situation, it will result in acquittal.

HOMICIDE

Retrial

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

Syl. pt. 3 - When a new trial is granted upon appeal, a defendant in the new trial who was originally convicted of voluntary manslaughter cannot be convicted of a more serious degree of homicide or sentenced to a harsher penalty than he received at the original trial. However, proper procedure upon retrial is to submit the case to the jury under proper instructions for every degree of homicide which the evidence supports, and if the jury returns a verdict in the second trial for an offense greater than that returned in the first trial, the trial court should then enter judgment for the offense for which the first conviction was obtained.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Under holding in syllabus point 3, *State v. Cobb*, 272 S.E.2d 467 (W.Va. 1980) trial court was correct in refusing to amend State's Instruction Number A to instruct the jury that they could not return a verdict providing for punishment in excess of murder in the first degree with a recommendation of mercy, the verdict returned in the defendant's first trial.

The correct practice is to instruct the jury as to every degree of homicide the evidence supports and allow the trial judge to correct the sentence if the jury verdict is greater than that rendered in the earlier trial.

Specify degree of murder

Gaines v. Leverette, 266 S.E.2d 451 (1980) (Harshbarger, J.)

Syl. pt. - It is always preferable that a jury comply with Code, 62-3-15, and specify the degree of murder. If it does not, the prosecutor or defense counsel should request that the verdict be amended before the jury is dismissed. However, if there can be only one degree of murder, based on the proof and instructions, we will not void a verdict because it did not specify the degree.

Specify degree of murder (continued)

Gaines v. Leverette, (continued)

In this case, the jury was instructed to find the defendant either guilty of first degree murder or not guilty. There can be no doubt about the degree of murder found by the jury despite its failure to so specify.

Sufficiency of evidence

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

In a trial for murder in the second degree, the Supreme Court found that there was sufficient evidence to support the jury's verdict and so no error was found.

State v. Clayton, 277 S.E.2d 619 (1981) (Per Curiam)

"Malice, express or implied, is an essential element of murder in the second degree, and if absent the homicide is of no higher grand than voluntary manslaughter. Syllabus pt.1, *State v. Galford*, 87 W.Va. 358, 105 S.E. 237 (1920).

To determine if there was sufficiency of evidence to establish malice, syllabus point 1 of State v. *Starkey, 2*44 S.E.2d 219 (W.Va. 1978) was applied. The Supreme Court held that the jury should not have been instructed on either first or second degree murder since there was no proof of malice. The defendant had made several attempts to secure police assistance before becoming involved in the fight. The victim was drunk and approaching theft with a chain at the time of the shooting.

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

Applies standard set forth in syllabus point 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

Sufficiency of evidence (continued)

State v. Conrad, (continued)

Under the facts of this case, there was sufficient evidence to allow the jury to infer the defendant acted with malice and that the State evidence was not manifestly inadequate when there was evidence in a murder trial that the defendant threatened the victim and then shot him, and that there was no threat made by the victim. There was no error in the refusal of the trial court to grant a directed verdict on the charges of first and second degree murder and no error in the court's giving instructions on the first and second degree murder verdicts.

State v. Dobbs, 259 S.E.2d 829 (1979) (Harshbarger, J.)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 916) for discussion of topic.

State v. Dye, 280 S.E.2d 323 (1981) (Per Curiam)

In an appeal from a murder conviction, defendant claimed that the State did not show that he acted with malice, and because there was no malice, the State's instructions on first and second degree murder were not properly given. Further, because there was no malice, the court should have directed a verdict on the first and second degree murder charges and should have granted a motion to set aside the jury verdict of guilty of second degree murder. The Supreme Court found that the evidence was sufficient to convince impartial minds that defendant had malice, that the evidence was not manifestly inadequate and that no injustice was done when: just prior to the fatal shooting, the defendant appeared with a firearm and threatened the victim, the shooting occurred in the absence of provocation, and that the victim was unarmed and was shot with a high-powered rifle from less than ten feet. The trial court did not err in refusing to grant the directed verdicts for defendant and in refusing to set aside the verdicts; further, the instructions on malice were supported by the evidence and were proper.

Sufficiency of evidence (continued)

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

The Supreme Court applied the *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) syllabus point 1, standard for determining if there was a sufficient amount of evidence to support the verdict in this case.

There was evidence the defendant killed his wife with a deadly weapon, and the jury could have inferred malice. Also, there was evidence sufficient to justify a jury finding the defendant brutally beat his wife, and then shot her.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Under standard announced in *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), State's evidence was sufficient to sustain a verdict of first-degree murder.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Applies standard set forth in *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited above.

Syl. pt. 3 - Where there has been an unlawful homicide by shooting and the State produces evidence that the homicide was a result of malice or a specific intent to kill and was deliberate and premeditated, this is sufficient to support a conviction of first degree murder. Code 61-2-1.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

When evidence showed that road conditions at the time of the accident were dry and clear, decedent's tractor was properly equipped, no other traffic was on the road, the tractor was struck twice by appellant's truck, and the appellant was found unfit to drive because of poor eyesight the Supreme Court, viewing the evidence according to the *Starkey* standard, "in the light most favorable to the prosecution", found that the evidence was not "manifestly inadequate" to convict the appellant of involuntary manslaughter.

Sufficiency of evidence (continued)

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

Evidence given at trial for first-degree murder was sufficient to support the jury's finding of guilt and the verdict.

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

Circumstances surrounding the shooting incident gave rise to evidence sufficient to support a finding of first-degree murder.

State v. Slonaker, 280 S.E.2d 212 (1980) (Harshbarger, C.J.)

Under the facts of this case, there was substantial evidence to justify a jury finding malice and convicting for second-degree murder. The defendant admitted using a deadly weapon, he shot several times, the victim was unarmed, there was no testimony of battery or assault upon him, and the jury was apparently not persuaded that defendant acted in self-defense.

Discharge of defendant

State v. Gialdella, 254 S.E.2d 685 (1979) (Harshbarger, J.)

"In a trial upon an indictment for murder in which the defendant is convicted of voluntary manslaughter and the evidence is not sufficient to justify a verdict of guilty of voluntary manslaughter, such verdict and the sentence of imprisonment entered upon it will be set aside and reversed by the appellant court." Syl. pt. 2, *State v. Blizzard*, 152 W.Va. 810, 166 S.E.2d 560 (1969).

The judgment here must be reversed and defendant released because the evidence was insufficient to sustain a voluntary manslaughter conviction.

HOMICIDE

Variance between indictment and proof

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, Retrial and double jeopardy, (p. 27) for discussion of topic.

IDENTIFICATION

Instructions

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

See SEXUAL ASSAULT Instructions, (p. 888) for discussion of topic.

Suggestive identification

Right to a lineup

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Applies standards set forth in syl. pt. 1, *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980), cited below.

The granting of a defendant's motion for a pretrial lineup is normally within the discretion of the trial judge. One of the factors to be considered by the trial judge in granting the motion is whether the motion is made sufficiently in advance of trial to enable arrangements for it in the event it is granted.

Where trial court did not feel that a distant possibility of misidentification existed and motion for an in-court lineup was untimely, Supreme Court was unable to conclude that the trial court abused its discretion by denying the motion.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

Syl. pt. 2 - Where the defendant raises the issue of suggestive identification procedures, the trial court should apply the identification test set out in *State v. Williams*, 249 S.E.2d 725 (W.Va. 1978). If the trial court finds the test results to be inconclusive such that there is a distinct possibility of misidentification, it may direct that the defendant be accorded a lineup to determine if the State's witness can identify him.

An independent lineup is not compelled just because the victim is uncertain in identification of defendant, when the State has another competent identification witness.

Suggestive identification (continued)

Right to a lineup (continued)

State v. Watson, (continued)

Here, the trial court was not confronted with a *bona fide* identification issue, since although the victim was uncertain in his identification, the State relied on other competent identification witnesses. The trial court was therefore clearly correct in refusing the defendant's motion for independent or lineup identification.

Right to an *in camera* hearing

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

The Court declined to hold an *in camera* hearing on the admissibility of in-court identifications is required in all cases whether there is a request to hold one or not.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Applies standards set forth in syl. pt. 2, *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980), cited below.

The granting of a defendant's motion for a pretrial lineup is normally within the discretion of the trial judge. One of the factors to be considered by the trial judge in granting the motion is whether the motion is made sufficiently in advance of trial to enable arrangements for it in the event it is granted.

Where trial court did not feel that a distant possibility of misidentification existed and motion for an in-court lineup was untimely, Supreme Court was unable to conclude that the trial court abused its discretion by denying the motion.

Suggestive identification (continued)

Right to an *in camera* hearing (continued)

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

Challenges to the admissibility of an in-court identification on the ground that it is tainted by unduly suggestive pre-trial identification procedures, entitles a defendant to an *in camera* hearing.

State v. Morgan, 284 S.E.2d 924 (1981) (Per Curiam)

No *in camera* hearing was held on defendant's assertion that his in-court identification was the result of constitutionally infirm pretrial identification procedures. The Supreme Court applied Syl. pt. 6 of *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). The Court remanded this case to permit the trial court to conduct a proceeding comparable to an *in camera* hearing.

If on remand the pre-trial identification proceedings are found not to be impermissibly suggestive, the defendant's conviction will stand. If the court finds them to be impermissibly suggestive, it will then determine under the test set out in *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), Syl. pt. 3, whether the identifying witnesses have an independent basis for their identification other than the suggestive pretrial identification procedures. If the witnesses do have such independent basis, the conviction will stand. If they do not, the trial court must set aside the conviction and award a new trial.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 6 - A defendant must be allowed an *in camera* hearing on the admissibility of a pending in-court identification when he challenges it because the witness was a party to pre-trial identification procedures that were allegedly constitutionally infirm.

Suggestive identification (continued)

Right to an *in camera* hearing (continued)

State v. Swiger, 289 S.E.2d 497 (1982) (Per Curiam)

Although the proper course would have been for the trial court to conduct an *in camera* hearing as required by *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), it would be meaningless to remand for such a hearing when the record clearly shows that the in-court identification was properly allowed.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

The failure to hold an *in camera* hearing may not be fatal in all cases where a claim of unduly suggestive identification procedures is made. It may be harmless error where there is sufficient evidence in the record to show an independent basis for the in-court identification.

In this case police officers were shown pictures of defendant prior to a recidivist case. No independent basis of identification was shown. The Court held because there were a number of other identification witnesses who properly connected the defendant with the prior conviction, the doctrine of harmless constitutional error could be applied.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

Applies standards set forth in syl. pt. 6, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), cited below.

Footnote 2 - Defendant can waive his right to be present at the *in camera* hearing on the identification issue prior to the actual lineup procedure.

Suggestive identification (continued)

Right to cross-examine the witnesses

State v. McCourt, 283 S.E.2d 918 (1981) (Per Curiam)

A defendant as a matter of trial strategy is entitled to test the credibility of an identifying witness by cross-examination on the suggestiveness of pretrial identification procedures and a total prohibition of cross-examination on the facts of a pretrial identification may constitute a denial of due process and a denial of fair trial.

In a trial for grand larceny, defendant was not denied his right to cross-examine the witnesses against him relative to the pre-trial identification made of him from a photo array since his attorney was permitted to use the photographs in cross-examining the only witness who identified him at the scene of the crime concerning the suggestiveness of the photo array.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Trial court's refusal to permit the examination of the photographic array denied defendant the right to effectively cross-examine the officers on the procedure used.

Right to examine photographic display

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 7 - A defendant must be allowed to examine any photographic display used by the government during pre-trial identification procedures, to determine whether it improperly suggested this identity.

Suggestive identification (continued)

Standard for determining

State v. Ayers, 282 S.E.2d 876 (1981) (Neely, J.)

When immediate comparison of appellant's name and physical description with existing police files was crucial to verification of the undercover agent's identification, the court correctly admitted the agent's testimony about the comparison of his personal observation with the file photograph and correctly limited the scope of the testimony by refusing to allow discussion of the photograph's exact origin.

State v. Barker, 281 S.E.2d 142 (1981) (Per Curiam)

Defendant contended that a photographic array in which he was wearing a jail uniform was unduly suggestive. However, a defendant's shoulders, collar and arms appeared clothed in a blue coat or mechanic's overalls that show no insignia, writing, number, or identifying marks of any kind identifying it as a jail uniform. The defendant's appearance was not unduly suggestive and did not influence the witness who identified the defendant.

It was further contended the witness' in-court identification should have been excluded because on cross-examination the witness in effect stated that without the photographs he might have had difficulty identifying the defendant. But taking the witness' testimony as a whole the in-court identification doesn't require suppression.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Applies standards set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited below.

These criteria, although designed to determine whether an out-of-court identification is so tainted as to require suppression of a subsequent in-court identification, can also be used to determine whether the out-of-court identification itself should be suppressed.

Suggestive identification (continued)

Standard for determining (continued)

State v. Boyd, (continued)

Under the facts of this case, the reliability of the witnesses' identification outweighed any suggestiveness that might have been inherent in the out-of-court identification procedure.

Suggestive procedures alone should not be the basis of excluding an otherwise totally reliable identification.

Here the inability of the witness to make an in-court identification of appellant and the conflicting testimony concerning the number of photographs shown to the witnesses was insufficient to convince the Supreme Court that the photographic identification was unreliable.

In a robbery by violence trial, it was not error for the court to admit the testimony of state troopers regarding the photographic identification by the witnesses when the witnesses testified at trial concerning a pretrial identification of the defendant and the witnesses were subject to cross examination. This third party testimony was not hearsay under these circumstances since it is offered not for the truth of the matter but is corroborative and is supportive of an inference that the identifier's testimony is credible.

The prosecution cannot buttress its case in chief by the introduction of evidence concerning a pretrial identification made in violation of an accused's right to counsel. An unduly suggestive lineup can be attacked on due process grounds even when the defendant's right to counsel has not been violated.

Where the defendant attacks the sufficiency of an in-court identification by showing that there was an impermissibly suggestive pretrial identification procedure, the in-court identification should be excluded unless the prosecution establishes by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the lineup identification.

Suggestive identification (continued)

Standard for determining (continued)

State v. Boyd, (continued)

Reliability of the witnesses' identification is the linchpin in determining when a suggestive out-of-court identification will so taint an in-court identification as to require its exclusion.

Where witness was subpoenaed to testify at the preliminary hearing of a co-defendant and appellant, unrepresented by counsel, was also present at the hearing, affording the witness the opportunity to view him and hear his name called as one of those involved in the robbery, Supreme Court found that the encounter was unnecessarily suggestive, that under the totality of the circumstances, the witnesses' in-court identification was reliable.

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 6, *State v. Harless*, 285 S.E.2d 461 (W.Va. 1981), cited below.

Where several photographs depicted white males, several of whom had beards not substantially different from appellant's, the requirement of syllabus pt. 6, *State v. Harless*, 285 S.E.2d 461 (W.Va. 1981) were met; therefore, the photographs were not impermissibly suggestive merely because of the others did not have similar characteristics.

Suggestive identification (continued)

Standard for determining (continued)

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

The victim was shown fifty photographs the day after the assault. The defendant was not among them and the victim made no identification. Over a month later, the victim was shown six photographs, five of which were contained in the original array of fifty, the sixth was a photograph of the defendant. Without hesitation, the victim made a positive identification of the defendant. The Supreme Court applied the test set out in Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976) for determining whether an out-of-court identification is so tainted as to require suppression of an in-court identification. Basically, the trial court must look to the totality of the circumstances to see if the identification procedures may be cured.

The victim in this case was afforded a succession of opportunities to observe the assailant. His initial description of the defendant was accurate. The photographic identification made by the victim was with complete certainty. All these factors support the conclusion that the in-court identification had a basis in accuracy independent of the photographic identification.

State v. Casdorph, 230 S.E.2d 476 (1976) (Neely, J.)

Syl. pt. 3 - In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Suggestive identification (continued)

Standard for determining (continued)

State v. Critzer, 280 S.E.2d 288 (1981) (Per Curiam)

Applies standards set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above.

Although it is clear the pretrial show-up procedure employed in this case was unnecessarily suggestive, the defendant was handcuffed and accompanied by police at the "show-up", and given the fact there was no emergency, under the totality of the circumstances the pretrial identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Applies standards set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above.

Victim's in-court identification of defendant was not based on impermissibly suggestive pretrial photographic viewing but was reliable since he had been physically close to defendant minutes before the attack, struggled with the attacker and afterwards gave an accurate description which was corroborated by another witness.

State v. Foddrell, 269 S.E.2d 854 (1980) (Caplan, J.)

Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976) was applied by the Supreme Court to determine if an in-court identification of the defendant was tainted due to a suggestive photograph. The photograph was not offered in evidence but was shown to the witness to see if the person in the photograph was the one who participated in the robbery. The witness positively, without equivocation, identified the defendant as one of the participants. The witness in the instant case was a former serviceman where he served as a military policeman. Taking all the above into consideration,

Suggestive identification (continued)

Standard for determining (continued)

State v. Foddrell, (continued)

the Supreme Court concluded the in-court identification was proper. Assuming that the in-court identification by this witness was improper, there is also the positive identification of the defendant by the other eyewitnesses who identified him from observation at the time of the crime. The "tainted" identification would have therefore constituted harmless error at most.

State v. Harless, 285 S.E.2d 461 (1981) (Miller, J.)

Syl. pt. 4 - A pretrial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The impermissible suggestiveness of a photographic array may arise not only from the photographs themselves but the manner in which they are presented to the identifying witness.

Syl. pt. 5 - Even though there was an impermissibly suggestive pretrial photographic array, an in-court identification could be made if the identifying witness had a reliable basis for making an identification of the defendant which basis is independent of the tainted pretrial identification procedures.

Syl. pt. 6 - Most courts have concluded that a photographic array will not be deemed excessively suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features. The fact that some of the photographs are dissimilar to thefts appearance will not taint the entire array.

In a trial for armed robbery, it was not error for the trial court to admit victim's in-court identification of defendant, even though the defendant contended that several of the photographs in the array did not match defendant's physical appearance.

Suggestive identification (continued)

Standard for determining (continued)

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

Applies standards set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above.

This test, although fashioned for witnesses of a crime, is also applicable to the witness in this trial who saw the defendant with the victim shortly before the murder.

In an appeal from a first-degree murder conviction, defendant claimed that the in-court identification of a witness was inadmissible because it was based on an impermissibly suggestive pretrial identification. The Supreme Court found that the identification was reliable under the circumstances.

State v. Kennedy, 249 S.E.2d 188 (1978) (Neely, J.)

Applies standards set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above.

The identification in this case had some aspects of reliability, but when these are weighed against the suggestive procedure of bringing the suspect before the identifier alone and in handcuffs the scale tips towards unreliability.

The testimony of the witness concerning the color and clothing and the built of the person he pursued passed the reliability test.

Suggestive identification (continued)

Standard for determining (continued)

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

In-court identification was made after the court asked the defendant to rise and inquired of the witness whether this was the man he had seen. This procedure, though improper, was not fatally tainted. The record reveals that the witness had an excellent opportunity to observe the defendant at the time of the crime and that only slightly more than three months had elapsed between the crime and the identification at trial. It is also apparent from the record that the witness demonstrated a high degree of certainty in the correctness of his identification. The witness' identification of the defendant had an independent basis for its reliability and was not influenced by the suggestiveness of the in-court identification procedure. The alleged tainted evidence would have constituted harmless error.

State v. McNeal, 251 S.E.2d 484 (1978) (McGraw, J.)

The Supreme Court applied the standards set out in Syl. pt. 3 of *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above to determine whether a one-on-one showing of a handcuffed suspect surrounded by police in a house forcibly entered so tainted the identification as to require suppression of an in-court identification. The Supreme Court concluded that while such a procedure is suggestive and unnecessary in the absence of an exigent circumstance, it is not to be *per se* excluded without regard to reliability. The Court considering the suggestive identification procedure and the *Casdorph* factors could not say there was "a very substantial likelihood of irreparable misidentification."

State v. Morgan, 284 S.E.2d 924 (1981) (Per Curiam)

The five factors set forth in Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), were utilized to determine if the defendant's in-court identification was tainted by impermissibly suggestive pretrial procedures.

Suggestive identification (continued)

Standard for determining (continued)

State v. Morgan, (continued)

No *in camera* hearing was held on defendant's assertion that his in-court identification was the result of constitutionally infirm pretrial identification procedures as required by *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). The Supreme Court, therefore, remanded the case for trial court to apply *Casdorph* five factors. If the witnesses are determined not to have an independent basis, the trial court must set aside the conviction and award a new trial.

State v. Rickman, 278 S.E.2d 880 (1981) (McGraw, J.)

The Supreme Court applied each of the five factors set out in Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above, to the facts of this case, and determined the pretrial identification of the defendant was not unfairly suggestive.

State v. Swigert, 289 S.E.2d 497 (1982) (Per Curiam)

Applies standard set forth in Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above.

The Supreme Court determined the in-court identification not to be tainted. (1) The witness had adequate opportunity at the time of the robbery to view the man she later identified as the defendant; (2) The witness testified that her attention was on the defendant when the crime occurred. (3) The witness described theft to State Police on the same day that the robbery occurred; (4) On cross-examination by defense counsel, the investigating officer testified that the witness identified both theft and his co-conspirator from the set of nine photographs; he also testified the witness identified the defendant at a lineup and at the magistrate's office.

Suggestive identification (continued)

Standard for determining (continued)

State v. Swigert, (continued)

The prosecution met its burden of proving by clear and convincing evidence that the witnesses' in-court identification of the defendant was based on observation of him other than at the show-up or line-up.

The prosecution cannot buttress its case-in-chief by introducing evidence of a pre-trial identification made in violation of an accused's Sixth Amendment right to counsel. *State ex rel. Patterson v. Gwinn*, No. 14392 (May 29, 1979).

The appellant did not have counsel present at the lineup nor did he waive his right to counsel. The record in this case indicates that the prosecuting attorney did not attempt to elicit information from any of the witnesses about the pretrial identification made of the defendant. The Supreme Court found that no violation of the defendant's sixth amendment right to counsel occurred in this case.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

See IDENTIFICATION Suggestive identification, Right to an *in camera* hearing, (p. 414) for discussion of topic.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

Syl. pt. 2 - Where the defendant raises the issue of suggestive identification procedures, the trial court should apply the identification test set out in *State v. Williams*, 249 S.E.2d 752 (W.Va. 1978) [Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976) cited above]. If the trial court finds the test results to be inconclusive such that there is a distinct possibility of misidentification, it may direct that the defendant be accorded a lineup to determine if the State's witness can identify him.

Suggestive identification (continued)

Standard for determining (continued)

State v. Williams, 249 S.E.2d 752 (1978) (Neely, J.)

In determining whether an identification is so tainted as to require suppression, it must first be determined whether the identification was reliable even though the confrontation procedure were suggestive. Reliability is determined by considering the factors set out in Syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976), cited above.

The victim's identification does have some aspects of reliability, but when these are weighed against the suggestive procedure of taking the victim to the scene of the arrest and telling him that his money and receipts had been found in the possession of the three men seated in the police car, the suggestiveness then obviously outweighs questionable reliability and exclusion is the only proper remedy.

Third-party testimony

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

A police officer testified to the victim's reaction upon seeing the defendant at the preliminary hearing. Third-party testimony regarding an out-of-court identification may in certain circumstances be admissible when the identifying witness testifies at trial because both the identifying witness and the third party are then available for cross-examination. Since both the victim and the police officer were witnesses at the trial, the officer's statements as to the victim's reaction on seeing theft at the preliminary hearing were admissible.

Suggestive identification (continued)

Third-party testimony (continued)

State v. Cox, 253 S.E.2d 517 (1979) (McGraw, J.)

The trial court did nor err in refusing to admit testimony that a third party, unrelated to this case, had once identified defendant as an automobile thief when later a "look-alike" pleaded guilty to the crime because this testimony was neither material nor relevant and did not bring the credibility of present eyewitnesses into question and because theft already had presented his theory of mistaken identity along with supporting evidence to the jury.

IMMUNITY

Authority to offer

State v. Cox, 253 S.E.2d 517 (1979) (McGraw, J.)

Syl. pt. - Law enforcement officers do not have authority to promise that in exchange for information, a person accused will not be prosecuted for the commission of a crime, and such promise is generally unenforceable.

Fifth amendment vs. sixth amendment

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

The trial court did not abuse its discretion by denying the defendant's request that immunity be given his witness, who had involved the fifth amendment privilege against self-incrimination, when the witness' testimony would have merely corroborated the testimony of another witness.

Instructions

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

Defendant claimed error in that the court did not instruct the jury that since the accomplice testified, he would be immune from prosecution. Since the accomplice made no assertion of his privilege against self-incrimination, the State did not make an effort to seek immunity under *W.Va. Code* § 57-2 (1966). There is no immunity unless the State grants it. Thus the legal conclusion in the instruction was wrong.

Procedure

State ex rel. Brown v. MacQueen, 285 S.E.2d 486 (1981) (McGraw, J.)

Syl. pt. 2 - A claim of immunity based in *W.Va. Code* § 57-2 is properly raised by motion to dismiss.

Prohibition is not a proper proceeding in which to initiate an immunity claim.

IMMUNITY

Scope of the grant

State ex rel. Brown v. MacQueen, 285 S.E.2d 486 (1981) (McGraw, J.)

Syl. pt. 1 - *W.Va. Code* § 57-2 (1966) confers upon a witness compelled to testify over his claim of self-incrimination a complete immunity that precludes subsequent criminal prosecution for the offense to which his testimony relates.

Here, since the petitioner's testimony related only to the facts surrounding the transfer of the allegedly stolen guns, the grant of immunity would not preclude his prosecution for burglary or grand larceny. These offenses are separate and distinct from the crime of buying, receiving, or aiding in the concealment or transfer of stolen goods.

INDECENT EXPOSURE

Constitutionality of the statute

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Syl. pt. 1 - The language contained in *W.Va. Code* § 61-8B-10 (1977 Replacement Vol.) and adjacent statutes is plain and unambiguous on its face and sufficient to put the community and the defendant on notice as to the criminal nature of his acts; in the case of the crime of indecent exposure, the defendant must be informed (1) that the victim did not consent to the act; (2) that the act consisted of the intentional exposure of sex organs or anus; and (3) that the act is done under circumstances which the perpetrator knows is likely to cause affront or alarm.

Indictment

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Syl. pt. 2 - The State's failure to provide in the indictment sufficient information from which the defendant could determine the statute he was being charged with violating and to state each element involved in the crime did not give the defendant adequate notice from which he could prepare a defense and is grounds for reversal of the conviction obtained thereunder.

Indictment for indecent exposure was insufficient in that it failed to allege lack of consent on the part of the victim, and its language was so brief and vague that it was not clear which statutory section the defendant was accused of violating.

Sufficiency of the evidence

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Applies standard set forth in Syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

Syl. pt. 3 - In order to secure a conviction the State must prove each and every element of the crime charged beyond a reasonable doubt.

Sufficiency of the evidence (continued)

State v. Knight, (continued)

The State introduced no evidence to show a lack of consent by forcible compulsion, and for this reason the evidence was insufficient to support the conviction.

INDICTMENT

In general

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

Even where the legislature has prescribed the form of the indictment, if such form does not contain all of the statutory elements of the offense, an indictment drawn under it will be invalid.

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

The indictment must give the defendant full information of the character of the accusation with which he is charged.

Accessory, aiding and abetting, principal

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 22) for discussion of topic.

Breaking and entering

See BREAKING AND ENTERING Indictment, (p. 86) for discussion of topic.

Consolidation

State v. Mitter, 285 S.E.2d 376 (1981) (Miller, J.)

It is reasonable to apply the case law relating to joinder of offense to consolidation of indictments for trial. Thus, a trial court may in its discretion order two or more indictments, or informations, or both, to be tried together if the offenses could have been joined in a single indictment or information, that is, the offenses are of the same or similar character or are based on the same act or transaction connected together or constituting a common scheme or plan.

INDICTMENT

Controlled substances

See CONTROLLED SUBSTANCES Indictment, (p. 135) for discussion of topic.

Double jeopardy

See JOINDER - SEVERANCE AND ELECTION Joinder of offenses, (p. 530) for discussion of topic.

Drunk driving

State v. Boggess, 256 S.E.2d 325 (1979) (Harshbarger, J.)

See DRUNK DRIVING Indictment, (p. 227) for discussion of topic.

False return of votes

See FALSE RETURN OF VOTES Indictment, (p. 327) for discussion of topic.

Grand jury

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

Syl. pt. 1 - An indictment will be vitiated where a witness completes his testimony but remains in the grand jury room while other witnesses are testifying and participates in questioning such witnesses.

Indecent exposure

See INDECENT EXPOSURE Indictment, (p. 430) for discussion of topic.

INDICTMENT

Joinder of offenses

See JOINDER - SEVERANCE AND ELECTION Joinder of offenses, (p. 530) for discussion of topic.

Larceny

See LARCENY Indictment, (p. 625) for discussion of topic.

Malicious wounding

State v. Furner, 245 S.E.2d 618 (1978) (Harshbarger, J.)

See INDICTMENT Sufficiency, (p. 437) for discussion of topic.

Negligent homicide

Myers v. Murensky, 245 S.E.2d 920 (1978) (McGraw, J.)

See HOMICIDE Negligent homicide, (p. 402) for discussion of topic.

Obtaining money by false pretenses

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

See OBTAINING MONEY BY FALSE PRETENSE Indictment, (p. 659) for discussion of topic.

Pre-indictment delay

State ex rel. Leonard v. Hey, 269 S.E.2d 394 (1980) (Harshbarger, J.)

See PRE-INDICTMENT DELAY In general, (p. 681) for discussion of topic.

Pre-indictment delay (continued)

State v. Ayers, 282 S.E.2d 876 (1981) (Neely, J.)

See PRE-INDICTMENT DELAY In general, (p. 682) for discussion of topic.

Procedure for raising defects

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Where the defects in an indictment are substantial, they may be raised after verdict on motion for new trial, more technically denominated motion in arrest of judgment.

Reckless driving

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

See RECKLESS DRIVING Indictment, (p. 752) for discussion of topic.

Robbery by violence

Scott v. Mohn, 268 S.E.2d 117 (1980) (Caplan, J.)

See INDICTMENT Sufficiency, (p. 436) for discussion of topic.

Severance of offenses

See JOINDER - SEVERANCE AND ELECTION Severance, (p. 530) for discussion of topic.

INDICTMENT

Sexual assault

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

See INDICTMENT Sufficiency, (p. 436) for discussion of topic.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

See INDICTMENT Sufficiency, (p. 438) for discussion of topic.

Sufficiency

Scott v. Mohn, 268 S.E.2d 117 (1980) (Caplan, J.)

Applies standard set forth in Syl. pt. 2, *State v. Furner*, 245 S.E.2d 618 (W.Va. 1978), cited below.

Indictment for robbery by violence, although somewhat archaic but which closely followed that suggested in Code § 62-9-6, fully and plainly informed the defendant of the character and cause of the accusations against him.

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

Syl. pt. 2 - An indictment charging a statutory offense need not use the precise language of the statute. It is sufficient if the indictment language is substantially equivalent to the statutory language.

Language in the indictment "sexual intercourse, to-wit, oral sex with another person" is substantially equivalent to the statutory language "contact between the sex organ of one person and the mouth of another person."

State v. Boggess, 256 S.E.2d 325 (1979) (Harshbarger, J.)

See DRUNK DRIVING Indictment, (p. 227) for discussion of topic.

Sufficiency (continued)

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

An indictment or warrant for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.

When the warrant, written in terms of *W.Va. Code* § 17C-5-3(a) (1951) (amended 1979), stated the defendant's conduct constituted reckless driving and also specified the time and place of the incident, but did not designate specific persons whose safety was disregarded, the warrant was sufficient to fully inform the petitioner of the reckless driving charge against him.

State v. Furner, 245 S.E.2d 618 (1978) (Harshbarger, J.)

Syl. pt. 1 - An indictment is sufficient when it clearly states the nature and cause of the accusation against a defendant, enabling him to prepare his defense and plead his conviction as a bar to later prosecution for the same offense.

Syl. pt. 2 - If an accused person is plainly and fully informed in an indictment of the character and cause of the accusation against him, transposition of his name with that of his victim in the videlicet clause of the indictment is not a fatal defect.

So the placing of the victim's name in the place of the defendant's in the charging part of the indictment, as in this case, is not fatal in the indictment.

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Syl. pt. 2 - The State's failure to provide in the indictment sufficient information from which the defendant could determine the statute he was being charged with violating and to state each element involved in the crime did not give the defendant adequate notice from which he could prepare a defense and is grounds for reversal of the conviction thereunder.

Sufficiency (continued)

State v. Knight, (continued)

An indictment in a trial for indecent exposure which fails to allege the lack of consent of the part of the victim, a necessary element, was insufficient.

The indictment is also defective in that its language is so brief and vague that it is not clear which statutory section the defendant was accused of having violated.

The Supreme Court stated it could properly deal with the issue of the sufficiency of the indictment on appeal for two reasons: (1) Defendant's counsel raised the issue at the trial level when he filed a motion to quash the indictment "for other reasons apparent on the face of the indictment." and (2) The defendant, to the degree he failed to raise objections to the indictment at the trial level did not thereby waive primary defects therein, that is, he did not waive the objection that the facts stated do not constitute an offense.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

See CONTROLLED SUBSTANCES Indictment, (p. 136) for discussion of topic.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

The indictment substantially followed the applicable sexual offense statute. Where an indictment substantially follows the language of a statute, it will be deemed sufficient.

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 2, *State v. Furner*, 245 S.E.2d 618 (W.Va. 1978), cited above.

Specific allegations as to when an offense was committed are not strictly required in indictments.

Sufficiency (continued)

Intent

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

"An indictment predicated on a statute which specifically makes intent an element of the offense sought to be charged must aver the intent." Syl. pt. 1, *State v. Sprague*, 111 W.Va. 132, 161 S.E. 24 (1931).

"The use of the word 'unlawfully' in an indictment for a statutory offense does not supply essential affirmative allegation of intent where the statute specifically makes intent an element of the offense." Syl. pt. 2, *State v. Sprague*, 111 W.Va. 132, 161 S.E. 24 (1931).

Jeofailes

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

The statute of jeofailes will not cure substantial defects in an indictment.

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

The statute of jeofailes will not cure substantial defects in an indictment. The point can be raised by a motion in arrest of judgment or motion for new trial.

The defendants did raise the omission of the requirement of proof of intent to possess a controlled substance from the indictment by a motion in arrest of judgment.

INDIGENTS

Appeal

See APPEAL Right to appeal, Determination of the merits, (p. 41) for discussion of topic.

Failure to or denial of appeal

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

See APPEAL Right to appeal, Failure to or denial of appeal, (p. 43) for discussion of topic.

See HABEAS CORPUS Failure to or denial of appeal, (p. 353) for discussion of topic.

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

See INEFFECTIVE ASSISTANCE Failure to appeal, Extraordinary dereliction, (p. 449); INEFFECTIVE ASSISTANCE Failure to appeal, Relief, (p. 450) for discussion of topic.

Right to transcript

See TRANSCRIPT Right to transcript, (p. 927) for discussion of topic.

INDIGENTS

Determination of indigency

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

Where defendant applies for a free transcript testimony to prosecute an appeal, the indigency of the defendant is a question of fact which, if timely controverted, must like other such questions of fact, be determined by the court, and a determination by the court in the issue of indigency rests within its sound discretion.

Expenses

Advance payment of expenses

State ex rel. Foster v. Gainer, 272 S.E.2d 666 (1980) (Harshbarger, J.)

Syl. pt. - Payment of a properly authorized procedurally correct requisition for expert fees, already determined by this Court to be constitutionally compelled and for which the legislature appropriated a special fund, is a nondiscretionary, ministerial duty of the auditor.

Advance payment to an expert does not violate *W.Va. Code* 12-3-13, proscribing salary advances, because the expert is neither an officer nor an employee of the State.

Advances are not lending the credit of the State in violation of *W.Va. Const.*, art 10, § 6.

Exceeding the statutory limit

State ex rel. Foster v. Luff, 264 S.E.2d 477 (1980) (Miller, J.)

Syl. pt. 1 - Upon request for additional expert fees under *W.Va. Code* 51-11-8: (1) the request should be made in writing; (2) the request should detail why the expert is needed; (3) defense counsel should be permitted an opportunity to elaborate on the motion; and (4) in denying the motion, the trial judge should place in the record the specific reasons for his ruling.

Expenses (continued)

Exceeding the statutory limit (continued)

State ex rel. Foster v. Luff, (continued)

Syl. pt. 2 - In evaluating a motion under *W.Va. Code* 51-11-8 for additional expert fees, the trial judge should accord considerable weight to the representations in the defense counsel's motion, but should also engage in independent inquiry as to the need for the expert if he believes that such inquiry is necessary. In ruling on the motion, the trial judge should grant it if he determines that the assistance of the expert is reasonably necessary to defense counsel's development of a relevant issue in the case.

Indigent defendant sought writs of mandamus and prohibition alleging that the circuit judge had abused his discretion by failing to authorize the expenditure of adequate funds to enable defendant to procure services of a forensic pathologist, ballistics expert, and psychiatrist in preparation of his defense. The Supreme Court issued a moulded writ directing the Court to hold a further hearing and requiring the Court to adhere to standards set forth in Syl. pt. 1 in determining the allocation in excess of the statutory maximum. Though the Court, in this case, accepted the issue of increased allowable expert fees under its original jurisdictional powers, further cases of this type such as motions *in limine* were determined to be inappropriate for original writs of mandamus or prohibition.

State ex rel. Leach v. Hamilton, 279 S.E.2d 420 (1982) (Per Curiam)

Syl. pt. - A trial court's decision as to whether good cause has been established under *W.Va. Code*, 51-11-8 for incurring expenses in excess of the five hundred dollar statutory maximum provided for the defense of a criminal case ordinarily involves questions of fact, and is interlocutory in nature, and therefore is not reachable by an original writ of mandamus or prohibition, but may be assigned as error on appeal.

Expenses (continued)

Exceeding the statutory limit (continued)

State ex rel. Leach v. Hamilton, (continued)

Where indigent defendant sought a writ of mandamus to compel the trial judge to authorize expenditure of funds in excess of the $500 statutory maximum for conducting a public opinion pole, procuring the services of two psychiatrists and a clinical psychologist, and securing the presence of four nonresident witnesses, the Supreme Court determined that this decision as to whether good cause was established under *W.Va. Code*, 51-11-8 for incurring expenses in excess of $500 involved questions of fact, and therefore was not reachable by an original writ of mandamus or prohibition, but may be assigned as error on appeal.

Procedural standards for determining whether a motion for additional expenses should be granted under *W.Va. Code* § 51-11-8 are set forth in *State ex rel. Foster v. Luff*, 264 S.E.2d 477 (W.Va. 1980).

Paternity cases

See PATERNITY Expenses, (p. 671) for discussion of topic.

Repayment of costs, attorney's fees

Armstead v. Dale, 294 S.E.2d 122 (1982) (Harshbarger, J.)

See PROBATION Conditions, (p. 582) PROBATION Revocation, Failure to pay court costs, attorney fees, restitution, (p. 711) for discussion of topic.

Repayment of costs, attorney's fees (continued)

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

When a condition of probation was repayment of court costs and defendant fails to meed this condition, the Court refused to determine whether this was a valid ground to support probation revocation since possession of marijuana was the ground for revocation. In footnote 6, the Court stated "We doubt probation revocation could be based solely on the failure to pay costs where the probationer is indigent. Most courts . . . have read their criminal costs statute (analogous to our *W.Va. Code* § 62-5-7) in light of a general statute relieving indigents from the payment of costs."

Right to counsel

Appeal

See APPEAL Right to counsel, (p. 45) for discussion of topic.

Dissatisfaction/rejection of appointed counsel

Watson v. Black, 239 S.E.2d 664 (1977) (Neely, J.)

Syl. pt. 2 - While an indigent defendant is entitled to competent counsel, he is not entitled to the appointment of any particular lawyer and may only reject representation by his court-appointed counsel for good cause.

Syl. pt. 3 - Whenever it is suggested to the trial court that an indigent criminal defendant is dissatisfied with his court-appointed counsel, the trial court should conduct a hearing on the record before trial to determine whether good cause exists to discharge a court-appointed counsel and appoint another.

Syl. pt. 4 - It is the obligation of an indigent criminal defendant to exert good faith errors to cooperate with his court-appointed counsel and any objection which is made to a court-appointed counsel which is not made in good faith need not be accepted by the trial court and, therefore, the defendant proceeds at his own peril if he continues to be uncooperative with his court-appointed counsel.

Right to counsel (continued)

Dissatisfaction/rejection of appointed counsel (continued)

Watson v. Black, (continued)

Syl. pt. 5 - Good cause for relief of a court-appointed counsel consists of: (1) a conflict of interests; (2) a complete breakdown in communication with court-appointed counsel after the exhaustion of good faith efforts to work with counsel; or, (3) an irreconcilable conflict which might lead to an unjust verdict.

Effective assistance

See APPEAL Right to counsel,(p. 45) for discussion of topic.

See DUE PROCESS Right to counsel, Effective assistance of counsel, (p. 238) for discussion of topic.

See INEFFECTIVE ASSISTANCE Failure to appeal, Relief, (p. 450) for discussion of topic.

Habeas corpus

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

W.Va. Code, 53-4A-4, the habeas corpus statute, requires the appointment of an attorney where a preliminary writ of habeas corpus is issued and where the petitioner is indigent.

Paternity

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

See PATERNITY Right to counsel, (p. 671) for discussion of topic.

Right to counsel (continued)

Paternity (continued)

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

See PATERNITY Expenses, (p. 671) for discussion of topic.

Violation of municipal ordinance

Bullett v. Staggs, 250 S.E.2d 38 (1978) (Caplan, C.J.)

Syl. pt. 1 - Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

Syl. pt. 2 - *W.Va. Code*, 1931, 51-11-5, as amended, constitutes sufficient authority for the appointment of counsel by the circuit court of one charged with a violation of a municipal ordinance, which violation could result in imprisonment.

INEFFECTIVE ASSISTANCE

In general

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

In future claims of ineffective assistance of counsel, the trial transcript or that part of which would lend substance to the petitioner's case should be made a part of the record before the Supreme Court.

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

A charge of ineffective assistance of counsel is not one to be made lightly. It is a serious charge which calls into question the intercity, ability and competence of a member of the bar. Counsel should carefully consider the facts before raising this issue, keeping the Code of Professional Responsibility in mind.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

On determining effective representation, some consideration also has to be given to the quality of the State's case arrayed against the defendant and the strength of the defendant's case.

State v. Sims, 248 S.E.2d 834 (1978) (Miller, J.)

Footnote 2 - The claim of incompetency of counsel implicates the sixth amendment right to effective assistance of counsel.

Appellant review

State v. Pelfrey, 256 S.E.2d 438 (1979) (McGraw, J.)

The Supreme Court will not attempt to find a contrary interpretation in the record to absolve counsel of the accusation of ineffective assistance of counsel when the trial judge stated that a mistrial would have been granted had one been requested, and defense counsel prejudiced and altered the outcome of the proceedings.

INEFFECTIVE ASSISTANCE

Burden and standard of proof

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

"One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

"This burden is on the defendant to establish his allegation . . . not as a matter of speculation but as a demonstrable reality . . . ." *State ex rel. Wine v. Bordenkircher*, 230 S.E.2d 747 (W.Va. 1976).

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

The burden is on the defendant to prove ineffective assistance by a preponderance of the evidence.

Failure to appeal

Asbury v. Mohn, 256 S.E.2d 547 (1979) (Harshbarger, J.)

When relator directs counsel not to appeal a grand larceny conviction based on his belief that appeal would jeopardize chances for parole, and relator's decision involves no legal judgment that counsel should overrule, counsel's failure to appeal is not considered ineffective assistance.

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

See APPEAL Right to appeal, Waiver of appeal, (p. 44) for discussion of topic.

Failure to appeal (continued)

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Although the state is constitutionally obliged to appoint effective counsel to assist an indigent criminal in his appeal, once this has been done there rests some responsibility on the indigent criminal to make known to the court counsel's inaction.

Turner v. Haynes, 245 S.E.2d 629 (1978) (Caplan, C.J.)

See APPEAL Failure to preserve for appeal, Failure to or denial of appeal, (p. 43) for discussion of topic.

Extraordinary dereliction

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

"Factors to be considered in determining whether there has been extraordinary dereliction are: the clarity and diligence with which the relator has moved to assert his right to appeal; the length of time that has been served on the underlying sentence measured against the time remaining to be served; whether prior writs have been filed or granted involving the right to appeal; and the related question of whether resentencing has occurred in order to extend the appeal period . . . ." Syl. pt. 6, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977).

Where relator wrote repeatedly to counsel, Judge and Clerk of the Supreme Court regarding his appeal; had served two and one half years of his sentence (and it was likely that he would have served almost the full minimum of five years and be eligible for parole before an appeal could be determined if he were to be resentenced); had filed two petitions for writs of habeas corpus; and had been sentenced once to begin a new appeal period; extraordinary dereliction was found and the appropriate remedy was unconditional discharge.

Failure to appeal (continued)

Relief

Sartin v. Bordenkircher, 272 S.E.2d 243 (1980) (Per Curiam0

In habeas corpus proceedings involving a claim of ineffective assistance of counsel because of the failure to prosecute a timely appeal the Supreme Court has held that where there has been extraordinary dereliction on the part of the State, the appropriate remedy is unconditional discharge. *Carter v. Bordenkircher*, 226 S.E.2d 711 (W.Va. 1976).

Although the Supreme Court found that the facts of this case presented a case of extraordinary dereliction on the part of the state and that relator was entitled to an unconditional discharge, double jeopardy would not bar a retrial.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

See HABEAS CORPUS Failure to or denial of appeal, (p. 353) for discussion of topic.

Failure to call witnesses

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

In prosecution for rape in which issue of consent was never raised, evidence of the chastity, or lack thereof, of the prosecutrix was inadmissible and therefore counsel was not remiss in not introducing such evidence.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Defense counsel's failure to call two witnesses did not amount to ineffective assistance since their testimony was weak and could have done more harm than good.

INEFFECTIVE ASSISTANCE

Failure to offer instructions

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Counsel's failure to offer instructions for lesser degrees of murder and manslaughter was not ineffective assistance since these lesser offenses were included in the State's instructions and defense counsel argued in closing that the case was one of not guilty because of self-defense or guilty of voluntary or involuntary manslaughter.

Failure to make motions

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

Even if counsel's failure to move to suppress evidence seized from the car at the time of the defendant's arrest was error, it was harmless since it would not have affected the outcome of the trial since the suppression motion would have properly been denied.

"If counsel's error, proven to have occurred, would not have changed the outcome of the case, it will be treated as harmless error." *Carrico v. Griffith*, 272 S.E.2d 235 (W.Va. 1980).

Trial counsel's failure to move to suppress in-court identification was harmless, if error, since in-court identification was properly admissible and the identity of the defendant as the victim's assailant was never in question at his trial.

Counsel's failure to request a stay of execution in pending appeal was not a denial of effective assistance of counsel at trial in violation of the defendant's constitutional rights since it did not even pertain to the outcome of the trial.

Failure to make motions (continued)

State v. Goodman, 290 S.E.2d 438 (1979) (McGraw, J.)

Supreme Court found that the defendant was not denied effective assistance of counsel when counsel failed to move for a mistrial when it was discovered that two confessions were inadmissible in State's case in chief, but instead asked judge to explain to the jury why the statements, which had been referred to, were not admitted; and, as a tactical decision to base argument of involuntariness of third confession on inadmissibility of other two.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Defense counsel's failure to record motion for continuance did not amount to ineffective assistance since even if the ground had been preserved, the Supreme Court would have declined to find error.

State v. Pelfrey, 256 S.E.2d 438 (1979) (McGraw, J.)

Syl. pt. - When in a criminal case, defense counsel, reinforced by the court, maintains a reasonable, good faith belief that error has occurred warranting mistrial, but fails to move for mistrial solely because of personal economic motivation, the defendant has been denied effective assistance of counsel.

Failure to prepare

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

"We do not hold that a lawyer's failure to investigate a material element in his client's defense cannot constitute ineffective assistance of counsel; in fact, as the Third Circuit said in *Moore v. United States*, 432 F.2d 739 (1970)" . . . [R]epresentation involves more than the courtroom of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance." However this Court takes notice that in the practice of law it is not always

Failure to prepare (continued)

Carrico v. Griffith, (continued)

possible for a lawyer to investigate every avenue suggested to him by his client. A lawyer must use his own skill and judgment to determine what evidence is relevant and what facts will materially aid his client in demonstrating innocence." *Carter v. Bordenkircher*, 226 S.E.2d 711 (W.Va. 1976).

Where appellant did not introduce any evidence at habeas corpus hearing tending to show what evidence would have been repealed by an independent investigation of the state's witnesses, or that such investigation would have produced evidence which would have changed the outcome of the trial, and since the trial transcript was not before the Court, the Supreme Court could not conclude that counsel failed to adequately investigate the case and that this failure prejudiced the defendant and changed the outcome of the trial.

State ex rel. Burton v. Whyte, 256 S.E.2d 424 (1979) (Miller, J.)

Counsel's failure to uncover the fact that defendant had requested counsel when he was arrested and before he signed a confession did not constitute incompetency.

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

Counsel's failure to obtain a court-ordered psychiatric examination was not ineffective assistance of counsel since counsel chose to present a defense of incapacity due to intoxication, and a psychiatric examination was not necessary to that defense, and there was no evidence at trial that the defendant suffered from any mental illness.

Failure to prepare (continued)

State v. Bradley, 260 S.E.2d 830 (1979) (Neely, J.)

Where counsel was absent at the striking of the jury, replaced with allegedly inexperienced counsel, and counsel was appointed late, Supreme Court found that none of these allegations singly amounted to *per se* ineffective assistance of counsel and even considered in the totality of the entire record, they did not amount to ineffective assistance.

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Defense counsel's decision not to request further neurological examination of the defendant did not constitute ineffective assistance of counsel under the facts of this case.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Appellant's claim that defense counsel did not prepare for proper impeachment was not supported since counsel brought information out in cross-examination.

Failure to raise a defense

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

Defendant was not denied effective assistance of counsel by counsel's presentation of the intoxication defense since such presentation resulted in a hung jury in defendant's first trial.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

When defendant's self-defense theory is weak and might reasonably not have been urged by counsel, and there was no other claim of ineffective assistance, and the ineffectiveness does not relate to a matter that would have substantially affected the fact-finding process, the claim of ineffective assistance will be rejected.

Failure to raise a defense (continued)

State v. Watson, (continued)

A determination of ineffective assistance of counsel for failure to raise an available defense involves a case-by-case examination of the particular facts in order that the issues those facts fairly raise can be compared with the defenses actually presented by counsel.

Guilty plea

See GUILTY PLEAS Ineffective assistance, (p. 339) for discussion of topic.

Inadequate time to prepare

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

Counsel's having four months to prepare for trial was considered adequate in regard to defendant's complaint that a continuance was not granted in a rape case.

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

Syl. pt. 1 - An interval of one day or less between the appointment of counsel and trial or the entry of a guilty plea raises a rebuttable presumption that the defendant was denied effective assistance of counsel and shifts the burden of persuasion to the state.

Syl. pt. 2 - Where the presumption of ineffective assistance of counsel is rebutted by evidence from any source, the presumption vanishes completely and disappears as a rule of law.

Inadequate time to prepare (continued)

Housden v. Leverette, (continued)

Under the facts of the case, the Supreme Court did find assistance to be ineffective when counsel was appointed for a malicious wounding charge only one day before entry of guilty plea; there was no transcript of the guilty plea for the Supreme Court to review; counsel could not recall matters outside the record; and there was no evidence to rebut the presumption of ineffective assistance.

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

See CONTINUANCE Reasonable opportunity to prepare, (p. 128) for discussion of topic.

State ex rel. Rogers v. Casey, 273 S.E.2d 356 (1980) (Per Curiam)

Syl. pt. 1 - "The right guaranteed by State and Federal Constitutions to a person charged with a criminal violation to have effective assistance of counsel, cannot be abrogated by denying counsel, if timely employed, sufficient time to adequately prepare for trial." Syl. pt. 2, *State ex rel. West Virginia - Pittsburgh Coal Co. v. Eno*, 135 W.Va. 473, 63 S.E.2d 845 (1951).

In this case, the defendant was confined on the eve of trial at Huttonsville, a considerable distance away from his counsel (Kanawha) and his counsel was given less than twenty-four hours notice of trial. Defendant's counsel was thus afforded inadequate time to prepare.

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

Syl. pt. 1 - The denial of a motion for a continuance constitutes a denial of the right to effective assistance of counsel as guaranteed by Art. 3, § 14 of the West Virginia Constitution where an attorney is directed by a trial court to represent a defendant in a criminal case and is permitted only a weekend to prepare for the trial.

Inadequate time to prepare (continued)

State v. Bush, (continued)

Timely appointment and a reasonable opportunity for adequate preparation are absolute prerequisites for fulfillment of counsel's constitutionally assigned role of seeing to it that available defenses are raised and the prosecution is put to its proof.

Reasonable time to prepare for trial is guaranteed in both State and Federal Constitutions, and is to be considered in determining whether defendant had effective counsel.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

See CONTINUANCE Reasonable opportunity to prepare, (p. 127) for discussion of topic.

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

The defendant's attorney had substantial time to prepare a defense since he appeared for the defendant at the arraignment some five weeks before the trial.

State v. Morris, 277 S.E.2d 638 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State ex rel. West Virginia - Pittsburgh Coal Co. v. Eno*, 135 W.Va. 473, 63 S.E.2d 845 (1951). See *State ex rel. Rogers v. Casey*, 273 S.E.2d 356 (W.Va. 1980), cited above.

Supreme Court found that court appointed counsel had inadequate time to prepare and undertake discovery when he was appointed a mere 15 minutes before trial and during trial, failed to call all of defendant's subpoenaed witnesses. Judgment was reversed and new trial ordered.

INEFFECTIVE ASSISTANCE

Jury selection

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

Defendant was not denied effective assistance of counsel by counsel's refusal to allow him to participate in jury selection since defendant had no connections to the area in which he was being tried, had been there only in the occasion of the crime, and defense counsel was a resident of the area and familiar with the inhabitants.

Prosecutorial overmatch

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

See DENIAL OF A FAIR TRIAL Prosecutorial overmatch, (p. 172) for discussion of topic.

Standard for determining

See GUILTY PLEAS Ineffective assistance, (p. 339) for discussion of topic.

Carrico v. Griffith, 272 S.E.2d 235 (1980) (Caplan, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977), cited above.

If counsel's failure, once proven, would not have changed the outcome of the case, it is harmless error.

Scott v. Mohn, 268 S.E.2d 117 (1980) (Caplan, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard for determining (continued)

Scott v. Mohn, (continued)

See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977), cited above.

Where counsel did conduct an independent investigation and successfully plea bargained, counsel was considered to be effectively assistive, even though he did not contact his client promptly nor consult with him until immediately before the trial, because defendant was fully informed of the charges against him and voluntarily pleaded guilty.

In determining whether the indigent defendant has been denied effective assistance the court should consider whether: (1) counsel was promptly furnished to the accused; (2) counsel was given a reasonable time to prepare to defend the accused; (3) counsel properly conferred and thoroughly discussed the facts and law with the client, including but not limited to advising him of his rights, matters of defense, etc.; (4) counsel conducted any investigation of the facts and the law in preparation for trial; (5) counsel displayed the normal and customary degree of skill possessed by attorney's who are reasonably knowledgeable of criminal law and (6) any prejudice resulted to the accused in the event that any of the above guidelines were not followed.

Watson v. Black, 239 S.E.2d 664 (1977) (Neely, J.)

Syl. pt. 1 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorney's who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Standard for determining (continued)

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *State v. Watson*, *supra*, above.

State v. Bradley, 260 S.E.2d 830 (1979) (Neely, J.)

While counsel did not exhibit excellence in his trial strategy and tactics, Supreme Court, considering entire record, could not find ineffective assistance and would not second guess decisions made in the courtroom unless "no reasonable attorney would have so acted under the circumstances of the case." *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

Effective representation by an attorney requires that he do more than merely insure that the trial is not a farce or mockery of justice. Counsel must exhibit the normal and customary degree of skill possessed by attorney's who are reasonably knowledgeable of criminal law.

State v. Church, 284 S.E.2d 897 (1981) (McHugh, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, supra, cited above.

A defendant in a criminal case is not constitutionally guaranteed such assistance of counsel as will necessarily result in his acquittal. He is constitutionally guaranteed counsel with the normal and customary degree of skill.

Standard for determining (continued)

State v. Foddrell, 269 S.E.2d 854 (1980) (Caplan, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977), cited above.

State v. Goodman, 290 S.E.2d 260 (1981) (McHugh, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, supra, cited above; see *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980), cited above.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977), cited above; see *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980), cited above.

Supreme Court found that in view of the rather overwhelming nature of the State's case and the paucity of the defense evidence on self-defense, they could not hold that defense counsel's strategy fell below that of "no reasonably qualified counsel."

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, supra, cited above.

Standard for determining (continued)

State v. Pelfrey, 256 S.E.2d 438 (1979) (McGraw, J.)

Errors of counsel are not deemed to be ineffective assistance if those errors are arguably a matter of trial tactics or strategy.

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

See *Watson v. Black*, supra, cited above; see *State v. Watson*, *supra*, cited above.

Where defense counsel was confronted with a substantial case of murder with little facts which would offer extenuating circumstances and no recognized defense to the killing, his tactical decisions were in keeping with what a reasonably qualified attorney would have done in accordance with syl. pts. 19 and 21 of *State v. Thomas*, *supra.*

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

"Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

INSANITY

Adjudication of criminal responsibility before trial

State ex rel. Smith v. Scott, 280 S.E.2d 811 (1981) (Neely, J.)

Syl. pt. 1 - While a criminal trial is unwarranted when pretrial psychiatric examinations clearly reveal by a preponderance of the evidence, that the accused at the time the crime was committed, was not criminally responsible for his acts, *W.Va. Code* 27-6A-1 [1977] *et seq.* provides no mandatory pretrial mechanism for resolving the issue of criminal responsibility; consequently, adjudication of criminal responsibility before trial is entirely within the combined discretion of the trial court judge and the prosecuting attorney, since absent a motion to *nolle* an indictment by the prosecuting attorney based on persuasive pretrial medical reports, the trial court judge has no discretion to deny the State a trial by jury on the issue of criminal responsibility.

A trial court judge is not under any duty to hold a hearing on the issue of criminal responsibility in advance of trial regardless of how compelling the pretrial report may be. Criminal responsibility is a jury question, unless both prosecutor and judge concur that the outcome of the proceedings would be a foregone conclusion.

State ex rel. Walton v. Casey, 258 S.E.2d 114 (1979) (Harshbarger, J.)

Syl. pt. 1 - A criminal trial is unwarranted when pre-trial psychiatric examinations clearly reveal by preponderance of the evidence that the accused at the time of the crime was committed, was not criminally responsible for his acts.

Where relator was found to have chronic mental illness and to have been suffering from it at the time of the crime and to presently be unable to cooperate with his defense, he was deemed to be not criminally responsible for his acts; the dismissal prescribed under *W.Va. Code §* 27-6A-2(c) was stayed for 10 days under the provisions of *W.Va. Code* § 27-5-1 to allow a civil commitment proceeding to be begun.

Adjudication of criminal responsibility before trial (continued)

State v. Kenney, 286 S.E.2d 398 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State ex rel. Smith v. Scott*, 280 S.E.2d 811 (W.Va. 1981).

Bifurcated trial

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Syl. pt. 3 - When deciding whether a defendant's motion for bifurcation should be granted, the trial court must first examine both the defendant's insanity defense and his defense on the merits to determine whether they are bona fide defenses supported by the facts of the law. If either defense is found lacking, bifurcation should be refused. If, however, both defenses are substantial, the court must then determine the likelihood of prejudice to the defendant which may result if both defenses are presented at a unitary trial.

Both the defendant's insanity and the defense on the merits must be "substantial" and both must be supported by sufficient evidence to enable the court to make an informed decision regarding bifurcation.

Some examples of when refusal of bifurcation would be appropriate would be: (1) where the defense on the merits consists of only a denial of the commission of the crime; or (2) when defendant only puts the State to its proof; or (3) where defendant can muster no competent psychiatric reports or testimony to support his defense.

In determining need for bifurcation, the court first decides if defendant has a substantial case on both the insanity issue and on the merits, then makes a determination of whether defendant will be prejudiced by a unitary trial. In this regard the court should inquire into any possible antagonism between the two defenses and the manner in which they might be inconsistent.

Bifurcated trial (continued)

State v. Boyd, (continued)

In a robbery by violence trial where defendant's defense on the merits was only the expectation that the State's evidence would be inadmissible, defendant was found not to have met the first part of the bifurcation test (that he presented a substantial case on the merits and insanity defenses) so bifurcation was properly refused and the trial court was found not to have abused its discretion in the refusal.

Syl. pt. 2 - A trial court does not abuse its discretion by refusing bifurcation where the defendant does not present a substantial defense both in the merits and on the issue of insanity.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

"The right to a bifurcated trial lies within the sound discretion of the trial court." Syl. pt. 3, *State v. Bragg*, 235 S.E.2d 466 (W.Va. 1977).

The Supreme Court will reverse the denial of a motion for bifurcated trial only upon abuse of discretion.

A trial court does not abuse its discretion by refusing bifurcation where theft does not present a substantial defense both in the merits and on the issue of insanity.

Burden of proof

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

There exists in the trial of an accused a presumption of sanity. However, should said accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.

Burden of proof (continued)

Edwards v. Leverette, (continued)

When an accused is relying upon the defense of insanity at the time of the crime charged, the jury should be instructed (1) that there is a presumption the accused was sane at the time; (2) that the burden is upon him to show that he was then insane; (3) that if any evidence was introduced by him or by the State fairly raising doubt upon the issue of his sanity at that time, the presumption of sanity ceases to exist; (4) that the State then has the burden to establish the sanity of the accused beyond a reasonable doubt; and (5) that if the whole proof upon that issue leaves the jury with a reasonable doubt as to the defendant's sanity at that time the jury must accord him the benefit of that doubt and acquit him.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

It is impossible to fashion a general rule that specifies the nature and quality of evidence which the prosecution must produce to prove sanity beyond a reasonable doubt; this issue must be resolved according to the facts and circumstances of the particular case.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Applies standard set forth in syl. pt. 2, *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979), cited below.

The presumption of sanity is constitutionally permissible because the state is still required to prove every element of the offense beyond a reasonable doubt and the issue of sanity or insanity is considered only after it has been found that all the elements of the offense are proven beyond a reasonable doubt.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

Applies standard set forth in syl. pt. 2, *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979), cited below.

Burden of proof (continued)

State v. Grimm, (continued)

Once any evidence is introduced fairly raising doubt upon the issue of the defendant's sanity at the time of the act, the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time of the offense.

State v. Kinney, 286 S.E.2d 398 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979), cited below.

The State's burden of proving sanity beyond a reasonable doubt does not mean that the sanity defense must be entirely without contradictions. It is factual contradiction which a jury is called upon to resolve, and where there is factual contradiction on the question of sanity that the question is one for the jury.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Syl. pt. 2 - There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.

State v. Rowe, 285 S.E.2d 445 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979), cited below.

INSANITY

Directed verdict

State ex rel. Smith v. Scott, 280 S.E.2d 811 (1981) (Neely, J.)

See INSANITY Sufficiency of evidence, (p. 477) for discussion of topic.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

See INSANITY Sufficiency of evidence, (p. 477) for discussion of topic.

State v. Kinney, 286 S.E.2d 398 (1982) (Per Curiam)

See INSANITY Sufficiency of evidence, (p. 478) for discussion of topic.

Disposition

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Under our statutes relating to the commitment of criminals, the court may order that a person who has been found not guilty by reason of mental illness, retardation or addiction be hospitalized in a mental health facility for a period not to exceed forty days for observation and examination. During the observation period procedures for civil commitment may be initiated before the court having jurisdiction over the individual. The prosecuting attorney of the county within which the crime occurred must be notified of any hearing, conducted within five years of the alleged crime, relating to commitment of the individual, and shall have a right to be heard at any such hearing. *W.Va. Code* § 27-6A-3.

In order for the individual to be committed, the court must make a finding that the individual is mentally ill, retarded or addicted and as a result is likely to cause serious harm to himself or to others if allowed to remain at liberty. The court must also find that there are no less restrictive alternatives than commitment appropriate for the individual. *W.Va. Code* § 27-5-4(j). Once these findings have been made, the court may order the individual to a mental health facility for an indeterminate period, or for a tempore observatory period not exceeding six months. *W.Va. Code* § 27-5-4(k).

Disposition (continued)

State v. Boyd, (continued)

If the order is for a temporary observation period the court, at any time prior to the expiration of the period, may hold another hearing on the basis of a report by the chief medical officer of the mental health facility where the patient is confined, to determine whether the original order should be modified or changed to an order of indeterminate hospitalization. At the conclusion of the hearing, the court shall order indeterminate hospitalization or dismissal of the proceedings. *W.Va. Code* § 27-5-4(k) (3).

An order for an indeterminate period expires of its own terms at the expiration of two years, unless prior to the expiration, the Department of Health, upon findings based on an examination of the patient by a physician or a psychologist, extends the order for indeterminate hospitalization. *W.Va. Code* § 27-5-4(k) (4).

An involuntarily committed patient cannot be discharged unless the chief medical officer of the mental hospital facility where the patient is confined makes a determination that the conditions justifying involuntary hospitalization. *W.Va. Code* § 27-7-1 (1980 Cum Supp.). Therefore, in order for the individual to be released, either at the expiration of the temporary observatory period, or at the expiration of the indeterminate period, there must be a showing, based on the sworn testimony of the examining physician or the chief medical officer of the mental health facility, that any likelihood of the defendant causing serious harm to himself or to others if allowed to remain at liberty no longer exists.

Furthermore, no person committed to a mental health facility subsequent to a verdict of not guilty by reason of insanity, shall be discharged unless the physician in charge gives notice to the committing court and to the prosecuting attorney of the county where the crime occurred. If the court objects to the discharge of the individual, a hearing shall be held at which it must be shown that the individual, a hearing shall be held at which it must be shown that the individual is not likely to cause serious harm to himself or to others if allowed to remain at liberty in order for the individual to be discharged. *W.Va. Code* § 27-6A-4 (1980 Replacement Vol.)

Disposition (continued)

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

The court of record may order that a person found not guilty by reason of insanity may be hospitalized in a mental health facility for observation and examination. *W.Va. Code* § 27-6A-3(a). During the observation period, procedures for civil commitment may be initiated before the court, pursuant to *W.Va. Code* §§ 27-5-1 *et seq.* If it is shown upon clear, cogent, and convincing proof that the individual is mentally ill and because of his illness is likely to cause serious harm to himself or to others if allowed to remain at liberty, and there is no less restrictive alternative, the court may order him hospitalized in a mental health facility for an indeterminate period. *W.Va. Code* § 27-5-4(j)(k).

An order for an indeterminate hospitalization expires at the end of two years unless the Department of Health extends the order prior to expiration. The individual may request a hearing by the court on the necessity of continued indeterminate hospitalization. *W.Va. Code* § 27-5-4(k)(4).

The individual will not be discharged without notice to the court and to the prosecuting attorney. Either the court or the prosecuting attorney may make a written objection to the discharge. If either objects, the court will conduct a hearing within ten days, and the individual will be discharged unless it is again shown by clear, cogent, and convincing proof that he is mentally ill, is likely to causes serious harm to himself or others if discharged, and there is no less restrictive alternative. If that is not shown, the individual will be released. *W.Va. Code* § 27-6A-4.

Evidence

Scope of psychiatric testimony

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

While trial court has considerable discretion as to the admissibility of testimony on the issue of insanity, Supreme Court found that the trial court abused its discretion in its severe restrictions on the scope of the psychiatric testimony.

Evidence (continued)

Scope of psychiatric testimony (continued)

State v. Rhodes, (continued)

"In a criminal trial, a psychiatrist testifying on the issue of insanity should be permitted to make unrestricted use of the information elicited by him during his interview with the defendant and should further be permitted to make reference to information available to him in the form of records or documents whose reliability has been reasonably established and which ave been kept in the regular course of professional care or treatment of the defendant, provided that such information either from the interview or the records is information taken into consideration by the psychiatrist in arriving at his diagnosis." Syl. pt. 1, *State v. Myers*, 222 S.E.2d 300 (W.Va. 1976).

Trial court's substantial restriction of the appellant's psychiatric testimony on the issue of his insanity resulted in reversible error as it prevented the jury from having relevant evidence in which to base a decision as to the appellant's insanity.

Statements by accused

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

Syl. pt. 2 - In a trial for murder where the defendant raises insanity as the sole defense, the court upon request should conduct an *in camera* hearing to determine whether incriminating statements made by the defendant to a third party while in a hospital emergency room shortly after committing the homicide, attempting suicide, and having been diagnosed by the attending staff psychiatrist as "suicidally depressed and mentally ill," were voluntary and admissible into evidence.

INSANITY

Evidence (continued)

Weight of expert testimony

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

"[T]he testimony of witnesses is not exclusive and the jury has the right to weigh the testimony of all witnesses, experts and otherwise. Syl. pt. 2, *Webb v. Chesapeake and Ohio Railway Co.*, 105 W.Va. 555, 144 S.E. 100 (1928).

Extradition

State ex rel. Jones v. Warmuth, 272 S.E.2d 446 (1980) (Miller, J.)

See EXTRADITION Competency, (p. 319) for discussion of topic.

Instructions

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

It was reversible error to give the following instruction in a first degree assault when the defendant relied upon an insanity defense: "Every man is presumed to be sane and to be free of such mental defect or disease causing him to lack the capacity either to appreciate the wrongfulness of his act or to conform his conduct to the requirements of law until the contrary is proved by a preponderance of the evidence to the satisfaction of the jury. In that regard, the Court further instructs the jury that a plea of not guilty by reason of insanity is an affirmative defense and the defendant has the burden of proof on the issue of insanity and must prove such insanity by a preponderance of the evidence."

Syl. pt. 3 - When an accused is relying upon the defense of insanity at the time of the crime charged, the jury should be instructed: (1) that there is a presumption the accused was sane at that time; (2) that the burden is upon him to show that he was then insane; (3) that if any evidence introduced by him or by the State fairly raises doubt upon the issue of his sanity at that time, the presumption of sanity ceases to exist; (4) that the State then has the

Instructions (continued)

State v. Daggett, (continued)

burden to establish the sanity of the accused beyond a reasonable doubt, and, (5) that if the whole proof upon that issue leaves the jury with a reasonable doubt as to the defendant's sanity at that time the jury must accord him the benefit of the doubt and acquit him.

This rule has limited retroactive application when an objection is properly raised at trial and preserved on appeal.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

State's instruction which focused on the defendant's initial burden to produce some evidence of insanity, and failed to state that once this was done, the State was required to disprove the defense beyond a reasonable doubt, and furthermore requested the defendant initially to prove the defense by a preponderance of the evidence, was improper, prejudiced the defendant's theory of the case and constituted reversible error.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Under the facts of this case, the defendant requested an instruction which required the prosecution to prove the defendant's sanity beyond a reasonable doubt, if the jury believed there was some evidence that the defendant was insane. This instruction was refused by the trial court. On appeal, the Supreme Court applied *Edwards v. Leverette*, 258 S.E.2d 436 (W.Va. 1979) retroactively, since the defense raised the point at trial and preserved it for the appeal.

State v. Nuckolls, 273 S.E.2d 87 (1980) (Neely, C.J.)

Where in a murder trial, defendant offered an instruction regarding the procedure of involuntary commitment in the event defendant were found not guilty by reason of insanity which correctly stated the law, the trial court should have either given the instruction as is or modified it, rather than refuse it altogether.

Instructions (continued)

State v. Nuckolls, (continued)

Syl. pt. 2 - In any case where the defendant relies upon the defense of insanity, the defendant is entitled to any instruction which advises the jury about the further disposition of the defendant in the event of a finding of not guilty by reason of insanity which correctly states the law; however, when the court gives an instruction on this subject which correctly states the law and to which the defendant does not object, the defendant may not later assign such instructions as error."

Syl. pt. 6, *State v. Grimm*, 156 W.Va. 615, 195 S.E.2d 637 (1973) is expressly overruled.

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 3, *State v. Daggett*, 280 S.E.2d 545 (W.Va. 1981), cited above.

Disposition

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Syl. pt. 6 - An instruction which attempts to explain under what circumstances a criminal defendant who has been involuntarily committed to a mental institution subsequent to a verdict of not guilty by reason of insanity may be discharged from the mental institution must include an adequate and accurate explanation of the law relating to commitment and discharge of involuntary patients at state mental institutions.

Trial court's instruction which neither adequately nor accurately set out the procedure for involuntary commitment and discharge of a criminal defendant who has been found guilty by reason of insanity, and did not discuss statutory standards for involuntary commitment or subsequent release, was defective and should not have been given.

Instructions (continued)

Disposition (continued)

State v. Boyd, (continued)

It was error for the trial court not to allow the defendant to offer an instruction regarding further disposition of the defendant if the jury should find him not guilty by reason of insanity, when the jury asked for further clarification on this indue or to allow defense counsel to object to the court's instruction before it was given.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Trial court erred in refusing to grant appellant's requested instruction concerning the consequences to the appellant should the jury find him not guilty by reason of insanity.

The disposition instruction must accurately specify the procedure established by *W.Va. Code* §§ 27-6A-3, as amended, and 27-5-1 *et seq.*, as amended.

A defendant relying upon the defense of not guilty by reason of insanity was entitled to an instruction which correctly informs the jury of the consequences of a verdict of not guilty by reason of insanity. *State v. Nuckolls*, 273 S.E.2d 87 (W.Va. 1980). Appellant was entitled to the benefit of this rule, announced during the pendency of his appeal, since he properly preserved the issue for appellant review.

M'Naughten Rule

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

Under the M'Naughten Rule, in order to be relieved of criminal responsibility, a defendant must have been incapable of knowing the difference between right and wrong and the nature and consequences of his acts.

INSANITY

Retrial

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

The defendant raised the insanity issue at his trial and argued the point on appeal. He was therefore entitled to the benefit of the rule announced in *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979), at his retrial.

State v. Rowe, 285 S.E.2d 445 (1981) (Per Curiam)

Where State had sustained its burden of proof on issue of insanity, but conviction was reversed on other grounds, retrial was not barred.

Retroactivity

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See INSANITY Instructions, (p. 472) for discussion of topic.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

The rule set fourth in *Edwards v. Leverette*, 258 S.E.2d 436 (W.Va. 1979) relating to the burden of proof of insanity does not rise to a constitutional level and, consequently, full retroactivity was not accorded to that rule. However, the rule was applied where the point was properly raised at trial and preserved on appeal.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Since the point was properly raised at trial and preserved on appeal, modification of burden of proof standard established in *Edwards v. Leverette*, 258 S.E.2d 436 (W.Va. 1979) was applied to facts of this case.

Retroactivity (continued)

State v. Rowe, 285 S.E.2d 445 (1981) (Per Curiam)

Defendant objected at trial to the giving of an instruction regarding the burden of proof in proving sanity and preserved that point for appeal. While his appeal was pending, *State v. Milam*, was decided by the Supreme Court , so under the retroactivity rules articulated here, defendant received the benefit of retroactive application of the rule in *Milam*.

Sufficiency of evidence

State ex rel. Smith v. Scott, 280 S.E.2d 811 (1981) (Neely, J.)

When the issue of sanity has been fully developed at trial and it conclusively appears that the defendant was not criminally responsible at the time the crime was committed, the trial judge may, and in many instances must, direct the verdict in favor of the defendant.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Where State offered testimony of a competent expert who had examined the appellant and determined that he was not suffering from a mental disease at the time of the examination or prior to that time, such testimony constituted a sufficient foundation upon which the jury could base a conclusion that the appellant was sane at the time of the offense.

State v. Grimm, 270 S.E.2d 173 (1980) (Caplan, J.)

In prosecution for murder where defendant raised insanity as a defense, court did not err in refusing to direct a verdict of not guilty by reason of insanity since cross-examination of the appellant's expert witnesses and the State's rebuttal evidence was sufficient for the jury to find the appellant sane at the time of the offense.

Sufficiency of evidence (continued)

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Defendant's witness psychiatrist testified that defendant had a past history of brain damage and that there was a "probability" or "good possibility" that defendant was insane at the time of the crime. This testimony was sufficient to remove the presumption of sanity, raising more than "some evidence" of insanity.

Footnote 6 - Further, defendant was not required to have his psychiatrist state that defendant was insane "to a reasonable degree of medical certainty.

There are those occasions where the psychiatric testimony offered by the defendant is so demolished by cross-examination that the state need not counter with its own expert.

Because of the variegated nature of the evidence surrounding insanity, it is not possible to fashion a particular rule on whether the state has failed to carry its burden of proving sanity beyond a reasonable doubt. It does appear that where the defendant has offered evidence to meet the legal insanity test, shows a mental disease or defect that has its origins in some organic injury or disease, and shows that he has undergone mental treatment, all of which pre-existed the date of the crime, the failure of the state to produce countervailing testimony as to his competence will be fatal to its case.

Since the State failed to offer any evidence to sustain its burden of sanity once the defendant's insanity has been shown, the evidentiary insufficiency barred retrial under double jeopardy principles. The State, however, was not precluded from initiating involuntary mental commitment procedures pursuant to *W.Va. Code* 27-6A-3(b).

State v. Kinney, 286 S.E.2d 398 (1982) (Per Curiam)

Under the facts of this case on unlawful wounding, there was sufficient evidence for the jury to find that defendant was sane at the time of the crime, as the evidence presented a factual contradiction which the jury was to resolve.

Sufficiency of evidence (continued)

State v. Kinney, (continued)

In this case of unlawful wounding, the defendant's expert evidence that she was not criminally responsible for her actions at the time of the crime was conflicting and did not present a clear enough case that a before trial decision to direct a verdict for her could be made.

The trial court did not err in refusing to direct a verdict of not guilty by reason of insanity since the level of proof in the appellant's case on lack of criminal responsibility did not rise to the evidentiary level set forth in syl. pt. 1, *State ex rel. Walton v. Casey*, 258 S.E.2d 114 (W.Va. 1977) and there is no mandatory requirement in *W.Va. Code* § 26-6A-1 (1977) that the trial court make a determination of criminal responsibility prior to trial.

State v. Rowe, 285 S.E.2d 445 (1981) (Per Curiam)

"[T]here are those occasions where the psychiatric testimony offered by the defendant is so demolished by cross-examination that the State need not counter with its own expert." *State v. Milam*, 260 S.E.2d 295, 302 (W.Va. 1979).

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

In a trial for murder, the jury could have concluded beyond a reasonable doubt that defendant was sane at the time of the crime, due to the speculativeness of the evidence: here the evidence included a psychiatrist's statement that one percent of those suffering from defendant's illness would engage in a criminal homicide such as murder, the defendant followed the shooting of the victim with other culpable behaviors, including taking the victim's body from the vehicle, driving the vehicle, and hiding from police.

INSANITY

Voir dire

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

Syl. pt. 3 - Upon request, in a murder case where the sole defense is insanity, the court should ask the jurors in *voir dire* whether they have a bias or prejudice against psychiatrists or against persons suspected of having a mental illness or defect.

INSTRUCTIONS

Abandonment of the crime

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Syl. pt. 7 - One is not entitled to an instruction exonerating him from the crime of accessory before the fact to felony murder by reason of the subjective declaration by one of the principals that he had abandoned the crime of which such principal was charged prior to the homicide.

Abstract proposition of law

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

See INSTRUCTIONS Reasonable doubt, (p. 517) for discussion of topic.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

As a general rule, an instruction embodying an abstract proposition of law without in any way connecting it with the evidence, or indicating which facts the jury must find from the evidence in order to make it applicable to the case, ought not be given.

Syl. pt. 7 - It is not reversible error for a trial court to give an abstract instruction where the instruction is not misleading or inapplicable to the case.

The giving of an instruction stating an abstract principal of law in a criminal case is not error, unless the principle stated is erroneous so as to mislead the jury.

Where the instruction given defining "aggressor" was unduly abstract and failed to connect the definition with the evidence presented, instruction should not have been given, but since definition of "aggressor" contained in instruction was essentially correct, the giving of the instruction was not reversible error.

INSTRUCTIONS

Accessory, aiding and abetting, principal

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Instructions, (p. 24) for discussion of topic.

Accidental killing

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

See SELF-DEFENSE Instructions, Retroactivity, (p. 824) for discussion of topic.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

The crime of felony-murder does not require proof of the elements of malice, premeditation or specific intent to kill. It is sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies. The court therefore properly refused defendant's instruction on accidental killing.

Accomplice

Conviction or guilty plea

State v. Caudill, 289 S.E.2d 748 (1982) (McHugh, J.)

See EVIDENCE Accomplice, Conviction or guilty plea, (p. 253) for discussion of topic.

State v. Ellis, 239 S.E.2d 670 (1977) (Neely, J.)

See EVIDENCE Accomplice, Conviction or guilty plea, (p. 253) for discussion of topic.

Accomplice (continued)

Conviction or guilty plea (continued)

State v. Wood, 280 S.E.2d 309 (1981) (Per Curiam)

See EVIDENCE Accomplice, Conviction or guilty plea, (p. 254) for discussion of topic.

Corroborated

State v. Adkins, 253 S.E.2d 146 (1979) (Neely, J.)

The corroborative evidence, standing alone, need not be sufficient either to support a conviction or to establish all the essential elements of an offense.

The testimony in this case was corroborated, but even so, an appropriate cautionary instruction as to testimony by an accomplice was given by the trial court.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

Syl. pt. 3- Where the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction. This rule applies even though the corroborative evidence falls short of constituting independent evidence which supports the alleged ultimate fact that the accused committed the offense charged.

In a doubtful case, the cautionary instruction should be given.

When in a trial for breaking and entering, there was evidence from four witnesses corroborating the testimony of accomplices that incriminated the defendant, this constituted sufficient corroboration to eliminate the necessity of cautioning the jury as to accomplice testimony. The trial court did not err in giving the jury the cautionary instruction.

Accomplice (continued)

Uncorroborated

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

The uncorroborated testimony of an accomplice must be received with caution and the jury in a criminal case, upon request, should be so instructed.

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

The accomplice's testimony was uncorroborated; therefore, the defendant was entitled to an instruction that the accomplice's testimony be received with great caution. The instruction "the evidence of the accomplice may be scanned with caution", failed to comply with the standard established, and so the court committed reversible error.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

Syl. pt. 2 - Where the accomplice's testimony is uncorroborated a criminal defendant is entitled to a jury instruction that such testimony should be received with great caution.

Alibi

State v. Alexander, 245 S.E.2d 633 (1978) (Harshbarger, J.)

Syl. pt. 2 - An instruction is proper that says that where the state has established a *prima facie* case and a defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused.

Alibi (continued)

State v. Alexander, (continued)

If the state puts on proof that a defendant committed an act at "X" place, the defendant introduces evidence that he could not have do so because he was at "Y" place, then the court may properly instruct the jury as was done in this armed robbery case, that defendant had a burden to prove his defense sufficient to create a reasonable doubt.

State v. Ayers, 282 S.E.2d 876 (1981) (Neely, J.)

Court's refusal to give appellant's instruction that his inability to account for activities on the night of the crime was committed was due to the four-month delay between commission and indictment was not an abuse of discretion.

The court's instruction on alibi which indicated the burden of establishing alibi was on the defendant, but that the burden was met if the alibi raised a reasonable doubt about the defendant's presence at the crime was correct.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Court did not err in refusing defendant's alibi instructions since a necessary element of the offense of "accessory before the fact" is absence at the time of the commission of the principal crime.

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

See INSTRUCTIONS Confusing/incorrectly states the law, (p. 505) for discussion of topic.

Arson

See ARSON Instructions, (p. 60) for discussion of topic.

Arson (continued)

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Instructions, (p. 24); INSTRUCTIONS Circumstantial evidence, (p. 501) for discussion of topic.

Assault and battery

State v. Combs, 280 S.E.2d 809 (1980) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 490) for discussion of topic.

Breaking and entering

See BREAKING AND ENTERING Instructions, (p. 86) for discussion of topic.

Burden shifting

Angel v. Mohn, 253 S.E.2d 63 (1979) (Miller, J.)

See HARMLESS ERROR Constitutional, Burden shifting instructions, (p. 366) for discussion of topic.

Footnote 3 - Not every instruction in which a presumption is linked to use of a deadly weapon is infirm. The following instruction is deemed to be constitutionally adequate: "Where it is shown that the defendant used a deadly weapon in the commission of a homicide, then you may find the existence of malice from the use of such weapon and other surrounding circumstances, unless there are explanatory or mitigating circumstances surrounding the homicide. You are not obligated so to find, however, and you may not find the defendant guilty unless you are satisfied that the State has established the element of malice beyond a reasonable doubt.

Burden shifting (continued)

Arthur v. McKenzie, 245 S.E.2d 852 (1978) (Harshbarger, J.)

The State's instructions were fatally flawed by shifting the burden of proof to the defendant. The first instruction was to the effect that if the defendant would reduce this crime to voluntary manslaughter, the burden is on him to show his reasoning and self-control were temporarily affected by sufficient provocation. The second instruction instructed the jury that where a homicide is proved, it is presumed to be murder in the second degree and it is up to the State to show it was murder in the first degree, and upon the defendant to show it was without malice or manslaughter. Both of these instructions were fatally defective.

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

Instruction give did not relieve the State on any material element of its burden of proof nor did it shift any burden to the defendant.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

Syl. pt. 1 - The giving of an instruction in a criminal trial that permits proof of an essential element of the crime charged by use of a presumption is constitutionally impermissible and can be raised and relied upon in a habeas corpus proceeding.

The trial court in a prosecution for first-degree murder committed reversible error of constitutional dimension in giving an instruction which permitted material elements of the crime charged to be proved by use of a presumption and which required defendant to set forth proof to establish his innocence.

Burden shifting (continued)

Jones v. Warden, W.Va. Penitentiary, 241 S.E.2d 914 (1978) (Harshbarger, J.)

"In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged, and it is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime with which the defendant is charged or as requiring the defendant either to introduce evidence to rebut the presumption or to carry the burden of proving the contrary." Syllabus pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976).

Syl. pt. 2 - The proscription against unconstitutionally shifting the burden of proof in criminal trials from the start to the defendant through the use of presumptions is fully retroactive and may be raised by collateral attack against a final conviction.

State ex rel. Ridenour v. Leverette, 271 S.E.2d 612 (1980) (Per Curiam)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976). See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

In a trial for murder, an instruction given was found to be inadequate under the *Pendry* standard, because it shifts the burden of proof improperly. The instruction stated that defendant used a deadly weapon to kill the victim; that a person is presumed to intend what he does; that if the jury believed beyond a reasonable doubt that the defendant without provocation gave the victim a mortal wound then he was *prima facie* guilty of wilful, malicious, deliberate and premeditated killing; that the burden rested upon defendant to show extenuating circumstances and that unless he showed or extenuating circumstances appeared otherwise in the case, he should be found guilty of first-degree murder.

Burden shifting (continued)

State ex rel. Wilhelm v. Whyte, 267 S.E.2d 554 (1980) (Per Curiam)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976). See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

The following instruction, given below in part, in a murder trial was found by the Supreme Court to be erroneous under the *Pendry* standard because it unconstitutionally shifted the burden of proof to the defendant: if the jury believed beyond a reasonable doubt that the defendant without provocation gave the victim a mortal wound with a deadly weapon, he was *prima facie* guilty of killing, and the burden was on defendant to show extenuating circumstances, and unless extenuating circumstances were shown by defendant or the State, he should be found guilty of first-degree murder.

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976), cited below. See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

An instruction in a trial for second-degree murder, which stated that the defendant had the burden of proving self-defense, was not an impermissible shifting of the burden from the State to the defendant, because the State had the obligation to prove every material element of the crime beyond a reasonable doubt.

An instruction in a trial for second-degree murder which described malice thusly: "[M]alice is presumed from the fact of killing, when the killing has been proved and is unaccompanied by circumstances of palliation, and the burden of introducing evidence to rebut such presumption rests upon the accused." When tested under the *Pendry* standard, was found to be erroneous because (1) it did require the jury to accept as proven beyond a reasonable doubt the element of malice simply by proof of the killing, and; (2) it put the burden of rebutting the presumption of malice on the defendant requiring him to show evidence in support of his rebuttal.

Burden shifting (continued)

State v. Belcher, (continued)

An instruction in a trial for second-degree murder which read as follows: "The Court instructs the jury that the law is that a man is taken to intend that which he does, or which is the natural and necessary consequences of his own act; and therefore, if they believe from the evidence that . . . shot and killed the deceased, . . . by the deliberate use of an instrument likely to produce death, under the circumstances, then the presumption of the law, arising in absence of proof to the contrary is that he intended the consequences that resulted from said use of said deadly instrument," when compared to the *Pendry* standard, was found to be erroneous.

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, J.)

In a manslaughter trial, it was not reversible error for the trial court to have permitted an instruction that was contrary to the *Pendry* standard (allowing a presumption of second-degree murder from the use of a deadly weapon with a shifting of the burden to the defendant to show that there was no malice or that he acted lawfully) where there was a conviction of less than murder. Both the *Mason* and the *Kirtley* tests were met.

State v. Combs, 280 S.E.2d 809 (1980) (Per Curiam)

Applies standard set forth in syl. pt. , *State v. O'Connell*, 256 S.E.2d 429 (W.Va. 1979), cited above.

In a trial for unlawful assault, it was error of constitutional dimension for the trial court to give a State instruction which said in pertinent part: a person is presumed to intend that which he does, or which is the immediate consequence of his act; if the jury believed beyond a reasonable doubt that the defendant without provocation wounded the victim by the deliberate use of a deadly weapon, the presumption arises (in the absence of proof to the contrary) that he intended the consequences that resulted from the use of the weapon. In this instruction, it was found that the defendant was wrongly required to disprove intent, an essential element of the crime.

Burden shifting (continued)

State v. Combs, (continued)

Because in the circumstances of this trial, the instruction is related to the actual verdict, the *Kirtley* and *Mason* cases do not save the instruction.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Applies standard set forth in syl. pt. , *State v. O'Connell*, 256 S.E.2d 429 (W.Va. 1979), cited above.

A jury must be free to reject a presumption (or inference) unless it believes the presumption is established beyond a reasonable doubt based on the evidence presented.

Use of a presumption to shift the burden of proof from the State to the defendant on any material element of the charged crime is constitutionally impermissible.

State v. Dozier, 255 S.E.2d 552 (1979) (McGraw, J.)

See INVITED ERROR Instructions, (p. 528) for discussion of topic.

State v. Keffer, 281 S.E.2d 495 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976), cited below.

Applies standard set forth in syl. pt. , *State v. O'Connell*, 256 S.E.2d 429 (W.Va. 1979), cited below.

In a trial in which defendant was convicted of voluntary manslaughter, the State instruction which presumed intent and premeditation with the language, "a man is presumed to intend that which he does or which is the immediate consequence of his act" was found to be constitutionally deficient.

Burden shifting (continued)

State v. Keffer, (continued)

Because the conviction in this trial was for voluntary manslaughter, the remainder of the questioned instruction, below, was found not to be erroneous under the *State v. Mason*, 249 S.E.2d 793 (W.Va. 1978) holding: if the jury believed beyond a reasonable doubt that the defendant with a deadly weapon without provocation intentionally gave the victim a mortal wound, the defendant is *prima facie* guilty of wilful and premeditated killing and the necessity rests upon defendant of showing extenuating circumstances and unless she does or such appear from the case made by the State, she is guilty of first-degree murder. In *Mason*. The Supreme Court had found that under certain circumstances a *Mullaney-Pendry* error could be harmless, if, for instance, the jury returned a verdict of voluntary manslaughter on a murder charge. Since this verdict did not involve a finding of malice or premeditation, it could be concluded that the verdict was not affected by the erroneous portions of the typical *Pendry* instruction.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

It was not reversible error to give the following instruction: "The Court instructs the jury that you may infer that a person intends to do that which he does, or which is the natural or necessary consequences of his own act."

Applies standard set forth in syl. pt. 2, *State v. Wright*, 249 S.E.2d 519 (W.Va. 1978).

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Syl. pt. 6 - An instruction which requires the Sate to prove beyond a reasonable doubt the existence of malice on the part of the defendant at the time of the homicide, cannot be said to unconstitutionally shift the burden of proof on the issue of provocation to the defendant.

Burden shifting (continued)

State v. Goff, 272 S.E.2d 457 (1980) (Miller, J.)

Syl. pt. 3 - In a criminal prosecution, it is constitutionally error to give an instruction which supplies by presumption any material element of the crime charged.

In a trial for breaking and entering, it was constitutional error to give an instruction which said in part "that a person is presumed to intend that which they do." The instruction was seen to have impermissibly shifted the burden and created a presumption of intent on the defendant which he must rebut. The element of intent must be proved by the State beyond a reasonable doubt.

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

The instruction objected to reads "[t]he court instructs the jury that there is a permissible inference of fact that a man intends that which he does, or which is the immediate and necessary consequences of his act." The key difference between this instruction and the one condemned in *State v. O'Connell*, *supra*, is that it uses the words "permissible inference" instead of "presume". It is clear that an instruction which uses the word "presume" could be viewed by a reasonable juror to mean mandatory. The phrase "permissible of fact" is not mandatory or binding. The distinction between "inference" and "presume" is apparent from their dictionary meaning, and the permissible inference instruction does not serve to shift any of the burden of proof to the defendant.

State v. Haddox, 276 S.E.2d 788 (1981) (Per Curiam)

The instruction given by the trial court was to the effect "the defendant . . . by the use of such deadly and dangerous weapon, intended the natural and probable consequences of her act." The instructions problem arises because of the use of the word "presumption" which establishes intent, an element of the crime necessary for conviction, and implicitly intent remains established unless the defendant can rebut it with proof to the contrary. Thus, the instruction unconstitutionally shifts the burden of proof to the defendant.

Burden shifting (continued)

State v. Haddox, (continued)

A conviction for second-degree murder cannot be sustained without proof beyond a reasonable doubt that the accused had the requisite criminal intent.

When the word presume is used in an instruction it creates a "rebuttable presumption of law."

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

When provocation is shown to exist as a matter of law, a murder instruction or conviction is not warranted.

Under the facts of this case, where the defendant adequately showed fear of bodily harm, the instruction for murder was not warranted.

Under the *Pendry* standard, it is constitutionally impermissible for the State's instruction to state that malice may be presumed from the use of a deadly weapon and that the defendant must prove that he acted from provocation.

An instruction in a murder trial stating that "when a homicide is committed that there arises a presumption of malice when a deadly . . . weapon is used and further that this is a rebuttable (sic) presumption that may be dispelled (sic) by competent evidence to the contrary" was defective.

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976), cited below. See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

As the *Pendry* standard was to be retroactive, the instruction given in a murder trial of two fifteen-year old youths that there is a presumption of murder in the second degree and the burden is on the state to show that it is without malice and is manslaughter, or that he acted lawfully was an erroneous instruction.

Burden shifting (continued)

State v. Laws, (continued)

Although not assigned as error in the appeal of a murder trial of two fifteen-year old youths, the instruction was erroneous which read that a man is presumed to intend that which he does; that if the defendant possessing a deadly weapon without any or with slight provocation give the victim a mortal wound then the defendant is *prima facie* guilty of killing; that defendant had the burden of showing extenuating circumstances; and that unless he shows extenuating circumstances or they are otherwise shown, defendant was guilty of first-degree murder.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

The trial court gave the instruction that if the jury finds beyond a reasonable doubt defendant broke and entered and committed a larceny therein, then he is presumed to have entered with intent to commit larceny. The instruction is constitutionally infirm because it supplies by presumption a material element of the crime charged and because it requires the appellant to come forward with proof to overcome the presumption.

State v. McCourt, 283 S.E.2d 918 (Per Curiam)

Footnote - The Supreme Court also disapproved the following instruction as violative of the *Pendry-O'Connell* standard: "The Court instructs the jury that if they believe from the evidence in this case, beyond all reasonable doubt, that the defendant broke and entered the dwelling house of . . . in the daytime, as charged in the indictment, and was guilty of larceny therein, then he is presumed to have broken and entered said dwelling house with the intent to commit larceny therein, and unless this presumption is negatived to the satisfaction of the jury, then they should find the defendant guilty." This instruction is deemed to be infirm because it supplies by presumption a material element of both the crime of burglary and breaking and entering, intent to commit a felony or any larceny therein. The instruction is also defective because it requires the defendant to overcome the presumption thus shifting the burden of proof to the defendant.

Burden shifting (continued)

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

An instruction read in part, that the jury should find the defendant guilty if it found beyond a reasonable doubt that he unlawfully, feloniously, wilfully, deliberately, maliciously, premeditatedly and with malice aforethought, shot the deceased and that the deceased died from such shot. And if the jury believed beyond a reasonable doubt there was a shooting and that it was without justification, then defendant was *prima facie* guilty of murder in the first degree. They were further instructed that if they believed that the shooting happened then it was not necessary for malice to have existed for a particular period during which the defendant might have contemplated the killing. The Court held that this instruction created no presumption and the State was still required to prove every element of the crime beyond a reasonable doubt. The instruction was therefore acceptable.

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

The harmless error standard of review is constitutionally permissible where *Mullaney*-type burden-shifting instructions have been given, and the verdict results in a conviction of less than murder. An automatic reversal standard of review is inappropriate where a court can confidently declare beyond a reasonable doubt that such instruction in no way contributed to the conviction or affected the outcome of the trial.

In this case of homicide, where the jury was given an instruction containing a presumption of intent, and they returned a verdict of voluntary manslaughter instead of murder, the harmless error standard of review was applied.

Burden shifting (continued)

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

The trial court instruction read "where a homicide is proved by the use of a deadly and dangerous weapon, it is presumed by law to be murder in the second degree . . . to reduce the offense below murder in the second degree, the burden is on the defendant." It is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime with which the defendant is charged or as requiring the defendant either to rebut the presumption or to carry the burden of proving the contrary.

State v. Myers, 245 S.E.2d 631 (1978) (Caplan, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976), cited below. See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

In a trial for breaking and entering, an instruction to the effect that if the jury believed beyond a reasonable doubt that the defendant broke and entered with intent, he should be found guilty, and if they found beyond a reasonable doubt that defendant did break and enter and committed larceny then he was presumed to have done so with the intent to commit larceny, and unless defendant negatived the presumption, then he should be found guilty. This was found to be an erroneous instruction when measured against the *Pendry* standard. The erroneous element (here intent) by a presumption and that it required defendant to show evidence to rebut the presumption (or to carry the burden of proving the contrary).

State v. O'Connell, 256 S.E.2d 429 (1979) (McGraw, J.)

Syl. pt. - In a criminal prosecution, it is constitutional error to give an instruction which supplies by presumption any material element of the crime charged.

Burden shifting (continued)

State v. O'Connell, (continued)

The following instruction was found by the Supreme Court not to be binding or mandatory, requiring the jury to find the defendant had the intent to kill. "The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate and necessary consequences of his act."

The following instruction was found by the Supreme Court to have impermissibly shifted the burden of proof on a material element of the crime: "The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate and necessary consequences of his act." This was so in light of two factors: a "reasonable juror" might have interpreted it as shifting the burden and the use of the word "presume" in an instruction has been viewed in West Virginia as creating a rebuttable presumption of law.

State v. Sacco, 267 S.E.2d 193 (1980) (Per Curiam)

Applies standard set forth in syl. pt. , *State v. O'Connell*, 256 S.E.2d 429 (W.Va. 1979), cited above.

The court's instruction to the jury that "a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act . . ." was error.

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976), cited above. See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

Burden shifting (continued)

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Syl. pt. 3 - An instruction in a criminal case which is not binding and does not require the jury to accept a presumption as proof beyond a reasonable doubt of any essential element of a crime, or require the defendant to introduce evidence to disprove an essential element of the crime for which he is charged, is not erroneous.

The instruction given in a trial for attempted murder in the second degree that said "The court instructs the jury that malice and intent can be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which you do not believe afforded the defendant excuse, justification or provocation for his conduct" was not erroneous because the inference of malice and intent did not arise until after the jury first found that there was no excuse, justification or provocation. Further, the instruction is not binding and does not shift to the defendant a burden of disproving any essential element.

State v. Whiting, 263 S.E.2d 896 (1980) (Per Curiam)

Applies standard set forth in syl. pt. 4, *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976). See *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978), cited above.

In a trial for larceny, an instruction found to be not in compliance with the *Pendry* standard, stated that if the jury believed that the defendant entered the victim's building and committed larceny, then the defendant was presumed to have entered with intent to commit larceny.

The Supreme Court suggested an instruction reading in part: if you believe that the defendant entered the victim's building and committed larceny then you may infer, but need not infer, that the defendant intended to commit a larceny.

Burden shifting (continued)

State v. Wright, 249 S.E.2d 519 (1978) (McGraw, J.)

Syl. pt. 2 - Insofar as the jury was permitted but not required to find from the evidence that the defendant had the intent to kill, and insofar as the jury was properly and adequately advised of the State's duty to prove intent to kill beyond a reasonable doubt, the giving of the instruction that "the jury may infer that a person intends to do that which he does, or which is the natural or necessary consequence of his act" was not reversible error in this case.

Despite the decision that the "may infer" instruction was permissible, there was not sufficient evidence in this trial for the killing of a child by his father to infer the intent to kill.

State v. Young, 273 S.E.2d 592 (1980) (McGraw, J.)

Instruction given by the trial court, over objection, violates the rule on presumptions laid down in *Pendry* and *O'Connell* and constitutes reversible error.

Harmless error

See HARMLESS ERROR Constitutional, Burden shifting instructions, (p. 366) for discussion of topic.

Retroactivity

See RETROACTIVITY Burden shifting, (p. 757) for discussion of topic.

INSTRUCTIONS

Circumstantial evidence

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

The use of the phrase "circumstantial evidence must be scanned with great caution" is limited to those cases where the conviction rests upon circumstantial evidence alone. No error resulted from the trial court omitting the phrase because the evidence was not wholly, or even chiefly, circumstantial.

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Giving of circumstantial evidence instruction was proper since parts of the case were built on circumstantial evidence.

State v. McCourt, 283 S.E.2d 918 (Per Curiam)

In a trial for grand larceny, it was not error for the trial court to give the standard circumstantial evidence instruction.

Coercive

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

Whether a trial court's instructions constitutes improper coercion of a verdict depends upon the facts and circumstances of the particular case and cannot be determined by any general or definite rule.

Generally, when a jury is unable to agree on a verdict, it is within the trial court's discretion to urge an ernest effort to agree, so long as the jurors are free to act without any form of coercion by the trial court.

The trial court must carefully instruct the jurors not to give up their convictions merely for the sake of achieving a verdict, and must scrupulously avoid expressing any opinion as to how the case should be decided. The court must neither encourage disagreement nor coerce agreement; it should foster fair and open-minded debate.

Coercive (continued)

State v. Hobbs, (continued)

The trial court's sending the jury back for further deliberation when they had been out previously only 1 ½ hours was not abuse of discretion.

The trial court's supplemental instructions were not coercive when they did not threaten to keep the jury out until they reached a verdict, did not chastise them, but asked them not to be obstinate and emphasized the problems resulting from a hung jury and the importance of the case. The court also instructed the jurors to be open minded, to discuss freely and to reach a decision only as long as each juror can do so without sacrificing his or her own convictions.

State v. Johnson, 282 S.E.2d 609 (1981) (Per Curiam)

See JURY Court's comments, (p. 542) for discussion of topic.

Collateral crime

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

Footnote 3 - There may be occasions when a requested cautionary instruction is advisable to inform the jury that evidence of other crimes is not to be considered on the issue of guilty for the crime charged. This type of instruction is ordinarily not required where, as here, the facts of the other crime are a part of the element of the offense charged.

State v. Nicholson, 252 S.E.2d 894 (1979) (Caplan, C.J.)

See EVIDENCE Collateral crimes, (p. 267) for discussion of topic.

INSTRUCTIONS

Confusing/incorrectly states the law

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

"An instruction which does not correctly state the law is erroneous and should be refused." Syl. pt. 3, *State v. Collins*, 154 W.Va. 771, 180 S.E.2d 54 (1971).

As the jury in a trial for second-degree murder was incorrectly instructed on the law, the instruction was improper, even though there was ample evidence presented tending to demonstrate the existence of malice and intent in the defendant.

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

An accomplice does not gain immunity from prosecution unless granted by the State. The legal conclusion in the instruction, "that by testifying he gained immunity" is wrong.

Syl. pt. 3 - Instructions in a criminal case which are confusing, misleading or which incorrectly state the law should not be given.

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, J.)

"Although it is established in this jurisdiction that the giving of an erroneous instruction raises a presumption of prejudice, it is an equally well-established rule that this Court will not reverse a criminal conviction because of an erroneous instruction where it clearly appears from the record that no prejudice has resulted.

In criminal cases, instructions that are confusing, misleading or which incorrectly state the law should not be given.

In a manslaughter trial, it was not error for the trial court to refuse to give defendant's instructions which were incomplete and misleading.

Confusing/incorrectly states the law (continued)

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

The instruction which the defendant contends should have been given includes the phrase "improperly conducted photographic lineup" which contains no standard by which the jury can correctly determine the factual issue of identification. Even if the photographic lineup was improper, this would not mean that the identification was totally improper. It has been consistently held that instructions in a criminal case which are confusing, misleading, or incorrectly state the law should not be given.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Instruction in homicide trial that jury could consider testimony as to what another person told the witness only to the extent that such things were told to the witness but not as evidence of the truth of the things related by the witness, was inartfully worded, but substantially correct, and therefore not error.

State v. Harper, 283 S.E.2d 921 (1981) (Per Curiam)

Syl. pt. 1 - "If, when instructions are read as a whole, it is apparent that they could not have misled the jury, the verdict will not be disturbed, though one may be susceptible of doubtful construction while standing alone." Syl. Pt. 2, *Whittaker v. Pauley*, 154 W.Va. 1, 173 S.E.2d 76 (1970).

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

The trial court was not in error by refusing to give defendant's instruction which stated that if the jury had any reasonable doubt as to the grade of offense of which theft was guilty, they should resolve the doubt in the defendant's favor and find him guilty of the lower grade. Since the elements of the offense are not graduated but the penalty is moderated by a recommendation of mercy or a finding of lack of bodily harm to the victim, the term "grade of offenses" is confusing. An instruction which is abstract or confusing need not be given.

Confusing/incorrectly states the law (continued)

State v. Jeffers, 251 S.E.2d 227 (1979) (Per Curiam)

Syl. pt. - Where a trial court gives, over objection, an instruction which incompletely states the law, and the defect is not corrected by a later instruction, the giving of such incomplete instruction constitutes reversible error, where the omission involves an element of the crime.

Where the trial court instructed the jury that if they believed beyond a reasonable doubt that the defendant passed on the left in a nonpassing zone, and the instruction omitted the element regarding the crossing of the double line and entering into the counter flow of traffic, and the instruction was not later corrected, reversible error was committed.

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Court can properly reject confusing instructions.

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

The instruction below, in part, was not confusing, misleading or an incorrect statement of the law and the appellant did not argue it in his brief, so it was not grounds for reversal. The jury was told that they are the sole judges of the weight of testimony; that in ascertaining the weight, they have the right to take into consideration the credibility of the witness, his evidence, his manner of testifying and demeanor on the stand, his apparent interest in the result of the case; that if the jury believe that any witness has knowingly and intentionally testified falsely on a material fact, they have the right to disregard all the testimony of the witness or they have the right to disregard all the testimony of the witness or to give the testimony or part of it such weight as they feel it is entitled to. And the jury was told that where the state has established a *prima facie* case and the defendant relied upon the defense of alibi, the burden is on him to prove it, not beyond a reasonable doubt, nor by a preponderance, but by such evidence, and to such degree of certainty as will when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilty of the accused.

Confusing/incorrectly states the law (continued)

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

Because it is required that the jury must be clearly and properly advised of the law in order for it to render a true and lawful verdict, any instruction calculated to mislead the jury, whether it arises from ambiguity or from any other cause ought to be avoided.

Instructions given to the jury should contain clear, distinct, and unambiguous statements of law.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

The instruction was confusing, misleading, and internally contradictory because the first part dealt with the defendant's alibi defense and the second part dealt with an affirmative factual defense predicated upon the defendant's presence at the scene of the crime.

Applies standard set forth in syl. pt. 3, *State v. Bolling*, 246 S.E.2d 631 (W.Va. 1978), cited above.

State v. Parks, 243 S.E.2d 848 (1978) (Miller, J.)

"An erroneous binding instruction is not cured by a correct one." Syl. pt. 2, *State v. Cobb*, 122 W.Va. 97, 7 S.E.2d 443 (1940).

The trial court committed reversible error in giving instructions which omitted the essential element that the marijuana be knowingly or intentionally possessed. The fact that the defendant had offered and the court gave a correct instruction did not cure the error.

State v. Romine, 272 S.E.2d 680 (1980) (Caplan, J.)

Syl. pt. 1 - "An instruction which does not correctly state the law i erroneous and should be refused." Syl. pt. 2, *State v. Collins*, 154 W.Va. 771, 180 S.E.2d 54 (1971).

Confusing/incorrectly states the law (continued)

State v. Romine, (continued)

The giving of an instruction for sexual assault in a trial for burglary and rape that stated that one of the penalties was death was prejudicial error and required reversal.

"An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudiced by such instruction." *Hollen v. Longer*, 151 W.Va. 144, 151 S.E.2d 330 (1966).

Syl. pt. 2 - In a criminal trial, where it is clear that an erroneous instruction was given and this Court cannot confidently declare beyond a reasonable doubt that such instruction in no way contributed to the conviction or affected the outcome of the trial, the conviction must be reversed and a new trial granted.

Instructions should contain clear, distinct, and unambiguous statements of law. An instruction calculated to mislead the jury, whether it arises from ambiguity or from any other cause ought to be avoided. The jury must clearly and properly advised of the law in order to render a true and lawful verdict.

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

Syl. pt. 4 - The giving of a confusing or incomplete instruction does not constitute reversible error when a reading and consideration of the instructions as a whole cure any defects in the complained of instructions.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

Applies standard set forth in syl. pt. 4, *State v. Stone*, 268 S.E.2d 50 (W.Va. 1980), cited above.

Confusing/incorrectly states the law (continued)

State v. Vance, (continued)

When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict." Syl. pt. 6, *State v. Milam*, 226 S.E.2d 433 (W.Va. 1976). The element of intent was sufficiently supplied in this case by later instructions and therefore the lack of discussion of the element of intent in State's instruction number one does not constitute reversible error.

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

"When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict." Syl. pt. 6, *State v. Milam*, 226 S.E.2d 433 (W.Va. 1976).

Controlled substances

See CONTROLLED SUBSTANCES Instructions, (p. 138) for discussion of topic.

Court's responsibility for

State v. Dozier, 255 S.E.2d 552 (1979) (McGraw, J.)

Syl. pt. 2 - When given, instructions to a jury are the court's instructions, and, irrespective of who requests them, the court must see to it that all instructions conform to constitutional requirements.

The trial court has the ultimate responsibility in criminal cases to see to it that the jury is instructed according to constitutional requirements.

Court's responsibility for (continued)

State v. Dozier, (continued)

In a trial for first-degree murder, when the defense gave an instruction impermissible under the *Pendry* standard which was detrimental to defendant, the court erred in not refusing to give the instruction.

Criminal trespass

State v. Gilliam, 289 S.E.2d 471 (1982) (Per Curiam)

See BREAKING AND ENTERING Instructions, Criminal trespass, (p. 87) for discussion of topic.

Curative

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

See MISTRIAL In general, (p. 649) for discussion of topic.

Eligibility for parole

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

Syl. pt. 4 - In a case in which a jury may return a verdict of first-degree murder, the defendant is entitled to any instruction on the interrelationship between a recommendation of mercy and parole which correctly states the law; however, when a court gives an instruction on this subject which correctly states the law and to which the defendant does not object, the defendant may not later assign such instruction as error.

In a trial of first-degree murder, it was not error for the trial court to give an instruction which correctly stated the law regarding the punishment for the crime and which stated that "the defendant shall be eligible for parole as provided by law" in that theist correctly stated the law and defendant did not object.

INSTRUCTIONS

Entrapment

See ENTRAPMENT Instructions, (p. 245) for discussion of topic.

Failure to object

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

Syl. pt. 3 - "The stringent requirements of Rule 51, R.C.P. , *i.e.*, stating 'distinctly' the ground of objection to an instruction is not met by a general objection." Syllabus point 4, *Fortner v. Napier*, 153 W.Va. 143, 168 S.E.2d 737 (1969).

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 31) for discussion of topic.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 33) for discussion of topic.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 33) for discussion of topic.

State v. Nuckolls, 273 S.E.2d 87 (1980) (Neely, C.J.)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 34) for discussion of topic.

Failure to object (continued)

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 36) for discussion of topic.

Felony-murder

See HOMICIDE Instructions, Felony murder, (p. 389) for discussion of topic.

Homicide

See HOMICIDE Instructions, (p. 385) for discussion of topic.

Immunity

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

See IMMUNITY Instructions, (p. 428) for discussion of topic.

Incomplete

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

"When instructions are read as a whole and adequately advise the jury of all the necessary elements for their consideration, the fact that a single instruction is "incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict." Syl. pt. 6, *State v. Milam*, 226 S.E.2d 433 (W.Va. 1976).

Incomplete (continued)

State v. Woods, (continued)

On appeal the defendant in an armed robbery trial claimed that the trial court erroneously allowed a state instruction that omitted the intent element and another that did not inform the jury of the standard for determining whether the defense was successfully established. The Supreme Court, quoting the *Milam* standard (above) stated that defendant's instructions were given which did adequately set forth the element of intent and did give the standard of proof required, and so rejected the challenge that the State's instructions were erroneous.

Insanity

See INSANITY Instructions, (p. 472) for discussion of topic.

Edwards v. Leverette, 258 S.E.2d 436 (1979) (Caplan, C.J.)

See INSANITY Burden of proof, (p. 465) for discussion of topic.

Intoxication

See DEFENSES Intoxication, (p. 159) for discussion of topic.

Jury's failure to comprehend

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

Syl. pt. 2 - Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court must on request of defense counsel, reinstruct the jury.

Jury's failure to comprehend (continued)

State v. McClure, (continued)

In this case, the defendant offered, and the trial court read the appellant's instruction that no inferences were to be drawn from his failure to take the stand. However, the nature of the questions and requests posed by the jury to the judge subsequent to the reading of the instructions demonstrated that the jury failed to comprehend the meaning of this instruction. The trial court in this case in denying defense counsel's motion to reread the instructions, after it became apparent that the jury had failed to comprehend the questioned instruction, committed reversible error.

Larceny

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

See LARCENY Instructions, (p. 627) for discussion of topic.

Lesser included offense

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See SEXUAL ASSAULT Instructions, (p. 888) for discussion of topic.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

See ROBBERY Instructions, Lesser included offenses, (p. 774) for discussion of topic.

State v. Spicer, 245 S.E.2d 922 (1978) (McGraw, J.)

See ROBBERY Instructions, Lesser included offenses, (p. 774) for discussion of topic.

Lesser included offense (continued)

State v. Stalnaker, 279 S.E.2d 416 (1981) (Neely, J.)

A trial court must give an instruction for a lesser included offense when evidence has been produced to support such a verdict.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

See ROBBERY Instructions, Lesser included offenses, (p. 775) for discussion of topic.

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

See HOMICIDE Instructions, Felony murder, (p. 389) for discussion of topic.

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

See BREAKING AND ENTERING Instructions, Receiving stolen property, (p. 87) for discussion of topic.

Non-sequestered witnesses

State v. Sherman, 260 S.E.2d 287 (1979) (Per Curiam)

Where two witnesses were excluded from testifying when it was discovered that they had not been sequestered with other witnesses, the Supreme Court held that their exclusion was erroneous. Further, the jury should have been instructed that in assessing the two witnesses' testimony, the jury could consider the presence of the two in the courtroom and their chance to hear some of the prosecution's evidence.

INSTRUCTIONS

Not supported by the evidence

State v. Brant, 252 S.E.2d 901 (1979) (Neely, J.)

It is prejudicial error to give an instruction not supported by the evidence.

State v. Johnson, 282 S.E.2d 609 (1981) (Per Curiam)

In a trial in which defendant was charged with malicious wounding and found guilty of unlawful wounding, defendant offered an instruction that stated that defendant had the right to repel force by force in defense of her person and if in so doing, she used only so much force as required, she was not guilty of any offense, though she might wound her assailant in so doing. The Supreme Court found that the trial court properly refused this instruction, because there was no evidence that the victim used force against the defendant and because self-defense was adequately covered by other instructions.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

"Proffered instructions . . . which are not supported . . . by the evidence are erroneous and should be refused." Syl. pt. 3, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975), in part.

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

"It is error to charge the jury with a theory of claim or defense unsupported by evidence." Syl. pt. 3, *Parker v. Knowlton Construction Company, Inc.*, 210 S.E.2d 918 (W.Va. 1975).

In an appeal from an armed robbery trial, the defendant claimed on appeal that it was error for the court to refuse to give his instruction that stated that if the jury believed defendant was an insane man at the time of the robbery, they would find him not guilty, though such insanity was a result of previous drunkenness. The Supreme Court held that the refusal of the instruction was proper, because the instruction was not supported by any expert medical showing that defendant was insane at the time of the crime.

INSTRUCTIONS

Oral instructions

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

Syl. pt. 4 - *W.Va. Code* § 56-6-9 (1966), requiring a trial court to submit in writing all proposed jury instructions to counsel for both parties, applies only to instructions which relate to material issues in the case, and does not apply to a supplemental instruction to the jury to deliberate further.

In a trial for making a false return of the result of the votes cast for a candidate at an election, the trial court did not err in giving supplemental instructions to the jury orally, when the instructions regarded their deliberating further.

State v. Johnson, 282 S.E.2d 609 (1981) (Per Curiam)

In an appeal from a conviction for unlawful wounding, the defendant claimed that the court's comments to the jury that it cost about a thousand dollars a day for court violated a statute (*W.Va. Code* § 56-6-19) which requires all instructions to be in writing and submitted to both counsel. The Supreme Court held that the remark in question was not an instruction and did not relate to material matters in issue, but dealt only with the functioning of the jury and its duties. The comment was not a violation of statutory prohibiting oral instructions.

Presumption of innocence

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

A State trial court's refusal to give a defendant's requested jury instruction on the presumption of innocence violates his right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

INSTRUCTIONS

Reasonable doubt

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

An instruction by the trial court was not error in its definition of "reasonable doubt" when stated: "If, after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the defendant is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty."

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

Instruction containing language identical to instruction condemned in *State v. Byers*, 224 S.E.2d 726 (W.Va. 1976) because it permitted imposition of a personal standard as to the meaning of beyond a reasonable doubt, could not be given on retrial.

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 2, *State v. Keffer*, 281 S.E.2d 495 (W.Va. 1981), cited below.

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

Any instruction defining reasonable doubt will of necessity be an abstract statement and abstractness alone will not invalidate such an instruction unless it is so abstract as to be confusing. Instructions defining reasonable doubt will not by their nature relate to the specific offense involved and their failure to do so does not render them defective.

Reasonable doubt (continued)

State v. Conrad, (continued)

An instruction in a trial for second-degree murder which read (in part) as follows was not deemed to be incorrect: ". . . proof beyond a reasonable doubt does not necessarily mean proof without contradiction or conflict, but if after considering all the evidence and circumstances . . . the jury can say that they have an abiding conviction of the truth of the charge . . . then they are satisfied beyond a reasonable doubt . . . ." The giving of this instructions was not ground for reversal.

State v. Duncan, 283 S.E.2d 855 (1981) (Per Curiam)

The Supreme Court wishes to discourage the giving of instructions attempting to define or explain what constitutes reasonable doubt which are framed in language at variance with traditional formulations. The court noted that the reasonable doubt instruction given by the State contained no source of the instructions and no citation to a case approving such an instruction.

State v. Goff, 272 S.E.2d 457 (1980) (Miller, J.)

Instructions which vary the reasonable doubt standard or attempt to explain it are discouraged because they confuse the jury as to the meaning of reasonable doubt and may be themselves prejudicial to the defendant because the jury is invited to convict on a lesser standard of proof.

An instruction in a breaking and entering case stating the reasonable doubt standard in nonstandard language did not result in reversible error. "The law does not require, however, proof amounting to an absolute certainty nor proof beyond the possibility of mistake." It might constitute reversible error if coupled with other language which varied substantially from the standard instruction.

Reasonable doubt (continued)

State v. Goff. (continued)

Footnote 9 - The Supreme Court offered a standard instruction on the presumption of innocence and burden of proof: "The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a 'clean slate' with on evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense – the kind of doubt is a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. The suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never sheiks to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions - one of innocence, the other of guilt - the jury should of course adopt the conclusion of innocence."

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

The instruction complained of attempts to define reasonable doubt. The Supreme Court has discouraged this type of instruction for many years but has not held it to be grounds for reversal. Because a number of instructions wee given for defendant in this case which cured the defect about which the defendant complains, the case is not reversed on this ground.

A standard instruction is set fort covering this and other grounds in *State v. Goff*, 272 S.E.2d 457 (W.Va. 1980), cited above.

Reasonable doubt (continued)

State v. Helmick, 286 S.E.2d 245 (1982) (McGraw, J.)

In a trial for murder, it was incorrect for the trial court to give an instruction reading: The court instructs the jury that although the burden is upon the State to prove the prisoner guilty beyond all reasonable doubt, yet such a doubt is not a mere vague, fanciful or imaginary doubt, but is a good and substantial doubt based upon all the evidence or lack of evidence in the case, and one for which he or she who entertains such doubt should be able to give a good and substantial reason based upon all the evidence or lack of evidence in the case. But the court gave sufficient other reasonable doubt instructions to correct the error.

State v. Keffer, 281 S.E.2d 495 (1981) (Miller, J.)

Syl. pt. 2 - Where the State's instructions attempt to define reasonable doubt and such definitions are in substantial variance from customary reasonable doubt language so that the jury may well have convicted on a lesser standard of proof, such instructions will constitute reversible error.

Because the State's burden is "beyond a reasonable doubt" the existence of any reasonable doubt is sufficient to bar a conviction.

An instruction that stated that unless a juror can give a good and substantial reason arising from the evidence for their opinion, the defendant should be found guilty, was improper and was reversible error.

An instruction that stated that if the jurors believed beyond a reasonable doubt that the defendant was guilty, although they also believe it possible she was not guilty, the should convict, was improper and was reversible error.

An instruction which stated, "If after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the defendant is guilty then it is your duty to so fine." was reversible error.

The above instructions constitute reversible error in that they vary from customary reasonable doubt language and invite the jury to convict on a lesser standard of proof.

Reasonable doubt (continued)

State v. McCourt, 283 S.E.2d 918 (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Keffer*, 281 S.E.2d 495 (W.Va. 1981), cited above.

In a trial for grand larceny, it was reversible error for the trial court to have given State instructions which said, "If from all the evidence, the jury only believe it is possible, or that it may be, or that perhaps the defendant is not guilty, this degree of uncertainty alone would not amount to such a reasonable doubt as to entitle the defendant to an acquittal." And, "If after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the defendant is guilty with such a degree of certainty that you would act upon the faith of it in your own most important and critical affairs, the evidence is sufficient to warrant a verdict of guilty." These instructions were worded in language varying substantially from customary formulations, such that the jury was invited to, and may well have convicted on, a lesser standard of proof.

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

Syl. pt. 4 - The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions.

In a trial for larceny, the giving of two of the state's reasonable doubt instructions which were confusing was not error, in light of the fact that two of the defendant's instructions on reasonable doubt were given and, on the whole, no prejudicial error occurred.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

In a trial for breaking and entering, it was error for the trial court to refuse to give a defense instruction on reasonable doubt and to alter another defense instruction on the State's requirement to prove its case beyond a reasonable doubt, when the defense did obtain two instructions which adequately covered the issue.

Reasonable doubt (continued)

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

The fact that an instruction did not use the phrase "beyond a reasonable doubt" is not fatal when other instructions adequately explain the complete element of a crime charged.

Receiving stolen property

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

See RECEIVING STOLEN GOODS Instructions, (p. 739) for discussion of topic.

Repetitious

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, J.)

Because it is unnecessary and undesirable to repeat instructions, the trial court may refuse instructions which do not give additional aid to the jury when proper instructions have already been given.

In a manslaughter trial, it was not error for the trial court to give State instructions, as they were not deemed to be repetitious.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

It was not error for a trial judge to refuse to give defendant's unlawful wounding instruction regarding necessity of intent beyond a reasonable doubt when one of the State's instructions explained the intent requirement.

Repetitious (continued)

State v. Griffith, 285 S.E.2d 469 (1981) (Harshbarger, J.)

The trial court's refusal to give defendant's instructions 1 and 3 was not reversible error, because State's Instruction 1 listed all elements of the crime and proof required, including those factors set out in the refused instructions.

State v. Helmick, 286 S.E.2d 245 (1982) (McGraw, J.)

Syl. pt. 4 - "It is not reversible error to refuse to give instructions offered by a party that are adequately covered by other instructions given by the court." Syl. pt. 20, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

In a trial for murder, the trial court gave an instruction regarding testimony of an accomplice which was an adequate statement of the law. It was not reversible error for the trial court to refuse to give another similar instruction desired by the defendant.

State v. Holdren, 294 S.E.2d 159 (1982) (Per Curiam)

Syl. pt. 1 - Duplication of instructions is unnecessary and undesirable. Syl. pt. 7, *State v. Blankenship*, 137 W.Va. 1, 69 S.E.2d 398 (1952); syl. pt. 4, *Robertson v. Hobson*, 114 W.Va. 236, 171 S.E. 745 (1933); syl. pt. 2, *Dake v. Clay Hardware and Supply Co.*, 110 W.Va. 63, 157 S.E. 35 (1931).

Applies standard set forth in syl. pt. 4, *State v. Bingham*, 42 W.Va. 234, S.E.2d 883 (1986). See *State v. Lott*, 289 S.E.2d 739 (W.Va. 1982) cited above.

Where defendant, allegedly intoxicated, provoked and then violently resisted arrest and was subsequently found guilty of obstructing an officer, he appealed alleging that his instruction concerning the officer's responsibility to inform defendant of charges against him and concerning the defendant's right to resist was improperly refused. The Supreme Court affirmed the trial court's judgment holding that the trial court did not err since this instruction was repetitive of other instructions.

Repetitious (continued)

State v. Johnson, 282 S.E.2d 609 (1981) (Per Curiam)

Syl. pt. 1 - "It is not error to refuse to give an instruction to the jury, though it states a correct and applicable principle of law, if the principle stated in the instruction refused is adequately covered by another instruction or other instructions given." Syl. pt. 3, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966).

It was not error for the trial court to refuse to give defendant's instruction on self-defense, since the defendant obtained three other instructions sufficiently covering this issue in this trial for unlawful wounding.

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

It is not error for the trial court to refuse to give an instruction which is adequately covered by another instruction in the case, even though the deleted instruction states the law correctly.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

"Where instructions given clearly and fairly lay down the law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given." Syl. pt. 4, *State v. Bingham*, 42 W.Va. 234, 24 S.E. 883 (1986. Syl. pt. 4, *State v. Johnson*, 157 W.Va. 341, 201 S.E.2d 309 (1973).

When the court refused to give instructions dealing with the degree of negligence necessary to find a person guilty of involuntary manslaughter, but a separate instruction adequately addressed the issue and correctly stated the law, the Supreme Court found that the substance of the stated instruction need not be repeated and that failure to give instructions that were substantially the same was not error.

INSTRUCTIONS

Retrial

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

See INSANITY Retrial, (p. 476) for discussion of topic.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

See HOMICIDE Retrial, (p. 405) for discussion of topic.

Robbery

See ROBBERY Instructions, (p. 772) for discussion of topic.

Self-defense

See SELF-DEFENSE Instructions, (p. 823) for discussion of topic.

Sexual assault

See SEXUAL ASSAULT Instructions, (p. 888) for discussion of topic.

Substantial evidence test to offer instruction

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

The test a trial court should use to decide upon possible verdicts to be given in instructions is borrowed from the test for defendant's motions for directed verdict in *State v. West*, 153 W.Va. 325, 168 S.E.2d 716 (1969): "The evidence is to be viewed in the light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court . . . be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might find the defendant guilty beyond a reasonable doubt." In addition, a "substantial evidence" determination should be made.

INSTRUCTIONS

Taken to jury room

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

W.Va.R.Crim.P. 30 (1981) provides that "[unless otherwise ordered by the court with the consent of all parties affected thereby, instructions shall not be shown to the jury or taken to the room." However, prior to the effective date of such rule on October 1, 1981 "[i]t [was] in the trial court's sound discretion whether instructions which have been read to the jury may be taken by them to their room when they retire to consider . . . their verdict." Syl. pt. 2, *Wiseman v. Ryan*, 116 W.Va. 525, 182 S.E. 670 (1935).

Since this case was tried prior to October 1, 1981, the trial court did not abuse its discretion in allowing the jury to take written instructions into the jury room during deliberations.

Uncorroborated testimony

See INSTRUCTIONS Accomplice, Corroborated, (p. 483); INSTRUCTIONS Accomplice, Uncorroborated, (p. 484) for discussion of topic.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

See SEXUAL ASSAULT Instructions, (p. 888) for discussion of topic.

Unlawful wounding

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

See UNLAWFUL WOUNDING Double Jeopardy, (p. 935) for discussion of topic.

INSTRUCTIONS

Voluntariness of confession

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Who determines, (p. 867) for discussion of topic.

INVITED ERROR

In general

State v. Compton, 277 S.E.2d 724 (1981) (Per Curiam)

"An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971).

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971). See *State v. Compton*, 277 S.E.2d 724 (W.Va. 1981), cited above.

State v. McCormick, 290 S.E.2d 894 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971). See *State v. Compton*, 277 S.E.2d 724 (W.Va. 1981), cited above.

Instructions

State v. Dozier, 255 S.E.2d 552 (1979) (McGraw, J.)

Syl. pt. 1 - A defendant may challenge, on appeal, the propriety of instructions tendered by him and given by the court if the challenge is based on a violation of due process.

Syl. pt. 2 - When given, instructions to a jury are the court's Instructions and, irrespective of who requests them, the court must see to it that all instructions conform to constitutional requirements.

Defendant's instruction created a presumption of malice relieving the state of its duty to prove beyond a reasonable doubt every material element of the crime and shifted the burden of proof to the defendant to disprove the existence of malice. Here the trial court erred in not refusing to give a patently unconstitutional instruction.

INVITED ERROR

Prior criminal activity

State v. Compton, 277 S.E.2d 724 (1981) (Per Curiam)

Counsel for defendant specifically asked the trooper to refer to his notes, and did not stop the trooper when he began reading the notes. The issue whether the trooper's testimony that defendant was spending time in jail on a breaking and entering charge is admissible as evidence of a collateral crime need not be decided. That issue is not relevant, because any error that resulted from this testimony was invited error.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

The defendant claimed that on cross-examination the prosecutor asked questions about a prior conviction, in violation of *State v. McAboy*, 236 S.E.2d 431 (W.Va. 1977). The record disclosed, however, that the admission as to a prior conviction was elicited by defendant's counsel on direct and then reiterated by the prosecutor on cross. The Supreme Court would not apply *McAboy* to the situation where the evidence of a prior conviction was first brought out by the defendant.

JOINDER - SEVERANCE AND ELECTION

Joinder of offenses

See DOUBLE JEOPARDY Joinder, (p. 207) for discussion of topic.

Severance

State ex rel. Hall v. Strickler, 285 S.E.2d 143 (1981) (Harshbarger, C.J.)

The granting of a motion for severance for prejudicial joinder tests within the sound discretion of the trial court.

For indictments charging only greater and lesser included offenses, a defense severance motion should not be granted if the State elects to try the greater offense first.

State v. Cunningham, 290 S.E.2d 256 (1981) (Neely, J.)

If the court finds that the defendant would be prejudiced by a joinder of courts, the court may grant the motion for a severance of the counts by ordering separate trials for each count.

In a trial for armed robbery and sexual assault it was not an abuse of discretion for the trial judge to refuse to sever the counts for separate trials. Here, the facts of the assault were necessary to prove the elements of the armed robbery, and the evidence of the robbery would have "punctuated" the evidence of the assault. There was no prejudice to defendant as both crimes were proven beyond a reasonable doubt and defendant would not have been able to offer a better defense had the counts been severed.

State v. Mitter, 285 S.E.2d 376 (1981) (Miller, J.)

Severance where there has been a joinder of different offenses in the same indictment or a consolidation of different indictments for the purpose of one trial depends on several circumstances.

Severance (continued)

State v. Mitter, (continued)

Where the offense charged are interrelated and the prosecutor joins offenses because he is unsure which offense he will be able to prove at trial, severance is not warranted. In those other situations where there has been either a joinder of separate offenses in the same indictment or the consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court.

In the present case, it was not error to refuse separate trials on the related offenses. The defense was essentially the same to all charges; the cumulative evidence of the related offense would not result in bolstering a weak charge; and the defendant didn't contend he desired to testify on some but not all of the charges.

JUDGES

Conduct

W.Va. Jud. Inquiry Comm'n v. Casto, 263 S.E.2d 79 (1979) (McGraw, J.)

Syl. pt. 1 - When a judge, with no intent to prejudice the rights of a party, makes a legal error, his act does not constitute a violation of Canon 2A Canon 3 of the Judicial Code of Ethics.

In a complaint by the Judicial Inquiry Commission, it was alleged that a magistrate backdated records, that is, that he signed records that had been filled out and dated some eight or nine months earlier. The Supreme Court found that the magistrate intended nothing improper in signing the predated form; ;that he sought to comply faithfully with his duties; there was no intentional misconduct or disrespect for the law as the magistrate perceived and understood it; and that the conduct complained of was not properly charged under Canon 2A. Neither Canon 2A nor 3 was not properly charged under Canon 2A nor 3 was designed to censure judicial acts that are merely erroneous but not committed in bad faith to willfully prejudice the rights of the parties.

Syl. pt. 2 - Charges relating to a judge's performance of his official duties should be brought under Canon 3 of the Judicial Code of Ethics.

Disqualification

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

Once a judge voluntarily recuses himself from a case, he should not participate in any further phase of it.

On appeal, defendant claimed that the trial judge who recused himself, should not have reentered the case to resentence the defendant. The Supreme Court found no error since the judge had no discretion in regard to the sentence.

Disqualification, (continued)

State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (1979) (McGraw, J.)

The proper procedure for disqualifying a circuit court judge is the filing of a written motion for disqualification in the circuit court together with evidence supporting the challenge. Once the motion is filed, the proceedings stop and the judge is prohibited from taking any actions in the case until the issue of disqualification is determined. A temporary judge is appointed to preside over the hearing.

When the circuit judge had participated in the petitioner's arrest and petitioner sought a writ of prohibition to disqualify the judge the Supreme Court declined to decide the matter and left the determination to the circuit court to decide the matter and left the determination to the circuit court in accordance with the Administrative Rules Procedures.

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

Syl. pt. 4 - While a trial court should not conduct the marriage of a witness during a recess of the proceeding at which the witness has testified, such an occurrence does not require the judge's recusal from the remainder of the trial when there were no jurors present to infer bias.

In an appeal from a conviction for first degree murder, the defendant claimed that the judge should have been recused after conducting the marriage of one of the State's key witnesses, (a detective) during a luncheon break during the trial. The Supreme Court found that this occurrence did not constitute reversible error.

State v. Moran, 285 S.E.2d 450 (1981) (Per Curiam)

Upon the filing of verified motion for disqualification, accompanied by a certificate of good faith, the circuit judge can proceed no further in the matter and must transfer a copy of the motion and certificate to the Chief Justice of the Supreme Court together with a letter advising that he will recuse himself or that a hearing will be required upon the motion. *Stern Brothers, Inc. v. McClure*, 236 S.E.2d 222 (W.Va. 1977).

Disqualification, (continued)

State v. Moran, (continued)

On appeal from a trial for unlawful wounding, the defendant claimed that the trial court had erred in not following the administrative procedure set out in the *Stern Brothers* case to disqualify himself. The Supreme Court found that the rule was not applicable because it had not been promulgated at the time the recusal motion was made. After the ruling was promulgated the defense did not make any effort to take advantage of the new procedures, though they had ample time to do so. The Supreme Court found no error.

Knowledge of the facts surrounding an alleged crime

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

See JUVENILE Transfer, Judge holding subsequent adjudicatory or criminal proceeding, (p. 614) for discussion of topic.

Magistrates

W.Va. Jud. Inquiry Comm'n v. Casto, 263 S.E.2d 79 (1979) (McGraw, J.)

See JUDGES Sanctions for violation of judicial canons, (p. 535) for discussion of topic.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Justices of the peace are subject to the same canons as judges and justices.

The present Code of Ethics requires a judge to maintain the integrity and independence of the judiciary, to avoid even the appearance of impropriety, and to act impartially.

When a judicial officer collaborates with law enforcement authorities, even in the interest of expedience, his independent status is jeopardized and he is subject to discipline.

JUDGES

Sanctions for violations of judicial canons

W.Va. Judicial Inquiry Com'n v. Casto, 263 S.E.2d 79 (1979) (McGraw, J.)

The sanctions provided upon a finding that a member of the judiciary has violated one or more of the Canons include admonition, private reprimand, public censure and temporary suspension from duties or fine or both. The sanctions, if not penal, are punitive in nature and should be strictly construed in favor of the party charged with violating the Canons.

The power to censure or discipline judges are provided by article 8, § 8 of the West Virginia Constitution is consonant with the provisions of article 3, § 2 which provides that all power is vested in and consequently derived from the people. Magistrates are their trustees and servants, and at all times amenable to them. The distinction between private reprimand and public censure is of little meaning.

A public official engaged in the administration of justice and found to have violated the standards of conduct to which the judicial is held should not be reprimanded privately out of the hearing of the public. Rather, if a judge's conduct is sufficiently serious to merit rebuke, it should be known publicly, so that the people whom he serves may be made aware of his conduct, and the constitutional provision maybe vindicated.

In a complaint by the Commission, it was alleged that a magistrate backdated records, that is, that he signed records that had been filled out and dated some eight or nine months earlier. The Supreme Court found that the magistrate's conduct was not intentional or committed in bad faith and did not rise to the level of a Canon 2 or Canon 3 violation. The complaint was dismissed and the magistrate exonerated.

JUDGMENT OF ACQUITTAL

Insufficiency of evidence

See generally SUFFICIENCY OF EVIDENCE, (p. 914) for discussion of topic.

Variance between indictment and proof

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

State v. Hobbs, 282 S.E.2d 258 (1981) (Per Curiam)

See FALSE RETURN OF VOTES Indictment, (p. 327) for discussion of topic.

State v. Perry, 284 S.E.2d 861 (1981) (Per Curiam)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

JUDGMENTS

Set aside

State ex rel. Kincade v. Spillers, 268 S.E.2d 137 (1980) (Harshbarger, J.)

Syl. pt. 2 - A criminal court may, for certain purposes, set aside a judgment by an order entered during the same term at which the order set aside was spread upon the records of court. That rule, however, in cases where the judgment has been satisfied in whole or in part, is limited to those cases in which the trial court reduces the penalty imposed. Cases in which the penalty is increased are treated as subjecting the accused to double jeopardy and therefore the second sentence is void.

Void/voidable

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

See RECIDIVIST Sentencing, Void/voidable, (p. 749) for discussion of topic.

State ex rel. Lemley v. Roberts, 260 S.E.2d 850 (1979) (Per Curiam)

"A void judgment, being a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment." Syl. pt. 3, *State ex rel. Vance v. Arthur*, 142 W.Va. 737, 98 S.E.2d 418 (1957).

"A void judgment is subject to collateral attack in a proceeding in mandamus." Syl. pt. 4, *State ex rel. Vance v. Arthur*, 142 W.Va. 737, 98 S.E.2d 418 (1957).

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Syl. pt. 5 - The void portion of a judgment can be attacked in a habeas corpus proceeding, but if there remains a valid portion of the sentence yet to be served, the relator is not entitled to a discharge.

Void/voidable (continued)

State v. Pelfrey, 256 S.E.2d 438 (1979) (McGraw, J.)

A trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who has been denied effective assistance of counsel, and a judgment so entered is void.

Blankenship v. Minton Chevrolet, Inc., 266 S.E.2d 902 (1979) (Neely, J.)

Syl. pt. 1 - Judgments rendered in the former justice of the peace courts where the judge was paid pursuant to a statute *W.Va. Code* § 50-17-1 (1966) (or its predecessor) which was ruled unconstitutional because it gave a theoretical pecuniary interest to the judicial officer, are merely voidable and not void *ab initio*.

JURY

Challenges

Cause

State v. Archer, 289 S.E.2d 178 (1982) (Per Curiam)

"The object of the law is in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused . . . ." Syl. pt. 1, in part, *State v. Hatfield*, 48 W.Va. 561, 37 S.E. 626 (1900).

". . . one accused of a felony is entitled as a matter of right to a panel of twenty jurors, unexceptionable under the rules of the common law, before being called upon to exercise his right of peremptory challenge." *State v. Dushman*, 79 W.Va. 747, 91 S.E. 809 (1917).

In a trial for delivery of LSD, a prospective juror stated that his son had been a deputy sheriff and was presently employed in law enforcement; he further stated that he would lean toward favoring testimony of a police officer. The Supreme Court found that the juror was at last subject to potential prejudice and that defense counsel's motion to strike for cause should have been granted.

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

The challenged juror answered "yes and no" to whether she had formed an opinion on the guilt or innocence of the defendant. As to whether she could render a true verdict based on the evidence she answered "outside of how I feel I guess not." Finally, she was asked if she knew of any reason why she would not render a verdict based solely on the evidence, to which she answered "no." These answers were held not to render her incompetent to serve.

An alternate juror, who answered the *voir dire* questions regarding bias with neutrality but intimated a reluctance to sit due to a long-planned vacation, was found to be competent to serve.

State v. Beck, (continued)

A juror whose niece had been slain by a man whom the defendant's counsel later represented, was found to be competent. The object of a jury selection is to secure jurors who are not only free from prejudice, but who are also free from the suspicion of prejudice. The juror had not attended his niece's murder trial and he made unequivocal affirmative responses each time he was asked if he could render an impartial verdict based on the evidence.

State v. Dye, 280 S.E.2d 323 (1981) (Per Curiam)

"In a criminal case it is reversible error for a trial court to overrule a challenge for cause of a juror who is an employee of a prosecutorial or enforcement agency of the State of West Virginia." Syl. pt. 5, *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973).

In an appeal from a conviction for murder, defendant claimed that it was error for the trial court to refuse to grant his request to strike for cause a prospective juror who on *voir dire* revealed that he was a member of a city police force. The Supreme Court found that the trial court committed reversible error, pointing out that prior cases had found objectionable a juror's close association with enforcement officials.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

When the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained. In any case where the trial court is in doubt, the doubt must be resolved in favor of the defendant's challenge, as jurors who have no relation whatsoever to the State are readily available. The defendant was entitled to a panel free of members who had even a tenuous relationship with the prosecutorial or enforcement arm of the State. The trial court's refusal to strike a juror who was a close friend of the special prosecutor and his wife and whose husband was the Democratic nominee for sheriff was error.

Challenges (continued)

Peremptory

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

A criminal defendant in a felony trial is entitled to exercise six peremptory strikes against a panel of twenty jurors who are free from challenge for cause under common law. Under this rule, it is reversible error to deny a valid challenge for cause even if the disqualified juror is later struck by a peremptory challenge. The *prima facie* grounds for disqualification at common law were: (1) Kinship to either party within the ninth degree; (2) was arbitrator on either side; (3) that he has an interest in the cause; (4) that there is an action pending between him and the party; (5) that he has taken money for his verdict; (6) that he was formerly a juror in the same case; (7) that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him; and causes of the same class or founded upon the same reason should be included.

In this case, none of the prospective jurors, which the defendant claimed should be disqualified, fit into any of the principal causes for disqualification at common law. The prospective jurors in this case worked for the victim's brother. The defense did not attempt to question these jurors to determine what extent the employer-employee relationship might have influenced them, and there is no evidence indicating they had any bias or prejudice toward the accused.

Court's comments

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

Trial court's comment in refusing to answer jury's written question concerning the duties and potential criminal responsibility of two unindicted election clerks who had worked at the same precinct, did not impermissibly influence the jury's verdict since the judge's comments were completely unrelated to the issues for jury consideration.

Court's comments (continued)

State v. Johnson, 282 S.E.2d 609 (1981) (Per Curiam)

Syl. pt. 2 - Where a jury has reported that it is unable to agree and the trial court addresses the jury urging a verdict, but does not use language the effect of which would be to cause the minority to yield its views for the purpose of reaching a verdict, the trial court's remarks will not constitute reversible error.

In an appeal from a conviction for unlawful wounding, the defendant claimed that the court's comment to the jury that it cost about a thousand dollars a day to hold court was coercive and placed undue pressure against the jury members who were in the minority of the voting. The Supreme Court found that the remark was not coercive, in that it was not directed toward the two jurors in the minority and was not intended to make them change their views to reach an agreement.

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

Syl. pt. 6 - A pre-trial orientation meeting, held at the beginning of the term with all members of the newly-called jury panel present, is not a critical stage of the trial proceeding requiring the presence of an accused.

Syl. pt. 7 - At any orientation meeting held in the future, a court reporter must be present to record those proceedings.

It was not reversible error for the trial court to hold an unrecorded, private orientation meeting with the entire panel of jurors on the first day of the jury's service, because no prejudice was shown to the defendant's rights.

JURY

Deliberations

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

Defendant objected to the prosecutor's suggestion and the trial court allowing the jury to take the murder weapon to its room to see if it could be placed in a position consistent with the defendant's explanation about how his wife was shot.

"It is within the sound discretion of the trial court to permit weapons used in the commission of the crime and the garments worn by the deceased at the time he was killed showing marks of violence, which have been identified and given in evidence, to be carried aby the jury to their room when they retire to consider their verdict." *State v. Panetta*, 85 W.Va. 212, 101 S.E. 360 (1919), Syl. pt. 9.

What jurors do with such exhibits is their business and there was no error in the prosecutor's remark or the judge's ruling about it.

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

Trial court's instructions to the jury, after being informed that the jury could not reach a verdict, were not coercive, and constituted a fair and reasonable effort to stimulate continued deliberation.

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

Syl. pt. 2 - Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court must, on request of defense counsel, reinstruct the jury.

JURY

Impeachment of verdict

State v. Scotchel, 285 S.E.2d 384 (1981) (Miller, J.)

Syl. pt. 1 - A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict.

Syl. pt. 2 - Courts recognize that a jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process.

Before this type of impeachment is permitted, it must be shown that due diligence was exercised by the parties during *voir dire* examination to develop possible bias, prejudice or disqualification on the part of the jury panel.

Syl. pt. 3 - Ordinarily, a juror's claim that he was confused over the law or evidence and therefore participated in the verdict on an incorrect premise is a matter that inheres in or is intrinsic to the deliberative process and cannot be used to impeach the verdict.

The fact that the juror was misled as to the penalty for assault and battery has no effect on the verdict.

Syl. pt. 4 - The general rule is that statements relative to intimidation or coercion by fellow jurors cannot ordinarily be received to impeach the verdict.

An allegation that the juror in this case claimed to have been verbally abused during deliberation is of no effect.

Allegations by jury member that expressions of belief or disbelief in a witnesses' testimony were made by other jury members during deliberation is of no consequence as these were matters inhering in the deliberative process of the jury. The same principle applies to the juror's statement that another member of the jury appeared ill which caused her to want to get the entire deliberation over as quickly as possible.

JURY

Magistrate court

State ex rel. Rauch v. Gay, 280 S.E.2d 595 (1981) (Harshbarger, C.J.)

Syl. - A magistrate court jury shall consist of six persons to be selected from a panel of ten, *W.Va. Code*, 50-5-8, and failure by the state to provide a ten-person panel whose members are free from prejudice and legally qualified, is a fatal defect to proceedings thereafter.

The Bench Book for the State of West Virginia Magistrate Court (1979) requires a panel of ten qualified and unprejudiced persons from which six will be chosen, and defendant is entitled to three peremptory strikes.

Defendant was convicted in magistrate court by a six person jury selected from a panel of eight prospective jurors, rather than the ten prospective jurors required by statute. His writ of habeas corpus was denied by the circuit court and he appealed. The Supreme Court found that his trial violated his rights and his convictions were void.

Mercy

State ex rel. Leach v. Hamilton, 280 S.E.2d 62 (1980) (Harshbarger, J.)

W.Va. Code § 62-3-15 provides that if the accused is found by the jury to be guilty of murder of the first degree or if he pleads guilty to murder of the first degree, he shall be imprisoned for life without being eligible for parole, but, "the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole . . ."

Syl. pt. 1 - Life imprisonment without possibility of parole is not cruel and unusual punishment for first-degree murder. *U.S.Const.* amends. XIV and VIII; *W.Va.Const.* Art. III, § 5.

Mercy (continued)

State ex rel. Leach v. Hamilton, (continued)

The Supreme Court rejected the appellant's argument that *W.Va. Code* § 62-3-15, which makes life imprisonment mandatory in cases of first-degree murder, life imprisonment mandatory in cases of first-degree murder, violated his due process and equal protection rights by failing to provide adequate guidelines for the jury's choice to grant mercy. The Court accepted the view of *Wilson v. State*, 268 Ind. 112, 374 N.E.2d 45 (1978), a decision which distinguished *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) acknowledging the unconstitutionality of a mandatory death penalty without adequate jury guidelines) indicating that *Furman* did not stand for mandatory guidelines anytime the jury undertook the sentencing function.

Misconduct

State v. Gilliam, 289 S.E.2d 471 (1982) (Per Curiam)

"A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of." Syl. pt. 7, in part, *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932).

During *voir dire*, the judge inquired whether any of the prospective jurors had been the victim of a breaking and entering, and no one responded in the affirmative. The jury was empaneled and a recess taken. During this recess one juror approached the judge and indicated that a breaking and entering had occurred at an apartment she rented to another person. The judge informed her that she had answered the question truthfully and she served on the jury. The Supreme Court found that the juror answered truthfully and that there was no misconduct on the part of the juror in failing to make the disclosure on *voir dire*.

JURY

Qualifications

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

One jury member had been convicted of shoplifting. The contention was that she was prohibited from serving on the jury under *W.Va. Code* § 52-1-2, which excludes persons convicted of "infamous" crimes. The court defined d"infamous" crimes as felonies or offenses punishable by death or imprisonment in the state penitentiary. Since shoplifting doesn't fall within this definition the juror was qualified to serve under the statute.

Another juror member was claimed to be unqualified due to the fact he was the father of a magistrate of the county. The defendant's position was that, the juror who is the father of a magistrate, a State official, is, in effect, related to the State. And, under common law, persons related to either party are prohibited from serving. The likelihood of bias or prejudice arises from relationship to a law enforcement or prosecutorial officer, parties charged with adversarial function, does not automatically arise from relationship to a magistrate.

Refusal to poll for prejudicial publicity

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

"A trial court is vested with discretion in making the initial determination as to whether or not newspaper articles or other publicity brought to the attention of the jury in the trial of a case results in prejudice." Syl. pt. 2 - *State v. Williams*, 230 S.E.2d 742 (W.Va. 1976).

The trial court must first determine if there is good reason to question the juror and then decide whether there is cause to grant a new trial. There are no hard and fast rules in determining whether newspaper articles or publicity read by or brought to the attention of the jury is prejudicial, but each case must be decided upon its facts and circumstances.

The Supreme Court will reverse a trial court's refusal to poll the jury for prejudicial publicity only for abuse of discretion.

Refusal to poll for prejudicial publicity (continued)

State v. Hobbs, (continued)

In a trial for making a false election return of votes the defendant claimed on appeal that the judge erred in refusing to poll the jury for prejudicial publicity. The Supreme Court held that the record revealed no finding by the trial court that the newspaper articles were not prejudicial, but defendant gave no evidence to support claim of prejudice and there appeared to be nothing inherently prejudicial about them.

Right to jury trial

Hendershot v. Hendershot, 263 S.E.2d 90 (1980) (Miller, J.)

Syl. pt. 2 - Article III, Section 14 of the West Virginia Constitution prohibits imprisonment without a jury trial in a criminal contempt proceeding.

W.Va. Const. art. III, § 14 prohibits imprisonment without a jury trial in a criminal contempt proceeding where the contemnor is sentenced and sentencing order does not provide him an opportunity to purge the contempt. It is not applicable where the sentencing order contains the condition that the contemnor can gain immediate release by purging himself of the contempt by performing an act that is within his power to accomplish.

In this case, appellant's son was a litigant in a divorce suit. The son was ordered by the trial court to relinquish to his wife the custody of their child. The appellant and his son conspired to remove the child from the state and the trial court sentenced appellant to sere 90 days in jail and fined him $500 for violating the court's order regarding the custody of the child. The appellant claimed that *W.Va. Const.* art. III, § 14 gives an absolute right to a jury trial for all crimes and misdemeanors where the penalty imposed involves a period of incarceration and that a contempt will be deemed criminal when a jail sentence is imposed and the contemnor has no chance for purging. Appellant's conviction for criminal contempt was reversed and a new trial awarded.

JURY

Supplementary charges

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

In this trial for murder, after the jury had deliberated for a period of time, they requested further instructions. They were brought back into the courtroom and given a supplementary charge. Although defendant claimed on appeal that the giving of this charge was error, the Supreme Court found that there was not a statement of the charge or other information in the record, and in the absence of such, would not rule on the point.

Venire

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Although minor deviations in the procedure by which jurors are chosen for the panel are allowed, there is no authority for choosing jurors other than from the lists of properly appointed jury commissioners. This task is to be performed by the circuit clerk, as set out in *W.Va. Code* § 52-1-15.

The prosecuting attorney moved the court to order the sheriff to bring before the court 15 persons to be questioned by the court to serve on the venire. Defendant's objections to jury selection different than statutorily authorized, was overruled. The Supreme Court found that the sheriff cannot simply pick the venire from those citizens who happen to be about the courthouse.

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

A defendant on trial for a felony is entitled to a panel of 20 jurors, free from exception, before being called upon to exercise jurors, free from exception, before being called upon to exercise his right of peremptory challenge. "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. pt. 1, *State v. Kilpatrick*, 210 S.E.2d 480 (W.Va. 1974). The significance as to whether he has formed an opinion regarding guilt or innocence, but whether he can render a just verdict based solely upon the evidence adduced at trial.

Venire (continued)

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

Syl. pt. 2 - To establish a *prima facie* case of unconstitutional jury selection methods under the Sixth Amendment's fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venire from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.

In a trial where defendants claimed on appeal that they were denied a fair trial because the petit jury which convicted them was selected from the count personal property tax rolls in violation of Sixth Amendment rights, the Supreme Court found that defendants did not make a *prima facie* showing that the jury selection did not represent a fair cross-section of the community.

Syl. pt. 3 - Persons not included on a county's personal property tax list does not constitute a cognizable group whose exclusion from the list of potential petit jurors violates a defendant's Sixth Amendment right to a jury composed of a fair cross-section of the community.

The Supreme Court did not endorse the use of personal property tax list as the only constitutionally permissible method for selecting a fair cross-section of the community as potential petit jurors. Courts have approved several alternative methods using various sources of names as within the Sixth Amendment requirements.

The question of constitutionally impermissible exclusion must be examined on a case-by-case basis considering the particular selection method chosen and the size and characteristics of the excluded group and of the local population.

Venire (continued)

State v. Hobbs, (continued)

The defendants claims on appeal that the trial court erred in refusing to conduct a full evidentiary hearing concerning the method of selecting the petit jury, by frustrating efforts to prepare an adequate record for appellant review of the constitutional issue, by refusing testimony of affidavits of the jury commissioners, and by refusing to allow the defendants' counsel to examine the master list from which the petit jury was drawn. The Supreme Court found that the trial judge properly refused to grant the motion for a full evidentiary hearing to investigate the petit jury selection process because the defendants' claims of unconstitutional exclusion were not adequately supported by statistical or other documentation.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

"A defendant is entitled to a panel of twenty jurors who are free from exception, and if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable." *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973).

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

W.Va. Code § 52-1-2 and related statutory provisions dealing with the selection of petit jurors are not violative of due process and equal protection provisions.

State v. Williams, 249 S.E.2d 752 (1978) (Neely, J.)

It is not erroneous to use voter registration rolls for jury selection absent evidence that there is an intent to exclude black persons or poor persons, or that the effect of the use of voter registration rolls was in fact to exclude black and poor persons unreasonably and systematically from jury selection.

Venire (continued)

State v. Williams, (continued)

Footnote 4: In order for a defendant to warrant a full hearing on any alleged invidious discrimination on jury selection he must demonstrate that he is a member of a recognizable, distinct group that has been under-represented by comparing the proportion of the group in the total population to the proportion called as jurors over a significant period of time. Once he has statistically shown substantial under-representation of his group, he has made a *prima facie* case of discrimination, and the burden shifts to the State to rebut that case. *State ex rel. Whitman v. Fox*, 236 S.E.2d 565 (W.Va. 1977).

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

See JURY Challenges, Peremptory, (p. 541) for discussion of topic.

Voir dire

See *VOIR DIRE*, (p. 947) for discussion of topic.

JUVENILE

In general

Gibson v. Bechtold, 245 S.E.2d 258 (1978) (McGraw, J.)

Syl. pt. 1 - The 1977 amendments to this state's juvenile law relating to the juvenile jurisdiction of circuit courts are clear and unambiguous and are to be applied to cases arising after its passage as well as to pending cases.

The Supreme Court applied Syl. pt. 3 of *Woodring v. Whyte*, 242 S.E.2d 238 (W.Va. 1978) to determine that the 1977 changes in the juvenile law relating to jurisdictional matters repealed the prior law on the subject.

State ex rel. C.A.H. v. Strickler, 251 S.E.2d 222 (1980) (McGraw, J.)

Since most juvenile cases are resolved by guilty pleas, it is clear for most adjudicated delinquents that the dispositional stage is the most critical stage of all.

Admission/denial of allegations

State ex rel. J.M. v. Taylor, 276 S.E.2d 199 (1981) (Harshbarger, C.J.)

Syl. pt. 2 - A juvenile may not knowingly and intelligently admit or deny allegations against him unless the judge informs him of the nature of the charges, lesser included offenses, possible defenses, his constitutional and statutory rights, each constitutional right which is waived by the plea, and the maximum penalty to which he may be subjected.

In this case, three juvenile cases were consolidated for appeal. The Supreme Court noted that in two of the cases, the children admitted the allegations in petitions against them and they had no counsel. The Supreme Court found the admissions to be not in compliance with requirements to allow the child to make a knowledgeable and intelligent decision.

JUVENILE

Burden of proof

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

A juvenile is entitled to the same standard of proof as an adult: beyond a reasonable doubt.

State v. Peterman, 260 S.E.2d 728 (1979) (Per Curiam)

Syl. pt. - At the adjudicatory stage of a juvenile proceeding the State has a constitutional imposed burden to prove the juvenile's guilt beyond a reasonable doubt.

In a delinquency proceeding in which the youth was alleged to have attempted to enter the home of the witness, the State did not sustain its burden of proof when the evidence did not show guilt beyond a reasonable doubt, even though it was not clear from the record what standard of proof the trial court applied.

Confessions

Voluntariness

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

In evaluating a confession given by a juvenile, the totality of circumstances must be considered including the following factors: 1- age of the accused; 2- education of the accused; 3- knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; 4- whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; 5- whether the accused was interrogated before or after formal charges had been filed; 6- methods used in interrogation; 7- length of interrogations; 8- whether *vel non* the accused refused to voluntarily give statements on prior occasions; and 9- whether the accused has repudiated an extra judicial statement at a later date.

Confessions (continued)

Waiver of rights

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

Syl. pt. 1 - There is no constitutional impediment which prevents a minor above the age of tender years solely by virtue of his minority from executing an effective waiver of rights; however, such waiver must be closely scrutinized under the totality of the circumstances.

The 15 year old defendant's in this case contended they did not voluntarily, knowingly, and intelligently waive their rights to counsel and to remain silent. Under the totality of the circumstances the Supreme Court found the juveniles had waived their rights despite the fact that one defendant's confession was given without his father present. Note, however, *W.Va. Code* § 49-5-1(d) [1978], which prohibits admission of extra-judicial statements by a child under 16 years of age other than *res gestae* statements made to law enforcement officers outside the presence of the child's counsel, was not the law at the time of this case. Nor was *W.Va. Code* § 49-5-1(d) [1978] in effect, which provides no interrogation can be made without the presence of parent or counsel.

Confinement

Constitutional rights

State ex rel. K.W. v. Werner, 242 S.E.2d 907 (1978) (Harshbarger, J.)

Syl. pt. 2 - Institutionalization of juveniles found guilty of delinquency because of criminal acts is not *per se* cruel and unusual punishment or a denial of equal protection of the law.

Syl. pt. 3 - Punitive practices such as "bench time," "floor time," solitary confinement, beating, slapping, kicking or otherwise physically abusing juveniles incarcerated at the State Industrial School for Boys at Pruntytown is cruel and unusual punishment forbidden by the state constitution, and every person subjected to any of the absent exigent circumstances, shall be entitled to redress. *W.Va. Const.* art. 3, § 5.

Confinement (continued)

Constitutional rights (continued)

State ex rel. K.W. v. Werner, (continued)

When juvenile inmates were confined in small, windowless cells, were required to do "floor time" and "bench time", and were "maced" frequently, the court held that this was cruel and unusual punishment and that those subjected to such punishment were entitled to redress.

Where the West Virginia Industrial School for Boys had more than adequate educational programs and library facilities and was within 35 miles of five colleges and universities and within 4 miles of clinics and medical facilities, the court determined that there was not sufficient evidence of lack of rehabilitative programs at the industrial school to require a finding that the use of the school was unconstitutional. The court did, however, recommend that the incarceration of juveniles in such schools be limited to those who are dangerous and those who will benefit from institutionalization.

County jails

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Footnote 2- Juveniles are not to be housed in common county jails.

Where a child, twelve years old at the time, was the subject of a petition that charged her with 4 crimes that would be felonious had they been committed by an adult and was kept in the section of the county jail that is reserved for juvenile offenders, the Supreme Court found the confinement to be a blatant denial of the mandate set forth in *State ex rel. R.C.F. v. Wilt*, 252 S.E.2d 168 (W.Va. 1979).

State ex rel. R.C.F. v. Wilt, 252 S.E.2d 168 (1979) (McGraw, J.)

Syl. pt. 1 - *W.Va. Code* § 49-5-1 *et. seq.*, particularly *W.Va. Code* § 49-5A-2 [1977] and *W.Va. Code* § 49-5-16(a) [1978], make it unlawful to incarcerate a child under eighteen years of age in a common county jail or police station lockup.

Confinement (continued)

County jails (continued)

State ex rel. R.C.F. v. Wilt, (continued)

Syl. pt. 2 - *W.Va. Code* § 49-5-16(a) provides that a child over fourteen years of age who has been committed to an industrial home or correctional institution may be held in the juvenile department of a jail while awaiting transportation to an institution for a period not to exceed ninety-six hours, and a child over fourteen years of age who is charged with a crime which would be a violent felony if committed by an adult, may, upon an order of the circuit court, be housed in a juvenile detention portion of a county facility, but not within sight (or sound) of adult prisoners.

In this case, a seventeen-year old indigent had been confined in a county jail on delinquency petitions charging him with commission of theft offenses. The Supreme Court awarded the writ of habeas corpus because it is unlawful for circuit courts and juvenile referees to incarcerate a child under eighteen years of age in a common county jail prior to an adjudication of delinquency.

Least restrictive alternative dispositions and considerations

See JUVENILE Dispositional hearing, Role of court, (p. 575) for discussion of topic.

State ex rel. C.A.H. v. Strickler, 251 S.E.2d 222 (1980) (McGraw, J.)

Syl. pt. 2 - By virtue of the terms of *W.Va. Code* § 49-5-13(b) [1978], a juvenile court is required to "give precedence to the least restrictive" of the enumerated dispositional alternatives consistent with the best interests and welfare of the public and the child.

Syl. pt. 3 - In preparation for the dispositional hearing, the court and all counsel should explore and become knowledgeable of all possible resources available to the juvenile court in an effort to find the least restrictive dispositional alternative having reasonable prospects for successful rehabilitation.

Confinement (continued)

Least restrictive alternative dispositions and considerations (continued)

State ex rel. C.A.H. v. Strickler, (continued)

In a prohibition proceeding, the Supreme Court found that the circuit court had exceeded its jurisdiction by placing a status offender in a facility that was found to be secure and prison-like, containing children adjudged delinquent because of criminal activity.

The absence of a secure detention facility or rehabilitation facility in West Virginia devoted exclusively to the rehabilitation of status offenders does not justify the violation of constitutional rights. Status offenders are never to be confined with non-status offenders.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Syl. pt. 8 - Failure to cooperate with a *reasonable* plan of rehabilitation proposed by the court, is one factor to be considered at a juvenile disposition hearing and willful, consistent and contumacious resistance to intelligent programs which are less restrictive than incarceration in a secure facility justify a court in committing a child to a secure facility.

Syl. pt. 5 - Since the treatment available in our juvenile justice system is often disguised punishment, particularly as the severity of the commitment increases, the court cannot justify incarceration in a secure, prison-like facility on the grounds of rehabilitation alone; notwithstanding improvements in the educational and counseling facilities of our industrial schools, secure, prison-like facilities are still dangerous and coercive and the selection of an industrial school as the appropriate disposition must be grounded on the factors set forth in syllabus point 4 of this case, (see JUVENILE Dispositional hearing, Role of court, (p. 575) and not on the fact that treatment can be afforded more cheaply or conveniently in a secure facility.

This case involved a juvenile who had for the first time committed a criminal offense.

Confinement (continued)

Least restrictive alternative dispositions and considerations (continued)

State ex rel. H.K. v. Taylor, 289 S.E.2d 673 (1982) (McGraw, J.)

The Supreme Court applied syllabus point 1 of *State ex rel. R.S. v. Trent*, 289 S.E.2d 166 (W.Va. 1982) in this case. The juvenile had been sent to the West Virginia Industrial School for Boys for medical evaluation and diagnostic classification. The Court found there were surely alternatives available to the circuit judge for the relator's diagnosis. The relator's incarceration in the Diagnostic Center at the W.V.I.S.B. was illegal.

It is well established in our body of juvenile law that juveniles are constitutionally entitled to the least restrictive treatment that is consistent with the purpose of their custody.

State ex rel. K.W. v. Werner, 242 S.E.2d 907 (1978) (Harshbarger, J.)

Juveniles are constitutionally entitled to the least restrictive alternative treatment that is consistent with the purpose of their custody.

State ex rel. R.S. v. Trent, 289 S.E.2d 166 (1982) (McGraw, J.)

Syl. pt. 1 *W.Va. Code* § 49-5-13(b) (1980 Replacement Vol.) required the juvenile court at the dispositional stage of delinquency proceedings to "give precedence to the least restrictive" of the enumerated dispositional alternative consistent with the best interests and welfare of the public and the child.

Juveniles are constitutionally entitled to the least restrictive treatment that is consistent with the purpose of their custody.

Confinement (continued)

Least restrictive alternative dispositions and considerations (continued)

State ex rel. S.J.C. v. Fox, 268 S.E.2d 56 (1980) (McGraw, J.)

Syl. pt. 1 - In order for a juvenile to be properly committed to a juvenile correctional facility, *W.Va. Code* § 49-5-13(5) (1978) requires a "finding" that "no less restrictive alternative would accomplish the requisite rehabilitation of the child." The failure to set forth a finding on the record deprives the Court of authority to order such a commitment.

"Finding" is more properly a conclusion of law which is based on the findings of fact of the Court.

Syl. pt. 2 - The sentence imposed on juvenile's codefendants is not a material or permissible factor for the juvenile court to consider in determining the final disposition of a juvenile case and does not justify the commitment of the child to a juvenile correctional institution.

Where in a dispositional hearing the juvenile court considered that relator's three codefendants were incarcerated for their part in the attempted robbery, the Supreme Court found that the information was improperly considered and did not justify incarceration, especially since it was shown that there were differences which justified a different disposition in relator's case from the codefendants.

The record here amply demonstrated a conscious effort by the relator to conform his attitudes and conduct to acceptable societal norms at the time of the dispositional hearing and it was clearly wrong not to give due consideration to the evidence supporting such a conclusion.

The circuit court exceeded the scope of its legislative authority by failing to make findings of fact and conclusions of law as required by statute and consistent with the evidence.

Confinement (continued)

Least restrictive alternative dispositions and considerations (continued)

State ex rel. S.J.C. v. Fox, (continued)

Syl. pt. 3 - In considering the least restrictive dispositional alternative for sentencing a juvenile, a juvenile court must consider the reasonable prospects for rehabilitation of the child as they appear at the time of the dispositional hearing, with due weight given to any improvement in the child's behavior between the time the offense was committed and the time the sentence is passed.

Mental illness

State ex rel. R.S. v. Trent, 289 S.E.2d 166 (1982) (McGraw, J.)

Syl. pt. 3 - A child who is mentally incapable of conforming his conduct to prescribed legal norms and who cannot restrain himself from committing proscribed antisocial acts, thereby presenting a danger to himself or to others, comes within the definition of "mental illness" and shall be treated accordingly.

Where a question is raised as to the mental capacity of a child adjudged delinquent, the juvenile court is obliged to develop the matter and to state its findings upon the record so that the conclusion of the juvenile court as to the child's capacity may properly be reviewed in a subsequent proceeding.

While the circuit court made a finding that the petitioner presented a danger to himself and to others, it should have posited that finding in mental incapacity.

The Court's investigation should involve multi-professional evaluations by those connected or employed by such agencies as the Department of Health, the County Board of Education, the Department of Welfare, and the Department of Corrections, who are able to evaluate the child's abilities and disabilities.

Confinement (continued)

Prior to adjudication and disposition

State ex rel. R.C.F. v. Wilt, 252 S.E.2d 168 (1979) (McGraw, J.)

Syl. pt. 3 - *W.Va. Code* § 49-2-16 (1973) provides in part that, "The state department of welfare shall provide care in special boarding homes for children needing detention pending disposition by a court having juvenile jurisdiction or temporary care following such court action."

In this case a seventeen year old indigent had been confined in a county jail on delinquency petitions charging him with commission of theft offenses. The Supreme Court awarded the writ of habeas corpus because it is unlawful for circuit courts and juvenile referees to incarcerate a child under eighteen years of age in a common county jail prior to an adjudication of delinquency.

Right to treatment

State ex rel. B.S. v. Hill, 294 S.E.2d 126 (1982) (Harshbarger, J.)

Applies syl. pt. 7, *State ex rel. R.S. v. Trent*, 289 S.E.2d 166 (W.Va. 1982), cited below.

State ex rel. H.K. v. Taylor, 289 S.E.2d 673 (1982) (McGraw, J.)

It is well established in our body of juvenile law that juveniles are constitutionally entitled to the least restrictive treatment that is consistent with the purpose of their custody. Relying on syllabus points 1and 2 of *State ex rel. R.S. v. Trent*, 289 S.E.2d 166 (W.Va. 1982).

The Supreme Court applied syllabus points 6 and 7 of State ex rel. R.S. v. *Trent, supra to* determine the child had a right to treatment and that there were other alternatives available to the circuit judge. Relator's incarceration in the Diagnostic Center at the West Virginia Industrial School for Boys was illegal.

Confinement (continued)

Right to treatment (continued)

State ex rel. H.K. v. Taylor, (continued)

Footnote 4: The purpose of the juvenile justice system is to provide for the rehabilitation of delinquent children.

In the facts of this case, the child bringing this habeas corpus proceeding was sent to the Industrial School after his parents petitioned the circuit to find him delinquent for staying away from home and getting into fights at school. The court ordered an investigation of his environment and discussion of the disposition alternatives. Later, the court ordered that he be sent to the School for a diagnostic period of less than thirty days. He had never been adjudicated or charged with an offense which would bee a crime if committed by an adult. The child requested that he be released from the school and returned to the circuit court for the purpose of determining a suitable rehabilitation environment. After finding that the child was entitled to rehabilitation, both constitutionally and statutorily, and that he was entitled to treatment in the least restrictive dispositional alternative, the Supreme Court found that the child as a status offender could surely have been managed in some other dispositional setting and that his incarceration at the School was illegal.

State ex rel. R.S. v. Trent, 289 S.E.2d 166 (1982) (McGraw, J.)

Syl. pt. 6 - A child adjudged delinquent and committed to the custody of the State has both a constitutional and a statutory right to treatment.

The purpose of our juvenile justice system is to provide for the rehabilitation of delinquent children.

The child welfare law clearly contemplates that the rehabilitation of delinquent children shall be accomplished by a program of individualized care and treatment directed towards the ultimate goal of reintegrating such children into society so that they no longer pose a threat to themselves or to the public.

Confinement (continued)

Right to treatment (continued)

State ex rel. R.S. v. Trent, (continued)

Since the State has defined its interest in taking custody of delinquent children as rehabilitation, due process requires that the nature of the child's custody bear a relation to that rehabilitative purpose.

Syl. pt. 7 - All officers and employees of the State charged with implementing the provisions of the juvenile law are required to act in the best interests of the child and the public in establishing an individualized program of treatment for each child adjudged delinquent.

The statutory provisions clearly anticipate a cooperative effort on the part of the named officers and agencies to develop a comprehensive program of individualized treatment for juvenile offenders.

Although the obligations of the officers and agencies is most discussed with respect to the disposition, this responsibility does not end with the juvenile's determination of the proper disposition. Treatment and rehabilitation represent a continuum measured by the period of time the juvenile offender remains in the state's custody. The officers and agencies gave a responsibility to monitor and evaluate the progress of the child. If the child does not progress in his current placement, the caretaker must report to the court and the court should reevaluate the alternatives and change the child's placement.

In the circumstances of this case, the child requested in his proceeding for a writ of habeas corpus and mandamus for appropriate placement that he be placed in an appropriate facility. The Supreme Court found that the circuit court did not work out with the Department of Welfare and other agencies a comprehensive individualized program of treatment for the child, so the writ of mandamus was issued and the court, in cooperation with the Department of Welfare and other agencies, was ordered to place the petitioner in an appropriate juvenile rehabilitation and treatment facility.

Confinement (continued)

Right to treatment (continued)

State ex rel. R.S. v. Trent, (continued)

The Supreme Court added that the juvenile courts and the Department of Welfare are not limited by statute to relying only upon their own resources to develop individualized treatment programs. The Department may enter into cooperative agreements with private or other state agencies to establish or implement alternatives to rehabilitation.

Secure, prison-like facility

State ex rel. B.S. v. Hill, 294 S.E.2d 126 (1982) (Harshbarger, J.)

Syl. pts. 4 and 5, *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977) provide that status offenders may not be housed in secure prison like facilities.

In *W.Va. Code* § 49-5B-3 (7) and (8), "secure facility" is defined as a facility designed and operated to ensure that all entrances and exits are under exclusive control of the staff regardless of whether or not the prisoner has freedom within the perimeter of the facility or a facility which relies on locked rooms and buildings, fences, or physical restraints to control behavior.

A nonsecure facility, on the other hand, is not characterized by use of physically restricting construction procedures. The nonsecure facility provides residents with access to the surrounding community with minimal supervision.

A facility that has no locks on residents' bedroom doors that neither locks residents in, nor has fences or physical barriers surrounding it and whose night staff does not maintain exclusive control of exits and entrances is not a "secure facility" within the definition of *W.Va. Code* § 49-5B-3 (7) and (8).

Confinement (continued)

Secure, prison-like facility (continued)

State ex rel. B.S. v. Hill, (continued)

The Russell L. Daugherty Status Offense Facility is a nonsecure facility within the definition of *W.Va. Code*, 49-5B-3(8) and housing status offenders therein does not violate our Constitution, statutes and case law. *W.Va. Const.* art. III, §§ 5 and 10; *W.Va. Code*, 49-5-13(b) (6); 49-5-16(a); *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977). Syl. pt. 1.

State ex rel. C.A.H. v. Strickler, 251 S.E.2d 222 (1980) (McGraw, J.)

The West Virginia Industrial Home for Girls at Salem is a secure, prison-like facility, because it contained all but one (corporal punishment) of the definitive factors set forth in *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977): a facility which relies for control of children upon locked rooms, locked buildings, guards, physical restraint, regimentation and corporal punishment.

In this prohibition proceeding, the Supreme Court found that the State's contention that the school at Salem was not a secure, prison-like facility was without merit.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

See JUVENILE Confinement, Least restrictive alternative, (p. 558) for discussion of topic.

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

Syl. pt. 5 - Regardless of any euphemistic title which the State may select such as "home for girls," "industrial school." "Forestry camp," "children's shelter," "orphanage," or other imaginative name, any institution for children which relies upon locked rooms, locked buildings, fences, guards, physical restraint, strict regimentation, or corporal punishment, is a "secure, prison-like facility."

Confinement (continued)

Status offender

State ex rel. C.A.H. v. Strickler, 251 S.E.2d 222 (1980) (McGraw, J.)

The Court applied points 4 and 6 of *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977) and held the circuit court exceeded its lawful jurisdiction by committing the relator, a juvenile status offender, to the West Virginia Industrial Home for Girls at Salem, a secure, prison-like facility housing exclusively juveniles adjudicated delinquent for committing criminal offenses.

The Supreme Court is firmly committed to the constitutional principle now embodied in statutory form, (*W.Va. Code* § 49-5-16(a) that status offenders are never to be confined with nonstatus offenders.

The absence of a secure detention facility or rehabilitation facility in West Virginia devoted exclusively to the rehabilitation of status offenders does not justify violation of constitutional rights.

State ex rel. H.K. v. Taylor, 289 S.E.2d 673 (1982) (McGraw, J.)

Syllabus points 1, 2, and 3 are taken from syllabus points 4, 6 and 7 respectively of points 4 and 6 of *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W.Va. 1977).

In applying these syllabus points to the present case the Supreme Court determined that a status offender cannot be sent to a secure prison-like facility for medical evaluation and diagnostic classification. It makes no difference that the incarceration under *W.Va. Code* § 49-5-13(a) was for a period "not to exceed thirty (30) days" or that it was allegedly "diagnostic" detention as opposed to "punitive" detention. A status offender can be sent to a residential treatment facility, a hospital, or other institution for diagnoses.

Confinement (continued)

Status offender (continued)

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

Syl. pt. 4 - Under no circumstances can a child adjudged delinquent because of a status offense, *i.e.*, an act which if committed by an adult would not be a crime, be incarcerated in a secure, prison-like facility with children adjudged delinquent because of criminal activity.

Syl. pt. 6 - No child adjudged delinquent for a status offense may be incarcerated in a secure, prison-like facility devoted exclusively to status offenders unless the record supports a specific finding by the juvenile court that the child is so ungovernable or anti-social that no other reasonable alternative exists, or with due café and diligence on the part of the State could exist, to physical restraint such as only a secure, prison-like facility can provide. The proper test in this regard is not what reasonable alternatives are actually afforded by the State but rather what reasonable alternatives could be afforded by a humane and enlightened state, solicitous of the welfare of its children.

Syl. pt. 7 - While no child adjudged delinquent for a status offense may be incarcerated in a secure, prison-like facility with children adjudged delinquent because of criminal activity, such status offenders may be housed and educated with criminal offenders in half-way houses and other modern, well-staffed facilities when it can be reasonably demonstrated that the welfare of bout status and criminal offenders will be enhanced and that there is no serious threat to the physical or emotional well-being of the status offenders.

Status offenders must be treated in a fashion consistent with *parens patriae* power, namely, they must be helpful and not punished. *State ex rel. Slatton v. Boles*, 147 W.Va. 674, 130 S.E.2d 192 (1963).

The standard which the juvenile court must apply is not a standard of what facilities are actually available in the State of West Virginia for treatment of juvenile status offenders, but rather a standard which looks to what facilities should reasonably be made available in an enlightened and humane state solicitous of the welfare of its children but also mindful of other demands upon the State budget for humanitarian purposes.

Confinement (continued)

Superintendent's recommendation for different placement

State ex rel. R.S. v. Trent, 289 S.E.2d 166 (1982) (McGraw, J.)

Syl. pt. 4 - Where the director of a correctional institution to which a delinquent child has been committed determines that continued incarceration will not accomplish the rehabilitation of the child and recommends that the child be returned to the custody of the committing court for placement in another facility better suited to meet the needs of the child, the court to which such recommendation is directed is required by *W.Va. Code* § 49-5-13(b) (5) to defer to the discretion of the director and to take steps to implement an appropriate alternative disposition.

The Legislature gave the director of a correctional facility the discretion to recommend the return of an incarcerated child to the committing court, in recognition of the fact that the director is the person best able to judge the programs of the child in the institution's rehabilitative program.

The paramount consideration is the negative effect continued incarceration is likely to have either upon the child or upon the institution's effective treatment of others.

Syl. pt. 5 - The circuit court must act affirmatively and in good faith to secure proper custody of a juvenile whom the director of a correctional institution has determined to be unamenable to treatment by further incarceration.

As the record shows no good faith effort was made by the circuit court in this case. Therefore, the court has not yet complied with the Superintendent's request that the petitioner be returned to the custody of the court and so the Superintendent retained custody of the petitioner. Writ of habeas corpus awarded on this ground.

Confinement (continued)

Superintendent's recommendation for different placement (continued)

State ex rel. Washington v. Taylor, 273 S.E.2d 84 (1980) (Neely, C.J.)

The question presented in this case is whether under *W.Va. Code* § 49-5-13(b) (5) [1980] a court may insist upon a minimum term of incarceration for a child committed to an industrial school as part of a plea bargain agreement and decline to accept the child after the superintendent of the facility has certified the further incarceration is not in the child's best interest. The State contended that by virtue of the plea bargain, which included a provision that the petitioner would serve one year at the industrial school in return for being treated as a juvenile delinquent rather than an adult offender, the petitioner waived his right to the benefit of *W.Va. Code* § 49-5-13(b) (5).

Syl. pt. - Where *W.Va. Code* § 49-5-13(b) (5) (1980) provides that the commitment of a child to an industrial school shall be for a period "not to exceed the maximum term for which an adult could have been sentenced for the same offense, which discretion as to discharge to rest with the director of the institution, who may release the child and return him to the court for further disposition," the intention of the Legislature was to vest discretion with regard to the child's discharge in the director of the institution, and a circuit court does not have authority to decline to receive a child after the director of the institution has concluded, that the child should be released.

Since juvenile institutions are structured in such a way that release is the primary reward for the inmates' behavior modification, it is quite likely that a rule which would permit courts to sentence children for a definite term would confound the rehabilitation and behavior modification program of the institution.

When the superintendent concludes that the child has reached his maximum degree of improvement under the school's therapeutic program it is obviously in the best interests of the child and society that the child be returned to the circuit court for placement in the community under appropriate terms and conditions.

The Supreme Court granted a writ of habeas corpus and ordered the superintendent to return the child to the jurisdiction of the circuit court.

JUVENILE

Critical stage

See JUVENILE Transfer, Critical stage, (p. 598) for discussion of topic.

State v. D.M.M. 286 S.E.2d 909 (1982) (Harshbarger, J.)

Syl. pt. 1 - A juvenile has a right to be present at all critical stages of Chapter 49, Article 5 proceedings.

The law requires a defendant's presence at all critical stages of trial unless he is voluntarily absent.

The requirement of presence at all critical stages applies to misdemeanors as well as felonies in West Virginia.

A juvenile has "the same liberty" interest as an adult in criminal proceedings. Code § 49-5-1(d).

A voluntary absence is deemed a waiver of the right to be present, whereas an involuntary absence cannot be a waiver.

Syl. pt. 2 - The right to be present at all critical stages belongs to a defendant, not his counsel. An effective waiver of a presence right can only be made by defense counsel when accompanied by testimony that a defendant has authorized counsel to continue in his absence.

Jury instructions and verdict rendition are critical stages.

A critical stage of a criminal proceeding is where the defendant's right to a fair trial will be affected.

Critical stages include commencement of the actual trial thorough final judgment.

Critical stage (continued)

State v. D.M.M. (continued)

In the circumstances of this case, of the second day of the jury deliberations, the defendant (a juvenile) was absent because he was in emergency surgery. Defense counsel equivocally waived defendant's presence and the child's guardian consented to the jury's continuing deliberations. The judge answered a question by the jury which then returned to its deliberations and found defendant guilty. The Supreme Court found that the attorney and the guardian were not shown by the evidence to be acting on defendant's instruction and the court did not discover whether the defendant had been consulted.

The Supreme Court also held that reversible error occurred when the judge communicated with the jury (and when it rendered a verdict on defendant's involuntary absence.) The issue of the communication with the jury was not developed.

Delinquency petition

Function

State ex rel. Kerns v. Fox, 268 S.E.2d 65 (1980) (Neely, J.)

See JUVENILE Right to counsel, (p. 585) for discussion of topic.

Sufficiency

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

Any delinquency petition must allege sufficiently specific underlying facts to give the defendant and his parents, guardians, or other custodians fair notice of the charges against the defendant.

JUVENILE

Dispositional hearing

Role of child

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

There is an affirmative obligation on the part of the child to cooperate.

The Supreme Court will not permit incarceration where the true fault lies with the State, in that the treatment and rehabilitative programs prescribed for the child are unreasonable.

Role of counsel

State ex rel. C.A.H. v. Strickler, 251 S.E.2d 222 (1980) (McGraw, J.)

See JUVENILE Confinement, Least restrictive alternative, (p. 557) for discussion of topic.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

It is the obligation of any court appointed or retained counsel to continue active and vigorous representation of the child through the dispositional stage.

Counsel should present to the court any facts which could lead the court to conclude that the child's environment is a major contributing factor to his misbehavior; he should investigate the child's school work, family, involvement of the parents, living conditions, and health problems.

Counsel must also inform himself in detail about the facilities both inside and outside the State which are able to help children.

It is the affirmative obligation of counsel to advise the court of the exact terms, conditions, and costs of such alternatives, whether the Department of Welfare or any other source can pay for such alternatives, and under what conditions any alternative facilities would be willing to accept the child.

Dispositional hearing (continued)

Role of counsel (continued)

State ex rel. D.D.H. v. Dostert, (continued)

There must be an adversarial proceeding at the dispositional stage.

Syl. pt. 3, in part - Once a court tentatively concludes that there is no alternative but incarceration, there is an obligation on the part of the child's retained or appointed counsel to explore all alternative placements short of incarceration in an industrial school and to present to the court a comprehensive program of rehabilitative treatment not involving incarceration. In this regard it is not sufficient for counsel to suggest upon the record as an abstract proposition that there are alternatives, but rather counsel must explore whether such alternative facilities will actually accept the child, and if so upon what terms and conditions.

Syl. pt. 7 - Where a court interferes with energetic advocacy by a child's counsel at the dispositional stage of a juvenile proceeding and abuse his discretion in removing counsel, this Court will award a writ of prohibition.

Under the circumstances of this case, the child's counsel was given merely 30 minutes to prepare for the first detention hearing after which the child was put in jail; the child was released upon counsel's efforts but was jailed again with counsel receiving no notice of her second detention hearing; counsel again obtained the child's release but she was again arrested and this time placed by the court in the jail of another nearby county without notice or presence of counsel and with no record except the summary order; after the child was adjudicated delinquent, counsel presented an alternative disposition but the court, refusing all less restrictive alternatives, placed the child in the Industrial Home for Girls; when after the child was sent to the Home, counsel worked to obtain her probation, the court withdrew his appointment as her counsel and found him in contempt. The Supreme Court found the trial court to have undermined counsel's efforts and found them unjustifiable. A writ of prohibition in connection with the contempt charge was granted.

Dispositional hearing (continued)

Role of court

State ex rel. B.S. v. Hill, 294 S.E.2d 126 (1982) (Harshbarger, J.)

Applies standard set forth in syllabus point 2, *State ex rel. R.S. v. Trent*, *supra*, cited below.

Where the trial court's record of juvenile's dispositional hearing and the court's order to incarcerate the juvenile explored no alternatives and gave no reasons for their rejection; gave no case histories, reports, records, psychiatric, psychological, educational social evaluations; and devised no individualized treatment plan, the requirements of *State ex rel. R.S. v. Trent*, *supra*, were not met; therefore, the juvenile was entitled to another dispositional hearing with records showing findings of fact, conclusions of law, and individualized treatment plan, and efforts to arrive at the least restrictive alternative.

Where no records of a juvenile disposition hearing are available, the Supreme Court cannot evaluate whether incarceration is the least restrictive alternative.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

See JUVENILE Confinement, Least restrictive alternative, (p. 558) for discussion of topic.

Syl. pt. 4 - In a juvenile proceeding it is the obligation of a trial court to make a record at the dispositional stage when commitment to an industrial school is contemplated under *W.Va. Code*, 49-5-14(b) (5) (1978) and where incarceration is selected as the disposition, the trial court must set forth his reasons for that conclusion. In this regard the court should specifically address the following: (1) the danger which the child poses to society; (2) all other less restrictive alternatives which have been tried either by the court or by other agencies to whom the child was previously directed to avoid formal juvenile proceedings; (3) the child's background with particular regard to whether there are pre-determining factors such as acute

State ex rel. D.D.H. v. Dostert, (continued)

poverty, parental abuse, learning disabilities, physical impairments, or any other discrete, causative factors which can be corrected by the State or other social service agencies in an environment less restrictive than an industrial school; (4) whether the child is amenable to rehabilitation outside an industrial school, and if not, why not; (5) whether the dual goals of deterence and juvenile responsibility can be achieved in some setting less restrictive than an industrial school and if not, why not; (6) whether the child is suffering from no recognizable, treatable determining force and therefore is entitled to punishment; (7) whether the child appears willing to cooperate with the suggested program of rehabilitation; and (8) whether the child is so uncooperative or so ungovernable that no program of rehabilitation will be successful without the coercion inherent in a secure facility.

The court must accommodate an adversarial proceeding at the disposition stage.

It is the obligation of the court to hear all witnesses who might shed light upon the proper disposition of a child and before incarcerating a child, to find facts *upon the record* which would lead a reasonable appellant court to conclude that "no less restrictive alternative would accomplish the requisite rehabilitation of the child . . . " or "the welfare of the public" requires incarceration.

The court has a duty to ensure that the child's social history is reviewed intelligently so that an individualized treatment plan may be designed when appropriate.

State ex rel. H.K. v. Taylor, 289 S.E.2d 673 (1982) (McGraw, J.)

The Supreme Court set out syllabus point 2 of *State ex rel. R.S. v. Trent*, 289 S.E.2d 166 (W.Va. 1982), in footnote 5 and syllabus point 5, cited above.

Dispositional hearing (continued)

Role of court (continued)

State ex rel. R.S. v. Trent, 289 S.E.2d 166 (1982) (McGraw, J.)

See JUVENILE Confinement, Mental illness, (p. 561) for discussion of topic.

Syl. pt. 2 - Before ordering the incarceration of a child adjudged delinquent, the juvenile court is required to set forth upon the record the facts which lead to the conclusion that no less restrictive alternative is appropriate. The record must affirmatively show that the child's behavioral problem is not the result of social conditions beyond the child's control, but rather of an intentional failure on the part of the child to conform his actions to the law, or that the child will be dangerous if any other disposition is used, or that the child will not cooperate with any rehabilitative program absent physical restraint.

The circuit court, in this case, did not make a sufficient record in light of the guidelines set forth in *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401 (W.Va. 1980), which would enable the Supreme Court to review the reasons for the circuit court's determination that the petitioner's rehabilitation could be accomplished by no less restrictive alternative than incarceration at the Industrial School. Writ of habeas corpus was granted.

State ex rel. S.J.C. v. Fox, 268 S.E.2d 56 (1980) (McGraw, J.)

See JUVENILE Confinement, Least restrictive alternative, (p. 560) for discussion of topic.

State v. M.E., 294 S.E.2d 171 (1982) (Per Curiam)

Applies standard set forth in syllabus point 2, *State ex rel. R.S. v. Trent*, *supra*.

Applies standard set forth in syllabus point 4, *State ex rel. D.D.H. v. Dostert*, 269 S.E.2d 401 (W.Va. 1980), cited above.

Dispositional hearing (continued)

Role of court (continued)

State v. M.E., (continued)

Where trial court's record of a juvenile dispositional hearing stated only generally that temporary commitment to a foster home would not rehabilitate juvenile, that parents could not supervise him, and that incarceration in West Virginia Industrial School for Boys would be the least restrictive alternative, the Supreme Court held that requirements of *State ex rel. R.S. v. Trent*, *supra*, and *State ex rel. D.D.H. v. Dostert*, *supra*, were not met, thus further dispositional proceedings were required.

Role of probation officer or welfare worker

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

The probation officer or welfare worker when requested by the judge is responsible for discovering whether there are forces which are at work upon the child which either the Department of Welfare or other social service agencies can correct.

Syl. pt. 3 (in part) - Under *W.Va. Code*, 49-5-13(a) (1978) there is an initial obligation on the part of the juvenile probation officer or the State Department of Welfare comprehensively to explore all alternative placements short of incarceration in an industrial school.

Before incarcerating a first offender like the petitioner, a 13 year old female juvenile, it would have been incumbent upon the Department of Welfare to find a suitable environment for her.

The appropriate time for the Department of Welfare or the juvenile probation officer to intervene is at the first sign of trouble.

JUVENILE

Evidence

In general

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Syl. pt. 1 - Where a child is adjudicated delinquent for having committed an act which would be a crime if committed by an adult upon evidence which would not be admissible in a criminal trial, the delinquency adjudication must be reversed.

Fruit of the poisonous tree

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

See EVIDENCE Fruits of the poisonous tree, (p. 280) for discussion of topic.

Expert witness

Rehabilitation

See EVIDENCE Expert witness, (p. 277) for discussion of topic.

Transfer hearing

In the Interest of John Moss, Jr., 295 S.E.2d 33 (1982) (McGraw, J.)

Syl. pt. 7 - The opinion of a properly qualified expert is not admissible at a transfer hearing unless a proper foundation is laid, either through the testimony of other witnesses or the exhibition of personal knowledge of the child's background.

Expert witness (continued)

Transfer hearing (continued)

In the Interest of John Moss, Jr., (continued)

Where probation officer had "not spent much time looking at appellant's file", had no personal contact with appellant, and had not gathered information from appellant's family, teachers, and friends, he was not qualified to give an expert opinion concerning appellant's rehabilitative prospects.

The transfer court is not precluded from hearing evidence concerning juvenile's rehabilitative prospects and giving it weight in the decision to transfer.

Guilty pleas

See JUVENILE Admission/denial of allegations, (p. 553) for discussion of topic.

Parole

Revocation

State ex rel. J.R. v. MacQueen, 259 S.E.2d 420 (1979) (Caplan, C.J.)

Syl. pt. 1 - The nature of the interest of the juvenile parolee is no less valuable than that of an adult parolee. A juvenile being subjected to parole revocation must be afforded all of the constitutional protections afforded an adult in a parole revocation proceeding.

Parole (continued)

Revocation (continued)

State ex rel. J.R. v. MacQueen, (continued)

In this case, the petitioner received written notice of the claimed parole violations and a disclosure of the evidence against him. There is no indication that he will not be afforded an opportunity to be heard and present evidence; that he will not be afforded the right to confront his accusers before a neutral and detached hearing body; and, that he will not be informed of the reasons for revocation should his parole be revoked. Clearly, the petitioner will be afforded the due process protections contemplated by the state and federal constitutions.

Syl. pt. 2 - A court which, as a further disposition under *W.Va. Code*, 1931, 49-5-13(b) (6), as amended, places a juvenile on parole may, as a modification of the dispositional order, revoke such parole under *W.Va. Code*, 1931, 49-5-14, as amended, and such revocation maybe accomplished upon a finding of clear and convincing proof of such substantial violation.

This standard of proof in juvenile parole proceedings is not constitutionally deficient.

Syl. pt. 3 - Where a juvenile is accused of violating a state law, thereby allegedly violating the court's order placing him on parole, a conviction on a formal charge is not a prerequisite to parole revocation.

The parole revocation hearing, in this case, involved a robbery charged which the State had never formally brought against the defendant. Writ of prohibition was denied.

Physical restraint

State ex rel. B.S. v. Hill, 294 S.E.2d 126 (1982) (Harshbarger, J.)

Syl. pt. 2 - A noninjurious, passive physical restraint carefully applied by two trained child care workers to an out-of-control juvenile status offender is acceptable for those times when reason and other techniques are unsuccessful.

JUVENILE

Plea bargaining

State ex rel. Washington v. Taylor, 273 S.E.2d 84 (1980) (Neely, C.J.)

See JUVENILE Confinement, Superintendent's recommendation for different placement, (p. 570) for discussion of topic.

Probation

Armstead v. Dale, 294 S.E.2d 122 (1982) (Harshbarger, J.)

See PROBATION Conditions, (p. 697) for discussion of topic.

Prohibition

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Syl. pt. 7 - Where a court interferes with energetic advocacy by child's counsel at the dispositional stage of a juvenile proceeding and abuses his discretion in removing counsel, this court will award a writ of prohibition.

State ex rel. S.J.C. v. Fox, 268 S.E.2d 56 (1980) (McGraw, J.)

Prohibition lies to restrain enforcement of orders of a juvenile court which exceeds the court's legitimate authority.

Prohibition is a proper remedy when a circuit court does not give precedence to the least restrictive alternative for disposition as in this case.

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

See JUVENILE Transfer, Prohibition, (p. 616) for discussion of topic.

JUVENILE

Public policy

Thomas v. Leverette, 273 S.E.2d 364 (1980) (McGraw, J.)

The enactment of the juvenile proceedings law reflected the intention of the legislature to separate and treat differently the wrongful acts of children from those of adults.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Chapter 49 of the *W.Va. Code* covering child welfare is clearly committed to the rehabilitative model.

Although helping the child is the first concern of the juvenile law, it is not the only concern, since at the operational rather than the theoretical level, the rehabilitative approach has dramatic limitations, preeminent among which is that it interferes both with the deterrence of other children and the protection of society.

Rehabilitation does not exhaust the goals of a juvenile disposition; responsibility and deterrence are also important elements of our juvenile philosophy.

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

The aim of the legislature is not to punish children like adults, but to provide a comprehensive system of child welfare. The aim of this system is to protect and rehabilitate children, not to punish them.

Records

Disclosure

Jeffrey v. McHugh, 273 S.E.2d 837 (1981) (Harshbarger, J.)

Syl. pt. 1 - *W.Va. Code*, 49-5-17, does not permit disclosure of juvenile records at any time, nor other disclosure except in the instances specifically enumerated in the statute.

Records (continued)

Disclosure (continued)

Jeffrey v. McHugh, (continued)

Syl. pt. 2 - The death of a juvenile does not vitiate the restrictions on disclosures of the juvenile's court records that are protected by Code, 49-5-17 and 49-7-1.

None of the limited exceptions in Code 49-5-17(d) allow disclosure to a prosecutor unless a court has the child before it in a proceeding; the statute was designed to prohibit public disclosure anytime, even when the records are allowed to be opened in one of the exceptional circumstances listed.

In this case the prosecutor had no standing to be before the circuit court with the request to open the records. The child's case ended when he died. There were no pending actions to which the prosecutor was a party that involved the child which might allow the prosecutor's invoking the statutory exceptions to confidentiality.

Fingerprints

State v. Van Isler, 283 S.E.2d 836 (1981) (McHugh, J.)

See EVIDENCE Juvenile fingerprints, (p. 294) for discussion of topic.

Right of parents, guardians, or custodians

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

All parties, particularly parents, guardians, or other custodians must be fully and meaningfully informed of their rights and must be accorded a reasonable time to prepare a defense.

Any delinquency petition must allege sufficiently specific underlying facts to give defendant and his parents, guardians, or other custodians fair notice of charges against the defendant.

JUVENILE

Right to counsel

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

A juvenile defendant in a delinquency proceeding is entitled to counsel who will represent and defend him both at trial and on appeal, and that his parents, guardians or other custodians are entitled to be informed that their child has a right to counsel.

An indigent defendant has a right to court-appointed counsel, Code 49-5-10 (1975) and all parties, particularly parents, guardians, or other custodians must be fully and meaningfully informed of their rights and must be accorded a reasonable time to confer with counsel and prepare a defense.

State ex rel. Kerns v. Fox, 268 S.E.2d 65 (1980) (Neely, C.J.)

Syl. pt. 1 - The filing of a petition under *W.Va. Code*, 49-5-7 (1978) begins the formal proceedings contemplated by Chapter 49 of the Code. Once formal proceedings have been instituted the juvenile against whom the petition has been filed has an absolute right to counsel, the court has a duty to appoint counsel for him.

Prior to the time at which the petition is filed the circuit judge may decide to proceed informally and in such a case need not appoint counsel.

The issue of the child's entitlement to counsel was moot in this case as counsel had been appointed.

Waiver of right

State ex rel. J.M. v. Taylor, 276 S.E.2d 199 (1981) (Harshbarger, C.J.)

Syl. pt. 1 - A juvenile defendant cannot waive his right to counsel during proceedings against him, unless he does so upon advice of counsel.

Only then can there be a knowing waiver. In this case, a parents' waiver of the juvenile's right to counsel was held not to be a knowing waiver.

Right to counsel (continued)

Waiver of right (continued)

State ex rel. J.M. v. Taylor, (continued)

There is an irrebuttable presumption that juveniles lack the capacity to make a legally binding decisions.

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

See INSTRUCTIONS Confessions, Waiver of rights, (p. 555) for discussion of topic.

Statutes

Constitutionality

See STATUTES Constitutionality in general, (p. 904) for discussion of topic.

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

Syl. pt. 2 - *W.Va. Code*, 49-1-4 [1941] and *W.Va. Code*, 49-5-11 [1975], providing the definition of "delinquent child" and the methods of disposition for children adjudged delinquent, respectively, are constitutional; however, they must be applied in such a way as to protect status offenders from unconstitutional incarceration.

Syl. pt. 3 - The indiscriminate incarceration of juvenile status offenders along with juvenile criminal offenders violates *W.Va. Const.*, art. III, § 5, and *W.Va. Const.*, art. III, § 10, because such indiscriminate incarceration denies status offenders' right to equal protection of the laws, their right to substantive due process, and their right to protection against cruel and unusual punishment.

Statutes (continued)

Constitutionality (continued)

State ex rel. Harris v. Calendine, (continued)

The disposition procedure in § 49-5-11 can be applied in a manner repugnant to the basic principles of equal protection regarding status offenders, because it discriminates invidiously against children based upon social class, sex, and geographic location.

The incarceration of status offenders in secure, prison-like facilities, except in a limited class of cases, bears no reasonable relationship to legitimate state purposes, namely, rehabilitation, protection of the children, and protection of society.

The nature of their offenses tends to indicate that status offenders incarcerated in secure, prison-like facilities, along with children guilty of criminal conduct, are suffering a constitutionally disproportionate penalty.

The status offender legislation discriminates invidiously against females, being easily used to control young women suspected by their parents or others of promiscuous behavior.

Under the facts of this case, a 16 year old youth was sent to the Industrial School for Boys at Pruntytown and to a forestry camp for his absence from school for 50 days. The Supreme Court found that his confinement under *W.Va. Code* § 49-1-4 (1941) and § 49-5-11 (1975) violated concepts of equal protection, substantive due process, freedom from cruel and unusual punishment (and proportionality), as the forestry camp was deemed a secure, prison-like facility; the boys was ordered to be discharged from the camp.

Retroactivity

State v. Bannister, 250 S.E.2d 53 (1978) (McGraw, J.)

See JUVENILE Transfer, Retroactivity of statutes, (p. 617) for discussion of topic.

Statutes (continued)

Retroactivity (continued)

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

Syl. pt. 2 - *W.Va. Code*, 49-5-1(d) [1978] and *W.Va. Code*, 49-5-9 [1978] are not retroactive in effect because retroactive application would nullify juveniles' statements constitutionally and statutorily sound when made and place an insurmountable burden on the State contrary to the intent of the Legislature.

Syl. pt. 3 - *W.Va. Code*, 49-5-1(a) [1978] and *W.Va. Code* 49-5-10 [1078] relating to procedures governing whether a minor should be tired as a juvenile or an adult are retroactive application promotes the just administration of the laws as they apply to juvenile defendant's and does not place an insurmountable burden on the State.

Footnote 2 - Application of prior law on disposition in trials of juveniles held before the enactment of *W.Va. Code* § 49-5-1(a) (1978) and § 49-5-10 (1978) will not serve as grounds for either appeal or habeas corpus. If a new trial is awarded on other grounds then these code provisions become applicable.

In the trial for first-degree murder of two fifteen year old youths, it was not error for the trial judge to refuse transfer upon the defendants' motion because they had neither a constitutional nor statutory right to transfer. As the 1978 act is retroactive in its transfer provisions, the transfer provisions would be applicable to defendant's on retrial, when the retrial is awarded on other grounds.

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

Syl. pt. 2 - The 1978 amendments to *W.Va. Code* § 49-5-1 *et seq.* respecting juvenile proceedings were not intended to apply retroactively to control proceedings which arose from the alleged commission of a criminal act at a time when the 1977 Act was in effect.

JUVENILE

Transfer

In general

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

Syl. pt. 2 - The legislature, in enacting the juvenile proceedings statutes, *W.Va. Code*, 49-5-1 *et seq.*, manifested an intention that juveniles should, in the ordinary case, be subject to juvenile court jurisdiction. Transfer, therefore, should be the exception and not the rule.

Footnote - The jurisdiction to transfer appears to now be limited in all cases whether capital or not to children 16 or over.

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

If a criminal actor is less than eighteen years old at the time of an alleged offense, the case is immediately certified to the circuit court's juvenile jurisdiction.

The Supreme Court has held, both prior and subsequent to the 1978 amendment to *W.Va. Code* § 49-5-10, that transfer from juvenile to criminal jurisdiction should be the exception and not the rule.

State v. D.W.C., 256 S.E.2d 894 (1979) (Miller, J.)

The 1977 transfer standards for juveniles have been made more explicit and less stringent by the 1978 amendments.

Under the 1977 standards, transfer should be the exception and not the rule.

Under the 1978 amendments, transfer is not mandatory unless the juvenile demands transfer under *W.Va. Code* § 49-5-10(c) (1978).

Transfer (continued)

Aider and abettor

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

Syl. pt. 1 - An aider and abettor is as criminally responsible for a crime as the principal actor.

Syl. pt. 2 - A child who aided and abetted the commission of a robbery involving the use or presenting of firearms may be subject to transfer to criminal court under *W.Va. Code*, 49-5-10(d)(1).

Footnote 7 - "Even if we were to find that he [the juvenile] was not covered by Code 49-5-10 (d)(1), he would be subject to transfer under Code, 49-5-10(d)(4), because armed robbery is an offense of violence to the person which would be a felony if committed by an adult."

Appellate review - In general

State v. D.W.C., 256 S.E.2d 894 (1979) (Miller, J.)

Where an appeal is taken from a transfer decision in advance of the final adjudication of guilt, the Supreme Court will consider only the propriety of the transfer order.

State v. G.B.G., 275 S.E.2d 922 (1981) (Per Curiam)

A decision on the transfer of a juvenile to the adult court is subject to the review of the Supreme Court.

"The waiver of juvenile jurisdiction by a juvenile court is subject to review by an appellant court . . . ." Syl. pt. 2, *State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973), in part.

Transfer (continued)

Appellant review - Burden of proof

State ex rel. E.D. v. Aldredge, 245 S.E.2d 849 (1978) (McGraw, J.)

Syl. pt. 2 - A juvenile court, in its order transferring a case to criminal proceedings, must set forth findings of fact and conclusions of law justifying the transfer ruling by virtue of *W.Va. Code* § 49-5-10 (1977).

Syl. pt. 3 - Where a juvenile court makes no express finding that "there are no reasonable prospects for rehabilitating the child through resources available to the court under this article", as required by *W.Va. Code* § 49-5-10 (1977), such transfer order is void, and the circuit court is without jurisdiction to proceed in such case.

On the record, in this case, it appeared no significant effort has yet been made to rehabilitate the juvenile. Where no such effort has been made, the State's burden to demonstrate by clear and convincing evidence that there is not reasonable prospect of rehabilitation must necessarily become exceedingly difficult. The transfer order is void.

State v. Bannister, 250 S.E.2d 53 (1978) (McGraw, J.)

Findings of a trial court will not be reversed or set aside on appeal unless its findings are clearly wrong.

Syl. pt. 1 - Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed. *W.Va. Code* § 49-5-10(a) [1977].

The finding of the trial court is clearly contrary to the weight of the evidence adduced in the transfer hearing. The petitioner had been treated successfully through resources available to the court.

State v. Bannister, (continued)

Because transfer should be the exception and not the rule, optimism toward petitioner's rehabilitative prospects require that he be given further rehabilitation within the juvenile system rather than punishment within the adult system.

State v. D.W.C., 256 S.E.2d 894 (1979) (Miller, J.)

"Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reverse." Syl. pt. 1, *State v. Bannister*, 250 S.E.2d 53 (W.Va. 1978).

In this case, the critical evidence was that of the psychiatrist and psychologist, both of whom testified that the juvenile was amenable to rehabilitation in the juvenile system; and certainly a primary factor is that the juvenile has no prior juvenile record. Further, the juvenile's mental and physical conditions are not abnormal and his emotional attitude and family environment do not demonstrate any pattern of hostility on his part which are factors *W.Va. Code* § 49-5-10 (1977) identifies as bearing on the rehabilitative decision. The record does not demonstrate aby clear and convincing evidence the child is without prospects of rehabilitation as required by the 1977 Juvenile Act.

Transfer (continued)

Appellant review - Burden of proof (continued)

State v. M.M., 256 S.E.2d 549 (1979) (McGraw, J.)

The circuit court's order transferring case from juvenile to criminal proceeding was based on conclusion of law, not findings of fact. A finding of fact is a statement of a fact in evidence or a fact properly inferable therefrom. Conclusions of law arise from findings of fact based on evidence in the record; evidence that should relate directly to the factors required by statute to be considered; evidence that should constituted clear and convincing proof in support of the conclusions of law set forth. Reversed and remanded.

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

The Supreme Court's review of transfer orders will focus on the findings of fact and conclusions of law upon which the court based its decision to make the transfer to criminal jurisdiction.

Ordinarily, findings of fact made by a trial court will not be set aside unless they are clearly wrong.

The Supreme Court upon review of the record and the court's order, wherein its findings of fact and conclusion of law appear, cannot say the trial court is clearly wrong and, consequently affirmed.

Appellant review - Scope

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

Syl. pt. 1 - The jurisdiction conferred upon the Supreme Court of Appeals in *W.Va. Code* § 49-5-10(c) (1977) is limited. Issues not related to the transfer of a juvenile to the circuit court's criminal jurisdiction, though emerging as possible issues in a later appeal, are not properly considered in these statutory appeals.

Transfer (continued)

Appellant review - Scope (continued)

State v. Trail, (continued)

The question of whether there was undue delay and a consequent violation of right to a speedy trial is beyond the scope of the limited appellant review provided in *W.Va. Code* 49-5-10 (f).

Defendant alleged that his constitutional right to a speedy trial had been denied due to the long delay in prosecuting him for the offense which occurred nearly five years earlier.

In an appeal to a juvenile transfer hearing brought pursuant to *W.Va. Code* § 49-5-10(c), the Supreme Court cannot consider the admissibility of a confession that neither has been used against the defendant nor has been ruled admissible by the trial court.

The propriety of discovery prior to the hearing is a proper subject for appellant review under *W.Va. Code* § 49-5-10(f), but discovery orders entered after the transfer hearing are not properly before this court in an appeal of a transfer hearing.

In this case, there was nothing in the record but total, unabridged compliance prior to the transfer hearing.

Burden of proof

In re E.H., 276 S.E.2d 557 (1981) (Miller, J.)

Syl. pt. 3 - Under *W.Va. Code*, 49-5-10 (1978), at a transfer hearing as a standard of proof the State need only establish that there is probable cause to believe that a child has committed one of the offenses therein enumerated.

Transfer (continued)

Burden of proof (continued)

In re E.H., (continued)

The juvenile claimed the State failed to prove by clear and convincing evidence he committed either armed robbery or kidnapping. The Supreme Court found that *W.Va. Code* § 49-5-10 (1978) section (d), the specific provision of probable cause to believe that a crime has been committed prevails in determining if the juvenile committed the offense over section (a), the general statutory standard of "clear and convincing proof" that applies to the remaining considerations involved in the transfer decision. So since there was on the record probable cause to believe the juvenile bringing this appeal committed the offense there is no merit to his claim.

Further, clear and convincing proof has never been the standard for a probable finding, and the Legislature did not intend to change the traditional probable cause standard.

In the Interest of S.M.P., 285 S.E.2d 408 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 3, *In re E.H.*, 276 S.E.2d 557 (W.Va. 1981), cited above.

State ex rel. E.D. v. Aldredge, 245 S.E.2d 849 (1978) (McGraw, J.)

See JUVENILE Transfer, Appellant review - Burden of proof, (p. 591) for discussion of topic.

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

Footnote 2 - The burden of proof is on the petitioner [the State], not the juvenile.

Transfer (continued)

Burden of proof (continued)

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

Syl. pt. 3 - The state has the burden of proving by clear and convincing evidence all the factors in Code, 49-5-10(d) relied upon to obtain transfer of a child from juvenile to adult court. *W.Va. Code*, 49-5-10(a).

A cursory inquiry is insufficient.

At the hearing in this case there were no expert witnesses, no physicians or psychologist testified; no school records were assessed. Reversed and remanded.

State v. M.M., 256 S.E.2d 549 (1979) (McGraw, J.)

See JUVENILE Transfer, Factors considered, (p. 611) for discussion of topic.

Syl. pt. 2 - In proceedings under *W.Va. Code* § 49-5-10 [1977] the State is required to produce "clear and convincing proof" there are no reasonable prospects for rehabilitating the juvenile through resources available to the court. To meed this burden it must be shown that consideration has been given to all alternatives, and if all alternatives have been rejected the reasons for their rejection must be shown.

In this case, the evidence was insufficient because no consideration was given to any alternatives other than continued probation in Wetzel County, or confinement in Pruntytown or the Davis Center. There is no evidence showing all alternatives were considered.

Confession

In the Interest of John Moss, Jr., 295 S.E.2d 33 (1982) (McGraw, J.)

At a transfer hearing, the court must determine the validity of a confession before allowing it to be used against the accused.

In the Interest of John Moss, Jr., (continued)

Lower court should have made a finding of record that appellant's confession to first-degree murder was voluntarily made and thus admissible before allowing this evidence to be used at the juvenile transfer hearing.

An *in camera* hearing to determine voluntariness is required even if the absence of an objection to admission or in the absence of request for such hearing.

Where appellant's confession was the only piece of probative evidence introduced by the State to support a probable cause determination, the admissibility is reviewable on appeal from transfer.

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

In an appeal to a juvenile transfer hearing brought pursuant to *W.Va. Code* § 49-5-10(c), the Supreme Court cannot consider the admissibility of a confession that neither has been used against the defendant nor has been ruled admissible by the trial court.

In an appeal from a transfer hearing, the defendant claimed that the trial court erred in not suppressing a confession he made. The Supreme Court found that the confession was an exhibit filed by the defendant but was not introduced nor ruled admissible. The Supreme Court found that it, under these circumstances, could not rule on the admissibility of the confession.

Transfer (continued)

Continuance

State ex rel. Cook v. Helms, 292 S.E.2d 610 (1981) (Neely, J.)

Syl. pt. 1 - Where it appears that it would be impossible to serve notice of a juvenile transfer hearing in a criminal case in time to give all parties concerned adequate opportunity to prepare for the hearing, good cause is shown for the continuance of that hearing beyond the seven day limit prescribed by *W.Va. Code*, 49-5-10(a) [1978].

At the time of the motion to transfer, the appellant was locked up at a detention facility four hours away from the count holding the hearing; her parents lived in North Carolina; and her attorney outside the hearing county. Given these circumstances and the several days necessary to effect service of process by U.S. Mail, the court granted a continuance of the hearing to provide "reasonable notice" to all necessary parties.

Critical stage

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

Syl. pt. 3 - A motion to transfer a juvenile to the criminal court from the juvenile court is a critical stage in the proceeding against a juvenile. It is invoked by the State where there are special circumstances which may justify relinquishment of juvenile jurisdiction. The hearing on the motion to transfer is not intended to establish guilt.

Discovery

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

The disclosure of a juvenile's report to his counsel is not statutorily mandated.

If the juvenile's records (social and juvenile) are to be considered by the court at the transfer hearing, copies must be supplied in advance to the child's counsel.

State ex rel. Smith v. Scott, (continued)

The trial court may consider reports which have been submitted but in order for the youth's counsel to be able to test their reliability, counsel must have copies of the reports.

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

Syl. pt. 2 - A child is entitled to receive a full discovery as provided by law in order to best prepare for the crucial transfer hearing. The propriety of discovery prior to the hearing is a proper subject for appellant review under *W.Va. Code* § 49-5-10(c) (1977).

Discovery orders entered after the transfer hearing are not properly before the Supreme Court in an appeal of a transfer hearing.

Once a child is properly transferred to The court's criminal jurisdiction to be treated as an adult, traditional pre-trial discovery becomes applicable.

A motion for discovery of material under *W.Va. Code* § 62-1B-3 may be made at any time not later than ten days before trial, or at such reasonable later time as the court may permit.

Whether the failure to disclose is a fatal non-compliance with a pre-trial order depends on its prejudicial effect on the preparation and presentation of the defendant's case.

Absent some particular showing of how late production of court-ordered discovery has affected the petitioner's right to a fair trial, late production alone will not suffice to reach the constitutional level of denial of fair trial.

The defendant neither specifically nor generally requested the type of material he now alleges was denied him. There is nothing in the record but total, unabridged compliance prior to the transfer hearing. In light of this the trial court had not erred.

Transfer (continued)

Double jeopardy

In the Interest of Clark, 285 S.E.2d 369 (1981) (Neely, J.)

The Supreme Court contrasted this situation with the double jeopardy finding in *Breed v. Jones*, *supra* saying that *Breed* does not preclude the juvenile court from fulfilling its duties during a transfer hearing, and the fact that the juvenile court hears facts surrounding the commission of the alleged offense does not mean that the hearing becomes adjudicatory so as to invoke the principle of *Breed*.

In the Interest of S.M.P., 285 S.E.2d 408 (1981) (Per Curiam)

In the circumstances of this case, the Supreme Court found that the State in the transfer hearing did not produce sufficient evidence to establish probable cause to believe that defendant committed an armed robbery or a crime of violence to the person. There is no double jeopardy problem with introducing additional evidence on the issue of probable cause because a transfer proceeding is not for the purpose of adjudicating guilt or innocence. So long as the transfer proceeding is conducted prior to the adjudicatory hearing on the merits, no double jeopardy problem is presented.

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

If a transfer hearing is not held until after the adjudicatory hearing jeopardy has already attached; a subsequent transfer and trial in the criminal curt would violate the double jeopardy clause.

The juvenile court may fulfill its duties during a transfer hearing and the fact that the juvenile court hears facts surrounding the commission of the alleged offense does not mean that the hearing becomes adjudicatory so as to involve the principles of *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

Transfer (continued)

Double jeopardy (continued)

State ex rel. Smith v. Scott, (continued)

On the present record there is no question that the transfer hearing was not adjudicatory; consequently, there can be no claim of double jeopardy. In awarding the writ of prohibition preventing the circuit court from exercising criminal jurisdiction over the juvenile its juvenile jurisdiction over relator and it may either hold a further transfer hearing or it may elect to hold an adjudicatory hearing.

Due process

In re E.H., 276 S.E.2d 557 (1981) (Miller, J.)

See JUVENILE Transfer, Jury trial right, (p. 614) for discussion of topic.

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

Syl. pt. 1 - Before a court can waive its juvenile jurisdiction it must under due process procedures: (1) afford adequate notice to the juvenile of the hearing; (2) appoint counsel in the case of indigency; (3) conduct a meaningful hearing; and (4) issue a statement of the reasons for relinquishing juvenile jurisdiction.

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

Due process requires a juvenile be afforded a meaningful transfer hearing before the court can waive the juvenile jurisdiction.

Footnote 2 - Due process, in such hearings requires that the court afford adequate notice to the juvenile of the hearing, appoint counsel in the case of indigency and issue a statement of the reasons for the court's relinquishment of jurisdiction.

Transfer (continued)

Due process (continued)

State v. R.H., (continued)

Syl. pt. 1 - *W.Va. Code* § 49-5-10 does not violate the due process provisions of our state and federal constitutions.

W.Va. Code § 49-5-10(d) (Cum. Supp. 1978) sets forth the legislatures' absolute minimum requirements for transfer. The standards set forth in *State ex rel. Smith v. Scott*, *supra* enhance that legislative determination by providing the juvenile courts with significant guidelines which ensure a meaningful transfer hearing as required by due process. Thus, the juvenile court must still vindicate the standards set forth in *Smith*, which were established by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

See JUVENILE Transfer, Jury trial right, (p. 614) for discussion of topic.

Error precluding defendant's testimony

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

Syl. pt. 3 - Where a juvenile court errs in determining which of two statutory enactments applies to transfer proceedings results in the refusal of the juvenile to testify in his own behalf because the statute erroneously applied deprives him of a substantial statutory protection granted him under the other statute, the error is prejudicial to the juvenile and will be reversed on appeal.

Transfer (continued)

Error precluding defendant's testimony (continued)

State v. R.H., (continued)

In this case, appellant challenged the transfer of his case from juvenile to criminal jurisdiction, claiming that the circuit court erroneously applied to him the new 1978 amendments, which omitted the portion of the previous statute that provided that no testimony of the child given at the transfer hearing could be admitted into evidence at any subsequent criminal or adjudicatory proceeding. The appellant therefore declined to testify. The Supreme Court found that the application of the 1978 amendments did prejudice appellant; it deprived him of the chance to present his own case and to rebut hostile witnesses and deprived the court of the chance to consider the appellant's words and demeanor in deciding whether to transfer.

Evidentiary rights

In re E.H., 276 S.E.2d 557 (1981) (Miller, J.)

Syl. pt. 4 - The failure to give strict adherence to the rules of evidence or to the scope of cross-examination as required in a criminal trial will not be grounds for reversible error at a transfer hearing.

W.Va. Code, 49-5-1(d) (1978) manifests an intention on the part of the Legislature to provide a general rule regarding a meaningful hearing with a right to present and cross-examine witnesses and its applicable to all hearings under § 49-5-1(1978) *et seq*.

In contrast the latter part of § 49-5-1(d) stating, "Except as herein modified, at all adjudicatory hearings, the rules of evidence applicable in criminal cases shall apply, including the rule against written reports based on hearsay", by only referring to the adjudicatory hearing indicates that these stricter provisions are only applicable to it.

Transfer (continued)

Ex post facto

State v. Bannister, 250 S.E.2d 53 (1978) (McGraw, J.)

See JUVENILE Transfer, Retroactivity of statute, (p. 617) for discussion of topic.

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

See *EX POST FACTO* Procedural changes, (p. 317) for discussion of topic.

Factors considered

In re E.H., 276 S.E.2d 557 (1981) (Miller, J.)

The juvenile appealing from his transfer to criminal jurisdiction claimed that he did not have notice from his transfer motion that his prior criminal record would be used as a ground for transfer. The Supreme Court found that Code § 49-5-10 (1978) requires consideration of prior felonies and that in *State ex rel. Smith v. Scott*, 238 S.E.2d 223 (W.Va. 1978), they had found that the juvenile's prior record was one of the relevant factors that a court could consider, and that therefore there was no error by the trial court on this point.

In the Interest of Clark, 285 S.E.2d 369 (1981) (Neely, J.)

Syl. pt. - *W.Va. Code*, 49-5-10(d) [1978] requires that the circuit court make an independent determination of whether there is probable cause to believe that a juvenile has committed one of the crimes specified for transferring the proceeding to criminal jurisdiction.

In this case, there were only conclusory statements by witnesses, without elaboration of the circumstances surrounding the alleged crime which would have linked defendant to it, there was no evidence at transfer hearing upon which court could have found probable cause to believe that a minor had committed the crime of murder.

Transfer (continued)

Factors considered (continued)

In the Interest of John Moss, Jr., 295 S.E.2d 33 (1982) (McGraw, J.)

Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it.

The accused is entitled to rebut the State's proof of probable cause at a preliminary or transfer hearing by showing that he was not the person who committed the crime.

At a juvenile transfer hearing to determine probable cause, the transfer judge should allow defense to rebut State's evidence by showing that another suspect had confessed and had previously been indicted for the same crime.

The question of whether a person other than the accused committed the crime is relevant to the determination of probable cause.

Although the preliminary or transfer hearing is not the proper phase of the trial in which to present evidence on the ultimate issue of guilt or innocence, if the defense can rebut the State's proof by showing another person committed the crime and this evidence shows that defendant could not have committed the crime, such evidence should be admitted solely for determination of probable cause.

Merely showing that another person has been charged with commission of a crime is not sufficient to warrant a finding of no probable cause in a juvenile transfer hearing. The accused must show that the evidence of another person's guilt is inconsistent with the State's probable cause theory against the accused.

In the Interest of John Moss, Jr., (continued)

The transfer judge erred in refusing to permit juvenile's rebuttal of State's evidence of probable cause by showing that another individual confessed and had been indicted for the same crime. The juvenile is entitled to present at the transfer hearing evidence concerning another suspect's confession to the murders.

Applies standard set forth in syl. pt., *In the Interest of Clark*, 285 S.E.2d 369 (W.Va. 1981), cited above.

The probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence.

Where a transfer hearing had been held, but, before a ruling, the State filed to reopen to introduce a tape-recorded confession submitted at preliminary hearing, the motion was granted. The transfer court allowed the tape recording and the entire transcript of the preliminary hearing to be admitted as evidence even though the State's only witness was available but not called at the original transfer hearing and, indeed, called to testify at the subsequent hearing.

Since the witness himself was available, the Court, in allowing the transcript into evidence, did not adhere to the *State v. R.H.*, 273 S.E.2d 578 (W.Va. 1980) rule concerning admissibility of sworn testimony from a former proceeding; thus the admission of the preliminary hearing transcript was error.

State v. R.H., 273 S.E.2d 578 (W.Va. 1980) does not call for total suspension of rules of evidence at a transfer hearing, but rather calls for a "broader latitude on evidentiary matters", therefore allowing a prejudicial transcript was grounds for reversible error.

In the Interest of John Moss, Jr., (continued)

Allowing prejudicial transcripts from previous proceedings coupled with the obvious impact of the juvenile referee's testimony at subsequent transfer hearing precluded the transfer court's finding that the determination of probable cause had been independently made.

Transfer court's failure to set forth findings of fact and conclusions of law upon which it based its decision voided the transfer.

In the Interest of S.M.P., 285 S.E.2d 408 (1981) (Per Curiam)

In this appeal, the juvenile claimed that the circuit court wrongly transferred him to adult jurisdiction. The Supreme Court noted that the only evidence of probable cause introduced by the State in the transfer hearing was from a state trooper who testified that he found the victim at the scene bloodied about the head and face. He related hearsay statements of the victim regarding the beating and theft of money and related that he accused the defendant and three others with armed robbery and he signed the delinquency petition against the child. He also said that the child would have been 16 at the time of the offense. The Supreme Court found that the State, upon this evidence, did not establish probable cause to believe that the defendant committed the armed robbery or a crime of violence to the person.

Here, the witness did not articulate any factual basis, hearsay or otherwise, connecting the appellant to the crime.

State ex rel. Cook v. Helms, 292 S.E.2d 610 (1981) (Neely, J.)

Syl. pt. 2 - When a court finds that there is probable cause to believe a juvenile has committed one of the specified in *W.Va. Code*, 49-5-10(d)(1) (treason, murder, robbery involving the use of or presenting of deadly weapons, kidnapping, first-degree arson, and first-degree sexual assault), the court may transfer the juvenile to The court's criminal jurisdiction without further inquiry. To the extent this holding is inconsistent with *State v. R.H.*, 273 S.E.2d 578 (W.Va. 1980) and *State v. C.J.S.*, 263 S.E.2d 899 (W.Va. 1980), those cases are overruled.

The trial court may still determine to treat a chid under the juvenile laws, even where serious crimes are committed, if the court believes such treatment is warranted.

The juvenile in this case had committed murder, so probable cause to believe he committed the crime is all that is needed.

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

The portions of *W.Va. Code* § 49-5-1 *et seq*. (1977) dealing with transfer set out several factors the judge should consider, but while these statutory standards must be followed, they need not be the only criteria.

A juvenile judge, in weighing the gravity of the offense allegedly committed, should accord greater weight to offenses against the person than against property. The same equation is applicable to the element of violence. In this regard, the court is a liberty to balance the maliciousness and deliberateness of the act against possible justifications, such as self-defense, provocation and lack of mental capacity. Moreover, previous acts of delinquency, their frequency, seriousness and relationship to the present charge are all relevant considerations in determining the rehabilitative prospects of the juvenile.

State ex rel. Smith v. Scott, (continued)

Age alone should never be the determining factor in a transfer decision, although the age of the juvenile is of some significance as it bears upon the opportunity of the court to exercise its jurisdiction and to select rehabilitation procedures.

Transfer should be the exception not the rule.

Footnote 4 - The rule is that it is the age at the commission of the offense which determines juvenile court jurisdiction.

Footnote 1 took note of the eight factors contained in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) for consideration by a court in determining whether to waive juvenile jurisdiction in favor of criminal jurisdiction.

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

See JUVENILE Transfer, Aider and abettor, (p. 590) for discussion of topic.

Syl. pt. 4 - Before a transfer of a juvenile to criminal court, a juvenile court judge must make a careful detailed analysis into the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors. *W.Va. Code*, 49-5-10(d).

In the present case, there were no expert witnesses; no physicians or psychologists testified; no school records were assessed.

Footnote 6 - In deciding whether to transfer a juvenile to criminal jurisdiction, the trial court need only find probable cause to believe that the juvenile committed the offense, not that the crime was actually committed.

State v. C.J.S., (continued)

Neely, C.J. (Dissenting) - The plain language of the *W.Va. Code* § 49-5-10(d)(1) [1978] permits a judge to transfer a juvenile upon a showing of probable cause to believe that the juvenile committed treason or one of the violent felonies enumerated in the statute.

State v. G.B.G., 275 S.E.2d 922 (1981) (Per Curiam)

The juvenile was charged by two delinquency petitions with murder and malicious wounding. The 1978 transfer statute was applicable in this case. *W.Va. Code* § 49-5-10(d)(1).

In determining whether to transfer to adult jurisdiction, the court below had before it evidence about the child's mental and physical condition, his home and family background, his school experience and similar personal factors. The fact that some of the evidence was introduced by the child was of no legal consequence. The trial court considered the child's individual background.

There was no legal error or abuse of discretion by the trial court in effecting the transfer.

The State contended the trial court did not abuse its discretion since it considered many personal factors as well as the 1978 transfer standard set out in *W.Va. Code* § 49-5-10 before ordering transfer. The Supreme Court agreed.

State v. M.M, 256 S.E.2d 549 (1979) (McGraw, J.)

Syl. pt. 3 - Mere probation without an active plan of treatment does not constitute a *bona fide* attempt at rehabilitation must include assessment of the juvenile's problems, consideration of alternative treatment plans, and reasonable attempts to implement a suitable plan of treatment. If no active plan of treatment is followed the reasons for this must be shown.

Under the 1977 law some significant attempt at rehabilitation must be made, and where no such effort has been made the State's burden of proving there are no reasonable prospects of rehabilitation becomes exceedingly difficult. The evidence in this case only shows probation with minimal supervision.

Syl. pt. 4 - in proceedings under *W.Va. Code* § 49-5-10 [1977] the nature of the crime is not alone sufficient to warrant transfer of juvenile proceedings to criminal court.

W.Va. Code § 49-5-10 [1977] directs that in reference to a child's prospects for rehabilitation the court must consider the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and the like. Absent evidence of this type the court relied too heavily on the nature of the crime.

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

The Supreme Court reiterated the guidelines set forth in *State ex rel. Smith v. Scott*, 238 S.E.2d 223 (W.Va. 1978), footnote 1, for determining whether a court should relinquish its juvenile jurisdiction in favor of criminal jurisdiction: "(1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver. (2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner. (3) Whether the alleged offense was against persons especially if personal injury resulted. (4) The prosecutive merit of the complaint, *i.e.*, whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the

State v. R.H., Jr., (continued)

United States Attorney). (5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia. (6) The sophistication and maturity of the juvenile as determined by consideration of his, environmental situation, emotional attitude, and pattern of living. (7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions. (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. Paradoxically, as stated in note 4 of *Kent*, these standards were rescinded at the time of the *Kent* opinion."

The new 1978 amendment did not require a finding by the trial court regarding likelihood of rehabilitation, but that does not preclude the consideration of that factor.

W.Va. Code § 49-5-10(d) (Cum. Supp. 1978) sets forth the legislatures' absolute minimum requirements for transfer. The standards set forth in *State ex rel. Smith v. Scott*, 238 S.E.2d 223 (W.Va. 1978), enhance that legislative determination by providing the juvenile courts with significant guidelines which ensure a meaningful transfer hearing as required by due process. Thus, the juvenile court must still vindicate the standards set forth in *Smith*, which were established by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

Transfer (continued)

Factors considered (continued)

Thomas v. Leverette, 273 S.E.2d 364 (1980) (McGraw, J.)

Syl. pt. - The crime of armed robbery was not intended to be included in that class of crimes designated "capital offenses" for the purposes of *W.Va. Code* § 49-5-3 (1975), excluding from the juvenile jurisdiction of the circuit court juveniles charged with the commission of acts which would be "capital offenses" committed by an adult.

Even under this former statute, juvenile jurisdiction over children who committed criminal acts was to be preferred in every instance except where it was specifically excluded.

In an appeal from a denial of a writ of *habeas corpus,* defendant claimed that the trial court erroneously failed to allow him to be tried as a juvenile because, although the statute in effect at the time said that juvenile proceedings would apply except as to violation of law which if committed by an adult would be a capital offense, the armed robbery with which he was charged was not a capital offense. The Supreme Court found that the crime of armed robbery was not to be considered a capital offense for purposes of the *W.Va. Code* § 49-5-3 (1975).

Hearsay

In the Interest of S.M.P., 285 S.E.2d 408 (1981) (Per Curiam)

The Supreme Court noted that "the admission of hearsay evidence at a transfer hearing has generally been held not to be constituted reversible error."

However, the Court points out that *W.Va. Code* § 49-5-10(d) setting the general provisions for juvenile hearings states in part, "Except as herein modified, at all adjudicatory hearings, the rules of evidence applicable in criminal cases shall apply, including the rule against written reports based on hearsay." The Court notes that this statute would preclude a transfer based entirely on hearsay evidence.

Transfer (continued)

Hearsay (continued)

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

See EVIDENCE Hearsay exceptions, Former testimony, (p. 290) for discussion of topic.

Judge holding subsequent adjudicatory or criminal proceeding

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

Footnote 3 - The Supreme Court noted that a juvenile judge who, during a transfer hearing, obtains knowledge of the facts surrounding an alleged crime and the involvement of a juvenile defendant, is not ordinarily precluded from holding a subsequent adjudicatory or criminal proceeding. The integrity of the fact-finding process is preserved by the right to have a jury trial in a juvenile proceeding and a criminal trial.

Jury trial right

In re E.H., 276 S.E.2d 557 (1981) (Miller, J.)

Syl. pt. 1 - *W.Va. Code*, 49-5-6, providing a right to demand a jury trial in a juvenile proceeding, must be read in light of its historical background and *in pari materia* with reference to a jury trial at the adjudicatory hearing contained in *W.Va. Code*, 49-5-11 (1978) with the result that the right to demand a jury trial is limited to the adjudicatory hearing.

The following portion of *W.Va. Code* § 49-5-10(c) was retained in the 1978 amendments: "if the court transfers the case to a criminal proceeding, the court's findings of fact and conclusions of law shall be incorporated within the order." The Supreme Court stated that it was apparent that the Legislature chose this phraseology to indicate that the court, as distinguished from the jury, was the appropriate entity to make the transfer decision. The use of the word "court" throughout the transfer statute reinforces this view.

Transfer (continued)

Jury trial right (continued)

In re E.H., (continued)

Syl. pt. 2 - Article III, Section 10 of the West Virginia Constitution does not require a jury trial at a juvenile transfer hearing.

The Supreme Court pointed out that issues of culpability are not determined at a transfer hearing, the transfer statute and Code contain general provisions to protect rights, the *State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973) case provides due process guidelines for a transfer hearing, and in light of the fact that the Court has never construed the due process section of the Constitution as requiring a jury trial at every instance that a liberty or property interest is affected, a jury trial is not required at a juvenile transfer hearing.

Preliminary hearing - remedy for delay

State ex rel. E.D. v. Aldredge, 245 S.E.2d 849 (1978) (McGraw, J.)

Syl. pt. 1 - The release of a child on recognizance is the remedy for delay in conducting a preliminary hearing under *W.Va. Code* § 49-5-10 [1977] where a transfer hearing is not held within seven days of a child being taken into custody.

In a prohibition proceeding, the juvenile relator claimed that the State had no right to transfer the matter to the circuit court after seven days had elapsed from the arrest. The Supreme Court found that this contention was without merit, as the court retained jurisdiction under *W.Va. Code* § 49-5-10 (1977).

Probable cause

In the Interest of Clark, 285 S.E.2d 369 (1981) (Neely, J.)

See JUVENILE Transfer, Factors considered, (p. 604) for discussion of topic.

Transfer (continued)

Probable cause (continued)

In the Interest of John Moss, Jr., 295 S.E.2d 33 (1982) (McGraw, J.)

See JUVENILE Transfer, Factors considered, (p. 605) for discussion of topic.

In the Interest of S.M.P., 285 S.E.2d 408 (1981) (Per Curiam)

See JUVENILE Transfer, Factors considered, (p. 600) for discussion of topic.

State ex rel. Cook v. Helms, 292 S.E.2d 610 (1981) (Neely, J.)

See JUVENILE Transfer, Factors considered, (p. 608) for discussion of topic.

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

See JUVENILE Transfer, Factors considered, (p. 609) for discussion of topic.

Prohibition

State ex rel. Smith v. Scott, 238 S.E.2d 223 (1977) (Miller, J.)

Syl. pt. 4 - Where the record of a transfer hearing is barren of any relevant data which could have provided a proper foundation for the juvenile court to make a meaningful decision as to the propriety of the transfer, a writ of prohibition will lie to preclude the criminal court from exercising jurisdiction over the juvenile since it is exceeding its legitimate jurisdiction.

Transfer (continued)

Prohibition (continued)

State ex rel. Smith v. Scott, (continued)

The reasons stated by the circuit court for transfer were that: "There is not sufficient time remaining in the jurisdiction of this court . . . to determine the guilt or innocence of the defendant . . . and to effectuate any meaningful program of rehabilitation or punishment." Writ awarded.

Reopening case

In the Interest of John Moss, Jr., 295 S.E.2d 33 (1982) (McGraw, J.)

"It is within the sound discretion of the court in the furtherance of the interests of justice to permit either party, after it has rested, to reopen the case for the purpose of offering further evidence and unless that discretion is abused the action of the trial court will not be disturbed." Syl. pt. 4, *State v. Fischer*, 211 S.E.2d 666 (W.Va. 1974); Syl. pt. 4, *State v. Daggett*, 280 S.E.2d 545 (W.Va. 1981).

Supreme Court could not say that the transfer judge abused his discretion in ordering the transfer hearing reopened to permit the State to introduce evidence on the issue of probable cause.

Retroactivity of statutes

State v. Bannister, 250 S.E.2d 53 (1978) (McGraw, J.)

Syl. pt. 2 - *W.Va. Code* § 49-5-10 [1978], governing the transfer of juvenile proceedings to criminal jurisdiction, applies only to those juvenile cases where the alleged criminal act was committed after the effective date of the statute.

Transfer (continued)

Retroactivity of statutes (continued)

State v. Bannister, (continued)

There is a presumption that a statute is intended to operate prospectively unless it appears, by clear strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force an effect, and it is in accord with the directive of the Legislature embodied in *W.Va. Code* § 2-2-10(bb) (1973) which states that a statute is presumed to be prospective in its operation unless expressly mad retroactive.

The trial court in this case followed the rule in *Gibson v. Bechtold*, 245 S.E.2d 258 (W.Va. 1978) that a juvenile was entitled to the benefit of a statutory provision enacted subsequent to the date of the alleged offense, and correctly concluded that the 1977 version of the transfer law applied to petitioner might constitute unconstitutional *ex post facto* legislation.

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

See JUVENILE Statutes, Retroactivity, (p. 588) for discussion of topic.

State v. R.H., 273 S.E.2d 578 (1980) (McGraw, J.)

Syl pt. 2 - The 1978 amendments to *W.Va. Code* § 49-5-1 *et seq*. respecting juvenile proceedings were not intended to apply retroactively to control proceedings which arose from the alleged commission of a criminal act at a time when the 1977 Act was in effect.

Right to hearing

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

A meaningful transfer hearing must be held before a child can be put under a trial court's criminal jurisdiction.

Transfer (continued)

Right to hearing (continued)

Thomas v. Leverette, 273 S.E.2d 364 (1980) (McGraw, J.)

Where the State seeks to deprive a juvenile of the protections of the juvenile law to which he or she is presumptively entitled, due process requires that the juvenile be afforded a hearing to determine whether he or she is statutorily excluded from the juvenile jurisdiction of the circuit court. It is presumed that jurisdiction over juveniles charged with the commission of criminal acts is vested in the juvenile courts. The removal of such proceedings to the criminal jurisdiction can be accomplished only by means of a hearing to determine whether: (1) the court in its discretion is justified in transferring the case to the criminal court for further proceedings therein or (2) the juvenile court lacks jurisdiction by virtue of statutory exceptions which place jurisdiction in the criminal court. To support the removal of a juvenile to the criminal jurisdiction of the circuit court for the commission of a specific offense, it must be shown to the Court that probable cause existed to believe the juvenile had committed that offense. The circuit court erred in determining that the appellant was not entitled to a hearing to determine whether he was statutorily excluded from the juvenile jurisdiction of the circuit court.

Speedy trial

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

A speedy trial claim is properly brought before the Supreme Court prior to trial by an original prohibition proceeding.

Waiver of constitutional rights

State ex rel. J.M. v. Taylor, 276 S.E.2d 199 (1981) (Harshbarger, C.J.)

See JUVENILE Right to counsel, Waiver of rights, (p. 585) for discussion of topic.

Waiver of constitutional rights (continued)

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

See JUVENILE Confessions, Waiver of rights, (p. 555) for discussion of topic.

Warrant

State ex rel. Kerns v. Fox, 268 S.E.2d 65 (1980) (Neely, C.J.)

Syl. pt. 2 - A juvenile may be brought before the court on a criminal warrant issued by a magistrate.

KIDNAPPING

Accessory before the fact

State v. Andriotto, 280 S.E.2d 131 (1981) (Neely, J.)

The defendant maintains that the facts do not demonstrate that he was an accessory before the fact to the crime of kidnapping as set forth in *W.Va. Code* § 61-2-14a [1965]. But, the victim was obviously "confined" within the meaning of that code section "for the purpose or with the intent of taking, receiving, demanding or extorting money." Furthermore, according to the witness' corroborated testimony the defendant was the person who, while not actually present at the commission of the crime, counseled, procured, planned and abetted in the preparation of it.

Sufficiency of evidence

State v. Andriotto, 280 S.E.2d 131 (1981) (Neely, J.)

The Supreme Court applied Syllabus pt. 1 of *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) to determine if there was enough evidence to support a conviction of being an accessory before the fact to kidnapping.

The corroboration of the witness' story, much of it from defendant's own mouth, was so overwhelming in this case and the explanations of the defendant, who voluntarily took the stand in his own defense, were so unpersuasive that the jury was entitled to conclude that the defendant was guilty.

LARCENY

Accessory, aiding and abetting, principal

State v. R.A.W., 267 S.E.2d 553 (1980) (Per Curiam)

"A person who is present, aiding and abetting another in the commission of an offense, is a principal in the second degree within the meaning of Code, 61-11-1, which provides, in part: 'In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree.'" Syl. pt. 3, *State v. Franklin*, 139 W.Va. 43, 79 S.E.2d 692 (1953).

The Supreme Court found that under the facts of the case the appellant was present, aiding and abetting the theft of the van. Under the *Franklin* holding, there was sufficient evidence to demonstrate beyond a reasonable doubt the defendant was guilty of grand larceny.

State v. Riley 282 S.E.2d 623 (1981) (McHugh, J.)

Syl. pt. 3 - A person who is present and participating with others in the taking of property in the commission of a larceny is chargeable with the entire value of the goods taken, even though such person may not have personally taken away each and every one of the items subject to the larceny.

Attempt

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

See LARCENY Sentence, (p. 628) for discussion of topic.

Defenses

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

See ROBBERY Defenses, *Bona fide* claim of ownership, (p. 768) for discussion of topic.

LARCENY

Double jeopardy

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

See DOUBLE JEOPARDY Larceny, (p. 209) for discussion of topic.

Elements

In general

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

Syl. pt. 3 - To support a conviction for larceny at common law, it must be shown that the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof.

"Larceny, as distinguished from other offenses, is the taking and carrying away from any place, at any time, of the personal property of another, without his consent, by a person not entitled to the possession thereof, feloniously, with intent to deprive the owner of his property permanently, and to convert it to the use of the taker or of some person other than the owner; . . .". *State v. Pietranton*, 137 W.Va. 477, 72 S.E.2d 617 (1952).

Intent

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

One of the requisite elements of grand larceny is that the taking away was done "with intent to deprive the owner of his property permanently."

Where there was no direct or circumstantial evidence that petitioner intended permanently to deprive the owner of his truck, the conviction for grand larceny could not stand.

Elements (continued)

Intent (continued)

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

See LARCENY Instructions, (p. 626) for discussion of topic.

State v. Rutter, 252 S.E.2d 899 (1979) (Neely, J.)

The State has the burden of proving a present intent to defraud on the part of defendant at the time a check was uttered, an essential element of larceny by false pretense.

State v. Simmons, 285 S.E.2d 136 (1981) (Per Curiam)

"*Animus furandi*, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syllabus pt. 2, *State v. Hudson*, 206 S.E.2d 415 (W.Va. 1974).

State v. Wolfe, 277 S.E.2d 640 (1981) (Per Curiam)

"The *Animus furandi*, or the intent to take and deprive another of his property, is an essential element in the crime of robbery and larceny." Syllabus pt. 2, *State v. McCoy*, 63 W.Va. 69, 59 S.E. 758 (1907).

Grand/petit

State ex rel. Arbogast v. Mohn, 260 S.E.2d 820 (1979) (McGraw, J.)

On March 30, 1977, the West Virginia Legislature passed Chapter 79 of the Acts of the West Virginia Legislature, which amended and reenacted *W.Va. Code* § 61-3-13, dealing with the crimes of grand and petit larceny. Th effect of the 1977 Amendment was to raise the value of demarcation between grand larceny and petit larceny from $50.00 to $200.00. Chapter 79 also created an alternative penalty of confinement for up to one year in

Grand/petit (continued)

State ex rel. Arbogast v. Mohn, (continued)

he county jail and a fine of not more than $500.00 to be applied in the discretion of the trial court upon conviction for grand larceny. A petit larceny conviction now carries an alternative penalty of a mere fine. This amendment became effective on or about June 28, 1977.

State v. Riley, 282 S.E.2d 623 (1981) (McHugh, J.)

Syl. pt. 3 - A person who is present and participating with others in the taking of property in the commission of a larceny is chargeable with the entire value of the goods taken, even though such person may not have personally taken away each and every one of the items subject to the larceny.

In 1977, the West Virginia Legislature rewrote *W.Va. Code* § 61-3-13, and the fifty dollar distinction between grand and petit larceny was changed to two hundred dollars.

Indictment

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

An indictment for larceny that follows the language of Code § 62-9-10, is sufficient.

Code § 62-9-10 does not require an indictment to allege the specific place of theft.

State v. Riley, 282 S.E.2d 623 (1981) (McHugh, J.)

"An indictment may allege burglary and larceny in the same count, and likewise may join charges of breaking and entering and larceny in the same count." Syllabus pt. 3, *State v. Varner*, 131 W.Va. 459, 48 S.E.2d 171 (1948).

Indictment (continued)

State v. Riley, (continued)

In an appeal from a conviction of grand larceny, defendant claimed that the article which he admitted having taken from the store was not listed upon the indictment, consequently the conviction could not stand on the basis of the indictment. The Supreme Court found that the indictment was sufficiently clear to inform defendant that at least one such article was taken from the store and was valued approximately the same. Therefore the evidence was sufficient to support the verdict of the jury.

Instructions

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

The trial court gave two of the defendant's instructions which advised the jury that criminal intent is an essential element of the crime of larceny. Considering the instructions as a whole, the Supreme Court found that the jury could not have been misled into thinking that they could return a guilty verdict merely upon a showing that the defendant took the cow and sold it at the market.

When two of defendant's instructions explained criminal intent as an essential element of larceny, it was not error to reject defendant's requested instruction which said that, if defendant honestly thought that the stolen property was his mother's he was not guilty.

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

See INSTRUCTIONS Burden shifting, (p. 495) for discussion of topic.

See INSTRUCTIONS Circumstantial evidence,(p. 501); INSTRUCTIONS Reasonable doubt, (p. 517) for discussion of topic.

Instructions (continued)

State v. Riley, (continued)

Since the instructions given at the conclusion of the defendant's trial set forth the elements of grand and petit larceny, the Supreme Court found that the offense of larceny and its elements were properly set forth for the defendant and the jury.

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

Instructions providing that "possession of recently stolen property is a circumstance tending to show that the possessor is the thief and may be considered in connection with all other attending circumstances and facts" was disapproved unless language negating the inference of guilt is added. Language such as "while possession of recently stolen goods is of itself not even *prima facie* evidence of guilt, yet it may be considered with other facts and circumstances as a circumstance bearing upon the guilt of the accused" must be added in order to make the instruction complete and accurate.

Lesser included offense

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Syl. pt. 2 - Joyriding is a lesser included offense to the crime of larceny of an automobile; accordingly, syl. pt. 6 of *State v. Bailey*, 220 S.E.2d 432 (W.Va. 1975) is overruled.

However at the time of the hearing in this case, joyriding was not a lesser included offense of grand larceny of an auto, and the juvenile relator received the benefit of the law at the time of the hearing.

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

See BURGLARY Lesser included offense, (p. 96) for discussion of topic.

LARCENY

Savings statute

State ex rel. Arbogast v. Mohn, 260 S.E.2d 820 (1979) (McGraw, J.)

While *W.Va. Code* § 61-3-13 is characterized as mandatory, the provisions of the later act operate as a repeal of inconsistent provisions in the prior act and are subject to the saving statute.

Sentence

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

Syl. pt. 3 - Grand larceny is punishable by confinement in the penitentiary not less than one nor more than ten years, and attempted grand larceny is punishable by confinement in a county jail not less than six months nor more than one year and by fine or not more than %500.

Sentence of twelve months' confinement in the county jail and $500 fine for attempted grand larceny was within the statutory parameters.

Sufficiency of evidence

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

Applies standard set forth in Syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

In this cattle rustling case, one neighbor had cattle including a Gurnsey and the other had cattle by no Gurnseys. The Gurnsey vanished. The fence separating the two properties was found to have been cut in one location, a bucket partially full of cattle feed was found on the defendant's side 25 feet from the cut fence. The defendant apparently loaded the Gurnsey on a pickup truck and sold it in Lewisburg. The Court found this evidence sufficient to convict.

Sufficiency of evidence (continued)

State v. R.A.W., 267 S.E.2d 553 (1980) (Per Curiam)

In the facts of this case, the evidence showed (1) that a van was stolen by two hitchhikers, (2) the victim identified the defendant as one of the hitchhikers, (3) when the van was found by police, defendant was asleep in it, (4) defendant admitted that she was one of the 2 hitchhikers, (5) she assented to the act of her partner taking the van. The Supreme Court found that this evidence showed beyond a reasonable doubt that the appellant was present, aiding and abetting in the theft of the van. They further noted that a person who is present, aiding and abetting another in the commission of an offense, is a principal in the second degree and that Code § 61-11-1 provides that in a felony, every principal in the second degree and every accessory before the fact, shall be punishable as if he were the principal in the first degree; the Court found that the evidence supported finding her guilty of grand larceny.

State v. Riley, 282 S.E.2d 623 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

In an appeal from a conviction for grand larceny, the defendant claimed that there was no evidence in the record to show that he broke into the store, although he did admit that he was present and took an article from the store and left the scene with the article in the company of his co-indictees and other stolen property. The Court found that the evidence was sufficient for the jury to convict the defendant of grand larceny as a principle in the first degree with respect to all of the property taken from the store by the defendant and his co-indictees.

State v. Rutter, 252 S.E.2d 899 (1979) (Neely, J.)

Applies standard set forth in Syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

Sufficiency of evidence (continued)

State v. Rutter, (continued)

On appeal, defendant challenged the sufficiency of the evidence upon which he was convicted of grand larceny, claiming that the State did not meet its burden to prove a present intent to defraud (an essential element of larceny by false pretense) when he uttered a worthless check. The Supreme Court found that viewing the evidence in the light most favorable to the prosecution, it was not manifestly inadequate: defendant admitted receiving a bank statement showing a balance of $38.18, he did not remember making any deposits, and he knew of another person's writing checks upon the account and may have acted in concert with her, before he wrote a check for $102. The State met its burden of proving present intent to defraud at the time the check was uttered.

State v. Simmons, 285 S.E.2d 136 (1981) (Per Curiam)

Applies standard set forth in Syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), the Court found that the State failed to prove the *animus furandi*, an essential element of the offense of larceny, and therefore reversed the conviction and unconditionally discharged the defendant from custody.

LESSER INCLUDED OFFENSE

In general

State v. Horton, 294 S.E.2d 248 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981) cited below.

State v. Louk, 285 S.E.2d 432 (1981) (Miller, J.)

Syl. pt. 1 - The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.

Breaking and entering

See BREAKING AND ENTERING Lesser included offense, (p. 88) for discussion of topic.

Burglary

See BURGLARY Lesser included offense, (p. 96) for discussion of topic.

Homicide

See HOMICIDE, (p. 381) for discussion of topic.

Robbery

See ROBBERY Lesser included offense, (p. 775) for discussion of topic.

LESSER INCLUDED OFFENSE

Sexual assault

See SEXUAL ASSAULT Lesser included offense, (p. 890) for discussion of topic.

MAGISTRATE COURT

In general

State ex rel. Skinner v. Dostert, 278 S.E.2d 624 (1981) (McGraw, J.)

Syl. pt. 3 - The constitutionally created office of magistrate is an independent judicial office and the exercise of the power of the office is subject only to the constitution and the law. Consequently, the superior court abused its authority by issuing a *sua sponte* order attempting to thwart the magistrate's jurisdiction. Prohibition was an appropriate remedy.

Appeal

Guilty pleas

State ex rel. O'Neill v. Gay, 285 S.E.2d 637 (1981) (McHugh, J.)

See GUILTY PLEAS Appeal, (p. 337) for discussion of topic.

Institution of action in magistrate court

W.Va. Judicial Inquiry Com'n v. Casto, 263 S.E.2d 79 (1979) (McGraw, J.)

Criminal actions in magistrate court are instituted by the issuance of a warrant. *W.Va. Code* § 50-4-2. Without the warrant an individual may neither be tried nor enter a plea to a criminal charge. Even where a warrantless arrest is permitted, the person arrested must be taken before a magistrate without delay, and a complaint must be filed and a warrant issued immediately. Code § 62-1-5.

Judgments

Void/voidable

Blankenship v. Minton Chevrolet, Inc., 266 S.E.2d 902 (1979) (Neely, J.)

See JUDGMENTS Void/voidable, (p. 538) for discussion of topic.

MAGISTRATE COURT

Jurisdiction

State ex rel. Burdette v. Scott, 259 S.E.2d 626 (1979) (Miller, J.)

Syl. pt. 1 - Under *W.Va. Code*, 50-2-3 (1976), a magistrate court has jurisdiction of all misdemeanor offenses committed in the county and to conduct preliminary examinations on warrants charging felonies committed within the county.

This statute enlarges the criminal jurisdiction of the magistrate courts, which under the justice of peace system had been confined to certain statutorily enumerated offenses under *W.Va. Code* § 50-18-1.

When the word "charged" in *W.Va. Code* § 50-5-7 (1976) ("Every defendant charged in a magistrate court in a criminal proceeding which is within the jurisdiction of the court shall have the right to a trial on the merits in a magistrate court.") is read together with Code § 62-1-1 (1976) as required by Code § 50-4-2 (1976), the word has no ambiguity. It is clear that a person is charged with a crime once a written complaint has been filed against him and a judicial officer, having found that the complaint contains sufficient facts to establish probable cause that a crime has been committed by the defendant, issues a warrant.

Syl. pt. 3 - Even though *W.Va. Code*, 50-5-7 (1976), gives exclusive jurisdiction to a magistrate court once a defendant is charged by warrant in that court with an offense within its jurisdiction, this does not mean that the circuit court has no initial jurisdiction over misdemeanor offenses. Concurrent jurisdiction still exists under Article VIII, Section 6 of the West Virginia Constitution, and *W.Va. Code*, 51-2-2 (1978).

Also, a prosecuting attorney can initiate any criminal proceedings through a grand jury indictment. So either avenue (circuit court or grand jury) makes the circuit court an available forum for the trial of misdemeanor offenses without the necessity of utilizing the magistrate court.

Under the circumstances of this case, the defendant was charged on an offense over which the magistrate court had jurisdiction and was charged in the magistrate court. He did not waive his right to a trial in the magistrate court and the court did not relinquish its jurisdiction. Thus, under Code § 50-3-7 since the initial charge was brought in the magistrate court, that court had jurisdiction.

MAGISTRATE COURT

Jury

State ex rel. Rauch v. Gay, 280 S.E.2d 595 (1981) (Harshbarger, C.J.)

See JURY Magistrate court, (p. 545) for discussion of topic.

Right to trial

Meadows v. Holliday, 264 S.E.2d 461 (1980) (Harshbarger, J.)

The Supreme Court applied syllabus pt. 2 of *State ex rel. Burdette v. Scott*, 259 S.E.2d 626 (W.Va. 1979) in this case and granted a writ of prohibition against the circuit court from trying the defendant.

State ex rel. Burdette v. Scott, 259 S.E.2d 626 (1979) (Miller, J.)

Syl. pt. 2 - *W.Va. Code*, 50-5-7 (1967), requires that if a defendant is charged by warrant in the magistrate court with an offense over which that court has jurisdiction, he is entitled to a trial on the merits in the magistrate court.

Prohibition will lie to prevent the circuit court from exercising its jurisdiction in the situation where defendant was initially charged in the magistrate court, the offense was one over which the magistrate court had jurisdiction, the defendant did not expressly waive his right to a magistrate court trial and the magistrate court did not relinquish its jurisdiction.

State ex rel. Rauch v. Gay, 280 S.E.2d 595 (1981) (Harshbarger, C.J.)

W.Va. Code, 50-5-13 entitled defendant to appeal his conviction and receive a circuit court trial *de novo*, but he was entitled to a trial in magistrate court, for an offense over which the magistrate had jurisdiction and upon a warrant issued by a magistrate, if he chose. That right is meaningless if substantially erroneous procedures in magistrate court only entitle defendant to appeal for a circuit court *de novo* trial that would have been due even if the had received a perfect magistrate court trial.

Right to trial (continued)

State ex rel. Rauch v. Gay, (continued)

The defendant's trial violated his rights and his convictions were deemed void. The Supreme Court reversed the matter and remanded to the circuit court to order a new trial. The Supreme Court found that if the defendant chose to have a properly conducted jury trial in *Magistrate Court*, he was entitled to that relief.

State ex rel. Tate v. Bailey, 274 S.E.2d 519 (1981) (McHugh, J.)

Applies standard set forth in syl. pt. 2, *State ex rel. Burdette v. Scott*, *supra*, cited above.

While concurrent jurisdiction over misdemeanor offenses exists between the magistrate and the circuit court's, where the defendant was initially charged by warrant in magistrate court and the defendant did not expressly waive his right to trial in magistrate court, nor did that court relinquish its jurisdiction, prohibition would lie to prevent the circuit court from exercising its jurisdiction.

In this action for a writ of habeas corpus and *ad subjiciendum* and writ of mandamus, petitioner sought an order directing the magistrate to enter a not guilty verdict based upon evidence taken at a hearing on negligent homicide. The Supreme Court found that petitioner was charged with negligent homicide, over which the magistrate court had jurisdiction and that there was nothing in the record to show that petitioner had waived in writing his right to a jury trial in magistrate court. Therefore, the Court found, he was denied his right to a trial in magistrate court (no trial had taken place). Because a trial was never conducted, petitioner was not entitled to a verdict of not guilty, as he requested.

Right to trial (continued)

State v. Romaca, 278 S.E.2d 891 (1981) (Per Curiam)

The Supreme Court applied syllabus pt. 2 of *State v. Burdette v. Scott*, 259 S.E.2d 626 (W.Va. 1979) to find the defendant entitled to trial on the merits in magistrate court and reversed the judgment of the circuit court of Kanawha County.

Waiver

State ex rel. Burdette v. Scott, 259 S.E.2d 626 (1979) (Miller, J.)

Under *W.Va. Code*, 50-4-6, defendant may waive his right to a trial in the magistrate court. The Supreme Court noted that this right of waiver is not absolute, but rather a qualified right dependent upon the consent of the magistrate to relinquish jurisdiction and transfer the case to circuit court.

Waiver of jury trial

State ex rel. Tate v. Bailey, 274 S.E.2d 519 (1981) (McHugh, J.)

W.Va. Code § 50-5-8 provides that a jury trial in a criminal proceeding in magistrate court may be waived if such waiver is made in writing.

MALICIOUS WOUNDING

Evidence

State v. Scotchel, 285 S.E.2d 384 (1981) (Miller, J.)

See EVIDENCE Evidence of injury, (p. 276) for discussion of topic.

Indictment

State v. Furner, 245 S.E.2d 618 (1978) (Harshbarger, J.)

See INDICTMENT Sufficiency (p. 437) for discussion of topic.

MANDAMUS

In general

Cooper v. Gwinn, (No. 15153, December 18, 1981) (McGraw, J.)

When the executive department fails to expedite the will of the people as expressed by the Legislature, the people may petition the courts by the way of extraordinary proceedings such as mandamus, to require the executive branch to comply with the law enacted by the Legislature. Both substantive and procedural due process guarantee that people receive the benefit of the law as enacted by the Legislature.

Syl. pt. 3 - Before the court may properly issue a writ of mandamus, three elements must co-exist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondents to do the thing the petitioners seek to compel; and (3) the absence of another adequate remedy at law.

When petitioners had originally brought an action in the Federal District Court seeking relief pursuant to 42 U.S.C. § 1982 and 23 U.S.C. § 1343 and respondents contended that this pending federal action was an adequate remedy at law, therefore, the writ of mandamus was inappropriate, the Court disagreed stating that the remedy was not adequate since petitioners sought to enforce state law and since petitioners need not exhaust all federal remedies before they are entitled to seek a writ of mandamus in a state court to enforce state law.

Syl. pt. 4 - While it is true that mandamus is not available where another specific and adequate remedy exists, if such other remedy is not equally as beneficial, convenient, and effective, mandamus will lie.

"The trend in this Court has been to enlarge the scope of mandamus, especially where there is an urgent question of public policy or where there is not reason for delaying adjudication of the issue by the highest court of the State." *Walls v. Miller*, 251 S.E.2d 491 (W.Va. 1979).

Perry v. Barker, 289 S.E.2d 423 (1982) (McGraw, J.)

Applies the standards set forth in syllabus points 3 and 4 of *Cooper v. Gwinn*, (No. 15153, December 18, 1981), cited above.

MANDAMUS

In general (continued)

State ex rel. Lemley v. Roberts, 260 S.E.2d 850 (1979) (Per Curiam)

Syl. pt. 1 - "Though the writ of mandamus will be denied where another and sufficient remedy exists, if such other remedy is not equally as beneficial, convenient and effective, mandamus will lie." Syl. pt. 5 of *State ex rel. Vance v. Arthur*, 142 W.Va. 737, 98 S.E.2d 418 (1957).

State ex rel. White v. Melton, 273 S.E.2d 81 (1980) (Harshbarger, J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Lemley v. Roberts*, *supra*, cited above.

"But the other remedy must not only be adequate in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case, and as will enforce a right or performance of the duty, and such remedy cannot be said to be fully adequate unless it reaches the end intended and actually compel performance of the duty in question, has the party a remedy at law, but is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?" *Eureka Pipe Line Co. v. Riggs*, 75 W.Va. 353, 83 S.E. 1020 (1915).

Paternity

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

Writs of mandamus/prohibition were issued to compel the court to appoint counsel for indigent paternity defendants and to assure that costs of blood testing would be absorbed by the state.

MANDAMUS

Payment of expenses for indigents

State ex rel. Foster v. Gainer, 272 S.E.2d 666 (1980) (Harshbarger, J.)

See INDIGENTS Advance payment of expenses, (p. 441) for discussion of topic.

State ex rel. Foster v. Luff, 264 S.E.2d 477 (1980) (Miller, J.)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 441) for discussion of topic.

State ex rel. Leach v. Hamilton, 279 S.E.2d 420 (1982) (Per Curiam)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 442) for discussion of topic.

Preliminary hearing

State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (1980) (Miller, J.)

Syl. pt. 5 - If a preliminary hearing has not been held within a reasonable time following the defendant's arrest on an offense which must be brought to the grand larceny, he is entitled to enforce his statutory right to a preliminary hearing under *W.Va. Code* 62-1-8 (1965) by a mandamus proceeding in the circuit court against the committing magistrate court.

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

Defendant contends he was denied effective discovery because seven months passed between arrest and indictment without a preliminary hearing. It is troubling that the defendant's right to a hearing after arrest and before indictment was so flagrantly disregarded; however, the cure for that is a writ of mandamus before indictment and not reversal after conviction.

MANDAMUS

Prison conditions

Cooper v. Gwinn, (No. 15153, December 18, 1981) (McGraw, J.)

When inmates at the State Prison for Women sought a writ of mandamus to compel the prison officials to establish educational and vocational programs for those women with higher levels of education or vocational interests, pursuant to West Virginia Code §§ 62-13-1 and 62-13-4, the Court concluded that the petitioners were entitled to the writ requiring the Commissioner of Corrections to comply with the statutory mandates.

When inmates had the right to expect implementation of the statutory requirements for meaningful educational and vocational programs and the Commissioner had the responsibility to provide such programs, and when the federal cause of action would not provide an adequate remedy, mandamus was appropriate.

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

When an attorney questioned the constitutionality of prison regulations that severely limited the hours in which he could have access to his client and that required a warrantless search of the attorney's person and briefcase before visitation, asserting that this denial of access was an infringement upon the inmate's constitutional right of access to the courts guaranteed under *W.Va. Const.* art. III, § 17, and further asserting that the conference rooms were not private and consequently jeopardized the attorney-client privilege, the Court declared the warrantless search regulation to be invalid and issued a writ of mandamus compelling the prison officials to alter visiting hours and provide attorney conference rooms.

Prosecutors

State ex rel. Robinson v. Michael, 276 S.E.2d 812 (1981) (McHugh, J.)

Syl. pt. 7 - 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.

MANDAMUS

Refusal to issue rule in mandamus

State v. Coleman, 281 S.E.2d 489 (1981) (Neely, J.)

Syl. pt. - A refusal with prejudice to issue a rule in mandamus by the Supreme Court of Appeals precludes the consideration of an essentially identical petition by a circuit court; however, such a refusal does not constitute *res judicata* as to the subject matter of the mandamus petition at a subsequent trial.

State mental hospital patients

E.H. v. Matin, 284 S.E.2d 232 (1981) (Neely, J.)

Syl. pt. 1 - *W.Va. Code*, 27-5-9 [1977] provides specific rights to all mental patients confined in the State hospitals of West Virginia and these rights may be enforced by an action in mandamus against the responsible state officials.

Void judgments

State ex rel. Lemley v. Roberts, 260 S.E.2d 850 (1979) (Per Curiam)

"A void judgment is subject to collateral attack in a proceeding in mandamus." Syl. pt. 4, *State ex rel. Vance v. Arthur*, 142 W.Va. 737, 98 S.E.2d 418 (1957).

MENS REA

Common law crimes

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

Applies standard set forth in *State v. Frisby*, 245 S.E.2d 622 (W.Va. 1978), cited below.

Knowledge or intent must be proven beyond a reasonable doubt by the State to convict for delivery of a controlled substance.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

All common law crimes require *mens rea* and what a person intended is always a question for jury determination under all the facts and circumstances.

Felonies

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

The developing law would indicate that in order to convict one of a felony, the State must prove beyond a reasonable doubt a guilty knowledge or intent.

MENTAL HYGIENE

Commitment proceedings

Discovery

Markey v. Wachtel, 264 S.E.2d 437 (1979) (Miller, J.)

The requirement of bringing "all records pertaining to said individual" can only sensibly refer to all records prepared by the witness and within his custody and control or that of his employer.

Syl. pt. 5 - *W.Va. Code*, 27-5-4(i)(3), cannot be construed to require a testifying physician or psychologist to produce records pertaining to an individual when such records are not prepared by him and are not in his custody or control or that of the institution for which he works.

Due process

Markey v. Wachtel, 264 S.E.2d 437 (1979) (Miller, J.)

A number of due process rights must be accorded adults who are faced with involuntary commitment to mental hospitals. The due process standards set in *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109 (W.Va. 1974) were (1) an adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to have appointed counsel; (3) the right to be present, cross-examine, confront and present witnesses; (4) the standard of proof to warrant commitment to be by clear, cogent and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal.

Jury trial

Markey v. Wachtel, 264 S.E.2d 437 (1979) (Miller, J.)

Syl. pt. 1 - Article III, Section 10 of the West Virginia Constitution cannot be interpreted to require a constitutional right to jury trial in a proceeding for the involuntary commitment of an adult to a mental health facility.

Commitment proceedings (continued)

Jury trial (continued)

Markey v. Wachtel, (continued)

Syl. pt. 3 - The right to a jury trial in an involuntary mental commitment does not exist as a part of our common law.

This conclusion is buttressed by the lack of any precedent in other states establishing a common law right to jury trial in involuntary commitment.

Standard of proof

Hatcher v. Wachtel, 269 S.E.2d 849 (1980) (Harshbarger, J.)

Syl. pt. 1 - To justify involuntary hospitalization of a person under the provisions of *W.Va. Code* 27-5-4 [1979], it must be shown that "the individual is mentally ill, retarded or addicted and because of his illness, retardation or addiction is likely to cause serious harm to himself or to others if allowed to remain at liberty . . . ."

While it is not necessary that the likelihood of harm be imminent, it is necessary that there be a substantial risk of harmful conduct within the reasonably foreseeable future.

Syl. pt. 2 - "The proper standard of proof in a proceeding for involuntary commitment pursuant to Chapter 27, Article 5, Section 4 of the Code of West Virginia, 1931, as amended, is proof which is clear, cogent and convincing." Syllabus pt. 7, *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974).

MENTAL HYGIENE

Conditions of confinement

E.H. v. Matin, 284 S.E.2d 232 (1981) (Neely, J.)

Syl. pt. 2 - *W.Va. Code*, 27-5-9 [1977] requires a system of custody and treatment in State mental hospitals which reflects the competent application of current, available scientific knowledge.

Where there is a good faith difference of opinion among equally competent professional experts concerning appropriate methods of treatment and custody, such differences should be resolved by the director of the West Virginia Department of Health and not by the courts.

Syl. pt. 3 - It is the obligation of the State to provide the resources necessary to accord inmates of State mental institutions the right which the State has granted them under *W.Va. Code*, 27-5-9 [1977].

Confinement

Least restrictive alternative

Markey v. Wachtel, 264 S.E.2d 437 (1979) (Miller, J.)

Syl. pt. 4 - The requirement of *W.Va. Code*, 27-5-4(j), which mandates that the mental hygiene commissioner shall determine if there are less restrictive alternatives available, has a corollary that a good faith effort must be made to find a placement in a less restrictive alternative, and that such search must encompass a reasonably broad geographic area.

W.Va. Code § 27-5-4(j), places "[t]he burden of proof of the lack of a less restrictive alternative . . . on the person or persons seeking the commitment of the individual." Moreover, this same code section requires this factual finding to be based upon clear, cogent and convincing proof.

Confinement (continued)

Least restrictive alternative (continued)

Hatcher v. Wachtel, 269 S.E.2d 849 (1980) (Harshbarger, J.)

A good faith effort to be made to find a placement in a less restrictive alternative, and *W.Va. Code* 27-5-4(j), places "the burden of proof of the lack of a less restrictive alternative . . . on the person or persons seeking the commitment of the individual." *Markey v. Wachtel*, 264 S.E.2d 437 (W.Va. 1979).

The State met this requirement. *Hatcher* had refused his medication, and refused to cooperate with the Shawnee Hills staff when he had been there on previous occasions; each medical witness opined that *Hatcher* would not benefit from medical treatment at Shawnee Hills. The Supreme Court was aware of no other alternatives and none were mentioned in the evidence.

Not guilty by reason of insanity

See INSANITY Disposition, (p. 468) for discussion of topic.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Since the State failed to offer any evidence to sustain its burden of sanity once the defendant's insanity had been shown, the evidentiary insufficiency barred retrial under double jeopardy principles. The State, however, was not precluded from initiating involuntary commitment procedures pursuant to *W.Va. Code* § 27-6A-3(b).

MISTRIAL

In general

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Syl. pt. 5 - "Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error." Syllabus Point 7, *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1973); Syllabus Point 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

There are extraordinary situations where the objectionable evidence is so prejudicial that an instruction to the jury to disregard it is ineffective, and a mistrial is an appropriate remedy.

Court did not err in refusing to grant mistrial where a jury was instructed twice to disregard witness' unresponsive statement "If he didn't intend on shooting him, what would he have the gun for?"

Accomplices conviction or guilty plea

State v. Ellis, 239 S.E.2d 670 (1977) (Neely, J.)

See EVIDENCE Accomplice, Conviction or guilty plea, (p. 253) for discussion of topic.

Failure to move for

State v. Pelfrey, 256 S.E.2d 438 (1979) (McGraw, J.)

See INEFFECTIVE ASSISTANCE Failure to make motions, (p. 452) for discussion of topic.

MOOTNESS

Capable of repetition

E.H. v. Matin, 284 S.E.2d 232 (1981) (Neely, J.)

The State attempted to moot the petitioners' claim that the Huntington State Hospital was not in compliance with *W.Va. Code* § 27-5-9 by providing the named petitioners extraordinary care during the pendency of this law suit. Since the violation of petitioners' rights in this case is capable of repetition, the release of any or all of the petitioners from hospitalization shall not be deemed to moot this case for adjudicative purpose.

Risler et al. v. Giardina, 289 S.E.2d 180 (1982) (Neely, J.)

Syl. pt. 3 - A class action will not be rendered moot, even though the named petitioners' status changes or they lose their stake in the outcome of the litigation, if the issue is capable of repetition and yet will evade review because of the petitioners' change in status.

State ex rel. White v. Narick, 292 S.E.2d 54 (1982) (Harshbarger, J.)

Even though prisoner who sought writ of prohibition to prevent prison officials from force feeding him voluntarily ended his fast, the Supreme Court decided the issue under *Rissler et al. v. Giardina*, 289 S.E.2d 180 (W.Va. 1982), since it was capable of repetition.

MOTOR VEHICLE VIOLATIONS

Drunk driving

See DRUNK DRIVING, (p. 224) for discussion of topic.

Negligent homicide

See HOMICIDE Negligent homicide, (p. 394) for discussion of topic.

Passing in no-passing zone

State v. Jeffers, 251 S.E.2d 227 (1979) (Per Curiam)

The intent of the legislature in adopting the no-passing zone statute was to prevent drivers from passing by entering the counter flow of traffic; and the purpose of the statute was to prohibit a driver from passing another vehicle by crossing the double line when in a no-passing zone.

NEW TRIAL - NEWLY DISCOVERED EVIDENCE

In general

State v. Andriotto, 280 S.E.2d 131 (1981) (Neely, J.)

The Supreme Court applied four criteria set out in syllabus point 2 of *State v. Stewart*, 239 S.E.2d 777 (W.Va. 1977), to determine if a new trial should be granted because of the newly-discovered evidence. The alleged newly-discovered evidence was at most cumulative and would not have changed the outcome at a second trial. Hence the evidence does not meet two of the four criteria set out in *Stewart*.

State v. Barker, 281 S.E.2d 142 (1981) (Per Curiam)

Using the standard set out in *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1979), the Court found an affidavit of an individual who stated another individual said he and not the defendant had forged the check was not sufficient to grant a new trial. One rule is that the new evidence must be such as ought to produce an opposite result at a second trial. The evidence would be hearsay and only admissible to impeach. It is also significant that the individual whom the defendant claims forged the check was not shown to be within the court's jurisdiction, that his whereabouts were know, or that he would be available to be a witness at a second trial.

State v. Frazier, 253 S.E.2d 534 (1979) (Miller, J.)

"A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus Point 1 of *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).

In general (continued)

State v. Frazier, (continued)

When defendants requested a new trial alleging that the prosecution's witness had given false testimony concerning presence of numbers on the engine of a stolen car, the Court refused to grant the new trial indicating that the defendants had been indicted for receiving a stolen car; therefore, whether or not an engine actually came from that car was irrelevant. The new evidence, consequently, did not meet all five requirements and its only value would have been to impeach the State's witnesses who testified the numbers on the engine.

Although *State v. Stewart*, 239 S.E.2d 777 (W.Va. 1977), recognized that newly discovered evidence consisting of impeachment testimony could be sufficient to warrant a new trial, that case also recognized that all five of the *Halstead* elements must be met. Here, the contradictory evidence merely impeached the testimony of collateral figures on collateral issues. The State's key witness' testimony was not impeached, therefore the motion for a new trial was denied.

State v. Nicholson, 296 S.E.2d 342 (1982) (Per Curiam)

"A new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special." State v. *Hamric, 151* W.Va. 1, 141 S.E.2d 252 (1966).

Although the Supreme Court has not discussed recantation testimony or affidavits as a form of newly discovered evidence, most courts hold that such testimony is exceedingly unreliable and untrustworthy, especially when it involves an admission of perjury.

The question of whether a new trial should be granted on such testimony depends on all the circumstances of the case and is a matter within the discretion of the trial court.

As in most matters where the trial court acts in its discretion, an appellant court may intervene only when there is manifest abuse of discretion.

In general (continued)

State v. Nicholson, (continued)

Applies standard set forth in syl. pt. 2, State v. *Stewart, 2*39 S.E.2d 777 (W.Va. 1977), cited below.

In *Stewart*, the Supreme Court recognized that, under certain circumstances, newly discovered evidence consisting solely of impeachment evidence may be sufficient to warrant a new trial if all the other elements are met.

In this case the alleged newly discovered evidence fell short of the *Stewart* impeachment standard. The Court found that the witness either lied at the first trial or lied in his affidavit in support of a new trial. The Court did not believe that there was even a remote possibility that the jury would find the recanting affidavit and subsequent testimony any more believable than the original trial testimony. Only under circumstances where there are credible corroborating circumstances that would lead the trial court to conclude that the witnesses did, indeed, lie at the first trial, can it be concluded that the fourth criterion of *Stewart* has been met.

State v. Stewart, 239 S.E.2d 777 (1977) (McGraw, J.)

Syl. pt. 2 - A new trial on the basis of newly-discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. However, when the newly-discovered impeachment evidence comes within the following rules, a new trial will be granted: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) The facts must appear in his affidavit that the party was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) The evidence must be new and material, and not merely cumulative. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits.

In general (continued)

State v. Stewart, (continued)

Coupling newly discovered evidence which would severely impeach the testimony of the State's principal witness, with the defense based upon an alibi, the Supreme Court was convinced that there was a substantial likelihood that the newly discovered evidence "ought to produce an opposite result" on retrial. The judgment was therefore reversed and a new trial awarded.

State v. Wolfe, 277 S.E.2d 640 (1981) (Per Curiam)

The Supreme Court applied syllabus point 2 of *State v. Stewart*, 239 S.E.2d 777 (W.Va. 1977), to determine if newly discovered evidence entitled the defendant to a new trial. The new evidence impeached the State's key witness by showing he gave testimony at a subsequent trial which was materially different from testimony he gave at the defendant's first trial. The severely impeaching testimony, coupled with the fact that the jury was unable to reach a verdict at defendant's second trial, is such that there is a likelihood that an opposite result ought to be reached at a new trial.

NOLLE PROSEQUI

In general

State ex rel. Skinner v. Dostert, 278 S.E.2d 624 (1981) (McGraw, J.)

Syl. pt. 2 - *Nolle prosequi*, which was at common law a statement that the king, through his attorney general, would proceed no further with a prosecution, is now a motion to the court requesting that the cause be dismissed, and may properly be cast as a motion to dismiss.

The decision to grant or deny the motion is now a judicial function.

Before the prosecuting attorney can legitimately move for a *nolle prosequi*, he must have a knowledge of all the circumstances surrounding the case. A prosecuting attorney who does not investigate the facts of a sworn complaint so as to enable him to make an informed decision as to whether to continue prosecution or to move a *nolle prosequi* abuses the discretion of his office. The decision to *nolle prosequi* a criminal warrant is, nevertheless, a prosecutorial function that may not be invaded by an "extra-judicial order."

State v. Cain, 289 S.E.2d 488 (1982) (Per Curiam)

A *nolle prosequi* is the equivalent of a dismissal. *State ex rel. Skinner v. Dostert*, 278 S.E.2d 624 (W.Va. 1981), cited above.

At common law a nolle *prosequi could* at any time be retracted. However, once the *nolle* had become a matter of record reindictment was necessary. Under this rule the State, if it should seek to try the defendant again, on the *nolled* counts of the indictment, should reindict him on those counts since the *nolle prosequi* appears of record.

Co-defendant

Keith v. Leverette, 254 S.E.2d 700 (1979) (Caplan, C.J.)

Syl. pt. 1 - Where two or more persons are charged in an indictment with conspiracy, the conviction of one of those indicted is not necessarily invalidated by the entry of a *nolle prosequi* as to one or more of the others so charged.

Co-defendant (continued)

Keith v. Leverette, (continued)

Where the record reveals, as it does in the instant case, that a *nolle prosequi* of conspiracy charges against all but one of those charged was not based on the merits of the charge, the conviction of the remaining defendant will not be invalidated.

Double jeopardy

State v. Cain, 289 S.E.2d 488 (1982) (Per Curiam)

See DOUBLE JEOPARDY *Nolle prosequi*, (p. 212) for discussion of topic.

W.Va. Judicial Inquiry Com'n v. Casto, 263 S.E.2d 79 (1979) (McGraw, J.)

Nunc pro tunc entries are usual only in situations where something that actually occurred on a prior date was omitted from the record by inadvertence or mistake, but such an order may not be made where the entry does not reflect something that actually occurred on the date indicted.

In complaint by the Commission, it was alleged that a magistrate backdated records, that is, that he signed records that had been filled out and dated some eight or nine months earlier. The Supreme Court held that his signing the forms gave the impression that the forms were signed on the earlier date and did not conform to the requirements of a valid *nunc pro tunc* entry and constituted error.

The erroneous action of signing the predated forms did not, however, rise to the level of a violation of Canon 2A of the Judicial Code of Ethics.

OBTAINING MONEY BY FALSE PRETENSES

In general

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

Syl. pt. - When one makes a promise to perform in the future with intent to cheat, defraud or deceive, such promise constitutes a misrepresentation of an existing fact which is indictable as a "false pretense" under *W.Va. Code* § 61-3-24 (1977).

Elements of offense

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

In order to obtain a conviction for the crime of obtaining money by false pretense under *W.Va. Code* § 61-3-24, the prosecution must prove the essential elements of the offense, namely: (1) the intent to defraud; (2) actual fraud; (3) the false pretense was used to accomplish the objective; and (4) the fraud was accomplished by means of the false pretense.

Evidence

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

See EVIDENCE Immaterial, (p. 293) for discussion of topic.

Indictment

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

The indictment returned against defendant alleged sufficient facts on its face to charge the crime of obtaining money by false pretenses and the trial court was correct in refusing to quash the indictment on that ground.

PAROLE

In general

Rowe v. Whyte, 280 S.E.2d 301 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 1 - *Tasker v. Mohn*, 267 S.E.2d 183 (W.Va. 1980), cited below.

Before a prisoner is released on parole, he must appear before the parole board for examination and interrogation concerning parole in general and concerning reports submitted to the board. An independent evaluation as to the desirability of the release on parole is to be made from these requires.

Tasker v. Mohn, 267 S.E.2d 183 (1980) (Harshbarger, J.)

Syl. pt. 1 - Our parole statute, *W.Va. Code* 62-12-13 (1979), creates a reasonable expectation interest in parole to those prisoners meeting its objective criteria.

West Virginia Code § 62-12-13(d) also provides that: "Before releasing any penitentiary prisoner on parole, the board of parole shall arrange for him to appear in person before the board and the board may examine and interrogate him on any matters pertaining to his parole, including reports before the board made pursuant to the provisions hereof. The board shall reach its own written conclusions as to the desirability of releasing such prisoner on parole . . ."

West Virginia Code § 62-12-13(c) (1979) requires that the parole board develop and adopt rules and regulations governing the procedure for granting parole.

PAROLE

Appellant review

Rowe v. Whyte, 280 S.E.2d 301 (1981) (McHugh, J.)

Syl. pt. 3 - The decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia Board of Probation and Parole. However, such a decision shall be reviewed by this Court to determine if the Board of Probation and Parole abused its discretion by acting in an arbitrary and capricious fashion. Syl. pt. 1 - *Tasker v. Mohn*, 267 S.E.2d 183 (W.Va. 1980), cited above.

State ex rel. Wooding v. Jarrett, 289 S.E.2d 203 (1982) (Per Curiam)

"The decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia Board of Probation and Parole. However, such decision shall be reviewed by this court to determine if the Board of Probation and Parole abused its discretion by acting in an arbitrary and capricious fashion." Syl. pt. 3, *Rowe v. Whyte*, 280 S.E.2d 301 (W.Va. 1981).

When the Board of Probation and Parole did not consider both positive and negative factors in determining whether parole was appropriate, the Supreme Court held that the Board did act in an arbitrary and capricious fashion in denying parole to appellant who had no prior criminal convictions and who had never been cited for violations of prison rules and regulations.

Credit on underlying sentence

Adkins v. Leverette, 239 S.E.2d 496 (1977) (Miller, J.)

Syl. pt. 2 - The rule in *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977), holding that upon parole revocation the failure to credit time spent on parole to the underlying sentence violates the Double Jeopardy Clause of the West Virginia Constitution, is fully retroactive.

Credit on underlying sentence (continued)

Woods v. Whyte, 247 S.E.2d 830 (1978) (Neely, J.)

Syl. pt. 2 - The statutes establishing good time credit for inmates, *W.Va.Code* 28-5-27A (1951 and 28-5-28 (1977) were intended by the Legislature to enhance prison discipline and do not contemplate good time credit for parolees.

Due process

Rowe v. Whyte, 280 S.E.2d 301 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 3, *Tasker v. Mohn*, 267 S.E.2d 183 (W.Va. 1980)

Following Syl. pt. 4 of *Tasker v. Mohn*, *supra*, the Supreme Court required a) adequate and timely notice of the parole release; b) inmate's access to information in his record; c) personal appearance before the board; d) written record of the parole release interview and e) written statements as to reasons for denial of parole.

Petitioner's parole hearing, scheduled for May 19, 1981, was accelerated and held on April 27, 1981, only three days after petitioner had received notice of the rescheduling, and 18 days after he had received reports to be considered by the parole board. Parole was denied and petitioner filed for a writ of habeas corpus. The court held that the petitioner failed to receive adequate notice, a due process requirement.

State ex rel. Wooding v. Jarrett, 289 S.E.2d 203 (1982) (Per Curiam)

Due process rights apply to the subjective evaluations by the Board of Probation and Parole in determining whether the release of an offender is compatible with the best interests of society.

Applies standard set forth in Syl. pt. 4, *Tasker v. Mohn*, 267 S.E.2d 183 (W.Va. 1980).

Due process (continued)

State ex rel. Wooding v. Jarrett, (continued)

When appellant was not permitted to view her inmate file, a violation of the due process requirement that "an inmate is entitled to access to information in his record which will be used to determine whether he receives parole", and when there was no transcript of the hearing to facilitate judicial review, a further violation of due process requirements, the Court remanded the case for another hearing.

Tasker v. Mohn, 267 S.E.2d 183 (1980) (Harshbarger, J.)

Syl. pt. 2 - The notice element of due process requires that administrative boards follow their own rules and statutes.

Syl. pt. 3 - Release on parole is a substantial liberty interest and the procedures by which it is granted or denied must satisfy due process standards.

Syl. pt. 4 - Due process requires that parole release interview processes include the following minimum standards: (1) Each prospective parolee must be given timely and adequate notice of the date and hour of his parole release interview; (2) An inmate is entitled to access information in his record which will be used to determine whether he receives parole (absent overriding security considerations which must be recorded in his file); (3) Each inmate may personally appear before the parole board and give oral and documentary evidence; (4) A record, which is capable of being reduced to writing, must be made of each parole release interview to allow judicial review; and (5) Inmates to whom parole has been denied are entitled to written statements of the reasons for denial.

Notice must be given in time to allow the accused to prepare his case.

A parole interview is not an adversarial proceeding; therefore, it is not entitled to full "panoply" of procedural due process protections.

Due process (continued)

Tasker v. Mohn, (continued)

Though the parole board's decision to grant or deny parole is discretionary, it is to be based upon the prisoner's record and is to be reviewed by the Supreme Court only to determine whether the board "abused its discretion by acting in an arbitrary and capricious" manner. In response to petitioner's allegations that the board considered information which had been ordered expunged from his record when there was no transcript of the hearing to verify this allegation, the Supreme Court imposed two additional procedural requirements upon the parole release proceeding: that there be an accurate record of the parole release interview which is capable of being reduced to writing, and a written statement of reasons for denial of parole.

Eligibility for parole

State ex rel. Leach v. Hamilton, 280 S.E.2d 62 (1980) (Harshbarger, J.)

See JURY Mercy, (p. 545) for discussion of topic.

Tasker v. Mohn, 267 S.E.2d 183 (1980) (Harshbarger, J.)

A prisoner is eligible for parole when he has served the minimum term of his indeterminate sentence or one-third of his definite term sentence, is not under punishment or in solitary confinement for only infraction of prison rules, has maintained a good conduct record for at least three months prior to his parole release, and has satisfied the board that he will act lawfully when released, and his release is compatible with the best interests and welfare of society. The first three criteria are objective. A prisoner knows whether he has or has not met those criteria. The last factor involves subjective, discretionary evaluation by the board and due process rights, which attempt to limit benevolent, arbitrary or reckless decisions, apply. The Supreme Court held that the parole statute creates a legitimate reasonable expectation that parole will be granted.

Eligibility for parole (continued)

Factors to consider

Rowe v. Whyte, 280 S.E.2d 301 (1981) (McHugh, J.)

Reports relating to the prisoner's attitudes ,conduct, mental, psychological, health, work record, etc., are to be considered by the parole board in determining eligibility for parole. If, however, the reports are not applicable or not available, the consideration of the reports may be waived. When the record did not indicate waiver of these reports and the reports were disregarded, the focus being on negative aspects of the petitioner's criminal activity, the Supreme Court found that the board abused its discretion and acted arbitrarily in denying parole.

West Virginia Code § 62-12-13(a) indicates that the parole board may release a prisoner upon parole if it is shown to be in the best interests of the State and the prisoner. The statute also mandates that the board adopt and follow rules and regulations concerning the parole procedure.

West Virginia Code § 62-12-13(d) provides that the parole board, when considering a prisoner for release on parole, shall have an authentic copy of the prisoner's record and warden reports. These reports are to contain information concerning: (1) the prisoner's conduct record; (2) improvements or other changes in the prisoner's attitude, mental condition while in prison; (3) the nature of the work performed by the prisoner with recommendations for successful employment; and, (4) physical, mental, and psychological evaluations.

Where *W.Va. Code* provision § 62-12-13(d) required that other information besides prior criminal activity was to be considered by the parole board in making a parole determination and such other relevant information such as inmate's conduct, work record, and physical and mental status was disregarded, the Supreme Court determined that the parole board had not followed the mandates of § 62-12-13(d); therefore, a new hearing was granted.

Eligibility for parole (continued)

Factors to consider (continued)

State ex rel. Wooding v. Jarrett, 289 S.E.2d 203 (1982) (Per Curiam)

"The eligibility of a prisoner for parole consideration and certain factors to be considered by the West Virginia Board of Probation and Parole in determining the actual release of a prisoner upon parole are established by *W.Va. Code* 62-12-13." *Rowe v. White*, 280 S.E.2d 301 (W.Va. 1981).

W.Va. Code 62-12-13 provides that a prisoner may be paroled if he or she has (1) served the minimum term of his indeterminate sentence or one-third of his definite term sentence; (2) is not under punishment or in solitary confinement for any infraction of prison rules; (3) has maintained a good conduct record for at least three months prior to his parole release; and, (4) has satisfied the board that he or she will act lawfully when released, and his or her release is compatible with the best interests and welfare of society.

When the appellant had pled guilty to two counts of obtaining property by false pretenses through the use of forged checks and was sentenced to two concurrent one-to-five year prison terms with the recommendation that only the minimum one-year term be served, but upon completion of the one-year term, the Board of Probation and Parole denied parole giving as reasons the nature of the criminal offense, public sentiment, and the best interests of society, appellant filed a petition for a writ of habeas corpus premised on the allegation that the "[Board] had acted in an arbitrary and capricious manner in denying her parole" by failing to consider favorable information, *i.e.*, that appellant had had no previous criminal convictions and had never been cited for violating institutional rules or regulations during her prison term. The Supreme Court determined that *W.Va. Code* § 62-12-13 reflects a legislative intent to have the parole board consider both the positive and negative factors in making a parole determination. Since, in this case, it was unclear whether the Board had actually considered any positive information, the Court remanded the case to allow appellant another parole interview.

Eligibility for parole (continued)

Factors to consider (continued)

State ex rel. Wooding v. Jarrett, (continued)

When the Board of Probation and Parole relied upon pre-sentencing reports to determine community sentiment regarding the appellant's eligibility for parole and the report was limited to the views of the sentencing judge, prosecuting attorney, arresting officer, and probation officer, the Supreme Court found such investigation to be limited and not representative of the community and therefore, unable to support a denial of parole. In addition, the Court found that even if the report had been adequate the Board would not have been justified in denying the appellant's parole since only one of the population interviewed felt strongly that parole should be denied.

Tasker v. Mohn, 267 S.E.2d 183 (1980) (Harshbarger, J.)

Both legislative mandates and rules created by the Parole Board are to be considered in parole hearings.

W.Va. Code § 62-12-13(d) requires an authentic copy of the prisoner's current criminal record together with reports of the warden or superintendent of the penitentiary. These reports are to contain information on (1) the prisoner's conduct while in prison; (2) improvement in mental and moral condition of the prisoner; (3) prisoner's work record; and, (4) physical, mental, and psychiatric exams. The board may waive the requirement of any report if it is found to be inapplicable or unavailable. This waiver, however, must be a matter of record.

Who determines

Rowe v. W.Va. Dept. of Corrections, 292 S.E.2d 650 (1982) (Miller, C.J.)

Syl. pt. 1 - *W.Va. Code*, 62-12-2(d) (1965), expressly states that the final determination as to release of prisoners on parole is vested in the Board of Probation and Parole. This provision reinforces the language in *W.Va. Code*, 62-12-13, relating to the authority of the Board to grant parole.

Eligibility for parole (continued)

Who determines (continued)

Rowe v. W.Va. Dept. of Corrections, (continued)

Syl. pt. 2 - The Parole Board's regulation, by requiring the Commissioner of Corrections' approval of the parolee's release plan as a condition subsequent to obtaining release on parole, has in effect delegated the ultimate decision as to release on parole to the Commissioner of Corrections.

This delegation is contrary to statute.

Syl. pt. 3 - It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

The legislature clearly manifested an intent to vest the Board with exclusive authority to determine whether to release a prisoner on parole.

"An administrative agency's rules and regulations must also be reasonable and conform to the laws enacted by the Legislature."

To comply with *W.Va. Code* §§ 62-12-13 and 62-13-2(d) the Board could revise its parole release regulation and require the parole release plan approved by the Commission in advance, to be submitted to the Board at the time it decides whether to grant parole; or the Board could grant conditional parole based on an acceptable release plan which would be subject to the approval of the Commissioner of Corrections. In either case, the ultimate decision and final release date must be determined by the Board.

Petitioner who was granted parole by the Board of Parole but remained incarcerated when his proposed plans for release were unacceptable to the Commissioner of Corrections sought writ of habeas corpus challenging the validity of the Parole Board's regulation that conditioned release upon a release plan acceptable to the Commissioner. The Supreme Court held the regulation to be invalid since exclusive authority vests in the Parole Board, not the Commissioner.

PAROLE

Fifth amendment protection

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

See SELF-INCRIMINATION Parole revocation hearing privilege protection, (p. 832) for discussion of topic.

Good time credit

Adkins v. Bordenkircher, 262 S.E.2d 885 (1980) (Miller, J.)

See GOOD TIME/REDUCTION OF SENTENCE *Ex post facto*, (p. 333) for discussion of topic.

Habeas corpus review

Tasker v. Mohn, 267 S.E.2d 183 (1980) (Harshbarger, J.)

Habeas corpus review of parole hearings is available only when a prisoner alleges specific facts that tend to prove abuse of discretion or other due process deprivations.

Homicide

Recommendation of mercy

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

See INSTRUCTIONS Eligibility for parole, (p. 509) for discussion of topic.

PATERNITY

In general

State ex rel. J.L.K. v. R.A.I., 294 S.E.2d 142 (1982) (McHugh, J.)

Syl. pt. - A woman, who conceived a child while she was married, but gave birth to the child while she was unmarried, may not obtain a warrant, pursuant to *W.Va. Code*, 48-7-1 (1969), accusing a person other than her former husband of being the father of the child if she has not lived separate and apart from her former husband for a space of one year or more prior to the birth of the child.

In West Virginia a child either born or conceived during marriage is a legitimate child. This, however, is a presumption which may be rebutted if the nonaccess of the husband is clearly proved.

West Virginia Code 48-7-1 protects the interests of the child in statutorily deeming the child legitimate. This is to provide the child with a legal father without the uncertainty of proceedings to establish paternity.

The purpose of the *W.Va. Code* 48-7-1 one-year separation requirement is to prevent an illegitimate child from becoming a charge upon the State, thus in balancing the state's interest together with the child's interests against the interests of others involved, the legislature had a rational basis for and did not act arbitrarily in its enactment of 48-7-1.

W.Va. Code, 48-7-1 presumes that a child born within the one-year separation period is legitimate, thus entitled to support from the man to whom the mother is married. Since the statute does not prohibit a married woman from filing a paternity suit in all instances and since it does not deny the child support, it does not violate the child's constitutional rights.

A child's classification as legitimate or illegitimate should not be based solely on the woman's marital status at the time of the birth of the child.

Custody

J.M.S. v. H.A., 242 S.E.2d 696 (1978) (Caplan, C.J.)

The right of parents to custody has been legislatively recognized.

Custody (continued)

J.M.S. v. H.A., (continued)

Case law establishes that in custody cases fathers of illegitimate children must be treated as any parents with respect to parental rights; thus the right to custody be denied unless the parent is proven unfit.

Expenses

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

Syl. pt. 2 - Indigent paternity defendants who move the court to order blood grouping tests under *W.Va. Code* 48-7-8, are entitled to have the expense borne by the State.

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 2, *State ex rel. Graves v. Daugherty*, 266 S.E.2d 142 (W.Va. 1980), cited above.

Instructions

State ex rel. Toryak v. Spangnuolo, 292 S.E.2d 654 (1982) (Miller, J.)

In a bastardy proceeding the defendant is entitled to an instruction of proof of his paternity beyond a reasonable doubt and the failure to give such instruction is reversible error.

Right to counsel

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

Syl. pt. 1 - Due process requires that an indigent defendant charged with paternity of an illegitimate child under *W.Va. Code* 48-7-1, et. *seq. be* provided court-appointed counsel.

PATERNITY

Right to counsel (continued)

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

Due process requires that an indigent defendant charged with paternity be provided court-appointed counsel.

Standard of proof

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

Proof beyond a reasonable doubt is required in paternity suits.

State ex rel. Toryak v. Spangnuolo, 292 S.E.2d 654 (1982) (Miller, J.)

Syl. pt. - In a proceeding upon a bastardy charge under *W.Va. Code*, 48-7-1 *et. seq.*, the paternity of the child, if contested, is an essential element of the charge, and must be proved beyond a reasonable doubt.

A paternity issue, in a bastardy proceeding under *W.Va. Code*, 48-7-1 *et. seq.* is identical to the paternity issue on a criminal nonsupport charge of an illegitimate child under *W.Va. Code* 48-8-1 *et. seq*.

The Supreme Court has recognized the criminal implications of both bastardy proceedings, *State ex rel. Graves v. Daugherty*, 266 S.E.2d 142 (W.Va. 1980), and proceedings charging criminal nonsupport of an illegitimate child, *State v. Clay*, 236 S.E.2d 230 (W.Va. 1977). In *Clay* the court indicated that paternity, if contested, was an essential element of the crime and, as such, must be proved beyond a reasonable doubt. The fact that the paternity issue in bastardy proceedings is identical to the paternity issue in nonsupport proceedings, together with the recognition that both proceedings have criminal implications, make proof of paternity beyond a reasonable doubt the appropriate standard in both proceedings.

PATERNITY

Statute of limitations

Constitutionality

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

The arbitrary imposition of a three-year statute of limitations for determining paternity as established in *W.Va. Code* § 48-7-1 (1969) violates the equal protection clause of both West Virginia and United States Constitutions since it creates classes "based upon certain immutable human characteristics which bear no substantial relationship to a permissible state interest."

Visitation

In general

J.M.S. v. H.A., 242 S.E.2d 696 (1978) (Caplan, C.J.)

A court, in determining a father's right to visitation of a child, legitimate or illegitimate, is charged with giving paramount consideration to the welfare of the child involved.

To deprive a parent of visitation rights without a hearing would constitute a denial of due process and equal protection under our State and Federal Constitutions.

Jurisdiction

J.M.S. v. H.A., 242 S.E.2d 696 (1978) (Caplan, C.J.)

Syl. pt. - A circuit court has jurisdiction to award or deny visitation rights to a father of an illegitimate child.

The presence of the child, together with jurisdiction over the persons seeking custody is sufficient basis to allow the court to award custody.

PLEA BARGAINING

See related topic - GUILTY PLEAS, (p. 337).

In general

Brooks v. Narick, 243 S.E.2d 841 (1978) (Harshbarger, J.)

An elementary principle of our criminal law is that when an agreement between a prosecuting attorney and a defendant has been entered into and approved by the court, the agreement should ordinarily be upheld if the accused has fulfilled his part of the agreement.

Gibson v. McKenzie, 259 S.E.2d 616 (1979) (Per Curiam)

Where the evidence not only at the time the plea was entered but at the habeas corpus hearing supports the conclusion that no plea bargain existed, the conclusion that there was any sort of plea bargain that induced the guilty plea is not warranted.

Breach of agreement

Brooks v. Narick, 243 S.E.2d 841 (1978) (Harshbarger, J.)

Where defendant agreed to plead guilty, go to Huttonsville for evaluation and diagnostic study and pay court costs, and State agreed to drop all other charges pending against him and recommend probation if report was favorable, but if report was unfavorable, State would recommend that court take whatever action it deemed appropriate, plea bargain agreement was breached when report was neither favorable or unfavorable and assistant prosecutor affirmatively opposed probation.

State v. Lane, 285 S.E.2d 138 (1981) (Per Curiam)

Any error that may have resulted from the prosecuting attorney's not reiterating his plea bargain recommendations at the sentencing hearing, and any prejudice that may have resulted from appellant's original counsel's not being able to attend the sentencing hearing was cured when the court held a hearing to reconsider the sentence.

PLEA BARGAINING

Court's failure to accept

State ex rel. Roark v. Casey, 286 S.E.2d 702 (1982) (Neely, J.)

It is entirely consistent with our plea bargaining process that the parties be informed of the judge's reasons for rejecting a preferred agreement.

Juveniles

State ex rel. Washington v. Taylor, 273 S.E.2d 84 (1980) (Neely, C.J.)

See JUVENILE Confessions, Superintendent's recommendation for different placement, (p. 570) for discussion of topic.

Negotiations

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

Syl. pt. 2 - Where a defendant enters a plea bargain arrangement whereby he agrees not to appeal conviction of a previous charge to which he has never admitted guilt, but has been convicted by jury verdict, the defendant should not be deemed to have irrevocably waived his right to appeal. However, if the defendant chooses to disregard the agreement and file a timely appeal, the State should not be held to the bargain and, at its option, may seek resentencing on all other convictions involved in the agreement or reinstitute any charges dismissed pursuant to the plea bargain and proceed to trial thereon.

State ex rel. Roark v. Casey, 286 S.E.2d 702 (1982) (Neely, J.)

Syl. pt. - Under Rule 11(e)(1) of the *West Virginia rules of Criminal Procedure*, a trial court may not issue an order dictating the terms under which a prosecutor may enter a plea bargain with a specific defendant.

Negotiations (continued)

State ex rel. Roark v. Casey, (continued)

When the prosecutor entered into a plea bargain whereby a juvenile agreed to testify against codefendant's in exchange for the prosecutor's assurance that he would not seek transfer to adult jurisdiction and the judge, upon motion by the counsel for codefendant, refused to allow the bargain unless the juvenile agreed to an interview with codefendant's attorneys regarding his testimony, the Supreme Court determined that the judge was injecting his presence into the plea bargaining discussion, which is in contravention of the rule forbidding a judge's participation in such discussions.

When the judge attempted to enforce terms that neither party favored, his participation in the plea bargain exceeded the minimal level of participation implicit in any rejection or series of rejections of plea bargaining agreements.

State v. Cox, 253 S.E.2d 517 (1979) (McGraw, J.)

Syl. pt. - Law enforcement officers do not have authority to promise that in exchange for information a defendant will not be prosecuted for the commission of a crime and such a promise is generally unenforceable.

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

Mere negotiations cannot be transformed into a consummated agreement merely by an exercise of the defendant's imagination.

Though there is no requirement that the plea bargain agreement be written, substantial evidence that the bargain was consummated, not merely discussed, is required.

PLEA BARGAINING

Specific performance

Brooks v. Narick, 243 S.E.2d 841 (1978) (Harshbarger, J.)

Syl. pt. 1 - When a court cannot restore a defendant to his position before a plea bargain was performed by him and breached by the state, he is entitled to specific performance of the bargain by the state.

Syl. pt. 2 - Where a defendant, having performed his part of a plea bargain is coerced by the government's violation of the bargain into withdrawing his guilty plea, he has the option of standing trial on the not guilty plea and suffering whatever other consequences may result from his being in the original position, or reinstating his guilty plea and requiring specific performance by the government of the bargain.

Where defendant entered a plea bargaining arrangement whereby he agreed to (1) plead guilty; (2) go to Huttonsville Correctional Center for a sixty day evaluation and diagnostic study; (3) begin his confinement on July 12, 1976, and (4) pay court costs of $656.90 in exchange for dismissal of all other charges pending, and the defendant actually performed his part of the bargain, he was entitled to choose between withdrawal of his guilty plea and specific performance of the plea bargain.

State ex rel. Gray v. McClure, 242 S.E.2d 704 (1978) (McGraw, J.)

Syl. pt. - A prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon.

If the defendant has entered a guilty plea or has in some other way acted to his detriment in reliance upon a plea bargaining arrangement, the State is bound to honor the arrangement; however, if the defendant has not yet acted to his detriment, the State is not bound to the terms of an inchoate plea agreement.

Where the record did not indicate that the defendant had pled guilty or otherwise relied to his substantial detriment upon a plea agreement, the State was not bound to execute the agreement; but the defendant was entitled to a hearing at which proof of such detrimental reliance could be presented.

Specific performance (continued)

State v. Conley, 285 S.E.2d 454 (1981) (Per Curiam)

When a court cannot restore a defendant to his position before a plea bargain was performed by him and breached by the State, he is entitled to specific performance of the bargain by the State, but where there is no breach of the plea bargain by the State, specific performance is inappropriate.

State v. Cox, 253 S.E.2d 517 (1979) (McGraw, J.)

Applies standard set forth in syl. pt. 1, *State v. Wayne*, 245 S.E.2d 838, 841 (1978), cited below.

Where the record indicated that the defendant had previously made a statement to a city police officer implicating other persons in the commission of a crime; where the information was provided before any promise of immunity was made; where the police officer had no authority to make a plea bargain agreement; where there was no valid contract making the plea bargaining agreement enforceable; and where defendant had testified that thee had been no agreements made which induced him to plead guilty, defendant failed to meet his burden of demonstrating that he had relied to his detriment on the promise made by the police officer.

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

Syl. pt. 1 - Specific performance of a plea bargain is an available remedy only when the party seeking it demonstrates that he has relied on the agreement to his detriment and cannot be restored to the position he held before the agreement.

Though there is no requirement that the plea bargain agreement be written, substantial evidence that the bargain was consummated, not merely discussed, is required; and when the record showed no development of the facts of the plea bargain, and the defendant gave no indication of detrimental reliance, the trial court did not err in refusing to enforce the agreement.

Specific performance (continued)

State v. Wayne, (continued)

When defendant was convicted of first-degree murder based upon the felony murder statute, *W.Va. Code* § 61-2-1 (1923), after the prosecuting attorney withdrew his alleged offer to accept a plea to second-degree murder, the defendant was not entitled to specific performance since there was more of a discussion of a plea than an actual agreement.

Unfulfillable element

Spencer v. Whyte, 280 S.E.2d 591 (1981) (Miller, J.)

Applies standard set forth in Syl. pt. 1, *State ex rel. Morris v. Mohn*, 267 S.E.2d 443 (W.Va. 1980).

When the plea bargain agreement specified that as a condition of probation the petitioner would serve a one-year sentence in the county jail and a one-to-five year sentence at the penitentiary in exchange for the suspension of a five-to-eighteen, the court concluded that the condition of probation contained an unfulfillable element and that the illegal plea bargain agreement must be set aside and the sentence based upon the guilty plea voided.

State ex rel. Morris v. Mohn, 267 S.E.2d 443 (1980) (Miller, J.)

Syl. pt. 1 - "A recognized corollary to the principle that a guilty plea must be shown to have been intelligently and voluntarily entered is the rule that if the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand."

Syl. pt. 2 - The federal parole revocation law militates against concurrency of sentence and ordinarily prevents the performance of a state commitment made in a plea bargain agreement which provides that the state sentence will run concurrently with the underlying federal sentence upon which the defendant was paroled.

Unfulfillable element (continued)

State ex rel. Morris v. Mohn, (continued)

Syl. pt. 3 - A guilty plea entered pursuant to a plea bargain which promises a concurrent sentence must be set aside where the promise of concurrence is not fulfilled.

If a guilty plea is based on a plea bargain which is unfulfillable, the guilty plea cannot stand even though the breach of the plea bargain agreement was inadvertent.

When defendant was still subject to completion of a federal sentence because his State armed robbery conviction was a violation of his federal parole and where federal law precluded concurrency of State and federal sentencing, the guilty plea and subsequent conviction based upon a specific plea bargain agreement that a ten year sentence would run concurrently with a federal sentence were void since the plea bargain agreement was impossible to fulfill by the State.

Courts have recognized that concurrence of sentence is a valuable agreement which, if not performed as promised, results in the guilty plea and conviction being set aside.

Withdrawal of plea

See GUILTY PLEAS Withdrawal of plea, (p. 346) for discussion of topic.

State v. Conley, 285 S.E.2d 454 (1981) (Per Curiam)

See GUILTY PLEAS Withdrawal of plea, (p. 346) for discussion of topic.

State v. Olish, 266 S.E.2d 134 (1980) (Miller, J.)

See GUILTY PLEAS Withdrawal of plea, (p. 347) for discussion of topic.

PRE-INDICTMENT DELAY

In general

State ex rel. Leonard v. Hey, 269 S.E.2d 394 (1980) (Harshbarger, J.)

Syl. pt. 1 - A delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of the law, *U.S. Const.* Amend. XIV, and *W.Va. Const.* Art. 3 § 10. The presumption is rebuttable by the government.

Claims of denial of constitutional speedy trial rights do not arise until a defendant is arrested or indicted. Pre-arrest or pre-accusatory delays are usually governed by statutes of limitations, but even if there are such statutes, a defendant's due process rights can be violated by a prosecution initiated within the statute but unjustifiably delayed by the government.

"[T]he due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional delay device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

When determining the legitimacy of governmental delay the issue becomes whether it might reasonably have been avoided. The importance of the reason for the delay, the length of the delay, and the potential prejudicial effects of the delay are important considerations in determining whether the governmental delay was unnecessary.

When the defendant had been convicted of murder and sentenced for life without mercy in 1968 and this sentence later was changed to life with mercy, thereby making the defendant eligible for parole in 1979; but the defendant, in 1979, was indicted for malicious wounding which occurred during the murder episode of 1967, the Supreme Court held that there was "*prima facie* prejudice" to the defendant and that his constitutional right to due process of law had been violated since eleven years between the connection of the defendant with the crime and his formal accusation was an unreasonable delay. The case was remanded with the burden on the state to justify the delay.

In general (continued)

State v. Ayers, 282 S.E.2d 876 (1981) (Neely, J.)

When appellant's indictment came four months after the commission of the crime, appellant was not prejudiced by the delay and his conviction for delivery of a controlled substance was affirmed.

Whether pre-indictment delay has caused prejudice is a question to be addressed to the trial court's discretion.

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

The effects of a delay upon a defendant's due process rights must be determined by weighing the reasons for delay against the impact of the delay upon the defendant's ability to defend himself. Defendant was charged three months after committing the act. One of the witnesses, however, had died in the meantime. In view of the reasonableness of the delay to prevent exposure of informants and to conduct a chemical analysis of the drug, the death of the witness should not work against the State.

PRELIMINARY HEARING

Right to counsel

State v. Bradley, 260 S.E.2d 830 (1979) (Neely, J.)

Ever since the preliminary hearing was established as a critical stage in a criminal proceeding, right to counsel has been mandatory at that stage. The requirement is, however, subject to the harmless error test.

Where the only purpose for the preliminary hearing was to inform defendant of his rights and to inform him regarding bond, but no witnesses were present who should have been subject to cross examination, the State presented no information, and there was no discussion of psychiatric examination, absence of defendant's counsel at the preliminary hearing was harmless error.

Introduction of an inculpatory statement made by defendant at preliminary hearing at which he had no counsel was harmless error since confession contained the same information.

State v. Stout, 285 S.E.2d 892 (1982) (Neely, J.)

Syl. pt. - "A preliminary hearing, when accorded an accused by a justice of the peace pursuant to *Code*, 1931, 62-1-8, as amended, is a critical stage in a criminal proceeding to which the right to counsel, guaranteed by the Sixth Amendment to the Constitution of the United States, attaches and a denial of counsel in those circumstances constitutes error for which a defendant is entitled to relief, unless it is clear beyond a reasonable doubt that the denial of counsel was harmless error." Syl. pt. 3, *Spaulding v. Warden, West Virginia State Penitentiary*, 212 S.E.2d 619 (W.Va. 1975).

Since the appellant had a constitutional right to counsel during his preliminary hearing, holding that hearing in the absence of counsel was error. The Supreme Court remanded for further proceedings to determine whether the absence of counsel at the preliminary hearing was harmless error. If the lower court should find that the error was not harmless and that the disadvantage which the appellant suffered could be corrected, the appellant would be awarded a new trial.

Right to counsel (continued)

State v. Stout, (continued)

Supreme Court noted that should the lower court find that presence of counsel would have aided discovery, that shortcoming was corrected by the appellant's subsequent discovery motions.

Right to preliminary hearing

See PROBATION Revocation, Preliminary hearing, (p. 713) for discussion of topic.

Gibson v. McKenzie, 259 S.E.2d 616 (1979) (Per Curiam)

While the right to a preliminary hearing is statutorily mandated by *W.Va. Code* §62-1-8, the Supreme Court has never held the failure to hold a preliminary hearing to be a constitutional violation.

State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (1980) (Miller, J.)

Syl. pt. 1 - A preliminary hearing in a criminal case is not constitutionally required.

"Where an indictment for felony is found, the accused is not entitled to a preliminary examination before a justice before trial." Syl. pt. 1, *State v. Mooney*, 49 W.Va. 712, 39 S.E. 657 (1901).

Where the State proceeds under *W.Va. Code* § 62-1-1, *et. seq.*, to arrest the accused for an offense which must be brought before the grand jury, the defendant is entitled to a preliminary hearing under *W.Va. Code* § 62-1-8 (1965). If, however, the State elects to indict him without a preliminary hearing or before one can be held, the preliminary hearing is not required."

Right to preliminary hearing (continued)

State ex rel. Rowe v. Ferguson, (continued)

Syl. pt. 5 - If a preliminary hearing has not been held within a reasonable time following the defendant's arrest on an offense which must be brought to the grand jury, he is entitled to enforce his statutory right to a preliminary hearing under *W.Va. Code* 62-1-8 (1965), by mandamus proceeding in the circuit court against the committing magistrate court.

When the magistrate had previously scheduled a preliminary hearing, but canceled it after defendant was indicted by a grand jury, the defendant did not have the right to a preliminary hearing.

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

Defendant contends he was denied effective discovery because seven months passed between arrest and indictment without a preliminary hearing. It is troubling that the defendant's right to a hearing after arrest and before indictment was so flagrantly disregarded; however, the cure for that is a writ of mandamus before indictment and not reversal after conviction. *State ex rel. Rowe v. Ferguson*, 268 S.E.2d 45 (W.Va. 1980).

PRISON CONDITIONS

In general

Risler et al. v. Giardina, 289 S.E.2d 180 (1982) (Neely, J.)

"Ordinarily an action under 42 U.S.C.A. § 1983 is appropriate where complaint is made to the conditions of confinement and not its duration." Syl. pt. 1, *Mitchem v. Melton*, 277 S.E.2d 895 (W.Va. 1981).

"An action based on 42 U.S.C.A. § 1983 can be maintained in our State courts to challenge prison conditions." Syl. pt. 2, *Mitchem v. Melton*, 277 S.E.2d 895 (W.Va. 1981).

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

When warden had done nothing to implement the provisions of *W.Va. Code* § 28-5-28, which related to commutation of a sentence for good behavior, the Court determined that the Code provision was mandatory and the inmates had the right to have the classification and good time credit system implemented.

Access to clients

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

Quoting from *Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941), and a subsequent reference in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), the Court states: "[I]mates must have reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."

When visiting hours were limited and attorney was denied access to his client due to prison regulations which severely restricted the hours that attorney's could visit their client inmates, the attorney sought and was awarded a writ of mandamus compelling the prison to expand the visiting hours and to modify the schedule for attorneys who found it necessary to confer with clients outside these regular visiting hours.

PRISON CONDITIONS

Class actions - mootness

Risler et al. v. Giardina, 289 S.E.2d 180 (1982) (Neely, J.)

Syl. pt. 3 - A class action will not be rendered, even though the named petitioners' status changes or they lose their stake in the outcome of the litigation, if the issue is capable of repetition and yet will evade review of petitioners' change in status.

Where petitioners filed a class action suit for relief under 42 U.S.C.A. § 1983, but at the time of the hearing none of the original petitioners were still confined in the county jail (except one who withdrew from the suit upon the prosecuting attorney's promise not to retry him for breaking and entering), the Court concluded that the conditions of the county jail would continue to affect other prisoners in the future; therefore, this case belonged to a class of cases where "an action will not be mooted merely because the named representatives have been released from jail or have otherwise lost their status."

Closing the prison

DeVault v. Nicholson, 296 S.E.2d 682 (1982) (Neely, J.)

Syl. pt. - Where a women's prison has been created by a legislative act, *W.Va. Code*, 28-5C-1 (1947) *et. seq.*, a legislative act is required to close it.

When the Department of corrections announced its intention to close the State Women's Prison and to transfer inmates to the Federal Correctional Institution, inmates sought a mandamus to compel the commissioner to bring the facility into compliance with constitutional and statutory standards set forth in *Cooper v. Gwinn*, (No. 15153, December 18, 1981), and to prevent the closing, the Supreme Court awarded the writ and held that the Commissioner of Corrections was not authorized to close the West Virginia State Prison in the absence of a statute authorizing him to close it.

The word "*shall* in both *W.Va. Code* 25-1-3 (1977) and *W.Va.. Code* 28-5C-2 (1947) is mandatory; thus the Department of Corrections has a mandatory duty to operate the Women's Prison.

PRISON CONDITIONS

Cruel and unusual punishment

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

A single spontaneous attack by a guard may simply be a common law tort, but continuing conduct subjecting prisoners to physical abuse which is unreasonable and excessive can violate the eighth amendment.

The use of physical force to stop a riot may be necessary; however, the use of physical force absent an existing riot is cruel and unusual punishment prohibited by the *W.Va. Const.*, art. III, § 5 as expressed in *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W.Va. 1978).

When inmates were subjected to continuous physical and verbal abuse, gouging, beating, harassment, shoving, tear gas, being dragged by the hair, confinement, coercion, and deprivation of proper dietary needs, medication, mail, and all normal privileges over an extended period of time and were forced to run over glass through gauntlets of guards, to watch destruction of personal property, and to behave as pigs or dogs following a riot, the Supreme Court determined that this continuous abuse was cruel and unusual punishment shocking to the conscience and offensive to the sensibilities in violation of the eighth amendment.

When supervisory personnel were aware of beatings and other physical, psychological and verbal abuse to inmates and should have known that such treatment had previously been determined to be cruel and unusual punishment, it was extraordinary dereliction on the part of the prison administration to either allow such a continuous curse of brutality or to be ignorant that it was happening. This extraordinary dereliction fits the *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977) test; inmates therefore are entitled to redress.

State ex rel. Harper v. Zegeer, 296 S.E.2d 873 (1982) (Harshbarger, J.)

Syl. pt. 3 - A jail is evaluated by a "totality of circumstances" test to determine if incarceration in that jail is cruel and unusual punishment.

Cruel and unusual punishment (continued)

State ex rel. K.W. v. Werner, 242 S.E.2d 907 (1978) (Harshbarger, J.)

Syl. pt. 2 - Institutionalization of juveniles found guilty of delinquency because of criminal acts is not *per se* cruel and unusual punishment or a denial of equal protection of the law.

Syl. pt. 3 - Punitive practices such as "bench time", "floor time", solitary confinement, beating, slapping, kicking or otherwise physically abusing juveniles incarcerated at the State Industrial School for Boys at Pruntytown is cruel and unusual punishment forbidden by the state constitution, and every person subjected to any of them absent exigent circumstances, shall be entitled to redress. *W.Va. Constitution*, Article III, § 5.

Practices such as "bench time", "floor time", solitary confinement, beating, slapping, kicking, etc., are considered to be cruel and unusual punishment except where "riotous conditions endangering other persons may require measures to subdue those who may reasonably be expected to hurt themselves or others.

The failure to administer proper psychological testing or other screening procedures to eliminate potential staff members unqualified to treat juvenile offenders is a violation of the eighteenth amendment. When Pruntytown had no such program for detection of those psychologically unfit to be correctional officers and when the Court determined that after-the-fact dismissal of brutal staff persons was an inadequate way to "cull unfit staff persons", the Court recommended "pre-hiring and periodic psychological testing or other screening techniques of the keepers to identify those who may be unable to restrain violent impulses.

When juvenile inmates were confined in small, windowless cells, were required to do "floor time" and "bench time", and were "maced" frequently, the Court held that this was cruel and unusual punishment and that those subjected to such punishment were entitled to redress.

PRISON CONDITIONS

Remedy

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

Habeas corpus is one means for challenging abuses within the prison system, and equitable principles are applicable.

Habeas corpus proceedings based upon cruel and unusual punishment do not usually involve an unconditional release from confinement, but discharge is an available remedy when the state is guilty of extraordinary dereliction.

Syl. pt. 4 - A person brutalized by State agents while in jail or prison may be entitled to: a) a reduction in the extent of his confinement or his time of confinement; b) injunctive relief and subsequent enforcement by contempt proceedings, including but not limited to, prohibiting the use of physical force as punishment, requiring psychological testing of guards and ordering guards discharged if at a hearing they are proved to have abused inmates; c) a federal cause of action authorized by 42 U.S.C.A. § 1983; and, d) a civil action in tort.

When prisoners were subjected to cruel and unusual punishment in violation of their eighth amendment rights, and in an original habeas corpus proceeding requested unconditional release, the Court recognized this as a viable remedy, yet, refused to carry that remedy to its full extent and instead devised a compromise plan whereby the lessening of restrictions was "tailor-made" to fit each individual case.

When inmates at Huttonsville Correctional Center were subjected to cruel and unusual punishment following a Labor Day weekend riot, and the State was found to be guilty of extraordinary dereliction following previous incidents involving brutality with concomitant warnings and admonitions by the Court, the prisoners were entitled to a reduction in the degree of their restrictions, which in some cases, could have resulted in release of the victim – though, in this case, not unconditional, the Department of Corrections was instructed to provide a plan to reduce restraints tailor-made to fit each individual's status. The court indicated that, where appropriate, release on parole, or reduction in length of sentences and transfer to less restrictive facilities or programs were proper remedies. Psychological testing of correctional officers was mandated.

Remedy (continued)

State ex rel. K.W. v. Werner, 242 S.E.2d 907 (1978) (Harshbarger, J.)

"Habeas corpus lies to secure relief from conditions of imprisonment which constitutes 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 States." Syl. pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972).

Disciplinary hearings

Fisher v. Whyte, 239 S.E.2d 133 (1978) (Neely, J.)

W.Va. Code § 28-5-28 (1977), which provides for disciplinary committee to hear appeals from prisoners removed from overtime job assignments because of misconduct and recommend to the warden what portion of accrued commutation of time should be forfeited when charges of misconduct are sustained, does not require that such committee determine guilt or innocence of misconduct charged. Thus, disciplinary committee which was properly constituted under prison's rules and regulations could determine prisoner's guilt or innocence of charge of misconduct.

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

See DUE PROCESS Disciplinary hearings, (p. 233) for discussion of topic.

Syl. pt. 2 - A disciplinary committee should be neutral and detached, and should not have any member with personal knowledge of the incidents charged.

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

Syl. pt. - Ordinarily no prisoner may be confined in administrative segregation more than once or for more than three days for investigation into each charge of misconduct. Syl. pt. 5, *Tasker v. Griffith*, 238 S.E.2d 229 (W.Va. 1977).

Disciplinary hearings (continued)

Keenan v. Bordenkircher, (continued)

Where fifteen inmates had escaped from a maximum security penitentiary, a hostage had been taken, an off-duty State Police trooper was murdered during the escape, a shakedown of the prison occurred and rules and regulations of the prison were suspended by the Governor, the Supreme Court held that these extraordinary circumstances under which the principles of *Tasker* need not apply; therefore, holding appellant in administrative segregation fifty-five days before a disciplinary hearing was held was not unreasonable.

Assistance of counsel

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

Although *Harrah v. Leverette*, 271 S.E.2d 322 (W.Va. 1980) held that the presence of a government prosecutor at a disciplinary hearing entitles an inmate to counsel, and Assistant Attorney General's presence at the penitentiary in the months following a mass escape but not present at the appellant's disciplinary hearing did not entitle the appellant to be represented by counsel.

Disciplinary measures

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

Syl. pt. 3 - Article III, § 5 of the West Virginia Constitution, prohibits state prison administrators and correctional officers from using physical force on inmates, absent imminent and present danger of harm to others, themselves or state property.

Disciplinary measures (continued)

Proportionality

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

When appellant was found guilty of participating in a mass escape he was sentenced to ten years in administrative segregation with the last three years on probation. Though his sentence was subsequently reduced, it was done so upon the condition that the appellant remain on good behavior or the entire seven year sentence would be reimposed. The Supreme Court found that the lengthy sentence to a punitive segregation was disproportionate even though the sentence was conditionally suspended. The Court, thus, voided the remainder of the appellant's sentence.

Fundamental rights

Cooper v. Gwinn, (No. 15153, December 18, 1981) (McGraw, J.)

Right to the benefit of the law is a fundamental right guaranteed by both the West Virginia Constitution and the inherent nature of the republican form of government. "[C]onvicted prisoners do not forfeit the fundamental protections of the Constitution by reason of their conviction and confinement."

West Virginia Code § 62-13-1 and 62-13-4 require that persons institutionalized for crime be afforded rehabilitative treatment by establishing a system of prisoner classification, by establishing educational programs and supervisory treatment programs. Since this is West Virginia Code Sections 62-13-1 and 62-13-4, the Court concluded that the petitioners were entitled to the writ requiring the Commissioner of Corrections to comply with the statutory mandate.

Fundamental rights (continued)

Cooper v. Gwinn, (continued)

When petitioners alleged that they did not have access to meaningful college courses, were denied daily outdoor exercises, and did not have a meaningful work release program and the record indicated that the educational program was clearly inadequate to meet the needs of high school graduates or those interested in vocational training, the court concluded that "the Commissioner of Corrections has not fulfilled his constitutional duty to faithfully execute the pertinent status requiring the establishment and maintenance of programs of classification, education, and treatment 'to the end that persons committed to institutions of the State for crime of delinquency shall be afforded individual and group treatment to reestablish their ability to live peaceably . . . .' *W.Va. Code* § 62-13-1, and that his plea of lack of funds is an insufficient justification for the failure to institute such programs."

West Virginia statutes require "just, humane, and efficient" programs of rehabilitation in state prisons, with § 62-13-4 specifically requiring the establishment of "programs of classification, education, and treatment." Since the Pence Springs programs were inadequate, the Court adopted the definitions set out in *Standards for Adult Correctional Institutions*, 2ed. 1981, American Correctional Association.

Hunger strike - force feeding

State ex rel. White v. Narick, 292 S.E.2d 54 (1982) (Harshbarger, J.)

A prisoner is not entitled to all constitutional rights since the nature and requirements of custody allow a state to impose limitations on those rights.

Syl. pt. 1 - A prisoner's right to privacy must be balanced against several state interests in keeping him alive: preservation of life and its converse, prevention of suicide; protection of interests of innocent third parties; and maintenance of medical ethical integrity.

Syl. pt. 2 - A prisoner's constitutional rights can be restricted or abridged when they substantially interfere with orderly prison administration.

Hunger strike - force feeding (continued)

State ex rel. White v. Narick, (continued)

Syl. pt. 3 - This State will not permit prisoners in its custody to die from fasting.

Prisoner, fasting to protest prison conditions, sought writ of prohibition to prevent force feeding. Though this prisoner subsequently ended the hunger strike voluntarily, the Supreme Court decided the issue for future reference. Writ was denied

Psychological testing of correctional officers

Harrah v. Leverette, 271 S.E.2d 322 (1980) (Harshbarger, J.)

Since The court's suggested program, whereby correctional officers would undergo psychological testing, *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W.Va. 1978), was not implemented, this court, following its determination that incidents of physical, verbal, and psychological abuse at Huttonsville were cruel and unusual punishment in violation of prisoners' 8th Amendment rights, required such psychological testing of all correctional officers both before employment and periodically throughout their employment. Those found psychologically unfit for the position would be discharged.

Right to privacy

State ex rel. White v. Narick, 292 S.E.2d 54 (1982) (Harshbarger, J.)

See PRISON CONDITIONS Hunger strike - force feeding, (p. 694) for discussion of topic.

PRISON CONDITIONS

Search of attorney's

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

Syl. pt. - Because of our constitutional and statutory obligations placed on attorney's in regard to representation of prison inmates, in order to justify a prison regulation requiring a physical search of their person and briefcases upon entering a prison, the State must show some factual basis that would warrant the conclusion that attorney's have created some type of security or discipline problem with regard to the inmates.

Though regulations requiring the search of most visitors are imperative to insure prison security, these regulations, when applied to attorney's who have a mandatory duty, once appointed, to represent indigent inmates effectively, and who are subject to professional sanctions for violations of moral or ethical conduct, are not justified unless attorney's have created security problems. When an attorney refused to undergo the search, he was denied entrance to the prison thereby denying the prisoner his right of access to the courts (*W.Va. Const.*, art. III, § 17) which, according to the court, can be utilized effectively only by the assistance of attorney's.

When the State failed to establish by a preponderance of the evidence that attorney's represented threats to security, no justification was found for a warrantless search prior to prison entry. The regulation requiring such search of attorney's was held to be invalid.

PROBATION

In general

Jett v. Leverette, 247 S.E.2d 469 (1978) (Miller, J.)

Syl. pt. 1 - In West Virginia there are fundamental statutory differences between probation and parole in the relationship they bear to the underlying criminal sentence. The term of probation has no correlation to the underlying criminal sentence, while parole is directly tied to it. In effect, there is a probation sentence which operates independently of the criminal sentence.

In West Virginia probation differs from parole in that the judge is authorized to tailor the probation conditions to meet the particular needs of the individual case, while parole conditions are generally uniformly set by the parole board for all parolees.

The court may either suspend imposition of a sentence initially and place the defendant on probation or impose sentence and then suspend it and place the defendant on probation.

Parole is available only after an initial period of confinement, whereas probation need not be prefaced by confinement. Parole is a legislatively created system granting power to the executive, whereas probation is a designation of power to the judiciary. A five-year maximum term is set for probation, but not for parole. Parole operates in conjunction with the underlying sentence; the probationary term has no relation to the sentence.

Conditions

Armstead v. Dale, 294 S.E.2d 122 (1982) (Harshbarger, J.)

Syl. pt. 1 - A probation condition requiring repayment of costs and attorney's fees is constitutionally acceptable if it is tuned to the probationer's ability to pay without undue hardship and is subject to modification if his indigency persists or reoccurs. *W.Va. Code*, 62-12-9.

W.Va. Code § 62-5-7 provides that all expenses incident to a prosecution are chargeable to a convicted defendant as a civil judgment and that execution may be had as a fine.

Conditions (continued)

Armstead v. Dale, (continued)

W.Va. Code § 29-21-17(d) gives trial courts statutory authority to order repayment of costs and attorney's fees and to make repayment a condition of probation; however, repayment is a discretionary condition and the requirement must be reasonable given the financial circumstances of the defendant.

Repayment as a condition of probation is unreasonable if it is beyond the probationer's ability to pay without causing undue hardship to the defendant or his family.

The *Cottrell v. Public Finance Corporation*, 256 S.E.2d 575 (W.Va. 1979) analysis is appropriate in a trial court's determination of whether a probationer can pay assessed costs without undue hardship.

Spencer v. Whyte, 280 S.E.2d 591 (1981) (Miller, J.)

The determination of conditions of probation has traditionally been a legislative function since the court did not have the power to grant probation, that is, at common law the court lacked subject matter jurisdiction in the area of probation.

The legislature has traditionally been recognized as the forum for determination of crimes and their punishments. Accordingly, it is legislative prerogative to determine the conditions under which a person can be placed on probation and a sentence suspended; therefore, the courts cannot set punishments that are inconsistent with the legislatively defined penalties and the court cannot impose conditions of probation that are not plainly suggested by the statute.

Syl. pt. 2 - In the absence of specific language in our probation statutes empowering a trial court to impose incarceration as a condition of probation, the trial court lacks the power to impose such a condition.

Conditions (continued)

Spencer v. Whyte, (continued)

When the plea bargain agreement specified that as a condition of probation the petitioner would serve a one-year sentence in the county jail and a one-to-five year sentence at the penitentiary in exchange for the suspension of a five-to-eighteen year sentence, the court concluded that the plea bargain agreement must be set aside since the statutory language of *W.Va. Code* §§ 62-12-9 and 62-12-3 clearly suggests that probation involves an initial release and therefore precludes confinement as a condition of probation.

State v. M.D.J., 289 S.E.2d 191 (1982) (McHugh, J.)

Syl. pt. - A trial judge may order restitution as part of a "program of treatment or therapy" designed to aid in the rehabilitation of the child in a juvenile case when probation is granted under *W.Va. Code* 49-5-13 (1978). Such order, however, must be reasonable in its terms and within the child's ability to perform.

Generally, restitution is a discretionary condition of probation under *W.Va. Code* § 62-12-9 (1953); however, this section of the code does not apply in juvenile cases.

Probation cannot "properly be revoked if the condition of probation allegedly violated is invalid."

When restitution was a condition of probation for a 17 year old unemployed juvenile charged with juvenile delinquency, and probation was revoked solely on the basis of the juvenile's inability to pay the first installment of the restitution ordered, the court found that this restitution was an "unreasonable condition of probation that was beyond the child's ability to perform." The order to revoke probation was reversed, and the condition of probation was eliminated.

PROBATION

Credit on underlying sentence

Jett v. Leverette, 247 S.E.2d 469 (1978) (Miller, J.)

Syl. pt. 2 - The separation of the probation term from the underlying criminal sentence, coupled with the significant statutory differences between probation and parole, warrants the finding that our State's Double Jeopardy Clause is not violated by the failure to credit the time spent on probation upon its revocation.

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

When appellant possessed and delivered marijuana while on two-years probation after serving six months in a training center, his probation was revoked and he was not allowed credit on an underlying sentence for the time spent on probation.

Denial of probation

State ex rel. Winter v. MacQueen, 239 S.E.2d 660 (1977) (Caplan, C.J.)

Syl. pt. 3 - Probation being a matter of grace, a legislative act precluding one from consideration therefor by reason of former convictions does not constitute cruel and unusual punishment, nor does it create a penalty disproportionate to the character or degree of the offense.

State v. Barnett, 240 S.E.2d 540 (1977) (Caplan, J.)

See CONTROLLED SUBSTANCES Sentencing, (p. 145) for discussion of topic.

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

Except for statutory exceptions, the legislative grant of power places the matter of probation within the sound discretion of the trial court.

Denial of probation (continued)

State v. Drake, (continued)

Even though possession of marijuana was appellant's first offense, denial of probation was within the Court's discretion.

State v. Shafer, 284 S.E.2d 916 (1981) (Neely, J.)

The Supreme Court will only overturn the decision of a trial court denying probation when that decision constitutes a palpable abuse of discretion.

Where defendant held a steady job, could get many references, and had no prior convictions, but probation officer recommended probation not be given, and there was no restitution made or offered, trial court's decision denying probation was neither arbitrary nor erroneous.

Trial court order stating "the ends of justice would not be served by placing the defendant on probation" was conclusory and not in the true spirit of statute providing that court should set forth a brief statement of reasons for denying probation, but not error since the transcript was replete with the trial court's explicit reasons for denying probation. Even if it were inappropriate to rely on the judge's reasons for denying probation as stated in the record, rather than in the order, the error was harmless since only relief to which defendant would be entitled would be remand for purposes of incorporating judge's previously stated reasons in the order.

Eligibility for probation

Jett v. Leverette, 247 S.E.2d 469 (1978) (Miller, J.)

Persons having prior felony convictions within 5 years of current convictions and persons convicted of or pleading guilty to felonies for which life imprisonment is the maximum penalty are not eligible for probation, but these persons may be eligible for parole.

Eligibility for probation (continued)

State ex rel. Hanley v. Hey, 255 S.E.2d 354 (1979) (McGraw, J.)

The portion of West Virginia Code § 62-12-10 indicating that the court or judge may, "except when the violation was the commission of a felony, again release (a probationer) on probation" is unambiguous in the use of the term "commission" rather than "conviction" therefore, the defendant's claim that suspension of his sentence based upon a felony committed in violation of the conditions of his probation was an exception to the general rule since it applied only to persons "convicted" of felonies was without merit.

Syl. pt. 1 - Under the terms of *W.Va. Code* 62-12-10, a circuit court exceeds its legitimate authority when it suspends the execution of sentence and releases on probation an offender who has been adjudged in a probation revocation proceeding to have committed a felony while on probation.

When defendant pled guilty to the charge of breaking and entering or entering without breaking while still serving a two-year period of probation, his probation was revoked and defendant was sentenced based upon the initial felony charge. Upon a motion for reconsideration of the sentence, the trial court again suspended the sentence. The Supreme Court held that the circuit court had exceeded its legitimate power by suspending the execution of sentence because the breaking and entering was a felony, and according to West Virginia Code § 62-13-10, the court cannot choose to again release a probationer when the violation of the condition of his probation was a felony.

State ex rel. Winter v. MacQueen, 239 S.E.2d 660 (1977) (Caplan, J.)

Syl. pt. 1 - Where a statute expressly provides that those "who have not been previously convicted of a felony within 5 years from the date of the felony for which they are charged . . . shall be eligible for probation . . .", a judge is without authority to place one so convicted on probation and should he do so he has exceeded his legitimate powers.

Eligibility for probation (continued)

State ex rel. Winter v. MacQueen, (continued)

When the accused pled guilty to one indictment of forgery and this plea was within 5 years of conviction for a previous felony, yet the judge knowingly went against the statutory law of West Virginia and placed the accused on probation, a stay of execution was ordered and a prohibition proceeding initiated. The Supreme Court held that the statutory language of *W.Va. Code* § 62-12-2 (1931) was clear; therefore, it must be applied, not construed, that the accused was not eligible for parole and that the judge had exceeded his legitimate powers.

State v. Dobbs, 286 S.E.2d 918 (1982) (Neely, J.)

Applies standard set forth in syl. pt. 2, *State v. Godfrey*, 289 S.E.2d 660 (W.Va. 1981), cited below.

When appellant, convicted of breaking and entering was sentenced to one to ten years and was denied his motion for a presentence investigation and consideration for probation, the Supreme Court held that the trial court had abused its discretion in failing to give the appellant, who had no previous felony convictions, an opportunity to present his case for probation. The case was remanded so that a presentencing report could be made and a sentencing hearing held. The trial court was instructed to give the appellant the benefit of any demonstrated improvement in his behavior.

State v. Duncan. 285 S.E.2d 468 (1981) (Harshbarger, C.J.)

W.Va. Code § 62-12-2(b) (1979) states: "Any person who commits or attempts to commit a felony with the use, presentment or brandishing of a firearm shall be ineligible for probation."

Syl. pt. - When a trial judge's findings show that a person indicted for armed robbery, but convicted on a guilty plea of unarmed robbery, used a firearm during the crimes' commission, Code 62-12-2(b) precludes eligibility for probation.

Eligibility for probation (continued)

State v. Duncan. (continued)

When defendant pled guilty to and was convicted of unarmed robbery but had been indicted for armed robbery the Supreme Court held that he was ineligible for probation since a firearm, in fact, had been used in the commission of the felony. The decision was based upon *W.Va. Code* § 62-12-2(c) (1979) which makes the existence of facts which would make any person ineligible for probation inapplicable unless they are, among other things, "found by the court upon a plea of guilty or *nolo contendere*."

State v. Godfrey, 289 S.E.2d 660 (1981) (McHugh, J.)

Syl. pt. 2 - A trial judge should, ordinarily, hear testimony regarding whether a defendant should be placed on probation if that defendant is statutorily eligible for such probation. The extent of such testimony, however, is within the sound discretion of the trial judge.

Syl. pt. 4 - *W.Va. Code* 62-12-2 (1979), which provides, in part, that, "[a]ll persons who have not been previously convicted of a felony within five years from the date of the felony for which they are charged . . . shall be eligible for probation" does not preclude a trial judge from considering a prior conviction when deciding whether to grant probation.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

"Probation is a matter of grace and not a matter of right." Syl. pt. 1, *State v. Rose*, 156 W.Va. 342, 192 S.E.2d 884 (1972).

The judge did not abuse his discretion by refusing probation to appellant who was convicted of involuntary manslaughter and sentenced to 8 months in a correctional center and who met the requirements for probation consideration under *W.Va. Code* § 62-12-2, since probation is not mandatory but rather is discretionary.

Eligibility for probation (continued)

State v. Ranski, 289 S.E.2d 756 (1982) (McHugh, J.)

When defendant pled guilty to voluntary manslaughter of her former husband and then moved to withdraw the guilty plea based upon the claim that she was not informed of the consequences and that she had entered the plea expecting the possibility of parole after one year, yet the motion for withdrawal of the plea was denied, the defendant moved for a presentence investigation "leading to the possibility of probation", the trial court denied this motion indicating that the defendant was ineligible for probation. The trial court based this ruling on *W.Va. Code* § 62-12-12 (1979), which makes a defendant who has used a firearm during the commission of a felony ineligible for probation, the judge having determined that "a weapon was, in fact, used." The Supreme Court found that the trial court erred in determining that the defendant was ineligible for probation since the trial judge must specifically find, as a matter of record, that a firearm was used in the commission of the crime before a person convicted upon a guilty plea may be found ineligible for probation. In this case, no such finding was made a part of the record and the firearm provisions of *W.Va. Code* 62-12-13 (1979) were not. The case was remanded for determination of the probation issue.

Syl. pt. - Pursuant to *W.Va. Code* 62-12-2(c) (1979), a trial judge must specifically find, as a matter of record, that a firearm was used in the commission of the crime before a person convicted of the crime upon a plea of guilty may be found to be ineligible for probation under *W.Va. Code* 62-12-1(b) (1979).

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Art. 12, Ch. 62 of the West Virginia Code provides that "[a]ny circuit court of this state shall have authority as provided in this article to place on probation any person convicted of a crime."

When it appears that the offender is not likely to commit a crime again, and that public good doesn't demand a fine or imprisonment, the sentence may be suspended and the offender placed on probation.

PROBATION

Eligibility for probation (continued)

State v. Wotring, (continued)

The matter of probation falls within the court's discretion except for clear statutory exceptions.

Presence of counsel

State v. Dawson, 282 S.E.2d 284 (1981) (Miller, J.)

Counsel may be present when the conditions of probation are set or modified by the trial court.

When probationer alleged that the record did not reveal counsel was present for the signing of the probation contract, but did not allege that probationer or his counsel were unaware of the terms, or that the terms were inappropriate or that any gross irregularity occurred, the Court concluded that as long as it appeared that counsel was present when the terms of the probation were initially agreed upon or modified, he need not be present at the time of probationer's signature.

Revocation

In general

State v. Patterson, 296 S.E.2d 684 (1982) (Harshbarger, J.)

Under *W.Va. Code* § 25-4-6 revocation of probation and imposition of original one-to-ten-year sentence was a requirement, not a matter within the trial court's discretion, when defendant violated the terms of his probation after serving time in a correctional facility pursuant to the Youthful Offenders Act.

Revocation (continued)

Appellant review

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

Probation is a statutory creation, and as such there is no requirement that direct appeal be the proper method of judicial review of a judgment revoking probation. In the absence of any statutory direction the Supreme Court held that in order to reach the Supreme Court for a probation revocation hearing the relator must come in habeas corpus.

Burden of proof

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

Syl. pt. 4 - Where probation violation is contested, the State must establish the violation by a clear preponderance of the evidence.

State v. Dawson, 282 S.E.2d 284 (1981) (Miller, J.)

When probationer alleged as error that there was insufficient evidence to support the decision to revoke probation, the Court found that there was sufficient evidence in the record to meet the clear preponderance of evidence standard established in *Sigman v. Whyte*, *supra*.

Commission of a crime

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

Syl. pt. 3 - The State may proceed with a probation revocation proceeding based upon commission of another crime without first obtaining a final disposition of that crime.

Revocation (continued)

Commission of a crime (continued)

State ex rel. Hanley v. Hey, 255 S.E.2d 354 (1979) (McGraw, J.)

See PROBATION Eligibility for probation, (p. 702) for discussion of topic.

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 3, *Sigman v. Whyte*, 268 S.E.2d 603 (W.Va. 1980), cited above.

When the appellant argued that probation should not have been revoked because he had not yet been criminally convicted on a marijuana offense, the Court upheld the revocation indicating that probation revocation may be based upon a crime prior to final disposition of that crime.

State v. Ketchum, 289 S.E.2d 657 (1981) (McGraw, J.)

When appellant was placed on three years probation for possession of marijuana with intent to deliver and during this period was charged with passing bad checks, a charge which was dismissed by the prosecuting attorney, the Supreme Court upheld the revocation of his probation based upon this criminal charge stating, "The dismissal of a criminal charge against a defendant for an offense committed while he is on probation does not preclude the subsequent use of such charge to revoke his probation."

Probation can be revoked without a conviction for the underlying crime because the revocation proceeding does not determine the defendant's guilt of the offense. The revocation proceeding does, rather, involve the determination that a crime has been committed thus making the rehabilitative purpose of probation a nullity.

Revocation (continued)

Due process

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

"Revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole [probation] revocations." *State v. Farley*, 258 S.E.2d 129 (W.Va. 1979). A probationer, however, is entitled to a review of an order that deprives him of his liberty.

State v. Fraley, 258 S.E.2d 129 (1979) (Harshbarger, J.)

"The final revocation proceeding required by the due process clause of the Fourteenth Amendment and necessitated by *W.Va. Code* 62-12-10, as amended, must accord an accused with the following requisite minimal procedural protections: (1) written notice of the claimed violation of probation; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documenting evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing officer; (6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation." Syl. pt. 12, *Louk v. Haynes*, 223 S.E.2d 780 (W.Va. 1976).

There is no form specified for written notice of the claimed violation of probation. Here, the evidence about guilty pleas presented at the preliminary hearing was transcribed, furnished to defendant's counsel (who was present at the preliminary hearing) and the transcript reflected the evidence with specificity as did the hearing examiner's summary. They had ample opportunity to "show . . . that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). It would be better to state all alleged violations in an original petition; however, due process notice was given.

Revocation (continued)

Due process (continued)

State v. Goff, 284 S.E.2d 362 (1981) (Per Curiam)

When defendant disregarded the terms of his probation and was convicted of reckless driving and public intoxication, the trial court revoked probation and found that evidence contained in the court order executing sentence was sufficient to comply with the requirement that "a written statement . . . as to the evidence relied on and reason for revoking probation or parole" be set forth.

State v. Godfrey, 289 S.E.2d 660 (1981) (McHugh, J.)

Syl. pt. 3 - Violation of the procedural requirement of *W.Va. Code* 62-12-8 (1939), that an order denying probation state the reasons for such denial, will not be grounds for remand for sentencing where the reasons appear in the sentencing record.

Entrapment

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

Syl. pt. 3 - A defendant may raise the defense of entrapment at a probation revocation proceeding.

Since entrapment occurs when the inspiration for the offense is created solely by the police and the accused would not have committed the crime but for that inducement, entrapment was not a valid defense when the defendant, who was on 2-year probation and without police coercion, obtained marijuana for a witness working with the police. Probation revocation based upon possession and delivery of marijuana was appropriate.

Revocation (continued)

Expiration of probationary period

Jett v. Leverette, 247 S.E.2d 469 (1978) (Miller, J.)

As a general rule, when the probationary term has been served the court can no longer revoke probation.

State ex rel. Ostrander v. Wilt, 269 S.E.2d 420 (1980) (Caplan, J.)

Syl. pt. 2 - A circuit court has jurisdiction to revoke probation subsequent to the expiration of the probationary period where a warrant for the probationer's arrest for probation violation is issued prior to the expiration of his probationary period; where the probationer flees the jurisdiction and is apprehended only a short time prior to the expiration of his probationary period; and where the delay in hearing the probation revocation until after the expiration of the probationary period is occasioned by the actions of the petitioner and/or his counsel.

As a rule, the court has no jurisdiction to revoke probation after the expiration of a probationary period, but where a warrant for defendant's arrest was issued prior to the termination of the period, defendant was apprehended only a few days prior to the expiration of the probation period, and the post-arrest delays were caused by the defendant and his counsel, probation was revoked and sentence imposed.

Failure to pay court costs, attorney fees, restitution

Armstead v. Dale, 294 S.E.2d 122 (1982) (Harshbarger, J.)

Syl. pt. 2 - Probation may not be revoked for failure to pay restitution, costs and attorney fees unless the probationer's failure is contumacious.

Syl. pt. 3 - A trial court seeking to revoke probation for failure to pay assessed costs or restitution must make findings of fact that indicate defendant's ability to pay, weighing available assets, income, attempts to find work, and reasonable family expenses.

Revocation (continued)

Failure to pay court costs, attorney fees, restitution (continued)

Armstead v. Dale, (continued)

Revocation of indigent defendant's probation was not justified when there was no proof of defendant's wilful refusal to comply with the condition of probation requiring repayment of costs. Defendant's habeas corpus petition, claiming his constitutional rights were violated by imprisonment for the status offense of indigency, was granted.

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

When one ground for probation revocation was the accused's failure to pay court costs, which was a condition of probation, the Court did not determine whether this was a valid ground for probation revocation since the revocation was based upon other valid grounds. The Court did state in footnote 6, "We doubt probation revocation could be based solely on the failure to pay costs where the probationer is indigent."

Habeas corpus review

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

Syl. pt. 1 - An order revoking probation may be reviewed by a writ of habeas corpus; if the habeas corpus is granted a transcript of the probation revocation proceeding will be made available.

Syl. pt. 2 - Counsel appointed to represent a probationer at his probation revocation may file a petition for habeas corpus to protest a probation revocation if the believes review is warranted. The cost of filing a petition for habeas corpus will be paid by the State as an integral part of the representation for an indigent at the probation revocation hearing.

Revocation (continued)

Invalid charge

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 3, *State v. Ketchum*, 289 S.E.2d 657 (W.Va. 1981), cited below.

State v. Ketchum, 289 S.E.2d 657 (1981) (McGraw, J.)

Syl. pt. 3 - Where probation is revoked on one valid charge, the fact that other charges may be invalid will not preclude upholding the revocation.

The probationer's contention that the revocation of his probation should be reversed because it was based upon an invalid charge that he changed his place of residence in violation of the conditions of his probation but in response to harassment in the county of his residence was without merit since the trial court did not give much consideration to this "technical violation" but instead looked at the more serious criminal charge in its decision to revoke probation.

Preliminary hearing

State ex rel. Ostrander v. Wilt, 269 S.E.2d 420 (1980) (Caplan, J.)

"The preliminary hearing . . . is a hearing held at the time of arrest and detention to determine whether there is probable cause to believe that the accused has committed a violation of his probation or parole. The hearing must be held by an independent officer as promptly as convenient after arrest, while information is still fresh and sources are available." *Louk v. Haynes*, 223 S.E.2d 780 (W.Va. 1976).

Syl. pt. 1 - In determining whether a preliminary hearing for an alleged probation violation has been held without unreasonable delay, three factors should be considered: (1) the length of and reason for the delay; (2) the probationer's assertion of his right, and, (3) the prejudice to the defendant.

State ex rel. Ostrander v. Wilt, (continued)

When defendant has asserted his right to a prompt hearing, but counsel notified the magistrate of his unavailability until June 25, and further, when there was no prejudice to defendant, the Court found that the preliminary hearing was afforded with reasonable promptness; therefore, the probation revocation was upheld.

When defendant violated conditions of his probation but a preliminary probation revocation hearing was not held until 47 days after the arrest and 16 days after the defendant's probationary period had ended, defendant's contention that he was not afforded a timely preliminary probation revocation hearing was not upheld as so unreasonable as to constitute a violation of the defendant's rights since the application of the balancing test and not the length of the delay itself was determinative.

State v. Cooper, 280 S.E.2d 95 (1981) (Miller, J.)

Syl. pt. 1 - A preliminary probation revocation hearing is attended with somewhat more procedural formality than a criminal probable cause hearing. However, it does not reach the strict procedural requirements of a criminal trial.

When at the preliminary probation revocation hearing State introduced evidence concerning the appellant's failure to remain employed and his failure to pay court costs but introduced no evidence concerning an alleged marijuana transaction because the marijuana had not yet been sent to the state police laboratory, the Court allowed the evidence to be submitted at the final revocation hearing because (1) the initial notice of revocation contained the charge; (2) the state had a *bona fide* explanation for its inability to deal with the charge at the preliminary revocation hearing; (3) there were other charges on which probable cause was found which warranted detaining the appellant and proceeding to a full hearing, and (4) the State by filing its disclosure statement prior to the final revocation hearing supplied the appellant with the evidence it had surrounding the marijuana charge.

State v. Dawson, 282 S.E.2d 284 (1981) (Miller, J.)

Syl. pt. 1 - The preliminary revocation hearing is a hearing held at the time of arrest and detention whether there is probable cause to believe that the accused has committed a violation of his probation or parole. The hearing must be held by an independent officer as promptly as convenient after arrest.

Applies standard set forth in syl. pt. 1, *State ex rel. Ostrander v. Wilt*, 262 S.E.2d 420 (W.Va. 1980), cited above.

The failure to hold a preliminary hearing does not create a presumption of prejudice, an element of the *Ostrander* test.

When probationer was charged with violations of his probation but was not afforded a preliminary revocation hearing because his counsel did not request it until the final hearing had begun and the circuit judge concluded that he was without jurisdiction to hold the final hearing until the preliminary hearing was completed first, a preliminary hearing was held before the conclusion of the State's case in the final hearing, probationer contended that the court erred in not granting a timely preliminary hearing. The Court determined that "[unless prejudice can be shown which affects the integrity of the final revocation hearing, it will not be reversed" and since probationer did not assert that any prejudice actually resulted from the failure to hold a timely preliminary hearing, the Court declined to reverse the probation revocation.

When the court was persuaded by defense counsel's argument during the final probation revocation hearing that a preliminary hearing was necessary and that hearing was held prior to the completion of the State's evidence, and held approximately one month later, the court refused to accept the probationer's assertion that the mistrial break and subsequent rehearing constituted a double jeopardy bar.

Syl. pt. 3 - "Principles of double jeopardy will not ordinarily be applied to probation or parole revocation hearings, at least in the absence of any claim of bad faith.

Revocation (continued)

Preliminary hearing (continued)

State v. Goff, 284 S.E.2d 362 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Ostrander v. Wilt*, 262 S.E.2d 420 (W.Va. 1980), cited above.

When defendant pled guilty to unlawful wounding and was placed on three years probation and subsequently disregarded the terms of his probation, the State filed a petition to revoke probation. A hearing on the petition and a final hearing were held, but no preliminary probation revocation hearing was held. Probationer asserted his right to a preliminary hearing for the first time on appeal, and the Supreme Court determined that there was no prejudice resulting from the failure to hold a preliminary hearing and that any error "in regard to the preliminary hearing was harmless beyond a reasonable doubt."

Right to counsel

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

Any defendant whose probation has been revoked will have the right to counsel through the preparation of a habeas corpus petition to be brought before the Supreme Court.

Since *State ex rel. Strickland v. Melton*, 152 W.Va. 500, 165 S.E.2d 90 (1968), the right to appointment of counsel at a probation revocation hearing has been mandatory.

Right to transcript

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

Syl. pt. 1 - An order revoking probation may be viewed by a writ of habeas corpus; if the habeas corpus is granted a transcript of the probation revocation proceeding will be made available.

Revocation (continued)

Right to transcript (continued)

Sigman v. Whyte, (continued)

The right to a transcript is not absolute. Since the grounds for questioning a probation revocation are simple and can be summarized in a petition for habeas corpus review, it is an undue burden to require the State to supply a transcript in every routine case.

PROHIBITION

In general

Gangwer v. Black, 253 S.E.2d 538 (1979) (Per Curiam)

"Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellant court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellant court determines that the abuse of power is flagrant and violative as to make a remedy by appeal inadequate, will a writ of prohibition issue." Syllabus Point 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973).

Hinkle v. Black, 262 S.E.2d 744 (1979) (Neely, J.)

Syl. pt. 1 - In 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 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, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which maybe 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.

The classic rule concerning prohibition is that prohibition is appropriate "in all cases of usurpation and abuse of power, when in inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

When there is not question of fact but rather the question is purely legal, prohibition is more efficient than appeal and also more adequate in terms of expense and time.

State ex rel. Hanley v. Hey, 255 S.E.2d 354 (1979) (McGraw, J.)

Applies standard set forth in Syl. pt. 2, *State ex rel. Winter v. MacQueen*, 239 S.E.2d 660 (W.Va. 1977), cited below.

In general (continued)

State ex rel. Maynard v. Bronson, 277 S.E.2d 718 (1981) (McHugh, J.)

W.Va. Code § 53-1-1 provides that "prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers."

Prohibition cannot be substituted for a writ of error or appeal unless a writ of error or appeal would be an inadequate remedy.

Footnote 7 - *W.Va. Const.*, art. VIII, § 3 provides, in part, that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition, and certiorari."

According to *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979), factors to be considered in determining whether prohibition is an appropriate remedy are: (1) "the adequacy of another remedy such as appeal, and (2) economy of effort."

State ex rel. McCarney v. Nuzum, 248 S.E.2d 318 (1978) (Miller, J.)

Syl. pt. 3 - A writ of prohibition will lie where the trial court does not have jurisdiction or, having jurisdiction, exceeds its legitimate powers.

State ex rel. Miller v. Smith, 285 S.E.2d 500 (1981) (McGraw, J.)

Prohibition does not lie to control a legislative body nor to prevent an executive act.

State ex rel. Williams v. Narick, 264 S.E.2d 851 (1980) (McGraw, J.)

Quoting from *Hinkle v. Black*, 262 S .E.2d 744, 749 (W.Va. 1979):

In general (continued)

State ex rel. Williams v. Narick, (continued)

"[W]here the proper resolution of the legal question first depends upon a proper finding of disputed facts, then the efficiency of prohibition disappears because of mechanical problems in fact finding inherent in multi member courts. In that event, surely, the relative adequacy of a remedy by appeal becomes correspondingly enhanced."

Applies standard set forth in syl. pt. 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973). See *Gangwer v. Black*, 253 S.E.2d 538 (W.Va. 1979), cited above.

W.Va. Code § 53-1-1 provides that "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate power," prohibition will lie.

The writ of prohibition was not designed to correct errors that can be corrected on appeal; therefore, the use of the writ has not been allowed in interlocutory matters not involving an obvious jurisdictional defect.

State ex rel. Winter v. MacQueen, 239 S.E.2d 660 (1977) (Caplan, C.J.)

Syl. pt. 2 - Prohibition will lie to prohibit a judge from exceeding his legitimate powers.

State v. West Virginia Judicial Review Bd., 264 S.E.2d 168 (1980) (Neely, C.J.)

Applies standard set forth in Syl. pt. 1, *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979), cited above.

PROHIBITION

In general (continued)

Notice to parties

State ex rel. Hanley v. Hey, 255 S.E.2d 354 (1979) (McGraw, J.)

As a general rule any person whose rights maybe affected by the issuance of a writ must be made a party and must be given notice of the proceedings, but where the probationer's counsel was present during all the proceedings and, in fact, acted as counsel for the judge against whom prohibition was sought, the Supreme Court concluded that the offender's interests were represented by counsel inasmuch as the probationer's interests in precluding the issuance of the writ of prohibition and allowing release on probation were identical to the judge's represented interests. Prohibition was, therefore, appropriate even though probationer was not a party to the action.

Abuse and neglect

State ex rel. McCarney v. Nuzum, 248 S.E.2d 318 (1978) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, Sufficiency of neglect petition, (p. 8) for discussion of topic.

Appointment and payment of special prosecutors

Moore v. Starcher, 280 S.E.2d 693 (1981) (McGraw, J.)

See ATTORNEYS Prosecutors, Disqualification, (p. 74); ATTORNEYS Prosecutors, Special/private, (p. 77) for discussion of topic.

PROHIBITION

Appointment of prosecutor's associate to represent defendant

State ex rel. Sowa v. Sommeville, 280 S.E.2d 85 (1981) (Harshbarger, C.J.)

Writ of prohibition was sought to prevent circuit judge from appointing lawyer, who was an associate of the two county prosecutor's, to represent indigent criminal defendant's. The writ was denied. The Supreme Court found that although prosecuting attorney and members of their law firms may not accept private retainers to defend alleged criminals, the availability of counsel to indigents is both constitutional guarantee and a requirement in the Canons of Professional Ethics and as such requires the partner to accept appointments. These appointments, however, are to be accepted in counties other than where the prosecutor serves only where defendant is aware of the conflict and has signed a written consent.

Attorney - client relationship - withdrawal

Cardot v. Luff, 262 S.E.2d 889 (1980) (Miller, J.)

See ATTORNEYS Attorney client, Withdrawal, (p. 65) for discussion of topic.

Bifurcated trial

State ex rel. Leach v. Hamilton, 280 S.E.2d 62 (1980) (Harshbarger, J.)

When the accused sought to prohibit the circuit judge from trying him for murder on the grounds that a single trial violated his equal protection and due process rights and contravened his constitutional protections against self-incrimination and cure and unusual punishment and that there should be one trial to determine guilt, and another to decide his sentence if he is found guilty, the Supreme Court denied the writ and held the unitary trial to be constitutional and the mandatory life imprisonment without parole not to be cruel and unusual punishment.

PROHIBITION

Change of venue

Gangwer v. Black, 253 S.E.2d 538 (1979) (Per Curiam)

See VENUE Change of venue, Appropriate forum, (p. 940) for discussion of topic.

Closure - public trial

State ex rel. Hearld Mail Co. v. Hamilton, 267 S.E.2d 544 (1980) (Miller, J.)

When there was no evidence that allowing the press to attend a criminal trial would result in prejudicial publicity or damage to defendant's right to a fair trial the court granted a moulded writ prohibiting the enforcement of an order closing a pretrial hearing but enabling the trial court to hold a further closure hearing in accordance with the guidelines set forth in the case.

Competency to stand trial

State ex rel. Williams v. Narick, 264 S.E.2d 851 (1980) (McGraw, J.)

When a ruling that defendant was competent to stand trial was made by the judge in his capacity as an interlocutory factfinder, the ruling was not subject to control by writ of prohibition - since prohibition is appropriate in matters of a jurisdictional, not factual, nature.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

See APPEAL Interlocutory, (p. 37) for discussion of topic.

PROHIBITION

Denial of due process

State ex rel. Leonard v. Hey, 269 S.E.2d 394 (1980) (Harshbarger, J.)

When the government questioned the propriety of a pretrial prohibition proceeding to determine whether there had been a violation of double jeopardy, speedy trial and due process rights, the court relied upon *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979), criteria to determine that judicial efficiency demanded a pretrial consideration of the matter and to determine that prosecution after eleven years would violate the defendant's constitutional rights; therefore, the writ of prohibition was proper.

Eligibility for probation

State ex rel. Hanley v. Hey, 255 S.E.2d 354 (1979) (McGraw, J.)

When the circuit judge exceeded his legitimate powers in contravention of *W.Va. Code* § 62-12-10, which precludes a second release on probation "when the violation was the commission of a felony", the Supreme Court concluded that prohibition was appropriate.

State ex rel. Winter v. MacQueen, 239 S.E.2d 660 (1977) (Caplan, C.J.)

See PROBATION Eligibility for probation, (p. 702) for discussion of topic.

Enforcement of void orders

State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (1979) (McGraw, J.)

Syl. pt. 1 - Where there is no showing on the record that any party has properly instituted proceedings in a court of record, the court cannot exercise jurisdiction over the matter and any purported order or judgment entered is void and its enforcement maybe restrained by prohibition.

Enforcement of void orders (continued)

State ex rel. Skinner v. Dostert, 278 S.E.2d 624 (1981) (McGraw, J.)

Circuit courts shall have control of all proceedings before magistrate courts by mandamus, prohibition and certiorari; however, when no pleadings were made which would invoke the jurisdiction of the circuit court to control proceedings in the magistrate court and the circuit judge entered a *sua sponte* order informing the magistrate that motions to dismiss should not be entertained by the magistrate court, the Supreme Court held that this order was not promulgated pursuant to the constitutional grant of such powers in Article 8, § 6 of the state constitution and did not comply with the general supervisory control granted to the court but was as an attempt to control the magistrate's judicial discretion, an act beyond the constitutionally prescribed limit of judicial control of inferior courts; therefore prohibition was granted to prevent enforcement of the order.

Syl. pt. 10 - As a general rule, any order promulgated *sua sponte* by a superior court which purports to control the judicial function in proceedings in a lower court is void *ab initio*.

Syl. pt. 11 - A circuit court may not invade the jurisdiction or the judicial function of a magistrate court under the guise of the administrative powers granted by *W.Va. Const*. art. 8, § 6.

When the circuit court of Jefferson County issued an order delineating the procedure for dismissal of warrants by a magistrate court and the prosecuting attorney sought a writ of prohibition to prevent enforcement claiming that the order invaded the jurisdiction of the magistrate court and the discretionary power of the prosecuting attorney's office, the Supreme Court held that the issuance of the order was a ploy to interfere with magisterial discretion and as such was beyond the scope of the superior court's power, thus void. The writ of prohibition was granted.

PROHIBITION

Extradition/Detainer

State ex rel. Maynard v. Bronson, 277 S.E.2d 718 (1981) (McHugh, J.)

Syl. pt. 1 - Prohibition 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. *W.Va. Code* , 53-1-1.

Where the judge had jurisdiction over the subject matter in controversy and did not exceed his legitimate powers under the West Virginia Agreement on Detainers, *W.Va. Code* § 62-14-1, *et seq.*, prohibition was not an appropriate remedy.

When the judge's interpretation of an Agreement on Detainers was at issue in the prohibition proceeding, the Supreme Court refused to consider the correctness of the interpretation so long as the interpretation did not involve usurpation and abuse of power.

Indigents - expenses

State ex rel. Foster v. Luff, 264 S.E.2d 477 (1980) (Miller, J.)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 441) for discussion of topic.

State ex rel. Leach v. Hamilton, 279 S.E.2d 420 (1982) (Per Curiam)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 442) for discussion of topic.

PROHIBITION

Judge's conduct

State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (1979) (McGraw, J.)

When petitioner sought a writ of prohibition to prevent the judge who had actively participated in the petitioner's arrest, from acting as judge in petitioner's case and to void the appointment of a special prosecutor assigned by the same judge, the writ was awarded.

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401 (1980) (Neely, C.J.)

Syl. pt. 7 - Where a court interferes with energetic advocacy by a child's counsel at the dispositional stage of a juvenile proceeding and abuses his discretion in removing counsel, this Court will award a writ of prohibition.

Judicial Inquiry Commission - Protective orders

State v. West Virginia Judicial Review Bd., 264 S.E.2d 168 (1980) (Neely, C.J.)

A complaint was filed by an individual with the Judicial Inquiry Commission against a justice. The Commission filed the complaint with the Judicial inquiry Board, thereafter the justice made arrangements to depose the Chairman of the Commission. The Chairman filed a motion with the Board for a protective order claiming that his information was privileged and not discoverable. The motion was granted. The justice then sought from the Supreme Court a prohibition to prohibit the Board from enforcing the protective order. The Supreme Court found that the rules governing the Commission, were recently established, so the Court desired to correct legal errors arising from the reviewing system; and since the discovery process is relevant to the truth finding function of the inquiry, it is appropriate in a rare proceeding such as this to correct errors before trial. The prohibition was the appropriate remedy for the justice to seek.

PROHIBITION

Juvenile court

State ex rel. Kerns v. Fox, 268 S.E.2d 65 (1980) (Neely, C.J.)

Prohibition lies to restrain enforcement of orders of a juvenile court which exceed the court's legitimate authority.

Paternity

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

See MANDAMUS Paternity, (p. 640) for discussion of topic.

Pending ruling

State ex rel. Preissler v. Daugherty, 273 S.E.2d 574 (1980)

Petitioner sought a writ of prohibition to prevent his trial in magistrate's court until certain documents held by the West Virginia Judicial Inquiry Commission were produced, however, the Commission filed a motion to quash the subpoena *duces tecum* on the ground that there existed a privilege of confidentiality. The Supreme Court delayed action on the issue of whether a writ of prohibition was appropriate pending a ruling on the motion to quash.

Syl. pt. - "Where a magistrate has not ruled on a motion to quash a subpoena *duces tecum*, which motion was made on the ground of privilege of confidentiality, this Court will prohibit the trial of the party who obtained such subpoena pending the magistrate's ruling."

Where the evidence in possession of the Judicial Inquiry Commission is exculpatory evidence, its production should be ordered. The responsibility for determining which materials should be turned over to the defendant rests with the trial court by *in camera* inspection.

The Supreme Court will not tell a lower court how to rule on a motion, however the Supreme Court can direct the lower court to rule.

PROHIBITION

Pre-trial evidentiary rulings

State ex rel. Williams v. Narick, 264 S.E.2d 851 (1980) (McGraw, J.)

Syl. pt. 2 - In the absence of compelling evidence of irremediable prejudice, a writ of prohibition will not lie to bar trial based upon the judge's pretrial ruling on a matter of evidentiary admissibility.

When petitioner's murder conviction was reversed and the case remanded for new trial based upon evidentiary problems involving the admissibility of physical evidence which had been illegally seized and upon the admissibility of the initial confession gained as the "fruit" of this illegal search and seizure, a hearing was held wherein both the physical evidence and the initial confession were suppressed. The judge at the hearing refused to suppress four remaining confessions, and petitioner sought a writ of prohibition to compel the suppression.

The Supreme Court held that prohibition lies only in matters of a jurisdictional nature absent evidence of irremedial prejudice. The question of the appropriateness of the district judge's decision regarding the suppression of tainted confessions did not deprive the court of jurisdiction, therefore, appeal, not prohibition, was an appropriate remedy.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

See APPEAL Interlocutory, (p. 37) for discussion of topic.

Prosecutor's - usurpation of judicial functions

State ex rel. Miller v. Smith, 285 S.E.2d 500 (1981) (McGraw, J.)

Even though a prosecuting attorney is an executive officer prohibition is appropriate when petitioner seeks to prevent the prosecutor from usurping judicial functions and not from performing executive actions.

See ATTORNEYS Prosecutors, Grand jury, (p. 77) for discussion of topic.

PROHIBITION

Right to trial in magistrate court

State ex rel. Burdette v. Scott, 259 S.E.2d 626 (1979) (Miller, J.)

Where defendant was initially charged in magistrate court with offense over which such court had jurisdiction, and defendant did not expressly waive his right to trial in magistrate court, nor did such court relinquish its jurisdiction, circuit court was without jurisdiction and prohibition was proper remedy to prevent the circuit court from exercising jurisdiction.

PROPORTIONALITY - PUNISHMENT TO THE OFFENSE

In general

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 8, *State v. Vance*, *supra*.

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 8, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980), cited below.

Syl. pt. 4 - While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

The United States Supreme Court has recognized that even though the eighth amendment contains no explicit statement of the proportionality principle, this principle is implicit in its prohibition against cruel and unusual punishment.

State v. Houston, 273 S.E.2d 375 (1980) (Miller, J.)

Applies standard set forth in syl. pt. 8, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980), cited below.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

Syl. pt. 7 - A criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

Syl. pt. 8 - Article III, § 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution has an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offense."

In general (continued)

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

Applies standard set forth in syl. pt. 8, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980), cited above.

Appropriateness of the sentence

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

The Supreme Court addresses factors set forth in *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980) that would bear on the appropriateness of the sentence: "it [the court] may look to the facts of the [crime] and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and, as was said in *People v. Popescue*, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199, the judge should know something of the life, family, occupation and record of the person about to be sentenced."

The Court found there is also authority for the point that another factor for inquiry is whether co-defendants who are similarly situated have received grossly disparate sentences; however, where the co-defendants differ in their criminal backgrounds or in their role in participation in the offense, disparate sentences are justified.

Denial of probation

State ex rel. Winter v. MacQueen, 239 S.E.2d 660 (1977) (Caplan, C.J.)

See PROBATION Denial of probation, (p. 700) for discussion of topic.

PROPORTIONALITY - PUNISHMENT TO THE OFFENSE

Disciplinary measures

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

See PRISON CONDITIONS Disciplinary measures, Proportionality, (p. 693) for discussion of topic.

Disparate sentences

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

Where the claim is made that a petitioner's sentence is disparate to that of his co-defendants the record should reflect their background. Such a record would necessarily include any presentence reports prepared on the appellant and the co-defendants, information regarding the sentence previously imposed on the appellant and the co-defendants, information showing whether those sentences were the result of plea-bargaining, whether any of the co-defendants had previously been placed on probation, why previous charges were *nolled*, and any facts which would relate to the degree of culpability of each party in regard to the commission of the crime.

The burden of producing a record to show disparate sentences rests with the petitioner.

The Court found authority for the point that where co-defendants differ in their criminal backgrounds or in their role or participation in the offense, disparate sentences are justified.

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

See ROBBERY Sentencing, Review of sentence, (p. 777) for discussion of topic.

Juvenile status offenders

See STATUTES Constitutionality in general, (p. 904) for discussion of topic.

PROPORTIONALITY - PUNISHMENT TO THE OFFENSE

Recidivist

See RECIDIVIST Cruel and unusual punishment, (p. 740) for discussion of topic.

Review of sentence

In general

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Syl. pt. 5 - In determining whether a given sentence violates the proportionality principle found in Article III, § 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

In addition to the guidelines set forth in Syl. pt. 5 for determining whether a given sentence violates the proportionality principle, the Supreme Court has placed emphasis upon the actual or threatened violence to the person as a determinative factor.

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

Applies standard set forth in *State v. Rogers*, 280 S.E.2d 82 (W.Va. 1981), cited below.

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

The general rule is that sentences imposed by the trial court, if within the statutory limits and if not based on some impermissible factor, are not subject to appellant review. The Supreme Court has entertained claims that sentences violate the cruel and unusual punishment prohibitions. These claims are generally limited to sentences which have no maximum limit provided by statute, *e.g.*, armed robbery or life recidivist sentences.

Review of sentence (continued)

Controlled substances

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

See CONTROLLED SUBSTANCES Sentencing, (p. 145) for discussion of topic.

Recidivist

See RECIDIVIST Cruel and unusual punishment, (p. 740) for discussion of topic.

Robbery

See ROBBERY Sentencing, Review of sentence, (p. 777) for discussion of topic.

Robbery

See ROBBERY Sentencing, Review of sentence, (p. 777) for discussion of topic.

PUBLIC INTOXICATION

Arrest

Probable cause

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

See ARREST Warrantless, Probable cause and exigent circumstances, (p. 54) for discussion of topic.

Incarceration of alcoholics

State ex rel. Harper v. Zegeer, 296 S.E.2d 873 (1982) (Harshbarger, J.)

Alcoholism is recognized as a disease.

Syl. pt. 1 - Criminal punishment of chronic alcoholics for public intoxication violates our State constitutional prohibition against cruel and unusual punishment. *W.Va. Const.* art. III, § 5.

Syl. pt. 2 - The State has a legitimate right to remove chronic alcoholics from public places, but not to incarcerate them as criminals.

Incarceration of alcoholics in county "drunk tanks" where unsanitary and often dangerous conditions prevail is cruel and unusual punishment.

Under 60-3-9C (1969) which directs increases in prices of alcoholic liquors to provide for care, treatment and rehabilitation of alcoholics, resources are available to establish centers for publicly inebriated people.

West Virginia must develop alternative methods for dealing with public drunkenness and alcoholics.

When defendant had been incarcerated for public intoxication, more than a dozen times in one year, he petitioned by habeas corpus to determine the constitutionality of jailing chronic alcoholics who are intoxicated. The Supreme Court granted the writ and held that such incarceration of chronic alcoholics for public intoxication was cruel and unusual punishment.

PUBLIC TRIAL

In general

State ex rel. Hearld Mail Co. v. Hamilton, 267 S.E.2d 544 (1980) (Miller, J.)

According to *Gannett Co. v. De Pasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) the sixth amendment confers the right to a public trial only on the accused; the public, consequently, has no constitutional right to pretrial hearings. On the other hand, the West Virginia Constitution counterpart to the sixth amendment, art. III, § 14, when read together with art. III, § 17, does provide a basis for the finding that the public has a right to attend criminal proceedings, "trials of crimes, . . . shall be . . . public . . . ." It is thus mandatory that the trial itself be public.

When the trial court granted defendant's closure motion in regard to *in camera* proceedings concerning the admissibility of statements made by the defendant and his mental state, the *Herald Mail* sought to prohibit enforcement of the closure order. The *Herald Mail* argued that under art. III, §§ 14 and 17 of the West Virginia Constitution, the public has a right to attend a criminal trial, including pretrial hearings. The Supreme Court agreed that the public, thus the press, does have a right to attend a criminal subject to "fair trial" limitations of the due process clause of the fifth and fourteenth amendments.

Since the record failed to indicate any widespread prejudicial publicity or any claim that the defendant would suffer irreparable damage to his right to a fair trial if the press were allowed, the defendant's motion should not have been granted.

Upon a finding that a closure motion is appropriate, the trial court must limit the order to the extent that the circumstances warrant closure. The court must also delineate reasons for closure.

RECEIVING STOLEN GOODS

In general

State v. Frazier, 253 S.E.2d 534 (1979) (Miller, J.)

Footnote 2 - *W.Va. Code* § 61-3-18 - "If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be deemed guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted."

Elements of the offense

State v. Frazier, 253 S.E.2d 534 (1979) (Miller, J.)

"The essential elements of the offense created by the foregoing statute [receiving stolen goods] are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or have reason to believe, when he bought or received or aided in concealing the property with a dishonest purpose." *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).

Identification of goods

State v. Frazier, 253 S.E.2d 534 (1979) (Miller, J.)

"The identity of the property received with that alleged to be stolen must be established beyond a reasonable doubt, and by the most direct and positive testimony of which the case is susceptible. However, identity may be established by circumstantial, as well as by direct, evidence. Generally speaking, the mere fact that the property is of the same kind as that stolen is, in the absence of other circumstances, not sufficient to establish identity . . . ." 75 C.J.S. Receiving Stolen Goods, § 19.

RECEIVING STOLEN GOODS

Instructions

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

The following instruction approved in *State v. Powers*, 91 W.Va. 737, 113 S.E. 912 (1922) is now disapproved, unless wording negating the inference of guilt is added: "The court instructs the jury that possession of recently stolen property is a circumstance tending to show that the possessor is the thief and may be considered in connection with all other attending circumstances and facts."

Language such as the following was suggested by the Supreme Court as now necessary to make the instruction acceptable: "While possession of recently stolen goods is of itself not even *prima facie* evidence of guilt, yet it may be considered with other facts and circumstances as a circumstance bearing upon the guilt of the accused."

RECIDIVIST

In general

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

"Habitual criminal proceedings providing for enhanced or additional punishment on proof of one or more prior convictions are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner." *State ex rel. Ringer v. Boles*, 151 W.Va. 864, 871, 157 S.E.2d 554, 558 (1967).

State v. Gilliam, 289 S.E.2d 471 (1982) (Per Curiam)

In an appeal from a breaking and entering trial, the defendant raised an irregularity in the manner in which the recidivist proceeding under *W.Va. Code* § 61-11-19, was invoked. The Supreme Court declined to address this issue, since the record showed defendant entered into a plea bargain with the State whereby the State agreed not to seek imposition of the life recidivist sentence, as found by the jury in the recidivist trial but only the additional five year enhancement, and the court accepted this bargain and imposed the five years upon defendant.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

The purpose of the habitual criminal statute is to deter a person from future criminal behavior.

Cruel and unusual punishment

Enhanced sentence

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

In resentencing defendant who had a prior conviction for a felony and a subsequent conviction for a burglary, the correct resentence as determined by the Supreme Court was an indeterminate term of one to twenty years.

Cruel and unusual punishment (continued)

Enhanced sentence (continued)

Martin v. Leverette, (continued)

Both crimes, a burglary and an armed robbery, were seen as serious and involving the threat of violence against persons, and it was held that the claim that the sentence violated the cruel and unhuman punishment prohibition was without merit.

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Syl. pt. 1 - [T]he habitual criminal statute, *W.Va. Code*, 61-11-18, and the enhanced sentence provided thereunder, are not *per se* violative of the Equal Protection and Cruel and Unusual Punishment Clauses of the West Virginia or the United States Constitutions. Syllabus Point 3, in part, *Martin v. Leverette*, 244 S.E.2d 39 (W.Va. 1978).

While the nature of the third felony, under West Virginia's recidivist statute, cannot be solely determinative of whether a life sentence is disproportionate, this third felony is entitled to more strict scrutiny than the previous crimes.

Where defendant had been convicted of two prior felonies, forging an $18.62 check and burning a barn, and defendant was subsequently given a recidivist life sentence under *W.Va. Code* § 61-11-18 upon his third felony conviction, forging a $43.00 check, the Supreme Court held that because of the nonviolent nature of the crimes, the imposition of a life sentence violated the West Virginia Constitutional provision requiring that the sentence be proportional to the crime. The habitual criminal statute, however, was not found to be unconstitutional *per se*.

Cruel and unusual punishment (continued)

Enhanced sentence (continued)

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

Applying principles of *Wanstreet v. Bordenkircher*, 276 S.E.2d 205 (W.Va. 1981), the Court found the defendant's convictions of unlawful assault and of first degree sexual assault unquestionably constitute, in their own manner, actual and threatened violence to the person. Therefore the life sentence imposed for recidivism is not constitutionally disproportionate to the offense upon which it is based.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

The Supreme Court declined to apply the proportionality doctrine in this case, since they found the crime of breaking and entering carries the potentiality of violence and danger to live as well as to property. The defendant was convicted of breaking and entering and a life sentence was imposed under the habitual criminal act.

Selective enforcement

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

Syl. pt. 3 - Selective enforcement by a prosecutor of the habitual crime statute, *W.Va. Code*, 61-11-18, and the enhanced sentence provided thereunder, are not *per se* violative of the Equal Protection or Cruel and Unusual Punishment Clauses of the West Virginia or the United States Constitutions.

RECIDIVIST

Double jeopardy

In general

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

The initial conviction under the recidivist statute does not violate double jeopardy principles, since the recidivist proceeding does not involve a new offense, but rather an enhancement of the penalty for the underlying felony conviction.

While it is necessary to establish a factual basis to prove the recidivist charge, these facts do not bear upon the defendant's guilt of a substantive offense.

Resentencing

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

A resentencing is not prevented by double jeopardy principles since the resentencing is unrelated to the underlying truth-finding process which led to the conviction.

Retrial of recidivist proceeding

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Syl. pt. 6 - Since a recidivist proceeding does not involve a separate substantive offense, double jeopardy principles do not bar a retrial of that proceeding.

Due process

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Quotes *State v. Vance* 262 S.E.2d 423 (W.Va. 1980) in addressing reasons for affording due process protection in a recidivist proceeding.

Due process (continued)

Wanstreet v. Bordenkircher, (continued)

In West Virginia recidivist sentences have been vacated for failure to file recidivist information in writing, failure to file this information at the same term of the last conviction, for failure to caution the defendant of his rights under the statute, and for failure to provide a jury trial.

Elements

"Conviction"

State v. Rector, 280 S.E.2d 597 (1981) (McHugh, J.)

W.Va. Code § 61-11-19 specifically requires that such proceedings be instituted upon conviction and before sentencing. It would not be proper, therefore, to delay the sentencing of a defendant, pursuant to the habitual offender statutes, until such "time" the appellant process relating to a defendant's last felony conviction has been completed.

Identification

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

Syl. pt. 4 - Where the issue of identity is contested in an habitual criminal proceeding, the State must prove identity beyond a reasonable doubt.

The particular method of proof varies, but it consists typically of some combination of authenticated records, photographs, fingerprints, and oral testimony. The Court has held that the mere proof of identity of names between the defendant and the person named in the prior conviction records fails to establish identity in a recidivist proceeding.

A defendant in a habitual criminal proceeding is entitled to the same right not to be subjected to unduly suggestive identification procedures as in a criminal trial.

Elements (continued)

Prior felonies

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Consistent with West Virginia's tendency to construe the recidivist statute in favor of the prisoner, the court has excluded from consideration as prior felonies those offenses punishable only because they had been repeated misdemeanors, felonies committed before the conviction and sentencing of a previous felony had been completed, and convictions by a military court.

The recidivist statute is meant to deter future crimes; thus the statute is applicable only to offenders who having been previously convicted and sentenced proceed to commit further crimes.

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Applies standard set forth in the syllabus in *State v. McMannis*, 242 S.E.2d 571 (W.Va. 1978), cited below.

State v. Adkins, 284 S.E.2d 619 (1981) (Harshbarger, J.)

Syl. pt. 1 - A trial court cannot double a defendant's sentence for violation of the Uniform Controlled Substance Act unless the principal offense was committed after a preceding conviction and sentence. Code, 60A-4-408.

The offenses in this case occurred on November 7, 1976, and the defendant was convicted on September 27, 1977. He committed a second offense on November 12, 1976 and was convicted in May, 1977. Therefore the trial court cannot double the defendant's sentence under *W.Va. Code* 60A-4-408.

Elements (continued)

Prior felonies (continued)

State v. McMannis, 242 S.E.2d 571 (1978) (McGraw, J.)

Syl. pt. - Where a prisoner being proceeded against under the habitual criminal statute remains silent or says he is not the same person who was previously convicted and sentenced to the penitentiary offense of offenses alleged in the information, a circuit court has no jurisdiction to impose an enhanced sentence under the statute where the State fails to prove beyond a reasonable doubt that each penitentiary offense, including the principal penitentiary offense, was committed subsequent to each preceding conviction and sentence. *W.Va. Code* §§ 61-11-18, 19.

"A third conviction for a felony which was committed prior to a second felony conviction does not justify the imposition of a life sentence by a trial court under Code, 61-11-19 . . ." *State ex rel. Stover v. Riffe*, 128 W.Va. 70, 35 S.E.2d 689 (1945).

The State has the burden of proving the trial court has jurisdiction to impose an increased sentence under the habitual criminal statute. The burden is not upon the defendant to raise the jurisdictional question as a matter of defense.

Where the State failed to show beyond a reasonable doubt that each offense was committed subsequent to a preceding conviction, the trial court had no jurisdiction to impose additional sentence in excess of that provided for the principal crime.

When defendant was convicted of grand larceny, and upon the basis of two prior convictions the court invoked the habitual criminal statute to impose a mandatory life sentence, the defendant brought a writ of error asserting that both the prior offenses relied upon by the prosecutor were committed in the same month of 1970 before any convictions were obtained, and consequently he had only one prior conviction within the meaning of the habitual criminal statute. Since the prosecutor's amended information

Elements (continued)

Prior felonies (continued)

State v. McMannis, (continued)

averred two former convictions, one in May 1970, and one ins September, 1970, since the amended information did not set out the sentences as required by *W.Va. Code* § 61-11-19, and since there was no evidence to contradict defendant's assertion, the Supreme Court held that the trial court did not have jurisdiction to impose a life sentence under the habitual criminal statute.

The primary purpose of the habitual criminal statute is to deter felony offenders from committing further penitentiary offenses, therefore, it is imperative that the conviction be for offenses committed after each preceding conviction and sentence.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 8 - A trial court cannot sentence a defendant as a recidivist under Code, 61-11-18, 19, absent his admission unless the prosecution proves that each subsequent offense counting toward habitual criminal penalties occurred after each prior conviction used in the calculation.

Recidivist conviction set aside

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

While the recidivist conviction was set aside and its attendant life sentence was invalidated, this did not affect the validity of the underlying conviction.

Where recidivist conviction was set aside and its attendant life sentence was invalidated, trial court, on remand, could sentence the relator to the statutory term provided for the underlying conviction or the State could reinvoke the recidivist proceeding to enhance the underlying sentence.

RECIDIVIST

Sentencing

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

The validity of petitioner's 1968 breaking and entering conviction and his 1957 sodomy conviction were not challenged. The Supreme Court found that the Circuit Court of Jefferson County had authority to validly impose a sentence of one-to-ten years for the crime of breaking and entering and an additional sentence of five years added to the maximum of the indeterminate sentence based on his previous conviction of a felony offense in 1957 and that the sentence thus authorized by law as for an indeterminate period of one-to-fifteen years.

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

Syl. pt. 2 - Under the provisions of the habitual criminal statute, *W.Va. Code*, 61-11-18, where the additional sentence of five years as authorized thereunder is imposed on an indeterminate sentence, it shall be added to the maximum term of the indeterminate sentence and shall not be given as a separate sentence to run consecutive to the indeterminate sentence.

In an appeal from a partial denial of a writ of habeas corpus, the defendant claimed it was error for the resentencing judge to resentence defendant to one-to-fifteen years on his burglary conviction and an additional five years to run consecutively for a prior felony conviction, under the habitual criminal statute. The Supreme Court held that the two separate sentences were contrary to case and statutory law requiring a single sentence, the correct resentencing being a single sentence of one-to-twenty years.

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

In applying the recidivist life penalty, the trial court does not impose a separate sentence for the last felony conviction, but upon the jury's conviction in the recidivist proceeding it imposes a life sentence on the last felony conviction.

Sentencing (continued)

State v. Adkins, 284 S.E.2d 619 (1981) (Harshbarger, J.)

See RECIDIVIST Elements, Prior felonies, (p. 745) for discussion of topic.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 9 - Code, 61-11-18, 19 require that the additional sentence of a recidivist by a trial court shall be included in the sentence imposed for the main calculation.

State v. Vance, 262 S.E.2d 423 (1980) (Miller, J.)

If an individual is successfully prosecuted as an habitual criminal, a greater penalty than that attaching to the underlying crime is imposed. The functional criteria used for determining the sentence are: (1) The nature of the offense; (2) the legislative purpose behind the punishment; (3) a comparison of the punishment with what would be inflicted in other jurisdictions; and (4) a comparison of punishment with other related offenses within the same jurisdiction.

Void/voidable

See RECIDIVIST Elements, Prior felonies, (p. 745) for discussion of topic.

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

"A petitioner in a habeas corpus proceeding upon whom imprisonment for an additional period has been improperly imposed under f this State, may be relieved of the void portion of the imprisonment but will not be discharged from serving the maximum term provided by statute for the principal offense and any valid additional sentence for any prior felony conviction." Syl. pt. 2, *State ex rel. Johnson v. Boles*, 151 W.Va. 224, 151 S.E.2d 213 (1966).

Sentencing (continued)

Void/voidable (continued)

Housden v. Leverette, (continued)

Inasmuch as the petitioner had not fully served the maximum sentence provided by statute for the substantive offense and the additional sentence of imprisonment for his prior felony conviction, he was not entitled to release from confinement in the habeas corpus proceeding.

Validity of prior convictions

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

Since petitioner was denied effective assistance of counsel, the trial court lacked jurisdiction to enter a valid judgment of conviction and such judgment as entered is void and cannot serve as a foundation for the application of the habitual offender statute. Therefore the sentence of life imprisonment imposed upon the petitioner under the habitual offender statute is null and void.

Wanstreet v. Bordenkircher, 276 S.E.2d 205 (1981) (Miller, J.)

Felony convictions underlying the recidivist sentence must be constitutionally valid; thus sentences based upon convictions obtained without assistance of counsel (unless voluntarily and intelligently waived) or without effective assistance of counsel have been vacated.

State v. Echard, 280 S.E.2d 724 (1981) (Per Curiam)

When defendant was denied a mental examination to determine his competency to stand trial under circumstances indicating that such exam was required and defendant was, subsequently, sentenced to life as a recidivist, the Supreme Court reversed the conviction and ordered a competency examination.

Validity of prior convictions (continued)

State v. Echard, (continued)

Under case law requiring that the previous convictions be valid before they will support a recidivist sentence, the Supreme Court required a determination upon retrial of the validity of the prior convictions.

"To justify the imposition, under the recidivist statute of this State, of a sentence in excess of the sentence provided for the principal offense, the previous conviction and sentence must be a valid conviction and sentence; and if such previous conviction and imposition of the punishment provided by such statute and, in that situation, such statute will be deemed to be wholly inapplicable." Syl. pt. 2, *State ex rel. Whytsell v. Boles*, 149 W.Va. 324, 141 S.E.2d 70 (1965).

RECKLESS DRIVING

In general

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

See CRITICAL STAGE Right to be present/harmless error, (p. 151) for discussion of topic.

W.Va. Code § 17C-5-3(a) (1951) (amended 1979) provides that "any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

Indictment

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

When the warrant, written in terms of *W.Va. Code* § 17C-5-3(a) (1951) (amend 1979), stated that defendant's conduct constituted reckless driving and also specified the time and place of the incident, but did not designate specific persons whose safety was disregarded, the warrant was sufficient to fully inform the petitioner of the reckless driving charge against him.

Sufficiency of warrant

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

Syl. pt. 3 - A warrant charging, under *W.Va. Code* § 17C-5-3 (1951) that the petitioner's conduct was in wanton and willful disregard of the safety of persons or property without specifically naming the persons or property involved was sufficient to fully inform the petitioner of the reckless driving charge against him.

RED MEN'S ACT

Constitutionality

State v. Postelwait, 239 S.E.2d 734 (1977) (Per Curiam)

Syl. pt. - the rule in *Pinkerton v. Farr*, 220 S.E.2d 682 (W.Va. 1975), holding *W.Va. Code* § 61-6-7, the Red Men's Act, unconstitutional, is fully retroactive.

In a December 16, 1975, Opinion, *Pinkerton v. Farr*, 220 S.E.2d 682 (W.Va. 1975), the Supreme Court declared the West Virginia Red Men's Act unconstitutional because it destroyed the presumption of innocence of the accused, because it infringed upon the accused's right against self-incrimination, and because it failed to require proof beyond a reasonable doubt as the basis for conviction. The decision was made retroactive since the reasons for declaring the Red Men's Act unconstitutional went to the impact on the criminal trial's fact-finding function.

This was based upon the *Adkins v. Leverette*, 239 S.E.2d 496 (W.Va. 1977), holding that where the purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function, neither good faith reliance on the old law nor *se vere* impact on administrative justice will preclude retroactive application.

RESISTING ARREST

Sufficiency of evidence

State v. Smith, 289 S.E.2d 478 (1982) (Per Curiam)

The Supreme Court applied the standard set out in syllabus point 1 of *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) to determine if the evidence adduced at trial was insufficient to support a verdict of guilty of resisting arrest.

The evidence offered by the officers involved in the arrests of the defendant's, if believed, would support a verdict of guilty, and the credibility of witnesses is peculiarly within the province of the trier of facts.

RETROACTIVITY

In general

Adkins v. Leverette, 239 S.E.2d 496 (1977) (Miller, J.)

Syl. pt. 1 - The concept of retroactivity determines how a case which substantially alters a relevant body of prior law should be applied to other cases.

Blankenship v. Minton Chevrolet, Inc., 266 S.E.2d 902 (1979) (Neely, J.)

Syl. pt. 2 - At the heart of any determination concerning retroactive application of a court imposed rule of constitutional, statutory, or common law is a balancing of the equity to those urging retroactive application versus the legitimate reliance interest of those against whom the retroactive application is urged.

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

The question of whether a displaced rule has substantially impaired the truth-finding process requires the application of a balancing test.

Some incorrect result that may have occurred due to the old rule is not enough to justify, by itself, retroactive application of the new rule.

Even if a new rule does seek to correct an aspect of trial that calls into question the integrity of the truth-finding process, the purpose of the rule may be "adequately served by prospective application" where there are countervailing considerations.

Footnote 17 - The essence of the whole retroactive doctrine is whether substantial justice would require a retrial because of serious unreliability in the fact finding process. A retrial, however, often forces the parties "to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971).

In general (continued)

Bowman v. Leverette, (continued)

Footnote 17 - "We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses . . . no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice was not involved." *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973).

State ex rel. Johnson v. Hamilton, 266 S.E.2d 125 (1980) (Neely, C.J.)

In determining whether to apply a ruling retroactively, the Supreme Court looks at the fundamental principle of reliance upon current procedural rules.

State v. Gangwer, 283 S.E.2d 839 (1981) (Miller, J.)

Syl. pt. 2 - The concept of "full retroactivity" in a criminal case ordinarily means that the new rule is available not only for those cases in litigation or on appeal where the point has been preserved but is also available by way of collateral attack on a final judgment through a writ of habeas corpus.

Syl. pt. 3 - In the absence of any substantial countervailing factors, where a new rule of criminal law is made of nonconstitutional nature, it will be applied retroactively only to those cases in litigation or on appeal where the same legal point has been preserved.

RETROACTIVITY

In general (continued)

State v. Rowe, 285 S.E.2d 445 (1981) (Per Curiam)

Applies standards set forth in Syl. pt. 2 and Syl. pt. 3, *State v. Gangwer*, 283 S.E.2d 839 (W.Va. 1981), cited above.

State v. Schrader, 288 S.E.2d 170 (1982) (Neely, J.) (Withdrawn from bound volume because rehearing is pending)

Applies standards set forth in Syl. pt. 2 and Syl. pt. 3, *State v. Gangwer*, 283 S.E.2d 839 (W.Va. 1981), cited above.

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

Retroactive application of a statute is warranted only where the legislative intent to do so is clearly indicated.

Accessory, aiding and abetting, principal

State v. Petry, 273 S.E.2d 346 (1980) (Neely, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 23) for discussion of topic.

Burden shifting

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

Syl. pt. 2 - The decisions in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and *State v. O'Connell*, 256 S.E.2d 429 (W.Va. 1979), do not require full retroactive application.

Burden shifting (continued)

Bowman v. Leverette, (continued)

The instruction in *Sandstrom* stated that the law presumes a man to intend that which he does. The error in the case was not so much the instruction itself but the possibility that the jury may have misinterpreted the instruction. The major purpose of the *Sandstrom* rule is not designed to overcome an aspect of trial that substantially impairs the truth-finding function. The mere possibility of a jury misinterpreting an instruction cannot be said to be a substantial impairment of the truth-finding process at trial. The purpose to be served by the prophylactic rule in *Sandstrom* would not be significantly furthered by full retroactive application, especially in light of the countervailing considerations of finality of judgments, reliance on the old rule, the burden that retroactivity would have on the administration of justice and the availability of other grounds of relief under *Mullaney* and *In re Winship*. The same consideration apply to *O'Connell*.

In armed robbery case, instruction stated that the law presumes a man to intend that which he does. This instruction failed to raise the possibility of a jury's misinterpreting it. The Supreme Court found that the rule disapproving such an instruction would not be applied retroactively by way of post-conviction habeas corpus here. The *Linkletter* test was applied and it was found that the major purpose of the disapproving rule was not to correct a substantial impairment of the truth-finding process at trial; the giving of the instruction did not outweigh reliance on the old rule; and the need for the instruction did not outweigh the effect on the administration of justice. Other factors were also discussed.

Jones v. Warden, W.Va. Penitentiary, 241 S.E.2d 914 (1978) (Harshbarger, J.)

Syl. pt. 2 - The proscription against unconstitutionally shifting the burden of proof in criminal trials from the state to the defendant through the use of presumption is fully retroactive and may be raised by collateral attack against a final conviction.

Burden shifting (continued)

Kosut v. Leverette, 242 S.E.2d 247 (1978) (Per Curiam)

Applies standard set forth in Syl. pt. 2, *Jones v. Warden, W.Va Penitentiary*, 241 S.E.2d 914 (W.Va. 1978), cited above.

The Supreme Court awarded the writ of habeas corpus where instructions of the type subsequently condemned in the case of *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976), were given at relator's trial.

State ex rel. Ridenour v. Leverette, 271 S.E.2d 612 (1980) (Per Curiam)

Applies standard set forth in syl. pt. 2, *Jones v. Warden*, 241 S.E.2d 914 (W.Va. 1978).

Although defendant was convicted before the *Pendry* decision, the *Jones* case retroactively applied the *Pendry* standard, and so defendant's conviction for murder was set aside.

Double jeopardy rules

See DOUBLE JEOPARDY Retroactivity, (p. 214) for discussion of topic.

Good time

See GOOD TIME/REDUCTION OF SENTENCE *Ex post facto*, (p. 333); GOOD TIME/REDUCTION OF SENTENCE Retroactivity, (p. 335) for discussion of topic.

Insanity

See INSANITY Retroactivity, (p. 476) for discussion of topic.

RETROACTIVITY

Joinder

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

See DOUBLE JEOPARDY Joinder, (p. 208) for discussion of topic.

State v. Shafer, 284 S.E.2d 916 (1981) (Neely, J.)

See DOUBLE JEOPARDY Joinder, (p. 209) for discussion of topic.

Judgments in justice of peace court

Blankenship v. Minton Chevrolet, Inc., 266 S.E.2d 902 (1979) (Neely, J.)

Syl. pt. 1 - Judgments rendered in the former justice of the peace courts where the judge was paid pursuant to a statute *W.Va. Code*, 50-17-1 [1966] (or its predecessor) which was ruled unconstitutional because it gave a theoretical pecuniary interest to the judicial officer, are merely voidable and not void *ab initio*.

Juvenile proceedings

See JUVENILE Statutes, Retroactivity, (p. 587); JUVENILE Transfer, Retroactivity of statutes, (p. 617) for discussion of topic.

Parole

Adkins v. Leverette, 239 S.E.2d 496 (1977) (Miller, J.)

See PAROLE Credit on underlying sentence, (p. 661) for discussion of topic.

RETROACTIVITY

Pre-sentence reports

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

See SENTENCING Presentence reports, (p. 877) for discussion of topic.

Prior convictions

State v. Baker, 267 S.E.2d 458 (1980) (Per Curiam)

The *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977) holding, of when prior convictions are admissible, applies retroactively to cases "in the trial courts or in the appellant process where the point has been specifically reserved." 236 S.E.2d at 437. This case falls within the limited retroactivity contained in *McAboy*.

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

The *McAboy* ruling applies to all pending cases where the error was preserved on appeal.

State v. McAboy, 236 S.E.2d 431 (1977) (Miller, J.)

The rules regarding evidence of prior convictions are not to be given retroactive application, except as to those cases in the trial courts or in the appellant process where the point has been specifically preserved.

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

During the appeal of this case, *State v. McAboy*, 236 S.E.2d 431 (W.Va. 1977), which controlled on the issue of limitation of impeachment by prior convictions, was handed down. As *McAboy's* rule was applicable to cases in trial or on appeal and defense counsel had preserved this point for appeal, *McAboy* did apply retroactively to this defendant.

RETROACTIVITY

Prior convictions (continued)

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

The *State v. McAboy* 236 S.E.2d 431 (W.Va. 1977) holding, of when prior convictions are admissible, applies retroactively to cases "in the trial courts or in the appellant process where the point has been specifically reserved." 236 S.E.2d at 437. This case falls within the limited retroactivity contained in *McAboy*.

Red Men's Act

State v. Postelwait, 239 S.E.2d 734 (1977) (Per Curiam)

See RED MEN'S ACT Constitutionality, (p. 753) for discussion of topic.

Self-defense

See SELF-DEFENSE, (p. 820) for discussion of topic.

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

See SELF-DEFENSE Instructions, (p. 823) for discussion of topic.

Speedy trial

Same term rule

State ex rel. Holstein v. Casey, 265 S.E.2d 530 (1980) (Harshbarger, J.)

See SPEEDY TRIAL Same term rule, (p. 895) for discussion of topic.

RIGHT TO COUNSEL

In general

Bullett v. Staggs, 250 S.E.2d 38 (1978) (Caplan, C.J.)

Syl. pt. 1 - Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

See EQUAL PROTECTION Right to counsel, (p. 250) for discussion of topic.

State ex rel. Graves v. Daugherty, 266 S.E.2d 142 (1980) (Harshbarger, J.)

See DUE PROCESS Right to counsel, In general, (p. 238) for discussion of topic.

Appeal

See APPEAL Right to counsel, (p. 45); APPEAL Right to counsel, When trial counsel appointed, (p. 46) for discussion of topic.

See DUE PROCESS Right to counsel, Effective assistance of counsel, (p. 238) for discussion of topic.

Communicable tuberculosis

Greene v. Edwards, 263 S.E.2d 661 (1980) (Per Curiam)

See COMMUNICABLE TUBERCULOSIS Due process, (p. 99) for discussion of topic.

RIGHT TO COUNSEL

Dissatisfaction/rejection of appointed counsel

Watson v. Black, 239 S.E.2d 664 (1977) (Neely, J.)

See INDIGENTS Right to counsel, Dissatisfaction/rejection of appointed counsel, (p. 444) for discussion of topic.

Extradition

State v. Mollohan, 272 S.E.2d 454 (1980) (Neely, C.J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 857) for discussion of topic.

Interrogation in absence of counsel

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 854) for discussion of topic.

Juveniles

See JUVENILE Right to counsel, (p. 585) for discussion of topic.

Municipal ordinance violations

Bullett v. Staggs, 250 S.E.2d 38 (1978) (Caplan, C.J.)

Syl. pt. 2 - *W.Va. Code*, 1931, 51-11-5, as amended, constitutes sufficient authority for the appointment of counsel by the circuit court of one charged with a violation of a municipal ordinance, which violation could result in imprisonment.

Paternity

See PATERNITY Right to counsel, (p. 671) for discussion of topic.

RIGHT TO COUNSEL

Preliminary hearing

See PRELIMINARY HEARING Right to counsel, (p. 683) for discussion of topic.

Right to effective assistance

See INDIGENTS Right to counsel, Effective assistance, (p. 445) for discussion of topic.

Waiver of

See JUVENILE Right to counsel, Waiver of right, (p. 585) for discussion of topic.

State v. Bradley, 255 S.E.2d 356 (1979) (Harshbarger, J.)

Syl. pt. 2 - If after requesting counsel an accused shall recant his request, there is a heavy burden upon the state to prove his waiver of right to counsel.

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 854) for discussion of topic.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Mental capacity, (p. 852) for discussion of topic.

State v. Mollohan, 272 S.E.2d 454 (1980) (Neely, C.J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 857) for discussion of topic.

Waiver of (continued)

State v. Sowards, 280 S.E.2d 721 (1981) (Per Curiam)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 858) for discussion of topic.

Youthful offenders

Watson v. Whyte, 245 S.E.2d 916 (1978) (Harshbarger, J.)

See YOUTHFUL OFFENDERS ACT Due process, (p. 973) for discussion of topic.

ROBBERY

In general

Thomas v. Leverette, 273 S.E.2d 364 (1980) (McGraw, J.)

Syl. pt. - The crime of armed robbery was not intended to e included in tat class of crimes designated "capital offenses" for the purpose of *W.Va. Code* § 49-5-3 (1975), excluding from the juvenile jurisdiction of the circuit court juveniles charged with the commission of acts which would be "capital offenses" if committed by an adult.

The crime of armed robbery does not carry a statutory penalty of life imprisonment, as do some other crimes. If the legislature had intended armed robbery to be a capital crime it would have indicated its intent by specifically providing for a penalty of life imprisonment as it did with other crimes. By leaving the maximum penalty for armed robbery within the discretion of the sentencing court, the legislature indicated that it did not consider armed robbery and other offenses carrying similar penalties to be in the same class of offenses with other crimes.

Insofar as it is in conflict with this holding, *Lycans v. Bordenkircher*, 222 S.E.2d 14 (W.Va. 1975) is overruled by this opinion.

Accessory, aiding and abetting, principal

State v. C.J.S., 263 S.E.2d 899 (1980) (Harshbarger, J.)

Syl. pt. 1 - An aider and abettor is as criminally responsible for a crime as the principal actor.

Syl. pt. 2 - A child who aided and abetted the commission of a robbery involving the use or presenting of firearms may be subject to transfer to criminal court under *W.Va. Code*, 49-5-10(d)(1).

State v. Wayne, 289 S.E.2d 480 (1982) (Miller, C.J.)

The act of accosting a prison guard and taking his firearm and key with intent to steal constitutes aggravated robbery or robbery by violence under *W.Va. Code* § 61-2-12. The fact that the defendant was aiding and abetting the others makes a principal in the second degree.

ROBBERY

Bail

State ex rel. Faircloth v. Catlett, 267 S.E.2d 736 (1980) (Harshbarger, J.)

See BAIL Post-conviction, Pending appeal, (p. 82) for discussion of topic.

Defenses

Bona fide claim of ownership

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

Syl. pt. 2 - A defendant may assert as a defense to a robbery or larceny charge, that he had a *bona fide* claim of ownership to the specific property stolen and, therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt.

Where defendant claimed that an agreement had been made whereby he was to receive payment of $7,750 for coins delivered and, to secure payment, defendant robbed defendant of his wallet and coins, defendant had no *bona fide* claim of right as a defense to the robbery since he took property to which he did not have a specific ownership claim.

Double jeopardy

State ex rel. Hall v. Strickler, 285 S.E.2d 143 (1981) (Harshbarger, C.J.)

See DOUBLE JEOPARDY Homicide, Felony-murder, (p. 206); JOINDER - SEVERANCE AND ELECTION Severance, (p. 530) for discussion of topic.

ROBBERY

Elements

In general

State v. Harless, 285 S.E.2d 461 (1981) (Miller, J.)

Syl. pt. 1 - At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods.

Syl. pt. 2 - At common law, robbery could be accomplished either by actual physical force or violence inflicted on the victim or by intimidating the victim by placing him in fear of bodily injury. There were no degrees or grades of common law robbery.

Syl. pt. 3 - *W.Va. Code*, 61-2-12, enacted in 1931, divides robbery into two separate classes calling for different penalties: (1) robbery by violence or by the use of a dangerous weapon, and (2) all other robberies.

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

"At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods." Syl. pt. 1, *State v. Harless*, 285 S.E.2d 461 (W.Va. 1981).

Aggravated/nonaggravated

State v. Coulter, 288 S.E.2d 819 (1982) (Per Curiam)

Both the common law and our statute recognize that robbery may be committed by fear as the defendant contends. However, when robbery is committed by force, the element of fear need not exist, although it may be committed without force by putting a person in fear. *W.Va. Code* § 61-2-12

Elements (continued)

Aggravated/nonaggravated (continued)

State v. Coulter, (continued)

defines the crime of robbery. But the Supreme Court "has previously resorted to the common law which defines robbery as 'the felonious taking of money or goods of value from the person of another or in his presence, against his will, by force or putting him in fear.'" *State v. Cunningham*, 290 S.E.2d 256 (W.Va. 1981).

State v. Cunningham, 290 S.E.2d 256 (1981) (Neely, J.)

Syl. pt. 3 - A person who (1) confronts a store clerk in the store's cooler (2) strikes her, (3) disrobes her, (4) commits a sexual assault against her and (5) warns her against following him out of the cooler, commits a robbery by violence (or armed robbery in common parlance) under *W.Va. Code*, 61-2-12 [1961], when he then goes directly to the cash register and takes money therefrom.

State v. Harless, 285 S.E.2d 461 (1981) (Miller, J.)

The distinguishing feature of a nonaggravated robbery is that it is accomplished, not through violence to the victim or the threat or presentation of firearms or other deadly weapon or instrumentality, but through intimidation that induces fear of bodily injury in the victim.

In the case of an aggravated robbery, fear of bodily injury is not an essential element of the crime, since the actual physical force or violence or threat or presentation of firearms or other deadly weapon or instrumentality can be presumed to have created fear or bodily injury.

Footnote 9 - It is clear under our robbery statute that a firearm or other deadly weapon does not have to be used on the victim, its threatened use or presentation is sufficient to constitute aggravated robbery. *State v. Young*, 134 W.Va. 771, 61 S.E.2d 734 (1950).

Elements (continued)

Intent

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

There was abundant evidence from which the jury could have properly inferred that the defendant had the requisite intent necessary for the crime of armed robbery even in light of defendant's evidence of intoxication at the time of the crime.

State v. Ferguson, 285 S.E.2d 448 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. McCoy*, 63 W.Va. 69, 59 S.E. 758 (1907). See *State v. Wolfe*, 277 S.E.2d 640 (W.Va. 1981) cited below.

When appellant had not touched the stolen purse and the victim was in no fear of bodily harm until after the incident was over, there was insufficient evidence to support an aggravated robbery charge. Furthermore, the State's evidence showed a lack of the requisite intent for the crime of robbery.

State v. Simmons, 285 S.E.2d 136 (1981) (Per Curiam)

"*Animus furandi*, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syl. pt. 2, *State v. Hudson*, 206 S.E.2d 415 (W.Va. 1974).

State v. Wolfe, 277 S.E.2d 640 (1981) (Per Curiam)

"The *animus furandi*, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny." Syllabus pt. 2, *State v. McCoy*, 63 W.Va. 69, 59 S.E. 758 (1907).

ROBBERY

Indictment

Scott v. Mohn, 268 S.E.2d 117 (1980) (Caplan, J.)

See INDICTMENT Sufficiency (p. 436) for discussion of topic.

Instructions

In general

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

When the State produced no evidence that the victim had actually been robbed and showed no other evidence that would allow a jury to find defendant guilty beyond a reasonable doubt of such, the court's offering to the jury robbery and larceny verdicts gave the jury a plethora of opportunities for a compromise verdict.

Aggravated/nonaggravated

State v. Harless, 285 S.E.2d 461 (1981) (Miller, J.)

Where the evidence clearly demonstrates that the defendant only threatened the victim with bodily injury and thereby placed him in fear, and no firearm or other deadly weapon is involved, the giving of a *Davis*-type instruction is not warranted. If such instruction is given and the defendant is convicted on aggravated or armed robbery, reversal is called for. The reason is that the *Davis* instruction states that the defendant can be convicted of armed robbery if he places the victim in fear or bodily injury. This is incorrect law under our robbery statute which makes this act nonaggravated or unarmed robbery.

Where the evidence is clear, as in the present case, that the robbery was committed by the use of physical violence on the victim or the presentation of a deadly weapon, the Supreme Court will treat the phrase "by placing the victim in fear," in a *Davis*-type instruction, as surplusage and not reversible error since fear is not a necessary element of aggravated robbery.

Instructions (continued)

Aggravated/nonaggravated (continued)

State v. Harless, (continued)

In cases where the evidence is in substantial conflict concerning whether the defendant used violence or a dangerous weapon of the victim, and a *Davis*-type instruction is given permitting the jury to find aggravated robbery if the victim is merely placed in fear of bodily injury, such instruction will be held to constitute reversible error. The reason for reversal is that with the evidence in substantial conflict on whether physical force or a dangerous weapon was used, which are the acts constitution aggravated robbery, the jury might well determine to convict on aggravated robbery even though the believe that no force was used upon the victim because the *Davis*-type instruction defines aggravated or armed robbery by the use of force or by placing the victim in fear. It is impossible to state with any certainty under these circumstances that the confusion in the *Davis*-type instruction did not contribute to a jury verdict of aggravated robbery.

To instruct the jury on aggravated robbery by telling them, that such a robbery can be committed by use of force and violence *or* by placing the victim in fear of bodily injury may result in confusing the jury and may lead to reversible error.

Footnote 8 - An appropriate charging portion of an instruction for "aggravated" robbery would be:

"Aggravated robbery is defined as the unlawful taking and carrying away of money or goods from the person of another, or in his presence, by the use of force or violence on the victim or through the use of a dangerous or deadly weapon or instrumentality, and with the intent to steal such property."

Instructions (continued)

Aiding and abetting

State v. Crockett, 265 S.E.2d 268 (1979) (Caplan, C.J.)

In a trial for robbery by violence, the jury could have found the defendant guilty or not guilty of robbery by violence as a principle in the first degree under the indictment. It could not have found her guilty of such crime as a principal in the second degree. It was erroneous for the court to give a State instruction which informed the jury of the elements of principal in the second degree to robbery. Even though the instruction did not tell the jury that it could find the defendant guilty as a principal in the second degree, the implication was sufficient to cause confusion.

Lesser included offense

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Where defendant was indicted for robbery and the court gave instructions which would allow a verdict of unlawful wounding, and defendant did not object to the instruction, the Supreme Court did not find plain error, since unlawful wounding is a lesser included offense in armed robbery and defendant had sufficient notice that he was accused of wounding the victim.

State v. Spicer, 245 S.E.2d 922 (1978) (McGraw, J.)

The general rule is that, when in doubt about whether there is enough evidence to instruct on a lesser included offense, the instruction on the lesser offense should be given.

In a trial for armed robbery where the defendant had at one point put away the knife with which he had threatened the victim, it was not error for the court to refuse the instruction on the lesser included offense of unarmed robbery, because the victim experienced no lessening of fear that she would be injured with the knife.

Instructions (continued)

Lesser included offense (continued)

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

The defendant complains that the State's instruction number one failed to incorporate the lesser included offenses of robbery, such as unlawful assault. The Supreme Court applied the test set out in *State v. Daggett*, 280 S.E.2d 545 (W.Va. 1981) for determining when an unlawful assault requires a specific "intent to maim, disfigure, disable or kill . . ." *W.Va. Code* § 61-2-9 (Cum. Supp. 1981). Such an intent to injure is not a necessary element of robbery. *W.Va. Code* § 61-2-12 (1977 Replacement Vol.) Therefore, since an element necessary to prove unlawful assault is irrelevant to the proof of robbery, unlawful assault is not a necessary part of the robbery and the trial court properly refused instructions which included it with robbery as a lesser offense.

Intent

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

The element of intent is essential to the crime of robbery.

Lesser included offense

State v. Coulter, 288 S.E.2d 819 (1982) (Per Curiam)

The defendant unquestionably used force in his attempt to take the pocketbook. The fact that he was unsuccessful is irrelevant.

"Under . . . [*W.Va. Code*, 61-2-12 [1961]], making robbery, and the attempt to commit robbery, a crime, and prescribing the penalties therefor, the attempt to commit robbery is a crime in itself . . . ." Syl. pt. 4, in part, *State ex rel. Vascovich v. Skeen*, 138 W.Va. 417, 76 S.E.2d 283 (1953).

Thus the facts of this case support the verdict of attempted robbery, a lesser included offense of attempted robbery by violence, the crime charged in the indictment.

ROBBERY

Lesser included offense (continued)

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Syl. pt. 7 - Unlawful wounding is a lesser included offense in armed robbery.

See ROBBERY Instructions, Lesser included offense, (p. 776) for discussion of topic.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

Applying the *State v. Daggett*, 280 S.E.2d 545 (W.Va. 1981) test for determining when an offense is considered a lesser included offense the Supreme Court found unlawful assault not to be a lesser included offense of robbery.

The crime of unlawful assault requires a specific "intent to maim, disfigure, disable or kill . . ." *W.Va. Code* § 61-2-9 (Cum. Supp. 1981). Such an intent to injure is not a necessary element of robbery. *W.Va. Code* § 61-2-12 (1977 Replacement Vol.)

Probation

State v. Duncan, 285 S.E.2d 468 (1981) (Harshbarger, C.J.)

See PROBATION Eligibility for probation, (p. 703) for discussion of topic.

Sentencing

State v. Crockett, 265 S.E.2d 268 (1979) (Caplan, C.J.)

In a trial for robbery, the trial judge imposed a sentence of 21 years. The Supreme Court found that the record did not reveal a reason for the sentence, and while such a sentence was permissible, they found it to be harsh under the circumstances and a reflection of the trial court's discriminatory demeanor.

Sentencing (continued)

Review of sentence

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

Even though the seventy-five year sentence for aggravated robbery was imposed before the *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980) decision, the Court remanded the case for reconsideration of the sentence.

Furthermore, when viewed in light of the alleged one-year sentence given to co-defendant following the entry of a guilty plea, *Houston* and *Smoot v. McKenzie*, 277 S.E.2d 624 (W.Va. 1981) dictate the development of an appropriate sentencing record.

State v. Houston, 273 S.E.2d 375 (1980) (Miller, J.)

Syl. pt. 2 - Where theft desires to challenge the length of his sentence for robbery by violence, he is entitled to do so by a timely motion to the trial court made within the time period provided by *W.Va. Code* § 62-12-3, for suspending a sentence, and an appropriate record shall be made to provide the factual basis for the sentence.

Even though the robbery by violence statute does not contain a maximum limit of punishment, it has been upheld as constitutional against claims of cruel and unusual punishment. The West Virginia Supreme Court has indicated its preference for utilizing the concept of proportionality to strike down a punishment as cruel and unusual under the eighth amendment.

The robbery by violence statute permits the court to set a determinate sentence without reference to any statutory maximum; consequently, it is subject to scrutiny under the proportionality principle.

In order to provide a meaningful judicial review of the sentence, a factual record on the basis for the sentence must be developed. This report should include the pre-sentence report and other diagnostic reports, statements made by defendant, his attorney, or prosecuting attorney if the statements have not already been recorded at or prior to the time sentence was imposed, which are relevant to the sentence, transcripts of guilty pleas, and the sen

Sentencing (continued)

Review of sentence (continued)

State v. Houston, (continued)

tencing judge's reasons for selecting a particular sentence, except in those instances where the sentencing judge considers it in the interest of the defendant not to fully state the reasons in the presence of the defendant where instead he will file such reasons in writing on the record.

Defendants appealed sentences for robbery by violence urging the Court to find the statutory punishment provisions for robbery by violence unconstitutional *per se* under the Eighth Amendment. The Supreme Court refused to declare the provision unconstitutional but chose instead to review the sentence under the proportionality principle, *W.Va. Const.*, art. II, § 5. The Court did, however, establish further guidelines requiring a specific factual record for the sentencing procedure for appellant review. The case was remanded with instructions to adhere to the guidelines to permit sentencing records to be developed.

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Appropriateness of the sentence, (p. 732);PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Disparate sentences, (p. 733) for discussion of topic.

Under our constitution proportionality principle contained in art. III, § 5 of the West Virginia Constitution, the term of an armed robbery sentence could be reviewed to determine if it was disproportionate.

State v. Winston, 295 S.E.2d 46 (1982) (Miller, J.)

Applies standard set forth in syl. pt. 2, *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980), cited above.

Sentencing (continued)

Review of sentence (continued)

State v. Winston, (continued)

The factors to be considered on sentencing as set forth in *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980) are only applicable to crimes such as aggravated robbery, where West Virginia's sentencing statutes give the trial court a broad leeway to set a determinate sentence.

Where appellant was sentenced to sixty years for aggravated robbery, he was entitled to a sentencing hearing in light of *Houston's* guidelines.

Sufficiency of evidence

State v. Coulter, 288 S.E.2d 819 (1982) (Per Curiam)

The defendant contends the State failed to prove that the victim was put in fear at the time of the alleged crime and that fear is a necessary element of robbery.

When robbery is committed by force, as in this case, the element of fear need not exist, although it may be committed without force by putting a person in fear.

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

"Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." Syl. pt. 4, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976).

Sufficiency of evidence (continued)

State v. Woods, (continued)

In an appeal from an armed robbery conviction, in regard to the defendant's motion for a directed verdict, the Supreme Court felt the record showed sufficient evidence upon which a jury might find defendant guilty of robbery beyond a reasonable doubt.

SAVINGS CLAUSE

In general

State ex rel. Arbogast v. Mohn, 260 S.E.2d 820 (1979) (McGraw, J.)

Syl. pt. 1 - An amendment to a penal statute which redefines the offense does not affect the character of the offense under the former law when the offense committed prior to the effect date of the amendment. *W.Va. Code* § 2-2-8.

Syl. pt. 2 - When a general savings statute specifically provides for the application of mitigated penalties upon the election of the affected party, he is entitled to choose the law under which he wishes to be sentenced. *W.Va. Code* § 2-2-8.

Syl. pt. 3 - When a criminal defendant is entitled to elect the law under which he is to be sentenced, it must appear on the record that he has been fully advised of his right to elect and he must be given an opportunity to exercise that right by the court.

State ex rel. Miller v. Bordenkircher, 272 S.E.2d 676 (1980) (Per Curiam0

When the Legislature enacted the Sexual Assault Act it did not include therein a savings clause. Therefore, *W.Va. Code* § 2-2-8, the general savings statute, is applicable.

The phrase "judgment pronounced" as used in the savings statute means the judgment pronounced and entered by the trial court.

In West Virginia, the rule is that the sentence pronounced becomes final at the end of the term at which it is declared. *State v. Ludwig*, 102 W.Va. 363, 135 S.E. 277 (1926).

Syl. pt. 1 - Where a defendant is convicted and sentenced for violation of a criminal statute, and while the case is pending on appeal the statute is repealed, the conviction and sentence remain valid by virtue of the terms of this State's general savings clause, *W.Va. Code* § 2-2-8.

In general (continued)

State ex rel. Miller v. Bordenkircher, (continued)

A judgment of the justice of the peace court is not a "judgment pronounced: under *W.Va. Code* § 2-2-8, since any appeal of such judgment under our present statute is by a trial *de novo*. *W.Va. Code* § 50-5-13.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

Under *W.Va. Code* § 2-2-8, the defendant argues since *W.Va. Code* § 61-8B-3(b) became effective in June of 1976, and he was not sentenced until September 1976, that he be allowed to elect between the penalties provided in the new and old statutes. The Supreme Court agrees as per Syl. pt. 2, *State ex rel. Arbogast v. Mohn*, 260 S.E.2d 820 (W.Va. 1970), cited above.

SEARCH AND SEIZURE

Automobiles

In general

See SEARCH AND SEIZURE Warrant requirement, Automobile exception, (p. 795) for discussion of topic.

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

While a police officer's casual observation of an out-of-state license plate would not by itself warrant further investigation, the other identifying markings. The detention of the defendant for the purpose of investigating his registration and license was reasonable and the evidence seized as a result of such investigation was not tainted.

Inventory search

State v. Goff, 272 S.E.2d 457 (1980) (Miller, J.)

Footnote 1 - *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) decided that routine police inventory searches were not unreasonable and did not fall within the prohibition of the Fourth Amendment.

Footnote 2 - An "inventory search" is different from the "automobile exception" where probable cause exists to believe the vehicle is carrying contraband or evidence of the commission of a crime.

An inventory search is based upon several considerations: (1) the protection of the owner's property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property; and (3) the protection of the police from potential danger.

Syl. pt. 1 - The right to an inventory search begins at the point where the police have a lawful right to impound the vehicle.

If the car is never taken into custody then there is no basis for an inventory search.

Automobiles (continued)

Inventory search (continued)

State v. Goff, (continued)

Syl. pt. 2 - An inventory search is not proper when there is no showing that the police saw any items of personal property in the interior of the vehicle, which would warrant the initiation of an inventory search.

In a situation where police were investigating the possible breaking and entering of a car lot, arrested and took to the station the defendants, left defendant's vehicle on the car lot and later returned and did an inventory search of the vehicle, the search was found not to be proper; here, there was no showing that any items of personal property were seen in the vehicle to establish need for an inventory search and the car had not been impounded.

Once the vehicle has been impounded the police have the right to secure it by rolling up the windows and locking the doors.

Footnote 7 - While there is a divergence of authority as to whether an inventory search authorizes exploration of sealed containers or into a locked trunk or other secured portions of the vehicle, the better view is that it does not.

Routine checks

State v. Frisby, 245 S.E.2d 622 (1978) (Neely, J.)

The weight of authority is that without violating the Fourth Amendment or *W.Va. Constitution*, art. 3, § 6, motorists may be stopped for no other reason than examination of licenses and registrations when such examinations are done on a random basis pursuant to a preconceived plan. However, the "routine" check cannot be used to make legitimate otherwise unwarranted police intrusion.

SEARCH AND SEIZURE

By private citizen

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

The Constitution does not prohibit searches and seizures by private citizens, but if the police officer commanded or directed a private citizen to retrieve evidence then constitutional issues do come into play. The test is whether the private citizen, in light of all the evidence, must be regarded as having acted as an instrument or agent of the State.

Where evidence indicated that appellant's cousin, without suggestion, coercion, or domination on the part of the police officer, retrieved appellant's clothing from the trunk of appellant's car and voluntarily brought them to the officer on his own initiative, the trial court resolved that appellant's cousin was not an "agent" of the State.

Exclusionary rule

In general

State v. Davis, 294 S.E.2d 179 (1982) (Miller, C.J.)

The general rule is that where there is an illegal seizure of property, such property cannot be introduced into evidence, and testimony may not be given in regard to the facts surrounding the seizure of the property.

Appellant review

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

"A trial court's decision regarding the voluntariness (issue) will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

The court's finding was not "plainly wrong" even though defendant's consent was not a formal consent to search the entire car; however, once lawfully there, the officer could seize contraband or evidence in plain view, as indicated in Syl. pt. 7, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980). The trial court did not err in refusing to suppress evidence.

Exclusionary rule (continued)

Appellant review (continued)

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Burden of proof, (p. 787) for discussion of topic.

Burden of proof

State ex rel. McCamic v. McCoy, 276 S.E.2d 534 (1981) (Miller, J.)

Both the federal and state constitutions place the burden on the State to show by a preponderance of the evidence that the warrantless search falls within an authorized exception to the general rule requiring a warrant.

When the State's evidence consisted only of general assertions that a search of attorney's entering the prison to confer with their clients was necessary for security, the State failed to establish a preponderance of the evidence that the warrantless search of attorney's fell within an authorized exception permitting such search. The regulation requiring such search, therefore, was held to be invalid.

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 798) for discussion of topic.

State v. Farley, 280 S.E.2d 234 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

Exclusionary rule (continued)

Burden of proof (continued)

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

Syl. pt. 2 - The burden rests on the State to show by a preponderance of the evidence that the warrantless search fails within an authorized exception.

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

"Where the defendant in a criminal case makes a timely objection to the introduction of evidence seized during a warrantless search, it is incumbent upon the state to prove by a preponderance of evidence that the search was legal." Syllabus, *State v. Hacker*, 209 S.E.2d 569 (W.Va. 1974).

The factual determination involving the credibility of the witnesses is much like the credibility issue in regard to voluntariness of a confession. The voluntariness must be proved by a preponderance of the evidence and the trial court's decision on this matter can not be disturbed "unless it is plainly wrong or clearly against the weight of evidence." *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978). In this case the trial court's ruling on the seizure question was not plainly wrong.

State v. Williams, 249 S.E.2d 758 (1978) (McGraw, J.)

The State must prove by a preponderance of evidence that a warrantless search was legal. *State v. Hacker*, 209 S.E.2d 569 (W.Va. 1974).

Exclusionary rule (continued)

Fruit of the poisonous tree

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

A knife recovered as a direct result of an admissible, voluntary confession is admissible evidence.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

See SEARCH AND SEIZURE Warrant requirement, Automobile exception, (p. 795) for discussion of topic.

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

Syl. pt. 2 - Property observed during an illegal or improper search cannot be subsequently seized pursuant to a lawful search warrant which was based solely upon observations made during the illegal search.

Such information is not, however, barred for all times. If information pertaining to the stolen property can be lawfully obtained, then a proper search and seizure could be accomplished. Under the facts of this case, the motion to suppress evidence seized in a search after it had been first observed during a search made under an illegal warrant, where there was no probable cause to search and the officers had no legal right to be at the site, should have been granted.

State v. Williams, 249 S.E.2d 758 (1978) (McGraw, J.)

The defendant was questioned at his home by three police officers, while a fourth was in the back of the house watching the door. At one point the defendant was taken by the arm and escorted to the porch. While on the porch, one of the officers kept a hand on the defendant at all times.

Exclusionary rule (continued)

Fruit of the poisonous tree (continued)

State v. Williams, (continued)

The defendant was by no means free to go and was so restricted in his freedom at the time he was questioned in his home that the strictures of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), designed to secure the right to counsel and to remain silent, are applicable, and the evidence having been located as a result of the defendant's responses, was inadmissible.

Independent source

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

Syl. pt. 2 - There are three generally recognized exceptions to the exclusionary rule: (1) where evidence sought to be introduced has an independent source; (2) where the evidence would inevitably have been discovered, and (3) where the connection between unconstitutional police conduct and the discovery of the evidence is so attenuated as to remove any taint of the original illegality.

In an appeal from a trial for first-degree murder, defendant claimed that evidence taken from his room was inadmissible since it was the fruit of an illegal search. The Supreme Court found that the evidence was seized during the execution of a valid consent search. Even if the police had possibly viewed the room illegally, the evidence would be admissible because its seizure came about from a source independent of the police conduct.

On appeal from a first-degree murder trial, defendant claimed that admission of evidence taken from his hotel room was reversible error because the evidence had been obtained by police after an allegedly illegal viewing of the room and was therefore "fruits of the poisonous tree." The Supreme Court found that the police obtained from defendant a valid consent to search and they had previously made a valid arrest; so regardless of whether

Exclusionary rule (continued)

Independent source (continued)

State v. Hawkins, (continued)

their viewing defendant's room was constitutional, the evidence was admissible because it was seized on the basis of competent information gained independently from the questionably illegal police conduct.

The police, after giving and explaining the *Miranda* warnings also explained that "consent to search" and did not try to pressure the defendant by saying either that they had already looked into the room or that they were getting a search warrant.

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause.

Even though troopers had no justification for illegal entry of defendant's trailer, evidence was properly admitted because a search warrant was validly issued under the independent source rule.

Even with the exclusion of information in the application for the warrant that was derived from the illegal entry, there were sufficient facts to enable a reasonably prudent, impartial magistrate to establish probable cause; therefore, the search warrant was validly issued.

Syl. pt. 9 - An affidavit in support of an application for a search warrant which contains information that antedates, is totally independent of, information learned from an unconstitutional search, as well as information from the unconstitutional search, may still be the basis upon which a valid search warrant may issue, if the information in the affidavit, excluding that information attributable to the unconstitutional search, is sufficient to justify a finding of probable cause.

SEARCH AND SEIZURE

In camera hearing

In general

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State v. Harr*, 156 W.Va. 492, 194 S.E.2d 652 (1973). See *State v. Tomey*, 259 S.E.2d 16 (W.Va. 1979), cited below.

The defendant objected to the validity of the search and the introduction of the evidence seized but the evidence was admitted because the State claimed that the defendant consented to the search. It was error for the trial court not to have conducted an *in camera* hearing on the voluntariness of the defendant's consent to search.

State v. Tomey, 259 S.E.2d 16 (1979) (Neely, J.)

Syl. pt. 1 - "If the defendant in a criminal trial objects to the admissibility of evidence on the ground that it was obtained by an unlawful search, the admissibility of such evidence should be determined by the court, out of the presence of the jury, after hearing evidence pertaining to the search warrant and the manner in which the evidence was obtained. Syl. pt. 1, *State v. Harr*, 156 W.Va. 492, 194 S.E.2d 652 (1973).

Validity of a warrant affidavit

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

See SEARCH AND SEIZURE Warrant requirement, Validity of warrant, (p. 818) for discussion of topic.

***In camera* hearing** (continued)

Voluntariness of consent search

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 798) for discussion of topic.

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 799) for discussion of topic.

State v. Fellers, 267 S.E.2d 738 (1980) (Neely, J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 799) for discussion of topic.

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 800) for discussion of topic.

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 801) for discussion of topic.

State v. Rickman, 278 S.E.2d 880 (1981) (McGraw, J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 802) for discussion of topic.

***In camera* hearing** (continued)

Voluntariness of consent search (continued)

State v. Williams, 249 S.E.2d 758 (1978) (McGraw, J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 802) for discussion of topic.

***Miranda* warnings prior to execution of search warrant**

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Syl. pt. 2 - While *Miranda* warnings must be given whenever there is a significant deprivation of an individual's freedom of action, there is no requirement that *Miranda* warnings be given before the execution of a search warrant.

Warrant requirement

In general

State v. Cain, 289 S.E.2d 488 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

State v. Farley, 280 S.E.2d 234 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

Warrant requirement (continued)

In general (continued)

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

Syl. pt. 1 - Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution, subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn; and there must be a showing by those who seek exemption that the exigencies of the situation made that curse imperative.

So that citizens will be secure from warrantless searches and seizures of their property and personal effects, the courts have historically required that a search warrant ordinarily must be obtained based on a finding of probable cause and that the person issuing the warrant be a neutral and detached magistrate.

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

The purpose of the Fourth Amendment's prohibition of warrantless searches and seizures is the protection of the citizen from unwarranted intrusion into his privacy, not the protection of property rights.

For a person to be protected under the Fourth Amendment he must have a reasonable expectation of privacy that has been invaded by official action.

Syl. pt. 7 - The Fourth Amendment of the United States Constitution and Article III, Section 6, of the West Virginia Constitution protects a person's reasonable expectation of privacy.

State v. Weigand, 289 S.E.2d 508 (1982) (Miller, C. J.)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

Warrant requirement (continued)

Automobile exception

State v. Tomey, 259 S.E.2d 16 (1979) (Neely, J.)

Closed containers were not intended to be covered by the "automobile exception" to the general warrant requirement.

State v. Cain, 289 S.E.2d 488 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

In this case, the search involved the locked trunk where there was a higher expectation of privacy. In addition the car had been towed to a secure area before the trunk was opened and, therefore, no exigent circumstances existed.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

Applies standard set forth in syl. pt. 2, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

According to the *Carroll* doctrine as adopted in *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), when a vehicle is unlawfully stopped, exigent circumstances giving rise to probable cause may allow a warrantless search.

When defendant's car was stopped for no other reason than defendant's asking policeman directions and advice and a subsequent warrantless search revealed marijuana, the warrantless search was illegal. Consequently, further search based upon a valid search warrant was also illegal.

Warrant requirement (continued)

Automobile exception (continued)

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

Syl. pt. 3 - In order to come within the automobile exception which authorizes a warrantless search, the police must initially have probable cause to believe that the automobile contains contraband or evidence of a crime. Second, there must be exigent circumstances which prevent the obtaining of a search warrant.

The *Carroll* doctrine in its pure form does not apply to facts of this case since the initial stopping of the automobile did not occur because the officer had probable cause to believe that it was carrying contraband or evidence of the commission of a crime.

Syl. pt. 4 - An automobile may be stopped for some legitimate state interest. Once the vehicle is lawfully stopped for a legitimate state interest, probable cause may arise to believe the vehicle is carrying weapons, contraband or evidence of the commission of a crime, and at this point, if exigent circumstances are present, a warrantless search may be made.

The initial stop of the vehicle for a missing taillight was lawful. However, where officer noticed that passenger leaned forward after officer flashed emergency light, officer recognized surname on driver's license as being the name of a person arrested on drug charges two and one-half years earlier, and officer shined light into vehicle and observed a portion of a paper bag protruding from beneath the front seat of the car, court found that these events did not constitute probable cause to justify the seizure and search of the paper bag.

Syl. pt. 5 - A furtive gesture on the part of the occupant of a vehicle is ordinarily insufficient to constitute probable cause to search a vehicle if it is not coupled with other reliable causative facts to connect the gesture to the probable presence of contraband or incriminating evidence.

Warrant requirement (continued)

Automobile exception (continued)

State v. Moore, (continued)

The furtive gesture of the passenger even when coupled with the vague recollection that a person with the same surname as the driver had been involved in a drug-related offense did not constitute sufficient facts to give rise to probable cause for a search.

Any suspicion attached to the driver because of his surname cannot be carried over or associated to the passenger who was the person arrested and whose surname was unknown to the officer at the time of the arrest.

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

Syl. pt. 8 - An individual's expectation of privacy in his automobile is less than that which he would have in his home or his place of business. The expectation of privacy associated with the exterior aspects of an automobile is even less than that associated with the interior portions. And, where an automobile is parked on a third person's property, after control had been relinquished to yet another person, and the automobile is open to view from a public highway, and possible expectation of privacy regarding the exterior aspects of the automobile is even further diminished.

Closed containers

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, J.)

See SEARCH AND SEIZURE Warrant requirement, Incident to arrest exception, (p. 804) for discussion of topic.

State v. Goff, 272 S.E.2d 457 (1980) (Miller, J.)

See footnote 7 - SEARCH AND SEIZURE Automobiles, Inventory search, (p. 783) for discussion of topic.

Warrant requirement (continued)

Closed containers (continued)

State v. Tomey, 259 S.E.2d 16 (1979) (Neely, J.)

See SEARCH AND SEIZURE Warrant requirement, Incident to arrest exception, (p. 808); SEARCH AND SEIZURE Warrant requirement, Automobile exception, (p. 795) for discussion of topic.

Syl. pt. 2 - Absent exigent circumstances, a search of baggage must be both reasonable and performed pursuant to a properly issued search warrant, and the mere reasonableness of a search, assessed in the light of surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.

Both the "automobile exception" and the "search incident to arrest exception" to the general warrant requirement are inapplicable because they were not intended to apply to closed containers.

The suitcase, in this case, could have been seized and later searched under a proper warrant.

State v. Winston, 295 S.E.2d 46 (1982) (Miller, C. J.)

See SEARCH AND SEIZURE Warrant requirement, Incident to arrest exception, (p. 808) for discussion of topic.

Consent search exception

State v. Buck, 294 S.E.2d 281 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 3, in part, *State v. McKinney*, 244 S.E.2d 808 (W.Va. 1978), cited below.

The voluntariness issue of a confession must be proven by the State by a preponderance of the evidence. This same rule would apply to the voluntariness of a consent to search.

Warrant requirement (continued)

Consent search exception (continued)

State v. Buck, (continued)

Where defendant's car was stopped for speeding following an armed robbery, and upon being asked for identification, defendant told police to get it from his car which contained the club used in the robbery and money in plain view, the trial court concluded that the defendant had consented to the officer's going to the car to get identification.

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

Syl. pt. 8 - Whether a consent to a search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.

The factors of *State v. Williams*, 249 S.E.2d 762 (W.Va. 1978) were applied in this case. Where the State relies upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was, in fact, freely and voluntarily given. The trial court properly held an *in camera* hearing to determine if the written consent to search executed by the defendant was voluntary. Officers who witnessed theft sign the form, testified that the form was read and explained to the defendant. The defendant did not contradict this testimony. The State met its burden of proof that the consent to search was voluntary.

State v. Fellers, 267 S.E.2d 738 (1980) (Neely, J.)

The State's "burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *State v. Williams*, 249 S.E.2d 758 (W.Va. 1978). While the State need not prove that the defendant knew that he had a right to refuse to allow the search, the defendant's knowledge of a right to refuse to consent is one of the relevant factors in determining

Warrant requirement (continued)

Consent search exception (continued)

State v. Fellers, (continued)

whether the consent was voluntary which is "a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, *supra*; accord, syl. pt. 2, *State v. Basham*, 223 S.E.2d 53 (W.Va. 1976).

In this case, nothing in the record suggests that the defendant had nay reason to believe that he was not free to end the conversation with the officers and to deny their request to search his house. The verbal consent given by the defendant was more than "mere submission to authority", *State v. Thomas*, 157 W.Va. 240, 203 S.E.2d 445 (1974), and that consent, along with the lack of any evidence of coercion, demonstrates "by a preponderance of evidence", *State v. Hacker*, 209 S.E.2d 569 (W.Va. 1974), that the consent obtained for the search was voluntary.

The voluntariness of the defendant's consent does not depend upon his being informed that he was free to decline to cooperate. *Schneckloth v. Bustamonte*, *supra*.

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 3, *State v. McKinney*, 244 S.E.2d 808 (W.Va. 1978), cited below.

The defendant objected to the validity of the search and the introduction of the evidence seized but the evidence was admitted because the State claimed that the defendant consented to the search. It was error for the trial court not to have conducted an *in camera* hearing on the voluntariness of the defendant's consent to search.

Warrant requirement (continued)

Consent search exception (continued)

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

In an appeal from a trial for first-degree murder, defendant claimed that evidence taken from his room was inadmissible since it was the fruit of an illegal search. The Supreme Court found, however, that under the circumstances he gave a consent to search freely and voluntarily; defendant had his *Miranda* rights read to him twice before signing the consent form; the police read him the consent form and went over it with him; he was not pressured; and defendant was a college educated person who had taken several courses in law-related subjects including law enforcement and constitutional law and in fact served as his own co-counsel. Therefore the seizure of the evidence followed a valid arrest and a valid search.

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

Syl. pt. 3 - A consent to search agreement signed by an accused must be treated in the same manner as a confession and the trial court must, even in the absence of a specific request, determine the voluntariness of such consent before the evidence obtained by the search can be introduced into evidence.

Error was found where the defendant's place of business had been searched without a warrant but with a "consent to search", and the trial court refused to determine the voluntariness of the consent and to suppress the evidence obtained in the search. The Supreme Court held that the case should be remanded for a suppression hearing to determine the validity of defendant's consent to search.

Warrant requirement (continued)

Consent search exception (continued)

State v. Rickman, 278 S.E.2d 880 (1981) (McGraw, J.)

The defendant's consent to search his automobile was given after *Miranda* warnings were given and in the presence of five police officers. The defendant contends the presence of the officer was unduly coercive. The Supreme Court, while upholding syllabus pts. 1 and 2 of *State v. Williams*, 244 S.E.2d 758 (W.Va. 1978), and syllabus pt. 3 of *State v. McKinney*, 244 S.E.2d 808 (W.Va. 1978) with regard to the voluntariness of consent, based their holding in this case on syllabus pt. 8 of *State v. Craft*, 272 S.E.2d 46 (W.Va. 1980), cited above.

The record amply supports the lower court's ruling and illustrates that the trial judge carefully and sensitively considered the evidence relating to the consent to search in light of the rule announced in *Craft*.

State v. Williams, 249 S.E.2d 758 (1978) (McGraw, J.)

Syl. pt. 1 - "Although evidence acquired by consent is admissible against the accused in trial, mere submission to colorable authority of police officers is insufficient to validate a 'consent' search or to legitimatize the fruits of the search, and evidence so obtained is incompetent against an accused." Syl. pt. 8, *State v. Thomas*, 157 W.Va. 240, 203 S.E.2d 445 (1974).

Syl. pt. 2 - "A suspect whose acquiescence to search is secured during police custody occurring by reason of an illegal arrest, or similar form of overt or subtle detention, is in no position to refuse to comply with the demands of the officer in whose custody he is, whether such demand is couched in the language of a polite request or direct order, and he cannot be held to have consented to the search voluntarily." Syl. pt. 9, *State v. Thomas*, 157 W.Va. 240, 203 S.E.2d 445 (1974).

Warrant requirement (continued)

Consent search exception (continued)

State v. Williams, (continued)

The search and seizure conducted by police is not unlawful or unreasonable, notwithstanding the absence of probable cause and a search warrant, where the search is voluntarily consented to, syllabus point 1, *State v. Basham*, 223 S.E.2d 53 (W.Va. 1976), provided the consenting person has the authority to consent. *State v. Hacker*, 209 S.E.2d 569 (W.Va. 1974).

"[W]hether a consent to search [is] in fact 'voluntary' or [is] the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances", *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and while knowledge of the constitutional right to refuse consent to search is one factor, such knowledge is not an essential prerequisite which must be proven by the government as "The *sine qua non* of an effective consent." *Id.* At 227, 93 S.Ct. 2048, 36 L.Ed.2d 863.

Custodial interrogation are inherently coercive, and an alleged consent to search given under such circumstances must be subjected to the most careful scrutiny. The police intended to search defendant's jacket and any objection on his part would have been futile.

The conclusion that consent was not the product of free will is reinforced by the fact that the defendant would not have consented voluntarily, absent extraordinary circumstances, if he had known the inculpatory evidence would be found.

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

"The general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures." Syl. pt. 8, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971).

Warrant requirement (continued)

Consent search exception (continued)

State v. Wimer, (continued)

In a murder trial, it was not error for the trial court to admit into evidence a revolver found in the home of defendant's parents, when the police entered the home at the request of the parents and the request of the owners of the property; and while on the premises, the police observed the revolver in plain view. Defendant's challenge that the warrantless search was unreasonable was unfounded.

Home entries

State v. Davis, 294 S.E.2d 179 (1982) (Miller, C.J.)

See ARREST Warrantless, Home entries, (p. 50) for discussion of topic.

Incident to arrest exception

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, J.)

The United States Supreme Court Case *New York v. Belton*, 453 U.S. 454, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981) held that an "officer who has made a lawful custodial arrest of 'recent' occupants of an automobile, may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and examine the contents of any container found within." This, in effect, extended the permissible area of a warrantless search to the entire passenger compartment. This Court relies, in part, upon *Belton* in making its decision. Where the warrantless search of defendant's van was made after an initial arrest for possession of marijuana which was in plain view after the officer had asked for identification of individuals in an already-stopped van, the Supreme Court articulated a different standard for determining whether the defendant had been seized in the initial encounter.

Warrant requirement (continued)

Incident to arrest exception (continued)

State v. Boswell, (continued)

Syl. pt. 1 - An initial police inquiry which calls into question a seizure of the person issue will ordinarily relate to some criminal investigation procedure and must originate from some suspicious circumstances involving the defendant. In determining the threshold question of whether the defendant had been seized, we look to the intensity of the initial inquiry. The less intense the initial inquiry the less likely that a seizure will be found. The intensity of the inquiry will determine whether the initial threshold of "seizure" has been crossed. This is because the intensity of the inquiry will govern when a reasonable person would believe that he was not free to leave the initial police encounter.

After the threshold question, "Has seizure occurred?" The question becomes "Was the seizure unreasonable?" The focus of this question becomes the suspicious circumstances that warranted the officer's belief that criminal activity had occurred or was occurring.

Defendant's actions in turning off lights in his van upon approach of police officer, were at least suspicious enough to warrant the officer's asking for identification, a minimal intrusion upon defendant's privacy, especially when the van was parked in an area with a history of bar room problems and arson. This minimal intrusion, coupled with the minimal intensity of the officer's approach, precluded the finding that there had been an initial seizure. Defendant's voluntary exit from the van, enabling officer to view the marijuana, in no way increased the intensity of the officer's inquiry. There being no initial seizure, the subsequent viewing of the marijuana permitted its seizure under the plain view doctrine, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980). Furthermore, the discovery of marijuana in plain view gave rise to the probable cause necessary to arrest the defendant without a warrant, which authorized the further warrantless search as incident to a valid arrest under *Belton*. Thus, the products of seizure were properly admitted into evidence.

Warrant requirement (continued)

Incident to arrest exception (continued)

State v. Boswell, (continued)

A permissible warrantless search requires a lawful stop of the vehicle and the subsequently arising problem cause to believe that the vehicle is carrying contraband or evidence of the commission of a crime.

State v. Drake, 291 S.E.2d 484 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 6, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

Once sufficient probable cause to sustain an arrest had been established, the warrantless search of the defendant's person was authorized as incident to a valid arrest.

See ARREST Warrantless, Probable cause and exigent circumstances, (p. 52) for discussion of topic.

State v. Farley, 280 S.E.2d 234 (1981) (Per Curiam)

Exception for a search incident to a lawful arrest permits a warrantless search of the person and the immediate geographic area under his physical control as an incident to a lawful arrest. The predicate for such a search is an initial lawful arrest.

"An arrest cannot be justified by the fruits of an illegal search." Syl. pt. 8, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), quoting syl. pt. 10, in part, *State v. Thomas*, 157 W.Va. 240, 203 S.E.2d 445 (1974).

Where there was no arrest of the defendant until after the officer had already searched the vehicle and seized the marijuana, the exception for a search incident to a lawful arrest did not justify the seizure.

Warrant requirement (continued)

Incident to arrest exception (continued)

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

Evidence seized during an unlawful arrest is inadmissible.

State v. Hawkins, 280 S.E.2d 222 (1981) (Neely, J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 801) for discussion of topic.

State v. McNeal, 251 S.E.2d 484 (1978) (McGraw, J.)

See ARREST Warrantless, Home entries, (p. 51) for discussion of topic.

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

Syl. pt. 6 - Evidence obtained as a result of a search incident to an unlawful arrest cannot be introduced against the accused upon his trial. *State v. Thomas*, 157 W.Va. 240, 203 S.E.2d 445 (1974).

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

Syl. pt. 6 - A warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest.

The predicate for a *Chimel* search is an initial lawful arrest. Since there was no arrest of the defendant until after the search of the vehicle, the search could not be justified as incident to a lawful arrest.

Warrant requirement (continued)

Incident to arrest exception (continued)

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

If an arrest is lawful, evidence obtained from defendant during the arrest is competent regardless of whether a search warrant was in effect. If an arrest is unlawful, evidence obtained from defendant during the arrest is incompetent.

Defendant is entitled to a hearing out of the jury's presence concerning the lawfulness of the arrest when he objects that evidence was obtained through illegal search incident to an illegal arrest.

Denial of a hearing out of the presence of the jury to consider whether evidence obtained from an allegedly illegal search incident to an illegal arrest is competent is reversible error.

State v. Tomey, 259 S.E.2d 16 (1979) (Neely, J.)

Closed containers were not intended to be covered by the "search incident to arrest exception" to the general warrant requirement. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) which allows the arresting officer to search the "grabbable" area in which the defendant "might gain possession of a weapon or destructible evidence", 395 U.S. at 763, 89 S.Ct. at 2040, is inapposite since there was no danger of a weapon being grabbed from the closed suitcase.

State v. Winston, 295 S.E.2d 46 (1982) (Miller, C. J.)

Syl. pt. 1 - Upon a lawful custodial arrest of the occupant of a motor vehicle its entire passenger compartment including closed containers can be searched without a warrant as an incident to such arrest.

Warrant requirement (continued)

Incident to arrest exception (continued)

State v. Winston, (continued)

When defendant was stopped and arrested pursuant to a police broadcast describing him as the person involved in a robbery, and, following the arrest, the police officer removed defendant's briefcase and looked inside, the search and seizure was proper as incident to a lawful custodial arrest. The Supreme Court based this decision upon the holding in *New York v. Belton*, 453 U.S. 454, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981) which permits the entire passenger compartment, including closed containers, to be searched, without a warrant, as an incident to a lawful custodial arrest of the occupant of the motor vehicle.

Since the search and seizure was proper, the items obtained as a result of the search were admissible as evidence.

The West Virginia Supreme Court interprets *Belton* to permit search of the entire passenger compartment of a motor vehicle after there has been a lawful arrest of the occupant regardless of whether or not the accused is handcuffed or otherwise secured away from the inside of the vehicle. The legal search extends to closed containers within the passenger compartment.

Independent judicial evaluation

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

A search warrant, valid on its face, may be impeached if it is later shown that the magistrate or judge made no independent determination of the two issues of the likelihood of the existence of criminal activity and of the reliability of the informant. *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975). In this case, the magistrate did make an effort to determine what the informant said and what made his information reliable.

Warrant requirement (continued)

Independent judicial evaluation (continued)

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

"Where it is conclusively proved that a magistrate acted as a mere agent of the prosecutorial process and failed to make an independent evaluation of the circumstances surrounding a request for a warrant, the warrant will be held invalid and the search will be held illegal." Syl. pt. 2 (in part), *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975).

State v. Slonaker, 280 S.E.2d 212 (1980) (Harshbarger, C.J.)

Syl. pt. 1 - "The constitutional guarantee under *W.Va. Const.*, Article III, § 6 that no search warrant will issue except on probable cause goes to substance and not to form; therefore, where it is conclusively proved that a magistrate acted as a mere agent of the prosecutorial process and failed to make an independent evaluation of the circumstances surrounding a request for a warrant, the warrant will be held invalid and the search will be held illegal." Syl. pt. 2, *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975).

Relying on Syl. pt. 2 of *State v. Stone*, 268 S.E.2d 50 (W.Va. 1980): If the original warrant was invalid because the magistrate was an agent of the prosecutor, then the information gathered during the first search which led to the search and seizure authorized by the second warrant, was inadmissible.

Footnote 3 - (in part) - An affiant must present sufficient facts in his complaint for the magistrate to find probable cause. After this determination the magistrate should have a search warrant prepared, accurately reflecting those facts that convinced the magistrate of probable cause.

Where the magistrate took information from a trooper over the phone and later in person to affirm the affidavit, this was adequate to allow him to make an independent evaluation of probable cause; further, the magistrate was not himself involved in preparing the affidavit and warrant.

Warrant requirement (continued)

Independent judicial evaluation (continued)

State v. Slonaker, (continued)

Footnote 3 - "We would urge magistrates not to deliver warrants to a police barracks, because it may give an appearance of impropriety."

Informant's reliability

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

Syl. pt. 1 - To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable.

Under the facts of this case, the affidavit on which the search warrant was based was inadequate because it stated no facts indicating criminal activity which would justify a search of the home; it only stated that the officer had reliable information from a confidential source that a motorcycle belonging to a named party was concealed in defendant's dwelling; it did not set out facts showing that the information from the confidential source was reliable; and it did not show how the informant's reliability was established or that the confidential informant had himself seen the stolen property in the defendant's dwelling. The search that took place under this search warrant was illegal.

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State v. White*, 280 S.E.2d 114 (W.Va. 1981), cited below.

Warrant requirement (continued)

Informant's reliability (continued)

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

Syl. pt. 1 - A valid search warrant may issue upon an averment that an unnamed informant was an eyewitness to criminal activities conducted on the premises described in the warrant.

W.Va. Const. art. III, § 6 and United States Constitution amendment IV require that probable cause be established under oath before a search warrant maybe validly issued. When the affiant is swearing to information given by an unnamed informant, the constitutional requirements are met by (1) setting forth facts to establish the existence of criminal activity to justify the search, and (2) setting forth facts to establish that the informant is reliable. The magistrate or judge who issues the search warrant must make an independent evaluation of the sufficiency of both these elements. *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975).

In this case, the affidavit upon which the warrant was issued merely stated the informant is reliable. This affidavit was sufficient. The informant's reliability may be inferred from the circumstances. *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). An averment that the informant was an eyewitness to particular criminal activities involving particular individuals in a particular place is alone sufficient to permit the issuance of a valid search warrant.

The Supreme Court distinguishes cases where the informant i relaying first-hand observations from those cases where the informant's own source of information is hearsay.

Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The affidavit in this case tells the place to be searched; who owned the occupied the place, that marijuana and other controlled substances were being kept there; and, that the criminal activity alleged was personally observed by an unnamed informant who had been on the premises four days earlier. This

Warrant requirement (continued)

Informant's reliability (continued)

State v. White, (continued)

first-hand information places the criminal activity in the place mentioned and the fact that it is first-hand information makes it reliable. The affidavit provides a reasonable basis for a detached and neutral magistrate to believe there was probable cause to search the premises.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Applies standard set forth in Syl. pt. 1, *State v. Stone*, 268 S.E.2d 50 (W.Va. 1980), cited above.

When the officer's affidavit named the informant, the warrant was placed outside the heightened reliability test used when an unnamed informant was involved; therefore the warrant and search were proper.

Open fields exception

State v. Weigand, 289 S.E.2d 508 (1982) (Miller, C. J.)

Syl. pt. 2 - Where under the "open field" exception law enforcement officials from a public highway observe contraband or evidence of a crime that is plainly visible or property which carries no indicia that the owner or possessor thereof had a reasonable expectation of privacy the same may be seized without the necessity of first obtaining a warrant.

In the present case, the law enforcement officials sighting from a public highway the marijuana plants which were not surrounded by any indicia of privacy were entitled to go upon the property and seize without a warrant.

Warrant requirement (continued)

Plain view exception

State v. Boswell, 294 S.E.2d 287 (1982) (Miller, J.)

Applies standard set forth in syl. pt. 7, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

See SEARCH AND SEIZURE Warrant requirement, Incident to arrest exception, (p. 804) for discussion of topic.

State v. Farley, 280 S.E.2d 234 (1981) (Per Curiam)

Applying the standard set forth in syllabus point 7 of *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below, the Supreme Court found that the police had a legal right to be where they were when making the plain sight observation, that the police had probable cause to believe the evidence seen constituted contraband or evidence of crime, and that since the trial court, confronted with conflicting testimony as to whether the contraband was in plain view, resolved the credibility issue in favor of the State, and the Court was not clearly wrong, nor did the officer's observation invade any reasonable expectation of privacy, the officer's observation of the contraband fell within the "plain view" exception, permitting a warrantless seizure of the hashish.

State v. Hanshaw, 294 S.E.2d 157 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 7, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited below.

When police officer observed the haphazard manner in which ladders wee loaded on appellant's truck in a parking lot and noticed markings and names on the ladders indicating that they may be stolen goods, his seizure of the stolen goods was proper since the requirements for a warrantless seizure of property in plain view were met; consequently, the motion to suppress the evidence was denied.

Warrant requirement (continued)

Plain view exception (continued)

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

Syl. pt. 7 - A warrantless seizure of property in plain view is constitutionally permissible provided three requirements are met: (1) the police observe the evidence in plain sight without the benefit of a search [without invading one's reasonable expectation of privacy]; (2) the police have a legal right to be where they are when they make the plain sight observation; and (3) the police have probable cause to believe that the evidence seen constitutes contraband or fruits, instrumentalities or evidence of crime." Syl. pt. 3, in part, *State v. Stone*, 268 S.E.2d 50 (W.Va. 1980).

The police may not, under the guise of an initial lawful search into a constitutionally protected area, such as a search incident to an arrest, use this action as a means of conducting a broad warrantless search.

The central question in the third requirement of the "plain view" exception is whether from the physical appearance of the object there is probable cause to believe that it represents contraband or incriminating evidence.

Even though initial intrusion of looking into stopped vehicle was lawful and observation of paper bag protruding from front seat on passenger side was inadvertent, seizure of the bag could not be justified under "plain view" exception since Supreme Court declined to hold that the portion of the paper bag protruding from the seat when coupled with the meager information available to the officer - that the officer observed the passenger lean forward when he activated his emergency light, and that driver had the same surname as person who had been the subject of a drug-related arrest two and one-half years earlier - could constitute probable cause for the officer to believe the bag contained contraband or incriminating evidence.

Warrant requirement (continued)

Plain view exception (continued)

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

Syl. pt. 3 - It is not a search for the police to discover evidence in plain sight and the warrantless seizure of such evidence is constitutionally permissible provided (1) the police observe the evidence in plain sight without the benefit of a search [without invading one's reasonable expectation of privacy]; (2) the police have a legal right to be where they are when they make the plain sight observation; and (3) the police have probable cause to believe that the evidence seen constitutes contraband or fruits, instrumentalities or evidence of crime.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

The discovery and seizure of the stolen goods was proper under the plain view doctrine adopted in Syl. pt. 7, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980), cited above.

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

See SEARCH AND SEIZURE Warrant requirement, Consent search exception, (p. 803) for discussion of topic.

Probable cause

See SEARCH AND SEIZURE Warrant requirement, Independent judicial evaluation, (p. 809) for discussion of topic.

Warrant requirement (continued)

Probable cause (continued)

State v. Messer, 277 S.E.2d 634 (1981) (Per Curiam)

The affiant, upon whose statement the warrant was issued, had statements from several juveniles indicating that marijuana had been purchased on the day the search warrant was obtained, as well as on prior occasions, from theft at the premises named. Further, the affiant recited those underlying circumstances from which the individual drew their conclusions that a crime of possession of marijuana with intent to distribute was being committed on the defendant's premises. This evidence combined with the fact that a prior search warrant for the same premises led to the seizure of approximately seven pounds of marijuana provided probable cause for the issuance of the warrant.

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

See SEARCH AND SEIZURE Warrant requirement, In general, (p. 794) for discussion of topic.

State v. Stone, 268 S.E.2d 50 (1980) (Caplan, J.)

See SEARCH AND SEIZURE Warrant requirement, Informant's reliability, (p. 811) for discussion of topic.

State v. White, 280 S.E.2d 114 (1981) (Neely, J.)

See SEARCH AND SEIZURE Warrant requirement, Informant's reliability, (p. 812) for discussion of topic.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

See SEARCH AND SEIZURE Warrant requirement, Informant's reliability, (p. 813) for discussion of topic.

Warrant requirement (continued)

Specificity of warrant

State ex rel. White v. Melton, 273 S.E.2d 81 (1980) (Harshbarger, J.)

The West Virginia Constitution requires that a warrant particularly describe the thing to be seized. "The property to be seized must be described within the warrant itself for within the sworn complaint expressly made a part of the warrant should not be made a catchall dragnet." *State v. Greer*, 130 W.Va. 159, 42 S.E.2d 719 (1947).

State v. Slonaker, 280 S.E.2d 212 (1980) (Harshbarger, C.J.)

A warrant that sought "firearms, handguns or pistols" was sufficient, in a situation where the police had been told by their suspect, that he had a pistol that he believed to be a .357 caliber pistol at his home.

Dragnet searches are improper, but a search for a murder weapon, described specifically to be a handgun or pistol is certainly permissible.

Validity of warrant affidavit

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

Syl. pt. 1 - In *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978), the United States Supreme Court held it constitutionally permissible under certain conditions to attack a search warrant affidavit. If such attack is successful, this will result in voiding the search warrant and rendering the property seized under such warrant inadmissible.

According to *Franks*, in order to attack the validity of the warrant affidavit the person challenging the affidavit must (1) make allegations of deliberate falsehood or of reckless disregard for the truth together with an offer of proof, (2) allege specific areas of falsity accompanied by supporting reasons, and support his allegations by affidavits or reliable statements of witnesses or satisfactorily explain their absence.

Warrant requirement (continued)

Validity of warrant affidavit (continued)

State v. Walls, (continued)

Deliberate falsity in the warrant affidavit, as required by *Franks*, was shown when defense counsel subpoenaed and had the information contained in the affidavit and that he had never been in defendant's residence.

This evidence directly impeached the entire warrant affidavit, thus indicating that the affidavit was a deliberate falsity.

Once deliberate falsity in the warrant affidavit is shown, the trial court must make further inquiry to preclude a finding of error.

Syl. pt. 2 - The proper procedure where a mandatory preliminary hearing has not been held by the trial court in regard to evidentiary matters whose admissibility are ordinarily challenged on constitutional grounds is to remand the case for conducting such hearing. Depending on the trial court's ruling at such hearing, the conviction is either affirmed or reversed.

Where deliberate falsity was found in a warrant affidavit thus permitting the warrant to be challenged under *Franks*, automatic reversal did not result. Instead, the case was remanded so that a preliminary hearing regarding evidentiary matters could be conducted. The conviction is either affirmed or reversed based upon this hearing.

If a warrant affidavit is found bad under *Franks*, the evidence seized under it must be suppressed.

Wiretapping

Blackburn v. State, 290 S.E.2d 22 (1982) (McGraw, J.)

See EVIDENCE Electronic surveillance, (p. 274) for discussion of topic.

SELF-DEFENSE

In general

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

The defense of self-defense constitutes a complete justification for a homicide.

Burden of proof

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

See INSTRUCTIONS Burden shifting, (p. 489) for discussion of topic.

State v. Duncan, 283 S.E.2d 855 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978), cited below.

State v. Gangwer, 283 S.E.2d 839 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978), cited below.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

Syl. pt. 4 - Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense.

Footnote 6 - The rule in *State v. Green*, 206 S.E.2d 923 (W.Va. 1974) requiring there be competent evidence showing self defense comports with the reasonable doubt standard, but is better expressed as "evidence sufficient to raise a reasonable doubt as to the defense of self-defense."

Burden of proof (continued)

State v. Stalnaker, 279 S.E.2d 416 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978), cited above.

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Footnote 7 - Because the defense of self-defense if proven is a bar to conviction, the defendant has the burden of proving this fact.

State v. W.J.B., 276 S.E.2d 550 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978), cited above.

Retroactivity

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

See SELF-DEFENSE Instructions, (p. 823) for discussion of topic.

Footnote 3 - Even if *Kirtley* was applied retroactively, it would have no application to this case because the defendant did not meet the threshold standard of sufficient evidence to create a reasonable doubt.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

The announced rule on allocating the burden of proof on the issue of self-defense is not bottomed on constitutional due process principles, and consequently, the Supreme Court did not extend full retroactivity to the rule.

Burden of proof (continued)

Retroactivity (continued)

State v. Schrader, 288 S.E.2d 170 (1982) (Neely, J.) (Withdrawn from bound volume because rehearing is pending)

The holding of, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978), should be applied only to cases where the question of allocating the burden of proof on the issue of self-defense was properly raised below.

In an appeal from a murder conviction, the *Kirtley* holding was not applied retroactively, because it was not required by the general rules regarding retroactivity, and because the error was obviously harmless.

Dwelling

State v. W.J.B., 276 S.E.2d 550 (1981) (Miller, J.)

"A man attacked in his won home by an intruder may invoke the law of self-defense without retreating." Syllabus pt. 4, *State v. Preece*, 116 W.Va. 176, 179 S.E. 524 (1935).

Syl. pt. 2 - The occupant of a dwelling si not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.

An unlawful intrusion will not be sufficient when coupled only with a vague suspicion that the intruder may intend to commit a felony or physically assault the occupant. There must be a reasonable basis for the occupant's belief.

Syl. pt. 3 - the reasonableness of the occupant's belief and actions in using deadly force must be judged in the light of the circumstances in which he acted at the time and is not measured by subsequently developed facts.

Dwelling (continued)

State v. W.J.B., (continued)

The reasonableness of the defendant's belief and conduct may depend on the past actions of the deceased, and for this reason the victim's history of threats and violence toward the defendant and his family and his general reputation for violence toward the defendant and his family and his general reputation for violence are admissible evidence on the issue of self-defense.

The defendant may interpose the defense of self-defense in protecting a member of his family as well as in protecting himself.

Failure to raise

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

See INEFFECTIVE ASSISTANCE Failure to raise a defense, (p. 454) for discussion of topic.

Instructions

Retroactivity

Bowman v. Leverette, 289 S.E.2d 435 (1982) (McHugh, J.)

Erroneous self-defense instruction was not a basis upon which post-conviction relief may be properly granted under *W.Va.* Code 53-4-A-1(d) [1967] since the discussion in State *v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978) regarding retroactivity was designed to preclude full retroactivity so that the *Kirtley* rule could not be applied by way of a collateral attack on habeas corpus on a final conviction.

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

See INSTRUCTIONS Burden shifting, (p. 489) for discussion of topic.

Instructions (continued)

Retroactivity (continued)

State v. Cobb, 272 S.E.2d 467 (1980) (Neely, C.J.)

Footnote 5 - We note that while our jurisdiction has not considered the issue of an accidental killing where one party is attempting to use non-deadly force to repel an attack, we have held on numerous occasions that where there is a competent evidence tending to support a theory of self-defense, it is error for the trial court to refuse to give a proper instruction presenting such theory when requested to do so.

State v. Duncan, 283 S.E.2d 855 (1981) (Per Curiam)

In a trial for second-degree murder, it was reversible error for the trial court to give an instruction regarding self-defense which put the burden on the defendant to prove that he acted in self-defense which put the burden on the defendant to prove that he acted in self-defense by a preponderance. There was sufficient evidence of self-defense given at the trial to warrant an instruction requiring the State to prove beyond a reasonable doubt that he did not act in self-defense.

State v. Gangwer, 283 S.E.2d 839 (1981) (Miller, J.)

The instruction in this case was to the effect that "[w]here a homicide is proven beyond a reasonable doubt . . . the burden of proving self-defense rests upon the defendant." Further, the defendant must establish the defense of self-defense "by a preponderance of the evidence." The giving of this instruction was reversible error.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Where instruction given defining "aggressor" was unduly abstract and failed to connect the definition with the evidence presented, instruction should not have been given, but since definition of "aggressor" contained in instruction was essentially correct, the giving of the instruction was no reversible error.

Instructions (continued)

Retroactivity (continued)

State v. Johnson, 282 S.E.2d 609 (1981) (Per Curiam)

See INSTRUCTIONS Not supported by the evidence, (p. 515) for discussion of topic.

State v. Kirtley, 252 S.E.2d 374 (1978) (Miller, J.)

In a homicide trial, the State's instruction on self-defense was erroneous where (1) It focused only on defendant's having an initial burden to produce some evidence of self-defense; (2) It failed to state that once this was done, the State was required to disprove the defense beyond a reasonable doubt; (3) It required the defendant initially to prove the defense by a preponderance, when it is sufficient if the evidence on this issue creates a reasonable doubt.

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

In a trial for attempted murder in the second degree, where the trial court gave the State's instruction on self-defense, but refused four suggested self-defense instructions by defendant, reversible error was not found, because the State's instructions accurately stated the law and the others would have been unnecessary and undesirable duplication.

Prior acts and offenses of victim

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

See EVIDENCE State of mind, (p. 313) for discussion of topic.

Prior acts and offenses of victim (continued)

State v. Dozier, 255 S.E.2d 552 (1979) (McGraw, J.)

In a trial for first-degree murder, where the defendant's main defense was self-defense, she would be entitled, in the event of a retrial, to elicit testimony about the prior beatings she received by the victim so that the jury could evaluate defendant's mental state at the time of the crime.

Sufficiency of the evidence

State v. Gialdella, 254 S.E.2d 685 (1979) (Harshbarger, J.)

The defendant's evidence supporting her self-defense defense was not materially disputed, and certainly created a reasonable doubt about her guilt of either voluntary or involuntary manslaughter. The judgment was reversed and defendant unconditionally discharged from custody.

Footnote 3 - The State's evidence was inadequate to sustain defendant's conviction of any crime.

State v. W.J.B., 276 S.E.2d 550 (1981) (Miller, J.)

The Supreme Court applied standard set out in syllabus point 1 of *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) which requires the evidence to be viewed in the light most favorable to the State, in determining if the evidence is sufficient to uphold the trial court's findings. Here the evidence was largely undisputed on the self-defense issue, and is substantial if not overwhelming in favor of that defense. Because of the State's failure to carry its burden of proof beyond a reasonable doubt, such evidentiary insufficiency bars a retrial under double jeopardy principles.

SELF-INCRIMINATION

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT, (p. 830) for discussion of topic.

In general

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

The privilege against self-incrimination traditionally can be invoked where the claim is made that answering the question will subject the individual to criminal prosecution in another state. *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971).

State v. Harman, 270 S.E.2d 146 (1980) (Miller, J.)

The privilege against self-incrimination is a bar against compelling "communications" or "testimony", but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. In this case, the question was whether a witness may invoke the fifth amendment protection against self-incrimination and thus avoid having his physical appearance viewed by a jury. In light of the fact that freedom from self-incrimination does not protect a defendant from the compelled display of his physical appearance before the jury, there is no basis for extending broader protection to a witness.

State v. Nuckolls, 273 S.E.2d 87 (1980) (Neely, C.J.)

Under the federal and state constitutions, a defendant has a right not to take the stand. Code § 57-3-6 provides that no one at the trial of a criminal case may comment before the court or jury about the defendant's failure to take the stand.

State v. Watson, 264 S.E.2d 628 (1980) (Miller, J.)

When a police officer is being examined, and his remarks relate to defendant's physical appearance, and there is not attempt to convey to the jury that defendant is exercising his right against self-incrimination, defendant's constitutional right against self-incrimination is not violated.

SELF-INCRIMINATION

Accomplice - Codefendant

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Syl. pt. 4 - Even though one charged in the same indictment as the defendant has entered a guilty plea he may assert his Fifth Amendment rights not to testify in the defendant's trial if he has expressed to the court his intention to appeal his conviction entered on his guilty plea.

A defendant cannot subpoena a codefendant and compel him to testify when the codefendant invokes his own constitutional right not to incriminate himself.

Fifth Amendment vs. Sixth Amendment

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

Where co indictee confesses to the crime, pleads guilty and has been sentenced, he can no longer claim a privilege against self-incrimination because any further statements are no longer incriminating. He can be subpoenaed to testify at the defendant's retrial.

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

The trial court did not abuse its discretion by denying the defendant's request that immunity be given his witness, who had involved the fifth amendment privilege against self-incrimination, when the witness' testimony would have merely corroborated the testimony of another witness.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

See SELF-INCRIMINATION Accomplice, Codefendant, (p. 828) for discussion of topic.

SELF-INCRIMINATION

Immunity

State ex rel. Brown v. MacQueen, 285 S.E.2d 486 (1981) (McGraw, J.)

See IMMUNITY Scope of the grant, (p. 429) for discussion of topic.

State v. Haverty, 267 S.E.2d 727 (1980) (Miller, J.)

See SELF-INCRIMINATION Fifth Amendment vs. Sixth Amendment, (p. 828) for discussion of topic.

Instructions

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

See IMMUNITY Instructions, (p. 428) for discussion of topic.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

See SELF-INCRIMINATION, (p. 827) for discussion of topic.

In general

State v. Headley, 282 S.E.2d 872 (1981) (Neely, J.)

Syl. pt. 1 - As a general rule no out-of-court statement of a defendant may be introduced as a confession unless it contains an acknowledgment of some element of the offense.

The first statement given to the police by the defendant was admissible as a confession because it placed the defendant at the scene of the murder.

State v. McClure, 253 S.E.2d 555 (1979) (Per Curiam)

A criminal defendant has a constitutionally mandated right against self-incrimination. That right is closely related to the presumption of innocence.

W.Va. Code, 57-3-6 provides that a defendant's failure to testify shall create no presumption against him and shall not be the subject of comment before the court or jury by anyone.

Allowing jury to take statements to jury room

State v. Taylor, 285 S.E.2d 635 (1981) (Harshbarger, C.J.)

Syl. pt. 4 - It is within the sound discretion of a trial court whether to permit a jury in a criminal case to take defendant's written confession into the jury room.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Corroboration

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Although the American rule is that a conviction in a criminal case is not warranted by the extrajudicial confession of the accused alone, and, the confession must be corroborated by independent evidence; the Supreme Court found that it was not error to admit defendant's confession in a homicide trial, because the evidence at trial other than the confession satisfied the American rule and, with the confession, established guilt beyond a reasonable doubt.

The State may use evidence discovered as a result of a voluntary confession to establish the *corpus delicti* and to corroborated the confession. It is of no consequence that the confession might have lead the State to some of the corroborative evidence.

Extradition proceeding

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

Syl. pt. 3 - The privilege against self-incrimination extends not only to those questions which, if answered, would in themselves support a conviction, but also to those disclosures that might furnish a link in the chain of evidence or lead to evidence which would be used in the criminal prosecution.

An extradition proceeding carries with it a sufficient penalty to cause evidence bearing on the issues arising at such hearing to come within the purview of the fifth amendment privilege against self-incrimination.

In this case, an admission by the witness of the prior felony goes to his identity as the person who violated parole on the original felony which will be a key issue in the extradition proceeding.

Footnote 5 - *W.Va. Const.*, art. 3, § 5 provides at least a coequal coverage in regard to the privilege against self-incrimination.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Incriminating statements at preliminary hearing

State v. Bradley, 260 S.E.2d 830 (1979) (Neely, J.)

Testimony made during examination at preliminary hearing would not be admissible into evidence since *W.Va. Code* § 57-2-3 (1965) precludes the introduction of any statements made by the accused in a prior legal examination.

Introduction of inculpatory statement made by defendant at preliminary hearing at which he had no counsel was harmless error since confession contained same information.

Parole revocation hearing - privilege protection

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

Syl. pt. 3 - The privilege against self-incrimination extends not only to those questions which, if answered, would in themselves support a conviction, but also to those disclosures that might furnish a link in the chain of evidence or lead to evidence which would be used in the criminal prosecution.

A parole revocation hearing is sufficiently penal in nature to extend the privilege of invoking the fifth amendment to the giving of evidence that might be germane to it. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Scope of cross-examination

State v. Horton, 294 S.E.2d 248 (1982) (Per Curiam)

When appellant took the stand to testify in his own behalf concerning the collateral issue of "known" fingerprints in city police files but was asked and responded to questions involving his guilt or innocence, the Supreme Court determined that appellant went beyond the limited examination for which he took the stand, consequently, he opened himself to general cross-examination thus precluding his claim that he had been compelled to waive his fifth amendment privilege against self-incrimination.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Spontaneous, volunteered

Wilhelm v. Whyte, 239 S.E.2d 735 (1977) (Miller, J.)

"A spontaneous statement by a defendant made prior to any action by a police officer and before an accusation, arrest or any custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing." Syllabus Point 1, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976).

Where State's witnesses were permitted to testify concerning inculpatory statements made by petitioner without a prior *in camera* hearing to determine the voluntariness of the statements the court held the statements to be admissible since they were made spontaneously prior to any arrest or custodial interrogation.

State ex rel. White v. Mohn, 283 S.E.2d 914 (1981) (Miller, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 846) for discussion of topic.

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

Syl. pt. 3 - "A spontaneous statement by a defendant made prior to any action by a police officer or before an accusation, arrest or any custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing." Syllabus Point 1, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976).

Admission of appellant's inculpatory statements made both at the decedent's home and en route to the hospital was appropriate under Syl. pt. 1, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976). *In camera* hearing rulings that the statements were spontaneously made were supported by the evidence.

Spontaneous, volunteered (continued)

State v. Rowe, 259 S.E.2d 26 (1979) (Harshbarger, J.)

Defendant was clearly in custody. But the *Miranda* protection only covered questioning initiated by law enforcement agents while in custody. The volunteered statements made by defendant while in custody are not prohibited by *Miranda*. "Volunteered statements of any kind are not barred by the fifth amendment."

A spontaneous statement by a defendant made prior to any action by a police officer and before an accusation, arrest or any custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Incriminating statements made prior to the giving of *Miranda* warnings were admissible since there is no requirement that *Miranda* warnings be given before the execution of a search warrant.

Appellant's acknowledgment that the room in which marijuana was discovered was hers was admissible evidence since appellant was not in custody at the time the statement was made.

Tape recorded inculpatory statements

State v. Andriotto, 280 S.E.2d 131 (1981) (Neely, J.)

The defendant asserts that a taped telephone conversation he had with a witness, who was acting for the State at the time, should not have been allowed in a trial because *Miranda* warnings were not given. In the instance of the defendant's telephone conversation there was no possible element of police coercion; the entire conversation emanated from a ruse, the success of which depended upon the defendant's believing that no police were in earshot. This sort of investigating tactic has been repeatedly upheld by the United States Supreme Court.

Tape recorded inculpatory statements (continued)

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

Syl. pt. 3 - The general rule is that tape recorded inculpatory statements may be admitted into evidence and played to the jury, if they meet the following criteria: (1) A showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) an establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions, or deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) an identification of the speakers; and (7) a showing that the testimony was voluntarily made without any kind of inducement.

In this case, the recorder worked well; there was an experienced operator; the tape was kept in a sealed envelope in a locker; the speakers are readily identifiable; the statement was voluntary; and there is no contention the tape did not accurately reflect the defendant's statements.

The contention was made that the tape was inaudible in places, and the trial court did remark that there were several areas of the tape that appeared inaudible but that a substantial portion was audible and made an understandable statement.

Syl. pt. 4 - A tape recording is not rendered inadmissible if it has inaudible areas so long as the recording as a whole is coherent and trustworthy.

Voluntariness

In general

State ex rel. Williams v. Narick, 264 S.E.2d 851 (1980) (McGraw, J.)

The test of voluntariness is determinative of the admissibility of a confession. If the confession is voluntary it will be used against the accused. If, however, the accused's "will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

Voluntariness (continued)

In general (continued)

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

A confession of a defendant is inadmissible as evidence unless it was made freely and voluntarily.

Appellant review

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 3,*State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited above.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Applies standard set forth in Syl. pt. 3,*State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited above.

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

Syl. pt. 1 - "The trial court has wide discretion as to the admission of confessions and ordinarily this discretion will not be disturbed on review." Syl. pt. 5, *State v. Vance*, 146 W.Va. 925, 124 S.E.2d 252 (1962).

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Where in a trial for homicide, the State showed by at least a preponderance that the confession of defendant was voluntarily and knowingly made, and proper instruction was given the jury might give the confession whatever weight and credibility it wished, the admission of the confession was proper.

Voluntariness (continued)

Appellant review (continued)

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

See APPEAL Interlocutory, (p. 37) for discussion of topic.

State v. Mitter, 289 S.E.2d 457 (1982) (McHugh, J.)

Applies standards set forth in Syl. pts 2 and 3, *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited below.

Where the issue of voluntariness depended upon to word of the police officer against that of the defendant and the trial judge chose to believe the officer, Supreme Court was of the opinion that the decision of the trial court was not plainly wrong and against the weight of the evidence and the admission of the confession was therefore not an abuse of discretion.

State v. Stanley, 284 S.E.2d 367 (1981) (Neely, J.)

Since the admission of the confession amounted to constitutional error and since the confession was not a negligible part of the State's case, the Supreme Court found that the error was reversible.

State v. Trail, 255 S.E.2d 900 (1979) (McGraw, J.)

See JUVENILE Transfer, Confession, (p. 597) for discussion of topic.

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

Syl. pt. 2 - It is a well-established rule of appellant review in this State that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review.

Voluntariness (continued)

Appellant review (continued)

State v. Vance, (continued)

Syl. pt. 3 - A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

Applies standard set forth in Syl. pt. 3, *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited above.

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 5, *State v. Vance*, 146 W.Va. 925, 124 S.E.2d 252 (1962). See *State v. Lamp*, 254 S.E.2d 697 (W.Va. 1979), cited above.

The trial court's decision that a tape recorded confession was admissible, as there was evidence that the defendant had been given a statement of this rights two times before his waiver of them and his confession, was not error. The confessions were admissible.

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

Applies standards set forth in Syl. pts 2 and 3, *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited below.

Voluntariness (continued)

Appellant review (continued)

State v. Wilson, 294 S.E.2d 296 (1982) (Per Curiam)

A trial judge is in the best position to observe the demeanor of witnesses and assess their credibility, and where a defendant has been given his rights and where credibility is the sole issue in a suppression hearing, the Supreme Court could not conclude that the judge abused his discretion in holding a confession admissible. *State v. Lamp*, 254 S.E.2d 697 (W.Va. 1979).

Burden of proof

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Footnote 6 - When the waiver of a constitutional right is at issue, the burden upon the State is indeed heavy.

Whether lay testimony is sufficient to carry the State's burden of proving that a confession was knowingly and voluntarily made when the defendant raises the issue of mental competence, will depend upon the facts of the particular case.

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

Applies standard set forth in Syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Applies standard set forth in Syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

Voluntariness (continued)

Burden of proof (continued)

State v. Laws, 251 S.E.2d 769 (1978) (Neely, J.)

Footnote 1 - In a prosecution for first degree murder, the court held an *in camera* hearing on the voluntariness of confessions. Defendant's contended that the trial judge employed the wrong standard. Although he did not use the words "preponderance", there was sufficient evidence to meet the preponderance test and any error resulting from lack of the work was harmless, especially since the defendant had a chance to cure any defect in the trial court's phrasing.

State v. McNeal, 251 S.E.2d 484 (1978) (McGraw, J.)

The burden is on the State to prove an intentional relinquishment or abandonment of a know right or privilege. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424, 439-40 (1977).

State v. Mitter, 289 S.E.2d 457 (1982) (McHugh, J.)

Applies standard set forth in Syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

It is the burden of the State to prove defendant's confession was voluntary.

State v. Rissler, 270 S.E.2d 778 (1980) (Caplan, J.)

Syl. pt. 2 - The State must prove, at least by a preponderance of the evidence, that a person under custodial interrogation has waived the right to remain silent or the right to have counsel present.

Voluntariness (continued)

Burden of proof (continued)

State v. Sprouse, 289 S.E.2d 228 (1982) (Per Curiam)

Applies standard set forth in Syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

In an appeal from a conviction of first degree murder, the Supreme Court held appellant's statement linking him to the murder to be involuntary and coerced since the lengthy interrogation was done at night in a small room even though police were aware of appellant's claustrophobic and epileptic conditions.

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

"The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of all or part of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syllabus pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975).

State v. Wilson, 294 S.E.2d 296 (1982) (Per Curiam)

Applies standard set forth in Syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

In the *in camera* hearing to decide whether the confession was voluntary and so would be admissible in evidence at trial, the State has the burden of proof by at least a preponderance.

Voluntariness (continued)

Burden of proof (continued)

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

Applies standard set forth in Syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978).

Illegal arrest

In re Betts, 289 S.E.2d 226 (1982) (Per Curiam)

Exclusion of a confession is mandated only if it is a result of the illegal arrest and the causal connection between the illegal arrest and the confession has not been broken.

State v. Canby, 252 S.E.2d 164 (1979) (Neely, J.)

Syl. pt. 3 - Exclusion of a confession obtained as a result of an illegal arrest without a warrant is mandated unless the causal connection between the arrest and the confession has been clearly broken.

State v. Davis, 294 S.E.2d 179 (1982) (Miller, C.J.)

Applies standard set forth in Syl. pt. 3, *State v. Canby*, 252 S.E.2d 164 (W.Va. 1979), cited above.

Because defendant's arrest was illegal, his oral statement made at the police station following his arrest was inadmissible.

Where an unlawful arrest is made and an inculpatory statement is subsequently given, such statement is not admissible even though the statement is made after the *Miranda* warnings have been given to the suspect.

Voluntariness (continued)

Illegal arrest (continued)

State v. Davis, (continued)

Where the trial court properly ruled that the television and tape recorder seized from defendant's home could not be introduce as evidence but then allowed the police officer to testify concerning defendant's inculpatory statements, the Supreme Court held the testimony to be inadmissible.

State v. Moore, 272 S.E.2d 804 (1980) (Miller, J.)

Applies standard set forth in Syl. pt. 3, *State v. Canby*, 252 S.E.2d 164 (W.Va. 1979), cited above.

Where unlawful arrest is immediately followed by inculpatory statements, these statements are not admissible even though they were made after *Miranda* warnings had been given to the suspect.

Where the illegal arrest of the defendant was followed immediately by the officer placing the defendant in his cruiser, giving the *Miranda* warnings and then questioning the defendant, who admitted that the bag seized did contain marijuana, there was no break in the causal connection between the illegal arrest and the subsequent statement and the statements were therefore inadmissible at trial.

State v. Stanley, 284 S.E.2d 367 (1981) (Neely, J.)

Syl. pt. 1 - Where police, lacking probable cause to arrest, ask suspects to accompany them to police headquarters and then interrogate them intermittently for seven hours during which time they are not free to leave or their liberty is restrained, the police have violated the Fourth Amendment.

Voluntariness (continued)

Illegal arrest (continued)

State v. Stanley, (continued)

Syl. pt. 2 - A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of *Miranda* warnings is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and the purpose or flagrancy of the official misconduct.

Illegal search and seizure

State ex rel. Williams v. Narick, 264 S.E.2d 851 (1980) (McGraw, J.)

There is a rebuttable presumption that successive confessions are the product of the initial confession. Confessions induced by an unlawful search and seizure are not admissible; however, where subsequent confessions are obtained after obtaining an inadmissible confession, "there must be an independent evaluation of whether the coercive actions which produced the first continued to produce the later confession."

When admissibility of initial confession was suppressed as "fruit" of illegal search an seizure and no independent evaluation was made of subsequent confessions, the confessions were presumed to be tainted, thus inadmissible. The State bore the burden of showing by clear and substantial proof that "the connection between the lawless conduct of the police and the discovery of the challenged evidence ha[d] "become so attenuated as to dissipate the taint'". This was a factual issue to be determined on appeal.

Voluntariness (continued)

Illegal search and seizure (continued)

State v. Williams, 249 S.E.2d 758 (1978) (McGraw, J.)

It is settled that where a confession is induced by illegally seized evidence, the confession must be excluded as "fruit of the poisonous tree." *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 171 (1963). The defendant's first confession was made immediately after being confronted with the illegally obtained evidence and at a time when the defendant still denied any involvement in the crime. This confession was induced by the illegal search, was a product of the search, and therefore must be excluded.

Syl. pt. 4 - Where an accused makes a confession as a result of being confronted with illegally seized evidence, and upon subsequent questioning again confesses, there is a rebuttable presumption that the second and each succeeding confession is a product of those that precede it.

The prosecution has the burden of proving by clear and substantial proof that the second and each subsequent confession was made when the mind of the accused was free from the influence which induced the prior confession. *Bunting v. Commonwealth*, 208 Va. 309, 157 S.E.2d 204 (1967).

There is not evidence demonstrating a break in the causative link running between the confessions in this case. The fact that *Miranda* warnings were given prior to each confession is not sufficient standing alone to purge the primary taint of the illegal search and seizure.

Voluntariness (continued)

***In camera* hearing**

Arthur v. McKenzie, 245 S.E.2d 852 (1978) (Harshbarger, J.)

The trial court has a mandatory duty, whether requested or not, to hear the evidence and to determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence, and it is reversible error to fail to follow this procedure. Defendant had made two statements one signed and the other not, and the court ruled without an *in camera* hearing to determine their voluntariness it was reversible error to admit them.

In camera hearing is constitutionally required about the voluntariness of any statement made by defendant's, intended to be placed in evidence.

State ex rel. White v. Mohn, 283 S.E.2d 914 (1981) (Miller, J.)

Following Syllabus point 5, *State v. Clawson*, 270 S.E.2d 659 (W.Va. 1980), this Court specifically overrules *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 669 (1966), to the extent it states that the failure to hold an *in camera* hearing to determine the voluntariness of a confession "constitutes reversible error".

Voluntariness was not an issue. Where defendant told telephone operator he had killed three people, gave his name, address, and telephone number and, subsequently, recounted this story to a news reporter and police officer prior to any custodial interrogation, thus the Court invoked Syl. pt. 1, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976), "A spontaneous statement by a defendant made prior to any action by a police officer or before an accusation, arrest or custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing." Defendant's confessions, therefore, were admissible as evidence.

Voluntariness (continued)

***In camera* hearing** (continued)

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

It is the mandatory duty of the trial court, whether requested or not, to make an *in camera* determination of the voluntariness of the defendant's inculpatory statements before they can be presented in evidence. In this case, one of defendant's confessions was admitted without *in camera* hearing. The Supreme Court found that where there is a failure to hold an *in camera* hearing on the defendant's inculpatory statements, the case will not be reversed for a new trial this basis alone. Instead, it will be remanded for a voluntariness hearing. If the trial court finds the statements to be involuntary, the verdict will be set aside unless the trial court determines that this constitutional error is harmless beyond a reasonable doubt.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Mental capacity, (p. 852) for discussion of topic.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

When the State seeks to admit an oral or written inculpatory statement into evidence against an accused, the trial court has a mandatory duty to hear the evidence out of the presence of the jury in order to determine its voluntariness.

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

It is the duty of the trial court to determine the voluntariness of a confession out of the hearing of the jury and such determination will not ordinarily be disturbed on review.

The Court found that upon the consideration of the evidence there was a sufficient showing of voluntariness and that the trial court did not abuse its discretion in holding the confession admissible.

Voluntariness (continued)

***In camera* hearing** (continued)

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Mental capacity, (p. 853) for discussion of topic.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

"It is the mandatory duty of the trial court, whether requested or not, to hear the evidence and determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence." Syl. pt. 1, *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 169 (1966), overruled in part, *State ex rel. White v. Mohn*, 283 S.E.2d 914 (W.Va. 1981).

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Mental capacity, (p. 854) for discussion of topic.

State v. Staley 253 S.E.2d 66 (1979) (Per Curiam)

"It is the mandatory duty of a trial court, whether requested or not, to hear the evidence and determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence, and the failure to observe this procedure constitutes reversible error." Syllabus point 1, *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 669 (1966).

Voluntariness (continued)

***In camera* hearing** (continued)

State v. Taylor, 285 S.E.2d 635 (1981) (Harshbarger, C.J.)

The defendant opted not to testify to the voluntariness of his confession at trial because doing so would have subjected him to cross-examination on other issues relevant to the crime. The *in camera* hearing protected the defendant's right to challenge the confession without forcing him to testify at trial. Noe of his constitutional rights were abrogated in this process. The judge correctly applied *W.Va. Code* § 57-3-6, that permits examination and cross-examination of defendant's on all matters relevant to a crime when they voluntarily testify.

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

The rule that a trial court must have an *in camera* hearing to hear the evidence and determine the voluntariness of a confession by the accused before trial to avoid reversible error had been modified now, failure to have the *in camera* hearing does not automatically signal reversible error.

State v. Woods, 289 S.E.2d 500 (1982) (Per Curiam)

It is the duty of the trial court to determine the voluntariness of a confession out of the hearing of the jury and such determination will not ordinarily be disturbed on review.

Inducement or coercion

State ex rel. Burton v. Whyte, 256 S.E.2d 424 (1979) (Miller, J.)

See HABEAS CORPUS Guilty pleas, (p. 355) for discussion of topic.

Voluntariness (continued)

Inducement or coercion (continued)

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Supreme Court found defendant's confession was voluntary even though defendant claimed he had been awake some thirty-six hours at the time he signed the confession. The State's witnesses testified that defendant appeared physically and mentally alert, he was given food and drink, and was never abused or threatened. Moreover, defendant had prior experience with the criminal justice system.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

Confessions obtained through coercion or inducement are inadmissible even though a *Miranda* waiver has been given.

"When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary." Syl. pt., *State v. Parsons*, 108 W.Va. 705, 152 S.E. 745 (1930).

A confession must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

State v. Stotler, 282 S.E.2d 255 (1981) (Per Curiam)

"To render admissible evidence of an extra-judicial confession by an accused to one in authority, . . . it must appear that the confession was freely and voluntarily made and without previous inducements of a temporal or worldly character in the nature of threats or intimidation, or some promise or benefit held out to the accused . . . ." Syllabus, *State v. Zaccario*, 100 W.Va. 36, 129 S.E. 763 (1925), *in part*.

Voluntariness (continued)

Inducement or coercion (continued)

State v. Stotler, (continued)

When Deputy Sheriff induced appellant to confess by confronting him with the welfare of his wife and children and promising the wife's release if appellant did confess, and when, in addition, appellant, who could hardly read or write, was held 14 hours incommunicado, was not represented by counsel and was not taken to a magistrate until 2 days later, the Supreme Court held his statements to be inadmissible since they were procured by improper inducements in the nature of threats and promises. The trial court, therefore, erred in admitting the statements into evidence. The case was reversed and remanded.

Mental capacity

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

It is the general rule that the intelligence of a person making a confession is but one factor to be considered in determining whether a waiver of rights was voluntary. The intelligence of the person confessing is not a controlling factor giving use of a *per se* rule.

Where a person of less than normal intelligence does not have the capacity to understand the meaning and effect of his confession, and such lack of capacity is shown by evidence at the suppression hearing, it is error for the trial judge not to suppress the confession. Where the defendant's lower than normal intelligence is not shown clearly to be such as would impair his capacity to understand the meaning an effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weighing the totality of the circumstances surrounding the challenged confession.

Voluntariness (continued)

Mental capacity (continued)

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

A waiver of constitutional rights cannot be made unless it is make knowingly and voluntarily.

The court may presume that a defendant did not waive his rights at the time of making a confession even when the court does not have psychiatric testimony to rely upon.

"Confessions elicited by law enforcement personnel from criminal suspects who because of mental conditions cannot knowledgeably and intelligently waive their rights are inadmissible." Syl. pt. 1, *State v. Hamric*, 236 S.E.2d 247 (W.Va. 1977).

Under the facts of this case, when the defendant showed that he was a retarded person with mental disease at the time of the confession, he satisfactorily showed that he was not able to knowledgeably and intelligently waive his constitutional rights and the State did not meet its burden of overcoming the presumption thereby created.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

"Confessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible." Syllabus pt. 4 from *State v. Fischer*, 211 S.E.2d 666 (W.Va. 1974).

In a first degree sexual assault trial in which insanity was the main defense, trial court's refusal to allow a psychologist to testify in an *in camera* hearing regarding whether defendant voluntarily waived his right to counsel before making a confession to police obstructed the court's ability to decide whether the confession had been made intelligently and voluntarily.

Voluntariness (continued)

Mental capacity (continued)

State v. Goff, 289 S.E.2d 467 (1982) (Per Curiam)

Impaired mental condition makes a defendant more susceptible to manipulation, influence, or coercion.

State v. Kelley, 285 S.E.2d 457 (1981) (Per Curiam)

Confessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible." Syllabus pt. 4 from *State v. Hamric*, 236 S.E.2d 247 (W.Va. 1977).

When psychological evaluations and reading test scores indicated that appellant did not have the mental capacity to understand and knowingly waive her right to counsel, appellant's confession in the absence of counsel should have been excluded as evidence. Use of such evidence in trial was prejudicial error.

State v. Milam, 260 S.E.2d 295 (1979) (Miller, J.)

Where an *in camera* hearing is held to consider the voluntariness of defendant's confession and the defendant does produce evidence tending to show that he was insane at the time of the confession, the prosecution has the burden of proving sanity by a preponderance of the evidence.

Syl. pt. 1 - It is error to deprive the defendant of an opportunity to produce psychiatric testimony at an *in camera* hearing to show that his confession was not voluntary because was probably insane at the time he gave it.

Where the defendant's sanity at the time he gave the confession is an issue, it is error to admit the confession without considering the sanity issue at an *in camera* hearing. But when the prosecution attempts to introduce defendant's confession, prosecution need not produce at the *in camera* hearing psychiatric testing to show defendant's sanity at the time of the confession.

Voluntariness (continued)

Mental capacity (continued)

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

Syl. pt. 2 - In a trial for murder, where defendant raises insanity as the sole defense, the court upon request should conduct an *in camera* hearing to determine whether incriminating statements made by the defendant to a third party while in a hospital emergency room shortly after committing the homicide, attempting suicide, and having been diagnosed by the attending staff psychiatrist as "suicidally depressed and mentally ill," were voluntary and admissible into evidence.

Right to counsel

State v. Bradley, 255 S.E.2d 356 (1979) (Harshbarger, J.)

Syl. pt. 1 - When a criminal defendant requests counsel, it is the duty of those in whose custody he is, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice. *W.Va. Const.*, Art. 3, § 14.

When the defendant specifically requested counsel, but deputies were unable to contact the attorney's defendant specified, and no further efforts were made to contact another lawyer, defendant's voluntary statements made in the absence of counsel should not have been allowed by the trial court.

Syl. pt. 3 - There can be no interrogation of a person accused of committing a crime after he requests counsel, until counsel is provided except that if the suspect recants his request before counsel can be provided with reasonable dispatch, interrogation may be conducted.

Voluntariness (continued)

Right to counsel (continued)

State v. Bradley, (continued)

If, after specifically requesting counsel, defendant recants the request, the government's burden of proving knowing and voluntary waiver of the right to counsel becomes extremely heavy; accordingly, defendant's written statement expressly relinquishing his previously asserted constitutional right would best support the State's position. Though the law is clear that interrogation must stop once the request for counsel is made, interrogation can proceed once the defendant has recanted his request.

Although defendant, having been read his rights, had requested counsel and refused to sign a waiver on two different occasions, defendant's oral statements, volunteered to police in the absence of counsel, were used at trial.

Defendant was subsequently convicted of murder. On appeal the Supreme Court held that once defendant had requested counsel, all interrogation, in any form, was to have stopped. Only if the request for counsel was recanted and if positive proof existed that defendant was relinquishing his asserted right, could interrogation proceed. The conviction was, therefore, reversed.

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

Under *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979) the State will bear an even heavier burden to show a voluntary waiver or recantation following an assertion of the right to counsel.

Where the defendant has sought or obtained counsel on a pending charge, it is apparent that he has initially exercised his right to counsel and waiver at that stage is not an issue. The State should not be permitted to make subsequent overtures to the defendant to see if he wishes to abandon his already exercised right to counsel. The defendant may decide to recant his right to counsel but any reconsideration must occur independently of overtures from the State.

Voluntariness (continued)

Right to counsel (continued)

State v. Clawson (continued)

Applies standard set forth in syl. pt. 1, *State v. McNeal*, 251 S.E.2d 484 (W.Va. 1978), cited below.

Where counsel has been obtained on an unrelated charge, as in this case, this fact has no particular bearing on whether the defendant desires to have counsel on the present charge. The essential point is whether the defendant desires to have counsel on the present charge or whether he will voluntarily waive that right. At the initial interrogation of the defendant his *Miranda* warnings were given and he expressly waived his right to remain silent and right to have counsel. Defendant was unequivocal in his willingness to waive his right to counsel, but when asked if he wanted his lawyer from the unrelated offense, his response was equivocal.

Where the defendant is equivocal in whether he desires to exercise his right to counsel, further questions may be asked to clarify his position.

Therefore, the trial court did not err in ruling the confession voluntary.

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

In a trial for homicide, it was not error for the defendant's confession to be admitted over his complaint that it was taken after he had requested counsel. The testimony on this point conflicted, but there was sufficient evidence for the trial court to find the defendant had voluntarily and intelligently waived his rights.

In a trial for homicide, it was not error for the defendant's confession to be admitted over his complaint that he had been awake 36 hours before the signing of the last confession, as the evidence tended to show that defendant was treated in a civilized manner, he had been involved in a criminal justice proceeding before, and the first of the two confessions occurred five hours after arriving at the police station.

Voluntariness (continued)

Right to counsel (continued)

State v. McNeal, 251 S.E.2d 484 (1978) (McGraw, J.)

Syl. pt. 1 - Once a suspect in custody has expressed his clear, unequivocal desire to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his decision on the presence of counsel.

State v. Mollohan, 272 S.E.2d 454 (1980) (Neely, C.J.)

Defendant's right to counsel attached at the extradition hearing under *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) which established that the constitutional role of counsel extends to the stage "when the process shifts from investigatory to accusatory - when its focus is on the accused and its purpose is to elicit a confession." The State carries the heavy burden of proving an intentional relinquishment or abandonment of a known right.

Waiver could not be presumed where troopers threatened appellant with the evidence of his fingerprints at the murder scene, played upon appellant's religious beliefs, and took advantage of appellant's diminished mental condition in an isolated environment where appellant was completely at the mercy of the troopers during a two-day trip from New Hampshire to West Virginia. Such an environment became an interrogation environment where appellant was subjugated to the will of the troopers.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

When there is a dispute over whether a defendant has requested counsel prior to the giving of a confession the trial court is entitled to consider as a factor whether the defendant asked for counsel on being initially taken before a magistrate.

Voluntariness (continued)

Right to counsel (continued)

State v. Sowards, 280 S.E.2d 721 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. McNeal*, 251 S.E.2d 484 (W.Va. 1978), cited above.

Applies standard set forth in syl. pt. 1, *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979), cited above.

"If after requesting counsel an accused shall recant his request before a lawyer can reasonably be secured, the heavy burden of the government to prove waiver . . . is even heavier. It can best be borne by a written statement, signed by the defendant, affirming his relinquishment of his theretofore asserted constitutional rights. Only then can an interrogation proceed, absent counsel." *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979).

Defendant was arrested on charge of intoxication and subsequently charged with armed robbery. Defendant requested counsel; however, before counsel was appointed, defendant admitted his involvement in the robbery. His written statement was admitted as evidence leading to a jury verdict of guilty and a sentence of 30 years imprisonment.

The Supreme Court held that the State failed to meet its heavy burden of proving a knowing and intelligent waiver of the right to counsel once request for counsel had been made. Since there had been no written waiver of the right to counsel, the custodial interrogation leading to confession should not have been admitted as evidence.

"When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights."

Voluntariness (continued)

Right to counsel (continued)

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

When law enforcement personnel interrogate an accused after he has indicated a desire to be represented by counsel, and a confession is elicited as a result of the interrogation, the confession is inadmissible absent a valid waiver of the right to counsel. *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979).

Understood rights

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

Although the trial court made no specific findings on the question of whether the appellant understood his rights, which would have been the preferable procedure, there was no evidence introduced that the appellant was incapable of understanding his rights and such claim was countered by the testimony of a state trooper.

Any alleged error in admitting inculpatory statement by accused was rendered harmless by the appellant's own admissions on direct and the testimony of the appellant's son and brother.

State v. Rissler, 270 S.E.2d 778 (1980) (Caplan, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Waiver, (p. 866) for discussion of topic.

Unreasonable delay in taking before magistrate

See ARREST Prompt presentment, (p. 48) for discussion of topic.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

In re Betts, 289 S.E.2d 226 (1982) (Per Curiam)

This Court, in interpreting *State v. Canby* indicates that "presentment before a neutral magistrate in compliance with *W.Va. Code*, 62-1-5 (1965), might serve to break the causal chain" between the illegal arrest and the confession, thus making evidence admissible; however, where appellant was not taken before a magistrate until 5 weeks after arrest and confession, the causal chain was not broken and the confession was not admissible.

State v. Canby, 252 S.E.2d 164 (1979) (Neely, J.)

In a proceeding where appellant was convicted of second degree arson, confessions obtained after a warrantless arrest made twenty-three hours before appellant was taken before a Justice of the Peace, were not admissible as evidence since there was no break in the causal connection between the arrest and the confession.

Although failure to comply with *W.Va. Code* § 62-1-5, does not necessarily vitiate a confession obtained after legal arrest, this failure, when combined with illegal arrest, does vitiate the confession.

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

Persons arrested late at night should not be subjected to interrogation throughout the night without presentment to a magistrate.

Persons must be taken without unreasonable delay to a magistrate in the county where the arrest was made.

The judicial system must function at all hours of the day and night or the statutory safeguards designed to guarantee that criminal defendants be fairly treated from the time of arrest to the time of trial will become eviscerated and meaningless.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Mitter, 289 S.E.2d 457 (1982) (McHugh, J.)

"]T]he focus in not so much on the length of the detention but whether the police were primarily using the delay in bringing the defendant before a magistrate to obtain a confession from him." *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982).

"The delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Syl. pt. 6, *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982).

"An unjustifiable and unreasonable delay in taking the accused before a magistrate after his initial arrest may in itself be sufficient to render a confession involuntary." *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982).

The failure to bring the defendant to a magistrate after he talked to a police officer the first time but before his statement was transcribed was not an unnecessary delay in violation of *W.Va. Code* § 62-1-6 (1965) since the purpose of that delay was not to obtain the confession but to transcribe it.

Where police sought a second confession to "clear up a few discrepancies" but were actually holding the defendant for the explicit purpose of rendering a useable confession from him, and a magistrate was available at the time, the Supreme Court found that the delay in taking the defendant before a magistrate after the first confession was so unreasonable that the second written statement was rendered inadmissible.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

Under our prompt presentment statute the focus is not so much on the length of the detention but whether the police were primarily using the delay in bringing the defendant before a magistrate to obtain a confession from him. An unreasonable delay may in itself be sufficient to render a confession involuntary.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Staley, 253 S.E.2d 66 (1979) (Per Curiam)

Six and one-half hour delay in taking petitioner before a magistrate pursuant to *W.Va. Code* § 62-1-5 was reasonable and neither influenced nor triggered petitioner's written confession; thus, the confession was not rendered inadmissible.

State v. Wilson, 294 S.E.2d 296 (1982) (Per Curiam)

In *State v. Persinger* the Supreme Court recognized that the purpose of taking an arrestee before a magistrate were: (1) to insure that the arrestee had been informed of his rights; (2) to determine if there was probable cause; (3) to inform the arrestee of his right to a preliminary hearing; (4) to arrange bail; and (5) to provide means for the arrestee to communicate with a relative or an attorney to arrange bail. The Supreme Court believed that of these factors the first two, relating to informing an arrestee of his rights and determining whether there is probable cause to hold him, particularly have bearing on the question of whether a confession is voluntary.

Here, it is clear that the appellant was informed of his rights before he was interrogated. Before his arrest, an arrest warrant had been issued, and there had been a judicial determination that there was probable cause for an arrest. During the interrogation the appellant was informed of the nature of the charge against him.

In *State v. Persinger* the Supreme Court concluded that time consumed in transporting an arrestee and the involved in performing customary booking and administrative procedures should not be considered in determining whether there has been unreasonable delay. In the confession context, the primary focus should be whether the purpose of the delay was to obtain a confession. Obviously once a confession has been made the obtaining of such a confession cannot be the purpose of the delay impinged on the voluntariness of a confession is the time between which routine administrative processing is completed and a confession is actually given.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Wilson, continued)

In this case, the Supreme Court viewed the crucial period of time to be the three-hour period between the administrative processing and the time the appellant indicated essential facts leading to his confession. The Court found there was no indication that during this period, the appellant became so emotionally exhausted or psychologically disorganized that interrogation during that period overcame the appellant's will so that he confessed against his will. In the absence of such an indication, and in view of the fact that the appellant had clearly been informed of his rights, the Supreme Court concluded that there was not an unreasonable delay in taking him before a magistrate.

Use in evidence

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

Syl. pt. 4 - Where a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible evidence in the State's case in chief.

State v. Goff, 289 S.E.2d 473 (1982) (Miller, C.J.)

Where the confession is otherwise valid but there has been a failure to comply with the requirements of *Miranda* in regard to advising and obtaining a waiver of the defendant's rights to remain silent and to consult with an attorney prior to interrogation and to decline further interrogation once it is initiated, the voluntary statement is inadmissible in the State's case in chief and may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement.

Voluntariness (continued)

Use in evidence (continued)

State v. Goff, (continued)

Syl. pt. 2 - A confession that has been found to be involuntary in the sense that it was not the product of the free will of the defendant cannot be used by the State for any purpose at trial.

In the present case, the defendant had a markedly reduced I.Q. and it is recognized that this can make a defendant more susceptible to manipulation, influence, or coercion. The defendant had also been a police informer and was not advised that he was suspected of armed robbery. Finally, the defendant later repudiated his extrajudicial statement which is a factor to be considered in the totality of circumstances test.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

Applies standard set forth in syl. pt. 8, *State v. Goodmon*, 290 S.E.2d 260 (W.Va. 1981), cited above.

Violation of *Miranda* rights

State v. Farley, 280 S.E.2d 234 (1981) (Per Curiam)

Where police officer heard the defendant tell another officer that he did not wish to make a statement after the was given his *Miranda* rights, and first officer proceeded to ask the defendant questions about contraband that was seized, officer failed to scrupulously honor defendant's privilege against self-incrimination and trial court erred in holding that the statements were admissible.

State v. Goff, 289 S.E.2d 473 (1982) (Miller, C.J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Use in evidence, (p. 863) for discussion of topic.

Voluntariness (continued)

Violation of *Miranda* rights (continued)

State v. Mason, 249 S.E.2d 793 (1978) (McGraw, J.)

In a trial for homicide, where defendant claimed that his confession was inadmissible because he was denied his constitutional right to consult with counsel prior to being interrogated, it was not error and there was no violation of defendant's *Miranda* rights to introduce the second of his confessions after he had twice heard his *Miranda* rights given to him. In the facts, defendant was given his *Miranda* rights once after which he gave an oral confession. Later, his rights were read again, after which he gave another oral confession which was transcribed and which he signed.

State v. Rissler, 270 S.E.2d 778 (1980) (Caplan, J.)

Once a person under interrogation has exercised the privilege against self-incrimination the police must scrupulously honor that privilege. The statement made after the defendant stated "[i]f I give you a statement now I won't have no shot" was inadmissible at trial.

Waiver

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Mental capacity, (p. 852) for discussion of topic.

State v. Bradley, 255 S.E.2d 356 (1979) (Harshbarger, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 854) for discussion of topic.

Voluntariness (continued)

Waiver (continued)

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 855) for discussion of topic.

State v. McNeal, 251 S.E.2d 484 (1978) (McGraw, J.)

The courts indulge in every presumption against waiver. *Glasser v. United States*, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-65, 86 L.Ed. 680, 699-700 (1941).

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

Constitutional safeguards such as those embodied in *Miranda* cannot be waived unless there is a knowing and intelligent relinquishment of such rights.

State v. Rissler, 270 S.E.2d 778 (1980) (Caplan, J.)

An explicit oral or written statement is not invariably necessary to support a conclusion that a person interrogated has waived the right not to "be a witness against himself." Nor is an explicit oral or written statement invariably necessary to support a conclusion that a person interrogated has waived the right to the assistance of counsel.

In determining the existence of a waiver all of the facts and circumstances of the individual case will be considered.

In the present case, the recitation of the right from memory while walking from the site of arrest without any evidence as to the defendant literacy, does not support a finding the defendant understood his rights. Without a sufficient evidence as to whether the rights were given in proper form and substance, the question of waiver cannot be properly reached.

Voluntariness (continued)

Waiver (continued)

State v. Sowards, 280 S.E.2d 721 (1981) (Per Curiam)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 858) for discussion of topic.

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 859) for discussion of topic.

State v. Wilcox, 286 S.E.2d 257 (1982) (Per Curiam)

Under the *State v. Rissler*, 270 S.E.2d 778 (W.Va. 1980) analysis, the evidence clearly supports the trial court ruling that the defendant waived his *Miranda* rights. The defendant was given his rights in proper form and there is no question that the defendant fully understood them. On the issue of whether defendant requested counsel, the trial court resolved the credibility issue against him, and its finding in this regard is supported by the evidence. The State met its burden of proof in this case.

Who determines

See SELF-INCRIMINATION-STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 846); SELF-INCRIMINATION STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 854) for discussion of topic.

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

Applies standards set forth in Syl. pts 2 and 3, *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited below.

Voluntariness (continued)

Who determines (continued)

State v. Harris, 286 S.E.2d 251 (1982) (Miller, C.J.)

While the trial court makes an initial *in camera* determination of the voluntariness of the defendant's confession, the jury is entitled to make this ultimate determination. There was no factual issue raised in regard to the voluntariness of the confession and it is for this reason that no reversible error was committed. The judge's remarks were addressed to the fact that there was no evidence that the police had utilized any coercive pressures on the defendant to obtain his confession.

State v. Taylor, 285 S.E.2d 635 (1981) (Harshbarger, C.J.)

Applies standards set forth in Syl. pts 2 and 3, *State v. Vance*, 146 W.Va. 925, 250 S.E.2d 146 (1978), cited below.

This rule is not constitutionally required. Before *Vance* it was not reversible error not to submit the question to the jury. This case antedated *Vance*, and so it was not reversible error.

State v. Vance, 250 S.E.2d 146 (1978) (McGraw, J.)

There is no sixth amendment right to have a jury redetermine the voluntariness issue, after the trial judge has decided the matter in the *in camera* hearing.

Syl. pt. 4 - We adopt the "Massachusetts" or "humane" rule whereby the jury can consider the voluntariness of the confession, and we approve of an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance of the evidence it was made voluntarily.

Voluntariness (continued)

Who determines (continued)

State v. Vance, (continued)

Syl. pt. 5 - In all trials conducted thereafter where a confession or admission is objected to by the defendant at trial or prior to trial on the grounds of voluntariness, the trial court must instruct the jury on this issue if requested by the defendant.

State v. Wimer, 284 S.E.2d 890 (1981) (McHugh, J.)

After the *in camera* hearing at which the trial court decides whether a confession is admissible in evidence, the jury at trial determines the weight to be given to the confession and the credibility of the confession.

SENTENCING

In general

State ex rel. S.J.C. v. Fox, 268 S.E.2d 56 (1980) (McGraw, J.)

Footnote 3 - It is a well-established principle of the criminal law that a criminal defendant is entitled to have his punishment determined by the evidence against him and not by the sentence imposed in another criminal prosecution against an accomplice, codefendant or anyone else.

A youth brought a prohibition against the trial judge claiming that the judge did not give precedence to the least restrictive alternative for disposition prior to sentencing. The Supreme Court found that the trial court considered that the youth's three codefendants were incarcerated for their part in the attempted robbery. The Supreme Court held that that was not a material or permissible factor to the relator's case and did not justify committing him to a juvenile correctional facility and remanded the case.

Accessory, aiding and abetting, principal

State v. Fitch, 263 S.E.2d 889 (1980) (Neely, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Punishment, (p. 25) for discussion of topic.

State v. Lamp, 254 S.E.2d 697 (1979) (Caplan, C.J.)

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Punishment, (p. 25) for discussion of topic.

SENTENCING

Appeal

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

"[U]pon a defendant's conviction at retrial following prosecution of a successful appeal, imposition by the sentencing court of an increased sentence violates due process and the original sentence must act as a ceiling above which no additional penalty is permitted." Consequently, syllabus point 6 of *Bradley v. Johnson*, 152 W.Va. 655, 166 S.E.2d 137 (1969) and syllabus point 5 of *State ex rel. Boner v. Boles*, 148 W.Va. 802, 137 S.E.2d 418 (1964) are overruled.

Syl. pt. 2 - A defendant who is convicted of an offense in a trial before a justice of the peace and exercises his statutory right to obtain a trial *de novo* in the circuit court is denied due process when, upon conviction at his second trial, the sentencing judge imposes a heavier penalty than the original sentence. *W.Va. Const.* art. 3, § 10.

When a defendant refuses to prosecute an appeal fearing that he will receive a heavier sentence, his right to appeal has effectively been denied. Denial of that right is a violation of both state an federal due process clauses, therefore the conviction is rendered void. This deterrent effect of heavier sentencing upon retrial similarly deprives a defendant of his statutory right to a trial *de novo*.

Appropriateness of the sentence

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Appropriateness of the sentence,(p. 732) for discussion of topic.

Attempt

State v. Goodnight, 287 S.E.2d 504 (1982) (Harshbarger, J.)

See LARCENY Sentence, (p. 628) for discussion of topic.

SENTENCING

Consecutive/concurrent sentences

Keith v. Leverette, 254 S.E.2d 700 (1979) (Caplan, C.J.)

Syl. pt. 3 - When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentence run concurrently, and unless it does so provide, the sentences will run consecutively.

Conspiracy

Keith v. Leverette, 254 S.E.2d 700 (1979) (Caplan, C.J.)

See CONSPIRACY Sentencing, (p. 109) for discussion of topic.

Contempt

Child support

State ex rel. Canada v. Hatfield, 258 S.E.2d 440 (1979) (Per Curiam)

See CONTEMPT Child support, (p. 112) for discussion of topic.

Credit for time spent in jail/detention center

Martin v. Leverette, 244 S.E.2d 39 (1978) (Miller, J.)

Syl. pt. 1 - The double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trail or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable.

Credit for time spent in jail/detention center (continued)

State v. Hersman, 242 S.E.2d 559 (1978) (Miller, J.)

Syl. pt. 2 - It is a violation of the Double Jeopardy Clause of the West Virginia Constitution, Article III, Section 5 to fail to credit the time served at a detention center under *W.Va. Code*, 25-4-6, when pursuant to this section a prisoner is found unfit to remain at a detention center, is returned to the court which committed him, and is sentenced for the crime for which he was convicted.

In this case, the defendant spent 343 days at detention centers for an offense which carried confinement in the jail for 180 days. He was then given 90 days in jail. This violates our double jeopardy clause for not giving credit for time spent in the detention center.

Disciplinary measures

Escape

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

See PRISON CONDITIONS Disciplinary measures, Proportionality, (p. 693) for discussion of topic.

Proportionality

Keenan v. Bordenkircher, 294 S.E.2d 175 (1982) (Per Curiam)

See PRISON CONDITIONS Disciplinary measures, Proportionality, (p. 693) for discussion of topic.

Disparate sentences

Smoot v. McKenzie, 277 S.E.2d 205 (1981) (Per Curiam)

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE Disparate sentences,(p. 733) for discussion of topic.

SENTENCING

Error

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Where the court, upon a valid conviction, mistakenly imposes an incorrect sentence, a proper sentence can be imposed without violating either the double jeopardy or three-term rule.

State v. Lawson, 267 S.E.2d 438 (1980) (Neely, C.J.)

Syl. pt. 2 - "Where in a criminal proceeding, there is no error other than in the entry of the judgment imposing sentence, the judgment should be reversed and the case remanded for proper judgment of sentence to be entered by the trial court." Syllabus pt. 7, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944), citing syllabus pt. 5, *State v. Fisher*, 126 W.Va. 117, 27 S.E.2d 581 (1943).

This case was remanded to allow the court to sentence the defendant to a definite term as required *W.Va. Code* § 61-11-16 [1965] since his sentence had been to a term of not less than ten nor more than twenty years.

Escape

State ex rel. Anderson v. Leverette, 253 S.E.2d 543 (1979) (Harshbarger, J.)

See ESCAPE Punishment, (p. 251) for discussion of topic.

Final at end of term at which declared

State ex rel. Dye v. Bordenkircher, 284 S.E.2d 863 (1981) (McHugh, J.)

"In West Virginia, the rule is that the sentence pronounced becomes final at the end of the term at which it is declared." *State ex rel. Miller v. Bordenkircher*, 272 S.E.2d 676 (W.Va. 1980).

SENTENCING

Juveniles

See JUVENILE Confinement, (p. 555); JUVENILE Dispositional hearing, (p. 573) for discussion of topic.

Postponement of execution of judgement

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

See STAY OF EXECUTION Postponement of execution of sentence, (p. 912) for discussion of topic.

Pre-sentence report

State v. Byrd, 256 S.E.2d 323 (1979) (Caplan, C.J.)

Syl. pt. 1 - Where a presentence report has been prepared and presented the court shall, upon request, permit the defendant, or his counsel if he is so represented, prior to imposition of sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons and the court shall afford the defendant or his counsel an opportunity to comment on the report, and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

Syl. pt. 2 - If the court be of the view that there is information in the presentence report which should not be disclosed, the court, in lieu of making the report thereof available, shall state orally or in writing a summary of the factual information contained therein; the defendant or his counsel shall be given an opportunity to comment thereon and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy.

Pre-sentence report (continued)

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

On appeal from a trial for murder, the defendant claimed the trial court committed error by denying him a copy of the presentence investigation report. The Supreme Court noted that a timely request was not made and that probation decisions are within the discretion of the trial court. The presentence report was not part of the record, so the Supreme Court could not make a finding as to abuse of discretion, and concluded there was no reversible error.

On appeal from a trial for murder, the defendant claimed the trial court committed error by denying him a copy of the report from the Huttonsville Diagnostic Center. The Supreme Court noted there was nothing in the record indicating a timely request for the report and the report was not in the record. The Court could not determine if the trial judge abused his discretion. The remainder of the record showed no apparent prejudice as a result of the denial of the report.

State v. Dobbs, 286 S.E.2d 918 (1982) (Neely, J.)

See PROBATION Eligibility for probation, (p. 703) for discussion of topic.

State v. Dotson, 269 S.E.2d 853 (1980) (Per Curiam)

A criminal defendant or his attorney, in the discretion of the trial court, is permitted to read and comment on the presentence report prior to the imposition of sentence.

Where the State and the defendant's attorney filed a joint motion to dismiss appeal on the ground that the parties had agreed that the defendant should be resentenced and afforded an opportunity to review the presentence investigation report prior to sentencing, Supreme Court treated such motion as a confession of error.

Pre-sentence report (continued)

State v. Godfrey, 289 S.E.2d 660 (1981) (McHugh, J.)

The Supreme Court applied syllabus point 1 of *State v. Byrd*, 256 S.E.2d 323 (W.Va. 1979) with regard to the disclosure of a diagnostic report used at sentencing hearing.

The diagnostic report was revealed to defendant's counsel on the same day the sentencing hearing was held. The trial judge's delay of, and limitation on, the disclosure of the diagnostic report was motivated by his concern that revelation of the report's diagnostic opinion to the defendant would have a disruptive effect on her rehabilitation as well as considerations of confidentiality. The factual content of the diagnostic report was the same as, and based on, the pre-sentence report which had been in the defendant's possession for six weeks. Under these circumstances the trial judge's delay in disclosing the report, and his limitation on the scope of that disclosure, did not prejudice the defendant and was not an abuse of discretion. See Code 62-12-7, 7a.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

State v. Byrd, 256 S.E.2d 323 (W.Va. 1979) requires that the trial court provide a copy of the pre-sentence report, if requested by the attorney or the defendant; however, it specifies that the report be shown prior to sentencing and that the rule be prospective in nature.

When appellant requested a copy of a pre-sentence report after sentencing and when appellant was sentenced two months before the *Byrd* ruling, which was a prospective ruling, the Supreme Court failed to find error in the court's failure to give appellant a copy of the probation officer's report.

SENTENCING

Prejudicial

State v. Meadows, 292 S.E.2d 50 (1982) (Harshbarger, J.)

Trial judge's harsher sentence of defendant found guilty than of co-indictee who chose to plead guilty merely because this defendant chose to plead innocent and be tried was violation of due process.

Syl. pt. 7 - Punishment cannot be increased merely because one decides to pursue his right to trial. Our law does not reward those who plead guilty and punish those who proceed to trial and are convicted by a judge or jury.

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort" and is patently unconstitutional.

Probation

See PROBATION, (p. 697) for discussion of topic.

Proportionality principal

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE, (p. 731) for discussion of topic.

Recidivist

See RECIDIVIST Elements, Prior felonies, (p. 745); RECIDIVIST Sentencing, (p. 748); RECIDIVIST Validity of prior convictions, (p. 750) for discussion of topic.

SENTENCING

Resentencing

Double jeopardy

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

Where the court mistakenly imposes an incorrect sentence, a resentencing is not prevented by double jeopardy principles since the resentencing is unrelated to the underlying truth-finding process which led to the conviction and only corrects the improper sentence.

Retrial

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

"Upon a defendant's conviction at retrial following prosecution of a successful appeal, imposition by the sentencing court, of an increased sentence violates due process and the original sentence must act as a ceiling above which no additional penalty is permitted." *State v. Eden*, 256 S.E.2d 868 at 867 (W.Va. 1979).

Review of sentence

See PROPORTIONALITY - PUNISHMENT TO THE OFFENSE; (p. 731) for discussion of topic.

Saving clause

See SAVINGS CLAUSE, (p. 782) for discussion of topic.

Sexual assault

State ex rel. Miller v. Bordenkircher, 272 S.E.2d 676 (1980) (Per Curiam0

When the Legislature enacted the Sexual Assault Act it did not include therein a savings clause. Therefore, *W.Va. Code* § 2-2-8, the general savings statute, is applicable.

Sexual assault (continued)

State v. Lawson, 267 S.E.2d 438 (1980) (Neely, C.J.)

See SENTENCING Error, (p. 874) for discussion of topic.

State/Federal sentences

State ex rel. Morris v. Mohn, 267 S.E.2d 443 (1980) (Miller, J.)

Syl. pt. 2 - The federal parole revocation law militates against concurrency of sentence and ordinarily prevents the performance of a state commitment made in a plea bargain agreement which provides that the state sentence will run concurrently with the underlying federal sentence upon which the defendant was paroled.

If the plea is based on a plea bargain which is not fulfilled or is unfulfillable, the plea must be set aside.

Stay of execution

Pending appeal

State ex rel. Dye v. Bordenkircher, 284 S.E.2d 863 (1981) (McHugh, J.)

See STAY OF EXECUTION Pending appeal, (p. 912) for discussion of topic.

Time within which sentence must be imposed

Ball v. Whyte, 294 S.E.2d 270 (1982) (Neely, J.)

Syl. pt. - Sentence shall be imposed without unreasonable delay; however, the passage of time alone will not bar imposition of sentence or require a defendant's discharge. Delay must not be purposeful or oppressive; deprivation of rights depends upon the particular circumstances of each case.

Time within which sentence must be imposed (continued)

Ball v. Whyte, (continued)

A 21-month delay between the time the guilty plea is entered and the sentence is pronounced is not necessarily grounds for defendant's discharge. Such grounds exist only if the delay was to give appellant time either to "stay clean" or to commit other crimes because then the delay was purposeful, oppressive, and a violation of due process principles.

A delay in sentencing caused by administrative oversight and promptly remedied upon discovery is not a violation of due process.

On remand, a record must be made of reasons for delay to resolve whether error has been committed.

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

There is no statute setting a specific time within which sentencing must be imposed after conviction, nor does the three-term statute *W.Va. Code* § 62-3-21 apply. *State v. Hudson*, 206 S.E.2d 415 (W.Va. 1974).

Void/voidable

Housden v. Leverette, 241 S.E.2d 810 (1978) (McGraw, J.)

Syl. pt. 3 - "A trial court lacks jurisdiction to enter a valid judgment of conviction against an accused who was denied effective assistance of counsel and a judgment so entered is void." Syl. pt. 5, *State v. Thomas*, 157 W.Va. 240, 203 S.E.2d 445 (1974).

Where defendant had been denied effective assistance in a prior malicious wounding conviction, the trial court's entry of a conviction of life imprisonment for breaking and entering under the recidivist statute was void.

Void/voidable (continued)

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See HABEAS CORPUS Judgments, (p. 357) for discussion of topic.

State v. Jeffers, 251 S.E.2d 227 (1979) (Per Curiam)

Although a judgment in excess of that which the court had jurisdiction to pronounce is void as to the excess only, that rule does not control where the trial court has given an instruction over objection that resulted in reversible error as then the entire judgment is set aside.

In this trial for a traffic offense, the defendant was fined $100 and sentenced to 30 days in jail, while the statute stated a fine of not more than $100 and imprisonment for not more than 10 days. As the sentence was void only as to the excess was not applicable, due to the giving of an erroneous instruction omitting elements of the offense properly objected to and not corrected.

Varney v. Superintendent, W.Va. Penitentiary, 264 S.E.2d 472 (1980) (Caplan, J.)

Syl. pt. 2 - One who has been convicted of two crimes, one of which convictions has been declared void, will be relieved of punishment for such void conviction, but he must serve the term provided by statute for the valid conviction.

Youthful offenders

State v. Hersman, 242 S.E.2d 559 (1978) (Miller, J.)

See SENTENCING Credit for time spent in jail/detention center, (p. 873) for discussion of topic.

Youthful offenders (continued)

Watson v. Whyte, 245 S.E.2d 916 (1978) (Harshbarger, J.)

See DUE PROCESS Evidentiary hearing, (p. 234) for discussion of topic.

See YOUTHFUL OFFENDERS ACT Due process, (p. 973) for discussion of topic.

SEXUAL ASSAULT

In general

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

The use of the word "or", which is a conjunction, expresses the legislative intent that sexual intercourse can be committed in each of the various alternative ways, with each type of prohibited contact constituting a separate offense.

Syl. pt. 1 - *W.Va. Code* 61-8B-1(7), when read in conjunction with *W.Va. Code* 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses.

Blood grouping test

State v. Lawson, 267 S.E.2d 438 (1980) (Neely, C.J.)

Syl. pt. 1 - In a prosecution for statutory rape, where the victim alleges that the incident resulted in her pregnancy because she had engaged in sexual intercourse only on the one occasion in question, the has a right to blood grouping tests to determine parentage of the victim's child.

Constitutionality of statute

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

The now-repealed rape statute is not unconstitutional because of sex-based classification.

Sex-based classification making it crime for a male to forcibly rape a female over sixteen years of age, but not making it a crime for a female to forcibly rape a male does not render the forcible rape statute (repealed) unconstitutional.

Constitutionality of statute (continued)

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

The sexual assault law which limits a defendant from presenting evidence of a victim's previous sexual conduct, does not violate the defendant's constitutional right to confront witnesses by restricting cross-examination of his accusers. A rape victim's previous sexual conduct with other persons has very little probative value about her consent to intercourse with a particular person at a particular time. The portions of the statute which prohibits such evidence is constitutional.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

The wording of the sexual abuse statute (*W.Va. Code* § 61-8B-1 (1976)), "done for the purpose of gratifying the sexual desire of either party" is not unconstitutionally void for vagueness because of lack of definition of the terms "sexual gratification" or "sexual desire". Both terms are plain and unambiguous on their face.

Legislative distinction between sexual assault in the second degree, where the victim uses all reasonable means available to discourage her assailant, and sexual misconduct, where the victim does not, in fact, consent, but fails to avail herself of all the resources available to her to overcome the attack, appeared to the Supreme Court to be a distinction without a difference. Nevertheless, the Supreme Court is compelled to exhaust every reasonable interpretation of a statute before concluding that the statute is unconstitutional.

Continuance

State v. Lawson, 267 S.E.2d 438 (1980) (Neely, C.J.)

The paternity of the child is a relevant fact in this case because the victim testified that this was the only instance of sexual intercourse in which she had engaged. Thus, if the defendant had been able to establish by a blood test that he could not possibly have fathered the child, he would have effectively impeached the victim's testimony.

Continuance (continued)

State v. Lawson, (continued)

The defendant was entitled to his continuance to secure potentially exculpatory evidence. The case is remanded on the limited basis that the trial court should order blood tests performed upon the child, victim, and the defendant. If the blood tests established lack of paternity, then the defendant's motion for a new trial should be granted; however, if they are merely inconclusive, the conviction should stand.

Corroboration

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

Syl. pt. 5 - A conviction for rape may be had on the uncorroborated testimony of the female, and unless her testimony is inherently incredible her credibility is a question for the jury.

Defendant contended since the victim was immature and the charges arose out of a family dispute, the rule should be modified to require corroboration. The court held a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim. It declined to reverse the conviction because the victim's testimony was not inherently incredible.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

Syl. pt. 4 - A conviction for rape may be had upon the uncorroborated testimony of the female, and unless her testimony is inherently incredible her credibility is a question for the jury.

Double jeopardy

See DOUBLE JEOPARDY Sexual assault, (p. 217) for discussion of topic.

Double jeopardy (continued)

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

It would appear to the Supreme Court that unlawful sexual intercourse could not possibly occur without a certain amount of unlawful sexual contact and it seems unreasonable that the Legislature contemplated the division of one act of rape into its component elements for the purposes of punishment.

Evidence of prior sexual conduct of victim

See EVIDENCE Sexual conduct, (p. 311) for discussion of topic.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

See SEXUAL ASSAULT Constitutionality of statute, (p. 885) for discussion of topic.

Expert testimony

State v. Mitter, 285 S.E.2d 376 (1981) (Miller, J.)

See EVIDENCE Opinion, Expert witness, (p. 295) for discussion of topic.

Indictment

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

See INDICTMENT Sufficiency (p. 436) for discussion of topic.

State v. Persinger, 286 S.E.2d 261 (1982) (Miller, C.J.)

See INDICTMENT Sufficiency (p. 438) for discussion of topic.

SEXUAL ASSAULT

Instructions

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

The trial court did not err in failing to instruct the jury on third degree sexual assault since third degree sexual assault is not a lesser included offense of first degree sexual assault.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

To constitute the crime of sexual assault the victim must have been forcibly compelled to have intercourse. *W.Va. Code* § 61-8B-1 defines "forcible compulsion". The defendant wanted an instruction which ignored and misstated this definition and so the refusal to give this instruction was not error.

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

See INSTRUCTIONS Burden shifting, (p. 493) for discussion of topic.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

Syl. pt. 5 - Where the State's case is based upon the uncorroborated and uncontradicted identification testimony of a prosecuting witness, it is error not to instruct the jury upon request that, if they believe from evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, then the jury should scrutinize such testimony with care and caution.

The same instruction, as set out above, is appropriate in a case where the prosecuting witnesses' testimony is contradicted and uncorroborated. *State v. Perry*, 41 W.Va. 641, 24 S.E. 634 (1896).

The above instruction is not necessary where the prosecuting witnesses' testimony is uncontradicted and corroborated. *State v. Garter*, 131 W.Va. 641, 49 S.E.2d 561 (1948).

Instructions (continued)

State v. Payne, (continued)

A jury should be altered to those facts which are relevant in determining the reliability of identification testimony and in deciding how much weight should be given to that testimony in cases where the identification testimony is uncorroborated. The Supreme Court suggests the instruction given in *United States v. Telafaire*, 469 F.2d 552 (1972) to accomplish this purpose.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

In a trial for sexual assault, the defendant was not entitled to an instruction that the victim's prior sexual activities could not be admitted into evidence that the jury should draw no conclusions from the defendant's failure to elicit such testimony. In an *in camera* hearing, the trial court determined that the victim's past sexual history was irrelevant to the question of defendant's guilt. The *in camera* hearing met the guidelines of *State v. Green*, 260 S.E.2d 257 (W.Va. 1979), so the victim's past sexual history had no bearing on the outcome of the case and defendant was not entitled to the requested instruction.

Since the evidence before the trial court indicated one continuing sexual offense transpiring over the course of approximately fifteen minutes and culminating in sexual intercourse, the Supreme Court found that it was reversible error for the court to have provided a verdict form which permitted the following guilty verdicts: guilty of sexual assault and battery under count one; guilty of sexual abuse under count two; and, guilty of sexual abuse under count three. The jury should have been instructed that they could find the defendant guilty of any one of the following in descending order of severity as follows: guilty of sexual assault in the second degree; guilty of sexual abuse in the first degree; guilty of sexual misconduct; or, guilty of assault and batter.

Instructions (continued)

State v. Romine, 272 S.E.2d 680 (1980) (Caplan, J.)

The giving of an instruction in prosecution for burglary and rape that possible penalty for rape was death was reversible error since the death penalty had been repealed and there was no possibility of such sentence legally having been imposed on the defendant.

Lesser included offense

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

The additional element that the actor be 16 years of age or older for conviction under third degree sexual assault, *W.Va. Code* § 61-8B-5(a)(2), precludes that statutory provision from being a lesser included offense of first degree sexual assault.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

The statutes on sexual assault in the second degree, a felony (*W.Va. Code* § 61-8B-4 (1976)) and sexual misconduct, a misdemeanor (*W.Va. Code* § 61-8B-9 (1976)) are sufficiently distinct that they are separate offenses, although sexual misconduct can be a lesser included offense of sexual assault in the second degree.

Sentencing

State ex rel. Miller v. Bordenkircher, 272 S.E.2d 676 (1980) (Per Curiam)

See SENTENCING Sexual assault, (p. 879) for discussion of topic.

State v. Lawson, 267 S.E.2d 438 (1980) (Neely, C.J.)

See SENTENCING Error, (p. 874) for discussion of topic.

SEXUAL ASSAULT

Sufficiency of evidence

State v. Burks, 267 S.E.2d 752 (1980) (Per Curiam)

The Supreme Court applied Syllabus pt. 1 of *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), and determined there was an insufficiency of evidence to support a conviction of third degree sexual assault.

There was insufficient evidence of the alleged victim's lack of consent or mental incapacity to consent to support the third degree assault charge, and there was no evidence of force to sustain the charge of assault. The Double Jeopardy Clause forbids retrial and results in a judgment of acquittal.

State v. Greenlief, 285 S.E.2d 391 (1981) (McGraw, J.)

The question here is "whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt" of sexual abuse. A thorough review of the records submitted with this action would indicate that the State had met this burden of proving each element at the trial.

SHOPLIFTING

Intent

State ex rel. Farley v. Wharton, 267 S.E.2d 754 (1980) (Harshbarger, J.)

Syl. pt. - *W.Va. Code*, 61-3A-3, which provides that one who conceals merchandise is presumed to intend to shoplift it, creates an unconstitutional presumption of intent, an element of the crime of shoplifting.

SPEEDY TRIAL

In general

State v. Cox, 253 S.E.2d 517 (1979) (McGraw, J.)

Four factors are to be balanced when evaluating a speedy trial claim. These are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant.

The court found that the State had complied with all constitutional and statutory requirements pertaining to a speedy trial since the delay was due to the defendant's incarceration in a federal penitentiary and prison officials' refusal to release him to temporary custody. Also, the defendant did not assert his right to a speedy trial until 1975, a critical witness was not subpoenaed, and the prosecuting authorities had made a good faith effort to secure the presence of the accused for trial.

State v. Foddrell, 269 S.E.2d 854 (1980) (Caplan, J.)

With respect to a speedy trial claim, four factors should be considered. They are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The record in this case does not contain sufficient information from which these questions can be answered. In determining whether due diligence was used, it may be significant as to whether or not a *capias* was issued for his arrest upon his failure to respond to the indictment. The defendant had been a resident of this state but moved to Michigan prior to the crime. Six years passed between the indictment and trial.

Habeas corpus proceeding

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

"Code, 62-3-21, as amended, requiring that an accused be tried within three terms of court from the finding of the indictment, with certain exceptions, is not applicable where a defendant, after entering a plea of guilty, is sentenced to the penitentiary and later institutes a habeas corpus proceeding,

Habeas corpus proceeding (continued)

State v. Gwinn, (continued)

and as a result thereof the conviction and sentence are held to be void, because he could not be tried again while he was confined in the penitentiary and the statute had been satisfied at the first trial." Syllabus pt. 3, *State v. Holland*, 143 S.E.2d 148 (W.Va. 1968).

"When a defendant institutes habeas corpus proceedings and has his conviction and sentence held void, he waives the provisions of the statute, Code, 62-3-21, as amended, to be tried within three terms of the finding of the indictment, making it applicable in such cases; and by accepting the benefits of having his conviction and sentence set aside and held for naught, he must also accept any disadvantage which may accrue therefrom." Syllabus pt. 4, *State v. Holland*, 143 S.E.2d 148 (W.Va. 1968).

A criminal defendant who secures relief by writ of habeas corpus does not waive his constitutional right to a speedy trial.

Where retrial occurred within three terms after the ending of the term at which habeas corpus relief was granted, Supreme Court found that this was not an unreasonable or oppressive delay and defendant was not denied right to speedy trial.

Pre-arrest, pre-accusatory delay

See PRE-INDICTMENT DELAY In general, (p. 681) for discussion of topic.

SPEEDY TRIAL

Same term rule

State ex rel. Holstein v. Casey, 265 S.E.2d 530 (1980) (Harshbarger, J.)

Syl. pt. 1 - Legislatively established parameters of West Virginia constitutional speedy trial rights, *W.Va. Const.* art. III, § 14 are set out in *W.Va. Code* 62-3-1 and 62-3-21. *W.Va. Code*, 62-3-1 mandates that a criminal defendant be tried in the term during which he is indicted unless good cause is shown for a continuance. *W.Va. Code*, 62-3-21 requires that (even if good cause is shown and trial is properly delayed beyond the indictment term) trial must commence within three terms after the indictment term unless delayed for the specific reasons stated in the statute.

A defendant is entitled to be forever discharged from prosecution under Code § 62-3-1, if he has not been tried in the same term as his indictment and there has been no grant of a continuance for good cause.

Silence or inaction by defendant or his counsel does not waive defendant's speedy trial rights, prescribed by § 62-3-1 and § 62-3-21.

Syl. pt. 2 - Failure by the state to abide by *W.Va. Code*, 62-3-1 and 62-3-21 bars prosecution of a criminal defendant.

Syl. pt. 3 - This decision shall have no retroactive application.

State ex rel. Shorter v. Hey, 294 S.E.2d 51 (1981) (McHugh, J.)

Syl. pt. 1 - "Whereas *W.Va. Code*, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is *W.Va. Code*, 62-3-21, rather than *W.Va. Code*, 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of *U.S. Const.*, amend. VI and *W.Va. Const.*, art III, § 14." *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 538, 120 S.E.2d 504, 506, (1961).

For good cause shown upon the record, a trial court pursuant to *W.Va. Code* § 62-3-1, may, upon its own motion of one or more parties, continue a criminal trial beyond the term of indictment.

Same term rule (continued)

State ex rel. Shorter v. Hey, (continued)

In the absence of a request for or the court's motion for continuance, *W.Va. Code* § 62-3-1 requires trial in the same term as the indictment; however, failure by the court to conduct such a trial during the term does not, in itself, bar further prosecution of a criminal defendant.

Syl. pt. 2 - The determination of what is good cause, pursuant to *W.Va. Code* § 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to *W.Va. Code* § 62-3-1, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or upon the court's own motion.

Syl. pt. 3 - A trial judge in a multi-judge circuit may, upon his own motion and for good cause, order a continuance of a trial beyond the term of indictment because of the judge's congested trial docket, and such judge need not ascertain whether any other judge in the circuit can try the case within the term of indictment. *W.Va. Code* § 62-3-1.

Where trial docket was congested, trial judge did not abuse his discretion when he found good cause to continue and continued on his own motion.

Syl. pt. 4 - Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to *W.Va. Code* § 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to *W.Va. Code* § 62-3-1, only in furtherance of the prompt administration of justice.

A dismissal in accordance with syl. pt. 4 is brought about by a violation of defendant's statutory right under *W.Va. Code* § 62-3-1 to a trial in the term of his indictment, not by a violation of his constitutional right to a speedy trial which is defined in West Virginia by *W.Va. Code* § 62-3-21.

Same term rule (continued)

State ex rel. Shorter v. Hey, (continued)

Syl. pt. 5 - Syl. pts. 1 and 2 in *State ex rel. Holstein v. Casey*, 265 S.E.2d 530 (W.Va. 1980) are hereby overruled to the extent the same are in conflict with this opinion.

W.Va. Code § 62-3-1 provides that unless good cause be shown, a criminal defendant shall be tried in the same term of court in which he is indicted.

So that the Supreme Court may review the case meaningfully, the trial judge should state in the record the elements constituting good cause under *W.Va. Code* § 62-3-1. Likewise, an objection made by the State or defendant must be a matter of record, the grounds for objection being stated specifically.

State ex rel. Workman v. Fury, 283 S.E.2d 851 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 4, *State ex el. Shorter v. Hey*, 294 S.E.2d 51 (W.Va. 1981), cited above.

Syl. pt. 1 - A failure as a matter of common practice to conduct jury trials during the term of court is not good cause to continue a criminal case after a motion has been made by the defendant for a speedy trial.

The defendant, in this case, moved vigorously for a speedy trial after his first trial ended in a hung jury. The trial court denied this motion because jury trials traditionally were not conducted during the summer months. This was not good cause for delay and it is not unavoidable. The defendant was "prejudiced" by the fact that he will have already served the minimum sentence to which he would have been subject upon conviction. The indictment against the defendant was ordered dismissed with prejudice.

State v. Alexander, 245 S.E.2d 633 (1978) (Harshbarger, J.)

See CONTINUANCE Abuse of discretion, (p. 121) for discussion of topic.

Same term rule (continued)

State v. Alexander, (continued)

West Virginia follows the minority rule that the duty is upon the prosecution to provide a prompt trial rather than upon the accused to demand a speedy trial.

The right to a speedy trial is not violated by unavoidable delays nor by delays caused by the defendant.

Under the facts of this case, the trial court did not abuse its discretion when it granted a continuance; and there was no deprivation of the defendant's rights to a quick trial, when the defendant's attorney delayed in issuing subpoenas causing the suppression hearing to be continued and thus also causing the State to be unable to prepare for trial before the court term ended.

Syl. pt. 1 - In a criminal case the state may have a continuance to the next term of court when defendant's actions have substantially inhibited the prosecutor's trial preparation. Such continuance violates neither the federal or state constitutions, nor *W.Va. Code* 62-3-1 which requires that a defendant be tried at the term of court in which he is indicted unless good cause be shown for a continuance.

State v. Bush, 255 S.E.2d 539 (1979) (McGraw, J.)

An accused in custody is entitled, unless good cause be shown for the continuance, to be tried in the same term of court as the indictment. The "good cause" exception contemplates relieving the State from its duty to try defendant at the same term as the indictment where the defendant seeks a continuance as a result of financial difficulties delaying the employment of counsel. See *W.Va. Code* § 62-3-1.

Same term rule (continued)

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Defendant was not denied his right to be tried at the same term in which the indictment was returned since the time consumed for the proper treatment of the defendant's motions and pleadings constituted "good cause" for a continuance.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

The right of a criminal defendant to a speedy trial is guaranteed by both the State and federal constitutions. In recognition of this right, *W.Va. Code* § 62-3-1 requires that a criminal defendant be tried in the term in which he is indicted, unless good cause for continuance be shown.

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

See PRE-INDICTMENT DELAY In general, (p. 682) for discussion of topic.

State v. Ward, 284 S.E.2d 881 (1981) (Per Curiam)

W.Va. Code § 62-3-1 normally requires that an accused be tried in the term in which he is indicted. However, upon a finding of good cause, a trial court may continue trial beyond the term in which the indictment is returned. Good cause is determined by the trial court. In view of the fact, in this case, a potential conflict of interest affecting defense counsel arose, good cause existed for continuing defendant's trial, and the trial judge did not abuse his discretion.

State v. Young, 280 S.E.2d 104 (1981) (McHugh, J.)

See SPEEDY TRIAL Three term rule, (p. 903) for discussion of topic.

SPEEDY TRIAL

Three term rule

Adkins v. Leverette, 264 S.E.2d 154 (1980) (Caplan, J.)

Where defendant requested and was granted several continuances, court could not find that he was deprived of a speedy trial, when most, if not all, of the delay was attributable to his own actions.

Syl. pt. 4 - A defendant cannot successfully assert violation of his constitutional right to a speedy trial when any delay, such as a continuance on his motion, is attributable to him.

State ex rel. Boso v. Warmuth, 270 S.E.2d 631 (1980) (Neely, C.J.)

Syl. pt. 1 - For the purpose of the "Three Term Rule," *W.Va. Code*, 62-3-21 [1959], the defendant who avoids prosecution by fleeing the State is in a category apart from the defendant who remains available for trial.

Syl. pt. 2 - *W.Va. Code* 63-3-21 [1959], imposes a duty on the State to exercise reasonable diligence to procure temporary custody of the defendant who has fled the State for the purpose of offering him a speedy trial once the defendant's out-of-state whereabouts become known.

Failure of the State to exercise such reasonable diligence entitles theft to count the terms during which the State took no action against the defendant under the "Three Term Rule."

Syl. pt. 3 - Under the "Three Term Rule," *W.Va. Code* 63-3-21 [1959], where an accused has been indicted in West Virginia and fled elsewhere, the defendant can only assert lack of reasonable diligence on the part of the State in procuring him for trial if the defendant himself has not resisted the State's efforts to return him for trial.

State ex rel. Holstein v. Casey, 265 S.E.2d 530 (1980) (Harshbarger, J.)

See SPEEDY TRIAL Three term rule, (p. 895) for discussion of topic.

Three term rule (continued)

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

There is no statute setting a specific time within which sentencing must be imposed after conviction, nor would the three term statute, *W.Va. Code* § 62-3-21, apply.

State ex rel. Rogers v. Casey, 273 S.E.2d 356 (1980) (Per Curiam)

Under *W.Va. Code* § 62-3-21 [1959] the term at which the indictment is returned is not to be counted against the State.

The "Three Term Rule" imposes a duty on the prosecution to provide a trial without unreasonable delay rather than a duty on the accused to demand a speedy trial.

The fact that the accused is out of the county serving a sentence in the state penitentiary does not affect the duty on the State to provide a trial where the penitentiary sentence was imposed by the same court in which the accused is indicted.

Three days before the end of the third term the State moved for a trial the next day. Coexistent with the right of a criminal defendant to a speedy trial is the right to have effective assistance of counsel at that trial.

"The right guaranteed by State and Federal Constitutions to a person charged with a criminal violation to have effective assistance of counsel, cannot be abrogated by denying counsel, if timely employed, sufficient time to adequately prepare for trial." Syllabus pt. 2, *State ex rel. West Virginia - Pittsburgh Coal Col v. Eno*, 135 W.Va. 473, 63 S.E.2d 845 (1951).

Although the trial court, on its own motion, correctly ordered a continuance of the case, it was brought about by the State's failure to schedule trial in such a manner as to ensure defendant's counsel time to prepare. Under these circumstances, if the continuance was not granted on a *de facto* motion of the defendant's counsel. Therefore, three terms of court passed before trial and accordingly the defendant is discharged from prosecution under this indictment.

Three term rule (continued)

State ex rel. Shorter v. Hey, 294 S.E.2d 51 (1981) (McHugh, J.)

W.Va. Code, 62-3-21, provides a defendant shall be discharged from prosecution if not tried within three terms of court after presentment, indictment or appeal from an inferior tribunal.

W.Va. Code, 62-3-21 is this State's declaration of a criminal defendant's constitutional right to a speedy trial.

The term at which indictment is returned is not to be counted under *W.Va. Code*, 62-3-21, in favor of the discharge of a defendant.

At least three full terms of court beyond the term of indictment must pass before, under *W.Va. Code* § 62-3-21, the constitutional right to a speedy trial is denied, thus the term of indictment under this statute is relegated to a position of less importance; consequently, it is not justifiable to associate the same term rule 62-3-1 with the constitutional right to a speedy trial.

State v. Fenders, 268 S.E.2d 120 (1980) (Per Curiam)

See EXTRADITION Three-term rule, (p. 324) for discussion of topic.

State v. Foddrell, 269 S.E.2d 854 (1980) (Caplan, J.)

The *State ex rel. Boso v. Warmuth*, 270 S.E.2d 631 (W.Va. 1980) syllabus pt. 3 rule, with regard to when a defendant can assert lack of reasonable diligence on the part of the State in procuring him for trial in order to invoke the three-term rule, is cited by the Supreme Court in this case.

State v. Gwinn, 288 S.E.2d 533 (1982) (McGraw, J.)

The Supreme Court has held that it is *W.Va. Code* 62-3-21 which establishes the outermost limit of what constitutes a speedy trial under the State constitution.

Three term rule (continued)

State v. Gwinn, (continued)

W.Va. Code § 62-3-21 provides that a person must be forever discharged from prosecution if not tried within three terms after the return of the indictment unless certain enumerated causes for continuance are shown.

State v. Rhodes, 274 S.E.2d 920 (1981) (Miller, J.)

Syl. pt. 2 - Where a defendant is unable to be tried in a particular term because of his incompetency to stand trial, such term should not be counted under our three-term rule, *W.Va. Code*, 62-3-21.

When defendant in a robbery trial was absent from the court and unable to have his trial because of his commitment in a mental institution, the time of his commitment does not count against the State in the three term rule.

State v. Young, 280 S.E.2d 104 (1981) (McHugh, J.)

Syl. pt. 1 - "Whereas *W.Va. Code*, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is *W.Va. Code*. 62-3-21, ranter than *W.Va. Code*, 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of *U.S. Const.*, amend. VI and *W.Va. Const.*, art. III, § 14." *State ex rel. Shorter v. Hey*, 294 S.E.2d 51 (W.Va. 1981), citing *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 538, 120 S.E.2d 504, 506 (1961).

Syl. pt. 2 - "The three regular terms of a court essential to the right of a defendant to be discharged from further prosecution pursuant to provisions of Code, 62-3-21, as amended, are regular terms occurring subsequent to the ending of the term at which the indictment against him is found. The term at which the indictment against his is found. Th term at which the indictment is returned is not to be counted in favor of the discharge of a defendant." Syl. pt. 1, *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961).

STATUTES

Constitutionality in general

See SEXUAL ASSAULT Constitutionality of statute, (p. 884) for discussion of topic.

State v. Griffith, 285 S.E.2d 469 (1981) (Harshbarger, J.)

"It is a well settled principle that courts do not generally pass on the constitutionality of challenged statutes unless that question is necessary to the decision of the case." *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1971).

Whether Code §§ 61-3-39a through 39g are constitutional need not be determined. Code § 61-3-39, which establish the offense of knowing issuance of a worthless check, can stand alone and suffers none of the constitutional infirmities alleged to invalidate subsequent sections.

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

See INDECENT EXPOSURE Constitutionality of statute, (p. 430) for discussion of topic.

State v. Reed, 276 S.E.2d 313 (1981) (Neely, J.)

"A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. pt. 1, *State v. Flinn*, 208 S.E.2d 538 (W.Va. 1974).

"When the constitutionality of a statute is challenged, every reasonable construction must be resorted to by the courts to sustain its validity and any reasonable doubt must be resolve in favor of the constitutionality of the legislative act in question." Syl. pt. 1, *State ex rel. West Virginia Housing Development Fund v. Waterhouse*, 212 S.E.2d 724 (W.Va. 1974).

Constitutionality in general (continued)

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

"When the constitutionality of a statute is challenged, every reasonable construction must be resorted to by The courts to sustain its validity and any reasonable doubt must be resolved in favor of the constitutionality of the legislative act in question." *State ex rel. Metz v. Bailey*, 152 W.Va. 53, 159 S.E.2d 673 (1968).

Syl. pt. 5 - Before a delegation of legislative power to an administrative agency will be held to be unconstitutional as a violation of Article VI, Section 1 of the West Virginia Constitution, such delegation must be of purely legislative power.

Purely legislative power is the authority to make a complete law.

See GOOD TIME/REDUCTION OF SENTENCE In general, (p. 332) for discussion of topic.

Least intrusive remedy

State ex rel. Harris v. Calendine, 233 S.E.2d 318 (1977) (Neely, J.)

Syl. pt. 1 - Under the doctrine of the least obtrusive remedy, this Court will not strike down a statute as unconstitutional whenever there is an adequate less obtrusive remedy which will assure that the statute will not be unconstitutional.

In this case, the Supreme Court went on to define the perimeters of *W.Va. Code* §49-1-4 [1941] and *W.Va. Code* § 49-5-11 [1975] to insure their constitutional application in juvenile proceedings.

Constitutionality in general (continued)

Least intrusive remedy (continued)

State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981) (Neely, J.)

Syl. pt. 2 - Under the doctrine of the least intrusive remedy, where a statute serves a necessary public purpose but has one unconstitutional element which is not an integral part of the statute's entire scheme, this Court will strike only so much of the statute as is unconstitutional, leaving the remainder in tact [sic] so that no vacuum in the law is created pending further legislative consideration.

Re-enactment

State ex rel. Betts v. Scott, 267 S.E.2d 173 (1980) (Miller, J.)

An act of the Legislature which repeals and simultaneously re-enacts a statute relating to a specific offense does not interrupt the continuous force of such statute, and an indictment thereunder may validly charge a 'second offense', even though the conviction of the alleged 'first offense' occurred prior to such repeal and re-enactment." Syllabus pt. 1, *State v. Mason*, 141 W.Va. 217, 89 S.E.2d 425 (1955).

Repeal

Gibson v. Bechtold, 245 S.E.2d 258 (1978) (McGraw, J.)

The Supreme Court applied Syllabus pt. 3 of *Woodring v. Whyte*, 242 S.E.2d 238 (W.Va. 1978) to determine that the 1977 changes in the juvenile law relating to jurisdictional matters repealed the prior law on the subject.

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

Repeal of a statute by implication is not favored.

Repeal (continued)

Woodring v. Whyte, (continued)

"A subsequent statute, which revises the entire subject matter of a former statute and which is evidently intended as a substitute for such former statute, operates to repeal the former statute, even though such subsequent statute does not contain express words to that effect." Syllabus pt. 1, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

Where *W.Va. Code* § 28-5-27 computed good time credit on the basis of the length of the prisoner's sentence and § 28-5-28 based the computation upon the prisoner's classification as determined by conduct, the statutes were irreconcilable, and the Court concluded that the Legislature, by enacting § 28-5-28, intended to repeal § 28-5-27.

Statutory construction

In general

In re E.H., 276 S.E.2d 557 (1981) (Miller, J.)

"[W]here there is repugnancy between provisions of a statute, that provision which is specific must be given preference over that which is merely general." *Elite Laundry Co. v. Dunn*, 126 W.Va. 858, 30 S.E.2d 454 (1944).

Myers v. Murensky, 245 S.E.2d 920 (1978) (McGraw, J.)

Syl. pt. 1 - Ambiguous penal statutes are strictly construed against the State and favorably to the liberty of the citizen.

"[I]t is a general rule that a penal statute will not be extended by construction, but must be limited to cases clearly within its language and spirit." Syllabus pt. 2, *State v. Larkin*, 107 W.Va. 680, 149 S.E. 667 (1929).

Statutory construction (continued)

In general (continued)

State ex rel. Arbogast v. Mohn, 260 S.E.2d 820 (1979) (McGraw, J.)

It is a general rule of statutory interpretation that those provisions of an earlier act which are irreconcilable with those of an amendatory act are impliedly repealed. IAJ. Sutherland, *Statutes and Statutory Construction* § 23.12 (4th ed. C. C. Sands 1972).

So, while *W.Va. Code* 61-3-13 is characterized as amendatory, the provisions of the later act operate as a repeal of inconsistent provisions in the prior act.

State v. Ball, 264 S.E.2d 844 (1980) (Neely, C.J.)

"Penal statutes must be strictly construed against the State and in favor of the defendant." Syllabus pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

State v. Myers, (No. 15296, June 17, 1982) (Neely, J.)

See HOMICIDE Negligent homicide, (p. 201) for discussion of topic.

State v. Vandall, 294 S.E.2d 177 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). See *State v. Ball*, 264 S.E.2d 844 (W.Va. 1980), cited above.

In pari materia

See ABUSE AND NEGLECT Emergency taking, (p. 1) for discussion of topic.

Statutory construction (continued)

In pari materia (continued)

State ex rel. Miller v. Locke, 253 S.E.2d 540 (1979) (Per Curiam)

Statutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia*.

Statutes *in pari materia* should be read and construed together, the primary purpose being to ascertain the intention of the Legislature.

Syl. pt. 2 - A statute may be constitutional as written, yet be unconstitutionally applied in a given case.

Whether a statute is unconstitutionally applied depends upon the particular facts of each case.

See ABUSE AND NEGLECT Emergency taking, (p. 1) for discussion of topic.

State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (1980) (Miller, J.)

W.Va. Code § 62-1-8 (1965) must be read "*in pari materia*".

Syl. pt. 3 - Where the State proceeds under *W.Va. Code*. 62-1-1, *et seq.*, to arrest the accused for an offense which must be brought before the grand jury, the defendant is entitled to a preliminary hearing under *W.Va. Code*, 62-1-8 (1965). If, however, the State elects to indict im without a preliminary hearing or before one can be held, the preliminary hearing is not required.

State ex rel. Shorter v. Hey, 294 S.E.2d 51 (1981) (McHugh, J.)

W.Va. Code § 62-3-1 and *W.Va. Code* § 62-3-21 should be read *in pari materia*.

Statutory construction (continued)

In pari materia (continued)

State ex rel. Shorter v. Hey, (continued)

A defendant, pursuant to *W.Va. Code* § 62-3-1, has a statutory right to a trial in the term of indictment, subject to a possible continuance for good cause, and pursuant to *W.Va. Code* § 62-3-21, he has a constitutional right to trial within three terms from the term of his indictment, subject to exceptions. Only *W.Va. Code* § 62-3-21 provides that a violation will result in the defendant's being discharged from prosecution.

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

W.Va. Code § 61-11-14 (1923 must be read *in pari materia* with *W.Va. Code* § 61-11-13 (1931). These statutes originated in the common law as did the constitutional double jeopardy provision and the statutes incorporate the same law to achieve the same end, *i.e.*, to bar a retrial after a judgment of acquittal is entered upon a determination of the merits of a case.

"Shall" is mandatory

Perry v. Barker, 289 S.E.2d 423 (1982) (McGraw, J.)

Syl. pt. 2 - "It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syllabus pt. 1, *Nelson v. Public Employees Ins. Board*, (No. 15468, March 4, 1982).

State ex rel. R.C.F. v. Wilt, 252 S.E.2d 168 (1979) (McGraw, J.)

It is a basic rule that the word "shall" is mandatory in the absence of any contrary intention expressed in the statute.

"Shall" is mandatory (continued)

State ex rel. R.C.F. v. Wilt, (continued)

Syl. pt. 1 - *W.Va. Code* § 49-5-1 *et. seq.*, particularly *W.Va. Code* § 49-5A-2 [1977] and *W.Va. Code* § 49-5-16(a) [1978], make it unlawful to incarcerate a child under eighteen years of age in a common county jail or police station lockup.

Woodring v. Whyte, 242 S.E.2d 238 (1978) (Miller, J.)

Syl. pt. 1 - Whether a statute is mandatory or directory must be determined from the intention of the Legislature.

"The word 'shall', in the absence of language in the statute showing contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969).

STAY OF EXECUTION

Pending appeal

State ex rel. Dye v. Bordenkircher, 284 S.E.2d 863 (1981) (McHugh, J.)

Syl. pt. 1 - The term "postponing the execution of the sentence" in *W.Va. Code*, 62-7-1 [1931], is not synonymous with the term "stay of proceeding" in *W.Va. Code*, 62-7-2 [1931]. A postponement of the execution of the sentence in a criminal case under *W.Va. Code*, 62-7-1 [1931], delays that one specific event in the case. A stay of proceedings under *W.Va. Code*, 62-7-2 [1931], however, stoops all action in the circuit court which otherwise might occur in a case after the stay take effect.

Syl. pt. 2 - When the Supreme Court of Appeals of West Virginia grants a petition for appeal all proceedings in the circuit court relating to the case in which the petition for appeal has been granted are stayed pending this Court's decision in the case. Such stay of proceedings is mandatory under *W.Va. Code*, 62-7-2 [1931].

In this case, petitioner's sentence was executed prior to the time when the stay of proceedings under *W.Va. Code*, 62-7-2 [1931], became effective. Therefore, petitioner was not at the West Virginia State Penitentiary as a result of proceedings that occurred after the stay of proceedings became effective. Writ discharged.

See BAIL Post-conviction, Pending appeal, (p. 81) for discussion of topic.

Postponement of execution of sentence

State ex rel. Bennett v. Whyte, 258 S.E.2d 123 (1979) (Miller, J.)

Syl. pt. 1 - *W.Va. Code*, 62-7-1, is mandatory, and any person under a judgment of conviction is entitled to a postponement of the execution of his sentence for a reasonable time to enable him to prepare and present bills of exceptions and to secure a transcript of the evidence before the court at the trial, and until a reasonable time beyond the first day of the next term of the Supreme Court of Appeals.

Postponement of the execution of the sentence does not entitle the defendant to be released from confinement. In the absence of appropriate bail, he is subject to detention in jail during the pendency of the appeal.

SUBPOENA

In general

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

See WITNESSES Compulsory process/confront witnesses, (p. 959) for discussion of topic.

State v. Harman, 270 S.E.2d 146 (1980) (Miller, J.)

Syl. pt. 3 - Under the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, the defendant has a constitutional right to have compulsory process for obtaining witnesses in his favor, and disallowance of a subpoena to bring a material witness before the jury constitutes reversible error.

The question in this case involved whether a subpoena *duces tecum* should be issued to obtain psychiatric records of the State's key witness. The Court used the following guidelines to determine the trial court did not abuse its discretion. "There must be: (a) A description of the writing, the production of which is sought, sufficient to identify it. (b) A showing of the relevance and materiality of its contents to the matters in controversy in the pending case. (C) The fact that proof is not otherwise practically available." *Ebbert v. Bouchelle*, 123 W.Va. 265, 14 S.E.2d 614 (1941).

SUFFICIENCY OF EVIDENCE

In general

State v. Belcher, 245 S.E.2d 161 (1978) (Caplan, C.J.)

Syl. pt. 1 - Where, in a criminal proceeding, the case has been fairly submitted to a jury, their verdict will not be disturbed where there is evidence sufficient to support it.

State v. Horton, 294 S.E.2d 248 (1982) (Per Curiam)

Syl. pt. 1 - Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. *State v. West*, 153 W.Va. 325, 168 S.E.2d 716 (1969); Syl. pt. 1, *State v. Fischer*, 211 S.E.2d 666 (W.Va. 1969).

State v. McCormick, 277 S.E.2d 629 (1981) (Per Curiam)

A bald assertion that the jury verdict is not supported by sufficient evidence is virtually meaningless.

State v. Wotring, 279 S.E.2d 182 (1981) (McGraw, J.)

Where the State's evidence, in a criminal case, is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt, a guilty verdict will not be set aside on the ground that it is contrary to the evidence.

When the fact of guilt or innocence depends on the conflicting evidence of witnesses to the crime, the jury is the sole judge of the weight and credibility to be given to their testimony.

SUFFICIENCY OF EVIDENCE

Abuse & neglect

See ABUSE AND NEGLECT Termination of parental rights, Sufficiency of evidence, (p. 8) for discussion of topic.

Arson

See ARSON Sufficiency of evidence, (p. 61) for discussion of topic.

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Standard for determining, (p. 922) for discussion of topic.

Breaking and entering

See BREAKING AND ENTERING, (p. 86) for discussion of topic.

Burglary

See BURGLARY Sufficiency of evidence, (p. 98) for discussion of topic.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

See BREAKING AND ENTERING Lesser included offense, (p. 88) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Circumstantial evidence

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

The victim and a witness testified that the defendant was present both before and after the rape. The defendant wasn't tied during the time of the rape. Further, there was testimony the defendant admitted sexually assaulting a woman at the bar. The State's case on identity fully met the circumstantial evidence test expressed in *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976):

"Briefly stated, circumstantial evidence will not support a guilty verdict unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create a mere suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction.

State v. Craft, 272 S.E.2d 46 (1980) (Miller, J.)

See BREAKING AND ENTERING, Lesser included offense, (p. 88) for discussion of topic.

State v. Dobbs, 259 S.E.2d 829 (1979) (Harshbarger, J.)

The standard guiding review of sufficiency of evidence is found in Syl. tp. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

Moreover, in cases involving sufficiency of circumstantial evidence, there is an additional standard set in *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976).

Syl. pt. 2 - Circumstantial evidence will not support guilt verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create only a suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction.

Circumstantial evidence (continued)

State v. Dobbs, (continued)

Syl. pt. 3 - "'If, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means and conduct, it concurs in pointing to the accused as the perpetrator of the crime, he may properly be convicted.' *State v. Beale*, 104 W.Va. 617, [141 S.E. 7]." Syllabus pt. 1, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967).

In this case, the circumstantial evidence presented did not prove guilt to the exclusion of every reasonable hypothesis of innocence, creating only a suspicion of guilt.

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

Applies standard set forth in Syl. pt. 1, *State v. Burton*, 254 S.E.2d 129 (W.Va. 1979), *State v. Dobbs*, 259 S.E.2d 829 (W.Va. 1979), *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976) for discussion of topic.

Controlled substances

See CONTROLLED SUBSTANCES Sufficiency of evidence, (p. 146) for discussion of topic.

Embezzlement

State v. Frasher, 265 S.E.2d 43 (1980) (Miller, J.)

"On the trial of one charged with the larceny or embezzlement of goods, proof of actual or constructive possession of the goods by the one alleged in the indictment to be the owner thereof is sufficient." Syl. pt. 2, *State v. DeBerry*, 75 W.Va. 632, 84 S.E. 508 (1915).

SUFFICIENCY OF EVIDENCE

Exclusion of evidence on appeal

State v. Frazier, 252 S.E.2d 39 (1979) (Miller, J.)

See DOUBLE JEOPARDY Sufficiency of evidence, (p. 146) for discussion of topic.

State v. Van Isler, 283 S.E.2d 836 (1981) (McHugh, J.)

The trial court which occurred here was a matter of first impression in this jurisdiction and the basis of reversal of the trial court is the trial error and not any insufficiency of the evidence at trial. Double jeopardy does not automatically bar retrial where an insufficiency of evidence results from material being held on appellant review to have been erroneously admitted at trial. The State may be able to make its proof without regard to the evidence here held to be inadmissible. Therefore, the possibility for retrial, should the State so elect, has not been excluded.

Homicide

See HOMICIDE Sufficiency of evidence, (p. 406) for discussion of topic.

State v. Dobbs, 259 S.E.2d 829 (1979) (Harshbarger, J.)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 916) for discussion of topic.

Identity

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

The Supreme Court utilized the rule in Syllabus pt. 1 of *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) to determine if there was sufficient evidence to establish the defendant's identity in a forcible rape case.

Identity (continued)

State v. Burton, (continued)

Proof of the defendant's identity was by both direct and circumstantial evidence. The State's case on identity fully met the circumstantial test as expressed in *State v. Noe*, 230 S.E.2d 826 (1976). The voluntary inculpatory statements made by the defendant to third parties, together with his actual presence at the scene of the crime, were sufficient to establish his identity.

Indecent exposure

See INDECENT EXPOSURE Sufficiency of the evidence, (p. 430) for discussion of topic.

Intent

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

See LARCENY Instructions, (p. 626) for discussion of topic.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

See BREAKING AND ENTERING Lesser included offense, (p. 88) for discussion of topic.

State v. Rutter, 252 S.E.2d 899 (1979) (Neely, J.)

See LARCENY Elements, Intent, (p. 624) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Juvenile proceedings

State v. Peterman, 260 S.E.2d 728 (1979) (Per Curiam)

In a delinquency proceeding, the youth was alleged to have attempted to enter the home of the witness; the State had the burden of showing his guilt beyond a reasonable doubt. The Supreme Court found that on the basis of the following evidence, the State did not sustain their burden: the witness testified that her daughter said she saw the youth entering the window and that she herself saw an object that looked like the youth leaving the window, but both the room and the area outdoors were dark. On a second occasion, another individual in the home said that she also saw the youth but the witness herself did not see him. The Supreme Court also noted that it was not clear from the record what standard of proof the trial court applied, but regardless, the State did not show guilt beyond a reasonable doubt.

Kidnapping

See KIDNAPPING Sufficiency of evidence, (p. 621) for discussion of topic.

Larceny

See LARCENY Sufficiency of evidence, (p. 628) for discussion of topic.

Malice

State v. Clayton, 277 S.E.2d 619 (1981) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 406) for discussion of topic.

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 406) for discussion of topic.

Malice (continued)

State v. Dye, 280 S.E.2d 323 (1981) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 407) for discussion of topic.

Resisting arrest

State v. Smith, 289 S.E.2d 478 (1982) (Per Curiam)

See RESISTING ARREST Sufficiency of evidence, (p. 754) for discussion of topic.

Retrial

Double jeopardy

See DOUBLE JEOPARDY Sufficiency of evidence, (p. 218) for discussion of topic.

Robbery by violence

See ROBBERY Sufficiency of evidence, (p. 779) for discussion of topic.

State v. Baker, 287 S.E.2d 497 (1982) (McHugh, J.)

See ROBBERY Elements, Intent, (p. 771) for discussion of topic.

Self-defense

See SELF-DEFENSE Sufficiency of evidence, (p. 826) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Sexual assault

See SEXUAL ASSAULT Sufficiency of evidence, (p. 891) for discussion of topic.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

See SEXUAL ASSAULT Corroboration, (p. 886) for discussion of topic.

Standard for determining

State v. Andriotto, 280 S.E.2d 131 (1981) (Neely, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Burks, 267 S.E.2d 752 (1980) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Conrad, 280 S.E.2d 728 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

Standard for determining (continued)

State v. Dobbs, 286 S.E.2d 918 (1982) (Neely, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Dye, 280 S.E.2d 323 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Hatfield, 286 S.E.2d 402 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

Standard for determining (continued)

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Lott, 289 S.E.2d 739 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. McKinney, 244 S.E.2d 808 (1978) (Caplan, C.J.)

Syl. pt. 1 - A verdict of guilt in a criminal case will not be set aside on the ground that it is contrary to the evidence, where the State's evidence is sufficient to convince impartial minds of the guilt of the accused beyond a reasonable doubt, though the evidence of the accused is in conflict therewith. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

State v. Ocheltree, 289 S.E.2d 742 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Riley, 282 S.E.2d 623 (1981) (McHugh, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

Standard for determining (continued)

State v. Riser, 294 S.E.2d 461 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Rutter, 252 S.E.2d 899 (1979) (Neely, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Smith, 289 S.E.2d 478 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited below.

State v. Starkey, 244 S.E.2d 219 (1978) (Miller, J.)

Syl. pt. 1 - In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustices has been done.

Standard for determining (continued)

State v. Wright, 249 S.E.2d 519 (1978) (McGraw, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978), cited above.

Whenever in a criminal trial, the evidence is sufficient to justify a verdict of guilty for the crime charged, the court should direct a verdict for the defendant when it is requested.

In a trial for the killing of his infant son, defendant claimed on appeal that there was insufficient evidence under the *Starkey* standard to find him guilty of voluntary manslaughter, as intent had not been shown by the State. The Supreme Court reversed in favor of defendant, agreeing that the evidence that defendant had shaken and squeezed the child was not sufficient to show intent.

Unlawful wounding

See UNLAWFUL WOUNDING Sufficiency of evidence, (p. 935) for discussion of topic.

TRANSCRIPT

Irregularity

State v. Key, 275 S.E.2d 924 (1981) (Per Curiam)

When defendant was in no way prejudiced by an alleged irregularity in the transcript (that he was not sworn until cross-examination when he apparently was sworn before that point), error is not found and the lower court will not be reversed.

State v. Romine, 272 S.E.2d 680 (1980) (Caplan, J.)

In a trial for burglary and rape, the court reporter's transcript was at variance with the final order of the court, the former showing conviction of robbery and the latter for burglary. The indictment and proof offered at the trial revealed that the charge was burglary, not robbery and that is the offense for which the defendant was sentenced. The Supreme Court found no prejudicial error in that instance.

Right to transcript

Rhodes v. Leverette, 239 S.E.2d 136 (1977) (Miller, J.)

Syl. pt. 1 - An indigent criminal defendant has a right to appeal his conviction. He is also constitutionally entitled to a copy of the trial court record, including the transcript of the testimony, without cost to him. West Virginia Constitution, Article III, Sections 10 and 17.

The denial of a trial court record to a non-indigent defendant who desires an appeal violates due process.

Under the Due Process and Equal Protection clauses of the Federal Constitution, a state cannot require an indigent defendant to pay for a transcript of trial proceedings.

State ex rel. Gary v. Warden, 288 S.E.2d 176 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977), cited above.

Right to transcript (continued)

State ex rel. Kisner v. Fox, 267 S.E.2d 451 (1980) (Neely, C. J.)

Applies standard set forth in syl. pt. 1, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977), cited above.

State v. Moore, 273 S.E.2d 821 (1980) (McGraw, J.)

A person who substantially complies with the requirements of *W.Va. Code* § 51-7-7, relating to an application for a transcript of testimony, is entitled to a free transcript which he seeks for purposes of prosecuting an appeal from his conviction upon a criminal charge.

The indigency of the defendant, however, is a question of fact which, if timely, controverted, must like other such questions of fact, be determined by the court, and a determination by the court on the issue of indigency rests within its sound discretion.

Failure to provide

Varney v. Superintendent, W.Va. Penitentiary, 264 S.E.2d 472 (1980) (Caplan, J.)

Applies standard set forth in syl. pt. 1, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977), cited above.

In the present case, the trial court repeatedly refused during the appeal period to furnish a transcript of petitioner's trial and subsequently the reporter's notes from which a trial transcript could be made were lost. Under these facts, the petitioner was entitled to discharge on that conviction. The circumstances constitute extraordinary dereliction on the part of the State and dictate discharge of the petitioner.

Right to transcript (continued)

Failure to provide (continued)

State ex rel. Gary v. Warden, 288 S.E.2d 176 (1982) (Per Curiam)

"Extraordinary dereliction on the part of the State [in providing an indigent with a transcript of the court record] sufficient to warrant unconditional release in a habeas corpus proceeding, where the relator's constitutional rights to an appal have been violated, will largely depend on the facts of the individual case." Syl. pt. 1, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977), cited above.

Applies standards set forth in syl. pt. 6, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977). See *State v. Pettigrew*, 284 S.E.2d 370 (W.Va. 1981), cited above.

State ex rel. Kisner v. Fox, 267 S.E.2d 451 (1980) (Neely, C. J.)

When defendant claimed that loss of the records effectively precluded his chances to prevail on appeal because his opting to choose a new trial over an appeal on the basis of a reconstructed record would allow the prosecution to correct defendant's assigned error of insufficient evidence, the court rejected the claim. The court's rationale was that if, indeed, the evidence was insufficient, the record could be reconstructed from the tape of the trial and if not, defendant would be getting a new trial, which was the most he could get on appeal.

When the court reporter lost his notes and was unable to provide for defendant the requested transcript, the court set aside defendant's conviction of sexual assault and ordered a new trial. Defendant sought a writ of prohibition, which, according to the court, was appropriate since a substantial, legal question with no disputed facts was involved. *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979).

The court also held that defendant was not entitled to discharge since loss of reporter notes did not constitute "extraordinary dereliction" on the part of the State and since offering the defendant the options of either retrial or appeal on the basis of a reconstructed record was constitutionally sufficient.

Right to transcript (continued)

Failure to provide (continued)

State ex rel. Kisner v. Fox, (continued)

Syl. pt. 2 - The failure of the State to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial.

State v. Pettigrew, 284 S.E.2d 370 (1981) (Neely, J.)

"Factors to be considered in determining whether there has been extraordinary dereliction are: the clarity and diligence with which the relator has moved to assert his right of appeal; the length of time that has been served on the underlying sentence measured against the time remaining to be served; whether prior writs have been filed or granted involving the right of appeal; and the related question of whether resentencing has occurred in order to extend the appeal period. While extraordinary dereliction on the part of the State does not require a showing of malice or ill will, certainly if such is shown it would be a significant factor." Syllabus point 6, *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977).

The standard for determining "if a defendant has been denied due process with respect to his rights of appeal is whether there has been 'extraordinary dereliction' on the part of the State as determined on a case by case basis." *Rhodes v. Leverette*, 239 S.E.2d 136 (W.Va. 1977).

When appellant was represented by private counsel from the beginning of the trial but made no attempt to obtain a transcript or perfect an appeal and when "extraordinary dereliction" on the part of the state, as determined by the *Rhodes* test, was not shown, the court refused to find merit in appellant's claim that the delay of the court reporter in preparing the transcript deprived the appellant of due process of law; therefore the court did not set aside the guilty plea.

Right to transcript (continued)

Failure to provide (continued)

State v. Shafer, 284 S.E.2d 916 (1981) (Neely, J.)

Applies standards set forth in syl. pt. 2, *State ex rel. Kisner v. Fox*, 267 S.E.2d 451 (W.Va. 1980), cited above.

Transcript of sentencing hearing was never prepared due to court reporter moving without leaving notes or tapes. Since there was no dispute that the hearing was short, the defendant relying on the probation report alone, and all that transpired was the sentencing during which the court stated reasons for denying probation, and the fact that the Supreme Court had the probation report and final sentencing orders before them, appellant review could adequately be accomplished in the absence of the sentencing hearing transcript.

Probation revocation

Sigman v. Whyte, 268 S.E.2d 603 (1980) (Neely, C.J.)

See PROBATION Revocation, Right to transcript, (p. 716) for discussion of topic.

What must be transcribed

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

Prejudicial error was alleged because the court reporter failed to record the closing argument. All proceedings in the criminal trial are required to be reported, but generally the failure to report some part of the proceeding will not alone constitute reversible error. Some identifiable error or prejudice must be shown by the defendant. It is, of course, only necessary to transcribe those portions of the record that are germane to the appeal.

What must be transcribed (continued)

State v. Bolling, (continued)

One consideration which will be taken into account is the nature of the claimed prejudice or error. A different result might obtain where the claim is made that prejudicial remarks or misstatements of the facts or law had occurred in a complex fashion such that it was not possible to accurately portray their meaning absent a record of the argument.

The defendant does not have the burden to piece together a precise reconstruction of the missing record. It will be sufficient if he can demonstrate that some error or prejudice has resulted and this is directly related to the lack of a portion of the record.

Whether failure to report constitutes reversible error depends upon the facts of the case.

State v. Helmick, 286 S.E.2d 245 (1982) (McGraw, J.)

Syl. pt. 3 - Courts are required to provide for the reporting of all proceedings in the criminal trial; where the defendant can demonstrate that some error or prejudice has resulted and that this is directly related to the lack of a portion of the record, reversal will result.

Omitted portions of the record can cause a petitioner prejudicial hardship.

In an appeal from a murder conviction, the Supreme Court reversed where defense counsel moved for the recording of the closing arguments, but such was not recorded. The Supreme Court found that the failure to record closing arguments made it impossible for them to determine whether or not the remarks made by the prosecutor during closing were improper. However, since the attorney on appeal submitted an affidavit in which he indicated that the defense attorney objected at the time the remarks were made, that objections were repeated on the record after the jury was deliberating, and the State submitted no evidence to the contrary, the Supreme Court took it as true that the trial court permitted the prosecutor to argue incorrectly, and reversed the conviction.

What must be transcribed (continued)

State v. Messinger, 256 S.E.2d 587 (1979) (Per Curiam)

All proceedings in a criminal trial must be reported; however, the failure to report the proceedings may not in all instances constitute reversible error. Whether failure to report constitutes reversible error or not cannot be determined by a mechanistic rule, but must depend on the facts of each case.

TRANSFER - PENAL INSTITUTION TO MENTAL HOSPITAL

In the Matter of Crews v. Bordenkircher, 283 S.E.2d 925 (1981) (McHugh, J.)

Syl. pt. 1 - Inasmuch as the 1980 amendment of *W.Va. Code*, 28-5-31, modified the procedure for transfer of "convicted person" in prison under that statute, and further added provisions concerning security at the facility to which transfer is sought, but did not substantially change the criteria for transfer under the statute or the due process rights of a "convicted person" in a prison, under the circumstances of this case the "convicted person" in prisons will not be prejudiced by being required to proceed under *W.Va. Code*, 28-5-31, as amended in 1980, if they wish to further prosecute their claims.

So, although the inmates in this case applied for transfer prior to the effective date of the 1980 amendment to *W.Va. Code* § 28-5-31, its application to them was not prejudicial.

UNLAWFUL WOUNDING

Double jeopardy

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

See DOUBLE JEOPARDY Unlawful wounding, (p. 220) for discussion of topic.

State v. Demastus, 270 S.E.2d 649 (1980) (Harshbarger, J.)

Syl. pt. 7 - Unlawful wounding is a lesser included offense in armed robbery.

Where trial court gave an instruction to this effect, the Supreme Court did not find plain error since the defendant had sufficient notice he was accused of wounding the victim.

Sufficiency of evidence

State v. Rogers, 280 S.E.2d 82 (1981) (Per Curiam)

In a trial for unlawful wounding, there was corroborating evidence supporting that of the victim. There was, however, conflicting evidence. The jury returned a verdict of guilty. Under the *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) standard, the verdict was upheld on appeal.

VAGUENESS

indecent exposure

State v. Knight, 285 S.E.2d 401 (1981) (McGraw, J.)

Syl. pt. 1 - The language contained in *W.Va. Code* § 61-8B-10 (1977 Replacement Vol.) and adjacent statutes is plain and unambiguous on its face and sufficient to put the community and the defendant on notice as to the criminal nature of his acts; in the case of the crime of indecent exposure, the defendant must be informed (1) that the victim did not consent to the act; (2) that the act consisted of the intentional exposure of sex organs or anus; and (3) that the act is done under circumstances which the perpetrator knows is likely to cause affront or alarm.

VARIANCE

Accessory, aiding and abetting, principal

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Variance between indictment and proof, (p. 26) for discussion of topic.

False return of votes

State v. Hobbs, 282 S.E.2d 258 (1981) (McGraw, J.)

See FALSE RETURN OF VOTES Indictment, (p. 327) for discussion of topic.

VENUE

In general

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

Syl. pt. 2 - In a criminal case the defendant who is trying to show the existence of a present hostile sentiment in the community that would affect his right to a fair and impartial jury panel should have a wide latitude of inquiry on *voir dire*.

Appellant review

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

The question of change of venue is a matter within the discretion of the trial court and the standard on review is whether that discretion has been abused.

Change of venue

Abuse of discretion

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

Only nine of forty-five jurors drawn had some prior knowledge of the facts and revealed a fixed bias that necessitated their disqualification. Further, there was a lack of specific identification of particular hostile publicity. Therefore, the trial court did not abuse its discretion in declining to order a change of venue.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Footnote 2 - We note that the individual *voir dire* of potential jury members conducted by the trial judge alleviated any fears we may have that appellant did not receive a fair trial at the hands of an impartial jury. This is not to say that *voir dire* can or cannot cure the failure of a trial court to order a change of venue when such an order is warranted by the facts. As the issue is not before us here, we offer no opinion as to its resolution.

Change of venue (continued)

Abuse of discretion (continued)

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Syl. pt. 2 - Whether a change of venue is warranted rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that such discretion has been abused.

Where defendant submitted numerous newspaper articles regarding homicide and the trial of his brother who was convicted of aiding and abetting in the killing, and also submitted 75 affidavits of members of the community who were of the opinion that he could not get a fair trial, Supreme Court found that defendant's evidence failed to show the existence of an extensive present hostile sentiment throughout the population of the county, and that the trial court did not abuse its discretion in denying the motion.

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

It was not abuse of trial judge's discretion to deny motion for change of venue in a murder trial when only one juror (immediately excused) expressed doubt in her ability to fairly decide the case and the defendant had not otherwise met his burden of showing such prejudicial sentiment against him in the community where venue originally lay that he could not receive a fair trial.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Where defense counsel filed motion for change of venue, attached affidavits, and informed the trial court that it was not necessary to speak to the motion, the Supreme Court found no merit to defendant's complaint that no evidentiary hearing was afforded on the motion.

Change of venue (continued)

Abuse of discretion (continued)

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 1 - "Good cause shown" for change of venue, as the phrase is used in *W.Va. Constitution*, Article III, Section 14 and *W.Va. Code*, 62-3-13, means proof that a defendant cannot get a fair trial in the county where the offense occurred because of the existence of locally extensive present hostile sentiment against him.

Here the defendant presented no evidence of the existence of poisonous prejudice against him, and the trial court did not abuse its discretion in denying the motion.

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

It was undisputed that the trial was preceded by substantial, pervasive, and inflammatory publicity, and that almost fifty percent of the jurors summoned for jury duty were disqualified because they had formed a conclusion concerning the case. Under the facts of this case the failure to grant a change of venue is in and of itself a sufficient ground for reversal.

Appropriate forum

Gangwer v. Black, 253 S.E.2d 538 (1979) (Per Curiam)

The trial court is the proper forum for determining whether change of venue is appropriate. Since these rulings are discretionary, their correctness can only be challenged when the complete record can be considered by the appellant court. *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973). Prohibition, consequently, was not a viable remedy since the judge did not abuse his discretion and since appeal was an adequate remedy.

Change of venue (continued)

Burden of proof

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

The initial burden of showing good cause for granting a change of venue rests upon the defendant.

Jury bias after change

Keys v. Hey, 260 S.E.2d 837 (1979) (Caplan, C.J.)

Syl. pt. 2 - "Where there has been a change of venue in a criminal case to another county from that in which the indictment was returned, the circuit court of the county to which the case has been ordered has jurisdiction to hear and determine the petition of the accused for further change of venue and to award a further change if good cause therefor be shown." Syl. pt. 2, *State v. Woods*, 92 W.Va. 331, 115 S.E. 470 (1922).

Syl. pt. 3 - When a change of venue has been awarded, the question of whether there is a denial of a defendant's right to a fair and impartial trial by reason of a systematic exclusion of a discernible class from petit jury participation is a matter that is properly cognizable in the court to which the case has been transferred.

It was claimed, in this case, the lower percentage of minority residence of the county into which the case had been transferred would bias the make-up of the jury against the defendant. The Supreme Court held it was for the court in the county into which the case had been transferred to determine.

Standards

Gangwer v. Black, 253 S.E.2d 538 (1979) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Siers*, 103 W.Va. 30, 136 S.E.2d 503 (1927). See *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978).

Change of venue (continued)

Standards (continued)

Gangwer v. Black, (continued)

While newspapers had reported proceedings from a previous trial where defendant's brother was convicted for aiding and abetting the crime of murder, this extensive newspaper coverage, according to the circuit judge, was in no way inflammatory and did not show widespread hostility, bias, or prejudice, against defendant existing throughout Wood County. Therefore, the defendant's motion to change venue on the grounds that the adverse effects of such publicity would preclude a fair trial was denied. The judge's assertion that the newspaper articles constituted basic newspaper reporting was considered by the Supreme Court to be within the judge's legitimate discretion and as such was not so flagrant and violative of the relator's rights as to make a remedy by appeal inadequate, thus prohibition was denied.

Keys v. Hey, 260 S.E.2d 837 (1979) (Caplan, C.J.)

The Supreme Court applied Syllabus pt. 1 of *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), cited above, in reviewing whether a change of venue was properly granted.

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

Applies standard set forth in syl. pt. 1, *State v. Siers*, 103 W.Va. 30, 136 S.E.2d 503 (1927). See *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978), cited below.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

Neither widespread publicity nor proof of some existing prejudice alone requires a change of venue, unless prejudice against defendant is so great that he cannot get a fair trial. *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978).

Change of venue (continued)

Standards (continued)

State v. Boyd, (continued)

Applies standard set forth in syl. pt. 1, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), cited below.

In the facts of this case, although the defendant presented newspaper and radio transcripts to illustrate prejudice against him that justified a change of venue, it was not error for the trial court to refuse a change of venue because defendant did not show that the publicity had created prejudice to warrant a change of venue.

State v. Clawson, 270 S.E.2d 659 (1980) (Miller, J.)

The right to a change of venue rests upon the defendant's showing that there exists in the community a present hostile sentiment against him. Some factors considered important in *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978) include, widespread adverse publicity in the media; and the percentage of jurors disqualified for having formed a conclusion concerning the case. Here seven out of the original panel claimed disqualification, but the record does not disclose the precise reasons beyond the inference that they had formed an opinion. The motion may be renewed, if warranted, before the next trial.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 1, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), cited below.

Syl. pt. 1 - Widespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial.

Change of venue (continued)

Standards (continued)

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

Prejudicial pre-trial publicity may, in some circumstances, require that a motion for a change of venue be granted.

Widespread publicity, however, is not, standing by itself, enough to require a change of venue.

Applies standard set forth in syl. pt. 1, *State v. Siers*, 103 W.Va. 30, 136 S.E.2d 503 (1927). See *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978), cited below.

Additionally, the prejudice against the defendant must be shown to be such that he cannot receive a fair trial in the county where trial would be held if the motion is not granted.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

Syl. pt. 1 - "Good cause shown" for change of venue, as the phrase is used in *W.Va. Constitution*, Article III, Section 14 and *W.Va. Code*, 62-3-13, means proof that a defendant cannot get a fair trial in the county where the offense occurred because of the existence of locally extensive present hostile sentiment against him.

But neither wide spread publicity about the case nor proof of some prejudice against defendant requires a change of venue unless prejudice is so great that he cannot get a fair trial.

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

Syl. pt. 2 - "A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county." Point 2, syllabus, *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967), quoting point 1, syllabus, *State v. Siers*, 103 W.Va. 30, 136 S.E. 503 (1927).

Change of venue (continued)

Proof of venue

State v. Burton, 254 S.E.2d 129 (1979) (Miller, J.)

The State has the burden of proving the venue; that is, that the crime occurred in the county where the defendant is tried, under *W.Va. Const.* art. III, § 14.

It has long been established in our law that venue can be established by circumstantial evidence. *State v. Alderson*, 74 W.Va. 732, 82 S.E. 1021 (1914).

There is no question that venue is a jurisdictional element of proof in a criminal trial under *W.Va. Const.* art III, § 14. *Ex parte Brickman*, 93 W.Va. 351, 116 S.E. 757 (1923).

Syl. pt. 5 - The State in a criminal case may prove the venue of a crime by a preponderance of the evidence, and is not required to prove the same beyond a reasonable doubt.

Venue is not a substantive element of a crime.

In the present case, one witness testified the defendant said the incident took place in a bar in the county seat of the count yin which the trial was held. Further, the defendant was lodged in that county's jail and a statement was taken by that county's sheriff.

State v. Nicholson, 252 S.E.2d 894 (1979) (Caplan, C.J.)

Venue will not be presumed but must be proved and the burden of proof is upon the prosecution. It need not be proved by direct testimony. Testimony positively establishing venue will suffice.

Where a deputy sheriff, a credible witness, made a positive statement placing the burglarized home in Harrison County, and such testimony was not contradicted, proper venue was sufficiently established.

Change of venue (continued)

Proof of venue (continued)

State v. Spicer, 245 S.E.2d 922 (1978) (McGraw, J.)

Where evidence at trial showed that the act charged was committed within the county of the trial, defendant's constitutional right to be tried in the county of the crime was not violated.

VOIR DIRE

In general

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

W.Va. Code, 56-6-12, permits inquiry during *voir dire* designed to disclose the potential prejudice of prospective jurors.

State v. Boyd, 280 S.E.2d 669 (1981) (McGraw, J.)

In a trial for robbery by violence, the trial judge conducted an individual *voir dire* of potential jury members. When the case was later appealed with error imputed to the judge's refusal to change venue, the Supreme Court said that the defendant did not successfully show that there was sufficient prejudice against him to warrant a change of venue. Further, in Footnote 2, the judge's "individual *voir dire* . . . alleviates any fears we may have that the appellant did not receive a fair trial at the hands of an impartial jury. This is not to say that *voir dire* can or cannot cure the failure of a trial court to order a change of venue when such an order is warranted by the facts."

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

The purpose of *voir dire* is to obtain a panel of jurors free from bias or prejudice.

Syl. pt. 1 - "The true test to be applied with regard to the qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had." *State v. Charlot*, 157 W.Va. 994, 1000, 206 S.E.2d 908, 912 (1974).

State v. Helmick, 286 S.E.2d 245 (1982) (McGraw, J.)

Insufficient or improper *voir dire* constitutes grounds for granting a new trial.

In general (continued)

State v. Helmick, (continued)

Under the *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976) standard, defense counsel is expected to engage in "meaningful" *voir dire* and, in order to give content to that standard, may ask specific questions designed to determine whether a juror, even without his knowledge, may be biased or prejudiced.

"A trial court must inquire beyond a simple and direct questioning of a juror as to whether he can decide a case fairly and impartially after having read news articles related to the trial of a case. Specific questions should be asked in order to determine whether a juror, even without his own knowledge, may be biased or prejudiced." Syl. pt. 6, *State v. Williams*, 230 S.E.2d 742 (W.Va. 1976).

In a trial for murder, the trial court granted defense motion for individual and separate *voir dire* but later sustained State's objections to numerous defense counsel questions and refused to allow defense counsel to delve into the extent of the acquaintance of one juror with the prosecutor. The defendant claimed on appeal that the restriction of his *voir dire* and sustaining the State's objection was error, and that there was error in the court's refusing to separately question the jurors regarding their exposure to inflammatory newspaper and TV coverage. The Supreme Court said that the record did not contain any of the news material, so a decision was difficult, but it appeared that the trial court's decision did not follow the holdings of the Supreme Court. Where there is any possibility of prejudice, a hearing should be conducted.

State v. Payne, 280 S.E.2d 72 (1981) (McHugh, J.)

Jurors who on *voir dire* of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice against either party, requiring their excuse. *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). The purpose of *voir dire* is to assure that the defendant's right to a jury free of interest, bias or prejudice is protected and effectuated. *Voir dire* works to protect that right not only by providing a bias to "enable

In general (continued)

State v. Payne, (continued)

a litigant and his counsel to exercise reasonable judgment in utilizing peremptory challenges." *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976). A prospective juror may, without his own knowledge or admission, have a demonstrable prejudice or bias.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

It is The court's responsibility to see that the jurors are qualified, that they are not related to either party, and that they have no interest in the cause or possible bias or prejudice. *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976).

Examination of the prospective jurors must allow litigants to be meaningfully informed of all relevant and material matters that might bear on possible disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily. *W.Va. Human Rights Commission v. Tenpin Lounge, Inc.*, 211 S.E.2d 349 (W.Va. 1975).

Abuse of discretion

Bennett v. Walton, 294 S.E.2d 85 (1982) (Per Curiam)

Trial court did not abuse its discretion in allowing counsel's *voir dire* question concerning prospective jurors' use of valium since appellant had admitted taking the drug the morning of her accident.

State v. Pratt, 244 S.E.2d 227 (1978) (Harshbarger, J.)

When the court, upon asking the jurors as a group questions submitted by defendant, discovered that four jurors wee related to or friends of a police officer, it was abuse of discretion and reversible error for the court to refuse to individually question the four jurors or excuse them.

VOIR DIRE

Individual

State v. Schrader, 288 S.E.2d 170 (1982) (Neely, J.) (Withdrawn from bound volume because rehearing is pending)

Individual *voir dire* is not required in all cases. It is required individually only when a juror has disclosed a possible area of prejudice.

In an appeal from a murder trial, the defendant claimed that the court erred in refusing his request for an individual *voir dire* of each juror. The Supreme Court held that because there was no allegation that any specific juror was prejudiced by pretrial publicity and because the trial court did use the appellant's proffered questions while addressing the jury members as a group, there was no reversible error. However, individual *voir dire* would have been the preferred technique.

"Jurors who on *voir dire* of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse." Syl. pt. 3, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978).

Insanity

State v. Sanders, 242 S.E.2d 554 (1978) (McGraw, J.)

Syl. pt. 3 - Upon request, in a murder case where the sole defense is insanity, the court should ask the jurors in *voir dire* whether they have a bias or prejudice against psychiatrists or against persons suspected of having a mental illness or defect. *W.Va. Code* § 56-6-12.

Scope

State v. Harshbarger, 294 S.E.2d 254 (1982) (McHugh, J.)

The scope of *voir dire* is within the discretion of the trial court and is not subject to review, except for abuse of discretion.

Scope (continued)

State v. Harshbarger, (continued)

The trial judge has a responsibility to insure that jurors selected to decide a defendant's guilt or innocence are able to apply the law as it is written, thus, where the defendant was charged with delivery of marijuana in violation of *W.Va. Code* § 60A-4-401, it was proper to inquire into the jurors' ability to apply the law that makes delivery of marijuana a crime.

It is within the judge's sound discretion to excuse jurors who are unable to apply the law.

State v. Peacher, 280 S.E.2d 559 (1981) (McHugh, J.)

The scope of *voir dire* is generally a matter within the discretion of the trial court and is not subject to review except for abuse of discretion.

The purpose of *voir dire* is to assure that the defendant's right to a jury free of interest, bias or prejudice is protected and effectuated. *Voir dire* works to protect that right not only by providing the basis for challenges for cause but also by providing a basis to "enable a litigant and his counsel to exercise reasonable judgment in utilizing peremptory challenges."

Where a trial court's restriction of the scope of *voir dire* undermines the rights sought to be protected by the *voir dire* process it will be held to be an abuse of discretion and reversible error.

In a trial for murder, where the victim was at one time a law enforcement officer, it was material to inquire into any possible relationship betwe4en potential jurors and law enforcement officers or agencies. The trial court's refusal to conduct or permit such an inquiry was an abuse of discretion.

VOUCHING THE RECORD

In general

Crawford v. Roeder, 286 S.E.2d 273 (1982) (Per Curiam)

"When evidence is excluded, and the action of the court in excluding it is relied upon in the appellant court, it must appear on the record that the evidence rejected was or would have been relevant, material, and important, to make its rejection available as a ground of error." Syl. pt. 5, *Maxwell v. Kent*, 49 W.Va. 542, 39 S.E. 174 (1901).

The evidence in this case was hotly contested and the witness, viewing the accident from the perspective of a driver immediately behind the truck when it was hit was able to give evidence on the central issue in the case.

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

The trial court was correct in not allowing defendant's lawyer to vouch the record about the qualifications of a forensic pathologist to testify that there were no powder burns on the victim's body.

The State set forth the qualifications of the forensic pathologist, and the defendant's counsel did not object.

The State asked the forensic pathologist about powder burns on the victim's body and the court permitted him to answer. Defendant's motion to strike his response because he was not qualified to answer questions about powder burns, was denied. Then, the defense moved to *voir dire* the forensic pathologist about his qualifications to assess powder burns, or alternatively to vouch the record. Both motions were denied.

Defendant's lawyer asked no questions on cross-examination about the forensic pathologist's background, education, or experience, but about shot patterns, bullets, and such. He could have examined the forensic pathologist about his powder expertise but did not, and cannot now complain.

VOUCHING THE RECORD

In general (continued)

State v. Rissler, 270 S.E.2d 778 (1980) (Caplan, J.)

The purpose of vouching the record is to place upon the record excluded evidence, or to show upon the record what the excluded evidence would have proved in order that appellant court may properly evaluate the correctness of the trial court's ruling excluding it.

It is not a denial of the right to vouch the record when it can clearly be determined from the record what it was that counsel desired to "prove". When the court is able to review the "excluded evidence", the defendant has not been denied his right to vouch the record.

WARRANTS

Independent judicial evaluation

See SEARCH AND SEIZURE Warrant requirement, Independent medical evaluation, (p. 809) for discussion of topic.

Informant's reliability

See SEARCH AND SEIZURE Warrant requirement, Independent medical evaluation, (p. 809) for discussion of topic.

Institution of action in magistrate court

W.Va. Jud. Inquiry Com'n v. Casto, 263 S.E.2d 79 (1979) (McGraw, J.)

Criminal actions in magistrate court are instituted by the issuance of a warrant. Without the warrant an individual may neither be tried nor enter a plea to a criminal charge. Even where a warrantless arrest is permitted, the person arrested must be taken before a magistrate without delay and a complaint must be filed and a warrant issued immediately.

Probable cause

See SEARCH AND SEIZURE Warrant requirement, Probable cause, (p. 816) for discussion of topic.

Raising defects

Fisher v. Whyte, 239 S.E.2d 133 (1978) (Neely, J.)

See APPEAL Right to appeal, (p. 41) for discussion of topic.

State v. Smith, 289 S.E.2d 478 (1982) (Per Curiam)

See APPEAL Failure to preserve for appeal, (p. 35) for discussion of topic.

WARRANT

Specificity of warrant

See SEARCH AND SEIZURE Warrant requirement, Specificity of warrant, (p. 818) for discussion of topic.

Sufficiency

State v. Eden, 256 S.E.2d 868 (1979) (McGraw, J.)

See RECKLESS DRIVING Sufficiency of warrant, (p. 752) for discussion of topic.

Validity of warrant affidavit

State v. Walls, 294 S.E.2d 272 (1982) (Miller, C.J.)

See SEARCH AND SEIZURE Warrant requirement, Validity of warrant, (p. 818) for discussion of topic.

WITNESSES

Attire and restraints

State ex rel. McMannis v. Mohn, 254 S.E.2d 805 (1979) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prison attire, (p. 172) for discussion of topic.

When witnesses are forced to appear in prison attire or physical restraints, the matter may, in an appropriate case, constitute reversible error on appeal if a timely objection is made.

Footnote 3 - Because prison witnesses do not appear in court without some prior arrangement with the custodial authorities, the court believes it is incumbent upon defense counsel, if he wishes to obtain prison witnesses, to make voluntary arrangements with the custodial authorities for them to appear in civilian attire. If a voluntary arrangement cannot be made, he should move the court for an order in advance of trial.

Footnote 7 - Most courts recommend that a pretrial hearing be held if voluntary arrangements cannot be made in the use of physical restraints. The footnote sets forth factors that have been considered in determining whether to use physical restraints. The Supreme Court believes it places no undue burden on defendant's counsel to initiate such hearing.

Children

State v. Butcher, 270 S.E.2d 156 (1980) (Caplan, J.)

Syl. pt. 1 - In relation to the competency of a child to testify, the general rule in West Virginia is that (1) a child under the age of fourteen years is incompetent but such presumption is rebuttable; and (2) a child fourteen years of age or over is presumed to be competent.

Syl. pt. 2 - The competency of an infant to testify is determined as of the time that his testimony is offered in evidence.

But the capacity of the child at the time of the occurrence about which he is asked to testify is to be considered in judging his competence.

Children (continued)

State v. Butcher, (continued)

A child who has sufficient intelligence to be competent as a witness concerning a recent event is incompetent as to an event which occurred when he was so young that he does not have an accurate recollection of it.

A child is not a competent witness if he is of such a young age and lacking in mental facilities as to be legally irresponsible for his conduct and has no idea or moral obligation of an oath.

It is the duty of the court to question the child witness as to his age, capacity and moral and legal accountability in an effort to determine his competency.

"The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error." Point 8, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

In a trial for manslaughter, there was no abuse of discretion when the trial judge admitted the testimony of a seven year old child. The judge examined the child extensively at the time of the trial, the child showed that he could recall the events in question, he expressed a belief in God, and he said that he would go to "Shantytown" (Pruntytown) if he lied. The fact that the child's testimony was inconsistent with that of other witnesses did not render him incompetent, but rather went to credibility.

In a trial for manslaughter, there was no abuse of discretion when the trial judge admitted the testimony of a thirteen year old child. Although the judge did not examine the child extensively, it was ascertained that the child said he believed in God, and understood that he would go to Pruntytown if he did not tell the truth. The lower courts are encouraged to make a more thorough examination in future cases involving witnesses of tender years.

Children (continued)

State v. Carter, 282 S.E.2d 277 (1981) (Miller, J.)

The defendant's motion to properly qualify a thirteen year old witnesses' testimony by first determining the witnesses' competency was overrule. "The general rule is that a witness under the age of fourteen years is presumed not to be competent as a witness, and that such competency must be shown. 2 Wigmore, *Evidence* § 508 (3d ed. 1940); *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974). The Supreme Court held that having the witness testify without an *in camera* hearing when there is an objection to his competency is not condoned, but in the present case there was no reversible error. The witness stated that he was in the seventh grade and made B's and C's in his courses. He answered the questions addressed to him in an intelligent and understanding fashion so that the trial court could have concluded that the was competent. Also his age of thirteen was close to the age when the presumption against competency disappears.

Footnote 5 - *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974), speaks of the presumption against competency of a child fourteen or under. This is probably too static a rule, or at least the term "presumption" should be read in a narrow sense to require an inquiry into competency; the burden of proving such would then be on the party offering the witness.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Syl. pt. 6 - The question of the competency of a child as a witness in any case is always addressed to the sound discretion of the trial judge, and if it appears that a careful and full examination as to the age, intelligence, capacity and moral accountability has been made by the judge and counsel and the trial judge has concluded that he is competent, the appellant court will not reverse the ruling which permits the evidence to be introduced unless it is apparent that it was flagrantly wrong.

It was not error for the trial court to allow the infant victim of a first degree sexual assault to testify, as the judge conducted an extensive *in camera* investigation of the infant's competence with direct and cross-examination by both parties.

WITNESSES

Comparative testimony

See EVIDENCE Comparative testimony, (p. 271) for discussion of topic.

Compulsory process/confront witnesses

See SELF-INCRIMINATION Fifth Amendment vs. Sixth Amendment, (p. 828) for discussion of topic.

State v. Green, 260 S.E.2d 257 (1979) (Harshbarger, J.)

The sexual assault law which limits a defendant from presenting evidence of a victim's previous sexual conduct, does not violate the defendant's constitutional right to confront witnesses by restricting cross-examination of his accusers. A rape victim's previous sexual conduct with other persons has very little probative value with regard to her consent to intercourse with a particular person at a particular time.

State v. Harman, 270 S.E.2d 146 (1980) (Miller, J.)

Syl. pt. 3 - Under the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, the defendant has a constitutional right to have compulsory process for obtaining witnesses in his favor, and disallowance of a subpoena to bring a material witness before the jury constitutes reversible error.

State v. Daggett, 280 S.E.2d 545 (1981) (McGraw, J.)

Footnote 3 - The question of whether a *capias* is the proper procedural device by which a trial judge may compel appearance of a nonparty witness to testify is an unresolved question in our State. Traditionally there have been different uses for a subpoena and a *capias*. A subpoena was used to compel attendance in court of a nonparty witness, while a *capias* was used upon a defendant. It has apparently been the case, however, that *capiases* have been used upon previously subpoenaed nonparty witnesses and this has been seen as a valid exercise of the judge's contempt power.

Compulsory process/confront witnesses (continued)

State v. Daggett, (continued)

In a case of first degree sexual assault, where the witness victim and his mother had been subpoenaed, excused, but informed that they would be recalled, the judge used a *capias* to compel their attendance later, instead of a subpoena.

Cross-examination

See DENIAL OF A FAIR TRIAL Cross-examination, (p. 167) for discussion of topic.

See IDENTIFICATION Suggestive identification, Right to cross-examine the witnesses, (p. 415) for discussion of topic.

State v. Barker, 289 S.E.2d 207 (1982) (Per Curiam)

A defendant must be given a reasonable opportunity to study the evidence and prepare his cross-examination. *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978).

State v. Beck, 286 S.E.2d 234 (1981) (Miller, J.)

The scope of cross-examination of the defendant's good character witness is found in *State v. Ramey*, 212 S.E.2d 737 (W.Va. 1975). It was held, in that case, that cross-examination could be made on prior criminal charges and convictions.

Cross-examination (continued)

State v. Beck, (continued)

The defendant alleged that his Sixth Amendment right to bring witnesses was violated by the circuit judge's advance ruling that a defense psychologist could testify but would be subjected to cross-examination about other crimes committed by the appellant, including prior sexual acts against the victim in the present case and the arrest for an unrelated sexual assault. There are no cases holding where a trial court indicates that a broad right of cross-examination will be permitted and thereafter the witness is not placed on the witness stand, a Sixth Amendment violation has occurred.

The State may not impose arbitrary limits on the admissibility of evidence which would hamper the fact-finding process, without violating the Sixth Amendment. Here the trial court's ruling did not necessarily result in any testimonial diminution but involved an interpretation of the scope of the cross-examination.

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

See DISCOVERY Witnesses' use of notes, (p. 199) for discussion of topic.

State v. Gangwer, 283 S.E.2d 839 (1981) (Miller, J.)

Footnote 7 - Cross-examination as to prior arrests of a witness who is not the defendant is ordinarily not permitted. Annot., 20 A.L.R.2d 1421, 1425.

State v. Gangwer, 286 S.E.2d 389 (1982) (McGraw, J.)

The scope of cross-examination is coextensive with and limited by the material evidence given on direct.

Cross-examination (continued)

State v. Jones, 239 S.E.2d 763 (1977) (Miller, J.)

Syl. pt. 5 - A witness may be cross-examined regarding bias, prejudice or expected favor or any other fact which might affect his credibility.

State v. Maynard, 289 S.E.2d 714 (1982) (Per Curiam)

The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court. The defendant wanted to cross-examine an undercover agent about a prior drug transaction with another individual which had been held to be entrapment. The defendant was attempting to show a common scheme. There may be occasions where cross-examination in this area is warranted if there are several prior occurrences of a similar nature, but we do not believe that one isolated incident is sufficient. Therefore, the trial judge did not abuse his discretion.

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

See DISCOVERY Nondisclosure, (p. 197) for discussion of topic.

State v. Wood, 280 S.E.2d 309 (1981) (Per Curiam)

Syl. pt. - The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse of injustice.

Denial of defense counsel to cross-examine witness on the merchandise stolen, and the names an investigating officer had suggested of others who might be involved in the crime was not an abuse of the court's discretion in limiting cross-examination because these matters were collateral to the main issues surrounding the defendant's culpability.

WITNESSES

Expert

See EVIDENCE Expert witness, (p. 277); EVIDENCE Opinion, Expert witness, (p. 295) for discussion of topic.

Hostile

State v. Ferguson, 270 S.E.2d 166 (1980) (Harshbarger, J.)

"A party who is surprised by unfavorable testimony given by his own witness may interrogate such witness as to previous inconsistent statements made by him." *State v. Swiger*, 105 W.Va. 358, 143 S.E. 85 (1928), Syl. pt. 2.

The State called a witness who had made a statement shortly after the shooting, but when asked about it, said: "I lied about that." It is evident that the government expected the witness to testify consistent with his prior statement and his repudiation thereof was surprise.

Impeachment

In general

State v. Bolling, 246 S.E.2d 631 (1978) (Miller, J.)

In the absence of the State's offering a person as a witness, there is no issue of credibility on which impeachment testimony can be introduced.

State v. Grimmer, 251 S.E.2d 780 (1979) (Caplan, C.J.)

Syl. pt. 5 - When a defendant testifies on direct examination that he has adhered strictly to the term of his parole, the State may properly introduce evidence to show that he has not complied with such terms.

Impeachment (continued)

In general (continued)

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

The general rule is that one may not impeach his own witness absent entrapment, hostility or surprise.

Confessions

State v. Goff, 289 S.E.2d 473 (1982) (Miller, C.J.)

Where the confession is otherwise valid but there has been a failure to comply with the requirements of *Miranda* in regard to advising and obtaining a waiver of the defendant's rights to remain silent and to consult with an attorney prior to interrogation and to decline further interrogation once it is initiated, the voluntary statement is inadmissible in the State's case in chief and may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradictory to the prior voluntary statement.

State v. Goodmon, 290 S.E.2d 260 (1981) (McHugh, J.)

Syl. pt. 4 - Where a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because that statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement, knowing that such prior voluntary statement is inadmissible as evidence in the State's case in chief.

Here it was not error for the trial judge to allow use of the confession for the limited purpose of testing the defendant's credibility on the issue of the voluntariness of the statements.

Impeachment (continued)

Confessions (continued)

State v. Vance, 285 S.E.2d 437 (1981) (McGraw, J.)

Applies standard set forth in syl. pt. 4, *State v. Goodmon* 290 S.E.2d 260 (W.Va. 1981).

Prior convictions

See EVIDENCE Prior convictions, Impeachment of character or reputation, (p. 302); EVIDENCE Prior convictions, Impeachment of credibility, (p. 302) for discussion of topic.

State v. McAboy, 236 S.E.2d 431 (1977) (Miller, J.)

In order for character impeachment to be proper, the defendant must affirmatively introduce evidence of his good character. *State v. McArdle*, 194 S.E.2d 174 (W.Va. 1973).

Prior inconsistent statements

Addair v. Bryant, 284 S.E.2d 374 (1981) (Miller, J.)

Syl. pt. 5 - While a specific foundation need not initially be made to impeach a witness with a prior inconsistent statement, the witness must be informed of the general nature of his prior inconsistent statement, and be afforded the opportunity to explain or deny the same. There is also a right, if requested, on the part of his counsel to see any prior written statement during the course of interrogation. All of the above is subject to the sound discretion of the trial court.

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Adkins, 289 S.E.2d 720 (1982) (Per Curiam)

Where codefendant has offered conflicting stories about the crime, one in his confession to police and one at trial of another co-defendant, he will be subject to cross-examination and impeachment based on prior inconsistent statements.

State v. Fellers, 267 S.E.2d 738 (1980) (Neely, J.)

A prior statement may be introduced at trial to impeach the credibility of a witness at trial. Such a statement may only be introduced when the testimony of the witness is shown to be inconsistent with the contents of his or her testimony and such statement may be used only "sparingly". *State v. Wayne*, 245 S.E.2d 838 (W.Va. 1978), and *State v. Spadafore*, 220 S.E.2d 655 (W.Va. 1975). *Ex parte* statements should not be used as a ruse for introducing damaging material about which the witness did not specifically testify. *State v. Spadafore*, *supra*.

State v. Harless, 285 S.E.2d 461 (1981) (Miller, J.)

In trial for aggravated assault, the defendant claimed on appeal that the trial court refused to let him attempt impeachment of the witness in regard to statements she made at the *in camera* hearing. The record revealed, however, that defense counsel did cross-examine her on these statements, and her testimony substantially followed her *in camera* statement.

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

The defendant sought to introduce evidence that the State's star witness was a liar. The State argued that the defendant failed to lay a proper foundation for the introduction of this testimony because defense counsel did not examine the witness about the alleged statement during cross-examination. Such a foundation was not essential as a precondition to the admission of this evidence. The statement which the defense sought to introduce was a prior inconsistent statement of the State's star witness, which under traditional rules of evidence was admissible for impeachment purposes.

State v. Smoot, 280 S.E.2d 286 (1981) (Per Curiam)

"Prior inconsistent statements of prosecution witnesses in a criminal case are admissible for impeachment purposes without the need to lay any particular foundation for their admission." Syl. pt. 5, *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978).

In an attempt to impeach the prosecution's witness, defense counsel on cross-examination asked questions regarding the subsequent statement in which the witness indicated that his July 25, 1977 statement implicating the defendant was untrue. The trial court's failure to allow this statement into evidence for impeachment purposes, especially in light of the witnesses' inability to recollect the circumstances surrounding the crime, prejudiced the defendant's case and constituted reversible error.

State v. Stewart, 239 S.E.2d 777 (1977) (McGraw, J.)

A witness may be impeached by proving that on another occasion he made statements inconsistent with or contradictory of his statements made during the trial, if the statements were material.

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Stewart, (continued)

"When the proper foundation has been laid therefor by cross-examination, a witness may be shown by another witness to have made contradictory statements on prior occasions respecting the facts testified to by him, for the purpose of discrediting his testimony thereon." Syl. pt. 3, *Wilson v. McCoy*, 93 W.Va. 667, 117 S.E. 473 (1923).

"There must be a contradiction, a witness can be impeached by statements made by him out of court only when such statements are contradictory to his testimony. If there is not substantial variance between such statements and his testimony, the statements cannot be introduced for purposes of impeachment." Syl. pt. 19, *State v. Price*, 92 W.Va. 542, 115 S.E. 393 (1922).

"The inconsistency of impeaching statement must appear clearly upon a direct comparison with the evidence of the witness, and cannot be based on a mere inference." *State v. Brown*, 104 W.Va. 93, 138 S.E. 664 (1927).

Testimony of witness that he did not remember a conversation that allegedly took place earlier is not the same as contradicting the substance of that alleged conversation and the court, therefore, did not err in refusing to allow the witness to so testify for impeachment purposes.

State v. Wayne, 245 S.E.2d 838 (1978) (Neely, J.)

"Prior out-of-court statements may be used to impeach the credibility of a witness and a prior inconsistent statement may be introduced concerning any specific matter about which the witness has testified at trial; however, where the witness does not testify contrary to his prior statement but demonstrates an absence of memory, such prior statement must be used sparingly to demonstrate lack of integrity in the witness or the reason for surprise to the party which calls him, but these legitimate purposes may not be used as a ruse for introducing inadmissible evidence." Syl. pt. 2, *State v. Spadafore*, 220 S.E.2d 655 (W.Va. 1975).

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Wayne, (continued)

Prior inconsistent statements cannot be given any value as substantive evidence; therefore, when the defendant tried to introduce the witness' prior statement as substantive evidence through the guise of impeachment, the court refused to allow the impeachment since the witness had merely testified that he could not remember the statement he had made to the police.

Rehabilitation

State v. Harman, 270 S.E.2d 146 (1980) (Miller, J.)

Syl. pt. 6 - Where cross-examination of a witness is directed at developing his bias or hostility against a party to the case, the party offering the witness is entitled to rehabilitate him. In this connection, the underlying reasons for the bias or hostility may be shown if they legitimately serve to rehabilitate the witness and are not simply used as a means of introducing inflammatory matter into the case.

If the impeachment is only slight and the rehabilitative evidence is highly inflammatory, the inflammatory evidence should not be permitted.

Nonexpert

See EVIDENCE Opinion, Nonexpert witness, (p. 296) for discussion of topic.

Self-incrimination

See SELF-INCRIMINATION, (p. 827) for discussion of topic.

WITNESSES

Sequestration

State v. Harriston, 253 S.E.2d 685 (1979) (Harshbarger, J.)

The government moved for sequestration of witnesses, asking at the same time that a trooper be allowed to remain and "assist the State." The trooper was the State's first witness and thereby gained no education from testimony of other State witnesses. As long as the officer testifies first, there is not rationale for not excluding him from sequestration.

Sequestration has never been a matter of absolute right in this State.

The question as to which witnesses may be exempt from a sequestration of witnesses ordered by the court lies within the discretion of the trial court, and unless the trial court acts arbitrarily to the prejudice of the rights of the defendant the exercise of such discretion will not be disturbed on appeal.

"It is within the judicial discretion of the trial court to permit a witness for the state, who is familiar with the facts on which the prosecuting attorney relies to establish the guilt of the accused, to be present in court during the trial to aid him in conducting the examination of other witnesses." Point 5, syllabus, *State v. Hoke*, 76 W.Va. 36, 84 S.E. 1054; Point 5, syllabus, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

The rule with regard to excluding police officers from a sequestration of witnesses is that it is not error to do so if the testimony of such police officers is not crucial to the state's case and not prejudicial to the defendant.

State v. Sherman, 260 S.E.2d 287 (1979) (Per Curiam)

"Where a witness has been sworn and sent out, and by accident or design comes into the courtroom during the progress of the trial, he is not, for that reason, to be excluded, but it is matter going to his credit with the jury, of which they should be sole judges, under the circumstances." Syl. pt. 2, *Gregg v. State*, 3 W.Va. 705 (1869).

Sequestration (continued)

State v. Sherman, (continued)

"It is well settled in this State that when an order is made separating the witnesses at the trial of a case, if a witness in violation of the order remains in or returns to the courtroom, and hears testimony of other witnesses, he is not thereby rendered incompetent as a witness." Syl. pt. 2, *State v. Stewart*, 63 W.Va. 597, 6 S.E. 591 (1908).

When two unsubpoenaed witnesses, father and wife of defendant, were not sequestered with other witnesses but remained in the courtroom and heard part of prosecution's case in chief, it was error for the trial judge to prohibit them from testifying for defendant. As the two would have testified in the case in chief, their testimony could not have been cumulative and would have provided the only corroboration for defendant's testimony establishing an affirmative factual defense, it was an abuse of discretion for the trial court to prohibit their testimony.

Spouses

State v. Evans, 287 S.E.2d 922 (1982) (Neely, J.)

See EVIDENCE Adverse spousal testimony, (p. 255) for discussion of topic.

Use of notes

State v. Dunn, 246 S.E.2d 245 (1978) (McGraw, J.)

See DISCOVERY Witnesses' use of notes, (p. 199) for discussion of topic.

State v. Sette, 242 S.E.2d 464 (1978) (Neely, J.)

See DISCOVERY Nondisclosure, (p. 197) for discussion of topic.

WORTHLESS CHECKS

Due process

State v. Griffith, 285 S.E.2d 469 (1981) (Harshbarger, J.)

Bank can choose to honor otherwise "worthless checks", and their doing so does not create due process or equal protection right for check writers whose paper they choose not to cover. A bank's decision to pay a customer's "bad check" relate to whether a customer has established credit with his bank and not to the statute's constitutionality.

Elements

State v. Griffith, 285 S.E.2d 469 (1981) (Harshbarger, J.)

W.Va. Code § 61-3-39 relates to knowingly issuing a worthless check for something of value without sufficient funds or credit to pay the same. If one knows there are neither sufficient funds nor credit to cover his check, the crime is committed.

Evidence

State v. Griffith, 285 S.E.2d 469 (1981) (Harshbarger, J.)

Defendant asserted, in a worthless check case, that a ledger kept by a bank does not prove customer knowledge abut its revelations unless there is evidence that account statements were received by the customer. Trial evidence showed that statements were mailed by the bank, but defendant denied receiving them. Evidence that defendant received statements would enhance the State's proof, but the ledger is probative and admissible, although certainly not conclusive proof of knowledge. Syl. Pt. 1, *State v. Frantz*, 108 W.Va. 639, 152 S.E. 326, *cert. denied*, 281 U.S. 767, 50 S.Ct. 465, 74 L.Ed. 1174 (1930). Defendant had an opportunity to persuade the jury that the ledger was not accurate, but had no such evidence.

YOUTHFUL OFFENDERS ACT

Due process

Watson v. Whyte, 245 S.E.2d 916 (1978) (Harshbarger, J.)

Where the defendant, a male youthful offender, was sentenced to Davis Forestry Center pursuant to *W.Va. Code* § 25-4-6, defendant was entitled to an "evidentiary" hearing before being transferred as "unfit" and resentenced to the W.Va. Penitentiary for an extended term. Due Process required that he be given: "(a) written notice of the claimed violations; (b) disclosure . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body . . .' and (f) a written statement by the fact finders as to the evidence called on and reasons for . . . [the transfer]." Also, since the defendant was to be "confronted by a government prosecutor, he (was) entitled to counsel". The Supreme Court remanded the case to the circuit court for an evidentiary hearing.

Sentencing

State v. Hersman, 242 S.E.2d 559 (1978) (Miller, J.)

See DOUBLE JEOPARDY Detention center - youthful offender, (p. 205) for discussion of topic.

State v. Patterson, 296 S.E.2d 684 (1982) (Harshbarger, J.)

Syl. pt. - *W.Va. Code*, 25-4-6, does not allow a trial court to impose any less than the original sentence when a male defendant, who has served at a youth correctional facility, violates his probation agreement.

Imposition of original one to ten year sentence with credit given for time served was appropriate, as mandated by *W.Va. Code* § 25-46, the Youthful Offenders Act, where defendant, while on probation after having served time in a correctional center, was arrested for shoplifting and petit larceny.

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