VOLUME III

CRIMINAL LAW DIGEST

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INTRODUCTION

Volume III of the Criminal Law Digest contains cases issued by the West Virginia Supreme Court of Appeals from May 1, 1985 - April 30, 1988. The types of cases selected are primarily those in which the Public Legal Services Council is authorized to provide services, i.e., criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene matters. DUI administrative appeals and legal ethics cases are also included since many issues raised therein are applicable to criminal matters. Cases are cross-indexed throughout the manual according to the issues discussed by the Court.

We have attempted to index all relevant cases handed down by the West Virginia Supreme Court within the heretofore mentioned time period. We suggest, however, that because of the possibility of errors that you not rely exclusively on this Digest when doing research. If you note an error, please contact this office.

In briefing the cases, we have attempted to be faithful to the language of the Court. Taking statements out of context, however, may distort their meaning. Also, since we used slip opinions in summarizing these cases, revision by the Court may have occurred subsequent to publication of this Digest. We again suggest that the summary of the case not be used as a substitute for a thorough reading of the case.

We welcome any comments or suggestions on this material and any ideas you may have regarding future projects for the research center to undertake which to assist practitioners.

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ABUSE AND NEGLECT

Teachers

Generally

W.Va. Department of Human Services, et.al. v. Boley, 358 S.E.2d 438 (1987) (Miller, J.)

Appellant, a public school teacher, was accused of abuse of children in her classroom. The issue presented was whether *W.Va.Code* 49-6-1, *et seq.*, applied so as to hold her liable under child and neglect charges.

Syl. pt. 1 - The provisions of *W.Va.Code*, 49-6-1, *et seq.*, relating to child abuse and neglect, are not applicable to remove or discipline a teacher who is alleged to have abused students. Such removal or disciplinary procedures should be accomplished under the provisions of *W.Va.Code*, 18A-2-8 (1985), our teacher disciplinary statute.

The Court held that a teacher is not a "custodian" withing the purview of the statutes. A custodian, freely chosen by the children's parents may not be deprived of her custody rights by the Department of Human Services arbitrarily." *Bowens v. Maynard*, 174 W.Va. 184, 324 S.E.2d 145 at 147 (1984). A teacher's custody does not result from voluntary acts by the parents, but rather from compulsory school attendance statutes. *W.Va.Code* 18-8-1.

The Court also rejected arguments that the *in loco parentis* statute supplied a basis for abuse proceedings (see *W.Va.Code* 18A-5-1), saying ". . . the statute which incorporated the *in loco parentis* doctrine in unrelated to and perhaps inconsistent with the concepts underlying our child neglect and abuse statute."

Termination of parental rights

Conviction of murder of child's other parent

Nancy R. v. Randolph W., 356 S.E.2d 464 (1987) (McHugh, J.)

Syl. pt. 1 - "'A parent has the natural right to the custody of his or her infant child, and, unless the parent is an until person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived

Termination of parental rights (continued)

Conviction of murder of child's other parent (continued)

Nancy R. v. Randolph W., (continued)

such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized an enforced by the courts.' Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d [798] (1969)." Syl. pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975).

Syl. pt. 2 - A conviction of first-degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

Syl. pt. 3 - Where parental rights of a father have been terminated because of his conviction of the first-degree murder of the child's mother, and other acts of violence to her and threats of violence to the child, permanent guardianship may be given to the West Virginia Department of Human Services. *W.Va.Code*, 49-6-5-(a)(6) (1984).

Family case plan

State ex rel. W.Va. Dept. of Human Services v. Cheryl J., 356 S.E.2d 181 (1987) (Miller, J.)

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

Improvement period

In the Interest of Darla B., 331 S.E.2d 868 (1985) (McHugh, J.)

The appellants appeal a final order of the circuit court terminating their parental rights to their infant daughter.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Improvement period (continued)

In the Interest of Darla B., (continued)

Syl. pt. 2 - The decision of a circuit court terminating the rights of parents to their child pursuant to *W.Va.Code*, 49-6-5 [1977], will not be reversed by this Court for failure to grant the parents an improvement period, where the evidence supports a finding that the child, 38 days old, suffered from life-threatening injuries in the form of broken bones and bruises, which could not have occurred in the manner testified to by the parents, and the circuit court found "compelling circumstances" for the termination of parental rights.

Syl. pt. 3 - The granting of an improvement period, pursuant to *W.Va.Code*, 49-6-2(b) [1980] and *W.Va.Code*, 49-6-5(c)]1977], unless otherwise provided by the laws of this State, is not an alternative disposition where a finding is made pursuant to *W.Va.Code*, 49-6-5(a)(6) [1977], that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future," and, pursuant to *W.Va.Code*, 49-6-2(b) [1980], "compelling circumstances" justify a denial thereof.

State ex rel. W.Va. Dept. of Human Services v. Cheryl J., 356 S.E.2d 181 (1987) (Miller, J.)

Syl. pt. 1 - "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Syl. pt. 2 - *W.Va.Code*, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.

Syl. pt. 3 - Under *W.Va.Code*, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to *W.Va.Code*, 49-6D-3 (1984).

ABUSE AND NEGLECT

Termination of parental rights (continued)

Improvement period (continued)

State ex rel. W.Va. Dept. of Human Services v. Cheryl J., (continued)

Syl. pt. 4 - Under *W.Va.Code*, 49-6D-3 (1984), the Department of Human Services is required to prepare a family case plan with participation by the parties and their counsel and to submit it to the court for approval within thirty days.

Syl. pt. 5 - The purpose of the family case plan as set out in *W.Va.Code*, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.

Least restrictive alternative

State ex rel. W.Va. Dept. of Human Services v. Cheryl J., 356 S.E.2d 181 (1987) (Miller, J.)

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

ABUSE OF CRIMINAL PROCESS

Obtaining money by false pretenses

No felonious intent

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

Petitioner and complainant entered into a contractual agreement whereby petitioner would construct a new home for the complainant. A criminal indictment was returned charging the petitioner with two counts of obtaining money by false pretenses from the complainant.

Petitioner contends the alleged actions cited in the indictment are not, as a matter of law and under the totality of circumstances, criminal in nature and, consequently, the indictment is an abuse of the criminal process. He contends the transactions involved no felonious intent on the petitioner's part and therefore, are contractual matters capable of resolution in civil proceedings. The petitioner contends the complainant, *vis a vis* the State, is abusing the criminal process to gain advantage in the related civil suit.

The Court found the conduct alleged by the State is covered under the statute and that matters of proof of such conduct are best left for review upon a full trial record. Here there was a *bone fide* complaint to the prosecutor, police investigation, and indictment by a grand jury. The petitioner's course is to litigate his guilt or innocence before a jury, rather than engage the Court in interlocutory review of essentially factual evidential matters. The Court found no "substantial, clear-cut, legal errors" warranting extraordinary relief.

ABUSE OF DISCRETION

Best evidence

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See EVIDENCE Duplicate of original, (p. 201) for discussion of topic.

Bifurcation

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

See INSANITY Bifurcated trial, (p. 325) for discussion of topic.

Competency of witnesses

Competency of alleged victim

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See SEXUAL ASSAULT Evidence, Competency of alleged victim, (p. 596) for discussion of topic.

Cross-examination

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

See CROSS-EXAMINATION Limitation of cross-examination by defense, (p. 81) for discussion of topic.

Discovery

Depositions

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

See DISCOVERY Depositions, (p. 119) for discussion of topic.

ABUSE OF DISCRETION

Evidence

Admissibility

State v. Giles, 368 S.E.2d 107 (1988) (Per Curiam)

See EVIDENCE Admissibility, Vouching the record, (p. 183) for discussion of topic.

Duplicates of original

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See EVIDENCE Duplicate of original, (p. 201) for discussion of topic.

Failure to grant state's motion to nolle prosequi

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See NOLLE PROSEQUI Abuse of discretion, Failure to grant state's motion, (p. 422) for discussion of topic.

Insanity

Criminal responsibility

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

See INSANITY Adjudication of criminal responsibility before trial, (p. 325) for discussion of topic.

ABUSE OF DISCRETION

Jury

Challenges for cause

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See JURY Challenges, Cause, (p. 201) for discussion of topic.

Mistrial

Defendant's misconduct

State v. Linkous, 355 S.E.2d 410 (1987) (Miller, J.)

See DENIAL OF A FAIR TRIAL Defendant's misconduct, Witnessed by jurors, (p. 95) for discussion of topic.

Denial of motion for

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See HARMLESS ERROR Nonconstitutional, Objections sustained, (p. 270) for discussion of topic.

Parole

Denial of parole consideration

Vance v. Holland, 355 S.E.2d 396 (1987) (Per Curiam)

See PAROLE Denial of parole consideration, (p. 424) for discussion of topic.

ABUSE OF DISCRETION

Plea bargains

Acceptance thereof

Six v. White, No. 17991 (3/14/88) (Per Curiam)

See PLEA BARGAINING Breach of agreement, (p. 430) for discussion of topic.

Probation

Granting of

State ex rel. Whitlow v. Frazier, No. 17509 (7/17/87) (Per Curiam)

See PROBATION Eligibility, (p. 447) for discussion of topic.

Self-representation

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See SELF-REPRESENTATION In general, (p. 582) for discussion of topic.

Sequestration of witnesses

State v. Barker, 364 S.E.2d 264 (1987) (Per Curiam)

See WITNESSES Sequestration, (p. 669) for discussion of topic.

ABUSE OF DISCRETION

Testimony

Form of

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

During appellant's trial on charges of aggravated robbery, an expert witness testified at length in a narrative form. Appellant moved for a mistrial based on the "argumentative" manner of the testimony. Finding the testimony did not constitute legal argument, the trial court denied the motion.

Syl. pt. 3 - The trial court is vested with sound discretion to permit a witness to testify in narrative form, rather than by question and answer.

Citing Rule 611(a) of the West Virginia Rules of Evidence, the Court found that the trial court has discretion to control the form of interrogation' only abuse of this discretion, usually in limiting testimony, will result in reversal. See *Payne v. Kinder*, 147 W.Va. 352, 127 S.E.2d 726 (1962). The Court also noted Rule 702 of the *West Virginia Rules of Evidence* allows an expert witness to testify "in the form of an opinion or otherwise." *See F. Cleckley, Handbook on Evidence for West Virginia Lawyers* §7.1(B)1., at 420 (2ded. 1986). No error here.

Venue

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

See VENUE Change of venue, Abuse of discretion, (p. 641) for discussion of topic.

APPEAL

Constitutional error

Failure to raise at trial

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See WITNESSES Disclosure of criminal record, (p. 657) for discussion of topic.

Denial of right to appeal

Fisher v. Holland, 342 S.E.2d 215 (1986) (Per Curiam)

Petitioner was convicted of possession of a controlled substance with the intent to deliver. A notice of intent to appeal the conviction of July 9, 1981 was filed on December 8, 1981. Not appeal was filed. Petitioner petitioned the Court for a writ of habeas corpus alleging he had not received his trial transcripts. On January 11, 1983, petitioner was resentenced to allow an opportunity to appeal. More than one year elapsed without an appeal being filed. On February 9, 1984, the Court again granted a petition for a writ of habeas corpus for the purpose of expediting an appeal. A hearing was held and a sentencing issue was resolved.

At the hearing, the petitioner informed the court that he still had not had an opportunity to appeal his 1981 conviction. Counsel at this hearing apparently believed he had not been appointed to represent the petitioner on appeal, but was representing petitioner for the limited purpose of sentence reduction. Counsel asked the court if someone would be appointed for appellate representation the judge state if petitioner still wanted to appeal, he would appoint the attorney at the sentence reduction hearing to represent him. The petitioner told the court they could decide after the attorney read the transcript.

Petitioner contends in this case that the attorney appearing on his behalf at the sentence reduction hearing was appointed to handle the appeal. The attorney filed an affidavit to the effect that he was not appointed to the appeal, nor had he ever received a transcript of the 1981 trial.

Petitioner contends the State was extraordinarily derelict in affording him an appeal and that he is therefore entitled to discharge from custody.

Denial of right to appeal (continued)

Fisher v. Holland, (continued)

There was no evidence that the petitioner attempted to inform the court that his counsel was taking no action to perfect the appeal. The delay may have been due to the confusion surrounding the question of whether counsel had, in fact, been appointed, and to the rather casual and tentative manner in which the court dealt with the appointment of counsel and obtaining the trial transcript. The Court found the trial judge allowed the matter to remain unresolved.

The Court concluded, however, from a review of all of the circumstances that the State was not extraordinarily derelict in affording the petitioner an appeal and that he was not entitled to unconditional discharge from custody.

The Court found the petitioner was entitled to the appointment of counsel for appeal, and ordered resentencing, with credit for time served; and that counsel be appointed within 30 days to perfect an appeal.

State ex rel. Wells v. Warmuth, 355 S.E.2d 363 (1987) (Per Curiam)

Relator contends that because of extraordinary dereliction on the part of the State in failing to provide him with a copy of the transcript of his trial, he has been denied the right to an appeal of his conviction. He asks that his conviction be declared void and the State be enjoined from bringing any further proceedings against him relating to the underlying charge.

Syl. pt. - "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, Section 10 and 17." Syl. pt. 1, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

The court found the appeal period in this case was extended on five separate occasions due to lack of a transcript; that realtor has served his entire sentence and still has not been provided with a copy of the transcript; and that in all probability the court reporter's notes have been lost or destroyed.

APPEAL

Denial of right to appeal (continued)

State ex rel. Wells v. Warmuth, (continued)

The Court found extraordinary dereliction on the part of the State and ordered relator's grand larceny conviction reversed and relator discharged from further prosecution.

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. He contends his due process rights were violated because more than two years elapsed before his transcript was supplied. The Court found the appeal has been allowed and there was no showing of prejudice by the delay.

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel because his court-appointed trial counsel was a relative and friend of the burglary victim. This relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions.

Appellant contends the State did not provide the appellant with a transcript of his daytime burglary trial until twenty-six months after his conviction and that the transcript was incomplete when it was received.

Syl. pt. 12 - "Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control, and discipline of the Supreme Court of Appeals." Syl. Pt. 3, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985).

The Court emphasized that court reporters must not shirk their responsibility as officer of the Court.

APPEAL

Discovery

Standard for failure to comply

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

See DISCOVERY Failure to disclose, Defendant's statements, (p. 120) for discussion of topic.

Failure to object

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See JUDGES Conduct at trial, Failure to recuse, (p. 357) for discussion of topic.

Failure to preserve

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing argument, (p. 463) for discussion of topic.

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See WITNESSES Competency, Generally, (p. 654) for discussion of topic.

Constitutional error

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. He contended for the first time on appeal that the prosecution's failure to provide him with the criminal records of the prosecution witnesses prejudiced his trial.

APPEAL

Failure to preserve (continued)

Constitutional error (continued)

State v. McKinney, (continued)

The Court noted that withholding exculpatory evidence sufficient to raise a reasonable doubt as to the defendant's guilt violated due process. The Court will hear prejudicial errors involving constitutional rights despite the failure to raise them below. *See* Syl. pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Here, however, appellant did not even contend that the criminal records complained of would have allowed impeachment of witnesses sufficient to raise a reasonable doubt. Since no fundamental constitutional error was involved and the appellant failed to raise the issue below, the Court refused to consider the issue.

Failure to develop record

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See WITNESSES Unavailability, (p. 671) for discussion of topic.

Failure to object

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

State v. Acord, 336 S.E.2d 741 (1985) (Brotherton, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Cross-examination of defendant, (p. 556) for discussion of topic.

APPEAL

Failure to preserve (continued)

Failure to object (continued)

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

Appellant challenges certain introductory remarks made by the trial court to explain to the jury the purpose of instructions. The Court found the appellant raised no objection to the court's remarks at trial. Since the Court found no "plain error" in the trial court's remarks, they would not consider this assignment of error.

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

The appellant contends the trial court erred in allowing extensive expert fingerprint testimony despite his stipulation to the prior use of a crime scene telephone booth from which the fingerprints were taken. The appellant failed to raise at trial any objection to such testimony. The Court found no merit in the argument since there was no objection at trial.

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See EVIDENCE Admissibility, (p. 178) for discussion of topic.

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

See DENIAL OF A FAIR TRIAL Right to transcript of co-participant's trial, (p. 114) for discussion of topic.

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

Appellant contends the prosecutor should not have been allowed to ask during *voir dire* if the jury panel had any philosophical, religious or ethical beliefs that would prevent them from returning a verdict to imprison the defendant for life.

State v. Humphrey, (continued)

The Court noted defendant did not object at the time and first raised the issue in a motion for a new trial. In order to preserve such error it is necessary to object to matters surrounding the impaneling of a jury before the jury is drawn.

Syl. pt. 9 - Our general rule is that nonjurisdictional trial error not raised in the trial court will not be addressed on appeal.

The Court found no error in this point.

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing argument, (p. 465) for discussion of topic.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. On appeal he objected to the prosecution's failure to comply with pre-trial motions concerning discovery and inspection of evidence, failure to submit a bill of particulars and admission of one piece of evidence. Defense counsel failed to object at trial.

The Court noted that the record disclosed that appellant was sufficiently informed of charges against him, was not deprived of exculpatory evidence, and was not surprised by introduction of evidence. Further, while the trial court did not rule on defense counsel's motions, neither did counsel request rulings or request orders directing the prosecution to provide additional discovery.

The Court found that appellant's silence constituted a waiver of his objections. See *State v. Moran*, 168 W.Va. 688, 285 S.E.2d 450 (1981).

APPEAL

Failure to preserve (continued)

Failure to object (continued)

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the court erred in not instructing the jury on the lesser included offense of driving left of center. The Court found that no objection was made to this point at trial and no alternate verdict was suggested. No error here.

General objections

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

See INSANITY Expert testimony, Scope, (p. 330) for discussion of topic.

Waiver of objection

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. At trial, testimony was allowed concerning statements of the victim's wife to paramedics called to attend the victim. The victim's wife died prior to trial. The testimony was admitted as an excited utterance exception to the hearsay rule.

Defense counsel objected to the testimony at an *in camera* haring but, upon cross-examination of the same witness at trial, introduced and read a lengthy statement containing the same information.

Syl. pt. 3 - Where a party objects to competent evidence, but subsequently introduces the same evidence, he is deemed to have waived his objection. However, one does not waive an objection otherwise sound and reasonably made by attempting to explain or destroy the probative value of the evidence on cross-examination.

APPEAL

Failure to provide transcript

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See TRANSCRIPT Right to transcript, Failure to provide, (p. 637) for discussion of topic.

In general

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 16) for discussion of topic.

Ineffective assistance

Alibi instruction

State v. Hutchinson, 342 S.E.2d 138 (1986) (McHugh, J.)

Appellant relied on an alibi defense at trial. He requested an alibi instruction which was refused by the court. The trial court, instead, gave his own instruction which was almost precisely in the language approved in Syl. pt. 2, *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978). The Fourth Circuit found in *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir. 1982) *cert. denied*, 459 U.S. 853 (1982) that the *Alexander* instruction unconstitutionally shifted the burden of persuasion to the defendant.

Following *Adkins*, the Court overruled *Alexander* in *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983). The appellant's trial occurred in the interim between *Adkins* and *Kopa*.

APPEAL

Ineffective assistance (continued)

Alibi instruction (continued)

State v. Hutchinson, (continued)

Syl. pt. 2 - Although this Court may, under Rule 30 of the West Virginia Rules of Criminal Procedure, notice plain error in the giving of an erroneous instruction (in the absence of a proper and timely objection at trial), this Court will not ordinarily recognize plain error under such circumstances, even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial.

The Court found their decision in *Kopa*, that the *Alexander* instruction did not substantially impair the truth-finding function of the trial, differed from the *Pendry-Mullaney* instructions to which the "plain error" doctrine is applied. The Court did not recognize "plain error" here.

Prosecutor's comments/conduct

State v. Hatala, 345 S.E.2d 310 (1986) (Brotherton, J.)

Appellant contends the prosecutor made an improper remark in closing by saying defense counsel would "give you all kinds of smoke screens." No objection was made.

Syl. pt. 1 - "Although it is a well-settled policy that the Supreme Court of appeals normally will not rule upon unassigned or imperfectly assigned errors, this Court will take cognizance of plain error involving a fundamental right of an accused which is protected by the Constitution." Syl. pt. 4, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

The Court will use the plain error rule to correct only particularly egregious errors. The rule is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result. They found no such case here.

APPEAL

Judge's failure to render decision

State ex rel. Buzzard v. MacQueen, No. 18029 (12/4/87) (Per Curiam)

See JUDGES Duty to render decision, (p. 364) for discussion of topic.

Plain error

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

See RECEIPT OF STOLEN PROPERTY Instructions, Acting with a dishonest intent or purpose, (p. 480) for discussion of topic.

State v. Dean, 363 S.E.2d 467 (1987) (Per Curiam)

See CONFESSIONS Voluntariness, (p. 64) for discussion of topic.

State v. Haller, 363 S.E.2d 719 (1987) (Neely, J.)

See CONFESSIONS Voluntariness, (p. 65) for discussion of topic.

State v. Oxier, 338 S.E.2d 360 (1985) (Miller, C.J.)

See DENIAL OF A FAIR TRIAL Prosecutor's comment's/conduct, (p. 108) for discussion of topic.

Erroneous instruction

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

Appellant was convicted of aggravated burglary. On appeal he alleged that his own instruction, as amended favorably to him, was misleading and should not have been given.

APPEAL

Plain error (continued)

Erroneous instruction (continued)

State v. Armstrong, (continued)

Syl. pt. 5 - "Although this Court may, under Rule 30 of the West Virginia Rules of Criminal Procedure, notice plain error in the giving of an erroneous instruction (in the absence of a proper and timely objection at trial), this Court will not ordinarily recognize plain error under such circumstances, even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial." Syl. pt. 2, *State v. Hutchinson*, 176 W.Va. 172, 342 S.E.2d 138 (1986).

Here, the Court found that the instruction merely implied that the State must prove its case beyond a reasonable doubt solely because the appellant raised an alibi defense. Any error did not impair the truth-finding function of the trial.

Right to transcript

Maddox v. Ferguson, No. 17923 (11/17/87) (Per Curiam)

See DENIAL OF A FAIR TRIAL Right to transcript, (p. 113) for discussion of topic.

State v. England, 363 S.E.2d 725 (1987) (Neely, J.)

See DENIAL OF A FAIR TRIAL Right to transcript, (p. 113) for discussion of topic.

APPEAL

Standard for review

Admission of evidence

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See EVIDENCE Admissibility, Standard for review, (p. 182) for discussion of topic.

Voluntariness of confession

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See RIGHT TO COUNSEL Waiver, Effect of police interrogation, (p. 506) for discussion of topic.

State's right to

State v. Jones, 363 S.E.2d 513 (1987) (Miller, J.)

The trial court granted a motion to dismiss a murder indictment on equal protection grounds after two trial ended in hung juries. The prosecution appealed.

Syl. pt. 1 - Our law is in accord with the general rule that the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or a statute.

See also, *State ex rel. Maynard v. Bronson*, 167 W.Va. 35, 277 S.E.2d 718, 722 (1981); *State v. Bailey*, 154 W.Va. 25, 173 S.E.2d 173 (1970).

Syl. pt. 2 - Other jurisdictions, including the federal courts, that have statutes enabling the State to appeal within a certain time limit have held that compliance with the time limit is mandatory.

See also *United States v. Hark*, 320 U.S. 531, 88 L.Ed. 290, 64 S.Ct. 359 (1944); *United States v. Martinez*, 681 F.2d 1248 (10th Cir. 1982, et al.).

APPEAL

State's right to (continued)

State v. Jones, (continued)

Syl. pt. 3 - Where the State does not file a petition to appeal with this court within thirty days from the date of the entry of the order dismissing an indictment as required by *W.Va.Code*, 58-5-30, the appeal will be dismissed as improvidently awarded.

Here, the appeal was not timely filed and the Court did not rule on the substantive issue of whether an appeal might lie.

Sufficiency of evidence

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 623) for discussion of topic.

ARREST

Appearance before magistrate

In the Matter of John A.L., 363 S.E.2d 729 (1987) (Per Curiam)

See POLICE OFFICER Interrogation by, (p. 435) for discussion of topic.

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

See JUVENILES Arrest, Appearance before magistrate, (p. 386) for discussion of topic.

By private security guard

Effect of

State v. Meugge, 360 S.E.2d 216 (1987) (McGraw, C.J.)

Appellant was convicted of shoplifting. Appellant was detained by a security guard employed by the store in which appellant was shopping. The guard took the appellant to a small office without a telephone and ordered appellant to empty his pockets. After finding several store items there she read appellant his rights from a form. She then asked appellant to sign a waiver of those rights. The appellant refused and requested a lawyer. The guard refused the request and instead called the state police.

The testimony differed at this point concerning the circumstances under which appellant signed the previously rejected waiver. The state police officer testified that he did not hear the guard read appellant his rights and that he did not read appellant his rights. Appellant also filled out a form entitled "apprehension report" which contained various incriminating statements. This form was later introduced at trial.

When shoplifting is suspected, *W.Va.Code*, 61-3A-4 allows detention by a merchant or his agent for a period not to exceed thirty minutes. By the terms of the statute, this detention is not an arrest.

State v. Meugge, (continued)

Syl. pt. 1 - An arrest is the "detaining of the person of another by any act or speech that indicated an intention to take him into custody and that subjects him to actual control and will of the person making the arrest." (See [*State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726, at 732 (1976)]). Although the common law allows a private citizen to make an arrest for a misdemeanor breach of the peace committed in his presence, *W.Va.Code*, 61-3A-4 does not change detention into an arrest.

The Court held that the security guard was acting "under the mantle of state authority" and therefore Constitutional search and seizure and self-incrimination protections apply.

Syl. pt. 3 - "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 course imperative." Syl. pt. 1, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

Syl. pt. 4 - "The burden rests on the State to show by a preponderance of the evidence that the warrantless search falls within an authorized exception." Syl. pt. 2, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

Syl. pt. 5 - Demand to disclose or produce concealed objects is treated as a search for purpose of constitutional analysis.

Syl. pt. 6 - A warrantless search of the person and the immediate area under his control is authorized incident to a valid arrest, but such a search is only permissible when it is necessary to uncover weapons that might be used against the arresting officer or to prevent destruction of evidence by the arrested party.

ARREST

By private security guard (continued)

Effect of (continued)

State v. Meugge, (continued)

Syl. pt. 7 - Once a person has exercised his rights under article three, section five of the West Virginia Constitution, those in whose custody he is held must scrupulously honor that privilege.

See, *e.g.*, Syl. pt. 3, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980) and syl. pt. 1, *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979).

Conviction reversed, case remanded.

Illegal

Effect on subsequent confession

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

See JUVENILES Self-incrimination, Confessions to police, (p. 391) for discussion of topic.

Warrantless

Exigent circumstances

State v. Mullins, 355 S.E.2d 24 (1987) (McGraw, J.)

Appellant appeals his conviction for first-degree murder. The appellant and the victim lived together in appellant's house. At around 9:15 a.m. on December 24, 1983, a neighbor saw the victim walking toward the home of the appellant's son, Robert Mullins. At about 9:30 a.m. or 10 a.m. another neighbor saw the victim's body in the driveway of Robert Mullins' residence. The neighbor aroused Robert and they called the sheriff's office at 10:45 to report a murder.

ARREST

Warrantless (continued)

Exigent circumstances (continued)

State v. Mullins, (continued)

Deputies arrived at 11:30 a.m. A state police trooper arrived and took over the investigation at about 11:45 a.m. One deputy was assigned to watch the body and the other was sent to watch the appellant's house. The trooper was in radio contact with the state police communications center and he radioed for back-up assistance. After the others arrived, the trooper, a police corporal and the appellant's son approached appellant's house.

The son called to his father, the appellant came to the door and was immediately placed under arrest, searched and taken to the cruiser. He was advised of his rights and asked to sign a waiver. The appellant complied. The trooper wrote out the appellant's statement, read it back to him and had him sign it. The appellant then gave permission to search the house. Several items, including the apparent murder weapon were found and introduced at trial.

Syl. pt. 1 - Both the federal and state constitutions protect citizens from unreasonable arrests, and provide for the issuance of a warrant upon a showing of probable cause. *U.S. Const. Amend.* IV; *W.Va. Const.* art. III, § 6.

Syl. pt. 2 - A warrantless arrest in the home must be justified not only by probable cause, but by exigent circumstances which make an immediate arrest imperative.

Syl. pt. 3 - "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." Syl. pt. 2, *State v. Canby*, 162 W.Va. 666, 252 S.E.2d 164 (1979).

The Court found there were no exigent circumstances to justify appellant's warrantless arrest.

ARREST

Warrantless (continued)

Exigent circumstances (continued)

State v. Mullins, (continued)

The Court noted there was no indication the appellant attempted to flee. Concern that evidence would be destroyed was insufficient; the appellant was alone several hours before the trooper decided to make the arrest. The Court noted a warrant could have been brought to the scene by the back-up officers. The Court found the warrantless arrest violated the appellant's constitutional rights.

Probable cause

State v. Choat, 363 S.E.2d 493 (1987) (McHugh, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 542) for discussion of topic.

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He challenges the validity of the warrant issued for his arrest.

Syl. pt. 2 - "Probable cause to make an arrest without a warrant exists when the facts and 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).

At the time of the appellant's arrest the description of the appellant (who had been seen with the victim on the afternoon prior to his death), along with the appellant's name and warrant identification number, were known to match a Cleveland bank employee's description of one of the men who had attempted to transfer funds from the victim's W.Va. bank account two days after the victim's death. The Court found this fact, along with the description of Mark Price (who had been seen accompanying the victim and the appellant on the

State v. Cook, (continued)

afternoon prior to his death), and his warrant identification number, matching the same bank employee's description of the other man who had attempted to transfer funds from the victim's account, provided the arresting officers with ample probable cause to arrest the appellant.

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He claimed that his arrest was tantamount to an unlawful "seizure" of his person, in that the police entered a private home without authority for the purpose of making a warrantless arrest. See *Payton v. New York*, 445 U.S. 573, 63 L.Ed. 639, 100 S.Ct. 1371 (1980).

The investigating officer discovered an abandoned car with blood and debris in the passenger area. He opened the trunk and discovered the victim's body. Based on statements given by a bartender who had seen the victim the night before her body was found, the police obtained a search warrant for defendant's car and a trailer where the defendant and another man were believed to reside. This warrant was later found invalid (See SEARCH AND SEIZURE Warrant, Testimony outside of affidavit, (p. 539) this Digest) but the evidence admitted on the basis of the voluntary consent to search (See below; see also, SEARCH AND SEIZURE Consent search, Voluntariness, (p. 519) this Digest).

The owner of the trailer, the defendant's father, allowed police access to the trailer voluntarily, assuring them that a warrant access to the trailer voluntarily, assuring them that a warrant was unnecessary. The defendant and a Bobby Hudnell were in the trailer. They were detained in the police car while police searched the trailer. A pistol matching the description in the warrant was seized in the defendant's bedroom. Defendant and Hudnell were advised of their *Miranda* rights and taken into custody.

State v. Worley, (continued)

Defendant subsequently made several incriminating statements and led police to further incriminating evidence. After signing a waiver of his right to counsel, defendant admitted robbing the victim but denied killing her; he did admit his presence during the murder.

Syl. pt. 5 - Where a police officer has by voluntary consent entered a private home, he may arrest a person therein upon probable cause without a warrant or the existence of exigent circumstances.

The Court noted that the purpose of the *Payton* rule, *supra*, is to protect against unlawful entry solely for the purpose of arrest. Here, however, the entry was with consent of the owner. See also, *State v. Dyer*, 177 W.Va. 567, 355 S.E.2d 356 (1987).

ARSON

Attempted

Property at risk

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

Appellant was convicted of attempted arson. He assigned as error that the prosecution failed to prove that the property in question was a "dwelling."

The Court held that attempted arson is not confined to a "dwelling." *W.Va. Code*, 61-3-4 states, *inter alia*, "any buildings or property mentioned in the foregoing sections." Property distinctions relevant to other degrees of arson are irrelevant in attempted arson.

Sufficiency of evidence

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

See EVIDENCE Sufficiency, Attempted arson, (p. 241) for discussion of topic.

ATTORNEYS

Attorney-client relationship

Committee on Legal Ethics of the West Virginia State Bar v. Pettry, No. 17562 (7/2/87) (Per Curiam)

See ATTORNEYS Professional responsibility, Attorney-client relationship, (p. 39) for discussion of topic.

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See PRIVILEGES Attorney-client, (p. 443) for discussion of topic.

Joint representation of codefendants

State v. Livingston, 366 S.E.2d 654 (1988) (Per Curiam)

See INEFFECTIVE ASSISTANCE Joint representation of co-defendants, (p. 317) for discussion of topic.

Disbarment

Burden of proof

Committee on Legal Ethics of the West Virginia State Bar v. Walker, 358 S.E.2d 234 (1987) (McGraw, C.J.)

See ATTORNEYS Professional responsibility, (p. 38) for discussion of topic.

ATTORNEYS

Discipline

Generally

Committee on Legal Ethics of the West Virginia State Bar v. Walker, 358 S.E.2d 234 (1987) (McGraw, C.J.)

After finding respondent guilty of ethics violations as charged, the Court noted that "the principle (sic) purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice." Syl. pt. 3, *Daily Gazette Co. v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705 (1984).

Syl. pt. 3 - In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Here, the Court annulled respondent's license.

Mitigating circumstances

Committee on Legal Ethics of the West Virginia State Bar v. Walker, 358 S.E.2d 234 (1987((McGraw, C.J.)

Respondent in this legal ethics proceeding was charged with breaking and entering his own law office, falsely accusing another of doing so, setting fire to his own home, threatening physical violence against two persons and knowingly tendering a worthless check for overdue interest on his burned home.

Respondent acknowledged the underlying events but denied wrongdoing, claiming he was suffering from extreme mental, financial and domestic problems.

The Committee on Legal Ethics found respondent guilty of violating Disciplinary Rules 1-102(A)(3)(4) and (6). It recommended that the Court suspend respondent's license pending a mental competency examination and annul respondent's license if respondent were to be found mentally competent.

ATTORNEYS

Discipline (continued)

Mitigating circumstances (continued)

Committee on Legal Ethics of the West Virginia State Bar v. Walker, (continued)

The Court suspended respondent's license and remanded to the Committee to give the respondent the opportunity to present new evidence. At the subsequent hearing respondent chose not to contest the previous evidence. The Committee again recommended annulment.

The Court found here that the Committee met its burden.

The Court held that emotional problems may be treated as mitigating circumstances though not as a complete defense to ethics charges. See Syl. pt. 2, *Committee on Legal Ethics v. Smith*, 156 W.Va. 471, 194 S.E.2d 665 (1973) and *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427, at 430 (1976).

The Court also noted that an attorney suffering from a mental disability, making adequate participation in his defense impossible, may petition for an order suspending his license pending evaluation. See By-Laws of the West Virginia State Bar.

Finding no evidence of disability in the psychiatric report and noting that respondent's counsel, upon rehearing, stated that his client was under no disability, the Court annulled respondent's license to practice law in West Virginia.

Neglect

Committee on Legal Ethics of the West Virginia State Bar v. Hearst, No. 18090 (4/21/88) (Per Curiam)

Respondent was retained to settle an estate. He took no action to settle the estate, failed to communicate with his client and admitted that he had never before settled an estate.

Discipline (continued)

Neglect (continued)

Committee on Legal Ethics of the West Virginia State Bar v. Hearst, (continued)

In separate matters for two other clients respondent failed to file a criminal appeal and failed to file a bankruptcy petition.

The Court held that respondent's actions showed a pattern of neglect worthy of a public reprimand.

Release from liability

Committee on Legal Ethics of the West Virginia State Bar v. Hazlett, 367 S.E.2d 772 (1988) (Brotherton, J.)

See ATTORNEYS Professional responsibility, Client's right to file, (p. 41) for discussion of topic.

Disqualification

Nicholas v. Sammons, 363 S.E.2d 516 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Disqualification, (p. 466) for discussion of topic.

ATTORNEYS

Fees

Multiple charges

Krivonyak v. Hey, 364 S.E.2d 18 (1987) (McGraw, J.)

Petitioners were appointed to represent an indigent indicted on multiple criminal charges. They submitted vouchers for each indictment and for each writ filed with the Court and with the United States Supreme Court. The total amount requested by Krivonyak was $8,157.11 and by Bland, $6,591.00. The circuit court judge authorized $2,000.00 for each.

Syl. pt. "To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded." Syl. Pt. 1, *State ex rel. Prince v. West Virginia Department of Highways*, 156 W.Va. 178, 195 S.E.2d 160 (1972).

Here the Court held that no clear legal right to payment exists. The Court cited *W.Va.Code*, 29-21-1, *et seq.*, and the Defense Counsel Voucher Instructions and Elated Materials (Revised March 1987) issued by the Public Legal Services Council, noting that the Council is charged with determining whether vouchers submitted meet statutory requirements.

Here, all criminal charges were resolved in one plea bargain agreement. The circuit court ruled that two separate cases were involved and awarded $2,000.00 to each counsel. Although counsel asserted that they were prepared to go to trial on all 21 separate charges, they made no showing that 21 separate trials would have been necessary.

Absent a showing of abuse of discretion, the Court denied petitioner's writ of mandamus.

Notice of hearing

Heydinger v. Starcher, No. 17491 (4/28/87) (Per Curiam)

See MENTAL HYGIENE Attorney's fees, Notice of hearing, (p. 416) for discussion of topic.

ATTORNEYS

Ineffective assistance

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p.322 322) for discussion of topic.

Professional responsibility

Committee on Legal Ethics of the West Virginia State Bar v. Walker, 358 S.E.2d 234 (1987) (McGraw, C.J.)

Respondent in this legal ethics proceeding was charged with breaking and entering his own law office, falsely accusing another of doing so, setting fire to his own home, threatening physical violence against two persons and knowingly tendering a worthless check for overdue interest on his burned home.

Respondent acknowledged the underlying events but denied wrongdoing, claiming he was suffering from extreme mental, financial and domestic problems.

The Committee on Legal Ethics found respondent guilty of violating Disciplinary Rules 1-102(A)(3)(4) and (6). It recommended that the Court suspend respondent's license pending a mental competency examination and annul respondent's license if respondent were to be found mentally competent.

The Court suspended respondent's license and remanded to the Committee to give the respondent the opportunity to present new evidence. At the subsequent hearing respondent chose not to contest the previous evidence. The Committee again recommended annulment.

Syl. pt. 1 - "In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syl. pt. 1, *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236 (W.Va. 1975).

The Court found here that the Committee met its burden.

Professional responsibility (continued)

Attorney-client relationship

Committee on Legal Ethics of the West Virginia State Bar v. Pettry, No. 17562 (7/2/87) (Per Curiam)

Respondent's attorney undertook representation of the administratrix and heirs of an estate regarding sale of real estate owned by the estate. Respondent was not retained as attorney for the estate. Following a complaint, respondent also agreed to assist, free of charge, in the transfer of common stock owned by the estate.

The complaint was reopened when respondent failed to effect the transfer of the stock. The Committee on Legal Ethics maintained that an attorney-client relationship existed between the respondent and the estate's administratrix and heirs. Despite some dispute as to the purpose of the fees, the respondent received a fee from the administratrix at the time the real estate was transferred and the heirs paid another fee upon the signing of the deed to them.

The Court held that establishment of an attorney-client relationship does not depend on payment of a fee; the parties' conduct may create it. See Syl. pt. 1, *Kennan v. Scott*, 61 S.E. 806 (W.Va. 1908); *Western Auto Supply Co. v. Dillard*, 153 W.Va. 678, 172 S.E.2d 388, at 393 (1970); and *State ex rel. Magun v. Sharp*, 143 W.Va. 594, 103 S.E.2d 792, at 794 (1958).

Here, the relationship was established, the respondent was deemed to have failed to complete the work in question and a public reprimand was imposed.

Burden of proof

Committee on Legal Ethics of the West Virginia State Bar v. Green - Thompson, 356 S.E.2d 623 (1987) (Per Curiam)

Respondent Green appeared before the Committee on Legal Ethics of the West Virginia State Bar to answer charges that she had falsified the date of an order so as to fall within the allowable time for appeal. The Committee recommended that the Court suspend respondent's license for six months.

ATTORNEYS

Professional responsibility (continued)

Burden of proof (continued)

Committee on Legal Ethics of the West Virginia State Bar v. Green - Thompson, (continued)

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence of the charges contained in the complaint filed on behalf of the Committee." Syl. pt. 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Here, the Court found that the Committee met its burden. However, the Court chose to suspend respondent's license for only three months due to her limited experience.

Syl. pt. 2 - "In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances in each case, including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate ..." Syl. pt. 2, in part, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976).

Committee on Legal Ethics of the West Virginia State Bar v. Harman, 367 S.E.2d 767 (1988) (Per Curiam)

Respondent Harman was accused of conspiring with a client to obtain a small amount of marijuana for the client while the client was incarcerated in the Marion County Jail.

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia Stat Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee." Syllabus Point 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 192 S.E.2d 312 (1973).

Professional responsibility (continued)

Burden of proof (continued)

Committee on Legal Ethics of the West Virginia State Bar v. Harman, (continued)

Syl. pt. 2 - "Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Legal Ethics Committee ... are to be given substantial consideration." *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

The Court found no conflicts in the evidence and held that the Committee had met its burden. Giving the Committee's findings "substantial consideration" the Court found respondent guilty but ordered only a public reprimand in light of her successful completion of probation on criminal charges and record of community service.

Client's right to file

Committee on Legal Ethics of the West Virginia State Bar v. Hazlett, 367 S.E.2d 772 (1988) (Brotherton, J.)

Respondent Hazlett was retained to pursue a personal injury action. His clients were dissatisfied and by letter of January 18, 1982, requested their file in order to retain another attorney. Receiving no response, the clients went to another attorney who wrote to Hazlett on March 15, 1984, also requesting the file.

Respondent wrote back on March 21, 1984, stating that he understood that a third attorney as to take the case. He requested that the clients execute a general release from liability before releasing the file. The attorney prepared a general release but advised the client' son that signing the release might bar a malpractice action against respondent. The clients did not sign.

In June, 1985, the clients requested a trial on their case. Respondent obtained a January, 1986 date but settled prior to trial.

ATTORNEYS

Professional responsibility (continued)

Client's right to file (continued)

Committee on Legal Ethics of the West Virginia State Bar v. Hazlett, (continued)

Syl. pt. - A lawyer's request for a release from personal liability before turning over a client's file violated DR6-102-(A) of the West Virginia Code of Professional Responsibility.

The Court gave respondent a public reprimand.

Neglect

Committee on Legal Ethics of the West Virginia State Bar v. Hearst, No. 18090 (4/21/88) (Per Curiam)

See ATTORNEYS Discipline, Neglect, (p. 35) for discussion of topic.

Prosecutorial conflict

Nicholas v. Sammons, 363 S.E.2d 516 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Disqualification, (p. 466) for discussion of topic.

Prosecuting

[See generally, PROSECUTING ATTORNEYS, (p. 462) this digest].

Chapman v. Summerfield, No. 17911 (11/17/87) (Per Curiam)

See PROSECUTING ATTORNEYS Disqualifications, (p. 465) for discussion of topic.

Prosecuting (continued)

Nicholas v. Sammons, 363 S.E.2d 516 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Disqualification, (p. 466) for discussion of topic.

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing argument, (p. 463) for discussion of topic.

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing arguments, (p. 463) for discussion of topic.

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Duties, Generally, (p. 468) for discussion of topic.

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing argument, (p. 464) for discussion of topic.

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

See PROSECUTING ATTORNEYS Duties, Debt collection, (p. 470) for discussion of topic.

ATTORNEYS

Prosecuting (continued)

Disqualification

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See PROSECUTING ATTORNEYS Disqualification, (p. 468) for discussion of topic.

Recommendation of committee

Committee on Legal Ethics of the West Virginia State Bar v. Harman, 367 S.E.2d 767 (1988) (Per Curiam)

See ATTORNEYS Professional responsibility, Burden of proof, (p. 40) for discussion of topic.

Reprimands

Committee on Legal Ethics of the West Virginia State Bar v. Harman, 367 S.E.2d 767 (1988) (Per Curiam)

See ATTORNEYS Professional responsibility, Burden of proof, (p. 40) for discussion of topic.

Committee on Legal Ethics of the West Virginia State Bar v. Hazlett, 367 S.E.2d 772 (1988) (Brotherton, J.)

See ATTORNEYS Professional responsibility, Client's right to file, (p. 41) for discussion of topic.

Committee on Legal Ethics of the West Virginia State Bar v. Hearst, No. 18090 (4/21/88) (Per Curiam)

See ATTORNEYS Discipline, Neglect, (p. 35) for discussion of topic.

Reprimands (continued)

Committee on Legal Ethics of the West Virginia State Bar v. Pettry, No. 17562 (7/2/87) (Per Curiam)

See ATTORNEYS Professional responsibility, Attorney-client relationship, (p. 39) for discussion of topic.

Suspensions

Committee on Legal Ethics of the West Virginia State Bar v. Green-Thompson, 356 S.E.2d 623 (1987) (Per Curiam)

See ATTORNEYS Professional responsibility, Burden of proof, (p. 39) for discussion of topic.

BIFURCATION

Multiple defense

State v. Lusk, 354 S.E.2d 613 (1987) (Brotherton, J.)

See DEFENSES Bifurcated trial on multiple defenses, (p. 88) for discussion of topic.

BRIBERY AND CORRUPT PRACTICE

Generally

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

See POLICE OFFICER Scope of duty, Remuneration for, (p. 437) for discussion of topic.

Public officials

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

See PUBLIC OFFICIALS Bribery and corrupt practices, (p. 475) for discussion of topic.

BURDEN OF PROOF

Admissions against interest

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See SELF-INCRIMINATION Voluntariness, Burden of proof, (p. 554) for discussion of topic.

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 560) for discussion of topic.

Alibi defense

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See DEFENSES Alibi, (p. 84) for discussion of topic.

Ineffective assistance of counsel

State v. Cain, 359 S.E.2d 581 (1987) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Burden of proof, (p. 308) for discussion of topic.

State v. Chamberlain, 359 S.E.2d 858 (1987) (Per Curiam)

See INEFFECTIVE ASSISTANCE Burden of proof, (p. 308) for discussion of topic.

Legal ethics proceedings

Committee on Legal Ethics of the West Virginia State Bar v. Harman, 367 S.E.2d 767 (1988) (Per Curiam)

See ATTORNEYS Professional responsibility, Burden of proof, (p. 40) for discussion of topic.

BURGLARY

Instructions

Aiding and abetting

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions.

Finding that the appellant must be given a new trial, the Court reviewed the assignments of error in the burglary trial.

Appellant alleges instructional error by the trial court. The appellant protested the trial court's instruction that if the jury was convinced beyond a reasonable doubt that the appellant was present and aided and abetted another in burglarizing the residence, they could find the appellant guilty as principal in the second degree.

Syl. pt. 7 - "[A] general indictment as a principal in the first-degree shall be sufficient to sustain a conviction as an aider and abettor ..." Syl. pt. 1, *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980).

The Court found the prohibition against aiding and abetting instructions in instances where the indictment only charges the defendant as a principal in the first-degree has also been abolished.

The appellant contends the jury inferred from the instruction that the appellant, by his mere presence, was guilty of a crime. The Court found the instruction given prohibits the jury from making such an inference. The appellant also contends there was no showing that the defendant participated as a principal in the burglary. The Court found no merit to this contention.

Instructions (continued)

Aiding and abetting (continued)

State v. Reedy, (continued)

The trial court concluded the jury could find the appellant guilty of daytime burglary as a principal in the first-degree, guilty of aiding and abetting in the daytime burglary, or not guilty of daytime burglary. The Court agreed and found the aiding and abetting instruction proper.

The appellant protests the trial court's refusal to instruct regarding the lesser included offense of entering without breaking a dwelling house. The trial court was unable to ascertain evidence of entering without breaking, because none was presented by either the State or the appellant. There was no factual conflict as to the element of breaking. The Court concluded the appellant was not entitled by any evidence at trial to a lesser included offense instruction.

Lesser included offense

State v. Hutcheson, 352 S.E.2d 143 (1986) (Miller, C.J.)

Appellant appeals three burglary convictions.

He contends there was insufficient evidence to warrant his conviction. Reviewing the evidence, the Court found no merit to this allegation.

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See BURGLARY Instructions, Aiding and abetting, (p. 49) for discussion of topic.

CARRYING A DANGEROUS OR DEADLY WEAPON

Elements of the offense

Absence of a license

State v. Wallace, 337 S.E.2d 316 (1985) (Per Curiam)

Appellant was convicted of unlawfully carrying a deadly weapon. During the trial, the State introduced evidence indicating that the pistol used during the attempted robbery had been stolen but did not directly prove that the defendant did not have a license or other legal authorization for carrying the pistol.

Syl. pt. 2 - "The absence of a license is an element of the crime of carrying a dangerous or deadly weapon without a license and the burden of proof as to this element must be borne by the State. To the extent it diverges from this opinion, *State v. Merico*, 77 W.Va. 314, 87 S.E. 370 (1913) is hereby overruled." Syl. pt. 6, *State v. Hodges*, 172 W.Va. 322, 305 S.E.2d 278 (1983).

The Court found the trial court erred in giving State's Instruction B and the defendant's conviction must be reversed.

Weapon defined

State v. Choat, 363 S.E.2d 493 (1987) (McHugh, J.)

See STATUTES Statutory construction, Dangerous or deadly weapon, (p. 620) for discussion of topic.

CIRCUMSTANTIAL EVIDENCE

In general

State v. Kelly, 338 S.E.2d 405 (1985) (Per Curiam)

Syl. pt. 2 - "Circumstantial evidence will not support a guilty verdict, unless the fact of guilt is proven 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." Syl. pt. 2, *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979).

COMPETENCY

Children

To testify

State v. Jones, 362 S.E.2d 330 (1987) (Neely, J.)

See WITNESSES Competency to testify, Children, (p. 655) for discussion of topic.

Criminal responsibility

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

Appellant was convicted of attempted murder, malicious wounding, brandishing a pistol, carrying an unlicenced weapon and destruction of property. He raised the issue of insanity at trial. A pre-trial hearing was held on that issue.

The Court applied the test of competency to stand trial.

Syl. pt. 6 - "No person may be subjected to trial on a criminal charge when, by virtue of mental incapacity, the person is unable to consult with his attorney and to assist in the preparation of his defense with a reasonable degree of rational understanding of the nature and object of the proceedings against him." Syl. pt. 1, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

Distinguished from credibility

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See WITNESSES Competency, Generally, (p. 654) for discussion of topic.

COMPETENCY

Failure to make finding

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

Appellant was convicted of attempted murder, malicious wounding, brandishing a pistol, carrying an unlicenced weapon and destruction of property. At trial he raised an insanity defense. The sequence for examination in *W.Va.Code*, 27-6A-2 was not followed. The trial court did not receive a copy of the examining psychiatrist's opinion and no initial finding of competency to stand trial was made.

The Court restated the general test for determining competency to stand trial (see Syl. pt. 1, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976)) and then noted that the issue of mental capacity at the time a crime is committed is not a matter to be determined under *W.Va.Code*, 27-6A-1. The hearing contemplated therein is limited to competency to stand trial. See *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199, *cert. denied*, 103 S.Ct. 338 (1983).

Syl. pt. 4 - "A trial judge's failure to make a finding that 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 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. 1, *State v. Church*, 168 W.Va. 408, 284 S.E.2d 897 (1981).

Syl. pt. 5 - "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." Syl. pt. 2, *State v. Church*, 168 W.Va. 408, 284 S.E.2d 897 (1981).

Here the Court found no prejudice sufficient for reversal.

COMPETENCY

Right to examination

State ex rel. Perry v. Watt, No. 18231 (2/24/88) (Per Curiam)

The defendant was an indigent. Her defense counsel filed a motion for a psychiatric examination pursuant to *W.Va.Code*, 27-6A-1 and for expenses to hire a psychologist or psychiatrist pursuant to *W.Va.Code*, 29-21-14(e)(3).

The Court found that some showing of irrational behavior must be made in order to obtain the examination. *e.g.*, *State v. Watson*, 173 W.Va. 553, 318 S.E.2d 603 (1984); *State v. Myers*, 167 W.Va. 663, 280 S.E.2d 299 (1981); *State v. Echard*, 167 W.Va. 900, 280 S.E.2d 724 (1981); *State v. DeMastus*, 165 W.Va. 572, 270 S.E.2d 649 (1989). Finding no such showing here, the Court declined to rule, noting that counsel may renew his motion.

Right to hearing

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See COMPETENCY Failure to make finding, (p. 54) for discussion of topic.

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

Appellant was convicted of attempted arson. He assigned as error the trial court's failure to hold a hearing to determine his competency to stand trial.

The defense moved, pursuant to *W.Va.Code*, 27-6A-1, to have the appellant examined for competency to stand trial and for criminal responsibility. Following an examination, the trial court found the defendant competent and criminally responsible. The court's finding was conveyed to defense counsel.

Syl. pt. 7 - When a defendant and his counsel have notice of the court's finding of competency to stand trial, under *W.Va.Code*, 27-6A-1(d), their failure to make a request for a competency hearing within a reasonable time from the receipt of the court's finding will constitute a waiver of the right to such a hearing.

Here, no request for hearing was made.

COMPETENCY

Three term rule

State v. Bias, 352 S.E.2d 52 (1986) (McHugh, J.)

See COMPETENCY To stand trial, Commitment to state mental hospital, (p. 57) for discussion of topic.

To stand trial

State v. Swiger, 336 S.E.2d 541 (1985) (McHugh, J.)

Syl. pt. 2 - "An accused person, although he may have been sane at the time of the acts charged, cannot be tried, sentenced or punished while mentally incapacitated." Syl. pt. 1, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975), *overruled upon other grounds* in syl. pt. 4, *State v. DeMastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

Syl. pt. 3 - "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 him." Syl. pt. 2, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975), *overruled on other grounds* in syl. pt. 4, *State v. DeMastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

Syl. pt. 4 - A circuit court committed reversible error in finding a criminal defendant mentally competent to stand trial, where the sole witnesses who testified at the hearing to determine the defendant's competency were a psychologist and a psychiatrist, and the record clearly revealed that, (1) the testimony of the psychologist that the defendant was competent to stand trial was equivocal and subject to a previous indication by that psychologist that a psychiatric evaluation should be conducted to "support or deny" the psychologist's opinion concurring the defendant's competency, and (2) the psychiatrist, who examined the defendant upon two occasions, consistently maintained that the defendant was incompetent to stand trial. *W.Va.Code*, 27-6A-2 [1979].

COMPETENCY

To stand trial

State v. Swiger, (continued)

Syl. pt. 5 - Where a defendant in a felony case, found by a court of record to be incompetent to stand trial, is civilly committed to a mental health facility pursuant to *W.Va.Code*, 27-6A-2(d) [1979], and *W.Va.Code*, 27-5-1 [1979], *et seq.*, the defendant's competency to stand trial shall, pursuant to *W.Va. Code*, 27-6A-2(d) [1979], thereafter be periodically reviewed.

Commitment to state mental hospital

State v. Bias, 352 S.E.2d 52 (1986) (McHugh, J.)

The defendant was indicted for murder in January, 1969. Upon defense counsel's motion, after two physicians had found him to be psychotic, the court committed the defendant indefinitely to a mental hospital in March, 1969, until he was competent to stand trial. Less than six months later he was returned to jail prompted a reexamination for competency and defendant was committed a second time in March, 1970.

Between March, 1970, and February, 1971, the defendant escaped four times from the mental hospital. He was then confined continuously in the mental hospital from February, 1971 to February, 1972, when he escaped again. Nearly a year and one-half later, he was extradited from Indiana where he was found. In February, 1974, the defendant was committed for a third time, upon defense counsel's motion. He escaped again and remained free for the next five and two-third years.

In November, 1979, he was arrested in the state and was subsequently found to be competent to stand trial after examination and a competency hearing. In May, 1980, defendant was found guilty of first-degree murder, without a recommendation of mercy. In March, 1983, the conviction was reversed on ineffective assistance grounds. Defendant was then brought from the penitentiary to jail to await trial.

The Circuit Court of Logan County certified two questions to the Court pursuant to *W.Va.R.App.P.* 13 and *W.Va.Code*, 58-5-2 (1967):

State v. Bias, (continued)

> (1) Does the trial court lack jurisdiction to try a criminal defendant who was on three occasions between 1969 and 1973 found to be incompetent to stand trial and was committed to a state mental hospital, by virtue of *State ex rel. Walker v. Jenkins*, 157 W.Va. 683, 203 S.E.2d 353 (1974), and by virtue of *W.Va.Code*, 27-6A-2, as effective in 1974 (2) Does the court lack jurisdiction to try this defendant, by virtue of *W.Va. Code*, 62-3-21 [1959]?

Here, the defendant was committed involuntarily to a state mental hospital, pending his attaining competency to stand trial, without interruption for the one year period between February 1971, and February 1972. The Court found this one-year period was *prima facie* unreasonably long under *State ex rel. Walker v. Jenkins*, 157 W.Va. 683, 203 S.E.2d 353 (1974). The Court found the State has not shown on this record that commitment of the defendant at that time for more than eight months, in light of the then chronic nature of his psychosis, was justified by progress toward attaining competency. The Court found this one-year commitment period exceeded the maximum period of ten and one-third months allowed under *W.Va.Code*, 27-6A-1 and 27-6A-2, as amended.

The issue presented was whether pending felony charges must be dismissed and further prosecution forever barred once it has been determined, as here, that the defendant had been committed to a mental institution, solely on account of incompetency to stand trial, for an excessive period of time.

Appellant contends *W.Va.Code*, 27-6A-2, as enacted in 1974 and prior to its amendment in 1979, is applicable in that it expressly requires dismissal of the criminal charges.

The 1979 version of this section explicitly requires in a case involving felony charges, that there be a review of the individual's competency to stand trial every six months and explicitly mandates a trial on a felony charge whenever

State v. Bias, (continued)

the individual becomes competent to stand trial. In this case the alleged criminal offense occurred prior to the effective date of the 1979 amendment. The court found the statute would not be applied retroactively.

The 1974 version of *W.Va.Code*, 27-6A-1 through 8 did not forever bar further prosecution of a person who is initially found to be incompetent to stand trial with no substantial likelihood of obtaining competency or who is found to be incompetent to stand trial after the six - nine month improvement period. *W.Va.Code*, 27-6A-5 provided for periodic review, for commitment to a mental institution to be terminated and for the return of the person for trial whenever a court, after a hearing, finds the person is competent to stand trial.

The Court found the statutory law providing for an accused to be brought to trial on a felony charge whenever the accused attains competency to stand trial, must comport with procedural due process. (See case for discussion).

Syl. pt. 2 - Being a bar to trial, an accused's incompetency to stand trial, regardless of the duration thereof, will not, as a matter of due process, ordinarily require dismissal of an indictment for a felony. The State must, however, show that the accused suffered no substantial prejudice beyond that which ensued from the ordinary and inevitable delay attendant to the attainment of competency to stand trial.

Here, the bulk of the delay prior to the trial in 1980 was due to the defendant's numerous and occasionally lengthy escapes from mental hospitals. The delay after 1980 was due to appeal and reevaluation of competency to stand trial. The State has the burden of proof on the issue of insanity and the passage of time prejudiced the State in carrying this burden. The defendant also has evidentiary burdens with respect to the insanity defense and the eighteen-year delay presumptively prejudiced the defendant's ability to present the defense. The Court found that prior to trial, the State must show, and the trial court must find, that any substantial prejudice to the defendant's ability to present his insanity defense was not attributable to the State.

State v. Bias, (continued)

Syl. pt. 3 - Any term during which the defendant is unable to be tried because his or her competency to stand trial is being tested or evaluated does not count in favor of discharge from prosecution under the three-term rule, *W.Va.Code*, 62-3-21 [1959].

Syl. pt. 4 - "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 os discharge from prosecution under the provisions of *W.Va.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 case was remanded.

COMPULSORY PROCESS

Denial of

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Denial of compulsory process, (p. 96) for discussion of topic.

Not a guarantee of actual attendance of witnesses

State v. Goad, 355 S.E.2d 371 (1987) (Brotherton, J.)

Appellant's estranged wife failed to appear as a witness even though she had been located in Illinois, ordered to appear and was subject to a protective order to guarantee her safety. The Court found although a criminal defendant has a right to compulsory process, the right does not guarantee the actual attendance of witnesses, and their absence does not preclude a lawful trial. The Court found the trial court need not grant a continuance due to absence of a material witness when there is no evidence that the witness is within the jurisdiction or can be procured at any future time.

CONFESSIONS

Generally

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See HARMLESS ERROR Constitutional, Generally, (p. 265) for discussion of topic.

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Prompt presentment, (p. 560) for discussion of topic.

Coerced

Misrepresentations by police

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He contended his confessions were involuntary and were coerced by improper police behavior.

The investigating officer discovered an abandoned car with blood and debris in the passenger area. He opened the trunk and discovered the victim's body. Based on statements given by a bartender who had seen the victim the night before her body was found, the police obtained a search warrant for defendant's car and a trailer where the defendant and another man were believed to reside. This warrant was later found invalid (see SEARCH AND SEIZURE Warrant, Testimony outside of affidavit, (p. 539) this Digest) but the evidence admitted on the basis of the voluntary consent to search (See SEARCH AND SEIZURE Consent search, Voluntariness, (p. 519) this digest.

The owner of the trailer, the defendant's father, allowed police access to the trailer voluntarily, assuring them that a warrant was unnecessary. The defendant and a bobby Hudnell were in the trailer. Defendant was detained in the police car while police searched the trailer and purportedly told that if he would "tell everything that happened" his bond would be set "real low" and he would be in jail only "a couple of days." A pistol matching the description in the warrant was seized in the defendant's bedroom. Defendant and Hudnell were advised of their *Miranda* rights and taken into custody.

CONFESSIONS

Coerced (continued)

Misrepresentations by police (continued)

State v. Worley, (continued)

Defendant subsequently made several incriminating statements and led police to further incriminating evidence. Defendant was then erroneously told of Hudnell's making a statement (either through police or through his father; the evidence is in conflict). After signing a waiver of his right to counsel, defendant admitted robbing the victim but denied killing her; he did admit his presence during the murder.

Syl. pt. 6 - Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability.

The prosecution must prove the voluntariness of the confession. See *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975). However, the Court did not agree that any possible misrepresentations made here were sufficient to overwhelm the defendant's free will.

Involuntary

Admissibility

State v. Randle, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

Obtained without prompt presentment

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 561) for discussion of topic.

CONFESSIONS

Sufficiency for conviction

State v. Dean, 363 S.E.2d 467 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Confessions, Sufficient for conviction, (p. 627) for discussion of topic.

Voluntariness

State v. Dean, 363 S.E.2d 467 (1987) (Per Curiam)

Appellant was convicted of second degree arson.

In the course of allowing himself to be taken to a mental health center appellant admitted to a fire department investigator that he had been involved in several fires. The investigator summoned police, who advised appellant of his *Miranda* rights. Appellant gave a written waiver, followed by a detailed recorded confession admitting complicity in setting a fire. Appellant accompanied by the fire department investigator to the scene of the fire where he gave additional details.

The trial court allowed the recorded confession into evidence but suppressed the other statements for lack of voluntariness. After reviewing the law relating to voluntariness of confessions (see *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975) and *State v. Parsons*, 108 W.Va. 705, 150 S.E. 745 (1930) the Court noted that a trial court has wide discretion in admitting confessions into evidence. See Syllabus Points 3 and 4, *State v. McDonough*, 178 W.Va. 1, 357 S.E.2d 34 (1987).

Here, the recorded testimony was admissible.

During redirect on the general issue of appellant's recorded confession, the trial court allowed questioning regarding appellant's initial statements to the fire department investigator. While noting that an involuntary confession cannot be used (see *State v. Goff*, 169 W.Va. 778, 289 S.E.2d 473 (1982) *State v. Burgess*, 174 W.Va. 784, 329 S.E.2d 856 (1985), the Court held that any error in the admission of this testimony was harmless. The testimony was merely duplicative of other admissible statements. (See cases cited in text).

Voluntariness (continued)

State v. Dean, (continued)

Syl. pt. 2 - "'Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975)." Syllabus Point 1, *Maxey v. Bordenkircher*, 175 W.Va. 49, 330 S.E.2d 859 (1985).

State v. Haller, 363 S.E.2d 719 (1987) (Neely, J.)

Appellant was convicted of delivering a controlled substance. On appeal he challenged the sufficiency of the evidence that the substance delivered was in fact a controlled substance. The primary evidence was a signed custodial confession that the appellant had delivered cocaine to another.

The Court found that the trial court had a duty to inquire as to the voluntariness of this confession (Syllabus Point 1, *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 669 (1966)) and that the prosecution must prove that the defendant was aware of his constitutional rights prior to confessing (*State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, 266 (1982)).

Syl. pt. 1 - "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." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Here, the Court found no clear error.

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See RIGHT TO COUNSEL Waiver, Effect of police interrogation, (p. 506) for discussion of topic.

State v. Randle, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

Voluntariness (continued)

Delay in taking before magistrate

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Delay in taking before magistrate, (p. 561) for discussion of topic.

CONFLICT OF INTEREST

Public officials

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

See PUBLIC OFFICIALS Conflict of interest, (p. 475) for discussion of topic.

CONFRONTATION CLAUSE

Denial of right to cross-examine

State v. Eye, 355 S.E.2d 921 (1987) (Brotherton, J.)

Appellant was convicted of burglary, grand larceny, arson, arson with intent to defraud an insurer and four counts of conspiracy to commit the above offenses. He contends the court erred in limiting his cross-examination of a key prosecution witness concerning possible bias. The witness was an alleged witness into the robbery. The witness had pending against him misdemeanor sexual assault charge and grand larceny charges, both of which were dropped. The trial court did not allow inquiry into this on cross-examination.

The Court found the confrontation clause of the Sixth Amendment coupled with the Fourteenth Amendment, guarantees the right of an accused in a criminal prosecution to confront witnesses against him. The Court found the facts in this case were similar to those in *Delaware v. Van Arsdall*, 106 S.Ct. 1431 (1986) and found the trial court erred in not allowing some inquiry into whether or not the dropped charges could have affected the witness's testimony.

CONSPIRACY

Proof of

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See EVIDENCE Admission pending foundation, (p. 185) for discussion of topic.

CONTEMPT

Civil

State ex rel. Britton v. Workman, 346 S.E.2d 562 (1986) (Per Curiam)

Syl. pt. 1 - "Where the purpose to be served by imposing a sanction for contempt 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. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Syl. pt. 2 - "The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for a 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." Syl. pt. 3, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Civil - criminal distinction

State ex rel. UMWA International Union v. Maynard, 342 S.E.2d 96 (1985) (Miller, C.J.)

Syl. pt. 3 - "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." Syl. pt. 1, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Syl. pt. 4 - "[W]hen a party is required to pay a fine to the State in order to purge himself of contempt the imposition of such fine makes the action one for criminal contempt." Syl. pt. 10, in part, *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 220 S.E.2d 672 (1975).

Syl. pt. 5 - A circuit court has no authority to impose a prospective penalty in an indirect criminal contempt proceeding whereby a specific fine was imposed payable to the State for a subsequent violation of the court's order.

CONTEMPT

Civil - criminal distinction (continued)

United Mine Workers of America v. Faeber, 365 S.E.2d 353 (1986) (Brotherton, J.)

Syl. pt. 2 - "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." Syl. pt. 1, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Syl. pt. 3 -"Where the purpose to be served by imposing a sanction for contempt 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. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Syl. pt. 4 - "The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for a 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." Syl. pt. 3, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Discovery

Vincent v. Preiser, 338 S.E.2d 398 (1985) (McHugh, J.)

Syl. pt. 1 - A movant for a protective order under *W.Va.R.Civ.P.* 26(c)(4) may be held in contempt of court under *W.Va.R.Civ.P.* 37(b)(2) (D), for failure to comply with court orders compelling discovery, where a fair reading of the orders compelling discovery as well as the circumstances, including repeated oral rulings of the court, indicate that the Rule 26(c)(4) motion(s) have been denied. The Rule 26(c)(4) movant in such a case, by filing such motion(s), does not, in effect, grant himself a protective order until the court expressly denies the motion(s) for protective order.

Discovery (continued)

Vincent v. Preiser, (continued)

Syl. pt. 2 - "A circuit court does not have authority to place a one-percent-per-day penalty, payable to the injured party, for unpaid, *pendente lite* support." Syl. pt. 4, *Gant v. Gant*, 174 W.Va. 740, 329 S.E.2d 106 (1985).

Syl. pt. 3 - "Where the purpose to be served by imposing a sanction for contempt 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. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Syl. pt. 4 - "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 contemner may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the failure of the contemner to comply with the order." Syl. pt. 3, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Applies standard set forth in Syl. pt. 5, *State ex rel. UMWA International Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985). (See CONTEMPT Civil - criminal distinction, (p. 70) this digest.

CONTINUANCE

Absence of material witness

State v. Goad, 355 S.E.2d 371 (1987) (Brotherton, J.)

See COMPULSORY PROCESS Not a guarantee of actual attendance of witnesses, (p. 61) for discussion of topic.

Inadequate opportunity to prepare

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant contends the trial court erred in failing to grant his motion for a continuance. The Court found review of the record reveals no abuse of discretion with regard to the trial court's refusal to grant the appellant's motion for continuance. With respect to the issue of opportunity for adequate preparation, the Court found trial counsel in this case had represented the appellant for almost seven months prior to trial and had previously secured a continuance two months earlier. The Court found trial counsel was afforded a "reasonable time to prepare for trial." With respect to the absence of a witness, the Court found trial counsel gave no indication to the trial court with regard to what efforts had been made to secure the attendance of this witness and that the witness' testimony would not have provided the appellant with an alibi for the time of the robbery anyway, but would have served only to undermine his alleged accomplice's testimony. With respect to the late production of the bill of particulars and information concerning the co-indictee's plea agreement, the Court found no specific allegation of harm was made with respect to either the bill of particulars or the information concerning the co-indictee's plea agreement. With respect to the defense attorney's competing federal court obligations, the Court found accommodations were made on two occasions during appellant's trial to permit his counsel's attendance in federal court at unspecified hearings.

The Court concluded the trial court's refusal to grant appellate another continuance did not constitute an abuse of discretion.

CONTROLLED SUBSTANCES

Constructive possession

Proof thereof

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

See CONTROLLED SUBSTANCES Proof of possession, (p. 77) for discussion of topic.

Delivery

Lesser included offense

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant was convicted of delivery of marijuana. She contends the trial court erred in refusing to instruct the jury on the lesser included offense of possession of marijuana and in refusing to allow the jury to return a possession verdict.

During the course of the trial, the defendant did not take issue with the State's contention that she had sold marijuana to the informant. Rather, she relied on the defense of entrapment.

Where a defendant is charged with delivery of marijuana and does not attempt to controvert the charge of delivery, but instead relies upon a defense, he is not entitled to an instruction on the lesser offense of possession of the substance. *State v. Ruddle*, 170 W.Va. 669, 295 S.E.2d 909 (1982).

The Court found this holding indicates the defendant was not entitled to a lesser included offense instruction or verdict.

Identification by non-experts

State v. Haller, 363 S.E.2d 719 (1987) (Neely, J.)

See EVIDENCE Opinion, Non-expert, (p. 205) for discussion of topic.

CONTROLLED SUBSTANCES

Indictment

Delivery

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant was convicted of delivery of marijuana.

The indictment charged the defendant with "unlawfully, knowingly, intentionally, and feloniously delivering unto Scott Myers, for remuneration, a certain quantity of marijuana." Appellant contends because the indictment contained the words "for remuneration" it included a pecuniary element in the charge and thus improperly stated the law relating to the unlawful delivery of marijuana and rendered the indictment defective.

The Court found the words "for remuneration" were pure surplusage in the indictment and that inclusion of surplusage in an indictment is not a fatal defect which renders conviction upon the indictment reversible. *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).

Mandatory probation

First offense distribution of less than 15 grams

State v. Carper, 342 S.E.2d 277 (1986) (Miller, C.J.)

The defendant pleaded guilty to the delivery of less than fifteen grams of marijuana without remuneration and was sentenced to serve 1-5 years in the penitentiary and fined $10,000. The defendant contends on appeal he was entitled to mandatory probation.

Syl. pt. 2 - *W.Va.Code*, 60A-4-402(c), mandates that a defendant guilty of a first offense for distributing less than fifteen grams of marijuana without any remuneration is entitled to mandatory probation under *W.Va.Code*, 60A-4-407.

Mandatory probation (continued)

First offense distribution of less than 15 grams (continued)

State v. Carper, (continued)

State v. Dudick, 158 W.Va. 629, 213 S.E.2d 458 (1975) noted that the Legislature intended that less than fifteen grams of marijuana might be possessed by young adults who were unaware of its dangers. The Court found the same may be said of unremunerative delivery of less than fifteen grams of marijuana between friends.

The Court remanded the case to the circuit court so that the defendant could have an opportunity to establish whether this was his first drug-related offense. If the defendant can establish that he meets the requirements of *W.Va.Code* 60A-4-402(c), he is entitled to mandatory probation. If he is found ineligible, the circuit court must accord the defendant his rights under Rule 32 of the W.Va. Rules of Criminal Procedure with regard to his right of allocution and his right to challenge the presentence report.

Manufacturing

Lesser included offenses

State v. Curtin, 332 S.E.2d 619 (1985) (Per Curiam)

Appellant was convicted of manufacturing and cultivating a controlled substance. He contends the verdict form would have contained the lesser included offense of possession as to the manufacturing and cultivating charge against him. The Court found defense witnesses testified at trial that they saw no marijuana growing in the garden and that the evidence offered by the State tended to prove that there was a large quantity of marijuana plants growing in an area of approximately forty-three square feet, some plants as high as six feet. The Court found there was no evidence in this case to support a verdict of a lesser included offense.

CONTROLLED SUBSTANCES

Possession with intent to manufacture or deliver

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

See INSTRUCTIONS Generally, Incomplete, (p. 335) for discussion of topic.

Proof of intent to deliver

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Controlled substance, Possession with intent to deliver, (p. 628) for discussion of topic.

Proof of possession

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

Appellant was a visitor at another's residence when police searched the residence pursuant to a search warrant. A controlled substance was found, along with a small amount of marijuana. The owner of the residence told police that the controlled substance was for his back pain. No controlled substances were found on appellant's person nor were appellant's fingerprints on any controlled substance. Police arrested the owner and the appellant for possession of a controlled substance. Appellant was convicted of possession with intent to deliver. He contends on appeal that the evidence was insufficient to convict him.

Syl. pt. 2 - "In West Virginia mere physical presence on premises in which a controlled substance is found does not give rise to a presumption of possession of a controlled substance, but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance." Syl. Pt. 3, *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975).

Syl. pt. 3 - "The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of a controlled substance and that it was subject to defendant's dominion and control." Syl. Pt. 4, *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975).

CONTROLLED SUBSTANCES

Sufficiency of indictment

Cocaine

State v. Fitcher, 337 S.E.2d 918 (1985) (Per Curiam)

The indictment against the appellee alleged that the appellee had committed the offense of delivery of a controlled substance by "... delivering a controlled substance, cocaine, which is a derivative of non-decocainized coca leaves ..." The circuit court granted the defendant's motion to dismiss the indictment on the ground it failed to adequately charge a crime.

Syl. pt. 1 - "Cocaine is a Schedule II Controlled Substance under *W.Va.Code*, 60A-2-206(4)." Syl. pt. 2, *State v. Adkins*, 168 W.Va. 330, 284 S.E.2d 619 (1981).

The defendant contends the language in the indictment describing cocaine as a derivative of non-decocainized coca leaves is inaccurate. The Court found the clear intent of the indictment was to define the substance so that it did not fall within the statutory exception of decocainized coca leaves.

The appellee also contends the indictment was insufficient since it failed to state whether cocaine is a narcotic or non-narcotic drug. The Court found this argument to be frivolous. Because cocaine is a derivative of coca leaves, it is included in the definition of narcotic drug in *W.Va.Code*, 60A-1-101(P)(4).

CRITICAL STAGE

Actions taken in defendant's absence

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

Relator contends several actions were taken by the trial court in her absence or at least without a record of what was done.

Relator refers to an order dated May 15, 1984, which set the case for trial on June 6, 1984. A subsequent order dated June 18, 1984, showing the relator's presence with counsel, continued the case to the next regular term of court on the relator's motion. Relator argues something must have occurred on the June 6, 1984 trial date by way of a continuance when she was not present. The Court found since the relator moved for and was granted a continuance on June 18, 1984, without referring to the June 6, 1984 trial date, there was no violation under *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977). (*Boyd* dealt with a defendant's constitutional right to be present at all critical stages of a criminal proceeding).

The relator also argues that she was not present when the trial court actually made its appointment of the psychiatrist and psychologist who conducted the additional mental examinations of the relator. The Court found it was clear from the record that the relator was present with her counsel in court each time the trial court determined that a mental examination was needed. At the January 17, 1985 hearing, the relator's counsel and the prosecutor were given the opportunity to agree on the psychiatrist and psychologist but were unable to reach an agreement. The Court found the trial court's later selection of a psychiatrist does not constitute a critical stage of the proceedings.

Enhancement modification

State ex rel. Everett v. Hamilton, 337 S.E.2d 312 (1985) (Brotherton, J.)

See RECIDIVISM Right to appear at enhancement modification, (p. 488) for discussion of topic.

CRITICAL STAGE

Right to be present

Communications between judge and jury

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

Appellant was charged with receiving stolen goods. After deliberating for about two hours, the jury informed the bailiff they were "hopelessly deadlocked." The bailiff told the trial judge of the situation and the judge, without informing the appellant or counsel, sent a message to the jury to continue deliberating. The jury returned a guilty verdict of grand larceny 45 minutes later. Just before announcing the verdict, the judge informed the appellant and counsel about what transpired during the deliberations. At the request of appellant's counsel, the events surrounding the judge's communication with the jury were placed on the record.

The Court found the conduct of the trial judge in communicating with the jury, in the absence of the appellant and hi counsel, was improper. The Court found "the court should have called the jury back into the courtroom and there, in the presence of the defendant, given its further instructions." *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

The Court reversed the case on other grounds and found it unnecessary to make any further determination of whether the trial court's conduct was harmless. They cited, however, to *Rushen v. Spain*, 464 U.S. 114 (1983), where it was held that an *ex parte* communication between the trial judge and the jury may be harmless, even though the constitutional rights to assistance of counsel and presence may be implicated.

CROSS-EXAMINATION

See WITNESSES Impeachment, (p. 660) generally.

Limitation of cross-examination by defense counsel

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

The Court found no abuse of discretion with respect to the scope of cross-examination allowed defense in this case.

State v. Eye, 355 S.E.2d 921 (1987) (Brotherton, J.)

See CONFRONTATION CLAUSE Denial of right to cross-examine, (p. 68) for discussion of topic.

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends the trial judge committed reversible error by significantly precluding defense counsel from conducting a meaningful and effective cross-examination of several of the State's witnesses. In one instance, the court limited cross-examination after defense counsel had cross-examined the witness for approximately fourteen pages on the record. In anther instance, the court prohibited defense counsel from questioning an expert during recross-examination on matters not raised on re-direct. In the third instance, the court limited the cross-examination of a deputy after the witnesses and defense counsel became involved in a discussion over whether the prosecution's chief witness should be designated as a "victim" or "alleged victim."

The Court found the judge was acting within his discretion in each instance.

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. He contends the defense was limited in its cross-examination of a key prosecution witness. The witness was a police officer who had allegedly made some statements which were inconsistent with testimony at an accomplice's trial. The prosecution insisted a proper foundation be laid for the impeachment, including showing the wit-

Limitation of cross-examination by defense counsel (continued)

State v. Mayle, (continued)

ness the statement and allowing him to admit or deny. The trial court ordered the court reporter to transcribe the relevant portions of the accomplice's trial for impeachment purposes. The officer was later recalled as a witness by the defense and asked about the testimony. The Court found he was allowed to do so with leading questions in a fashion similar to cross-examination. The Court found cross-examination was not limited and found no error.

Of defendant

See WITNESSES Impeachment, (p. 660) for discussion of topic.

Re-enactment of the crime

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See DENIAL OF A FAIR TRIAL Cross-examination of defendant, Re-enactment of the crime, (p. 94) for discussion of topic.

Trial court's restriction of

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See DENIAL OF A FAIR TRIAL Cross-examination of defendant, Re-enactment of the crime, (p. 94) for discussion of topic.

CRUEL AND UNUSUAL PUNISHMENT

Consecutive sentences

State ex rel. White v. White, No. 17918 (10/22/87) (Per Curiam)

See SENTENCING Consecutive sentences, (p. 586) for discussion of topic.

Prison/jail conditions

Facility Review Panel v. Holden, 356 S.E.2d 457 (1987) (Per Curiam)

See PRISON/JAIL CONDITIONS Cruel and unusual punishment, (p.441 441) for discussion of topic.

DEFENSES

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See generally COMPETENCY (p. 53) this Digest.

Alibi

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

The trial court, over defense objections, amended defendant's alibi instruction and, in effect placed on the defendant the burden of proving his alibi.

The Court found that, based on *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.), *cert. denied*, 459 U.S. 853 (1982), and *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983), the alibi instruction was constitutionally defective and reversible error.

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

Appellant was convicted of felony-murder. On appeal, he contended that the trial court improperly instructed the jury that the defense carried the burden of proving an alibi.

Appellant was convicted November 17, 1980; his counsel made no objection at trial to the instruction. *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983) was decided three years after trial.

Syl. pt. 3 - "The invalidation of the instruction approved in *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial." Syl. pt. 2, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

See also, *State v. Hutchinson*, 176 W.Va. 172, 342 S.E.2d 138 (1986); failure to preserve this error results in the Court's inability to re cognize it as plain error.

Alibi (continued)

State v. Hutchinson, 342 S.E.2d 138 (1986) (McHugh, J.)

See APPEAL Ineffective assistance, Alibi instruction (p. 19) for discussion of topic.

Instructions

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

Relator contends the trial court erred by permitting defense instruction 21 concerning relator's alibi to go to the jury.

The Court found the record showed the instruction was proper because it avoided placing a burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt. The Court found the instruction in question did not shift the burden of persuasion to the defendant to prove his alibi, and the instruction was proper.

Morrison v. Holland, 352 S.E.2d 46 (1986) (Miller, C.J.)

Relator contends his due process rights were violated when the trial court over his objection gave an alibi instruction that had been held constitutionally deficient in *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.), *cert. denied*, 459 U.S. 853 (1982) and *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Syl. pt. 1 - "Because of the holding in *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.), *cert. denied*, 459 U.S. 853 (1982), *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978) is overruled to the extent that it permits the giving of an instruction that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt." Syl. pt. 1, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Morrison v. Holland, (continued)

Syl. pt. 2 - "The invalidation of the instruction approved in *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial." Syl. pt. 2, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Syl. pt. 3 - "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Syl. pt. 4 - The so-called *Alexander* instruction on alibi is unconstitutional as impermissibly burden shifting, but this error is subject to the doctrine of harmless constitutional error.

Syl. pt. 5 - Where a burden-shifting alibi instruction has been offered and the question arises as to whether it is harmless constitutional error, courts look to the credibility of the alibi testimony and, if it is not incredible, the error is not harmless.

In this case the entire defense was based on alibi. Cross-examination of both the defendant and his girlfriend did not reveal any critical flaws in their alibi testimony, even though their testimony conflicted with that of the victim and the co-defendants.

The Court could not conclude the defendant's alibi evidence was inherently incredible such that the State's case was proved beyond a reasonable doubt. The Court found the initial conviction contained error of a constitutional dimension which cannot be declared harmless. Relator was entitled to a new trial or to be released if not retried within 90 days.

Alibi (continued)

Instructions (continued)

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant contends the trial court erred in failing to give an alibi instruction despite trial counsel's failure to request such instruction. The Court noted that some courts have held that where the sole defense of alibi, presented in a criminal prosecution, has been supported by corroborating testimony, the trial court has an affirmative duty, even in the absence of a request, to properly charge the jury on this issue. The Court found that since other error in the trial necessitated reversal, they refrained from making a determination of the issue except to note their displeasure with trial counsel's failure to request an alibi instruction.

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

Appellant was convicted of forgery. On appeal he complained of ineffective assistance of counsel because counsel failed to object to the following state's instruction:

> "As the State bears the burden of proving each and every element of the crimes charged, including the presence of the defendant, beyond a reasonable doubt, the defendant is not required to sustain the defense of alibi by any particular degree of proof. It is sufficient if such evidence of alibi, when considered along with all of the evidence in this case, creates in the mind of each juror a reasonable doubt as to his guilt."

The Court held no error, noting that this instruction was essentially approved in *Acord v. Hedrick*, 176 W.Va. 154, 342 S.E.2d 120, at 126 (1986).

DEFENSES

Bifurcated trial on multiple defenses

State v. Lusk, 354 S.E.2d 613 (1987) (Brotherton, J.)

Appellant was convicted of second-degree murder. She moved for a bifurcated trial under *State v. Boyd*, 167 W.Va. 385, 280 S.E.2d 669 (1981) on the issue of insanity and accidental killing. The motion was refused.

The Court found the two defenses were not inconsistent and would not undermine each other.

Syl. pt. 2 - "The right to a bifurcated trial lies within the sound discretion of the trial court." Syl. pt. 3, *State v. Bragg*, 160 W.Va. 455, 235 S.E.2d 466 (1977).

The Court found appellant was not prejudiced by trying the defense together.

Burden of proof

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See INSANITY Burden of proof, (p. 326) for discussion of topic.

Entrapment

See ENTRAPMENT (p. 174) for discussion of topic.

Insanity

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See INSANITY Test for, (p. 334) for discussion of topic.

DEFENSES

Intoxication

State v. Hickman, 338 S.E.2d 188 (1985) (Miller, J.)

Appellant contends his first-degree murder convictions must be reversed as a matter of law because at the time of the incident he was so intoxicated by alcohol and drugs he was incapable of premeditation.

The trial court gave defendant's instruction No. 3 which was patterned after Syl. pt. 2 of *State v. Keeton*, 166 W.Va. 77, 272 S.E.2d 817 (1980). The appellant contends, however, the evidence of intoxication was so overwhelming that the trial court should have ruled as a matter of law that convictions for first-degree murders were not warranted.

The Court found, given the conflicting facts and medical opinions in this case, the *Keeton* issue was clearly one for the jury resolution.

Prima facie showing

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See SELF-DEFENSE Burden of proof, Prosecution's after *prima facie* showing, (p. 546) for discussion of topic.

Right to hearing

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

See COMPETENCY Right to hearing, (p. 55) for discussion of topic.

DENIAL OF A FAIR TRIAL

Appearance in prison attire

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See RECIDIVISM Appearance before jury in prison attire, (p. 485) for discussion of topic.

Comment on defendant's post-arrest silence

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 106) for discussion of topic.

Community hostility

Change of venue

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See VENUE Change of venue, Factors to be considered, (p. 643) for discussion of topic.

Competency

Failure to find

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See COMPETENCY Failure to make finding, (p. 54) for discussion of topic.

DENIAL OF A FAIR TRIAL

Complainant interference with defense

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

Petitioner was charged with obtaining money by false pretenses. He and complainant had entered into a contractual agreement whereby the petitioner would construct a new home for the complainant.

The circuit court granted petitioner's motion to allow an inspection by the defense of the complainant's residence. Petitioner's counsel wrote to ascertain a convenient date for this inspection and to request an interview with the complainant concerning the events involved in the criminal action. The complainant's counsel in the related civil action responded with available dates for inspection and that the complainant would not submit to an interview pertaining to the criminal action.

Upon petitioner's motion to clarify the previous inspection order, the circuit judge found the order was clear and did not need clarification and that the prosecuting witness had a right to be represented by private counsel, that counsel could be present at the inspection and that the prosecuting witness had a right to refuse to be interviewed by counsel for the defendant.

The Court found no infringement on the petitioner's constitutional rights of confrontation and assistance of counsel, and found no abuse of discretion by the judge in his rulings on this matter.

Petitioner also asserts that the "apparent relationship" between the respondent prosecutor and the complainant's private counsel places the latter in the role of "quasi-prosecutor" in the criminal action. The Court found the only basis cited to support this characterization is a letter complainant received from the petitioner's counsel pertaining to the setting of a date for inspection of the house. Her counsel then contacted the prosecutor to let him know that he would respond to this letter on behalf of the complainant. Particularly in view of the fact that the letter sent to the complainant indicated that a copy had been sent to the prosecutor, the Court did not find this indicative of any sort of prosecutorial relationship, apparent or otherwise.

The Court noted victims of criminal acts are entitled, by common law, to employ a private prosecutor to assist a public prosecutor in the conduct of a particular case, and that in such a situation a private prosecutor is subject to the same high standards of conduct applicable to the public prosecutor.

Complainant interference with defense (continued)

Kennedy v. State, (continued)

The Court noted that private counsel involved in furthering a civil interest should avoid assuming any prosecutorial duties in a related criminal action. The petitioner in this case did not present any facts to indicate that the complainant's counsel had acted in an official or collusive capacity as private prosecutor in the underlying criminal action.

The Court found the complainant has the right to the assistance of private counsel in arranging the inspection of the house, and the concomitant right to his presence during the inspection. The complainant is entitled to such representation to protect and pursue her interests in the collateral civil suit instituted by a third-party lien holder. The Court could not infer any duplicitous motive from this justifiable conduct.

The Court also found a prosecutor may not instruct prosecuting witnesses not to speak with a defendant or defense counsel, or otherwise unreasonably obstruct access to such witnesses. A government witness who does not wish to speak to or be interviewed by the defendant or defense counsel may not, absent extraordinary and compelling circumstances, be required to do so. Private counsel or public prosecutors may properly inform a witness of this choice. The Court found a defendant's right of access is not violated so long as the final decision of the witness not to be interviewed is of his or her own volition. In this case there was no showing of anything other than a free choice, upon advice of private counsel, not to be interviewed.

Conduct of judge

Witnesses, examination by court

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

Appellant, convicted of welfare fraud, alleged that the trial court impermissibly examined several prosecution witnesses, thereby prejudicing appellant before the jury.

Conduct of judge (continued)

Witnesses, examination by court (continued)

State v. Banjoman, (continued)

The Court noted that a trial court has the right to intervene in proceedings so long as prejudice is avoided. See *State v. Jenkins*, 176 W.Va. 652, 346 S.E.2d 802 (1986); *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979). However, a trial judge occupies a "unique position" and should refrain from words or conduct which would indicate "his opinion on any material matter." See *State v. McGee*, 160 W.Va. 1, 230 S.E.2d 832 (1976). See also *State v. Whittington*, 168 W.Va. 288, 284 S.E.2d 363 (1981); *State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981); and *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977).

The Court found no error in the trial judge's conduct in this instance.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See JUDGES Conduct at trial, Failure to recuse, (p. 357) for discussion of topic.

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

See JUDGES Conduct at trial, Comments, (p. 357) for discussion of topic.

Cross-examination

Limitation of cross-examination by defense

State v. Eye, 355 S.E.2d 921 (1987) (Brotherton, J.)

See CONFRONTATION CLAUSE Denial of right to cross-examine, (p. 68) for discussion of topic.

Cross-examination (continued)

Limitation of cross-examination by defense (continued)

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

See CROSS-EXAMINATION Limitation of cross-examination by defense counsel, (p. 81) for discussion of topic.

Restricting cross-examination

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the trial court erred by restricting his cross-examination of one of the State's witnesses. The Court found this contention was without merit. They found the State had called a police investigator to give the height and weight of the defendant and the victim and their ages. The defendant sought on cross-examination to get into the details of his investigation. The State objected because this was beyond the limited scope of direct. The trial court agreed and stated the defense could make him its witness. The Court found no error.

Syl. pt. 5 - "As a general rule, the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination." Syl. pt. 5, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982).

Cross-examination of defendant

Re-enactment of the crime

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the trial court erred by permitting the State to engage the defendant in a re-enactment of the shooting on cross-examination. The Court found it was within the trial court's discretion to control the extent of cross-examination. The Court found the re-enactment was relevant to the issues in the case and did not deny him a fair trial or violate his privilege against self-incrimination.

DENIAL OF A FAIR TRIAL

Defendant's misconduct

Witnessed by jurors

State v. Linkous, 355 S.E.2d 410 (1987) (Miller, J.)

Appellant contends his conviction for first-degree murder should be reversed since the court denied his motion for a mistrial after members of the jury saw him scuffling with court bailiffs. During an *in camera* hearing, the defendant unlocked and went out a door leading into a hallway in the courthouse. When an officer attempted to stop him, a scuffle broke out. Defendant was wrestled to the floor and handcuffed. The jury panel, in the hallway at the same time, observed the incident. When questioned, eight of the jurors related what they had seen, and two indicated they had discussed the incident during deliberations. Defendant's motion to set aside the verdict and grant a new trial was denied.

Syl. pt. 3 - Misconduct or disruptive behavior on the part of a defendant during the course of a criminal trial will not establish grounds for his obtaining a mistrial.

Illinois v. Allen, 397 U.S. 337 (1970) held the Sixth Amendment right to be present at trial did not preclude the removal of an unruly defendant, and that the accused could not be permitted to indefinitely avoid trial by disruptive behavior. The trial court did not abuse its discretion in refusing to grant mistrial.

Appellant also contends the court erred in not *sua sponte* instructing the jury they could consider the defendant's state of intoxication on the issue of mental capacity to form intent for first-degree murder.

The Court found this was not a case where the evidence of intoxication was such that the defendant was entitled to the benefit of the rule set forth in Syl. pt. 2 of *State v. Keeton*, 166 W.Va. 77, 272 S.E.2d 817 (1980).

DENIAL OF A FAIR TRIAL

Defense counsel's comments

State v. Tanner, 332 S.E.2d 277 (1985) (Per Curiam)

Appellant contends the court indicated prejudice against the defendant's case during closing argument. In the course of closing, defense counsel stated "when you return, your verdict will be cast in stone. There will be no way that this decision can be appealed." The Court found defense counsel clearly misstated the law in this remark.

Later during closing defense counsel stated "... remember that every time the defendant is found not guilty, the State doesn't lose." At this point the prosecution objected and the objection was sustained. Defense counsel then proceeded to say: "... because the government always wins whenever justice is done." The appellant contends that by sustaining the prosecution's objection to his remarks regarding the State no always losing, the court showed a preference for the State's case.

The Court found the beginning of the statement was arguably misleading until the remaining portion was added. Given in context, the trial court's rulings did not show a preference for the State's position and were withing the discretion given to trial courts to regulate closing argument.

Denial of compulsory process

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court-appointed trial curse was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions.

Finding that the appellant must be given a new trial, the Court reviewed the assignments of error in the burglary trial.

Denial of compulsory process (continued)

State v. Reedy, (continued)

Appellant contends the trial court erroneously ruled concerning the extent to which the appellant's co-indictee, Allen could waive his fifth amendment privilege against self-incrimination if he testified as a witness for the appellant. Appellant also contends the court's ruling denied him his Sixth Amendment right to compulsory process for obtaining witnesses in his favor.

At the appellant's request, an *in camera* hearing was held to determine the extent to which a witness (Allen) would waive his constitutional privilege against self-incrimination by testifying on direct. The trial court ruled Allen would waive his privilege against self-incrimination concerning those cross-examination questions reasonably related to and within the scope of the direct.

The Court could find no error. Allen was appropriately advised and did not testify.

The Court also found no merit to the appellant's contention he was denied his right to compulsory process. The trial court's ruling did not prohibit the appellant from calling Allen as a witness. This decision was made by the appellant after consulting with his counsel; appellant could have obtained a subpoena to compel Allen's appearance. The trial court was careful to note it made no ruling as to whether Allen could or could not testify, since it had no authority to rule whom the appellant would call as a witness. The Court found appellant made a strategic decision not to seek compulsory process and he could not now contend the trial court denied that right.

Ineffective assistance of counsel

State v. Cain, 359 S.E.2d 581 (1987) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Burden of proof, (p. 308) for discussion of topic.

DENIAL OF A FAIR TRIAL

Judge interrogating witness

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See JUDGES Conduct at trial, Witnesses, examination by court, (p. 358) for discussion of topic.

Judge's comments

State v. Blessing, 331 S.E.2d 863 (1985) (Per Curiam)

See JURY Court's comments, Coercion to reach a verdict, (p. 374) for discussion of topic.

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See JURY Court's comments, Coercion to reach a verdict, (p. 375) for discussion of topic.

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends the trial judge committed reversible error by frequently and persistently interrupting the course of the trial to make prejudicial remarks about trial counsel's performance. The Court found the judge's remarks were not prejudicial.

State v. Sloan, 355 S.E.2d 374 (1987) (Per Curiam)

See JURY Court's comments, Coercion to reach a verdict, (p. 376) for discussion of topic.

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

See JUDGES Conduct at trial, Comments, (p. 357) for discussion of topic.

DENIAL OF A FAIR TRIAL

Jury bias

Same jurors sitting on trials of accomplices

State v. VanMetre, 342 S.E.2d 450 (1986) (Neely, J.)

See JURY Challenges, Same jurors sitting on trials of accomplices, (p. 373) for discussion of topic.

Jury misconduct

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends the trial court erred in refusing to grant a new trial based on allegations of juror misconduct. Appellant contends he observed jurors in a hallway near prosecution witnesses who were discussing the case during trial. The appellant also contends noise from the air conditioning units prevented him and possibly the jurors from hearing all of the testimony. No objections were made at trial.

The Court found no error. The trial judge advised the jurors several times to tell him if they couldn't hear and admonished the jury not to discuss the case. There was no evidence presented that any juror actually overheard any improper conversation of the prosecution witnesses or was unable to hear.

Permitting the jury to draw unfair inferences from the evidence

State v. Phillips, 342 S.E.2d 210 (1986) (McHugh, J.)

Appellant contends it was error for the trial court to permit the jury to draw unfair inferences from the evidence, *i.e.*, that the appellant may have been responsible for a second homicide, the death of the murder victim's father.

The Court found the appellant had not shown that he suffered prejudice before the jury, and that the record demonstrated that the inference, if any, concerning the separate homicide were *de minimus*.

DENIAL OF A FAIR TRIAL

Physical restraints

State v. Billups, 368 S.E.2d 723 (1988) (Per Curiam)

Appellant was convicted of aggravated robbery. At trial he was forced to wear physical restraints in view of prospective jurors while the jury was being impaneled.

Syl. pt. 2 - "A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints." Syllabus Point 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

In *Brewster*, *supra*, however, the defendant was forced to wear restraints throughout the trial. *State v. Linkous*, 177 W.Va. 621, 355 S.E.2d 410 (1987) held that the juror's merely seeing the prisoner in handcuffs is not reversible error.

Here, the Court declined to rule, having reversed on other grounds (See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing argument, (p. 462) for discussion of topic.

State v. Linkous, 355 S.E.2d 410 (1987) (Miller, J.)

Appellant contends his conviction for first-degree murder should be reversed on the ground he was handcuffed when initially brought for trial. The jury had not been impaneled, but prospective jurors were in the courtroom at the time the appellant was brought in. The handcuffs were removed once appellant was in the courtroom.

Syl. pt. 1 - "A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints." Syl. pt. 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

Syl. pt. 2 - Ordinarily, it is not reversible error nor grounds for a mistrial to proceed to try a criminal defendant with a jury panel that may have seen him in handcuffs for a brief period of time prior to trial.

The Court found there is a security need to have some physical restraints on prisoners when moved from jail to court but that the better practice is to remove restraints before the defendant is brought before the jury.

Physical restraints (continued)

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. After hearing conflicting evidence regarding appellant's claim of self-defense, the jury recommended no mercy. Appellant was sentenced to life without opportunity for parole.

Appellant claimed he was restrained in handcuffs and leg irons throughout the trial, except for his testimony when he was kept in leg irons only. On appeal, he contended that no necessity was shown for the restraint and demanded reversal and a new trial. The State answered that the record contained no showing of the restraint and therefore the Court could not rule on this point.

The Court found the record sufficient to conclude that physical restraints were used.

Syl. pt. 1 - "A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints." Syl. pt. 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

Finding no justification for the restraints in the record, the Court ordered a remand.

Pre-indictment delay

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

See PRE-INDICTMENT DELAY In general, (p. 438) for discussion of topic.

Prejudicial publicity

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See MISTRIAL Prejudicial publicity, Standard for determining, (p. 418) for discussion of topic.

DENIAL OF A FAIR TRIAL

Prosecutor's comments/conduct

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Complainant interference with defense, (p. 91) for discussion of topic.

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See PROSECUTING ATTORNEYS Intimidating witnesses, (p. 471) for discussion of topic.

State v. Billups, 368 S.E.2d 723 (1988) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing argument, (p. 462) for discussion of topic.

State v. Collins, 354 S.E.2d 610 (1987) (Brotherton, J.)

Appellant was convicted of first-degree murder with no recommendation of mercy.

He contends the trial court erred in refusing to grant a mistrial after the close of all the evidence and the giving of instructions based on prosecutorial misconduct.

During the trial, one of the prosecutors made the statement in the witness room, "we will see you all in June when we nail Nannie's hide to the wall," to a group of Ohio policemen who were witnesses at the trial. Nannie Collins, appellant's wife, overheard the statement. She, too, had been indicted for the murder and was potential defense witness. Appellant contends the prosecutor's statement undermined the usefulness of her testimony.

The Court found the statement was of a vindictive nature and that prosecutor's intimidation of defense witnesses has been found to be a violation of due process. However, the effect here was harmless. The Court found the statement was not directed to Nannie Collins, she was not meant to hear it, and it was not made in bad faith.

Prosecutor's comments/conduct (continued)

State v. Collins, (continued)

Syl. pt. 2 - Courts view an honest mistake by the prosecution more leniently that a bad faith attempt to improperly influence the trial.

The Court found the statement was not greatly intimidating since Mrs. Collins knew when was under indictment and would be tried in June. Her testimony at appellant's trial was to be that her husband, in an uncontrolled fit of insanity, suddenly and inexplicably shot and killed the conservation officer. The Court found this story would tend to exculpate her. She remained willing to testify, but trial counsel decided not to call her because he believed she would no longer be a useful witness. There was no certainty that any harm actually occurred and that any injury to the appellant's case was speculative.

Defense counsel knew of the statement prior to the close of evidence, but did not object. The Court found his failure to do so is a waiver of the point. The Court found no error.

State v. Combs, 338 S.E.2d 365 (1985) (Per Curiam)

Appellant contends the court erred in overruling objections to the cross-examination of appellant's alibi witnesses concerning their failure to inform the police prior to trial that the appellant was with them at the time of the crime and that the appellant did not have a beard; and also erred in overruling an objection to the prosecuting attorney's comment during closing argument with respect to the failure of these witnesses to inform the police of the appellant's alibi.

Appellant contends these comments constituted prosecutorial misconduct and relies on *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The Court found at issue impeachment, not of the defendant, but witnesses whose rights against self-incrimination were not implicated. The Court found other courts have clearly indicated this to be permissible with witnesses other than the defendant.

Prosecutor's comments/conduct (continued)

State v. Combs, (continued)

The Court found none of the questions or comments of the prosecutor implied the existence of a legal duty to come forward and disclose exculpatory information prior to trial. The defense witnesses were simply asked why they had not volunteered the information to police. The challenged portion of the prosecutor's closing was nothing more than a re capitulation of the testimony of the albeit witnesses, coupled with a permissible comment concerning credibility. The Court found no misconduct.

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He objects on appeal to remarks made in closing by the prosecutor concerning the possibility of parole within ten to twelve years if the jury returned a verdict of first-degree murder with a recommendation of mercy.

Syl. pt. 15 - "The discretion 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." Syl. pt. 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

The Court found the trial judge properly instructed the jury that if they recommended mercy the appellant "would be eligible for consideration for parole only after having served a minimum of ten years of such sentence, such eligibility in no way guaranteeing immediate release." The prosecution's argument in this case was limited to the appellant's eligibility for parole consideration and *possibility* of discharge in ten or twelve years. In light of the court's instruction that eligibility for parole consideration in no way guaranteed immediate release, refusal to grant the appellant's motion for mistrial based upon the prosecutor's comments was not an abuse of discretion.

Prosecutor's comments/conduct (continued)

State v. Goad, 355 S.E.2d 371 (1987) (Brotherton, J.)

Appellant contends the prosecutor improperly commented in closing argument on the failure of the defendant's wife to testify. The court found this violated *W.Va.Code*, 57-3-3 (1966) although it might not by itself have required reversal.

Appellant was convicted of non-aggravated robbery. He contends the prosecutor threatened an important witness to the extent that the witness refused to testify. The Court found prejudicial prosecutorial misconduct and reversed.

Appellant intended to call Jimmy Dillard as an alibi witness. Dillard was in jail on an unrelated charge. Two days before trial, the prosecutor contacted an attorney who had represented Dillard on unrelated charges, and asked him to tell Dillard of "the State's position" regarding his testimony in appellant's upcoming trial. The attorney prepared a letter to Dillard which conveyed the message that the prosecutor said he had two witnesses who would testify that Dillard drove the getaway car in the robbery with which Dillard was charged, and that the prosecutor would agree not to prosecute Dillard on the robbery charge if he told the truth and did not provide appellant with an alibi or if he took the Fifth Amendment when questioned.

At a pre-trial conference, where the appellant, his attorney, the prosecutor, Dillard, the lawyer who wrote the letter to Dillard and the judge were present, the court advised Dillard of his right to remain silent, he was advised by the lawyer of his fifth amendment right against self-incrimination and was told that the prosecutor's agreement not to prosecute was withdrawn, and that the prosecutor would bring charges or not as he saw fit. When asked by the judge what he planned to do, Dillard decided to take the fifth. Defense counsel did not call him at trial.

Syl. pt. - Admonitions by the prosecutor to a potential defense witness to refrain from lying, combined with threats of prosecution as an accomplice and for perjury, which result in the witness's assertion of his right against self-incrimination effectively deprive a criminal defendant of due process of law by denying him the opportunity to present witnesses in his own defense.

Prosecutor's comments/conduct (continued)

State v. Goad, (continued)

The Court found if a trial court is of the opinion that a witness may not fully understand his right against self-incrimination, the court may warn the witness prior to the testimony and appoint counsel if necessary to fully protect the witness' rights.

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

Appellant was convicted of breaking and entering. He contends it was error to allow a police officer to testify that the defendant gave no statement after he was given his *Miranda* rights and to allow the prosecutor to comment in closing argument on the defendant's post-arrest silence.

The Court found here, the officer made a comment to the effect that after the defendant's arrest and *Miranda* warnings had been given, he made no statement. The Court found there was no attempt by the prosecutor to cross examine the defendant with regard to this silence, and the officer's comment could not be deemed to be an attempt to impeach on pre-trial silence. The Court found this generalized comment did not amount to reversible error.

The Court also found no error in the prosecutor's closing remarks that the defendant needed some time to prepare his story after he was caught. The Court found these comments were not designed to be remarks about pre-trial silence, and that the comments were abstract.

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during closing arguments, (p. 465) for discussion of topic.

Prosecutor's comments/conduct (continued)

State v. Lusk, 354 S.E.2d 613 (1987) (Brotherton, J.)

Appellant contends the prosecutor exceeded the scope of direct examination during rebuttal. In rebuttal, a neighbor stated he had seen the defendant fire a gun in the direction of the victim on one occasion. An objection was made after the witness described the incident for several pages. The judge struck the testimony and instructed the jury to disregard it. The Court found any error was cured by the instruction to the jury.

In closing argument, the prosecutor stated there were three people who supposedly witnessed the crime. He stated "[o]ne we know saw it and that was the defendant because she fired the gun." ... The Court found the prosecutor's statement came close to commenting on the appellant's failure to testify.

Syl. pt. 4 - An isolated comment by the prosecutor during closing argument did not constitute reversible error, as it did not specifically refer to the accused's failure to testify, and when read in context it was not manifestly intended to be, nor was it of such a character that the jury would naturally and necessarily take the remark to be, a comment on the failure of the accused to testify.

The Court found no error on this point.

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

See DISCOVERY Prospective witnesses for the state, Refusal to cooperate with defense, (p. 138) for discussion of topic.

Prosecutor's comments/conduct (continued)

State v. Oxier, 338 S.E.2d 360 (1985) (Miller, C.J.)

At trial, appellant presented an alibi defense and claimed he was not involved in the breaking and entering. In his cross-examination of the defendant the prosecutor asked why he did not tell the police officers on the night of the crime the exculpatory story he and related in direct. This question was objected to by defense counsel but overruled. In closing, the prosecutor dwelled at some length on the defendants failure to disclose his exculpatory story to the police either when they talked to him shortly after the incident or soon after his arrest.

Syl. pt. 1 - "Under the Due Process Clause of the *West Virginia Constitution*, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syl. pt. 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

In this case, there was a pre-arrest noncustodial silence (at the home of a Ms. White where the defendant only stated "I got shot") and a second silence after his arrest and *Miranda* warnings were given, (which occurred after he had been discharged from the hospital). The Court found the latter situation falls squarely within the *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Boyd* rationale precluding exploitation of pre-trial silence after receipt of *Miranda* warnings.

Although the prosecutor did not cross-examine the defendant with regard to the defendant's silence after his arrest he did dwell on it in his closing. The prosecutor initiated the argument and proceeded to develop it in considerable detail, emphasizing to the jury that the defendant's failure to disclose his alibi prior to trial meant it was a lie. The Court found reversible error.

The State contended there was a lack of precision in defense counsel's objection because it was based on relevancy rather than on a constitutional ground.

Applying the plain error principles set forth ins Syl. pt. 4, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975), the Court reached the *Doyle - Boyd*, issue.

Prosecutor's comments/conduct (continued)

State v. Oxier, (continued)

The prosecutor began his closing by stating that although he had been a prosecutor for some twenty years, he felt instructions were confusing and suggested they use common sense. He then suggested that the concept of proof beyond a reasonable doubt was like an intuition of a gut reaction. He told the jury not to be mealy-mouthed over the State's proof, but to follow their gut reactions.

The Court found the prosecutor's comments constituted clear misstatements of the reasonable doubt law, even more egregious that the misstatements made in *State v. Keffer*, 168 W.Va. 59, 281 S.E.2d 495 (1981). They found the comments were neither isolated nor fortuitous and could only be viewed as a calculated strategy to induce the jury to believe that the State's burden of proof as to the defendant's guilt was only a matter of common sense view of the evidence or an intuitive gut reaction to it.

Since this case was reversed on other grounds, the Court did not determine whether the prosecutor's closing remarks constituted plain error.

Failure to disclose witness' criminal record

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See WITNESSES Disclosure of criminal record, (p. 657) for discussion of topic.

Prosecutorial overmatch

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See also, INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

Prosecutorial overmatch (continued)

Acord v. Hedrick, (continued)

Petitioner contends the trial court erred in permitting a privately retained lawyer to aid the State in its prosecution against him, contending there was prosecutorial overmatch resulting in a trial riddled with reversible error, and that he was deprived of effective assistance of counsel.

The victim's family hired an attorney to help prosecute the case. Petitioner was represented by an attorney conducting his first criminal trial, and an attorney who had served as a circuit judge in this state for 16 years.

Syl. pt. 1 - The gravamen of any "prosecutorial overmatch" claim is proof of ineffectiveness of counsel as determined by reference to the trial record.

The record in this case did not disclose that defense counsel allowed the prosecution to introduce incompetent evidence of a prejudicial nature, or that they unwittingly allowed the prosecution to achieve any other undue advantage. The Court found defense counsel gave a vigorous and well conceived defense.

Petitioner contended the prosecution took unfair advantage of the defense by improperly questioning witnesses about items stolen from the victim's house on the night of the sexual assault. The Court found this evidence was admissible as an exception to the collateral crime rule. (See EVIDENCE Collateral crimes, (p. 192) for discussion of topic.

The petitioner also contended it was prejudicial to introduce a facsimile of a ring that was stolen during the robbery. The Court found this was admissible. (See EVIDENCE Best evidence, (p. 186) for discussion of topic.

Petitioner contended the prosecution was clearly overreaching and taking advantage of petitioner's trial counsel when they questioned the State's key witnesses, Bailey and Bolen. Both testified they drive to the victim's house with petitioner on the night of the sexual assault. The prosecution adduced from them that as a result of the incidents of that night, Mr. Bailey had been charged with and pled guilty to grand larceny and Mr. Bolen had been charged with a criminal offense.

DENIAL OF A FAIR TRIAL

Prosecutorial overmatch (continued)

Acord v. Hedrick, (continued)

Applying the standards set forth in Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) and in *Strickland v. Washington*, 466 U.S. 668 (1984), the Court did not find prosecutorial overmatch or ineffective assistance.

State v. Collins. 354 S.E.2d 610 (1987) (Brotherton, J.)

Appellant was convicted of first-degree murder with no recommendation of mercy.

On appeal, he contends there was prosecutorial overmatch.

Syl. pt. 1 - "The gravamen of any 'prosecutorial overmatch' claim is proof of ineffectiveness of counsel determined by reference to the trial record." Syl. pt. 1, *Acord v. Hedrick*, 176 W.Va. 154, 342 S.E.2d 120, at 126 (1986).

The Court found appellate was ably represented at trial and the defense was not intimidated or overmatched by the prosecution.

Refusal to allow testimony of nonparty witness

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

The Appellant was convicted of first-degree murder. He contends the trial court erred in refusing to permit the testimony of Mark Price, an alleged accomplice.

Price, whose appeal of a murder conviction was pending at the time of the appellant's trial, had consented, against the advice of counsel, to answer two exculpatory and corroborating questions. Price's attorney indicated Price would invoke his fifth amendment privilege and refuse to answer any further questions after answering these two. The trial court sustained the prosecutor's objection to the calling of Price because the denial of cross would be unfair to the State.

Refusal to allow testimony of nonparty witness (continued)

State v. Cook, (continued)

The Court found the trial court's ruling failed to take into account the extent to which the testimony of Price would have waived his privilege against self-incrimination. *Brown v. U.S.*, 356 U.S. 148 (1958) (if witness elects to testify, cannot claim immunity from cross-examination on the matters he has himself put in dispute). *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979) (privilege extends to questions, if answered, which would support a conviction and to those disclosures that might furnish a link in the chain of evidence or lead to evidence which could be used in a prosecution).

The Court found that to the extent Price's testimony would have established his presence at the time of the victim's alleged murder, it was the admission of an incriminating fact which would have waived the privilege against self-incrimination. A non-party witness who voluntarily testifies as to an incriminating fact may be cross-examined concerning such fact as long as the answers sought do not tend to further incriminate. (Cite omitted). The Court found the general rules with respect to cross-examination would have been applicable as set forth in Syl. pt. 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

The Court acknowledged the sensitive nature of the competing interests involved and found the trial court was under a special obligation to seek an accommodation. An *in camera* hearing would have been appropriate to determine the precise extent to which Price would have sought to invoke his privilege.

Upon remand, if Price remains willing to testify, the trial court should conduct an *in camera* hearing to ascertain the exact nature of his testimony and to establish the parameters of appropriate cross-examination.

Restricting direct examination

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

See WITNESSES Expert, Opinion, (p. 658) for discussion of topic.

DENIAL OF A FAIR TRIAL

Right to speedy trial

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

See INSANITY Adjudication of criminal responsibility before trial, (p. 325) for discussion of topic.

State v. Drachman, 358 S.E.2d 603 (1987) (Miller, J.)

See SPEEDY TRIAL Measure of time, Duty of prosecution, (p. 607) for discussion of topic.

Right to transcript

Maddox v. Ferguson, No. 17923 (11/17/87) (Per Curiam)

Relator was convicted of first-degree murder. He complained that he was not given a copy of his trial transcript in order to file a petition for habeas corpus.

The Court noted that an indigent has a right to appeal his conviction (it was not stated whether relator was an indigent) and that he is constitutionally entitled to a copy of his trial transcript without cost to him. See Syllabus Point 1, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

Here, an order issued directing the respondent court to provide the relator with a transcript within thirty days after receipt of the order.

State v. England, 363 S.E.2d 725 (1987) (Neely, J.)

Appellant's first trial on charges of breaking and entering ended in a hung jury. At a pre-trial conference before his second trial, appellant requested a transcript of the prosecution witnesses' testimony at the first trial for purposes of impeachment. This request and five subsequent requests at trial were denied. Appellant was indigent.

Syl. pt. - Under the Equal Protection clause of the Fourteenth Amendment to the *Constitution of the United States* the State must provide an indigent defendant with a transcript of prior proceedings resulting in a mistrial when that transcript is needed for an effective defense or appeal.

Right to transcript (continued)

State v. England, (continued)

See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Draper v. Washington*, 372 U.S. 487 (1963); and *Britt v. North Carolina*, 404 U.S. 226 (1971).

Right to transcript of co-participant's trial

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

Appellant was convicted of aiding and abetting robbery.

He contends the court erred in denying him a copy of the transcript of the trial of a co-participant in the crime charged.

Appellant moved for a copy of the transcript on March 7, 1984. On March 12, 1984 the court determined the transcript had not been prepared since the co-participant's trial had occurred only during the prior week. Defendant's trial was scheduled for March 27, 1984. The trial judge proposed giving the defendant the transcript of the testimony of all significant witnesses at the co-participant's trial. He found the testimony of six witnesses was significant and asked the prosecutor and defense for their opinion. The State suggested another witness and the court agreed the defendant should have that testimony also. Defense counsel suggested certain police officers' testimony might be important, but the court noted those officers arrived after the crime. The defendant did not object to the ruling.

Ordinarily the Court will not consider matters on appeal to which no objection was made at trial. Even without this rule, the facts of the case fail to show the defendant was prejudiced by the trial court's ruling on the co-participant's transcript.

Surprise witness

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See WITNESSES Surprise witness, (p. 670) for discussion of topic.

DENIAL OF A FAIR TRIAL

Voir dire

Collateral crimes mentioned

State v. Finley, 355 S.E.2d 47 (1987) (McHugh, J.)

Appellant was convicted of manufacturing marijuana in violation of *W.Va. Code*, 60A-4-401(a)(ii) (1983).

On appeal, he contends the trial court erred in denying his motion for mistrial on the ground that the jurors had been prejudiced by mention of collateral crimes during *voir dire*, he had "known [the defendant] ever since he was knee-high to a grasshopper, under a different name." Another stated she "was on the jury three years ago ... when [the defendant] was being tried ... on a different indictment." Both were struck for cause but the other prospective jurors heard their remarks.

The Court found the remarks could have prejudiced the remaining prospective jurors, but because of the limited record, they had no way of knowing the effect of the responses on the jurors.

Syl. pt. 1 - When a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.

The case was reversed and remanded on the point.

Witnesses

Sequestration

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See WITNESSES Sequestration, (p. 667) for discussion of topic.

DETAINER

Wanted on charges in another jurisdiction

State ex rel. Sutton v. Keadle, 342 S.E.2d 103 (1985) (Miller, C.J.)

The Court noted a detainer is not a document designed to compel the production of a prisoner for purposes of prosecuting him; this is accomplished by a writ of habeas corpus *ad prosequendum*, as was pointed out in *State v. Fender*, 165 W.Va. 440, 268 S.E.2d 120 (1980). *Moore v. Whyte*, 164 W.Va. 718, 266 S.E.2d 137 (1980) defined as a detainer as a notification filed with an institution in which a prisoner is serving a sentence advising that he is wanted on charges in another jurisdiction.

DIRECTED VERDICT

In general

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

The Court found no merit to this issue.

DISINTERMENT

Generally

State v. Duncan, 369 S.E.2d 464 (1988) (Brotherton, J.)

See STATUTES Statutory construction, Disinterment, (p. 621) for discussion of topic.

DISCOVERY

Depositions

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the trial court erred in denying certain pre-trial discovery requests.

Appellant contends the judge erred in denying his request to depose certain State's witnesses. The Court found *W.Va.R.Crim.P.* 15 allows depositions to be taken under "exceptional circumstances" in order to preserve testimony for use at trial. The Court has interpreted this rule to require a showing that the prospective deponent will be unable to attend trial. *State v. Ferrell*, 174 W.Va. 697, 329 S.E.2d 62 (1985). No such showing was made here and the trial court did not abuse its discretion.

Failure to disclose

Generally

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

Appellant, convicted of first-degree murder, claims error in the prosecution's failure to produce evidence pursuant to court ordered discovery.

Appellant's motion requested disclosure, *inter alia*, of statements by the appellant, scientific reports or experiments and a list of prosecution witnesses. The prosecution failed to disclose the results of a polygraph test, the results of a chemical analysis of the appellant's saliva, the content of appellant's oral statement made to police prior to his arrest and the name of a prosecution witness. Neither side was allowed to introduce the polygraph results and the prosecution was prohibited from introducing the oral statement; results of the saliva test were admitted without objection.

Defense counsel did object to an unexpected witness' testifying without an opportunity to interview the witness. An interview was allowed and testimony given without objection. The testimony confirmed appellant's alibi.

Failure to disclose (continued)

Generally (continued)

State v. Hobbs, (continued)

Syl. pt. 1 - "'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.' Syl. pt. 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980)." See Syl. pt. 5, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

See also, *State v. Trail*, 174 W.Va. 656, 328 S.E.2d 671 (1985) and *State v. Ward*, 168 W.Va. 385, 284 S.E.2d 881 (1981).

Here, the Court did not find prejudice sufficient to reverse.

Defendant's statements

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. He contended that the prosecution failed to provide him with the substance of incriminating oral statements which he made to other inmates. (Appellant was already incarcerated when the crime was committed).

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." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

DISCOVERY

Failure to disclose (continued)

Defendant's statements (continued)

State v. Miller, (continued)

Syl. pt. 3 - Rule 16(a)(1)(A) of the West Virginia Rules of Criminal Procedure, unlike its federal counterpart, requires the prosecution to disclose the substance of any oral statement of the defendant it intends to offer in evidence at trial, and is not limited to oral statements made to law enforcement officers.

Syl. pt. 4 - Our traditional appellate standard for determining whether the failure to comply with court ordered pretrial discovery is prejudicial is contained in Syllabus Point 2 of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980). This was evolved prior to the adoption of our Rules of Criminal Procedure, but is applied to Rule 16 discovery.

Syl. pt. 5 - Rule 16(d)(2) enables a trial court to impose sanctions that may have the effect of curing a late discovery problem.

Here, the Court, having already found reversible error see HOMICIDE Instructions, Mercy in 1st degree homicide, (p. 281), declined to rule on whether the trial court's failure to cure the clear prejudice constituted reversible error.

Effect of

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

See DISCOVERY Failure to disclose, Defendant's statements, (p. 120) for discussion of topic.

Failure to disclose (continued)

Evidence of accomplice

State v. Fauber, 332 S.E.2d 625 (1985) (Per Curiam)

Appellant contends the trial court erred in refusing to grant a new trial upon discovery of the prosecutions' failure to disclose certain testimony given by his brother, who was also involved in the robbery. The Court found the appellant cannot claim surprise inasmuch as the prosecution made no use of the brother's suppression hearing testimony. Furthermore, the Court found there was no indication that such nondisclosure in any way weakened the appellant's case. It would have been preferable if the prosecution had disclosed this testimony, but mere oversight with respect to the disclosure of certain evidence, in the absence of prejudice to the defendant, is insufficient to constitute reversible error. The Court found no error in the trial court's refusal to award a new trial on this ground.

Exculpatory evidence

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

The Court found relator's assertion that the State withheld exculpatory material and key witnesses' criminal records to be frivolous. The record shows the State provided the witnesses' criminal records to the defense counsel. As soon as the defense counsel requested copies of the statements that witness Bolen made to a state trooper, the prosecution made them available. They were available before the prosecution's cross-examination of the trooper and Bolen. Lack of either surprise or prejudice, coupled with failure to object at trial, obviates any error.

DISCOVERY

Failure to disclose (continued)

Exhibits

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant contended the State failed to disclose during discovery that it planned to introduce a steak knife and several photographs into evidence. The Court found the knife was listed in several reports supplied by the State to the defendant, so he should have been aware that it existed and that tests had been performed upon it. The trial court ruled there was nothing in the photographs that could be prejudicial to the defendant, particularly since the jury had been to the area pictured in the photos. The Court found no error on this point.

Inculpatory evidence

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the trial court erred in denying certain pre-trial discovery requests.

Syl. pt. 5 - "Subject to certain exceptions, pre-trial discovery in a criminal case is within the sound discretion of the trial court." Syl. pt. 8, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983), *cert. denied* 464 U.S. 934 (1983).

The Court found no abuse of discretion.

Appellant contends he was prejudiced by the State's failure to disclose until six days before trial inculpatory statements he had made. The Court found the appellant did not explain the manner in which he was prejudiced by the delay and that the statements were merely cumulative to other, independent and substantial evidence of guilt, including statements of the co-conspirator and two eyewitness accounts of the murder. The Court found any error in failing to suppress these statements was harmless.

Failure to disclose (continued)

Investigation report

State v. Tanner, 332 S.E.2d 277 (1985) (Per Curiam)

Appellant was convicted of delivering marijuana. He contends the trial court erred in refusing to allow defense counsel an opportunity to inspect an investigation report prepared by the State's principal witness.

The Court found at the time of the sale of at least five adults were present: the defendant, a police officer, a police informant, Souder and McDonald. The testimony of the officer and the informant clearly indicated the defendant was the person who sold the marijuana to the officer. The testimony of the defendant and McDonald suggested Souder had conducted the sale.

Souder took the fifth. After the defendant had introduced evidence contradicting the State's witnesses, the State recalled the officer. The officer, in rebuttal, indicated he had prepared a report after purchasing the marijuana. Defense counsel moved to inspect that report. The court denied the motion.

State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984) states that the refusal of a circuit court to order disclosure proper under Rule 26.2 is error. The Court found, however, there is substantial federal authority which indicated the failure to allow inspection does not always constitute prejudicial or reversible error. The question of whether the error was harmless or prejudicial hinges upon whether there was a substantial discrepancy between the contents of the prior statements or report and the witness' testimony during trial.

Here the investigation report was not in the record and it was impossible to determine whether testimony during trial varied substantially from the contents of the report. The case was remanded on this point.

Failure to disclose (continued)

Prosecution's knowledge that witness lied to defense counsel

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

The Court was troubled by the fact the prosecution knew a witness Holstein had lied to defense counsel, yet took no steps to apprise defense counsel of this deceit. The Court noted the prosecution has an affirmative obligation, even in the absence of a discovery request, to notify the defense of any *evidence* that might negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. The Court noted the fact that Holstein had lied to defense counsel was a *fact*, the knowledge of which gave the prosecution a strategic advantage, not *evidence* tending to negate or mitigate culpability. The Court noted the prosecution must see the accused is afforded a fair and impartial trial, and there may be situations in which the prosecution is under an obligation to disclose information outside the ambit of *Brady* and its progeny.

The Court found this was not such a case since Holstein lied to defense counsel at the defendant's request and the information withheld by the prosecution was known to the defendant the entire time.

Psychological tests

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She assigns as error the State's nondisclosure of psychological examinations and results relied upon by the State's psychiatrist, Dr. Knapp, during his rebuttal testimony on the issue of insanity. Appellant made three discovery requests for the psychological tests performed by Dr. Knapp. The motions were granted. Although Dr. Knapp used extensive psychological testing to arrive at his results, only the Minnesota Multiphasic Personality Inventory (MMPI) test was disclosed. At trial, Dr. Knapp testified that a number of psychological tests had been performed on the appellant and that he had used them to arrive at his conclusions.

Failure to disclose (continued)

Psychological tests (continued)

State v. Duell, (continued)

The Court found the failure of the State to comply with Rule 16(a)(1)(D) of the W.Va. Rules of Criminal Procedure, as well as the trial court's discovery order, was erroneous. The Court found the element of surprise and, more importantly, the extent to which the failure to disclose a criminal defendant's psychological tests and results can significantly hamper the preparation and presentation of his or her defense is amply illustrated by the disclosure of the MMPI in this case. On cross-examination Dr. Knapp testified that the test had been incorrectly scored on the "male" instead of "female" scale which resulted in its complete invalidity. Of the other four tests administered, only the results of the Wechsler's Adult Intelligence Test were disclosed by the State, which the Court found relevant to the question of competency, but of little benefit to a determination of sanity. Appellant was caught completely by surprise when Dr. Knapp mentioned the Thematic Apperception, Rorschach, and Bender-Gestalt tests on direct examination, denying her the opportunity to effective cross-examination.

The Court also noted with disfavor the prosecution's apparent perception that Dr. Knapp could promiscuously refer to his so-called psychological "x-rays" without introducing them into evidence.

Dr. Knapp, the prosecution' sole witness on the issue of the appellant's sanity, clearly expressed an opinion which was extremely unfavorable to the appellant's defense. The Court noted the appellant was persistent in her attempts to secure the information withheld. The Court found the non-disclosure was reversible error.

Reports, memoranda, internal office documents

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant contends the trial court refused to require the State to respond to the defendant's discovery motion to give the defendant certain police reports containing statements made by the victim and her cousin.

Failure to disclose (continued)

Reports, memoranda, internal office documents (continued)

State v. Miller, (continued)

The Court found the defendant did not make a motion under Rule 26.2, following the direct examination of the victim, to request a copy of any previous statements she had made prior to testifying in court. The Court found no error. As to the statement of the cousin, her written statement had already been read into evidence when she testified and the defendant did have the benefit of the statement.

Statements by defendant

State v. Ellis, 342 S.E.2d 285 (1986) (McGraw, J.)

Appellant contends the trial court erred in allowing the State to introduce evidence of an inculpatory extra-judicial statement allegedly made by the appellant. Appellant was convicted of malicious wounding. He testified he had fired a warning shot into the ground one or two minutes before the victim was sounded. He denied firing at the victim. The prosecution attempted to impeach appellant's credibility by showing that shortly after his arrest he had made a prior inconsistent statement to a magistrate. The appellant testified he had told the magistrate about firing the shot into the ground. In rebuttal, the magistrate testified the appellant had stated he had fired the gun at the victim.

Appellant contends the admission of the magistrate's testimony was reversible error because it was not disclosed by the State prior to trial. Although the appellant's motion for a bill of particulars requested that the State turn over copies of any statements made by the appellant to any person involved in the case, the State's response made no mention of the statement allegedly made to the magistrate.

State v. Ellis, (continued)

The Court found that the defense was prejudiced by the prosecution's nondisclosure. Defense counsel stated on the record he was unaware of the existence of the statement until it was mentioned at trial, that the magistrate's testimony went to the credibility of the appellant, a key issue, and that the statement was inculpatory in nature and subject to attack on the ground it was not given voluntarily. The Court found the prosecution's nondisclosure effectively restricted defense counsel's opportunity to raise this issue. Although the prosecution had no duty to disclose the evidence in its answer to the appellant's bill of particulars, on the facts of this case the admission of that evidence at trial was reversible error.

State v. Hager, 342 S.E.2d 281 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy. He relied on self-defense at trial. To rebut this defense, the prosecution put on a paramedic who had worked on the appellant after the incident and who testified that appellant told him, "I' tired of getting screwed with and I fixed it." Despite a prior request by the defendant, the State did not make these statements available to the defense prior to trial.

Syl. pt. - Where the State is unaware until the time of trial of material evidence which it would be required to disclose under a Rule 16 discovery request, the State may use the evidence at trial provided that: (1) the State discloses the information to the defense as soon as reasonably possible; and (2(the use of the evidence at trial would not unduly prejudice the defendant's preparation for trial.

Here, the Court found the appellant was not advised of the evidence until the rebuttal stage of the trial, that the evidence strongly rebutted appellant's self-defense argument, and that it was quite probable that had defense counsel known of the statement, would have tried the case differently. The Court held the appellant's trial preparation was prejudiced.

Failure to disclose (continued)

Statements by defendant (continued)

State v. Lambert, 331 S.E.2d 873 (1985) (Per Curiam)

Appellant was convicted of aiding in concealing stolen property. He contends the trial court erred in admitting into evidence certain statements which the State failed to disclose on discovery prior to trial and that the trial court erred in admitting the fruits of an oral statement which the defendant made to the police.

The appellants motion for discovery requested the State be required to disclose any statements, oral or written, which the State intended to use as evidence during trial. The court granted the motion but during a dispute arose over what the discovery order covered. Subsequently, certain witnesses testified regarding the content of certain oral statements made by the defendant to them.

Rule 16(a)(1A) of the West Virginia Rules of Criminal Procedure, which governs pre-trial discovery, provides in part:

> Upon request of a defendant the State shall permit the defendant to inspect and copy ... the substance of any oral statement which the State intends to offer in evidence at the trial made by the defendant whether before or after arrest ...

This differs from the Federal rule covering the same point in that the Federal rule limits the disclosure requirement to: "... any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent ..." *Fed.R.Crim.P.* 16(a)(1)(A). In view of the difference between the West Virginia decisions rendered prior to the adoption of the West Virginia Rules of Criminal Procedure should be given weight in applying the West Virginia rule.

State v. Lambert, (continued)

The defendant's brief focused on a statement made by the defendant to Paul Junior Barb prior to trial. Barb testified at trial: "They [Beckett and the defendant] tried to sell me cigarettes in there... Both defendants came to me, Lloyd Burns Lambert and Buddy Beckett." This statement had not been disclosed on discovery. The Court found the state provided defense counsel with a list of possible witnesses before trial. Also before Paul Junior Barb testified before the jury he indicated in an *in camera* hearing that Buddy Beckett and the defendant had attempted to sell him cigarettes on May 17. The record indicated that defense counsel was adequately advised that Mr. Barb was a potential witness for the State and that he had an adequate opportunity to interview the witness and ascertain the character of his testimony. The Court found the circumstances do not indicate prejudicial surprise which justifies the reversal of the defendant's conviction;

The appellant also complains the State attempted to introduce an oral statement he made to Trooper Snodgrass. That statement, like the Barb statement, had not been revealed on discovery.

The trial court refused to allow Trooper Snodgrass to testify as to the statement but did allow him to testify that the defendant directed him to where the stolen property was concealed. The Court found the essential points in the oral statement were covered by a written confession in which the defendant stated that he had taken Trooper Snodgrass and Trooper Jordan to the area where the stolen property was concealed. The Court found since defense counsel had received a copy of this confession prior to trial, he could not have been surprised by the oral statement during trial.

DISCOVERY

Failure to disclose (continued)

Witnesses

State v. Bennett, 339 S.E.2d 213 (1985) (McHugh, J.)

Appellant was convicted of first-degree murder. He contends he was unduly prejudiced at trial because of an alleged failure by the State to comply with court ordered pretrial discovery. Appellant filed discovery motions seeking from the State information concerning, among other things, the manner in which the homicide was committed and a list of persons possessing knowledge of the facts and circumstances of the homicide. The circuit court ordered the State to comply. Subsequently, the State became aware of the existence of a metal club allegedly used in the homicide. More than two months later and two days prior to trial, the State informed defense counsel of the existence of the club. It was not until trial had begun that the State revealed to defense counsel the names of four witnesses who could connect the metal club to the homicide.

Although the trial court conducted *in camera* hearings concerning the metal club and the testimony of the four witnesses, which allowed defense counsel information concerning the previously undisclosed evidence, the Court held the State failed to comply with the requirements of Rule 16 of the W.Va. Rules of Criminal Procedure that consequently, the appellant was unduly prejudiced at trial.

Syl. pt. 6 - Where a defendant charged with murder of the first-degree filed discovery motions seeking information concerning the manner in which the homicide was committed and a list of persons possessing knowledge of the facts and circumstances of the homicide, and the motions were granted by the trial court, the defendant was entitled to a new trial where (1) the State, two days before trial, informed defense counsel of the existence of a weapon used in the commission of the homicide, which weapon the State had knowledge of in excess of two months before trial, (2) the State, during trial, revealed to defense counsel the names of four witnesses who could connect the weapon to both the homicide and the defendant and (3) *in camera* hearings conducted during the trial with regard to such previously undisclosed evidence failed to overcome the undue prejudice suffered by the defendant at trial because of the non-disclosure. *W.Va.R.Crim.P.* 16.

Failure to disclose (continued)

Witnesses

State v. Bennett, (continued)

The circumstances of this action clearly demonstrate that the appellant was "surprised on a material issue" withing the meaning of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980). The Court found the State had knowledge of the metal club in excess of two months prior to trial but did not inform the appellant about the club until shortly before the trial. The Court found the State waited even longer to disclose to the appellant the identity of the four witnesses. The admission at trial of the undisclosed evidence violated the rights of the appellant under Rule 16 of the *W.Va.R.Crim.P*.

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

The trial court permitted Detective Horbatak to testify during the trial of appellant's case.

The State did not disclose the name of this witness in its answer to defense counsel's discovery motion requesting names and addresses of witnesses to be called by the State. At trial, the State called the detective to establish the chain of custody of the six marijuana cigarettes and the other real evidence seized in the course of the investigation of the case.

The Court found the record in this case indicated the sole purpose of the detective's testimony was to establish the chain of custody of items purchased from the defendant and seized from her home. Defense counsel was advised of the detective's role in the investigation early in the proceedings in the case and was also aware of the fact that the State had seized certain items and would seek the admission of the items into evidence. It appeared defense counsel was provided with a copy of the evidence submission slip prepared by the detective and that the detective as listed on a praecipe which was filed four weeks before trial. The praecipe indicated that the detective would be a witness.

DISCOVERY

Failure to disclose (continued)

Witnesses (continued)

State v. Thompson, (continued)

The Court found the facts of this case indicated that defense counsel was aware or reasonably should have been aware of the fact that the detective participated in the investigation of the case and that the State would attempt to introduce the evidence obtained by him. Under these circumstances, the failure of the prosecution to make formal disclosure should not reasonably have hampered defense counsel's preparation and presentation of the defense's position. The Court concluded under the rule set forth in Syl. pt. 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), the trial court's subsequent admission of the detective's testimony was not prejudicial error.

Witnesses' notes

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

The appellant contends the circuit court erred when it would not allow the appellant to examine the personal notes of Dr. Erma Ullrich, an endocrinologist who testified during the State's rebuttal case. The circuit court initially denied the appellant access to the notes because Dr. Ullrich did not refer to them during her testimony. The appellant established during cross-examination, however that the witness had used the notes prior to being called as a witness to refresh her memory and prepare her testimony. Dr. Ullrich testified that the notes in question were her abstracts of other reports already in the possession of the appellant.

Syl. pt. 13 - "After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and his attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession that relates to the subject matter concerning which the witness has testified." *W.Va.R.Crim.P.* 26.2(a).

Syl. pt. 14 - A witness' notes which are abstracts from reports in the possession of a defendant in a criminal case do not constitute a "statement" as defined in *W.Va.R.Crim.P.* 26.2(f).

DISCOVERY

Failure to disclose (continued)

Witnesses' notes (continued)

State v. McFarland, (continued)

The Court found it important to note that the appellant in this case does not deny that he had in his possession the statements and reports upon which Dr. Ullrich's notes were based. The Court found that her notes do not constitute a "statement" as defined in Rule 26.2(f). The appellant was, therefore, not entitled to examine Dr. Ullrich's notes on cross-examination and the trial court did not err in denying the motion.

Informant

State v. Corbett, 352 S.E.2d 149 (1986) (Per Curiam)

Appellant was convicted of misdemeanor possession of marijuana. He contends the trial court erred by refusing to require the State to disclose the identity of the confidential informant and the informant's friend who were present when the purchase of marijuana was made. The Court found this transaction was the basis for the search warrant, but was not the basis for the criminal charge on which the defendant was tried. The court found this charge arose from the marijuana later seized pursuant to the search warrant and that the informant and his friend were not involved in this charge.

State v. Mansfield, 332 S.E.2d 862 (1985) (Per Curiam)

Appellant was convicted of delivery of a controlled substance. He contends the trial court erred in denying his motions for a mistrial and for a judgment of acquittal, both based on the refusal of the trial court to compel disclosure of the identity of a confidential informant.

The State's evidence showed the State trooper working under cover in this case and two unidentified individuals drove to the appellant's residence where the trooper purchased six bags of marijuana from the appellant. Both informants were present at the sale.

Informant (continued)

State v. Mansfield, (continued)

Prior to trial, the appellant moved for disclosure of the two informants on the grounds that both were eyewitnesses to the alleged drug purchase and that the appellant's defense would be prejudiced by nondisclosure. The appellant also requested a bill of particulars to include the names and addresses of all persons who supplied information about appellant to the police or who observed the transaction upon which the indictment was based. A pretrial hearing was held on the disclosure motion.

The motion was denied on the ground that the informants did not play an active part in the transaction. Disclosure was also denied as part of the requested bill of particulars. The Court applied Syl. pts. 1 and 3, *State v. Tamez*, 169 W.Va. 382, 290 S.E.2d 14 (1982), and Syl. pts. 2 and 5, *State v. Walls*, 170 W.Va. 419, 294 S.E.2d 272 (1982).

The Court found Syl. pt. 5 of *Walls* is directly applicable to the situation presented in this case since the trooper's trial testimony clearly showed one of the informants was a witness to and a participant in the drug purchase. He was used to bolster the trooper's credibility with drug dealers and the trooper vouched for the informant's credibility and expertise. The informant also handled the marijuana and helped confirm its identity. The Court found no abuse of discretion in denying appellant's motion for a mistrial, but believed the proper course would have been to hold an additional hearing on the appellant's need for disclosure, in light of the trooper's revelation concerning the actual role of one of the informants. The Court suggested the procedure described in Syl. pt. 3 of *Tamez*. Inquiry should be made into whether the informant might offer any exculpatory evidence or support appellant's defense of entrapment. The case was remanded.

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

DISCOVERY

Informant (continued)

State v. Reedy, (continued)

Based on this ground, the Court reversed appellant's convictions.

Finding that the appellant must be given a new trial, the Court reviewed the assignments of error in the burglary trial.

Appellant contends the trial court erred in failing to order the State to disclose the identity of the confidential informant. The Court found after an *in camera* hearing on the matter, the trial court overruled the appellant's disclosure motion, in part, because the informant did not have direct knowledge of what took place at the time of the crime. The trial court ruled the informant's confidentiality should be maintained.

The Court found the record supports the trial court's finding and there was no abuse of discretion.

Late disclosure

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the trial court erred in denying certain pre-trial discovery requests.

Appellant contends he was prejudiced by the court's denial of his motion to compel the State to disclose the names of all persons supplying information to law enforcement officials until immediately before trial. The Court found the appellant made no showing of prejudice warranting reversal.

Prosecutions's right to

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition which set aside his first-degree murder conviction.

Prosecutions's right to (continued)

Marano v. Holland, (continued)

The defendant killed a man who was having an affair with his wife, from whom the defendant was separated at the time of the killing. Psychologists for the defense testified at trial that the defendant was extremely fragile emotionally and had viewed his wife as his "dream girl." His relationship with the deceased was described as like a father and son.

According to the psychologists, the defendant suffered hallucinations and honestly believed that he heard the voice of God telling him to kill his wife. They therefore believed that he lacked the capacity to appreciate the wrongfulness of his act at the time of commission.

At a pretrial conference the prosecution requested discovery of all papers used by the psychologists in arriving at their conclusions. The motion was denied but the trial court ruled that these papers be made available directly to the State's psychologist. Certain procedures were prescribed to protect the defendant's confidentiality.

Syl. pt. 1 - Under Rule 16(d) of the West Virginia Rules of Criminal Procedure the State's right to request discovery from a defendant is triggered only if the defendant initially seeks discovery, and is confined to the particular area in which the defendant has sought discovery. Additionally, the State must have complied with the defendant's initial discovery request before it can request discovery.

Here, the defendant did not request discovery. The Court distinguished *State v. Simmons*, 172 W.Va. 590, 309 S.E.2d 89 (1983) and *State v. Jackson*, 171 W.Va. 329, 298 S.E.2d 866 (1982). The Court concluded that the defendant's Fourth Amendment right against unreasonable search and seizure was violated.

Syl. pt. 2 - "The Fourth Amendment of the United States Constitution, and Article III, Section 6, of the West Virginia Constitution protect an individual's reasonable expectation of privacy." Syllabus Point 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981).

DISCOVERY

Prosecutions's right to (continued)

Marano v. Holland, (continued)

Syl. pt. 3 - Conversation or material delivered by a defendant, at his attorney's direction, to a psychiatric expert retained by the attorney in preparation for a mental defense is within the attorney-client privilege.

Syl. pt. 4 - For Fourth Amendment purposes, the fact that a document compelled to be produced may be self-incriminating is ordinarily of no consequence.

Syl. pt. 5 - As an absolute minimum, the Fourth Amendment demands that a criminal defendant's private papers, in which there has been found to exist a reasonable expectation of privacy, cannot be seized by law enforcement officials in the absence of a valid warrant issued upon probable cause.

Prospective witnesses for the state

Refusal to cooperate with defense

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

The appellant contends the State had ordered prospective State witnesses to refuse to cooperate with the defendant's investigator and to speak only with the defendant's counsel or his investigator in the presence of a State's attorney. The State denied this allegation in a pretrial hearing and stated on the record that the defendant's counsel had full access to any State witnesses. The Court found the defendant did not at any time after this hearing advise the court that he was denied access to the State's witnesses and the Court found no error on this point.

Right to police reports

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

Appellant was convicted of aiding and abetting robbery. He contends the trial judge erred in denying his motion made pursuant to Rule 26.2 of the West Virginia Rules of Criminal Procedure for the production of a written report prepared by a police detective.

Right to police reports (continued)

State v. Gale, (continued)

The Court found the trial court's procedure with regard to the Rule 26.2 motion was improper and remanded for further development on that point.

A principal state witness was a police detective who investigated the crime and who participated in the search of the appellant's car. At the beginning of cross of the detective, the appellant moved to inspect the detective's investigation report. The detective had not used the report to refresh his recollection or for any other purpose during his testimony at trial. The court denied the motion.

Syl. pt. - "'After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the State or the defendant and his attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession that relates to the subject matter concerning which the witness has testified.' Rule 26.2, West Virginia Rules of Criminal Procedure." Syl. pt. 1, *State v. Tanner*, 175 W.Va. 264, 332 S.E.2d 277 (1985).

State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984) ruled that when a motion for disclosure under the rule has been made after a witness has testified, it is incumbent on the court to ascertain if a "statement" within the meaning of the rule exists, and next, to determine whether it is in the possession of the party. The court must then determine if it relates to the inquiries often involve disputed facts and if the evidence is sufficient to suggest a statement subject to discovery exists, the court should require the production of the writing for examination.

The Court found that with regard to investigation notes and reports prepared by government agents who testify as witnesses, rough notes and preliminary reports are no producible, but formal or final reports of agents who testify against the defendant are. 8A J. Moore, *Federal Practice* Sec. 26.2.02(2)(b) (2ded. 1986).

Here, the deceive's report was not introduced into evidence and was not presently available to the Court for inspection.

Right to police reports (continued)

State v. Gale, (continued)

The Court found the evidence in this case sufficiently substantial to suggest that the report might have been a formal or final report and that the trial court should examine it to determine whether it is in fact a statement producible to the opposing party.

Under *Watson* the refusal to order production under Rule 26.2 is error, but failure to allow inspection does not always constitute reversible error. The question of whether the error is harmless or prejudicial hinges on whether there is a substantial discrepancy between the report and the witness' trial testimony.

Although it is not clear in this case whether the production of the report is actually required, sufficient evidence was introduced that the trial court should have ordered production of the report to the court and examined it *in camera* to determine whether it was producible to the defense. The Court remanded for determination of whether the defendant was prejudiced by non-production, and noted the determination must be based on an examination of the actual report.

Right to statements of prosecution witnesses

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

See DISCOVERY Right to police reports, (p. 138) for discussion of topic.

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the trial court erred in denying certain pretrial discovery requests.

Right to statements of prosecution witnesses (continued)

State v. Lassiter, (continued)

Appellant contends he was prejudiced by the court's denial of his motion to compel the State to produce statements of co-conspirators and police reports until six days before the trial. The Court found under *W.Va.R.Crim.P.* 16(a)(2) and *W.Va.R.Crim.P.* 26.2, witnesses' statements and police reports are not discoverable until the witness has been called, or the report used at trial. Since the statements were disclosed before they were used at trial, there was no error.

DOUBLE JEOPARDY

Habeas corpus

Effect of

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition setting aside defendant's conviction for first-degree murder.

The Court agreed that habeas corpus relief was appropriate, based on violations of the Fourth Amendment (See SEARCH AND SEIZURE (p. 516) this Digest) but disagreed with the habeas court's order to retry the defendant "withing ninety (90) days ... or the (defendant) shall be forthwith released and the indictment dismissed ..."

Syl. pt. 16 - "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." Syllabus Point 3, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

Syl. pt. 17 - "Retrial must occur within three terms after the term in which relief is granted upon habeas corpus or appellate review, subject to the statutory exceptions excusing delay under *W.Va.Code*, 62-3-21." Syllabus Point 1, *State v. Moore*, 178 W.Va. 98, 357 S.E.2d 780 (1987).

Noting that a reasonable time may be given upon remand to furnish a transcript, the Court held that the trial court, upon remand should allow a reasonable time for retrial and not order dismissal of the indictment.

Kidnaping/first-degree sexual assault

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant was convicted of first-degree sexual assault and of kidnaping. He contends it was a violation of double jeopardy principals to be convicted of both.

Kidnaping/first-degree sexual assault (continued)

State v. Miller, (continued)

Syl. pt. 1 - "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syl. pt. 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

Syl. pt. 2 - In interpreting and applying a generally worded kidnaping statute, such as *W.Va.Code*, 61-2-14a, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnaping must be developed. The general rule is that a kidnaping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnaping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, and location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.

The Court found the kidnaping in this case was not merely incidental to the sexual assault. The victim was in the appellant's control for approximately one and one half hours. It soon became apparent that she was in danger. The appellant attempted to tie some cord around the wrists of the victim and her cousin, and threatened to hurt the victim with a steak knife. As the appellant drove off, the victim was forced to lie down in the front seat of the car under the threat of the defendant's knife. The Court could not determine how many miles the victim was forced to travel with the appellant but the distance was not inconsequential. The Court found that the location of the place where the sexual assault occurred was isolated and unfamiliar to the victim and on private property behind a locked gate which lessened the possibility of the appellant being discovered or her escaping. The Court found the victim was exposed to a greater risk of harm in this situation.

The Court concluded the double jeopardy rights of the appellant were not violated and that the kidnaping was not merely incidental to the sexual assault charge.

DOUBLE JEOPARDY

Mistrial

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

Appellant's first trial on charges of first-degree murder resulted in a mistrial after the prosecuting attorney made improper remarks to the jury. Defense counsel moved to bar the second trial on double jeopardy grounds. The motion was denied and appellant was convicted.

Appellant asserted on appeal that the mistrial was granted *sua sponte*, absent manifest necessity, and that the mistrial was a result of prosecutorial overreach, thereby constituting grounds for double jeopardy.

Syl. pt. 6 - "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 functionally equivalent to an appeal based on the same trial error." Syl. pt. 1, *State ex rel. Betts v. Scott*, 165 W.Va. 73, 267 S.E.2d 173 (1980).

Syl. pt. 7 - Where a defendant moves for a mistrial and fails to withdraw that motion before the motion is granted by the trial court, the trial court's declaration of the mistrial cannot be characterized as *sua sponte*, when the record does not disclose an objection by the defendant to the trial court's action. Thus, further prosecution of the defendant under the above circumstances does not offend jeopardy principles embodied in the federal and state constitutions. *U.S.Const.* Amend. V; *W.Va.Const*. Art. III. § 5,

Syl. pt. 8 - When a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles. *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982).

Here, no manifest necessity was present since the defendant moved for mistrial and did not withdraw the motion. The Court found that the prosecution did not provoke the motion for mistrial.

Mistrial (continued)

Manifest necessity

Keller v. Ferguson, 355 S.E.2d 405 (1987) (Miller, J.)

A mistrial was granted during petitioner's trial after the prosecutor claimed the petitioner's attorney asked improper questions of a State's witness on cross-examination. Petitioner seeks to prohibit his retrial on the ground that his retrial is barred by former jeopardy because there was no "manifest necessity" to terminate his initial trial.

On cross-examination a State's witness, the defense attorney sought to impeach her credibility by asking: "I'm told you entered a plea of guilty to welfare fraud in Lawrence County, Ohio." The prosecutor objected and at a bench conference it was revealed the witness had not been formally charged with any offense although she had received welfare money for which she was not qualified and had voluntarily agreed to repay it.

The State moved for a mistrial on the ground the question presupposed some criminal wrongdoing which could not be shown and that the question was improper. The court denied the motion and found no manifest necessity existed. He recommended the witness answer "no" to the question.

Later, in developing a line of questioning relating to the same witness' refusal to discuss the case with the defense, defense counsel suggested that the witness' son-in-law received a sentence a few months prior. The prosecutor objected and moved for a mistrial and the motion was granted.

Appellant contends there was no manifest necessity to discontinue his trial and that his retrial for the same offense is prohibited by former jeopardy.

Syl. pt. 3 - "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*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

Syl. pt. 4 - Termination of criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial.

Mistrial (continued)

Manifest necessity (continued)

Keller v. Ferguson, (continued)

Syl. pt. 5 - Where a prosecutor claims that the defense has by its actions prejudiced the jury, he is entitled to obtain a mistrial, without double jeopardy barring a retrial, it can be shown: (1) that the conduct complained of was improper and prejudicial to the prosecution, and (2) that the record demonstrates the trial court did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial.

The State contends *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984) should control, but the Court found its facts were more egregious. The Court found the case at hand does not involve willful violations of a prior court ruling by defense counsel where it may be expected that the prior ruling was designed to forestall introduction of prejudicial evidence. In this case the second episode's prejudicial effect was more tenuous than the first since the question only suggested that the witness's son-in-law had received a sentence. The judge did not consider any alternatives that might have corrected this error by way of instructing the jury to disregard the question.

The Court found the right to a mistrial based on manifest necessity arising out of improper questioning by the parties should not be easily obtainable. The Court held the record did not support a finding of manifest necessity and awarded the writ.

Plea bargaining

Breach of plea bargain agreement

State ex rel. Rogers v. Steptoe, 350 S.E.2d 7 (1986) (Neely, J.)

See PLEA BARGAINING Breach of agreement, Specific performance, (p. 431) for discussion of topic.

DOUBLE JEOPARDY

Plea bargaining (continued)

Setting aside guilty plea

Sellers v. Broadwater, 342 S.E.2d 198 (1986) (Neely, J.)

See PLEA BARGAINING Setting aside, Double jeopardy, (p. 433) for discussion of topic.

Probation

Consecutive sentence for violation

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See PROBATION Violation of, Sentencing, (p. 453) for discussion of topic.

Robbery

Multiple store clerks

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

Appellant was convicted of two counts of attempted aggravated robbery, involving two clerks at a store, and one count of malicious wounding, inflicted on one of the clerks. He contends that under the facts of this case, only one count of attempted aggravated robbery could be charged because the property sought to be taken belonged to only one owner, the Village Mar.

In this case, two men wearing ski masks over their faces and carrying handguns entered a village mart store. One of the store clerks testified that prior to their entry, he had seen and recognized the two armed men. As they entered the store, the defendant stated: "Get on the floor. This is a hold-up."

The defendant pointed his gun at one clerk who proceeded to get on the floor. The other clerk, who had been in the back stock-room, came out into the store area, where she was subsequently shot and injured by the co-defendant. Immediately thereafter, the defendant and co-defendant fled the store without taking money.

Robbery (continued)

Multiple store clerks (continued)

State v. Collins, (continued)

Syl. pt. 2 - it is impossible to conclude from either the common law or *W.Va.Code*, 61-2-12, that an attempt to rob a store by presenting a firearm and leaving without taking any property can, in light of double jeopardy principles, result in multiple convictions of attempted aggravated robbery for each clerk present in such store.

The Court found the facts in this case do not warrant the conclusion that two attempted robberies were contemplated. Even though the Legislature has made an attempt to commit robbery punishable to the same extent as the completed crime of robbery (*W.Va.Code*, 61-2-12), this statute did not alter the basic common law element of robbery or our substantive law on attempted crimes.

The Court concluded the trial court erred in allowing the defendant to be tried for two counts of attempted aggravated robbery.

State v. Phillips, 342 S.E.2d 210 (1986) (McHugh, J.)

Appellant was convicted of first-degree murder without a recommendation of mercy. He was also indicted for the robbery of the murder victim, but the jury did not return a verdict of guilty or not guilty upon the robbery charge. The Court found upon the record in this case, double jeopardy principles would forbid the State from pursuing the robbery charge. See *W.Va.R.Crim.P.* 31(b). The Court declined to overturn the appellant's murder conviction upon such alleged error.

Same offense

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

See DOUBLE JEOPARDY Robbery, Multiple store clerks, (p. 147) for discussion of topic.

DOUBLE JEOPARDY

Transfer of juvenile to adult jurisdiction

Previous successful appeal of transfer

State ex rel. Vance v. Maynard, 351 S.E.2d 437 (1986) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Previous successful appeal of transfer, (p. 400) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Blood alcohol tests

State v. York, 338 S.E.2d 219 (1985) (Neely, J.)

Applies standard set forth in Syl. pt. 3, *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985).

Assessment of costs

State v. Moczek, 363 S.E.2d 238 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Right to test, (p. 152) for discussion of topic.

Duty to inform of right to

State v. Moczek, 363 S.E.2d 238 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Right to test, (p. 152) for discussion of topic.

Failure to honor request for blood test

State ex rel. King v. MacQueen, No. 17294 (11/19/86) (McGraw, J.)

Relator prosecutor seeks a writ of prohibition to prohibit the circuit judge from enforcing an order entered issuing a rule to show cause why a writ of prohibition should not be awarded prohibiting trial against respondent Bailey for driving under the influence and staying these proceedings until further order of the circuit judge.

Syl. pt. 2 - Article VIII, § 6 of the West Virginia Constitution and West Virginia Code § 51-2-2 (1981 Replacement Vol.) provide circuit courts with jurisdiction to control the proceedings of a magistrate court by issuance of a writ of prohibition.

Blood alcohol tests (continued)

Failure to honor request for blood test (continued)

State ex rel. King v. MacQueen, (continued)

The Court found a clear legal question has been presented to the circuit court which may be resolved independently of any disputed facts. Respondent Bailey was arrested for driving under the influence of alcohol, and her request for a blood test was denied. The Court found the circuit judge must rule on the remedy where a person is not given a blood test which he or she requests pursuant to the *W.Va.Code*, 17C-5-9 and must make this ruling promptly and without unreasonable delay.

Horizontal gaze nystagmus

State v. Barker, 366 S.E.2d 642 (1988) (Brotherton, J.)

Appellant was convicted of third offense, driving under the influence of alcohol. He protested the admission of the horizontal gaze nystagmus test as proof of intoxication.

The trial court allowed the arresting officer to qualify as an expert regarding the nystagmus test. Although the officer described the test and the normal reaction of a sober person he did not address the scientific basis for the test. Nonetheless, he went on to estimate the defendant's blood alcohol based on the test.

Syl. pt. 1 - "In order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test." Syl. pt. 7, *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980).

Syl. pt. 2 - Estimates of blood alcohol content based on the Horizontal Gaze Nystagmus test are inadmissible as evidence in a criminal trial.

The Court noted that a "demonstration of reliability should include both testimony by expert witnesses and relevant articles and scholarly publications." See *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980).

Even assuming general reliability on the issue of intoxication, the Court was not persuaded that the test demonstrated specific blood alcohol content.

Blood alcohol tests (continued)

Right to test

State v. Moczek, 363 S.E.2d 238 (1987) (Neely, J.)

Appellant was arrested for driving under the influence of alcohol. Following an explanation of the consequences, he refused to take a breathalyzer test. At his arraignment before a magistrate appellant requested a blood test but claimed he could not pay for it. No blood test was given and appellant's license to drive was suspended for one year.

Syl. pt. 1 - *W.Va.Code*, 17C-5-9 [1983] does not require blood tests of motorists arrested for driving under the influence of alcohol and law enforcement officers are under no duty to inform DUI suspects of their right to blood tests in addition to the designated chemical test for intoxication; however, *W.Va.Code*, 17C-5-9 [1983] accords an individual arrested for driving under the influence of alcohol a right to demand and receive a blood test within two hours of his arrest.

Syl. pt. 2 - A person's driver's license may be suspended under *W.Va.Code*, 17C-5-7(a) [1983] for refusal to take a designated breathalyzer test.

Syl. pt. 3 - *W.Va.Code*, 17C-5-10 [1983] does not require that a person arrested for driving under the influence of alcohol pay for the blood test to which he is entitled under *W.Va.Code*, 17C-5-9 [1983] at the time such test is administered. Rather, the county must pay for the blood test to which the defendant is entitled even though the test is requested by the suspect rather than the arresting officer; if the defendant is found guilty, the cost of the test should be taxed as costs of the proceeding.

The Court stressed that this decision is based on the narrow ground that appellant's license was revoked due to his refusal to take the breathalyzer test. In other circumstances the issue of denial of a right because of indigency may be persuasive. Clearly, a person accused of DUI should not be required to pay for a blood test at the time of its administration or forfeit the right to a test.

Blood alcohol tests (continued)

Time within which to receive

State v. Dyer, 355 S.E.2d 356 (1987) (McGraw, C.J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the trial court erred in allowing the State to introduce into evidence the results of the blood alcohol tests performed at the hospital with appellant's consent. The trial court found the blood specimen had not been taken within the two-hour time period required by *W.Va.Code*, 17C-5-8, but concluded the results were admissible as long a they were not used as *prima facie* evidence of intoxication.

Admission of blood test was not reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the offense; they were used to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question and were, therefore, relevant evidence of a probative fact. Similar evidence had been offered by other State's witnesses and had been given in the appellants own statements. In view of the peculiar circumstances of this case, including the structure of the State's examination of its expert and the nature of the expert testimony (he was not questioned as to appellant's probable blood alcohol level or asked if he was intoxicated at the time) there was no error.

State York, 338 S.E.2d 219 (1985) (Neely, J.)

Syl. pt. 1 - *W.Va.Code*, 17C-5-9 [1983] accords an individual arrested for driving under the influence of alcohol, controlled substance or drugs a right to demand and receive a blood test within two hours of arrest.

Here, the issue was whether or not the defendant requested a blood test. The Court found the evidence supported the trial court's finding that the defendant had not made such a request.

DRIVING UNDER THE INFLUENCE

Breathalyzer tests

Foundation of admission into evidence

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Petitioner contends the trial court erred in admitting the results of the breathalyzer test because the test was not administered in accordance with the rules and regulations promulgated by the State Department of Health, and because the test procedure and results were not properly authenticated by the State.

Petitioner did not specify how the administration of the test failed to comply with the rules and regulations nor did he specify which rules or regulations were violated or state the manner in which the test procedure results were improperly authenticated. The results were offered to prove the petitioner was under the influence of alcohol and there was ample independent proof of this. The Court found any conceivable error in admitting the test results was not sufficiently prejudicial to require reversal.

Causing a death

Evidence of deceased's driving record

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the trial court erred in excluding evidence of the deceased's driving record. The Court found in footnote 4 the deceased's prior record of bad driving was immaterial to the issue of whether the appellant was guilty of a violation of *W.Va.Code*, 17C-5-2(b) (1981).

Causing a death (continued)

Independent intervening cause

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the victim's failure to wear his seatbelt was an independent, intervening cause of the death. The Court found this contention seriously distorts the definition of an intervening cause. An intervening cause is a new and independent force which breaks the causal connection between the original act or omission and the injury, and itself becomes the direct and immediate cause of the injury. The victim's failure to take precautionary steps which may have prevented his eventual demise was not an intervening cause.

Indictment

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the indictment was fatally defective because it did not follow the statutory language of *W.Va.Code*, 17C-5-2(b) (1981). A comparison of the indictment and the statute showed that the statutory phrase "to a degree which renders him incapable of safely driving" was omitted from the indictment.

Syl. pt. "An indictment 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." Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

The Court found the indictment was sufficient. Except for a small omission in the language of the indictment, it is substantially similar to the statutory language, and the reference to the code section fully informed the accused of the particular offense with which he was charged and enabled the court to determine the statute on which he was charged.

Causing a death (continued)

Instructions

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Petitioner contends that Instruction No. 1 was incomplete because it did not instruct the jury that he could be convicted of the lesser included offense of violation of *W.Va.Code*, 17C-5-2(b) [1983], the misdemeanor version of *W.Va.Code*, 17C-5-2(a) [1983].

Syl. pt. 4 - "A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to specific law points ought to be asked. A court may, without request, if it thinks the interest of justice and a fair trial call for it, instruct the jury in matter of law, the instruction being bound in law and relevant to the evidence; but it not bound to do so unless asked; but, if asked to give such proper specific instructions, it must do so." Syl. pt. 5, *State v. Cobb*, 40 W.Va. 718, 22 S.E.2d 310, *overruled on other grounds*, 117 W.Va. 605, 186 S.E. 607 (1936).

Here, the petitioner did not offer the court a proposed instruction on *W.Va. Code*, 17C-5-2(b) [1983] nor did petitioner object to the lack of an instruction of *W.Va.Code*, 17C-5-2(b) [1983]. Petitioner clearly made a strategic choice not to offer an instruction on *W.Va.Code*, 17C-5-2(b) [1983] in the hope that he would be convicted of nothing greater than driving under the influence. This strategy was unsuccessful and petitioner may not now claim that his own strategic maneuver denied him a fair trial. In the absence of a request by petitioner's counsel, the trial court was not obliged to give the instruction.

Proximate and contributing cause

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Appellant was convicted of violating *W.Va.Code*, 17C-5-2(a) [1983]. He contends the trial court erred in failing to include in its jury charge defendant's proposed Instruction No. 5 which provided.

> The driver of a motor vehicle is not liable either criminally or in a civil suit for unavoidable or inevitable accidents. The mere fact that an accident occurs which results in personal injury, death or property damage does not warrant a conviction of a criminal offense unless it is proven beyond a reasonable doubt that the injury or death was caused by the driver's reckless disregard of the safety of others. An unavoidable or inevitable accident is such an occurrence or happening as, under all the facts and circumstances, could not have been foreseen or anticipated and could not have been foreseen or anticipated in exercise of ordinary care as the proximate cause of the injury or death. In other words, where the accident did not occur as the result of the driver's reckless disregard of the safety of others and he could not have anticipated or foreseen the resulting accident, the accident is deemed to have been an unavoidable or inevitable accident for which no criminal liability attaches.
>
> Therefore, if the jury and each member of the jury believe to even the slightest degree that the accident in which STEPHANIE SPINDLE was killed was unavoidable or inevitable and was not the result of the Defendant's reckless disregard of the safety of STEPHANIE SPINDLE then you may not convict the Defendant of the offenses charged in either COUNT ONE or COUNT TWO of the indictment.

and defendant's proposed instruction No. 2 which provided:

> The indictment in this case charges that the Defendant, at the time of the accident in which it is alleged that STEPHANIE SPINDLE was killed occurred, was operating a motor vehicle while under the influence of alcohol and that this was a contributing cause to the death of STEPHANIE SPINDLE. Before the jury may return a verdict of guilty as to either COUNT ONE or COUNT TWO of the indictment, the jury,

Causing a death (continued)

Proximate and contributing cause (continued)

State v. Bartlett, (continued)

> and each member of the jury, must believe, beyond a reasonable doubt, that the Defendant was operating a motor vehicle while under the influence of alcohol at the time of the accident and that this was a contributing cause of the death of STEPHANIE SPINDLE.
>
> The term contributing cause means that the Defendant's operation of a motor vehicle while under the influence of alcohol lead to and was one of the precipitating causes for the accident occurring. If the jury, and each member of the jury, believe that the accident would have occurred and the death of STEPHANIE SPINDLE would have occurred in spite of the Defendant having operated a motor vehicle while under the influence of alcohol then the jury should not find that the Defendant's operation of a motor vehicle while under the influence of alcohol was a contributing cause to the accident in which STEPHANIE SPINDLE was killed.

The trial court defined "contributing cause" as follows:

> The term contributing cause as used in these instructions means that the operation of a motor vehicle while under the influence of alcohol was one of the precipitating causes of the accident occurring and the resultant death of Stephanie Spindle.

The Court found the "unavoidable or inevitable accident" instruction was not an instruction the trial court was required to give since that was merely another way of saying the misconduct was neither a proximate nor a contributing cause of the accident.

The Court found the petitioner sought to prove a lack of causation and counsel for the defense was permitted to argue extensively that the accident would have occurred even had petitioner not been intoxicated and that the intoxication could not have been a contributing cause of the death.

Causing a death (continued)

Proximate and contributing cause (continued)

State v. Bartlett, (continued)

Syl. pt. 1 - "'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 (1896)." Syl. pt. 4, *State v. Johnson*, 157 W.Va. 341, 201 S.E.2d 309 (1973).

The Court found the jury was adequately advised on the requirements of proximate and contributing cause and that the court did not err in refusing the instructions.

Reckless disregard

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Petitioner contends the trial court erred in failing to instruct the jury with defense instruction No. 1 defining "reckless disregard for the safety of others." The instruction provided:

> The indictment in this case charges the Defendant acted, or failed to act, in reckless disregard for the safety of others when he was operating a motor vehicle on East Street in the City of Parkersburg, Wood County, West Virginia, during the early morning hours of May 1, 1984. In order for the jury to return a verdict of guilty as to the charges contained in COUNT ONE or COUNT TWO of the indictment the jury and each and every member of the jury must believe beyond a reasonable doubt that the Defendant did, in fact, act in reckless disregard for the safety of others.
>
> The term reckless disregard for the safety of others requires proof of conduct indicating an entire absence of care for the safety of others which exhibits an indifference to the consequences of a persons actions. Such conduct is more than negligence or even gross negligence.

DRIVING UNDER THE INFLUENCE

Causing a death (continued)

Reckless disregard (continued)

State v. Bartlett, (continued)

The Court found no error, noting they have never held that every term in a jury instruction must be defined.

Syl. pt. 2 - A term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction.

The Court found no error.

Sufficiency of evidence

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends there was insufficient evidence to submit the case to the jury. The Court in footnote 5 found the only dispute as to the sufficiency of the evidence was whether there was sufficient evidence to prove the appellant was drunk at the time of the accident. The appellant had admittedly been drinking before the accident and had a swaying walk, there was an aroma of alcohol in the car, and the officers at the scene were of the opinion that appellant was drunk. The Court found although the appellant offered explanations that contradicted the State's assertion of inebriation, this was a question for the jury to decide.

DRIVING UNDER THE INFLUENCE

Due process

Preservation of ampule in which breath sample is taken

State v. Sandler, 336 S.E.2d 535 (1985) (Brotherton, J.)

Appellant was convicted of driving under the influence of alcohol upon a public highway in violation of *W.Va.Code*, 17C-5-2 (1976). He contends his due process rights were violated because the police did not preserve the ampule in which the breath sample was taken or the breath sample itself.

Syl. pt. 3 - Due process does not require that law enforcement agencies preserve breath samples or the ampule used in testing the sample in order to introduce breath-analysis tests at trial.

Evidence

Refusal to take breathalyzer test

State v. Cozart, 352 S.E.2d 152 (1986) (Miller, C.J.)

Appellant was convicted of third offense driving under the influence. He contends the trial court erred in allowing the State to introduce testimony concerning the defendant's refusal to take a breathalyzer test.

Syl. pt. 1 - The admission into evidence at a criminal trial of the fact that a defendant arrested for driving under the influence of alcohol refused to take a breathalyzer test offered to him does not violate the defendant's right against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution. To the extent that *State v. Adams*, 162 W.Va. 150, 247 S.E.2d 475 (1978), excludes such evidence on these constitutional grounds is overruled.

Syl. pt. 2 - There is no statutory provision directly prohibiting the admission into evidence at a criminal trial of the fact that a defendant arrested for driving under the influence of alcohol refused to take a breathalyzer test offered to him.

Evidence (continued)

Refusal to take breathalyzer test (continued)

State v. Cozart, (continued)

Syl. pt. 3 - In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol 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 effect.

Syl. pt. 4 - A cautionary instruction is warranted where evidence of the refusal of a defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilty because such refusal does not have a direct bearing on the issue of guilt.

In this case, the Court remanded to give the defendant the benefit of the rule developed here. On remand, the defendant is entitled to an *in camera* hearing to consider the admissibility of the defendant's refusal to take the breathalyzer test. If the trial court concludes this evidence should have been excluded, the defendant is entitled to a new trial, but if the trial court reaches a contrary conclusion, the conviction stands.

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

Appellant was convicted by a jury of DUI, first offense. Appellant assigned error in that the prosecuting attorney, during opening statement, commented upon appellant's refusal to take a breathalyzer test.

The Court refused to follow the holding in *State v. Cozart*, 177 W.Va. 400, 352 S.E.2d 152 (1986), (See DRIVING UNDER THE INFLUENCE Evidence, Refusal to take breathalyzer test, (p. 161) this Digest), choosing instead to analyze the case in more general terms of prosecutorial misconduct during opening statements. The rationale was that no evidence of the refusal was offered.

Evidence (continued)

Refusal to take breathalyzer test (continued)

State v. Holland, (continued)

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." Syl. pt. 1, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978).

The Court noted that the same rule applied to closing statements or to any remarks made during a trial. *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

Here, although finding the prosecution's comments improper, the Court found harmless error.

Instructions

Proximate and contributing cause

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Causing a death, Proximate and contributing cause, (p. 156) for discussion of topic.

Reckless disregard

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Causing a death, Reckless disregard, (p. 159) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Instructions (continued)

Reckless disregard (continued)

State v. Dyer, 355 S.E.2d 356 (1987) (McGraw, C.J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the state failed to allege and prove an act or omission which the appellant was alleged to have committed in reckless disregard of the safety of others. The court did instruct the jury as to the elements of the offense of reckless driving. Appellant contends the indictment was fatally defective in its failure to allege reckless driving as the act or omission of the appellant which gave rise to the charge against him. The Court found the felony of causing a death while driving under the influence of alcohol is not unlike the offense of felony-murder in that the underlying offense need not be specified in the indictment. The court found the indictment was couched in the statutory language of *W.Va.Code*, 17C-5-2(a). The Court found no defect on the face of the indictment which would warrant reversal of the conviction.

The Court found no reversible error in the trial court's refusal to require the state to specify the act or omission relied upon in its instruction as to the elements of the offense with which the appellant was charged. The Court found the jury was instructed as to that act or omission by separate instruction.

Municipal offense

Effect of

Bolton v. Bechtold, 363 S.E.2d 241 (1987) (Per Curiam)

Appellant's license to operate a motor vehicle was administratively suspended for ten years following an arrest for DUI. The enhanced suspension was based on a previous DUI conviction in municipal court. The Commissioner appealed from the circuit court's refusal to allow the municipal court conviction to be considered.

Finding *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985) to be on point, the Court reversed.

Municipal offense (continued)

Effect of (continued)

Bolton v. Bechtold, (continued)

Syl. pt. - "In reviewing the judgment of a lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, *Burks v. McNeel*, 164 W.Va. 654, 264 S.E.2d 651 (1980).

Effect of invalidity

State ex rel. Crank v. City of Logan, 363 S.E.2d 135 (1987) (McHugh, J.)

On December 1, 1984 appellee was arrested for violating a municipal ordinance against driving under the influence of alcohol. His license was suspended for ninety days and was reinstated on March 25, 1985.

The municipality adopted a new DUI ordinance on January 17, 1985, reducing the maximum jail term from six months to thirty days. On May 31, 1985 appellee was arrested for a second time for DUI and charged under the new ordinance. Following administrative revocation of his license for ten years, he appealed to circuit court, alleging that the first ordinance, under which he was later convicted, was void for exceeding the statutory maximum penalty for municipal offenses. (See *W.Va.Code*, 8-11-1).

The trial court agreed, held the later offense to be a first offense and ruled that appellee's first revocation period satisfied the revocation for the later offense.

Syl. pt. - Pursuant to *W.Va.Code*, 17C-5-11(b), as amended, a municipal ordinance must impose the same penalty for driving under the influence of alcohol as is prescribed for the corresponding state offense.

The municipal ordinance here had originally provided a penalty identical to the state penalty. By the terms of *W.Va.Code*, 17C-5-11(b) it was therefore valid. Thus, the Court upheld the first revocation. When the ordinance was altered, however, it violated the terms of the statute and therefore the second revocation was void. Appellee was saved by the same argument directed toward the second offense.

DRIVING UNDER THE INFLUENCE

Refusal to take breathalyzer

Consequences thereof

State v. Moczek, 363 S.E.2d 238 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Right to test, (p. 152) for discussion of topic.

Second offense DUI

Bolton v. Bechtold, 363 S.E.2d 241 (1987) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Municipal offense, Effect of, (p. 164) for discussion of topic.

State ex rel. Crank v. City of Logan, 363 S.E.2d 135 (1987) (McHugh, J.)

See DRIVING UNDER THE INFLUENCE Municipal offense, Effect of invalidity, (p. 165) for discussion of topic.

Third offense DUI

Right to counsel in prior DUI convictions, waiver thereof

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

Appellant was convicted of third offense DUI. He seeks review solely on questions arising out of the use of the two prior DUI convictions to enhance the most recent charge and conviction to a felony for third offense. Appellant contends there was lack of counsel or effective waiver in both of his two prior DUI convictions, precluding their collateral use for third offense.

Syl. pt. 1 - Under the Sixth Amendment of the federal constitution and article III, section 14 of the West Virginia Constitution, unless an individual convicted may not be used to enhance a sentence of imprisonment for a subsequent offense.

Third offense DUI (continued)

Right to counsel in prior DUI convictions, waiver thereof (continued)

State v. Armstrong, (continued)

The record in this case clearly indicated appellant's two prior DUI convictions resulted from guilty pleas made without the assistance of counsel. The Court found the only substantial question presented was whether appellant waived his right to counsel.

The absence of a written transcript of proceedings in the State's magistrate courts, as well as the less serious direct and collateral consequences of misdemeanors argues in favor of allowing substantial flexibility in informing misdemeanants of their constitutional rights. The Court found, however, that the record of the proceeding must demonstrate that the defendant waived these rights knowingly and understandingly.

Two matters in evidence related to both of the prior convictions. First, the record indicated the appellant was of limited intelligence and education. He did not progress beyond eighth grade, and previously been adjudged incompetent, had a guardian appointed for him, and had an I.Q. in the mentally retarded range. The Court found these factors had substantial bearing upon other evidence of waiver.

Second, the Court found in evidence in both prior convictions a fully completed "Rights Certification Form." Completion of the rights form in both cases is not conclusive proof of a knowing and intelligent waiver but does constitute *prima facie* evidence that the waiver of counsel in both instances was proper. It was therefore, incumbent upon the appellant to present evidence of the lack of an informal waiver.

Regarding the 1977 plea, the appellant signed the rights form under the information relating to his counsel rights and marked the blank that indicated "I have counsel to represent me." The State did not contend, and there was nothing in the record to indicate that the appellant ever conferred with a lawyer before entering his plea.

Third offense DUI (continued)

Right to counsel in prior DUI convictions, waiver thereof (continued)

State v. Armstrong, (continued)

More importantly, the rights form was signed by the appellant more than one month before he entered his guilty plea. The magistrate who accepted the appellant's plea testified that he had no independent recollection of what transpired during the taking of this plea. Although this lack of supporting testimony alone would not normally raise doubt, circumstances surrounding this particular conviction, as a whole, militate against finding a voluntary under standing and intelligent waiver of counsel.

The Court found as a fundamental proposition, a waiver of rights, including the right to counsel, should be reasonably contemporaneous to the taking of the plea. The record of the 1977 conviction contained only an erroneous rights form signed over a month before the actual plea. The only item of record from the date to the plea was the magistrate's judgment order assessing the fine. The Court found no record of a voluntary and intelligent waiver. Given the substantial lapse of time between the arrest and eventual plea, and the fact that the appellant appeared before the magistrate without counsel, the magistrate was under a duty to ascertain, and make it clear by written record, that the appellant understood the rights he would be foregoing upon entering a guilty plea and waived them knowingly.

Normally, if a defendant indicates, correctly or incorrectly, that he has his own counsel, he may not later attack the validity of the conviction on right to counsel grounds. The assertion that one will employ his own counsel removes the necessity of ascertaining the existence of a knowledgeable waiver. The evidence in this case, however, particularly in light of the limited mental capacity of the appellant and the failure of the magistrate to determine the accuracy of the one-month old rights form, compels a finding of an inadequate waiver of the right to counsel in the 1977 conviction.

Third offense DUI (continued)

Right to counsel in prior DUI convictions, waiver thereof (continued)

State v. Armstrong, (continued)

The evidence of a proper waiver under the 1978 conviction was more substantial. The appellant expressly waived counsel in a rights form completed and signed at the time he entered his plea of guilty. The testimony of the magistrate who accepted his plea provided further support to the *prima facie* showing in the record that the waiver of rights and plea were made understandingly. The appellant did not present sufficient rebuttal evidence. Accordingly, the Court found the trial court's refusal to strike this conviction amply supported by the evidence.

Treatment of substance abusers

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

The record in this case indicated the appellant had a long history of chronic alcohol abuse. The Court noted that the people of this State are deprived of the benefit of the State's laws which operate against drunk driving when concentrated efforts to treat alcoholic offenders are not undertaken. The Court noted experience teaches that, without treatment of this illness, the likelihood that an alcoholic will repeatedly commit drunk driving offenses is substantial.

The record in this case did not disclose whether the appellant had undergone diagnosis, evaluation or treatment pertaining to his alcohol abuse problem subsequent to his conviction. The Court found a right to such rehabilitative measures. Where little or no incarceration time is involved, rehabilitative treatment for alcohol abuse should be one of the conditions of the sentence in every misdemeanor or felony conviction in which alcohol abuse was a contributing factor.

Treatment of substance abusers (continued)

State v. Armstrong, (continued)

The Court noted that the mental health laws of this State provide for treatment of those addicted to alcohol who pose a danger to themselves and others. The Court found the State's mental health laws provide a process of adjudication and rehabilitation for alcoholics which, in many cases, will more likely keep the chronic DUI offender off the road. Irrespective of the results of criminal prosecution, the State has a duty to proceed civilly to require treatment. In instances where there is probable cause to suspect alcohol addiction, rehabilitative treatment should be sought by the county prosecutor by application for the institution of proceedings for involuntary commitment to an appropriate mental health facility.

Here, the record clearly revealed probable cause to believe that the appellant suffered from alcohol addiction as defined by *W.Va.Code*, 27-1-11 (Supp. 1984) and posed a substantial threat of harm to himself and others. Accordingly, the State must provide appropriate rehabilitation for the appellant.

The appellant's diminished mental capacity is no defense to his demonstrated propensity to drink and drive. The Court found if the appellant has not successfully completed rehabilitative treatment subsequent to his conviction, the prosecuting attorney should initiate involuntary commitment proceedings for examination and determination of appropriate treatment in a mental health facility.

DUE PROCESS

Juveniles

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

See JUVENILES Institutional hearings, Generally (p. 389) for discussion of topic.

Parole

Denial of parole consideration

Vance v. Holland, 355 S.E.2d 396 (1987) (Per Curiam)

See PAROLE Denial of parole consideration, (p. 424) for discussion of topic.

Paternity actions

Turner v. Jones, 330 S.E.2d 323 (1985) (Per Curiam)

See PATERNITY Statute of limitations, Constitutionality, (p. 427) for discussion of topic.

Right to hearing

Probation revocation

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See PROBATION Revocation, Right to hearing, (p. 451) for discussion of topic.

Right to be present witnesses

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See PROSECUTING ATTORNEYS Intimidating witnesses, (p. 471) for discussion of topic.

DUE PROCESS

Right to transcript

Maddox v. Ferguson, No. 17923 (11/17/87) (Per Curiam)

See DENIAL OF A FAIR TRIAL Right to transcript, (p. 113) for discussion of topic.

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See PROBATION Revocation, Grounds for, (p. 450) for discussion of topic.

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See TRANSCRIPT Right to transcript, Failure to provide, (p. 637) for discussion of topic.

ELECTIONS

Campaign contributions

In the Matter of Magistrate Vandelinde, 366 S.E.2d 631 (1988) (Miller, J.)

The Judicial Hearing Board recommended dismissal of charges against Magistrate Dennie Vandelinde for making political contributions in violation of Canons 2 and 7 of the Judicial Code of Ethics. Vandelinde was not charged with any criminal violation and the Hearing Board found that he had relied on the advice of the county's chief election officer, who had in turn been advised by the Secretary of State's office.

Syl. pt. 2 - "A specific section of a statute controls over a general section of the statute." Syllabus Point 2, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970).

Syl. pt. 3 - In the absence of any specific language in *W.Va.Code*, 3-8-9, authorizing expenditures to a person, committee, or organization engaged in advocating the election of a committee, or organization is controlled by *W.Va. Code*, 3-8-12(f), and is subject to a maximum limit of one thousand dollars.

Syl. pt. 4 - *W.Va.Code*, 3-8-12(f), which places a one thousand dollar limit on contributions to a committee or organization supporting a candidate, does not violate the First Amendment rights of free speech and association.

Here, the Court found that Vandelinde had violated the provisions of *W.Va. Code*, 3-8-9 and gave him a public reprimand. The Court noted that the oral advice of a public official is insufficient to obviate guilt but can be used to mitigate punishment.

ENTRAPMENT

Instructions

State v. Taylor, 337 S.E.2d 923 (1985) (Per Curiam)

Appellant contends the trial court erred in giving the State's instruction defining the defense of entrapment. The Court noted the instruction given appears to be widely accepted as a correct and complete statement of the law.

State's instruction 1-B read:

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provided what appears to be a favorable opportunity is not entrapment. For example, when the government suspects that a person is engaged in illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy [sic], to purchase narcotics from the suspected person. If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.
>
> On the other hand, if the evidence is the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

ENTRAPMENT

Standard for determining

State v. Taylor, 337 S.E.2d 923 (1985) (Per Curiam)

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 procure its commission by an accused who would not have otherwise perpetuated it except for the instigation or inducement by the law enforcement officers." Syl. pt. 3, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976).

Syl. pt. 2 - "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." Syl. pt. 4, *State v. Knight*, 159 W.Va. 924, 230 S.E.2d 732 (1976).

Appellant contends the trial court should have directed a verdict of acquittal because the State's evidence shows that he was entrapped as a matter of law into making the transfer of the marijuana. The Court found the State's evidence in this case is such that reasonable minds could differ as to whether the officer's conduct arose to such an unconscionable level as to constitute entrapment as a matter of law. (Appellant contends the officer's appeal to his sympathy induced him to commit the act). The Court found the trial court correctly refused to order a directed verdict in favor of the appellant.

EQUAL PROTECTION

Right to transcript

Maddox v. Ferguson, No. 17923 (11/17/87) (Per Curiam)

See DENIAL OF A FAIR TRIAL Right to transcript, (p. 113) for discussion of topic.

State v. England, 363 S.E.2d 725 (1987) (Neely, J.)

See DENIAL OF A FAIR TRIAL Right to transcript, (p. 113) for discussion of topic.

See also, DUE PROCESS Right to transcript, (p. 172).

ETHICS

See ATTORNEYS Discipline, Mitigating circumstances, (p. 34).

See ATTORNEYS Discipline, Generally, (p. 34).

See ATTORNEYS Professional responsibility, (p. 38).

See JUDGES Discipline, Generally, (p. 359).

EVIDENCE

Accomplice's guilty plea

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

Admissibility

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant was convicted of nighttime burglary. In addition to one eyewitness, the only other evidence placing appellant at the scene of the crime was a blood sample taken from a doorknob on the door through which the intruder gained entry.

Appellant contended the blood samples obtained from the scene of the crime and from his person after arrest were inadmissible because the officer testifying at trial as to the consistency of the two samples was not an expert.

The Court noted that no objection was raised at trial and refused to find error.

Syl. pt. 3 - "'Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived.' Syl. pt. 4, *State v. Michael*, 141 W.Va. 1, 87 S.E.2d 595 (1955)." Syl. pt. 7, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

Chain of custody

State v. Chamberlain, 359 S.E.2d 858 (1987) (Per Curiam)

Appellant was convicted of delivery of marijuana. Delivery was made in a plain brown grocery bag. Appellant alleged on appeal that the chain of custody prior to seizure did not eliminate the possibility of tampering.

Admissibility (continued)

Chain of custody (continued)

State v. Chamberlain, (continued)

Syl. pt. 2 - "Before a physical object connected with a crime may properly be admitted into 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." Syl. pt. 1, *State v. Davis*, 164 W.Va. 783, 266 S.E.2d 909 (1980). See also, *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981).

Every possibility of meddling need not be eliminated, only that "the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with." Quoting *State v. Davis*, *supra*.

Expert testimony

State v. McCoy, 366 S.E.2d 731 (1988) (Brotherton, J.)

See EVIDENCE Expert witnesses, Rape trauma, (p. 205) for discussion of topic.

In camera **hearing**

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Admissibility (continued)

***In camera* hearing** (continued)

State v. Reedy, (continued)

Based on this ground, the Court reversed appellant's convictions.

Finding that the appellant must be given a new trial, the Court reviewed the assignments of error in the burglary trial.

Appellant attacks the admissibility of testimony given by one of the officers that the appellant requested to have a pair of gloves removed from his hands. He contends the trial court erred in allowing the testimony prior to holding an *in camera* hearing on its admissibility. The trial court had no reason to anticipate the need for such a hearing, the defense had not requested one, and the prosecution itself did not mean to elicit the testimony. Since the trial court is now on notice of the possibility of this testimony, on remand it will have an opportunity to hold an *in camera* hearing.

Involuntary confession

State v. Randle, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

Judge's discretion

State v. Giles, 368 S.E.2d 107 (1988) (Per Curiam)

See EVIDENCE Admissibility, Vouching the record, (p. 183) for discussion of topic.

Admissibility (continued)

Prior voluntary statement

State v. Randle, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

Defendant was convicted of first-degree murder. During the course of the murder investigation police officers interrogated the defendant in a Pennsylvania jail where he was held on unrelated charges. They continued to question him even after he invoked his Fifth Amendment privilege, telling him that his fingerprints were at the scene (and on the murder weapon), that they would "talk to the judge" on his behalf if he confessed, and that a confession could reduce murder charges to manslaughter. Defendant finally confessed.

The trial court suppressed the confession on *Miranda* grounds but judged it voluntary and admissible for impeachment. The Court distinguished between a confession taken in violation of *Miranda* (involuntary in law) and one which was coerced (involuntary in fact). The former may be admissible for impeachment while the latter is inadmissible for any purpose.

Syl. pt. 1 - "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 as evidence in the State's case in chief." Syllabus Point 4, *State v. Goodmon*, 170 W.Va.123, 290 S.E.2d 260 (1981).

Syl. pt. 2 - "A confession that has been found to be involuntary in the sense that it was not the product of the freewill of the defendant cannot be used by the State for any purpose at trial." Syllabus Point 2, *State v. Goff*, 169 W.Va. 778, 289 S.E.2d 473 (1982).

Syl. pt. 3 - "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." Syllabus, *State v. Parsons*, 108 W.Va. 705, 150 S.E. 745 (1930).

Admissibility (continued)

Prior voluntary statement (continued)

State v. Randle, Jr., (continued)

The Court noted that the methods used during interrogation overwhelmed the defendant's will to resist. Further, the trial court's ruling regarding use of the confession for impeachment deterred the defendant from testifying in his own behalf. The defendant's failure to testify does not waive the constitutional violation of his right against self-incrimination.

Scientific tests

State v. Barker, 366 S.E.2d 642 (1988) (Brotherton, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Horizontal gaze nystagmus, (p. 151) for discussion of topic.

Standard for review

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

Appellant was convicted of first-degree sexual assault. At trial appellant sought to introduce into evidence a United States Geological Survey map in an effort to show that the crime took place in a different county than that charged by the prosecution. The trial court refused to admit the map on the theory that it was not properly authenticated as to county boundary lines.

Syl. pt. 6 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

The Court found no abuse of discretion in refusing to admit the map.

Admissibility (continued)

Tape recordings of telephone calls

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See EVIDENCE Telephone calls, Interception by spouse, (p. 242) for discussion of topic.

Vouching the record

State v. Giles, 368 S.E.2d 107 (1988) (Per Curiam)

Defendant was convicted of sexual misconduct and intent to defile. Defendant claimed that the victim, a married woman, consented to leaving her home area and having sexual relations. He claimed that the assault charges were brought to aid the victim in reconciling with her husband, especially in light of her pregnancy.

Certain evidence regarding the victim's kissing the defendant and sitting on his lap, and certain statements the victim allegedly made to the defendant regarding her pregnancy and sexual relationship with her husband were excluded following *in camera* hearings.

Syl. pt. 1 - "The purpose of vouching the record is to place upon the record excluded evidence, or to show upon the record what excluded evidence would have proved in order that the appellate court may properly evaluate the correctness of the trial court's ruling excluding it." Syl. pt. 4, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).

Here, while defense counsel made reference to two witnesses who would support defendant's claim of prior sexual contact with the victim, no testimony was introduced, nor the witnesses even identified.

The trial court refused to allow the defendant to testify as to the victim's statements to him concerning her pregnancy and sexual relations with her husband, ruling that these disclosures were to remote to be considered on the issue of consent. Defendant claims that his right to confrontation of his accuser was thereby compromised.

Admissibility (continued)

Vouching the record (continued)

State v. Giles, (continued)

Syl. pt. 2 - "A trial judge's ruling after an *in camera* hearing on admissibility of evidence of a rape victim's prior sexual relationship with defendant will not be disturbed on appeal unless there is a clear abuse of discretion." Syl. pt. 1, *State v. Pancake*, 170 W.Va. 690, 296 S.E.2d 37 (1982).

The Court found no clear abuse of discretion. Defendant was not so hampered in his defense that manifest injustice resulted.

Waiver of objection

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See APPEAL Failure to preserve for appeal, Waiver of objection, (p. 18) for discussion of topic.

Admissions against interest

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See SELF-INCRIMINATION Voluntariness, Burden of proof, (p. 554) for discussion of topic.

Admissibility

State v. Randle, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

EVIDENCE

Admission pending foundation

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. On appeal she protested the admission into evidence of conspiratorial statements by co-defendants prior to the establishment of a *prima facie* case against her.

Syl. pt. 4 - The trial court may conditionally admit a co-conspirator's statement subject to the laying of a proper foundation. *State v. Fairchild*, 171 W.Va. 137, 298 S.E.2d 110, at 117-18 (1982).

"The quality of the independent evidence necessary to serve as a foundation showing a conspiracy has been described by other courts as ranging from any competent evidence through a reasonable inference to a preponderance of the evidence." See *Fairchild*, *supra*, at 118.

Here, appellant had made repeated public statements that she wished her husband were dead and made references to his live insurance policies. The Court held these and other statements to be sufficient for laying a foundation for the co-defendants' statements to the police.

Argumentative

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

An objection by the State was sustained when the defendant asked the investigating officer if he simply accepted the word of a complainant or if he investigated the allegations made by a complainant. The Court found the question was argumentative and properly rejected.

Battered woman syndrome

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

See EVIDENCE Expert witness, (p. 203) for discussion of topic.

EVIDENCE

Best evidence

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

Petitioner contends it was prejudicial for the State to introduce a facsimile of a ring that was stolen during the robbery. Applying the standard set forth in Syl. pt. 2, *State v. Acord*, 175 W.Va. 611, 336 S.E.2d 741 (1985), the Court found the evidence was admissible.

State v. Acord, 336 S.E.2d 741 (1985) (Brotherton, J.)

Among the items stolen from the victim's house was a gold class ring that belonged to the victim's husband. The ring was never recovered. Because of the sentimental value attached to the ring, the victim had a duplicate made. The duplicate was identified by witnesses at trial as being similar to the one offered for sale after the robbery and was admitted into evidence over appellant's objection. The Court found the admission of this substitute ring was proper since the State could not show the jury the actual ring and the alternatives were to either let the witnesses describe the ring, or to allow the witnesses to base their testimony on an exact duplicate of the actual ring.

Syl. pt. 2 - When an accurate physical replica of an unavailable object clarifying a witness's testimony, that replica may, in the discretion of the trial court, be introduced into evidence.

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See EVIDENCE Duplicate of original, (p. 201) for discussion of topic.

Blood tests

State v. Moczek, 363 S.E.2d 238 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Right to test, (p. 152) for discussion of topic.

EVIDENCE

Chain of custody

State v. Linkous, 355 S.E.2d 410 (1987) (Miller, J.)

See EVIDENCE Expert witness, Cause of death, (p. 203) for discussion of topic.

Character

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

Appellant was convicted of welfare fraud. During her trial the prosecuting attorney was allowed to cross-examine her character witnesses concerning two specific acts of misconduct. Nine character witnesses were called, all of whom testified as to appellant's reputation for honesty or lack of reputation for dishonesty.

The prosecuting attorney was allowed to vouch the record during an *in camera* hearing concerning the two acts of misconduct. The trial court instructed the jury that the questions on cross-examination were asked for the limited purpose of testing the character witnesses' credibility and had no bearing on the appellant's guilt or innocence.

The Court noted that this case was tried before the adoption of the Rules of Evidence on February 1, 1985. Rule 405(a) states that "in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

Syl. pt. 4 - The cross-examination of a defendant's character witnesses with regard to questions as to the witness's knowledge of specific instances of the defendant's misconduct is confined by certain limitations. There must initially be, by way of an *in camera* hearing, a disclosure of the proposed specific misconduct questions. The State must produce documents or witnesses from which the court may determine whether there is a good faith basis in fact that the misconduct actually occurred and would have been known to some degree in the community. A second limitation requires that the specific misconduct impeachment relate to facts which would bear upon the character traits that may have been placed in issue by the character testimony on direct examin

Character (continued)

State v. Banjoman, (continued)

ation. Finally, the court must make the ultimate determination as to whether the probative value of the defendant's specific incident of misconduct, which is to be the subject of the cross-examination, outweighs its prejudicial value.

Syl. pt. 5 - Once the court determines at the *in camera* hearing that the specific-misconduct cross-examination of a character witness may proceed, the jury should be informed that its purpose is to test the credibility of the character witness and it is not to be considered as bearing on the defendant's guilt in the present trial.

Here, the two incidents were established by the prosecution *in camera* and were shown to be neither too remote nor too private for character witnesses to have heard of them. However, the Court found that one of the incidents (an allegation of child abuse) was unrelated to the character traits at issue and should not have been allowed as a subject of cross-examination. Allowing this questioning was deemed, nonetheless, to be harmless error.

State v. Welker, 357 S.E.2d 240 (1987) (Neely, J.)

Appellant was convicted of first-degree murder of her four-year old daughter Patricia. She contends on appeal the court erred in refusing to admit into evidence portions of psychiatric records and testimony of other witnesses regarding the behavior of her live-in boyfriend, David Adkins. The Court found this evidence tended to show: that Adkins had a history of physical and sexual abuse of children; Adkins suffers from visual and auditory hallucinations; Adkins interprets these auditory hallucinations as the voices of demons instructing him to perform certain acts; Adkins had attempted suicide several times in the past at the behest of these voices; Adkins had been diagnosed as having numerous psychiatric disorders, ranging from depressive neurosis to schizophrenic psychosis; in 1982 Adkins was declared incompetent to stand trial on a grand larceny charge; and Adkins has a history of destructive, antisocial and criminal behavior.

Character (continued)

State v. Welker, (continued)

The Court found Rule 404 of the W.Va. Rules of Evidence generally restricts the use of character evidence introduced to prove that a person acted in a particular manner on a particular occasion. The Court found the Rule is an attempt to codify common law rules on the admission of character evidence. The Court found compelling the view set forth by Professor Wigmore in *Treatise* on the Anglo-American System of Evidence in Trials at Common Law:

> Where the character offered is that of a *third person*, *not a party* to the cause, the reasons of policy * * * for exclusion seem to disappear or become inconsiderable; hence, if there is any relevancy in the fact of character, *i.e.*, if some act is involved upon the probability of which a moral trait can throw light, the character may well be received. On this principle it has been admitted to evidence the *illegitimacy* of one claiming an inheritance, to evidence the adultery of a *co-respondent in divorce* * * * now, if the fact to be proved is that B committed the murder * * * why should not B's threats be admitted, without further restriction, as A's are? It is true that evidence of B's threats alone would not go far towards proving B's commission; *but it is not a question of absolute proof nor even of strong probability, but only of raising a reasonable doubt as to A's commission; and for this purpose the likelihood of B's commission may suffice or at least assist*. The evidence of B's threats, to be sure, may, in a given instance, be too slight to be worth considering; but it seems unsound as a general rule that mere threats, or mere evidentiary facts of any sort, are to be rejected if unaccompanied by additional facts pointing towards B as the doer. Nevertheless, most Courts have shown an inclination to make some such restriction, and to insist that two or more kinds of evidentiary facts pointing towards B must be offered, and that one kind alone will not be received. It is difficult to see the object of this restriction, because if the evidence is really of no appreciable value, no harm is done in

Character (continued)

State v. Welker, (continued)

> committing it; while if it is in truth calculated to cause the jury to doubt, the Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt. A contrary rule is unfair to really innocent accused.

The Court found the logic of this view especially compelling in a circumstantial evidence case on a charge of first-degree murder and found the trial court erred in excluding the proffered character evidence.

In footnote 1, pg. 245, the Court noted that the trial court could exclude, under Rule 403 of the W.Va. Rules of Evidence, otherwise admissible evidence when the admission would result in "undue delay, waste of time, or needless presentation of cumulative evidence."

The State contended the evidence was inadmissible because it did not meet the requirements set forth in Syl. pt. 1 of *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980) where it was stated:

> In a criminal case, the admissibility of testimony implicating another person as having committed a 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. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error.

Character (continued)

State v. Welker, (continued)

The case against appellant was entirely circumstantial and the evidence excluded the possibility that Patricia died either accidentally or at the hand of a neighbor or strange. Since appellant and Adkins were the only two custodians of Patricia, the only reasonable hypothesis inconsistent with appellant's guilt was that Adkins had committed the crime. The Court found, viewed in this light, the *Harman* ruling militates in favor of permitting appellant to introduce evidence regarding Adkins' character. The Court found such evidence should be limited to those traits consistent with the elements of the crime for which appellant is being tried.

Circumstantial

State v. Phillips, 342 S.E.2d 210 (1986) (McHugh, J.)

Applies standards set forth in Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978) and Syl. pt. 2, *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979).

Syl. pt. 3 - "The weight of circumstantial evidence, as in the case of direct evidence, is a question for jury determination, and whether such evidence excludes, to a moral certainty, every reasonable hypothesis, other than that of guilt, is a question for the jury." Syl. pt. 4, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967).

Syl. pt. 4 - "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 [or she] may properly be convicted." *State v. Beals*, 104 W.Va. 617, 632-33, 141 S.E. 7, 13 (1927).

Based upon the facts of this case, the Court rejected the appellant's assertion of insufficiency of the evidence and declined to disturb the verdict of the jury.

EVIDENCE

Collateral crimes

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

Petitioner contends the prosecution improperly questioned witnesses about items stolen from the victim's house on the night of the sexual assault. The Court found this testimony was not used to show the defendant's propensity toward criminality, but rather to establish the identity of the person charged with the commission of the crime; it is therefore an exception to the collateral crime rule.

Appellant claimed that the privately retained lawyer hired to assist in the prosecution improperly questioned witnesses about items stolen from the victim's house on the night of the assault. The Court found this testimony was not used to show the defendant's propensity toward criminality, but rather served to establish the identity of the person charged with the commission of the crime and thus was an exception to the collateral crime rule.

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

Appellant was convicted of second degree murder. He assigned as error the admission of antecedent threats against the deceased's life. He contends the testimony was error because it invited the jury to speculate upon a prior criminal act with which the appellant was not charged.

In footnote 2, the Court noted the record showed the trial court admonished the jury that it could consider the evidence of threats only for the limited purposes for which it was introduced.

State v. Chamberlain, 359 S.E.2d 858 (1987) (Per Curiam)

Appellant was convicted of delivery of marijuana. Witnesses testified at trial concerning the ultimate sale of the marijuana; appellant was charged with sale of the substance to middle men. He claimed on appeal that the testimony improperly introduced collateral crimes and was prejudicial.

Collateral crimes (continued)

State v. Chamberlain, (continued)

Syl. pt. 1 - "Subject to exceptions, it is a well-established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other offenses are an element of or are legally connected with the offenses for which the accused is on trial." Syl. pt. 11, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

However, the rule in *Thomas* is not applicable to crimes committed by persons other than the defendant, as here. See *State v. Harshbarger*, 170 W.Va. 401, 294 S.E.2d 254 (1982).

The testimony was admissible.

(The Court noted that this issue would now be governed by Rule 404(b) of the West Virginia Rules of Evidence, adopted after this case was tried.)

State v. Corbett, 352 S.E.2d 149 (1986) (Per Curiam)

See EVIDENCE Search warrant and supporting affidavit, Evidence of other crimes, (p. 239) for discussion of topic.

State v. Dolin, 347 S.E.2d 208 (1986) (Miller, C.J.)

Appellant was charged with two counts of first-degree sexual assault and one count of incest.

The appellant contends the court erred in permitting his daughter to testify about additional sexual offenses allegedly committed by the defendant on her which were collateral to the charges contained in the indictment. Applies standards set forth in Syl. pts. 11, 12, and 15, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Collateral crimes (continued)

State v. Dolin, (continued)

Syl. pt. 3 - Before a trial court can determine that evidence of collateral crimes is admissible under one of the exceptions, an *in camera* hearing is necessary to allow a trial court to carefully consider the admissibility of collateral crime evidence and to properly balance the probative value of such evidence against its prejudicial effect.

Here, the Court found the trial court held an *in camera* hearing prior to trial to consider the admissibility of the collateral crime evidence. The Court found that at the hearing, the specific collateral sexual offenses the State planned to present at trial and the possible applicable exceptions were simply discussed in general terms. The Court found the *in camera* hearing is rendered meaningless if a trial court is not informed specifically of the details surrounding each collateral offense and is not informed of which exception is applicable. The Court found a trial court needs such information so that it can examine the similarities and differences between the collateral offenses and the present offense and can apply the balancing test to determine whether the probative value outweighs the prejudicial effect of such evidence.

Syl. pt. 5 - A collateral crime need not be proven beyond a reasonable doubt, but must be proven by clear and convincing evidence.

Syl. pt. 6 - In examining the similarities and differences between collateral crimes must have occurred reasonably close in point of time to the present offense.

Syl. pt. 7 - It is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim.

Syl. pt. 8 - To the extent that *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944), *State v. Lohm*, 97 W.Va. 652, 125 S.E. 758 (1924), and *State v. Driver*, 88 W.Va. 479, 107 S.E. 189 (1921), allow collateral sexual offenses to be admitted into evidence to show an improper or lustful disposition toward the victim, they are overruled.

Collateral crimes (continued)

State v. Dolin, (continued)

The Court found that from a procedural standpoint evidence admitted under one of the collateral crime exceptions is thought to be relevant to some aspect of the State's case, but such evidence is not admitted as proof of the ultimate guilt of the defendant.

Syl. pt. 9 - It is customary to give the jury a limiting instruction with regard to its consideration of a collateral crime. This instruction generally provides that the evidence of a collateral crime is not to be considered as proof of the defendant's guilt on the present charge, but may be considered in deciding whether a given issue or element relevant to the present charge has been proven. When a defendant requests this limiting instruction, it must be given.

In the present case, the proffered basis for admitting the evidence of the collateral sexual offenses was to show intent, motive, and system.

The Court found the evidence of collateral crimes should not have been admitted on the issue of intent because intent was not an element of any of the crimes charged in the indictment [incest-Code, 61-8-12 (1931; rape; first-degree sexual assault-Code, 61-8B-3 (1976)].

In addition, where the main offense charged is sexual in nature, motive cannot be inferred from the fact that on prior occasions the defendant committed similar sexual acts with the same victim. Collateral sexual offenses should not have been admitted to show motive.

The collateral crimes evidence was also offered to show a "system." The Court found the phraseology of "common scheme or plan" found in *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) is the appropriate terminology and concluded that the collateral sexual offenses introduced in this case, varying as they do as to time and manner of the acts committed, should not have been admitted to show a common scheme or plan.

Evidence of collateral crimes in this case was not admissible. The Court recognized, however, that trial counsel may not have made a sufficiently particularized objection when this matter was brought before the trial court in the defendant's motion *in limine*.

Collateral crimes (continued)

State v. Dolin, (continued)

The Court concluded the trial court committed reversible error in improperly instructing the jury on this issue. The defendant offered an instruction informing the jury that any collateral sexual offenses committed by the defendant could only be considered in relation to the relevant considerations listed in Syl. pt. 12 of *Thomas*. Over the defendant's objection, the trial court amended this instruction so that not all of the collateral offenses were covered.

The Court found this instruction to be flawed because the trial court did not cite all of the collateral sexual offenses that occurred as falling into this collateral crime category. Limiting the instruction to these specific collateral sexual offenses kept the jury from being told for what purposes the remaining instances of collateral crimes were to be considered. This error was particularly egregious because the jury might have considered the fifth incident, where the daughter was forced to perform oral sex when she was twelve or thirteen, as being included in the acts charged in count one of the indictment. The Court found that by failing to limit all of the collateral crimes, the trial court confused the issue and left the jury free to consider the acts not mentioned as proof of the substantive charges. The Court found this was reversible error.

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See SEXUAL ASSAULT Elements, Reputation for violence, (p. 595) for discussion of topic.

State v. McCallister, 357 S.E.2d 759 (1987) (Brotherton, J.)

Appellant was found guilty of aiding and abetting the crime of aggravated robbery. Although appellant was immune from prosecution for aiding and abetting after the fact, due to her relation to the principal (see *W.Va.Code*, 61-11-6), evidence of her actions after the fact was introduced to show unlawful intent.

Collateral crimes (continued)

State v. McCallister, (continued)

Syl. pt. 1 - "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).

Syl. pt. 2 - "It is customary to give the jury a limiting instruction with regard to its consideration of a collateral crime. This instruction generally provides that the evidence of a collateral crime is not to be considered as proof of the defendant's guilt on the present charge, but may be considered in deciding whether a given issue or element relevant to the present charge has been proven. When a defendant requests this limiting instruction, it must be given." Syl. pt. 9, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Although requested here, no instruction was given regarding appellant's immunity from prosecution. This failure was held to be reversible error.

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant was convicted of delivery of marijuana. She asserts that at least twice during the trial the State introduced testimony indicating or implying that she had been selling or dispensing marijuana to various people for up to a year or more. She contends that with this testimony the State created the impression that she was a steady supplier of drugs to people in the area and that the evidence essentially was evidence of collateral crimes. She contends the trial court erred in depriving her of a pretrial *in camera* evidentiary hearing regarding the admissibility of this evidence.

Collateral crimes (continued)

State v. Thompson, (continued)

A police officer, called by the State, testified that the police had received anonymous complaints concerning drug trafficking at the defendant's residence for some months prior to her arrest. Also, the informant testified that his brother had been buying marijuana regularly from the defendant for a year. At the beginning of the officer's testimony, the court interrupted to warn jurors to consider the testimony concerning the anonymous complaints only as an explanation for the informant's action and for no other purpose. Later when the informant was testifying, the court instructed the jury that this evidence was given to show the motive of the informant in working with the police in attempting to make a buy.

Appellant contends that in spite of the cautionary instructions the assistant prosecutor referred to the testimony regarding collateral criminal conduct in his closing argument.

The Court found the direct evidence in this case, excluding the evidence relating to the prior crimes, was sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt and that the trial court's instructions neutralized any prejudicial effect that the evidence of the prior crimes might have created. The Court found the trial court's error in admitting it was harmless under the rule set forth in Syl. pt. 2 of *State v. Adkins*, 163 W.Va. 502, 261 S.E.2d 55 (1989).

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

Appellant was convicted of receiving stolen property. He contends he was denied a fair trial by the State's introduction of evidence tending to show that he was guilty of crimes other than those charged in the indictment.

The Court found the record devoid of any instances in which the prosecution introduced evidence of crimes for which appellant was not charged to show the commission of the crime charged. The Court found a Mr. Jarvis did testify on rebuttal he had sold stolen property to appellant on previous occasions, but that appellant had opened up this line of questioning by testimony on direct. The Court noted Mr. Jarvis' testimony was admissible for impeachment.

EVIDENCE

Competency of witness to testify

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See WITNESSES Competency, Generally, (p. 653) for discussion of topic.

Competency to stand trial

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See INSANITY Evidence, Mental condition, (p. 329) for discussion of topic.

Confessions

Involuntary

State v. Randall, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

Controlled substances

Possession thereof

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

See CONTROLLED SUBSTANCES Proof of possession, (p. 77) for discussion of topic.

Corroboration

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See INSTRUCTIONS Advantage to witness, (p. 336) for discussion of topic.

EVIDENCE

Credibility of witness

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See WITNESSES Competency, Generally, (p. 653) for discussion of topic.

Criminal responsibility

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See INSANITY Evidence, Mental condition, (p. 329) for discussion of topic.

Displaying items not in evidence

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant was convicted of delivery of marijuana. In the course of the search of her house, the police seized a large number of items. The appellant contends many of these items were inadmissible as evidence against the accused. Some were never identified as illegal substances, some could not be conclusively traced to the defendant's exclusive possession or ownership, and most were wholly irrelevant to the State's case. All of the items were in a box which was placed on the prosecutor's table next to the jury.

Before trial, the appellant moved to suppress most of the items in the box. The court ordered stricken from evidence everything except the marijuana cigarettes, the money used to pay for the cigarettes, and a white glass dish with marijuana residue in it found in the defendant's first floor dining room.

Despite the court's ruling, many items remained in the courtroom in the box within view of the jury. They were not offered into evidence. Not until completion of three-fifths of the case were some of these items removed from the table. Even then, they were moved only a short distance and they remained visible to the jury during the duration of the trial.

Appellant contends her case was damaged by the State's failure to inform the jurors that many of the pills and capsules in the box were not illegal. Additionally, she argues that the items' proximity to the marijuana cigarettes and other drug paraphernalia in the evidence box tainted them with a presumption of illegality.

Displaying items not in evidence (continued)

State v. Thompson, (continued)

The Court found the facts presented here are somewhat analogous to those presented in *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983), and, as in *Kopa*, the Court found the trial court did not commit reversible error by permitting the display of the items. The Court noted the trial court did move the items when requested to do so by defense counsel.

Drugs

Possession thereof

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

See CONTROLLED SUBSTANCES Proof of possession, (p. 77) for discussion of topic.

Duplicate of original

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends the trial court erred in allowing the State to introduce photos of the money and bank wrapper seized from the truck he was leasing and the testimony of a deputy sheriff. The Court found the photos were introduced because the money had been returned to the victim after the robbery and the bank wrappers were inadvertently returned at the same time. The deputy who took the photos was allowed to testify that the name of an Ansted bank appeared on the wrapper and was visible in the photo with a magnifying glass.

Under Rule 1003 of the W.Va. Rules of Evidence, the contents of writings or recordings may be proved by admission of a duplicate of the original "to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

EVIDENCE

Duplicate of original (continued)

State v. Brown, (continued)

The Court found there was no challenge to the authenticity of the items at trial and whether or not it was fair to admit the photos in lieu of the items themselves was a matter of discretion for the trial judge.

The Court found the best evidence rule does not preclude a witness from testifying to facts recorded in a writing from his personal knowledge and that the deputy's testimony was, therefore, admissible.

Exhibits

Degree of connection to the crime

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

Appellant contends the trial court erred in admitting a number of exhibits because the State did not establish beyond a reasonable doubt that all of these items were used in the commission of the crime.

The Court found the defendant is not correct in asserting the State must meet this high burden before physical objects and instruments connected to a crime can be admitted in evidence.

Syl. pt. 8 - "'In the trial of an indictment for murder all instruments which the evidence tends to show were used in the perpetration of the crime, may be produced for the inspection of the jury.' Syl. pt. 1, *State v. Henry*, 51 W.Va. 283, 41 S.E. 439 (1902)." Syl. pt. 8, *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983).

The Court found in this case, all of the exhibits challenged by the defendant were connected in some way to facts mentioned in his written statement. The Court found no error in the admission of the exhibits.

EVIDENCE

Expert witness

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. At trial the State Medical Examiner testified that the victim was killed by a gunshot wound and that the wound was not self-inflicted.

Appellant objected to the Medical Examiner's testimony in that it went to the ultimate issue to be decided by the jury. He cited *State v. Clark*, 171 W.Va. 74, 297 S.E.2d 849, at 853 (1982). He may not, however, give an opinion that the death was a "homicide."

Rule 704 of the West Virginia Rules of Evidence, adopted since *Clark* was decided, states in part, "(a) *Generally*. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Testimony held admissible.

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

In her trial for first-degree murder appellant introduced psychiatric evidence tending to show that, as a battered woman, she was out of touch with reality and unable to assess the victim's acts of aggression toward her which resulted in the homicide.

Syl. pt. 5 - Expert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome.

Cause of death

State v. Linkous, 355 S.E.2d 410 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. He contends the court erred in allowing the chief medical examiner to testify as to the manner and cause of death based on an autopsy report prepared by the assistant medical examiner. The Court found the assistant medical examiner was out of state at the time of trial, that the chief medical examiner testified the cause of death was a shotgun wound to the chest, and that the chief medical examiner is responsible for the care, custody and control of post-mortem medical property.

Expert witness (continued)

Cause of death (continued)

State v. Linkous, (continued)

The Court found no merit to this assignment of error since no objection was made a trial. In footnote 2, the Court noted if they were to address the issue, the evidence would be admissible under *State v. Jackson*, 171 W.Va. 329, 298 S.E.2d 866 (1982).

Appellant also contended the admission of shotgun shell pellets and plastic wadding taken from the victim's body by the assistant medical examiner was error. The Court found no merit to this assignment of error since no objection was made at trial. In footnote 4, the Court noted that even if an objection had been made, the evidence was admissible under the chain of custody rule set forth in *State v. Davis*, 164 W.Va. 783, 266 S.E.2d 909 (1980).

Opinion

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

See INSANITY Expert testimony, Scope, (p. 330) for discussion of topic.

McCroskey v. Proctor, 332 S.E.2d 646 (1985) (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." Syl. pt. 5, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

Syl. pt. 3 - "'Expert opinion evidence concerning a matter as to which the jury are as competent to form an accurate opinion as the witness, is admissible.' Syl. pt. 7, *Lawrence Adm'r v. Hyde*, 77 W.Va. 639, 88 S.E. 45 (1916)." Syl. pt. 2, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

Expert witness (continued)

Non-expert

State v. Haller, 363 S.E.2d 719 (1987) (Neely, J.)

Appellant was convicted of delivery of a controlled substance (cocaine). One element of the proof was testimony given at trial by the persons to whom the substance was delivered that the substance was cocaine. Appellant challenged these witnesses' competence to give opinion testimony as lay witnesses pursuant to Rules 701 and 702 of the *W.Va. Rules of Evidence*.

Syl. pt. 2 - "It is firmly established in this state that the opinion of a witness who is not an expert may be given in evidence if he has some peculiar knowledge concerning the subject of the opinion than jurors are ordinarily expected to have." *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 246 S.E.2d 624 (1978).

Syl. pt. 3 - "The determination of whether a witness has sufficient knowledge of the material in question so as to be qualified to give his opinion is largely within the discretion of the trial court, and will not ordinarily be disturbed on appeal unless clearly erroneous." *Cox v. Galigher Motor Sales Co.*, 158 W.Va. 685, 213 S.E.2d 475 (1975).

Syl. pt. 4 - According to Rule 701 of the *West Virginia Rules of Evidence*, it is within the trial court's discretion to allow lay witnesses to offer opinion testimony concerning the identity of a controlled substance.

Here, the Court found that the trial court did not abuse its discretion in allowing the testimony.

Rape trauma

State v. McCoy, 366 S.E.2d 731 (1988) (Brotherton, J.)

Defendant was convicted of second degree sexual assault. The victim did not file a police report until the day after the assault. The only testimony as to physical manifestations of the assault came from a police officer who testified that he observed abrasions on her lip and a small bruise behind her left ear.

Expert witness (continued)

Rape trauma (continued)

State v. McCoy, (continued)

The prosecution called as a witness a counselor with extensive experience in counseling rape victims. The Court agreed that she qualified as an expert witness under Rule 702 of the West Virginia Rules of Evidence. The counselor testified that the victim was traumatized by the alleged rape.

Syl. pt. 1 - Expert testimony that helps the jury to understand the evidence or determine a fact in issue is admissible under West Virginia Rule of Evidence 702.

Syl. pt. 2 - Qualified expert testimony regarding rape trauma syndrome is relevant and admissible in a prosecution for rape where the defense is consent. The expert may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped.

The Court rejected arguments that testimony on post-rape behavior invades the province of the jury where a consent is at issue. See *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982). *Cf. State v. Saldana*, 324 N.W.2d 227 (Minn. 1982).

Used by jury

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

During appellants trial on charges of aggravated burglary the trial court allowed the jury to take physical evidence to the jury room during deliberations.

Syl. pt. 6 - The jury, during deliberations, may use an exhibit, admitted into evidence, according to its nature and within the bounds of the evidence at trial in order to aid the jury in weighing the evidence, and the jury may make a more critical examination of an exhibit than was made during the trial.

Expert witness (continued)

Used by jury (continued)

State v. Armstrong, (continued)

The Court noted that the jury may not "experiment" with evidence in a manner other than shown at trial since other use would constitute taking of evidence out of the presence of the accuses. Here, no experimentation was shown; no error.

Waiver of privilege

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See PRIVILEGES Attorney-client, (p. 443) for discussion of topic.

Eyewitnesses

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See EVIDENCE Identification of defendant, Admissibility, (p. 222) for discussion of topic.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See WITNESSES Competency, Generally, (p. 653) for discussion of topic.

False or misleading statements

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

The Court found that, like evidence of flight, evidence of false or misleading statements given by the accused to the police as to matters under investigation is generally held to be relevant and admissible as a circumstance indicating consciousness of guilt.

False or misleading statements (continued)

State v. Berry, (continued)

The Court found the trial court properly instructed the jury that the evidence of the appellant's false report of suicide was merely a factor which they could consider in weighing the evidence on the issue of his guilt of the crime of murder.

False swearing

Sworn statements during plea

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See FALSE SWEARING Evidence, Sworn statements during plea, (p. 250) for discussion of topic.

Flight

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

Appellant contends the trial court refused to have an *in camera* hearing on the evidence of flight, as required by *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981). The Court found this case was tried before *Payne* was issued and consequently the trial court could not have be faulted for not following *Payne*. The circuit court did have a preliminary *in camera* conference when the issue initially surfaced during the prosecutor's opening statement.

Flight (continued)

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

Appellant was convicted of unlawful wounding. Part of the circumstantial evidence presented concerned the appellant's flight from arrest. The trial court held an *in camera* hearing and concluded that the probative value of the flight evidence outweighed any prejudicial effect. The court gave a cautionary instruction to the jury. Appellant argued on appeal that he was unaware that an arrest warrant had been issued.

Syl. pt. 2 - "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 effect." Syl. pt. 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

Further, the State has the burden of proving that the defendant "fled under circumstances such that would indicate a desire to escape or avoid prosecution due to a guilty conscience or knowledge." *State v. Payne*, *supra*, at 81.

Evidence of flight admitted.

Foundation

Admission pending

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See EVIDENCE Admission pending foundation, (p. 185) for discussion of topic.

Goods seized from co-defendant

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

See SEARCH AND SEIZURE Co-defendant, (p. 516) for discussion of topic.

EVIDENCE

Gruesome photographs

State v. Adkinson, 338 S.E.2d 185 (1985) (Per Curiam)

The Court examined four color photographs objected to by the defendant and agreed with the trial court that they are not gruesome under the standards announced in *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979) and elaborated on in *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980).

State v. Harper, 365 S.E.2d 69 (1987) (McHugh, J.)

At appellant's trial for aiding and abetting murder by lying in wait, black and white photographs were allowed into evidence of the victim's body at the scene and a close up of the fatal wound.

"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." Syl. pt. 1, *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979).

Syl. pt. 5 - "In order for photographs to come within our gruesome photograph rule established in *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979), there must be an initial finding that they are gruesome." Syl. pt. 6, *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982).

Here, the Court held that the trial court did not err in holding the photographs admissible.

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. He contends a photograph of the scene where the officer was killed was prejudicial. The Court found the photo did not show the officer's body, but only showed the location where he was found and some blood. The Court found the photo was admissible.

EVIDENCE

Guilty conscience

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

See EVIDENCE Flight, (p. 209) for discussion of topic.

Handwriting

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

See SELF-INCRIMINATION Handwriting samples, (p. 552) for discussion of topic.

Hearsay

Admissibility

State v. Bailey, 365 S.E.2d 46 (1987) (Brotherton, J.)

Appellant was found guilty of first-degree murder. Appellant married the deceased's former wife before trial but not before she gave a statement to police regarding the appellant's threat to shoot the deceased.

The Court first rejected appellant's claim of espousal immunity, noting the appellant and the witness were not married at the time the statement was made. The witness gave no further testimony at trial.

Syl. pt. 1 - "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syl. pt. 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

Hearsay (continued)

Admissibility (continued)

State v. Bailey, (continued)

Here, factors two, three, four and five were met. The Court especially noted appellant's failure to cross-examine by waiving the marital privilege (then applicable) and challenging her previous statement. This failure tended to show the trustworthiness of the statement.

Admission of, harmless error

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See HARMLESS ERROR Non-constitutional, Admission of hearsay evidence, (p. 267) for discussion of topic.

Excited utterance

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. The victim's wife, who died prior to trial, stated to a neighbor that the appellant and the victim were fighting prior to the shooting and that both were drinking. At trial, the neighbor testified as to the victim's wife's statements, made over the telephone on the evening of the death and apparently while a fight was in progress.

Syl. pt. 1 - Rule 803(2) of the West Virginia Rules of Evidence correctly contains the heart of the hearsay exception that was formerly called a spontaneous declaration and which is now termed the excited utterance exception to the hearsay rule. The more detailed treatment of this exception contained in Syl. pt. 2 of *State v. Young*, 166 W.Va. 309, 272 S.E.2d 592 (1980), is helpful to further refine the contours of the rule.

Syl. pt. 2 - A witness who testifies about an excited utterance of a third person need not be present at the exciting event as a condition of its admissibility.

State v. Smith, (continued)

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. See Syl. pt. 2, *Young*, *supra*. See also, *Ward v. Raleigh County Park Board*, 143 W.Va. 931, 105 S.E.2d 881 (1958).

The trial court admitted the statements pursuant to Rule 803(2), the excited utterance rule. (Some courts have admitted similar statements pursuant to Rule 803(1), the present sense impression rule. See *Booth v. State*, 508 A.2d 976 (1986). Here, the Court concluded that the statements were properly admitted in light of the victim's wife's agitated tone, her reference to a fight, statements that she wanted someone to get her out of the house and shouting overheard in the background.

The Court noted that the witness need not be present to observe the event which caused the excited utterance. The reliability of the utterance is founded upon the declarant's presence, not the witness'. See *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, at 273 (1982); *State v. Mahramus*, 157 W.Va. 175, 200 S.E.2d 357 (1973); F. Cleckley, Handbook on Evidence for West Virginia Lawyers, at 501 (2ded. 1986).

Hearsay (continued)

In general

State v. Golden, 336 S.E.2d 198 (1985) (Per Curiam)

See EVIDENCE Hearsay - exceptions, Spontaneous declarations/excited utterance, (p. 218) for discussion of topic.

State v. Welker, 357 S.E.2d 240 (1987) (Neely, J.)

Appellant was convicted of first-degree murder of her four year old daughter Patricia. On redirect, a state trooper was asked, "Did you learn as a result of the investigation how Patricia Welker died, ... and at whose hands?" The Trooper responded, "Yes sir. I was told by David Adkins –." An objection was made to this testimony and the court ruled the testimony regarding Adkins' statements was admissible. The trooper then testified he was told the appellant had spanked Patricia rather severely prior to her death, that white foam or some type of matter had come out of her nose and mouth, that she was bruised and had gone to bed not feeling well, and that there was some inference as to water breaking.

The Court found the testimony regarding statements made by Adkins clearly constituted hearsay not falling within any exception. The Court found the error was aggravated by the fact that the trooper's testimony was the only direct evidence of criminal agency offered in an otherwise completely circumstantial evidence case. The Court could not find the error harmless.

Multiple hearsay

State v. Golden, 336 S.E.2d 198 (1985) (Per Curiam)

See EVIDENCE Hearsay - exceptions, Spontaneous declarations/excited utterance, (p. 218) for discussion of topic.

Hearsay (continued)

Prior inconsistent statements of defendant

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See WITNESSES Impeachment, Defendant, (p. 661) for discussion of topic.

Hearsay - exceptions

Co-conspirator

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the statements of co-conspirators were improperly admitted into evidence. The State's theory was that the defendant and a co-conspirator, a fellow inmate at the penitentiary, jointly planned and executed the killing.

Over objection, the State introduced statements of the co-conspirator, Mr. White, through three inmate witnesses. The State did not call White.

The Court found the statements were admitted pursuant to Rule 801(d)(2)(E) of the W.Va. Rules of Evidence which provides that statements by co-conspirators made "during the course and in furtherance of the conspiracy" are not hearsay, and are admissible.

The Court found sufficient independent evidence to demonstrate the underlying conspiracy. The appellant contends the court failed to make any explicit finding that the statements admitted were uttered at the time of and in the furtherance of a conspiracy as required by Rule 801(d)(2)(E).

> The requisite independent determination on the part of the Judge as to the existence of conspiracy need not be explicit. "Submission of the case to the jury, with instructions that it can consider co-conspirators' statements, is an indication that the court has found independent evidence establishing a *prima facie* case [of a conspiracy]."

State v. Lassiter, (continued)

United States v. Scott, 730 F.2d at 148-49, citing *United States v. Lutz*, 621 F.2d 940, 947 (1980).

Appellant contends *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980), requires the prosecution to show that out-of-court statements made by the non-testifying co-conspirator have some indicia of reliability. The Court found this interpretation to be flawed. *Ohio v. Roberts* stated that reliability is inferred in a case where the evidence is rooted in an exception to the hearsay rule. The Court found the trial court was justified in inferring the requisite reliability of the out-of-court statements from the fact that the statements fell within the co-conspirators' exception to the hearsay rule.

Appellant contends the statements were introduced in violation of the holding in *State v. Adkins*, 162 W.Va. 815, 253 S.E.2d 146 (1979). In Syl. pt. 2 of *Adkins*, the Court held:

> The proper rule concerning admissions and confessions of co-conspirators 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 in 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 is charged.

Hearsay - exceptions (continued)

Co-conspirator (continued)

State v. Lassiter, (continued)

Syl. pt. 4 - To the extent that it is inconsistent with *W.Va.R.Evid*. 801(d)(2)(E), Syl. pt. 2 of *State v. Adkins*, 162 W.Va. 815, 253 S.E.2d 146 (1979), is expressly overruled.

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. The girlfriend of accomplice Bobby Stacy testified that on the night of the murder she was told by Stacy that he "had to go to meet [appellant] and pick him up and go to the hills to take care of business." She understood they were going to commit robberies.

Appellant contends this statement was hearsay.

Syl. pt. 4 - The statement of a co-conspirator in furtherance of the conspiracy is a hearsay exception.

The Court found the statement by Stacy was to explain his absence and keep his girlfriend from locating him. The Court found this was a furtherance of the criminal conspiracy.

Prompt complaint rule

State v. Golden, 336 S.E.2d 198 (1985) (Per Curiam)

See EVIDENCE Hearsay - exceptions, Spontaneous declarations/excited utterance, (p. 218) for discussion of topic.

Hearsay - exceptions (continued)

Spontaneous declarations/excited utterance

State v. Golden, 336 S.E.2d 198 (1985) (Per Curiam)

Appellant was convicted of first-degree sexual abuse. On appeal, he contends the trial court allowed the State to introduce evidence of certain extrajudicial statements which the appellant asserts should have been excluded as hearsay.

The appellant first complains of certain testimony of Irene Thompson, the complainant's mother. After repeated attempts to get her daughter to come home, Mrs. Thompson drove to the Haller residence. She testified that when she arrived, Rose Harris, the appellant's sister-in-law, came to running down the street in an excited state, approached Mrs. Thompson and told her the appellant had tried to rape the complainant. Rose Harris testified at trial and denied having made any such statement to Mrs. Thompson. Defense counsel objected to this evidence on the ground it was inadmissible hearsay. An *in camera* hearing was conducted at which the State asserted the extra-judicial statement of Rose Harris was admissible as original evidence or, in the alternative, under the spontaneous declaration exception to the hearsay rule. The trial court allowed the testimony to come in on these grounds.

The Court found that if Rose Harris' statement was, in fact hearsay, it was not admissible as a spontaneous declaration because the declarant was neither a participant in nor a witness to the alleged assault upon the complainant. The Court also found Mrs. Thompson testified Rose Harris was told of the alleged assault by Betty Harris, who in turn, had been told by the complainant, and that the statement would thus constitute at least triple hearsay. The Court found the general rule is that multiple hearsay evidence is admissible into evidence only if each level of hearsay comes within a recognized exception to the exclusionary rule. There was no evidence adduced to show that the other levels of hearsay were admissible as exceptions to the hearsay rule, and that the statement was clearly inadmissible.

The State contended Rose Harris' extrajudicial statement was not offered to prove the truth of the matter asserted, but rather, to show that the statement was rather, to show that the statement made. The Court agreed that the mere fact that the extra-judicial statement was made may have some relevance

State v. Golden, (continued)

independent of the truth or falsity of the statement, but in view of the fa ct that the statement went to the ultimate issue of the case (the guilt or innocence of the appellant) they held that its prejudicial effect far outweighed its probative value and therefore it should have been excluded.

The appellant also asserts the testimony given by Mrs. Thompson and by the complainant's father relating to the complainant's statement to them constituted inadmissible hearsay. Mrs. Thompson testified that when the first encountered the complainant, approximately 45 minutes after the alleged attack, her daughter told her Bobby tried to rape me." The complainant's father also testified that approximately four hours after the alleged assault, the complainant had made a similar statement to him. The trial court permitted the evidence on the theory the complainant's statements were spontaneous exclamations or excited utterances. The Court disagreed. The Court did not believe the evidence showed the statements were "made at such time and under such circumstances as will exclude the presumption that (they were) the result of deliberation."

The Court noted that in a number of earlier sex offense cases, they had ruled that a witness for the State may testify to *the* fact of an out-of-court complaint by an alleged victim which is not part of the *res gestae* or a spontaneous declaration. Here, however, the extrajudicial statements complained or included the appellant's name, which is inadmissible hearsay. Moreover, the Court found the rule is intended to allow corroboration of an alleged victim's testimony, since the unexplained failure to make a prompt complaint of rape may discredit her testimony. Even though evidence of prompt complaint is particularly probative where there is an allegation that the charge was fabricated, to be admissible, such testimony must be introduced in rebuttal. Here, Mrs. Thompson's testimony, arguably admissible to impeach the allegation of fabrication, was offered into evidence before the defense was raised at trial and should have been rejected at that time. The complainant's statement to her father was made after the defense alleged the charge was fabricated and was, therefore, of little probative value.

Hearsay - exceptions (continued)

Spontaneous declarations/excited utterance (continued)

State v. Jones, 362 S.E.2d 330 (1987) (Neely, J.)

Appellant was convicted of first-degree sexual assault of his six year old daughter. At trial a state trooper was allowed to testify concerning a conversation he had with the victim six months after the alleged abuse. No foundation was laid concerning the victim's remarks as being within the excited utterance exception to the hearsay rule.

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 the 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 revoked 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 appeal 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." Syllabus Point 2, *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1989).

Here, the Court found that the combination of a six month interval between the alleged incident and the trooper's interview of the victim, the lack of other corroborative evidence and the bolstering of the victim's testimony created a prejudicial effect. Remanded for new trial.

Statements against interest

State ex rel. White v. White, No. 17918 (10/22/87) (Per Curiam)

See SELF-INCRIMINATION During arrest, (p. 551) for discussion of topic.

Hearsay - exceptions (continued)

Statements against interest (continued)

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J)

See EVIDENCE Hearsay - exceptions, Co-conspirator, (p.217) for discussion of topic.

State v. Welker, 357 S.E.2d 240 (1987) (Neely, J.)

Appellant was convicted of first-degree murder of her four-year-old daughter Patricia. Appellant contends the trial court erred in failing to admit testimony that would have tended to exculpate her. Counsel informed the judge that they had reasons to believe that appellant's live-in boyfriend, David Adkins, had confessed to a Mrs. Morrison that he had killed Patricia. Counsel represented that Mrs. Morrison's testimony would also reveal that: appellant had not been at home at the time of the slaying; that Adkins was angry with Patricia for getting in front of the television; that Patricia's eyes had popped out of her head, she had foamed at the mouth and her legs kicked against the wall; and that Adkins had watched her die.

The trial court ruled that Mrs. Morrison's statements were inadmissible hearsay. The Court disagreed, finding that the testimony fell squarely within the exception to the hearsay rule set forth in Rule 804(b) of the W.Va. Rules of Evidence which states:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: * * * (3) Statement against Interest. - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man [person] in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicated the trustworthiness of the statement.

EVIDENCE

Hearsay - exceptions (continued)

Statements against interest (continued)

State v. Welker, (continued)

The Court found the statement clearly tended to subject Adkins to criminal liability and tended to exculpate appellant. The Court found corroborating circumstances indicate the trustworthiness of the statement.

The Court found there was substantial circumstantial evidence from which the jury could have inferred appellant's guilt, but that the substance of Mrs. Morrison's potential testimony raised a reasonable hypothesis that Adkins killed Patricia. The Court remanded so Morrison's testimony could be heard.

Identification of defendant

Admissibility

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. Two witnesses made in-court identifications. Appellant protested that the identifications were tainted by improper out-of-court identifications.

Syl. pt. 7 - "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 to opportunity of the witness to view the criminal at the level of certainty demonstrated by the witness at the confrontation. Syl. pt. 1, *State v. Rickman*, 167 W.Va. 128, 278 S.E.2d 880 (1981); Syl. pt. 1, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978), citing Syl. pt. 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976)." Syl. pt. 4, *State v. Boyd*, 167 W.Va. 385, 280 S.E.2d 669 (1981).

Here the Court held the out-of-court identification to be suggestive (police accompanied the victim to view the suspect thirty minutes after the incident; only two officers and the appellant were present) but sufficiently reliable to allow in-court identification.

EVIDENCE

Identity

Prison photos

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See RECIDIVISM Identification, Prison photos, (p. 487) for discussion of topic.

Immaterial and prejudicial

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court-appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions. Finding that the appellant must be given a new trial, the Court reviewed the assignments of error in the burglary trial.

Appellant contends the trial court erred in allowing into evidence a gun and ammunition clip which had been in a co-defendant's possession. The appellant contends he was not in possession of a firearm and that the introduction of such evidence was made by the prosecution in an effort to inflame the jury against him.

The Court found no abuse of discretion in allowing this evidence. They found the evidence clearly demonstrated the appellant and the co-defendant were together at the burglary scene. The appellant and the co-defendant were seen inside the house and were apprehended together outside the house.

Immaterial and prejudicial (continued)

State v. Wood, 352 S.E.2d 103 (1986) (Per Curiam)

Appellant contends the court erred in allowing the officer to testify, over objection, that the appellant was arrested when she confronted the officers with a gun. Appellant contended this evidence was immaterial and could only serve to prejudice the jury against her. The trial court ruled the testimony related to the circumstances of the appellant's arrest and was admissible.

The Court found no abuse of discretion in this ruling.

Impeachment

State v. Holmes, 351 S.E.2d 422 (1986) (Per Curiam)

See WITNESSES Impeachment, Extrinsic evidence where witness recants, (p. 662) for discussion of topic.

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See EVIDENCE Rebuttal, (p. 231) for discussion of topic.

Hearsay exception

State v. McCallister, 357 S.E.2d 759 (1987) (Brotherton, J.)

Appellant was convicted of aiding and abetting an aggravated robbery. At trial a police detective testified that the appellant made an oral confession to him shortly after the incident. This purported confession was not recorded in the initial police reports and was produced two weeks after the State failed to make a case at the preliminary hearing. The detective claimed that the delay was due to his going on vacation. Appellant attempted to inquire into this point at trial, claiming the "confession" was contrived, but was prevented by the trial court.

The Court held that the trial court should have allowed the inquiry, noting the strong influence on the jury of any confession evidence. The trial court erred in not allowing further inquiry into the reliability of the detective's testimony.

Impeachment (continued)

Use of prior confession

State v. Randle, Jr., 366 S.E.2d 750 (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

Insanity

Lay witnesses

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See INSANITY Burden of proof, Lay witnesses, (p. 326) for discussion of topic.

Instructions to disregard

Effect of

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

Appellant was convicted of nighttime burglary and petit larceny for the theft of a postal money order. During trial, a police witness, describing the circumstances surrounding appellant's arrest, gratuitously added that appellant responded to a question about understanding his rights by saying that he had been "through it before", thus indicating a prior arrest.

Defense counsel objected to the remark and the trial court instructed the jury to disregard it. Defense counsel then moved for a mistrial at the conclusion of the state's case in chief, citing improper introduction of collateral crimes. The court denied the motion.

Instructions to disregard (continued)

Effect of (continued)

State v. Bennett, (continued)

Syl. pt. 7 - "'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*, 159 W.Va. 158, 219 S.E.2d 922 (1975); Syllabus Point 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966)." Syllabus Point 5, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982).

Here, the Court found that the error was corrected by the instruction to disregard. The Court found the error to be nonprejudicial in light of the State's strong case.

Judicial admissions

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy, and was convicted of two counts of malicious assault. His defense at trial was insanity.

The appellant subpoenaed prosecutor Newbraugh for trial for the purpose of testifying to a statement he made in a motion for an order of *nolle prosequi* in this case. The motion stated:

> That, if the above-captioned matters were to proceed to trial, the State would be without any evidence to rebutt [sic] an insanity defense.

Appellant contends the statement should have been treated as a judicial admission which is conclusive as to its content.

Syl. pt. 4 - A judicial admission is a statement of fact made by a party in the course of the litigation for the purpose of withdrawing the fact from the realm of dispute.

Judicial admissions (continued)

State v. McWilliams, (continued)

The Court found in order to constitute a judicial admission, the statement must be one of fact, not opinion. The statement in question here is opinion. The State made the statement in support of a motion, not as an admission of fact. A statement made by an attorney which amounts to an opinion on the strength or weakness of a case is not relevant and is not admissible as evidence. The Court found no error in the trial court's decision to quash the subpoena.

Knowledge

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

See EVIDENCE Flight, (p. 209) for discussion of topic.

Lack of knowledge

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

The defendant asked the victim a number of questions designed to reveal whether she thought her assailant was right or left-handed. The victim denied remembering or noting which hand her assailant appeared to favor. When the defendant continued pursuing this line of questioning, the State objected and the court sustained the objection because the victim had already indicated she did not know which hand was favored. The Court found a trial court has the right to prevent further inquiry of a witness when he has previously indicated a lack of knowledge.

Newly discovered

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. After both sides had rested their cases, the trial court allowed the prosecution to introduce newly discovered evidence.

Newly discovered (continued)

State v. Nixon, (continued)

The Court held that "a trial court should only allow a case to be reopened for good cause and upon proper showing," but a trial court also has a duty not to close the case 'until all evidence offered in good faith and necessary to the ends of justice has been heard.' *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545, at 553 (1981).

A trial court will rarely be reversed for a discretionary reopening of a case. Syl. pt. 4, *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985); Syl. pt. 3, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983); Syl. pt. 4, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974).

Here, no abuse of discretion was found.

Authority to reconsider ruling on

Thompson v. Steptoe, 366 S.E.2d 647 (1988) (Brotherton, J.)

See JUDGES Authority to reconsider, (p. 356) for discussion of topic.

Polygraph

State v. Acord, 336 S.E.2d 741 (1985) (Brotherton, J.)

A State witness made an unsolicited remark during trial indicating that he had passed a polygraph examination. Appellant's counsel immediately moved for a mistrial. The trial court denied the motion and instead instructed the jury to disregard the remark. While acknowledging the error the Court found this was not one of those extraordinary situations where the introduction of evidence was so prejudicial that a mistrial should be granted.

EVIDENCE

Premeditation

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Premeditation, (p. 633) for discussion of topic.

Prior convictions

Over ten years old

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. He contends it was error for the prosecution to put into evidence prior convictions over ten years old. Defense counsel questioned a prosecution witness concerning appellant's nonviolent nature. She responded affirmatively when asked if appellant was "a pretty nice guy." The prosecution rebutted this statement with evidence of a 1968 auto theft and a 1970 conviction for attacking a police officer.

Appellant contends the convictions were inadmissible because Federal Rule 609(b) sets a specific time limitation allowing only evidence of convictions less than ten years old. The Court found this rule was not effective as a West Virginia rule of evidence until February 1, 1985 and that appellant's trial was two years earlier. The Court found rule 609(b) inapplicable.

Prior convictions, crimes or offenses

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant contends the State should not have been allowed to cross-examine one of the defendant's witnesses on two prior felony convictions he had in 1962 and 1967. The Court found this trial occurred prior to the adoption of Rule 609 of the W.Va. Rules of Evidence which places limitations on the use of prior convictions to impeach witnesses. The then existing law as to the use of prior convictions to impeach a witness, other than a criminal defendant, is

Prior convictions, crimes or offenses (continued)

State v. Miller, (continued)

contained in Syl. pt. 3 of *State v. Woods*, 155 W.Va. 344, 184 S.E.2d 130 (1971): "Questions may be asked of witnesses as to convictions, both felonies and misdemeanors, in order to test the witness' credibility." *See also State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32, 42 (1983).

State v. Simmons, 337 S.E.2d 314 (1985) (Per Curiam)

Appellant was convicted of sexual abuse in the first-degree. He contends the trial court erred in admitting testimony relating to his sexual contact with his daughter at places and times other than the place and time of the incident charged in the indictment. The Court found the testimony to be evidence of potential crimes. The testimony was indefinite as to when the acts allegedly occurred, but they were apparently somewhat remote in time.

The Court found the prior acts were not a part of the sequence of events which resulted in the charges against the defendant. The Court found the testimony unnecessary to establish motive, intent or any of the other factors which would bring the situation within the exceptions enumerated in Syl. pt. 12 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The State argued the evidence tended to prove the element of forcible compulsion. The Court found direct evidence that the defendant threatened to hit the victim if she failed to cooperate with him during the May, 1983 incident. In view of the direct evidence, the testimony relating to prior crimes was unnecessary and its prejudicial effect outweighed its evidentiary value. The Court ruled its admission was reversible error.

Prosecution's failure to disclose documents

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See HARMLESS ERROR Non-constitutional, Failure to disclose documents, (p. 268) for discussion of topic.

EVIDENCE

Psychiatric disability

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See HARMLESS ERROR Constitutional Generally, (p. 264) for discussion of topic.

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See SEARCH AND SEIZURE Exclusionary rule, Testimony obtained from tainted evidence, (p. 526) for discussion of topic.

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See SELF-INCRIMINATION Statements by defendant, Documents, (p. 553) for discussion of topic.

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

See WITNESSES Credibility, Psychiatric disability, (p. 656) for discussion of topic.

Rebuttal

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. At trial, appellant's testimony was impeached by a statement given to the police at the time of her arrest. Appellant claimed that the statement was coerced. On rebuttal, the officer who took the statement denied any coercion.

Rebuttal (continued)

State v. Massey, (continued)

In addition, appellant claimed that she used a toy gun in the robbery. The toy was never recovered. On rebuttal, the victim testified that, based on her knowledge and experience, the gun was real.

Appellant objected to the rebuttal evidence on the grounds that it did not controvert evidence already presented and was therefore prejudicial.

Syl. pt. 4 - "'The admissibility of evidence as rebuttal is within the sound discretion of the trial court, and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant.' Syl. pt. 4, *State v. Blankenship*, 137 W.Va. 1, 69 S.E.2d 398 (1952), *overruled on other grounds*, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431, 432 (1977)." Syl. pt. 4, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

The Court found no prejudice here.

Refusal to take breathalyzer test

State v. Cozart, 352 S.E.2d 152 (1986) (Miller, C.J.)

See DRIVING UNDER THE INFLUENCE Evidence, Refusal to take breathalyzer test, (p. 161) for discussion of topic.

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Evidence, Refusal to take breathalyzer test, (p. 162) for discussion of topic.

Relevant

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He contends Mark Price's possession of items taken from the victim was irrelevant to the issue of appellant's involvement either in the robbery or the homicide and should not have been admitted.

EVIDENCE

Relevant (continued)

State v. Cook, (continued)

The Court found the evidence clearly demonstrated the appellant and Mark Price were together on the night of the victim's death.

The Court found the evidence seized from Price, which implicated him in the victim's death, was consistent with the appellant's theory that he was more or less an innocent bystander. The Court found no abuse of discretion in admitting the evidence.

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

The trial court refused on the ground of relevancy to allow the defendant in his testimony to state the size of his sex organ, which the defendant alleges was an attempt to rebut previous testimony given by the victim. The Court found this issue was entirely collateral to the elements of the sexual assault charge.

Prejudicial

State v. Adkinson, 338 S.E.2d 185 (1985) (Per Curiam)

Appellant contends the court erred in allowing two of the State's witnesses to testify that the victims body separated while being moved to the burial site and was buried in two pieces by the defendant and his co-defendant. Appellant contends the probative value of this evidence outweighed by its alleged prejudicial effect.

The trial judge directed the State not to dwell on the condition of the victim's body and the State complied with this admonition. The Court found under the circumstances of this case, there was no reversible error.

Religious beliefs of decedent

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

Appellant was convicted of second degree murder. His defense at trial was that his wife was accidentally killed in the course of his struggle to prevent her from committing suicide.

Religious beliefs of decedent (continued)

State v. Berry, (continued)

On cross-examination of the appellant, the prosecution asked about the religious significance of the appellant's false report of suicide for members of her family. The purpose of the question apparently was to establish that a threat of or attempt at suicide was inconsistent with the victim's religious beliefs. The trial court overruled defense counsel's objection to the question, but the appellant professed not to understand it, and the prosecution abandoned the inquiry.

The Court found the question was not without probative value in light of the appellant's defense. The Court found the State was entitled to present evidence to rebut the appellant's assertion that the victim was attempting to carry out threats of suicide at the time of her death. In such circumstances, evidence of the deceased's religious beliefs, if properly presented, may well be relevant.

The Court found appellant could not have been prejudiced by the question in view of the fact that he did not answer it. The jury was not allowed to consider any evidence of the religious beliefs of the victim or her family, the prosecution did not belabor the point, and no mention was made of it in counsel's arguments to the jury. The Court could not say the reference was so prejudicial as to constitute reversible error.

Remote

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

See EVIDENCE Threats against the deceased, (p. 243) for discussion of topic.

Remote (continued)

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. The appellant contends the trial court erred in refusing to permit their daughter's testimony concerning a 1976 incident in which the deceased placed his hand on appellant's then seventeen year old daughter's breast in a lascivious manner. The Court found that, "As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility," Syl. pt. 6, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982), and given the questionable relevancy of the testimony excluded, the trial court did not abuse its discretion in sustaining the State's objection.

Reputation for violence

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

See SELF-DEFENSE Character and reputation of victim, Evidence, (p. 546) for discussion of topic.

Reputation of dangerous person

Specific instances of conduct

State v. Hager, 342 S.E.2d 281 (1986) (Brotherton, J.)

Appellant was found guilty of first-degree murder with a recommendation of mercy.

Appellant contends the trial court erred in not allowing the testimony of two brothers who were prepared to testify about an incident in which the victim, a police captain, had violently and unjustifiably arrested them a week before his death. The testimony was being offered to show the captain's violent nature in order to buttress the appellant's claim of self-defense. The trial court ruled the testimony had no probative value and disallowed it.

Reputation of dangerous person (continued)

Specific instances of conduct (continued)

State v. Hager, (continued)

The Court found the rule of evidence in effect at the time of the trial provided that where the accused relied on a self-defense argument, he was allowed to prove that the deceased had the reputation of a dangerous man; but proof would not be permitted of specific acts of violence committed by the deceased upon third persons unless the accused had an opportunity to know of these acts. Because the appellant had no knowledge of the attack on the brothers, it was not error to exclude their testimony.

In footnote 3, the Court noted the present rule is where character or a trait of character of a person is an essential element of a charge, claim or defense, proof may be made of specific instances of his conduct. See *W.Va.R.Evid.* 405(b).

In footnote 4, the Court noted that the new rules of evidence became effective February 1, 1985. On retrial the new rule should be used and the brother's testimony allowed.

Scientific tests

Admissibility

State v. Barker, 366 S.E.2d 642 (1988) (Brotherton, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Horizontal gaze nystagmus, (p. 151) for discussion of topic.

Scientific tests (continued)

Bite-marks

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

Appellant was convicted of aggravated robbery. A paper towel with bite marks on it was found at the scene of the crime. These marks were compared with impressions of the appellant's teeth. The forensic pathologist and dentist, Dr. Irwin Sopher, State Medical Examiner, testified at trial that the pattern of marks on the towel was "that of the teeth of Keith Armstrong, to the exclusion of all other individuals."

Appellant moved for an *in camera* hearing to establish the general scientific acceptance of bite-mark comparisons. He argued that a hearing was necessary before Dr. Sopher could be allowed to testify. The trial court denied the request.

Syl. pt. 1 - "There are certain scientific tests that have been widely used over a long period of time, such that their general acceptance in the scientific community can be judicially noticed." Syl. pt. 8, *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980).

Syl. pt. 2 - The general reliability of bite-mark evidence as a means of positive identification is sufficiently established in the field of forensic dentistry that a court is authorized to take judicial notice of such general reliability without conducting a hearing on the same.

The Court noted that all twenty-one of the jurisdictions considering bite-mark evidence have held it admissible. So long as the witness demonstrates the required skill and experience and the accuracy and reliability of the evidence a trial court may properly admit opinion testimony of an expert witness regarding bite-marks without an *in camera* hearing to establish general scientific reliability.

Blood tests

State v. Moczek, 363 S.E.2d 238 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Right to test, (p. 152) for discussion of topic.

Scientific tests (continued)

Hair samples

State v. Wallace, 337 S.E.2d 316 (1985) (Per Curiam)

During the trial, the State offered evidence showing that a hair had been recovered from a ski mask dropped at the scene of the crime. An expert witness compared this hair with a sample removed from the defendant. He described a number of comparison tests which he had performed on the two samples and testified that the sample from the ski mask could have belonged to the defendant. Appellant contends the witness' testimony was inadequate to connect the samples. He argues that the hair sample evidence was not relevant or material and that the trial court committed reversible error in admitting it.

The issue raised is similar to that raised in *State v. Wyant*, 174 W.Va. 567, 328 S.E.2d 174 (1985). In *Wyant* the Court noted that lack of comparison certainly is not a sufficient basis for excluding hair-comparison evidence. The Court found it is, instead, a factor relating to the weight to be given to the evidence and should not serve as the ground for reversal of a conviction.

Judicial notice

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See EVIDENCE Scientific tests, Bite-marks, (p. 237) for discussion of topic.

Scientific tests

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See EVIDENCE Scientific tests, Bite-marks, (p. 237) for discussion of topic.

EVIDENCE

Search warrant and supporting affidavit

Evidence of other crimes

State v. Corbett, 352 S.E.2d 149 (19860 (Per Curiam)

Appellant contends the trial court should not have permitted the State to introduce a search warrant and supporting affidavit into evidence because they contained information as to another crime.

After the prosecution's opening argument, the trial court found the search warrant and affidavit could be admitted into evidence to prove the validity of the search. The trial court also held the prosecution could not elicit any testimony concerning previous sale or refer to it in argument to the jury. The prosecutor made an oblique reference to the alleged sale in opening, but there was no objection. Defense conceded simple possession but denied any intent to distribute.

The prosecution introduced the affidavit and search warrant during the direct testimony of its first witness and no reference was made to the alleged sale. The court instructed the jury the search warrant was valid. Defense counsel chose to cross-examine the witness concerning the alleged sale in an effort to prove it had not occurred. Defense called three witnesses for the purpose of proving the defendant was somewhere else when the alleged sale took place. These tactics seemed to work since defendant was found guilty only of possession. The Court found no error.

Sexual assault

Reputation for violence

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See SEXUAL ASSAULT Elements, Reputation for violence, (p. 595) for discussion of topic.

EVIDENCE

Statement by attorney on strength or weakness of case

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See EVIDENCE Judicial admissions, (p. 226) for discussion of topic.

Statements made by witness upon a legal examination

In the Interest of C.S.V., 337 S.E.2d 916 (1985) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Admissibility of testimony given by the juvenile at a legal proceeding (p. 399) for discussion of topic.

Sufficiency

Generally

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 623) for discussion of topic.

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See NEW TRIAL - NEWLY DISCOVERED EVIDENCE Sufficiency for, (p. 421) for discussion of topic.

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 623) for discussion of topic.

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 624) for discussion of topic.

Sufficiency (continued)

Attempted arson

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

Appellant claimed that the prosecution failed to prove either intent or motive in his conviction for attempted arson.

Syl. pt. 3 - "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 fall short of completing the underlying crime." Syl. pt. 2, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court noted that an intentional and willful burning is contemplated by *W.Va.Code*, 61-3-4. Therefore, under *Starkey*, the prosecution must show an intent to commit arson and an overt act toward commission.

Syl. pt. 4 - The phrase "willfully and maliciously" in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.

Here, the evidence was found sufficient. " 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 injustice has bee done." Syl. pt. 1, *State v. Starkey*, *supra*.

For conviction

State v. Dean, 363 S.E.2d 467 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Confessions, Sufficient for conviction, (p. 627) for discussion of topic.

EVIDENCE

Tape recordings

State v. Thompson, 342 S.E.2d 268 91986) (Brotherton, J.)

Appellant contends the trial court erred in allowing the jury to hear the tape recording made in the course of the alleged controlled buy. She contends the recording was in great part inaudible and nonintelligible and that an adequate foundation had not been laid for it, in that all the voices recorded on it were not identified.

The Court found although portions of the tape were inaudible and unintelligible, the portions surrounding the actual purchase of marijuana from the appellant were audible and intelligible. The tape supported the informant's testimony that he requested that the defendant sell him drugs, that the price was set, and that the defendant sold him marijuana. The Court found the tape is sufficiently coherent and trustworthy to have been admissible under the rule set forth in *State v. Harris*, 169 W.Va. 150, 286 S.E.2d 251 (1982).

Telephone calls

Foundation for admission

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence. He contends an inadequate foundation was laid for the admission of a certain phone call. The Court found that a proper foundation for the phone call was not laid but because a proper foundation could have been laid the error was harmless.

Interception by spouse

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition. Defendant was found guilty of first-degree murder for the killing of his wife.

Telephone calls (continued)

Interception by spouse (continued)

Marano v. Holland, (continued)

At the original trial defendant's counsel did not introduce tape recordings defendant made of his wife's conversations with other men. Defendant claimed that failure to introduce these tapes in order to show defendant's state of mind and aid his insanity defense constituted ineffective assistance of counsel.

The Court found that counsel was not ineffective and found, among other grounds, that the telephone tapes should not have been introduced.

Syl. pt. 15 - One spouse's interception of telephone communications by the other is a violation of the Omnibus Crime Control and Safe Streets Act of 1964, 18 U.S.C. §2110, *et seq.*, which by its terms renders them inadmissible.

Threats against the deceased

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

Appellant was convicted of second degree murder. He contends the trial court erred in allowing the State to introduce evidence of threats he had made against the deceased prior to the shooting. At trial, there was evidence that on one occasions, the appellant had stated in the deceased's presence that if she ever did anything, he was going to take her to the mountains, kill her and bury her there. It was alleged on another occasion he drew a handgun and threatened to "blow her head off."

Syl. pt. 1 - "'Evidence of thread made by a defendant on trial for murder, against the life of the person alleged to have been murdered, coupled with a statement of the manner or means by which such threat was intended to be carried out, is admissible.' Syl. pt. 3, *State v. Flint*, 142 W.Va. 509, 96 S.E.2d 677 (1957)." Syl. pt. 5, *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985).

Appellant contends the evidence was too remote to be admissible. One of the incidents occurred several months prior to the shooting while the other occurred a year to eighteen months before the death.

Threats against the deceased (continued)

State v. Berry, (continued)

Applying the standards set forth in Syl. pt. 6, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982), the Court found that the trial court did not abuse its discretion in allowing the challenged evidence. The evidence showed the appellant and the deceased had engaged in a long courtship prior to their brief marriage, and that the threats allegedly made by the appellant occurred towards the end of that courtship. In view of the relevance of the evidence the Court found no reversible error.

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Syl. pt. 5 - "Evidence of a threat made by a defendant on trial for murder, against the life of the person alleged to have been murdered, coupled with a statement of the manner or means by which such threat was intended to be carried out, is admissible." Syl. pt. 3, *State v. Flint*, 142 W.Va. 509, 96 S.E.2d 677 (1957).

The Court found a threat by the accused made against the victim of a homicide only two weeks before the killing is admissible at least to show premeditation. The Court found no error in the admission of the testimony.

EXCLUSIONARY RULE

Incident to arrest

By private security guard

State v. Meugge, 360 S.E.2d 216 (1987) (McGraw, C.J.)

See ARREST By private security guard, Effect of, (p. 25) for discussion of topic.

Victim Protection Act

Restitution as condition of probation

State v. Short, 350 S.E.2d 1 (1986) (Brotherton, J.)

Appellant pled guilty to one felony count of transferring stolen property. He was granted five years probation, one of the terms being that he make restitution bo the victims as determined by the court. Appellant made payments of $50-$100 per week during the probationary period, but the payments were insufficient to pay the entire debt. At the conclusion of his probationary period, the trial court granted judgment to the State on behalf of the victims under the Victim Protection Act of 1984 in the amount of the unpaid balance– $15,151.30.

The Court found that *W.Va.Code*, 62-12-9 (1953) allows restitution, in whole or in part, to be imposed as a condition of probation to be made immediately or within the period of probation. The Court found the trial court's authority under this section dissolved at the end of the probationary period.

The Court found the Victim Protection Act of 1984, which allows for the enforcement of restitution beyond the probationary period in the same manner as a civil judgment, was retroactively applied against appellant.

Syl. pt. - A law which changes the punishment for a crime and inflicts a greater punishment than the law annexed to the crime when it was committed is an *ex post facto* law.

EXTRADITION

Basis for

State ex rel. Jones v. McKenzie, 367 S.E.2d 769 (1988) (Per Curiam)

Appellant was denied habeas corpus relief below. He complained that he was being improperly held for extradition to New York state.

The Governor of New York, in applying for appellant's extradition, forwarded to West Virginia several documents, including a certified copy of the indictment and an affidavit from the New York District Attorney setting forth the purposes of the prosecution. Upon receiving these documents the Governor of West Virginia authorized appellant's arrest and signed a warrant of rendition instructing West Virginia police to deliver appellant to Buffalo, New York police. It erroneously stated that those police officers had been "appointed by the Governor of the State of Pennsylvania" and that appellant was to be delivered to Pennsylvania.

Syl. pt. "In habeas corpus proceedings 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 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." Syllabus point 2, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971), *cert. denied*, 406 U.S. 946, 92 S.Ct. 2048, 32 L.Ed.2d 333 (1972).

The Court noted that the requisition material from the requesting state was the vital factor in determining validity of extradition proceedings. Errors in the asylum state's response do not automatically invalidate the procedure. Errors regarding whether the crime was committed or regarding the identity of the accused are another matter. See *Locke v. Burns*, 160 W.Va. 753, 238 S.E.2d 536 (1977) and *State ex rel. Gonzales v. Wilt*, 163 W.Va. 270, 256 S.E.2d 15 (1979).

The Court also noted that the Governor of West Virginia should invalidate the incorrect warrant of rendition.

EXTRADITION

In general

Feathers v. Detrick, 336 S.E.2d 922 (1985) (McHugh, J.)

Syl. pt. 1 - "A person, after having been convicted of a crime committed within a state and not having served in full the sentence resulting therefrom, who when sought for to be subjected to the sentence of the court is found in another state, is a fugitive from justice within the meaning of the extradition clause of the United States Constitution, Article IV, Section 2." Syl. pt. 1, *State ex rel. Sublet v. Adams*, 145 W.Va. 354, 115 S.E.2d 158 (1960), *cert. denied*, 366 U.S. 933 (1961).

Syl. pt. 2 - Under the Uniform Criminal Extradition Act (*W.Va.Code*, 5-1-7 through *W.Va.Code*, 5-1-13), a demand for the extradition of one who has been convicted of a crime and sentenced and who, thereafter, is alleged to have broken the terms of his or her parole, must be supported by documents authenticated by the executive authority of the demanding state, including a copy of a judgment of conviction or a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person demanded has broken the terms of his or her parole. *W.Va.Code*, 5-1-7 [1937].

Syl. pt. 3 - The Uniform Criminal Extradition Act (*W.Va.Code*, 5-1-7 through *W.Va.Code*, 5-1-13), does not require, as a prerequisite to the extradition of an alleged parole violator, a judicial determination by the demanding state of probable cause to believe that the person demanded has broken the terms of his or her parole.

FALSE SWEARING

Elements

Farber v. Douglas, 361 S.E.2d 456 (1985) (Miller, C.J.)

The Court found the prosecutor in this case was disqualified as a matter of law from seeking the false swearing indictment and that his presence before the grand jury on this matter was unauthorized and vitiates the indictment. The Court also found the indictment must be dismissed as a matter of law because the facts alleged do not constitute false swearing.

Syl. pt. 3 - "A 'lawfully administered' oath or affirmation is an essential element of the crimes of perjury, *W.Va.Code*, 61-5-1 [1931], and false swearing, *W.Va.Code*, 61-5-2 [1931]; and a 'lawfully administered' oath or affirmation, as that phrase is used in *W.Va.Code*, 61-5-1 [1931], and *W.Va. Code*, 61-5-2 [1931], is an oath or affirmation authorized by law and taken before or administered by a tribunal, officer or person authorized by law to administer such oaths or affirmations." Syl. pt. 1, *State v. Wade*, 174 W.Va. 381, 327 S.E.2d 142 (1985).

Syl. pt. 4 - In order to support a charge of false swearing under *W.Va.Code*, 61-5-2, the person administering the oath or affirmation must be qualified to do so and the sworn testimony, document, or affidavit must be authorized by law to be rendered under an oath or affirmation.

The Court found the sworn affidavit signed by the relator was filed pursuant to Rule XVII of the Court's Trial Court Rules. Under this rule, if a party desires to move for the disqualification of a judge, he must file a verified motion stating "the facts and reasons for disqualification," and accompany the motion with a certificate of counsel which states "it is made in good faith and has evidence to support the same." The Court found there is no requirement under Rule XVII that the certificate of counsel be sworn before a notary public.

Here, although the relator swore to the certificate, this was neither required nor authorized by law and, consequently, was merely gratuitous. The Court found since the certificate of counsel under Rule XVII of our Trial Court Rules is not required to be sworn before the notary public, no charge of false swearing could be made under these facts.

See also, PROSECUTING ATTORNEYS Disqualification, (p. 465) for discussion of topic.

FALSE SWEARING

Evidence

Sworn statements during plea

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

Appellant was convicted of nighttime burglary and petit larceny for theft of a postal money order. Pursuant to a plea bargain, he pled guilty to a conspiracy to commit a felony. During the guilty plea hearing the appellant admitted his guilt. The trial court rejected the plea.

At trial the appellant indicated his intent to testify. The trial court, during an *in camera* hearing, warned the appellant that he was in danger of perjury if he contradicted his prior statements. Appellant did not testify. On appeal he claimed that he was denied due process in that he was required during the guilty plea hearing to testify to the factual basis of the plea, thus effectively preventing his testifying during trial.

Syl. pt. 1 - Rule 11(e)(6)(D)(ii) of the West Virginia Rules of Criminal Procedure, expressly recognized that a defendant's statements under oath, in the presence of counsel, and on the record during a guilty plea proceeding, can be used in a subsequent criminal proceeding for false swearing when the guilty plea is withdrawn.

Syl. pt. 3 - The perjury exception in Rule 11(e)(6)(D)(ii) of the West Virginia Rules of Criminal Procedure, does not violate the Fifth Amendment privilege against self-incrimination.

Syl. pt. 4 - Under Rule 11(e)(6)(D)(ii) of the West Virginia Rules of Criminal Procedure, a defendant whose plea agreement is withdrawn or rejected by a trial court may be subsequently indicted for perjury or false swearing if he testifies at trial contrary to the statements made during the plea agreement hearing.

Syl. pt. 5 - Rule 11(e)(6)(D)(ii) of the West Virginia Rules of Criminal Procedure, requires that before plea agreement statements can form the basis for a subsequent perjury or false swearing charge, they must be made by the defendant under oath, on the record, and in the presence of counsel.

The Court noted that Rule 11 speaks only to immunity where the guilty plea is withdrawn; they held the language broad enough to include rejected guilty pleas, as here.

FRAUD

Worthless checks

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

See WORTHLESS CHECKS Obtaining money thereby, (p. 673) for discussion of topic.

GOOD TIME/REDUCTION OF SENTENCE

Computation

Echard v. Holland, 351 S.E.2d 51 (1986) (McGraw, J.)

Appellant appeals an order of the circuit court vacating a writ of habeas corpus ad subjiciendum, finding "good time" was properly calculated, and approving the discharge date set for appellant. The records clerk computed the minimum discharge date on the appellant's sentence to be May 5, 1989.

The Court agreed with the appellees that a double deduction for good time is not allowed where consecutive sentences have been imposed. The Court found the appellant did not prove he was being illegally detained. The Court recomputed credit due the appellant and concluded February 4, 1991, to be the minimum discharge date on appellant's sentence. (See case for computations).

Ex post facto

Hasan v. Holland, 342 S.E.2d 144 (1986) (Per Curiam)

Petitioner contends the application of the current "good time" statute, *W.Va. Code*, 28-5-27 (1985) to inmates who were convicted of crimes committed prior to the effective date of the statute, violates the constitutional prohibitions against *ex post facto* laws.

Syl. pt. - "Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syl. pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

The issue here was whether the application of the 1984 statute was disadvantageous. The Court found they must determine whether an inmate could earn more good time under the prior good time statute than he could under the present one. The Court was unable to say the 1984 statute operates to the detriment of the petitioner. (See case for discussion). Accordingly, the Court found no violation of the prohibition against *ex post facto* laws in the application of *W.Va.Code*, 28-5-27 to the petitioner.

GOOD TIME/REDUCTION OF SENTENCE

Right to credit

State ex rel. Coombs v. Barnette, 368 S.E.2d 717 (1988) (Neely, J.)

Petitioner was sentenced on three counts of sexual abuse in the third degree, and was sentenced to ninety days on each count, sentences to run consecutively. On 29 June 1987 he began serving his sentence in the Braxton County Jail. On 23 October 1987 he was allowed thirteen days credit for time served before sentencing. He claimed that he should be discharged for having served his sentence.

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 the rules and regulations. *W.Va.Code*, 7-8-11." Syl. Pt. 1, *State ex rel. Gillespie v. Kendrick*, 164 W.Va. 599, 265 S.E.2d 537 (1980).

Syl. pt. 2 - "Good time credit is a valuable liberty interest protected by the due process clause, *W.Va. Const.* Art. III, § 10." Syl. Pt. 2, *State ex rel. Gillespie v. Kendrick*, 164 W.Va. 599, 265 S.E.2d 537 (1980).

Syl. pt. 3 - *W.Va.Code*, 7-8-11 [1963] allows good time credit for county jail prisoners sentenced to jail for cumulative terms of six months or more.

Syl. pt. 4 - "Penal statutes must be strictly construed against the State and in favor of the defendant." Syl. Pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

The main issue was whether petitioner's three consecutive ninety day sentences qualify him for the five days per month credit pursuant to *W.Va. Code*, 7-8-11. Noting that inmates in state prisons are allowed to cumulate consecutive sentences for purposes of determining good time (see *W.Va. Code*, 28-5-27e), the Court allowed petitioner to do the same.

GRAND JURY

Procedural irregularity

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

See INDICTMENT Sufficiency, Endorsement, (p. 300) for discussion of topic.

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant contends that his indictment for nighttime burglary is fatally defective because the grand jury foreman failed to endorse it on the back.

The Court noted that the indictment was signed on the front and therefore met the requirements of Rule 7(c)(1) of the Rules of Criminal Procedure. Failure to sign on the back was not a fatal defect. See *State v. Davis*, 178 W.Va. 87, 357 S.E.2d 769 (1987).

Return of "not true bill" in misdemeanor

Precludes filing of information

State ex rel. Swanigan v. Cline, 350 S.E.2d 734 (1986) (McGraw, J.)

Petitioner seeks a writ of prohibition preventing her trial under an information charging her with receipt of stolen property. She contends that since a grand jury had returned a "not true bill" to this charge, the subsequent information was improper. The Court agree, granting her the writ precluding prosecution until possible return of an indictment.

Syl. pt. - Return of not true bill on a misdemeanor charge precludes prosecution until return of a true bill of indictment by a grand jury.

The Court found the protective role of the grand jury must be preserved. Where a prosecutor proceeds initially by way of presentation to a grand jury, it would be an affront to the dignity of the grand jury and contrary to our concept of fundamental fairness for the prosecutor to then proceed by information following return of a not true bill.

GRAND JURY

Right of putative defendant and counsel to appear

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

See RIGHT TO COUNSEL Right of putative defendant and counsel to appear before grand jury, (p. 503) for discussion of topic.

GRAND LARCENY

Larceny

Fingerprint evidence

State v. Sexton, 346 S.E.2d 745 (1985) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Larceny, Fingerprint evidence, (p. 630) for discussion of topic.

State v. William T., 338 S.E.2d 215 (1985) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Larceny, In general, (p. 631) for discussion of topic.

Lesser included offense

State v. Sexton, 346 S.E.2d 745 (1985) (Per Curiam)

Appellant was convicted of grand larceny. He contends the verdict form should have contained the lesser included offense of petit larceny because the evidence showed appellant's fingerprints only on a Bulova watch box and that watch was worth less than $200. The Court found the defense at trial was appellant's testimony that he did not take any of the valuables, and that the evidence offered by the State tended to prove the appellant committed the larceny of all the items stolen.

Applying the standards set forth in Syl. pt. 2 of *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), the Court found there was no evidence in this case to support a verdict of a lesser included offense and the appellant was not entitled to a lesser included offense instruction.

GUILTY PLEAS

Rejection of plea

Vindication of defendant's rights

Kennedy v. Frazier, 357 S.E.2d 43 (1987) (Neely, J.)

Petitioner was indicted on a two count indictment. He entered into a plea agreement under which he would plead guilty to delivery of marijuana in return for dismissal of a second charge. The prosecution also agreed not to seek an enhanced sentence. The judge found the plea to be voluntary and intelligently given, and referred the matter to the probation department for a presentence investigation. The presentence report included statements by petitioner indicating he had been entrapped and that improper sexual advances had been made toward by a police officer. Based upon this report, a hearing was held and the circuit judge rejected the plea agreement and scheduled the matter for trial.

Syl. pt. 1 - An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him.

Syl. pt. 2 - Although a judge would be remiss to accept a guilty plea under circumstances where the weight of the evidence indicated a complete lack of guilt, a court should not force any defense on a defendant in a criminal case, particularly when advancement of the defense might end in disaster.

The Court found the court abused its discretion in rejecting the plea agreement in order to vindicate the *defendant's* rights. The Court found the law in *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984) protects the interests of the public, and that had the trial judge rejected the plea because the probation report demonstrated lack of adequate contrition on petitioner's part and the plea agreement did not adequately protect the public, the decision would have ben within the permissible discretion allowed by Rule 11(e)(2) of the *W.Va. Rules of Criminal Procedure* and the holding in *Myers*.

Here, it was for the defendant, after proper consultation with counsel, to determine whether to risk jury trial or enter into the plea agreement. The writ was granted.

GUILTY PLEAS

Right to counsel

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

Syl. pt. 2 - "The constitutional right to assistance of counsel may be waived by an accused by conduct which demonstrates intelligent and understanding waiver." Syl. pt. 1 *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Syl. pt. 3 - "The right of the defendant in a criminal proceeding to the assistance of counsel is a fundamental right, the waiver of which will not be presumed by the failure of the accused to request counsel, by the entry of a guilty plea or by reason of a record silent concerning the matter of counsel and the conviction of a defendant in the absence of counsel or of an affirmative showing of an intelligent waiver of such right is void." Syl. pt. 3, *State ex rel. Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 (1965).

Syl. pt. 4 - "Where the record affirmatively discloses that a person accused of a crime expressly waived his constitutional right to assistance of counsel and his constitutional right to trial by jury and entered a plea of guilty to the charge, such waivers and such plea of guilty will not be held in a habeas corpus [or other collateral attack] proceeding to be void on the ground that such waiver were not made intelligently and understandingly or that the plea of guilty was not entered intelligently and understandingly, unless such contentions are supported by proper allegations and by a preponderance of the evidence." Syl. pt. 6 *State ex rel. Powers v. Boles*, 149 W.Va. 6, 138 S.E.2d 159 (1964).

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Right to counsel in prior DUI convictions, (p. 166) for discussion of topic.

GUILTY PLEAS

Setting aside

Basis for

State v. Moore, 367 S.E.2d 757 (1988) (Per Curiam)

Appellant was charged with receiving stolen property. He entered into a plea bargain, pleading guilty to the charge. Sentencing was not part of the agreement. Subsequently, appellant was sentenced to one to ten in the state penitentiary. The sentencing judge appeared to base the sentence in part on matters in a victim impact statement which the appellant was not given the chance to rebut. Appellant's motions for reduction of sentence and withdrawal of the guilty plea were denied.

Syl. pt. 1 - "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." Syl. pt. 3 , *State ex rel. Burton v. Whyte*, 163 W.Va. 276, 256 S.E.2d 424 (1979).

The Court found no showing of incompetence of counsel here. Since sentencing was not a part of the agreement the Court found no error.

Double jeopardy

Sellers v. Broadwater, 342 S.E.2d 198 (1986) (Neely, J.)

See PLEA BARGAINING Setting aside, Double jeopardy, (p. 433) for discussion of topic.

Voluntariness

Kennedy v. Frazier, 357 S.E.2d 43 (1987) (Neely, J.)

See GUILTY PLEAS Rejection of plea, Vindication of defendant's rights, (p. 257) for discussion of topic.

GUILTY PLEAS

Withdrawal of plea

State v. Cabell, 342 S.E.2d 240 (1986) (Miller, C.J.)

Appellant was charged with burglary by breaking and entering, burglary by entering without breaking, aggravated robbery, malicious wounding, and attempted murder. On the day before trial, the defendant entered a plea of guilty to aggravated robbery and burglary pursuant to a plea bargaining agreement with the prosecutor. Before accepting the pleas, the judge questioned the defendant, both his court-appointed attorneys and the prosecutor about the terms of the agreement. The defendant and both court-appointed counsel also completed standardized forms which indicated the defendant's pleas were voluntarily entered.

The Court found that although the circuit court explained it had the ultimate responsibility for sentencing and was not bound by the prosecutor's recommendation, the court did not inform the defendant that if it decided not to accept the sentencing recommendation, the defendant would none the less have no right to withdraw his pleas as provided for in Rule 11(e)(2).

After the judge chose not to follow the prosecutor's sentencing recommendations, the defendant moved to withdraw his guilty pleas on a number of grounds, including the court's failure to comply with Rule 11(e)(2) of the *W.Va.R.Crim.P.* Rule 11(e)(2) provides with respect to this type of agreement that the court "shall advise" the defendant that if the court does not accept the prosecutor's sentencing recommendation, the defendant nevertheless has no right to withdraw his plea.

Syl. pt. 2 - A trial court has two options to comply with the mandatory requirements of Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure. It may initially advise the defendant at the time of the guilty plea is taken that as to any recommended sentence made in connection with a plea agreement, if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea. As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea.

Withdrawal of plea (continued)

State v. Cabell, (continued)

Here, neither option was followed. The Court reversed the convictions and remanded the case with the instruction that the defendant be given an opportunity either to plead anew or to grant specific performance so that the sentence comports with the reasonable understanding an expectations of the defendant as to the sentence for which he bargained.

State v. Harlow, 346 S.E.2d 350 (1986) (Miller, C.J.)

Syl. pt. 1 - Rule 32(d) of the West Virginia Rules of Criminal Procedure as it relates to the right to withdraw a guilty or nolo contendere plea prior to sentence permits the withdrawal of a plea for "any fair and just reason."

Here, the Court found the prosecutor's statement to the probation officer regarding relator's lack of cooperation, and consequently his failure to remain at least neutral, was sufficient to enable the relator to withdraw his pleas prior to sentencing. The fact the prosecutor recommended probation to the circuit court does not lessen the impact of the prosecutor's subsequent statements contained in the presentence report. The State did not claim it would be unduly prejudiced if the pleas were withdrawn.

The Court found the withdrawal of a plea prior to sentencing places both parties in their original position and enables the State to try a defendant on all charges. A defendant gains no advantage, since he is returned to his original position and is again subject to trial. The Court found relator's request to set aside his pleas made prior to his sentence should have been granted.

HABEAS CORPUS

Appeal not recorded

Estep v. Hedrick, No. 18212 (3/3/88) (Per Curiam)

Relator was convicted of aggravated robbery on May 9, 1985. In April, 1986 relator filed a petition for writ of habeas corpus alleging denial of his right to appeal.

On May 28, 1986 the Court issued a writ returnable to the trial court. On June 4, 1986 the trial court granted an expedited appeal, allowing 45 days in which to file a petition. Relator's counsel filed a petition for appeal and note of argument with the circuit court but the documents were never sent to the Court. Finally, in September, 1987 this proceeding was brought seeking unconditional release for failure to afford an appeal.

The Court found no dereliction by the State and therefore refused to grant unconditional release. (The Court noted that petitioner was free to file his appeal, the State having waived objections based on timeliness). See *State v. Pettigrew*, 168 W.Va. 299, 284 S.E.2d 370 (1981); *Varney v. Superintendent*, 164 W.Va. 520, 264 S.E.2d 472 (1980); *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977); *Johnson v. McKenzie*, 160 W.Va. 385, 235 S.E.2d 138 (1977).

Double jeopardy

Effect on

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DOUBLE JEOPARDY Habeas corpus, Effect of, (p. 142) for discussion of topic.

Extradition

State ex rel. Jones v. McKenzie, 367 S.E.2d 769 (1988) (Per Curiam)

See EXTRADITION Basis for, (p. 247) for discussion of topic.

Omnibus hearing

State ex rel. Vickers v. Bivens, No. 17067 (4/4/86) (McHugh, J.)

The Court found an omnibus post-conviction habeas corpus hearing is properly conducted only after the time for taking an appeal has expired or appeal rights have been exhausted. *W.Va.Code*, 53-4A-1(e) (1967); *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606, 609 (1981). The Court found *Losh* does not require an omnibus habeas corpus hearing where, as here, the sole purpose of the habeas corpus hearing is to secure a record for an appeal. Relator should now pursue his right to a review of his conviction upon direct appeal. He now has three trial transcripts and he has been resentenced to preserve his appeal rights.

Retrial

State v. Moore, 357 S.E.2d 780 (1987) (Miller, J.)

See SPEEDY TRIAL Three term rule, (p. 615) for discussion of topic.

Retrial following

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DOUBLE JEOPARDY Habeas corpus, Effect of, (p. 142) for discussion of topic.

State v. Moore, 357 S.E.2d 780 (1987) (Miller, J.)

See RETRIAL Three term rule following habeas, (p. 495) for discussion of topic.

HARMLESS ERROR

Constitutional

Alibi instructions

Morrison v. Holland, 352 S.E.2d 46 (1986) (Miller, C.J.)

See DEFENSES Alibi, Instructions, (p. 85) for discussion of topic.

Generally

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus writ which reversed his first-degree murder conviction.

The trial court held as error the prosecution's compelling the production of papers used by psychologists testifying for the defense. The Court agreed, holding that the compulsory production of these papers constituted an unreasonable seizure in violation of the Fourth Amendment. Testimony by the prosecution's psychologist, based partially upon these papers, was excluded.

Syl. pt. 7 - "'Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975)." Syllabus Point 5, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The error here was clearly not harmless. The Court was unable to find that the improper evidence did not harm the defendant's insanity defense and reversed the conviction.

Maxey v. Bordenkircher, 330 S.E.2d 859 (1985) (McGraw, J.)

See SELF-INCRIMINATION - STATEMENT BY DEFENDANT Post-arrest, Statements made to court-appointed psychiatrists, (p. 557) for discussion of topic.

Constitutional (continued)

Generally (continued)

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

Appellant was convicted of attempted murder, malicious wounding, brandishing a pistol, carrying an unlicenced weapon and destruction of property. The prosecution contended on appeal that admission at trial of appellant's statement to police, made in violation of appellant's Sixth Amendment right to counsel, was harmless error.

Syl. pt. 3 - "'Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975)." Syl. pt. 1 *Maxey v. Bordenkircher*, 175 W.Va. 49, 330 S.E.2d 859 (1985).

See also, *Chapman v. California*, 87 S.Ct. 824 (1967) and *United States v. Hasting*, 103 S.Ct. 1974 (1983).

The test to be followed is ". . . Absent the . . . (error), is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *United States v. Hasting*, 103 S.Ct. 1974 (1983).

Here, the Court found that a reasonable doubt did exist as to appellant's conviction absent the objectionable evidence. Reversal required.

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant contends the trial court erred in refusing to permit defense counsel's testimony regarding the warrantless search of the appellant's home on the day of the robbery. The Court concluded the evidence seized from the appellant's home pursuant to a search warrant was admissible irrespective of any previous warrantless search. The trial court's action, if erroneous, was harmless under Syl. pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979).

Constitutional (continued)

Generally (continued)

State v. Dean, 363 S.E.2d 467 (1987) (Per Curiam)

See CONFESSIONS Voluntariness, (p. 64) for discussion of topic.

State v. Gravely, 342 S.E.2d 186 (1986) (Per Curiam)

See IDENTIFICATION Suggestive identification, Denial of right to counsel, (p. 284) for discussion of topic.

Ineffective assistance of counsel

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See INEFFECTIVE ASSISTANCE Failure to object, Failure to offer instructions, (p. 314) for discussion of topic.

Instructions, error in

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See APPEAL Plain error, Erroneous instruction, (p. 21) for discussion of topic.

Non-constitutional

Maxey v. Bordenkircher, 330 S.E.2d 859 (1985) (McGraw, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Post-arrest, Statements made to court-appointed psychiatrist, (p. 557) for discussion of topic.

Non-constitutional (continued)

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

The appellant contends the trial court erred in admitting a store audit, conducted by managerial personnel, but signed by the victim, over an objection that it was inadmissible hearsay. The Court found that under our aggravated robbery statute, the amount of money taken is irrelevant, that the victim in this case testified that the robber emptied the bills from the cash register and petty cash drawer, and that testimony with respect to the precise amount taken, even if hearsay, would have had no appreciable effect upon the jury. Harmless error.

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

See INSANITY Expert testimony, Scope, (p. 330) for discussion of topic.

Admission of hearsay evidence

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. At trial several statements were admitted as exceptions to the hearsay rule. On appeal the Court disallowed those statements. The question then became whether admission of the statements into evidence was reversible error.

Syl. pt. 6 - "Where improper evidence of a non-constitutional 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." Syl. pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 63 L.Ed.2d 320, 100 S.Ct. 1081 (1980).

Here, the Court held that the remaining evidence was sufficient to sustain the conviction and that the jury was not prejudiced.

Non-constitutional (continued)

Collateral crimes

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See EVIDENCE Instructions to disregard, Effect of, (p. 225) for discussion of topic.

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

See EVIDENCE Collateral crimes, (p. 197) for discussion of topic.

Cross-examination re: character

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See EVIDENCE Character, (p. 187) for discussion of topic.

Evidence of competency

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See COMPETENCY Failure to make finding, (p. 54) for discussion of topic.

Failure to disclose documents

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

Appellant was convicted of DUI, first offense. On appeal, he complained of the prosecution's failure to provide him with evidence introduced at trial relating to his prior DUI conviction.

The Court noted that appellant was initially charged with second offense DUI. He was therefore on notice that evidence regarding his first offense would be introduced. The evidence consisted of a judgment order and testimony of the first offense arresting officer.

Non-constitutional (continued)

Failure to disclose documents (continued)

State v. Holland, (continued)

The Court refused to reverse on this point, holding that "a verdict of guilty in a criminal case will not be reversed by this Court because of error committed by the trial court, unless the error is prejudicial to the accused." Syl. pt. 2, *State v. Blaney*, 168 W.Va. 462, 284 S.E.2d 920 (1981).

Failure to disclose witness

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

See DISCOVERY Failure to disclose, Generally, (p. 119) for discussion of topic.

Failure to provide transcript

State v. Chamberlain, 359 S.E.2d 858 (1987) (Per Curiam)

See TRANSCRIPT Right to transcript, Failure to provide, (p. 637) for discussion of topic.

Hearsay evidence

State v. Welker, 357 S.E.2d 240 (1987) (Neely, J.)

See EVIDENCE Hearsay, In general, (p. 214) for discussion of topic.

Joinder of offenses

State v. Eye, 355 S.E.2d 921 (1987) (Brotherton, J.)

See JOINDER SEVERANCE AND ELECTION Prejudicial joinder, (p.355 355) for discussion of topic.

Non-constitutional (continued)

Objections sustained

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

Appellant was convicted of first-degree sexual assault and incest. At trial the victim, while testifying as to where the alleged assaults took place, mentioned a place not specified in the indictment. Defendant's counsel moved for a mistrial or, in the alternative, to strike the testimony. The trial court denied the mistrial, granted the motion to strike and gave a curative instruction to the jury to disregard the victim's potential reference to an assault not in the indictment.

Syl. pt. 2 - "'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.' Syl. pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966)." Syl. pt. 3, *State v. Lusk*, 177 W.Va. 517, 354 S.E.2d 613 (1987).

Reputation evidence

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

In appellant's trial on charges of welfare fraud the prosecuting attorney was allowed to cross-examine appellant's character witnesses, all of whom testified as to appellant's reputation for honesty and veracity, as to their knowledge of appellant's investigation by the Department of Welfare on allegations of child abuse (no charges were brought). At an *in camera* hearing the prosecution was allowed to vouch the record to show the good faith of the cross-examination. The jury was instructed that the subject of cross-examination was not to be considered on the issue of appellant's guilt.

Syl. pt. 6 - "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, the error is not harmless; (3) if the remaining evidence is sufficient to support the

Non-constitutional (continued)

Reputation evidence (continued)

State v. Banjoman, (continued)

conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syl. pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 63 L.Ed.2d 320, 100 S.Ct. 1081 (1980).

Here, the Court found the alleged child abuse incident to be unrelated to the character traits at issue. In finding the questioning to be harmless error, the Court also noted that several of appellant's character witnesses were not questioned on the incident and that no mention of the incident was made in closing argument.

Right of allocution

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See SENTENCING Right of allocution, (p. 592) for discussion of topic.

Sufficiency of evidence

Sexual abuse in the first-degree

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See SEXUAL ASSAULT Sufficiency of evidence, Sexual abuse in the first-degree, (p. 602) for discussion of topic.

Sufficiency of evidence (continued)

Testimony re: prior arrests

State v. Haller, 363 S.E.2d 719 (1987) (Neely, J.)

Appellant was convicted of delivery of a controlled substance. At trial, testimony was elicited by defense counsel regarding the voluntariness of appellant's confession. In reply to defense counsel's allegation that appellant could not have understood his rights due to his drugged state, the trooper stated that he believed appellant understood because appellant had been previously arrested.

Defense counsel's objection was sustained and the jury instructed to disregard appellant's prior arrests.

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." Syl. Pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

The Court found no reversible error here.

See also, *State v. Acord*, 175 W.Va. 611, 336 S.E.2d 741 (1985).

HEARSAY

Generally

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. The victim's statement to a friend that the appellant had struck him and taken $100 from his wallet was admitted pursuant to Rule 804(b)(5), *W.Va.R.Evid*.

Rule 804(b)(5) states, in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: "Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent 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 purposes of these rules and the interests of justice will best be served by admission of the 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 this intention to offer the statement and the particulars of it, including the name and address of the declarant."

Syl. pt. 5 - The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) require that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered that any other evidence the proponent can reasonably procure. Fourth, the statement must comport with the g general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice to the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

Generally (continued)

State v. Smith, (continued)

Here, the Court held that the prosecution failed to comply with the rule. No disclosure of the evidence was made prior to trial, the testimony here was not crucial to a material issue and its probative value was reduced such that admission did not serve the ends of justice. In addition, the declarant's statement itself, without corroboration, was not sufficiently trustworthy, especially given the past animosity between appellant and him.

The Court also noted that a right of confrontation may exist under the Sixth Amendment. See *Naum v. Halbritter*, 172 W.Va. 610, 309 S.E.2d 109 (1983).

Prior inconsistent statements of defendant

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See IMPEACHMENT Prior inconsistent statements, Defendant, (p. 293) for discussion of topic.

HOMICIDE

Felony murder

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

See SUFFICIENCY OF EVIDENCE Homicide, Felony murder, (p. 630) for discussion of topic.

Indictment

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See INDICTMENT Sufficiency, In general, (p. 302) for discussion of topic.

Instructions

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

Appellant was convicted of first-degree murder without a recommendation of mercy. The State's theory of the case was felony-murder. Appellant contends the trial court erred in not giving the defendant's instruction defining robbery. The Court found the trial court did give a State's instruction on the elements of robbery and found no merit to this allegation.

Proof of malice, premeditation or specific intent to kill

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He requests reconsideration of the holding in Syl. pt. 7 of *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978). The Court once again reaffirmed *Sims*.

Robbery

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

See SUFFICIENCY OF EVIDENCE Felony murder, Robbery, (p. 629) for discussion of topic.

HOMICIDE

First-degree

State v. Harper, 365 S.E.2d 69 (1987) (McHugh, J.)

Appellant and an Arthur Wiseman were parked behind appellant's apartment building when the decedent and decedent's girlfriend arrived. Arthur Wiseman hailed the decedent and killed him with a shotgun as he approached. Appellant had earlier retrieved Wiseman's shotgun and shells for the gun while they were sitting in the parking lot.

The prosecution argued that appellant's acts constituted aiding and abetting murder of the first-degree by lying in wait. The trial court instructed the jury as to three possible verdicts: guilty of murder in the first-degree; guilty of murder in the first-degree with mercy; and not guilty. Appellant was convicted of aiding and abetting first-degree murder.

The issue presented was whether the trial court should have instructed the jury regarding second degree murder or involuntary manslaughter.

Syl. pt. 1 - "*W.Va.Code*, 61-1-2-1, 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." Syl. pt. 6, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978).

Syl. pt. 2 - "Lying in wait" as a legal concept has both mental and physical elements. The mental element is the purpose or intent to kill or inflict bodily harm upon someone; the physical elements consist of waiting, watching and secrecy or concealment. In order to sustain a conviction for first-degree murder by lying in wait pursuant to *W.Va.Code*, 61-2-1 [1987], the prosecution must prove that the accused was waiting and watching with concealment or secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person.

Here, the Court held that sufficient evidence of lesser included offenses was present and the instruction should have been given.

Syl. pt. 3 - "[A] trial court must give an instruction for a lesser included offense when evidence has been produced to support such a verdict." *State v. Stalnaker*, 167 W.Va. 225, 227, 279 S.E.2d 416, 417 (1981).

HOMICIDE

First-degree (continued)

State v. Harper, (continued)

Syl. pt. 4 - Where, in the prosecution of first-degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first-degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present.

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

See INSTRUCTIONS Not supported by the evidence, (p. 346) for discussion of topic.

Indictment

Sufficiency

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

See INDICTMENT Sufficiency, In general, (p. 302) for discussion of topic.

Instructions

Excessive force in repelling a trespasser

State v. Pannell, 330 S.E.2d 844 (1985) (Brotherton, J.)

Appellant was convicted of attempted murder. He contends the court erred in not instructing the jury on attempted voluntary manslaughter for using too much force in repelling a trespasser. The appellant had shot at a police officer.

Syl. pt. 2 - Where the police have probable cause to believe that people may be in danger, their duty to swiftly investigate this possibility empowers them with a privilege which rises above common law prohibitions against trespass.

Instructions (continued)

Excessive force in repelling a trespasser (continued)

State v. Pannell, (continued)

When the police arrived, after receiving a distress call, an angry man with a gun greeted them and ordered them to leave. The Court found under these circumstances the police had probable cause to believe that people were in danger, and, therefore, had a duty to investigate. The Court found entry by the police on the property of the defendant, while technically a trespass, was not actionable, and gave the defendant no right to use force to evict them.

Felony murder

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

Appellant was convicted of first-degree murder without a recommendation of mercy. He contends the trial court erred in refusing to instruct on involuntary manslaughter.

The State's theory of the case was felony-murder. The Court found the fact defendant claimed he accidentally discharged the shotgun would not remove the case from the felony-murder rule and instruction on involuntary manslaughter was correctly rejected.

Higher degrees not supported by the evidence

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the trial court erred in giving either a first or second degree murder instruction because the evidence would not support either verdict.

In view of the jury's verdict of voluntary manslaughter, about which they were properly instructed, the Court could not conclude appellant was entitled to a reversal.

See also, INSTRUCTIONS Lesser included offenses, (p. 344) for discussion of topic.

Instructions (continued)

Intent

State v. Pannell, 330 S.E.2d 844 (1985) (Brotherton, J.)

Appellant was convicted of attempted murder. He contends the trial court erred in amending one of the proposed defense instructions. The instruction read:

> The Court instructs the jury that if you should believe from the evidence that the State has proved only that the defendant acted irrationally or that the defendant acted in reckless disregard for the safety of others, *or that the defendant only accidentally discharged the firearm*, then the Court instructs the jury that you must acquit the defendant of an attempt to commit murder.

The italicized words were deleted by the judge before he gave the instruction to the jury. The Court found this was error. The Court noted, however, that other instructions, as well as the remainder of the above instruction, made it clear that the jury could not convict appellant of attempted murder without first finding that he intended to fire the gun. The Court found deleting the phrase from the instruction did not warrant reversal.

Involuntary manslaughter

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See HOMICIDE Instructions, Felony murder, (p. 275) for discussion of topic.

Lesser included offenses

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He contends the trial court erred in failing to instruct regarding lesser included offenses of murder. The Court found no error. *State v. Wayne*, 162 W.Va. 41, 245 S.E.2d 838 (1978) (upholding a trial judge's refusal to give instructions on lesser included offenses of felony murder.)

Instructions (continued)

Lesser included offenses (continued)

State v. Cook, (continued)

Appellant also contends the trial court erred in failing to instruct on aggravated robbery and its lesser included offenses. He places particular emphasis on the separation of charges of first-degree murder and aggravated robbery into two counts of his indictment. The Court found the appellant knew he was being charged with felony murder by robbery, and not with first-degree murder and aggravated robbery.

In rejecting a contention that failure to mention the underlying felony in an indictment precludes conviction for felony murder, this Court in *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118, 135 (1983), reaffirmed our holding in Syl. pt. 5 of *State v. Bragg*, 160 W.Va. 455, 235 S.E.2d 466 (1977) that:

> An indictment which charges that the defendant feloniously, wilfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder is sufficient to support a conviction for murder committed in commission of, or attempt to commit arson, rape, robbery or burglary it not being necessary, under *W.Va.Code*, 61-2-1, to set forth the manner or means by which the death of the deceased was caused.

The inclusion of a charge of aggravated robbery in count two merely supplied the appellant with additional notice that he was being charged with felony murder.

The Court found appellant was not entitled to instructions on aggravated robbery and its lesser included offenses as possible verdicts.

Instructions (continued)

Malice

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She contends the trial court erred in giving a State instruction on malice which was repetitive of another instruction on the same matter. The Court found close examination of the two malice instructions in question revealed that the appellant's objection as to repetitiveness is without merit. The Court found the first of these instructions informed the jury only that malice was a necessary element of murder, while the second defined the concept.

State v. Matney, 346 S.E.2d 818 (1986) (Per Curiam)

See SELF-DEFENSE In general, (p. 548) for discussion of topic.

Mercy in 1st degree homicide

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

At appellant's trial on first-degree charges, the trial court gave an instruction containing a list of factors to consider in whether to recommend mercy. Appellant noted that the jury asked for the instruction again after it began deliberations and reached a verdict without a recommendation of mercy ten minutes later.

Syl. pt. 1 - An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first-degree murder case should not be given.

Reckless disregard

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

See INCONSISTENT VERDICTS In general, (p. 295) for discussion of topic.

HOMICIDE

Self defense

State v. Baker, 356 S.E.2d 862 (1987) (Miller, J.)

See SELF-DEFENSE As a matter of law, (p. 545) for discussion of topic.

Sufficiency of evidence

Circumstantial evidence

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 629) for discussion of topic.

State v. Phillips, 342 S.E.2d 210 (1986) (McHugh, J.)

See EVIDENCE Circumstantial, (p. 191) for discussion of topic.

IDENTIFICATION

In general

State v. Acord, 336 S.E.2d 741 (1985) (Brotherton, J.)

Before trial, appellant requested that a State witness be required to identify the appellant out of a line-up before he could testify. Instead, the State chose to have the witness identify the appellant's picture out of a photographic array. The appellant asserts the witness should not have been allowed to testify. The Court disagreed, finding there is no requirement that a State's witness must be able to identify the defendant in a line-up before he can testify, and that even if the error had been committed, the evidence strongly indicated that the witness had known the appellant well and would have no difficulty in recognizing him.

Instructions

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

Appellant contends his identification instruction was improperly refused. *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981) indicated that an identification instruction must be given in certain circumstances. The Court found the circuit court, although without the benefit of *Payne* and *State v. Watson*, 173 W.Va. 553, 318 S.E.2d 603 (1984), did permit the State and the defendant to have a limited identification instruction.

Right to independent line-up

State v. Martin, 356 S.E.2d 629 (1987) (Per Curiam)

Appellant was convicted of burglary in the daytime by breaking and entering and aggravated robbery.

He contends the suppression hearing was improperly conducted by the trial court so as to cause it to become, in itself, a suggestive pretrial identification procedure. He contends the court erred in refusing to grant his motion to withdraw from the courtroom during testimony of the victim. He relies on Syl. pt. 2, *State v. Watson*, 164 W.Va. 642, 264 S.E.2d 628 (1980):

Right to independent line-up (continued)

State v. Martin, (continued)

> Where the defendant raises the issue of suggestive identification procedures, the trial court should apply the identification test set out in *State v. Williams*, 162 W.Va. 348, 249 S.E.2d 752 (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.

The trial court found the pretrial identification procedures were not suggestive and noted the defendant did not ask for an independent lineup prior to trial.

The Court found the defendant failed to make the advance motion to trigger the procedure set out in *Watson* and that the trial court was correct in concluding *Watson* was inapplicable to this case.

Suggestive identification

Denial of right to counsel

State v. Gravely, 342 S.E.2d 186 (1986) (Per Curiam)

Appellant was convicted of aggravated robbery and was sentenced to fifteen years in the penitentiary. His conviction was reversed in *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982), the Court finding reversible error in the admission of testimony regarding identification of the appellant that was obtained in violation of his right to counsel. Appellant was retried and again found guilty. In this appeal, he contends the trial court erred in admitting testimony relating to the pretrial identification held inadmissible in *Gravely*, *supra*.

In *Gravely*, *supra*, the Court held that Jeffrey Stevens' identification of the appellant in the basement of the courthouse after the appellant had left the magistrate's office where he expressed a desire to be represented by counsel was a violation of the appellant's Sixth Amendment right to counsel. In this appeal, the appellant asserts that when he was retried the trial court erred in again admitting evidence of this pretrial identification.

State v. Gravely, (continued)

The Court noted that in appellant's second trial, the prosecuting attorney did not question Mr. Stevens about the basement identification on direct examination. On cross, the appellant questioned Stevens about his failure to identify the appellant when he observed him shortly after the booking procedures in the upstairs part of the jail. The testimony of which the appellant complains was elicited by the prosecutor on redirect.

The Court found both Stevens and David Sargent, a store clerk who was present during the robbery, made in-court identifications of the appellant and that each also independently identified the appellant as one of the perpetrators of the crime from a photographic display. In addition, the revolver used in the robbery and the money stolen from the grocery store were recovered from the drive-in where the appellant and another were observed shortly after the robbery. The Court also found that the identification testimony was not part of the State's case in chief but formed only a minor part of Stevens' testimony or redirect. The Court found the prosecutor did not dwell on the improper basement identification but merely rehabilitated the witness's credibility by having him testify that he was able to identify the appellant in the courthouse basement when he had previously testified in response to a question from the appellant, that he was unable to make an identification in the upstairs part of the jail. The Court found, taking all these factors into consideration, the admission of the basement identification of the appellant was merely cumulative of other evidence before the jury and was harmless error.

State v. Hutchinson, 342 S.E.2d 138 (1986) (McHugh, J.)

Appellant contends a pre-trial voice identification should have been suppressed on the ground that the appellant was asked by police to give a voice sample after he had requested to speak with a lawyer.

After appellant arrived at the police station, he was given *Miranda* warnings. He signed a waiver of his right to counsel and agreed to speak with the police officers. Soon thereafter he was asked if he was willing to take a polygraph examination. The appellant replied that he did not want to subject himself to a polygraph test without first talking to a lawyer. He was then asked to give a voice sample by speaking certain words through an open doorway.

Suggestive identification (continued)

Denial of right to counsel (continued)

State v. Hutchinson, (continued)

Appellant moved to suppress evidence of the out-of-court voice identification and to prohibit an in-court identification based on it. He claimed denial of his right to counsel rendered inadmissible the fruits of any subsequent interrogation. Following a hearing, the trial judge ruled that the evidence of the voice identification was admissible because the request for counsel was linked solely to the potential polygraph examination, so that the written waiver of counsel was still operative.

The Court found the request to give a voice sample for the purpose of identification does not implicate the privilege against self-incrimination, *U.S. v. Dionisio*,410 U.S. 1 (1973), and does not constitute a proscribed interrogation. The Court found that evidence of the voice identification was admissible.

Physical characteristics

State v. Combs, 338 S.E.2d 365 (1985) (Per Curiam)

Appellant contends because he was the shortest participant in the line-up and the victim described the robber as short, the line-up was unduly suggestive, and that evidence of the line-up should have been suppressed. The appellant also challenges the in-court identification by the victim on the grounds it was tainted by the suggestive pre-trial identification procedure and that the taint could not be cured under the standards of *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976).

The evidence showed the victim had ample time to view the robber and had seen him twice before. Her description matched the appellant with regard to height, build, and voice quality. Her identification of him at the lineup held within an hour and a half after the robbery was unequivocal.

Suggestive identification (continued)

Physical characteristics (continued)

State v. Combs, (continued)

The Court viewed a photograph of the line-up participants and found that the appellant was the shortest person in the photo and that four of the seven participants were considerably larger than the appellant. Two men in the photo did not appear to be so much larger or taller as to draw special attention to the appellant's height. All but one of the others wore trousers resembling those in the victim's description and all but one were bearded, another feature of the description. The Court concluded the line-up participants were fairly representative of the significant features described by the eyewitnesses.

Having found nothing impermissible in the line-up identification and thus nothing to taint the in-court identification, the Court did not consider whether the in-court identification had an independent basis.

Suggestive photo array

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

The trial court found an out-of-court identification was obtained by the use of suggestive confrontation procedures but was nonetheless reliable and admissible.

Syl. pt. 1 - "'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 to 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.' Syl. pt. 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976)." Syl. pt. 2, *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982).

Suggestive identification (continued)

Suggestive photo array (continued)

State v. Brown, (continued)

The Court found no reversible error in the identifications. The circuit court applied the standard set forth above and it appeared from the record that both witnesses were able to make in-court identifications of appellant based on observations independent of the suggestive procedures. The Court found the evidence admissible.

Appellant contends the trial court erred in refusing to suppress an in-court identification by Cynthia Applegate, who participated in an allegedly unconstitutional pretrial identification procedure. The Court found two aspects of the identification procedure used in this case combine to create a substantial likelihood of misidentification.

First, it appeared from the record that only the appellant and possibly one other individual participated in both the physical lineup and the photographic array. Second, despite the previous indication by the witness that the individual departing the 7-Eleven was wearing an "army green" jacket and hood, the appellant's photograph presented by police clearly depicted him in a uniform with the phrase "U.S. Army" emblazoned across one side of his military issue shirt, with his name covered by tape.

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Unlike the photographs depicting the appellant and one other individual, the other four photographs shown Applegate had been drawn from police files, depicting individuals who more than likely would have been unavailable for the lineup. She was unable to identify the appellant at the physical lineup. The Court found there was a distinct possibility that when the witness chose the appellant's photograph from the array, she was mistakenly identifying him not from the robbery, but rather from the prior lineup in which he had participated.

Suggestive identification (continued)

Suggestive photo array (continued)

State v. Davis, (continued)

The Court found the suggestiveness of depiction of the appellant in military attire was somewhat ameliorated by the photograph of another individual wearing an army jacket, but that this individual bore little resemblance to the suspect described by the witness. Furthermore, a report of arrest form stapled to the back of this individual's photograph clearly indicated that it was taken on January 9, 1976, in connection with charges of threatening, interfering, and obstructing a police officer at the National Guard Armory. This form also contained information regarding his name, address, age and status as a student at Woodrow Wilson High School in Beckley.

Standing alone, each of these two circumstances may not have been impermissibly suggestive. Taken together, however, the identification procedure in this case created a substantial likelihood of misidentification.

The Court also found the identifying witness did not possess a sufficiently reliable independent basis for in-court identification. (See case for discussion of this issue). The Court concluded the trial court committed reversible error when it overruled appellant's motion to suppress Applegate's in-court identification.

Witness' recollection of identification procedure

State v. Stiff, 351 S.E.2d 428 (1986) (Per Curiam)

Appellant was convicted of attempted aggravated robbery. He contends the victim's pretrial identification of him was inadmissible. He alleges the court erred in allowing the photos used in the identification procedure to be admitted into evidence since 1) the victim testified he was shown approximately five photos on two separate cards, but the deputy testified he was shown six photos one on top of the other; and 2) the victim described the robber as being between twenty and thirty and the ages of the six men in the photo array ranged from twenty-one to forty-seven.

Suggestive identification (continued)

Witness' recollection of identification procedure (continued)

State v. Stiff, (continued)

The Court examined the six photos shown to the victim and concluded the trial court was correct in its ruling on their admissibility. The Court could not say the procedure was unduly suggestive or gave rise to a "very substantial likelihood of irreparable misidentification." *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

The Court found the evidence indicated the victim was able to pick out the appellant from the photos within a minute or two and told the deputy he was sure about the identification. Whether the victim remembered five instead of six did not make the identification unreliable. Nor did the victim's recollection that the photos were on cards. There was no evidence that the deputy said or did anything improper to cause the victim to select the appellant's photos. The trial court, at appellant's request, gave a detailed instruction to the jury on the issue of identity and was told to consider the circumstances under which the identification was made and the credibility of the witnesses making the identification. The Court found no error.

IMMUNITY

Prosecuting attorney's power to grant

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Power to grant immunity, (p. 472) for discussion of topic.

Power to grant

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See PROSECUTING ATTORNEYS Power to grant immunity, (p. 473) for discussion of topic.

Spousal

Statements by spouse

State v. Bailey, 365 S.E.2d 46 (1987) (Brotherton, J.)

See EVIDENCE Hearsay, Admissibility, (p. 211) for discussion of topic.

Standing to assert

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See PROSECUTING ATTORNEYS Power to grant immunity, (p. 473) for discussion of topic.

IMPEACHMENT

See WITNESSES Impeachment, (p. 660) for discussion of topic.

Character evidence

State v. Welker, 357 S.E.2d 240 (1987) (Neely, J.)

See EVIDENCE Character, (p. 188) for discussion of topic.

Defendant

Post-arrest silence

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

Prior convictions

Over ten years old

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

See EVIDENCE Prior convictions, Over ten years old, (p. 229) for discussion of topic.

Prior inconsistent statements

Cautionary instruction

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See IMPEACHMENT Prior inconsistent statements, Defendant, (p. 293) for discussion of topic.

Prior inconsistent statements (continued)

Defendant

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the trial court erred by permitting the State to utilize a prior inconsistent statement to impeach his credibility and by not *sua sponte* giving a limiting instruction telling the jury not to consider his prior inconsistent statement as substantive evidence of guilt.

The Court found no error. The trial court, following a suppression hearing, correctly ruled that the appellant's unsigned statement was admissible. The Court found the fact that he did not sign the statement went only to its weight, not to its admissibility.

Appellant's reliance on *State v. Spadafore*, 159 W.Va. 236, 220 S.E.2d 655 (1975) is misplaced. *Spadafore*, adhered to the orthodox rule that the prior inconsistent extra-judicial statements of a witness who is not a party can only be used to impeach and cannot be considered as substantive evidence of the facts to which such statements relate. When a prior inconsistent statement is admissible for impeachment purposes, a cautionary instruction is given to the jury. This case involved the use of a prior extrajudicial statement of a criminal defendant who is a party to the proceeding.

Syl. pt. 4 - A criminal defendant's confession or admissions have historically been admitted in evidence to prove the truth of the matters asserted therein as an exception to the hearsay rule, subject to an initial inquiry that the defendant's constitutional rights were not violated and the statements were freely and voluntarily made.

The appellant's statement was admissible as substantive evidence of guilt, that is, for the truth of the matters asserted therein. The Court found there was no need for a cautionary instruction advising the jury that the statement was only admitted for the purposes of impeachment. The fact that the State did not introduce the statement in its case-in-chief did not foreclose the use of the statement on cross-examination.

Prior inconsistent statements (continued)

Truth of the matters asserted

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See IMPEACHMENT Prior inconsistent statements, Defendant, (p. 293) for discussion of topic.

INCONSISTENT VERDICTS

In general

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Petitioner contends the jury was inconsistent in finding him not guilty of involuntary manslaughter, yet finding him guilty of violating *W.Va.Code*, 17C-5-2-(a) [1983]. Petitioner contends because the jury found him not guilty of involuntary manslaughter, they must have found that his conduct did not constitute "reckless disregard" and since "reckless disregard" is a material element of *W.Va.Code*, 17C-5-2(a) [1983], petitioner contends the jury's acquittal on the involuntary manslaughter charge was by implication an acquittal on the charge of violating *W.Va.Code*, 17C-5-2(a) [1983].

Syl. pt. 5 - "Appellate review of a claim of inconsistent verdicts is not generally available." *State v. Hall*, 174 W.Va. 599, 328 S.E.2d 206 (1985).

(See case for discussion of inconsistent verdicts).

The Court found the jury convicted on the greater offense and acquitted on the lesser included offenses. If the court had provided a clearer jury form it would have been obvious that the jury understood that the defendant could not be convicted of both since all the elements of involuntary manslaughter are contained in the offense of *W.Va.Code*, 17C-5-2(a).

INDICTMENT

Amendment by motion

Sufficiency of evidence

State v. Pruitt, 358 S.E.2d 231 (1987) (Per Curiam)

At appellant's trial for obtaining property by means of a worthless check, the prosecution realized that the appellant had drawn the check on the account of "Cash Sales, Inc.," a corporation, while the indictment averred that appellant as an individual did not have sufficient funds. Upon motion of the prosecution, the trial court allowed amendment of the indictment to read, in part, ". . . the said David Pruitt individually and as agent for Cash Sales, Inc., a corporation, knew that he and said corporation did not have sufficient funds on deposit in or credit with the said bank. . ."

Syl. pt. 1 - "When an allegation is descriptive of the identity of that which is essential to the charge in the indictment, whether it be necessary or unnecessary or more or less particular, it cannot be rejected as surplusage and must be proved." Syl. pt. 2, *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).

In *McGraw*, the indictment averred that property was stolen from a Sam Brown instead of George Brown. The prosecution sought to amend in a motion similar to the one here. In both that case and here, the indictments contained unnecessary allegations unrelated to the crime alleged. Once made, however, each allegation must be proven so as to support a conviction.

Syl. pt. 2 - "A valid indictment or presentment can be made only by a grand jury; and no court can make an indictment in the first instance or alter or amend the substance of an indictment returned by a grand jury." Syl. pt. 5, *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).

Both here and in *McGraw*, the Court held that amendment of the indictment rendered it invalid, depriving the trial court of the power to proceed. Judgment reversed.

INDICTMENT

Controlled substances

Delivery

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

See CONTROLLED SUBSTANCES Indictment, Delivery, (p. 75) for discussion of topic.

Defect in

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See GRAND JURY Procedural irregularity, (p. 254) for discussion of topic.

Immaterial averments

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Syl. pt. 13 - "Immaterial, unnecessary and harmless averments, which might be omitted without affecting the charge in an indictment against the accused and which need not be proved, may be properly considered and rejected as surplusage." Syl. pt. 1, *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).

The Court found the appellant, who was charged with first-degree murder and aggravated robbery, and was convicted of first-degree murder, was not entitled to instructions on aggravated robbery and its lesser included offenses since he was clearly aware that he was charged with felony murder by robbery.

Motion to quash

Failure to hold preliminary hearing

State v. Hutcheson, 352 S.E.2d 143 (1986) (Miller, C.J.)

See PRELIMINARY HEARING Failure to conduct, (p. 439) for discussion of topic.

INDICTMENT

Multiple offenses

Sufficiency

State v. Duskey, 358 S.E.2d 819 (1987) (Per Curiam)

Appellant was indicted on three separate charges arising from one incident, arson, possession of a Molotov cocktail and conspiracy to commit arson. Appellant was first tried on the arson charge and acquitted.

Appellant then moved to dismiss the remaining indictments pursuant to Rule 8(a) of the Rules of Criminal Procedure, arguing that all three indictments were "acts or transactions connected together or constituting parts of a common scheme or plan" and therefore should have been charged in one indictment. The motion was denied but the remaining charges were joined and appellant was found guilty of possession of a Molotov cocktail and conspiracy to commit arson.

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 constitution parts of a common scheme or plan." Syl. pt. 1, *Watson v. Ferguson*, 166 W.Va. 336, 274 S.E.2d 440 (1980).

The *Watson* case was decided prior to the adoption of the present Rules of Criminal Procedure on October 1, 1981. This case was tried after adoption of the Rules.

Prior to either the *Watson* case or adoption of the new Rules, the Court held:

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; . . ." Syl. pt. 2, in part *State ex rel. Johnson v. Hamilton*, 164 W.Va. 682, 266 S.E.2d 125 (1980).

INDICTMENT

Multiple offenses (continued)

Sufficiency (continued)

State v. Duskey, (continued)

After adoption of the new Rules, the Court held that "absent strong and urgent countervailing policy reasons for not requiring a joint trial going to the need to vindicate individual victims, a person cannot be tried at a second trial for an offense of which the prosecution was aware at the time of the first trial if the second offense arose out of the same transaction as the first offense." *Gilkerson v. Lilly*, 169 W.Va. 412, 288 S.E.2d 164 (1982).

In *Gilkerson* the Court found that separate trials were necessary to avoid "utterly outrageous miscarriages of justice" inherent in the operation of the magistrate court system. See *Gilkerson*, *supra*, at 168. Here, however, no sufficient countervailing reasons were found so as to suspend operation of Rule 8(a). "The duty to join offense arising out of the 'same transaction' rests with the State, absent such urgent 'countervailing' policies as were found in *Watson*, *supra* and *Gilkerson*, *supra*." Convictions reversed.

Pre-indictment delay

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

See PRE-INDICTMENT DELAY In general, (p. 438) for discussion of topic.

Prosecutor's attempt to influence grand jury

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant was convicted of delivery of marijuana.

A police officer appeared before the grand jury and stated the police informant was a "juvenile" when he was actually 18. Later, in response to a question from a juror, an assistant prosecutor indicated the informant was "sixteen or seventeen" and also defined entrapment in response to a juror's question.

INDICTMENT

Prosecutor's attempt to influence grand jury (continued)

State v. Thompson, (continued)

Appellant contends the remarks about the informant's age and entrapment were improper and vitiated the indictment. She contends the State intentionally exploited the informant's young age in order to enlist the juror's sympathy for an indictment.

State ex rel. Miller v. Smith, 168 W.Va. 745, 285 S.E.2d 500 (1981) held that when a prosecutor attempts to influence a grand jury in reaching a decision, by presenting unsworn evidence, or otherwise, the indictment returned is potentially tainted.

The Court found the record in this case failed to demonstrate the prosecutor was attempting to influence the grand jury or that the defendant's conviction should be reversed because of the rule in the *Miller* case. The Court found the prosecutor's remarks relating to the informant's age were not made at the instigation of the prosecutor, but in response to a juror's question. The remarks about entrapment were made after the State had completed presentation of its case and also made in response to a juror's question.

Sufficiency

Controlled substances

State v. Fitcher, 337 S.E.2d 918 (1985) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of indictment, Cocaine, (p. 78) for discussion of topic.

Endorsement

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

Appellant was convicted of attempted arson. He claims that his indictment was fatally defective in that it was endorsed on the face of the document rather than the reverse side.

Sufficiency (continued)

Endorsement (continued)

State v. Davis, (continued)

Syl. pt. 1 - The purpose served by the endorsement of the grand jury foreman and the attestation by the prosecutor under *W.Va.Code*, 62-9-1, is to prevent the substitution or the use of an indictment other than the one actually returned by the grand jury.

Syl. pt. 2 - Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure supersedes the provisions of *W.Va.Code*, 62-9-1, to the extent that the endorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such endorsement and attestation are sufficient if they appear on the face of the indictment.

Pursuant to Article VIII, § 3 of the West Virginia Constitution, rules promulgated by the Court have the force and effect of law and will supersede procedural statutes in conflict with them. *State ex rel. Watson v. Ferguson*, 166 W.Va. 336, 274 S.E.2d 440 (1989).

Here, the indictment complied with Rule 7(c)(1), *W.Va.R.Crim.P.* and no error was found.

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See GRAND JURY Procedural irregularity, (p. 254) for discussion of topic.

In general

State v. Fitcher, 337 S.E.2d 918 (1985) (Per Curiam)

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. *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981); *State v. Furner*, 161 W.Va. 680, 245 S.E.2d 618 (1978); *State v. Ash*, 139 W.Va. 374, 80 S.E.2d 339 (1954).

Sufficiency (continued)

In general (continued)

State v. Fitcher, 337 S.E.2d 918 (1985) (Per Curiam)

Appellant contended that the indictment was insufficient because it lacked the words "feloniously" or "maliciously."

Syl. pt. 2 - "Where the indictment, by reference to the offense charged, including the reference to any appropriate statute, clearly indicated that the charge of felony, the absence of the word 'felonious' or words of like import will not render the indictment invalid. We adopt this rule and to the extent *State ex rel. Reed v. Boles*, 148 W.Va. 770, 137 S.E.2d 246 (1964), and related cases espouse a per se rule that the omission of the word 'felonious' renders a felony indictment invalid, they are overruled." Syl. pt. 2, *State v. Manns*, 174 W.Va. 793, 329 S.E.2d 865 (1985).

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. After hearing conflicting evidence regarding appellant's claim of self-defense, the jury recommended no mercy. Appellant was sentenced to life without opportunity for parole.

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

Appellant was convicted of receiving a pecuniary benefit from a government contract over which he had some influence (conflict of interest). On appeal he alleges that the indictment was insufficient.

Syl. pt. 3 - "An indictment 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." Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Here, the indictment contained the necessary elements and the Court held that no bill of particulars was required.

Sufficiency (continued)

Kidnaping

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

See KIDNAPING Indictment, Sufficiency of, (p. 405) for discussion of topic.

Sexual assault

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

See KIDNAPING Indictment, Sufficiency of, (p. 405) for discussion of topic.

INDIGENTS

Appointed counsel

Payment of

Krivonyak v. Hey, 364 S.E.2d 18 (1987) (McGraw, J.)

See ATTORNEYS Fees, Multiple charges, (p. 37) for discussion of topic.

Right to appeal

Contempt

Moore v. Hall, 341 S.E.2d 703 (1986) (Miller, C.J.)

Syl. pt. - An indigent defendant is entitled to a court-appointed attorney where he is charged by way of contempt for failing to pay court-ordered alimony or support payments.

Right to court appointed counsel

State ex rel. Randolph v. Circuit Court of Doddridge County, No. 17097 (4/4/86) (Per Curiam)

Petitioner was convicted of receiving and transferring stolen property. Prior to trial, he filed an affidavit of indigency and the trial court appointed an attorney to represent him. He was also represented by another attorney, at the instance of petitioner's father. The second attorney did not receive any enumeration for his services, but continued to represent petitioner.

Immediately after sentencing, petitioner announced his intent to appeal. The trial court then ruled that petitioner was not an indigent and thus was not entitled to appointment of counsel for the appeal or a free trial transcript.

Petitioner's uncompensated and unappointed attorney requested a transcript and obtained a copy on the representation that he would pay the transcription costs. The trial court, upon learning that counsel had obtained but had not paid for the transcript advised petitioner's counsel on January 27, 1986, that he would lift the stay of execution if the transcript fee were not paid by January 31. The petitioner, apparently unable to pay the fee, turned himself in and was incarcerated in jail.

INDIGENTS

Right to appeal (continued)

Right to court appointed counsel (continued)

State ex rel. Randolph v. Circuit Court of Doddridge County, (continued)

The Court found the petitioner is legally entitled to relief. The State, in its answer, submitted various orders of the circuit court entered in the post-trial proceedings, but that none of this evidence would support a finding that the petitioner is, in fact, not an indigent, nor does it establish that the requirements of the governing statute, *W.Va.Code*, 21-29-1, *et. seq.*, have been satisfied.

The Court ordered that a moulded writ of habeas corpus issue directing that the petitioner be released forthwith from further confinement in the Huttonsville Correctional Center and returned to Doddridge County, that the petitioner's post-conviction appeal bond be reinstated, that the petitioner's counsel in this proceeding be appointed to represent petitioner on appeal, that the petitioner not be charged for the trial transcript furnished, and that execution of his sentence be stayed pending appeal.

Right to competency examination

State ex rel. Perry v. Watt, No. 18231 (2/24/88) (Per Curiam)

See COMPETENCY Right to examination, (p. 55) for discussion of topic.

Right to counsel

Appeal

Moore v. Hall, 341 S.E.2d 703 (1986) (Miller, C.J.)

See INDIGENTS Right to appeal, Contempt, (p. 304) for discussion of topic.

Right to counsel (continued)

Civil cases

Craigo v. Hey, 345 S.E.2d 814 (1986) (Neely, J.)

Syl. pt. 1 - Legal assistance for prisoners is not required for all civil claims; however, under *W.Va.Code*, 59-2-1 [1923] it is within a circuit judge's discretion to appoint counsel on behalf of indigent prisoners when their legal rights would be prejudiced in the absence of court-appointed counsel. Indigent convicts enjoy the same right to legal aid as indigent freemen, but no more.

Syl. pt. 2 - Circuit courts should maintain a roster of lawyers willing to undertake fee generating cases on behalf of indigent prisoners and willing to make reasonable efforts to determine the legal and factual validity of such claims and thus insure prisoners that at least one conscientious lawyer will evaluate their claims. These rosters should be updated at least annually and provided to prisoners seeking legal assistance.

Syl. pt. 4 - It is impossible to establish hard-and-fast guidelines for the appointment of counsel for indigent prisoners, but it is possible to sketch a general topology that will provide a frame of reference for the intelligent use of secretions. Three general classes of cases emerge as follows: (1) Civil cases where the state has traditionally provided legal aid to indigents such as divorce, paternity, or the termination of parental rights; (2) fee generating cases; and (3) civil rights cases. In the first type of case there is a presumption in favor of appointing counsel for defendants; in the second type there is a presumption against appointing counsel; and in the third type the circuit court should apply the following five, non-exclusive factor test to decide whether to appoint counsel to aid the petitioner in the preparation of litigation of his complaint: (1) Whether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint.

INEFFECTIVE ASSISTANCE

Appeal

Inadequate appeal petition

Whitt v. Holland, 342 S.E.2d 292 (1986) (Per Curiam)

See INEFFECTIVE ASSISTANCE Appeal, Inhibiting participation of petitioner in preparation of appeal, (p. 307) for discussion of topic.

Inhibiting participation of petitioner in preparation of appeal

Whitt v. Holland, 342 S.E.2d 292 (1986) (Per Curiam)

Petitioner was convicted of breaking and entering. Petitioner's trial counsel, representing him on appeal, presented a petition subsequently filed a *pro se* petition for a writ of habeas corpus in which he asserted grounds for relief, most of which were not raised on appeal. Among the grounds listed in the pro se petition was the allegation petitioner was denied his right to appeal because his counsel filed an appeal petition without first consulting with the petitioner and without submitting the appeal petition to the petitioner for review. Petitioner contends he was denied a right to assist his counsel in the preparation of the appeal.

Copies of letters from petitioner to his appointed counsel and a member of appointed counsel"s law firm substantiate the allegation that there was a failure of communication between counsel and petitioner at the time of the preparation and presentation of the petitioner's appeal. Considering the petition for appeal filed by counsel in light of the comments made by counsel in this habeas proceeding, the Court observed that the petition was deficient in failing to raise several important issues, including ineffective assistance of counsel during trial. The Court found the statement of facts also reflected a lack of conscientious attentiveness to the record.

The Court found counsel's actions, in inhibiting the participation of petitioner in the preparation of the appeal and in presenting an inadequate appeal petition fell below the standard of "normal and customary degree of skill." The Court concluded the petitioner was denied his right to effective assistance of counsel on appeal and was entitled to appointment of counsel for the purpose of perfecting a new appeal.

INEFFECTIVE ASSISTANCE

Burden of proof

State v. Cain, 359 S.E.2d 581 (1987) (McHugh, J.)

Appellant challenged his recidivism on the theory that one of his prior felony convictions was void on account of ineffective assistance of counsel. Appellant claimed that because appointment of counsel, entry of a guilty plea and sentencing all occurred within a period of one day, a presumption of ineffective assistance was raised.

Syl. pt. 2 - "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. 1, *Housden v. Leverette*, 161 W.Va. 324, 241 S.E.2d 810 (1978).

See also, *State v. Morris*, 166 W.Va. 811, 277 S.E.2d 638 (1981); *State ex rel. Rogers v. Casey*, 166 W.Va. 179, 273 S.E.2d 356 (1980); *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

The Court rejected the prosecution's objection to applying this presumption retroactively (appellant's questionable conviction had overruled in 1961).

The Court held that the trial court lacked jurisdiction to enter the prior felony conviction judgment; therefore, appellant's life sentence for recidivism was void. See Syl. pt. 3, *Housden v. Leverette*, *supra*; see also, Syl. pt. 25, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). On the application of the prior voided offense, see Syl. pt. 1, *State ex rel. Johnson v. Boles*, 151 W.Va. 224, 151 S.E.2d 213 (1986); Syl. pt. 2, *State ex rel. Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 (1965).

State v. Chamberlain, 359 S.E.2d 858 (1987) (Per Curiam)

Appellant was convicted of delivery of marijuana. At trial, his counsel relied on an alibi defense. On appeal, appellant contended that his trial counsel did not adequately investigate the case so as to present a good defense.

Syl. pt. 3 - "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 and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's

Burden of proof (continued)

State v. Chamberlain, (continued)

performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not effect 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).

Syl. pt. 4 - "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 defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court refused to hold this representation inadequate but noted that a petition for habeas corpus could better address the issue, since an evidentiary hearing would be available for review. See *e.g.*, *Walker v. Mitchell*, 299 S.E.2d 698 (1983).

State v. Leverette, 359 S.E.2d 344 (1987) (Per Curiam)

Appellant was convicted February 23, 1973 of robbery by violence and sentenced to thirty years in the penitentiary. In March, 1974, appellant filed a petition for habeas corpus, alleging that his trial counsel failed to appeal. He was resentenced so as to allow time for appeal; his new counsel's appeal was refused on May 9, 1975.

On July 20, 1977 appellant filed this petition for habeas corpus. A hearing was held on August 23, 1977, but no decision rendered until September 20, 1985. A final order issued March 27, 1986, granting relief.

The trial court found that appellant was denied effective assistance of counsel. The Court restated the standard as follows:

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 and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's

Burden of proof (continued)

State v. Leverette, (continued)

performance by whether he exhibited the normal and customary degree of skill possessed by attorneys 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).

In *Scott v. Mohn*, 165 W.Va. 393, 268 S.E.2d 117 (1980), the standards for determining the effectiveness of counsel were further developed when we set out six inquires the court should make when ineffective assistance of counsel has been alleged. Those inquiries are whether:

1) counsel was promptly furnished to the accused;

2) counsel was afforded a reasonable time to prepare to defend the accused;

3) counsel promptly conferred and thoroughly discussed the facts and the law with the client, including but not limited to advising him of his rights, matters of defense, etc.'

4) counsel conducted any investigation of facts and the law in preparation for trial;

5) counsel exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law; and,

6) any prejudice resulted to the accused in the event any of the above guidelines were not followed.

Here, the Court found that counsel had been ineffective.

INEFFECTIVE ASSISTANCE

Failure to advise

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends his counsel misadvised him concerning the consequences of his testifying at trial. He indicated his attorney advised him that if he took the stand the State could bring up his past record and intimidate him, and that for that reason he did not take the stand during the trial of his cases. At a hearing on this matter, defense counsel indicated that he did not advise the defendant that prior crimes could be brought up under any circumstances and for that reason the defendant should not testify. He stated that what he told the defendant was that at a rape trial there was a probability that a man's character would be brought into evidence the State would be allowed to say, "Isn't it true that you have been convicted of a felony." He informed the defendant he had the right to testify or not to testify and that if he did not, that fact could not be used against him. He also attempted to inform the defendant of the risks of taking the stand. The Court found the record did not show by a preponderance that defense counsel was ineffective on this point.

Failure to make motions

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

Appellant contends counsel was ineffective in failing to move to suppress the fruits of the search of his truck. The Court found the search permissible because the truck parts being hauled by the appellant were in "plain view,"; counsel was not ineffective when he failed to make a suppression motion. The nose clips were clearly visible in the bed of appellant's dump truck and the state trooper had a legal right to mount the truck bed in order to examine the contents.

The Court found the simple observation of a truck bearing a dealer special plate and hauling vehicle parts constitutes probable cause to believe that the vehicle parts are evidence of a crime. *See W.Va.Code*, 17A-6-25(b) (1967). Upon inspecting the contents, the state trooper observed that the serial numbers were missing from the doors and that he thus had probable cause to believe that the vehicle parts were stolen. See *State v. Hanshaw*, 157 W.Va. 354, 294 S.E.2d 157 (1982). Seizure of these parts was not illegal and failure to seek suppression was not ineffective assistance.

Failure to make motions (continued)

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends his counsel was ineffective in failing to move to suppress the statements made after his arrest. The trial court *sua sponte* conducted a voluntariness hearing on the statements and found them to be voluntary.

The Court found where defense counsel fails to make motions that an attorney reasonably knowledgeable of criminal law would make, but the attorney's omission is not prejudicial and does not influence the out come of the case, the omission must be regarded as harmless. In this case, in view of the fact that the court *sua sponte* conducted a voluntariness hearing, defense counsel's failure to make a motion for such a hearing was not prejudicial.

The appellant also contended counsel was ineffective in failing to move that the prosecutor recuse himself because he was present at the defendant's arrest and interrogation. The Court found that a state's attorney is not disqualified from prosecuting a case simply because he has heard the defendant make incriminating statements, unless circumstances are such that it will be necessary for him to testify to the jury about those statements. *State v. Howard*, 27 Ariz. 339, 554 P.2d 1282 (1976). The Court found no ineffective assistance.

Failure to object

State v. Lusk, 354 S.E.2d 613 (1987) (Brotherton, J.)

During rebuttal, a prosecution witness stated he had seen the defendant fire a gun in the direction of the victim on one occasion. He described the incident for several pages before there was an objection. The judge struck the testimony and instructed the jury to disregard it.

On appeal, counsel claims he was ineffective in making the late objection.

The Court found one small mistake does not make counsel ineffective, and that counsel was competent and not ineffective in this case.

Failure to object (continued)

Alibi instructions

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

See DEFENSES Alibi, Instructions, (p. 87) for discussion of topic.

State v. Hutchinson, 342 S.E.2d 138 (1986) (McHugh, J)

Appellant contends his lawyer's failure to object to an unconstitutional alibi instruction constituted ineffective assistance.

The trial judge refused the alibi instruction offered by defense counsel and gave an alibi instruction which was almost precisely in the language approved in syllabus point 2 of *State v. Alexander*, 161 W.Va. 776, 245 S.E.2d 633 (1978) The *Alexander* instruction was found to be unconstitutional in *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir. 1982) *cert. denied*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982). Following *Adkins*, the Court overruled *State v. Alexander*, in *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983). The appellant's trial occurred between *Adkins* and *Kopa*.

Appellant contends that his trial counsel was ineffective by failing to adequately research the validity of the *Alexander* alibi instruction and that a reasonably competent attorney would have discovered the Fourth Circuit's opinion in *Adkins* and would neither have offered nor failed to object to an *Alexander* type instruction.

The Court did not believe counsel's failure to discover *Adkins* constituted ineffective assistance of counsel. Since trial counsel's performance was not deficient, they did not determine whether the alleged ineffective assistance affected the outcome of the trial.

Failure to object (continued)

Failure to offer instructions

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant was convicted of nighttime burglary. He contended that his court-appointed attorney's failure to object so as to the preserve error for appeal and failure to offer certain jury instructions constituted ineffective assistance of counsel.

The Court found no reversible error. "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).

Hearsay

State v. Hatala, 345 S.E.2d 310 (1986) (Brotherton, J.)

Appellant contends counsel was ineffective by failing to object to hearsay testimony as to the value of the goods stolen.

The declarant of the hearsay statements was present in the courtroom, ready to be a witness if needed. The Court found defense counsel is not required to make every objection if it is reasonably clear that the objection would not affect the final outcome of the trial.

Here, defense counsel allowed hearsay evidence without objection in order to avoid testimony by another State's witness. The Court found no ineffective assistance.

INEFFECTIVE ASSISTANCE

Failure to prepare

Failure to give timely notice of alibi defense

State v. Glover, 355 S.E.2d 631 (1987) (McHugh, J.)

Appellant was convicted of aggravated robbery and malicious assault. Appellant testified he had a hangover on the day in question and was at his house in another town where he was being cared for by his family. The trial court precluded the appellant from presenting the testimony of purported alibi witnesses because the appellant had failed to comply timely with *W.Va.R.Crim.P.* 12.1(a) which requires a criminal defendant to serve written notice of an intent to offer an alibi defense, along with the names and addresses of alibi witnesses, within ten days after the prosecution demands the same. Here the appellant served notice on the day before trial, nearly two months after service of the State's demand for such notice. An amended notice of alibi was served by the appellant on the second day of trial. Appellant's counsel explained he had been preoccupied with an attempted plea agreement and had insufficient time to complete the investigation of the alibi defense. Trial counsel had subpoenaed four possible alibi witnesses. The trial court had continued the trial for a week after plea negotiations concluded and concluded there had been sufficient time to prepare the alibi defense.

Syl. pt. 1 - "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).

Syl. pt. 2 - Ineffective assistance of counsel is established when it is proved that counsel for a criminal defendant failed to investigate adequately a purported alibi defense and consequently failed to contact, subpoena and call alibi witnesses who were willing and able to testify for the defendant in a case in which the alibi was the defendant's sole possible defense or a material defense.

(See case for discussion of various possible explanations for the failure to give timely notice of an alibi defense).

Failure to prepare (continued)

Failure to give timely notice of alibi defense (continued)

State v. Glover, (continued)

Syl. pt. 3 - Where the record on appeal is inconclusive as to whether counsel failed to investigate the sole possible defense or a material defense adequately and with reasonable diligence, this Court will not decide on such a record whether a criminal defendant was denied effective assistance of counsel but will remand the case for development of the record on the point and for a ruling by the trial court on the question.

Failure to request instruction

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends counsel was ineffective in failing to request a cautionary instruction where the State's case was based on the uncorroborated and uncontradicted testimony of the prosecuting witness. The Court found in this case the victim's testimony was corroborated by physical evidence.

Failure to vouch the record

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends counsel was ineffective in failing to vouch the record after the trial court precluded him from eliciting certain testimony. The Court found, absent a showing of prejudice, failure of defense counsel to vouch the record does not constitute ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE

Inexperienced counsel

State v. Glover, 355 S.E.2d 631 (1987) (McHugh, J.)

Appellant was convicted of aggravated robbery and malicious assault. Appellant contends trial counsel's inexperience with criminal trial supports the claim of ineffective assistance of counsel. Trial counsel admitted during a hearing on the appellant's motion for a new trial he had not tried a case before a jury in circuit court for about eight years and he therefore may not have rendered effective assistance. The Court found this admission is not sufficient to establish ineffective assistance of counsel.

Syl. pt. 4 - Inexperience alone does not constitute ineffective assistance of counsel.

The Court found the appellant failed to prove by the preponderance of the evidence that the performance of trial counsel at trial constituted ineffective assistance of counsel.

Issue previously litigated

State v. Linkous, 355 S.E.2d 410 (1987) (Miller, J.)

Appellant contends he was denied his right to effective assistance of counsel at trial. The Court found the defendant previously raised this claim of ineffective assistance and had it resolved against him.

Syl. pt. 6 - "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. . . ." Syl. pt. 2, in part, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Joint representation of codefendants

State v. Livingston, 366 S.E.2d 654 (1988) (Per Curiam)

Defendant was convicted of breaking and entering. She and her husband, who was also indicted for breaking and entering, were assigned the same counsel. The cases were severed, resulting in defendant's conviction and dismissal of the charges against her husband.

INEFFECTIVE ASSISTANCE

Joint representation of codefendants (continued)

State v. Livingston, (continued)

Syl. pt. - "The joint representation by counsel of two or more accused, jointly indicted and tried is not improper *per se*; and, one who claims ineffective assistance of counsel by reason of conflict of interest in the joint representation must demonstrate that the conflict is actual and not merely theoretical or speculative." Syl. pt. 3, *Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975).

Here, the main evidence linking defendant's husband to the crime was her voluntary statement to police. In view of the weak case against defendant, the joint representation was held denial of effective assistance due to the conflict of interests of the codefendants.

Waiver of the conflict was not shown by the record here, even though waiver may have been permissible. There fore, the Court presumed prejudice.

Jury venire

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contends his attorney was ineffective when, without cause, he struck a member of the venire from the jury panel who was favorable to him. Appellant suggests that the verdict might have been different had that member been left on. The Court found this to be pure speculation, and found that the record suggested defense counsel and the member of the venire had been acquainted for years and that defense counsel may have made the strike for cause. Defense counsel later testified he did not want the member's presence on the jury to hurt the defendant. The Court noted the defendant and defense counsel did go over the jury list together. The appellant failed to show his attorney was ineffective.

INEFFECTIVE ASSISTANCE

Prosecutorial overmatch

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

The heart of petitioner's claim is that trial counsel wrongly permitted a privately retained lawyer to aid the State in its prosecution against him. He contends the private prosecutor "overmatched" his court appointed counsel, that as a result of this "overmatch" his trial was riddled with a spate of reversible errors and that he was deprived of effective assistance of counsel.

The Court charged the trial court with a duty to see that a "prosecutorial overmatch" does not deprive a criminal defendant of due process of law. Inexperience alone, however, is not enough to prove "overmatch." The gravamen of any "prosecutorial overmatch" claim is proof of ineffectiveness of counsel.

In this case, the record did not disclose that relator's attorneys allowed the prosecution to introduce incompetent evidence of a prejudicial nature, or allowed the prosecution to achieve any other undue advantage. The Court found the two attorneys gave relator a vigorous and well conceive defense. The Court concluded relator had not proven "prosecutorial overmatch."

The Court found it was not prejudicial to introduce a facsimile of a ring stolen during the robbery. The introduction of the ring did not suggest that the prosecution took unfair advantage of the defense.

Appellant claimed prosecutorial overreaching in questioning the State's two key witnesses. These witnesses testified they drive to the victim's house with petitioner on the night of the rape. One of the witnesses had pled guilty to grand larceny and the other had been similarly charged. The Court found that although an accomplice' guilty plea cannot be used to show the defendant's guilt by association, it is admissible to show the witness's credibility. The trial court gave appropriate limiting jury instructions. The Court found no error.

The prosecutor questioned appellant abut what he said upon his arrest and then introduced rebuttal testimony from a police officer. The trial court instructed the jury to view this evidence not as an incriminating statement, but merely to impeach a prior statement made by defendant. Appellant contends this was an unfair use of his post-arrest silence. In *Anderson v. Charles*, 447 U.S. 404 (1980), the U.S. Supreme Court held it is permissible to use silence to cross-

Prosecutorial overmatch (continued)

Acord v. Hedrick, (continued)

examine a criminal defendant concerning prior inconsistent statements made after receiving *Miranda* warnings. The Court found in this case the questions were not designed to draw meaning from silence, but rather were used to elicit meaning from a prior inconsistent statement and thus, were permissible. The cross-examination and rebuttal testimony did not constitute overreaching.

Appellant objected to State's instruction 9, directing the jury that they were permitted to find a rape had occurred, even if the victim's testimony was uncorroborated. The Court found the portion concerning the defendant's contradiction of the victim's testimony inapplicable since the defendant did not contradict the victim. Taking all the instructions together, however, the Court found harmless error.

During the examination of witnesses, the prosecution raised the fact that relator had to be returned from Georgia to West Virginia to face prosecution. The Court found this testimony was not used to show the defendant's "flight" or his guilty conscience or knowledge. Accordingly, the limitations that *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981) places on such testimony are inapplicable in this case.

The prosecution noted that appellant's brother and uncle could have appeared and offered exculpatory evidence but didn't, and that they had been charged under the same indictment but had chosen to have separate trials. Appellant claimed it is improper to raise the issue of the non-appearance of such a co-defendant witness. Defense counsel failed to object at trial, thereby failing to preserve the point on appeal. The Court found comment on defendant's failure to call favorable witnesses is permissible in some circumstances, as here.

State ex rel. Levitt v. Bordenkircher, 342 S.E.2d 127 (1986) (McHugh, J.)

Syl. pt. 5 - A defendant in a criminal case, whose voluntary tape recorded confession to police authorities indicated that he was guilty of murder of the first-degree under the West Virginia "felony-murder rule," who entered a plea of guilty to murder of the first-degree and received a sentence of life imprisonment, without a recommendation of mercy, failed to demonstrate that

Prosecutorial overmatch (continued)

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

his conviction and sentence resulted from ineffective assistance of counsel, where his counsel (1) filed various pre-trial motions upon the defendant's behalf, including motions to discover the nature of the State's evidence, (2) evaluated the strength of the evidence against the defendant and met with the defendant upon several occasions prior to recommending the guilty plea and (3) attempted to mitigate the defendant's sentence by eliciting testimony from witnesses who stated that the defendant "turned himself in," helped the authorities locate a revolver used during the crime, and would, in time, be a good candidate for parole. *W.Va.Code*, 61-2-1 (1931).

Relationship between court-appointed counsel and victim

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court-appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Syl. pt. 1 - "The right of one accused of a crime to the assistance of counsel is a fundamental right, essential to a fair trial . . ." Syl. pt. 1, *State ex rel. May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964).

Syl. pt. 2 - "A trial court lacks jurisdiction to enter a valid judgment of conviction against one accused who was denied effective assistance of counsel and a judgment so entered is void." Syl. pt. 25, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 3 - The existence of a family relationship between a defense counsel and the crime victim must be disclosed to the accused at the earliest opportunity, so that the accused can make an intelligent decision whether to waive his right to assistance of counsel free from potential conflict, or to demand or retain different counsel.

Relationship between court-appointed counsel and victim (continued)

State v. Reedy, (continued)

(See full text for review of ineffective assistance case). The Court reversed appellant's daytime burglary and recidivist convictions.

Standard of proof

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition which reversed his conviction for first-degree murder.

At the habeas corpus hearing defendant claimed that his counsel was ineffective due to failure to introduce audio tapes of conversations between the deceased and defendant's wife, with whom the deceased was having an affair. In additions, defendant complained that diminished capacity was not raised as a defense.

Syl. pt. 13 - "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 and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys 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).

Syl. pt. 14 - "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 defense of an accused." Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Here, the Court found that the substance of the tapes was introduced through testimony by psychologists; and that counsel's decision not to use the defense of diminished capacity was inconsistent with the defense of insanity which was offered. Counsel was clearly not ineffective.

INEFFECTIVE ASSISTANCE

Voir dire

State v. Jenkins, 346 S.E.2d 802 (1986) (Per Curiam)

Appellant contended his attorney was ineffective because he failed to conduct a meaningful *voir dire* of the prospective jurymen. In the course of the *voir dire*, defense counsel asked a number of questions to which the trial judge objected. Appellant contends that because the trial judge interrupted the admonished defense counsel not to ask these questions, defense counsel's *voir dire* was ineffective. The Court found that even though defense counsel did conduct an aggressive *voir dire* and was from time to time interrupted, his performance was not clearly ineffective, and that appellant failed to carry the burden of showing that defense counsel's actions adversely affected the outcome of the case.

INFORMATION

Recidivism

State v. Cain, 359 S.E.2d 581 (1987) (McHugh, J.)

See RECIDIVISM Amended information for, (p. 484) for discussion of topic.

Return of "not true bill" by grand jury in misdemeanor

State ex rel. Swanigan v. Cline, 350 S.E.2d 734 (1986) (McGraw, J.)

See GRAND JURY Return of "not true bill" in misdemeanor, Precludes filing of information, (p. 254) for discussion of topic.

INSANITY

Adjudication of criminal responsibility before trial

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

Relator contended the Court should rule as a matter of law that she was not criminally responsible.

The Court applied the rule on prohibiting a criminal trial based upon evidence in pretrial psychiatric reports in *State ex rel. Smith v. Scott*, 167 W.Va. 231, 280 S.E.2d 811 (1981). Under this rule, the discretion as to whether a criminal trial should be held is left to the "combined discretion of the trial court judge and the prosecuting attorney." In this case the trial court only had the four reports from the psychiatrists and the psychologist who had examined the relator. These experts had not yet been questioned in a hearing before the trial court concerning their methodology and the reasons for their conclusions. Furthermore, the facts surrounding the murder had not yet been fully developed. Given this lack of development in the record, it was held inappropriate to rule as a matter of law that the relator was not criminally responsible at the time of the murder.

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See COMPETENCY Criminal responsibility, (p. 53) for discussion of topic.

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See COMPETENCY Failure to make finding, (p. 54) for discussion of topic.

Bifurcated trial

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

Relator contended the trial court must bifurcate the trial to allow her to separate her insanity defense from her claim of defense of another.

The Court refused to rule that the trial court abused its discretion in denying the motion for a bifurcated trial.

INSANITY

Burden of proof

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. She claimed an insanity defense at trial. Appellant contended on appeal that the trial court erred in refusing a jury instruction, drawn from *United States v. Brawner*, 471 F.2d 969 (D.C.Cir.1972), which defined a mental disease as "any abnormal condition of the mind, regardless of its medical label, which . . .substantially impairs behavior controls." The instruction also placed on the appellant the burden of showing that she lacked the capacity to appreciate the criminality of her conduct or to conform her behavior to the law's requirements.

The instruction misapplied the burden of proof. The Court applied the law in *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979), that once the accused offers evidence of insanity, the burden shifts to the prosecution to show beyond a reasonable doubt that the defendant was sane at the time of the offense.

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

See WORTHLESS CHECKS Obtaining money thereby, (p. 673) for discussion of topic.

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

Although not decided on insanity grounds, see *State v. Orth* for discussion of lack of culpability because "pattern of aberrant behavior gave constructive notice, making fraud impossible." The Court comes close to creating a new area of defense.

Law witnesses

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy, and was convicted of two counts of malicious assault. His defense at trial was insanity.

Burden of proof (continued)

Law witnesses (continued)

State v. McWilliams, (continued)

Appellant contends the State failed to meet its burden of proving the appellant was sane at the time of the shootings. The Court agreed and reversed.

Syl. pt. 6 - "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 of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense." Syl. pt. 2, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979).

Appellant presented one psychiatrist and several lay witnesses who knew him before the shootings. The State cross-examined the psychiatrist, presented no expert testimony, and relied on lay testimony of witnesses who did not know the defendant before the night of the shootings.

The Court found the State did not meet its burden of rebutting appellant's substantial evidence of insanity.

Syl. pt. 7 - When lay witnesses testify about a person's mental condition, the following factors are to be considered: (1) the witnesses' acquaintance with the person and opportunity to observe the person's behavior; (2) the time during which the observation occurred; and (3) the nature of the behavior observed.

Lay witnesses may give an opinion about the mental condition of a criminal defendant and may testify as to facts concerning the defendant's behavior, thereby providing the jury with information needed to reach a conclusion about the defendant's mental condition. In this case, none of the State's witnesses knew the defendant before the shootings, none of the State's witnesses had a sufficient opportunity to observe the defendant to enable them to testify about his mental condition and the State produced no evidence of any reason, other than slight provocation, that defendant committed the acts. The Court found the facts of this case point conclusively to defendant's insanity at the time of the offense.

Burden of proof (continued)

Law witnesses (continued)

State v. McWilliams, (continued)

The Court noted that as a result of this decision, defendant will be acquitted and the State can initiate involuntary civil commitment proceedings against him. The Court was troubled by the prospect that a defendant who has committed a crime my neither serve time in the penitentiary nor undergo treatment at a mental institution since the State may not be able to prove that he is mentally ill at the time of the involuntary commitment hearing. The Court noted legislation is needed to fill the gap created and that other jurisdictions have developed methods to deal with the problem.

The Court entered a judgment of acquittal, staying the order for forty days to allow the State to initiate involuntary commitment proceedings.

Competency to stand trial

State v. Bias, 352 S.E.2d 52 (1986) (McHugh, J.)

See COMPETENCY To stand trial, Commitment to state mental hospital, (p. 57) for discussion of topic.

Three term rule

State v. Bias, 352 S.E.2d 52 (1986) (McHugh, J.)

See COMPETENCY To stand trial, Commitment to state mental hospital, (p. 57) for discussion of topic.

Discovery of evidence

Defendant's right to privacy

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

INSANITY

Evidence

Mental condition

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy, and was convicted of two counts of malicious assault. His defense at trial was insanity.

Appellant contends the trial court improperly excluded evidence of the appellant's mental condition subsequent to the shootings. During direct, defendant asked Dr. Williams about her opinion as to the defendant's competency to stand trial after she examined him in 1982. The State objected, claiming a defendant's competency to stand trial is not a jury question. The trial court sustained the objection.

Appellant contends the question was an attempt to elicit circumstantial evidence relating to defendant's mental condition at the time of the shooting.

The Court found the determination of the accused's competency to stand trial is solely for the judge and is of no concern to the jury. The question asked by appellant was improper as phrased, and the confusion was compounded by the court's ruling that appellant would only be permitted to "elicit testimony that goes to his [appellant's] mental status at the time of the shooting."

The Court found that the ultimate issue is mental condition at the time of the offense, but evidence of mental condition before or after the offense is admissible so far as it is relevant to mental condition at the time of the offense.

The Court agreed that appellant's mental condition at the time of Dr. Williams' examination is relevant to the issue of criminal responsibility. The Court noted that expert psychiatric opinions on criminal responsibility will never be based upon examinations which take place at the scene of the crime; a psychiatrist can only determine the defendant's mental condition at the time of the examination, and then give an opinion as to mental condition at the time of the offense.

Here, the trial court's ruling on the question as it was phrased was proper.

INSANITY

Expert testimony

Scope

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

Appellant contends it was error to allow a psychiatrist who testified during the State's rebuttal case to testify concerning the ultimate issue in the case. Dr. Patricia Williams testified, in answer to the questions from the State, that the appellant was "able to form an intent," "able to hold malice in his heart," and that "there was evidence he had premeditated." The appellant urges that the trial court violated the holdings in *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

The Court declined to delineate the contours of permissible psychiatric testimony in a criminal case involving the insanity defense, a question also left open in *Mitter*. The Court found the subject is very complex and it would be inappropriate to anticipate and to resolve the many related questions involved without a precise presentation of the alleged error on the record and briefing of the issues. The matter does not involve merely the oversimplified principle of an expert's opinion on the ultimate issue invading the province of the jury.

The manner in which the record was made in this case does not indicate the exact nature of the alleged error. After each of the three questions to the State's psychiatric expert witness on ability or capacity to form the specific intent the appellant's counsel made a general objection and subsequently, a general motion to strike all three answers. The trial court overruled each of the general objections and denied the general motion to strike. The Court found the repeated general objections and general motion to strike raise the question of whether the alleged error was preserved on the record for purposes of appellate review.

While the general nature of the alleged error was apparent on the face of the record, namely, that an opinion of a witness, lay or expert, may not usurp the jury's function of finding the facts, the appellant's failure to make timely, specific objections and a specific motion to strike resulted in the State and the trial court not having the opportunity to avoid or to correct the alleged error by, for example, rephrasing the question. In addition, the precise nature of the alleged error is not apparent on the face of the record. On appeal, the appellant noted two reasons that the admission of the evidence in question was improper. The Court found if the appellant had specified these reasons at trial the State could have layed the foundation more fully to meet the specific objection or rephrased the question in proper hypothetical formulation.

Expert testimony (continued)

Scope (continued)

State v. McFarland, (continued)

The Court found that reversal on such an isolated segment of testimony would be unwarranted. Assuming, without deciding, that the evidence in question was erroneously admitted, and assuming that the error is apparent on the face of the record, the error, under the test set forth in *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 63 L.Ed.2d 320, 100 S.Ct. 1081 (1980), constitutes harmless constitutional error in light of the overwhelming evidence remaining in support of the verdict and the obvious lack of prejudicial effect on the jury.

Instructions

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She contends the trial court erred in giving the State's insanity instruction which stated that, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks *substantial capacity* either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law." She contends this instruction lessened the prosecution's burden of proof with respect to the issue of her sanity. The Court found that the insanity instruction incorrectly stated the law under *State v. Grimm*, 156 W.Va. 615, 632, 195 S.E.2d 637, 647 (1973). In *State v. Nuckolls*, 166 W.Va. 259, 273 S.E.2d 87, at 90-91 (1980), this Court stated that, "We would approve of an instruction to the effect that an accused is not responsible for his act if, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act, or to conform his act to the requirements of law."

The instruction here effectively increased the burden on the prosecution to prove the appellant sane at the time of her husband's death. The Court found it is easier to prove mere capacity than it is to prove substantial capacity.

Instructions (continued)

State v. Duell, (continued)

Syl. pt. 8 - "It is not reversible error to give an erroneous instruction which favors the party complaining of such instruction." Syl. pt. 14, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

The Court found no error in this assignment.

Disposition if found guilty by reason of insanity

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy, and was convicted of two counts of malicious assault. His defense at trial was insanity.

Appellant contends the trial court improperly instructed the jury on the disposition of the appellant if he was found not guilty by reason of insanity. The trial court gave an instruction which completely covered the procedure for hospitalization of defendants found not guilty by reason of insanity. The appellant regarded the instruction as highly prejudicial and initially requested the jury be instructed not to consider post-trial disposition. When the court refused to give such an instruction, appellant offered a different disposition instruction which he requested be given in lieu of the trial court's instruction. The trial court refused, finding the offered instruction was incomplete.

The Court found the appellant's original proposed instruction on disposition did not correctly state the law as required by *State v. Nuckolls*, 166 W.Va. 259, 273 S.E.2d 87 (1980), and did not state any law. The Court found the appellant's second proposed instruction on disposition did not provide a complete explanation of all phases of the civil commitment process as required by *State v. Boyd*, 167 W.Va. 385, 280 S.E.2d 669 (1981). The Court found the trial court's instruction did explain the process completely. Appellant raised no specific objection to the trial court's instruction, but rather insisted on amending his own instruction in order to make it acceptable.

Syl. pt. 3 - a party is not entitled to his own instruction when the trial court's instruction accurately and adequately covers the issue and when the party makes no specific objection to the trial court's instruction.

INSANITY

Instructions (continued)

Disposition if found guilty by reason of insanity (continued)

State v. McWilliams, (continued)

The Court found no error in the instruction given by the trial court in the disposition of a defendant after a verdict of not guilty by reason of insanity.

Not guilty

Involuntary commitment

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See INSANITY Burden of proof, Lay witnesses, (p. 326) for discussion of topic.

Sufficiency of evidence

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She contends the trial court erred in failing to strike the testimony of Dr. Knapp, the State's sole expert witness on the issue of the appellant's sanity, and to direct a verdict against the prosecution following his admission concerning the invalidity of the MMPI test results. The Court found on cross-examination Dr. Knapp testified that the test had been incorrectly scored on the "male" instead of "female" scale which resulted in its complete invalidity. The Court found Dr. Knapp testified that his opinion with respect to the issue of insanity was based not only on the results of the MMPI, but also on his personal examination of the appellant, his review of her history, and his evaluation of the other four psychological test administered at his direction. The Court found no abuse of discretion in refusing to strike the witness' testimony and to direct a verdict against the prosecution.

Sufficiency of evidence (continued)

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See INSANITY Burden of proof, Lay witnesses, (p. 326) for discussion of topic.

Test for

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. She claimed an insanity defense at trial. Appellant contended on appeal that the trial court erred in refusing a jury instruction, drawn from *United States v. Brawner*, 471 F.2d 969 (D.C.Cir.1972), which defined a mental disease as "any abnormal condition of the mind, regardless of its medical label, which . . . substantially impairs behavior controls." The instruction also placed on the appellant the burden of showing that she lacked the capacity to appreciate the criminality of her conduct or to conform her behavior to the law's requirements.

Syl. pt. 5 - "When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law. . ." Syl. pt. 2, in part, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976). See also, *State v. Grimm*, 156 W.Va. 615, 195 S.E.2d 637 (1973) and *State v. Nuckolls*, 166 W.Va. 259, 273 S.E.2d 87 (1980).

Thus, the instruction misstated the basic test for insanity.

INSTRUCTIONS

Generally

Incomplete

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

At the conclusion of appellant's trial on charges of possession of a controlled substance with intent to deliver, several instructions were given which appellant contends improperly relieved the prosecution of the burden of proving the offense beyond a reasonable doubt.

State's Instruction No. 2 failed to advise the jury that the defendant must have knowledge of the presence of a controlled substance on his premises in order to have constructive possession of the substance. See *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975) and *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981). See also, *State v. Underwood*, 168 W.Va. 52, 281 S.E.2d 491 (1981). However, the prosecutor's burden of showing the appellant's knowledge of and control over the controlled substance was clearly stated in State's Instruction No. 4, as well as by defense counsel's instructions. Other errors complained of were similarly compensated for by other instructions (The Court omitted specific references).

Syl. pt. 1 - "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." Syllabus point 6, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

Abstract proposition of law

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

At conclusion of appellant's trial on charges of first-degree murder, defense counsel requested an instruction to the jury that to sustain a guilty verdict the defendant must have intended the particular consequences of his acts. The instruction was not tied to any facts of the case or acts of the defendant.

Abstract proposition of law (continued)

State v. Smith, (continued)

The Court held the instruction to be too abstract. An instruction not connected to the evidence is confusing and need not be given. See *State v. Harris*, 169 W.Va. 150, 286 S.E.2d 251 (1982); *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975); *State v. Cantor*, 116 S.E. 396 (W.Va. 1923).

Advantage to witness

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

At conclusion of appellant's trial on charges of first-degree murder, defense counsel requested an instruction that the uncorroborated testimony of an accomplice must be reviewed with caution.

The Court held that the statements here were adequately corroborated. See *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980) for similar instruction.

Aiding and abetting

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See BURGLARY Instructions, Aiding and abetting, (p. 49) for discussion of topic.

Alibi

Morrison v. Holland, 352 S.E.2d 46 (1986) (Miller, C.J.)

See DEFENSES Alibi, Instructions, (p. 85) for discussion of topic.

INSTRUCTIONS

Alibi defense

Burden of proof

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See DEFENSES Alibi, (p. 84) for discussion of topic.

Burden shifting

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See INSANITY Burden of proof, (p. 326) for discussion of topic.

Burglary

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See BURGLARY Instructions, Aiding and abetting, (p. 49) for discussion of topic.

Cautionary

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

In appellant's trial on welfare fraud charges the trial court refused to give a defense instruction that OASDI (Old Age, Survivors Disability Insurance) benefits cannot be considered in determining eligibility for AFDS (Aid to Families with Dependent Children) benefits. Appellant alleges error in that refusal.

Syl. pt. 7 - Old-age, survivors, and disability insurance benefits, under U.S.C. §§ 401, *et seq.*, paid to minor children living in the applicant's household are includible as income for purposes of determining the applicant's eligibility for Aid to Families with Dependent Children benefits under 42 U.S.C. §§ 601, *et seq*.

Cautionary (continued)

Prior inconsistent statements

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See IMPEACHMENT Prior inconsistent statements, Defendant, (p. 293) for discussion of topic.

State v. McCallister, 357 S.E.2d 759 (1987) (Brotherton, J.)

See EVIDENCE Collateral crimes, (p. 196) for discussion of topic.

Circumstantial evidence

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. Appellant contended that State's Instruction No. 3 was inadequate. That instruction said that circumstantial evidence would support a guilty verdict if "as to time, place, means and conduct (it) concurs in pointing to the defendant as the perpetrator of the crime."

The Court held in language acceptable, having approved similar instructions. See *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986); *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983); and *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983).

Collateral crimes

State v. McCallister, 357 S.E.2d 759 (1987) (Brotherton, J.)

See EVIDENCE Collateral crimes, (p. 196) for discussion of topic.

INSTRUCTIONS

Conflict of interest

State v. Neary, 365 S.E.2d 395 (1997) (Miller, J.)

Appellant was convicted of having a pecuniary interest in a contract over which he had control as a member of a county commission (see *W.Va.Code*, 61-10-15). On appeal he objected to two state's instructions.

State's Instruction No. 3 summarized the relationship between a county commission and a public service district (with whom the appellant had a contract for services). The Court noted that the prosecution need not prove that the appellant actually had a pecuniary interest in the proceeds; for the purposes of statute it is enough if he merely had any "voice, influence or control" over the contract. Therefore, appellant's argument that the instruction was improper because the prosecution failed to prove a pecuniary interest was without merit.

Appellant also argued that the instruction did not accurately state the authority of a county commission over a public service district. The Court held that the objection was not well taken since the mere fact of any authority was all that was required under the statute in question.

State's Instruction No. 6 defined the elements of proof necessary for conviction. The Court dismissed appellant's arguments here in discussing the sufficiency of the indictment and of the evidence (see INDICTMENT Sufficiency of, In general, (p. 301); see also, PUBLIC OFFICIALS Conflict of interest (p. 475) for discussion of topic).

Finally, appellant complained that his Instruction No. 3 was not given. It would have instructed the jury that a county commission has no direct or indirect influence or control over public service district boards. This proposition was an incorrect statement of law.

Syl. pt. 4 - "Instructions in a criminal case which are confusing, misleading or incorrectly state the law should not be given." Syllabus Point 3, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d (1978).

INSTRUCTIONS

Confusing

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

Appellant was convicted of first-degree murder. He assigned as error the failure to give an instruction which reminded the jury of its duty to act fairly and impartially.

The Court found the instruction to be unnecessary and confusing. "It is well established that 'instructions in a criminal case that are confusing, misleading, or incorrectly state the law should not be given.'" Syl. pt. 3, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978). See also, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549, at 563, n. 18 (1986) and Syl. pt. 4, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981).

Confusing/incorrectly states the law

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

Appellant was convicted of breaking and entering.

Syl. pt. 3 - "'Instructions in a criminal case which are confusing, misleading or incorrectly state the law should not be given.' Syl. pt. 3, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978)." Syl. pt. 2, *State v. Saunders*, 175 W.Va. 16, 330 S.E.2d 674 (1985).

Cumulative

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

The appellant contends the trial court erred by refusing certain instructions tendered by the appellant. The Court agreed with the trial court that the instructions were either repetitious or not supported by the evidence.

INSTRUCTIONS

Driving under the influence

Proximate and contributing cause

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Causing a death, Proximate and contributing cause, (p. 156) for discussion of topic.

Reckless disregard

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Causing a death, Proximate and contributing cause, (p. 156) for discussion of topic.

Evidence

Disregarding

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See EVIDENCE Instructions to disregard, Effect of, (p. 225) for discussion of topic.

Expert witnesses

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

At conclusion of appellant's trial on charges of first-degree murder, defense counsel requested an instruction that the jury was not required to accept the conclusion of the State Medical Examiner regarding the victim's manner of death.

The Court noted that the Medical Examiner's testimony was properly admitted and was the only medical testimony offered relating to the manner of death. Under these circumstances the jury may not disregard the testimony.

INSTRUCTIONS

Failure to instruct on all elements of the offense

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

See RECEIPT OF STOLEN PROPERTY Instructions, Acting with a dishonest intent or purpose, (p. 480) for discussion of topic.

Failure to request

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant contended that the trial court erred in failing to instruct the jury on several points of law. Defense counsel failed to offer any instructions at trial. The Court noted that the matters complained of were substantially covered in other instructions actually given. Thus, no reversible error was found. Syl. pt. 20, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966), Syl. pt. 5, *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983).

Counsel's failure to request instructions waived his right to them. *State v. Scholfield*, 175 W.Va. 99, 331 S.E.2d 829 (1985).

Felony murder

Robbery

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See HOMICIDE Felony murder, Instructions, (p. 275) for discussion of topic.

Given in defense language

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

See INSANITY Instructions, Disposition if found guilty by reason of insanity, (p. 332) for discussion of topic.

INSTRUCTIONS

Homicide

Felony murder

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See HOMICIDE Instructions, Felony murder, (p. 275) for discussion of topic.

Involuntary manslaughter

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See HOMICIDE Instructions, Felony murder, (p. 275) for discussion of topic.

Mercy in 1st degree homicide

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

See HOMICIDE Instructions, Mercy in 1st degree homicide, (p. 281) for discussion of topic.

Inculpatory evidence

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

At the conclusion of appellant's trial on charges of first-degree murder, defense counsel requested an instruction that the statements of a prosecution witness could only be considered as evidence of guilt if the statements were unambiguous and the defendant had been given an opportunity to deny them.

The Court noted that this proposition would have been correct if the statements were used as a tacit admission of guilt due to the defendant's failure to deny them. See *State v. Robinson*, 97 W.Va. 691, 127 S.E. 46 (1924); F. Cleckley, Handbook on Evidence for West Virginia Lawyers (2d ed. 1986).

INSTRUCTIONS

Insanity

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See INSANITY Burden of proof, (p. 326) for discussion of topic.

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See INSANITY Test for, (p. 334) for discussion of topic.

Lesser included offenses

Generally

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Syl. pt. 3 - "The general rule is that, where a crime is divided into degrees, if the court commits error in instructing the jury as to the higher of such crime, and they return a verdict of guilty of a lower degree as to which they were properly instructed, the defendant cannot complain." Syl. pt. 4, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927).

Homicide

State v. Harper, 365 S.E.2d 69 (1987) (McHugh, J.)

See HOMICIDE First-degree, (p. 276) for discussion of topic.

Robbery

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See ROBBERY Instructions, Lesser included offense, (p. 512) for discussion of topic.

Lesser included offenses (continued)

Sexual assault

State v. Dellinger, 358 S.E.2d 826 (1987) (Per Curiam)

See SEXUAL ASSAULT Lesser included offense, Generally, (p. 600) for discussion of topic.

Motive

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant contends the trial court erred in refusing to give a motive instruction.

The appellant's motive instruction, which was rejected by the trial court, attempted to establish motive as an element of the crime of aggravated robbery. The Court cited Syl. pt. 5 of *State v. Lemon*, 84 W.Va. 25, 99 S.E. 263 (1919) for the proposition that motive is not an element of the offense that the State must prove. The Court found the trial court was correct in refusing to give the appellant's motive instruction.

Non-aggravated robbery

Presence of a gun

State v. Goad, 355 S.E.2d 371 (1987) (Brotherton, J.)

See ROBBERY Non-aggravated, Instructions, (p. 514) for discussion of topic.

INSTRUCTIONS

Not supported by the evidence

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

Appellant was convicted of first-degree murder. Appellant assigned error in the trial court's refusal to give an instruction regarding his inability to premeditate due to intoxication.

Noting that voluntary intoxication may serve to reduce a first-degree murder charge to second degree murder (see *State v. Burdette*, 135 W.Va. 312, 63 S.E.2d 69 (1950)); *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985); *State v. Brant*, 162 W.Va. 762, 252 S.E.2d 901 (1979); *State v. Phillips*, 80 W.Va. 748, 93 S.E. 828 (1917); and *State v. Keeton*, 166 W.Va. 77, 272 S.E.2d 817 (1980), the Court held that the lack of evidence regarding appellant's condition prior to the killing made refusal of the instruction proper.

Syl. pt. 2 - "It is error to give instructions to the jury, even though they state correct propositions of law, when there is no evidence to support some of the hypotheses which they contain." Syl. pt. 7, *State v. Morris*, 142 W.Va. 303, 95 S.E.2d 401 (1956).

Plain error

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See APPEAL Plain error, Erroneous instruction, (p. 21) for discussion of topic.

Reasonable doubt

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

The appellant objects to the giving of a State instruction on reasonable doubt, contending that a portion of the instruction varies substantially from customary reasonable doubt language and invited the jury to convict on a lesser degree of proof.

Reasonable doubt (continued)

State v. Berry, (continued)

The Court found the State's instruction in question is taken verbatim from the standard reasonable doubt instruction approved in *State v. Goff*, 166 W.Va. 47, 272 S.E.2d 457 (1980). The Court found no error in the reading of this instruction at trial.

State v. Oxier, 338 S.E.2d 360 (1985) (Miller, C.J.)

In view of the fact that this case was reversed on another ground, the Court declined to give an extended discussion of the defendant's claim of an erroneous reasonable doubt instruction. The instruction utilized the phrase "abiding conviction of the truth of the charge contained in the indictment" in defining proof beyond a reasonable doubt. The Court commented on this instruction in *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983), finding the instruction probably confused rather than helped, but declined to find reversible error since other traditional reasonable doubt instructions were given.

In this case, the jury was also given the recommended reasonable doubt instruction set out in note 9 of *State v. Goff*, 166 W.Va. 47, 272 S.E.2d 457 (1980).

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 106) for discussion of topic.

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

The appellant contends the trial court erred in refusing to give her instruction on reasonable doubt. The appellant offered the pattern instruction suggested by the Court in *State v. Goff*, 166 W.Va. 47, 272 S.E.2d 457 (1980). In lieu of that instruction, the trial court gave another instruction.

The Court found the instruction offered by the defendant may have been more "charitable" but the trial judge's refusal to give it was not reversible error.

INSTRUCTIONS

Refusal to instructions

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See INSTRUCTIONS Refusal to give, (p. 348) for discussion of topic.

Refusal to give

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

During appellant's trial on charges of aggravated burglary the trial court refused two defense instructions on eyewitness identification.

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).

Here, the substance of both instructions was covered in other instructions. In addition, the second instruction was misleading. No error.

Repetitious

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends the trial court erred in refusing to give a number of requested defense instructions. The Court found the matters were addressed in the court's charge or by other instructions given and found no error.

State v. Crouch, 358 S.E.2d 782 (1987) (Brotherton, J.)

The Court held that repetitious instructions should not be given by the trial court and were properly refused here.

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She contends the trial court erred in failing to give two of her proffered instructions to the jury. The Court found a careful review of the instructions given by the trial court supports its rejection of the appellant's two instructions as repetitive.

Repetitious (continued)

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

Appellant was convicted of breaking and entering.

Syl. pt. 2 - " ' "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).' Syllabus point 3, *State v. Evans*, 172 W.Va. 810, 310 S.E.2d 877 (1983). Syl. pt. 6, *State v. Thompson*, 176 W.Va. 300, 342 S.E.2d 268 (1986).

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. Appellant requested the following instruction : "The court instructs the jury that the guilt of the Defendant of any charge contained in the indictment against him is not to be inferred because the facts proved are consistent with his guilt but on the contrary that they must be inconsistent with his innocence."

Upon review, The Court found that the trial court had given an instruction on circumstantial evidence in virtually identical language. See Syl. pt. 2, *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986). Finding the appellant's requested instruction repetitious, the Court found no error in its refusal. See Syl. pt. 6, *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983).

Supplemental

State v. Goad, 355 S.E.2d 371 (1987) (Brotherton, J.)

See ROBBERY Non-aggravated, Instructions, (p. 514) for discussion of topic.

State v. Sloan, 355 S.E.2d 374 (1987) (Per Curiam)

See JURY Courts comments, Coercion to reach a verdict, (p. 376) for discussion of topic.

INSTRUCTIONS

Re-reading instructions to jury upon their request

State v. Pannell, 330 S.E.2d 844 (1985) (Brotherton, J.)

The appellant was convicted of attempted murder with a strong recommendation of probation. The jury did not return the interrogatory submitted to them by the trial judge dealing with whether or not a firearm had been used. The trial judge refused the verdict as incomplete. One of the jurors asked the court to repeat the instructions concerning degrees. The court repeated certain instructions submitted by both the State and the defense, over a defense objection that its instruction dealing with acquittal should also be read. The appellant argues the court erred in selectively repeating certain jury instructions.

Syl. pt. ". . . [I]t is usually not error for the trial court to comply with the request of the jury in the matter of rereading to them instructions that they may wish to hear." *State v. Price*, 114 W.Va. 736, 740, 174 S.E. 518, 520 (1934).

The Court found no unusual circumstances that would cause this case to be an exception to the general rule.

Self-defense

Burden of proof

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

See SELF-DEFENSE Burden of proof, Prosecution's after *prima facie* showing, (p. 546) for discussion of topic.

Welfare fraud

Elements of

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

Appellant contended that her conviction for welfare fraud was improper due to an instruction by the trial court incorrectly stating the law.

Welfare fraud (continued)

Elements of (continued)

State v. Banjoman, (continued)

W.Va.Code, 9-5-4 states several alternative grounds for welfare fraud. The instruction complained of used the word "or" between the phrases "willfully, intentionally and knowingly make a false statement or misrepresentation" and "willfully, intentionally knowingly withhold information."

Syl. pt. 8 - "An instruction for a statutory offense is sufficient if it adopts and follows the language of the statute, or uses substantially equivalent language and plainly informs the jury of the particular offense for which the defendant is charged." Syl. pt. 8, *State v. Slie*, 158 W.Va. 672, 213 S.E.2d 109 (1975).

See also *State v. Wilson*, 145 W.Va. 261, 114 S.E.2d 465 (1960).

INTENT

Generally

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

See INSTRUCTIONS Not supported by the evidence, (p. 346) for discussion of topic.

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See INSTRUCTIONS Abstract proposition of law, (p. 335) for discussion of topic.

INTERROGATIONS

Generally

In the Matter of John A.L., 363 S.E.2d 729 (1987) (Per Curiam)

See POLICE OFFICER Interrogation by, (p. 435) for discussion of topic.

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

See JUVENILES Arrest, Appearance before magistrate, (p. 386) for discussion of topic.

See *also* JUVENILES Transfer to adult jurisdiction, Admissibility of extrajudicial statements; JUVENILES Self-incrimination, Confessions to police; SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Generally; ARREST Illegal, Effect on subsequent confession; POLICE OFFICER Interrogation by.

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See HARMLESS ERROR Constitutional, Generally, (p. 265) for discussion of topic.

Waiver of right to counsel

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See RIGHT TO COUNSEL Police interrogation, (p. 500) for discussion of topic.

JOINDER

Multiple offenses

State v. Duskey, 358 S.E.2d 819 (1987) (Per Curiam)

See INDICTMENT Multiple offenses, Sufficiency, (p. 298) for discussion of topic.

See also, JOINDER, SEVERANCE AND ELECTION (p. 355) for discussion of topic.

When required

State v. Duskey, 358 S.E.2d 819 (1987) (Per Curiam)

See INDICTMENT Multiple offenses, Sufficiency, (p. 298) for discussion of topic.

JOINDER, SEVERANCE AND ELECTION

Prejudicial joinder

State v. Eye, 355 S.E.2d 921 (1987) (Brotherton, J.)

The appellant was indicted in a fifteen-count indictment which included charges of burglary, arson, obstruction of justice and various related conspiracy counts.

Syl. pt. "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, or on two or more acts or transactions connected together or constituting a common scheme or plan." Syl. pt. 5, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

The Court found in this case were not the same or of similar character, and the prosecution did not present any evidence that these actions were connected or constituted a common scheme or plan. The Court found witnesses showed some of the offenses took place on different nights and seemed to be totally unrelated except for appellant's participation. The Court found the trial court erred in trying these indictments together.

> "Courts that have addressed the problem have recognized that joinder or consolidation may prejudice the defendant because the jury may tend to cumulate the evidence of various offenses and convict the defendant on all of the offenses charged on the theory he is a bad individual rather than weigh the evidence separately on each offense." *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 at 383 (1981).

The Court could not say the joinder was harmless beyond a reasonable doubt and reversed the conviction on this ground.

JUDGES

Authority to reconsider

Thompson v. Steptoe, 366 S.E.2d 647 (1988) (Brotherton, J.)

The prosecution brought this appeal asking the Court to compel the trial court to reconsider his ruling on a motion to suppress a confession. The trial judge believed that he was without authority to reopen the hearing.

Syl. pt. - A trial court has the authority to reconsider an set aside its prior order granting a defendant's motion to suppress a confession when presented with new or additional evidence that would have a substantial effect on the court's ruling.

See *Rouse v. United States*, 359 F.2d 1014 (D.C. Cir. 1966), *Cogen v. United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (1929) and other cases cited.

Conduct at trial

Comments

See also, DENIAL OF A FAIR TRIAL Judge's comments, (p. 98); JUDGES Discipline, Generally, (p. 359); JUDGES Failure to hear, (p. 365).

State v. Blessing, 331 S.E.2d 863 (1985) (Per Curiam)

See JURY Court's comments, Coercion to reach a verdict, (p. 374) for discussion of topic.

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See JURY Court's comments, Coercion to reach a verdict, (p. 375) for discussion of topic.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Physical restraints, (p. 101) for discussion of topic.

Conduct at trial (continued)

Comments (continued)

State v. Sloan, 355 S.E.2d 374 (1987) (Per Curiam)

See JURY Court's comments, Coercion to reach a verdict, (p. 376) for discussion of topic.

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

Appellant was convicted of receiving stolen property. He contends he was prejudiced by remarks made by the trial judge. The Court found no merit to this allegation.

Failure to recuse

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See DENIAL OF A FAIR TRIAL Conduct of judge, Witnesses, examination by court, (p. 92) for discussion of topic.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. He claimed error that the trial court judge did not voluntarily recuse himself due to presiding over appellant's prior criminal case of the same type. Appellant did not file a motion for recusal below.

Syl. pt. 4 - "It is not error for a trial judge to preside over more than one criminal case involving the same defendant. . ." Syl. pt. 6, *State v. Flint*, 171 W.Va. 676, 301 S.E.2d 765 (1983).

Conduct at trial (continued)

Intimidation

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See PROSECUTING ATTORNEYS Intimidating witnesses, (p. 471) for discussion of topic.

Restraining defendant

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Physical restraints, (p. 101) for discussion of topic.

Witnesses

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See PROSECUTING ATTORNEYS Intimidating witnesses, (p. 471) for discussion of topic.

Witnesses, examination by court

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See DENIAL OF A FAIR TRIAL Conduct of judge, Witnesses, examination by court, (p. 92) for discussion of topic.

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. At trial the judge questioned a witness. Appellant contended that prejudice resulted.

JUDGES

Conduct at trial (continued)

Witnesses, examination by court (continued)

State v. Massey, (continued)

Syl. pt. 8 - "A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene in 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." Syl. pt. 4, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

See also, *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987).

A judge may ask questions and in some instances is required to do so. *State v. Grimm*, 156 W.Va. 615, 195 S.E.2d 637 (1973). He may not, however, disclose an opinion thereby. *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985); *State v. Starcher*, 168 W.Va. 144, 282 S.E.2d 877 (1981); *State v. McGee*, 160 W.Va. 1, 230 S.E.2d 832 (1976); and *State v. McAboy*, 160 W.Va. 497 , 236 S.E.2d 431 (1977).

Here, the Court found no prejudice.

Discipline

Generally

See ATTORNEYS Professional responsibility,(p. 38) for discussion of topic.

In the Matter of Magistrate Hall, No. 17275 (4/1/87) (Per Curiam)

See JUDGES Failure to hear, (p. 365) for discussion of topic.

In the Matter of Magistrate McGraw, 359 S.E.2d 853 (1987) (Per Curiam)

Magistrate Patsy McGraw was charged with violating Canon 1, Canon 2A and Canon 3A(1)-(4), in that she refused to issue a domestic violence protective order, allowed an *ex parte* communication in denying the order, attempted to call the husband while the requesting wife was present and acted in an undignified manner when the complaint stated her intention to file an affidavit of prejudice against the magistrate.

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial Review Board [now 'Judicial Hearing Board'] in disciplinary proceedings." Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - "Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 3 - "Where 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 or Canon 3 of the Judicial Code of Ethics." Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Casto*, 163 W.Va. 661, 263 S.E.2d 79 (1979).

Here, the evidence against the magistrate was not clear and convincing. Complaint dismissed.

The Court did, however, admonish all magistrates to refrain from lecturing to complainants intending to file an affidavit of prejudice against them.

In the Matter of Magistrate McGraw, No. 17274 (7/17/87) (Per Curiam)

Magistrate Patsy McGraw was charged with violating Canons 1, 2A, 3A and 3C of the Judicial Code of Ethics. The charges resulted from an incident in her courtroom in which the girlfriend of an arrested person became verbally abusive toward the magistrate after having physically and verbally assaulting her boyfriend in the magistrate's presence.

The police officer who had arrested her boyfriend obtained a warrant from Magistrate McGraw and the girlfriend was arrested while still in court. Bond was set at $10,000, resulting in the girlfriend being temporarily remanded to jail.

The Court noted that a warrant should not be issued by an interested magistrate but observed that the setting was stressful. While suggesting that ejection from the courtroom may have been more desirable, the Court also noted that Magistrate McGraw showed good faith effort to have the bond amount lowered the next morning.

"Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

The Court agreed with the recommendation of the Judicial Hearing Board and ordered the complaint dismissed.

In the Matter of Magistrate McGraw, No. 17591 (12/18/87) (Per Curiam)

Magistrate Patsy McGraw was accused of violating Canons 1, 2, 3A(1)(3)(4) and 3C(1)(a) of the Judicial Code of Ethics for communicating with a former husband accused of non-support outside his ex-wife's presence; refusing to help in enforcing the support obligation; and interfering with police procedures following the ex-husband's arrest for non-support.

The Court agreed with the Judicial Hearing Board's conclusion that these actions did not constitute a violation.

JUDGES

Discipline (continued)

Generally (continued)

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

Magistrate Vivian M. Saffle was charged with violating Canon 3A(1), (4) and (5) and Canon 3B(1) and (2) of the Judicial Code of Ethics. Specifically, she was charged with failing to make an appropriate entry in her case number register and with failing to appear for a hearing involving driving under the influence of alcohol (DUI).

The Judicial Hearing Board dismissed both charges. The Court agreed with dismissing the first charge but disagreed with dismissal of the second charge.

Syl. pt. 1 - "'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial (Hearing) Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233 271 S.E.2d 427 (1980)." Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).

Upon an independent review of the record, the Court concluded that sufficient evidence was presented to demonstrate misconduct in failing to appear for the DUI hearing. Further, the Court found that *W.Va.Code*, 62-1-6 imposed a clear legal duty on the magistrate to perform a proper arraignment.

Syl. pt. 2 - "The deliberate failure to follow mandatory criminal procedures constitutes a violation of the Judicial Code of Ethics." Syl. pt. 2, *In re Pauley*, 173 W.Va. 475, 318 S.E.2d 418 (1984).

Here, the violation of judicial ethics warranted a public reprimand.

Appearance of impropriety

In the Matter of Justice Neely, 364 S.E.2d 250 (1987) (Brotherton, J.)

Justice Richard Neely was alleged to have required his staff to perform certain personal services, including babysitting, as a condition of her employment; and that staff be available twenty-four hours a day. Justice Neely was charged

Discipline (continued)

Appearance of impropriety (continued)

In the Matter of Justice Neely, (continued)

by the Judicial Investigation Commission with violating Canon 1 and Canon 2A of the Judicial Code of Ethics. The Judicial Hearing Board recommended that the complaint be dismissed, pursuant to Rule III(c)(13)(a) of the Rules of Procedure for Handling of Complaints Against Justices, Judges and Magistrates.

Syl. pt. - A judge or justice violates Canon 2A of the Judicial Code of Ethics when he requires his secretary to care for his child as a condition of employment, because such action creates the appearance of impropriety and undermines public confidence in the judiciary.

Here, the Court refused the Judicial Hearing Board's recommendation and admonished Justice Neely that his actions were improper.

Standard of proof

In the Matter of Magistrate McGraw, 359 S.E.2d 853 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 360) for discussion of topic.

Violation of criminal law

In the Matter of Magistrate Vandelinde, 366 S.E.2d 631 (1988) (Miller, J.)

The Judicial Hearing Board recommended dismissal of charges against Magistrate Vandelinde for making political contributions in violation of Canons 2 and 7 of the Judicial Code of Ethics. Vandelinde was not charged with any criminal violation and the Hearing Board found that he had relied on the advice of the county's chief election officer, who had in turn been advised by the Secretary of State's office.

Syl. pt. 1 - Conduct by a judge which violates federal or state criminal law may, unless the violation is trivial, constitute a violation of the requirement that a judge must comply with the law found in Canon 2A of the Judicial Code of Ethics.

Discipline (continued)

Violation of criminal law (continued)

In the Matter of Magistrate Vandelinde, (continued)

Here, the Court found that the statutes in question were clear and unambiguous. Although relevant in mitigation, respondent's good faith reliance on oral advice was not a defense. The Court imposed a public reprimand, noting that the particular statute most clearly applicable had never been interpreted.

Duty to render decision

State ex rel. Buzzard v. MacQueen, No. 18029 (12/4/87) (Per Curiam)

Relator's habeas corpus petition had been pending in the Circuit Court of Kanawha County for eight months at the time this original mandamus proceeding was granted returnable. Relator had made two written requests for hearing but received no response.

In Syllabus Point 1 of *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984), this Court held:

> "Under article III, § 17 of West Virginia Constitution, which provides that 'justice shall be administered without sale, denial or delay,' and under Canon 3A(5) of the West Virginia Judicial Code of Ethics (1982) Replacement Vol.), which provides that 'A judge should dispose promptly of the business of the court,' judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission."

The Court also noted that mandamus will lie where a trial judge fails or refuses to render a decision in a reasonable time. *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

Here, the Court ordered a writ of mandamus to issue requiring respondent to rule on the pending habeas corpus petition within thirty days from the date of this order.

JUDGES

Ethical misconduct

In the Matter of Magistrate Hall, No. 17275 (4/1/87) (Per Curiam)

See JUDGES Failure to hear, (p. 365) for discussion of topic.

In the Matter of Magistrate McGraw, 359 S.E.2d 853 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 360) for discussion of topic.

In the Matter of Magistrate McGraw, No. 17274 (7/17/87) (Per Curiam)

See JUDGES Discipline, Generally, (p. 361) for discussion of topic.

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

Failure to hear

In the Matter of Magistrate Hall, No. 17275 (4/1/87) (Per Curiam)

Magistrate Clay Hall was charged by the Judicial Investigation Commission with refusing to issue arrest warrants and for refusing to allow withdrawal of a guilty plea.

The charges resulted from an incident involving two police officers. The police had obtained a warrant for the arrest of Bobby L. Gillespie. After spotting Mr. Gillespie on the open highway they pursued him to his residence where, according to Mr. Gillespie, they forcibly entered his home.

Magistrate Hall refused to issue a warrant for the arrest of the officers. A different magistrate issued a warrant two days later, whereupon Magistrate Hall, at the request of one of the original arresting officers, issued warrants charging Mr. And Mrs. Gillespie with obstructing a police officer.

Failure to hear (continued)

In the Matter of Magistrate Hall, (continued)

Prior to the hearing on the charges brought against Mr. Gillespie, one of the officer's attorneys persuaded Mr. Gillespie to plead guilty to a lesser charge, with a recommendation that only a small fine be imposed. Magistrate Hall accepted the plea but refused to allow Gillespie to withdraw it later.

"The deliberate failure to follow mandatory criminal procedures constitutes a violation of the Judicial Code of Ethics." Syl. pt. 2, *In re Pauley*, 173 W.Va. 475, 318 S.E.2d 418 (1984).

In the Matter of Wharton, 175 W.Va. 348, 332 S.E.2d 650 (1985) held that it is a mandatory duty of magistrates to determine whether probable cause exists for the issuance of arrest warrants. Further, a magistrate should not consult with police before making a determination.

Here, although Hall's refusal to allow withdrawal of the guilty plea was within his discretion, his failure to conduct a probable cause hearing upon the allegations against the police officers violated Canon 3A(1) of the Judicial Code of Ethics. Hall was publicly reprimanded.

Plea bargains

Acceptance thereof

Six v. White, No. 17991 (3/14/88) (Per Curiam)

See PLEA BARGAINING Breach of agreement, (p. 430) for discussion of topic.

JUDGES

Recusal

State v. Thorne, 333 S.E.2d 817 (1985) (Brotherton, J.)

Appellant was convicted of making phone calls with the intent to harass, in violation of *W.Va.Code*, 61-8-16(a)(4) (1984). The phone calls were made to employees of Marshall University. The appellant contends it was error for the trial judge not to have recused himself from the case. The trial judge was a part-time employee at Marshall at the time of trial. Although he offered to recuse himself the appellant withdrew his motion and therefore waived any error.

Appellant moved to recuse the trial judge, alleging prejudice based on the court's adverse rulings on pretrial motions and bond. Appellant also alleged prejudice as a result of his filing a civil suit against the judge in federal court. The trial judge refused to recuse himself and submitted the motions to the Chief Justice of the Supreme Court. The Chief Justice found insufficient cause to warrant recusal.

Syl. pt. 5 - "'Where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation as to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself.' Syl. pt. 14, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976 (in part)." Syl. pt. 3, *State v. Hodges*, 172 W.Va. 322, 305 S.E.2d 278 (1983).

The Court found no substantial reasons for recusal and affirmed the judge's decision not to recuse himself.

Reprimands

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

JUDGES

Right of review of advisory opinion

In the Matter of Justice McGraw, Jr., No. 17272 (7/23/87) (Per Curiam)

Justice McGraw filed a petition with the Judicial Investigation Commission seeking an advisory opinion as to whether he should recuse himself. The Commission determined that recusal was not required.

Following the ruling, the party seeking recusal filed a supplemental motion to recuse based on newly-discovered evidence. The Commission declined to modify its original finding. Meanwhile, Justice McGraw filed a petition with the West Virginia Judicial Hearing Board to affirm the Commission's advisory opinion.

The Court noted that the Judicial Investigation Commission has authority to issue advisory opinions. See Rules of Procedure for the Handling of Complaints against Justices, Judges and Magistrates, Rule II(K). While Section (K) does allow advisory opinions to be introduced in disciplinary proceedings, these opinions are not binding on the Court.

The Judicial Hearing Board, pursuant to Rule III of the same Rules, is to hear complaints filed by the Commission following a finding of probable cause. The Board is to make recommendations to the Court. It is not empowered to review advisory opinions.

The Court held that "where the language of a statute or regulation is clear and unambiguous, the plain meaning is to be accepted without resorting to the rules of interpretation. Syl. pt. 2, *State ex rel. Underwood v. Silverstein*, 167 W.Va. 121, 278 S.E.2d 886 (1981); Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

The Court upheld the Board's decision not to review the Commission's advisory opinion.

Sentencing

Use of confidential statements

State v. Moore, 367 S.E.2d 757 (1988) (Per Curiam)

See SENTENCING Presentence report, Defendant's right to, (p. 590) for discussion of topic.

JURY

Challenges

Cause

State v. Bailey, 365 S.E.2d 46 (1987) (Brotherton, J.)

During the *voir dire* preceding appellant's trial for first-degree murder (which resulted in conviction) a prospective juror indicated that she was a social worker with the Department of Human Services and often dealt with the prosecuting attorney's office. Appellant sought to strike her for cause, showing that her division had investigated the appellant and his relationship to the deceased and the deceased's ex-wife and children. The juror indicated that she knew nothing of the case.

The trial court refused appellant's motion to strike for cause and the juror was removed by peremptory strike.

Syl. pt. 2 - Where a prospective juror, who is not an employee of a prosecutorial agency, indicates during *voir dire* that her employment involves work with the prosecutor's office, there is no error in the trial court's refusal to strike the prospective juror for cause, absent a showing on the record of bias or prejudice, or a request by counsel for individual *voir dire* to determine whether such bias or prejudice actually exists.

Here, the record did not show that the juror was exposed to prejudicial information, nor did the appellant request additional *voir dire*.

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends the court erred in refusing to strike a number of jurors for cause. Two jurors were related by marriage to law enforcement officers. A third was related to a deputy sheriff and was married to a former employee of the sheriff's department. A fourth was married to the judge's secretary and a fifth was acquainted with the victim and her husband.

Appellant's counsel conducted individual *voir dire* and moved to strike these five jurors for cause. The motion was denied and the appellant used peremptory challenges to strike four of the challenged jurors.

State v. Brown, (continued)

The Court did not find that any of the prospective jurors were automatically disqualified by virtue of their relationships or acquaintances. There was no showing that the law enforcement officers to which three of the prospective jurors were related or acquainted had any connection to these proceedings.

"A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. . ." Syl. pt. 6, in part, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

There was no showing that the judge's secretary had any active involvement or knowledge of the case. Even if she had, the relationship did not give rise to the same inference of bias or prejudice as arises from a relationship or close acquaintance with law enforcement or prosecutorial officers charged with an adversarial function.

Syl. pt. 3 - "'The true test 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. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974)." Syl. pt. 4, *State v. Wade*, 174 W.Va. 381, 327 S.E.2d 142 (1985).

The Court found no abuse of discretion even though it may have been better for the trial court to excuse certain of the challenged jurors for cause.

State v. Curtin, 332 S.E.2d 619 (1985) (Per Curiam)

The appellant contends the court erred in granting the State's motion to strike prospective jurors Elizabeth Tracy and Seldon Taylor for cause. Mrs. Tracy informed the court she was employed by a local newspaper and had written an article about the defendant's case. The prosecutor challenged her for cause and the court excused her, finding what she learned about the case came from matters outside the courtroom.

State v. Curtin, (continued)

Mr. Taylor informed the court he was a friend or acquaintance of a number of the defendant's witnesses and of the defendant himself and had previously discussed the case with others. Taylor stated during *voir dire* that he had been friends and acquaintances with some of them for several years and was a friend of the defendant's, and that it would be difficult for him to serve as a juror in this case.

The appellant argues that the trial court should have questioned the two jurors more extensively about their bias or lack thereof. The Court found the court conducted a rather extensive examination of Mr. Taylor (who even admitted that he could not render an impartial verdict). The Court found the trial court could have inquired further of Mrs. Tracy, but in view of the fact that she had written a newspaper article on the case, it was not error to dismiss her as a potential juror. The Court found the defendant is no more entitled to jurors who are biased in his favor than the State and that the rule of impartiality applies to both.

State v. Deaner, 334 S.E.2d 627 (1985) (Per Curiam)

Appellant was convicted of welfare fraud. During *voir dire* of the jury, two prospective jurors responded affirmatively to the questions, "Are there members of the jury panel who have made any statements to anyone that welfare should be abolished and the jury panel . . . who feel that public assistance, better known as welfare, should be abolished?" Counsel moved that they be discharged for cause. Without conducting further inquiry of these prospective jurors, who were eventually struck by peremptory challenges, the trial court denied both of these motions.

When it became apparent that the two potential jurors had possible prejudices which could adversely affect their ability to render a verdict (even if the facts established that the appellant had not obtained public assistance fraudulently), it was incumbent upon the trial court to conduct a further inquiry. The Court found the trial court committed reversible error by failing to question each of these potential jurors individually.

Challenges (continued)

Cause (continued)

State v. Matney, 346 S.E.2d 818 (1986) (Per Curiam)

The appellant was convicted of second degree murder. He contends the trial court erred by dismissing a member of the jury venire in his second trial, although the juror indicated he would render a fair and impartial verdict in the case. The trial judge asked a general question concerning whether any juror knew of a reason he could not render a fair and impartial verdict. One juror raised his hand, and in chambers revealed he knew of the de cent's reputation and had discussed the matter with another juror, Harris. Harris revealed in chambers that he knew the defendant and had known the decedent, that he had told the other prospective juror that he would rather not sit on the case due to his knowledge of the decedent, and indicated the decedent was a violent person. When asked if he could render a fair verdict he replied he could, but it would be hard. Later, he indicated he could return a verdict based on the law an evidence. The State challenged him for cause and the court granted the motion.

The Court found the juror's responses raised a substantial question as to whether he would be able to be fair and impartial, and that where there is doubt, the doubt must be resolved in favor of the juror's challenge. Striking this juror was within the trial court's discretions.

Knowledge of defendant

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

At *voir dire* a juror failed to acknowledge her prior acquaintance with the defendant or her knowledge of the defendant's actions at issue in court.

Syl. pt. 3 - "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. 1, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

Where, however, the juror's misconduct is "extrinsic to" the deliberations of the jury, impeachment may be available. In addition, where a juror is biased or prejudiced the verdict may be attacked. See *Scotchel*, *supra*.

Challenges (continued)

Knowledge of defendant (continued)

State v. Banjoman, (continued)

Here, no evidence was produced to show bias nor did defense counsel attempt to inquire at *voir dire* concerning the juror's connection with appellant, (despite clear indications such a connection existed). Further, no hearing on this matter was held subsequent to trial. Without a record, no error was found.

Same jurors sitting on trials of accomplices

State v. VanMetre, 342 S.E.2d 450 (1986) (Neely, J.)

The question presented in this case is whether the same jurors can sit on the trials of two defendants who are charged with the same crime and tried separately.

The Court found the situation in this case presented a compelling case of possible juror bias because the same juror sat on the trials of two persons indicted in the same indictment for the same offense involving exactly the same set of facts.

Syl. pt. 1 - "'Upon a joint indictment for a felony, any one of the persons jointly indicted may, under *W.Va.Code*, 62-3-8, (1931), elect to be tried separately.' Syl. pt. 1, *State ex rel. Zirk v. Muntzing*, 146 W.Va. 349, 120 S.E.2d 260 (1961)." Syl. pt. 2, *State ex rel. Whitman v. Fox*, 160 W.Va. 633, 236 S.E.2d 565 (1977).

The Court saw little difference in trying two defendants jointly and trying each defendant separately but before members of a jury who sat in the trial of the other.

Defense counsel promptly raised the issue of possible juror bias by moving for a continuance and by objecting to the method of impaneling the jury. Objections were raised prior to trial and again at the beginning of trial. After defense counsel became aware that nine of the jurors had already heard the evidence in the case, he objected to the jurors' sitting at the appellant's trial.

Challenges (continued)

Same jurors sitting on trials of accomplices (continued)

State v. VanMetre, (continued)

Syl. pt. 2 - The same juror should not sit on the trials of two defendants who are charged with the same crime and tried separately.

When the demands for fair procedure conflict with the desirable public policy of economy of effort and money, fair procedure prevails. However, the Court found, the *per se* ruling made in this case shall have no retroactive effect except to those cases currently on appellate review where the objection has been preserved on the record.

Court's comments

Coercion to reach a verdict

State v. Blessing, 331 S.E.2d 863 (1985) (Per Curiam)

Appellant was convicted of second degree murder. Approximately one hour and three quarters after the case was submitted to the jury the foreman sent a note to the judge advising that ten jurors voted for second degree, two jurors voted for voluntary manslaughter, and that no one would change. The court called the jurors in and told them he did not think they had had sufficient time to consider all the evidence and he asked them to continue their deliberations. The court told them they could recess and return either the same evening or the following Monday and that "It doesn't make any difference to me one way or the other. I though you would like to conclude this case today if you possibly could." The court then gave a supplemental instruction to the jury on the importance and desirability of reaching a verdict.

The appellant contends the effect of the supplemental instruction and the court's comments was to coerce the jury into reaching a verdict.

The Court found whether a trial court's instructions constitute improper coercion of a verdict necessarily depends upon the facts and circumstances of the particular case and cannot be determined by any general or definite rule.

Court's comments (continued)

Coercion to reach a verdict (continued)

State v. Blessing, (continued)

"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." Syl. pt. 2, *State v. Johnson*, 168 W.Va. 45, 282 S.E.2d 609 (1981).

In this case the trial court's remarks and instruction were not clearly coercive when the court never mentioned majority and minority opinions nor urged the minority to reconsider. The Court found the instruction was directed to the jury as a whole and told each of the jurors to re-examine his or her own views after discussion with other jurors. The trial court was within the bounds of his discretion in instructing the jury to deliberate further since the appellant was charged with first-degree murder, trial had been held for two days and the jury had deliberated only one and three quarter hours.

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the trial judge coerced the jury into reaching a verdict. The Court found the jury, after having deliberated for slightly more than one hour, returned to the courtroom and indicated they had taken three votes. The judge told the jury foreman to reveal the votes without disclosing which way the votes were divided. Only a general objection to the trial court's proposed procedure was made. The foreman responded they were divided by a ten to two vote and had made little progress since beginning their deliberations. The judge then advised the jury that this was a serious matter and instructed them to return to their deliberations and attempt, if they could, "without doing violence to anyone's conscience, to reach a verdict." About eighteen minutes later, the jury returned its voluntary manslaughter verdict.

The Court affirmed the trial judge's actions. The Court found nothing to cause or even tend to cause the minority to sacrifice their beliefs or opinions in order to arrive at a verdict.

Court's comments (continued)

Coercion to reach a verdict (continued)

State v. Sloan, 355 S.E.2d 374 (1987) (Per Curiam)

Appellant was convicted of shoplifting. She contends the trial judge made improper remarks during trial which had the effect of coercing the jury into reaching a verdict, and that the court's supplemental instruction to the jury was coercive.

The Court could not conclude that the judge's remarks or the supplemental instruction had the effect of improperly coercing the jury. (See case for remarks and instruction). The Court found the supplemental instruction is almost identical to the one given in *State v. Blessing*, 175 W.Va. 132, 331 S.E.2d 863 (1985). The appellant contends this case is different from *Blessing* since at the outset of the trial, the judge informed the jury that they needed to finish that day and that they may have to stay past five o'clock if necessary.

The Court found the trial court was within its discretion in giving the additional instruction. The court's remark was not coercive since before giving the supplemental instruction the court twice informed the jury that they could deliberate further that evening or return the following day.

Syl. pt. - "'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.' Syl. pt. 2, *State v. Johnson*, 168 W.Va. 45, 282 S.E.2d 609 (1981)." Syl. pt., *State v. Blessing*, 175 W.Va. 132, 331 S.E.2d 863 (1985).

Credibility of witnesses

Finding a jury

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See SEXUAL ASSAULT Sufficiency of evidence, Victim's uncorroborated testimony, (p. 602) for discussion of topic.

JURY

Disqualification

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See JURY Challenges, Knowledge of defendant, (p. 372) for discussion of topic.

Exhibits

Use during deliberations

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See EVIDENCE Exhibits, Use by jury, (p. 206) for discussion of topic.

Failure of trial court to submit verdict form

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

The appellant contends the trial court erred in failing to submit a verdict form to the jury. The trial court instructed the jury but submitted no verdict form. When the jury returned to the courtroom following deliberations, the foreman read the verdict of guilty from a piece of paper he had signed. Following a poll of the jury, the trial court instructed that the verdict be transposed onto the original indictment and read by the clerk. The members of the jury stated their affirmance of this transcription, and the indictment was signed by the foreman.

The Court found the provision of a verdict form would have avoided confusion but found the verdict in this proceeding was sufficiently definite.

Interference with juror

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant contended that his conviction for nighttime burglary should be set aside because of threats and intimidation in the jury room during the jury's deliberations. The jury foreman allegedly pressured a juror into voting for a guilty verdict even though the juror had a reasonable doubt.

Interference with juror (continued)

State v. Dudley, (continued)

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." Syl. pt. 4, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

The Court found no evidence of any misconduct which would trigger further inquiry. When polled, each juror indicated agreement with the guilty verdict.

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See NEW TRIAL Prejudicing jury, (p. 420) for discussion of topic.

Intimidation

Mistrial

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

See MISTRIAL Intimidation of jurors, (p. 417) for discussion of topic.

Juror as witness

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See WITNESSES Unavailability, (p. 671) for discussion of topic.

Juror bias

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

The Court found seating a juror who knew and allegedly disliked a defense witness would not be error since this dislike was disclosed after the jury was impaneled and the juror indicated he could be unbiased.

Juror bias (continued)

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He complained on appeal that the trial court erred in denying his motions to strike two jurors for cause. One of the jurors was the wife of a retired F.B.I. agent who had worked with local law enforcement and the other was employed by the arson division of the local fire department, a job entailing contact with local police.

Syl. pt. 10 - "A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such relationship exists, a party has a right to obtain individual voir of the challenged juror to determine possible prejudice or bias arising from the relationship." Syllabus Point 6, *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

Here, no request was made to conduct individual *voir dire* of the F.B.I. agent's wife; therefore, no facts were developed to demonstrate actual bias. As to the city fireman, the Court rejected appellant's argument that the fireman, should be disqualified per se as a law enforcement official. See *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1983); *Bailey v. Wayne*, 179 W.Va. 1, 365 S.E.2d 46 (1987), (Social worker who had contact with prosecuting attorney's office was not disqualified per se). *Voir dire* of the fireman failed to show prejudice.

Misconduct

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

See DENIAL OF A FAIR TRIAL Jury misconduct, (p. 99) for discussion of topic.

JURY

Polling the jury

Prejudicial publicity

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See MISTRIAL Prejudicial publicity, Standard for determining, (p. 418) for discussion of topic.

Prejudicing

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See DENIAL OF A FAIR TRIAL Conduct of judge, Witnesses, examination by court, (p. 92) for discussion of topic.

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Duties, Generally, (p. 468) for discussion of topic.

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Evidence, Refusal to take breathalyzer test, (p. 162) for discussion of topic.

Qualifications

State v. Couch, 358 S.E.2d 782 (1987) (Brotherton, J.)

A juror in a first-degree murder trial failed to recognize one of the prosecution's witnesses during *voir dire*. After seeing the witness testify, however, she stated that she could not believe anything the witness said due to past experience with him. The juror was removed and an alternate, who had been present during the entire trial, replaced her.

Qualifications (continued)

State v. Couch, (continued)

The Court held that, absent an abuse of discretion, qualifications of jurors are for the trial court to judge. (See *State v. Harshbarger*, 170 W.Va. 401, 294 S.E.2d 254, 257 (1982)). Here, the object of securing impartial triers was met and no error occurred. See *State v. Hatfield*, 48 W.Va. 561, 37 S.E. 626 (1900) and *State v. Archer*, 169 W.Va. 564, 289 S.E.2d 178 (1982).

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. She contended that the trial court erred in refusing to strike a juror for cause and in allowing the prosecution to inquire of the jurors whether they could return a verdict resulting in life imprisonment.

During *voir dire*, defense counsel recognized one of the jury panel as an opposing party in a domestic relations case he was handling. After questioning *in camera*, the court refused to strike the juror. Appellant did not claim actual prejudice on appeal but that a *per se* disqualification should have been made.

The Court found no common law ground for disqualification. See *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308, at 320 (1966).

Syl. pt. 1 - "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. 6, *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983) (quoting Syl. pt. 4, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983), *cert. denied* 464 U.S. 934 (1983).

The Court found that the trial court did not abuse its discretion by refusing to strike the juror.

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See JURY Juror bias, (p. 379) for discussion of topic.

JURY

Sequestration

State v. Wallace, 337 S.E.2d 316 (1985) (Per Curiam)

Appellant contends the trial court erred in failing to sequester the jury involved in this case. The Court found *W.Va.Code*, 62-3-6 places the decision on sequestering a jury in felony cases in the discretion of the trial court. In *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118, 135 (1983) the Court ruled that when a party raises the question of whether a jury should be sequestered he has the burden of providing the trial court with an adequate basis to support a finding of a reasonable probability that absent sequestration the verdict will be tainted.

In this case, no motion was made for the sequestration of the jury, and it did not appear that the factors examined in *Young*, which require a trial court *sua sponte* to sequester the jury, were present. The Court found no showing that the jury's verdict was tainted by failure to sequester the jury.

Tampering

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See JURY Interference with juror, (p. 377) for discussion of topic.

Venire

From another county

State ex rel. Owens v. Brown, 351 S.E.2d 412 (1986) (McGraw, J.)

Petitioner was indicted by a Mingo County special grand jury. The special prosecutor moved that a jury from another county be brought in for petitioner's trial. Over petitioner's objection, the judge ruled that a jury panel from Cabell County be summoned. Petitioner seeks prohibition.

Syl. pt. 1 - "A defendant in a criminal case cannot be deprived of a trial by a jury composed of jurors of the county wherein he stands charged, except upon a clear showing that a fair and impartial jury cannot be obtained from that county." Syl. pt. 1, *State v. Bail*, 140 W.Va. 680, 88 S.E.2d 634 (1955).

State ex rel. Owens v. Brown, (continued)

Syl. pt. 2 - "A finding by a trial court in a criminal case that a fair and impartial jury cannot be obtained in the county wherein defendant stands charged, must be clearly supported by facts appearing in the record." Syl. pt. 2, *State v. Bail*, 140 W.Va. 680, 88 S.E.2d 634 (1955).

Syl. pt. 3 - The ends of justice are served by having the credibility of witnesses passed upon by jurors from the county in which the crime occurred.

Syl. pt. 4 - Insofar as West Virginia Code section 52-1-14 (Supp. 1986) allows the State or the trial court to propose the summoning of a jury from another county, it is in derogation of a defendant's general common law rights and it must be narrowly construed so that summoning a jury from another county is allowed only when there has been a clear and convincing showing on the record that it is necessary in order to obtain a fair and impartial trial.

Syl. pt. 5 - Before a court may summon a jury from another county over the defendant's objection, it must make a thorough effort to impanel a local jury, and the additional facts upon which it bases its decision must appeal on the record, rather than being peculiarly within the personal knowledge of the trial judge.

Syl. pt. 6 - "Unless it clearly appears that a qualified jury cannot be obtained, at the time of trial, in the county in which the offense is alleged to have been committed, for the trial of the defendant in a criminal prosecution in that county, the court in which the prosecution is pending exceeds its legitimate powers under the statute, *W.Va.Code*, 52-1-20 (1931) [now *W.Va.Code*, § 52-1-14 (Supp. 1986)], in causing jurors to be summoned from another county for the trial of the defendant." Syl. pt. 4, *State ex rel. Cosner v. See*, 129 W.Va. 722, 42 S.E.2d 31 (1947).

Because the judge relied on his own personal knowledge and upon a showing of widespread publicity without a separate showing of a present hostile sentiment against either party, and because the trial court made no effort to impanel a jury, meaningful review is impossible.

Venire (continued)

From another county (continued)

State ex rel. Owens v. Brown, (continued)

The Court granted the writ prohibiting the respondents from proceeding further with the trial until it appeared from clear and convincing evidence on the record that a legally qualified, fair and impartial jury could not be obtained from Mingo County.

Voir dire

Collateral crimes mentioned

State v. Finley, 355 S.E.2d 47 (1987) (McHugh, J.)

See DENIAL OF A FAIR TRIAL *Voir dire*, Collateral crimes mentioned, (p. 115) for discussion of topic.

Individual

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. Appellant asked permission to question potential jurors individually.

Syl. pt. 2 - "In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944).

The Court found individual *voir dire* is only required when a juror has disclosed a possible area of prejudice. *State v. Schrader*, 172 W.Va. 1, 301 S.E.2d 70 (1982). This was not so in this case.

JURY

Voir dire (continued)

Right to additional

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See JURY Juror bias, (p. 379) for discussion of topic.

JUVENILES

Adjudication of delinquency

Standard for review

State v. William T., 338 S.E.2d 215 (1985) (Per Curiam)

The Court found rules of evidence and procedural rights applicable in adult criminal proceedings are applicable with equal force in juvenile adjudicatory proceedings. *W.Va.Code*, 49-5-1(d) (1982). The Court found an adjudication of delinquency is subject to the same standards of review on appeal as is a criminal conviction. The standard of review where insufficiency of the evidence is assigned as error is set forth in Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Arrest

Appearance before magistrate

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

Appellants were two juveniles transferred to adult jurisdiction on murder charges. In *In the Matter of Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985), the Court remanded for further findings regarding the juveniles' confessions. Following a second transfer hearing, the trial court once again found the juveniles' confessions admissible.

Despite differing versions of the events, it was clear that *Mark E.P.* was taken by police from his place of summer work at approximately 9:30 a.m., was interrogated by police and signed a confession at 11:30 a.m., following reading of his rights and signing of a document on which they were printed; and then was taken before a magistrate at approximately 1:00 p.m.

Syl. pt. 1 - "Under *W.Va.Code*, 49-5-8(d), when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate. If there is a failure to do os, any confession obtained as a result of the delay will be invalid where it appears that the primary purpose of the delay was to obtain a confession from the juvenile." Syl. pt. 3, *State v. Ellsworth*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

The Court found that police officers lacked probable cause for arrest and therefore were not required to take *Mark E.P.* before a magistrate forthwith.

JUVENILES

Competency to testify

State v. Jones, 362 S.E.2d 330 (1987) (Neely, J.)

See WITNESSES Competency to testify, Children, (p. 655) for discussion of topic.

Defined

State ex rel. M.L.N. v. Greiner, 360 S.E.2d 554 (1987) (McGraw, C.J.)

The relators here were three eighteen year old males under continuing juvenile court supervision pursuant to *W.Va.Code*, 49-5-2.

The primary issue raised was whether these juveniles could be held in the Wood County Correctional Center (jail) within the sight and sound of adult prisoners. The Court addressed the fundamental question of whether a juvenile remains a "child" within the definition of 49-5-2 so as to require separate housing while detained.

Syl. pt. 3 - Youths between the ages of eighteen and twenty years, who remain under juvenile court jurisdiction pursuant to West Virginia Code § 48-5-2 (1986 Replacement Vol.), come within the definition of "child" as set forth in *W.Va.Code* § and must be afforded the same commitment and rehabilitation rights as delinquent children under the age of eighteen who are under juvenile court jurisdiction.

Here, a separate facility was required.

Delinquency petition

Sufficiency

State v. William T., 338 S.E.2d 215 (1985) (Per Curiam)

Appellant assigns as error certain defects in the charging portion of the juvenile petition.

Delinquency petition (continued)

Sufficiency (continued)

State v. William T., (continued)

In *Harris v. Calendine*, 160 W.Va. 172, 176, 233 S.E.2d 318, 322 (1977), the Court said:

> [A]ny 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. *State ex rel. Wilson v. Bambrick*, 156 W.Va. 703, 195 S.E.2d 721 (1973); *Crow v. Coiner*, 323 F. Supp. 555 (N.D. W.Va. 1971); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

The Court found the charging portion of the petition was sufficient to allege the elements of the offense of larceny and to adequately inform the accused of the nature of the charge, and further was sufficient to inform the accused that he was charged with an act of delinquency which, if committed by an adult, would be a crime punishable by confinement. Weighing this petition against the requirements of *W.Va.Code*, 49-5-7 and the due process standards of *Harris v. Calendine*, the Court found no defect.

Detention

Separate from adults

State ex rel. M.L.N. v. Greiner, 360 S.E.2d 554 (1987) (McGraw, J.)

See JUVENILES Defined, (p. 387) for discussion of topic.

State ex rel. M.L.N. v. Greiner, 360 S.E.2d 554 (1987) (McGraw, J.)

See JUVENILES Rehabilitation, Confinement between ages of eighteen and twenty, (p. 389) for discussion of topic.

JUVENILES

Institutional hearings

Generally

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

Appellant was a juvenile offender, transferred from Anthony Center to the State Penitentiary following the circuit court's upholding of several findings of guilt made by an institutional hearing committee regarding infractions of the institution's code of resident conduct.

Appellant protested the lack of a neutral and detached hearing board, claiming a denial of due process.

The Court noted that a hearing body cannot have members on it having personal knowledge of the incident at issue. See *Harrah v. Leverette*, 165 W.Va. 665, 271 S.E.2d 322 (1980); but knowledge of unrelated incidents is not an impediment. See *United States ex rel. Silverman v. Commonwealth of Pennsylvania*, 527 F. Supp. 742 (W.D. Pa. 1981), affd. 707 F.2d 1397 (3rd cir. 1983).

Here, the record showed no prejudice because no reporting officer or witness to the incidents at issue sat on the committee.

Rehabilitation

Confinement between ages of eighteen and twenty

State ex rel. M.L.N. v. Greiner, 360 S.E.2d 554 (1987) (McGraw, C.J.)

Relators here are three eighteen year old males held in the Wood County Correctional Center (jail). They protested their confinement within sight and sound (although within a separate room) of adult prisoners while awaiting further proceedings. The males were all under the continuing jurisdiction of the juvenile court.

The Court found that the relators came within the definition of "child" in *W.Va.Code*, 49-5-2 so as to require incarceration out of the sight and sound of adult prisoners (see *W.Va.Code* 49-5-16(a)).

Rehabilitation (continued)

Confinement between ages of eighteen and twenty (continued)

State ex rel. M.L.N. v. Greiner, (continued)

Syl. pt. 4 - Under West Virginia Code §§ 49-5-16(a) (1986 Replacement Vol.) and 49-5A-2 (1986 Replacement Vol.), the Legislature intended a prohibition against jailing youths between the ages of eighteen and twenty years, who remain under juvenile jurisdiction, within the sight or sound of adult prisoners. Therefore, such persons may be incarcerated in county jails only if they are housed in a separate section designed for housing juveniles exclusively, which is not within the sight or sound of adult prisoners.

Finding no suitable alternative in Wood County, the Court suggested that the juveniles be sent to another county or committed to the Department of Corrections. Detention in a juvenile detention center was deemed inappropriate.

For discussion of factors to be considered in detaining juveniles pending further proceedings, see Syl. pt. 3, *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984).

See also, JUVENILES Defined (p. 387).

Right to counsel

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

See JUVENILES Transfer from juvenile to adult jurisdiction, Right to counsel, (p. 393) for discussion of topic.

JUVENILES

Search and seizure

Search of public school locker

State v. Joseph T., 336 S.E.2d 728 (1985) (McHugh, J.)

See SEARCH AND SEIZURE Search of public school locker, (p. 527) for discussion of topic.

Self-incrimination

Confessions to police

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

Both juveniles here were charged with murder. Appeal was taken from their hearing transferring to adult jurisdiction.

Mark E.P. was taken by police from his place of work at approximately 9:30 a.m. Following a reading of his rights and his written acknowledgment, he signed a confession at 11:30 a.m. and was taken before a magistrate at approximately 1:00 p.m.

In both this case and a previous hearing (see *In the Matter of Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985)) the Court found that the police lacked probable cause to arrest.

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 of flagrancy of the official misconduct." Syl. pt. 2, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

Syl. pt. 3 - Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go." Syl. pt. 2, *State v. Mays*, 172 W.Va. 486, 307 S.E.2d 655 (1983).

Self-incrimination (continued)

Confessions to police (continued)

In the Matter of Mark E.P., (continued)

Here, no intervening circumstances was found sufficient to cleanse the effects of the illegal arrest. Mark E.P.'s confession was not admissible and the Court remanded for another transfer hearing.

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

See JUVENILES Arrest, Appearance before magistrate, (p. 386) for discussion of topic.

In the Matter of Mark E.P., 331 S.E.2d 813 (1985) (Miller, J.)

See JUVENILES Transfer to adult jurisdiction, Probable cause, (p. 401) for discussion of topic.

Sexual assault

Voluntary social companion

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See SEXUAL ASSAULT Voluntary social companion, Defined, (p. 604) for discussion of topic.

Statutory construction

See JUVENILES Defined, (p. 387) for discussion of topic.

JUVENILES

Transfer from juvenile to adult penal institution

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

See PROPORTIONALITY Generally, (p. 455) for discussion of topic.

Transfer from juvenile to adult jurisdiction

Right to counsel

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

Appellant was ordered transferred from Anthony Center to the State Penitentiary and sentenced to five to eighteen years on a non-aggravated robbery charge.

While at the Anthony Center appellant was found guilty by a disciplinary committee of several infractions of the resident code of conduct. Following the fourth finding of guilt, the Commissioner of Corrections returned appellant to the circuit court as unfit to remain at the Center.

The circuit court upheld the Commissioner's finding and reinstated appellant's original sentence. Although appellant had counsel at the circuit court hearing, he was not afforded an opportunity to present evidence.

A second hearing on the issue of probation was held by the circuit court following an evaluation for classification. Appellant once again had counsel present but was denied an opportunity to present evidence.

Following incarceration at the State Penitentiary, appellant, on a writ of habeas corpus, gained a rehearing concerning the Anthony Center infractions. The original ruling was affirmed and appellant took exception.

Syl. pt. 1 - "'a youthful male offender sentenced to confinement in a special center pursuant to *W.Va.Code*, 25-4-6, is entitled to an evidentiary hearing when he is returned, as unfit, to the sentencing court and faces resentencing to the penitentiary; and he is entitled to counsel to assist him in the hearing before the sentencing court.' Syl. pt. 2, *Watson v. Whyte*, 162 W.Va. 26, 245 S.E.2d 916 (1978)." Syl. pt. 1, *State v. Stucky*, 174 W.Va. 236, 324 S.E.2d 379 (1984).

Transfer from juvenile to adult jurisdiction (continued)

Right to counsel (continued)

State v. Anderson, (continued)

The Court distinguished between disciplinary hearings held at youth correctional centers, at which counsel is not required, and transfer hearings before a circuit court, which require a full hearing with counsel present.

Transfer to adult jurisdiction

Admissibility of extrajudicial statements

In the Matter of Mark E.P., 331 S.E.2d 813 (1985) (Miller, J.)

Two juveniles appeal from a transfer order which waived the court's juvenile jurisdiction and transferred them to adult criminal jurisdiction.

The juveniles contend *W.Va.Code*, 49-5-1(d) (1982), relating to the admissibility of confessions of juveniles, means that such statements are inadmissible unless made in the presence of the child's counsel or in the presence of and with the consent of the child's fully informed parent or custodian. They contend the only statements excepted from this rule are *res gestae* by children under sixteen but above thirteen years of age.

Syl. pt. 1 - The language in *W.Va.Code*, 49-5-1(d) (1982), [extrajudicial statements other than *res gestae* by a child under sixteen years of age but above the age of thirteen to law-enforcement officers or while in custody, shall not be admissible unless made in the presence of counsel or made in the presence of and with the consent of the child's parent or custodian," does not apply to an extrajudicial statement made by a juvenile who is sixteen years of age or older.

The juveniles also contend their waivers of *Miranda* rights, specifically the right to remain silent and the right to have a lawyer present during questioning, were ineffective. The juveniles rely on Syl. pt. 1 of *State ex rel. J.M. v. Taylor*, 166 W.Va. 511, 276 S.E.2d 199 (1981): "A juvenile defendant cannot waive his right to counsel during proceedings against him, unless de does so upon advice of counsel.

In the Matter of Mark E.P., (continued)

State v. Manns, 174 W.Va. 793, 329 S.E.2d 865 (1985) rejected this argument and stated that *Taylor* involved a juvenile's ability to waive his right to counsel at a juvenile hearing and this "must be distinguished from the capacity of a juvenile to give a voluntary confession as discussed in *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978)."

Syl. pt. 2 - " "[Subject to the provisions of *W.Va.Code*, 49-5-1(d)], [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.' Syl. pt. 1, as modified, *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978)." Syl. pt. 3, *State v. Howerton*, 174 W.Va. 801, 329 S.E.2d 874 (1985).

The Court concluded the validity of a juvenile's confession is tested by the *Howerton*-Laws rule and not by the principles in *Taylor*. The Court found because both of the juveniles in this case were over sixteen, the requirements of *W.Va.Code*, 49-5-1(d) were not applicable. Their confessions are tested by the totality of the circumstances under which they were taken.

One of the juveniles contends his right to counsel under *W.Va.Code*, 49-5-1(c) (1982) was violated. The Court found this provision must be read with the subsequent subsection, *W.Va.Code*, 49-5-1(d) which authorized the taking of a confession without the presence of counsel or parents when a juvenile is age sixteen or older. The detailed procedures relating to the taking of a confession in *W.Va.Code*, 49-5-1(d) takes primacy over the general language in *W.Va. Code*, 49-5-1(c).

Syl. pt. 3 - The requirements of *W.Va.Code*, 49-5-1-(c), relating to the right of a juvenile "to be effectively represented by counsel at all stages of proceedings under the provisions of this article" does not relate to the taking of the juvenile's extrajudicial statements as this is controlled by *W.Va.Code*, 49-5-1(d).

In the Matter of Mark E.P., (continued)

The juveniles contend that the totality of the circumstances, including their race, their youth, their lack of experience with law enforcement operations and procedures, and the location of the interrogation, show duress and coercion so as to make the statements involuntary. The Court noted the factors to be examined in a "totality of the circumstances" evaluation of a juvenile confession were set out in *Laws* and that the U.S. Supreme Court's guidelines in *Fare v. Michael C.*, 442 U.S. at 707 (1979) are similar. In *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982) a court in a transfer hearing is obliged to hear evidence pertaining to the voluntariness of a juvenile's confession prior to allowing it to be introduced against the juvenile for the purpose of proving probable cause.

The Court found the waivers of *Miranda* rights were knowing and intelligent, and that the statements were voluntarily given. There was insufficient evidence to demonstrate under the totality of the circumstances that the confessions were involuntary. Nothing in the record suggested that the juveniles were mentally deficient. Both were sixteen years old. No claim was made that there was any coercion involved in the interrogation. Written waivers of *Miranda* rights were signed by each juvenile. They were both informed of the nature of the charge prior to interrogation and the interrogation itself was not unduly prolonged.

One juvenile signed a written confession which contained an acknowledgment that he had read the same. At the transfer hearing, he stated that some portion of the confession was inaccurate, but this portion was never specifically identified. At the time he was arrested, he was asked if he wished to call his parents, but he declined to do so. The other juvenile did not sign a written statement because a lawyer arrived and advised him not to answer any further questions. He was arrested in the presence of his great-grandmother with whom he lived.

The juveniles also contend their rights under *W.Va.Code*, 49-5-8(d) were also violated.

In the Matter of Mark E.P., (continued)

Syl. pt. 6 - "Under *W.Va.Code*, 49-5-8(d), when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate. If there is a failure to do so, any confession obtained as a result of the delay will be invalid where it appears that the primary purpose of the delay was to obtain a confession from the juvenile." Syl. pt. 3, *State v. Ellsworth*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

The Court found they were hampered in this case by the lack of a developed factual record that enables them to make a specific analysis of the *Ellsworth*, standards.

With regard to the first juvenile, it appeared that at the time he was asked to accompany the police to the station for questioning, they did not have probable cause for his arrest. However, the record did not disclose under what circumstances the questioning occurred and whether he was free to leave. On remand this issue must be resolved before the statement could be used against him for the purpose of transfer.

The confession of the second juvenile was given after he was arrested pursuant to a warrant. The only reason offered for not taking him directly to a magistrate was that he was brought to the police station for processing. His first statement while in custody was exculpatory, and he was told by the interrogating officer that nobody would believe it. After these remarks the se cond incriminating statement was obtained. The record did not indicate how long he was in custody from the time of his arrest to the time he was taken to the magistrate. The Court found because of the lack of an adequate record, they could not make an ultimate decision on this confession either.

Syl. pt. 7 - Where there are substantial defects in the transfer hearing that go to the validity of the probable cause finding, we will reverse and remand the case for a further transfer hearing. Double jeopardy principles are not involved because a transfer hearing does not involve an adjudication of guilt.

Transfer to adult jurisdiction (continued)

Admissibility of extrajudicial statements (continued)

State v. Ellsworth, 331 S.E.2d 503 (1985) (Miller, J.)

Appellant contends his extrajudicial statements were inadmissible at the transfer hearing because counsel was not present when they were taken. The Court applied the standards set forth in Syl. pt. 3, *State v. Howerton*, 174 W.Va. 801, 329 S.E.2d 874 (1985). The Court found *W.Va.Code*, 49-5-1(d) did not prevent a juvenile over sixteen from giving a confession without the presence of counsel, parents or custodian. Under the totality of the circumstances the confessions were not invalid for lack of counsel.

Syl. pt. 3 - Under *W.Va.Code*, 49-5-8(d), when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate. If there is a failure to do so, any confession obtained as a result of the delay will be invalid where it appears that the primary purpose of the delay was to obtain a confession from the juvenile.

Here, the oral confession given by the juvenile shortly after he was placed in the police cruiser was valid. Proper *Miranda* warnings had been given and these rights had been waived prior to his confession. The juvenile was over the statutory age limitations on confessions contained in *W.Va.Code*, 49-5-1(d). The police were not shown to have taken a circuitous journey to have more time to obtain the confession.

The second attack, on the subsequent written confession, is premised on the requirements of *W.Va.Code*, 49-5-8(d), relating to a prompt detention hearing. The written confession was also admissible. Ordinarily the time taken to reduce an oral confession to writing does not count on the unreasonable delay issue. (Cites omitted). Here, the Court found the written confession was preceded by an additional giving of the *Miranda* rights and the juvenile's waiver of these rights. The written statement was taken approximately one hour after the juvenile was first picked up. Although the record does not disclose how long transport took nor the exact time period from the oral confession in the police cruiser to the start of the written confession, the interval was clearly less than one hour.

Syl. pt. 4 - Under both *W.Va.Code*, 49-5-8(a) and -a(b), the grounds for taking a juvenile into custody where the juvenile has allegedly committed a criminal act are the same as for the arrest of an adult.

Transfer to adult jurisdiction (continued)

Admissibility of extrajudicial statements (continued)

State v. Ellsworth, (continued)

Once a custodial arrest of a juvenile has occurred, his right to be immediately taken before a judicial officer arises under *W.Va.Code*, 49-5-7(d). The State argued there was no probable cause for the juvenile's arrest and he had agreed to accompany the police to the station. The Court found probable cause, but noted that a written confession taken under these circumstances would not necessarily be valid. The validity of such a confession, independent of the age restrictions in *W.Va.Code*, 49-5-1(d) turns on the custodial circumstances outlined in *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

Stanley followed *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979), concluding that where a suspect is not free to leave the officer's place of questioning, an illegal detention has occurred and a confession obtained under such circumstances, even though preceded by *Miranda* warnings, is invalid unless there is a break in the causal connection between the illegal detention and the confession.

Here, the juvenile's confessions were properly admitted in evidence; therefore the trial court's transfer order cannot be reversed as there was sufficient evidence establishing probable cause to believe that the juvenile had committed murder.

Admissibility of testimony given by the juvenile at a legal proceeding

In the Interest of C.S.V., 337 S.E.2d 916 (1985) (Per Curiam)

Appellant's mother was accused of the shotgun wounding of Raymond Toler. At her preliminary hearing, the appellant testified that he, not his mother, had shot Toler. Toler died of the wounds and a delinquency petition was filed against the appellant. The State moved to transfer to criminal jurisdiction. At the transfer hearing, a state trooper testified as to what had occurred at the preliminary hearing and read the portion of the transcript containing the appellant's confession.

Transfer to adult jurisdiction (continued)

Admissibility of testimony given by the juvenile at a legal proceeding (continued)

In the Interest of C.S.V., (continued)

"In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." *W.Va.Code*, 57-2-3. The Court found the transfer hearing is a critical stage against a juvenile and that a juvenile involved in transfer hearings should be entitled to the benefit of the provisions of *W.Va.Code*, 57-2-3. The Court found since the transfer order was based solely upon the appellant's in-court confession which was inadmissible, the trial court erred in ordering the appellant's transfer.

Double jeopardy

State ex rel. Vance v. Maynard, 351 S.E.2d 437 (1986) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Previous successful appeal of transfer, (p. 400) for discussion of topic.

Previous successful appeal of transfer

State ex rel. Vance v. Maynard, 351 S.E.2d 437 (1986) (Per Curiam)

Petitioner was charged with the shotgun death of Raymond Toler. At a previous hearing, the trial court ordered transfer. The decision was reversed on appeal. The Court found the trial court erred in granting the State's motion to transfer based solely on petitioner's prior in-court confession, because the confession was inadmissible under *W.Va.Code*, 57-2-3 (1965). Petitioner contends this ruling bars any further transfer hearing. The Court disagreed and denied the writ.

Petitioner contends the transfer attempt should be barred due to his claim that any evidence proffered by the State is *per se* inadmissible. Whether the State can establish probable cause to believe that petitioner shot the decedent through evidence gained from sources other than the inadmissible confession is a question for the trial court.

Transfer to adult jurisdiction (continued)

Previous successful appeal of transfer (continued)

State ex rel. Vance v. Maynard, (continued)

The Court found double jeopardy will not bar a second transfer hearing because the proceeding does not involve an adjudication of guilt or innocence.

Probable cause

In the Matter of Mark E.P., 331 S.E.2d 813 (1985) (Miller, J.)

Syl. pt. 7 - Where there are substantial defects in the transfer hearing that go to the validity of the probable cause finding, we will reverse and remand the case for a further transfer hearing. Double jeopardy principles are not involved because a transfer hearing does not involve an adjudication of guilt.

In the Matter of John A.L., 363 S.E.2d 729 (1987) (Per Curiam)

Two juveniles were transferred to adult jurisdiction following a remand from an earlier case (See *In the Matter of Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985)).

Here, the Court found that a confession should have been suppressed; and that the police lacked probable cause to arrest, absent the illegal confession.

Syl. pt. 4 - "Where there are substantial defects in the transfer hearing that go to the validity of the probable cause finding, we will reverse and remand the case for a further transfer hearing. Double jeopardy principles are not involved because a transfer hearing does not involve an adjudication of guilt." Syl. pt. 7, *In the Matter of Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985).

Transfer to adult jurisdiction (continued)

Sentencing

State v. Ball, 337 S.E.2d 310 (1985) (Miller, C.J.)

Appellant was convicted of committing multiple homicide when he was sixteen. He contends that under his plea agreement he was entitled to be incarcerated at Anthony Center for Youthful Male Offenders.

The Court found the purpose of *W.Va.Code*, 49-5-13, is to provide substantial flexibility for sentencing of persons who committed offenses when they were juveniles. The trial court did have authority under *W.Va.Code*, 49-5-13(e) and *W.Va.Code*, 49-5-13(b)(5) to sentence a person who commits a homicide while a juvenile to the Anthony Center for Youthful Male Offenders even though he is sentenced as an adult. The Court remanded with directions that appellant be sentenced to the Anthony Center under the terms of the plea agreement.

State v. Pettrey, 356 S.E.2d 477 (1987) (Per Curiam)

Appellant contends the court was without authority to order him transferred from a secure juvenile facility to an adult penal institution.

"'Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property are not properly cognizable by a court.' Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908)." Syl. pt. 1, *State ex rel. Durkin v. Neely*, 166 W.Va. 552, 276 S.E.2d 311 (1981).

The Court found the issue to be moot and dismissed the appeal.

Appellant was involved in a shotgun killing when he was sixteen. He was transferred to adult jurisdiction, pled guilty to murder of the second degree and was sentenced to the penitentiary for five to eighteen years. Execution of the sentence was suspended, and appellant was committed to the custody of the Industrial Home for Youth at Salem until age 18. At that time, he was to be returned to the court for further disposition under *W.Va.Code*, 49-5-16(b).

Transfer to adult jurisdiction (continued)

Sentencing (continued)

State v. Pettrey, (continued)

At the subsequent dispositional hearing upon the appellant's 18th birthday, the court found the appellant had not been rehabilitated and reimposed the original sentence in the penitentiary. Upon motion of counsel, the circuit judge indicated his willingness to assign the appellant to the Anthony Center in conformity with the recommendation of the Commissioner of Corrections, but expressed doubt as to his statutory authority to do so. Appellant was returned to Salem pending appeal of the lower court's decision.

On the same day the Court agreed to docket appellant's appeal, the circuit judge entered an order transferring appellant to the Anthony Center for one year based on the decision the Court handed down in *State v. Ball*, 175 W.Va. 652, 337 S.E.2d 310 (1985). In light of these developments, the Court found the issue presented in the appeal moot.

KIDNAPING

Incidental to jail breaking

State v. Brumfield, 358 S.E.2d 801 (1987) (McHugh, J.)

Appellant was convicted of three counts of kidnaping three correctional officers during an unsuccessful escape attempt at the Cabell County Jail. The main issue considered was whether the facts proven constituted kidnaping or merely jail breaking.

Syl. pt. 1 - "In interpreting and applying a generally worded kidnaping statute, such as *W.Va.Code*, 61-2-14a, in a situation in which another offense was committed, some reasonable limitations on the broad scope of kidnaping must be developed. The general rule is that a kidnaping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnaping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syl. pt. 2, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

The Court noted that ordinarily, where an escape is attempted and a correctional officer is confined but not used as a hostage, prosecution for kidnaping is not appropriate.

Syl. pt. 2 - "Penal statutes must be strictly construed against the State and in favor of the defendant." Syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). See also, Syl. pt. 3, *State v. Nichols*, 177 W.Va. 483, 354 S.E.2d 415 (1987); Syl. pt. 1, *State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696 (1986); *Ray v. Mangum*, 176 W.Va. 534, 346 S.E.2d 52, at 54 (1986); and *State v. Myers*, 171 W.Va. 277, 298 S.E.2d 813 (1982).

Syl. pt. 3 - Where an inmate, by force, has unlawfully confined a correctional officer for a minimal period of time within the walls of a correctional facility in order to facilitate his escape, and movement of that officer was slight and did not result in exposure to an increased risk of harm, a conviction for the offense of kidnaping pursuant to *W.Va.Code*, 61-2-14a [1965] will be reversed where the confinement was incidental to the escape and the inmate has not utilized the officer as a hostage nor as a shield to protect that inmate or others from bodily harm or capture or arrest after that inmate or others have committed a crime.

Incidental to jail breaking (continued)

State v. Plumley, 368 S.E.2d 726 (1988) (Per Curiam)

Appellant was convicted of three counts of kidnaping and one count of aggravated robbery arising out of a jail break attempt.

Syl. pt. 1 - "Where an inmate, by force, has unlawfully confined a correctional officer for a minimal period of time within the walls of a correctional facility in order to facilitate his escape, and movement of that officer was slight and did not result in exposure to an increased risk of harm, a conviction for the offense of kidnaping pursuant to *W.Va.Code*, 61-2-14a [1965] will be reversed where the confinement was incidental to the escape and the inmate has not utilized the officer as a hostage nor as a shield to protect that inmate or others from bodily harm or capture or arrest after that inmate or others have committed a crime. Syllabus point 3, *State v. Brumfield*, 178 W.Va. 240, 358 S.E.2d 801 (1987).

See also, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

The Court reversed and remanded for retrial on the robbery count. See ROBBERY Elements of, Intent, (p. 512).

Indictment

Sufficiency of

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant was convicted of kidnaping and first-degree sexual assault. He challenges the sufficiency of the indictment, contending the indictment fails to allege criminal intent and fails to describe with sufficient detail the acts of which he was being charged. The two counts in the indictment generally track the language of the statute involved.

The Court found the counts were sufficient to inform the appellant that he was charged with kidnaping under *W.Va.Code*, 61-2-14a and first-degree sexual assault under *W.Va.Code*, 61-8B-3 (1976).

LARCENY

Bona fide claim of right

State v. Kelly, 338 S.E.2d 405 (1985) (Per Curiam)

Syl. pt. 1 - "If a person takes property of another under an honest belief of right in himself to do so, he is not guilty of larceny thereof, even though he took it with knowledge of the adverse claim of such other person, and his own claim ultimately proves to be untenable." Syl. pt. 2, *State v. Bailey*, 63 W.Va. 668, 60 S.E. 785 (1908).

Here, the evidence, when viewed in the light most favorable to the prosecution, did not establish beyond a reasonable doubt that the defendant acted with criminal intent. He believed that he had proper authority to remove the property. The Court vacated the judgment of the circuit court and the case was remanded for the entry of a judgment of acquittal as required by Rule 29 of the Rules of Criminal Procedure. *State v. Watts*, 172 W.Va. 602, 309 S.E.2d 101 (1983).

Grand larceny

Lesser included offense

State v. Sexton, 346 S.E.2d 745 (1985) (Per Curiam)

Appellant was convicted of grand larceny. He contends the verdict form should have contained the lesser included offense of petit larceny because the evidence showed appellant's fingerprints only on a Bulova watch box and that watch was worth less than $200. The Court found the defense at trial was appellant's testimony that he did not take any of the valuables, and that the evidence offered by the state tended to prove the appellant committed the larceny of all the items stolen. Applying the standard set forth in Syl. pt. 2 of *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), the Court found there was no evidence in this case to support a verdict of a lesser included offense and the appellant was not entitled to a lesser included offense instruction.

Grand larceny (continued)

Fingerprint evidence

State v. Sexton, 346 S.E.2d 745 (1985) (Per Curiam)

Appellant was convicted of grand larceny. He contends his conviction should be set aside since the fingerprint evidence was insufficient to support this conviction. The Court found their holding in Syl. pt. 1, *State v. Noe*, 160 W.Va. 10, 230 S.E.2d 826 (1976) was not the only evidence linking the appellant to the commission of the crime. The Court concluded the State's evidence was sufficient to support a grand larceny conviction.

LEGAL ETHICS

Ethics

Professional responsibility

See ATTORNEYS Professional responsibility, (p. 38).

LESSER INCLUDED OFFENSES

Controlled substances

Delivery

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

See CONTROLLED SUBSTANCES Delivery, Lesser included offense, (p. 74) for discussion of topic.

Grand larceny

State v. Sexton, 346 S.E.2d 745 (1985) (Per Curiam)

See GRAND LARCENY Lesser included offense, (p. 256) for discussion of topic.

Homicide

State v. Harper, 365 S.E.2d 69 (1987) (McHugh, J.)

See HOMICIDE First-degree, (p. 276) for discussion of topic.

Sexual assault

State v. Wallace, 337 S.E.2d 321 (1985) (Miller, C.J.)

See SEXUAL ASSAULT First-degree, Lesser included offenses, (p. 598) for discussion of topic.

State entitled to instruction on

State v. Wallace, 337 S.E.2d 321 (1985) (Miller, C.J.)

Appellant sought to force the State to proceed to the jury only on the greater offense contained in the indictment by objecting to the State's lesser included offense instruction.

State entitled to instruction on (continued)

State v. Wallace, (continued)

Syl. pt. 4 - A defendant does not have the right to preclude the State from seeking a lesser included offense instruction where it is determined that the offense is legally lesser included and that such an instruction is warranted by the evidence.

MAGISTRATES

Failure to present before

Effect on confessions

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 579) for discussion of topic.

MAGISTRATE COURT

Judicial ethics

In the Matter of Magistrate McGraw, 359 S.E.2d 853 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 360) for discussion of topic.

In the Matter of Magistrate McGraw, No. 17274 (7/17/87) (Per Curiam)

See JUDGES Discipline, Generally, (p. 361) for discussion of topic.

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

In the Matter of Magistrate Vandelinde, 366 S.E.2d 631 (1988) (Miller, J.)

See JUDGES Discipline, Violation of criminal law, (p. 363) for discussion of topic.

MAKING PHONE CALLS WITH INTENT TO HARASS

Constitutionality of the statute

State v. Thorne, 333 S.E.2d 817 (1985) (Brotherton, J.)

Appellant was convicted of making phone calls with intent to harass, in violation of *W.Va.Code*, 61-8-16(a)(4) (1984). He contends this code section is overbroad and prohibits conduct beyond the legitimate governmental interest in preventing harassment.

W.Va.Code, 61-8-16(a)(4) (1984) provides: "I shall be unlawful for any person with intent to harass or abuse another by means of telephone to: . . . [M]ake repeated telephone calls, during which conversation ensues, with intent to harass any person at the called number. . ."

The Court found prohibiting harassment is not prohibiting speech, because harassment is not protected speech. Harassment is not communication, although it may take the form of speech. Because the statute does not prohibit communicative speech, its proscription is not overbroad.

The Court found this case is of greater concern because the harassing phone calls were made to employees of Marshall University, a state agency. The Court noted a citizen must have the right to petition the government and to petition it forcefully and repeatedly without any danger of being found guilty of a crime. The Court found, however, the First Amendment does not protect someone interrupting a legitimate government function.

The Court stressed the statute requires intent to harass. If a citizen intends legitimate communication, he may call repeatedly without fear of prosecution. The Court noted that under this statute he may even call one time totally for the purpose of harassment; nevertheless, there is a point where legitimate inquiry ends and harassment begins.

Sufficiency of evidence

State v. Thorne, 333 S.E.2d 817 (1985) (Brotherton, J.)

Appellant was convicted of making phone calls with the intent to harass, in violation of *W.Va.Code*, 61-8-16(a)(4) (1984). He contends the trial court should have directed a verdict in his favor at the end of the State's case.

Sufficiency of evidence (continued)

State v. Thorne, (continued)

Four state's witnesses testified to receiving phone calls and testified to being threatened and insulted. Even the appellant admitted he may have made reference to barbecuing hogs and frying the little pigs in the fat left behind. The Court found, viewing the evidence in the light most favorable to the State, there was sufficient evidence to allow the case to go to a jury.

MEDICAL CARE

Right to

State ex rel. Burdette v. Hey, et al., No. 17921 (7/17/87) (Per Curiam)

Petitioner brought a mandamus action to compel treatment of his medical problem. Petitioner's treating physician had concluded that injury to his leg, occurring prior to his confinement, required consultation. This consultation was arranged and the consulting physician recommended surgery, without which the petitioner would risk loss of his leg.

The circuit court refused petitioner's motion to have surgery performed, concluding that the condition was not life threatening.

With approval the Court quoted the United States Supreme Court that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' *Gregg v. Georgia*, 428 U.S. 153, 182-83, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion), proscribed by the Eighth Amendment." *Estelle v. Gamble*, 97 S.Ct. 285 (1976).

See also, *Hickson v. Kellison*, 170 W.Va. 732, 296 S.E.2d 855 (1982) and *W.Va.Code*, 7-8-2.

A rule to show cause was issued against the respondent sheriff directing him to show cause why the petitioner should not be given the requested treatment.

MENTAL HYGIENE

Attorney's fees

Notice of hearing

Heydinger v. Starcher, No. 17491 (4/28/87) (Per Curiam)

The attorney for a person involuntarily hospitalized brought a petition for writ of prohibition, mandamus and habeas corpus before Judge Larry Starcher to enforce a mental hygiene commissioner's order directing the state Department of Health to provide a residential placement for his client. Respondent Starcher entered an order directing the attorney to seek relief from the Court. Upon the filing of similar pleadings the Court granted the writ and made it returnable to Judge Starcher.

Upon rehearing, the petitioner sought and obtained a continuance based upon the existence of an ongoing plan to place similarly situated persons in community settings. The client was placed as represented. Some time later the attorney directed petition to petitioner's counsel requesting attorney's fees. Neither an order nor a notice of hearing appeared with the petition. Respondent Judge Starcher nonetheless entered an order awarding fees without notice or hearing to the petitioner. Petitioner's counsel was not aware of the order until he made inquiry of respondent's office regarding a hearing on the matter of attorney's fees.

"A party who is not served with notice of a hearing on a motion made by an opposing party, as provided in R.C.P., Rule 6(d) and does not appear at the hearing, is denied a substantial right and is entitled to a reversal of the judgment entered pursuant to the hearing on the motion." Syl. pt. 3, *State ex rel. Battle v. Demkovich*, 148 W.Va. 618, 136 S.E.2d 895 (1964). See also *Cremeans v. Goad*, 158 W.Va. 192, 210 S.E.2d 169 (1974) and *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

Here, the Court held that the respondent court exceeded its jurisdiction in awarding fees without notice or a hearing. Writ of prohibition issued.

MISTRIAL

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987 (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

Intimidation of jurors

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. While the jury was visiting the scene of the murder, a van jumped the curb and narrowly missed hitting a few of them. This was apparently a deliberate attempt. The defense motion for a mistrial based on this incident was denied.

Syl. pt. 3 - A court should not declare a mistrial because a juror was threatened, unless it is apparent that the juror's impartiality has been so affected that he can no longer fairly decide the facts.

Applying the principles set forth in *State v. Dye*, 171 W.Va. 361, 298 S.E.2d 898 (1982), the Court found no error in denying the mistrial.

Jury deliberations

Tampering with

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See NEW TRIAL Prejudicing jury, (p. 420) for discussion of topic.

Mid trial discharge at behest of prosecution

Manifest necessity

Keller v. Ferguson, 355 S.E.2d 405 (1987) (Miller, J.)

See DOUBLE JEOPARDY Mistrial, Manifest necessity, (p. 145) for discussion of topic.

MISTRIAL

Prejudicial publicity

Standard for determining

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. Following the third day of trial, the clerk of the circuit court made statements to a local television station that this was appellant's second trial, that the trial would be a long one, that a life sentence was a possibility and that the prosecution would try to show that the motive was a large life insurance policy. Appellant was denied her motion for a mistrial on account of prejudicial publicity.

Syl. pt. 2 - "If it is determined that publicity disseminated by the media during trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material." Syl. pt. 5 *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

The trial court must examine all circumstances and exercise its discretion, not simply rely on the juror's own representations. *State v. Williams*, 160 W.Va. 19, 230 S.E.2d 742 (1976).

The Court found no abuse of discretion here, but admonished the circuit clerk to refrain from public comment. West Virginia Judicial Code of Ethics Canon 3A(6) (1976).

MURDER

Lying in wait

State v. Harper, 365 S.E.2d 69 (1987) (McHugh, J.)

See HOMICIDE First-degree, (p. 276) for discussion of topic.

NEW TRIAL

In the Matter of Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

Newly discovered evidence

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See EVIDENCE Newly discovered, (p. 227) for discussion of topic.

Prejudicing jury

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

Appellant was convicted of first offense DUI. On appeal he claimed that the trial court erred in refusing his motion for acquittal or mistrial, made on the grounds that a prosecution witness had conversations with jurors out of court. The witness testified that the case was not discussed.

Syl. pt. 2 - "A motion for a new trial on the ground of the misconduct of a jury is address 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).

The Court found no injury here.

Three term rule

State v. Moore, 357 S.E.2d 780 (1987) (Miller, J.)

See SPEEDY TRIAL Three term rule, (p. 615) for discussion of topic.

NEW TRIAL - NEWLY DISCOVERED EVIDENCE

Sufficiency for

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant was convicted of nighttime burglary. Appellant alleged that the evidence was insufficient to support the verdict since at a post-trial hearing the only witness was shown at a post-trial hearing to have recanted her testimony and then repudiated her recantation prior to trial.

The Court, quoting *State v. Hamrick*, 151 W.Va. 1, 151 S.E.2d 252 (1966), noted that the question of granting a new trial upon newly discovered evidence is within the trial court's discretion.

Syl. pt. 1 - "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 appeal 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 its merits." Syl. pt. 2, *State v. Stewart*, 161 W.Va. 127, 239 S.E.2d 777 (1977).

Further, according to *State v. Stewart*, 161 W.Va. 127, 239 S.E.2d 777 (1977) a new trial is warranted only "under circumstances where there are credible corroborating circumstances that would lead the trial court to conclude that the witness did, indeed, lie. . . ."

Here, no abuse of discretion was found in the trial court's refusal of a new trial.

NOLLE PROSEQUI

Abuse of discretion

Failure to grant state's motion

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy, and was convicted of two counts of malicious assault. His defense at trial was insanity.

He contends on appeal the trial court improperly refused to grant the State's motion for an order of *nolle prosequi*. In support of its motion, the State noted that, at that time, three psychiatrists had examined the defendant and had concluded his mental disorder interfered with his capacity to appreciate the criminality of his acts.

The appellant contends the trial court was required to grant the State's motion due to the volume of evidence that defendant was suffering from a mental disorder which interfered with his criminal capacity.

Syl. pt. 1 - "The attorney for the state may by leave of court file a dismissal of an indictment, information or complaint, and prosecution shall thereupon terminate. Such a dismissal may be filed during the trial without the consent of the defendant." *W.Va.R.Crim.P.*48(a).

The Court found the decision was within the discretion of the trial court and the prosecutor as to whether or not a trial was warranted in this case. The Court found no abuse of discretion.

See EVIDENCE Judicial admissions, (p. 226) for discussion of topic.

OBTAINING MONEY BY FALSE PRETENSES

Abuse of criminal process

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

See ABUSE OF CRIMINAL PROCESS Obtaining money by false pretenses, No felonious intent, (p. 5) for discussion of topic.

Elements of the offense

State v. Barnes, 354 S.E.2d 606 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Obtaining money by false pretenses, (p. 631) for discussion of topic.

Indictment

Sufficiency

State v. Barnes, 354 S.E.2d 606 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Obtaining money by false pretenses, (p. 631) for discussion of topic.

Kennedy v. State, 342 S.E.2d 251 (1987) (Per Curiam)

Petitioner contends neither count 1 nor 2 of the indictment is sufficient because both fail to allege fraud. He contends the indictment is framed in "conclusory language" which fail to aver facts alleging the element of actual fraud.

The Court found both counts of the indictment allege that the petitioner "by obtaining" from complainant "a certain check . . . by knowingly and falsely pretending and representing . . ." committed the stated offense. The Court found this language is clearly a sufficient allegation of actual fraud.

PAROLE

Denial of parole consideration

Vance v. Holland, 355 S.E.2d 396 (1987) (Per Curiam)

Petitioner contends his statutory right to a parole hearing was repeatedly denied and seeks immediate discharge.

Petitioner and a co-defendant were convicted of first-degree murder when petitioner was sixteen years old. The co-defendant was released on parole after serving ten years of his term, while petitioner has been continuously incarcerated since 1962. The board granted petitioner a parole hearing in 1972, 1973 and 1974 and then failed to interview him annually from 1975 until 1982. As required by *W.Va.Code*, 62-12-13. The board interviewed petitioner in 1982 and in 1985 and at both times ruled he was ineligible for parole consideration because his conviction order included no recommendation of mercy. After seeking an attorney general's opinion which advised that under the law at the time of petitioners conviction, petitioner was eligible for parole consideration each year after his tenth year of incarceration, the board scheduled a new hearing. Petitioner was denied parole because of the circumstances of the crime and his record of violation of prison rules. The board supported its decision with findings of disciplinary infractions, facts of the crime and petitioner's current criminal record. It also noted petitioner's improvements while incarcerated and other factors.

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 criterion. Syl. pt. 1, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980).

Syl. pt. 2 - "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. 3, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980).

Syl. pt. 3 - "The de vision 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. 3, *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981), *Quoting Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980).

The Court found in this case it was reasonable to conclude that the wrongful denial of parole consideration over an eleven-year period could certainly have had the effect of encouraging despair and disrespect for prison authority.

Denial of parole consideration (continued)

Vance v. Holland, (continued)

The Court held the Board abused its discretion by refusing to grant petitioner a parole review and that the January 1986 hearing failed to fully correct the injustice. The Board's denial of parole after this hearing was based in part on petitioner's disciplinary history which included infractions which occurred during years when access to the Board was denied. The Court found since petitioner was entitled to annual parole hearings before the Board after serving ten years, it would not be appropriate to consider disciplinary infractions occurring during the period he was improperly denied meaningful parole consideration.

Here, the murder conviction, which is petitioner's only felony conviction, occurred almost 25 years ago. The Court found all future decisions on petitioner's parole status should weigh the factors in *W.Va.Code*, 62-12-13 and the principles enunciated in *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981), excluding the infraction of prison rules occurring from 1975 through 1985 when he was denied parole consideration.

Discretion of parole board

Vance v. Holland, 355 S.E.2d 396 (1987) (Per Curiam)

See PAROLE Denial of parole consideration, (p. 424) for discussion of topic.

Eligibility

Incorrect sentence

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

Appellant was convicted of six counts of first-degree sexual assault. He received six concurrent terms of ten years each, although the statute required a sentence of ten-to-twenty years. The probation board would not consider the lighter sentence and instead treated appellant according to the statutorily prescribed sentence.

State v. Allman, (continued)

Appellant contends the sentence imposed may have been improper, but it was not corrected within the appropriate time period. The Court found the appellant's sentence was merely a recommendation to the board of probation and that the board properly applied the correct sentence.

PATERNITY

Statute of limitations

Constitutionality

Turner v. Jones, 330 S.E.2d 323 (1985) (Per Curiam)

This is an appeal of the dismissal by the circuit court of the plaintiff's complaint in a civil action commenced to establish the paternity of, and obtain support for, the plaintiff's daughter, born on July 28, 1972. The complaint was filed on August 19, 1983 under *W.Va.Code*, 48-7-1 (1984). Based upon this code section, which requires that such civil actions be brought within ten years of the birth of the child, the circuit court dismissed the complaint. The limited record in this appeal indicated that prior to the filing of the instant complaint, the plaintiff had, on three earlier occasions, attempted to secure child support from the appellee by resort to magistrate court and the county prosecutor. Noe of these proceedings culminated in a determination of the merits.

A three-year limitation previously governing paternity actions was struck down in *State ex rel. S.M.B. v. D.A.P.*, 168 W.Va. 455, 284 S.E.2d 912 (1981). The Court found the new ten year statute of limitations cannot be applied to the plaintiff's complaint. In bringing needed change to the law, the Legislature may not cut off existing causes of action, at least not without allowing a reasonable opportunity to respond to changes in the law. The Court found that the plaintiff was never given the opportunity to present any evidence in her prior attempts to establish paternity. Repeated attempts to establish the child's right to support heighten the patent unfairness of applying a newly enacted limitation bar to permanently deny the opportunity to present evidence in this case.

Prior to the enactment of the ten-year limitation on such actions, plaintiff's ability to bring an action to determine paternity and support obligations, under the holding in *S.M.B.*, *supra*, was limited only by the practical time constraints of the child's minority status. The time limitation created under *W.Va.Code*, 48-7-4(a) in effect extinguished the plaintiff's remedy. The Court found that where a new statute shortens the period withing which a remedy may be enforced, the statute must provide a reasonable time for bringing actions which have already occurred but have not been filed before the statute takes effect.

Statute of limitations (continued)

Constitutionality (continued)

Turner v. Jones, (continued)

The plaintiff in the instant proceeding, in response to the new statute, promptly sought to preserve her remedy by filing her complaint. The Court found to bar the plaintiff's cause of action without reasonable time to respond to the new statutory time requirement fails to meet the standard of due process required in this particular situation. Accordingly, the Court held the ten-year limitation under *W.Va.Code*, 48-7-4(a) cannot be constitutionally applied to the plaintiff's complaint.

PENAL STATUTES

Statutory construction

Generally

State ex rel. Coombs v. Barnette, 368 S.E.2d 717 (1988) (Neely, J.)

See GOOD TIME/ REDUCTION OF SENTENCE Right to credit, (p. 253) for discussion of topic.

PLEA BARGAINING

Breach of agreement

Six v. White, No. 17991 (3/14/88) (Per Curiam)

Petitioner was originally indicted for embezzlement. He then agreed to a plea bargain in which he agreed to plead guilty to receiving stolen property, cooperate with the authorities, be truthful and give testimony. By the terms of the agreement, violation would result in use of all evidence and testimony against the petitioner.

The petitioner pled guilty and the plea bargain was presented to the trial court. Before the trial court accepted the agreement or the plea a presentence report was ordered and petitioner admitted knowledge and participation in other crimes. Following petitioner's testimony before a grand jury, the prosecution moved to set aside the guilty plea.

Petitioner then admitted that he had knowledge of and involvement in crimes which he previously denied. Clearly, the petitioner violated the plea agreement. Both the plea and the plea bargain were rejected and petitioner was indicted on numerous felony counts.

The Court here agreed that no factual basis existed on which to accept the guilty plea. In addition, since petitioner breached the plea bargain, no enforceable agreement existed. Although The Court hinted that petitioner's full performance may have resulted in a writ of mandamus to compel enforcement of the plea bargain, under these facts the trial court was free to exercise discretion and no abuse was found.

Evidence

Sworn statements during plea

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See FALSE SWEARING Evidence, Sworn statements during plea, (p. 250) for discussion of topic.

PLEA BARGAINING

Right to

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He complained that the private prosecutor acted improperly. The private prosecutor had made an offer of life with mercy in a plea bargain. The defendant's family rejected the offer, the private prosecutor communicated that rejection to the prosecuting attorney and he withdrew the offer.

Syl. pt. 9 - A defendant does not have the right, by statute or by constitutional mandate, to have his case disposed of by a plea bargain.

No prosecutorial impropriety was found.

Specific performance

State ex rel. Rogers v. Steptoe, 350 S.E.2d 7 (1986) (Neely, J.)

Petitioner seeks to prohibit his trial for first-degree murder and to enforce a plea bargain.

Petitioner had entered into an agreement with the prosecutor whereby he would plead guilty to second degree murder and testify truthfully at the trial of a co-defendant. In return, the State agreed not to prosecute petitioner for first-degree murder, to make no recommendation regarding sentencing, and to defer sentencing until after the co-defendant's trial. By court order, the trial court judge accepted the plea agreement, found the petitioner guilty of second degree murder, and referred the matter to the probation officer for pre-sentence investigation. Petitioner cooperated with the prosecutor in preparation of his testimony.

Subsequently, the trial court granted a motion by the co-defendant's counsel that petitioner be sentenced before the co-defendant's trial. Petitioner received no notice of the motion nor an opportunity to be heard, and was not sentenced. The prosecutor moved to vacate the conviction on the grounds that the order regarding the sentencing motion invalidated the plea agreement. The motion was granted.

Right to (continued)

Specific performance (continued)

State ex rel. Rogers v. Steptoe, (continued)

Petitioner subsequently testified as a witness for the State at the co-defendant's trial. The jury found the co-defendant not guilty. Petitioner then moved the court to reinstate the plea agreement. The court denied the motion, finding the plea agreement was not in the public interest.

Syl. pt. - "An agreement between a prosecuting attorney and an accused, approved by the court, should be upheld ordinarily when the accused has fulfilled his part of the agreement." Syl. pt. *State v. Ward*, 112 W.Va. 552, 165 S.E. 803 (1932).

The Court found the petitioner relied on the plea agreement to his detriment within the meaning of *State ex rel. Gray v. McClure*, 161 W.Va. 448, 242 S.E.2d 704 (1978) and is entitled to specific performance of the plea agreement. Petitioner's promise to testify truthfully was an integral part of the acts he promised to perform in exchange for dismissal of the first-degree murder charges. In cooperating with the prosecution in the preparation of his testimony, the petitioner conferred upon the State a benefit it would not have received but for his reliance on the court-approved plea agreement. Petitioner undoubtedly provided the prosecution with some insights applicable to his own prosecution.

Principles of double jeopardy bar petitioner's prosecution; prohibition is the appropriate remedy.

Sentencing

State v. Moore, 367 S.E.2d 757 (1988) (Per Curiam)

See GUILTY PLEAS Setting aside, Basis for, (p. 259) for discussion of topic.

PLEA BARGAINING

Setting aside

Double jeopardy

Sellers v. Broadwater, 342 S.E.2d 198 (1986) (Neely, J.)

Petitioner was indicted for four counts of sexual abuse. Prior to the trial of the case, the parties announced they had reached a plea agreement. The two young victims, petitioner's stepdaughters, and their mother, Karen Sellers, attended and participated in the plea bargaining hearing. The agreement was that Petitioner would plead guilt to all counts and be placed on probation. The conditions of probation included that he be prohibited from any contact with the victims and that he receive psychiatric counseling.

After determining that Karen Sellers had no objection to the plea bargain, the trial judge orally approved and accepted the guilty plea. The court subsequently entered an order approving the plea, setting forth suspended sentences and a fine and placing petitioner on probation. On the same day the order was entered, Karen Sellers appeared in court and objected to the plea on the grounds she wanted jury to hear the case. The next day she wrote a letter to the judge explaining her change of heart stating she had been cajoled into accepting the plea agreement and that she had made a mistake.

The circuit judge advised the parties he would forward an order in the case and that a new trial date would be set. Defense counsel filed a motion to consider the order accepting the plea as final, which was denied. The trial court then vacated the order accepting the plea and set the case for trial. By that time, petitioner had attended five counseling and testing appointments pursuant to the terms and conditions of probation.

The issue here was whether principles of double jeopardy preclude a court's setting aside an order accepting a guilty plea pursuant to a court-accepted plea bargain after the defendant has undertaken to fulfill the terms and conditions of the bargained-for sentence.

Syl. pt. 1 - 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 the court; however, in criminal cases where the judgment has been satisfied in whole or in part this power is limited to those cases in which the trial court reduces the penalty imposed, and cases in which the penalty is increased are treated as cases subjecting the accused to double jeopardy.

Setting aside (continued)

Double jeopardy (continued)

Sellers v. Broadwater, (continued)

Here, because the petitioner lived under the standard restrictions applicable to probationers and began the affirmative program of psychological counseling mandated by his plea agreement, execution of his sentence began and double jeopardy principled precluded the trial court's setting aside its original order and subjecting him to trial. Once a final judgment order in a criminal case is entered, unless there is a question of a fraud on the court, double jeopardy principles preclude the court's setting aside the order if the change works to the defendant's detriment.

POLICE OFFICER

Arrest by

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See ARREST Warrantless, Probable cause, (p. 30) for discussion of topic.

Interrogated by

In the Matter of John A.L., 363 S.E.2d 729 (1987) (Per Curiam)

John A.L., a juvenile, was taken to a police station for interrogation and gave a written waiver of rights and a written confession at approximately 3:00 p.m. He was taken before a magistrate sometime after 4:00 p.m. The Court concluded that approximately two to two an one-half hours elapsed from the time of his arrest until he was taken before a magistrate.

The question presented was whether the police erred in not taking John A.L. immediately before a magistrate in compliance with *W.Va.Code*, 49-5-8(d).

Syl. pt. 5 - "The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved." Syl. pt. 3, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Syl. pt. 6 - "Ordinarily the delay in taking accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule." Syl. pt. 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Finding that the confession here was given less than an hour after arrest, the Court held the trial court did not abuse its discretion in admitting the confession into evidence.

In the Matter of Mark E. (1987) (Per Curiam)

See JUVENILES Self-incrimination, Confessions to police, (p. 391) for discussion of topic.

Interrogated by (continued)

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See HARMLESS ERROR Constitutional, Generally, (p. 265) for discussion of topic.

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See RIGHT TO COUNSEL Police interrogation, (p. 500) for discussion of topic.

Effect on waiver of right to counsel

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See RIGHT TO COUNSEL Waiver, Effect of police interrogation, (p. 506) for discussion of topic.

Use of coercion

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 560) for discussion of topic.

Misrepresentation to coerce confession

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See CONFESSIONS Coerced, Misrepresentations by police, (p. 62) for discussion of topic.

POLICE OFFICER

Scope of duty

Remuneration for

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

Appellant was convicted of obtaining money by worthless checks. The warrants for appellant's arrest were served by an off-duty police officer working at the racetrack which sought appellant's arrest. Copies of the warrants were kept at the racetrack offices.

At trial the racetrack manager admitted that he pressed charges for the sole reason of collecting the money owed.

The Court noted that the police officer was engaging in an act (serving warrants) which fell within his official duties while in the employ and under the direction of a private party.

Syl. pt. 3 - It is general law that where a ;public peace officer, within his territorial jurisdiction, undertakes to discharge a duty which comes within the purview of his office, he is presumed to act in his official capacity. For his services in such connection he may have recompense only as fixed by law. A promise of a third person, whether individual or corporate, to remunerate him for such services is against public policy.

See *Ferrell v. State Compensation Commissioner*, 114 W.Va. 555, 172 S.E. 609 (1934).

Syl. pt. 4 - The bribery and corrupt practices act, West Virginia Code, § 61-5A-1 *et seq.*, (1984 Replacement Vol.), provides that a person is guilty of bribery if he offers or confers any pecuniary benefits as consideration for the recipient's official action as a public servant.

PRE-INDICTMENT DELAY

In general

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

Appellant was convicted of six counts of first-degree sexual assault of his granddaughter. He contends on appeal he was prejudiced by the State's delay to timely prosecute since he was not indicted until the January 1983 term of the grand jury and the last offense occurred in February 1982. Appellant contends this delay denied him an effective defense and impaired his right to a fair trial.

Syl. pt. 3 - "The general rule is that where there is a delay between the commission of the crime and the return of the indictment or the arrest of the defendant, the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not *prima facie* excessive." Syl. pt. 1, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

The Court found the eleven month delay was not so long as to be *prima facie* excessive and that the defendant did not show the delay had impaired his ability to present his case.

PRELIMINARY HEARING

Failure to conduct

State v. Hutcheson, 352 S.E.2d 143 (1986) (Miller, C.J.)

Appellant appeals three burglary convictions.

He contends he was not given a preliminary hearing and the trial court erred in failing to quash the indictment on this basis. The Court found it difficult to determine from the record whether he was denied a preliminary hearing altogether, or whether there was a delay in the preliminary hearing in violation of the time constraints of Rule 5(c) of the Rules of Criminal Procedure. The Court found this discrepancy unimportant since the rule applies in either case.

Syl. pt. 4 - Rule 5(c) of the West Virginia Rules of Criminal Procedure requires that where a defendant is in custody following his initial appearance before a magistrate, his preliminary hearing must be held no later than ten days from the date of his initial appearance, unless one of the following exceptions occurs: (1) if the defendant waives the preliminary hearing; (2) if before the date of the preliminary hearing, an indictment or information is filed against the defendant in the circuit court; (3) if, with the consent of the defendant and upon a showing of good cause, the preliminary hearing date is extended one or more times by the magistrate; or (4) if, in the absence of the defendant's consent, a circuit court judge extends the time for preliminary hearing only upon a showing that extraordinary circumstances exist and that the delay is indispensable to the interest of justice.

Syl. pt. 5 - The time periods contained in Rule 5(c) of the West Virginia Rules of Criminal Procedure are mandatory and, in the absence of meeting any of the exceptions contained in the rule, the appropriate remedy where the time periods for holding a preliminary hearing have lapsed is for the defendant to move to dismiss the arrest warrant and to be released from custody. Such a dismissal of the charge, however, does not foreclose the State from initiating a new charge.

Syl. pt. 6 - The delay in holding or failure to hold a preliminary hearing will not vitiate an indictment.

The record showed the defendant was arrested on July 14, 1983, and was held in custody from that date up to and including the trial because of his inability to make bond. Even assuming a preliminary hearing was held on August 3, 1983, more than ten days elapsed from the date of his arrest; this exceeds the ten-day limitation set out in Rule 5(c), where a defendant is in custody.

Failure to conduct (continued)

State v. Hutcheson, (continued)

The defendant did not move to have the charges dismissed and for his release from custody for the failure to hold a timely hearing. Prior to trial and after the return of the indictment he moved to quash the indictment. The Court found authorities are uniform that the delay in holding or failure to hold a preliminary hearing will not vitiate an indictment. The Court reached virtually the same result by holding that the return of an indictment dispenses with the necessity of a preliminary hearing. The defendant is not entitled to have the indictment dismissed as a result of delay or failure to hold the preliminary hearing.

PRISON/JAIL CONDITIONS

Cruel and unusual punishment

Facility Review Panel v. Holden, 356 S.E.2d 457 (1987) (Per Curiam)

This mandamus proceeding was brought in behalf of inmates of the Doddridge County Jail seeking closure of the jail until conditions meet minimal constitutional and statutory standards.

The Court issued a rule to show cause why a writ of mandamus directing respondents to cure deficiencies in the jail should not be awarded. Respondents appeared and answered by listing certain steps being taken to remedy some of the jail conditions, as well as plans for future improvements. Respondents did not contest any of the factual representations concerning conditions in the jail.

(See case for jail conditions)

Respondents contend lack of funds restrict their ability to correct deficiencies. The Court notes that one option respondents may consider is permanently closing the jail and transporting inmates to other county jails.

The Court ordered the Doddridge County Jail closed until the facility meets the minimum constitutional and statutory standards; in the meantime, inmates are to be incarcerated at suitable facilities in adjoining counties.

The Court directed respondents to submit to relator's counsel within 60 days, a detailed plan of improvements including a timetable for implementation.

Closing the prison limitations

Facility Review Panel v. Holden, 356 S.E.2d 457 (1987) (Per Curiam)

See PRISON/JAIL CONDITIONS Cruel and unusual punishment, (p. 441) for discussion of topic.

PRISON/JAIL CONDITIONS

In general

Crain v. Bordenkircher, 342 S.E.2d 422 (1986) (Miller, C.J.)

In this appeal by inmates at the West Virginia Penitentiary at Moundsville, the Court was asked to determine if the State's Compliance Plan approved by a special judge comports with the original findings and orders of the judge who heard the case. The Court found it did not. (See case for specifics).

Medical care

State ex rel. Burdette v. Hey, et al., No. 17921 (7/17/87) (Per Curiam)

See MEDICAL CARE Right to, (p. 415) for discussion of topic.

Overcrowding

Validity of executive order

State ex rel. Dodrill v. Scott, 352 S.E.2d 741 (1986) (Brotherton, J.)

Petitioner sought a writ of prohibition to prohibit the respondent circuit court judge from ruling on the validity of an executive order and from finding the petitioners in contempt of court for complying with an executive order refusing to admit inmates to the Huttonsville Correctional Center.

A Governor's executive order which directs action on the part of the West Virginia Department of Corrections that is contrary to specific statutory mandates is invalid.

Remedy

Facility Review Panel v. Holden, 356 S.E.2d 457 (1987) (Per Curiam)

See PRISON/JAIL CONDITIONS Cruel and unusual punishment, (p. 441) for discussion of topic.

PRIVILEGES

Attorney-client

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition which reversed his conviction for first-degree murder.

At defense counsel's request, defendant prepared certain papers indicating his state of mind. The prosecution's psychologist testified using these papers and the defendant's psychologists used them to arrive at their conclusions. In addition, the prosecution cross-examined the defense psychologists with the aid of the material. These papers were held protected from discovery by the Fourth Amendment and the testimony excludible.May 31, 2001

In addition, defendant claimed that his Fifth Amendment right against self-incrimination was violated by being compelled to produce the documents and that cross-examination revealed privileged communications.

Syl. pt. 11 - The attorney-client privilege originated at common law, and has its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.

Syl. pt. 12 - The attorney-client privilege may be waived if disclosure of privileged communications is made so as to insure sound legal advice or advocacy.

Here, the Court noted that the defendant agreed to the examination which led to the production of the documents at issue. The revelations contained therein were not compelled. Although the attorney-client privilege normally embraces communications with experts, it was waived here. See *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979). Voluntary testimony by the psychologist operated as a waiver; and that waiver extended to all privileged communication. See *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975) and *State v. Kociolek*, 129 A.2d 417, 23 N.J. 400 (1957).

Attorney-client (continued)

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See PRIVILEGES Attorney-client, (p. 443) for discussion of topic.

PROBATION

Conditions

Costs of room and board

State v. Chanze, 359 S.E.2d 142 (1987) (Per Curiam)

See SENTENCING Costs of prosecution, (p. 587) for discussion of topic.

Costs of room and board in jail while awaiting trial

State v. St. Clair, 355 S.E.2d 418 (1987) (Brotherton, J.)

Appellants challenge the legality of taxing them with the costs of room and board in the county jail while awaiting trial.

Syl. pt. - Room and board in the county jail is a public charge on the county, and may not therefore be collected from a convicted criminal as a cost incident to the prosecution in the absence of statutory authority.

Costs of prosecution

State v. Chanze, 359 S.E.2d 142 (1987) (Per Curiam)

See SENTENCING Costs of prosecution, (p. 587) for discussion of topic.

Court costs and attorney fees

Fox v. State, 347 S.E.2d 197 (1986) (McGraw, J.)

See PROBATION Conditions, Restitution, (p. 446) for discussion of topic.

Conditions (continued)

Restitution

Fox v. State, 347 S.E.2d 197 (1986) (McGraw, J.)

Syl. pt. 1 - A condition of probation which requires an offender to pay restitution or court costs and attorney fees is unreasonable if it is beyond the offender's ability to pay without undue hardship to himself or his family.

Syl. pt. 2 - An inquiry into the offender's ability to pay is statutorily required before the court may condition probation on reimbursement of the costs of the services rendered a defendant under the public defender law. *W.Va.Code*, § 29-21-17(d) (1985 Cum. Supp.).

Syl pt. 3 - Before probation may be conditioned upon the payment of restitution, the sentencing court must conduct a hearing and make a finding on the record with respect to the extent of the loss suffered by the aggrieved party and the ability of the offender to pay without undue hardship to himself or his family.

Syl. pt. 4 - When the sentencing court believes that restitution may be an appropriate condition of probation, it should direct the probation officer to include in the presentence investigation and report information concerning such matters as the nature and extent of the loss caused by the offender, the portions of the loss attributable to him when there are co-defendants and the offender's financial condition and employment prospects. This information should be disclosed to the offender prior to sentencing and, at the sentencing hearing, the court should invite the offender to comment upon the presentence report and to state whether he will be able to pay restitution. The offender then has the burden of advising the court of any inaccuracies in the presentence report or of any reason that he would be unable to make restitution, presenting such evidence as the court, in its discretion, may deem relevant. After all the evidence is heard, it is incumbent on the sentencing court to enter in the record findings of fact supporting its decision as to the propriety, amount and method of paying restitution.

State v. Short, 350 S.E.2d 1 (1986) (Brotherton, J.)

See *EX POST FACTO* Victim protection act, Restitution as condition of probation, (p. 246) for discussion of topic.

PROBATION

Eligibility

State ex rel. Whitlow v. Frazier, No. 17509 (7/17/87) (Per Curiam)

After being found guilty of delivery of a controlled substance, appellant was denied probation by respondent, Judge John R. Frazier. She contended on petition for writ of habeas corpus that respondent should have granted probation and that respondent has shown a consistent pattern of denying probation to drug offenders.

In support of her argument appellant claimed that the sale was an isolated incident, that her prior record consisted of two dismissed misdemeanor offenses and that the police report contradicted the Victim Impact Statement of the investigating detective. The circuit court found that the sale was not casual but that there was no substantial likelihood that appellant would commit any more offenses.

"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). Syl. pt. 3, *State v. Lott*, 170 W.Va. 65, 289 S.E.2d 739 (1982).

The Court also noted that the granting of probation rests within the discretion of the trial judge. *State v. Miller*, 172 W.Va. 718, 310 S.E.2d 479, at 481 (1983). See also, *State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696, at 700 (1986); *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268, at 276 (1983).

Here, no abuse of discretion was found.

Aggravated robbery

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. A special jury interrogatory failed to find appellant to have committed the robbery by the use, presentment or brandishing of a firearm. An affirmative finding would have prevented probation by the terms of *W.Va.Code*, 62-12-2(b) and (c). Further, the appellant had not been convicted of a previous felony within five years of this conviction. (*W.Va.Code*, 62-12-2(a) would make her ineligible in that case).

PROBATION

Eligibility (continued)

Aggravated robbery (continued)

State v. Massey, (continued)

Syl. pt. 9 - A person convicted of aggravated robbery under *W.Va.Code*, 61-2-12, is eligible to be considered for probation under *W.Va.Code*, 62-12-2, unless there has been a specific finding of the use of a firearm under *W.Va. Code*, 62-12-1(c)(1) (1981), or the five-year felony bar under *W.Va.Code*, 62-12-2(a) (1981), applies.

See *State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696 (1986).

Ineligible

Use of a firearm in commission of a felony

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

Relator argues the court should not have submitted an interrogatory to the jury asking them whether the defendant "committed a felony with the use, presentation or blandishment of a firearm." The Court found relator was a principal in the first-degree. The victim testified that all three assailants sexually assaulted her, and that a gun was held to her heat *at* all times during the assaults. The Court found *W.Va.Code*, 62-12-1(b) (1981) does not require there be evidence that each principal in the first-degree involved in a felony held a gun at all times, and that as long as there is evidence from which the jury can logically infer that the principal used a gun in the commission of the felony, the principal is subject to the provisions of *W.Va.Code* 62-12-2(b) (1981).

Revocation

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See SENTENCING Right of allocution, (p. 592) for discussion of topic.

Revocation (continued)

Due process

State v. Minor, 341 S.E.2d 838 (1986) (Per Curiam)

The failure of the circuit court to state the reasons for its decision in this case was clearly error. The Court remanded the case, directing the lower court to give due consideration to any mitigating circumstances in the appellant's favor and admonishing that probation should not be revoked for minor technical violations of the conditions of probation. The Court found the lower court's decision should be accompanied by proper findings.

Failure to pay court costs, attorney fees, restitution

State v. Minor, 341 S.E.2d 838 (1986) (Per Curiam)

The issue here is whether the circuit court erred in revoking the appellant's probation for her failure to make restitution.

The Court found the circuit court was clearly wrong in finding that the appellant's failure to make restitution was contumacious. Appellant's testimony as to the reasons for her failure to make restitution payments was uncontradicted and was not inherently incredible. There was no evidence that she incurred additional expenses or sought unemployment as a means of evading this condition of her probation. The Court found she reported her financial problems and changes in circumstances to her probation officer.

The State did not meet its burden of showing by a preponderance that the appellant's failure to pay restitution was contumacious and accordingly, it was impermissible for the circuit court to revoke probation on that ground. The case was remanded since the trial court failed to state reasons for its decision in this case.

Revocation (continued)

Grounds for

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

Appellant was convicted of breaking and entering and given three years probation. Following his subsequent conviction and sentencing in a different circuit for aggravated robbery, appellant was arrested for violation of his probation and detained in the county jail of the county where he was originally convicted.

At the revocation hearing defense counsel's motion to dismiss for lack of a preliminary hearing was denied and, based upon the subsequent conviction, appellant's probation was revoked. At the same hearing the trial court sentenced appellant to serve one to ten years for the original charge, the sentence to run consecutively with the subsequent sentence for aggravated robbery.

Appellant claimed denial of due process because of the lack of a transcript of the subsequent conviction.

Although acknowledging the necessity of a transcript upon appeal, the Court held that a probation hearing is not part of a criminal prosecution and therefore the same rights do not attach. 'Because a probation revocation proceeding does not involve a determination of the probationer's guilt or innocence of a subsequent crime, it follows that the mere fact of a criminal conviction, after a trial at which the probationer was entitled to the full panoply of rights guaranteed a criminal defendant, is, in and of itself, sufficient evidence of a probation violation to warrant revocation of probation." *United States v. Feinberg*, 631 F.2d 388 (5th Cir. 1980); *People v. Robinson*, 271 P.2d 872 (1954); see, generally Annot., 76 A.L.R.3d 588 (1977).

Further, the Court held that a probationer may not use a revocation hearing to attack the validity of an intervening conviction. *Reese v. United States Board of Parole*, 530 F.2d 231 (9th Cir.) *cert. denied*, 97 S.Ct. 525 (1976); *Morrissey v. Brewer*, 92 S.Ct. 2593, at 2604 (1972).

Syl. pt. 4 - A probation revocation proceeding is not intended to serve the function of an appeal from an intervening criminal conviction.

Revocation (continued)

Grounds for (continued)

State v. Holcomb, (continued)

"Where revocation is based solely on a subsequent conviction of a criminal offense, the probationer should be entitled to attack the conviction of the grounds that he was not the person convicted, that the offense of which he was convicted was other than the one specified as a probation violation, or that the probation violation report or petition is inaccurate or contains misinformation." See *In re Edge*, 108 Cal. Rptr. 757 (1973).

Right to hearing

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

Appellant was convicted of breaking and entering and given three years probation. Following his subsequent conviction and sentencing in a different circuit for aggravated robbery, appellant was arrested for violation of his probation and detained in the county jail of the count where he was originally convicted.

At the revocation hearing defense counsel's motion to dismiss for lack of a preliminary hearing was denied and, based upon the subsequent conviction, appellant's probation was revoked. At the same hearing the trial court sentenced appellant to serve one to ten years for the original charge, the sentence to run consecutively with the subsequent sentence for aggravated robbery.

Appellant claimed that the trial court denied him due process in its failure to give him a preliminary revocation hearing.

Syl. pt. 1 - The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States requires a probationer who is arrested for violating the conditions of his probation to be afforded both a prompt preliminary hearing and a final revocation hearing. (See *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976)). See *Ganon v. Scarpelli*, 93 S.Ct. 1756 (1973); *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972).

Revocation (continued)

Right to hearing (continued)

State v. Holcomb, (continued)

Syl. pt. 2 - In the absence of a showing of prejudice to the substantial rights of the probationer, an order revoking probation will not be reversed for failure to hold a prompt preliminary revocation hearing. (See *State v. Dawson*, 168 W.Va. 101, 282 S.E.2d 284 (1981)); *State v. Goff*, 168 W.Va. 285, 284 S.E.2d 362 (1981).

Here, the Court found no prejudice; appellant was given adequate notice and an opportunity to present evidence.

Right to transcript

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See PROBATION Revocation, Grounds for, (p. 450) for discussion of topic.

Use of a firearm

State v. Pannell, 330 S.E.2d 844 (1985) (Brotherton, J.)

Appellant was convicted of attempted murder. After instructions and arguments to the jury, the trial court submitted an interrogatory to the jury asking it to find whether the appellant used a gun, pursuant to *W.Va.Code*, 62-12-2(c)(1)(ii) (1984). The jury returned a verdict which read "Talbert Pannell guilty in the second degree with a strong recommendation of probation." The interrogatory was returned unanswered. The court subsequently made its own finding that the appellant had used a firearm in the commission of the crime, and held appellant was ineligible for probation.

Syl. pt. 4 - West Virginia Code, § 62-12-2(c)(1) (1984) does not allow the trial court to make its own finding that the defendant used a firearm, where the matter was tried before a jury.

The Court vacated the sentence and remanded the case for a new sentencing hearing, taking into consideration the possibility of probation.

PROBATION

Violation of

Sentencing

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

Appellant complained of the consecutive running of his sentence upon revocation of probation with a sentence on an offense committed during probation. The original offense, later revocation hearing, and sentencing were before a different court than the subsequent offense committed during probation. He maintained that *W.Va.Code*, 61-11-21 (1984 Replacement Vol.) confers exclusive jurisdiction regarding consecutive sentencing upon the court before which the subsequent offense was heard.

The Court held the statute irrelevant to the case. See *State ex rel. Yokum v. Adams*, 145 W.Va. 450, 114 S.E.2d 892 (1960) (sentence pronounced for first offense before sentence pronounced for second offense).

Syl. pt. 5 - In the absence of statutory authority to the contrary, a circuit court has the power to order a sentence imposed or executed for violation of probation to run consecutively with a sentence imposed by another court for an intervening crime. (*Yokum*, *supra*, at 896).

The Court rejected appellant's double jeopardy argument that allowing a different court to impose consecutive terms results in an increased punishment for the same offense. The Court applied the rule in *Adams v. Circuit Court of Randolph County*, 173 W.Va. 448, 317 S.E.2d 808 (1984), that the offenses are separate and distinct; thus no double punishment occurs.

PROHIBITION

Control of proceedings in magistrate court

State ex rel. King v. MacQueen, No. 17294 (11/19/86) (McGraw, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, Failure to honor request for blood test, (p. 150) for discussion of topic.

Scope

Farber v. Douglas, 361 S.E.2d 456 (1985) (Miller, C.J.)

Applies standard set forth in Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

The Court found prohibition is not an appropriate or necessary remedy under the circumstances of this case.

Transfer of juvenile to adult jurisdiction

Previous successful appeal of transfer

State ex rel. Vance v. Maynard, 351 S.E.2d 437 (1986) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Previous successful appeal of transfer, (p. 400) for discussion of topic.

PROPORTIONALITY

Generally

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

Appellant was sentenced to the State Penitentiary for from five to eighteen years on charges of non-aggravated robbery. His sentence came upon resentencing following time spent at the Anthony Center (youth correctional institution). On appeal he complained that the sentence was grossly disproportionate to the crime committed.

Syl. pt. 2 - "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." Syl. pt. 4 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

See also, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982) and *State v. Houston*, 166 W.Va. 202, 273 S.E.2d 375 (1980).

State v. Oxier, 369 S.E.2d 866 (1988) (Per Curiam)

In 1966 appellant broke into a store and stole miscellaneous items worth $65.00. He was not armed and no one was present. He was convicted of breaking and entering.

Eleven years later he stole $312.00 worth of copper wire and, in a separate event, a canoe worth $455.00. He was convicted of grand larceny and breaking and entering, respectively.

Finally, on December 13, 1983, he broke into another store. The appellant was tried and convicted of breaking and entering. The prosecuting attorney filed a recidivist information showing appellant's prior convictions. Appellant was found to have committed the previous crimes and was sentenced to life imprisonment. (A second proceeding, necessitated by prior error, resulted in the same sentence). He argued on appeal that the sentence was disproportionate to the character and degree of his offense.

PROPORTIONALITY

Generally (continued)

State v. Oxier, (continued)

Syl. pt. - "Article III, Section 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.'" Syllabus point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

The Court noted that a number of factors are relevant to proportionality, including the nature of the offenses. See *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978) and *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974). The potential for violence was especially important. See *Griffith v. Warden*, 517 F.2d 756 (4th Cir. 1975), *cert. denied*, 423 U.S. 990, 96 S.Ct. 402, 46 L.Ed.2d 308 (1975); and *State v. Vance*, *supra*.

The Court affirmed appellant's life sentence.

Appropriateness of sentence

State v. Buck, 361 S.E.2d 470 (1987) (Per Curiam)

Appellant was sentenced to seventy-five years for aggravated robbery. This case is the third appeal from that judgment. In the first appeal, Buck raised the questions of Constitutional proportionality of the sentence and whether the sentence violated the Constitutional prohibitions against cruel and unusual punishment. In the second case, the Court concluded that the sentence was disparate and violated proportionality. See *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982) and *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984).

The trial court, upon the second remand, reduced the sentence to thirty years. Appellant then challenged the proportionality of that sentence, in light of his co-defendant's one-year sentence.

Appropriateness of sentence (continued)

State v. Buck, (continued)

Syl. pt. 1 - "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III § 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syl. pt. 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

The evidence adduced at trial showed that appellant was the instigator of the crime and struck the victim with a tire iron. Appellant's co-defendant testified against the appellant and pled guilty to a reduced charge of grand larceny (receiving the one-year sentence appellant relied on to show disproportionality).

Syl. pt. 2 - "Disparate sentences for co-defendants are not per se unconstitutional. Courts consider many factors such as each co-defendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If co-defendants are similarly situated, some courts will reverse on disparity of sentence alone." Syl. pt. 2, *State v. Buck*, 173 W.Va. 243, 314 S.E.2d 406 (1984).

Appellant complained that the sentencing court did not measure his sentence against those given in other states for more serious or similar offenses. The Court noted that several jurisdictions allow maximum penalties in excess of thirty years for the crime of aggravated robbery. (The Court examined twenty-eight jurisdictions upon the second appeal). The Court noted the permanent disability suffered by the victim and the general attitude toward this crime in other jurisdictions and approved the thirty year sentence.

Consecutive sentences

State ex rel. White v. White, No. 17918 (10/22/87) (Per Curiam)

See SENTENCING Consecutive sentences, (p. 586) for discussion of topic.

PROPORTIONALITY

Disparate sentences

State v. Buck, 361 S.E.2d 470 (1987) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, (p. 456) for discussion of topic.

Recidivism

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

Appellant contended that his life sentence for recidivism is disproportionate to the severity of the offenses.

Syl. pt. 3 - "The appropriateness of a live recidivist sentence under our constitutional proportionality provision found in Article III, § 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of theses offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute." Syl. pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

See also, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Here, the Court found that the lack of violence in appellant's most recent conviction and the sixteen years since appellant's one violent felony (with no showing of a propensity toward violence since that conviction) warranted reversal of his life sentence.

PROPORTIONALITY - PUNISHMENT TO THE OFFENSE

Aggravated robbery

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends his sentence of 60 years for aggravated robbery was disproportionate to the crime. The Court found the appellant set forth no mitigating factors which would warrant interference with the court's sentence.

State v. Glover, 355 S.E.2d 631 (1987) (McHugh, J.)

Appellant was convicted of aggravated robbery and malicious assault. He was sentenced to seventy-five years for the aggravated robbery conviction. He contends the sentence was disproportionate to the offense.

Syl. pt. 5 - "In determining whether a given sentence violates the proportionality principle found in Article III, Section 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." Syl. pt. 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The Court set forth two tests in *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983) to determine whether a sentence is disproportionate. The first "is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society." The second is:

> In determining whether a given sentence violates the proportionality principle found in Article III, Section 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.

Syl. pt. 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Aggravated robbery (continued)

State v. Glover, (continued)

In this case, the Court found the record indicated Appellant has a felony record going back to the 1960's, that he committed two previous malicious assaults and has a conviction of arson and receiving stolen property, that he spent time in the penitentiary for these offenses, that the presentence report recommended the maximum sentence due to his history of violence, and that the victim nearly died from the assault. The Court found the sentence was not disproportionate to the offense under either the subjective or objective test set forth in *Cooper*.

Aggravated robbery and kidnaping

State v. Black, 338 S.E.2d 370 (1985) (Per Curiam)

Appellant was convicted of kidnaping and aggravated robbery. He was sentenced to a 15 and a 20 year term, to run consecutively.

The Court found under the circumstances of this case, the sentences were not disproportionate or improper. The trial court found the defendant was actively involved in the commission of the crimes charged, that appellant had been sent to a forestry camp in 1979 and the personnel at the camp "couldn't do anything with [him] and wanted [him] transferred out," that there were about thirty bad check charges pending against the defendant, that he had been charged with fifty-two misdemeanors and had received twelve misdemeanor convictions, that five felony charges had been lodged against him, that there were reports that the defendant hd been involved in attempted break-outs from jail. The Court found the defendant was not a candidate for probation because of past drug abuse and alcoholism and lack of remorse. It appeared the sentence imposed on the co-defendant was identical. The Court found no error.

PROPORTIONALITY - PUNISHMENT TO THE OFFENSE

Causing a death while driving under the influence

State v. Nester, 336 S.E.2d 187 (1985) (Brotherton, J.)

Appellant was convicted of causing a death while driving under the influence. He was sentenced to one year in the county jail (being eligible for probation in 90 days and with credit for 25 days already served) and a $500 fine. He contends the sentence was unconstitutional. The Court found the sentence was not unconstitutionally severe.

PROSECUTING ATTORNEYS

Appeal by

State v. Jones, 363 S.E.2d 513 (1987) (Miller, J.)

See APPEAL State's right to, (p. 23) for discussion of topic.

Conduct at trial

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 106) for discussion of topic.

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See HARMLESS ERROR Non-constitutional, Reputation evidence, (p. 270) for discussion of topic.

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

See PROSECUTING ATTORNEYS Duties, Generally, (p. 468) for discussion of topic.

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Evidence, Refusal to take breathalyzer test, (p. 162) for discussion of topic.

Comments during closing argument

State v. Billups, 368 S.E.2d 723 (1988) (Per Curiam)

Appellant was convicted of aggravated robbery. During closing argument the prosecuting attorney said of the appellant ". . . you haven't heard him deny that he was there, have you? And you haven't heard him deny that the money was on him, have you?

State v. Billups, (continued)

Syl. pt. 1 - "Remarks made by the State's Attorney in closing argument which made specific reference to the defendant's failure to testify, constitute reversible error and defendant is entitled to a new trial." Syllabus Point 5, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).

The Court noted that commentary on the lack of rebuttal evidence is permissible. *State v. McClure*, 163 W.Va. 33, 253 S.E.2d 555 (1979); Syl. pt. 4, *State v. Angel*, 173 W.Va. 620, 319 S.E.2d 388 (1984); and *State v. Bogard*, 173 W.Va. 118, 312 S.E.2d 782 (1948). However, when the commentary focuses on the defendant's personal failure to testify, it is impermissible. See *State v. Clark*, 170 W.Va. 224, 292 S.E.2d 643, 646-47 (1982).

State v. Davis, 357 S.E.2d 769 (1987) (Miller, J.)

Appellant was convicted of attempted arson of the Preston County jail. During closing argument, the prosecuting attorney noted that toxic fumes might have filled the jail had appellant's alleged plan succeeded.

Although no testimony had been offered regarding toxic fumes the remarks were held not sufficiently prejudicial to warrant reversal.

Syl. pt. 8 - "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. 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant contended that the prosecuting attorney made prejudicial remarks to the jury during summation. Defense counsel failed to object.

State v. Dudley, (continued)

The Court held that failure to object resulted in waiver of any error (see *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956)). Also, upon review of the record the Court noted that no clear prejudice appeared. (See *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982 and *State v. Barker*, 168 W.Va. 1, 281 S.E.2d 142 (1981)).

State v. Harper, 365 S.E.2d 69 (1987) (McHugh, J.)

During closing argument at appellant's trial for aiding and abetting murder by lying in wait, the prosecuting attorney claimed his witnesses were told the truth while the defendant's witnessed lied; in addition, he suggested that the members of the jury were his clients and that the victim could not testify.

Syl. pt. 6 - "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. 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

Here, the Court did not find prejudice sufficient for reversal.

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

During closing argument the prosecuting attorney commented on appellant's failure to rebut certain prosecution testimony.

Syl. pt. 3 - "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. 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

See also, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979) and *State v. Sparks*, 171 W.Va. 320, 298 S.E.2d 857 (1982).

PROSECUTING ATTORNEYS

Conduct at trial (continued)

Comments during closing argument (continued)

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

Appellant was convicted of unlawful wounding. At trial the prosecuting attorney referred to appellant as a "coward" during closing argument.

No objection was made to the comment. Appellant claimed error in the trial court's refusal of his motion for mistrial.

Syl. pt. 3 - "'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.' Point 6, syllabus, *Yuncle v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945)." Syl. pt. 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956).

Manifest necessity

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See DOUBLE JEOPARDY Mistrial, (p. 144) for discussion of topic.

Disqualification

Chapman v. Summerfield, No. 17911 (11/17/87) (Per Curiam)

Relator, charged with "murder" petitioned for a writ of prohibition based on alleged conflicts of interest. The prosecuting attorney's office had employed an attorney whose firm had previously represented the relator in a property dispute and who had himself represented the relator in the initial stages of this prosecution.

In granting the writ, the Court held that a prosecutor has a duty to recuse himself when he acquires knowledge of facts by virtue of his professional relations with the accused; if he fails to do so, then the trial court has a duty to remove him. Syllabus Point 5, *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Disqualification (continued)

Farber v. Douglas, 361 S.E.2d 456 (1985) (Miller, C.J.)

It is contended the prosecutor should have disqualified himself as a matter of law from seeking this indictment because he has a direct interest in the criminal charge, which arose out of a civil action in which he was a party.

Syl. pt. 2 - It is generally held that a prosecutor is disqualified from acting in a criminal proceeding where he has a personal or pecuniary interest in the proceeding that conflicts with his duties as a public prosecutor.

The prosecutor was a party to the underlying civil suit filed by the relator against the county commissioners. Even though the prosecutor was dropped as a named party under an agreement that he would not represent the county commissioners, this action did not change his interest in a law office arrangement with the commissioners, a par of the subject matter of the civil action.

Furthermore, the actual event leading to the indictment was a motion by the relator to have the presiding judge in the civil action to disqualify himself as to reconsideration of his earlier decision not to appoint a special prosecutor to investigate the conduct of the prosecutor. The relator, as the attorney representing taxpayers, executed an affidavit attached to his motion to disqualify in which he stated the motion was made in good faith and there were "ample facts of record" to support the allegations made in the motion. The false swearing indictment was based upon this sworn affidavit.

The Court concluded as a matter of law the prosecutor should have disqualified himself from seeking the false swearing indictment against the relator. His presence before the grand jury in this matter was therefore unauthorized and vitiates the indictment.

Nicholas v. Sammons, 363 S.E.2d 516 (1987) (Miller, J.)

Relator was charged with obtaining money from a local bank by false pretenses. He sought to disqualify the prosecuting attorney because the attorney had represented the bank in various civil matters, had outstanding loans from the bank and was a depositor. In addition the attorney represented a client in a civil action against the relator.

Disqualification (continued)

Nicholas v. Sammons, (continued)

The prosecuting attorney answered that the civil action in question was dismissed four months prior to the criminal indictment and had no relation to either the bank or to petitioner's alleged wrongdoing. Further, he stated that his representation of the bank never included any transaction between the bank and the relator and that he has not performed any work for the bank or title searches for the bank's customers since the indictment in this case.

Syl. pt. 1 - Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

(See generally, Annot. 31 A.L.R. 3d at 963, 978).

Syl. pt. 2 - "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." Syllabus Point 4, in part, *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981).

Syl. pt. 3 - It is generally held that past representations of a victim on civil matters unrelated to the criminal charges involving the defendant ordinarily will not disqualify a prosecutor. (Citations omitted).

Here, the Court held the attorney's past representation to be insufficient for disqualification.

PROSECUTING ATTORNEYS

Disqualification (continued)

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

Appellant was convicted of first-degree murder. He asserted on appeal that the prosecuting attorney should have been disqualified and complained of prosecutorial overreaching and abuse, primarily from publicity during and after appellant's first trial, allegedly generated by the prosecuting attorney to enhance his chances for election. A mistrial was declared following the prosecuting attorney's remarks to the jury. Following a change in venue a second trial resulted in a conviction.

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. . . ." Syl. pt. 4, in part, *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981).

Syl. pt. 5 - Where a prosecutor, while involved in his election campaign, made pretrial statements regarding the status of a criminal case and also by newspaper advertisements responded to his opponent's newspaper advertisements which questioned acts of the prosecutor in the conduct of that case, absent evidence that the defendant was prejudiced by the prosecutor's conduct, that conduct alone may not necessarily disqualify the prosecutor in that case.

Here, the Court found the prosecuting attorney's conduct ill- advised but not prejudicial.

Duties

Generally

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

Appellant was convicted of forgery. At trial defense counsel suggested that the jury could acquit the appellant even if they thought him to be guilty. In response, the prosecuting attorney expressed his personal opinion that appellant's witnesses were not credible.

State v. Grubbs, (continued)

Syl. pt. 2 - "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 Point 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 3 - "It is improper for a prosecutor in this State 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 the accused . . . .' ABA Code DR7-106(C)(4) in part." Syllabus Point 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

Syl. pt. 4 - "The plain error doctrine of *W.Va.R.Crim.P.*52(b), whereby the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court, is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result." Syllabus Point 2, *State v. Hatala*, 176 W.Va. 435, 345 S.E.2d 310 (1986).

Syl. pt. 5 - We do not countenance the invited response rule. If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks. A later attempt to retaliate by way of improper argument will not be excused under the invited response rule.

Here, since neither party objected at trial, the Court attempted to use the plain error doctrine to reverse but held that the test was not met. Although condemning the prosecuting attorney's remarks, the Court concluded that the entire record showed an acceptable performance.

Duties (continued)

Debt collection

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

Appellant was convicted of obtaining money by worthless checks. Following arrest the prosecuting attorney agreed to forego prosecution if appellant made regular monthly payments to erase the bad debt. Appellant failed to do so and prosecution resulted.

The Court noted that "the threat of prosecution for failure to make the required payments smack of the generally discredited practice of imprisonment for debts." See 30 Am.Jur. 2d Executions § 865 (1967). Further, the Court noted that "[t]he prosecuting attorney has a duty to vindicate the public's constitutional right of redress for a criminal invasion of rights." Syl. pt. 6, *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 278 S.E.2d 624 (1981); and "when (the prosecutor) has information of the violation of any penal law." ..., he shall institute and prosecute all necessary and proper proceedings against the offender. *W.Va.Code*, § 7-4-1 (1984 Replacement Vol.).

A prosecutor may exercise some discretion when he is doubtful of guilt or when the case cannot be proven; otherwise, his duty to prosecute is mandatory and nondiscretionary. See *Skinner*, *supra*, at 631; *Ginsberg v. Naum*, 173 W.Va. 510, 318 S.E.2d 454, at 455-56 (1984); and *State ex rel. Hamstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984).

Syl. pt. 5 - The prosecutorial services of the state are not for private use in civil debt collection.

Syl. pt. 6 - Prosecuting attorneys in this state are not authorized to divert cases prior to bringing formal charges where there is probable cause to believe the accused is guilty.

Conviction reversed.

PROSECUTING ATTORNEYS

Failure to disclose defendant's statement

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

See DISCOVERY Failure to disclose, Defendant's statements, (p. 120) for discussion of topic.

Failure to disclose documents

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

See HARMLESS ERROR Non-constitutional, Failure to disclose documents, (p. 268) for discussion of topic.

Failure to disclose witness' criminal record

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

See WITNESSES Disclosure of criminal record, (p. 657) for discussion of topic.

Intimidating witnesses

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

Appellant was convicted of nighttime burglary and petit larceny in the theft of a postal money order. Following a plea bargain, appellant testified at his guilty plea hearing concerning the factual basis of his plea. The trial court then rejected the plea. At trial the court warned appellant that he was subject to perjury charges if he contradicted his prior testimony. Appellant did not testify.

Appellant claimed that his right to due process was violated due to the effective foreclosure of his testimony at trial.

Intimidating witnesses (continued)

State v. Bennett, (continued)

Syl. pt. 2 - "Admonitions by the prosecutor to a potential defense witness to refrain from lying, combined with threats of prosecution as an accomplice and for perjury, which result in the witness' assertion of his right against self-incrimination effectively deprive a criminal defendant of due process of law by denying him the opportunity to present witnesses in his own defense." Syllabus, *State v. Goad*, 177 W.Va. 582, 355 S.E.2d 371 (1987).

Here, the Court refused to apply *Goad*, *supra*, to the judge's actions. The trial court repeatedly stated that it was not trying to discourage the appellant from testifying. Appellant was given the opportunity to consult with counsel before declining to testify.

Power to divert

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

See PROSECUTING ATTORNEYS Duties, Debt collection, (p. 470) for discussion of topic.

Plea bargaining

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See PLEA BARGAINING Right to, (p. 431) for discussion of topic.

Power to grant immunity

State v. Miller, 363 S.E.2d 504 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. He contended on appeal that the prosecution granted immunity to two state's witnesses without court approval. At trial, defense counsel requested a writ of mandamus to compel the prosecution to present the evidence against the witnesses to a grand jury. The prosecution then belatedly moved to grant them immunity, which motion was granted.

Power to grant immunity (continued)

State v. Miller, (continued)

Syl. pt. 6 - "Most courts have held that in the absence of some express constitutional or statutory provision, a prosecutor has no inherent authority to grant immunity against prosecution." Syllabus Point 16, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

Here, the Court ruled that the trial court's grant of immunity rendered the issue moot.

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

Appellant was convicted of first-degree murder. The primary prosecution witness was granted immunity by the prosecutor following his confession that he had actually committed the murder at appellant's instigation.

Syl. pt. 2 - "Most courts have held that in the absence of some express constitutional or statutory provision, a prosecutor has no inherent authority to grant immunity against prosecution." Syl. pt. 16, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

Syl. pt. 3 - A prosecution witness who has purportedly been afforded immunity from prosecution pursuant to *W.Va.Code*, 57-5-2 [1931], and who testifies against a defendant in a protection of that statute in regard to that grant of immunity. The defendant, however, in that criminal proceeding may not assert irregularities in regard to the granting of that immunity from prosecution.

Here, although conceding the point that the prosecuting attorney had no power to grant immunity, the Court refused to allow the appellant to attack the procedure.

Private prosecutors

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Complainant interference with defense, (p. 91) for discussion of topic.

Private prosecutors (continued)

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See PLEA BARGAINING Right to, (p. 431) for discussion of topic.

Retention of private prosecutor

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

Relator contends the rape victim's family' retention of a private prosecutor was *per se* improper.

Syl. pt. 8 - "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." Syl. pt. 1, *State v. Adkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979).

Syl. pt. 9 - At the appellate level, a complaint against a private prosecutor must be bottomed on an instance of the private prosecutor's misconduct that in some way prejudiced the defendant.

The Court found relator failed to establish any prejudice that would rise to a constitutional level.

PUBLIC OFFICIALS

Bribery

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

See PUBLIC OFFICIALS Conflict of interest, (p. 475) for discussion of topic.

Bribery and corrupt practices

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

Appellant was convicted under the Bribery and Corrupt Practices Act (*W.Va. Code*, 61-5A-2) for accepting a telephone credit card from a telephone service company from whom the county commission of which he was then a member had purchased services.

The credit card in question was given to appellant after the service contract was awarded. These cards were given as a matter of course to all purchasers of this service. Competitors of the company even gave free residential service. The service in question here was for count business done while at home; ironically, appellant could not even use the card since he did not have the proper telephone in his home. The evidence showed that appellant did not know he would get the card until after the contract was awarded.

Syl. pt. 5 - The acceptance by a county commissioner of a card containing a telephone access code does not constitute a "pecuniary benefit" as defined in *W.Va.Code*, 61-5A-2(8), where the purpose of the card is to facilitate a commissioner's ability to perform the county commission's business.

Conflict of interest

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

Appellant, a member of the Putnam County Commission, was convicted of having a pecuniary interest in a public contract over which he had come influence, in violation of *W.Va.Code*, 61-10-15; and of having accepted a telephone credit card in exchange for having voted for a telephone service contract, in violation of 61-5A-2(8).

Conflict of interest (continued)

State v. Neary, (continued)

Prior to his election to the county commission appellant had furnished contractual services to a local public service district authorized by the county commission. After his election he continued to provide the services. In addition, appellant, after voting for a telephone service, accepted a credit card which would allow him to transact county business from his home. Appellant was unable to do any business with the card, much less use if tor his personal use, because his home did not have a touch tone phone.

The Court rejected appellant's argument that he had no actual control over the public service district contract and therefore could not be culpable.

Syl. pt. 1 - The public policy of this State, as evidenced by *W.Va.Code*, 61-10-15, as amended, is not directed against actual fraud or collusion, but is for the purpose of preventing those acts and eliminating any opportunity therefor. The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself.

Syl. pt. 2 - Upon becoming a member of a county commission, a person who is pecuniarily interested in the proceeds of any contract or service with a public service district violates the conflict of interest statute, *W.Va.Code*, 61-10-15, because such person by virtue of the position has some voice, influence or control over the continuation of the contract.

The Court rejected the notion that appellant had violated *W.Va.Code*, 61-5A-2(8), the Bribery and Corrupt Practices Act.

Syl. pt. 5 - The acceptance by a county commissioner of a card containing a telephone access code does not constitute a "pecuniary benefit" as defined in *W.Va.Code*, 51-5A-2(8), where the purpose of the card is to facilitate a commissioner's ability to perform the county commission's business.

State v. Neary, 365 S.E.2d 395 (1987) (Miller, J.)

See INSTRUCTIONS Conflict of interest, (p. 339) for discussion of topic.

PUBLIC TRIAL

Publicity during trial

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See MISTRIAL Prejudicial publicity, Standards for determining, (p. 418) for discussion of topic.

PUBLICITY

Prejudicial

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See MISTRIAL Prejudicial publicity, Standard for determining, (p. 418) for discussion of topic.

REBUTTAL

Scope

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She contends the trial court erred in allowing the prosecution to present certain rebuttal testimony regarding promissory notes that had been executed by the appellant in favor of her husband. On cross-examination, the appellant testified that she had signed only two or three notes in amounts ranging from two thousand five hundred to three thousand dollars. As rebuttal evidence, over the appellant's objection, the trial court permitted testimony by five witnesses concerning a number of promissory notes allegedly made by the appellant to her husband or his business over the years totaling anywhere from sixty to eighty thousand dollars.

Syl. pt. 4 - '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." Syl. pt. 2, *State v. Fitzsimmons*, 137 W.Va. 585, 73 S.E.2d 136 (1952), *overruled on other grounds*, Syl. pt. 2, *State v. Clay*, 160 W.Va. 651, 236 S.E.2d 230 (1977).

The Court found the trial court did not abuse its discretion because the rebuttal testimony was offered to contradict the appellant's assertion on cross-examination that she had executed only two or three promissory notes to her husband or his business.

RECEIPT OF STOLEN PROPERTY

Concealing stolen property

State v. Lambert, 331 S.E.2d 873 (1985) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Receipt of stolen property, Concealing stolen property, (p. 634) for discussion of topic.

Elements

Acting with a dishonest intent or purpose

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

See RECEIPT OF STOLEN PROPERTY Instructions, Acting with a dishonest intent or purpose, (p. 480) for discussion of topic.

Instructions

Acting with a dishonest intent or purpose

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

Appellant contends the jury instruction defining the offense of receiving stolen property omitted an essential element of the offense, namely, acting with a dishonest intent or purpose.

Syl. pt. 3 - "'The essential elements of the offense created by [*W.Va.Code*, 61-3-18 [1931]] 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 had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a dishonest purpose.' *State v. McGraw*, 140 W.Va. 547, 550, 85 S.E.2d 849, 852 (1955)." Syl. pt. 6, *State v. Hall*, 171 W.Va. 212, 298 S.E.2d 246 (1982).

Instructions (continued)

Acting with a dishonest intent or purpose (continued)

State v. Barker, (continued)

Syl. pt. 4 - "In a prosecution under *W.Va.Code*, 61-3-18, for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a 'dishonest purpose' before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent." Syl. pt. 4, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976).

The Court found the element of dishonest purpose is distinct from the element of knowledge.

> It is not enough for guilt that one receives stolen property with knowledge that it is stolen. Otherwise, the policeman who catches a thief in possession of stolen property and who takes the booty from him in order to return it to its owner would be guilty. Some sort of a bad state of mind, in addition to the guilty knowledge, is required. (Citations omitted). This is so although this requirement is not generally spelled out in the statute defining the offense of receiving stolen property.
>
> The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefitting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefitting himself but rather by aiding the thief, as by hiding the stolen property for him. (Citations omitted).

Lafave and Scott Handbook on Criminal Law, 93 (5th Reprint 1980).

> The mere receipt of stolen goods, knowing them to have been stolen, is not of itself a crime, (citations omitted) as where the property is received with the intent of restoring it to the owner without reward (citations omitted) or with any other innocent intent (citations omitted); in order to constitute the crime, there must be an absence of intent to restore the property to the owner. (Citations omitted) 76 C.J.S. Receiving Stolen Property § 9.

Instructions (continued)

Acting with a dishonest intent or purpose (continued)

State v. Barker, (continued)

The Court found that no request was made for an instruction containing the element of "dishonest purpose." The Court found the instructional error assigned on appeal was not distinctly articulated by trial counsel, as required by *W.Va.R.Crim.P.* 30.

The Court found instruction that defines a crime but omits an essential element of the crime may constitute reversible error. Failure to afford a criminal defendant the fundamental right to have the jury instructed on all essential elements of the offense charged has been recognized as plain error. *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964); *Ramirez v. People*, 682 P.2d 1181 (Colo. 1984). Under Rule 30 *W.Va.R.Crim.P.*, the Court may notice plain error in the giving of an instruction regardless of the failure to make a specific objection. See *State v. Hutchinson*, 176 W.Va. 172, 342 S.E.2d 138 (1986).

The Court found there was plain and fundamental error in this case because the jury was not completely instructed on the essential elements of the offense. The conviction was reversed.

Sufficiency of indictment

Transferring stolen goods

State v. Taylor, 346 S.E.2d 822 (1986) (Miller, C.J.)

See RECEIPT OF STOLEN PROPERTY Transferring stolen goods, Indictment, (p. 483) for discussion of topic.

RECEIPT OF STOLEN PROPERTY

Transferring stolen goods

Elements

State v. Taylor, 346 S.E.2d 822 (1986) (Miller, C.J.)

See RECEIPT OF STOLEN PROPERTY Transferring stolen goods, Indictment, (p. 483) for discussion of topic.

Indictment

State v. Taylor, 346 S.E.2d 822 (1986) (Miller, C.J.)

The trial court dismissed a two-count indictment charging the defendant with transferring stolen goods, on the theory that it failed to allege an essential element of the crime charged, *i.e.*, that the defendant bought, received, or aided in the concealment of the stolen goods prior to his transfer of the goods to a person other than the owner. The Court reversed.

Syl. pt. 1 - *W.Va.Code*, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct. The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose.

Syl. pt. 2 - In an indictment for transferring stolen goods, it is not necessary to aver that the defendant obtained the goods from another person before he transferred them as this is not an element of the crime.

RECIDIVISM

Amended information for

State v. Cain, 359 S.E.2d 581 (1987) (McHugh, J.)

Appellant was convicted of breaking and entering during the January, 1984 term of the Circuit Court of Randolph County. Before the term was over the prosecuting attorney filed a recidivist information, pursuant to *W.Va.Code*, 61-11-19, charging that the appellant had two prior felony convictions.

During the next term of court the prosecuting attorney filed an amended information, charging that appellant had a fourth felony conviction. At a subsequent hearing, appellant protested the untimely amended information and challenged the use of one of the prior convictions since it occurred when the appellant was sixteen years old.

At trial appellant challenged one of the former convictions, alleging ineffective assistance of counsel. He also renewed his challenge to the allegedly untimely amended information. In denying both attacks the trial court ruled that the validity of an underlying conviction should be questioned by petition for habeas corpus.

The Court noted that challenges to underlying convictions may be brought at a recidivist hearing or on appeal from that proceeding. See, *e.g.*, *State v. McMannis*, 161 W.Va. 437, 242 S.E.2d 571 (1978).

The Court held that the filing of the amended information violated the provisions of *W.Va.Code*, 61-11-19.

Syl. pt. 1 - A person convicted of a felony may not be sentenced pursuant to *W.Va.Code*, 61-11-18, -19 [1943], unless a recidivist information and any or all material amendments thereto as to the person's prior conviction or convictions are filed by the prosecuting attorney with the court before expiration of the term at which such person was convicted, so that such person is confronted with the facts charged in the entire information, including any or all material amendments thereto. *W.Va.Code*, 61-11-19 [1943].

See *State ex rel. Housden v. Adams*, 143 W.Va. 601, 103 S.E.2d 873 (1958).

Amended information for (continued)

State v. Cain, (continued)

NOTE: Crucial to the decision were the general principles of statutory construction that "penal statutes must be strictly construed against the State and in favor of the defendant." Syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970); and that strict construction in favor of the prisoner is required since the statute is in derogation of the common law. See Syl. pt. 2, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). See also, *State v. Larkin*, 106 W.Va. 580, 149 S.E. 667 (1929).

Although the statute in question did not strictly prohibit an amended information, the Court held that the defendant was deprived of his right to confront all charges against him, especially here where the amended added another offense. See *Patterson v. Boles*, 276 F. Supp. 735 (N.D. W.Va. 1967).

Appearance before jury in prison attire

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court-appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions.

The appellant also raises allegations of error regarding the recidivist trial. Appellant contends it was error for him to be seen in prison attire prior to *voir dire* by the jurors later impaneled for the recidivist proceeding. Appellant admitted he subsequently refused the trial court's offers to allow him to change clothes for the jury selection and the recidivist proceeding, because the jury had already seen him in prison attire. He contends his appearance before the jury in prison attire allowed the jury to witness evidence which the State would have otherwise had to prove by other means.

Appearance before jury in prison attire (continued)

State v. Reedy, (continued)

The Court found the rule that a criminal defendant may not be compelled to wear identifiable prison attire at trial extends to a recidivist proceeding.

Syl. pt. 11 - "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." Syl. pt. 2, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. denied*, 464 U.S. 831 (1983).

The Court realized the jury in a recidivist proceeding will learn from other evidence that the appellant has in fact been convicted of the most recent felony. This fact did not alleviate the prejudice of requiring a defendant to appear at a recidivist proceeding in identifiable prison attire.

Appropriateness of sentence

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

See PROPORTIONALITY Recidivism, (p. 458) for discussion of topic.

Enhancement of separate convictions

State v. Stover, 368 S.E.2d 308 (1988) (Per Curiam)

Appellant was convicted of burglary in the daytime by breaking and entering and of grand larceny. Following the filing of an information showing a previous felony conviction, appellant entered a guilty plea to recidivism. The trial court enhanced both the breaking and entering and the grand larceny sentences by five years. See *W.Va.Code*, 61-11-18.

Syl. pt. - "In the absence of some express language in our recidivist statute, *W.Va.Code*, 61-11-18, authorizing criminal convictions returned against the defendant at the same time to be separately enhanced by a prior felony, it may not be done and only one enhancement is permissible." Syllabus, *Turner v. Holland*, 175 W.Va. 202, 332 S.E.2d 164 (1985).

RECIDIVISM

Appropriateness of sentence (continued)

Enhancement of separate convictions (continued)

State v. Stover, (continued)

State ex rel. Medley v. Skeen, 138 W.Va. 409, 76 S.E.2d 146 (1953) treated as one conviction two convictions obtained the same day where enhancement of sentence was sought on each as a result of the other. Here, the Court refused to allow multiple convictions to be enhanced separately by a previous felony.

Identification

Prison photos

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel in the burglary trial because his court appointed trial counsel was a relative and friend of the burglary victim, and because this relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions.

The appellant also raises allegations of error regarding the recidivist trial. He challenges the introduction of prison photographs of the appellant which prominently showed prison numbers. The prison photos were presented and introduced as evidence of the identity of the appellant as the person charged with two prior felony convictions.

The Court found the holding in *State v. Lawson*, 125 W.Va. 1, 22 S.E.2d 643 (1942) is dispositive here:

Identification (continued)

Prison photos (continued)

State v. Reedy, (continued)

> Where it is necessary to establish the identity of the accused as the person charged with former convictions under the Habitual Criminal Law, *W.Va.Code*, 61-11-19, as amended, and the same is established by formal court record, personal identification, and by comparison of his fingerprints with those appearing on prison records, the introduction in evidence, over objection, of prison photographs of the accuse prominently showing a prison number, over-emphasizes the former convictions, is prejudicial and constitutes reversible error.

The Court found other identification methods were available to the prosecution in this case.

Right to appear at enhancement modification

State ex rel. Everett v. Hamilton, 337 S.E.2d 312 (1985) (Brotherton, J.)

Petitioner was convicted of voluntary manslaughter. Because of two prior felony convictions, one in West Virginia and one in Maryland, he was given an enhanced sentence of life imprisonment pursuant to *W.Va.Code*, 61-11-18 (1984). The Maryland conviction was reversed. Because of the void Maryland judgment, petitioner's first writ of habeas corpus was granted and the case remanded to have the life sentence vacated and a lawful sentence imposed. The circuit court sentenced petitioner *in absentia* to a prison term of one-to-ten years. The petitioner filed a writ with the circuit court of Marshall County claiming the imposition of the reduced sentence without his presence was void. The circuit court agreed and ordered that petitioner be resentenced within 30 days from September 18, 1985.

Right to appear at enhancement modification (continued)

State ex rel. Everett v. Hamilton, (continued)

Without an enhanced sentence, petitioner would have been serving a one-to-five term which would have been fully served on June 20, 1984. The petitioner was not resentenced for the second time, however, until October 4, 1985. The petitioner contends the original enhanced sentence was void because the Maryland conviction was overturned; the first modification of the sentence was void because it was made *in absentia*; and no enhancement of his sentence could be made after he had served his principal sentence, therefore, the second and modification was void.

The Court did not address the claim of whether an enhancement can lawfully be made after a prisoner has served his principal sentence, but instead found the first modification of the petitioner's sentence by the circuit court was valid. Since this sentence was imposed while the petitioner was serving his original sentence, the petitioner's claim was moot.

Rule 43 of the W.Va. Rules of Criminal Procedure requires that a criminal defendant must be present at almost every stage of his trial. Nevertheless, the defendant's presence is not required "at a conference or argument upon a technical question of law not depending upon facts within the personal knowledge of the defendant." *W.Va.R.Crim.P.*43(c)(3). Where an enhanced sentence is set aside, "[t]he resentencing is unrelated to the underlying truth-finding process which led to the conviction and only corrects the improper sentence." *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 142, 254 S.E.2d 805, 812 (1979). Not personal knowledge of the defendant is required. Because the resentencing hearing was a conference upon a technical question of law not depending upon facts within the personal knowledge of the defendant, the Court held his presence was not required.

RECIDIVISM

Sentencing at new term

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

Appellant contended that his life imprisonment sentence for recidivism was void because trial on the habitual criminal charge was not conducted at the same term of court as the principal conviction. The question presented was whether trial on the issue of identity must be held at the same term of court when the defendant either denies that he is the same person or stands silent. *W.Va.Code*, 61-11-19 requires that the information be filed in the same term but is silent regarding trial on the information.

The Court noted that "a person convicted of a felony cannot be sentenced under the habitual criminal statute, *W.Va.Code*, 61-11-19, unless there is filed by the prosecuting attorney with the court at the same term, and before sentencing, an information as to the prior conviction or convictions and for the purpose of identification the defendant is confronted with the facts charged in the information and cautioned as required by the statute." Syl. pt. 2, *State ex rel. Housdon v. Adams*, 143 W.Va. 601, 103 S.E.2d 873 (1958). Syl. pt. 3, *State ex rel. Beckette v. Boles*, 149 W.Va. 112, 138 S.E.2d 851 (1964). See also, Syl. pt. 1 *State ex rel. Young v. Morgan*, 173 W.Va. 452, 317 S.E.2d 812 (1984); *State ex rel. Albright v. Boles*, 149 W.Va. 561, 142 S.E.2d 725 (1965); *State ex rel. Foster v. Boles*, 147 W.Va. 655, 130 S.E.2d 111 (1963).

The provisions of the statute are mandatory; compliance must be complete. See *Justice v. Hedrick*, 177 W.Va. 53, 350 S.E.2d 554 (1967); *State ex rel. Ringer v. Boles*, 151 W.Va. 864, 157 S.E.2d 554 (1967); and *State ex rel. Nutter v. Boles*, 150 W.Va. 93, 144 S.E.2d 238 (1965).

The Court held that *W.Va.Code*, 61-11-19 does not prohibit trial upon a previously brought information at a subsequent term of court held within a reasonable time. See *Patterson v. Boles*, 276 F. Supp. 735 at 737 (N.D. W.Va. 1967).

RECIDIVISM

Status of offense and offender

Convicting state or West Virginia

Justice v. Hedrick, 350 S.E.2d 565 (1986) (McHugh, J.)

Following petitioner's conviction of voluntary manslaughter with the use of a firearm, the State filed an information charging him as an habitual criminal pursuant to the recidivist statute. The information charged petitioner with two previous felony convictions in Michigan–attempted breaking and entering and escape. Petitioner was under 18 when the initial offense occurred.

In adherence to a plea agreement, petitioner admitted he was the person in the plea agreement and that he had been convicted of attempted breaking and entering. The State moved to dismiss the charge in the information relating to the escape conviction. A five-year enhancement under the recidivist statute was added to the sentence for conviction of voluntary manslaughter.

Syl. pt. 2 - Where a defendant has been convicted of a crime in another jurisdiction, which defendant in West Virginia would have been treated as a juvenile offender, such prior conviction may not be used in subsequent West Virginia proceedings to enhance the defendant's sentence pursuant to the West Virginia Habitual Criminal Statute. *W.Va.Code*, 61-11-18, -19 [1943].

The Court found in this case the Michigan conviction of attempted breaking and entering could not be used for enhancement purposes pursuant to the West Virginia Habitual Criminal Statute.

The Court noted another aspect of this case is that the defendant was convicted of attempted breaking and entering which is a felony in Michigan but only a misdemeanor in West Virginia.

Syl. pt. 3 - Whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, *W.Va.Code*, 61-11-18, -19 [1943], depends upon the classification of that crime in this state.

The Court found the plea agreement and the additional five years added to the petitioner's sentence on the basis of the prior Michigan conviction of attempted breaking and entering are void and unenforceable, and petitioner was relieved from serving that portion of the sentence.

RECIDIVISM

Third offense DUI

Right to counsel in prior DUI convictions

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

Syl. pt. 2 - "The constitutional right to assistance of counsel may be waived by an accused by conduct which demonstrates intelligent and understanding waiver." Syl. pt. 1, *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Syl. pt. 3 - "The right of the defendant in a criminal proceeding to the assistance of counsel is a fundamental right, the waiver of which will not be presumed by the failure of the accused to request counsel, by the entry of a guilty plea or by reason of a record silent concerning the matter of counsel and the conviction of a defendant in the absence of counsel or of an affirmative showing of an intelligent waiver of such right is void." Syl. pt. 3, *State ex rel. Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 (1965).

Syl. pt. 4 - "Where the record affirmatively discloses that a person accused of a crime expressly waived his constitutional right to assistance of counsel and his constitutional right to trial by jury and entered a plea of guilty to the charge, such waivers and such plea of guilty will not be held in a habeas corpus [or other collateral attack] proceeding to be void on the ground that such waivers were not made intelligently and understandingly or that the pleas of guilty was not entered intelligently and understandingly, unless such contentions are supported by proper allegations and by a preponderance of the evidence." Syl. pt. 6, *State ex rel. Powers v. Boles*, 149 W.Va. 6, 138 S.E.2d 159 (1964).

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Right to counsel in prior DUI convictions, Waiver of, (p. 166) for discussion of topic.

REOPENING THE CASE ONCE SUBMITTED TO THE JURY

In general

State v. Sandler, 336 S.E.2d 535 (1985) (Brotherton, J.)

Responding to a request by the jury, the trial court allowed the prosecution to recall a witness after the jury retired. The trial court then conducted the examination of the witness. Appellant contends the trial judge abused his discretion by allowing the prosecution to reopen at such a late stage in the trial.

Syl. pt. 4 - "Whether a party shall be permitted to introduce further evidence after the case has been closed and submitted to the jury, and before the jury returns a verdict, is a matter of sound discretion of the trial court, and its exercise of this discretionary power will not be cause for reversal except in case of abuse of the discretion, and that it plainly appears that the person making the request has been injured by the refusal." Syl. pt. 4, *State v. Littleton*, 77 W.Va. 804, 88 S.E. 458 (1916).

The Court found, nevertheless, such a practice of allowing additional evidence even after the jury has retired is not to be encouraged or lightly pursued. The Court found the trial court's discretion in reopening a case after the jury has retired should be exercised with the utmost caution and be based upon the following factors:

> (1) Whether good cause is shown for reopening. *See*, *e.g.*, *Fernandez v. United States*, 329 F.2d 899, 903, *cert. denied*, 379 U.S. 832 (1964) (Defendant's lack of diligence reason not to allow reopening);
>
> (2) Whether the new evidence is significant. *See People v. Johnson*, 155 Cal. App.3d 241, 248, 201 Cal. Rptr. 908, 911 (1984);
>
> (3) Whether the evidence introduced at such a late stage would be given undue emphasis by the jury, prejudicing the party against whom it is offered. *See*, *Jones v. State*, 15 Ark. App. 283, 692 S.W.2d 775, 777 (1985);
>
> (4) Whether the reopening is at the request of the jury or a party.

In general (continued)

State v. Sandler, (continued)

See generally Annot. 87 A.L.R.2d 849 (1963) (concerning propriety of reopening criminal case in order to present omitted or overlooked evidence).

In this case, the request for new evidence came from the jury and not from a party and could have been answered concisely with little prejudice to the defendant. The Court found therefore the trial court was within its discretion in allowing the State to reopen its case. The Court found the reopening was handled poorly in that the jury's questions were not answered concisely and the witness was examined by the trial court, instead of by the State's attorney. "[W]hen a case is reopened for the reception of further evidence, it must be done in such a manner that the rights of all parties will be protected and ample opportunity afforded them for cross-examination or rebuttal, and even for requesting additional instructions, if the matters introduced should reasonably require them." *Perkins v. State*, 253 Miss. 652, 655, 178 So.2d 694, 696 (1965).

In this case the trial court allowed the State's breathalyzer expert to repeat much of his testimony. The Court found where powerful evidence is unnecessarily repeated to the jury during their deliberations, the chance for undue influence is great. Further, the defendant was not given any chance to rebut this testimony and was given no additional time for argument. The obvious prejudice to the defendant was compounded when the court assumed the role of prosecuting attorney and conducted a lengthy examination of the witness. The Court concluded that because of the cumulative nature of the evidence presented in reopening and the prejudicial manner in which it was introduced, error was committed by the trial court.

RETRIAL

Three term rule following habeas

State v. Moore, 357 S.E.2d 780 (1987) (Miller, J.)

Appellant was convicted for obtaining money under false pretenses. Upon appeal, his conviction was reversed. Retrial did not take place during the subsequent three terms of court.

Upon remand, the prosecuting attorney sent notice to defense counsel that trial would take place during the third term following remand. The case was not tried on the scheduled date, apparently because the prosecution believed that defense counsel would request a continuance; a proposed order to that effect was sent to defense counsel but never signed.

At the beginning of the fourth term following remand, defense counsel moved to dismiss for failure to try the case within three terms. The trial court rejected the motion on the theory that defense counsel had agreed to a continuance. No record was made, however, of the alleged agreement to continue.

Syl. pt. 1 - Retrial must occur within three terms after the term in which relief is granted upon habeas corpus or appellate review, subject to the statutory exceptions excusing delay under *W.Va.Code*, 62-3-21.

See *State v. Bias*, 177 W.Va. 302, 352 S.E.2d 52, at 65 (1986). See also, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533, at 541 (1982) (neither one-term rule in *W.Va.Code* 62-3-1 nor three-term rule in *W.Va.Code*, 62-3-21 cover habeas corpus relief); and *State v. Holland*, 149 W.Va. 731, 143 S.E.2d 148 (1965) (where habeas corpus granted, cannot count terms from date of original indictment).

Syl. pt. 2 - The failure to comply with the three-term rule under *W.Va.Code*, 62-3-21, bars further prosecution. This same rule is applicable for a retrial if the case is not tried within three terms after the term of the remand, subject to the exceptions contained in *W.Va.Code*, 62-3-21.

See *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981); *State v. Young*, 167 W.Va. 312, 280 S.E.2d 104 (1981); *State v. Lacy*, 160 W.Va. 96, 232 S.E.2d 519 (1977); *State ex rel. Parsons v. Cuppett*, 155 W.Va. 469, 184 S.E.2d 616 (1971); and *State v. Underwood*, 130 W.Va. 166, 43 S.E.2d 61 (1947).

Three term rule following habeas (continued)

Following

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DOUBLE JEOPARDY Habeas corpus, Effect of, (p. 142) for discussion of topic.

RETROACTIVITY

Generally

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

See WITNESSES Impeachment, One's own witness, (p. 663) for discussion of topic.

Alibi defense

Burden of proof

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See DEFENSES Alibi, (p. 84) for discussion of topic.

Prompt presentment rule

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Prompt presentment, (p. 560) for discussion of topic.

Same jurors sitting on trials of accomplices

State v. VanMetre, 342 S.E.2d 450 (1986) (Neely, J.)

See JURY Challenges, Same jurors sitting on trials of accomplices, (p. 373) for discussion of topic.

RIGHT TO CONFRONT

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See HEARSAY Generally, (p. 273) for discussion of topic.

Sexual assault

State v. Giles, 368 S.E.2d 107 (1988) (Per Curiam)

See EVIDENCE Admissibility, Vouching the record, (p. 183) for discussion of topic.

RIGHT TO COUNSEL

Contempt

Moore v. Hall, 341 S.E.2d 703 (1986) (Miller, C.J.)

See INDIGENTS Right to appeal, Contempt, (p. 304) for discussion of topic.

Dissatisfaction/rejection of appointed counsel

State v. Sandler, 336 S.E.2d 535 (1985) (Brotherton, J.)

Appellant contends the trial court should have continued the trial to allow him to obtain new counsel.

Syl. pt. 1 - "Good cause for the relief of a court-appointed counsel consists of: (1) a conflict of interest; (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." Syl. pt. 5, *Watson v. Black*, 161 W.Va. 46, 239 S.E.2d 664 (1977).

Appellant's attorney had advised him to accept the prosecutor's offer of a plea bargain. The Court found negotiating a favorable plea bargain is an integral part of a defense attorney's job and does not fall within the parameters of good cause for dismissal. The record did not reflect any other conflict or breakdown in communication that would justify removal of the appointed attorney. The trial court was correct in refusing the appellant's motion for new counsel.

Juvenile proceedings

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

See JUVENILES Transfer from juvenile to adult jurisdiction, Right to counsel, (p. 393) for discussion of topic.

RIGHT TO COUNSEL

Police interrogation

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

Appellant was convicted of attempted murder, malicious wounding, carrying an unlicenced weapon, brandishing a pistol and destruction of property. Appellant was apprehended following a martial dispute during which he stopped his wife's car and fired a pistol through the window. Following a consensual search of his vehicle, he was arrested for carrying an unlicenced weapon.

The arresting officer read the appellant his *Miranda* rights. During transport to the magistrate, appellant, upon being asked by the police officer, stated that he had fired a shot into his wife's vehicle as a result of marital trouble. After being charged with multiple offenses by the magistrate, appellant requested a lawyer and was allowed to telephone a local attorney.

The magistrate issued a commitment order. Appellant was transported to the sheriff's office where he was again advised of his rights. Upon request of the police, he agreed to make a statement but did not sign a written waiver of his rights. Before the statement could be reduced to writing his attorney arrived and advised appellant not to speak to the police; the attorney also advised appellant not to speak to the police; the attorney also advised the police not to speak with the appellant. Shortly after the attorney left, the police initiated further discussion and obtained a written statement from the appellant.

The trial court admitted the oral statement made while being transported to the sheriff's office. The prosecution elected not to introduce the written statement.

Syl. pt. 1 - If police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant's Sixth Amendment right to counsel. To the extent that *State v. Wyer*, 173 W.Va. 720, 320 S.E.2d 92 (1984), is in conflict with this principle, it is overruled.

See *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, at 1411, 89 L.Ed.2d 631 (1986). See also, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987), (accused subsequently initiates conversation with police; recantation of request for counsel).

Police interrogation (continued)

State v. Barrow, (continued)

The Sixth Amendment right to counsel attached here.

Syl. pt. 2 - "An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to *W.Va.Code*, 62-1-5 [1965], and is *inter alia*, informed pursuant to *W.Va.Code*, 62-1-6 [1965], of the complaint against him and of his right to counsel." Syl. pt. 1, in part, *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982).

See also, *Kirby v. Illinois*, 92 S.Ct. 1877 (1972); *Brewer v. Williams*, 97 S.Ct. 1232 (1977); and *Michigan v. Jackson*, *supra*.

State v. Haller, 363 S.E.2d 719 (1987) (Neely, J.)

See CONFESSIONS Voluntariness, (p. 65) for discussion of topic.

Pre-trial identification

State v. Gravely, 342 S.E.2d 186 (1986) (Per Curiam)

See IDENTIFICATION Suggestive identification, Denial of right to counsel, (p. 284) for discussion of topic.

Public interrogation

State v. Tenley, 366 S.E.2d 657 (1988) (Per Curiam)

Appellant was convicted of first-degree murder. He claims error in the admission of his confession obtained in violation of his assertion of his right to counsel.

Appellant and his wife first gave statements voluntarily to police following a stabbing at their home. These statements implicated Appellant's wife. Following the victim' death, the police charged her with first-degree murder, whereupon the appellant asked to change his statement.

Public interrogation (continued)

State v. Tenley, (continued)

Based on his revised statement, appellant was charged with being an accessory to the murder. Upon being taken before a magistrate and advised of his right to counsel, appellant asserted that right and completed forms for appointment of counsel.

The police then concluded that it was unlikely appellant's wife committed the murder. They informed appellant that he was a suspect; upon being advised of his *Miranda* rights appellant denied murdering the victim and refused to talk. After an interval, however, police once again interrogated him, he signed a waiver and made a confession.

Syl. pt. 1 - "If police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel. To the extent that *State v. Wyer*, 173 W.Va. 720, 320 S.E.2d 92 (1984), is in conflict with this principal, it is overruled." Syl. pt. 1, *State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987).

Syl. pt. 2 - " ' "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).' Syllabus Point 1, *Maxey v. Bordenkircher*, 175 W.Va. 49, 330 S.E.2d 859 (1985)." Syl. pt. 3, *State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987).

The conviction was reversed and remanded to the trial court.

Retained counsel

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, J.)

Relator contends that by the trial court's failure to set the matter for trial in the September 1984 term, she lost her right to be represented by counsel of her choice. The court declined to address this issue because the fact that the relator's original attorney had an associate who was elected prosecutor in Pleasants County and took office in January, 1985 would not have prevented

Retained counsel (continued)

Good v. Handlan, (continued)

this original attorney from continuing to handle the case. The Court found it would have only have precluded his associate from trying the case as prosecutor. The Court found the trial court's order of January 17, 1985 reflects the fact that the associate withdrew from the case and a special prosecutor was appointed.

Right of putative defendant and counsel to appear before grand jury

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant contends under the Sixth Amendment, he and his counsel had the right to be present at and participate in the grand jury proceedings which resulted in his two-count indictment.

Syl. pt. 5 - Courts have generally held that a putative defendant and his counsel have no constitutional right to be present at and participate in grand jury proceedings.

Waiver

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

Syl. pt. 2 - "The constitutional right to assistance of counsel may be waived by an accused by conduct which demonstrates intelligent and understanding waive." Syl. pt. 1, *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Syl. pt. 3 - "The right of the defendant in a criminal proceeding to the assistance of counsel is a fundamental right, the waiver of which will not be presumed by the failure of the accused to request counsel, by the entry of a guilty plea or by reason of a record silent concerning the matter of counsel and the conviction of a defendant in the absence of counsel or of an affirmative showing of an intelligent waiver of such right is void." Syl. pt. 3, *State ex rel. Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 (1965).

Waiver (continued)

State v. Armstrong, (continued)

Syl. pt. 4 - "Where the record affirmatively discloses that a person accused of a crime expressly waived his constitutional right to assistance of counsel and his constitutional right to trial by jury and entered a plea of guilty to the charge, such waivers and such plea of guilty will not be held in a habeas corpus [or other collateral attack] proceeding to be void on the ground that such waivers were not made intelligently and understandingly or that the plea of guilty was not entered intelligently and understandingly, unless such contentions are supported by proper allegations and by a preponderance of the evidence." Syl. pt. 6, *State ex rel. Powers v. Boles*, 149 W.Va. 6, 138 S.E.2d 159 (1964)

State v. Armstrong, 332 S.E.2d 837 (1985) (McGraw, J.)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Right to counsel in prior DUI convictions, (p. 166) for discussion of topic.

State v. Barrow, 359 S.E.2d 844 (1987) (Miller, J.)

See HARMLESS ERROR Constitutional, Generally, (p. 265) for discussion of topic.

State v. Crouch, 358 S.E.2d 782 (1987) (Brotherton, J.)

Appellant was arrested following a statement made to police by an eyewitness to the shooting death of another. Appellant was taken before a magistrate and waived a preliminary hearing but requested a court-appointed attorney. Later the same day appellant signed a written statement while in custody upon a form containing preprinted language waiving his right to counsel. No attorney was present at the time, nor had an appointment been made.

Waiver (continued)

State v. Crouch, (continued)

The testimony was in conflict concerning appellant's understanding of the contents of the document which he signed. The trial court found the confession to be voluntary and the waiver of counsel to be knowing, having determined that the accused initiated the conversation resulting in the waiver and confession. Noting that *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) held that any waiver following a police-initiated interrogation is invalid, the Court went on to hold that mere initiation by the accused is insufficient for an effective waiver.

Syl. pt. 1 - For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.

Here, the accused showed a willingness to engage in a general discussion, was given his *Miranda* rights (having signed a form acknowledging those rights) and had graduated from high school and attended college. The Court concluded, therefore, that a valid waiver of the right to counsel took place when the accused initiated the conversation with police.

State v. Gravely, 342 S.E.2d 186 (1986 (Per Curiam)

See SELF-REPRESENTATION In general, (p. 582) for discussion of topic.

State v. Lease, 341 S.E.2d 841 (1986) (Per Curiam)

See SELF-REPRESENTATION In general, (p. 584) for discussion of topic.

Waiver (continued)

Effect of police interrogation

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

Appellant was convicted of first-degree sexual assault. He was taken before a magistrate, requested appointed counsel and appointment was made the next day. Following three days in jail due to his inability to make bond, appellant waived his right to counsel and confessed. Appellant alleged that he waived his right to an attorney as a direct result of coercion by police. The police officer contended that appellant voluntarily waived his rights and gave a written statement.

Syl. pt. 1 - "If police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant's Sixth Amendment right to counsel. To the extent that *State v. Wyer*, 173 W.Va. 720, 320 S.E.2d 92 (1984), is in conflict with this principal, it is overruled." Syl. pt. 1, *State v. Barrow*, 178 W.Va. 406, 359 S.E.2d 844 (1987).

Syl. pt. 2 - "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syllabus Point 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

Here, the trial court found the confession to be voluntary. The Court found no error.

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.' Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syllabus Point 4, *State v. McDonough*, 178 W.Va. 1, 357 S.E.2d 34 (1987).

RIGHT TO HEARING

Juvenile proceedings

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

See JUVENILES Transfer from juvenile to adult jurisdiction, Right to counsel, (p. 393) for discussion of topic.

Probation revocation

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See PROBATION Revocation, Right to hearing, (p. 451) for discussion of topic.

RIGHT TO JURY TRIAL

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

RIGHT TO SPEEDY TRIAL

Denial of fair trial

State v. Drachman, 358 S.E.2d 603 (1987) (Miller, J.)

See SPEEDY TRIAL Measure of time, Duty of prosecution, (p. 607) for discussion of topic.

ROBBERY

Aggravated

Probation for

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See PROBATION Eligibility, Aggravated robbery, (p. 447) for discussion of topic.

Sentencing

State v. Buck, 361 S.E.2d 470 (1987) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, (p. 456) for discussion of topic.

Youthful offenders

State v. Turley, 350 S.E.2d 696 (1986) (McHugh, J.)

See YOUTHFUL OFFENDERS Conviction of aggravated robbery, (p. 675) for discussion of topic.

Attempted aggravated robbery

Instructions

State v. Combs, 338 S.E.2d 365 (1985) (Per Curiam)

Appellant was convicted of aggravated robbery. He contends that the evidence was insufficient to support the giving of an instruction on aggravated robbery, arguing that an aggravated robbery by threatening the use of a gun cannot be proven unless it is established that a gun was actually used. The victim testified the robber put his hand in a pocket and made a gesture that caused her to believe he had a concealed gun, but she did not actually know what, if anything, was in his pocket.

Attempted aggravated robbery (continued)

Instructions (continued)

State v. Combs, (continued)

The Court found the factual circumstances surrounding the armed robbery in *State v. Young*, 134 W.Va. 771, 61 S.E.2d 734 (1950) are nearly identical to those in this case. The Court found the type of robbery in *Young* was specifically classified as aggravated robbery. *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461, 466, n.9 (1981).

The Court disagreed with appellant's contention that *Young* was implicitly overruled by *Harless*. The Court concluded the trial court did not err in instructing the jury that they could find the defendant of aggravated robbery.

Sufficiency of evidence

State v. Wallace, 337 S.E.2d 316 (1985) (Per Curiam)

The Appellant contends the conviction was contrary to the evidence adduced against him and that the trial court erred in overruling his motions for directed verdicts. The Court found in this case that the evidence, although circumstantial, was properly submitted to the jury.

Elements

Aggravated - nonaggravated distinguished

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See ROBBERY Instructions, Lesser included offense, (p. 512) for discussion of topic.

ROBBERY

Elements of

Intent

State v. Plumley, 368 S.E.2d 726 (1988) (Per Curiam)

Appellant was convicted of three counts of kidnaping and one count of aggravated robbery, all stemming from an unsuccessful jail break. The robbery occurred during the alleged kidnaping (See KIDNAPING Incidental to jail breaking, (p. 404).

Syl. pt. 2 - "*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 point 2, *State v. Hudson*, 157 W.Va. 939, 206 S.E.2d 415 (1974).

The main question was whether the robbery was incidental to the alleged kidnaping or was a crime of itself. Here, jail keys and a radio were taken. While the keys were suitable only for opening the jail, and therefore the taking was clearly incidental to the jail break attempt, the radio was potentially of use after an escape.

The Court determined that a jury must decide and that it must be clearly instructed on the issue of *animus furandi* (intent to deprive the owner of his property). Reversed and remanded.

Instructions

Lesser included offense

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. She contended on appeal that she was entitled to a jury instruction on the lesser offense of nonaggravated robbery.

Syl. pt. 1 - "*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." Syl. pt. 3, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

Instructions (continued)

Lesser included offense (continued)

State v. Massey, (continued)

Syl. pt. 2 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 3 - "Under *W.Va.Code*, 61-2-12, one who enters a home or place of business of another and makes a gesture indicating that he has in his possession a firearm or other deadly weapon, immediately orders the person or persons there in charge to take a certain position, remain there, and not follow him, and then takes physical possession of money or other things of value then on said premises and in the control of the person or persons in charge thereof, is guilty of armed robbery. The threat of the use of a firearm or other deadly weapon constitutes robbery by putting in fear." Syl. pt. 1, *State v. Young*, 134 W.Va. 771, 61 S.E.2d 734 (1950).

Here, the appellant claimed that she used a toy, not a real handgun, in demanding money. The Court held that even if that were true, the appellant was not entitled to an instruction on nonaggravated robbery. Aggravated robbery involves the "threat . . . of firearms," not their actual use. Thus, even the appearance of a firearm was sufficient for aggravated robbery and precluded consideration of nonaggravated robbery as a lesser included offense. See *State v. Combs*, 175 W.Va. 765, 338 S.E.2d 365 (1985) and *State v. Young*, 134 W.Va. 771, 61 S.E.2d 734 (1950).

Motive

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

See INSTRUCTIONS Motive, (p. 345) for discussion of topic.

ROBBERY

Non-aggravated

Instructions

State v. Goad, 355 S.E.2d 371 (1987) (Brotherton, J.)

Appellant contends the jury verdict of non-aggravated robbery was not supported by the evidence because the witnesses testified the robber had a gun. The Court found defense counsel noted on the record the discrepancy between the evidence and the possible verdicts presented to the jury and then approved the instruction. The Court upheld a conviction for unarmed robbery under similar circumstances in *State v. Hudson*, 157 W.Va. 939, 206 S.E.2d 415 (1974) and did so here.

Sentence

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

See SENTENCING Review of sentence, (p. 592) for discussion of topic..

Sentencing

State v. Anderson, 359 S.E.2d 576 (1987) (Per Curiam)

See PROPORTIONALITY Generally, (p. 455) for discussion of topic..

Sufficiency of evidence

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

Appellant was convicted of aiding and abetting robbery. He contends the jury's verdict was contrary to the evidence and was not supported by substantial evidence.

The Court found no merit to this allegation.

Sufficiency of evidence (continued)

State v. Stiff, 351 S.E.2d 428 (1986) (Per Curiam)

Appellant was convicted of attempted aggravated robbery. He contends the evidence was insufficient to support the verdict and the court erred in refusing to grant his motion for acquittal. The Court could not say the evidence was manifestly inadequate. The State's case revolved around the victim's testimony. The Court found if the jury believed the victim's testimony, then there was sufficient evidence to support the guilty verdict.

SEARCH AND SEIZURE

Co-defendant

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

Appellant was convicted of breaking and entering.

He contends it was error to admit into evidence that his co-defendant had sixty-nine quarters in his pocket at the time he was arrested. This evidence circumstantially supported the State's case that the money came from the video machines.

There was no initial showing that the search of the co-defendant was illegal. The Court found the search was made incident to a valid arrest and that there was no requirement for a warrant. The Court found no error.

Consent to search

Arrest following

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See ARREST Warrantless, Probable cause, (p. 30) for discussion of topic.

Authority to consent

State v. Hambrick, 350 S.E.2d 537 (1986) (McGraw, J.)

Appellant served as lookout while Jesse Bennett broke into a convenience store. The two carried the goods, which included beer and cigarettes, to the home of Shirley Bennett, Jesse's mom. They awakened two other residents of the home, including Scotty Bennett, and invited them to the basement to drink beer. Scotty declined. He was on parole and did not wish to be implicated in any criminal activity, so he called the police. Scotty took a state trooper to Shirley's house. They approached the basement door, which was open, and saw several long-neck bottles of beer and packs of cigarettes. The trooper followed Scotty in.

Syl. pt. 1 - "Where a person voluntarily and knowingly consents to a search of his premises, such a search may be conducted in the absence of a search warrant." Syl. pt. 1, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976).

Consent to search (continued)

Authority to consent (continued)

State v. Hambrick, (continued)

Syl. pt. 2 - "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." Syl. pt. 8, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980).

Syl. pt. 3 - In deciding if a consent to search is valid, the trial court must make a factual determination whether the consenting party possessed the requisite authority over or relationship to the premises to be searched to justify his allowing the police to conduct a search.

Syl. pt. 4 - "The Fourth Amendment of the *United States Constitution*, and Article III, Section 6, of the *West Virginia Constitution* protect an individual's reasonable expectation of privacy." Syl. pt. 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981).

It was uncontested that Scotty freely consented to the search. Appellant contends Scotty did not have requisite authority over or relationship to the premise to justify his consent to the search. The Court reviewed the facts of this case an could not conclude the trial court was plainly wrong. The Court found appellant generally slept in one of the bedrooms, not the basement, when he would stay at the house, that the basement was a family area, and that two others slept there most often.

The Court found Scotty had been an occupant of the house for approximately four years and was never told he could not bring people to the house. The appellant had invited Scotty to the basement that night, and the door to the basement was never locked and was standing open when Scotty and the trooper approached.

The Court found no Fourth Amendment violation in this case.

Consent to search (continued)

Generally

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See SEARCH AND SEIZURE Consent search, Voluntariness, (p. 519) for discussion of topic.

Illegal arrest

State v. Mullins, 355 S.E.2d 24 (1987) (McGraw, J.)

Appellant was convicted of first-degree murder. The Court found the warrantless arrest of the appellant violated his constitutional rights and reversed the conviction. See ARREST Warrantless, Exigent circumstances (p. 27) for facts of this case.

Syl. pt. 5 - "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 course imperative." Syl. pt. 1, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

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." Syl. pt. 6, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 7 - As a general rule, a person in custody as a result of an illegal arrest is in no position to resist an officer's request to allow his home to be searched.

The Court found the appellant's consent to search was not given voluntarily, but was merely submission to authority.

The Court found the illegal arrest tainted the consent to search and reversed.

Consent to search (continued)

Voluntariness

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

Appellant was convicted of nighttime burglary. In addition to one eyewitness, the only other evidence placing appellant at the scene of the crime was a blood sample taken from a doorknob on the door through which the intruder gained entry.

Appellant contended that he was coerced into giving a blood sample after his arrest. He claimed his Fourth Amendment rights concerning unreasonable search and seizure were violated.

Syl. pt. 2 - "Whether 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." Syl. pt. 8, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980). Syl. pt. 4, *State v. Farmer*, 173 W.Va. 285, 315 S.E.2d 392 (1983).

The Court found conflicting testimony in the record. Finding this matter within the discretion of the trial court, the Court refused to reverse because no abuse of discretion appeared.

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He claimed that evidence should be suppressed due to the inadequacy of the search warrant used to obtain it. The prosecution claimed the searches conducted were valid even if the warrant were inadequate since consent to search was given.

The investigating officer discovered an abandoned car with blood and debris in the passenger area. He opened the trunk and discovered the victim's body. Based on statements given by a bartender who had seen the victim the night before her body was found, the police obtained a search warrant for defendant's car and a trailer where the defendant and another man were believed to reside. This warrant was later found invalid, See SEARCH AND SEIZURE Warrant, Testimony outside of affidavit, (p. 539).

State v. Worley, (continued)

The owner of the trailer, the defendant's father, allowed police access to the trailer voluntarily, assuring them that a warrant was unnecessary. The defendant and a Bobby Hudnell were in the trailer. They were detained in the police car while police searched the trailer. A pistol matching the description in the warrant was seized in the defendant's bedroom. Defendant and Hudnell were advised of their *Miranda* rights and taken into custody.

Two more searches were performed with the defendant's father's consent (indeed, at his invitation). These yielded some of the victim's jewelry and the murder weapon, a second pistol. Defendant subsequently made several incriminating statements and led police to further incriminating evidence. After signing a waiver of his right to counsel, defendant admitted robbing the victim but denied killing her; he did admit his presence during the murder.

Syl. pt. 3 - 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." Syllabus Point 8, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971).

Syl. pt. 4 - "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." Syllabus Point 8, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980).

The Court noted that neither party raised the issue of defendant's father's right to give consent. The parent-child relationship, the father's legal ownership and defendant's lack of measures to limit the father's access were held sufficient to permit the father to consent.

The Court was satisfied that the consent was truly voluntary, noting that no duress or coercion was shown.

SEARCH AND SEIZURE

Exclusionary rule

Consent search

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

Appellant was convicted of aiding and abetting robbery.

Appellant contends the trial court erred in finding he had voluntarily consented to the search of his motor vehicle and in finding the items seized as a result of the search were admissible into evidence.

The Court found the evidence on the voluntariness of the consent to search was plainly contradictory, and the Court could not say the trial court's ruling was plainly wrong or against the weight of the evidence.

Fruit of the poisonous tree

State v. Black, 338 S.E.2d 370 (1985) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Independent source, (p. 523) for discussion of topic.

Incident to arrest exception

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He contends the trial court erred in admitting certain evidence seized from the hotel room pursuant to searches conducted without a warrant.

Syl. pt. 3 - "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 course imperative." Syl. pt. 1, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

State v. Cook, (continued)

When the arresting officers entered the hotel room unannounced with shotguns drawn, the appellant and the Price brothers were sleeping in bed together. They offered no resistance and complied with the officers' order to "freeze." Each man was searched next to the bed, and the appellant and Mark Price were handcuffed. The officers then searched the immediate area around and underneath the bed, seizing some items of clothing. One of the officers then examined items located on a dresser some distance from the bed. One of these items was an address book which, upon closer inspection, was shown to belong to Roy Frye. Under the address book on the dresser was a checkbook which belonged to Roy Frye.

Two to three minutes later, after the officers had secured the scene, a scientific investigation unit arrived to "process" the hotel room. The Price brothers and appellant were escorted out before it began its search of the premises. This unit seized the address book and the checkbook and took photographs of the room and its contents.

The Court found the arresting officer's search of the top of the dresser was outside the scope of the immediate geographic area under the physical control of the three arresters. Furthermore, the address book and the checkbook offered no immediately apparent evidence of criminal activity. Since the three arresters, two of them handcuffed, were apparently seated on a bed with one or more shotguns pointed at them, the arresting officer's search of the top of the dresser outside of the area of their physical control was clearly unnecessary under either the law enforcement safety or protection of evidence rationales of the "incident to a valid arrest" and "plain view" doctrines. Furthermore, the address book and the checkbook were obviously not weapons and offered no indicia of ownership.

The Court found the seizure of this evidence, along with the photographs taken of the room and its contents, was further complicated by the fact that it was executed by a second group of officers who began conducting their search after the arresters were removed from the premises. On cross-examination, the arresting officer admitted at the suppression hearing that the room could have been secured and a warrant obtained prior to the search and seizure by this second group of officers.

Exclusionary rule (continued)

Incident to arrest exception (continued)

State v. Cook, (continued)

The Court found there was no excuse for the failure to obtain a warrant prior to the search by the second group of officers. The Court found the State failed to meet its burden under Syl. pts. 1 and 2 of *State v. Moore*, *supra*, to show, by a preponderance of the evidence, that the exigencies of the situation justified the action taken. Therefore, the evidence seized by the second group of officers, including the address book and the checkbook, was illegally obtained and inadmissible.

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

See SEARCH AND SEIZURE Co-defendant, (p. 516) for discussion of topic.

Independent source

State v. Black, 338 S.E.2d 370 (1985) (Per Curiam)

Appellant was convicted of kidnaping and aggravated robbery. Following the incident, Officer Byard, who had not yet received information regarding the robbery, observed appellant driving in an odd manner. He stopped the car and gave the defendant a field sobriety test. The defendant passed the test and the officer permitted him to leave.

The appellant contends the cash boxes, which were seized under an illegal warrant were suppressed as evidence by the trial court and that because the actual introduction of the cash boxes was prohibited, the testimony of Officer Byard that he had seen the cash boxes should also have been suppressed. Essentially, the defendant argues the evidence was "fruit of a poisonous tree" and inadmissible.

State v. Aldridge, 172 W.Va. 218, 304 S.E.2d 671 (1983), held the fruit of the poisonous tree doctrine has no application where the government learns about evidence from a source independent of an illegal search and seizure.

Exclusionary rule (continued)

Independent source (continued)

State v. Black, (continued)

The Court found it was clear that the officer had no notice that a robbery had been committed and that his view of the safe boxes was a result, not of any search, but of a chance glance through the window of the car incidental to his stop of the defendant. No search warrant was issued for the seizure of the safe boxes until sometime after the officer stopped the defendant for the sobriety test and the boxes were not seized until considerably later.

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant contends the trial court erred in failing to suppress, as "fruit of the poisonous tree," clothing seized from his home pursuant to a search warrant obtained following a warrantless search of the premises. The State contends that the officer whose affidavit formed the basis for the issuance of the search warrant had no knowledge of the alleged warrantless search and there was, therefore, no "causal link" between the initial search and the issuance of the warrant, rendering the "poisonous tree" doctrine inapplicable.

In this case, the police officer's affidavit, containing absolutely no indicia of the existence of a previous search, corroborated his testimony that he was totally unaware of any search that had allegedly taken place on the date of the robbery. The Court found absolutely no link was established by the appellant between the search and the warrant which could raise even a possibility of "exploitation" of the initial search by the police. Applying the standard set forth in Syl. pt. 9 of *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981), the Court found no error in the trial court's failure to suppress evidence seized pursuant to the warrant.

Plain view exception

State v. Barker, 346 S.E.2d 344 (1986) (Per Curiam)

See INEFFECTIVE ASSISTANCE Failure to make motions, (p. 311) for discussion of topic.

Exclusionary rule (continued)

Plain view exception (continued)

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He contends the trial court erred in admitting certain evidence seized from the hotel room pursuant to searches conducted without a warrant.

Syl. pt. 6 - "A warrantless search of property in plain view is constitutionally permissible provided three requirements are met: '(1) the police must observe the evidence in plain sight without benefit of a search [without invading one's reasonable expectation of privacy], (2) the police must have a legal right to be where they are when they make the plain sight observation and, (3) the police must 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. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)." Syl. pt. 7, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

See SEARCH AND SEIZURE Exclusionary rule, Incident to arrest exception, (p. 521) for discussion of topic.

State v. Curtin, 332 S.E.2d 619 (1985) (Per Curiam)

Appellant contends the marijuana plants found in the garden behind his residence should have been suppressed as the product of an illegal search because the search warrant was only for the house itself. The Court found the "plain view" exception permitted seizure of the evidence. The Court found the marijuana plants were in plain sight from where the police officers were standing in the defendant's backyard; the observation of the plants clearly did not invade any reasonable expectation of privacy on the part of the defendant (who grew the plants in a plainly visible area); and the fact that a trooper used a flashlight to see the plants did not affect the propriety of the view.

The Court found the police had a legal right to be on the defendant's property and the two officers who found the plants in the garden had a valid purpose in being in the backyard, *i.e.*, to maintain security during the search of the residence.

Exclusionary rule (continued)

Testimony obtained from tainted evidence

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition which set aside his first-degree murder conviction.

The defendant killed a man who was having an affair with his wife, from whom the defendant was separated at the time of the killing. Psychologists for the defense testified at trial that the defendant was extremely fragile emotionally and had viewed his wife as his "dream girl." His relationship with the deceased was described as like a father and son.

According to the psychologists, the defendant suffered hallucinations and honestly believed that he heard the voice of God telling him to kill his wife. They therefore believed that he lacked the capacity to appreciate the wrongfulness of his act at the time of commission.

At a pretrial conference the prosecution requested discovery of all papers used by the psychologists in arriving at their conclusions. The motion was denied but the trial court ruled that these papers be made available directly to the State's psychologist. Certain procedures were prescribed to protect the defendant's confidentiality but at trial the prosecution cross-examined defense psychologist using material obtained in violation of the Fourth Amendment (See DISCOVERY Prosecution's right to, (p. 136).

Syl. pt. 6 - a Witness's testimony which is obtained or substantially influenced by materials seized in violation of the Fourth Amendment may be suppressed.

Failure to provide copy of warrant or receipt for property

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends evidence seized by police from the cab of the tractor-trailer he was driving on the day of the robbery was inadmissible because he was not given a copy of the search warrant or a receipt for the property seized.

Failure to provide copy of warrant or receipt for property (continued)

State v. Brown, (continued)

The Court found no merit to these contentions. The Court found the vehicles was not owned by the appellant and that a copy of the search warrant and property receipt was left in the cab of the truck by the officers conducting the search.

Probable cause to search

State v. Thompson, 358 S.E.2d 815 (1987) (Neely, J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 537) for discussion of topic.

Return of property

Gamecocks

Ray v. Mangum, 346 S.E.2d 52 (1986) (McHugh, J.)

Syl. pt. - Absent express statutory authority providing for the humane destruction of gamecocks seized as a result of illegal cockfighting in violation of *W.Va.Code*, 61-8-19 [1931], such gamecocks ordinarily must be returned to the owners thereof.

Search of a public school locker

State v. Joseph T., 336 S.E.2d 728 (1985) (McHugh, J.)

The appellant was found, during delinquency proceedings, to have marijuana. In this appeal, he challenges the warrantless search of his school locker by school authorities.

Search of a public school locker (continued)

State v. Joseph T., (continued)

The appellant was a student in the eighth grade at Follansbee Middle School in Brooke County. An assistant principal noticed the smell of alcohol upon Warren M., a student. Warren M. admitted to the assistant he had consumed beer at the appellant's house on the way to school that morning. Suspecting the appellant may have brought an alcoholic beverage to school, the assistant principal directed two teachers at the school to search the appellant's locker. The two opened the locker with a master key while the assistant principal talked with the appellant in the principal's office. Although no alcoholic beverages were located, the teachers found various items in a jacket in the locker, including two or three wooden pipes, a number of "wrapper papers" for making cigarettes and a small plastic box. The plastic box contained several handmade cigarettes which were packed with what appeared to be marijuana. The teachers placed the items back in the jacket and locked the jacket in the locker. With one of them waiting at the locker, the other went to the principal's office and returned with the appellant, assistant principal and the principal. The appellant's locker was again opened and its contents examined.

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 course imperative." Syl. pt. 1, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

Syl. pt. 2 - Public school students in West Virginia are entitled under *U.S. Const. Amend.* IV and *W.Va. Const. art.* III, § 6, to security against unreasonable searches and seizures conducted in the schools by school principals, teachers and other school authorities.

Syl. pt. 3 - In determining whether a warrantless search concerning a public school student conducted by school authorities is reasonable under *U.S. Const.* amend. IV and *W.Va. Const.* art. III, § 6, in the context of delinquency or criminal proceedings instituted against the student, the search is to be assessed in view not only of the rights of the public school student but also in view of the need of this State's educational system to prevent disruptive or illegal conduct by public school students; in particular, the search must be reasonable

Search of a public school locker (continued)

State v. Joseph T., (continued)

in terms of (1) the initial justification for the search and (2) the extent of the search conducted; the initial justification for the search is determined by the "reasonable suspicion" standard: (a standard less exacting than "probable cause") under which a search is justified where school authorities have reasonable ground for suspecting that the search will reveal evidence that the student violated the rules of the school or the law; the extent of the search conducted is reasonable when reasonably related to the objective of the search and not excessively intrusive to the student.

Syl. pt. 4 - Where an assistant principal of a public school had reasonable grounds for suspecting that the locker of a public school student contained an alcoholic beverage in violation of the rules of the school, and a warrantless search of the student's locker revealed a number of marihuana cigarettes, the search, in the context of delinquency or criminal proceedings instituted against the student, did not constitute a violation of the student's right under *U.S. Const.* amend. IV and *W.Va. Const.* art. III, § 6, to security against unreasonable searches and seizures.

Self-incrimination

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

Standing to challenge

Reasonable expectation of privacy

State v. Adkins, 346 S.E.2d 762 (1986) (Miller, C.J.)

Appellant was convicted of possession with intent to deliver a controlled substance. He contends the contraband introduced against him was seized under an invalid search warrant in that the warrant affidavit failed to establish probable cause. The State argues the appellant has no right to challenge the

Standing to challenge (continued)

Reasonable expectation of privacy (continued)

State v. Adkins, (continued)

search and seizure because he had no legitimate expectation of privacy in the premises from which the contraband was seized. The search was made of a house rented to the defendant's girlfriend, where he frequently stayed.

Syl. pt. 1 - A defendant who is more than a casual visitor to an apartment or dwelling in which illegal drugs have been seized has the right under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia constitution to challenge the search and seizure of the illegal drugs which he is accused of possessing.

The Court found this test was met in this case. The evidence was seized from a house rented by the defendant's girlfriend and that the defendant had access to all parts of the residence and was present when the police searched the house and seized the evidence. The defendant stayed with his girlfriend in her house on and off for six years and was there as long as two and three weeks at a time. From these facts, it was clear appellant was more than a casual visitor to the residence and, therefore, had a legitimate expectation of privacy.

Voluntariness

Illegal arrest

State v. Dyer, 355 S.E.2d 356 (1987) (McGraw, C.J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends the trial court erred in allowing the State to introduce into evidence the inculpatory statements he gave the police. Although he was not formally arrested, he was taken into custody at his home on the day of the offense and contends that since the officer did not have a warrant to arrest him at that time, the inculpatory statements should have been excluded as the products of an illegal arrest.

Voluntariness (continued)

Illegal arrest (continued)

State v. Dyer, (continued)

The victim was struck by a hit-and-run driver in front of her home. A neighbor heard a loud crash and saw a blue and white truck or a four-wheel drive vehicle pull out of the ditch and proceed down Connell Road. The police learned that a vehicle owned by appellant and matching the description given by the neighbor had been seen speeding down Connell Road about half an hour before the victim was found. A trooper drove to appellant's home, where he observed a blue and white four-wheel drive vehicle with recent damage to the passenger side. He parked his cruiser behind the vehicle and knocked on the door of the house. He unsuccessfully inquired of a neighbor as to appellant's where-abouts, and as he was returning to his cruiser, he met a woman walking up the driveway who identified herself as appellant's wife. The trooper explained he wanted to speak to appellant and she invited him in. The trooper advised the appellant that he was investigating a hit-and-run accident and asked to speak with him outside. Appellant consented , they went out to the porch and the trooper told appellant the details of the accident and the fact that his vehicle may have been involved. Appellant agreed to be questioned, executed a written waiver of his rights and gave an inculpatory oral statement.

The Court found the trooper entered the house at the invitation of appellant's wife, and once inside did not exercise any control or influence over appellant which would lead a reasonable person to believe he was in custody. Appellant voluntarily accompanied the officer outside and to the cruiser to make a statement. The Court found no evidence of an illegal detention sufficient to vitiate the subsequent inculpatory statements.

The Appellant executed a written waiver of his *Miranda* rights, and gave a statement admitting he had been driving home from work on Connell Road at the time of the accident, had fallen asleep and run off the road, striking a large rock; but he denied having hit anyone. He also admitted to drinking earlier that day.

Voluntariness (continued)

Illegal arrest (continued)

State v. Dyer, (continued)

Appellant agreed to return to the scene of the accident and speak to the investigating officer. After being orally advised of his rights, appellant consented to allow the officer to return to his home and inspect his vehicle. The officer observed the damaged exterior and noticed what appeared to be blood on the hood and windshield. The appellant agreed to allow his vehicle to be impounded for a thorough search and to accompany the officer to the sheriff's office to give a written statement and to submit to a breathalyzer test.

Appellant contends the trial court erred in refusing to exclude the paint scraping and blood samples seized from his automobile. He contends his consent was involuntary because it was given while he was in custody.

The Court found no evidence that the appellant's consent to search the vehicle was the product of implied or express threats, force or promises of leniency. All of the evidence indicated the appellant's consent to the search was the product of free choice and a desire to cooperate with the police. The Court could not conclude his consent was invalidated merely by the fact that he was in custody.

Warrant

False statements

State v. Wood, 352 S.E.2d 103 (1986) (Per Curiam)

Appellant was convicted of possession with intent to deliver and manufacture a controlled substance.

She contends the trial court erred in denying her motion to suppress certain incriminating evidence.

A police officer obtained a warrant to search the appellant's residence for PCP and drug paraphernalia. The affidavit supporting the warrant stated a confidential informant "previously used and found to be reliable" had bought the drug at the appellant's residence. The warrant was executed and the officers seized a quantity of white powder later determined to be PCP.

Warrant (continued)

False statements (continued)

State v. Wood, (continued)

Prior to trial the appellant moved to suppress the items seized claiming the affidavit supporting the warrant was invalid. The judge denied the motion. On appeal, she contends the affidavit contained false statements, made either deliberately or with reckless disregard for the truth, which, if removed, would render the affidavit insufficient to establish probable cause for a search warrant.

The Court found that, in some situations, a substantial preliminary showing that the affiant in a search warrant affidavit has made a false statement, knowingly and intentionally or with reckless disregard for the truth, entitles an accused to an evidentiary hearing at which to challenge the truthfulness of the factual statements contained in the affidavit. A showing of entitlement to a hearing does not necessarily insure the accused will prevail. The accused must show, by a preponderance that the statements are false and that they were made deliberately or with reckless disregard for the truth.

The testimony of the police officer and the alleged informant was conflicting. The trial court noted the inconsistencies in the testimony of the alleged informant and concluded his testimony was not credible.

The Court could not say the trial court's ruling was erroneous, and in view of the conflicting testimony, found no reversible error.

Good faith exception

State v. Adkins, 346 S.E.2d 762 (1986) (Miller, C.J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 534) for discussion of topic.

Warrant (continued)

Hearsay

State v. Corbett, 352 S.E.2d 149 (1986) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 536) for discussion of topic.

Informant's reliability

State v. Curtin, 332 S.E.2d 619 91985) (Per Curiam)

Appellant contends the trial court erred in denying his motion to suppress the evidence seized under the search warrant. He contends the magistrate who issued the warrant failed to make an independent evaluation of the reliability of the informant.

The named informant had stated he not only witnesses the criminal activity but participated in it. The Court found the deputy's affidavit recited the informant's name and the magistrate questioned him about the informant's reliability. The Court found this recitation placed the warrant outside of the heightened reliability test used when an unnamed informant is involved. The Court found under the circumstances of this case, the magistrate made an independent judicial decision that there was probable cause to believe there was marijuana on defendant's property.

Probable cause

State v. Adkins, 346 S.E.2d 762 (1986) (Miller, C.J.)

The question presented was whether it is proper for a court to look outside the "four corners" of a search warrant affidavit and consider at a suppression hearing testimony that was given to the magistrate at the time the warrant was issued in order to determine if there was probable cause to issue the warrant.

State v. Adkins, (continued)

Syl. pt. 2 - Under Rule 41(c) of the West Virginia Rules of Criminal Procedure, it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information had been contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit.

The Court found Rule 41(c), *W.Va.R.Crim.P.*, which became effective on October 1, 1981, controls the search warrant in this case since it was issued in April, 1983.

Syl. pt. 4 - Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative effort of police officers.

The factual basis for the affidavit in this case was an undisclosed confidential informant's statement, reported by the officer making the affidavit, that he had "observed marijuana inside the aforementioned (sic) structure and in the control (sic) of Danny Atkins (sic)." The warrant affidavit lacked the date when the informant observed the drugs, which creates a staleness problem that has caused some search warrant affidavits to be deficient. The Court found the fact statement in the warrant affidavit provides nothing that supplements the informant's basis of knowledge so as to lend credence to his conclusory assertion, much less his reliability. The Court found there were no facts in the affidavit indicating that police investigation had tended to corroborate the informant's tip. See *Illinois v. Gates*, 462 U.S. 213 (1983). The Court concluded the warrant affidavit is defective under the *Gates* "totality rule."

The Court acknowledged that the "good faith" exception to the exclusionary rule set forth in *United States v. Leon*, 104 S.Ct. 3405 (1984) may salvage an otherwise defective warrant and discussed situations in which the exception would not apply. Here, the Court found the affidavit was so conclusory with

State v. Adkins, (continued)

regard to its probable cause information as to render it a "bare bones" affidavit. Even under *Leon*, a bare bones affidavit is not subject to rehabilitation by the good faith exception because no reasonably well-trained officer could have concluded that there were sufficient facts stated in the warrant and affidavit to justify a conclusion of probable cause for the issuance of the warrant.

State v. Corbett, 352 S.E.2d 149 (1986) (Per Curiam)

Appellant was convicted of misdemeanor possession of marijuana. He contends the trial court erred in denying his motion to suppress because the affidavit for the search warrant did not establish probable cause.

Syl. pt. - "Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers." Syl. pt. 4, *State v. Adkins* 176 W.Va. 613, 346 S.E.2d 762 (1986).

Here, the affiant police officer gave a date which was the day before the police officer made the application for the warrant. The Court found the affidavit also contains other indicia of probable cause not present in the *Adkins* affidavit. The marijuana which was purchased was still fresh, while other marijuana was being dried in a room located on the left just after entering the house. The police officer stated in the affidavit that he had the marijuana allegedly purchased from the defendant in his possession. These facts further differentiate this case from *Adkins* and serve to minimize the possibility that the informant's hearsay statements were a fabrication.

State v. Corbett, (continued)

Under the totality of the circumstances, the facts contained in the affidavit provided the magistrate with a sufficient basis for probable cause for the issuance of the search warrant. The search warrant was valid and the trial court did not err in denying the defendant's motion to suppress the marijuana seized from his residence.

State v. Curtin, 332 S.E.2d 619 91985) (Per Curiam)

Appellant contends the trial court erred in denying his motion to suppress the evidence seized under the search warrant. He contends the magistrate who issued the warrant failed to make an independent evaluation of probable cause.

The magistrate was not involved in the preparation of the affidavit or the warrant and although the magistrate could not remember the exact questions she asked of the police officer she remembered asking questions about his information for approximately twenty minutes and inquired about the reliability of the information. The Court found no contradictory evidence suggesting that the magistrate did not make a probable cause determination before issuing the search warrant.

State v. Thompson, 358 S.E.2d 815 (1987) (Neely, J.)

Appellant was convicted of two counts of receiving stolen property, in violation of *W.Va.Code*, 61-3-18.

The investigating officer received information from a confidential informant regarding the location of the stolen property. The officer and the informant traveled to the appellant's farm and were told by appellant's employee that the employee had helped unload some property fitting the description of the stolen property. Armed with that information the officer obtained a search warrant by affidavit and located the stolen property on appellant's land.

State v. Thompson, (continued)

Syl. pt. 1 - "In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (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." Syl. pt. 1, *State v. Walls*, 170 W.Va. 419, 294 S.E.2d 272 (1982).

The Court held that the affiant must establish the reliability of any confidential informant and show the basis for his assertion about the location of the stolen property. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. U.S.*, 393 U.S. 410 (1969); and *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1989).

Although the affidavit stated that "a confidential and reliable informant who has been reliable in the past" gave the information, the informant was not shown to have been reliable in the past. The officer also admitted that he had not used the informant previously. Although informant's reliability was established in the present, it was not established as to past information. In addition, no corroboration was given to support issuance of the warrant.

Here, the affidavit, minus the false allegations about the informant's reliability, was held insufficient to establish probable cause. See *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1989). See also, *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980); *United States v. Character*, 568 F.2d 442 (5th Cir.1978); *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977); *State v. Little*, 560 S.W.2d 403 (Tenn. 1978).

Syl. pt. 2 - "Both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation. There is virtual unanimity that a warrant may not issue on unsworn testimony." Syl. pt. 3, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Warrant (continued)

Probable cause (continued)

State v. Thompson, (continued)

The Court rejected the State's attempts to bring the affidavit within various "good faith" exceptions. See *Illinois v. Gates*, 462 U.S. 213 (1983) ("totality of the circumstances:) and *United States v. Leon*, 468 U.S. 897 (1984) ("reasonably well-trained officer would have known that the search was illegal").

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Testimony outside of affidavit, (p. 539) for discussion of topic.

Sworn testimony

State v. Adkins, 346 S.E.2d 762 (1986) (Miller, C.J.)

Syl. pt. 3 - Both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation. There is virtual unanimity that a warrant may not issue on unsworn testimony.

In this case it was undisputed that the police officers were not under oath when they gave information about the reliability of the informant to the magistrate.

Testimony outside of affidavit

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He claimed that evidence should be suppressed due to the inadequacy of the search warrant used to obtain it.

State v. Worley, (continued)

The investigating officer discovered an abandoned car with blood and debris in the passenger area. He opened the trunk and discovered the victim's body. Based on statements given by a bartender who had seen the victim the night before her body was found, the police obtained a search warrant for defendant's car and a trailer where the defendant and another man were believed to reside. The sole ground for probable cause given in the warrant affidavit was "statement verifying that Danny Worley and Bobby Hudnell were last seen (sic) with the victim(,) were also new (sic) leaving with victim in victim's vehicle.

The owner of the trailer, the defendant's father, allowed police access to the trailer voluntarily, assuring them that a warrant was unnecessary. The defendant and a Bobby Hudnell were in the trailer. They were detained in the police car while police searched the trailer. A pistol matching the description in the warrant was seized in the defendant's bedroom. Defendant and Hudnell were advised of their *Miranda* rights and taken into custody.

Two more searches were performed with the defendant's father's consent (indeed, at his invitation). These yielded some of the victim's jewelry and the murder weapon, a second pistol. Defendant subsequently made several incriminating statements and led police to further incriminating evidence. After signing a waiver of his right to counsel, defendant admitted robbing the victim but denied killing her; he did admit his presence during the murder.

Syl. pt. 1 - "Under Rule 41(c) of the West Virginia Rules of Criminal Procedure, it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information has been contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit." Syllabus Point 2, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Warrant (continued)

Testimony outside of affidavit (continued)

State v. Worley, (continued)

Syl. pt. 2 - "Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers." Syl. pt. 4, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Here, the Court refused to consider oral testimony and a letter from the issuing magistrate and rejected the affidavit as inadequate.

Warrantless search

Arrest following

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See ARREST Warrantless, Probable cause, (p. 30) for discussion of topic.

Burden of state to show exception

State v. Meugge, 360 S.E.2d 216 (1987) (McGraw, C.J.)

See ARREST By private security guard, Effect of, (p. 25) for discussion of topic.

Warrantless search (continued)

Generally

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See SEARCH AND SEIZURE Consent search, Voluntariness, (p. 519) for discussion of topic.

Incident to arrest

State v. Meugge, 360 S.E.2d 216 (1987) (McGraw, C.J.)

See ARREST By private security guard, Effect of, (p. 25) for discussion of topic.

Probable cause for

State v. Choat, 363 S.E.2d 493 (1987) (McHugh, J.)

Appellant was convicted of carrying a dangerous or deadly weapon without a license (*W.Va.Code*, 61-7-1). He contended on appeal that the search used to obtain the weapon was unreasonable.

Police officers were on patrol when they noticed appellant and others standing outside a van parked near a local bar. One officer testified that he observed at least one person drinking a can of beer. Since drinking in pubic violated a city ordinance, the officer stopped to investigate.

Appellant apparently leaned into the van, whereupon one of the officers grabbed him, placed him against the van and patted down his outside pants pockets. The search yielded the dangerous weapon in question.

Syl. pt. 1 - "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment to the *United States Constitution* and Article III, Section 6 of the *West Virginia Constitution*-subject only to a few specifically established and well-delineated exceptions. . . . ." Syl. pt. 1, in part, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

Warrantless search (continued)

Probable cause for (continued)

State v. Choat, (continued)

Syl. pt. 2 - Where a police officer observes several individuals in a high-crime vicinity during the early morning hours and has reason to believe at least one of those individuals is violating a city ordinance, an investigatory stop conducted by the police officers is constitutionally permissible. *U.S. Const*. amend. IV. *W.Va. Const.* art. III, § 6.

Syl. pt. 3 - Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. *U.S. Const.* amend. IV. *W.Va. Const.* art. III, § 6.

Here, the Court held that the officers were justified in stopping to investigate criminal activity and in searching the appellant.

Wiretapping

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant contended the trial court erred in allowing the jury to hear a tape recording made in the course of the alleged controlled drug buy. The police had suspected for some time that the appellant was selling marijuana. They agave an informant marked money, fitted him with a radio transmitter and sent him to the appellant's house. There, the informant bought six marijuana cigarettes from the appellant. The police monitored and recorded the conversation and subsequently searched the house pursuant to a search warrant.

Appellant contends the surveillance was made without a warrant and constituted an illegal search and seizure. The Court found no merit to this contention.

Wiretapping (continued)

State v. Thompson, (continued)

Syl. pt. 4 - A warrantless electronic recording of a defendant's conversation made before this Sixth Amendment right to counsel has attached, and made 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 guaranteed by the Fourth Amendment to the United States Constitution and by article III, section 6 of the West Virginia Constitution.

The Court found that the tape involved in this case was made with the knowledge and consent of the informant and that at the time the defendant had neither been arrested nor indicted. The Court found this situation falls within the principle set forth in *State v. Blackburn*, 170 W.Va. 96, 290 S.E.2d 22 (1982) rather than that in *Farruggia v. Hedrick*, 174 W.Va. 58, 322 S.E.2d 42 (1984). The Court found the tape was admissible into evidence.

SELF-DEFENSE

As a matter of law

State v. Baker, 356 S.E.2d 862 (1987) (Miller, J.)

Appellant claimed error in the trial court's refusal to acquit her on the grounds of self defense as a matter of law. Appellant was convicted of voluntary manslaughter.

The evidence showed that the victim, while intoxicated, entered a bar operated by appellant and proceeded to wreak havoc on both patrons and premises. A struggle ensued with the bar owner during which the owner struck the victim with a pistol. The struggle continued and the pistol fell to the floor. The appellant secured the pistol and fired a warning shot. The victim came toward appellant stating "I'll kill you, bitch. I'll kill you, bitch." Appellant fired several shots at the victim while she backed away from him. At one point she stated "I don't want to hurt you." The victim walked out of the bar after being show and died some time later at a hospital.

The evidence showed that appellant believed that the victim intended to kill her or to inflict serious bodily harm. Appellant was fifty-four years of age and small in stature. The deceased was in his twenties and weighed approximately two hundred fifteen pounds.

Syl. pt. 1 - The amount of force that can be used in self-defense is that normally one can return deadly force only if one reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return.

Syl. pt. 2 - "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." Syl. pt. 4, *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

Here, despite an earlier ruling (*State v. Clark*, 175 W.Va. 58, 331 S.E.2d 496 (1985) stating that self-defense was not available as a matter of law because "a person is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled," the Court noted that at no time was the victim disabled sufficiently to eliminate appellant's reasonable expectation that she would be seriously harmed. Appellant even fled the bar following the shooting, thinking the victim was pursuing her, and locked herself in her apartment.

As a matter of law (continued)

State v. Baker, (continued)

The Court ruled the appellant entitled to acquittal as a matter of law.

Burden of proof

Prosecution's after *prima facie* showing

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. He assigned as error the trial court's failure to instruct the jury concerning burden of proof when self-defense is asserted.

The Court held that the State must disprove beyond a reasonable doubt the defense of self-defense once it is asserted. See *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

Here, the Court found that appellant's own instruction, properly given, covered this point. No error.

Character and reputation of victim

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

See EVIDENCE Expert witness, (p. 203) for discussion of topic.

Evidence

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

During her trial for first-degree murder appellant attempted to introduce evidence of the victim's past violent behavior as part of her grounds for self-defense.

Character and reputation of victim (continued)

Evidence (continued)

State v. Steele, (continued)

Syl. pt. 6 - "'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 or reputation of the deceased as a dangerous and quarrelsome man, and also to prove 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.' Syl. pt. 1, *State v. Hardin*, 91 W.Va. 149, 112 S.E. 401 (1922)." Syl. pt. 3, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982).

Here, it was shown that the appellant knew nothing of the incidents alleged. No error was found in the trial court's disallowing the testimony.

The Trial court also ruled the same evidence inadmissible for remoteness. Again, no error was found.

Syl. pt. 7 - "'Whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syl. pt. 5, *Yuncle v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945)." Syl. pt. 6, *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985).

In general

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Syl. pt. 1 - "No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot." Syl. pt. 6, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927).

In general (continued)

State v. Clark, (continued)

Syl. pt. 2 - "It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence." Syl. pt. 5, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927).

State v. Matney, 346 S.E.2d 818 (1986) (Per Curiam)

Appellant was convicted of second degree murder. He contends the trial court erred by instructing the jury on both first and second degree murder without a showing of malice on the part of the defendant because the evidence established as a matter of law that the defendant has acted in the heat of passion under great provocation. The evidence was also insufficient to prove beyond a reasonable doubt that the defendant did not act in self-defense.

The Court found the evidence in this case did raise a jury question as to whether the defendant acted in self-defense. The evidence did not, however, establish that the defendant acted in self-defense as a matter of law. The Court found the trial court did not err in instructing the jury on both degrees of murder; the evidence was such that a rational jury could have found beyond a reasonable doubt that the killing was not done in self-defense.

The Court found here the evidence was not manifestly inadequate and was sufficient to convince impartial minds of the guilty of the defendant. The Court found, viewing the evidence in the light most favorable to the prosecution, the verdict is consistent with evidence and will not be overturned.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, J.)

See SELF-DEFENSE Burden of proof, Prosecution's after *prima facie* showing, (p. 546) for discussion of topic.

SELF-DEFENSE

Instructions

Defense of another

State v. Saunders, 330 S.E.2d 674 (1985) (Neely, C.J.)

Appellant was convicted of first-degree murder. He contends the trial court erred in refusing to give any of appellant's instructions on the issue of defense of another.

Syl. pt. 1 - "The right of self-defense may be exercised in behalf of a brother or a strange." Syl. pt. 15, *State v. Greer*, 22 W.Va. 800 (1883).

Syl. pt. 3 - The validity of a claim of defense of another, like the question of self-defense, is properly a matter for the jury's determination.

The State contended the court's refusal to give instructions in regard to the defense of another was harmless error since one of the appellant's instructions informed the jury that if the defendant's use of a dangerous and deadly weapon resulted from sudden passions brought about by his brother's being beaten, assaulted, and struck by the deceased and his brother without fault on the part of the defendant, then malice could not be presumed. The State contended that the jury believed the appellant was acting in defense of himself or his brother, a verdict of voluntary manslaughter would have been returned. The Court found the instruction was not adequate to explain to the jury the issue of defense of another.

The Court found the jury should have been provided with the proffered instruction on defense of another because the defense exists in West Virginia and because there was sufficient evidence to allow the jury to consider whether the appellant believed the deceased and his brother were going to injure seriously or even kill his brother.

Reasonable force

State v. Baker, 356 S.E.2d 862 (1987) (Miller, J.)

See SELF-DEFENSE As a matter of law, (p. 545) for discussion of topic.

Reasonable force (continued)

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See SUFFICIENCY OF EVIDENCE Self-defense, (p. 634) for discussion of topic.

SELF-INCRIMINATION

During arrest

State ex rel. White v. White, No. 17918 (10/22/87) (Per Curiam)

On a writ of habeas corpus, relator alleges that his right against self-incrimination was violated during his arrest. At an *in camera* hearing, the evidence showed that the relator was advised of his right to remain silent and executed a written waiver. No evidence of coercion regarding either the waiver or subsequent statements was introduced. An allegation of intoxication was rebutted by police testimony and relator did not introduce evidence on this issue.

Here, the Court found the trial court acted properly in determining the voluntariness of the statements out of the jury's presence. See *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982). Since the trial court's decision was neither plainly wrong or clearly against the weight of the evidence (see *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985) relief was granted.

During arrest by private security guard

State v. Meugge, 360 S.E.2d 216 (1987) (McGraw, C.J.)

See ARREST By private security guard, Effect of, (p. 25) for discussion of topic.

Duty of those detaining

State v. Meugge, 360 S.E.2d 216 (1987) (McGraw, C.J.)

See ARREST By private security guard, Effect of, (p. 25) for discussion of topic.

SELF-INCRIMINATION

Handwriting samples

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

Appellant was convicted of forgery. On appeal he asserted that samples of his handwriting should no have been admitted into evidence.

While Appellant was in the Kanawha County jail on unrelated charges, state police officers requested a handwriting sample and interrogated appellant. The officers testified that appellant agreed to talk with them. Appellant also said that he had fired his lawyer and was requesting appointed counsel. (Appellant already had appointed counsel on prior forgery charges and was being held for an initial appearance on these forgery charges).

Following his magistrate court appearance, appellant was taken to state police headquarters. He signed a waiver of his *Miranda* rights and a special waiver stating that he had agreed to talk with the officers at the jail prior to requesting counsel on the unrelated charges. He then gave several handwriting samples and confessed to the current charges. He was returned to the Kanawha County jail but was brought back to the police headquarters the next day, once again signed a waiver of his rights and gave additional handwriting samples. Four of these samples were admitted into evidence at trial.

Appellant claimed on appeal that his right against self-incrimination was violated by the delay between his original confession and the later handwriting samples. See *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, 266 (1982).

Syl. pt. 1 - Handwriting samples or exemplars have long been regarded as physical evidence and are not testimonial. Consequently, they are outside the Fifth Amendment protection against self-incrimination.

The Court held that *Persinger* was inapplicable here since no constitutional or statutory right was at issue. See *W.Va.Code*, 62-1-5 (prompt presentment before a magistrate; at issue in *Persinger*).

Psychological tests

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

SELF-INCRIMINATION

Statements by defendant

Documents

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

The prosecution appealed defendant's successful habeas corpus petition which reversed his conviction for first-degree murder.

At defense counsel's request, defendant prepared certain papers indicating his state of mind. The prosecution's psychologist testified using these papers and the defendant's psychologists used them to arrive at their conclusions. In addition, the prosecution cross-examined the defense psychologists with the aid of the material. These papers were held protected from discovery by the Fourth Amendment and the testimony excludible.

(See DISCOVERY Prosecution's right to, (p. 136) for discussion of topic.

In addition, defendant claimed that his Fifth Amendment right against self-incrimination was violated by being compelled to produce the documents and that cross-examination revealed privileged communications.

Syl. pt. 8 - The Fifth Amendment privilege against self-incrimination has been interpreted to provide protection only where incriminating evidence of a testimonial or communicative nature is sought from a witness through the vehicle of state compulsion.

Syl. pt. 9 - The Fifth Amendment protects only against compelled communications. It does not extend to the contents of documents which are obtained by compulsory process where such documents have been voluntarily prepared.

Syl. pt. 10 - Where papers are prepared by a person who is subject to a subpoena duces tecum, the possibility of testimonial self-incrimination exists if production of the papers authenticates them sufficiently to make them admissible in evidence.

SELF-INCRIMINATION

Testimony of a nonparty witness

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Refusal to allow testimony of nonparty witness, (p. 111) for discussion of topic.

Unreasonable delay in taking before magistrate

State v. Grubbs, 364 S.E.2d 824 (1987) (Miller, J.)

See SELF-INCRIMINATION Handwriting samples, (p. 552) for discussion of topic.

Voice identification

State v. Hutchinson, 342 S.E.2d 138 (1986) (McHugh, J.)

See IDENTIFICATION Suggestive identification, Denial of right to counsel, (p. 285) for discussion of topic.

Voluntariness

Burden of proof

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

Appellant was convicted of aggravated robbery. She gave a confession to police shortly after arrest. On appeal she contended that she "was not in full possession of her faculties" at the time the confession was given; therefore the statement was not voluntary and a valid waiver of her right against self-incrimination did not take place.

Syl. pt. 6 - "'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 a part of an offense were voluntary before such may be admitted into the evidence of a criminal case.' Syl. pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975)." Syl. pt. 1, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Voluntariness (continued)

Burden of proof (continued)

State v. Massey, (continued)

When the defendant raises impairment as a bar to voluntariness the State must prove the defendant's sanity by a preponderance of the evidence. *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295, at 299 (1979)

Here, the Court held that the State need not produce expert testimony at a pre-trial suppression hearing. Lay testimony was sufficient. *State v. Price*, 92 W.Va. 542, 115 S.E. 393 (1922); *State v. Fugate*, 103 W.Va. 653, 138 S.E.2d 318 (1927).

Right to counsel

State v. Hutchinson, 342 S.E.2d 138 (1986) (McHugh, J.)

See IDENTIFICATION Suggestive identification, Denial of right to counsel, (p. 285) for discussion of topic.

Witness

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Denial of compulsory process, (p. 96) for discussion of topic.

SELF-INCRIMINATION – STATEMENTS BY DEFENDANT

Confessions to police

In the Matter of Mark E.P., 363 S.E.2d 729 (1987) (Per Curiam)

See JUVENILES Self-incrimination, Confessions to police, (p. 391) for discussion of topic.

State v. McCallister, 357 S.E.2d 759 (1987) (Brotherton, J.)

See EVIDENCE Impeachment, Hearsay exception, (p. 224) for discussion of topic.

Cross-examination of defendant

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

State v. Acord, 336 S.E.2d 741 (1985) (Brotherton, J.)

When appellant was arrested, he told the arresting officer that he did not want to talk about the case. He was cross-examined about this statement at trial. The Court found this line of cross-examination may well have been error, but failure to object precluded consideration on appeal.

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See DENIAL OF A FAIR TRIAL Cross-examination of defendant, Restricting cross-examination, (p. 94) for discussion of topic.

SELF-INCRIMINATION – STATEMENTS BY DEFENDANT

Post-arrest

After requesting counsel

State v. Randle, Jr., 366 S.E.2d 750 (1988) (Per Curiam)

See EVIDENCE Admissibility, Prior voluntary statement, (p. 181) for discussion of topic.

Silence

State v. Hamilton, 355 S.E.2d 400 (1987) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 106) for discussion of topic.

Statements made to court-appointed psychiatrist

Maxey v. Bordenkircher, 330 S.E.2d 859 (1985) (McGraw, J.)

Appellant appeals from an order of the circuit court denying his petition for a writ of habeas corpus seeking retrospective application of the holding in *State v. Jackson*, 171 W.Va. 329, 298 S.E.2d 866 (1982), that a court-appointed psychiatrist's testimony with respect to self-incriminating statements made by an accused during the course of his or her examination violates the accused's privilege against self-incrimination. Finding the error harmless beyond a reasonable doubt renders unnecessary an analysis of the issue of retroactivity.

Appellant pled guilty to first-degree sexual abuse and not guilty by reason of insanity to kidnaping. The trial court ordered his examination by a state psychiatrist. His motion to suppress incriminating statements made during the course of this examination was denied, and the statements recounted by the psychiatrist at trial.

In *Jackson*, *supra* the Court held "A psychiatrist can testify to the bases of his medial opinion (cite omitted) but without reference to a defendant's specific statements about his criminal offense."

Post-arrest (continued)

Statements made to court-appointed psychiatrist (continued)

Maxey v. Bordenkircher, (continued)

In this case, given the fifth and sixth amendment implications of the admission of self-incriminating statements made during the course of a court-ordered psychiatric examination, any error would be of a constitutional dimension. The erroneous admission of self-incrimination statements obtained from a criminal defendant in violation of his or her constitutional rights may nevertheless be rendered harmless in certain limited circumstances.

In this case the appellant had voluntarily confessed to the entire episode and had entered a plea of guilty to first-degree sexual abuse long before his court-ordered psychiatric examination. His detailed confession, along with a letter he had written to the victim's mother stating that he was sorry for what he had done and begging forgiveness, were properly admitted into evidence at trial. When shown a copy of his confession at trial by his attorney, the appellant testified, "there is no doubt abut that, it's all true." In addition, the victim's relatives and treating physicians testified to the physical manifestations of the molestation.

The state psychiatrist testified concerning self-incriminating statements made by the appellant with respect to other instances of abuse of the victim in the months preceding the episode for which he was convicted. Defense counsel failed to object. "An error in the admission of evidence not objected to by the defendant is deemed waived by him." *State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955). The Court found, therefore, "ordinarily, evidentiary objections of a non-constitutional nature not shown to have been made in the trial court cannot be considered on appeal. (Cites omitted). Even though testimony with respect to other acts of criminal or other misconduct may have been inadmissible, the appellant's failure to preserve this potential error excludes it from consideration in analyzing the issue of harmless error.

In light of the overwhelming evidence of the appellant's guilt, any harm caused by the admission of psychiatric testimony recounting incriminating statements was insignificant beyond a reasonable doubt. The Court found there was no reasonable possibility, in light of this evidence, that such admission contributed to his conviction.

Post-arrest (continued)

Statements made to court-appointed psychiatrist (continued)

State v. McWilliams, 352 S.E.2d 120 (1986) (Brotherton, J.)

Appellant was convicted of first-degree murder with a recommendation of mercy, and was convicted of two counts of malicious assault. His defense at trial was insanity.

Appellant contends the trial court improperly permitted the introduction of statements made by the appellant during a court ordered psychiatric examination. Dr. Williams performed the examination as ordered by the trial court over the appellant's objection. The appellant called Dr. Williams during his case-in-chief. On cross, the State elicited statements the defendant made during the examination concerning his ability to understand the criminality of his actions. Appellant contends the admission of these statements violated his constitutional privilege against self-incrimination.

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).

In this case, the defendant put the psychiatrist on the stand an explained in depth the doctor's examination. Cross touched the same subject matter as direct and was not objected to at the time. The Court found that because the appellant's counsel opened the door to the State's cross-examination by questioning Dr. Williams about the statements made during the examination, the appellant may not complain of error in the State's cross-examination of other statements made during the same psychiatric examination touching the same subject.

Post-arrest (continued)

Statement prior to *Miranda* warnings

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Petitioner contends the trial court erred in admitting into evidence a statement made by him before he was fully advised of his *Miranda* rights. When the police officer arrived at the scene of the accident, he asked petitioner, before advising him of his *Miranda* rights, whether he was the driver of the truck. Petitioner answered yes and his response was admitted at trial. The officer testified at trial that a passenger in petitioner's vehicle told him immediately after the accident that Petitioner had been driving, and the petitioner conceded at trial he was driving. The Court could find no prejudice in the admission of this statement.

Sworn statements during plea

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See FALSE SWEARING Evidence, Sworn statements during plea, (p. 250) for discussion of topic.

Voluntariness

Burden of proof

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

Appellant was convicted of felony-murder. He alleged that oral and written statements given to the police were not voluntarily made because they were given following repeated beatings by the police.

At trial, the defense relied on an alibi defense while the prosecution used the defendant's statements and some circumstantial evidence.

Voluntariness (continued)

Burden of proof (continued)

State v. Hall, (continued)

Syl. pt. 1 - "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case. Syl. pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

The Court noted that a reviewing court should look at "both the conduct of the police . . . and the particular characteristics of the accused. See *State v. Williams*, 171 W.Va. 556, 301 S.E.2d 187, 189 (1983). The tainting effect of coercion can be neutralized by the giving of *Miranda* warnings, the passage of time or other circumstances. See *Almon v. Jernigan*, 715 F.2d 1505 (11th Cir. 1983), *cert. denied* 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984). (*Cf. Hill v. State*, 91 Wis.2d 315, 283 N.W.2d 585 (Wis.Ct. App. 1978) where fifteen to thirty minute delay between police assault and confession was insufficient to dissipate taint)).

Here, appellant confessed to the murder thirteen days after the last of the alleged beatings, he was college educated, he volunteered his confession after having previously consulted an attorney, and he was familiar with police procedures. The Court held these factors sufficiently dissipated the taint of coercion here.

Delay in taking before magistrate

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

Appellant was convicted of nighttime burglary and petit larceny in the theft of a postal money order. After arrest in Ohio, appellant was interviewed at Ohio police headquarters by the city police chief of Ravenswood, West Virginia. At approximately 10:00 a.m., appellant signed a written waiver of his *Miranda* rights but denied knowledge of the crime.

Voluntariness (continued)

Delay in taking before magistrate (continued)

State v. Bennett, (continued)

At his request, the West Virginia officers drove appellant to his place of work. On the return trip to Ravenswood they stopped for lunch, arriving at the police station at 2:50 p.m., whereupon appellant signed another waiver. Appellant agreed to make a statement and signed the written statement at 3:10 p.m. He was then taken before a magistrate.

Syl. pt. 6 - " ' "The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended.' Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984)." Syllabus Point 1, *State v. Hutcheson*, 177 W.Va. 391, 352 S.E.2d 143 (1986).

The Court noted that transporting the appellant should not count in judging prompt presentment (see *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, 266 (1982); see also, *Commonwealth v. D'Amato*, 514 Pa. 471, 526 A.2d 300 (1987). Here, no interrogation was held during the delay, *Miranda*, warnings were given twice and the confession was obtained within one-half hour of arrival at the police station. No violation was found.

Denial of right to counsel

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

Appellant was convicted of receiving stolen property. The prosecution relied heavily on the testimony of Mr. Jarvis, the only witness present at the delivery of the stolen bits who could both identify Mr. Wilder and testify that Mr. Wilder knew the bits were stolen at the time of delivery. As part of its effort to discredit Mr. Jarvis, the defense called Mr. Holstein. To the defense's surprise, Holstein testified he had in fact received the remaining stolen bits from Mr. Jarvis. Mr. Holstein testified on cross-examination that the appellant had offered him $500 for his testimony at the trial and that he had disclosed appellant's offer to the prosecuting attorney approximately ten days before trial.

Voluntariness (continued)

Denial of right to counsel (continued)

State v. Wilder, (continued)

At an *in camera* hearing, Holstein testified he had secretly taped a conversation with appellant and turned the tape over to the prosecutor's investigator. On the tape, appellant made remarks tending to corroborate Holstein's charge of subornation of perjury. Testimony *in camera* indicated the taping had been Holstein's idea and that the prosecutor's investigator had provided Holstein with a hand dictaphone and a cassette tape. (See case for additional facts).

Appellant contends the introduction of the tape violated his Sixth Amendment right to counsel because the statements were recorded outside the presence of his counsel after the indictment.

The Court found that the right to counsel attaches upon indictment and that incriminating statements made by indicted defendants outside the presence of counsel may not be admitted at trial to prove the charge in the indictment. In each of three cited cases, the inculpatory statements were admitted as direct evidence of the accused's guilt of the charge contained in the indictment. In this case, however, the tape was admitted not to prove the charge in the indictment, but rather to impeach the defendant and to rehabilitate Mr. Holstein. To the extent that the tape tended to prove Mr. Wilder's guilt of any crime, it demonstrated guilt of subornation of perjury. Nothing on the tape tended to show that Mr. Wilder was guilty of the crime for which he was being tried, namely, receiving stolen property.

The Court also noted the tape was not used on direct, but was used only to impeach appellant during rebuttal.

Syl. pt. 1 - At a criminal trial, when evidence that the defendant attempted to bribe a witness in that trial is properly admitted, and the defendant takes the stand and testifies that he offered no such bribe, the admission for purposed of impeachment of a tape recording tending to demonstrate that the defendant offered such a bribe does not violate the defendant's Sixth Amendment right to counsel.

Voluntariness (continued)

Illegal arrest

State v. Mullins, 355 S.E.2d 24 (1987) (McGraw, J.)

The Court found the appellant's illegal arrest (See ARREST Warrantless, Exigent circumstances, (p. 27) for facts of this case) tainted his subsequent oral statement and his putative consent to search his home.

Syl. pt. 4 - "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. Syl. pt. 3, *State v. Canby*, 162 W.Va. 666, 252 S.E.2d 164 (1979)." Syl. pt. 3, *State v. Sprouse*, 171 W.Va. 58, 297 S.E.2d 833 (1982).

Simply advising the appellant of his constitutional rights is not sufficient to break the connection. Appellant's statement was made just minutes after the illegal arrest while he was in a police cruiser with police officers and before he had been presented to a neutral magistrate. The Court reversed the conviction and found the statement could not be used on retrial.

***In camera* hearing**

State v. Bennett, 339 S.E.2d 213 (1985) (McHugh, J.)

Appellant was convicted of first-degree murder with no recommendation of mercy. He contends the court erred in permitting the State to introduce into evidence an oral confession given prior to trial. The Court found the question of the voluntariness of the appellant's oral confession was never resolved by the circuit court. No *in camera* hearing with respect to the oral confession was held. The Court remanded for a "voluntariness hearing" upon the oral confession.

Voluntariness (continued)

***In camera* hearing** (continued)

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

Appellant contends the trial court erred in allowing two State witnesses to testify concerning statements made by him while he was in custody in a Virginia hospital. He contends the court erred in failing to conduct an *in camera* hearing on the voluntariness of the statements.

The first statement involved a West Virginia deputy sheriff who traveled to Virginia upon learning that the appellant had been apprehended. Upon entering the appellant's hospital room, the deputy said "Hello, Pat." The deputy testified that without opening his eyes, the appellant said "Hello, Bob." The State expressly stated at trial that his statement was elicited to partially rebut evidence of insanity.

The Court found no error in failing to hold an *in camera* hearing on the voluntariness of the above described statement.

Syl. pt. 8 - A noninculpatory statement made spontaneously by a criminal defendant in response to the greeting or salutation of a law enforcement officer does not result from an "interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and such a spontaneous statement is admissible without an *in camera* hearing on its voluntariness.

The second statement was introduced by the State during rebuttal through the head nurse on duty in the emergency room at the time the appellant arrived at the Virginia hospital.

Syl. pt. 9 - "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." Syl. pt. 2, *State v. Sanders*, 161 W.Va. 399, 242 S.E.2d 554 (1978), *overruled in part on other grounds*, *State ex rel. White v. Mohn*, 168 W.Va. 211, 283 S.E.2d 914 (1981).

Voluntariness (continued)

***In camera* hearing** (continued)

State v. McFarland, (continued)

The Court found the appellant had not been diagnosed as "suicidally depressed and mentally ill" by a psychiatrist in the emergency room prior to making the above described statements to the nurse. The Court also noted that the statements were not inculpatory. The Court found no error in failing to hold an *in camera* hearing on the voluntariness of the statements.

State v. Wood, 352 S.E.2d 103 (1986) (Per Curiam)

Appellant was convicted of possession with intent to deliver an manufacture a controlled substance.

The Court also declined to hold the trial court erred in allowing the officer to testify to an incriminating statement allegedly made by the appellant following arrest. Appellant denied making the statement and testified she was extremely intoxicated at the time. The police officer contradicted this, stating appellant appeared coherent at the time of arrest and seemed to understand her rights. The Court found the only issue was the credibility of the witnesses, which the trial court resolved against the appellant. The Court found no abuse of discretion.

Inducement or coercion

State v. Adkinson, 338 S.E.2d 185 (1985) (Per Curiam)

The Court found the trial court's findings that no promises were made to the defendant and that the defendant understood that the interrogation police officers lacked the authority to make any promises as to sentencing, clearly distinguished this case from *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, 266 (1982) and *State v. Burgess*, 174 W.Va. 784, 329 S.E.2d 856 (1985).

The Court found no error.

Voluntariness (continued)

Inducement or coercion (continued)

State v. Black, 338 S.E.2d 370 (1985) (Per Curiam)

Appellant was convicted of kidnaping and aggravated robbery. While awaiting trial, the defendant approached the prosecutor in a restaurant. The defendant asked to discuss his case. The prosecutor replied that he would only speak to the defendant through his attorney. Then the defendant spontaneously stated: "Look, John, I knew what I was doing when I was in there with Dean. But I was really kidding around. I wasn't going to hurt anybody. Of course, this is all allegedly what happened." An investigator with the prosecutor at the time took notes and transcribed them afterwards. The defendant was not in custody at the time the statements were made, nor was he being interrogated. The Court found there was no indication the prosecutor made any inducement whatsoever to the defendant in exchange for the remarks. The Court found no error.

State v. Fauber, 332 S.E.2d 625 (1985) (Per Curiam)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Prompt presentment, (p. 574) for discussion of topic.

Intoxication

State v. Hambrick, 350 S.E.2d 537 (1986) (McGraw, J.)

Appellant served as lookout while Jesse Bennett broke into a convenience store. The two carried the goods, which included beer and cigarettes, to the home of Shirley Bennett, Jesse's mom. They awakened two other residents of the home, including Scotty Bennett, and invited them to the basement to drink beer. Scotty declined. He was on parole and did not wish to be implicated in any criminal activity, so he called the police. Scotty took a state trooper to Shirley's house. They approached the basement door, which was open, and saw several long-neck bottles of beer and packs of cigarettes. The trooper followed Scotty in.

Voluntariness (continued)

Intoxication (continued)

State v. Hambrick, (continued)

In response to a question, the appellant provided the trooper with an explanation of where the items came from. Jesse and appellant were placed under arrest and taken to the state police office where they were advised of their rights. Appellant refused to make a written statement, but again offered an explanation of how the items came into his possession.

Appellant contends the trial court erred when it failed to suppress the statement he made. He contends he was so intoxicated at the time that he lacked the capacity to knowingly and intelligently waive his right to self-incrimination.

Syl. pt. 6 - "A defendant may waive his constitutional rights as enunciated in *Miranda*, provided the waiver is made voluntarily, knowingly and intelligently." Syl. pt. 2, *State v. Bragg*, 160 W.Va. 455, 235 S.E.2d 466 (1977).

Syl. pt. 7 - "A claim of intoxication may bear upon voluntariness of a defendant's confession, but, unless the degree of intoxication is such that it is obvious that the defendant lacked the capacity to voluntarily and intelligently waive his rights, the confession will not be rendered inadmissible." Syl. pt. 1, *State v. Hall*, 174 W.Va. 599, 328 S.E.2d 206 (1985).

The Court found that the prosecution presented evidence sufficient to show that the appellant's statement was freely and intelligently given. There was no contention of police coercion; the trooper adequately explained the appellant's rights and testified he felt the appellant understood; the appellant testified he remembered being read his rights at the state police office; he signed the form refusing to waive his rights or give a written statement; and he told the trooper he wanted to explain how the seized items came to be in his possession. The trial court found the explanation to be rational, which evidenced appellant's lucid state at the time.

Voluntariness (continued)

Intoxication (continued)

State v. Hickman, 338 S.E.2d 188 (1985) (Miller, J.)

The appellant contends his confession should be ruled inadmissible because he was too intoxicated at the time to voluntarily and intelligently waive his constitutional rights.

Applies standard set forth in Syl. pt. 1, *State v. Hall*, 174 W.Va. 599, 328 S.E.2d 206 (1985).

Here, the Court believed the trial court was correct in holding the defendant's confessions were not rendered inadmissible by virtue of intoxication.

State v. Wood, 352 S.E.2d 103 (1986) (Per Curiam)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 566) for discussion of topic.

Mental capacity

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. He challenges the trial court's finding that he was capable of intelligently waiving his constitutional rights before making a statement to police shortly after his arrest.

Syl. pt. 8 - "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." Syl. pt. 2, *State v. Hamrick*, 160 W.Va. 673, 236 S.E.2d 247 (1977).

Syl. pt. 9 - "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions on part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syl. pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

Voluntariness (continued)

Mental capacity (continued)

State v. Cook, (continued)

Syl. pt. 10 - "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." Syl. pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court found the evidence submitted clearly demonstrated the appellant's intellectual deficiency. Three batteries of tests produced full a scale intelligent quotient scores of 42, 48, and 63, placing the appellant in the range of moderate mental retardation. The evidence indicated the twenty-six year old appellant never completed the fourth grade, is functionally illiterate, and has considerable difficulty in meeting the normal demands of everyday life. On the other hand, the appellant had been married, possessed a driver's license, suffered from no mental disease, had previous experience withy law enforcement officials pursuant to a prior drug arrest, and indicated that he understood the seriousness and possible consequences of the charges against him. There was no allegation of police deception or coercion and the largely exculpatory character of the statement given supports the trial court's conclusion that the appellant understood "the meaning and effect of any admission or confessions or statement against his own interest."

The Court found the trial court's ruling on this question, that the appellant's below average intelligence did not impair his capacity to understand the meaning and effect of his confession, was not clearly against the weight of the evidence presented or plainly wrong.

State v. Dailey, 351 S.E.2d 431 (1986) (Per Curiam)

Appellant was convicted of first-degree sexual assault. He contends that because of his senility, IQ, and mental condition, his confession was not the product of a knowledgeable and voluntary waiver of his Fifth Amendment rights.

Voluntariness (continued)

Mental capacity (continued)

State v. Dailey, (continued)

An eight year old accused the defendant of sexually assaulting her. Two police officers went to the defendant's home and informed the defendant's sons, out of the presence of the defendant, of the nature of the charge. The officers requested that the defendant and his two sons accompany them to the police barracks. The defendant was seventy-four at the time and was acquainted with the victim's family.

At the barracks, defendant was left in the reception area while the sons were accompanied to a back room. The sons were again informed of the nature of the charge and the officers' desire to talk with him. The officers spoke with the sons and the sons were then permitted to talk privately with their father. After this conversation, the sons left the room and the officers began to give the defendant his *Miranda* rights and to interrogate him for an hour and twenty minutes. A written question and answer statement was obtained.

At the suppression hearing, the deposition of one of the officers was introduced. He stated he believed the defendant understood his questions and indicated there were some occasions when the defendant did not quite understand what was being asked and that several times the defendant began to cry.

Three doctors produced evidence with regard to the defendant's mental competency. There was disagreement over whether the defendant was mentally competent to stand trial. Two of the doctors were of the view that because of the defendant's severe hearing loss, senility and reduced IQ, he could not make an intelligent and voluntary waiver of his rights. One doctor observed the defendant had a passive personality which would make him deferential to anyone in authority. Another doctor found the defendant to have a number of physical disorders. He was of the view the defendant was not only incompetent to stand trial, but could not have given a valid waiver of his rights. One doctor found the defendant competent to stand trial.

Syl. pt. 1 - "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." Syl. pt. 1, *State v. Hamrick*, 160 W.Va. 673, 236 S.E.2d 247 (1977).

Voluntariness (continued)

Mental capacity (continued)

State v. Dailey, (continued)

Syl. pt. 2 - "'Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such a fundamental right.' Syl. pt. 2, *Browning v. Boles*, 149 W.Va. 181, 139 S.E.2d 263 (1964)." Syllabus, *State v. Mollohan*, 166 W.Va. 60, 272 S.E.2d 454 (1980).

The Court found in this case the psychiatric and psychological evidence clearly establishes that the defendant was incapable of knowingly and voluntarily waiving his rights. The Court found the defendant was possessed of low to low average intelligence with senility, and organic brain disorder, depression, and a number of physical illnesses which impaired his health. The Court found the defendant's severe hearing loss made it difficult for him to understand others.

Admission of the defendant's statement constitutes prejudicial error and requires reversal.

Prompt presentment

State v. Bennett, 339 S.E.2d 213 (1985) (McHugh, J.)

Appellant was convicted of first-degree murder with no recommendation of mercy. He contends the court erred in allowing the State to introduce into evidence a written confession taken prior to the trial.

The Court found that shortly after the discovery of the body, the officers contacted a magistrate and informed her that her services would be needed. The magistrate's office was located across the hall from the room in which the appellant was questioned by the officers. The magistrate arrived at approximately 3:20 p.m., prior to the taking of the appellant's written confession. One of the troopers testified they had an oral confession and they

Voluntariness (continued)

Prompt presentment (continued)

State v. Bennett, (continued)

wanted to get the written confession before taking appellant to a magistrate. The Court found the officers acted improperly in failing to present the appellant to the magistrate until after the officers obtained the written confession. The Court found the delay was not merely for the purpose of transcribing a confession, it was for the purpose of obtaining a separate confession. It was error to admit the confession into evidence.

State v. Dyer, 355 S.E.2d 356 (1987) (McGraw, C.J.)

Appellant was convicted of causing a death while driving under the influence of alcohol. He contends his inculpatory statements were inadmissible because he was not taken before a magistrate without undue delay after his arrest. (See case for facts).

The Court found it not unreasonable to assume the appellant was no longer free to leave after making the inculpatory statement at 4:00 p.m. He did not appear before a magistrate until 7:00 p.m. He contends this delay was unreasonable and renders his statements inadmissible.

The Court found the primary purpose of the delay in this case was not to elicit a confession. The Court found the second, written statement, though given during the course of the delay, was substantially the same as the prior oral statement. The Court could not find the trial court's decision to admit the statements plainly wrong or clearly against the weight of evidence.

Voluntariness (continued)

Prompt presentment (continued)

State v. Fauber, 332 S.E.2d 625 (1985) (Per Curiam)

Appellant contends the trial court erred in admitting his confession. At the suppression hearing, the appellant testified he was taken on a detour from the place of arrest en route to the detachment, allegedly to delay his arrival, and that the arresting officers made threats concerning his personal safety and the safety of his family and friends. The arresting officers denied that they had either taken a detour or threatened the appellant in any fashion. The Court found the State met its burden with respect to the voluntariness of the appellant's confession and the trial did not abuse its discretion in admitting the confession.

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

Appellant was convicted of felony-murder. He alleged that his oral and written confessions were a result of repeated assaults by police (See SELF-INCRIMINATION Voluntariness, Burden of proof, (p. 554) for discussion of topic) and that his written confession should be suppressed for failure to present him promptly before a magistrate.

Appellant's confession took place on 8 May 1980; his attorney made no objection at trial. *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982) was decided January 19, 1982.

Syl. pt. 2 - "The rule stated in syllabus point 6 of *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), is not to be applied retroactively to a confession which was obtained prior to the date of that decision where no prompt presentment objection was made at trial." Syl. pt. 4, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985).

State v. Hickman, 338 S.E.2d 188 (1985) (Miller, J.)

Appellant presents the issue of whether or not the rule announced in Syl. pt. 6 of *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982) has retroactive application to confessions taken prior to the date of the opinion, January 19, 1982. The confessions here were obtained on June 26, 1981. Not objection was made at trial based on lack of prompt presentment.

Voluntariness (continued)

Prompt presentment (continued)

State v. Hickman, (continued)

Syl. pt. 4 - The rule stated in Syl. pt. 6 of *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), is not to be applied retroactively to a confession which was obtained prior to the date of that decision where no prompt presentment objection was made at trial.

Right to counsel

State v. Bennett, 339 S.E.2d 213 (1985) (McHugh, J.)

The issue presented was whether the appellant waived his right to counsel prior to making oral confession. The Court found that a serious question existed as to whether the appellant requested counsel, if at all, before the making of his written confession, before or during the taking of his oral confession, or after both confessions were made. The Court also noted the record contained a form upon which the appellant checked the section stating "I have counsel to represent me." The Court remanded the case for a determination of whether the appellant waived his right to counsel prior to making the oral confession.

State v. Hickman, 338 S.E.2d 188 (1985) (Miller, J.)

The issue here was whether a defendant who is in custody and has had an attorney retained for him by his family can waive his right to counsel where the attorney's retention is known by police officials, but is not known by the defendant.

Syl. pt. 1 - A defendant who is being held for custodial interrogation must be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of his attorney's retention or appointment. This rule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel.

Voluntariness (continued)

Right to counsel (continued)

State v. Hickman, (continued)

The Court found the critical factor in this case is that the defendant was advised that his parents had contacted an attorney and was asked if he wanted the attorney present. Since the defendant was also fully informed of his *Miranda* rights and declined assistance of counsel, the Court concluded the defendant voluntarily and intelligently waived his Fifth Amendment right to counsel.

Statements made to a third party other than police officer

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 565) for discussion of topic.

Tape recording

State v. Wilder, 352 S.E.2d 723 (1986) (Neely, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Denial of right to counsel, (p. 562) for discussion of topic.

Unreasonable delay in taking before magistrate

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

Appellant was convicted of first-degree murder without a recommendation of mercy. He contends the court erred in admitting a written statement taken in violation of our prompt presentment statute.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Humphrey, (continued)

Odell Washington was shot in the alley beside his grocery store. The next day, Huden Nicholes told state police officers the defendant had told him, prior to the shooting, that he had waited outside of Mr. Washington's store on a prior occasion with the intent to rob him. Mr. Nicholes aided police by meeting with the defendant while wearing a transmitting device. During the course of one of these conversations, the defendant again mentioned the incident where he changed his mind about robbing Mr. Washington. Based on this, a state police officer asked the defendant if he would voluntarily go to police headquarters to answer questions about the Washington shooting. He agreed. Defendant was advised of his *Miranda* rights and asked some questions. He was not restrained and was free to go at any time. The police played the tape recording of defendant's conversation with Nicholes. Upon further questioning, defendant stated he did it.

After this statement, defendant was again advised of his *Miranda* rights. He read the rights form and signed it. The officer continued to question defendant and recorded the answers on a note pad. It took one hour and fifteen minutes for the officer to complete the written statement. The defendant read and signed each page.

When the statement was completed, the police sought to corroborate it by finding evidence. During the time police retrieved evidence, the defendant remained at police headquarters. One hour and one half after completing the written statement defendant was taken to a magistrate.

Syl. pt. 2 - Our prompt presentment rule contained in *W.Va.Code*, 62-1-5, and Rule (5)(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.

Syl. pt. 3 - The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Humphrey, (continued)

Syl. pt. 4 - Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.

The Court found that by confessing to the crime, an accused has given the State probable cause to arrest him, and that once an accused confesses, the police will not let him leave freely and he is under "*de facto* arrest."

Here, the Court found the trial court did not err in admitting the written statement in this case.

State v. Hutcheson, 352 S.E.2d 143 (1986) (Miller, C.J.)

Appellant appeals three burglary convictions. He contends the trial court erred in refusing to suppress his confession be cause of the delay in taking him to a magistrate.

Syl. pt. 1 - "'The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible' where it appears that the primary purpose of the delay was to obtain a confession from the defendant.' Syl. pt. 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261, 266 (1982), as amended." Syl. pt. 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. pt. 2 - "The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved." Syl. pt. 3, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Syl. pt. 3 - "Ordinarily the delay in taking accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule." Syl. pt. 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Hutcheson, (continued)

Distinguishing *Humphrey*, the Court found that here, the defendant initially indicated a willingness to make a statement. Consequently, the time consumed in reducing the defendant's oral statement to writing is not countable on the unreasonable delay question. The Court stated as the rationale for this rule that "having an oral confession put in writing protects the interests of the defendant and the State by ensuring the accuracy of the confession and by preserving its details in writing." 352 S.E.2d 143 at pg. 146.

The Court found in this case the additional delay in taking the defendant to a magistrate was not occasioned by the police attempting further interrogation or efforts to obtain other inculpatory evidence that was not revealed in the initial confessions. Here, the defendant volunteered to lead the police to recover a piece of stolen property that was unrelated to the offenses for which he was charged and to which he was not connected. Under these circumstances, the Court did not believe this delay could be deemed a reason for vitiating his original confessions.

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

Appellant was convicted of first-degree murder. He contended his confessions should be suppressed because he was not taken promptly before a magistrate.

Following preliminary investigations the police obtained a search warrant for defendant's car and a trailer where the defendant and another man were believed to reside. This warrant was later found invalid, See SEARCH AND SEIZURE Warrant, Testimony outside of affidavit, (p. 539) but the evidence admitted on the basis of the voluntary consent to search, See SEARCH AND SEIZURE Consent search, Voluntariness, (p. 519).

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Worley, (continued)

The owner of the trailer, the defendant's father, allowed police access to the trailer voluntarily, assuring them that a warrant was unnecessary. The defendant and a Bobby Hudnell were in the trailer. Defendant was detained in the police car while police searched the trailer and purportedly told that if he would "tell everything that happened" his bond would be set "real low" and he would be in jail only "a couple of days." A pistol matching the description in the warrant was seized in the defendant's bedroom. Defendant and Hudnell were advised of their *Miranda* rights and taken into custody.

Defendant subsequently made several incriminating statements and led police to further incriminating evidence. Defendant was then erroneously tod of Hudnell's making a statement (either through police or through his father; the evidence is in conflict). After signing a waiver of his right to counsel, defendant admitted robbing the victim but denied killing her; he did admit his presence during the murder. He was then taken before a magistrate.

Syl. pt. 7 - "'The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.' Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended." Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. pt. 8 - "Ordinarily the delay in taking accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule." Syl. pt. 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

The Court noted that defendant's voluntary statements and offer to lead police to the crime scene occasioned the delay here. See *State v. Hutcheson*, 177 W.Va. 391, 352 S.E.2d 143 (1986) (where no delay occurs in obtaining the confession, subsequent delay is not fatal).

Voluntariness (continued)

Violation of *Miranda* rights

State v. McDonough, 357 S.E.2d 34 (1987) (McGraw, C.J.)

Appellant was convicted of grand larceny. He contends the trial court erred in allowing an inculpatory statement to be introduced into evidence.

Appellant contends he was not fully informed of the reason for the investigation before he waived his *Miranda* rights, the statement was not voluntarily given and the statement was not admitted by him to be correct.

One factor in determining whether a defendant has intelligently and voluntarily waived his *Miranda* rights is whether the defendant was initially advised of the nature of the charge against him. In *State v. Goff*, 169 W.Va. 778, 289 S.E.2d 473 (1982) the Court stated "that some information should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his *Miranda* rights." While *Colorado v. Spring*, 107 S.Ct. 851 (1987) held that a suspect need not be informed of all possible charges before effectively waiving his *Miranda* rights under the federal constitution, independent authority exists to protect a person's right not to incriminate himself under article three, section five of the West Virginia Constitution.

The totality of the circumstances in this case shows the appellant was informed and intelligently and voluntarily waived his *Miranda* rights.

Appellant contends his statement was involuntary because the deputy coerced the statement by offering to seek leniency if the appellant confessed and that the deputy questioned the appellant concerning the stolen cycles after he had asked the officers to "leave him be." The deputy was unable to testify at appellant's suppression hearing and trial and appellant contends the state did not meet its burden of proof. The Court reviewed the record and found no merit to this assertion.

Appellant contends the entire statement should have been excluded because it was not admitted by the appellant to be correct. The Court found the trial court's ruling was not plainly wrong or clearly against the weight of the evidence.

SELF-REPRESENTATION

In general

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant filed a *pro se* motion to represent himself and have counsel dismissed and a hearing was held on the motion. Appellant had no prior training in law or experience in self-representation in a felony prosecution. The trial court advised him of the seriousness of the offenses, urged him to cooperate with his attorney and denied the motion.

Syl. pt. 2 - "A defendant in a criminal proceeding who is mentally competent and *sui juris*, has a constitutional right to appear and defend in person without the assistance of counsel, provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial." Syl. pt. 8 *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983).

The Court found the appellant made a timely request, but that there was an issue as to whether the request was unequivocal. Appellant's remarks to the trial judge indicated he believed he could not get a fair trial, and that he did not indicate a genuine desire to proceed *pro se*. After the trial court ruled on the motion, the issue was not raised again and appellant cooperated fully with counsel.

The Court found the threshold inquiry is whether the request was timely and unequivocal. The decision to grant or deny the request therefore was within the discretion of the trial court. The Court found no abuse of discretion.

State v. Gravely, 342 S.E.2d 186 (1986) (Per Curiam)

Appellant represented himself at trial. He contends the court erred in holding that he had waived his right to counsel with full knowledge and comprehension of that right and of the dangers in relinquishing the same.

In general (continued)

State v. Gravely, (continued)

Appellant filed a "motion to proceed *pro se*" and indicated he wanted to represent himself at trial, but that he wanted his court-appointed attorneys to remain in the courtroom to assist him. He contended the motion was prompted by a disagreement between himself and his attorneys about the manner in which the case should be conducted. The attorneys agreed there were irreconcilable differences as to how the case should be handled and filed a motion to withdraw from the case.

In response to questions about his desire to represent himself the appellant was emphatic and repeatedly indicated to the court he wanted to represent himself with the presence of an attorney. When informed by the court that he had no legal right to represent himself and to have court-appointed counsel assist him, the appellant unequivocally stated that he wanted to represent himself. He asked that the record show his request to proceed with the assistance of an attorney had been denied. The court granted the appellant's court-appointed attorney's motion to withdraw from the case.

Prior to striking the jury, a bench conference was held at which the trial judge stated that he had explained to the appellant the right to represent himself and determined that as a matter of fact, the appellant understood the nature and consequences of his decision. The trial judge stated the appellant had the benefit of all the transcripts of his first trial and that appellant was well dressed and very alert.

Appellant contends that under *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983) the trial court was required to inform him that self-representation is almost always detrimental and that one who asserts the right cannot later claim ineffective assistance of counsel. The Court noted that *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985) held these guidelines are not mandatory and that the omission of one or more of them in a particular case would not necessarily require reversal so long as the record shows the defendant made an intelligent and knowledgeable waiver of his right to counsel.

In general (continued)

State v. Gravely, (continued)

The Court held the trial court did not err in finding that the appellant knowingly and intelligently elected to proceed *pro se*. The trial court was familiar with the appellant, having presided at his first trial, and was able to evaluate the appellant's intelligence and understanding of the consequences of waiving counsel. The trial court questioned the appellant several times to determine if he understood the consequences of representing himself. The appellant was familiar with the manner in which a trial is conducted and the responsibility he was accepting by relieving counsel. The Court found the fact that the trial court did not warn the appellant of the specific dangers and disadvantages of self-representation is not reversible error where the record indicates the appellant was familiar with the court system and exhibited an awareness of the consequences of his decision. The Appellant was not entitled as a matter of right to appear as co-counsel. There was no abuse of discretion in the court's refusal to allow him to do so.

The Court noted that the *Sheppard* guidelines should be strictly followed and substantiated on the record so that whether a particular defendant made a knowing and intelligent waiver of his right to counsel can be readily ascertained on appellate review.

State v. Lease, 341 S.E.2d 841 (1986) (Per Curiam)

Appellant contends the court erred in allowing him to represent himself at trial because there was no showing that his election to proceed without counsel was made knowing and intelligently.

Applies standard set forth in Syl. pt. 3, *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985).

Here, the trial court made a brief inquiry of the appellant at the initial pretrial hearing concerning his ability to represent himself and the court subsequently secured an expert opinion as to the appellant's mental competency. At the se cond pretrial hearing, the court instructed the appellant that the offense of malicious assault was a felony which carried a penalty of two to ten years' imprisonment. The trial court took no further steps to insure that the appellant was aware of the dangers of self-representation. The Court found the trial court's inquiry fall short of that suggested in *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983).

In general (continued)

State v. Lease, (continued)

The Court recognized that the failure of a trial court to adhere strictly to the guidelines set forth in *Sheppard* may not, alone, warrant reversal of a defendant's conviction.

Here, the record indicated the appellant had some prior experience with the criminal justice system and that the appellant repeatedly asserted he was aware of "the law." These circumstances alone were not sufficient to demonstrate that there was an intelligent and knowledgeable election on appellant's part. It was apparent the appellant was neither advised nor aware of even the most rudimentary technical aspects of conducting a defense. The Court noted the trial court and the prosecution attempted to aid the appellant.

The Court conduced the absence of a knowing and intelligent election by the appellant to proceed without counsel impinges upon the appellant's fundamental right to a fair trial and that the conviction should be reversed in view of the failure of the record to demonstrate a valid choice of self-representation.

State v. Sandler, 336 S.E.2d 535 (1985) (Brotherton, J.)

Appellant contends the trial court failed to adequately warn him of the dangers of proceeding *pro se*. The Court found the guidelines set forth in *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983) (found in Volume II under this topic) are not mandatory. The Court found the omission of one or more of the warnings in a particular case would not necessarily require reversal, so long as it is apparent from the record that the defendant made a truly intelligent and knowledgeable waiver of his right to counsel. The Court found "[t]he determination of whether an accused has knowingly and intelligently elected to proceed without the assistance of counsel depends on the facts and circumstances of the case. The test in such cases is not the wisdom of the accused's decision to represent himself or its effect upon the e expeditions administration of justice, but, rather, whether the defendant is aware of the dangers of self-representation and clearly intends to waive the rights he relinquishes by electing to proceed *pro se*." *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983). The Court found such a showing was not made on the record in this case.

SENTENCING

Appropriateness

Generally

State v. Buck, 361 S.E.2d 470 (1987) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, (p. 456) for discussion of topic.

State v. Oxier, 369 S.E.2d 866 (1988) (Per Curiam)

See PROPORTIONALITY Generally, (p. 455) for discussion of topic.

Recidivism

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

See PROPORTIONALITY Recidivism, (p. 458) for discussion of topic.

Co-defendants

State v. Buck, 361 S.E.2d 470 (1987) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, (p. 456) for discussion of topic.

Consecutive sentences

State ex rel. White v. White, No. 17918 (10/22/87) (Per Curiam)

Pursuant to writ of habeas corpus, relator, convicted of breaking and entering and grand larceny, alleged that the trial court's imposition of consecutive sentences constituted cruel and unusual punishment.

Consecutive sentences (continued)

State ex rel. White v. White, (continued)

The Court noted that the sentences complained of were statutorily-prescribed and that consecutive sentences for multiple offenses are not unusual. Holding this matter to be within the discretion of the trial court, the Court found no abuse of discretion here. *Adams v. Circuit of Randolph County*, 173 W.Va. 448, 317 S.E.2d 808 (1984).

Costs of prosecution

State v. Chanze, 359 S.E.2d 142 (1987) (Per Curiam)

Appellant was assessed the costs of room and board in the county jail while awaiting trial.

Syl. pt. - "Room and board in the county jail is a public charge on the county, and may not be therefore collected from a convicted criminal as a cost incident to the prosecution in the absence of statutory authority." Syllabus, 177 W.Va. 629, 355 S.E.2d 418 (1987).

In addition, the Court found no authorization in *W.Va.Code*, 62-5-7 to allow the charging of room and board as "expenses incident to the prosecution" of a criminal case.

Court's consideration of perceived perjury

State v. Finley, 355 S.E.2d 47 (1987) (McHugh, J.)

Appellant was convicted of manufacturing marijuana in violation of *W.Va. Code*, 60A-4-401(a)(ii) (1983).

He contends the trial court erred when it considered the perceived perjury when denying a motion to reduce his sentence or place him on probation. The defendant testified in his own behalf. The defendant's motion to reduce his sentence or place him on probation was denied. The judge emphasized that the defendant had twice testified in court contrary to the jury's findings. He believed the defendant had perjured himself on two occasions.

Court's consideration of perceived perjury (continued)

State v. Finley, (continued)

Syl. pt. 2 - A sentencing judge, in evaluating a defendant's potential for rehabilitation and in determining the defendant's sentence, may consider the defendant's false testimony observed during the trial.

The Court stressed that while it is permissible to consider a defendant's perjury within the scope of evaluating his character for rehabilitation potential, enhancement of a defendant's sentence as punishment for the substantive offense of perjury for which he has not been indicted, tried or convicted would be improper.

Enhancement modification

Right to appear

State ex rel. Everett v. Hamilton, 337 S.E.2d 312 (1985) (Brotherton, J.)

See RECIDIVISM Right to appear at enhancement modification, (p. 488) for discussion of topic.

Failure to court to consider probation

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant was convicted of aggravated robbery. The trial court failed to consider probation as an alternative to imprisonment. The indictment did not allege use of a firearm and no special interrogatory was submitted to the jury for such purpose. The trial court reluctantly found the appellant ineligible for probation. (Appellant was convicted six weeks after the effective date of amendment to *W.Va.Code*, 61-12-2(c)(1) and the Court found the trial judge apparently was unaware of the amendments).

Failure to court to consider probation (continued)

State v. Davis, (continued)

Syl. pt. 13 - Under West Virginia Code, § 62-12-2-(c)(1) (1984 Replacement Vol.), the commission or attempted commission of a felony with the use, presentment, or blandishment of a firearm must be clearly stated in the indictment or presentment by which a person is charged and must be found by the jury upon submission of a special interrogatory for such purposes in order to make any person ineligible for probation upon conviction in a jury trial of a felony prosecution.

The Court found neither of the statutory criteria were met in this case. The trial court erred by failing to consider probation as an alternative to imprisonment.

Good time credit

State ex rel. Coombs v. Barnette, 368 S.E.2d 717 (1988) (Neely, J.)

See GOOD TIME/ REDUCTION OF SENTENCE Right to credit, (p. 253) for discussion of topic.

Incorrect sentence

Eligibility for parole

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

See PAROLE Eligibility, In correct sentence, (p. 425) for discussion of topic.

Plea bargaining

Where sentence not specified

State v. Moore, 367 S.E.2d 757 (1988) (Per Curiam)

See GUILTY PLEAS Setting aside, Basis for, (p. 259) for discussion of topic.

SENTENCING

Presentence investigation report

State v. Tanner, 332 S.E.2d 277 (1985) (Per Curiam)

Appellant contends the trial court improperly denied him probation on the basis of an incomplete investigation report and improperly refused to make that report a part of the record. He contends a report was prepared, but not seen by him.

The Court found Rule 32(c)(3) of the W.Va. Rules of Criminal Procedure requires a trial court to afford a defendant's counsel an opportunity to read portions of a presentence investigation report prior to the imposition of a sentence, to comment upon it, and to introduce evidence on any factual inaccuracy contained in it. It did not appear the trial court complied with the rule in imposing sentence.

Presentence report

Defendant's right to

State v. Moore, 367 S.E.2d 757 (1988) (Per Curiam)

Appellant was charged with receiving stolen property. He entered into a plea bargain, pleading guilty to the charge. Sentencing was not part of the agreement. Subsequently, appellant was sentenced to one to ten in the state penitentiary. The sentencing judge appeared to base the sentence in part on matters in a victim impact statement which the appellant was not given the chance to rebut. These matters were not contained in the presentence report. Appellant's motions for reduction of sentence and withdrawal of the guilty plea were denied.

Syl. pt. 2 - "'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, to read the report exclusive of any recommendation as to 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

Presentence report (continued)

Defendant's right to (continued)

State v. Moore, (continued)

shall afford the defendant or his counsel an opportunity to comment on the record, 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. 1, *State v. Byrd*, 163 W.Va. 248, 256 S.E.2d 323 (1979)." Syl. pt. 1, *State v. Godfrey*, 170 W.Va. 25, 289 S.E.2d 660 (1981).

The Court affirmed the trial court's denial of appellant's motion to set aside the plea but remanded to allow appellant to review the confidential statement and to rebut the contents thereof.

Probation

Violation of

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

See PROBATION Violation of, Sentencing, (p. 453) for discussion of topic.

Recidivism

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

See RECIDIVISM Sentencing at new term, (p. 490) for discussion of topic.

State v. Cain, 359 S.E.2d 581 (1987) (McHugh, J.)

See RECIDIVISM Amended information for, (p. 484) for discussion of topic.

Recidivism (continued)

State v. Stover, 368 S.E.2d 308 (1988) (Per Curiam)

See RECIDIVISM Appropriateness of sentence, Enhancement of separate convictions (p. 486) for discussion of topic.

Review of sentence

State v. Collins, 329 S.E.2d 839 (1984) (Miller, J.)

Appellant was convicted of two counts of attempted aggravated robbery and one count of malicious wounding. He assigns as error the seventy-year sentence imposed. The Court reversed on other grounds and found if, after remand, a similar sentence is imposed, the court should state the reasons therefor.

Right to allocution

State v. Holcomb, 360 S.E.2d 232 (1987) (McGraw, C.J.)

While on probation, appellant committed a subsequent offense and was sentenced by a different court for that offense. During a probation revocation hearing before the original court he was sentenced to consecutive terms for both offenses.

Appellant protested the trial court's refusal to allow time to prepare and present evidence in mitigation before pronouncing sentence.

The Court recognized that *W.Va.R.Crim.P.*, Rule 32(a)(1) confers a right of allocution upon one about to be sentenced. *State v. Thompson*, 176 W.Va. 300, 342 S.E.2d 268 (1986); *State v. Carper*, 176 W.Va. 309, 342 S.E.2d 277 (1986).

Rejecting the theory of harmless error, the Court held that the trial court should have afforded the appellant the opportunity to present evidence in mitigating before pronouncing sentence.

Right to allocution (continued)

State v. Thompson, 342 S.E.2d 268 (1986) (Brotherton, J.)

Appellant contends the trial court erred in failing to allow her attorney to speak in her behalf prior to sentencing and in denying her an opportunity to be heard on the question of probation.

Rule 32(a)(1) of the West Virginia Rules of Criminal Procedure requires the court to allow the defendant and her counsel the opportunity to speak on the defendant's behalf before the imposition of sentence.

The record in this case clearly showed the trial court did not permit the defendant or her counsel to speak before sentencing. The court denied counsel's request for a stay of execution and summarily denied probation.

The Court found the failure of the trial court to follow the proper procedure for sentencing does not affect the validity of the defendant's conviction, but remanded for resentencing, directing the trial court to afford the defendant the right of allocution and the right to present her case for probation.

SEVERANCE AND ELECTION

Severance

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

Appellant was convicted of first-degree murder, first-degree sexual assault and attempted first-degree murder. He contends the circuit court erred when it denied his motion for severance of the three counts of the indictment. Primarily, he argues he was prejudiced by the inclusion of the sexual assault count in the trial because: (1) the sexual assault evidence was sparse and in a separate trial he could have been acquitted; (2) he was unable to vigorously cross-examine the victim for fear of arousing the sympathy of the jury for the witness; and (3) as a result of his inability to cross-examine the victim he was effectively denied the right to testify in his own behalf. (The Court found there was no assertion that the offenses were improperly joined in the indictment under *W.Va.R.Crim.P.* 8(a)).

Appellant's defense to all of the charges was insanity. The Court found that a better defense could not have asserted in a separate trial. There was sufficient evidence to support the first-degree sexual assault charge and that evidence was not so weak or minimal so as to risk having the sexual assault charge "bolstered" by the evidence of the other charges.

The Court found no merit in the appellant's assertion that he was prevented from vigorously cross-examining the witness. The risk of arousing jury sympathy for a witness under cross is one that attends every trial. The Court found no abuse of discretion.

SEXUAL ASSAULT

Collateral crimes

Instructions

State v. Dolin, 347 S.E.2d 208 (1986) (Miller, C.J.)

See EVIDENCE Collateral crimes, (p. 193) for discussion of topic.

Elements

Reputation for violence

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

Appellant was convicted of first-degree sexual assault. At trial the prosecution questioned the victim about prior forcible sexual relations with the appellant. Appellant protested that this evidence violated the ban on introduction of collateral crimes.

Syl. pt. 4 - "Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. *W.Va.Code*, 61-8B-1(1)(b)." Syllabus Point 4, *State v. Pancake*, 170 W.Va. 690, 296 S.E.2d 37 (1982).

The Court found no error.

Voluntary social companion

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

Appellant was convicted of six counts of first-degree sexual assault of his granddaughter. He contends on appeal the granddaughter was a voluntary social companion.

Syl. pt. 2 - Where a child is in the care of a supervisory adult, the child is not the "voluntary social companion" of the adult within the meaning of *W.Va. Code*, § 61-8B-3 (1981).

SEXUAL ASSAULT

Evidence

Competency of alleged victim

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

Appellant was convicted of first-degree sexual assault and incest. The trial court denied his motion for a psychiatric examination of the seven-year-old victim to determine her competency to testify.

Syl. pt. 1 - " ' "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)." Syllabus Point 3, *State v. Butcher*, 165 W.Va. 522, 270 S.E.2d 156 (1980)." Syl. pt. 7, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Here, the defendant alleged that the victim was unduly influenced by her aunt, defendant's wife's sister. He relied on a report by a treating psychiatrist to whom the victim was referred after the incident and on obiter dictum in *Burdette v. Lobban*, 174 W.Va. 120, 323 S.E.2d 601 (1984) recommending appointment of a "neutral child psychologist" in abuse cases.

Although one of defense counsel's expert witnesses recommended a second evaluation of the victim, none was ordered. The victim was extensively questioned by the prosecution to determine her understanding of the difference between truth and falsehood and demonstrated competency. Relying on *Burdette*, *supra*, the Court held no abuse of discretion occurred in refusing to order an additional psychiatric examination.

Judge's ruling on admissibility

State v. Giles, 368 S.E.2d 107 (1988) (Per Curiam)

See EVIDENCE Admissibility, Vouching the record, (p. 183) for discussion of topic.

Evidence (continued)

Psychiatric disability of alleged victim

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

See WITNESSES Credibility, Psychiatric disability, (p. 656) for discussion of topic.

First-degree

Lesser included offense

State v. Acord, 336 S.E.2d 741 (1985) (Brotherton, J.)

Appellant was convicted of first-degree sexual assault. He contends the trial court erred in failing to give an instruction on second degree sexual assault or sexual assault without the use of a weapon.

The Court found the trial court correct in refusing to instruct on the lesser included offense where the evidence did not warrant such an instruction. Here the victim testified that three men held a gun to her during her ordeal; no evidence was presented to the contrary. The Court found if the jury believed that the victim was raped, they would have no reason to believe that a gun was not used.

State v. Cox, 338 S.E.2d 227 (1985) (Per Curiam)

The appellant was convicted of two counts of sexual abuse in the first-degree. He contends the trial court erred in refusing to allow the jury to consider a verdict of guilty of the lesser offense of sexual misconduct.

First-degree (continued)

Lesser included offense (continued)

State v. Cox, (continued)

The Court noted the element of "forcible compulsion" is an element of the crimes of first-degree sexual assault and first-degree sexual abuse, but not of sexual misconduct. The State's evidence showed the victims were induced to engage in sexual intercourse with the appellant by his threats to shoot them if they tried to get away. The appellant offered no evidence to contradict this testimony, testifying only that as a result of his intoxication, he did not remember having made such threats. Under the test set forth in *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), this was insufficient to entitle the appellant to have the jury consider the lesser offense of sexual misconduct.

State v. Wallace, 337 S.E.2d 321 (1985) (Miller, C.J.)

Appellant was charged with committing two acts of first-degree sexual assault but convicted of sexual misconduct. He testified he had participated in only one act of consensual vaginal intercourse with the victim. The medical evidence indicated there were no marks or bruises or any evidence of trauma in and around the vaginal area or on other areas of the victim' body. Appellant argues that sexual misconduct is not a lesser included offense of first-degree sexual assault.

Syl. pt. 2 - Sexual misconduct under *W.Va.Code*, 61-8B-9 (1976), is a lesser included offense of first-degree sexual assault as set out in *W.Va.Code*, 61-8B-3 (1976).

Syl. pt. 3 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offenses, then the defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Here, the Court found a substantial conflict in the evidence on the forcible compulsion issue, the main element distinguishing first-degree sexual assault from sexual misconduct. The victim testified there was forcible compulsion while the defendant claimed the sexual intercourse was consensual. The Court found a lesser included offense instruction was warranted because of the conflict in this evidence.

SEXUAL ASSAULT

First-degree (continued)

Lesser included offense (continued)

State v. Wallace, (continued)

Syl. pt. 4 - A defendant does not have the right to preclude the State from seeking a lesser included offense instruction where it is determined that the offense is legally lesser included and that such an instruction is warranted by the evidence.

Forcible compulsion

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Syl. pt. 4 - In determining whether the victim of a sexual assault exercised "earnest resistance" as defined in *W.Va.Code*, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault.

Here, the Court could not find as a matter of law that the victim failed to exercise earnest resistance.

Indictment

Sufficiency of

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

See KIDNAPING Indictment, Sufficiency of, (p. 405) for discussion of topic.

SEXUAL ASSAULT

Lesser included offense

Generally

State v. Dellinger, 358 S.E.2d 826 (1987) (Per Curiam)

Appellant was convicted of first-degree sexual assault. He was sentenced to ten years in the State penitentiary. After serving three years of that sentence, he was resentenced to an indeterminate term of from ten to twenty years in the State penitentiary. Although other errors were assigned, the Court chose to rule only on the issue of whether the trial court should have given a jury instruction regarding the lesser included offense of first-degree sexual abuse.

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." Syl. pt. 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981).

Syl. pt. 2 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Here, the Court noted that substantial conflict in the evidence, along with the necessary commission of sexual abuse when committing sexual assault, required that an instruction be given on the lesser included offense of sexual abuse.

Instructions

State v. Dellinger, 358 S.E.2d 826 (1987) (Per Curiam)

See SEXUAL ASSAULT Lesser included offense, Generally, (p. 600) for discussion of topic.

SEXUAL ASSAULT

Rape trauma syndrome

Evidence of

State v. McCoy, 366 S.E.2d 731 (1988) (Brotherton, J.)

See EVIDENCE Expert witnesses, Rape trauma, (p. 205) for discussion of topic.

Sexual abuse

State v. Dellinger, 358 S.E.2d 826 (1987) (Per Curiam)

See SEXUAL ASSAULT Lesser included offense, Generally, (p. 600) for discussion of topic.

Sexual assault

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

See SUFFICIENCY OF EVIDENCE Sexual assault, (p. 635) for discussion of topic.

Sufficiency of the evidence

Generally

State v. Barker, 364 S.E.2d 264 (1987) (Per Curiam)

Appellant was convicted of sexual assault of a minor. On appeal he argued that the evidence was insufficient as a matter of law and that the trial court erred by not directing an acquittal.

Syl. pt. 2 - "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim unless such testimony is inherently incredible; the credibility is a question for the jury." Syl. pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Sufficiency of the evidence (continued)

Generally (continued)

State v. Barker, (continued)

Here, the Court noted that the victim was capable of testifying in a clear manner and that the testimony of the examining physician was consistent.

Forcible compulsion

State v. Holmes, 351 S.E.2d 422 (1986) (Per Curiam)

See SEXUAL ASSAULT Sufficiency of evidence, Voluntary social companion, (p. 603) for discussion of topic.

Sexual abuse in the first-degree

State v. Brown, 355 S.E.2d 614 (1987) (McGraw, C.J.)

Appellant contends the trial court erred in refusing his motion for judgment of acquittal on the ground that the evidence failed to show penetration. The Court found the appellant was convicted of sexual abuse in the first-degree, an offense which error in this regard was therefore harmless.

Victim's uncorroborated testimony

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

Appellant was convicted of first-degree sexual assault and incest with his seven year old stepdaughter. On appeal, he contended that the evidence was insufficient; specifically, that the victim was unduly influenced by her aunt and that the medical evidence failed to corroborate her testimony.

Sufficiency of the evidence (continued)

Victim's uncorroborated testimony (continued)

State v. Ayers, (continued)

Syl. pt. 3 - "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 accused beyond a reasonable doubt, though the evidence adduced by the accused is in conflict therewith. 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 injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 4 - "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." Syl. pt. 4, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).

Here, the victim testified that she had recanted her original allegations under pressure from the defendant's relatives. She also admitted to practicing testimony with both her aunt and an assistant prosecuting attorney. The Court found the victim's credibility to be a jury question and, finding further that the jury was properly instructed, refused to disturb the verdict. See *State v. Bailey*, 151 W.Va. 796, at 806, 155 S.E.2d 850, at 856 (1967).

Voluntary social companion

State v. Holmes, 351 S.E.2d 422 (1986) (Per Curiam)

Defendant was convicted of sexual assault in the first-degree.

He contends the Court erred in refusing to direct a verdict of acquittal since the State did not prove beyond all reasonable doubt that the alleged victim was not a voluntary social companion, and did not prove forcible compulsion.

Reviewing the evidence in this case and viewing it in the light most favorable to the prosecution, the Court found the trial court did not err in refusing to grant the defendant's motion for a directed verdict.

Sufficiency of the evidence (continued)

Voluntary social companion (continued)

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant contended the victim was a voluntary social companion and therefore the use of a deadly weapon or the infliction of serious bodily injury had to be shown. The Court found that inducing the victim to get in the car under the guise of helping the defendant find his dog did not make her a voluntary social companion. Furthermore, once the ruse of looking for the defendant's dog ended, her status could not be termed voluntary. The Court found the appellant attempted to tie a cord around the wrists of both the victim and her cousin and subsequently threatened the victim with a steak knife and forced her to lie on the floor of his car while he drove to the remote location where the sexual assault occurred.

Voluntary social companion

Defined

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

Appellant was convicted of first-degree sexual assault. The victim was his twelve year old stepdaughter. Appellant asserted on appeal that the evidence was insufficient to find that the victim was not a voluntary social companion.

Syl. pt. 5 - "Where a child is in the care of a supervisory adult, the child is not the 'voluntary social companion' of the adult within the meaning of *W.Va. Code*, § 61-8B-3 (1981)." Syllabus Point 2, *State v. Allman*, 177 W.Va. 365, 352 S.E.2d 116 (1986).

The Court refused to reconsider its decision in *Allman*.

SEXUAL ASSAULT

Witnesses

Competency

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See SEXUAL ASSAULT Evidence, Competency of alleged victim, (p. 596) for discussion of topic.

SHOPLIFTING

Sufficiency of evidence

State v. Sloan, 355 S.E.2d 374 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Shoplifting, (p. 635) for discussion of topic.

SPEEDY TRIAL

State ex rel. Buzzard v. MacQueen, No. 18029 (12/4/87) (Per Curiam)

See JUDGES Duty to render decision, (p. 364) for discussion of topic.

Distinctions between one- and three-term rule

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

See SPEEDY TRIAL One-term rule, (p. 609) for discussion of topic.

Measure of time

Duty of prosecution

State v. Drachman, 358 S.E.2d 603 (1987) (Miller, J.)

Appellant was found guilty of issuing a worthless check (felony offense) for $7,250. He contended that his right to speedy trial was denied.

On December 24, 1978 appellant, a North Carolina resident, executed a worthless check, payable in West Virginia. The West Virginia payee obtained a warrant. On March 28, 1979 appellant was served in North Caroling with a fugitive from justice warrant.

Prior to a hearing on this matter, appellant was arrested on charges of forgery and larceny in North Carolina. Appellant struck a plea agreement with the North Carolina prosecution and no extradition was made to West Virginia. In August, 1979 appellant began serving his North Carolina sentence. On September 18, 1979 the fugitive warrant was ordered dismissed but dismissal apparently never took place.

Appellant was paroled in North Carolina in February, 1982 and was arrested in August, 1983 on the fugitive charges. He was ordered to appear in West Virginia and was indicted January 5, 1984 on the worthless check charges. Trial was held February 14, 1985.

Syl. pt. 1 - The Sixth Amendment speedy trial right begins with the actual arrest of the defendant and will also be initiated where there has been no arrest, but formal charges have been brought by way of an indictment or information. (See *United States v. Marion*, 400 U.S. 307, at 320-21, 92 S.Ct. 455, at 463 (1971)).

Measure of time (continued)

Duty of prosecution (continued)

State v. Drachman, (continued)

Syl. pt. 2 - In those situations where there has been no arrest or indictment, the Sixth Amendment right to a speedy trial is not implicated. Yet, the prosecution may have substantially delayed the institution of criminal proceedings causing prejudice to the defendant by way of loss of witnesses or other evidence. In this situation, the Fifth Amendment due process standard is utilized. (See *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044 (1977)).

Syl. pt. 3 - "The right to a trial without unreasonable delay is basic in the administration of criminal justice and is guaranteed by both the state and federal Constitution. *U.S. Const.* Amend. VI; *W.Va. Const.*, Art,. 3, § 14." Syl. pt. 1, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982).

Syl. pt. 4 - "A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding to support a finding that the defendant has been denied a speedy trial." Syl. pt. 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982). (See also *Barker v. Wingo*, 407 U.S. 514, at 530, 92 S.Ct. 2182, at 2192 (1972)).

Syl. pt. 5 - Under the Sixth Amendment speedy trial right, the length of the delay is a triggering mechanism. Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance. (See *State v. Foddrell*, *supra* (five and one half year delay sufficient to examine other factors)) and *State v. Cox*, 162 W.Va. 915, 253 S.E.2d 517 (1979) (two and one half year delay sufficient to examine other factors).

Syl. pt. 6 - Under the Sixth Amendment speedy trial right, the prosecution has a duty to seek the return of a prisoner known to be incarcerated out of state. (See *State ex rel. Stines v. Locke*, 159 W.Va. 292, 220 S.E.2d 443 (1974)) and *State ex rel. Sutton v. Keadle*, 176 W.Va. 138, 342 S.E.2d 103 (1985).

Measure of time (continued)

Duty of prosecution (continued)

State v. Drachman, (continued)

Here, the primary assertion of prejudice to the appellant was the loss of a potential concurrent sentence for the North Carolina and West Virginia offenses. (See *Smith v. Hooey*, 393 U.S. 374, at 378, 89 S.Ct. 575, at 577 (1969)). The Court found no prejudice and upheld the conviction.

One-term rule

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

Relator seeks to prohibit the Circuit Court from trying her on a second degree murder indictment because of the delay in bringing her to trial. Her main contentions are that this delay violated the one-term rule under *W.Va.Code*, 62-3-1, and the three-term rule under *W.Va.Code*, 62-3-21, requiring the dismissal of the indictment with prejudice.

Relator was indicted in the January term of the Circuit Court of Pleasants County. The three annual terms of this court commence on the se cond Monday in January, May, and September. The relator moved for and was granted continuances in the January and May 1984 terms.

Relator requested the case be set for trial at some time during the September term. The State moved to have her examined by a psychiatrist and a psychologist for a determination of her competency to stand trial and her criminal responsibility at the time of the murder. The trial court granted the motion.

The medical reports of the psychiatrist and psychologist were presented to the court in October, 1984. Both found her competent to stand trial, but raised questions concerning her criminal responsibility at the time of the murder. At the October 31 hearing, relator repeated her desire to have the trial set during that term.

One-term rule (continued)

Good v. Handlan, (continued)

In a letter dated December 3, 1984, the trial court stated the relator should be examined again to provide further information on her mental competency and criminal responsibility. At the December 17, 1984, hearing, the relator voiced no objection to this additional mental examination.

In the January 1985 term, the relator was required to retain different counsel because her original attorney withdrew from the case. A special prosecutor had to be appointed because of the newly elected prosecutor's previous representation of the relator in the case, and a special judge had to be appointed after the death of the original trial judge. During this term of court, the relator did not repeat her request that the case be set for trial. In March, 1985, the second set of medical reports were filed with the court. These reports essentially corroborated the conclusions made in the first two medical reports.

On June 18, 1985, the State and the relator jointly moved to have a presentence investigation report prepared to aid them in a possible plea bargain agreement. This report was to have been to have the case continued generally, to be reset by the trial court after the presentence report was filed. No further proceedings took place in this term.

The next hearing was held October 29, 1985 at which time it was determined that the probation officer who had prepared the presentence report had failed to give copies of it to the parties. The trial court ordered that the report should be given to the parties promptly and set a trial date for December 17, 1985. The relators petition for a writ of prohibition was filed on December 2, 1985.

The Court noted several distinctions between the one-term rule and the three-term rule.

Syl. pt. 1 - It is the three-term rule, *W.Va.Code*, 62-3-21, which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution.

While the speedy trial right under the Sixth Amendment to the U.S. Constitution is discussed in Syl. pt. 1 of *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981), it is clear that West Virginia's three-term rule is not the federal constitutional speedy trial standard established by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972).

One-term rule (continued)

Good v. Handlan, (continued)

A distinction between the two West Virginia rules is the burden of proof. Under the one-term rule, the burden is on the party seeking the statutory protection to show that the trial was continued without good cause. In addition, an accused must request a prompt trial in order to take advantage of the one-term rule.

Syl. pt. 3 - Under the three-term rule, *W.Va.Code*, 62-3-21, it is the duty of the State to provide a trial without unreasonable delay and an accused is not required to demand a prompt trial as a prerequisite to invoking the benefit of this rule.

Syl. pt. 4 - The possible reasons justifying good cause for a continuance under *W.Va.Code*, 62-3-1, are broader than the causes listed in *W.Va.Code*, 62-3-21, as valid reasons for not counting a particular term. As a consequence, the causes justifying continuances listed in the three-term rule, *W.Va.Code*, 62-3-21, may be applied in a one-term rule situation, but the general good cause standard in *W.Va.Code*, 62-3-1, may not be applied in a *W.Va.Code*, 62-3-21 situation.

The Court found more found more flexibility in the remedy for a one-term rule violation than for a three-term rule violation. *W.Va.Code*, 62-3-1, does not specifically provide a remedy for a violation of the one-term rule. In Syl. pt. 4 of *Shorter*, the Court stated what had to be proven in order for a violation of *W.Va.Code*, 62-3-1 to justify a dismissal of an indictment. Where a violation of the three-term rule is established, a trial court is obligated to dismiss the indictment. (See *W.Va.Code*, 62-3-21).

In applying the one-term rule, the State argues that because the relator obtained continuances in the January and May 1984 terms, she waived her right to a prompt trial under the one-term rule. Under the State's theory, once a defendant allows the term at which the indictment is returned to lapse without demanding a prompt trial, the one-term rule has no application.

Syl. pt. 7 - *W.Va.Code*, 62-3-1, is not limited to the term of court at which an indictment is returned, but is applicable to any term of court in which an accused asserts his right to a prompt trial. Where such right is asserted, the accused must be tried during that term unless good cause can be shown for a continuance.

One-term rule (continued)

Good v. Handlan, (continued)

In this case, the Court found the only term during which the relator asserted the right to a prompt trial under *W.Va.Code*, 62-3-1, was the September 1984 term. In that term, the State requested a mental examination of the relator. After examining the two reports, the trial court was not satisfied that it had enough information and advised the parties that additional psychiatric exams were needed. No objection was made by relator's counsel.

The Court found good cause sufficient to continue a case under *W.Va.Code*, 62-3-1 is rather broad and is not confined to the exceptions in *W.Va.Code*, 62-3-21. Under this latter statute, one of the listed exceptions is "the failure to try him was caused by his insanity." Cases construing this exception have indicated that where a defendant is returned to a circuit court as being competent to stand trial, that term of court is not counted under *W.Va.Code*, 62-3-21.

W.Va.Code, 62-3-21 specifically provides that a term during which an accused is insane shall not be counted for the purpose of the 'Three Term Rule'. This provision is sufficiently broad to include any term during which a defendant's mental competency is being tested.

Here, the trial court's ordering of a second mental examination of the relator was sufficient good cause to avoid the provisions of *W.Va.Code*, 62-3-1. The relator demanded the case be tried in the September 1984 term, but at the hearing on December 17, 1984, where the necessity for a second mental examination was discussed, the relator's counsel not only did not object to such examination, but indicated that he was agreeable. This acquiescence to a second examination constituted sufficient good cause for the trial court to continue the trial to the next term. There were no subsequent terms at which the relator demanded a prompt trial under *W.Va.Code*, 62-3-1. The Court rejected the relator's argument that her right to a speedy trial under *W.Va.Code*, 62-3-1 was violated.

Appellant was convicted of aiding in concealing stolen property. He contends he was denied his right to a speedy trial. The Court found the appellant failed to establish that the trial court continued his case without good cause.

SPEEDY TRIAL

Same term rule

Keller v. Ferguson, 355 S.E.2d 405 (1987) (Miller, J.)

A mistrial was granted during petitioner's trial after the prosecutor claimed the petitioner's attorney asked improper questions of a State's witness on cross-examination. Petitioner seeks to prohibit his retrial on the ground that he was deprived of his right to a speedy trial in violation of *W.Va.Code*, 62-3-1, the one-term rule.

The Court held the petitioner waived his statutory right to a speedy trial by failing to make a timely motion asserting his right to a trial within one term.

Syl. pt. 1 - "*W.Va.Code*, 62-3-1, is not limited to the term of court at which an indictment is returned, but is applicable to any term of court in which an accused asserts his right to a prompt trial. Where such right is asserted, the accused must be tried during that term unless good cause can be shown for a continuance. *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986).

Syl. pt. 2 - A defendant must assert his speedy trial right under *W.Va.Code*, 62-3-1, the one-term rule, by a timely written motion.

The Court found no indication the petitioner positively asserted his rights under the one-term rule and held he had no basis upon which to assert a violation of *W.Va.Code*, 62-3-1.

Three-term rule

Good v. Handlan, 342 S.E.2d 111 (1986) (Miller, C.J.)

See facts under SPEEDY TRIAL One-term rule (p. 609).

Here, the term of indictment, January, and the second term, March, are not counted because the relator moved for a continuance in each of these terms. Under *W.Va.Code*, 62-3-21, a term continued on motion of an accused is not included in counting the three terms, nor is the term at which the indictment is returned. Even if the relator were given the benefit of the September, 1984 and January, 1985 terms of court, the May, 1985 term concluded with an agreed order dated June 18, 1985, continuing the matter until the pre-sentence

Three-term rule (continued)

Good v. Handlan, (continued)

report was filed. At the next hearing in October, 1985, it was discovered the presentence report had not been delivered to the parties by the probation officer. No objection was made by relator's counsel and the case was set for trial on December 17.

The Court found that since the May 1985 term was continued by agreement of the parties, it could not be counted and, consequently, the relator failed to show three terms had elapsed excluding the term of the indictment.

State ex rel. Sutton v. Keadle, 342 S.E.2d 103 (1985) (Miller, C.J.)

As long as a defendant is being held for trial in one county in this State, he is not entitled to have the three-term rule, *W.Va.Code*, 62-3-21, run in another county where other criminal charges are pending. If, however, a defendant is incarcerated under a sentence in one county and criminal charges are pending in another county, then the prosecutor in the county where the charges are pending must exercise reasonable diligence to secure the defendant's return for trial; otherwise the three-term rule, *W.Va.Code*, 62-3-21, is applicable. To the extent that Syl. pts. 2 and 3 of *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961), and the Syllabus of *Ex Parte Hollandsworth v. Godby*, 93 W.Va. 543, 117 S.E. 369 (1923), vary from these principles, they are overruled.

Here, the prosecutor of Upshur County was aware that the defendant was incarcerated in Harrison County under a sentence and not merely being held for trial. The Court found this was known in the January 1984 term and became chargeable in April 1984, September 1984 and January 1985 terms when the prosecutor did not secure the defendant's temporary custody for trial. The Court rejected the argument that the issuance of a detainer by the Upshur County authorities to the authorities in Harrison County was an act of reasonable diligence which should toll the three-term rule. The Court found a detainer is not a document designed to compel the production of a prisoner for purposes of prosecution. This is accomplished by a writ of habeas corpus *ad prosequendum*. *W.Va.Code*, 62-3-21 barred further proceedings.

Three-term rule (continued)

State v. Lambert, 331 S.E.2d 873 (1985) (Per Curiam)

Appellant was convicted of aiding in concealing stolen property. He contends he was denied his right to a speedy trial. The Court found the appellant was originally indicted for breaking and entering on September 15, 1981, during the September 1981 Term of the Circuit Court of Randolph County. Under the formula for calculating the three-term limitation, that term does not count against the State. The original indictment was nolle prosequied, and he was reindicted. He was tried on the se cond indictment on December 1 and 2, 1982, during the September 1982 term. Even assuming, arguendo, that the three-term period commenced running from the time of the first indictment, only two full terms passed before trial; therefore, appellant was not discharged from prosecution under the "Three Term Rule."

State v. Moore, 357 S.E.2d 780 (1987) (Miller, J.)

Appellant was convicted of obtaining money under false pretenses. Upon appeal, his conviction was reversed. Retrial did not take place during the subsequent three terms of court.

Upon remand, the prosecuting attorney sent notice to defense counsel that trial would take place during the third term following remand. The case was not tried on the scheduled date, apparently because the prosecution believed that defense counsel would request a continuance; a proposed order to that effect was sent to defense counsel but never signed.

At the beginning of the fourth term following remand, defense counsel moved to dismiss for failure to try the case within three terms. The trial court rejected the motion on the theory that defense counsel had agreed to a continuance. No record was made, however, of the alleged agreement to continue.

Syl. pt. 1 - Retrial must occur within three terms after the term in which relief is granted upon habeas corpus or appellate review, subject to the statutory exceptions excusing delay under *W.Va.Code*, 62-3-21.

Three-term rule (continued)

State v. Moore, (continued)

See *State v. Bias*, 177 W.Va. 302, 352 S.E.2d 52, at 65 (1986). See also, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533, at 541 (1982) (neither one-term rule in *W.Va.Code* 62-3-1 nor three-term rule in *W.Va.Code*, 62-3-21 cover habeas corpus relief); and *State v. Holland*, 149 W.Va. 731, 143 S.E.2d 148 (1965) (where habeas corpus granted, cannot count terms from date of original indictment).

Syl. pt. 2 - The failure to comply with the three-term rule under *W.Va.Code*, 62-3-21, bars further prosecution. This same rule is applicable for a retrial if the case is not tried within three terms after the term of the remand, subject to the exceptions contained in *W.Va.Code*, 62-3-21.

See *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981); *State v. Young*, 167 W.Va. 312, 280 S.E.2d 104 (1981); *State v. Lacy*, 160 W.Va. 96, 232 S.E.2d 519 (1977); *State ex rel. Parsons v. Cuppett*, 155 W.Va. 469, 184 S.E.2d 616 (1971); and *State v. Underwood*, 130 W.Va. 166, 43 S.E.2d 61 (1947).

Here, the lack of a record of the alleged continuance led to reversal for failure to try within three terms.

Competency to stand trial

State v. Bias, 352 S.E.2d 52 (1986) (McHugh, J.)

See COMPETENCY To stand trial, Commitment to state mental hospital, (p. 57) for discussion of topic.

STATUTES

Penal statutes

Generally

State v. Brumfield, 358 S.E.2d 801 (1987) (McHugh, J.)

Appellant was convicted of three counts of kidnaping three correctional officers during an unsuccessful escape attempt at the Cabell County Jail. The main issue considered was whether the facts proven constituted kidnaping or merely jail breaking.

The Court noted that ordinarily, where an escape is attempted and a correctional officer is confined but not used as a hostage, prosecution for kidnaping is not appropriate.

Syl. pt. 2 - "Penal statutes must be strictly construed against the State and in favor of the defendant." Syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). See also, Syl. pt. 3, *State v. Nichols*, 177 W.Va. 483, 354 S.E.2d 415 (1987); Syl. pt. 1, *State v. Turley*, 177 W.Va. 69, 350 S.E.2d 696 (1986); *Ray v. Mangum*, 176 W.Va. 534, 346 S.E.2d 52, at 54 (1986); and *State v. Myers*, 171 W.Va. 277, 298 S.E.2d 813 (1982).

State v. Choat, 363 S.E.2d 493 (1987) (McHugh, J.)

See STATUTES Statutory construction, Dangerous or deadly weapon, (p. 620) for discussion of topic.

State v. Duncan, 369 S.E.2d 464 (1988) (Brotherton, J.)

Appellant was convicted of unlawful disinterment of a dead human body pursuant to *W.Va.Code*, 61-8-14. She argued on appeal that the statute was unconstitutionally vague and fails to give notice of the prohibited conduct.

Syl. pt. 2 - "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*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Penal statutes (continued)

Generally (continued)

State v. Duncan, (continued)

Syl. pt. 3 - "Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied." Syl. pt. 3, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 4 - "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. pt. 3, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178, *cert. denied*, 389 U.S. 848 (1967).

Here, the Court held that the statute gave a person of ordinary intelligence fair notice of the prohibited action. No error.

Statutory construction

Generally

In the Matter of Justice McGraw, Jr., No. 17272 (7/23/87) (Per Curiam)

See JUDGES Right to review of advisory opinion, (p. 368) for discussion of topic.

In the Matter of Magistrate Vandelinde, 366 S.E.2d 631 (1988) (Miller, J.)

See ELECTIONS Campaign contributions, (p. 173) for discussion of topic.

Statutory construction (continued)

Generally (continued)

State ex rel. M.L.N. v. Greiner, 360 S.E.2d 554 (1987) (McGraw, C.J.)

Three juveniles, *M.L.N.*, *G.F.* and *M.L.W.*, were confined temporarily in the Wood County Correctional Center's juvenile detention section pending hearings to modify prior disposition orders. The juvenile court had concluded, based on numerous violations which would have been crimes if committed by an adult, that more restrictive alternatives were required (several previous placements had been unsuccessful; sever probation violations had occurred).

All three had turned eighteen while under court supervision. The issue here was whether they could be held in the Wood County Correctional Center (jail). The Center afforded a separate room but juveniles so housed were apparently within sight and sound of adults.

Several statutes were at issue, including *W.Va.Code*, 49-5-2, 49-5-16(a), 49-5A-2 and 49-5-13 (1986 Replacement Vol.). The Court held that judicial intervention was proper because of the ambiguous and possibly conflicting nature of the statutes. Syl. pt. 1, *Ohio County Commission v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983).

The conflict here was whether the Legislature intended to give circuit judges the authority, pursuant to *W.Va.Code*, § 49-5-2, to incarcerate in county jails juveniles between the ages of eighteen and twenty, or whether the prohibition against incarceration of juveniles within the sight and sound of adult prisoners controlled (see *W.Va.Code*, 49-5a-2 and 49-5-16(a)).

The Court held that the statutes must be read in pari materia. See *State ex rel. R.C.F. v. Wilt*, 162 W.Va. 424, 252 S.E.2d 168 (1979); *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

Syl. pt. 1 - "It is a cardinal rule of construction governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent." Syl. pt. 4, *State ex rel. Bibb v. Chambers*, 138 W.Va. 701, 77 S.E.2d 297 (1953).

Statutory construction (continued)

Generally (continued)

State ex rel. M.L.N. v. Greiner, (continued)

The Court also followed the following precepts: "Statutes which are "*in pari materia*" should be construed, if possible to do, so that none should fail." Syl. pt. 13 *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953); and "the general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. pt. 1, *UMWA By Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). See also, *Simpkin v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268, at 273 (1983); Syl. pt. 2, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970); and *Elite Laundry Co. v. Dunn*, 126 W.Va. 858, 30 S.E.2d 454, at 459 (1944).

The purpose of the statutes here was held to be the rehabilitation of delinquent children. Thus, custody must be related to rehabilitation. See *State ex rel. R.S. v. Trent*, 169 W.Va. 493, 289 S.E.2d 166, at 175 (1982). The Court held that the Legislature must have intended that persons between the ages of eighteen and twenty not be held within sight and sound of adult prisoners.

State ex rel. M.L.N. v. Greiner, 360 S.E.2d 554 (1987) (McGraw, C.J.)

See JUVENILES Rehabilitation, Confinement between ages of eighteen and twenty, (p. 389) for discussion of topic.

Dangerous or deadly weapon

State v. Choat, 363 S.E.2d 493 (1987) (McHugh, J.)

Appellant was convicted of carrying a dangerous or deadly weapon without a license, in violation of *W.Va.Code*, 61-7-1. The trial court found that the weapon in question was dangerous as a matter of law and instructed the jury accordingly. The statute did not specifically list the weapon (a lock-blade knife) in its enumeration of deadly weapons.

Statutory construction (continued)

Dangerous or deadly weapon (continued)

State v. Choat, (continued)

Syl. pt. 4 - "Penal statutes must be strictly construed against the State and in favor of the defendant." Syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

Syl. pt. 5 - When the instrument involved in a prosecution under *W.Va.Code*, 61-7-1 [1975] is not one specifically enumerated in the statute, the issue as to whether it is a "dangerous or deadly weapon" is essentially a factual determination and must be submitted to the jury, unless the trial court can determine as a matter of law that under the evidence in the case the jury could not have concluded that the weapon was dangerous or deadly. To the extent that this Court's holding in *Village of Barboursville ex rel. v. Taylor*, 115 W.Va. 4, 174 S.E. 485 (1934), is inconsistent with this opinion, it is hereby overruled.

The Court remanded this case for a jury determination of whether the weapon in question was a dangerous weapon within the meaning of the statute.

State v. Duncan, 369 S.E.2d 464 (1988) (Brotherton, J.)

See STATUTES Penal statutes, Generally, (p. 617) for discussion of topic.

Disinterment

State v. Duncan, 369 S.E.2d 464 (1988) (Brotherton, J.)

Appellant was convicted of unlawful disinterment of a dead human body pursuant to *W.Va.Code*, 61-8-14. She alleges as error that the crime of unlawful disinterment presumes that the body was decently buried, while the victim's body was merely hidden.

Syl. pt. 1- West Virginia Code § 61-8-14 *1884) contains no requirement that a body be decently or lawfully buried before it can be subjected to unlawful disinterment.

Statutory construction (continued)

Kidnaping

State v. Brumfield, 358 S.E.2d 801 (1987) (McHugh, J.)

See KIDNAPING Incidental to jail breaking, (p. 404) for discussion of topic.

Oral interpretation

In the Matter of Magistrate Vandelinde, 366 S.E.2d 631 (1988) (Miller, J.)

See ELECTIONS Campaign contributions, (p. 173) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Generally

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See SEXUAL ASSAULT Sufficiency of evidence, Victim's uncorroborated testimony, (p. 602) for discussion of topic.

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

Appellant was a visitor at another's residence when police searched the residence pursuant to a search warrant. A controlled substance was found, along with a small amount of marijuana. The owner of the residence told police that the controlled substance was for his back pain. No controlled substances were found on appellant's person nor were appellant's fingerprints on any controlled substance. Police arrested the owner and the appellant for possession of a controlled substance. Appellant was convicted of possession with intent to deliver. He contends on appeal that the evidence was insufficient to convict him.

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 injustice has bee done." Syl. pt. 1, *State v. Starkey*,161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court held the evidence here to be "grossly inadequate."

State v. Holland, 364 S.E.2d 535 (1987) (Per Curiam)

Appellant was convicted by a jury of first offense DUI. He contended that the evidence was insufficient to support the verdict.

SUFFICIENCY OF EVIDENCE

Generally (continued)

State v. Holland, (continued)

Syl. pt. 3 - "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 injustice has bee done." Syl. pt. 1, *State v. Starkey*,161 W.Va. 517, 244 S.E.2d 219 (1978).

Here, the Court found conflict in the evidence but held it sufficient

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 626) for discussion of topic.

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. Appellant objected to evidence admitted at trial as exception to hearsay.

The Court held that certain statements should have been excluded but found their admission insufficient for reversal. The remaining evidence was held sufficient for conviction.

See *State v. Holland*, *supra*.

Burglary

State v. Hutcheson, 352 S.E.2d 143 (1986) (Miller, C.J.)

Appellant appeals three burglary convictions.

He contends there was insufficient evidence to warrant his conviction. Reviewing the evidence, the Court found no merit to this allegation.

Burglary (continued)

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

Appellant appeals his conviction for daytime burglary and his subsequent conviction and life sentence as a recidivist.

He contends he was denied effective assistance of counsel because his court-appointed trial counsel was a relative and friend of the burglary victim. This relationship was not revealed to the appellant prior to the burglary trial.

Based on this ground, the Court reversed appellant's convictions.

Finding that the appellant must be given a new trial, the Court reviewed the assignments of error in the burglary trial. Appellant contends the evidence was insufficient for conviction. The Court found sufficient evidence was introduced.

Causing a death

Proof of causal link between intoxication and accident

State v. Bartlett, 355 S.E.2d 913 (1987) (Neely, J.)

Petitioner contends the trial court erred in failing to direct a verdict of acquittal because the State had not presented any evidence of the speed at which his vehicle was traveling at the time of the accident, nor had the State presented any evidence regarding what speed would have been reasonable and prudent under the prevailing conditions. The Court found petitioner's contention was not supported by the evidence. Two witnesses estimated the speed of the vehicle at the time of the accident. Under the circumstances of this case, the jury could have inferred that the petitioner was driving at a speed that was not reasonable and prudent for the conditions.

Petitioner also contends the trial court erred in not directing a verdict of acquittal because the evidence presented by the State was insufficient to support the conviction. Petitioner contends the State did not present any medical or scientific evidence regarding the affect the consumption of alcohol would have had on his ability to operate the vehicle at the time, and that the State had therefore failed to show the consumption of alcohol was a "contributing cause." The Court found no merit to the contention.

Causing a death (continued)

Proof of causal link between intoxication and accident (continued)

State v. Bartlett, (continued)

Syl. pt. 3 - In a prosecution under *W.Va.Code*, 17C-5-2(a) [1983], the prosecution need not put on medical or scientific evidence of a causal link between the accused's intoxication and the accident in which he accused was involved. The jury may infer such a causal link once it has been shown that the driver was intoxicated, that the vehicle was driven in a negligent manner, and that an accident occurred.

Circumstantial evidence

State v. Jennings, 359 S.E.2d 593 (1987) (Per Curiam)

Appellant was convicted of unlawful wounding. He contended that the trial court erred in refusing his motion for a directed verdict of acquittal, in that the circumstantial evidence presented did not constitute a *prima facie* case.

The Court quoted 160 W.Va. 10, 230 S.E.2d 826, at 829-30 (1976):

> "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." (Citations omitted).

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 accused 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 injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

SUFFICIENCY OF EVIDENCE

Circumstantial evidence (continued)

State v. Jennings, (continued)

Evidence may be circumstantial and yet be sufficient if it points clearly to the accused. *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967).

The Court held that the evidence here was adequate.

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See INSTRUCTIONS Circumstantial evidence, (p. 338) for discussion of topic.

Confessions

Sufficient for conviction

State v. Dean, 363 S.E.2d 467 (1987) (Per Curiam)

Appellant was convicted of second degree arson. He contended that the evidence was insufficient to support a conviction because no evidence was introduced except his confession.

Syl. pt. 3 - "A conviction in a criminal case is not warranted by the extrajudicial confession of the accused alone. The confession must be corroborated in a material and substantial manner by evidence *aliunde* of the *corpus delicit*. The corroborating evidence, however, need not of itself be conclusive, the crime is established beyond reasonable doubt." Syllabus point 1, *State v. Blackwell*, 102 W.Va. 421, 135 S.E. 393 (1926).

Here, sufficient corroborating evidence was introduced to show that the fire in question was caused by arson. The Court held that this evidence, in conjunction with appellant's statement, was sufficient to establish that a crime was committed.

SUFFICIENCY OF EVIDENCE

Confessions (continued)

Voluntariness

State v. Hall, 369 S.E.2d 701 (1988) (Brotherton, J.)

See SELF-INCRIMINATION – STATEMENTS BY DEFENDANT Voluntariness, Burden of proof, (p. 560) for discussion of topic.

Controlled substance

Possession with intent to deliver

State v. Deal, 358 S.E.2d 226 (1987) (Per Curiam)

Appellant challenged the sufficiency of the evidence to sustain his conviction on charges of possession of a controlled substance with intent to deliver. More specifically, he challenged the proof of intent.

The Court noted that the question of intent is a jury question and must be proved beyond a reasonable doubt. Syl. pt. 3, *State v. Frisby*, 161 W.Va. 734, 245 S.E.2d 622 (1978).

Syl. pt. 2 - "'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.' Syl. pt. 4, *State v. Drake*, 170 W.Va. 169, 291 S.E.2d 484 (1982)." Syl. pt. 7, *State v. Walls*, 170 W.Va. 419, 294 S.E.2d 272 (1982).

Here, the evidence was found to be sufficient.

Proof of possession

State v. Chapman, 363 S.E.2d 755 (1987) (Per Curiam)

See CONTROLLED SUBSTANCES Proof of possession, (p. 77) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Felony murder

Robbery

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder (felony murder). He contends the trial court erred in failing to direct a motion for directed verdict based upon the prosecution's failure to prove that intent to rob existed in appellant's mind before he struck the fatal blows.

The Court found sufficient evidence was presented to establish a pre-existing intent to rob in the mind of the appellant. The Court found the victim's initial murder and subsequent robbery occurred within minutes, at the same location. The Court found no error in the trial court's refusal to direct a verdict for the appellant.

Homicide

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

Appellant was convicted of first-degree murder. He claimed the evidence was insufficient for conviction; specifically, that no physical evidence was adduced to link him to the murder, while other witnesses established an alibi.

"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 accused 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 injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 4 - "'If, on 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.' Syllabus point 1,*State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967)." Syl. pt. 3, *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983).

Here, viewing the evidence as most favorable to the prosecution, the Court found the evidence sufficient.

SUFFICIENCY OF EVIDENCE

Homicide (continued)

Felony murder

State v. Mayle, 357 S.E.2d 219 (1987) (Brotherton, J.)

Appellant was convicted of felony murder. He contends the state failed to meet its burden of proof.

The Court found a robbery was committed when two men took car keys at gunpoint from a McDonald's restaurant in Chesapeake, Ohio, and that the appellant's participation in the commission or attempt was satisfactorily proved. The Court found sufficient evidence to support the determination that officer Harman was killed during the commission of the felony. The distance from the McDonald's to the scene of the shooting was only 2.1 miles. The Court found that whether appellant and his accomplice were escaping or moving on to another crime, their activities were a part of "one continuous transaction," *State v. Wayne*, 169 W.Va. 785, 289 S.E.2d 480 (1982), and therefore the felony murder rule was properly applied.

In judicial ethics matters

In the Matter of Magistrate McGraw, 359 S.E.2d 853 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 360) for discussion of topic.

Larceny

Fingerprint evidence

State v. Sexton, 346 S.E.2d 745 (1985) (Per Curiam)

Appellant was convicted of grand larceny. He contends his conviction should be set aside since the fingerprint evidence was insufficient to support this conviction. The Court found their holding in Syl. pt. 1, *State v. Noe*, 160 W.Va. 10, 230 S.E.2d 826 (1976) was not the only evidence linking the appellant to the commission of the crime. The Court concluded the State's evidence was sufficient to support a grand larceny conviction.

Larceny (continued)

In general

State v. William T., 338 S.E.2d 215 (1985) (Per Curiam)

Appellant was adjudicated delinquent for committing petit larceny. The security guard at the department store testified he was alerted that appellant had removed a knife from a shelf in the sporting good section of the store. The guard observed the appellant remove the knife from its package and place it in his jacket pocket. He saw the appellant walk past the checkout lines and enter the lobby where the guard then stopped him and asked if he was leaving without paying for something. Appellant replied "no." The guard asked him about the knife and the appellant produced it from his pocket.

The appellant argues the State failed to prove two essential elements of larceny: (1) trespass against the owner's possession (a taking against the will or without the consent of the owner); and (2) asportation (carrying away).

The Court found both of these elements were proved and that under the standard set forth in *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978), the evidence was sufficient.

New trial

State v. Dudley, 358 S.E.2d 206 (1987) (Per Curiam)

See NEW TRIAL - NEWLY DISCOVERED EVIDENCE Sufficiency for, (p. 421) for discussion of topic.

Obtaining money by false pretense

State v. Barnes, 354 S.E.2d 606 (1987) (Per Curiam)

Appellant was convicted of two counts of obtaining $200 or more by false pretenses. Appellant, a project manager trainee for an apartment complex, borrowed a total of $7,800 from a 53 year old tenant of the complex on two separate occasions. The tenant testified these loans wee made because Appellant promised that her rent would not be raised, that she would be hired

Obtaining money by false pretense (continued)

State v. Barnes, (continued)

by the management to replace another employee and that appellant needed the money to buy Easter clothes and other items for himself and his family. The appellant failed to keep his promises. The rent was raised and the other employee kept the job. The Court found the appellant lacked authority over these matters.

Appellant contends he did not commit the crime of obtaining money by false pretenses because he allegedly did not obtain both the title and possession of the loan proceeds and because the State did not show the lender had suffered financial loss, in light of an offer of full repayment made in conjunction with an attempted plea agreement.

The Court found "where a person obtained a loan of money by means of a knowingly false representation or pretense relating to a past or existing fact, the person obtaining money by false pretenses." (Cites omitted).

"The crime of obtaining money or property by false pretenses is complete when the fraud intended is consummated by obtaining title to and possession of the property by means of a knowingly false representation or pretense. The crime is not purged by ultimate restoration or payment to the victim. It is sufficient if the fraud of the accused has put the victim in such a position that he or she may eventually suffer loss." *Quidley v. Commonwealth*, 221 Va. 963, 966, 275 S.E.2d 622, 625 (1981).

The Court cited with approval *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554, 52 S.Ct. 579, 76 L.Ed. 1289 (1932) where it was stated:

> "Civilly of course the action [for deceit] would fail without proof of damage, but that [principle] has no application or criminal liability. A man [or woman] is none the less cheated out of his or her] property, when he [or she] gets a quid pro quo of equal value. . . That is the evil against which the [criminal] statute is directed."

Obtaining money by false pretense (continued)

State v. Barnes, (continued)

The Court found "the essential elements of the crime of obtaining money or property by false pretense", *W.Va.Code*, 613-24(a), as amended, are: (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, that is, the false pretense must be in some degree the cause, if no the controlling cause, which induced the owner to part with his or her property. *State v. Moore*, 166 W.Va. 97, 273 S.E.2d 821, 829 (1980).

The Court found the false pretense need not be the only inducing cause of the owner's parting with the property.

Syl. pt. - "When one makes a promise to perform in the future with the 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)." See *State v. Moore*, 166 W.Va. 97, 273 S.E.2d 821, 829 (1980).

The Court affirmed the convictions.

Premeditation

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant maintained that the evidence of premeditation was inadequate as a matter of law.

The Court reiterated that premeditation "does not involve as a necessary element a constant purpose for a definite length of time." *State v. Farley*, 125 W.Va. 266, 23 S.E.2d 616, at 620 (1942). See also, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Here, telephone conversations, during which a prosecution witness overheard sounds of an argument just prior to the killing, coupled with evidence of general animosity and evidence that the appellant had offered to kill the victim earlier on the day of the killing, were held sufficient for a finding of premeditation.

SUFFICIENCY OF EVIDENCE

Receipt of stolen property

Concealing stolen property

State v. Lambert, 331 S.E.2d 873 (1985) (Per Curiam)

Appellant was convicted of aiding in concealing stolen property. He contends the evidence was insufficient to support his conviction.

The evidence showed that certain property was stolen from a gas station. The defendant ultimately directed the police to the property. One witness indicated the defendant was aware of the break-in and that he was associated with it. Another testified that the defendant and Donald Beckett had attempted to sell him cigarettes on the night following the break-in. The Court found, when viewed in the light most favorable to the prosecution, this evidence demonstrated the defendant was aware of the break-in and was privy to the concealment of the property taken. It may be inferred that the defendant aided in the concealment of the property and did so with a dishonest purpose. The Court found the evidence, although circumstantial, was not manifestly inadequate to support the verdict.

Self-defense

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the State failed to prove beyond a reasonable doubt that he did not act in self-defense. Considering the evidence in the light most favorable to the State, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978), there was sufficient evidence from which the jury could have found beyond a reasonable doubt that the killing was not done in self-defense.

Sexual assault

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See SEXUAL ASSAULT Sufficiency of evidence, Victim's uncorroborated testimony, (p. 602) for discussion of topic.

Sexual assault (continued)

State v. Miller, 336 S.E.2d 910 (1985) (Miller, C.J.)

Appellant contends the evidence was insufficient to support the first-degree sexual assault conviction because there was no proof that a deadly weapon had been used in the assault.

State v. Holmes, 351 S.E.2d 422 (1986) (Per Curiam)

See SEXUAL ASSAULT Sufficiency of evidence, Voluntary social companion, (p. 603) for discussion of topic.

Shoplifting

State v. Sloan, 355 S.E.2d 374 (1987) (Per Curiam)

Appellant was convicted of third offense shoplifting. She contends that the State failed to prove the value of the items or that they were the property of Hecks. Two Heck's employees testified the items were taken off the store's racks and had price tags which appeared to be Heck's tags. One employee testified the clothing belonged to Hecks and that the value of the two pairs of pants taken was $11.99 each. The Court found the value of the blouse was not important.

> Upon a third or subsequent shoplifting conviction, *regardless* of the value of the merchandise, the defendant shall be guilty of a felony and shall be fined not less than five hundred dollars nor more than five thousand dollars, and shall be imprisoned in the penitentiary for one to ten years. At least one year shall actually be spent in confinement and not subject to probation. [Emphasis Supplied]. *W.Va.Code*, 61-3A-4 [1981].

Uttering a forged writing

State v. Nichols, 354 S.E.2d 415 (1987) (Neely, J.)

Appellant was convicted of uttering a forged writing, a prescription. He contends on appeal the prosecution did not prove every material element of the offense.

Uttering a forged writing (continued)

State v. Nichols, (continued)

Syl. pt. 1 - To sustain a conviction under *W.Va.Code*, 61-4-5 [1961], the prosecution must prove four elements: (1) the writing uttered was forged; (2) the accused uttered or attempted to employ as true and forged writing; (3) the accused knew the writing to be forged; and (4) the writing itself was of such a nature as to prejudice the legal rights of another.

Appellant contends the prosecution failed to prove that the writing prejudiced the legal rights of another.

The State contends the person prejudiced by the actions was the pharmacist. The pharmacist testified he received fair market value for the drugs he sold to appellant and upon vouching the record, testified he was unaware of any civil, criminal, or administrative sanctions that could be applied to him as the result of having unknowingly filled a forged prescription. The Court found the State did not cite any law subjecting the pharmacist to sanctions for filling the prescription.

Syl. pt. 2 - "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." Syl. pt. 4, *in part*, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), *overruled, in part, on other grounds*, *Jones v. Warden, West Virginia Penitentiary*, 161 W.Va. 168, 241 S.E.2d 914 (1978).

Syl. pt. 3 - "Penal statutes must be strictly construed against the State in favor of the defendant." Syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

The Court found the State did not carry its burden of proof.

Vouching the record

State v. Giles, 368 S.E.2d 107 (1988) (Per Curiam)

See EVIDENCE Admissibility, Vouching the record, (p. 183) for discussion of topic.

TRANSCRIPT

Right to transcript

Failure to provide

State v. Chamberlain, 359 S.E.2d 858 (1987) (Per Curiam)

Appellant was convicted of delivery of marijuana. He contended on appeal that he was prejudiced by inability to obtain transcripts of pre- and post-trial hearings.

Syl. pt. 5 - "Under the provisions of *W.Va.Code*, 57-7-1 and -2 all proceedings in the criminal trial are required to be reported; however, the failure to report all of the proceedings may not in all instances constitute reversible error." Syl. pt. 5, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978).

Failure to report proceedings is not in an of itself reversible error unless the defendant is able to show prejudice thereby. *Bolling*, *supra*, at 638.

Here, no prejudice was shown.

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

Appellant was convicted of first-degree murder. Following a mistrial appellant was tried a second time and appeals from the order in the second trial. He alleged that the State was so extraordinarily derelict in producing a transcript of the trial that he was entitled to acquittal or a new trial.

The transcript was not produced until two years after the trial. The State protested that the record of this dereliction was inadequate and that the issue should have been raised by writ of habeas corpus.

Syl. pt. 1 - "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 g ranted 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." Syl. pt. 6, *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

Right to transcript (continued)

Failure to provide (continued)

State v. Pennington, (continued)

See also, *State ex rel. Johnson v. McKenzie*, 159 W.Va. 795, 226 S.E.2d 721 (1976); and *State v. Pettigrew*, 168 W.Va. 299, 284 S.E.2d 370 (1981).

Here, although appellant asserted his rights at the outset and even filed a writ of habeas corpus the Court held that extraordinary dereliction did not occur. The Court placed great weight on the appellant's short period of incarceration and the absence of malice or ill will on the part of the State.

TRIAL

Judges

Failure to hold hearing

In the Matter of Magistrate Saffle, 357 S.E.2d 782 (1987) (Per Curiam)

See JUDGES Discipline, Generally, (p. 362) for discussion of topic.

UTTERING A FORGED WRITING

Sufficiency of evidence

State v. Nichols, 354 S.E.2d 415 (1987) (Neely, J.)

See SUFFICIENCY OF EVIDENCE Uttering a forged writing, (p. 635) for discussion of topic,

VENUE

Change of venue

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

Appellant was convicted of first-degree murder, first-degree sexual assault and attempted first-degree murder. He contends the circuit court erred when it denied his motion for a change of venue based on the results of a survey conducted in the county by the appellant and based the alleged difficulty of the court and the parties to choose an unbiased jury during *voir dire*.

Syl. pt. 1 - Even though a majority of individuals surveyed in a county where a prosecution is pending, by way of a questionnaire, indicate that, based upon what they have heard or read, there is existing hostile sentiment in that county but that the defendant would receive a fair trial in that county, before a change of venue shall be granted the circuit court must be satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial. *See W.Va.R.Crim.P.* 21(a).

The Court did not find inordinate evidence of prejudice and hostility toward the appellant elicited during *voir dire*. The record indicated that only three jurors were dismissed for prejudging the guilt of the appellant. All prospective jurors who expressed an opinion as to the appellant's guilt were excused from the panel.

The Court found that the appellant did not met his burden of demonstrating a county-wide "present hostile sentiment" such that he would be deprived of a fair trial.

Abuse of discretion

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the court erred in refusing his motion for a change of venue because the hostility evidenced by residents of Marshall County was so great he could not obtain a fair and impartial jury. He bases this contention on the results of a survey administered by one of his experts.

Change of venue (continued)

Abuse of discretion (continued)

State v. Lassiter, (continued)

Syl. pt. 1 - "To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests upon the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Syl. pt. 2, *State v. Woolridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946).

Syl. pt. 2 - "'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 count where the offense occurred because of the e existence of a locally extensive present hostile sentiment against him." Syl. pt. 1, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

In *State v. McFarland*, 175 W.Va. 205, 332 S.E.2d 217 (1985), the Court held:

> Even though a majority of individuals surveyed in a county where a prosecution is pending, by way of a questionnaire, indicate that, based upon what they have heard or read, there is existing hostile sentiment in that county but that the defendant would receive a fair trial in that county, before a circuit court must be satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial. *W.Va.R.Crim.P.* 21(a).

The Court was unpersuaded that appellant was prejudiced. The Court found the questionnaire concerned public perception of inmates in general, not hostility toward the defendant. The survey was insufficient to show that appellant could not receive a fair trial. (See case for results of survey.)

Change of venue (continued)

Factors to be considered

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. After hearing conflicting evidence regarding appellant's claim of self-defense, the jury recommended no mercy. Appellant was sentenced to life without opportunity for parole.

Appellant protested the denial of his motion for change of venue based on newspaper articles published one day after the shooting and again three months before trial. Appellant argued prejudice resulted throughout the county in which he was tried.

Syl. pt. 3 - "Good cause shown" for change of venue, as the phrase is used in *W.Va. Constitution*, Article III, § 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 a locally extensive present hostile sentiment against him." *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

Neither widespread publicity alone nor actual prejudice is sufficient "unless it appears that the prejudice against him is so great that he cannot get a fair trial."

State v. Gangwer, 169 W.Va. 177, 286 S.E.2d 389 (1982). See also, *State v. Woolridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946) prejudice must exist at the time change is requested; granting is within trial court's discretion; *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983); and *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118, 135 (1983).

Here, The Court held that the trial court did not abuse its discretion in refusing a change of venue. Only four of twenty-three prospective jurors were excused, only three having admitted to knowing anything about the case. The Court also found significant that three months elapsed between the last newspaper article and the trial.

VICTIM PROTECTION ACT

Restitution as condition of probation

Ex post facto

State v. Short, 350 S.E.2d 1 (1986) (Brotherton, J.)

See *EX POST FACTO* Victim protection act, Restitution as condition of probation, (p. 246) for discussion of topic.

VIOLATION OF MUNICIPAL ORDINANCES

Mayor as judge

Violation of separation of powers

Hubby v. Carpenter, 350 S.E.2d 706 (1986) (Miller, C.J.)

This prohibition action challenges the validity of *W.Va.Code*, 8-10-1, which vests mayors with the authority to hear and determine violations of municipal ordinances, on the basis that it contravenes the separation of powers clause of the *W.Va. Constitution*.

Section 8 of the Charter of the City of Buckhannon entitled "Legislative Department: Duties" vests the legislative power of the city in the city counsel composed of the mayor, the city recorder, and five councilmen. Section 10 of the Charter provides that the mayor shall preside over city council meetings, and Section 18 provides that the judicial power of the city shall be vested in a police court of which the mayor shall be the judge.

Syl. pt. 3 - In the absence of special circumstances, the doctrine of the separation of powers is not applicable to municipalities.

The Court found no need to rigidly apply the separation of powers doctrine at the municipal level of government. The writ of prohibition was denied.

VOIR DIRE

Generally

State v. Bailey, 365 S.E.2d 46 (1987) (Brotherton, J.)

See JURY Challenges, Cause, (p. 369) for discussion of topic.

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See JURY Challenges, Knowledge of defendant, (p. 372) for discussion of topic.

State v. Crouch, 358 S.E.2d 782 (1987) (Brotherton, J.)

See JURY Qualifications, (p. 380) for discussion of topic.

Abuse of discretion

State v. Nixon, 359 S.E.2d 566 (1987) (McGraw, C.J.)

See JURY Qualifications, (p. 381) for discussion of topic.

Individual

State v. Bailey, 365 S.E.2d 46 (1987) (Brotherton, J.)

See JURY Challenges, Cause, (p. 369) for discussion of topic.

State v. Lassiter, 354 S.E.2d 595 (1987) (Neely, J.)

Appellant was convicted of the premeditated murder of a fellow inmate. He contends the trial judge conducted voir dire improperly in that (1) the judge should have permitted counsel to conduct extensive individual voir dire of the prospective jurors; (2) the judge should have conducted individual voir dire of prospective jurors *in camera*; (3) the judge's *voir dire* of prospective jurors indicated a relationship to a law enforcement officer was insufficiently extensive and (4) the judge abused his discretion in failing to question prospective jurors regarding their ability to recommend mercy in a murder case.

Individual (continued)

State v. Lassiter, (continued)

The Court found a trial court must conduct individual voir dire when a possibility of prejudice is shown, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), but individual voir dire is not required in every case.

Syl. pt. 3 - "In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944).

Here, the trial judge did not conduct individual voir dire of all prospective jurors indicating a potential bias against the appellant. His decision to conduct *voir dire* himself was not an abuse of discretion nor was it an abuse of discretion to deny the appellant's motion to conduct individual voir dire *in camera*, but the judge's decisions were no per se a violation of law or an abuse of discretion.

Appellant contends the trial judge's individual *voir dire* of prospective jurors who indicated a relationship to law enforcement officials was insufficiently extensive. The Court found that the judge need only ask individually each juror who either was or is related to a law enforcement official whether that relationship would bias him against the accused in any way. Whether to conduct a more extensive *voir dire* is within the judge's discretion. Four of the prospective jurors who sat on the panel disclosed a relationship to law enforcement officials. The Court found none of these was challenged for cause by the appellant and all joined in the recommendation of mercy. The Court found no abuse of discretion.

Appellant contends the court erred by refusing to ask the panel any questions concerning the jurors' ability to recommend mercy under the circumstances of this case. The Court found the jury recommended mercy and any error in this regard did not prejudice the appellant.

Individual (continued)

Insanity

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

Appellant contends the circuit court erred when it failed to ask prospective jurors during *voir dire* certain questions submitted by the appellant. The appellant sought to have the court ask Questions 21 and 22 on the issue of insanity and question 32 on the theories underlying incarceration. The appellant contends the circuit court's refusal to ask such questions infringed upon his ability to determine whether the jurors were free from prejudice and bias and to effectively exercise his peremptory challenges.

The Court found that the circuit court twice questioned the prospective jurors as a group concerning their knowledge of the verdict of the trial of John Hinckley, Jr. The circuit court asked all prospective jurors if such knowledge would interfere with their ability to render a fair and impartial verdict in the appellant;'s trial. There were no responses.

The Court found the circuit court afforded the appellant wide latitude in the *voir dire* of the prospective jurors on all issues, including the insanity defense. The appellant was not hindered by his determination of whether prospective jurors were free from interest, bias or prejudice nor was she hindered in the exercise of her peremptory challenges. The Court found no abuse of discretion.

Syl. pt. 5 - "A defendant charged with murder of the first-degree is entitled to question potential jurors on *voir dire* to determine whether any of the mare unalterably opposed to making a recommendation of mercy in any circumstances in which a verdict of guilt is returned." Syl. pt. 7, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

The Court deemed appellant's *voir dire* question on incarceration theories inadequate under *Williams*. Appellant's question simply inquired into the prospective jurors' views on the various theories underlying incarceration: punishment, rehabilitation and deterrence. Appellant did not inquire into the unwillingness of any of the prospective jurors to impose a particular penalty, that is, make a recommendation of mercy in the event of the verdict of guilt. The Court found no abuse of discretion.

Individual (continued)

Theories underlying incarceration

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

See *VOIR DIRE* Individual, Insanity, (p. 648) for discussion of topic.

Juror fails to disclose knowledge

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See WITNESSES Unavailability, (p. 671) for discussion of topic.

Scope

State v. Wood, 352 S.E.2d 103 (1986) (Per Curiam)

Appellant was convicted of possession with intent to deliver and manufacture a controlled substance.

Appellant contends the trial court erred in limiting defense counsel's *voir dire* of the jury. The record showed the trial court allowed each party to submit proposed questions to be asked of the potential jurors. The trial court rejected ten of the fifteen questions submitted by defense counsel on the ground they did not relate to the jurors' qualifications, but rather presented principled of law more properly the subject of instructions at the close of the evidence. Appellant contends she was deprived of her right to a meaningful opportunity to examine the qualifications of the venire.

Syl. pt. 2 - "In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944), *overruled on other grounds*, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

The Court found no error in the trial court's refusing to make the questions part of its *voir dire* examination. The Court noted the trial court conducted an extensive *voir dire* of the jury on its won and that defense counsel refused the opportunity to question the jurors individually about their qualifications.

WAIVER

Right to counsel

State v. Lucas, 364 S.E.2d 12 (1987) (Per Curiam)

See RIGHT TO COUNSEL Waiver, Effect of police interrogation, (p. 506) for discussion of topic.

WARRANTS

Generally

State v. Worley, 369 S.E.2d 706 (1988) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Testimony outside of affidavit, (p. 539) for discussion of topic.

Failure to issue

In the Matter of Magistrate Hall, No. 17275 (4/1/87) (Per Curiam)

See JUDGES Failure to hear, (p. 365) for discussion of topic.

WELFARE FRAUD

Sufficiency of the evidence

State v. Deaner, 334 S.E.2d 627 (1985) (Per Curiam)

Appellant was convicted of welfare fraud. The Court noted that the only evidence introduced by the prosecution indicating the appellant "obtained" public assistance in the form of food stamps, as charged, was a Department of Welfare [sic] computer printout showing that food stamps had been mailed to her husband, (the official applicant and recipient), at their home address. The Court noted that food stamps are not endorsed when tendered as payment for the purchase of food items. It is therefore difficult to prove beyond a reasonable doubt that the appellant actually "obtained" the food stamps.

WITNESSES

Competency

Generally

State v. Ayers, 369 S.E.2d 22 (1988) (Per Curiam)

See SEXUAL ASSAULT Evidence, Competency of alleged victim, (p.596 596) for discussion of topic.

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

Appellant was convicted of first-degree murder without a recommendation of mercy. An *in camera* hearing was held following the direct examination of Mr. Nicholes, who testified defendant had admitted to him he had killed the victim. The trial judge stated at this hearing he believed Nicholes lied and he knew Nicholes to be a scoundrel. Defendant moved for a mistrial on the basis the trial court was essentially stating Nicholes was incompetent to testify. The Court refused the motion.

Syl. pt. 6 - Competency differs from credibility. The former is q question that arises before considering the evidence given by the witness; the latter concerns the degree of credit to be given to his testimony. The former denotes the personal qualifications of the witness; the latter his veracity.

The issue was not whether Nicholes was incompetent to testify, but whether the witness was believable.

The Court did not believe that Nicholes' testimony was so inherently incredible as to be excluded as a matter of law. The Court found the trial court was correct in denying a mistrial.

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. He contended that the only eyewitness to the shooting was incompetent to testify. The trial court, *sua sponte*, conducted an *in camera* hearing regarding the witness' competency and allowed her to testify.

Competency (continued)

Generally (continued)

State v. McKinney, (continued)

Syl. pt. 5 - "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." Syl. pt. 8, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

See also, Syl. pt. 7 *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986) and Syl. pt. 3, *State v. Butcher*, 165 W.Va. 522, 270 S.E.2d 156 (1980).

The Court found no abuse here.

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

Appellant was convicted of first-degree murder. At trial one of the prosecution's witnesses gave contradictory testimony on direct, cross-examination and subsequent redirect. Appellant argued on appeal that the witness was incompetent to testify.

The Court noted that no objection was made at trial, only a motion following conclusion.

Syl. pt. 4 - Our general rule is that nonjurisdictional trial error not raised in the trial court will not be addressed on appeal." Syl. pt. 9, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

The Court then noted that competency denotes the witness' personal qualifications while credibility concerns veracity. See *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613, at 619 (1986). See also, F. Cleckley, Handbook on Evidence for West Virginia Lawyers at 25.

Excluding a witness' testimony requires an extremely high standard.

The testimony here was allowed to stand.

Competency (continued)

Children

State v. Jones, 362 S.E.2d 330 (1987) (Neely, J.)

Appellant was convicted of first-degree sexual abuse. One of the witnesses at trial was the victim, appellant's six year old daughter. The daughter was questioned both in the absence of and before the jury and indicated that she knew the difference between right and wrong, that it was wrong to tell a lie and that telling the truth meant telling "what has happened."

Syl. pt. 1 - "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 appellate court will not reverse the ruling which permits the evidence to be introduced unless it is apparent that it was flagrantly wrong." Syllabus Point 9, *State v. Watson*, 173 W.Va. 553, 318 S.E.2d 603 (1984).

Here, The Court found no error in allowing the daughter to testify. In addition, The Court noted that it seemed permissible to allow the daughter's testimony while seated on her mother's lap.

Corroboration

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See INSTRUCTIONS Advantage to witness, (p. 336) for discussion of topic.

Credibility

State v. Humphrey, 351 S.E.2d 613 (1986) (Miller, C.J.)

See WITNESSES Competency, Generally, (p. 653) for discussion of topic.

Credibility (continued)

Psychiatric disability

State v. Allman, 352 S.E.2d 116 (1986) (Brotherton, J.)

Appellant was convicted of six counts of first-degree sexual assault of his granddaughter. After his arrest, appellant requested the granddaughter submit to a mental examination and that he be allowed to review her psychological records. The records were delivered to the trial court, who reviewed them *ex parte*. The trial court ruled the records were not discoverable and that the granddaughter would not have to submit to a psychological examination. The records were made a part of the record on appeal and reviewed by the Court. The Court found admissions by the granddaughter which would partially exculpate the appellant.

The Court has "recognized that there may be occasions where evidence of psychiatric disability may be introduced when it affects the credibility of the material witness' testimony in a criminal case. Courts have generally required that before such psychiatric disorder can be shown to impeach a witness' testimony, there must be a showing that the disorder affects the credibility of the witness and that the expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder." *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146, 154 (1980).

Here, the defendant had no opportunity to make a showing that the witness' disorder affected her credibility or that the psychiatrist had a sufficient opportunity to make a diagnosis, because he was not provided with a copy of the records. The Court ordered that upon remand a copy of the granddaughter's psychiatric records be provided to defense counsel and an *in camera* hearing held as to relevancy. Defense counsel may designate what parts of the record he believes to be relevant. The trial court is to accept arguments as to relevancy and a record made of all proceedings. The Court directed all material found to be irrelevant was to be sealed, but kept with the record.

WITNESSES

Cross-examination

Reputation evidence

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See HARMLESS ERROR Non-constitutional, Reputation evidence, (p. 270) for discussion of topic.

Decision to be interviewed by opposing counsel

Kennedy v. State, 342 S.E.2d 251 (1986) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Complainant interference with defense, (p. 91) for discussion of topic.

Denial of compulsory process

State v. Reedy, 352 S.E.2d 158 (1986) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Denial of compulsory process, (p. 96) for discussion of topic.

Disclosure of criminal record

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. He contended for the first time on appeal that the prosecution's failure to provide him with the criminal records of the prosecution witnesses prejudiced his trial.

The Court noted that withholding exculpatory evidence sufficient to raise a reasonable doubt as to the defendant's guilt violated due process. The Court will hear prejudicial errors involving constitutional rights despite the failure to raise them below. See Syl. pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Disclosure of criminal record (continued)

State v. McKinney, (continued)

Here, however, appellant did not even contend that the criminal records complained of would have allowed impeachment of witnesses sufficient to raise a reasonable doubt. Since no fundamental constitutional error was involved and the appellant failed to raise the issue below, the Court refused to consider the issue.

Expert

State v. Smith, 358 S.E.2d 188 (1987) (Miller, J.)

See INSTRUCTIONS Expert witnesses, (p. 341) for discussion of topic.

Opinion

State v. Duell, 332 S.E.2d 246 (1985) (McGraw, J.)

Appellant was convicted of first-degree murder. She contends the trial court erred in restricting the testimony of her psychiatrist, Dr. Neilan. The psychiatrist was permitted only to "testify from facts within her own knowledge" and was prohibited from testifying concerning her review of the transcript of the appellant's interview with the State's psychiatrist, Dr. Knapp, and her consultations with a psychologist.

Syl. pt. 3 - "In presenting testimony in a criminal trial, an expert medical witness should be permitted to state the facts or data upon which he basis his opinion, and this includes the information available to him in the form of records or documents whose reliability has been reasonably established and which have been kept in the regular course of professional care or treatment of the defendant and are of a type reasonably relied upon by experts in the witness' particular field of expertise." Syl. pt. 1, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), *overruled on other grounds*, *Jones v. Warden, West Virginia Penitentiary*, 161 W.Va. 168, 173, 241 S.E.2d 914 (1978).

Expert (continued)

Opinion (continued)

State v. Duell, (continued)

Here, the trial court's prohibition against Dr. Neilan's testimony concerning her analysis of the tape recordings of Dr. Knapp's interview with the appellant was troubling. The Court found the trial court's ruling precluded Dr. Neilan from presenting an alternative analysis of the psychiatric and psychological implications of the substance of Dr. Knapp's interview. Thus, the appellant was denied the opportunity to submit a second opinion to the jury. The Court found this could mislead the jury into believing that the state psychiatrist possessed superior knowledge from which his opinion was formulated. Amnesia was an important component of Dr. Neilan's diagnosis. Appellant's inconsistent ability to recall the events surrounding her husband's death was apparent throughout her conversations with the police, with the psychologist and with Dr. Knapp during their interview. The trial court prevented Dr. Neilan from mentioning any of these indices of the appellant's mental status, which she sought to connect to her diagnosis of psychogenic fugue. The Court found the restriction of her testimony constituted reversible error.

State v. McFarland, 332 S.E.2d 217 (1985) (McHugh, J.)

See INSANITY Expert testimony, Scope, (p. 330) for discussion of topic.

Sequestration

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

At appellant's trial for welfare fraud (*W.Va.Code*, 9-5-4) defense counsel moved to sequester all witnesses, both State and defense. The motion was granted but another motion by the prosecution was also granted which gave an exemption from sequestration to the Department of Welfare (sic) investigator so as to provide assistance at trial.

Although an exempt witness is usually required to testify first so as to avoid prejudice (See Syl. pt. 2, *State v. Harriston*, 162 W.Va. 908, 253 S.E.2d 685 (1979)), this rule is flexible. See *Harriston*, *supra*, at 688. Here, the testimony was not susceptible of being colored by prior testimony and was presented in its logical sequence. No error occurred.

Expert (continued)

Waiver of privilege

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See PRIVILEGES Attorney-client, (p. 443) for discussion of topic.

Immunity

Standing to assert

State v. Pennington, 365 S.E.2d 803 (1987) (McHugh, J.)

See PROSECUTING ATTORNEYS Disqualification, (p. 468) for discussion of topic.

Impeachment

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See EVIDENCE Character, (p. 187) for discussion of topic.

Cautionary instruction

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

See WITNESSES Impeachment, Defendant, (p. 661) for discussion of topic.

Defendant

Acord v. Hedrick, 342 S.E.2d 120 (1986) (Neely, J.)

See INEFFECTIVE ASSISTANCE Prosecutorial overmatch, (p. 319) for discussion of topic.

Impeachment (continued)

Defendant (continued)

State v. Clark, 331 S.E.2d 496 (1985) (Miller, J.)

Appellant was convicted of voluntary manslaughter. He contends the trial court erred by permitting the State to utilize a prior inconsistent statement to impeach his credibility and by not *sua sponte* giving a limiting instruction telling the jury not to consider his prior inconsistent statement as substantive evidence of guilt.

The Court found no error. The trial court, following a suppression hearing, correctly ruled that the appellant's unsigned statement went only to its weight, not to its admissibility.

Appellant's reliance on *State v. Spadafore*, 159 W.Va. 236, 220 S.E.2d 655 (1975) is misplaced. *Spadafore* adhered to the orthodox rule that the prior inconsistent extrajudicial statements of a witness who is not a party can only be used to impeach and cannot be considered as substantive evidence of the facts to which such statements for impeachment purposes, a cautionary instruction is given to the jury. Here, the use of a prior extrajudicial statement of a criminal defendant who is a party to the proceeding was at issue and thus, *Spadafore*, is inapposite.

Syl. pt. 4 - A criminal defendant's confessions or admissions have historically been admitted in evidence to prove the truth of the matters asserted therein as an exception to the hearsay rule, subject to an initial inquiry that the defendant's constitutional rights were not violated and the statements were freely and voluntarily made.

The Court found the appellant's statement was admissible as substantive evidence of guilt, that is, for the truth of the matters asserted therein. The Court found no need for a cautionary instruction advising the jury that the statement was only admitted for the purposes of impeachment. The fact that the State did not introduce the statement in its case-in-chief did not foreclose the use of the statement on cross-examination.

State v. Oxier, 338 S.E.2d 360 (1985) (Miller, C.J.)

See DENIAL OF A FAIR TRIAL Prosecutor's comment's/conduct, (p. 108) for discussion of topic.

Impeachment (continued)

Extrinsic evidence where witness recants

State v. Holmes, 351 S.E.2d 422 (1986) (Per Curiam)

Defendant was convicted of sexual assault in the first-degree. He contends the circuit court erred in improperly intervening in the trial process after a defense witness recanted before the jury.

Shelby Adkins initially corroborated the defendant's testimony by testifying he had observed the defendant and the victim engaging in sexual intercourse two days before the alleged sexual assault occurred. Upon cross-examination, Mr. Adkins admitted he had not actually seen anything. The trial judge told Mr. Adkins he could step down, but not to leave since the judge wanted to talk with him when the case was over. After the defense rested, the State called William Ward as a rebuttal witness. Ward was asked about a conversation with Adkins. The defense objected. The trial judge instructed the court reporter to read the principal testimony of Adkins and then directed the proceedings be conducted in chambers.

In chambers, the judge asked Adkins what the truth was regarding what he had seen. Adkins told the judge he had not seen what he testified to, but had lied because the defendant's family had hounded him to testify for the defense. The judge advised the prosecutor to call Adkins as a witness so he could tell the truth. The prosecutor recalled Adkins who then clearly recanted his testimony, stating he had been hounded. The defense's motion for a mistrial at this point was denied.

The defendant contends Ward's testimony was extrinsic evidence of a prior inconsistent statement by Adkins that tended to impeach Adkins, and that such extrinsic evidence was inadmissible after Adkins recanted. He also contends the trial court prejudiced his case by saying to Adkins in the jury's presence that he wanted to talk to him, and that the trial court erred by suggesting to the prosecutor that he recall Adkins.

The Court found it has been recognized that proof of former inconsistent statements is admissible where a witness neither admits or denies making them or where his response is ambiguous. The Court found the authorities cited suggest that from an evidentiary point of view, given the unclear recantation, the trial court did not err in receiving the testimony of Ward.

Impeachment (continued)

Extrinsic evidence where witness recants (continued)

State v. Holmes, (continued)

Where extrinsic evidence is introduced, Rule 613(b) of the Rules of Evidence requires that the impeached witness be afforded an opportunity to explain the inconsistency.

It was therefore the trial court's duty to see that Adkins again took the stand after Ward testified. The trial court's responsibility for controlling the trial process dictated Adkins be given an opportunity to clarify his testimony. The Court 's suggestion that the State recall Adkins did not constitute reversible error.

The trial court's remark that he wished to speak to Adkins did not constitute an intimation of opinion as to the credibility of the witness.

One' own witness

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. At trial the prosecution was allowed to impeach its own witness. Appellant assigned error.

While at the time of trial, the rule in West Virginia was that "one may not impeach his own witness absent entrapment, hostility or surprise." (See *State v. Wayne*, 162 W.Va. 41, 245 S.E.2d 838, at 841 (1978), this case was on appeal when the new rule in *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983) was announced. Any party may now attack a witness' credibility.

Although The Court held that retroactive application of *Kopa* was proper (see *State v. Gangwer*, 168 W.Va. 190, 283 S.E.2d 839 (1981)), the application was unnecessary here because the prosecution was, in fact, surprised by its own witness and impeachment was allowable under either rule.

Impeachment (continued)

Prior convictions

State v. Davis, 345 S.E.2d 549 (1986) (McGraw, J.)

Appellant contends the trial court erred in refusing to permit impeachment, by prior felony convictions, of the appellant's alleged accomplice, who testified against him pursuant to a plea arrangement.

The appellant conceded that trial counsel's cross-examination of the alleged accomplice with respect to his prior convictions could best be described as "groping" and that inadequate discovery on the part of trial counsel was the reason for this fumbling.

In exasperation, the trial court directed defense counsel not to pursue the issue unless he had come concrete evidence of a felony conviction. Having no concrete evidence of felony convictions, appellant's trial counsel immediately abandoned this line of questioning. The Court found under these circumstances, the trial court did not abuse its discretion.

Prior conviction reversed on appeal

State v. Gale, 352 S.E.2d 87 (1986) (Per Curiam)

Appellant was convicted of aiding and abetting robbery.

He contends the trial court erred in denying him an opportunity to impeach the State's rebuttal witness on a prior felony conviction of welfare fraud.

At the time of defendant's trial, the rebuttal witness' conviction had been set aside and reversed. The Court ruled this fact precluded the use of the conviction for impeachment purposes. The Court found the trial court did not err in refusing to permit its use.

Impeachment (continued)

Prior inconsistent statements

State v. Berry, 342 S.E.2d 259 (1986) (Per Curiam)

Appellant was convicted of second degree murder. His defense at trial was that his wife was accidentally killed in the course of his struggle to prevent her from committing suicide. After, the shooting, the appellant reported the death as a suicide to friends, family members and police.

On cross-examination, the prosecution asked appellant the religious significance of the appellant's false report of suicide. The appellant professed not to understand the question and the prosecution abandoned the inquiry.

Appellant contends the inquiry was prejudicial because it suggested that the appellant had misrepresented the circumstances surrounding his wife's death. The Court found substantial evidence of appellant's false report introduced without objection. The appellant even admitted to having made the false statements. The Court found in such circumstances any error in the admission of the evidence was harmless.

The Court also found the evidence of the appellant's false declarations was clearly admissible as impeachment evidence of prior inconsistent statements since the appellant was the only witness who testified as to what occurred on the night of his wife's death.

The Court found the trial court properly instructed the jury that the evidence of appellant's false report of suicide was merely one factor to consider in reaching a verdict.

Intimidation of

State v. Bennett, 370 S.E.2d 120 (1988) (Miller, J.)

See PROSECUTING ATTORNEYS Intimidating witnesses, (p. 471) for discussion of topic.

WITNESSES

Judge interrogating

State v. Massey, 359 S.E.2d 865 (1987) (Miller, J.)

See JUDGES Conduct at trial, Witnesses, examination by court, (p. 358) for discussion of topic.

Prejudicing

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

At appellants first-degree murder trial it was discovered that the victim's brother had been tape-recording testimony. The trial court ordered the recorder seized. Some time after the trial, at a hearing held for the purpose, it was determined that two prosecution witnesses had listened to the tape. One witness subsequently testified on rebuttal only; the other gave testimony prior to hearing the tape and then gave rebuttal testimony after hearing parts of the tape. Appellant's motion for a new trial was denied.

The Court noted that the purpose of sequestration is to prevent a witness from altering his testimony after listening to other witness' testimony. (See *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987)). The same problem is presented when a witness listens to a tape recording.

Syl. pt. 1 - A witness sequestration order includes a prohibition against prospective witnesses listening to mechanical recordings of the testimony of other witnesses who have given prior testimony.

Failure to sequester or failure of witnesses to follow an order to sequester does not necessarily result in reversible error.

Syl. pt. 2 - "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. Syl. pt. 4, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Syl. pt. 3 - "Where a sequestered witness does not withdraw when ordered, or afterwards returns into the courtroom and is present during the examination of other witnesses, it is discretionary with the judge whether or not he will allow this witness to be examined." Syl. pt. 7, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Prejudicing (continued)

State v. Steele, (continued)

Syl. pt. 4 - Where a State witness violates a sequestration order is permitted to testify, the question on appeal is whether the witness's violation of the order and the ensuing testimony had a prejudicial effect on the defendant's case.

The Court noted that no prejudice results where the testimony given is unrelated or collateral to any testimony heard. Here, no effect was found on the witness' testimony and no error occurred.

Reopening case to allow State to present impeachment evidence

State v. Phillips, 342 S.E.2d 210 (1986) (McHugh, J.)

Appellant alleges it was error for the trial court to allow the State to reopen its case after the parties had rested, in order for the State to present impeachment evidence concerning the appellant's identification of a man. The Court found no error, in that the appellant had not shown he suffered prejudice before the jury and the circuit court permitted the appellant to take the stand in rebuttal.

Self-incrimination

State v. Cook, 332 S.E.2d 147 (1985) (McGraw, J.)

See DENIAL OF A FAIR TRIAL Refusal to allow testimony of nonparty witness, (p. 111) for discussion of topic.

Sequestration

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

At appellant's trial for welfare fraud (*W.Va.Code*, 9-5-4) defense counsel moved to sequester all witnesses, both State and defense. The motion was granted but another motion by the prosecution was also granted which gave an exemption from sequestration to a Department of Welfare investigator so as to provide assistance at trial.

Sequestration (continued)

State v. Banjoman, (continued)

Syl. pt. 1 - "The question as to which witnesses may be exempt from a sequestration of witnesses ordered by the court lies withing 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." Syl. pt. 4, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Syl. pt. 2 - "'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 (1915)]." Syl. pt. 5, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

(See also, Rule 615, W.Va. Rules of Evidence).

Although, exempt investigative witness rules have traditionally applied only to police officers, the Court held that designated government agents may also be exempt from sequestration to aid in prosecution. See *United States v. Perry*, 643 F.2d 537 (5th Cir. 1981) (drug enforcement agent); *United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983) (narcotics agent); *United States v. Alvarado*, 647 F.2d 537 (5th Cir. 1981) (drug enforcement agent); *United States v. Shearer*, 606 F.2d 819 (8th Cir. 1979) (FBI agent); *United States v. Jones*, 687 F.2d 1265 (8th Cir. 1982) (city police officer appointed as case agent).

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

See WITNESSES Expert, Sequestration, (p. 659) for discussion of topic.

Sequestration (continued)

State v. Barker, 364 S.E.2d 264 (1987) (Per Curiam)

Appellant was convicted of sexual assault of a minor. During the trial a psychologist who had treated the victim and was also one of the prosecution's witnesses was allowed to stay in the courtroom to provide emotional support for the victim. Appellant objected but relented when faced with the choice of having the victim's mother sequestered or having the psychologist sequestered.

Syl. pt. 1 - "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 in exercise of such discretion will not be disturbed on appeal." Syl. pt. 4, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

The Court noted that in child sexual abuse cases the support of an individual "familiar and protective" of the child is essential to the presentation of the case and therefore within subsection 3 of Rule 615 of the West Virginia Rules of Evidence. Here, even though the psychologist did not testify first (see *State v. Harriston*, 162 W.Va. 908, 253 S.E.2d 685 (1979); see also, *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987)

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

See WITNESSES Prejudicing, (p. 666) for discussion of topic.

Surprise

State v. Hobbs, 358 S.E.2d 212 (1987) (Per Curiam)

See DISCOVERY Failure to disclose, Generally, (p. 119) for discussion of topic.

WITNESSES

Surprise witness

State v. McKinney, 358 S.E.2d 596 (1987) (McGraw, C.J.)

Appellant was convicted of first-degree murder. After hearing conflicting evidence regarding appellant's claim of self-defense, the jury recommended no mercy. Appellant was sentenced to life without opportunity for parole.

At trial, appellant claimed that he was surprised by a prosecution witness not listed on the police report furnished to defense counsel. The prosecuting attorney claimed that defense counsel was informed orally one day before trial that the witness would be called. Defense counsel acknowledged discussing the witness but denied being told that she would be called.

Defense counsel was allowed a recess for the purpose of interviewing the witness. He did not move for a continuance to gain more time, nor did he renew his objection to her testimony.

The Court found "the trial court alleviated any possibility of harm to the appellant's preparation of his defense by allowing defense counsel additional time to interview the new (witness)." (*Quoting State v. Trail*, 174 W.Va. 656, 328 S.E.2d 671 (1985). See also *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

Tampering

State v. Steele, 359 S.E.2d 558 (1987) (Miller, J.)

See WITNESSES Prejudicing, (p. 666) for discussion of topic.

Testimony

Form of

State v. Armstrong, 369 S.E.2d 870 (1988) (McHugh, C.J.)

See ABUSE OF DISCRETION Testimony, Form of, (p. 10) for discussion of topic.

WITNESSES

Testimony from tainted evidence

Marano v. Holland, 366 S.E.2d 117 (1988) (Miller, J.)

See SEARCH AND SEIZURE Exclusionary rule, Testimony obtained from tainted evidence, (p. 526) for discussion of topic.

Unavailability

State v. Banjoman, 359 S.E.2d 331 (1987) (Miller, J.)

Appellant contends error in the unavailability of a juror to call as a witness. During *voir dire* the juror failed to acknowledge certain knowledge of the criminal activity and of the defendant. Defense counsel, however, made no attempt to inquire into these matters despite clear indications that the juror might have such knowledge.

The Court , noting the absence of both a voucher of the lost testimony and a mere avowal of the lost information, held that no error occurred.

State v. McCallister, 357 S.E.2d 759 (1987) (Brotherton, J.)

Appellant was convicted of aiding and abetting an aggravated robbery. On advice of counsel, the principal defendant in the robbery refused to testify. Counsel for the principal told the trial court that his client's testimony, if given, would be clearly exculpatory for the appellant. Appellant's defense counsel moved for continuance, which motion was denied.

Syl. pt. 3 - "In a criminal case, the granting or denial of a motion for continuance rests in the sound discretion of the trial court and the refusal to grant such a continuance constitutes error only where the discretion is abused." Syl. pt. 4, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

Syl. pt. 4 - A party moving for a continuance due to the unavailability of a witness must show: (1) the materiality and importance of the witness to the issues to be tried; (2) due diligence in an attempt to procure the attendance of the witness; (3) that a good possibility exists that the testimony will be secured at some later date; and (4) that the postponement would not be likely to cause an unreasonable delay or disruption in the orderly process of justice.

Unavailability (continued)

State v. McCallister, (continued)

Here, although the importance of the witness was clearly established and the appellant made every effort to secure his attendance, the Court found no error. The Court noted that the case was to be retried, error being found on a different point, and expressed the hope that the witness would be available at that time.

WORTHLESS CHECKS

Obtaining money thereby

State v. Orth, 359 S.E.2d 136 (1987) (McGraw, J.)

Appellant was convicted of obtaining money by means of a worthless check, in violation of *W.Va.Code*, 61-3-39 (1984 Replacement Volume). The evidence showed that appellant was a regular patron at Wheeling Downs race track and frequently wrote checks in order to gamble. Between April and June, 1982 the appellant wrote eleven checks, totaling $7350. Six of those checks, totaling $4800, were returned for insufficient funds.

Since appellant made good the deficit amounts, the race track manager allowed her to continue cashing checks without limits on the face amount and without verifying the adequacy of appellant's funds on deposit. Between July and August, 1982 appellant cashed checks totaling $5600, all ow which were returned for insufficient funds and none of which appellant made good. The racetrack obtained warrants for her arrest.

Appellant initially agreed to repay the racetrack in monthly installments in return for the State's promise not to prosecute. Appellant failed to make payments and was tried on seven counts of obtaining money by worthless check. The jury acquitted her on five of those counts, finding that the racetrack had notice of the insufficient funds. Appeal was taken from the guilty finding on the other two counts.

The Court noted that the statute, *W.Va.Code*, 61-3-39, specifically does not apply when the person receiving the check "knows or . . . has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment." Concluding that fraud is the basis of the offense, the Court held:

Syl. pt. 1 - When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and, thus, no offense is committed under West Virginia Code, § 61-3-39 (1984 Replacement Vol.). See *State v. McGinnis*, 181 S.E.2d 820 (1935).

Obtaining money thereby (continued)

State v. Orth, (continued)

Reviewing the record, the Court found that the racetrack general manager testified that the track would not normally have continued to cash checks when several worthless checks were returned. Although rejecting an insanity defense the Court noted the appellant's apparent inability to control her behavior (see *State v. Grimm*,156 W.Va. 615, 195 S.E.2d 637 (1973); In *State v. Nuckolls*, 166 W.Va. 259, 273 S.E.2d 87 (1980); and *State v. Samples*, 174 W.Va. 584, 328 S.E.2d 191, n.4 (1985) and observed that the racetrack employees should have recognized her "pattern of aberrant behavior."

Syl. pt. 2 - A payee or holder accepting a check cannot be defrauded by representations he knows to be untrue or could have known to be untrue by exercising ordinary prudence, using means readily at hand.

YOUTHFUL OFFENDERS

Conviction of aggravated robbery

State v. Turley, 350 S.E.2d 696 (1986) (McHugh, J.)

The defendant pled guilty to one count of aggravated robbery. The trial court made an express finding that a pistol had been used in the commission of the crime. Defendant was sentenced to ten years in the state penitentiary. Defendant appeals the trial court's determination that it had no authority to suspend his sentence an commit him to a youthful offender center because hd had pled guilty to aggravated robbery, a criminal offense punishable by life imprisonment.

Syl. pt. 4 - A person who has attained his or her sixteenth birthday but has not reached his or her twenty-first birthday at the time of the commission of the crime and who is convicted of or pleads guilty to aggravated robbery is eligible for suspension of sentence and commitment to a youthful offender center under *W.Va.Code*, 25-4-6 [1975].

The Court reversed and remanded for the trial court to exercise discretion as to whether the appellant should be sentenced as a youthful offender.

Sentencing

State v. Mansfield, 332 S.E.2d 862 (1985) (Per Curiam)

Appellant was convicted of delivery of a controlled substance. He contends the trial court erred in denying his motion to be sentenced under the Youthful Offender Act.

The Court found the court considered the investigative report prepared by the probation officer, recommending that appellant not be given probation and indicating that the appellant had a history of drug dealing. Under these circumstances, the Court found nothing improper in the denial of treatment as a youthful offender.

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