

VOLUME VII OF THE WEST VIRGINIA CRIMINAL LAW DIGEST

December 1995 through July 1998



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INTRODUCTION

Volume VII of the CRIMINAL LAW DIGEST contains cases issued by the WV Supreme Court of Appeals from December 1995 through July 1998. *You may discard the Third Cumulative Supplement.* Indexed in Volume VII are cases affecting areas in which Public Defender Services is authorized to provide services. i.e., criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene matters. DUI administrative appeals are applicable to criminal matters. This Digest is divided into different topics and is cross-indexed throughout according to the issues discussed by the Court.

We attempt to index all relevant cases handed down by the West Virginia Supreme Court within the heretofore mentioned time period. We suggest, however, that if you are relying on a case as authority, you should inquire of the Clerk of the Supreme Court of Appeals whether a petition for rehearing has been filed. These slip opinions are also subject to formal revision before publication.

In briefing the cases, we have attempted to be faithful to the language of the Court. 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 which will assist you. If you detect an error in this publication, please contact Iris Brisendine at (304) 558-3905, or ibrisendine@pds.state.wv.us

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ABUSE AND NEGLECT

Abandonment

Adding to abuse charges

In re Katie S. and David S., 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

Non-custodial parent

In re Christine Tiara W., 479 S.E.2d 927 (1996) (Per Curiam)

Department of Health and Human Resources sought termination of Donald W.'s parental rights to his child, Christine Tiara W. pursuant to allegations of abandonment brought pursuant to *W.Va. Code 49-6-1, et seq.* Donald W. did not have custody. The circuit court concluded that *State ex rel. McCartney v. Nuzum*, 161 W.Va. 740, 248 S.E.2d 318 (1978) forbade the action.

Syl. pt. - "When the Department of Health and Human Services finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under *W.Va. Code 49-6-1(a)* (1992). Every effort should be made to comply with the notice requirements for both parents. To the extent that *State ex rel. McCartney v. Nuzum*, 161 W.Va. 740, 248 S.E.2d 318 (1978), holds that a non-custodial parent can be found not to have abused and neglected his or her child it is expressly overruled." Syllabus point 1, *In re Katie S. and David S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

The Court noted that since the circuit court's ruling and the filing of this appeal *In re Katie S.*, *supra*, overruled *McCartney*, *supra*. The record showed that Donald W. was incarcerated when the child was born. He surrendered temporary custody to DHHR, which placed physical custody with Donald W.'s sister, Kelly K., where she has remained.

The petition showed that Donald W. refused to provide clothing, food, medical help, supervision or education. Donald W. had been incarcerated several times during the child's life and on one occasion was too drunk to take her to an emergency room to treat an injury which later required nine stitches. Reversed and remanded.

ABUSE AND NEGLECT

Abused child defined

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

Case plan required

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See EVIDENCE Admissibility, Abuse to children not subject of abuse petition, (p. 175) for discussion of topic.

Child's case plan

Requirements of

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

An abuse and neglect petition was filed upon the birth of Mark M., alleging he was born with cocaine in his blood. Following an adjudication hearing and a dispositional hearing, the court terminated the mother's parental rights and ordered the child returned to his father.

The child's guardian *ad litem* alleged that the circuit court erred in not formulating a permanent plan and that DHHR abruptly changed its position just prior to the disposition without notice to the guardian. The guardian appealed, seeking continuation of the matter until an investigation of the father is made, asking for court assistance in getting information from the father, and asking the court to order DHHR to investigate.

ABUSE AND NEGLECT

Child's case plan (continued)

Requirements of (continued)

In re Mark M., (continued)

Syl. pt. 1 - “ “Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).’ *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996).” Syl. Pt. 1, *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997).

Syl. pt. 2 - “The purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in *W.Va. Code*, 49-6-5(a) [1992] and 49-6D-3(a) [1984], as well as the additional requirements articulated in *W.Va. Code*, 49-6-5(a).” Syl. Pt. 4, *In the Interest of S.C.*, 191 W.Va. 184, 444 S.E.2d 62 (1994).

Syl. pt. 3 - “A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.” Syl. Pt. 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Syl. pt. 4 - “Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied.” Syl. Pt. 4, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

ABUSE AND NEGLECT

Child's case plan (continued)

Requirements of (continued)

In re Mark M., (continued)

Syl. pt. 5 - "There is a clear legislative directive that guardians *ad litem* and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians *ad litem* in representing their clients in accord with the traditions of the adversarial fact-finding process." Syl. Pt. 3, *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996).

The Court required the circuit court to formulate a case plan, which shall include a permanency plan. Further, the Court found the circuit court abused its discretion in denying a continuance so that the guardian might be heard. Reversed and remanded.

Children's testimony

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997)
(Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

Civil actions

DHHR as client

State ex rel. Diva P. v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997)
(Davis, J.)

See ABUSE AND NEGLECT DHHR as client in civil abuse and neglect, (p. 9) for discussion of topic.

ABUSE AND NEGLECT

Civil actions distinguished from criminal

State ex rel. Diva P. v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997)
(Davis, J.)

See ABUSE AND NEGLECT DHHR as client in civil abuse and neglect, (p. 9) for discussion of topic.

Plea bargain

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

Taylor B. was the child of James B. and Regina B. Regina testified that she left the child in James B.'s care and returned five minutes later to find him lying limp on the floor. James B. claimed the child had fallen from a couch twelve inches to the carpeted floor.

The child was diagnosed with a subdural hematoma, "interhemispheric blood" and retinal hemorrhages. The treating physician testified that the child was in "grave danger" and was suffering from shaken baby syndrome. A second physician agreed and testified that an older injury was also consistent with shaken baby syndrome.

Following the filing of a petition alleging abuse and neglect the parents refused to acknowledge that abuse had occurred and refused to sign the family case plan. The mother did acknowledge that the child was injured but refused to believe her husband was responsible. A criminal proceeding against James B. resulted in a plea of nolo contendere to presenting false information to medical personnel. *W.Va. Code*, 61-8D-7. Despite a plea agreement to dismiss the abuse charges the circuit court kept the charges alive and appointed a special prosecutor to pursue the charges.

The circuit court ultimately allowed return of full custody to the parents.

ABUSE AND NEGLECT

Civil actions distinguished from criminal (continued)

Plea bargain (continued)

In the Matter of Taylor B., (continued)

Syl. pt. 1 - “In civil abuse and neglect cases, the legislature has made DHHR the State’s representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through *W.Va. Code*, 49-6-10 that prosecutors must cooperate with DHHR’s efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.” Syl. pt. 4, *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997).

Syl. pt. 2 - A civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to Code, 49-6-1 *et seq.*, is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.

Syl. pt. 3 - “Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.” Syl. pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syl. pt. 4 - “Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Syl. pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

ABUSE AND NEGLECT

Civil actions distinguished from criminal (continued)

Plea bargain (continued)

In the Matter of Taylor B., (continued)

Syl. pt. 5 - "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 6 - "Termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such non-participating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. pt. 2, *In the Matter of Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syl. pt. 7 - "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

The Court found the circuit court acted correctly in refusing to dismiss the petition and appointing a special prosecutor; a civil child abuse and neglect petition is not subject to dismissal pursuant to a plea bargain in a criminal case.

ABUSE AND NEGLECT

Civil actions distinguished from criminal (continued)

Plea bargain (continued)

***In the Matter of Taylor B.*, (continued)**

The Court found “clear and convincing” evidence that Taylor B. sustained serious injury. Further, in light of the failure to acknowledge the abuse, the Court found the child to be in danger of further abuse if allowed to stay in the home. Reversed and remanded for entry of an order terminating parental rights, directing DHHR to develop a permanent plan and allowing for parental visitation.

Continuances

***In re Mark M.*, 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)**

See ABUSE AND NEGLECT Child’s case plan, Requirements of, (p. 2) for discussion of topic.

Definitions

Abused child

***DHHR v. Scott C. and Amanda J.*, 200 W.Va. 304, 489 S.E.2d 281 (1997) (Per Curiam)**

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

DHHR as client in civil abuse and neglect

***In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)**

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

ABUSE AND NEGLECT

DHHR as client in civil abuse and neglect (continued)

State ex rel. Diva P. v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997)
(Davis, J.)

At age 16 Sherry P. gave birth to Diva P. While Sherry and her mother were away, Sherry P.'s autistic sister threw the baby against a wall. The child was taken to the hospital; several months later she was returned to the hospital and was diagnosed as having a fractured right arm, hairline skull fracture and a depressed skull fracture. Although DHHR filed an abuse and neglect petition it was dismissed following an improvement period.

Sherry P. gave birth to a second child, Destiny, a year later; that child was at high risk for sudden death and a heart monitor was recommended. Hospital personnel later determined that the monitor was defective but Sherry P. was not told. The child was later found dead.

DHHR then filed an amended abuse and neglect petition alleging Diva was abused and neglected. The trial court found neglect and ordered the child to the custody of DHHR. Ultimately, the court returned the custody to the mother for a three month improvement period. Sherry P. was then indicted for the murder of Destiny and DHHR brought this action.

DHHR claimed it agreed with the trial court and challenged the prosecution's right to initiate appellate procedures in its behalf.

Syl. pt. 1 - " 'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177." Syl. Pt. 1, *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996).

ABUSE AND NEGLECT

DHHR as client in civil abuse and neglect (continued)

State ex rel. Diva P. v. Kaufman, (continued)

Syl. pt. 2 - “In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Syl. pt. 3 - “The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. *W.Va. Const.*, art. 2, Sec. 2; art. 3, Sec. 2; art. 9, Sec. 1.” Syl. Pt. 2, *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 279 (1979).

Syl. pt. 4 - In civil abuse and neglect cases, the legislature has made DHHR the State’s representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through *W.Va. Code* § 49-6-10 (1996) that prosecutors must *cooperate* with DHHR’s efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

Syl. pt. 5 - When county prosecutors represent the DHHR, they may not invoke the Supreme Court of Appeals’ appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR.

ABUSE AND NEGLECT

DHHR as client in civil abuse and neglect (continued)

State ex rel. Diva P. v. Kaufman, (continued)

Citing *W.Va. Code* 49-6-10, relating to the prosecutor's duty, the Court noted that DHHR and the prosecution had disagreed throughout the case. Prosecutors must cooperate with DHHR; unlike the usual criminal power vested in the prosecution, in abuse and neglect cases DHHR stands clearly in the role of client. The Court noted the prosecution's actions here violated Rules of Professional Conduct 1.2(a), 1.6(a) and 1.7(b).

The Court also found that *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993) did not justify the prosecution's actions here. The prosecution cannot invoke its power to represent the state to circumvent DHHR. (The guardian *ad litem* is of course free to take whatever position may be required.) Writ denied.

Evidence of prior acts

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See EVIDENCE Admissibility, Abuse to children not subject of abuse petition, (p. 175) for discussion of topic.

Family case plan

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

Fifth Amendment rights

Effect of invoking

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

ABUSE AND NEGLECT

Findings required

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

This appeal is from a circuit court denial of a motion to reconsider dismissal of Amanda J., an infant, from an abuse and neglect proceeding concerning Scott C., an infant residing in the same household. Following an initial DHHR petition alleging sexual abuse of Scott C., Amanda J. was added to the petition. Physical custody was returned to the parents (Amanda J. was the parents' natural child, while Scott C. was a nephew living with them).

Subsequently, an amended petition was filed and a probable cause hearing held, which resulted in the dismissal of the case regarding Scott C., although not mentioned in the original motion, the allegations concerning Amanda J. were also dismissed. Because Scott C. was abandoned by his parents the circuit court subsequently terminated their parental rights and gave Amanda J.'s mother temporary custody pending DHHR's investigation of the home.

Upon obtaining new evidence, Amanda J.'s guardian *ad litem* moved for reconsideration of the dismissal order, which motion was opposed by the parents' attorneys. The court denied the motion.

Syl. pt. 1 - "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 2, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syl. pt. 2 - "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

ABUSE AND NEGLECT

Findings required (continued)

DHHR v. Scott C. and Amanda J., (continued)

Syl. pt. 3 - “Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va. Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.’ Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).” Syllabus Point 4, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 4 - “Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under *W.Va. Code*, 49-1-3(a) (1994).” Syllabus Point 2, *In re Christiana L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 5 - “*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove “conditions existing at the time of the filing of the petition ... by clear and convincing proof.” The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.’ Syllabus Point 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981). Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990). Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994).” Syllabus Point 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 6 - “Child abuse and neglect cases must be recognized as being among the highest priority for the court’s attention. Unjustified procedural delays wreak havoc on a child’s development, stability and security.” Syllabus Point 1, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

ABUSE AND NEGLECT

Findings required (continued)

DHHR v. Scott C. and Amanda J., (continued)

The Court found the circuit court should have allowed the guardian an opportunity to be heard with regard to Amanda J. and should set a final disposition hearing with regard to Scott C. The Court also noted that the guardian should not have been forced to pay for a transcript with her own funds. Reversed and remanded.

Foster parents

Role in proceedings

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

Guardians

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

Guardians *ad litem*

Right to be heard

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996)
(Workman, J.)

In this petition for writ of prohibition and mandamus petitioners ask that respondent judge be ordered to vacate his post-adjudicatory improvement period order and set a final disposition hearing pursuant to *W.Va. Code* 49-6-5.

ABUSE AND NEGLECT

Guardians *ad litem* (continued)

Right to be heard (continued)

State ex rel. Amy M. v. Kaufman, (continued)

The mother in this matter is a 23-year old with five children who was pregnant with her sixth at the time of this action. Documented incidents of medical, police and social service intervention in her home date back to April 15, 1991. The latest incident was the result of police taking emergency custody upon finding the children in a dangerous and unsanitary state.

Following numerous hearings, from February 10, 1994 through November 1, 1995, the court continually extended improvement periods despite significant and chronic lack of progress in addressing the problems here. Finally, on November 20, 1995 the court found neglect pursuant to *W.Va. Code* 49-6-2(c) but, incredibly, ordered yet another improvement period. Counsel for the state and for the children objected vehemently and brought this petition.

Syl. pt. 1 - "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Syl. pt. 2 - Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under West Virginia Code §§ 49-6-2(b) and 49-6-5-(c) (1995).

Syl. pt. 3 - There is a clear legislative directive that guardians *ad litem* and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians *ad litem* in representing their clients in accord with the traditions of the adversarial fact-finding process.

ABUSE AND NEGLECT

Guardians *ad litem* (continued)

Right to be heard (continued)

State ex rel. Amy M. v. Kaufman, (continued)

The Court noted that continual limbo denies the children here an adequate remedy. *In re Carlita B.*, 185 W.Va. 613, 623, 408 S.E.2d 365, 375 (1991). The circuit court violated the clear legislative direction to limit the extent and duration of improvement periods. Improvement periods are not to run more than twelve months. Prohibition is therefore available.

(NOTE: Effective June 8, 1996, improvement periods are to run three months, pre-adjudicatory, and six months, post-adjudicatory. See *W.Va. Code* 49-6-2(b), 49-65-(c) and 49-6-12.)

The guardian here acted appropriately in attempting to adduce additional evidence and asking the court to reconsider its ruling. Refusing to allow the guardian to submit a proposed disposition was reversible error in *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). The Court did not reach this issue but made it clear that the guardian could develop the issues on remand. Writ granted.

Hearing required

W.Va. DHHR ex rel. Wright v. Brenda C., 197 W.Va. 468, 475 S.E.2d 560 (1996) (Per Curiam)

The circuit court terminated Brenda C.'s parental rights. DHHR alleged that Brenda and her husband were both drug addicted. DHHR was granted temporary custody; at a subsequent adjudicatory hearing, wherein appellant was represented by counsel, no objection was made or any sworn testimony taken or other evidence taken. Only the prosecution's statements appeared on the record.

The circuit court did question appellant and her husband to see if they understood what was happening. A month later the court entered an order reciting that appellant and her husband had agreed that their children were abused or neglected at the time of the filing of a petition, that one child was born drug addicted and that both the mother and father admitted to substance abuse. The matter was continued and at the continued hearing a thirty-day improvement period was granted.

ABUSE AND NEGLECT

Hearing required (continued)

W.Va. DHHR ex rel. Wright v. Brenda C., (continued)

After several more hearings and substitution of counsel appellant was incarcerated in Ohio. DHHR retained custody throughout, with physical custody with the parents. Because of her incarceration appellant was unable to attend the adjudicatory hearing and her rights were terminated over counsel's objections and request for a continuance. Appellant claimed on appeal that her rights were terminated without a single hearing on the merits wherein evidence was presented.

Syl. pt. 1 - “ ‘ “*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove ‘conditions existing at the time of the filing of the petition . . . by clear and convincing proof.’ The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.” Syllabus Point 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).’ Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990).” Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994). Syl. Pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 2 - “ ‘ “In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under *W.Va. Code*, 49-6-5, it must hold a hearing under *W.Va. Code*, 49-6-2, and determine ‘whether such child is abuse or neglected.’ Such a finding is a prerequisite to further continuation of the case.” Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983).

The Court found the summary agreement, evidenced only by the prosecuting attorney's statements, to be inadequate. The Court noted appellant did not sign any stipulation or indicate on the record their understanding and agreement with it; similarly, they did not sign the trial court's order based on the alleged agreement.

A stipulation may be sufficient to comply with Code provisions but it should be reduced to writing and introduced into evidence. Reversed and remanded.

ABUSE AND NEGLECT

Improvement period

Case plan required

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

Duty to grant

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See EVIDENCE Admissibility, Abuse to children not subject of abuse petition, (p. 175) for discussion of topic.

Failure to grant

State ex rel. Virginia M. v. Gina Lynn S., 475 S.E.2d 548 (1996) (Per Curiam)

Appellant's child was premature and suffers from numerous physical problems. With mutual consent, the child was primarily cared for by the child's grandmother for several years. Appellant had two other children and an apparently abusive live-in, who was the child's father. The father is no longer in the home.

The grandmother became dissatisfied and contacted DHHR, which was satisfied with the child's placement. The grandmother then approached the prosecuting attorney, requesting an abuse and neglect petition; as a result she was granted temporary custody. Three hearings were held in a year, with the third denying appellant an improvement period; at the final disposition hearing, both women testified. The court found neglect without a finding of fact.

Appellant claimed on appeal that there was no prima facie case; that there was no clear and convincing evidence of abuse and neglect; and that she should have been given an improvement period.

ABUSE AND NEGLECT

Improvement period (continued)

Failure to grant (continued)

State ex rel. Virginia M. v. Gina Lynn S., (continued)

Syl. pt. 1 - “Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

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. 2, *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

The Court found no imminent danger ever existed for granting of temporary custody; nor was the denial of an improvement period acceptable. The Court noted this case should have been brought as a custody case.

The Court ordered the circuit court to grant an improvement period and ordered DHHR to prepare a case plan pursuant to *W.Va. Code* 49-6D-3 and 49-6-2(b). The Court recommended that both the mother and grandmother should be involved with the child. Reversed and remanded.

Length of

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

ABUSE AND NEGLECT

Non-custodial parent

Capable of abuse and neglect

In re Christine Tiara W., 198 W.Va. 266, 479 S.E.2d 927 (1996) (Per Curiam)

See ABUSE AND NEGLECT Abandonment, Non-custodial parent, (p. 1) for discussion of topic.

Notice required

In re Christine Tiara W., 198 W.Va. 266, 479 S.E.2d 927 (1996) (Per Curiam)

See ABUSE AND NEGLECT Abandonment, Non-custodial parent, (p. 1) for discussion of topic.

Notice

Abandonment

In re Christine Tiara W., 198 W.Va. 266, 479 S.E.2d 927 (1996) (Per Curiam)

See ABUSE AND NEGLECT Abandonment, Non-custodial parent, (p. 1) for discussion of topic.

Notice to both parents

In re Christine Tiara W., 198 W.Va. 266, 479 S.E.2d 927 (1996) (Per Curiam)

See ABUSE AND NEGLECT Abandonment, Non-custodial parent, (p. 1) for discussion of topic.

Parent or guardian's failure to cooperate

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

ABUSE AND NEGLECT

Plea bargain

Not available in civil abuse

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

Post-termination parental visitation

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

Prior acts of abuse

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See EVIDENCE Admissibility, Abuse to children not subject of abuse petition, (p. 175) for discussion of topic.

Priority status

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997) (Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

ABUSE AND NEGLECT

Proof of facts

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997)
(Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

W.Va. DHHR Wright v. Brenda C., 197 W.Va. 468, 475 S.E.2d 560 (1996)
(Per Curiam)

See ABUSE AND NEGLECT Hearing required, (p. 16) for discussion of topic.

Right to counsel

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

Right to present evidence

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997)
(Maynard, J.)

Appellant is a widower and the father of Joseph A. and Justin A. The original neglect petition charged that appellant threw an ashtray at Joseph A., resulting in a serious laceration. The school nurse took the child to appellant's home since appellant had no telephone, and the wound needed sutures. Appellant declined the nurse's offer to take the child to the emergency room.

ABUSE AND NEGLECT

Right to present evidence (continued)

In re Joseph A. and Justin A., (continued)

Appellant testified that the nurse gave him the option of treating the wound himself. The nurse testified she gave advice when it became obvious that appellant was not going to take the child for treatment. A family member ultimately took the child (whose wound was by then infected) to a child protective services worker who investigated the case. (Appellant had previously been given an improvement period resulting from abuse and neglect.) The social worker found that the children had access to pornographic movies and gunpowder.

At trial, the children testified as to the father's mood swings and unpredictable behavior. DHHR workers documented that neglect and emotional abuse had taken place in 1991, including sexual abuse of an older female sibling. Appellant was acquitted of criminal charges relating to this abuse. In this case the circuit court denied appellant's request for an improvement period and put the children in long-term foster care. On appeal, appellant claimed the evidence was insufficient to show abuse in that (a) no one saw him throw the ashtray; (b) no medical evidence showed emergency treatment was required; (c) and no evidence showed the presence of pornography was harmful. He also claimed he was wrongfully denied an improvement period and was wrongfully excluded from an *in camera* adjudicatory hearing while his son Justin testified.

Syl. pt. 1 - “ ‘ “ ‘ “*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove ‘conditions existing at the time of the filing of the petition ... by clear and convincing proof.’ The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.” “Syllabus Point 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).” “Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990).” ‘Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994).’ Syl. pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Syllabus Point 1, *West Virginia Department of Health and Human Resources ex rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996).

ABUSE AND NEGLECT

Right to present evidence (continued)

In re Joseph A. and Justin A., (continued)

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.’ Syllabus Point 2, *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).” Syllabus Point 2, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

Syl. pt. 3 - *W.Va. Code*, 49-6-2(c) (1996), provides parties having custodial or parental rights to the opportunity to testify during abuse and neglect proceedings and to present and cross-examine witnesses. The requirement of cross-examination is fully met when counsel for the parent or guardian is present during the testimony of a child witness and is given the opportunity to fully cross-examine the witness.

Syl. pt. 4 - Rule 8(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings, which were approved by this Court on December 5, 1996, controls the procedure for taking testimony from children in abuse and neglect proceedings in future cases.

The Court found clear evidence of abuse. Noting that appellant had already been given three years to improve his parenting the Court also found that appellant had been given every reasonable assistance and had deliberately subverted DHHR’s efforts. Cf. *Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987). No error in refusing another improvement period.

The Court noted that appellant’s counsel was not excluded from the *in camera* hearing while Justin testified; counsel was even allowed cross-examination. The presence of counsel preserved appellant’s right to cross-examination. No error.

Silence as admission of abuse

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

ABUSE AND NEGLECT

Standard for review

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

In the Matter of Elizabeth v. Hammack, 201W.Va. 158, 494 S.E.2d 925 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 34) for discussion of topic.

State ex rel. Virginia M. v. Gina Lynn S., 475 S.E.2d 548 (1996) (Per Curiam)

See ABUSE AND NEGLECT Improvement period, Failure to grant, (p. 18) for discussion of topic.

Judge's finding

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

Sufficiency of evidence

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997) (Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

On September 26, 1994 DHHR filed a petition against Christina B. alleging abuse and neglect of her children, Katie S. and David S. The petition also sought termination of the children's father, David S., whose whereabouts were unknown. At a hearing held October 5, 1994, the circuit court found abuse and neglect and granted a twelve month improvement period. Although he attended the hearing, the father was found "not a proper party" and was dismissed.

For the first six months, the children were placed outside the home but allowed visitation with their mother. On June 8, 1995, they were returned to their mother. Between June 15 and June 26, 1995, a DHHR social worker found repeated instances of unsanitary practices and lack of food for the children. On June 26, 1995 the worker again removed the children from the home.

Between June 26, 1995, and October 15, 1995, respondent visited her children only four or five times despite living only a mile from them. A hearing was held November 15, 1995. Respondent acknowledged that she did not feed the children regularly but there was conflict in the testimony as to her efforts to improve. Respondent asked for the remainder of her twelve month improvement period time to improve but the circuit court terminated her parental rights based on lack of "a substantial likelihood of improvementwithin a short period." Respondent was denied visitation but the court allowed DHHR to grant visitation.

Syl. pt. 1 - When the Department of Health and Human Services finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under *W.Va. Code* 49-6-1(a) (1992). Every effort should be made to comply with the notice requirements for both parents. To the extent that *State ex rel. McCartney v. Nuzum*, 161 W.Va. 740, 248 S.E.2d 318 (1978), holds that a non-custodial parent can be found not to have abused and neglected his or her child it is expressly overruled.

ABUSE AND NEGLECT

Termination of parental rights (continued)

In re Katie S. and David S., (continued)

Syl. pt. 2 - “Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. pt. 3 - Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.

Syl. pt. 4 - “Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in face of knowledge of the abuse, have taken no action to identify the abuser.” Syl. Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 5 - “[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.’ *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). Syllabus point 1, *In the Interest of Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985).” Syllabus Point 1, *In re Lacey P.*, 189 W.Va. 580, 433 S.E.2d 518 (1993).

ABUSE AND NEGLECT

Termination of parental rights (continued)

In re Katie S. and David S., (continued)

Syl. pt. 6 - “Neither *W.Va. Code* § 49-6-2(b) nor *W.Va. Code* § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court’s discretion to grant an improvement period within the applicable statutory requirements; it is also within the court’s discretion to terminate the improvement period before the twelve-month time frame has expired if the court is not satisfied that the defendant is making the necessary progress. The only minimum time period set forth in the statute is the three-month period granted in the pre-dispositional section, *W.Va. Code* § 49-6-2(b).” Syllabus Point 2, *In re Lacey P.*, 189 W.Va. 580, 433 S.E.2d 518 (1993).

Syl. pt. 7 - “‘Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.’ Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).” Syllabus Point 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 8 - “When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between the parent and child and the child’s wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child’s well being and would be in the child’s best interest.” Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

The Court found the father was wrongfully dismissed below and noted ironically that the circuit court’s ruling terminated the rights of the mother, who claimed to love and want the children, but left the father’s rights intact when he clearly had abandoned the children. Waiting for adoption proceedings is clearly insufficient. *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Upon remand, the father’s status should be determined.

ABUSE AND NEGLECT

Termination of parental rights (continued)

In re Katie S. and David S., (continued)

As to the mother's rights, the Court found the mother unable to comply with required improvement plans; clearly there was sufficient evidence of abuse and neglect. With no substantial likelihood of improvement, *W.Va. Code* 49-6-5(b), the Court found termination appropriate.

Because the older child had great affection for her mother, the Court remanded for determination of whether post-termination visitation is appropriate. Affirmed in part, reversed in part, remanded.

Best interest of the child

In the Matter of Elizabeth v. Hammack, 201W.Va. 158, 494 S.E.2d 925 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 34) for discussion of topic.

Contact with siblings

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

Standard for

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Standard for (continued)

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

Appellants claimed their parental rights were improperly terminated because appellee failed to present clear and convincing evidence that the abuse could not be corrected and by denying them a meaningful improvement period. Appellants did not testify at the termination proceedings.

Syl. pt. 1 - Implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health and welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent.

Syl. pt. 2 - Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

Syl. pt. 3 - "*W.Va. Code*, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Syl. pt. 4 - Pursuant to the provision of West Virginia Code § 49-1-3(a)(1) (1995), the definition of child abuse encompasses a parent, guardian or custodian who knowingly allows another person to inflict physical injury upon another child residing in the same home as the parent and his/her child(ren), even though that child is not the parent's natural or adopted child.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Standard for (continued)

W.Va. DHHR ex rel. Wright v. Doris S., (continued)

Syl. pt. 5 - “Termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such non-participating parent supports the other parents’s version as to how a child’s injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.” Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syl. pt. 6 - “Parental rights may be terminated where there is clear and convincing evidence that the infant child suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in face of knowledge of the abuse, have taken no action to identify the abuser.” Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 7 - The term “knowingly” as used in West Virginia Code § 49-1-3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred.

Syl. pt. 8 - A parent’s parental rights to his/her child(ren) may be terminated: 1) where there is clear and convincing evidence that the parent knowingly allowed another person to inflict extensive physical injury upon another child residing in the same home as the parent and his/her child(ren), even though the injured child is not the parent’s natural or adopted child; and, 2) where there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parent, even in the face of knowledge of the abuse, has taken no action to identify the abuser.

The Court noted that neither Doris S., Melissa C. or David E. took action to protect the child who died. Clearly, sufficient evidence to terminate rights to the other children was adduced.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Standard for (continued)

W.Va. DHHR ex rel. Wright v. Doris S., (continued)

As to the granting of an improvement period, the Court found appellants were given sufficient opportunity but failed to meet their responsibilities to show some sign of eliminating the abuse. No error.

Standard of proof

W.Va. DHHR ex rel. Wright v. Brenda C., 197 W.Va. 468, 475 S.E.2d 560 (1996) (Per Curiam)

See ABUSE AND NEGLECT Hearing required, (p. 16) for discussion of topic.

Visitation following

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

In re William John R., 200 W.Va. 627, 490 S.E.2d 714 (1997) (Per Curiam)

Both children at issue were mildly retarded or impaired. In addition, William John R. has attention deficit disorder and Dana R. has post-traumatic disorder from the abuse. Appellant, their mother, also is mildly retarded and suffers from various personality disorders as well as depression and anxiety.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Visitation following (continued)

In re William John R., (continued)

On February 17, 1994, DHHR filed an abuse and neglect petition; the circuit court granted DHHR temporary custody and appointed counsel for appellant and her children. In March, 1994, the court granted an improvement period with supervised visitation. Because of their special needs, the children were moved to Kanawha County; as a result, weekly visits became monthly visits.

In August, 1995, the court conducted an adjudicatory hearing which resulted in a finding of abuse. On September 14, 1995 the court allowed another improvement period over the objections of both DHHR and the children's guardian. In February, 1996 the court ordered DHHR to continue efforts to find local care for the children. In May and June the court held hearings on the guardian's motion to terminate the improvement period. The court found "no reasonable likelihood" that the children could be reunited with their mother; the court did not specifically terminate appellant's parental rights but gave DHHR permanent custody.

Appellant argued that she was denied a meaningful improvement period because the children were moved to Kanawha County. The guardian *ad litem* argued that exhaustion of every possibility was not required. DHHR agreed that appellant deserved either restoration of the improvement period or meaningful visitation.

Syl. pt. 1 - "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. pt. 1, *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

Syl. pt. 2 - "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

ABUSE AND NEGLECT

Termination of parental rights (continued)

Visitation following (continued)

In re William John R., (continued)

Syl. pt. 3 - "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Taking the best interests of the child as paramount, the Court noted that specialized care was being given in Kanawha County not available elsewhere. Although DHHR did not have a family case plan, it clearly had made efforts to place the children closer to appellant.

The Court also found that expert testimony established that no amount of parenting classes or on the job training could be expected to help appellant. The Court found the circuit court did not abuse its discretion in terminating the improvement period but that visitation should be allowed. Affirmed in part; remanded with directions.

In the Matter of Elizabeth v. Hammack, 201W.Va. 158, 494 S.E.2d 925 (1997) (Per Curiam)

The trial court found Elizabeth A.D. to be an abused child and terminated her mother's parental rights. Elizabeth A.D.'s guardian claimed that the court's denial of visitation with the mother following termination was error.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Visitation following (continued)

In the Matter of Elizabeth v. Hammack, (continued)

Syl. pt. 1 - “ “Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).’ *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996).” Syl. Pt. 1, *State ex rel. Diva v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997).

Syl. pt. 2 - “When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child’s wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child’s well being and would be in the child’s best interest.” Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

The Court found clear error in that the record showed a close emotional bond between mother and child. Reversed and remanded.

ABUSE OF DISCRETION

Automatism

No instructions on

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Collateral crimes

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 183) for discussion of topic.

Continuances

State v. Snider, 196 W.Va. 513, 474 S.E.2d 180 (1996) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

Evidence

Chain of custody

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Chain of custody, (p. 221) for discussion of topic.

Expert testimony

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Expert opinion, (p. 195) for discussion of topic.

ABUSE OF DISCRETION

Indictments

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See INDICTMENT Sufficiency of, Murder, (p. 311) for discussion of topic.

Instructions

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See INSTRUCTIONS Evidence sufficient to support, (p. 328) for discussion of topic.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See INSTRUCTIONS Refusal to give, (p. 332) for discussion of topic.

Admissibility

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See INSTRUCTIONS Admissibility, Cumulative, (p. 325) for discussion of topic.

Lesser included offenses

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic

Refusal of

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See HOMICIDE Murder, Accessory after the fact, (p. 292) for discussion of topic.

ABUSE OF DISCRETION

Joinder

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See JOINDER Prejudicial, Separation permissible, (p. 346) for discussion of topic.

Judge's questioning of witness

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Jury selection

Refusal to strike for cause

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Lesser included offenses

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic.

Sentencing

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

ABUSE OF DISCRETION

Voir dire

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See JURY *Voir dire*, Discretion of court, (p. 377) for discussion of topic.

Delegation to circuit clerk

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY *Voir dire*, Circuit clerk conducting, (p. 377) for discussion of topic.

Refusal to strike for cause

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Sufficiency of

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY *Voir dire*, Circuit clerk conducting, (p. 377) for discussion of topic.

ACCESSORIES

Liability for consequences of principal offense

State v. Whetzel, 488 S.E.2d 45 (1997) (Maynard, J.)

See STATUTES Legislative intent, (p. 558) for discussion of topic.

AFFIDAVIT

Search warrant

Misstatements to get

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 506) for discussion of topic.

AGGRAVATED ROBBERY

Lesser included offenses

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic

AIDING AND ABETTING

Concerted action

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

Principle in first and second-degree defined

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

ALLOCUTION

Right to

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

State v. Posey, 480 S.E.2d 158 (1996) (Per Curiam)

See RIGHT TO ALLOCUTION Denial of, (p. 489) for discussion of topic.

Effect of denial

State v. West, 478 S.E.2d 759 (1996) (Per Curiam)

See RIGHT TO ALLOCUTION Denial of, (p. 489) for discussion of topic.

APPEAL

Abandonment

In re Christine Tiara W., 198 W.Va. 266, 479 S.E.2d 927 (1996) (Per Curiam)

See ABUSE AND NEGLECT Abandonment, Non-custodial parent, (p. 1) for discussion of topic.

Abuse and neglect

In re Christine Tiara W., 198 W.Va. 266, 479 S.E.2d 927 (1996) (Per Curiam)

See ABUSE AND NEGLECT Abandonment, Non-custodial parent, (p. 1) for discussion of topic.

In re William John R., 200 W.Va. 627, 490 S.E.2d 714 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 32) for discussion of topic.

Ineffective assistance

State ex rel. Bailey v. Legursky, 490 S.E.2d 858 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 315) for discussion of topic

Review of judge's findings

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

APPEAL

Abuse and neglect (continued)

Standard for review

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

Abuse of discretion

Expert testimony

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Expert opinion, (p. 195) for discussion of topic.

Admissibility

Collateral crimes

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Prior bad acts, (p. 208) for discussion of topic.

Other bad acts

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Prior bad acts, (p. 208) for discussion of topic.

APPEAL

***Anders* brief**

When required

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

See ATTORNEYS Duty to file appeal, (p. 94) for discussion of topic.

Automatism

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Conclusions of law

State v. Davis, 483 S.E.2d 84 (1996) (Per Curiam)

See OBSTRUCTING AN OFFICER Defined, (p. 430) for discussion of topic.

Confessions

Standard for review

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 514) for discussion of topic.

Continuance

Standard for review

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

APPEAL

Continuance (continued)

Standard for review (continued)

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Directed verdict

Standard for review

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J.)

See CONSPIRACY Elements of, (p. 125) for discussion of topic.

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See DIRECTED VERDICT Standard for review, (p. 139) for discussion of topic.

Double jeopardy

Standard for review

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See DOUBLE JEOPARDY Test for, Legislative intent, (p. 152) for discussion of topic.

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

APPEAL

Entrapment

Standard for review

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

Evidence

Chain of custody

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Chain of custody, (p. 221) for discussion of topic.

Failure to object

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See BREAKING AND ENTERING Building defined, (p. 112) for discussion of topic.

Consequences of

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See PROSECUTING ATTORNEY Conduct at trial, Reference to appellant's foul language, (p. 472) for discussion of topic.

Effect of

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

APPEAL

Failure to object (continued)

Effect of (continued)

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

Pre-trial suppression

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

Waiver of suppression issues

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

Failure to preserve

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder. The trial court allowed into evidence the victim's statement to his son that he and appellant had an argument the day of the shooting. Appellant objected at pre-trial that the statement was inadmissible hearsay and that she had no notice of the state's intent to use the deceased's statements. The prosecution claimed the statement was admissible under Rule 803(3) of the Rules of Evidence as a statement of then-existing state of mind.

On appeal appellant argued the victim's state of mind was not relevant. *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995). The prosecution claimed the error, if any, was waived because appellant did not renew her objection at trial on the same grounds she now raises on appeal.

Syl. pt. 4 - This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record.

APPEAL

Failure to preserve (continued)

***State v. Browning*, (continued)**

The Court noted that appellant objected at pre-trial based on lack of notice but then did not object to the statement's admission under Rule 803(3). The Court found appellant waived her objection; further the statement was properly admitted anyway. The Court distinguished *Phillips, supra*, in that the evidence did not clearly show motive; here, the victim's statement was made the day before the shooting and was not too remotely connected to the act. No error.

Final order

Standard for review

***State v. Davis*, 483 S.E.2d 84 (1996) (Per Curiam)**

See OBSTRUCTING AN OFFICER Defined, (p. 430) for discussion of topic.

Findings of fact

***State v. Davis*, 483 S.E.2d 84 (1996) (Per Curiam)**

See OBSTRUCTING AN OFFICER Defined, (p. 430) for discussion of topic.

Frivolous appeals

***State ex rel. Edwards v. Duncil*, No. 23357 (5/15/96) (Per Curiam)**

See ATTORNEYS Duty to file appeal, (p. 94) for discussion of topic.

APPEAL

Frivolous appeals (continued)

Determination of

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

Relator was convicted of unspecified crimes in McDowell County. His petition for habeas corpus was denied by the McDowell County Circuit Court, whereupon he asked for counsel to appeal the court's ruling. Tracy Lusk of the McDowell County Public Defender Office was appointed.

Approximately 18 months later, relator contacted the Clerk of the Supreme Court complaining that Mr. Lusk had not contacted him or responded to his inquiries. Mr. Lusk said he had been relieved of responsibilities and had sent relator's file to the Kanawha County Public Defender's Office. Neither office was able to locate relator's file.

Relator's letter was treated as a writ of mandamus and Mr. Lusk responded to a rule to show cause by appearing on 23 April 1996.

The Court noted that defense counsel is not to determine whether a defendant's appeal is frivolous. *Turner v. Haynes*, 162 W.Va. 33, 245 S.E.2d 629 (1978) (quoting *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)). The court applied the rule for appeals to the habeas matter here; counsel is to file a brief referring to any matter which might support the appeal and the client allowed to respond. *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

Since Mr. Lusk did not file such a brief, he was ordered to file a motion for resentencing and a motion to withdraw, supported by an *Anders* brief or a petition for appeal within 30 days.

Habeas corpus

Findings required

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

APPEAL

Habeas corpus (continued)

Hearing required

Nazelrod v. Hun, 486 S.E.2d 322 (1997) (Per Curiam)

See HABEAS CORPUS Evidentiary hearing required, (p. 272) for discussion of topic.

Moot when client released

Kemp v. State, No. 23980 (12/16/97) (Per Curiam)

See HABEAS CORPUS Moot when client released, (p. 273) for discussion of topic.

Harmless error

Standard for review

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 185) for discussion of topic.

Inadequate record

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

Indictment

Sufficiency of

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

APPEAL

Ineffective assistance

Standard for

State ex rel. Bailey v. Legursky, 490 S.E.2d 858 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 315) for discussion of topic

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

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

Instructions

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Admissibility

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See INSTRUCTIONS Admissibility, Cumulative, (p. 325) for discussion of topic.

Confusing or incorrect

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

APPEAL

Instructions (continued)

Crimes not charged

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

See INSTRUCTIONS Crime not charged, Effect of including, (p. 327) for discussion of topic.

Essential elements of offense

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

Malice

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Plain error

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See INSTRUCTIONS Sufficiency of, Generally, (p. 333) for discussion of topic.

Invited error

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Admissibility, Invited error, (p. 205) for discussion of topic.

APPEAL

Invited error (continued)

Effect of

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See INDICTMENT Prior offenses included but not tried, (p. 309) for discussion of topic.

Issues not reviewed below

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

Juveniles

Transfer to adult jurisdiction

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

Magistrate court

Circuit court imposes higher penalty

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See DUE PROCESS Magistrate court conviction, Circuit court imposes higher penalty, (p. 155) for discussion of topic.

No right to jury trial

State v. Bergstrom, 474 S.E.2d 586 (1996) (Per Curiam)

Appellant was found guilty of harassing phone calls in a magistrate court jury trial. He appealed to circuit court, where his conviction was affirmed without a jury. Because the jury trial in magistrate court was not electronically recorded, he claimed he should have had a trial *de novo* in circuit court.

APPEAL

Magistrate court (continued)

No right to jury trial (continued)

State v. Bergstrom, (continued)

Between the magistrate and circuit court trials *W.Va. Code*, 50-5-13 was amended to eliminate the statutory right to a jury trial in circuit court. *W.Va. Code*, 50-5-8 was also amended to require electronic recording a magistrate court trials.

Syl. - “*W.Va. Code*, 50-5-13 [1994], which sets forth the appeal procedure in a criminal proceeding from magistrate court to circuit court, but which does not give the defendant a statutory right to a jury trial *de novo* on the appeal to circuit court, does not violate *W.Va. Const.* art. III, § 14 or art. VIII, § 10.” Syl. Pt. 2, *State ex rel. Collins v. Bedell*, 194 W.Va. 390, 460 S.E.2d 636 (1995).

The Court noted *W.Va. Code* 50-5-13(c)(5) allows a circuit court to take evidence if the record from magistrate court is deficient and to empanel a jury if the defendant was “effectively denied a jury trial” in magistrate court. Appellant had a jury trial. No error.

Motion to suppress

Standard for review

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Newly-discovered evidence

Effect of

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Newly-discovered evidence, Effect of, (p. 238) for discussion of topic.

APPEAL

Nonjurisdictional issues not reviewed below

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

Plain error

Instructions

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See INSTRUCTIONS Sufficiency of, Generally, (p. 333) for discussion of topic.

Standard for

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

Newly-discovered evidence

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Newly-discovered evidence, Effect of, (p. 238) for discussion of topic.

When applied

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See PLAIN ERROR Defined, (p. 437) for discussion of topic.

APPEAL

Plain error (continued)

When reversible

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See PLAIN ERROR When reversible, (p. 439) for discussion of topic.

Prohibition

Abuse and neglect

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996)
(Workman, J.)

See ABUSE AND NEGLECT Guardians *ad litem*, Right to be heard, (p. 14)
for discussion of topic.

Proportionality of sentences

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See SENTENCING Appellate review of, (p. 526) for discussion of topic.

Prosecuting attorney

Appeal by in DUI case

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of
topic.

Prosecuting attorney's right to

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion
of topic.

APPEAL

Questions not presented below

State v. Francisco, 483 S.E.2d 806 (1996) (Per Curiam)

See SENTENCING Presentence report, Client's right to, (p. 545) for discussion of topic.

Reversal

Admission of improper evidence

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See EVIDENCE Admissibility, Surviving spouse and children, (p. 215) for discussion of topic.

Search and seizure

Standard for review

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Sentencing

Standard for review

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

APPEAL

Sentencing (continued)

Standard for review (continued)

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See SENTENCING Appellate review of, (p. 526) for discussion of topic.

Standard for review

Abuse and neglect

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

In the Matter of Elizabeth v. Hammack, 201 W.Va. 158, 494 S.E.2d 925 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 34) for discussion of topic.

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

APPEAL

Standard for review (continued)

Abuse and neglect (continued)

State ex rel. Virginia M. v. Gina Lynn S., 475 S.E.2d 548 (1996) (Per Curiam)

See ABUSE AND NEGLECT Improvement period, Failure to grant, (p. 18) for discussion of topic.

In re William John R., 200 W.Va. 627, 490 S.E.2d 714 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 32) for discussion of topic.

Admissibility of evidence

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J.)

See EVIDENCE Admissibility, Discretion of court, (p. 194) for discussion of topic.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Prior bad acts, (p. 208) for discussion of topic.

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See EVIDENCE Admissibility, Surviving spouse and children, (p. 215) for discussion of topic.

Automatism

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

APPEAL

Standard for review (continued)

Confessions

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 514) for discussion of topic.

Continuances

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

State v. Snider, 196 W.Va. 513, 474 S.E.2d 180 (1996) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Delay in charging

State ex rel. State v. Hill, 491 S.E.2d 765 (1997) (Per Curiam)

See INDICTMENT Common scheme or plan, Joinder of multiple offenses, (p. 306) for discussion of topic.

APPEAL

Standard for review (continued)

Denial of instruction

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See HOMICIDE Murder, Accessory after the fact, (p. 292) for discussion of topic.

Directed verdict

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J.)

See CONSPIRACY Elements of, (p. 125) for discussion of topic.

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See DIRECTED VERDICT Standard for review, (p. 139) for discussion of topic.

Double jeopardy

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See DOUBLE JEOPARDY Test for, Legislative intent, (p. 152) for discussion of topic.

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

Entrapment

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

APPEAL

Standard for review (continued)

Expert testimony

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Expert opinion, (p. 195) for discussion of topic.

Failure to object

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See PROSECUTING ATTORNEY Conduct at trial, Reference to appellant's foul language, (p. 472) for discussion of topic.

State v. Rager, 484 S.E.2d 177 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 519) for discussion of topic.

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See BREAKING AND ENTERING Building defined, (p. 112) for discussion of topic.

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

Final order

State v. Davis, 483 S.E.2d 84 (1996) (Per Curiam)

See OBSTRUCTING AN OFFICER Defined, (p. 430) for discussion of topic.

APPEAL

Standard for review (continued)

Findings by circuit court

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

Findings of fact

State v. Davis, 483 S.E.2d 84 (1996) (Per Curiam)

See OBSTRUCTING AN OFFICER Defined, (p. 430) for discussion of topic.

Harmless error

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 185) for discussion of topic.

Inadequate record

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

Indictments

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See INDICTMENT Sufficiency of, Murder, (p. 311) for discussion of topic.

APPEAL

Standard for review (continued)

Ineffective assistance

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for, (p. 320) for discussion of topic.

Instructions

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See HOMICIDE Murder, Accessory after the fact, (p. 292) for discussion of topic.

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See INSTRUCTIONS Evidence sufficient to support, (p. 328) for discussion of topic.

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See INSTRUCTIONS Sufficiency of, Generally, (p. 333) for discussion of topic.

APPEAL

Standard for review (continued)

Instructions (continued)

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

Appellant was convicted of breaking and entering, petit larceny and conspiracy to commit breaking and entering in the theft of nitrous oxide canisters. Over appellant's objection the trial court gave the following instruction:

Before the possession of stolen property creates even a presumption that the person in possession is a thief, the State must prove by the evidence beyond all reasonable doubt that the possession was personal, exclusive, recent, unexplained, and that it involved a distinct and conscious assertion of property by the defendant.

Appellant claimed there was insufficient evidence of exclusive possession of the canisters to warrant giving the instruction and that the instruction was confusing and misleading.

APPEAL

Standard for review (continued)

Instructions (continued)

State v. Sampson, (continued)

Syl. pt. 3 - “A trial court’s instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not [misled] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court’s discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.” Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found sufficient testimony to justify a finding of joint possession; since joint possession can include the concept of exclusive possession, *State v. Wilcox*, 169 W.Va. 142, 286 S.E.2d 257 (1982), no error in giving the instruction.

Judge’s questioning of witness

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Lesser included offenses

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic

APPEAL

Standard for review (continued)

Matters not raised below

State v. Rager, 484 S.E.2d 177 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 519) for discussion of topic.

Motion to suppress

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Plain error

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See PLAIN ERROR Defined, (p. 437) for discussion of topic.

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See PLAIN ERROR When reversible, (p. 439) for discussion of topic.

Plea bargain

State v. Wolfe, 500 S.E.2d 873 (1997) (Per Curiam)

See PLEA BARGAIN Acceptance of, Effect, (p. 441) for discussion of topic.

APPEAL

Standard for review (continued)

Preserving error

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

Probation revocation

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J)

See SENTENCING Probation revocation, (p. 548) for discussion of topic.

Prohibition in abuse and neglect

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996) (Workman, J.)

See ABUSE AND NEGLECT Guardians *ad litem*, Right to be heard, (p. 14) for discussion of topic.

Proportionality

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See SENTENCING Appellate review of, (p. 526) for discussion of topic.

Question of law

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

APPEAL

Standard for review (continued)

Questions not presented below

State v. Francisco, 483 S.E.2d 806 (1996) (Per Curiam)

See SENTENCING Presentence report, Client's right to, (p. 545) for discussion of topic.

Restitution

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Search and seizure

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Sentencing

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

APPEAL

Standard for review (continued)

Sentencing (continued)

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See SENTENCING Appellate review of, (p. 526) for discussion of topic.

Statutory interpretation

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee's work in regional jail, (p. 539) for discussion of topic.

Sufficiency of evidence

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See INVOLUNTARY MANSLAUGHTER Sufficiency of evidence, (p. 340) for discussion of topic.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

APPEAL

Standard for review (continued)

Transfer to adult jurisdiction

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

Unconsciousness

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Waiver of jury trial

State v. Redden, 487 S.E.2d 318 (1997) (Starcher, J.)

See JURY TRIAL Waiver of, Standards for, (p. 379) for discussion of topic.

Sufficiency of evidence

Murder

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

Standard for review

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Newly-discovered evidence, Effect of, (p. 238) for discussion of topic.

APPEAL

Sufficiency of evidence (continued)

Standard for review (continued)

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See INVOLUNTARY MANSLAUGHTER Sufficiency of evidence, (p. 340) for discussion of topic.

State v. Williams, 480 S.E.2d 162 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 186) for discussion of topic.

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

Sufficiency of indictment

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

Generally

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

Standard for review

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

APPEAL

Suppression of testimony

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

Unconsciousness

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

APPOINTED COUNSEL

Co-counsel in murder case

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder and sentenced to life without mercy. He complained that appointment of co-counsel was wrongfully denied.

The Court found no authority requiring appointment of co-counsel. *State v. Chamberlain*, 819 P.2d 673, 683-84 (N.M. 1991); *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), *cert. denied*, 464 U.S. 843, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983); *Hatch v. Oklahoma*, 58 F.3d 1447 (10th Cir. 1995); *Riley v. Snyder*, 840 F.Supp. 1012 (D. Del. 1993); *Spangler v. State*, 650 N.E.2d 1117, 1123 (Ind. 1995); and *State v. Smith*, 445 So.2d 227, 230 (Miss. 1984). No error.

Due diligence

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

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

No right to

Habeas corpus petition

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

Petitioner sought to compel the respondent judge to consider petitioner's post-conviction habeas corpus petition based on ineffective assistance of counsel and other allegations. Petitioner was convicted of malicious assault and, based on two prior felon convictions, was sentenced to life imprisonment.

His appeal was denied, whereupon he petitioned the circuit court for writ of habeas corpus. He now appeals from that denial. The judge's order denying relief gave as the only reason for denial that "upon consideration of the petition for habeas corpus the court is of the opinion that allegations are entirely without merit and that good cause for the filing thereof and appointment of counsel has not been shown."

APPOINTED COUNSEL

No right to (continued)

Habeas corpus petition (continued)

State ex rel. Watson v. Hill, (continued)

Syl. pt. 1 - West Virginia Code 53-4A-7(c) (1994) requires a circuit court denying or granting relief in a habeas corpus proceeding to make specific findings of fact and conclusions of law relating to each contention advanced by the petitioner, and to State the grounds upon which the matter was determined.

Syl. pt. 2 - “A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court’s satisfaction that the petitioner is entitled to no relief.” Syl. Pt. 1, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

Syl. pt. 3 - “In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 4 - “In reviewing counsel’s performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel’s strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Court found the circuit court’s order clearly inadequate and ordered the lower court to issue an order making the necessary findings. The Court noted that the judge could determine most of the issues raised without an additional hearing except the allegation of ineffective assistance.

Finding the necessity of a hearing the Court granted the writ as to ineffective assistance of counsel.

APPOINTED COUNSEL

Prompt appointment and time to prepare

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

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

ARREST

Juveniles

Custody same arrest

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

Warrantless

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

Warrantless

Exigent circumstances required

State v. Cheek, 483 S.E.2d 21 (1996) (Per Curiam)

Appellant was arrested in his home for DUI, second offense. However, the offense was committed outside the presence of the arresting officer. Appellant claimed the officer lacked probable cause and no exigent circumstances were present.

Appellant had removed a barricade and driven through a street “block party” sponsored by a local church. Appellant, who lived on the street, pulled into his own yard and entered his house. One witness claimed appellant was “staggering” but the pastor of the church did not notice anything amiss.

Police arrived and pulled appellant from his house, seeing an object in his hand which later turned out to be a telephone. They handcuffed appellant and gave him field sobriety tests which he failed. Appellant’s blood alcohol was .20. After appeal of his magistrate court conviction, the circuit court held the arrest valid because officers observed appellant intoxicated.

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.” Syllabus Point 1, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

ARREST

Warrantless (continued)

Exigent circumstances required (continued)

State v. Cheek, (continued)

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.” Syllabus Point 2, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

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).” Syllabus Point 3, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

The Court also cited *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976), wherein a third offense DUI did not require a warrant to arrest or to be in the presence of the officer to justify a warrantless arrest. The officer must have reasonable grounds to believe the person was driving while intoxicated.

Here, however, the Court found the arresting officer did not have reasonable grounds; there was neither accident, odor of alcohol, nor injury. The officer first smelled alcohol when he pulled appellant through the door. Further, the officer had sufficient time to obtain a warrant without danger of appellant’s fleeing or destroying evidence. See also, *State v. Shugars*, 180 W.Va. 280, 376 S.E.2d 174 (1988) (suspect arrested in hospital after accident; and *State v. Franklin*, 174 W.Va. at 472, 327 S.E.2d 449 at 452-53 (1985). Reversed.

ATTORNEYS

Alcohol or drug addiction

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

See ATTORNEYS Incapacitation, Supervised practice, (p. 95) for discussion of topic.

Annulment

Disciplinary Counsel v. Cunningham, No. 24892 (6/12/98) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 84) for discussion of topic.

Appeal

Duty to file

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

See ATTORNEYS Duty to file appeal, (p. 94) for discussion of topic.

Appointed

Co-counsel in murder case

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See APPOINTED COUNSEL Co-counsel in murder case, (p. 77) for discussion of topic.

No right to in habeas corpus

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

ATTORNEYS

Attorney-client privilege

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See PRIVILEGES Attorney-client privilege, Divorce attorney as witness, (p. 454) for discussion of topic.

Client privilege

Divorce lawyer as witness

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See PRIVILEGES Attorney-client privilege, Divorce attorney as witness, (p. 454) for discussion of topic.

Disappearance

Office of Disciplinary Counsel v. Butcher, 475 S.E.2d 162 (1996) (Per Curiam)

Respondent is an active member of the Bar who practiced in Huntington until April, 1996, at which time his whereabouts became unknown. Since April, 1995, respondent made no response to repeated requests for information by Disciplinary Counsel, necessitating use of a subpoena to appear before Disciplinary Counsel. Further, respondent did not fulfill his promises to take action in four specific matters by 27 November 1995.

Disciplinary Counsel filed charges 7 March 1996 alleging lack of diligence, lack of competence, lack of communication with clients, failing to respond to counsel and other allegations. Both the clerk of the Court and the Office of Disciplinary Counsel have been unable to serve respondent. A warning of default judgment was also sent four times; all four letters were returned. Disciplinary Counsel filed a motion to deem charges as admitted but was also unable to serve this motion.

ATTORNEYS

Disappearance (continued)

Office of Disciplinary Counsel v. Butcher, (continued)

Syl. pt. - “Under the authority of the Supreme Court of Appeal’s inherent power to supervise, regulate and control the practice of law in this State, the Supreme Court of Appeals may suspend the license of a lawyer or may order such other actions as it deems appropriate, after providing the lawyer with notice and an opportunity to be heard, when there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct or is under a disability and (2) poses a substantial threat of irreparable harm to the public until the underlying disciplinary proceeding has been resolved.” Syl. Pt. 2, *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993).

The Court authorized the Chief Judge of Cabell County to appoint counsel to take whatever action is necessary to protect respondent’s clients pursuant to Rule 3.29 of the Rules of Lawyer Disciplinary Procedure.

The Court also suspended respondent indefinitely as a substantial threat to public confidence in the legal system and to his clients. Further, pursuant to Rule 3.23 of the Rules of Lawyer Disciplinary Procedure, the Court ordered respondent to undergo a psychiatric examination. See *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993).

Disbarment

Disciplinary Counsel v. Cunningham, No. 24892 (6/12/98) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 84) for discussion of topic.

Discipline

Annulment

Disciplinary Counsel v. Cunningham, No. 24892 (6/12/98) (Per Curiam)

Respondent was previously ordered to practice under supervision. *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995). Upon his failure to abide by the plan, the Court suspended his license indefinitely. *Office of Lawyer Disciplinary Counsel v. Cunningham*, 200 W.Va. 339, 489 S.E.2d 496 (1997).

ATTORNEYS

Discipline (continued)

Annulment (continued)

Disciplinary Counsel v. Cunningham, (continued)

Respondent has continued to practice. He claimed he was unaware of the Court's denial of his motion for rehearing following his suspension.

Syl. - This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

License annulled.

Concurrent jurisdiction with Judicial Hearing Board

In the Matter of Troisi, No. 24204 (6/18/98) (Maynard, J.)

See JUDGES Discipline, Generally, (p. 348) for discussion of topic.

Disappearance

Office of Disciplinary Counsel v. Butcher, 475 S.E.2d 162 (1996) (Per Curiam)

See ATTORNEYS Disappearance, (p. 83) for discussion of topic.

Dual representation

Lawyer Disciplinary Board v. Frame, 479 S.E.2d 676 (1996) (Per Curiam)

See ATTORNEYS Professional responsibility, Dual representation, (p. 98) for discussion of topic.

ATTORNEYS

Discipline (continued)

Prosecuting attorney

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

Respondent was primarily responsible for the prosecution of Glen Dale Woodall for the rape of two women. See *State v. Woodall*, 182 W.Va. 15, 385 S.E.2d 253 (1989). Woodall was ultimately found not guilty through DNA testing. One of the major issues at trial was the identity of the attacker.

The Investigative Panel determined that respondent: (1) failed to disclose two complaint forms describing the victims' assailant's dress and appearance; (2) failed to disclose tape recordings of the sessions wherein the victims were hypnotized; (3) failed to disclose hair analysis results returned by the West Virginia State Police Crime Lab; and (4) failed to disclose a tape recording of a conversation between the two victims. The Panel found respondent violated DR 1-102(A)(5), 7-102(A)(3) and 7-103(B). In addition the Panel found respondent intentionally misrepresented facts during post-trial proceedings in violation of Rule 8.4(d) of the Code of Professional Responsibility.

The Hearing Panel found only that respondent failed to disclose tape recordings or transcripts of the hypnosis sessions with the two victims; and failed to disclose a tape recording or a transcript of conversation between the victims.

Syl. pt. 1 - "A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 2 - "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the *West Virginia Constitution*." Syl. pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

ATTORNEYS

Discipline (continued)

Prosecuting attorney (continued)

Lawyer Disciplinary Board v. Hatcher, (continued)

Syl. pt. 3 - “Gross infidelity by a prosecuting attorney to his trust and duty as such officer, being connected with his character as an attorney, is misconduct for which his name may be stricken, by summary process, from the roll of attorneys entitled to practice in court.” Syl. pt. 1, *State v. Hays*, 64 W.Va. 45, 61 S.E. 355 (1908).

Syl. pt. 4 - A prosecutor in West Virginia, as an attorney licensed to practice law in this State, is subject to the rules of ethics currently set forth in the West Virginia Rules of Professional Conduct. Concomitant with the duty of a prosecutor to seek justice, rather than merely to convict, is a duty to disclose evidence which is known to the prosecutor tending to exculpate the accused in a criminal proceeding. In addition to the risk of bringing reversible error to the criminal proceeding, a prosecutor, who knowingly fails to make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, also runs the risk of violating the West Virginia Rules of Professional Conduct, particularly Rule 3.8, concerning the special responsibilities of a prosecutor. The Court noted that reversible error is not necessarily an ethics violation. In this particular case the numerous proceedings, plus the long period elapsed since the 1987 trial made proof difficult. The Court noted conflicting testimony regarding whether defense counsel knew the victim-witnesses had been hypnotized. Similarly, the Court found testimony conflicting as to whether respondent even knew of the tape recording of the two victims talking with each other.

The Court found that Disciplinary Counsel did not prove by “clear and convincing evidence” that respondent failed to disclose exculpatory information. Complaint dismissed.

Reinstatement following

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

Pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, petitioner sought reinstatement of his license to practice law. Petitioner was suspended in 1989 for three years following his guilty plea to criminal charges.

ATTORNEYS

Discipline (continued)

Reinstatement following (continued)

Roark v. Lawyer Disciplinary Board, (continued)

Following his 1996 petition for reinstatement, it was determined that petitioner had been arrested in 1991 on charges of misdemeanor larceny and obstructing a police officer. The charges were dismissed following petitioner's completion of community service but petitioner omitted the charges in his petition for reinstatement. The Office of Disciplinary Counsel recommended an additional year of suspension for failure to disclose the offenses.

Syl. pt. 1 - "A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. . . ." Syllabus Point 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 2 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (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 . . . 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." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

The Court acknowledged that petitioner's record showed exemplary behavior and substantial community service but also noted that failure to disclose the charges cannot be condoned. Respondent was suspended until 1 January 1998 (the petition was filed 7 September 1997), after which time he is to be supervised for one year, comply with continuing legal education requirements prior to reinstatement and pay costs.

ATTORNEYS

Judges

Concurrent ethical prosecution jurisdiction over

In the Matter of Troisi, No. 24204 (6/18/98) (Maynard, J.)

See JUDGES Discipline, Generally, (p. 348) for discussion of topic.

Lawyers not admitted in West Virginia

Lawyer Disciplinary Board v. Allen, 479 S.E.2d 317 (1996) (Albright, J.)

Respondents are not admitted to practice in West Virginia. They were charged with im-properly soliciting clients in West Virginia. The Board recommended that they be prohibited from further solicitation and prohibited from appearing in any West Virginia court for one year.

Respondents' investigator contacted Kathleen Shepherd at her West Virginia residence one day after her husband was killed in a vehicular accident. The man asked Ms. Shepherd to consider hiring respondents' firm; he sent a Federal Express letter and firm brochure the next day describing respondents as "trial specialists." The investigator made further follow-up calls.

Two or three days following the death of her husband in an industrial accident, Ms. Scarlett Mayles also received a telephone call from the same investigator, telling her she needed a lawyer and suggesting that she hire respondents. The investigator asked to meet with Ms. Mayles at her home or at the Pittsburgh hospital where her husband was in intensive care. Upon being informed that Ms. Mayles would hire local counsel, the investigator told her not to employ "rinky-dink" lawyers in Morgantown.

From 1990 through 1993 the same investigator and another employee contacted four other persons whose spouses, brother or son were killed and made essentially the same pitch. Respondents were charged with violating Rules 7.3(a), 8.4(a) and 7.4 of the Rules of Professional Conduct.

ATTORNEYS

Judges (continued)

Lawyers not admitted in West Virginia (continued)

Lawyer Disciplinary Board v. Allen, (continued)

Syl. pt. 1 - “A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the committee’s recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee’s findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.” Syllabus point 3, *Committee on Legal Ethics of the West Virginia State Bar v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 2 - A lawyer who initially contacts a prospective client who is located in West Virginia regarding a cause of action that may be initiated in West Virginia courts is subject to discipline in this State if he or she violates the West Virginia Rules of Professional Conduct with respect to such prospective client, even if the conduct constituting a violation occurs outside of our State.

Syl. pt. 3 - Commercial speech that is not unlawful or misleading may be regulated only if the government satisfies the remaining elements of the test set forth in *Central Hudson Gas v. Public Service Com’n of New York*, 447 U.S. 557, 564-65, 100 S.Ct. 2343, 2350-51, 65 L.Ed.2d 341, 350-51 (1980), which requires first, that the government assert a substantial interest in support of its regulation; second, that the government demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, that there is a reasonable fit between the regulation and the State’s interest. As the body charged with regulating and controlling the practice of law in West Virginia, the West Virginia Supreme Court of Appeals has a substantial interest in regulating telephone solicitation by lawyers. Moreover, Rule 7.3(a) of the West Virginia Rules of Professional Conduct, which proscribes telephone solicitation by lawyers, directly advances West Virginia’s stated interest for such restriction and there is a reasonable fit between the regulation and the State’s interest in such regulation.

Syl. pt. 4 - Direct telephone solicitation of a prospective client with whom the lawyer has no family or prior professional relationship, when a least partially motivated by the potential for lawyer’s pecuniary gain, violates Rule 7.3(a) of the West Virginia Rules of Professional Conduct and is not protected as the constitutional exercise of commercial speech.

ATTORNEYS

Judges (continued)

Lawyers not admitted in West Virginia (continued)

Lawyer Disciplinary Board v. Allen, (continued)

Syl. pt. 5 - Rule 7.4 of the West Virginia Rules of Professional Conduct, as adopted by this Court on June 30, 1988, does not survive the test for determining whether a regulation of commercial speech is constitutional, as set forth in *Central Hudson Gas v. Public Service Com'n of New York*, 447 U.S. 557, 564-65, 100 S.Ct. 2343, 2350-51, 65 L.Ed.2d 341, 350-51 (1980). While we recognize a legitimate state interest in discouraging claims of expertise where none is recognized, Rule 7.4 fails to directly and materially advance this interest and is broader than reasonably necessary to prevent unrecognized claims of expertise.

Syl. pt. 6 - This Court retains the inherent power to regulate the practice of law in this State, and under Rule 1 of the Rules of Lawyers Disciplinary Procedure, as amended by this Court on December 6, 1994, a lawyer is subject to discipline in this State for violating the West Virginia Rules of Professional Conduct if he or she engages in the practice of law in this State, whether or not he or she is formally admitted to practice by this Court.

The Court found respondents had violated Rule 7.3(a) at least six different times and had also violated Rule 8.4(a) at least five times because of their routine telephone solicitation; further, that repeated contacts violated Rule 7.3(b)(1). Because of superfluous remarks about West Virginia lawyers the Court also found Rule 7.1(c) was violated.

Finding a strong state interest in preventing harm and that the regulation was reasonably related to the harm, the Court ruled that under *Central Hudson Gas, supra*, (see also, *State v. Imperial Marketing*, 196 W.Va. 346, 472 S.E.2d 792 (1996) the speech here was not protected as commercial speech. The Court roundly condemned respondents' actions. Further, the Court found respondents were guilty of violating Rules 7.3(a) and 7.3(b)(1) for inducing others to improperly solicit; and found respondents guilty of violating Rule 5.3(a) for failing to supervise their employees so as to comply with ethical requirements.

ATTORNEYS

Judges (continued)

Lawyers not admitted in West Virginia (continued)

Lawyer Disciplinary Board v. Allen, (continued)

As to respondents' claims of specialization, the Court found no recognition of the specialty of trial practice in West Virginia. (*Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990)); certification possible by National Board of Trial Advocacy. Similar Illinois rule struck as overbroad). Although respondents clearly violated Rule 7.4, the Court found Rule 7.4 to be overbroad. Going further, the Court noted that procedures should be developed to recognize "specialists" so as to avoid public confusion extant because of current advertising in areas of "concentration."

The Court found it had jurisdiction over respondents regardless of whether they were admitted to practice in West Virginia because any attorney who "regularly engages in the practice of law in West Virginia" is subject to discipline. Article VI, Sec. 4, *West Virginia State Bar Constitution and By-Laws*. The practice of law goes far beyond cases in court, *State ex rel. Frieson v. Isner*, 168 W.Va. 758, 285 S.E.2d 641 (1981), and respondents clearly practiced law here by their solicitation, despite their calling from elsewhere. See *State v. Knapp*, 147 W.Va. 704, 131 S.E.2d 81 (1963); contract governed by state law in which acceptance occurs. Two West Virginia clients accepted respondents' offers.

However, the Court reluctantly found that respondents did not "regularly" practice law here. *Committee on Legal Ethics v. McGaughey*, No. 21842 (W.Va. 12/13/93; unpublished). Despite finding it could impose sanctions through its inherent power, the Court refused. Charges dismissed.

Misappropriation of funds

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

ATTORNEYS

Judges (continued)

Procedure for sanctions

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

Public reprimand

Lawyer Disciplinary Board v. Frame, 479 S.E.2d 676 (1996) (Per Curiam)

See ATTORNEYS Professional responsibility, Dual representation, (p. 98) for discussion of topic.

Reinstatement following

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Supervised practice

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

See ATTORNEYS Incapacitation, Supervised practice, (p. 95) for discussion of topic.

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

ATTORNEYS

Judges (continued)

Suspension

Disciplinary Counsel v. Cunningham, No. 24892 (6/12/98) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 84) for discussion of topic.

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Duty to file appeal

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

Relator sought writ of mandamus against respondents William Duncil, Warden of Huttonsville Correctional Center and Tracy Lusk, Public Defender. Relator was convicted in McDowell County of unspecified crimes; he filed a writ of habeas corpus, denied 6 May 1994. On 6 June 1994 respondent Lusk was appointed to represent relator.

On 3 January 1996 relator complained that Mr. Lusk had not contacted him. Mr. Lusk claimed he had been relieved of representation and had forwarded the file to the Kanawha County Public Defender Office. That office did not receive the file. Rule to show cause was issued, returnable 23 April 1996.

The Court held it is not counsel's role to determine whether an appeal is frivolous. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *Turner v. Haynes*, 162 W.Va. 33, 245 S.E.2d 629 (1978); *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977). Counsel should advise the court that he feels the appeal is frivolous, accompanied by a brief referring to anything in the record which might support an appeal. The indigent must be given time to respond. Only then can counsel withdraw.

Writ issued directing respondent Lusk to file motion for resentencing and motion to withdraw, supported by a brief, or a petition for appeal.

ATTORNEYS

Ethics

Failure to disclose exculpatory evidence

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Supervised practice

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

See ATTORNEYS Incapacitation, Supervised practice, (p. 95) for discussion of topic.

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Frivolous appeals

Duty to file *Anders* brief

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

See ATTORNEYS Duty to file appeal, (p. 94) for discussion of topic.

Incapacitation

Supervised practice

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

On October 6, 1995, respondent was ordered to undergo an examination to determine his fitness to practice law. Following that examination, Disciplinary Counsel requested respondent's suspension from practice. On January 6, 1996, the Court ordered respondent to show cause why he should not be suspended.

ATTORNEYS

Incapacitation (continued)

Supervised practice (continued)

Office of Disciplinary Counsel v. Karr, (continued)

On the return date of the show cause order, respondent and Disciplinary Counsel agreed that respondent would undergo intensive alcoholism treatment and be suspended for six months in exchange for six month stay of the pending disability petition pursuant to Rule 3.23(b) of the *Rules of Lawyer Disciplinary Procedure*.

In this follow-up review, the Court agreed to the stipulated “administrative action” whereby respondent agreed to intensive alcoholism treatment and supervised practice for six months, with any breach to result in immediate action.

Suspension

Office of Disciplinary Counsel v. Butcher, 475 S.E.2d 162 (1996) (Per Curiam)

See ATTORNEYS Disappearance, (p. 83) for discussion of topic.

Ineffective assistance

Hearing required

Nazelrod v. Hun, 486 S.E.2d 322 (1997) (Per Curiam)

See HABEAS CORPUS Evidentiary hearing required, (p. 272) for discussion of topic.

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

ATTORNEYS

Ineffective assistance (continued)

Standard for

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for, (p. 320) for discussion of topic.

State ex rel. Strogen v. Trent, 469 S.E.2d 7 (1996) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 318) for discussion of topic.

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

Incapacitation

Office of Disciplinary Counsel v. Butcher, 475 S.E.2d 162 (1996) (Per Curiam)

See ATTORNEYS Disappearance, (p. 83) for discussion of topic.

Lawyers not admitted in West Virginia

Lawyer Disciplinary Board v. Allen, 479 S.E.2d 317 (1996) (Albright, J.)

See ATTORNEYS Discipline, Lawyers not admitted in West Virginia, (p. 89) for discussion of topic.

Misappropriation of funds

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

ATTORNEYS

Professional responsibility

Annulment

Disciplinary Counsel v. Cunningham, No. 24892 (6/12/98) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 84) for discussion of topic.

Divorce actions

Lawyer Disciplinary Board v. Frame, 479 S.E.2d 676 (1996) (Per Curiam)

See ATTORNEYS Professional responsibility, Dual representation, (p. 98) for discussion of topic.

Dual representation

Lawyer Disciplinary Board v. Frame, 479 S.E.2d 676 (1996) (Per Curiam)

Respondent prepared a complaint and an answer in what his client, the husband, claimed was an uncontested, amicable divorce. Although both husband and wife appeared at respondent's office to pick up the documents neither respondent nor anyone in his office talked with her. Several weeks later, the wife contacted respondent, claiming her husband had physically abused her. Respondent immediately withdrew from the case and refunded his client's money.

Syl. pt. 1 - "A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syllabus point 3, *Committee on Legal Ethics of the West Virginia State Bar v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 2 - "A plaintiff's lawyer should not prepare an answer for the defendant in any divorce, regardless of whether the divorce is uncontested and simple." Syl. pt. 5, *Walden v. Hoke*, 189 W.Va. 222, 429 S.E.2d 504 (1993).

ATTORNEYS

Professional responsibility (continued)

Dual representation (continued)

Lawyer Disciplinary Board v. Frame, (continued)

Syl. pt. 3 - “This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.” Syl. pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

The Court noted respondent was involved in a prior dual representation. *Committee on Legal Ethics v. Frame*, 189 W.Va. 641, 433 S.E.2d 579 (1993). Although no actual harm resulted either then or now, the Court issued a public reprimand.

Lawyers not admitted in West Virginia

Lawyer Disciplinary Board v. Allen, 479 S.E.2d 317 (1996) (Albright, J.)

See ATTORNEYS Discipline, Lawyers not admitted in West Virginia, (p. 89) for discussion of topic.

Misappropriation of funds

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

Respondent was a special commissioner for the sale of property. Respondent was to pay his client the proceeds minus fees and expenses and remit to the circuit court the balance of \$28,802.26 to cover payments to parties then unknown.

The circuit court refused to approve respondent’s legal fees. The case disappeared for seven years, after which time the circuit court judge filed a complaint. Respondent advised the judge that he could pay the full \$28,802.26 to the court but did not do so for six months. An investigation revealed that funds had been withdrawn from the account over a period of several years, causing the balance to at one point sink to \$5,892.97; further, the account in which the funds were deposited was respondent’s law firm account. Expenses in other cases were paid from this account.

ATTORNEYS

Professional responsibility (continued)

Misappropriation of funds (continued)

Lawyer Disciplinary Board v. Kupec, (continued)

Respondent was charged by the Investigative Panel. Based on the findings at the evidentiary hearing, the Hearing Panel Subcommittee dismissed all charges but one.

Syl. pt. 1 - ““A *de novo* standard applies to a review of the adjudicatory record made before the [Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Hearing Panel Subcommittee’s] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Hearing Panel Subcommittee’s] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.’ Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).” Syl. Pt. 2, *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

Syl. pt. 2 - The authority of the Supreme Court to regulate and control the practice of law in West Virginia, including the lawyer disciplinary process, is constitutional in origin. *W.Va. Const.* art. VIII, § 3.

Syl. pt. 3 - The Lawyer Disciplinary Board was created as an agency of the Supreme Court. It is not an agency independent of the Court. As an administrative arm of the Court the Board is subject to the exclusive control and supervision of the Court, including the approval of all regulatory and adjudicatory activities regarding attorney disciplinary proceedings. In the exercise of this plenary authority to regulate and control the practice of law, we have delegated to the Board certain administrative, investigative, and adjudicatory functions. The delegation of certain administrative, investigative and adjudicatory functions is a method of assisting the Court.

Syl. pt. 4 - It is the function of the Investigative Panel of the Lawyer Disciplinary Board to determine whether probable cause exists to formally charge a lawyer with a violation of the Rules of Professional Conduct. Upon the Investigative Panel’s receipt of the report filed by the Office of Disciplinary Counsel, the Investigative Panel must file a written decision as to whether there is probable cause to formally charge the lawyer with a violation of the Rules of Professional Conduct, whether the matter should be investigated further by the ODC, or whether the matter should be referred for mediation in accordance with the Rules of Procedure for Court-Annexed Mediation.

ATTORNEYS

Professional responsibility (continued)

Misappropriation of funds (continued)

Lawyer Disciplinary Board v. Kupec, (continued)

Syl. pt. 5 - Should the Investigative Panel of the Lawyer Disciplinary Board determine probable cause does not exist to formally charge a lawyer with a violation of the Rules of Professional Conduct, the Investigative Panel is required to issue a brief explanatory statement supporting its decision to close the complaint. Should the Investigative Panel determine that probable cause does exist but formal discipline is not appropriate, the Investigative Panel must comply with Rule 2.9 of the Rules of Disciplinary Procedure. Finally, when the Investigative Panel has determined that probable cause exists and that formal discipline is appropriate, it is the responsibility of the Investigative Panel to file a formal charge with the Clerk of the Supreme Court.

Syl. pt. 6 - No provision in the Rules of Lawyer Disciplinary Procedure grants to the Hearing Panel Subcommittee of the Lawyer Disciplinary Board the explicit or implicit authority to dismiss outright, a formal disciplinary charge brought against an attorney without holding an evidentiary hearing on the matter. The fact that, prior to a hearing, an attorney and the Office of Disciplinary Counsel reach an agreement to request dismissal of charges, or the fact that the Hearing Panel Subcommittee recommends the dismissal of charges with or without objection by the Office of Disciplinary Counsel, does not dispense with the evidentiary hearing requirement set forth in Rule 3.3 of the Rules of Disciplinary Procedure.

Syl. pt. 7 - Should the Supreme Court reject the recommendation of dismissal of a formal charge by the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, an evidentiary record is necessary for the Court to determine the proper disposition of the charge. When no evidentiary record is made on a formal charge that is recommended for dismissal by the Hearing Panel Subcommittee, and such dismissal is rejected by the Court, we will remand the matter to the Hearing Panel Subcommittee for the making of an evidentiary record. Should the Court determine that other charges not recommended for dismissal by the Hearing Panel Subcommittee were proven based upon an evidentiary hearing held before the Hearing Panel Subcommittee, the Court may, in its discretion, hold in abeyance imposition of sanctions until the case is returned to this Court from remand.

ATTORNEYS

Professional responsibility (continued)

Misappropriation of funds (continued)

Lawyer Disciplinary Board v. Kupec, (continued)

Syl. pt. 8 - Rule 3.10 of the Rules of Lawyer Disciplinary Procedure states that “[w]ithin sixty days after the final hearing ... the Hearing Panel Subcommittee [of the Lawyer Disciplinary Board] shall file a written recommended decision with the Clerk of the Supreme Court of Appeals.... The decision shall contain findings of fact, conclusions of law, and a recommended disposition.” Neither Rule 3.10 nor any provision in the Rules of Lawyer Disciplinary Procedure explicitly or implicitly authorizes the Hearing Panel Subcommittee to dismiss outright a formal charge upon which an evidentiary hearing was held. Rule 3.10 implicitly authorizes the Hearing Panel Subcommittee to recommend to the Supreme Court dismissal of a formal charge on which an evidentiary hearing was held. Any agreement between an attorney and the Office of Disciplinary Counsel or Hearing Panel Subcommittee to dismiss a formal charge, upon which an evidentiary hearing was held, is merely a dispositional recommendation to the Supreme Court.

Syl. pt. 9 - “This Court may in appropriate circumstances exercise its inherent supervisory power to review attorney disciplinary charges for which the [Hearing Panel Subcommittee of the Lawyer Disciplinary Board] has not recommended discipline.” Syl. Pt. 3, *Committee on Legal Ethics of West Virginia State Bar v. Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (1988).

The Court engaged in a lengthy review of the various roles of the Office of Disciplinary Counsel, the Lawyer Disciplinary Board and its Investigative Panel and the Hearing Panel Subcommittee, noting that the ultimate authority for all discipline resides with the Court.

Applying its own standards to the recommendations of the Hearing Subcommittee, the Court found respondent misappropriated funds. Noting that restitution is insufficient as a defense, the Court, or even as mitigation when not made promptly or without coercion, the Court found trust funds were converted to unauthorized purposes.

However, the Court found dismissal of the other charges improper and remanded for evidentiary hearing on the dismissed charges.

ATTORNEYS

Professional responsibility (continued)

Procedures for discipline

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

Reinstatement

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Prosecuting

Conduct at trial

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comment on appellant and witnesses, (p. 471) for discussion of topic.

Disqualification

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

Appellant was convicted of felony murder, attempted first-degree murder, kidnaping, attempted aggravated robbery and grand larceny. Among other assignments of error, appellant claimed the prosecuting attorney should have been disqualified in that he had known appellant for years and that bitter feelings were exhibited by the prosecuting attorney in his questioning.

It was clear that the judge and the prosecuting attorney who had put appellant in jail were targets on this particular spree.

ATTORNEYS

Prosecuting (continued)

Disqualification (continued)

State v. Hottle, (continued)

Syl. pt. 7 - “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.” Syllabus Point 1, *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987).

The Court noted the importance of an impartial prosecuting attorney, without a personal interest. (See extensive cites in opinion). Here, although a prosecuting attorney who is an intended victim should generally be disqualified, the prosecuting attorney did not know his victim status until appellant testified at trial. No error.

Ethical responsibility

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Residence of

State v. Macri, 487 S.E.2d 891 (1996) (Workman, J.)

See PROSECUTING ATTORNEY Assistants, Residence of, (p. 469) for discussion of topic.

Psychiatric examination

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

See ATTORNEYS Incapacitation, Supervised practice, (p. 95) for discussion of topic.

ATTORNEYS

Public reprimand

Lawyer Disciplinary Board v. Frame, 479 S.E.2d 676 (1996) (Per Curiam)

See ATTORNEYS Professional responsibility, Dual representation, (p. 98) for discussion of topic.

Reinstatement

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Standard of care

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

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

Supervised practice

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Suspension

Office of Disciplinary Counsel v. Butcher, 475 S.E.2d 162 (1996) (Per Curiam)

See ATTORNEYS Disappearance, (p. 83) for discussion of topic.

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

ATTORNEYS

Suspension (continued)

Reinstatement following

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

AUTOMATISM

Defense in criminal matters

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

BAIL

Home confinement

As condition of bail

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See SENTENCING Home confinement, Credit for time served pre-trial, (p. 541) for discussion of topic.

BATTERED WOMEN'S SYNDROME

Admissibility

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See EVIDENCE Admissibility, Battered women's syndrome, (p. 179) for discussion of topic.

BIFURCATION

Grounds for

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J)

Appellant was convicted of first-degree murder in the death of his infant son. On appeal he claimed he was prejudiced because his motion for bifurcation was denied. Appellant claimed *W.Va. Code* 62-3-15 is unconstitutional.

Syl. pt. 4 - A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.

Syl. pt. 5 - The burden of persuasion is placed upon the shoulders of the party moving for bifurcation. A trial judge may insist on an explanation from the moving party as to why bifurcation is needed. If the explanation reveals that the integrity of the adversarial process which depends upon the truth-determining function of the trial process would be harmed in a unitary trial, it would be entirely consistent with a trial court's authority to grant the bifurcation motion.

Syl. pt. 6 - Although it virtually is impossible to outline all factors that should be considered by the trial court, the court should consider when a motion for bifurcation is made: (a) whether limiting instructions to the jury would be effective; (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa; (d) whether either party can demonstrate unfair prejudice or disadvantage by bifurcation; (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and (f) whether bifurcation unreasonably would lengthen the trial.

Syl. pt. 7 - An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

The Court found the constitutionality of the statute to be beyond question. *Billotti v. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990); *State ex rel. Leach v. Hamilton*, W.Va., 280 S.E.2d 62 (1980); *Moore v. McKenzie*, 160 W.Va. 511, 236 S.E.2d 342 (1977); *State ex rel. Rasnake v. Narick*, 159 W.Va. 542, 227 S.E.2d 203 (1976).

BIFURCATION

Grounds for (continued)

State v. LaRock, (continued)

Nonetheless, a trial court should have discretion to bifurcate a trial. The constitutionality of bifurcation has already been upheld. *Schofield v. West Virginia Dept. of Corrections*, 185 W.Va. 199, 406 S.E.2d 425 (1991); *Leach, supra*; *Rasnake, supra*. Further, *W.Va. Code* 62-3-15 does not forbid bifurcation.

(NOTE: the Court listed factors arguing for bifurcation; see case for discussion). Here, however, the Court refused to grant a new trial. Affirmed.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder without mercy. The trial court refused to bifurcate the guilt and penalty phases.

Syl. pt. 6 - “A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.” Syl. pt. 4, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The Court noted that to show an abuse of discretion a showing of “compelling prejudice” is required. This showing is tantamount to “fundamental unfairness.” *LaRock, supra* at Slip opinion 44.

(NOTE: Current bifurcation rules were not in effect at the time of this case.)

BREAKING AND ENTERING

Building defined

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

Appellant was convicted of breaking and entering, petit larceny and conspiracy to commit breaking and entering in the theft of nitrous oxide canisters from a hospital. *W.Va. Code* 61-3-12 specifies breaking and entering is improper into “any office shop, storehouse, warehouse, banking house or any house or building, other than a dwelling house or outhouse adjoining thereto..... .”

The tanks were stored in an enclosure with a concrete floor, two brick walls forming the exterior of the hospital, two walls of chain link fence and a chain link fence roof. In an instruction, the trial court defined building to include a structure or edifice enclosing a space.

Syl. pt. 2 - “When objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.” Syl Pt. 1, *State Rd. Comm’n v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964).

Although appellate counsel objected on appeal that the enclosure was not a building within the meaning of the statute, the Court refused to consider the assignment of error because trial counsel did not object to the trial court’s instruction.

BURGLARY

Plea bargain

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See PLEA BARGAIN Finding of fact required, (p. 442) for discussion of topic.

Sufficiency of indictment

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See INDICTMENT Sufficiency of, Burglary, (p. 310) for discussion of topic.

CHARGING

Prosecuting attorney

Duty to charge all offenses in common scheme

State v. Hubbard, 491 S.E.2d 305 (1997) (Per Curiam)

See PLEADING AND JOINDER Common scheme or plan, All offenses to be joined, (p. 445) for discussion of topic.

CLERGY

Privileged communication

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See PRIVILEGES Clergy-communicant, (p. 454) for discussion of topic.

COLLATERAL CRIMES

Admissibility

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 182) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 184) for discussion of topic.

State v. Williams, 480 S.E.2d 162 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 186) for discussion of topic.

COMMITMENT

Due process required

State ex rel. White v. Todt, 475 S.E.2d 426 (1996) (McHugh, C.J.)

See MENTAL HYGIENE Commitment, Due process requirements, (p. 418) for discussion of topic.

COMMUNITY SENTIMENT

Change of venue resulting from

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See VENUE Change of venue, Sufficiency of proof for, (p. 579) for discussion of topic.

COMMUTATION

Governor's power to commute sentences

State ex rel. Forbes v. Caperton, 481 S.E.2d 780 (1996) (Workman, J.)

See SENTENCING Commutation of, Governor's power, (p. 527) for discussion of topic.

CONCERTED ACTION

Liability for

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

Test for

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

CONDITIONS OF CONFINEMENT

Punitive segregation

Denial of access to courts

State ex rel. Osborne v. Kirby, No. 23982 (7/11/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Punitive segregation, Denial of access to courts, (p. 453) for discussion of topic.

CONFESSIONS

Accomplice

State ex rel. Jones v. Trent, 490 S.E.2d 357 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions of accomplice, (p. 192) for discussion of topic.

Admissibility

State v. Strook, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

Out of court statements

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

Prompt presentment

Delay in taking before magistrate

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

State v. George Anthony W., 488 S.E.2d 361 (1996) (Per Curiam)

See JUVENILES Prompt presentment, (p. 392) for discussion of topic.

Juveniles

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

CONFESSIONS

Standard for review

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

Suppression of

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

Voluntariness

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 514) for discussion of topic.

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 518) for discussion of topic.

State v. Rager, 484 S.E.2d 177 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 519) for discussion of topic.

CONFRONTATION CLAUSE

Witness unavailable

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

CONSPIRACY

Elements of

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J.)

Appellant was convicted of delivery of marijuana and cocaine; and of conspiracy to deliver marijuana. On appeal he claimed the prosecution failed to introduce sufficient evidence to support either delivery or conspiracy charges and that the circuit court erred in denying him a directed verdict.

Syl. pt. 2 - “ ‘ “ ‘Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W.Va. 325, 168 S.E.2d 716 (1969).” Syl. pt. 1, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974).’ Syllabus Point 10, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).” Syl. Pt. 1, *State v. Stevens*, 190 W.Va. 77, 436 S.E.2d 312 (1993).

Syl. pt. 3 - “In order for the State to prove a conspiracy under *W.Va. Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.” Syl. Pt. 4, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).

Syl. pt. 4 - “The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

CONSPIRACY

Elements of (continued)

State v. Broughton, (continued)

Syl. pt. 5 - “A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.” Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found the evidence sufficient to support both delivery and conspiracy charges. Viewing the evidence favorably for the prosecution, it was shown that appellant received payment for both the marijuana given to an informant by another and for cocaine appellant handed to the informant.

Further, it was shown that appellant accepted money for delivery of both the marijuana and cocaine. The credibility of the informant was a matter for the jury. No error.

CONTINUANCE

Grounds for

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

Appellant was convicted of second-degree murder. Prior to trial his counsel filed a "Notice of Intention to Rely upon Defense of Mental Condition." During a status conference two weeks prior to trial defense counsel provided the prosecution with a psychiatric report and stated that appellant would not rely on an insanity defense but would use the report on the issue of whether appellant had the requisite mental intent for murder.

The prosecution moved for a continuance to obtain an expert, which motion was granted.

Syl. pt. 3 - "The determination of what is good cause, pursuant to *W.Va. Code*, 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to *W.Va. Code*, 62-3-1, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or upon the court's own motion." Syllabus Point 2, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

The Court found sufficient good cause for the continuance. No denial of appellant's right to a speedy trial. No error.

State v. Snider, 196 W.Va. 513, 474 S.E.2d 180 (1996) (Per Curiam)

Appellant was convicted of DUI, first offense and obstructing an officer. Appellant's jury trial in magistrate court was scheduled 21 December 1994; on 19 December 1994 he requested a continuance due to the unavailability of his witness. Although no record was made, appellant contended the motion was denied the day of the trial.

In affirming the magistrate court conviction, the circuit court noted appellant's motion for continuance failed to state when the witness would be available and that the motion was not filed within the time period specified by Rule 12(b)(1) of the Rules of Criminal Procedure for Magistrate Courts. Appellant did not subpoena the witness.

CONTINUANCE

Grounds for (continued)

State v. Snider, (continued)

Syl. pt. 1 - “It is well settled as a general rule that the question of continuance is in the sound discretion of the trial court, which will not be reviewed by the appellate court, except in case it clearly appears that such discretion has been abused.” Syllabus Point 1, *Levy v. Scottish Union & National Ins. Co.*, 58 W.Va. 546, 52 S.E. 449 (1905); Syllabus Point 2, *Nutter v. Maynard*, 183 W.Va. 247, 395 S.E.2d 491 (1990).

Syl. pt. 2 - “Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied.” Syllabus Point 3, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979); Syllabus Point 4, *Hamilton v. Ravasio*, 192 W.Va. 183, 451 S.E.2d 749 (1994).

Syl. pt. 3 - “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.” Syllabus Point 3, *State v. McCallister*, 178 W.Va. 77, 357 S.E.2d 759 (1987).

Appellant failed to make the showing required by *McCallister*, *supra*.
Affirmed.

CORAM NOBIS

Possible when client released

Kemp v. State, No. 23980 (12/16/97) (Per Curiam)

See HABEAS CORPUS Moot when client released, (p. 273) for discussion of topic.

COURT REPORTER

Transcript

Failure to produce

State ex rel. Johnson v. Jones, No. 23359 (5/15/96) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 575) for discussion of topic.

State ex rel. Stacy v. Hall, No. 23455 (6/26/96) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 575) for discussion of topic.

CRITICAL STAGE

Right to be present

Exhumation of victim

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

Appellant was convicted of voluntary manslaughter in the death of her newborn baby. Following a first autopsy of the body the victim was exhumed for the purpose of a second autopsy. Appellant claimed she was not notified of the exhumation and would have objected. Appellant's motion to suppress the results was denied.

The Court noted the right to be present at critical stages is guaranteed by Art. III, Sec. 14, *West Virginia Constitution* and the Fifth and Sixth Amendments to the *United States Constitution*. A critical stage is defined as "a criminal proceeding where the defendant's right to fair trial will be affected. Syl. Pt. 2, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981). If a defendant is not present "the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." Syl. Pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977). But, "the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs." Syl. Pt. 3, *State ex rel. Redman v. Hedrick*, 185 W.Va. 709, 408 S.E.2d 659 (1991).

The Court noted Rule 43, *Rules of Criminal Procedure* also require a defendant to be present but not where "a technical question of law depending upon facts within the personal knowledge of the defendant." Rule 43(c)(3). Appellant fell within this exception. No error.

Communication with jury

State v. Hicks, 482 S.E.2d 641 (1996) (Per Curiam)

See RIGHT TO BE PRESENT Communication with jury, (p. 491) for discussion of topic.

Judge communication with jury

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

CRITICAL STAGE

Right to be present (continued)

Jury instructions

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

CROSS-EXAMINATION

Abuse and neglect

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997)
(Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

Explaining evidence

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Admissibility, Invited error, (p. 205) for discussion of topic.

Impeachment

Use of criminal conviction for

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Impeachment, Criminal conviction use for, (p. 232) for discussion of topic.

Prior voluntary statement without counsel

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

Waiving prior objections

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Admissibility, Invited error, (p. 205) for discussion of topic.

CRUEL AND UNUSUAL PUNISHMENT

Excessive fines

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

Proportionality

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See SENTENCING Proportionality, (p. 550) for discussion of topic.

CUSTODY

Conflict between state and federal

State ex rel. Massey v. Hun, 478 S.E.2d 579 (1996) (Per Curiam)

See SENTENCING Conflict between state and federal sentences, (p. 528) for discussion of topic.

Juveniles

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

DEADLY WEAPON

Presumption of malice

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

DEFENSES

Insanity

Test for

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

DETENTION

Written reasons requiring

State ex rel. Lewis v. Stephens, 483 S.E.2d 526 (1996) (Per Curiam)

See JUVENILES Detention, Capacity of centers, (p. 384) for discussion of topic.

DIRECTED VERDICT

Standard for review

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See CONSPIRACY Elements of, (p. 125) for discussion of topic.

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

Appellant was convicted of aggravated robbery. He claimed that the trial court erred in refusing his motion for directed verdict.

Syl. pt. 3 - “‘Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W.Va. 325 [168 S.E.2d 716] (1969).” Syllabus Point 1, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974).

The Court noted that all the witnesses agreed as to appellant’s identity and clearly saw the crime. No error.

DISCIPLINE

Alcohol or drug addiction

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

See ATTORNEYS Incapacitation, Supervised practice, (p. 95) for discussion of topic.

DOMESTIC VIOLENCE

Parole revocation

When sufficient for

State ex rel. Schoolcraft v. Merritt, No. 23850 (7/8/97) (Per Curiam)

See PAROLE Revocation of, Domestic violence, (p. 432) for discussion of topic.

DOUBLE JEOPARDY

Civil versus criminal penalties

State v. Greene, 473 S.E.2d 921 (1996) (Albright, J.)

Appellant was indicted for DUI and possession of a controlled substance with intent to deliver. Police seized appellant's truck, a weight scale and a cellular telephone. Pursuant to *W.Va. Code* 60A-7-701, *et seq.*, prosecutors sought forfeiture of the seized goods; their petition was granted prior to appellant's indictment. Appellant ultimately pled guilty to the charges and was sentenced to six months in jail and fined \$1000.00.

Appellant sought dismissal of the indictment on double jeopardy grounds, arguing that civil forfeiture of the truck and weight scale in addition to incarceration, with a fine, constituted double punishment for the same offense. That motion was denied, as was a Rule 35(a) reduction of sentence motion.

Syl. pt. 1 - The scope of the Double Jeopardy Clause in the Fifth Amendment of the *Federal Constitution* is at least coextensive with that of the Double Jeopardy Clause in the West Virginia Constitution.

Syl. pt. 2 - To determine whether a particular statutorily defined penalty is civil or criminal for the purpose of double jeopardy under Article III, § 5 of the *West Virginia Constitution*, we must ask: (1) whether the Legislature, in establishing the penalizing mechanism, indicated, either expressly or impliedly, that the statutory penalty in question was intended to be civil or criminal; and (2) where we find that the Legislature has indicated an intention to establish a civil penalty, whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

Syl. pt. 3 - West Virginia Code §§ 60A-7-703(a)(2) and (4) are not punitive for the purpose of the guarantees against double jeopardy as expressed in the *United States* and *West Virginia Constitutions*.

Generally, civil forfeitures are not punishment for purposes of double jeopardy. *U.S. v. Ursery*, 95-345 (U.S. (1996)). Although the Court noted West Virginia Constitutional protections may be more extensive than United State Constitutional protection, this case did not qualify. No error.

Drug offense

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

DOUBLE JEOPARDY

Enhancement

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

Forfeiture

State v. Greene, 473 S.E.2d 921 (1996) (Albright, J.)

See DOUBLE JEOPARDY Civil versus criminal penalties, (p. 142) for discussion of topic.

State v. One (1) 1994 Dodge Truck Auto., 478 S.E.2d 118 (1996) (Per Curiam)

See FORFEITURE Double jeopardy, (p. 264) for discussion of topic.

Generally

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

State v. Greene, 473 S.E.2d 921 (1996) (Albright, J.)

See DOUBLE JEOPARDY Civil versus criminal penalties, (p. 142) for discussion of topic.

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See DOUBLE JEOPARDY Test for, (p. 149) for discussion of topic.

DOUBLE JEOPARDY

Joinder

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See JOINDER Prejudicial, Separation permissible, (p. 346) for discussion of topic.

State ex rel. State v. Hill, 491 S.E.2d 765 (1997) (Per Curiam)

See INDICTMENT Common scheme or plan, Joinder of multiple offenses, (p. 306) for discussion of topic.

Legislative intent

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See DOUBLE JEOPARDY Test for, Legislative intent, (p. 152) for discussion of topic.

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

Multiple offenses

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

DOUBLE JEOPARDY

Legislative intent (continued)

Multiple punishments

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

Lesser included offenses

Enhancement based on

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

Multiple offenses

Joinder of

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See JOINDER Prejudicial, Separation permissible, (p. 346) for discussion of topic.

Parole restriction as multiple punishment

Legislative intent

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

DOUBLE JEOPARDY

Parole restriction as multiple punishment (continued)

Legislative intent (continued)

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See DOUBLE JEOPARDY Test for, (p. 149) for discussion of topic.

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

Appellant was charged with malicious assault, carrying a deadly weapon, wanton endangerment and unlawful shooting. He pled guilty to wanton endangerment involving a firearm; the remaining charges were dismissed. After giving appellant an opportunity to withdraw his plea and explaining sentencing options the court made a finding that a firearm was used.

Defense counsel objected to application of *W.Va. Code*, 62-12-13(a)(1)(A), requiring three years jail time, or the complete sentence, whichever is less, before parole eligibility whenever a firearm is used. Counsel termed this an enhancement of sentence. Following briefs and a hearing the court sentenced appellant to five years, with a minimum three years prior to parole eligibility. Appellant claims application of this enhancement violated double jeopardy principles.

Syl. pt. 1 - Both the construction and scope of *W.Va. Code*, 62-12-13(a)(1)(A) (1988), the parole statute, and a Double Jeopardy claim are reviewed *de novo*.

Syl. pt. 2 - In order to establish a double jeopardy claim, the defendant must first present a *prima facie* claim that double jeopardy principles have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant.

Syl. pt. 3 - The purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments.

DOUBLE JEOPARDY

Parole restriction as multiple punishment (continued)

Legislative intent (continued)

State v. Sears, (continued)

Syl. pt. 4 - The strength of a Double Jeopardy claim is whether a defendant is facing multiple punishment for the same course of conduct. To determine if a particular statutory sanction constitutes punishment for Double Jeopardy purposes, courts should consider: (1) whether the statute serves solely a remedial purpose or serves to punish and deter criminal conduct and (2) whether the Legislature tied the sanction to the commission of specific offenses.

Syl. pt. 5 - Under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), if two statutes contain identical elements of proof, the presumption is that double jeopardy principles have been violated unless there is a clear and definite statement of intent by the Legislature that cumulative punishment is permissible.

Syl. pt. 6 - A prior conviction which is used as the predicate to establish the crime of wanton endangerment with a firearm also cannot be used to enhance a defendant's punishment under *W.Va. Code*, 62-12-13 (1988), the parole statute, in the absence of explicit legislative authority.

Noting that legislative intent is a better test than whether each offense requires proof of an additional element the other does not, the Court found that parole enhancement is inapplicable to the offense of wanton endangerment involving a firearm as violative of double jeopardy principles. It is the conduct prohibited rather than the "offense" which is the focus.

The Court rejected the prosecution's argument that only one sentence was given for one offense, not multiple punishments given for the same crime. The Legislature clearly intended to deter specific conduct but did not clearly authorize additional punishment for the same conduct. Parole matters are clearly punishment. *Conner v. Griffith*, 160 W.Va. 680 at 683, 238 S.E.2d 529 at 530 (1977). The parole provision here is an additional punishment, not merely an enhancement and in the absence of clearly legislative intent to punish, is violative of double jeopardy principles.

DOUBLE JEOPARDY

Possession with intent to deliver

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See DOUBLE JEOPARDY Test for, Legislative intent, (p. 152) for discussion of topic.

***Prima facie* showing**

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

Purpose of

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

Same transaction test of

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

With same evidence test

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See DOUBLE JEOPARDY Test for, (p. 149) for discussion of topic.

Sufficiency of evidence

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See DUI Sufficiency of evidence, (p. 163) for discussion of topic.

DOUBLE JEOPARDY

Test for

State ex rel. State v. Hill, 491 S.E.2d 765 (1997) (Per Curiam)

See INDICTMENT Common scheme or plan, Joinder of multiple offenses, (p. 306) for discussion of topic.

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

Appellant was convicted of DUI, first offense. After the policeman gave field sobriety tests and took him in, appellant refused to take the secondary chemical test. He was charged with driving left of center and paid a fine the evening of arrest. He was later charged with DUI, third offense.

On appeal he claimed the driving left of center and DUI charges arose from the same transaction and trying them separately violates double jeopardy principles.

Syl. pt. 5 - “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. 6 - “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 while the other does not.” Syl. pt. 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

See also, *State ex rel. Johnson v. Hamilton*, 164 W.Va. 682, 266 S.E.2d 125 (1980); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932); *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980).

The Court adopted the “same evidence” test in *Gilkerson v. Lilly*, 169 W.Va. 412, 288 S.E.2d 164 (1982). The “same transaction” test if a procedural rule embodied in *W.Va. R.Crim.P.* 8(a). The *Blockburger, supra*, test is the law. Here, since driving left of center requires different proof, no double jeopardy error in failing to try together.

DOUBLE JEOPARDY

Test for (continued)

State v. Johnson, (continued)

Similarly, because *Watson, supra*, excluded from joinder those offenses not known to the prosecuting attorney or committed within the same county, no error in failing to join.

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

Appellant was convicted of malicious assault, attempted murder and wanton endangerment with a firearm. On appeal he claimed that double jeopardy principles prohibited his conviction for both malicious assault and wanton endangerment; and that the evidence was insufficient to convict.

Appellant telephoned the victim, a friend who was to marry his ex-girlfriend, and threatened him. Appellant then proceeded to the victim's house. The two men struggled briefly and the victim was shot with appellant's gun.

Syl. pt. 1 - "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.' Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977)." Syllabus Point 2, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 2 - "[A] double jeopardy claim . . . [is] reviewed *de novo*." Syllabus Point 1, in part, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996).

Syl. pt. 3 - "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses." Syllabus Point 8, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

DOUBLE JEOPARDY

Test for (continued)

State v. Wright, (continued)

Syl. pt. 4 - “[W]here 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 a fact which the other does not.’ *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed 306, 309 (1932).” Syllabus Point 4, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 5 - “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.’ Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [*overruled on other grounds, State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994)].” Syllabus Point 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 6 - “The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syllabus Point, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court noted the State confessed error on the issue of double jeopardy. Although wanton endangerment requires use of a firearm and malicious assault does not, here the single act involved a gunshot so the elements were identical. It would have been impossible to commit the malicious assault charged without also committing wanton endangerment; wanton endangerment is a lesser included offense of malicious assault under these facts.

The Court found sufficient evidence to convict. Viewing the evidence in the light most favorable to the prosecution, appellant’s claim of an accidental shooting conflicted with both a firearms expert and the victim’s testimony. Reversed in part, affirmed in part.

DOUBLE JEOPARDY

Test for (continued)

Legislative intent

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

Appellant was convicted of four counts of possession of heroin with intent to deliver. A police informant was supplied with money to give to an Albert Parker. After the exchange Parker drove to a motel, then delivered heroin to the informant.

Upon arrest, Parker agreed to cooperate with police. He admitted purchasing heroin on at the motel from someone named “Turbo.” Officers observed a man matching Parker’s description of “Turbo” drive away from the motel with another man. They stopped him and informed him he was the focus of an investigation and that he would be searched. During a pat-down, officers found eight bundles of heroin. A full search incident to the arrest followed.

Upon entering the motel room, officers found a Sandra Wright who gave them permission to look around. They found ten more bundles of heroin. Appellant admitted he rented the room and signed a written consent to search. A service technician later found seventy more bundles of heroin, along with a digital scale and ammunition. All three series of bundles were similarly marked.

Appellant claims conviction on the four counts and consecutive sentences for each violated principles of double jeopardy. He claimed possession of one drug in four places should be construed as one offense. The prosecution claimed each count required proof of different facts.

Syl. pt. 5 - “A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.” Syl. Pt. 7, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

DOUBLE JEOPARDY

Test for (continued)

Legislative intent (continued)

State v. Rahman, (continued)

Syl. pt. 6 - “In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.” Syl. Pt. 8, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Appellant sought to distinguish *State v. Broughton*, 196 W.Va. 281, 470 S.E.2d 412 (1996) and *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983) by saying he possessed only one type of drug. He also cited *State v. Barnett*, 168 W.Va. 361, 284 S.E.2d 622 (1981), holding delivery of two substances in the same category at the same time to the same person constituted one offense.

The Court held these charges did not constitute delivery to the same person at the same time. Each count here required proof of different facts. Cf. *United States v. Williams*, 480 F.2d 1204 (6th Cir. 1973). No error.

Writ of prohibition by prosecution

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

State ex rel. State v. Hill, 491 S.E.2d 765 (1997) (Per Curiam)

See INDICTMENT Common scheme or plan, Joinder of multiple offenses, (p. 306) for discussion of topic.

DUE PROCESS

Conditions of confinement

State ex rel. Osborne v. Kirby, No. 23982 (7/11/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Punitive segregation, Denial of access to courts, (p. 453) for discussion of topic.

Critical stages

Different judges presiding

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See DUE PROCESS Same judge throughout proceeding, No requirement for, (p. 156) for discussion of topic.

Denial of access to court

State ex rel. Osborne v. Kirby, No. 23982 (7/11/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Punitive segregation, Denial of access to courts, (p. 453) for discussion of topic.

Entrapment

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

Juveniles

Automatic transfer to adult jurisdiction

State v. Robert K. McL., 496 S.E.2d 887 (1997) (Starcher, J.)

See JUVENILES Transfer to adult jurisdiction, Rehabilitation as factor, (p. 401) for discussion of topic.

DUE PROCESS

Magistrate court conviction

Circuit court imposes higher penalty

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

Appellant was convicted of DUI, second offense. Following conviction in magistrate court, he was again convicted in circuit court following appeal. The circuit court remanded to the magistrate court for clarification of the conditions of home confinement originally imposed.

Following a general sentence of six months home confinement issued by the magistrate court, the circuit court imposed a number of terms.

Syl. pt. 5 - "A defendant who is convicted of an offense in a trial before a magistrate or in municipal court and exercises his statutory right to obtain a trial . . . in the circuit court is denied due process when, upon conviction at his second trial, the sentencing judge imposes a heavier penalty than the original sentence. *W.Va. Const.* Art. 3, § 10." Syllabus Point 2, *State v. Bonham*, 173 W.Va. 416, 317 S.E.2d 501 (1984).

The Court found the circuit court's action fell within Rule 35(a) of the *Rules of Criminal Procedure* (allowing for correcting a sentence) in that the circuit court corrected the magistrate court's original sentence in order comply with *W.Va. Code* 62-11B-5 which requires specific conditions for home confinement. A heavier sentence was not imposed; both were for six months. No error.

Mental hygiene commitment

State ex rel. White v. Todt, 475 S.E.2d 426 (1996) (McHugh, C.J.)

See MENTAL HYGIENE Commitment, Due process requirements, (p. 418) for discussion of topic.

Outrageous government conduct

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

DUE PROCESS

Revocation hearing

Minimum required

State ex rel. Jones v. Trent, 490 S.E.2d 357 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions of accomplice, (p. 192) for discussion of topic.

Same judge throughout proceeding

No requirement for

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder in the death of his father and second-degree sexual assault in the rape of his stepmother. On appeal he claimed the cumulative prejudicial effect of using three separate judges at critical stages of the proceeding denied him due process. Some evidence which an earlier-presiding judge had said would not be admitted was later allowed into evidence.

Syl. pt. 8 - Due process does not require that a single judge preside over all the stages of a criminal proceeding.

The Court noted appellant was unable to cite any authority. No error.

DUI

Conviction in another state

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

Double jeopardy

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See DOUBLE JEOPARDY Test for, (p. 149) for discussion of topic.

Driving while revoked

After statutory revocation period

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

Petitioner is the prosecuting attorney of Boone County; he sought prohibition of an order to dismiss an information for operating a motor vehicle while license revoked for a DUI conviction. The statutory period of revocation (six months) had expired at the time the information was filed but the perpetrator had never gone through the prescribed steps for license reinstatement.

Syl. pt. 1 - "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Compensation Comm'r.*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

DUI

Driving while revoked (continued)

After statutory revocation period (continued)

State ex rel. Hall v. Schlaegel, (continued)

Syl. pt. 2 - ““A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.’ Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).” Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983), superseded by statute on other grounds as stated in *State ex rel. Hagg v. Spillers*, 181 W.Va. 387, 382 S.E.2d 581 (1989).

Syl. pt. 3 - Until such time as a driver whose license has been revoked for driving under the influence has complied with the statutorily-prescribed steps for reissuance of his driver’s license set forth in West Virginia Code § 17C-5A-3(b) (1996), he/she remains subject to prosecution for driving while his/her license is revoked for driving under the influence pursuant to West Virginia Code § 17B-4-3(b) (1996), notwithstanding the fact that the statutory period of revocation has elapsed.

The Court noted the criminal statute, *W.Va. Code* 17B-4-3(b) simply says driving while revoked for driving under the influence is a separate offense. The Court also noted that the revocation order issued by the DMV clearly states that a license cannot be reinstated until the requirements are met.

Considering the various statutes relating to suspension and revocation of licenses and the criminal statutes relating to DUI and driving while revoked, the Court concluded that the legislative intent was to have a revocation of license continue until such time as the license is reinstated, rather than have a suspension for a specific period of time. To rule otherwise protects those who refuse to comply with the reinstatement procedures. Writ granted.

DUI

Driving while suspended

Joinder with

State v. Ludwick, 475 S.E.2d 70 (1996) (Per Curiam)

Appellant was convicted of third-offense DUI and third-offense driving while suspended (for driving under the influence). The circuit court denied appellant's motion for severance and separate trial on each charge.

Syl. pt. - "Even where joinder or consolidation of offenses is proper under the *West Virginia Rules of Criminal Procedure*, the trial court may order separate trials pursuant to Rule 14(a) on the ground that such joinder or consolidation is prejudicial. The decision to grant a motion for severance pursuant to *W.Va.R.Crim.P.* 14(a) is a matter within the sound discretion of the trial court." Syllabus point 3, *State v. Hatfield*, 181 W.Va. 106, 380 S.E.2d 670 (1988).

Appellant indicated he had serious disagreements with his appointed counsel. Further, he told the court he could not defend on the DUI charge without incriminating himself on the driving while suspended charge. The danger is that the jury may convict because it sees the defendant as a "bad man." See C.A. Wright, *Federal Practice and Procedure: Criminal 2d Sec. 222* (1982).

A criminal defendant has the absolute right not to testify. *State v. Layton*, 189 W.Va. 470, 432 S.E.2d 740 (1993). Further, although the charges are intertwined, proof of one may not require proof of essential elements of the other. Unnecessarily prejudicial evidence could be introduced. (The Court also noted pointedly that assistance of counsel did not appear to be vigorous.) Reversed and remanded with directions.

Enhancement

Based on conviction in another state

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

DUI

Enhancement (continued)

Based on conviction in another state (continued)

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

Sheriff's notice

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

Indictment

Amendment to

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See INDICTMENT Amendments to, (p. 303) for discussion of topic.

Amendment to date of offense

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

See INDICTMENT Amendment to, Effect of, (p. 304) for discussion of topic.

DUI

Joinder with other charges

State v. Ludwick, 475 S.E.2d 70 (1996) (Per Curiam)

See DUI Driving while suspended, Joinder with, (p. 159) for discussion of topic.

Per se offense versus intoxication

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

See INSTRUCTIONS Crime not charged, Effect of including, (p. 327) for discussion of topic.

Probable cause to stop

Reasonable suspicion standard

Muscatell v. Cline, No. 22945 (6/14/96) (Albright, J.)

See PROBABLE CAUSE Investigatory stop, (p. 456) for discussion of topic.

State v. Bishop, 488 S.E.2d 453 (1997) (Per Curiam)

See PROBABLE CAUSE Investigatory stop, Grounds for, (p. 458) for discussion of topic.

Prosecutorial appeal

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

DUI

Reissuance of license

Following statutory procedure

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

See DUI Driving while revoked, After statutory revocation period, (p. 157) for discussion of topic.

Revocation of licenses

Continues until reinstatement

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

See DUI Driving while revoked, After statutory revocation period, (p. 157) for discussion of topic.

Second offense

Enhancement based on offense in another state

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

See SENTENCING Enhancement, DUI as second felony, (p. 538) for discussion of topic.

DUI

Sentencing

Enhancement based on second offense

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

See SENTENCING Enhancement, DUI as second felony, (p. 538) for discussion of topic.

Sufficiency of evidence

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

Appellant was convicted of DUI, causing death. Appellant unsuccessfully objected to admission of blood tests showing his level of blood alcohol (see elsewhere, this Digest). He now asked the Court to assume the evidence was erroneously admitted and rule that the trial court committed error in denying his motion for acquittal pursuant to Rule 29(c) of the Rules of Criminal Procedure. He claimed the evidence was insufficient to convict.

Pursuant to *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983) circumstantial evidence will not support a guilty verdict unless it is proven to the exclusion of every other reasonable hypothesis; appellant claimed that only circumstantial evidence was left after exclusion of the blood tests and that he offered a reasonable hypothesis of innocence (testimony of a Dr. Craske that appellant should not have had a blood alcohol level sufficient for intoxication).

Syl. pt. 4 - "In order to determine if there is evidentiary insufficiency that will bar a retrial under double jeopardy principles, such determination is made upon the entire record submitted to the jury and not upon the residual evidence remaining after the appellate court reviews the record for evidentiary error." Syllabus Point 5, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

The Court agreed with the prosecution that appellant's reasonable hypothesis collapsed upon admission of the blood tests (Dr. Craske admitted that appellant's diabetic condition could have made the theoretical calculations meaningless).

Further, the blood test evidence was clearly admissible. (Although not reaching the issue, the Court noted *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) overruled the reasonable hypothesis standard).

DUI

Sufficiency of evidence (continued)

State v. Knuckles, (continued)

Even had the blood tests been inadmissible, they would have been used to consider the sufficiency of evidence. *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979). Evidence was sufficient here. No error.

EIGHTH AMENDMENT

Cruel and unusual punishment

Sentence proportionate to offense

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529)
for discussion of topic.

ELEMENTS OF OFFENSE

“Knowingly” defined

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See HOMICIDE Murder by failing to provide medical care, Element of knowledge, (p. 293) for discussion of topic.

ENTRAPMENT

Defined

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

Distinguished from unconscionable conduct

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

Elements of

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

Appellant was convicted of delivery of a controlled substance. The trial court refused to direct a verdict on the issue of entrapment. Appellant was sentenced to one to five years, suspended, with probation upon serving 120 days in the Upshur County Jail.

On 15 December 1992 Richard Bennett, a narcotics task force deputy sheriff, and Eddie Bennington, Bennett's informant, attempted to buy marijuana from appellant. Bennington was wearing a hidden microphone, monitored by Bennett with a tape recorder. Appellant said he had no marijuana because he "sold the last one a little while ago." Bennington offered to come back the next day. Upon Bennington's return, appellant showed Bennington some marijuana and, after Bennington left to obtain money, sold it to Bennington.

At trial, Bennington admitted he had persisted in trying to buy marijuana from appellant on several occasions before and after the above sequence. Appellant refused to deal. Bennington admitted that even during the December buy, appellant was reluctant and had to be pressured to sell. Appellant claimed he told Bennington he did not "mess with it" and to "leave me alone." He finally sold the marijuana in order to be rid of Bennington.

ENTRAPMENT

Elements of (continued)

State v. Houston, (continued)

Syl. pt. 1 - The unconscionable government conduct doctrine is separate and distinct from the defense of entrapment. We specifically overrule *State v. Knight*, 159 W.Va. 924, 230 S.E.2d 732 (1976), and its progeny to the extent that *Knight* holds that a trial court can apply both the subjective and objective tests as part of an entrapment defense, and instead hold that the defense of entrapment is fully contained within the subjective test standard. Any inquiry into the outrageous or unconscionable conduct of the police, which was previously considered under our two-tiered analysis, is now considered under a separate constitutional due process analysis.

Syl. pt. 2 - The exclusive entrapment defense to criminal prosecution in West Virginia is the subjective standard, which 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 perpetrated it except for the instigation or inducement by the law enforcement officers. To the extent that *State v. Knight*, 159 W.Va. 924, 230 S.E.2d 732 (1976), and its progeny are inconsistent with this position, they are expressly overruled.

Syl. pt. 3 - The significance of the distinction between outrageous government conduct and entrapment is that the existence of a predisposition on the part of the accused to commit a crime, while possibly fatal to a claim of entrapment, does not serve to eradicate a due process claim based on outrageous government conduct.

Syl. pt. 4 - When the defendant invokes entrapment as a defense to the commission of a crime, the defendant has the burden of offering some competent evidence that the government induced the defendant into committing that crime. Once the defendant has met this burden of offering some competent evidence of inducement, the burden of proof then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was otherwise predisposed to commit the offense.

Syl. pt. 5 - While the issue of the defendant's predisposition to commit the crime is usually reserved for the jury, a trial court may enter a judgment of acquittal if the State fails to rebut the defendant's evidence of inducement, or fails to prove the defendant's predisposition to commit the offense charged beyond a reasonable doubt. Syllabus, *State v. Hinkle*, 169 W.Va. 271, 286 S.E.2d 699 (1982).

ENTRAPMENT

Elements of (continued)

State v. Houston, (continued)

Syl. pt. 6 - Upon review of a trial court's refusal to enter a judgment of acquittal based on the defense of entrapment, we will examine the evidence in the light most favorable to the prosecution, and will reverse only if no rational trier of fact could have found predisposition to exist beyond a reasonable doubt.

Syl. pt. 7 - The formula for proving the separate and distinct claim of outrageous government conduct shall be that the defendant must show that the conduct of the government in inciting the defendant to commit the crime was so egregious and reprehensible that it violates notions of fundamental fairness, shocking to the universal sense of justice, as mandated by the due process clauses of the Fifth Amendment of the *United States Constitution* and article three, section ten of the *West Virginia Constitution*. If outrageous government conduct rising to a due process violation is proven, the State shall be barred from any prosecution relating to a crime resulting from that conduct.

Syl. pt. 8 - In determining whether government or its agents engaged in outrageous conduct rising to the level of a due process violation, the following factors shall be considered: 1) whether the government's conduct went beyond that of mere inducement, such that the government must have "created" or "manufactured" the crime solely for the purpose of generating criminal charges and without any motive to prevent further crime or protect the public at large; 2) whether the government, in procuring the defendant's commission of the crime, engaged in criminal or improper conduct repugnant to our sense of justice; and 3) whether the government appealed to humanitarian instincts such as sympathy, past friendship, or temptation by exorbitant gain to overcome the defendant's reluctance to commit the offense.

Syl. pt. 9 - When a defendant appeals a trial court's refusal to find as a matter of law that the government acted outrageously in violation of the defendant's due process rights, we will review that decision *de novo* to the extent that if there is insufficient evidence of outrageous government conduct so as to violate notions of fundamental fairness, shocking to the universal sense of justice, the ruling of the trial court will not be reversed. Any factual determinations made by the trial court in issuing its ruling on the claim of outrageous government conduct will be reviewed under a clearly erroneous standard.

ENTRAPMENT

Elements of (continued)

State v. Houston, (continued)

Syl. pt. 10 - “Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

The Court abandoned the two-tier analysis of “subjective” and “objective” standards. Noting that the principal element is the accused’s predisposition to commit the crime, the Court focused on that “subjective” measure, rather than the government’s conduct, the “objective” measure. See *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); and *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

The Court noted the test generally shifts the burden to the prosecution to show the accused was predisposed to commit the crime once the defense has shown government inducement. Whether this burden is met is usually a jury question.

Here, the only issue before the Court was the trial court’s refusal to grant a judgment of acquittal, which challenges the sufficiency of the evidence as to appellant’s predisposition to commit the crime. Taking the evidence in the light most favorable to the prosecution, the Court found the jury could have found either that appellant was predisposed or that the government induced him. Considering that there was inconsistent evidence, the trial court properly let the case go to the jury.

As to whether the conduct was so outrageous as to offend fundamental due process, the Court found the trial court also properly let that issue go to the jury. Finally, the Court found the trial court correctly applied *W.Va. Code* 62-12-9 which allows for one third of the minimum sentence to be served in the county jail, so long as it does not exceed six months. No error.

Standard for review

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

EQUAL PROTECTION

Juveniles

Automatic transfer to adult jurisdiction

State v. Robert K. McL., 496 S.E.2d 887 (1997) (Starcher, J.)

See JUVENILES Transfer to adult jurisdiction, Rehabilitation as factor, (p. 401) for discussion of topic.

Right to jury free of racial discrimination

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See JURY Bias, Racial exclusion, (p. 368) for discussion of topic.

Sentencing of indigent

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

ETHICS

Alcohol or drug addiction

Office of Disciplinary Counsel v. Karr, No. 23238 (2/15/96) (Per Curiam)

See ATTORNEYS Incapacitation, Supervised practice, (p. 95) for discussion of topic.

Attorneys

Lawyers not admitted in West Virginia

Lawyer Disciplinary Board v. Allen, 479 S.E.2d 317 (1996) (Albright, J.)

See ATTORNEYS Discipline, Lawyers not admitted in West Virginia, (p. 89) for discussion of topic.

Prosecutor fails to disclose exculpatory evidence

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Reinstatement

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Discipline

Magistrates

In the Matter of Browning, 475 S.E.2d 75 (1996) (Per Curiam)

See MAGISTRATE COURT Discipline, Use of office to get witness to recant, (p. 411) for discussion of topic.

ETHICS

Discipline (continued)

Magistrates (continued)

In the Matter of Rice, 489 S.E.2d 783 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extra-judicial contact with family members, (p. 409) for discussion of topic.

In the Matter of Verbage, 490 S.E.2d 323 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Domestic violence petition, (p. 408, 453) for discussion of topic.

Judges

Solicitation of votes

In the Matter of Starcher, 501 S.E.2d 772 (1998) (Holliday, J.)

See JUDGES Discipline, Solicitation of votes, (p. 351) for discussion of topic.

Magistrates

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

In the Matter of Rice, 489 S.E.2d 783 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extra-judicial contact with family members, (p. 409) for discussion of topic.

In the Matter of Verbage, 490 S.E.2d 323 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Domestic violence petition, (p. 408, 453) for discussion of topic.

ETHICS

Misappropriation of funds

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

Procedures for discipline

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

EVIDENCE

Abuse and neglect

Prior acts of abuse

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See EVIDENCE Admissibility, Abuse to children not subject of abuse petition, (p. 175) for discussion of topic.

Right to be present during child's testimony

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997) (Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

Admissibility

Abuse to children not subject of abuse petition

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

Sherry P. gave birth at 16 to two children one and one half years apart. The first child was likely injured by Sherry P.'s sister who was autistic; Sherry took the child to the hospital. The child was brought back to the hospital the next day with fractures in her arm and skull. DHHR filed an abuse petition which was ultimately dismissed.

Following the death of the second child, DHHR filed a second abuse petition which resulted ultimately in return of custody to the mother. The guardian *ad litem* claimed Sherry P.'s parental rights should be terminated.

Syl. pt. 6 - "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).

EVIDENCE

Admissibility (continued)

Abuse to children not subject of abuse petition (continued)

State ex rel. Diva v. Kaufman, (continued)

Syl. pt. 7 - “Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of *W.Va.R.Evid.* 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.” Syl. Pt. 8, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 8 - “Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under *W.Va. Code*, 49-1-3(a) (1994).” Syl. Pt. 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 9 - “*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. 2, *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

Syl. pt. 10 - ““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).” Syl. pt. 3, *State ex rel. W.Va. Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).” Syl. Pt. 3, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

The Court found that the evidence adduced relating to the first abuse petition could only be used as an allegation of other child abuse; death of the second child did not revive the initial allegations. The Court further noted that no evidence showed Sherry P. was responsible for the child’s injuries; Sherry acted promptly upon discovery of the injuries and placed restrictions on her autistic sister.

Finally, the Court noted the death of the second child was not attributed to abuse but rather “natural causes.” It was clear that a heart monitor given to Sherry P. was “worthless” and hospital personnel failed to warn her. The child was not clearly abused nor did the guardian establish that the conditions of neglect could not be corrected. Writ denied.

EVIDENCE

Admissibility (continued)

Authentication

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE DNA, Admissibility when sample unavailable, (p. 225) for discussion of topic.

Balancing test

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

Appellant was convicted of felony murder in the death of a person resulting from an apartment building fire. At trial the court allowed a gun to be introduced into evidence which was found outside the building which burned. The prosecution introduced evidence showing a gun was involved in an altercation which preceded the fire.

However, the prosecution did not connect the gun to appellant nor to the altercation itself, nor to the crime charged. Appellant claimed the gun was irrelevant to the crime charged and had no probative value.

Syl. pt. 5 - “Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.” Syllabus point 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 6 - “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.” Rule 402, West Virginia Rules of Evidence.

Syl. pt. 7 - “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, West Virginia Rules of Evidence.

EVIDENCE

Admissibility (continued)

Balancing test (continued)

State v. Lopez, (continued)

The Court did not directly address this issue because the case was reversed and remanded on other grounds. However, the Court did admonish the trial court to carefully assess the gun's relevancy on remand.

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

See EVIDENCE Admissibility, Flight, (p. 197) for discussion of topic.

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

Appellant was convicted of attempted murder in the first-degree. Appellant allegedly attempted to run over two persons with his automobile. At trial one of the near-victims testified one of the occupants of the automobile was a white male with tattoos. Appellant was forced to remove his shirt and show his tattoos.

Syl. pt. 1 - "Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence." Syl. pt. 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 2 - Ordinarily, it is not an abuse of discretion for a trial court in a criminal case to direct the accused to reveal or display the accused's tattoos to a witness and to the jury at trial, where the accused's tattoos are relevant to the question of the identification of the perpetrator of the offense and where the trial court has weighed the probative value of such evidence against the danger of unfair prejudice, *etc.*, pursuant to Rules 401, 402 and 403 of the West Virginia Rules of Evidence.

The Court noted appellant admitted to driving the car in question but claimed he did not attempt to hit the near-victims but was simply driving the car back onto a parking lot in response to a rock thrown through the car's rear windshield.

EVIDENCE

Admissibility (continued)

Balancing test (continued)

State v. Meade, (continued)

Civil cases have allowed the victim to exhibit his injuries (see cases cited in opinion) but the Court distinguished them in that this criminal case involves identification of the accused. Numerous other states have allowed physical displays in criminal cases for the purpose of identification (see cases in opinion). The probative value outweighed any possible prejudice. No abuse of discretion.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Irrelevant evidence, (p. 184) for discussion of topic.

Battered women's syndrome

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

Appellant was convicted of child abuse and neglect with bodily injury, malicious assault and murder of a child by failure to provide medical care. It was undisputed that the child died of shaken baby syndrome; the child had extensive bruising over his entire body. Appellant testified that she did not seek medical care earlier because she feared for her safety because of her abusive relationship with the child's father.

Appellant's defense was that she was a victim of "battered women's syndrome." During pre-trial proceedings relating to defense expenses the judge remarked that he did not "really think there is such a thing." Defense counsel nonetheless hired Dr. Lois Veronen, a psychologist. Near the conclusion of the state's case, Dr. Veronen testified *in camera* that appellant was a victim of battered women's syndrome which caused her to misperceive the child's true state and be unable to conform her actions to law. The trial court initially refused to admit the testimony but said it would reconsider if evidence was introduced that the child's father abused appellant.

EVIDENCE

Admissibility (continued)

Battered women's syndrome (continued)

State v. Wyatt, (continued)

At the end of appellant's case, the trial court ruled that Dr. Veronen would be allowed to testify as to appellant's state of mind but not as to the battered women's syndrome per se. Dr. Veronen herself agreed that applying the syndrome to cases like this one was unusual. Appellant claimed the refused testimony would have gone to appellant's intent, a necessary element of the crimes here. The state contended Dr. Veronen's testimony was irrelevant, would not have assisted the trier of fact (Rule 702, Rules of Evidence) and did not satisfy the *Daubert/Wilt* tests. Syl. Pts. 3, 4 and 6, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). The state also contended the trial court's ruling is reviewable only for abuse of discretion. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The Court was baffled by defense counsel's failure to offer the testimony even for limited purposes. Noting that retrial will allow reconsideration of this issue (reversed on other grounds), the Court found this case distinguishable from *State v. Lambert*, 173 W.Va. 60, 312 S.E.2d 31 (1984) wherein the accused claimed she committed the acts because she feared for her safety.

Further, the Court did not limit *State v. DeBerry*, 185 W.Va. 512, 408 S.E.2d 91 (1991), *cert. denied*, 502 U.S. 984, 112 S.Ct. 592, 116 L.Ed.2d 616 (1991), regarding absence of intent in prosecutions for neglect or of altering the standard of proof under *W.Va. Code 61-8D-1, et seq.*

The Court noted the scientific basis for admitting the testimony should be established at retrial. Recognizing that battered women's syndrome is a particular type of post-traumatic stress disorder, the Court recommended further development below and hinted that intent may be negated thereby. (Reversed on other grounds.)

Blood samples

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

Appellant was convicted of second-degree murder in the death of his daughter-in-law. The victim's clothing was blood stained. By DNA testing the stains on a jacket were determined to have markers consistent with appellant and not with the victim. Stains on a pair of jeans were determined to be the victim's blood.

EVIDENCE

Admissibility (continued)

Blood samples (continued)

State v. Jarvis, (continued)

Appellant's own blood was apparently sampled. He complained on appeal that the integrity of the specimen was suspect because it was stored in an unsecured refrigerator where deputy sheriffs stored food. The testimony showed the sample was collected by a nurse at a local hospital and put in a vacuum tubes. The nurse labeled the tubes and put protective seals over the caps. The seals were intact when the laboratory received them.

Further, the tubes were put into styrofoam boxes after sealing and these boxes were also sealed. The boxes were put in a cardboard box, which box was stored in a separate compartment of the sheriff's refrigerator. Although the refrigerator stood in an area accessible to the public, the room is kept locked unless a deputy is present. No error.

Chain of custody

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Chain of custody, (p. 221) for discussion of topic.

Character of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

Co-conspirator's statements

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

Appellant was convicted of conspiracy to commit murder. At trial, a witness testified that one of the co-conspirators told him that the co-conspirator had killed the victim. Because the statement was made after the termination of the alleged conspiracy appellant claimed error in its admission.

EVIDENCE

Admissibility (continued)

Co-conspirator's statements (continued)

State v. Helmick, (continued)

Syl. pt. 3 - Under Rule 801(d)(2)(E) of the West Virginia Rules of Evidence, a declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity.

Syl. pt. 4 - An error in admitting hearsay evidence is harmless where the same fact is proved by an eyewitness or other evidence clearly establishes the defendant's guilt.

The Court noted that the post-conspiracy statement must still further the aim of concealing the conspiracy. *State v. Daniels*, 92 Ohio App.3d 473, 636 N.E.2d 336 (1993) and *State v. Anders*, 483 S.E.2d 780 (S.C. App. 1997). The Court found the statement admissible under Rule 804(b)(3). Even if error, admission of the statement was harmless error here. (See also, Syllabus Point 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Collateral crimes

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

Appellant was convicted of first-degree murder. At trial appellant introduced a videotaped deposition of a psychiatrist. During the tape the prosecution asked several times about appellant's past history, inter alia, to wit:

“If there were a history of problems, Doctor, and a history of being confronted with these problems, with behavioral problems with criminal activity and the excuse was always, ‘It was an alcoholic blackout,’ would that not indicate that that's exactly what it was, was an excuse----“

Appellant objected to the introduction of the questions pursuant to Rule 609; Rule 404(b) was not cited. The prosecution claims the objection was properly overruled since the questions were not offered to impeach appellant. Appellant's trial counsel turned down the judge's offer to give a cautionary instruction.

EVIDENCE

Admissibility (continued)

Collateral crimes (continued)

State v. Degraw, (continued)

The Court here refused to consider the error because appellant did not raise a 404(b) objection below. See Rules of Evidence 103(a)(1) (specific grounds for objection must be given). Also, *Leftwich v. Inter-Ocean Casualty Co.*, 123 W.Va. 577, 17 S.E.2d 209 (1941). The Court also refused to call this matter plain error. See *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). No error.

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

Appellant was convicted of felony-murder, attempted murder, kidnaping, attempted aggravated robbery and grand larceny. On appeal he complained of the admission of prejudicial collateral crimes. Testimony was admitted concerning a car of the type that was stolen; testimony linking a chain of custody; and an eyewitness testified to seeing a convenience store clerk dead from a bullet to the head.

The prosecution claimed the evidence was presented to establish the time of the murders charged. Shell casings from the convenience store killing matched the pistol used in the murders charged. A limiting instruction was read to the jury.

Syl. pt. 4 - "When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The circuit court held an *in camera* hearing. When evidence went beyond the limited scope established, the jury was instructed to disregard it. Both general charges and the defense's instructions contained limiting warnings. No error.

EVIDENCE

Admissibility (continued)

Collateral crimes (continued)

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Prior bad acts, (p. 208) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder and sentenced to life without mercy. At the time of the crime appellant had outstanding warrants against him for kidnaping, sexual assault and malicious wounding. The victim was lured by appellant's girlfriend into bed, apparently for the purpose of robbery. The killing was an especially bloody one, with the victim being stabbed thirteen times while appellant's girlfriend watched. Appellant then forced her to accompany him to Florida in the victim's vehicle.

The prosecution stated during pretrial evidentiary hearings that motive to leave West Virginia was shown by the outstanding warrants.

Syl. pt. 1 - "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Syl. pt. 2 - "When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus Pt. 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

EVIDENCE

Admissibility (continued)

Collateral crimes (continued)

State v. Phelps, (continued)

Syl. pt. 3 - “Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court’s general charge to the jury at the conclusion of the evidence.” Syllabus Pt. 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

(See *McGinnis*, *supra*, for six steps necessary to admit collateral crime evidence.) The Court found the trial court did hold a hearing out of the jury’s hearing and perform a balancing test to determine admissibility. No error.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

Appellant was convicted of possession of heroin with intent to deliver. The prosecution asked on cross-examination whether appellant had sold heroin before. Following objection, no more questions were asked.

The Court rejected the prosecution’s attempt to justify the question as an attempt to impeach appellant. See Rule 609(a)(1) West Virginia Rules of Evidence (“...”evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.”) The questions was improper under Rule 404(b). See also *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

EVIDENCE

Admissibility (continued)

Collateral crimes (continued)

State v. Rahman, (continued)

Syl. pt. 4 - “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 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 (1980).

The Court found the question harmless error.

State v. Williams, 480 S.E.2d 162 (1996) (Per Curiam)

Appellant was convicted of possession of a controlled substance with intent to deliver. Testimony was allowed into evidence that appellant had possession of the same substance long before the arrest in this case. Appellant was said to have given and sold tablets of the substance. Further, he told others that he received the tablets through the mail from his sister. The arrest was made pursuant to a package of the tablets sent by appellant’s sister. Limiting instructions were given that the evidence could be considered only for the purpose of showing motive, intent, plan, knowledge, or control over the substance or lack of accident.

Syl. pt. 1 - “When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court’s instruction.” Syl. pt. 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

EVIDENCE

Admissibility (continued)

Collateral crimes (continued)

State v. Williams, (continued)

Syl. pt. 2 - “Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court’s general charge to the jury at the conclusion of the evidence.” Syl. pt. 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

Syl. pt. 3 - “A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.” Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

EVIDENCE

Admissibility (continued)

Collateral crimes (continued)

State v. Williams, (continued)

The general standard of review is abuse of discretion. The trial court should make a finding that the acts occurred; the court then reviews *de novo* whether the trial court found the evidence admissible for a legitimate purpose; finally, the judgment of whether the evidence is more probative than prejudicial is reviewed for abuse of discretion. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Here, no “shotgunning” of collateral evidence occurred as in *McGinnis, supra*. The circumstances here were not sufficiently detrimental to appellant to justify exclusion. No error.

Confessions

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

Appellant was convicted of murder one, without mercy. The murder occurred some time around 8:00 a.m. Police were called and that afternoon went to appellant’s house to arrest him. Appellant was given his *Miranda* rights at 2:45 p.m. at approximately 3:55 p.m. appellant gave a signed statement in which he stated he remembered being at the crime scene, awaking to find his money missing and that he started “swinging the knife.”

He claimed that he did not remember anything after that; police fingerprinted and photographed him. While walking to the magistrate, at approximately 6:00 p.m., appellant told TV reporters that he committed the murder. All of appellant’s statements, including a videotape of appellant’s comments, were admitted to evidence.

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Boxley, (continued)

Syl. pt. 1- “This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.” Syl. pt. 2, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Syl. pt. 2 - “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.” Syl. pt. 4, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Syl. pt. 3 - “The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 4 - “A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.” Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court noted appellant signed a waiver of his rights prior to giving his signed statement. Further, no evidence of police misconduct or coercion was introduced.

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Boxley, (continued)

As to the delay in presentation before a magistrate, the Court found it reasonable in that some of the time was consumed in transportation from appellant's house to the police station and completing paper work upon arrival. Further, appellant was questioned about an unrelated crime which he had witnessed.

The Court dismissed summarily appellant's claims that exculpatory evidence was withheld until the second day of trial. Appellant failed to show the items at issue were exculpatory.

Also, the Court ruled that the trial court's failure to read the word "anger" in the instruction on voluntary manslaughter was not an abuse of discretion; and that the evidence was sufficient to convict him. No error.

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 513) for discussion of topic.

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SELF-INCRIMINATING/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 517) for discussion of topic.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 515) for discussion of topic.

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 518) for discussion of topic.

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Strook, 495 S.E.2d 561 (1997) (Per Curiam)

Appellant was convicted of public intoxication, DUI, driving while his license was revoked and knowingly providing false information to a police officer. He had gone to magistrate court to bail his brother out of jail; while he was there, a state police trooper, who knew appellant's sister-in-law had reported a stolen vehicle, asked appellant how he had gotten to the magistrate's office.

Appellant, who claimed he had not driven a vehicle, nonetheless surrendered the keys to the stolen vehicle. Appellant said he wanted to change his story and the trooper told him he did not have to say anything. Before the trooper could give him *Miranda* warnings, appellant confessed he had driven the car to the magistrate's office.

Following appellant's conviction in magistrate court, he appealed to circuit court. Appellant's attorney did not move to strike appellant's statements during pre-trial, nor did he object to the trooper's testimony at trial. At the conclusion of testimony, counsel moved to strike; the trial court deferred and counsel renewed the motion at the conclusion of trial. Neither motion was ruled upon.

Syl. pt. 1 - "The following must be raised prior to trial: . . . (3) Motions to suppress evidence unless the grounds are not known to the defendant prior to trial . . ." Part, Rule 12(b), *West Virginia Rules of Criminal Procedure*.

Syl. pt. 2 - "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. . . . Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." Part, Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found appellant's failure to raise suppression issues before trial amounted to a waiver. Further, the Court summarily dismissed appellant's claims regarding sufficiency of the evidence. No error.

EVIDENCE

Admissibility (continued)

Confessions of accomplice

State ex rel. Jones v. Trent, 490 S.E.2d 357 (1997) (Per Curiam)

Petitioner sought a writ of habeas corpus in connection with the revocation of his probation. Following petitioner's conviction of burglary and subsequent probation, the Kanawha County Adult Probation Department moved for revocation based on petitioner's failure to meet with his probation officer and a series of robberies and other criminal acts allegedly committed by petitioner.

Notice of eleven probation violations was provided to petitioner. During the hearing a Sheriff's Detective related what a Shawn Hartleroad said about the robberies; Hartleroad was subpoenaed but was refused to testify, invoking his right against self-incrimination. Hartleroad's statement clearly implicated respondent.

Appellant claimed the detective's statement should not have been admitted in that it was uncorroborated hearsay.

Syl. pt. 1 - "A confession of an accomplice which inculcates the accused is presumptively unreliable. Where the accomplice is unavailable for cross-examination, the admission of the confession, absent sufficient independent 'indicia of reliability' to rebut the presumption of unreliability, violates the Sixth Amendment right of confrontation." Syl. Pt. 2, *State v. Mullens*, 179 W.Va. 567, 371 S.E.2d 64 (1988)." Syl. Pt. 1, *State v. Marcum*, 182 W.Va. 104, 386 S.E.2d 117 (1989).

Syl. pt. 2 - "The final revocation proceeding required by the due process clause of the Fourteenth Amendment and necessitated by *W.Va. Code*, 62-12-10, as amended, must accord an accused with the following requisite minimal procedural protections: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing officer; (6) a written statement by the fact finders as to the evidence relied upon and reasons for revocation of probation." Syl. Pt. 12, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976).

Syl. pt. 3 - "Where a probation violation is contested, the State must establish the violation by a clear preponderance of the evidence." Syl. Pt. 4, *Sigman v. Whyte*, 165 W.Va. 356, 268 S.E.2d 603 (1980).

EVIDENCE

Admissibility (continued)

Confessions of accomplice (continued)

State ex rel. Jones v. Trent, (continued)

The Court found Hartleroad was an unavailable witness. Further, the Court distinguished the higher reliability required of statements admitted in an initial trial versus the requirement of reliability sufficient for admission in a probation revocation hearing. *W.Va. Code* 62-12-10. See *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976); cf. *In re Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997).

Here, the Court found that sufficient reliability had been established and no due process violations occurred. Writ denied.

Corroborative testimony as to victim's statements

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

See EVIDENCE Rape shield, Victim's statements about unrelated offense, (p. 243) for discussion of topic.

Decedent's communication with divorce lawyer

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See PRIVILEGES Attorney-client privilege, Divorce attorney as witness, (p. 454) for discussion of topic.

Decedent's lawyer's testimony

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See PRIVILEGES Attorney-client privilege, Divorce attorney as witness, (p. 454) for discussion of topic.

EVIDENCE

Admissibility (continued)

Defendant's mental condition before and after offense

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

Discretion of court

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J.)

Appellant was convicted of delivery of cocaine and marijuana; and conspiracy to deliver marijuana. While police were monitoring an apartment leased to a Catherine Lohmeyer, police apprehended a Robert Kaetzel with marijuana and cocaine in his possession. Kaetzel agreed to be an informant in exchange for not being charged.

Kaetzel reentered the apartment and purchased drugs from appellant with marked money; a Lee Townsley gave Kaetzel marijuana. Upon his exiting the apartment, police chased appellant approximately 200 yards, finding on his person a check endorsed to appellant by Lee Townsley. A police dog later discovered marked money near where appellant was apprehended.

Appellant contended on appeal that the marked money should not have been admitted because a proper foundation was not laid nor was the money relevant. Specifically, appellant objected to the lack of showing that the dog was reliable, nor that the trail upon which the dog was put provided a reasonable assurance of identification.

Testimony at trial showed the dog was unable to track appellant's actual route of flight. The dog was led on a search in a circular pattern from the point of apprehension.

Syl. pt. 1 - "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." *State v. Louk*, 171 W.Va. 639, [643,] 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

The Court found no abuse of discretion here. The marked money was found by a trained police dog 35 to 40 feet of the point of apprehension and within hours of it.

EVIDENCE

Admissibility (continued)

Discretion of court (continued)

State v. Broughton, (continued)

Testimony established a nexus between appellant and the money. Issues as to the training of the dog, qualifications of the handler and passage of time between apprehension and recovery of the money go to the weight properly given, not to the admissibility of the evidence.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 184) for discussion of topic.

DNA

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE DNA, Admissibility when sample unavailable, (p. 225) for discussion of topic.

DUI conviction in another State

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

Expert opinion

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his infant son. At trial appellant claimed he was suffering from “diminished capacity” and was unable to form the requisite intent and premeditation.

EVIDENCE

Admissibility (continued)

Expert opinion (continued)

State v. LaRock, (continued)

A clinical psychologist testified that appellant had “a delusional thinking system, which means he thinks things that other people don’t think that are not grounded in fact.” Further, he said appellant may be “psychotic” and “not in touch with reality.” At the time of the killing “it is possible that (he) could have lost control to the point that he didn’t even know what he was doing until after he did it.”

Upon objection, this latter opinion was struck. In vouching the record, the psychologist noted that “there’s nothing in the records from Dr. Adamski or any other interview that said that (he) had the intent at that time either premeditatedly or with malice to kill his child.” On cross-examination the psychologist noted that neither was there an indication appellant suffered “delusional thinking or hallucinations” commanding him to kill his son.

The state’s psychiatrist, Dr. Adamski, testified that appellant was fit to stand trial, able to understand the wrongfulness of his acts and capable of acting lawfully. He diagnosed appellant as “schizotypal personality disorder” but able to control his rage.

(1) Appellant claimed the excluded testimony was relevant to his defense of diminished capacity and wrongfully excluded. He claimed it showed a “delusional thinking system” and afforded the jury assistance in determining his intent.

The Court found Rule 702 allowing for expert testimony if the witness qualifies and if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” The review of whether a trial court’s decision to admit the testimony is for abuse of discretion. *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171, 179 (1995); *Board of Ed. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 612, 390 S.E.2d 796, 811 (1990); *Rozas v. Rozas*, 176 W.Va. 235, 240, 342 S.E.2d 201, 206 (1986). Evidence which is no more than mere speculation is not admissible. *Gentry*, 466 S.E.2d at 186 (1995). No error in excluding.

EVIDENCE

Admissibility (continued)

Failure to object

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See PROSECUTING ATTORNEY Conduct at trial, Reference to appellant's foul language, (p. 472) for discussion of topic.

Flight

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

Appellant was convicted of attempted first-degree murder. After being forced to display his tattoos at trial, appellant failed to appear at the next day of trial. Although the court revoked bond and issued a *capias*, appellant voluntarily appeared three days later and trial resumed. The court allowed testimony regarding appellant's flight. A subsequent jury instruction cautioned the jury to consider flight with care since "such evidence has only a slight tendency to prove guilt."

Syl. pt. 3 - "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).

The Court noted the trial court conducted an *in camera* hearing and weighed the probative and prejudicial effects. Further, the jury was allowed to hear appellant's explanation at trial. No error.

Gruesome photographs

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See PROSECUTING ATTORNEY Conduct at trial, Reference to appellant's foul language, (p. 472) for discussion of topic.

EVIDENCE

Admissibility (continued)

Gruesome photographs (continued)

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

Appellant was convicted of felony murder. At trial the court allowed into evidence a photograph of a fireman and another person loading the victim's burned body onto a stretcher. Although the victim was only a small part of the photograph, his body was badly burned, with fragments of clothing hanging from it.

Syl. pt. 3 - "The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts. These rules constitute more than a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them." Syllabus point 7, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 4 - "The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence." Syllabus point 8, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Noting that *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1970) was expressly overruled by *Derr, supra*, the Court ducked this issue because the conviction was reversed and remanded on other grounds.

Hearsay

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

Appellant, then sixteen years old, was charged with delinquency in an intentional killing. The circuit court allowed transfer to adult jurisdiction.

At the transfer hearing, the circuit court allowed testimony from a William Smith who refused to testify based on his privilege against self-incrimination. Finding Mr. Smith to be an unavailable witness, the court allowed introduction into evidence of a written statement previously given.

Appellant claimed admission of the statement violated Rule 804(b)(3) of the Rules of Evidence and *W.Va. Const.* Art. III, §14, the right to confront one's accuser. See *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

EVIDENCE

Admissibility (continued)

Hearsay (continued)

In the Interest of Anthony Ray Mc., (continued)

Syl. pt. 1 - “Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed. *W.Va. Code*, 49-5-10(a) [1977] [now, 49-5-10(e) [1996]].” Syl. pt. 1, *State v. Bannister*, 162 W.Va. 447, 250 S.E.2d 53 (1978).” Syl. Pt. 1, *In the Interest of H.J.D.*, 180 W.Va. 105, 375 S.E.2d 576 (1988).

Syl. pt. 2 - “When ruling upon the admission of a narrative under Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must break down the narrative and determine the separate admissibility of each single declaration or remark. This exercise is a fact-intensive inquiry that requires careful examination of all the circumstances surrounding the criminal activity involved.” Syl. Pt. 7, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

Syl. pt. 3 - “To satisfy the admissibility requirements under Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must determine: (a) The existence of each separate statement in the narrative; (b) whether each statement was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable.” Syl. Pt. 8, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

Syl. pt. 4 - A declarant’s self-serving collateral statements and neutral collateral statements are not admissible into evidence under the *against penal interest* exception of Rule 804(b)(3) of the West Virginia Rules of Evidence.

Syl. pt. 5 - When circuit courts are confronted with a Rule 804(b)(3) against penal interest unavailability issue, involving a declarant seeking to invoke the privilege against self-incrimination, they should follow a three step procedure in determining whether and to what extent the privilege may be invoked: (a) determine whether questions are facially self-incriminating, (b) determine whether the witness proved non-facially self-incriminating questions were in fact self-incriminating, and (c) determine whether the witness established unavailability.

EVIDENCE

Admissibility (continued)

Hearsay (continued)

In the Interest of Anthony Ray Mc., (continued)

Syl. pt. 6 - To determine whether questions are facially self-incriminating, the following must occur: (a) the court must have previously determined the existence of self-inculpatory statements by the witness, (b) the party seeking to question the witness must be allowed to pose relevant individual questions to the witness, (c) before the witness responds in any way to each question, the court must *sua sponte* make a determination as to whether each question is facially self-incriminating, and (d) if a question is facially self-incriminating the witness may not be compelled to answer the question absent a grant of immunity from prosecution by the court.

Syl. pt. 7 - To determine whether the witness proved non-facially self-incriminating questions were in fact self-incriminating, the following must occur: (a) if the court determines that a particular relevant question is not facially self-incriminating, the witness or counsel for the witness must be permitted a reasonable opportunity to attempt to show the manner in which the question, if answered, is self-incriminating, (b) if the witness or counsel for the witness establishes by satisfactory proof that answering a non-facially self-incriminating question leads to self-incrimination, then the court cannot compel and answer, absent a grant of immunity from prosecution by the court, (c) if the witness fails to prove by satisfactory proof that answering a non-facially self-incriminating question would in fact be self-incriminating, the witness must answer the question.

Syl. pt. 8 - To determine whether the witness established unavailability, the court must make an independent determination of whether, as a result of the questioning, the witness established his or her unavailability or the purpose of admitting the previously determined self-inculpatory statements.

Syl. pt. 9 - “The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment of the *United States Constitution* [and *W.Va. Const.* Art. III, §14] are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness’s out-of-court statement.” Syl. Pt. 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

EVIDENCE

Admissibility (continued)

Hearsay (continued)

In the Interest of Anthony Ray Mc., (continued)

Syl. pt. 10 - Circumstances that trigger a Confrontation Clause inquiry, when admission of a self-inculpatory statement under Rule 804(b)(3) is based solely upon a declarant's unavailability due to an assertion of the privilege against self-incrimination, include: (a) declarant refused outright to answer questions that a court has determined are non-facially self-incriminating, or (b) declarant refused to answer non-facially self-incriminating questions after failing to prove to the court that the questions are self-incriminating, or (c) declarant refused to answer facially self-incriminating questions after being granted immunity from prosecution, or (d) declarant refused to answer non-facially self-incriminating questions that were proven to be self-incriminating, but the declarant was granted immunity to answer them. In such instances, an independent Confrontation Clause inquiry is necessary and must be reflected in the record as having been occurred.

Syl. pt. 11 - If a declarant is determined to be unavailable under the penal interest exception of Rule 804(b)(3) merely because he or she refused to answer answerable questions, the Confrontation Clause inquiry into *unavailability* is necessary. In this situation alone, in order for a declarant to be deemed constitutionally unavailable, the prosecutor must affirmatively show that the declarant was granted immunity from prosecution by the court. If the prosecutor fails to establish a grant of immunity was made, the declarant is available within the meaning of the Confrontation Clause.

Syl. pt. 12 - If a declarant is determined to be unavailable under the penal interest exception of Rule 804(b)(3) because he or she refused to answer answerable questions, then an independent Confrontation Clause inquiry into *reliability* is necessary.

Syl. pt. 13 - "The burden is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." Syl. Pt. 9, in part, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

The Court noted that both the hearsay rule and the right of confrontation seek to ensure the ability to confront one's accusers. However, a statement can be admissible under a hearsay exception and still violate the right to confront.

EVIDENCE

Admissibility (continued)

Hearsay (continued)

In the Interest of Anthony Ray Mc., (continued)

Here, the trial court did not even analyze whether the witness could properly invoke the right against self-incrimination. Further, the Court found that the circuit court did not analyze the out-of-court statement so as to determine what parts were self-inculpatory and therefore admissible. Clearly, the prosecution did not meet its burden of showing sufficient reliability to justify admission. See *Mason, supra*. Reversed and remanded.

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See APPEAL Failure to preserve, (p. 50) for discussion of topic.

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder in the shooting of her ex-boyfriend. At trial the victim's brother testified concerning a conversation between the victim and the victim's brother several weeks before the shooting. While examining a firearm, the victim told his brother that he had bought a smaller firearm for appellant and she "carried it with her all the time."

Appellant claimed the statement should not have been admitted because it violated her right to confront her accuser under the Sixth Amendment; and because it violated Rule 402 and 403 of the W.Va. Rules of Evidence regarding relevancy. The statement and appellant's silence were admitted under Rule 801(d)(2)(B) as a statement against interest (and therefore not hearsay).

Syl. pt. 3 - When a party adopts a statement by silence, in order to be admissible, the statement does not have to be accusatory or against the party's interest at the time it was made, but one that would naturally call for a reply if the truth of the statement was not intended to be admitted.

EVIDENCE

Admissibility (continued)

Hearsay (continued)

State v. Browning, (continued)

The Court noted that silence can be agreement only where the person understood the statement and had an opportunity to speak. *Reall v. Deiriggi*, 127 W.Va. 662, 34 S.E.2d 253 (1945). Here, appellant had personal knowledge of the statement's truth, and had an opportunity to deny the statement but remained silent. The Court found appellant's silence to be "an adoptive admission" under Rule 801(d)(2)(B). Further, the Court found relevance in that the statement and consequent silence were admitted to challenge appellant's testimony that she did not carry a gun. No error.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder without mercy. He complained that testimony of law enforcement officers was hearsay. The officers' testimony related to matters learned during the course of their investigations and was offered to "explain previous conduct" by the officers.

The Court held the evidence was not hearsay. It was offered to explain previous conduct. *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990). Further the evidence must be relevant pursuant to Rules 401 through 403 of the Rules of Evidence.

In *Maynard, supra*, the Court found the truth of the matters asserted was not at issue but rather the reasons for including appellant's photo in a photo array. There, however, the testimony was rejected because the issue of why appellant became a suspect was not at issue. Here, the testimony was relevant in that it related to how police were able to track a call from Florida charged to the victim's credit card; and to the identity of the person taking the call; and to other purchases on the victim's credit cards. Even were the evidence erroneously admitted the Court found it to be harmless error.

EVIDENCE

Admissibility (continued)

Identification in court

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

Appellant was convicted of aggravated robbery of a supermarket. Four store employees were shown a photo array which included appellant's photo. One of those arrays was lost prior to trial. Two of the employees saw appellant as he was taken to magistrate court prior to trial. All four identified appellant at trial.

Appellant claimed the prejudicial effect of his being seen on the way to magistrate court, the lost photo array and the lack of a sufficiently reliable independent basis for the in-court identification require reversal.

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 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." Syllabus Point 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976).

The Court found that other witnesses corroborated the witness' identification; that all gave a similar description of the perpetrator; all witnesses were sure of their identification; and the length of time between the crime and the trial was relatively short. Sufficient independent reliability was shown. Further, the lost photo array was not prejudicial under these circumstances. Cf. *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978); *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982).

Finally, the out of court viewing of appellant on the way to magistrate court was harmless where other witnesses also made positive identifications. *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983). No error.

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EVIDENCE Admissibility, Identification in court, (p. 204) for discussion of topic.

EVIDENCE

Admissibility (continued)

Immaterial evidence

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

Impeachment evidence

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Impeachment, Criminal conviction use for, (p. 232) for discussion of topic.

Independent replications

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE DNA, Admissibility when sample unavailable, (p. 225) for discussion of topic.

Invited error

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

Appellant was convicted of DUI causing death. Appellant challenged the admissibility of blood tests taken at the hospital to which he was transported. Because a mistrial was initially granted (for change of venue) and the medical witnesses were from Virginia, the trial court held a suppression hearing while the witnesses were present.

The parties agreed to treat the hearing as a deposition should the witnesses' testimony be admitted to evidence. Appellant claimed the state did not lay a proper foundation for admission of the testimony and the trial court improperly conducted an examination to rehabilitate a witness. (See Rule 614(b), *W.Va. Rule of Evidence*.)

EVIDENCE

Admissibility (continued)

Invited error (continued)

State v. Knuckles, (continued)

In response to appellant's concern about reading the deposition to the jury, the court offered to have the parties stipulate the blood test results or to have one of the parties read the questions asked by the court. Appellant chose to have the deposition read as recorded despite the court's warning that he was thereby "waiving the right to object."

Syl. pt. 1 - "A judgment will not be reserved for an error in the record introduced by or invited by the party asking for the reversal." Syllabus Point 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966).

Syl. pt. 2 - "Where a party objects to incompetent 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 seasonably made by attempting to explain or destroy the probative value of the evidence on cross-examination." Syllabus Point 3, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

The Court held appellant waived any objection, thereby precluding even a plain error analysis.

Irrelevant evidence

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder without mercy. On appeal he complained that several items of evidence were introduced that were irrelevant and allowed an inference that appellant was a bad person. A paper bag containing a ponytail, an axe handle and a claw hammer were allowed into evidence.

EVIDENCE

Admissibility (continued)

Irrelevant evidence (continued)

State v. Phelps, (continued)

The Court found that “under Rule 401 evidence having any probative value whatsoever can satisfy the relevancy definition.” *McDougal v. McCammon*, 193 W.Va. 229, 236, 455 S.E.2d 788, 795 (1995). Here, the ponytail was found under appellant’s mattress; there was testimony that appellant wore a ponytail and that appellant’s girlfriend had cut it off before the killing; the axe handle was found at the girlfriend’s house; appellant’s girlfriend testified appellant planned to use it on the victim; the claw hammer was found in the victim’s car; and the girlfriend testified that appellant threatened her with the hammer.

The Court found the evidence relevant and the probative value outweighed any evidence. No error.

Newly-discovered Evidence

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Newly-discovered evidence, Effect of, (p. 238) for discussion of topic.

Other sexual offenses against victim not at issue

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

See EVIDENCE Rape shield, Victim’s statements about unrelated offense, (p. 243) for discussion of topic.

Plain view exception

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 509) for discussion of topic.

EVIDENCE

Admissibility (continued)

Polygraph statement for impeachment

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

See EVIDENCE Impeachment, Prior inconsistent statements, (p. 232) for discussion of topic.

Prejudicial evidence

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Prior bad acts, (p. 208) for discussion of topic.

Prior bad acts

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his infant son. At trial evidence was allowed of his treatment of his son prior to time of the killing. Appellant's behavior constituted a consistent pattern of abuse (although *uncharged*).

The prosecution argued the past acts were relevant to showing a pattern of conduct relating to the issue of accidental death. The trial court allowed the evidence, presumably to show intent, motive and absence of accident.

Syl. pt. 3 - It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

The Court noted the appellate review for admission under Rule 404(b) is: (1) whether there is sufficient evidence to show the other acts occurred; (2) whether the evidence was admissible for a legitimate purpose; and (3) whether the probative value outweighs possible prejudice. *State v. Dillon*, 191 W.Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992); *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

EVIDENCE

Admissibility (continued)

Prior bad acts (continued)

State v. LaRock, (continued)

A defendant should be tried for what he or she did, not for who he or she is. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Nonetheless, other acts can be admissible. Admissible here; the evidence was both relevant and admitted for a proper purpose. Evidence of prior acts are admissible to show “intent” and “absence of mistake or accident.” *State v. Berry*, 176 W.Va. 291, 342 S.E.2d 259 (1986); *State v. Huffman*, 69 W.Va. 770, 73 S.E. 292 (1911).

Further, the probative value outweighed possible prejudice here. The showing of harm to appellant’s son could even have been admissible as part of *res gestae*. No error.

Prior inconsistent statement

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

See EVIDENCE Impeachment, Prior inconsistent statements, (p. 232) for discussion of topic.

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder in the shooting of her ex boyfriend. At trial she took the stand in her own defense and claimed she did not remember breaking up with him. The prosecution thereupon introduced into evidence four handwritten notes from appellant for impeachment purposes. The notes generally discussed the break up and appellant’s love for the victim.

Appellant claimed on appeal that the notes were not inconsistent with appellant’s testimony because they were somewhat ambiguous and not directly contradictory.

Syl. pt. 5 - “[B]efore admission at trial of a prior inconsistent statement allegedly made by a witness ... [t]he statement must actually be inconsistent, but there is no requirement that the statement be diametrically opposed.” Syllabus Point 1, in part, *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996).

EVIDENCE

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Browning, (continued)

The Court found the statements were sufficiently inconsistent for admission. No error.

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 210) for discussion of topic.

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See SENTENCING Enhancement of, Notice of, (p. 538) for discussion of topic.

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

Appellant was convicted for malicious wounding and battery, resulting in life imprisonment for recidivism. Appellant's defense was that he was on his way to the home of a friend, Billy Joe Workman, at the time of the incident. At the preliminary hearing Workman testified that appellant woke at 11:45 p.m. (just after the incident) and stayed at his home for about an hour and a half. Workman's statement was read into the record since he died before the trial.

The prosecution told the judge he would call appellant's parole officer to testify that Workman told her appellant did not reach his home until 2:00 a.m. Appellant objected on the grounds that the statement was hearsay and the witness was unavailable. The trial court allowed the testimony but gave a limiting instruction that it was for impeachment purposes only. The parole officer claimed the statement was collaborated by Workman's parole officer.

Syl. pt. 1 - "Prior trial testimony is admissible as an exception to the hearsay rule under Rule 804(b)(1) of the West Virginia Rules of Evidence. Therefore, impeachment by reason of an inconsistent statement is available under Rule 806 of the West Virginia Rules of Evidence." Syl. Pt. 2, *State v. Hall*, 174 W.Va. 787, 329 S.E.2d 860 (1985).

EVIDENCE

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Crabtree, (continued)

Syl. pt. 2 - A statement or conduct by a declarant that is inconsistent with his or her hearsay statement that is admitted pursuant to Rule 806 of the West Virginia Rules of Evidence is not subject to the traditional requirement of affording the declarant an opportunity to explain or deny the inconsistency.

Syl. pt. 3 - ““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).” Syl. Pt. 1, *State v. Compton*, 167 W.Va. 16, 277 S.E.2d 724 (1981).

Syl. pt. 4 - A witness should give responsive answers to questions of counsel, and answers that are not responsive may be stricken on motion of the examining party especially if the unresponsive answer contains inadmissible evidence. Unresponsive answers, or those that are responsive but broader than the question, should not be viewed as the responsibility of the questioner. On the other hand, a responsive answer, one that is reasonably within the scope of the question, even though prejudicial, should not be stricken as unresponsive.

The Court noted if Workman had testified at trial his prior inconsistent statements to the parole officers would have been admissible under Rule 806. Further, his preliminary hearing testimony was clearly admissible under Rule 804(b)(1). The fact that the parole officer did not testify at the preliminary hearing is irrelevant. No foundation is required for impeachment of an admitted hearsay statement.

As to the hearsay within hearsay (appellant’s parole officer testifying as to what Workman told his parole officer), the Court found invited error because the statement was made in response to appellant’s counsel’s questions. *State v. Hanson*, 181 W.Va. 353, 382 S.E.2d 557 (1989); *Floharty v. Wimbush*, 172 W.Va. 134, 304 S.E.2d 39 (1983).

The Court rejected appellant’s argument that the error was not really invited since the witness’ answer was unresponsive to his question. No error.

EVIDENCE

Admissibility (continued)

Prior voluntary statement without counsel

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

Prompt presentment

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Prompt presentment, (p. 521) for discussion of topic.

Religious beliefs

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

Appellant was convicted of first-degree sexual assault and sexual abuse by a custodian. Appellant, who was pastor of the Paw Paw Bible Church, put his occupation into evidence. The circuit court allowed cross-examination on his religious beliefs. Specifically, the prosecution asked appellant whether he viewed his teaching the victim to masturbate as a sin; and whether he believed God had forgiven him.

Syl. pt. 4 - If evidence of religion is offered for purposes other than impairing or enhancing a witness's credibility, Rule 610 of the West Virginia Rules of Evidence does not require its exclusion.

Syl. pt. 5 - For religious belief or affiliation evidence to be admissible, the trial court must make the following findings: (1) the evidence of religion is offered for a specific purpose other than to show generally that the witness's credibility is impaired or enhanced; (2) the evidence is relevant for that specific purpose; (3) the trial court makes an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court, if requested, delivers an effective limiting instruction advising the jury of the specific purposes(s) for which the evidence may be used. If these elements are met, it may be presumed that the complaining party was protected from undue prejudice.

EVIDENCE

Admissibility (continued)

Religious beliefs (continued)

***State v. Potter*, (continued)**

Here, appellant testified to his religious capacity to justify teaching the victim to masturbate in his capacity as a pastor. The Court found the cross-examination to be proper impeachment pursuant to Rule 611(b) of the Rules of Evidence. Further, the Court found the trial court properly found the evidence admissible under Rule 403; although a close question, the Court deferred to the trial court.

Reputation of defendant

***State v. Phelps*, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)**

See EVIDENCE Admissibility, Collateral crimes, (p. 184) for discussion of topic.

Sexual abuse victims' statements

***State v. Quinn*, 490 S.E.2d 34 (1997) (Starcher, J.)**

See EVIDENCE Rape shield, Victim's statements about unrelated offense, (p. 243) for discussion of topic.

Sheriff's notice of DUI arrest

***State v. Simons*, 496 S.E.2d 185 (1997) (Per Curiam)**

Appellant was convicted of DUI and driving while revoked. At trial the prosecution introduced a notice from the sheriff of Volusia County, Florida, which showed a "Gary Simons" was arrested twice on DUI charges and convicted. Subsequent booking information showed the date of birth and social security number matched those of appellant.

EVIDENCE

Admissibility (continued)

Sheriff's notice of DUI arrest (continued)

State v. Simons, (continued)

Appellant complained that the sheriff's notice should not have been admitted to evidence since it is not evidence of a final judgment (see *W.Va.R.Evid.* 803(22) and therefore should have been excluded as hearsay. Appellant did not object at trial on hearsay grounds, saying only that "I am saying that what you can use to support a conviction is a judgment or final entry of the----so this is the only one that can be used----these two documents here (the sheriff's notice and the judgment and sentence."

Appellant also objected to the admission of the booking reports but on the grounds of being unrelated to the sheriff's notice and judgment and sentence, and on the basis of prejudice. He made no mention of *W.Va.R.Evid.* 803(8)(B), inadmissible hearsay.

Syl. pt. 1 - "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syl. pt. 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964).

Syl. pt. 2 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

As to the sheriff's notice, the Court refused to consider the objection since it was not raised below. Further, noting that the booking information and judgement orders clearly showed the same number as the sheriff's notice, the Court refused to consider admission of the booking reports because the correct rule of evidence was not cited. See *W.Va.R.Evid.* 103(a)(1); also *Earp v. Vanderpool*, 160 W.Va. 113, 120, 232 S.E.2d 513, 517 (1976) and *Page v. Columbia Natural Resources*, 198 W.Va. 378, 391, 480 S.E.2d 817, 830 (1996).

The Court noted that several other errors were raised for the first time on appeal and similarly refused to rule. Affirmed.

EVIDENCE

Admissibility (continued)

Silence as admission

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Hearsay, (p. 202) for discussion of topic.

Surviving spouse and children

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

Appellant was convicted of felony murder in the death of York Rankin. Appellant was assisting a drug dealer when an altercation ensued; appellant shot Rankin.

The victim's father testified with regard to his son's employment and that the son had a twelve year old boy. He authenticated a check written by the victim the day he was shot and identified the victim's wallet, noting there was no money in it after the shooting. The father also identified as his the truck the victim was driving and identified the shirt the victim wore.

Appellant claimed the testimony was irrelevant, prejudicial and was calculated to elicit the jury's sympathy.

Syl. pt. 10 - "Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury." Syllabus point 5, *in part State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992).

Syl. pt. 11 - " " "A judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syllabus Point 7, *Starcher v. South Penn Oil Co.*, 81 W.Va. 587, 95 S.E. 28 (1918). Syllabus Point 7, *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991)." Syllabus point 3, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

Citing Rule 401, Rules of Evidence, the Court found testimony regarding the victim's son was irrelevant and should not have been admitted. However, although the standard for reversal is stricter than in a civil case, *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996), the Court found the outcome here was not affected. See also, *State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992). No error.

EVIDENCE

Admissibility (continued)

Tattoos

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

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

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder without mercy. He had tattooed on the backs of his hands words such as “Grim reaper” and “devil.” He claimed that he had a right to cover those tattoos pursuant to *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) and *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

The Court disagreed. “The mere fact that a defendant has tattoos is not inherently prejudicial.” *State v. Smith*, 170 Ariz. 481, 484, 826 P.2d 344, 345 (1992). The cases cited related to wearing prison uniforms at trial and the right to be free of unnecessary physical restraints. Cf. *State v. Ballantyne*, 128 Ariz. 68, 623 P.2d 857 (1981) (forced display of the tattoo coupled with the question whether the tattoo was typically one used by Hell’s Angels motorcycle gang).

Testimony elicited by judge

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

Appellant was convicted of four counts of delivery of a controlled substance. A Mr. Wilkins bought the marijuana at issue. During his testimony at a pre-trial hearing, the trial court questioned Wilkins as to the details of the timing of the transactions.

During the subsequent trial, the court interrupted Wilkins’ testimony and advised the prosecution, outside of the presence of the jury, to clarify the timing of the transactions. He later directed further questions to the witness out of the jury’s presence. Upon the jury’s return the witness testified as to dates which he earlier claimed not to remember.

Appellant claimed the trial court’s questioning violated Rule 614(b) of the Rules of Evidence.

EVIDENCE

Admissibility (continued)

Testimony elicited by judge (continued)

State v. Farmer, (continued)

Syl. pt. 1 - A trial court must exercise its sound discretion when questioning a witness pursuant to Rule 614(b) of the West Virginia Rules of Evidence. This Court will review a trial court's questioning of a witness under the abuse of discretion standard. To the extent the issue involves an interpretation of the Rule 614(b) as a matter of law, however, our review is plenary and *de novo*.

Syl. pt. 2 - "A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case. With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury." Syl. Pt. 4, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

Syl. pt. 3 - The plain language of Rule 614(b) of the West Virginia Rules of Evidence authorizes trial courts to question witnesses—provided that such questioning is done in an impartial manner so as to not prejudice the parties.

The Court commented that Wilkins became very confused on cross-examination and that Wilkins is illiterate and could not read the transcribed responses he gave at an earlier hearing. The Court found the trial court's intervention proper. No error.

Testimony implicating another

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder of his father and second degree sexual assault of his stepmother. He complained that he was prevented from cross-examining his stepmother to establish her motive to kill his father.

Appellant claimed that three witnesses would testify as to discord between the couple but only appellant testified at trial. Appellant admitted he had no knowledge of his father and stepmother's relationship over the preceding year.

EVIDENCE

Admissibility (continued)

Testimony implicating another (continued)

State v. Bradford, (continued)

Syl. pt. 6 - “In a criminal case, the admissibility of testimony implicating another party as having committed the crime hinges on a determination of whether the testimony tends to directly link such party 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.’ Syl. Pt. 1, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).” Syl. pt. 2, *State v. Malick*, 193 W.Va. 545, 457 S.E.2d 482 (1995).

No error.

Threats against other than victim

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

Appellant was convicted of first-degree murder. At trial the prosecution introduced evidence that he threatened someone other than the victim the morning of the murder. Appellant had attended a party, leaving at 4 a.m. Upon the host asking him to “quiet down,” appellant replied by saying “I kill or shoot people who tell me to quiet down or shut up.”

Appellant claimed the evidence was more prejudicial than probative under Rule 403; the prosecution argued the evidence was admissible under Rule 404(b) to show appellant’s state of mind near the time of the crime and to show he was capable of deliberation.

Syl. pt. 4 - “As a general rule, an expressed intent of an accused to kill a certain person is not pertinent on his trial for killing another, but it may become pertinent and admissible under circumstances showing a connection between the threat and subsequent conduct of the accused’ Syl. Pt. 2 (in part), *State v. Corey*, 114 W.Va. 118, 171 S.E. 114 (1933).” Syl. Pt. 5, *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980), *modified on other grounds sub nom. State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

EVIDENCE

Admissibility (continued)

Threats against other than victim (continued)

State v. Degraw, (continued)

The Court noted the trial court gave a cautionary instruction limiting the jury's consideration of the threat to evidence of appellant's state of mind and "not to establish that he acted in conformity with such threat." The Court rejected appellant's reliance on *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980), noting that appellant raised the issue of his mental state through the defense of diminished capacity. No error.

Unavailable declarant

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

Appellant was convicted of DUI, third offense. His primary defense was that he was not the driver of the vehicle. The alleged actual driver was living in another state at the time of trial. Appellant attempted to introduce the defense through his former lawyer, who had spoken with the alleged driver. Appellant relied on *W.Va.R.Evid.* 804(b)(3) and (5) as a statement against interest or being otherwise trustworthy.

Appellant was convicted of DUI, third offense. His primary defense was that he was not the driver of the vehicle. The alleged actual driver was living in another state at the time of trial. Appellant attempted to introduce the defense through his former lawyer, who had spoken with the alleged driver. Appellant relied on *W.Va.R.Evid.* 804(b)(3) and (5) as a statement against interest or being otherwise trustworthy.

Syl. pt. 2 - For a party to satisfy its burden of showing unavailability within the meaning of West Virginia Rules of Evidence 804(a)(5), so that the extrajudicial statement of an unavailable declarant is exempt from a hearsay objection, we require the proponent of such testimony to show the unavailability of the witness by proving that they have made a good-faith effort to secure the declarant as a witness for trial by using substantial diligence in procuring the declarant's attendance (or testimony) by process or other reasonable means.

The Court found insufficient effort was made to show the witness was unavailable. Even absent Sixth Amendment confrontation requirements, the burden is similar to that of the prosecution. No abuse of discretion in refusing the proffer here.

EVIDENCE

Admissibility (continued)

Wavier of objections

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Admissibility, Invited error, (p. 205) for discussion of topic.

Authentication

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE DNA, Admissibility when sample unavailable, (p. 225) for discussion of topic.

Autopsy results

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See EXPERT WITNESSES Physicians, Use of autopsy, (p. 253) for discussion of topic.

Balancing test

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See EVIDENCE Admissibility, Balancing test, (p. 177) for discussion of topic.

Battered women's syndrome

Admissibility

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See EVIDENCE Admissibility, Battered women's syndrome, (p. 179) for discussion of topic.

EVIDENCE

Blood tests

Chain of custody

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE Admissibility, Blood samples, (p. 180) for discussion of topic.

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Chain of custody, (p. 221) for discussion of topic.

Preservation of same

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE Admissibility, Blood samples, (p. 180) for discussion of topic.

Chain of custody

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

Appellant was convicted of DUI causing death. He was flown by helicopter from the accident scene to a Roanoke hospital where a blood sample was taken and tested for blood alcohol level. On appeal he claimed there was no evidence that the test results were in fact appellant's, no evidence that anyone saw blood drawn from appellant and no evidence that testifying hospital personnel actually kept the tests in their normal course of business.

The prosecution argued any objections were waived because appellant introduced other blood tests done by hospital personnel showing he was diabetic and suffering from ketoacidosis at the time of the accident. Appellant claimed he was merely responding to the state's case in chief, thereby not waiving his objections.

Syl. pt. 3 - "The preliminary issue of whether a sufficient chain of custody has been shown to permit the admission of physical evidence is for the trial court to resolve. Absent an abuse of discretion, that decision will not be disturbed on appeal." Syllabus Point 2, *State v. Davis*, 164 W.Va. 783, 266 S.E.2d 909 (1980).

EVIDENCE

Chain of custody (continued)

State v. Knuckles, (continued)

The Court found appellant waived his objections by introducing the other blood tests. This evidence was not used merely to rebut. See *State v. Corbett*, 177 W.Va. 397, 352 S.E.2d 149 (1986). Further, authentication requires only that a party establish that the evidence is what it claims; chain of custody is merely a variation of that requirement. See *W.Va.R.Evid.* 901(a); *State v. Dillon*, 191 W.Va. 648, 447 S.E.2d 583 (1994). No abuse of discretion.

Blood samples

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE Admissibility, Blood samples, (p. 180) for discussion of topic.

Character

Of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

Co-conspirator's statement

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Co-conspirator's statements, (p. 181) for discussion of topic.

Collateral crimes

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Prior bad acts, (p. 208) for discussion of topic.

EVIDENCE

Collateral crimes (continued)

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 182) for discussion of topic.

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

Appellant was convicted of aggravated robbery. At trial, a state trooper related that appellant said to him that “drugs and alcohol now’s out of his system. That’s why he committed crimes.”

The Court found that a limiting instruction should be given when other crimes are mentioned at trial, *State v. McGhee*, 193 W.Va. 164, 455 S.E.2d 533 (1996), but that trial courts are not required to give such instructions sua sponte. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Because appellant’s counsel moved for a mistrial, rather than for a limiting instruction, the Court found no error.

State v. Williams, 480 S.E.2d 162 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 186) for discussion of topic.

Admissibility

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 183) for discussion of topic.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 185) for discussion of topic.

EVIDENCE

Collateral crimes (continued)

Mentioned by police officer

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EVIDENCE Collateral crimes, (p. 223) for discussion of topic.

Confessions

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 515) for discussion of topic.

Admissibility

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 518) for discussion of topic.

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

Voluntariness

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SELF-INCRIMINATING/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 517) for discussion of topic.

EVIDENCE

Confessions (continued)

Voluntariness (continued)

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

Confessions of accomplice

State ex rel. Jones v. Trent, 490 S.E.2d 357 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions of accomplice, (p. 192) for discussion of topic.

DNA

Admissibility when sample unavailable

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

Appellant was convicted of second-degree murder. DNA tests on blood stains found on the victim's clothing matched appellants' genetic markers. Expert testimony was allowed even though the piece of clothing on which the blood was found was consumed. Appellant complained protocols were not shown to have been followed and photographs were not taken.

Three sets of tests were performed, one at the State Police Forensic Laboratory, one at Roche Laboratories and one at Cellmark Diagnostics. The State Police got their sample by immersing a part of the bloodstain in detergent; Roche swabbed the material with sterile solution; and Cellmark was unable to obtain any material, despite consuming the material in the attempt.

Appellant also objected to the lack of identifying marks on the clothing from which the samples were taken and to the lack of testimony connecting the clothing to the victim.

EVIDENCE

DNA (continued)

Admissibility when sample unavailable (continued)

State v. Jarvis, (continued)

Syl. pt. 3 - “When the government performs a complicated test on evidence that is important to the determination of guilt, and in so doing destroys the possibility of an independent replication of the test, the government must preserve as much documentation of the test as is reasonably possible to allow for a full and fair examination of the results by a defendant and his experts.” Syllabus point 4, *State v. Thomas*, 187 W.Va. 686, 421 S.E.2d 227 (1992).

Syl. pt. 4 - “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 901(a), West Virginia Rules of Evidence.

Material was preserved for the secondary test by Cellmark. Despite the lack of test results, the Court found the State fulfilled its obligation to preserve a sample.

Further, the Court found the clothing was discovered in the victim’s yard in an area where a struggle apparently took place. The body was found unclothed and witnesses testified that the clothing was of the type the victim owned. No error.

DUI

Committed in another state

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

Pursuant to *W.Va. Code* 53-1-1, petitioner, the prosecuting attorney of Wood County, sought a writ of mandamus instructing the circuit judge to correct an instruction given to the grand jury that a DUI conviction sustained in Ohio could not be used to enhance a West Virginia conviction to third offense DUI pursuant to *W.Va. Code* 17C-5-2.

The judge ruled that Ohio’s statute had significant differences in that it charged *operating* a motor vehicle under the influence, not *driving* a motor vehicle as in West Virginia. Ohio has allowed conviction for sitting in a vehicle in a parking lot or driveway.

EVIDENCE

DUI (continued)

Committed in another state (continued)

State ex rel. Conley v. Hill, (continued)

Syl. pt. 1 - “A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath’ has committed an offense with ‘the same elements’ as the offense set forth in *W.Va. Code* 17C-5-2(d)(1)(E) of operating a motor vehicle with ‘an alcohol concentration in his blood of ten hundredths of one percent or more, by weight.’” Syl. Pt. 2, *State ex rel. Kutch v. Wilson*, 189 W.Va. 47, 427 S.E.2d 481 (1993).

Syl. pt. 2 - Notwithstanding the fact that another state’s driving under the influence statute may contain additional elements not found in West Virginia Code § 17C-5-2 (1996), an out-of-state conviction may properly be used for sentence enhancement pursuant to West Virginia Code § 17C-5-2(k) provided that the factual predicate upon which the conviction was obtained would have supported a conviction under the West Virginia DUI statute.

The Court rejected respondent’s argument that because vehicular movement is not a necessary element for DUI conviction in Ohio no Ohio convictions can be used for enhancement. The Court held that *W.Va. Code* 17C-5-2(k) does not bar all Ohio DUI convictions; only where the element of movement is not present in the Ohio conviction must the Ohio conviction be ignored for enhancement purposes. Writ granted.

Conviction in another state

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

Appellant was convicted of DUI, second offense and sentenced to six months, sentence suspended, with home confinement. He argued that his prior DUI conviction in Virginia cannot be used to enhance his West Virginia conviction because Va. Code Ann. 18.2-266 makes it unlawful for a person to “drive or operate any motor vehiclewhile such person is under the influence of alcohol.”

EVIDENCE

DUI (continued)

Conviction in another state (continued)

State v. Williams, (continued)

W.Va. Code 17C-5-2(1) allows enhancement when the other state's DUI statute has the "same elements as an offense" as in the West Virginia statute.

Syl. pt. 1 - "Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another State is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant has once before been convicted of driving under the influence of alcohol, the State has made a *prima facie* case." Syllabus Point 1, *State ex rel. Kutsch v. Wilson*, 189 W.Va. 47, 427 S.E.2d 481 (1993).

Syl. pt. 2 - "Notwithstanding the fact that another State's driving under the influence statute may contain additional elements not found in West Virginia Code § 17C-5-2 (1996), an out-of-state conviction may properly be used for sentence enhancement pursuant to West Virginia Code § 17C-5-2(k) provided that the factual predicate upon which the conviction was obtained would have supported a conviction under the West Virginia DUI statute." Syllabus Point 2, *State ex rel. Conley v. Hill*, 199 W.Va. 686, 487 S.E.2d 344 (1997).

Syl. pt. 3 - Unless it can be shown that the factual predicated upon which a prior out-of-state driving under the influence conviction was obtained failed to include any element of this State's driving under the influence statute, the introduction of an out-of-state driving under the influence conviction constitutes a *prima facie* case for sentence enhancement. Whether the out-of-state conviction satisfies the requirement of this State's enhancement statute is a question of law.

Noting that the prosecution made a *prima facie* showing that appellant committed a prior DUI offense, and in the absence of evidence showing the other offense's elements were *not* similar, the Court found no error in allowing its use for enhancement.

EVIDENCE

Exculpatory

Failure to give

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

Enhancement

Based on conviction in another state

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

Exhumation of body

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See EXPERT WITNESSES Physicians, Use of autopsy, (p. 253) for discussion of topic.

Failure to object

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See APPEAL Failure to preserve, (p. 50) for discussion of topic.

Consequences of

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See PROSECUTING ATTORNEY Conduct at trial, Reference to appellant's foul language, (p. 472) for discussion of topic.

EVIDENCE

Flight

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

See EVIDENCE Admissibility, Flight, (p. 197) for discussion of topic.

Gruesome photographs

Admissibility

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See EVIDENCE Admissibility, Gruesome photographs, (p. 198) for discussion of topic.

Hearsay

Admissibility

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See APPEAL Failure to preserve, (p. 50) for discussion of topic.

Prior inconsistent statements

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 210) for discussion of topic.

Sheriff's notice of DUI conviction

State v. Simons, 496 S.E.2d 185 (1997) (Per Curiam)

See EVIDENCE Admissibility, Sheriff's notice of DUI arrest, (p. 213) for discussion of topic.

EVIDENCE

Hearsay (continued)

Statement against penal interest

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

Identification out of court

Defendant taken to magistrate court

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EVIDENCE Admissibility, Identification in court, (p. 204) for discussion of topic.

Lost photo arrays

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EVIDENCE Admissibility, Identification in court, (p. 204) for discussion of topic.

Immaterial evidence

Admissibility

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

EVIDENCE

Impeachment

Criminal conviction use for

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

Appellant was convicted of possession of heroin with intent to deliver. At trial he sought impeachment of the police informant who posed as a buyer for the heroin by asking him about a 1991 conviction for shoplifting. The circuit court struck the question, ruling the offense did not involve dishonesty or false statement as required by Rule 609(a)(2)(B) of the Rules of Evidence.

Syl. pt. 7 - "Rule 609(a)(2) of the West Virginia Rules of Evidence divides the criminal convictions which can be used to impeach a witness other than a criminal defendant into two categories: (A) crimes 'punishable by imprisonment in excess of one year,' and (B) crimes 'involving dishonesty or false statements regardless of the punishment.'" Syl. Pt. 2, *CGM Contractors, Inc. v. Contractors Environmental Services, Inc.*, 181 W.Va. 679, 383 S.E.2d 861 (1989).

Syl. pt. 8 - "Evidence that a witness other than the accused in a criminal case has been convicted of a crime is admissible for the purpose of impeachment under West Virginia Rule of Evidence 609(a)(2)(B) when the underlying facts show that the crime involved dishonesty or false statement." Syl. Pt. 5, *Wilkinson v. Bowser*, 199 W.Va. 92, 483 S.E.2d 92 (1996).

The Court found shoplifting did not involve false statement. No error.

Prior inconsistent statements

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder and sexual assault. On the early morning of the killing, John A. Burdette, a bartender, saw the victim and appellant emerge from a backroom of the bar. He noted that both appeared angry and that appellant "said something to the effect of bitch or whore or something like that."

During a polygraph exam, Burdette denied any knowledge of the victim's death. Ross Gray told police that Burdette told him that appellant said as he was leaving the bar "take a look at this young pretty c__t. It will be the last time you see her pretty face." Burdette later admitted he was not telling the truth during the exam and did indeed hear the statement Gray alleged.

EVIDENCE

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Blake, (continued)

At trial Burdette testified to hearing the statement. Defense counsel attempted to introduce the prior polygraph questions to show prior inconsistent statements. The trial court refused, holding that polygraph settings require different questioning than ordinary interviews.

Syl. pt. 1 - Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence---notice and an opportunity to explain or deny---must be met; and, finally, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact.

Syl. pt. 2 - Generally, a witness who testifies to certain matters cannot be impeached by showing his or her failure on a prior occasion to disclose a material fact unless the disclosure was omitted under circumstances rendering it incumbent or natural for the witness to state it.

Syl. pt. 3 - When a prior inconsistent statement is offered to impeach a witness and the claimed inconsistency rests on an omission to state previously a fact now asserted, the prior statement is admissible if it also can be shown that prior circumstances were such that the witness could have been expected to state the omitted fact, either because he or she was asked specifically about it or because the witness was purporting to render a full and complete account of the accident, transaction, or occurrence and the omitted fact was an important and material one, so that it would have been natural to state it.

Syl. pt. 4 - Assessments of harmless error are necessarily content-specific. Although erroneous evidentiary rulings alone do not lead to automatic reversal, a reviewing court is obligated to reverse where the improper exclusion of evidence places the underlying fairness of the entire trial in doubt or where the exclusion affected the substantial rights of a criminal defendant.

EVIDENCE

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Blake, (continued)

The Court noted that evidentiary rulings are only reversible if the jury was influenced thereby. However, if the harmlessness is in doubt, relief must be granted. *O'Heal v. McAnich*, 115 S.Ct. 992, 996, 130 L.Ed.2d 947, 955 (1995); *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court noted any relevant statement made during a polygraph exam may be questioned for impeachment purposes. *Heydinger v. Adkins*, 178 W.Va. 463, 360 S.E.2d 240 (1987). The statement may not be admitted for its truthfulness but only as impeachment. *State v. Collins*, 186 W.Va. 1, 6, 409 S.E.2d 181, 186 (1990). For requirements for admission (cited above) see *State v. Carrico*, 189 W.Va. 40, 427 S.E.2d 474 (1993).

Finding the question here to be whether an omission is a prior inconsistency, the Court noted Burdette admitted lying when confronted by the polygraph operator with his statement to Gray. The Court dismissed the prosecution's claim that a proper foundation was not laid for introduction of the statement. Rule 613(b) of the Rules of Evidence was not implicated here. Similarly, the Court rejected the argument that a proffer of evidence was not properly made under Rule 103(a)(2).

Most importantly, the statement here excluded went not just to the witness' credibility but to a critical element of the case. Reversed and remanded (on the murder conviction).

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 210) for discussion of topic.

EVIDENCE

Impeachment (continued)

Prior voluntary statement without counsel

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

Appellant was convicted of first-degree murder in the stabbing death of Adrianna Vaught. Appellant's mother testified that her son arrived home at 7:00 a.m. the morning of the killing with blood on his shirt and pants. He was carrying a knife from her kitchen and had a small cut between his thumb and forefinger, which he explained as having resulted from the struggle with his victim. After asking his mother to wash the clothes appellant wrapped the knife in a paper bag, telling his mother she was to "throw it away."

He claimed to be going to Huntington State Hospital but was picked up on a fugitive warrant in Michigan. The transporting officer noticed a cut on appellant's hand. The investigating officer found a chair under a transom over the door into the kitchen of the victim's apartment. He observed blood on the right side of the transom and also "beside the chair, right beside the entrance door." Another officer got a shoeprint from the top of the stove, and a partial print in blood near the victim's body. Both prints appeared to be those of a tennis shoe.

The State Police print expert was unable to "make any positive identifications or eliminations." He did say the prints were "consistent with" appellant's shoes. The State Police serologist testified that polymerase chain reaction (PCR) test showed some of the blood in the apartment was consistent with a mixture of appellant's and the victim's blood; appellant could not be conclusively identified but 78% of the population could be excluded.

Appellant's mother testified that her son had been hospitalized for suicide attempts and drank heavily. Other witnesses told of seeing appellant leave a party at 4 to 4:30 a.m. the morning of the killing, and that appellant was drinking heavily. In addition, appellant apparently took pain medication (Percocets) and sniffed spray paint the same evening. A pharmacist testified that he filled numerous prescriptions for appellant the week prior to the murder. He further testified that if all of these medications were taken, along with Percocet and alcohol, the person "would be stumbling everywhere, not knowing what they had in their hand...." and be incapable of driving a car or climbing in windows.

EVIDENCE

Impeachment (continued)

Prior voluntary statement without counsel (continued)

State v. Degraw, (continued)

Appellant relied upon diminished capacity as a defense. A psychiatrist testified that appellant suffered from bipolar disorder or manic depression, along with antisocial personality disorder. Appellant's ability to premeditate the morning of the murder would have been "drastically affected" by the combined effects of appellant's mental illness and what he ingested and inhaled. The doctor gave a detailed account of appellant's inability to remember events the morning of the murder.

The prosecution presented another psychiatrist's testimony diagnosing appellant as suffering from major depression with psychosis. A psychologist testified that appellant was someone who tended to exaggerate his problems and that appellant claimed blackouts as an excuse. Finally, the transporting officers said appellant responded to their pointing out the cut on his hand that "you've talked to mama." Further during a conversation regarding the route taken back from Michigan, appellant commented that the way he had gotten there was shorter, with no tolls.

Appellant claimed admission of the police statements violated his Fifth Amendment rights when they were admitted to rebut his diminished capacity defense (the statements were ruled inadmissible in the prosecution's case-in-chief).

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." Syl. Pt. 4, *State v. Goodmon*, 170 W.Va. 123, 290 S.E.2d 260 (1981).

Syl. pt. 2 - Pursuant to the United States Supreme Court's decision in *James v. Illinois*, 493 U.S. 307, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990), the scope of the impeachment exception pertaining to the admissibility of a defendant's voluntary, yet illegally obtained statement, does not permit prosecutors to use such statements to impeach the credibility of defense witnesses.

EVIDENCE

Impeachment (continued)

Prior voluntary statement without counsel (continued)

State v. Degraw, (continued)

Syl. pt. 3 - When a defendant offers the testimony of an expert in the course of presenting a defense such as the insanity defense or the diminished capacity defense, which calls into question the defendant's mental condition at the time the crime occurred, and the expert's opinion is based, to any appreciable extent, on the defendant's statements to the expert, the State may offer in evidence a statement the defendant voluntarily gave to police, which otherwise is found to be inadmissible in the State's case-in-chief, solely for impeachment purposes either during the cross-examination of the expert or in rebuttal, even though the defendant never takes the witness stand to testify.

The Court noted that the police statements were admissible here because appellant gave contradictory statements. No error.

Independent replications of tests

DNA

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See EVIDENCE DNA, Admissibility when sample unavailable, (p. 225) for discussion of topic.

Indictments

Amendment to

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See INDICTMENT Amendments to, (p. 303) for discussion of topic.

Inspection of tangible objects

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Physical, Right to inspect, (p. 240) for discussion of topic.

EVIDENCE

Irrelevant

Admissibility

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

See INSANITY Test for, (p. 323) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Irrelevant evidence, (p. 206) for discussion of topic.

Judge's questioning of witness

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Juveniles

Proof of age required for transfer

State ex rel. Blake v. Vickers, No. 23317 (6/14/96) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 400) for discussion of topic.

Newly-discovered evidence

Effect of

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

Appellant was convicted of conspiracy to commit murder in the shooting death of Michael Hart. Appellant was indicted along with two others, Lee Allen and Jason Henthorne, and separate trials were held for each.

EVIDENCE

Newly-discovered evidence (continued)

Effect of (continued)

State v. Helmick, (continued)

At appellant's trial a Charlene Foster testified that appellant, Allen and Henthorne were at her apartment one week prior to the shooting and discussed shooting Hart. Another witness testified that Henthorne and Hart did not get along and that Henthorne admitted to him that Henthorne killed Hart. Finally, an Amy Below testified that she drove Henthorne to the scene of the shooting, heard a loud bang and observed Henthorne return to her car with a shotgun in hand.

Allen's trial resulted in his acquittal. Three witnesses testified at Allen's trial who did not testify at appellant's trial. Michael McDonald testified that Charlene Foster told him it was her idea to kill Hart. He also claimed to have seen a gun in Foster's apartment. Henthorne testified that there was no plan to kill Hart, that he did it of his own volition.

The trial court denied appellant's motion under Rule 33 for new trial based on newly discovered evidence, noting that appellant did not subpoena the witnesses who later testified, nor did he even interview the co-defendants. Further, in the court's view, none of the testimony would have changed the result.

Syl. pt. 1 - “ “A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.” Syllabus, *State v. Frazier*, 162 W.Va. 602, 253 S.E.2d 534 (1979), quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).’ Syl. Pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).” Syllabus Point 1, *State v. O'Donnell*, 189 W.Va. 628, 433 S.E.2d 566 (1993).

EVIDENCE

Newly-discovered evidence (continued)

Effect of (continued)

State v. Helmick, (continued)

Syl. pt. 2 - "A new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special." Syllabus Point 9, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

The Court noted appellant did not produce affidavits showing the nature of new testimony. Further, the Court was not convinced that the trial court abused its discretion in finding that the testimony at issue would have changed the result. The Court also noted that due diligence was not exercised to obtain the witnesses' testimony. Further, the evidence appeared to be cumulative. No error.

Photo arrays

Effect of losing

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EVIDENCE Admissibility, Identification in court, (p. 204) for discussion of topic.

Physical

Right to inspect

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

Appellant was convicted of malicious wounding and battery. A stick was used in the assault, which included sexual assault. Prior to trial appellant moved for a separate forensic examination of the stick, which motion was denied; the circuit court found no purpose in having a separate examination. The prosecution's examination was solely for the purpose of showing the stick was somehow connected with the victim.

EVIDENCE

Physical (continued)

Right to inspect (continued)

State v. Crabtree, (continued)

Syl. pt. 7 - Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure requires that upon the request of the defendant the State shall permit the defendant to inspect tangible objects that are material to the preparation of the defendant's defense. The right of inspection under this rule includes the right to have the defendant's own expert examine the tangible evidence that the State contends was used or possessed by the defendant at the time of the commission of the crime.

Syl. pt. 8 - A criminal defendant who desires to analyze an article or substance in the possession or control of the State under Rule 16 of the West Virginia Rules of Criminal Procedure should file a motion setting forth the circumstances of the proposed analysis, the identity of the expert who will conduct such analysis, and the expert's qualifications and scientific background. The trial court may then, in its discretion, provide for appropriate safeguards, including, where necessary, the performance of such tests at the State laboratory under the supervision of the State's analyst.

Upon reconsideration, the circuit court allowed a separate forensic examination. For that reason only, the Court refused to reverse and remand. See *United States v. Armstrong*, 116 S.Ct. 1480, 1485, 134 L.Ed.2d 687, 697 (1996); *United States v. Vaughn*, 736 F.2d 665, 666 (11th Cir. 1984), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989); *United States v. Gaultney*, 606 F.2d 540, 545 (5th Cir. 1979). No error.

Plain view exception

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 509) for discussion of topic.

EVIDENCE

Prejudicial

Displaying tattoos for identification

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

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

Irrelevant evidence

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Tattoos, (p. 216) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Irrelevant evidence, (p. 206) for discussion of topic.

Prior inconsistent statement

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

See EVIDENCE Impeachment, Prior inconsistent statements, (p. 232) for discussion of topic.

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 209) for discussion of topic.

Prior voluntary statement without counsel

Impeachment using

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

EVIDENCE

Privileges

Attorney-client

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See PRIVILEGES Attorney-client privilege, Divorce attorney as witness, (p. 454) for discussion of topic.

Prompt presentment

Delay in taking before a magistrate

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

Rape shield

Victim's statements about unrelated offense

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

Appellant was convicted of sexual misconduct by a guardian. The infant victim had made other statements about sexual misconduct against her by other persons, which statements were held inadmissible.

In addition, the infant made statements to two witnesses, whose testimony was admitted, regarding appellant's sexual misconduct. The two witnesses were her aunt and a social worker.

The infant began seeing a therapist after charges were brought. During therapy she made statements to her therapist about being the victim of sexual misconduct by other persons.

EVIDENCE

Rape shield (continued)

Victim's statements about unrelated offense (continued)

State v. Quinn, (continued)

Syl. pt. 1 - Evidence that the alleged victim of a sexual offense has made statements about being the victim of sexual misconduct, other than the statements that the alleged victim has made about the defendant and that are at issue in the state's case against the defendant, is evidence of the alleged victims "sexual conduct" and is within the scope of West Virginia's rape shield law, *W.Va. Code*, 61-8B-11 [1986] and West Virginia Rules of Evidence 404(a)(3) [1994], unless the defendant establishes to the satisfaction of trial judge outside of the presence of the jury that there is a strong probability that the alleged victim's statements are false.

Syl. pt. 2 - Requiring strong and substantial proof of the actual falsity of an alleged victim's other statements is necessary to reasonably minimize the possibility that evidence which is within the scope of our rape shield law, *W.Va. Code*, 61-8B-11 [1986] and West Virginia Rules of Evidence 404(a)(3) [1994], is not erroneously considered outside of its scope.

Syl. pt. 3 - A defendant who wishes to cross-examine an alleged victim of a sexual offense about or otherwise introduce evidence about other statements that the alleged victim has made about being the victim of sexual misconduct must initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution, which presentation may in the court's discretion be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim and effectuates the purpose of our rape shield law, *W.Va. Code*, 61-8B-11 [1986] and West Virginia Rules of Evidence 404(a)(3) [1994].

Syl. pt. 4 - If the trial court finds that there is a strong probability that the alleged victim of a sexual offense has made other statements which are false of being the victim of sexual misconduct, evidence relating to those statements may be considered by the court outside the scope of our rape shield law, *W.Va. Code*, 61-8B-11 [1986] and West Virginia Rules of Evidence 404(a)(3) [1994].

EVIDENCE

Rape shield (continued)

Victim's statements about unrelated offense (continued)

State v. Quinn, (continued)

Syl. pt. 5 - A determination of the probable falsity of other statements of being the victim of sexual misconduct made by an alleged victim of a sexual offense is not a determination of the admissibility of evidence regarding the statements, nor is it a determination that cross-examination on the other statements must be permitted. A falsity determination means only that evidence regarding the other statements is not to be considered as evidence of an alleged victim's "sexual conduct" within the meaning of our rape shield law, *W. Va. Code*, 61-8B-11 [1986] and West Virginia Rules of Evidence 404 (a)(3) [1994]. The evidence remains subject to all other applicable evidentiary requirements and considerations. Moreover, in the event that an ultimate determination is made that such evidence is admissible, the state retains the right to seek to rebut or impeach such evidence before the ultimate trier of fact.

Syl. pt. 6 - Under West Virginia Rules of Evidence 801(d)(1)(B) [1994] a prior consistent out-of-court statement of a witness who testifies and can be cross-examined about the statement, in order to be treated as non-hearsay under the provisions of the Rule, must have been made before the alleged fabrication, influence, or motive came into being.

The Court noted that the victim's statements of others' misconduct toward the victim, if true, constitute evidence of sexual misconduct to which the rape shield statute applies. It is necessary that the trial court determine the truth of the statements out of the jury's presence. The defendant must show the falsity of the statements. The Court noted that establishment of the falsity is necessary for consideration under the rape shield law.

Here, appellant's offer failed to show falsity. Appellant sought to introduce statements by the alleged other perpetrators, which proffer the judge deemed insufficient. The record was never actually vouched with the statements. Similarly, the trial court refused attempts to cross-examine the victim, citing the victim's age and vulnerability; the Court concurred and noted pointedly that appellant had earlier sought to introduce the victim's statements about other abuse for their truth so as to explain the medical findings of her physical condition. No error.

EVIDENCE

Rape shield (continued)

Victim's statements about unrelated offense (continued)

State v. Quinn, (continued)

As to the two witnesses who were allowed to testify as to the victim's statements about the abuse, the Court held the statements admissible as a prior consistent statement West Virginia Rules of Evidence 801(d)(1)(B). The allegations were made before any motive for fabrication came into being. See *Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). No error.

Religious beliefs

Admissibility

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Religious beliefs, (p. 212) for discussion of topic.

Reputation

Of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

Sexual abuse victims' statements

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

See EVIDENCE Rape shield, Victim's statements about unrelated offense, (p. 243) for discussion of topic.

EVIDENCE

Sexual offenses

Victim's statements as to other attacks

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

See EVIDENCE Rape shield, Victim's statements about unrelated offense, (p. 243) for discussion of topic.

Second offense

Enhancement based on

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

Silence as admission

Failure to reply

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Hearsay, (p. 202) for discussion of topic.

Sufficiency of evidence

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

DUI

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See DUI Sufficiency of evidence, (p. 163) for discussion of topic.

EVIDENCE

Suppression of

Standard for review

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Tangible objects

Inspection of

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Physical, Right to inspect, (p. 240) for discussion of topic.

Tattoos

Admissibility

State v. Meade, 474 S.E.2d 481 (1996) (McHugh, C.J.)

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

Testimony elicited by judge

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Testimony implicating another

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Testimony implicating another, (p. 217) for discussion of topic.

EVIDENCE

Threats

Admissibility

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Admissibility, Threats against other than victim, (p. 218) for discussion of topic.

Waiver of objections

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See APPEAL Failure to preserve, (p. 50) for discussion of topic.

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See EVIDENCE Admissibility, Invited error, (p. 205) for discussion of topic.

Pre-trial suppression of testimony

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

Witness sequestration

Violation of

State v. Omechinski, 468 S.E.2d 173 (1996) (Cleckley, J.)

See WITNESSES Sequestration, Violation of, (p. 587) for discussion of topic.

EVIDENCE

Witnesses

Unavailable

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

See EVIDENCE Admissibility, Unavailable declarant, (p. 219) for discussion of topic.

EX POST FACTO

Criminal versus civil application

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

EXPERT WITNESSES

Autopsy results

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See EXPERT WITNESSES Physicians, Use of autopsy, (p. 253) for discussion of topic.

Defendant's statements to

Opening door for impeachment

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

Eyewitness identification

Denial of expert on

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

Appellant was convicted of aggravated robbery. Several eyewitnesses identified appellant as the perpetrator. Prior to trial appellant sought the services of Dr. Kenneth Anchor, a psychiatrist, whom appellant claimed would have testified as the psychology of eyewitness identification. The accuracy of the identification was the ultimate issue.

Citing *State ex rel. Foster v. Luff*, 164 W.Va. 413, 264 S.E.2d 477 (1980), the Court found that arbitrary refusal to authorize an expert witness may be reversible. Here, however, the Court found no error.

EXPERT WITNESSES

Physicians

Use of autopsy

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

Appellant was convicted of second-degree murder in the death of his ex-girlfriend. Evidence was adduced showing appellant shot her, then dumped her over a cliff. Appellant's current girlfriend confessed she heard the victim mumbling before being dumped but the confession was apparently not introduced into evidence. At trial, a Dr. Howard Kaufman testified as to the victim's ability to survive the gunshot. The court refused to order exhumation of the body to allow for an independent examination.

The body was examined by the Deputy Medical Examiner. After the state included Dr. Kaufman, a WVU neurosurgeon, the court ruled that Dr. Kaufman could not use the girlfriend's testimony as to the victim's mumbling in forming an opinion. Dr. Kaufman claimed the wound was survivable based on the results of the autopsy. Appellant claimed the opinion was based on the victim's attempt to talk, a fact not in evidence and therefore the opinion itself was inadmissible.

Syl. pt. 3 - "Any physician qualified as an expert may give an opinion about physical and medical cause of injury or death. This opinion may be based in part on an autopsy report." Syl. pt. 5, *State v. Jackson*, 171 W.Va. 329, 298 S.E.2d 866 (1982).

Syl. pt. 4 - "If a court, in a murder prosecution, has power to order the body of the deceased to be disinterred for examination for evidential purposes, it is only when to do so is plainly necessary and essential to the justice and fairness of trial, and is a matter in the discretion of the court, and its refusal to make such order is, as a rule, not reviewable as cause for reversal." Syllabus point 1, *State v. Highland*, 71 W.Va. 87, 76 S.E. 140 (1912).

The Court found the expert's opinion clearly admissible under Rule 702 of the West Virginia Rules of Evidence. Experts need not base their opinions on facts in evidence.

As to the refused exhumation, the Court found the medical examiner preserved sufficient evidence for an independent analysis. No error in refusing to exhume the body. Appellant was given a reasonable opportunity to examine the state's evidence. *State v. Thomas*, 187 W.Va. 686, 421 S.E.2d 227 (1992).

EXPERT WITNESSES

Scope of opinion

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See EXPERT WITNESSES Physicians, Use of autopsy, (p. 253) for discussion of topic.

EXPERTS

Inspection of tangible objects

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Physical, Right to inspect, (p. 240) for discussion of topic.

EXTRADITION

Grounds for

State ex rel. Nelson v. Grimmett, 486 S.E.2d 588 (1997) (Per Curiam)

In a habeas corpus proceeding the Circuit Court of Logan County ordered the Sheriff of Logan County to discharge petitioner from custody. The court concluded appellant did not knowingly and intelligently waive her right to counsel in South Carolina, which state sought her extradition.

Syl. pt. 1 - “The courts in an asylum state cannot determine constitutional questions with regard to crimes charged against fugitives in a demanding state in habeas corpus proceedings challenging the validity of extradition warrants. It is for the courts of the demanding state to determine such question in the first instance.” Syllabus Point 1, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971).

Syl. pt. 2 - “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).

Despite the lack of showing that appellant had counsel in South Carolina and proof submitted to the Logan County Circuit Court that four of nine bad checks there at issue had been paid off, the Court found the Circuit Court could not determine whether appellant was represented in South Carolina. Reversed and remanded.

Factors to consider

State ex rel. Nelson v. Grimmett, 486 S.E.2d 588 (1997) (Per Curiam)

See EXTRADITION Grounds for, (p. 256) for discussion of topic.

FELONY MURDER

Continuous transaction

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

Elements of

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Instructions on, (p. 285) for discussion of topic.

Instructions

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

Lesser included offenses

Involuntary manslaughter

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

Second-degree murder

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

FELONY MURDER

Lesser included offenses (continued)

Second-degree murder (continued)

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

Test for

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

Voluntary manslaughter

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

Provocation

When underlying offense is delivery of a controlled substance

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Instructions on, (p. 281) for discussion of topic.

Self-defense

Underlying felony delivery of controlled substance

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Instructions on, (p. 281) for discussion of topic.

FELONY MURDER

Sufficiency of evidence

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

FIFTH AMENDMENT

Abuse and neglect

Effect on termination of parental rights

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

Confessions

Admissibility

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 515) for discussion of topic.

Double jeopardy

Multiple offenses

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

Purpose of

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

FIFTH AMENDMENT

Double jeopardy (continued)

Purpose of (continued)

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

Waiver of

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

FIRST AMENDMENT

Restrictions on

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

Solicitation by lawyers not admitted in West Virginia

Lawyer Disciplinary Board v. Allen, 479 S.E.2d 317 (1996) (Albright, J.)

See ATTORNEYS Discipline, Lawyers not admitted in West Virginia, (p. 89) for discussion of topic.

FORENSIC EXAMINATIONS

Right to

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Physical, Right to inspect, (p. 240) for discussion of topic.

FORFEITURE

Double jeopardy

State v. Greene, 473 S.E.2d 921 (1996) (Albright, J.)

See DOUBLE JEOPARDY Civil versus criminal penalties, (p. 142) for discussion of topic.

State v. One (1) 1994 Dodge Truck Auto., 478 S.E.2d 118 (1996) (Per Curiam)

Appellant pled guilty to two counts of delivery of a controlled substance within one thousand feet of a school. Pursuant to *W.Va. Code* 60A-7-703 and 704, the prosecution moved to forfeit the vehicle here at issue, which motion was granted.

Appellant claimed double jeopardy principles were violated.

Syl. pt. - “West Virginia Code §§ 60A-7-703(a)(2) and (4) are not punitive for the purposes of the guarantees against double jeopardy as expressed in the *United States* and *West Virginia Constitutions*.” Syllabus point 3, *State v. Greene*, 196 W.Va. 500, 473 S.E.2d 921 (1996).

Affirmed

Motor vehicles

State v. One (1) 1994 Dodge Truck Auto., 478 S.E.2d 118 (1996) (Per Curiam)

See FORFEITURE Double jeopardy, (p. 264) for discussion of topic.

FOURTH AMENDMENT

Protective search

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Search and seizure

Standard for review

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Warrantless search

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

Warrant

Requirement for

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Warrantless search

Plain view exception

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 509) for discussion of topic.

FOURTH AMENDMENT

Warrantless search (continued)

Plain view exception (continued)

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507)
for discussion of topic.

FREE SPEECH

Restrictions on

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

GOVERNOR

Power to commute sentences

State ex rel. Forbes v. Caperton, 481 S.E.2d 780 (1996) (Workman, J.)

See SENTENCING Commutation of, Governor's power, (p. 527) for discussion of topic.

GRAND JURY

Amending indictment

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See INDICTMENT Amendments to, (p. 303) for discussion of topic.

Assistant prosecuting attorney

Authority to appear if non-resident

State v. Macri, 487 S.E.2d 891 (1996) (Workman, J.)

See PROSECUTING ATTORNEY Assistants, Residence of, (p. 469) for discussion of topic.

Power to render indictment

Residence of assistant prosecuting attorney

State v. Macri, 487 S.E.2d 891 (1996) (Workman, J.)

See PROSECUTING ATTORNEY Assistants, Residence of, (p. 469) for discussion of topic.

GUARDIANS AD LITEM

Abuse and neglect

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996)
(Workman, J.)

See ABUSE AND NEGLECT Guardians *ad litem*, Right to be heard, (p. 14) for discussion of topic.

HABEAS CORPUS

Appellate brief

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

See ATTORNEYS Duty to file appeal, (p. 94) for discussion of topic.

Appointed counsel not required

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

Circuit court's findings required

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

Denial of access to courts

State ex rel. Osborne v. Kirby, No. 23982 (7/11/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Punitive segregation, Denial of access to courts, (p. 453) for discussion of topic.

Denial of due process

State ex rel. Osborne v. Kirby, No. 23982 (7/11/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Punitive segregation, Denial of access to courts, (p. 453) for discussion of topic.

Duty to rule upon

State ex rel. Dotson v. Hoke, No. 23799 (12/6/96) (Per Curiam)

See JUDGES Duties, Duty to rule, (p. 360) for discussion of topic.

HABEAS CORPUS

Evidentiary hearing required

Nazelrod v. Hun, 486 S.E.2d 322 (1997) (Per Curiam)

Appellant was convicted of first-degree murder and sentenced to life with mercy. His first appeal was denied. Thereupon appellant filed for post-conviction habeas corpus relief, raising all issues previously raised on appeal. The circuit court denied the petition without granting a hearing.

Syl. - “A habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the petitioner an adequate opportunity to demonstrate his entitlement to relief.” Syllabus Point 5, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).

Although recognizing that not every petition for habeas corpus necessitates a hearing, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973), the Court found these circumstances required a hearing. Appellant claimed the trial court erred in determining his statements to police were voluntary; and that his counsel was ineffective. Especially in light of the ineffective assistance claim, the Court deemed a hearing necessary. Reversed.

Extradition

Limits of inquiry

State ex rel. Nelson v. Grimmer, 486 S.E.2d 588 (1997) (Per Curiam)

See EXTRADITION Grounds for, (p. 256) for discussion of topic.

Generally

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

HABEAS CORPUS

Ineffective assistance

State ex rel. Bailey v. Legursky, 490 S.E.2d 858 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 315) for discussion of topic

State ex rel. Strogon v. Trent, 469 S.E.2d 7 (1996) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 318) for discussion of topic.

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

Moot when client released

Kemp v. State, No. 23980 (12/16/97) (Per Curiam)

Petitioner was incarcerated in the penitentiary for sexual abuse. His petition claimed ineffective assistance of counsel and certain trial errors by the court. One week prior to oral arguments he was released from the penitentiary.

Syl. pt. - “Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.” Syllabus Point 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908).

The Court refused to consider whether parole or probation status are sufficient restrictions of ones freedom to justify a writ (with a hint that different facts may allow a writ). Further, the Court recognized that a writ of coram nobis may still be available.

Parole revocation

State ex rel. Schoolcraft v. Merritt, No. 23850 (7/8/97) (Per Curiam)

See PAROLE Revocation of, Domestic violence, (p. 432) for discussion of topic.

HABEAS CORPUS

Parole violations

State ex rel. Smith v. Duncil, 483 S.E.2d 272 (1996) (Per Curiam)

Petitioner was released on parole 14 February 1995; on 11 January 1996 he was charged with seven parole violations and by order dated 26 April 1996 the Parole Board revoked his parole. The order was signed by only one member of the Board.

Prior to the date of return for the writ of habeas corpus, petitioner's attorney wrote a letter saying the Parole Board appeared to comply with *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996) because the Board's Secretary signed a statement saying all three Board members had considered and ruled on petitioner's revocation. Dismissed.

Plea bargain

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See PLEA BARGAIN Finding of fact required, (p. 442) for discussion of topic.

Plea bargain different from face of indictment

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See PLEA BARGAIN Finding of fact required, (p. 442) for discussion of topic.

Sentence

Enhancement of

State ex rel. Chadwell v. Duncil, 474 S.E.2d 573 (1996) (Per Curiam)

See SENTENCING Enhancement, Based on enhanced misdemeanor, (p. 536) for discussion of topic.

HABEAS CORPUS

Standard for review

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 185) for discussion of topic.

HARMLESS ERROR

Co-conspirator's statements

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Co-conspirator's statements, (p. 181) for discussion of topic.

Fact proved by other evidence

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Co-conspirator's statements, (p. 181) for discussion of topic.

Hearsay

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Co-conspirator's statements, (p. 181) for discussion of topic.

Indictments

Defects not raised pre-trial

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See INDICTMENT Sufficiency of, Burglary, (p. 310) for discussion of topic.

Plea bargain

Trial court's duty to advise defendant

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

HEARSAY

Admissibility

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See APPEAL Failure to preserve, (p. 50) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 203) for discussion of topic.

Prior inconsistent statements

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 210) for discussion of topic.

Statement against penal interest

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

HOME CONFINEMENT

Conditions for

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See SENTENCING Home confinement, Credit for time served pre-trial, (p. 541) for discussion of topic.

Credit for time served pre-trial

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See SENTENCING Home confinement, Credit for time served pre-trial, (p. 541) for discussion of topic.

Increased severity of sentence

Denial of due process

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See DUE PROCESS Magistrate court conviction, Circuit court imposes higher penalty, (p. 155) for discussion of topic.

While free on bail

Distinguished from sentence of home confinement

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

Appellant was convicted of voluntary manslaughter. She claimed on appeal that she should be given credit for time spent on home confinement while released on pretrial bail.

HOME CONFINEMENT

While free on bail (continued)

Distinguished from sentence of home confinement (continued)

State v. McGuire, (continued)

Syl. pt. 4 - “When a person who has been arrested, but not yet convicted of a crime, is admitted to pre-trial bail with the condition that he be restricted to home confinement pursuant to West Virginia Code § 62-1C-2(c) (1992), the home confinement restriction is not considered the same as actual confinement in jail, nor is it considered the same as home confinement under the Home Confinement Act, West Virginia Code §§ 62-11B-1 to -12 (1993). Therefore, the time spent in home confinement when it is a condition of bail under West Virginia Code § 62-1C-2(c) does not count as credit toward a sentence subsequently imposed.” Syl. Pt. 4, *State v. Hughes*, 197 W.Va. 518, 476 S.E.2d 189 (1996).

The Court found the Home Confinement Act, *W.Va. Code 62-11B-1, et seq.*, inapplicable because appellant was not convicted while she was at home. Even though the bail conditions were very similar, the Act did not apply. No credit for time served. No error.

HOMICIDE

Automatism

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Character of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

Co-counsel

No requirement for

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See APPOINTED COUNSEL Co-counsel in murder case, (p. 77) for discussion of topic.

Evidence

Victim's surviving spouse and children

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See EVIDENCE Admissibility, Surviving spouse and children, (p. 215) for discussion of topic.

HOMICIDE

Felony-murder

Instructions on

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

During the consummation of the sale of crack cocaine, appellant shot and killed the customer following a disagreement as to the crack's sufficiency. Appellant and his companion were jointly charged with felony-murder. Appellant's co-defendant pled to second-degree murder and testified against him.

The circuit court rejected appellant's self-defense and provocation instructions, holding these are not available under a felony-murder charge. It was clear that appellant was not the initial aggressor here; on the other hand, appellant was not in fear of bodily injury.

Syl. pt. 1 - "[T]he elements which the State is required to prove to obtain a conviction of felony-murder are: (1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt." *State v. Williams*, 172 W.Va. 295, 311, 305 S.E.2d 251, 267 (1983)." Syllabus point 5, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987).

Syl. pt. 2 - Self-defense and provocation instructions are not available in response to a charge of felony-murder where the predicate felony is the delivery of a controlled substance.

The Court noted that any theory of self-defense must be established in relation to the underlying felony. The underlying felony here was delivery of a controlled substance. As a matter of law, neither provocation nor self-defense is available. No error.

Instructions on second-degree not required

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

HOMICIDE

Felony-murder (continued)

Lesser included offenses

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

Appellant was convicted of felony-murder for a killing associated with delivery of a controlled substance. He claimed that second-degree murder, along with voluntary and involuntary manslaughter, are lesser included offenses; the trial judge erred in refusing his instructions thereon.

Syl. pt. 3 - “‘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).” Syllabus point 3, *State v. Hays*, 185 W.Va. 664, 408 S.E.2d 614 (1991).

Syl. pt. 4 - As a matter of law, second-degree murder, voluntary manslaughter, and involuntary manslaughter are not lesser included offenses of felony-murder.

Malice is required for second murder but not for felony-murder, therefore second-degree murder is not a lesser included offense. The intent to commit the killing is required for voluntary manslaughter but only the intent to commit the felony is required for felony-murder so voluntary manslaughter is not a lesser included offense of felony-murder. Lastly, although engaging in an unlawful act can be required for both involuntary manslaughter and felony-murder, when that unlawful act has been enumerated as a underlying offense for felony-murder, involuntary manslaughter is not a lesser included offense. No error.

HOMICIDE

Felony-murder (continued)

Second-degree not lesser included offense

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

Appellant was convicted of felony murder, attempted murder in the first degree, kidnaping, aggravated robbery and grand larceny. He claimed on appeal that the jury should have been instructed on second-degree murder. Appellant claimed at trial that he killed the victims but claimed he was threatened with a deadly weapon.

The prosecution noted that appellant was indicted on felony murder and that second-degree murder is not a lesser included offense. The question presented to the jury was whether appellant killed the victims while committing or attempting to break and enter.

Syl. pt. 5 - “‘In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder--willful, deliberate, and premeditated murder and felony-murder--if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.’ Syl. pt. 9, *State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481 (1990).” Syllabus Point 1, *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992).

Syl. pt. 6 - “‘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.’ Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [*overruled on other grounds, State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994)].” Syllabus Point 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Because appellant was indicted and tried on felony murder, no error in refusing to give second-degree murder instructions.

HOMICIDE

Felony-murder (continued)

Sufficiency of evidence

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his infant son. He claimed on appeal that the evidence was insufficient to establish premeditation or intent; and that he suffered from “diminished capacity” at the time of the killing.

The evidence showed that appellant subjected his infant son to a continuous pattern of severe physical and emotional abuse. The immediate cause of death was appellant’s throwing the child into the bathroom where the child hit his head on the tub, causing a fatal skull fracture. Appellant refused to take the child to the hospital.

After his wife finally called an ambulance appellant apparently did assist a neighbor in giving CPR. Following the child’s death, DHHR was contacted and the investigating social worker found both appellant and his wife to be unremorseful. The medical examiner testified that the injuries were “a classic case of an abused child.” Appellant admitted he was a bad parent and did not deny he hit the child and dropped him on his head; his primary defense was he did not intend to kill his son, being in a “rage” at the time of the killing.

Syl. pt. 1 - “The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 2 - When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor’s coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial judge to resolve all evidentiary conflicts and credibility questions in the prosecutor’s favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecutor’s theory of guilt.

HOMICIDE

Felony-murder (continued)

Sufficiency of evidence (continued)

State v. LaRock, (continued)

The Court noted the prosecution need no longer prove that all other reasonable hypotheses of innocence are excluded in circumstantial cases. See *State v. Guthrie*, 194 W.Va. 657, 667-70, 461 S.E.2d 163, 173-76 (1995). All credibility issues must be resolved in the jury's favor, both at the trial court and appellate court level (*de novo* review is made of the trial court's ruling on appellant's motion for acquittal).

Here, the Court found the evidence of appellant's pattern of abuse overwhelming. Further, appellant's actions at the time of the incident clearly showed no concern for the child, giving rise to an inference of premeditation and deliberation. Motion for acquittal was properly refused and the case submitted to the jury. (See *Guthrie*, note 24, 194 W.Va. at 676, 461 S.E.2d 182: three categories of evidence which support first-degree murder conviction).

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

Appellant was convicted of felony-murder in connection to the sale of crack cocaine. Appellant accompanied his friend, an occasional drug dealer, to a street corner where drug sales were common. Appellant was carrying a pistol and showed it to his friend. It was uncontested that the friend conducted at least two sales that evening; appellant and others present were aware of the sales.

The victim pulled up to the corner in his truck and indicated he wanted to buy crack cocaine. Because he did not know the victim, the seller did not respond. A bystander, who knew the victim, then proceeded to speak to him and served as an intermediary in the subsequent sale.

During the actual delivery, however, the bystander took part of the cocaine, resulting in the victim's protest. The bystander took the victim's wallet and ran toward the group where appellant and the seller stood. The victim pursued and was attacked. During the melee the victim noticed his truck rolling toward the seller's car; he reentered the truck and began backing toward the car. Testimony conflicted regarding whether members of the group felt they were in danger.

HOMICIDE

Felony-murder (continued)

Sufficiency of evidence (continued)

State v. Wade, (continued)

At the seller's urging, appellant fired his pistol toward the back of the truck, fatally wounding the driver.

Syl. pt. 5 - "A person who is the absolute perpetrator of a crime is a principal in the first-degree, and a person who is present, aiding and abetting the fact to be done, is a principal in the second-degree." Syllabus point 5, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syllabus point 3, *State v. Mullins*, 193 W.Va. 315, 456 S.E.2d 42 (1995).

Syl. pt. 6 - " " "Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." Syllabus, *State v. Patterson*, 109 W.Va. 588, [155 S.E. 661] [1930]." Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972)." Syl. Pt. 9, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syllabus point 3, *State v. Kirkland*, 191 W.Va. 586, 447 S.E.2d 278 (1994).

Syl. pt. 7 - "Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime." Syl. Pt. 10, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syllabus point 4, *State v. Kirkland*, 191 W.Va. 586, 447 S.E.2d 278 (1994).

Syl. pt. 8 - "Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator." Syllabus point 11, *State v. Fortner*, 182 W.Va. 345, 357, 387 S.E.2d 812, 823 (1989).

Syl. pt. 9 - "The felony-murder statute applies where the initial felony and the homicide are parts of one continuous transaction, and are closely related in point of time, place, and causal connection, as where the killing is done in flight from the scene of the crime to prevent detection or promote escape." Syllabus point 2, *State v. Wayne*, 169 W.Va. 785, 289 S.E.2d 480 (1982).

HOMICIDE

Felony-murder (continued)

Sufficiency of evidence (continued)

State v. Wade, (continued)

The Court noted the underlying offense here, delivery of a controlled substance, is defined by delivery or possession with intent to deliver; only a “knowing” or “intentional” delivery is prohibited. Something more than mere presence during the delivery was required for appellant to be guilty of aiding and abetting (principal in the second degree).

The Court found that the underlying offense was committed and that appellant’s acts were “designed by him and operated as an encouragement to or protection of the perpetrator.” *Kirkland, supra*. Further, it was clear that the victim’s death resulted from the injuries received during the commission of the felony. No error.

First-degree murder

Instructions distinguishing categories

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

No right to co-counsel

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See APPOINTED COUNSEL Co-counsel in murder case, (p. 77) for discussion of topic.

Sufficiency of evidence

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

Appellant was convicted of murder. The victim was found on a roadside beside his vehicle. Lying next to the body was an empty .22 shell. The prosecution’s theory was that appellant lured the victim, her boyfriend, to the scene because he had severed their relationship. Appellant challenged the sufficiency of the evidence.

HOMICIDE

First-degree murder (continued)

Sufficiency of evidence (continued)

State v. Browning, (continued)

Syl. pt. 1 - “The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found that the essential elements of first-degree murder, an unlawful killing of another with malice, premeditation and deliberation, were present. The state proved the victim was killed by a gunshot, five witnesses saw appellant or her car at the murder scene at the appropriate time and an eyewitness saw the victim stagger and fall after hearing a gunshot. The witness also saw appellant leave the scene.

There was testimony that appellant persuaded the victim to meet her, that she and the victim had argued and the victim had left. The Court noted a jury may infer malice from the use of a deadly weapon in circumstances without excuse, provocation or justification. *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996). Taken in the light most favorable to the prosecution, the evidence here was sufficient. No error.

Instructions

Felony murder

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

HOMICIDE

Instructions (continued)

Lesser included offenses

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

Malice

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder. At trial the court gave the following prosecution instruction:

The court instructs the jury that in a prosecution for murder, if the state proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, shot the deceased with a firearm, then from such circumstances it may be inferred that the defendant acted with malice and the intent to kill.

No instruction was given telling the jury that the presumption of malice was rebuttable. Further, appellant claimed the instruction unconstitutionally relieved the prosecution of its duty to prove each element beyond a reasonable doubt. *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991); *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994).

Syl. 2- In a murder case, an instruction that a jury may infer malice and the intent to kill where the State proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, shot the victim with a firearm, does not unconstitutionally shift the burden of proof.

The question was whether the jury was properly instructed on the law, taking all instructions as a whole. *State v. Miller*, 197 W.Va. 588 at 607, 476 S.E.2d 535 at 554 (1996). The Court found the instruction here merely allowed the jury to infer malice, it did not require a presumption of malice. No error.

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder. Over defense objection the court gave the following instruction:

HOMICIDE

Instructions (continued)

Malice (continued)

State v. Miller, (continued)

“The Court instructs the jury that in a prosecution for murder, if the State proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, fired a deadly weapon in the direction where a person was located then from such circumstances it may be inferred that the defendant acted with malice and the intent to kill.”

Appellant claimed this instruction was banned in *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994). Further, appellant alleged the instruction improperly creates a presumption of an element of the offense. Appellant claimed no evidence was introduced of premeditation, deliberation or malice. Without the inference, the jury could not have convicted of any higher charge than manslaughter. Finally, the instruction shifted the burden of proof to the defense by relieving the prosecution of proving an essential element.

Syl. pt. 7 - In instructing a jury as to the inference of malice, a trial court must prohibit the jury from finding any inference of malice from the use of a weapon until the jury is satisfied that the defendant did in fact use a deadly weapon. If the jury believes, however, there was legal justification, excuse, or provocation, the inference of malice does not arise and malice must be established beyond a reasonable doubt independently without the aid of the inference. If requested by a defendant, the trial court must instruct the jury that the defendant has no obligation to offer evidence on the subject and the jury may not draw any inference from the defendant's silence.

The Court noted the purpose of instructions is to guide the jury as to the law and the theory of defense; instructions are to be taken as a whole. The instruction here did not create an impermissible presumption. Merely allowing a permissible inference, as here, is not the same. See *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Similarly, the instruction here did not violate *Jenkins, supra*, because, unlike *Jenkins*, the instruction here did not instruct the jury to reject all defenses. The jury was given a choice whether to infer malice from use of the weapon. Only if the prosecution established “the absence of excuse, justification, or provocation beyond a reasonable doubt” could the inference be used.

HOMICIDE

Instructions (continued)

Malice (continued)

State v. Miller, (continued)

Appellant's defense essentially was incapacitation due to alcohol and drugs or accidental killing, both inconsistent with malice. However, the jury was free to determine whether these defenses were supported by the evidence. The Court noted that upon request an instruction must be given that the defendant did not have an obligation to offer evidence on this point and the jury may not draw any conclusion from the defendant's silence (**QUERY**: why not make this instruction mandatory?). No error.

Involuntary manslaughter

Automatism

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Sufficiency of evidence

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See INVOLUNTARY MANSLAUGHTER Sufficiency of evidence, (p. 340) for discussion of topic.

Unconsciousness

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

HOMICIDE

Malice

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Inference from use of firearm

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Murder

Accessory after the fact

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder and second-degree sexual assault. The trial court refused an instruction on accessory after the fact as a lesser included offense or a theory of the case. Accessory after the fact was not included on the verdict form.

Appellant claimed to have been having sex with his stepmother when his father arrived home. He claimed he went to the front door, heard a shot and turned to find his stepmother with a rifle in her hand, with his father dead on the porch. Appellant admitted to dismembering the body and hiding it.

Syl. pt. 2 - Accessory after the fact to murder is not a lesser included offense of the crime of murder.

Syl. pt. 3 - “Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution.” Syl. pt. 12, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 4 - “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).

HOMICIDE

Murder (continued)

Accessory after the fact (continued)

State v. Bradford, (continued)

Syl. pt. 5 - “A trial court’s refusal to give a requested instruction is reversible error only if...the instruction is a correct statement of law...” Syl. pt. 11, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Since additional elements must be shown to be an accessory after the fact, the instruction cannot be given as a lesser included offense of murder. Further, appellant’s instruction was wrong in that an accessory must be absent from the crime scene at the time of the offense. Appellant was clearly present. No error.

Murder by failing to provide medical care

Element of knowledge

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

Appellant was convicted of child abuse and neglect with bodily injury, malicious assault and murder of a child by failure to provide medical care. Appellate counsel argued the statute is unconstitutionally vague and proper instructions were not given.

W.Va. Code 61-8D-2 applies to any “custodian.” Appellant argued that the statute can be applied to anyone with even temporary physical custody, whether or not the person has legal custody; and merely knowing of deprivation of medical care by another is sufficient, even if the other person’s conduct is malicious.

Finding that the criminal intent element of the offense is whether the conduct was done “knowingly,” the Court adopted the Model Penal Code definition of “knowingly” in 2.02(2) (b). (See opinion for text).

Syl. pt. 1 - A person acts knowingly with respect to a material element of an offense when: (1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

HOMICIDE

Murder by failing to provide medical care (continued)

Element of knowledge (continued)

State v. Wyatt, (continued)

Syl. pt. 2 - West Virginia Code § 61-8D-2(b) is not impermissibly vague by reason of its incorporation of the definition of “custodian” from the provisions of *W.Va. Code* § 61-8D-1(4). However, in a prosecution under *W.Va. Code* § 61-8D-2(b), an accused is entitled to instructions defining the term knowingly, requiring that the defendant have knowledge that the charged failure of another to act is both malicious and intentional and that the accused had an awareness that by allowing another to engage in such malicious and intentional conduct, the child was being denied necessary food, clothing, shelter or medical care.

No error in applying the statute to a “custodian.”

Self-defense

Character of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

Appellant was convicted of second-degree murder and conspiracy to commit murder. Appellant lived with her boyfriend, Conrad, and their three children. The relationship was stormy. Although appellant claimed Conrad struck her, no evidence was introduced of physical injuries to her or her children.

One evening while Conrad was asleep on the couch, one of appellant’s children pointed a rifle at him and pulled the trigger. Appellant held the rifle barrel. Appellant’s statement to police, entered into evidence. Was that she told the child that this was the only way to be safe.

Motions were granted to exclude any reference to “battered woman syndrome” and to exclude evidence of Conrad’s acts of violence toward appellant or her children. The trial court also refused appellant’s instructions on voluntary manslaughter or self-defense.

HOMICIDE

Self-defense (continued)

Character of victim (continued)

State v. Smith, (continued)

Syl. pt. 1 - “When in a prosecution for murder the defendant relies upon self-defense to excuse the homicide and the evidence does not show or tend to show that the defendant was acting in self-defense when he shot and killed the deceased, the defendant will not be permitted to prove that the deceased was of dangerous, violent and quarrelsome character or reputation.” Syl. pt. 1, *State v. Collins*, 154 W.Va. 771, 180 S.E.2d 54 (1971).

Syl. pt. 2 - “Instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given.” Syl. pt. 4, *State v. Collins*, 154 W.Va. 771, 180 S.E.2d 54 (1971).

The facts here were not in dispute. There was no sign of a struggle. Appellant did not meet the criteria of battered woman syndrome according to her own expert, testifying *in camera*. Reviewing the failure to give instructions by an abuse of discretion standard, *State v. Derr*, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994), the Court found no error in refusing to admit evidence of Conrad’s misconduct or in failing to give instructions.

Sentencing

Bifurcation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See BIFURCATION Grounds for, (p. 110) for discussion of topic.

Sufficiency of evidence

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

HOMICIDE

Sufficiency of evidence (continued)

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

Appellant was convicted of first-degree murder. The trial court refused his request for a directed verdict. Appellant contended on appeal that the only evidence before the jury regarding appellant's state of mind showed that he was not capable of premeditation or deliberation.

Appellant's psychiatrist witness did not think appellant capable of thought sufficient to premeditate. Appellant claimed his witness was uncontradicted by the state and therefore the evidence cannot be rejected. *Mildred L.M. v. John A. O.F.*, 192 W.Va. 345, 452 S.E.2d 436 (1994). The state maintains the jury was free to reject the opinion and that the evidence was sufficient to convict.

Syl. pt. 5 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 6 - "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found appellant's expert was contradicted. The jury was free to reject appellant's expert's testimony. See *Billotti v. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990) (expert testimony may be rebutted by lay witnesses). As in *Billotti*, there was sufficient lay testimony indicating appellant's ability to premeditate.

HOMICIDE

Sufficiency of evidence (continued)

State v. Degraw, (continued)

Considering the evidence in the light most favorable to the prosecution, there was sufficient evidence. No error.

Intent

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

Involuntary manslaughter

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See INVOLUNTARY MANSLAUGHTER Sufficiency of evidence, (p. 340) for discussion of topic.

Premeditation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

Unconsciousness

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

HOMICIDE

Voluntary manslaughter

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

Elements of

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

Appellant was convicted of voluntary manslaughter of her newborn daughter and sentenced to ten years. The trial court rejected the following jury instructions:

(1) That the state must prove beyond a reasonable doubt that (a) there was a death; and (b) that the death occurred by result of “a criminal act rather than by natural causes or by accident.” The instruction also contained elements necessary to prove the baby was born alive.

(2) Two instructions relating to involuntary manslaughter but which advised the jury of the differences between manslaughter and murder.

Further, the circuit court gave an instruction on voluntary manslaughter, holding there was sufficient evidence to support the instruction. The instruction read, “in order to convict the defendant of the offense of voluntary manslaughter you must find from the evidence beyond a reasonable doubt each of the above stated essential elements (for first-degree murder) except that the killing was not deliberate, premeditated or maliciously but that it was intentional.”

Syl. pt. 1 - “Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court’s discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed for an abuse of discretion.” Syl. Pt. 15, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

HOMICIDE

Voluntary manslaughter (continued)

Elements of (continued)

State v. McGuire, (continued)

Syl. pt. 2 - As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.

Syl. pt. 3 - Gross provocation and heat of passion are not essential elements of voluntary manslaughter, and, therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter.

The Court noted the first instruction related to whether the baby was born alive. Appellant argued that she believed the baby was dead at birth. The autopsy showed the baby was alive when appellant put it in a lit wood stove. Appellant's expert did not examine the baby and did not refute the autopsy findings in any way. No error in refusing the first instruction since the cause of death was not in dispute.

As to the involuntary manslaughter instructions, the Court noted the first instruction did not set forth the elements of first and second-degree murder but rather states the prosecution must prove the elements of first-degree murder except for the elements unnecessary to establish second-degree murder and manslaughter. The Court found an instruction given by the prosecution, while in one word, nonetheless adequately instructed the jury on involuntary manslaughter. No error.

The Court noted there is no statutory definition of voluntary manslaughter. Citing *State v. Beegle*, 188 W.Va. 681, 425 S.E.2d 823 (1992), the Court found that voluntary manslaughter is the "sudden intentional killing upon gross provocation and in the heat of passion." *Id.*, at 685, 425 S.E.2d 827. See also, *State v. Kirtley*, 162 W.Va. 249, 253-54, 252 S.E.2d 374, 376 (1978). The Court found that the issue was whether the prosecution had to prove "gross provocation" and "heat of passion."

Clearly, a conviction is appropriate only for an offense which is lesser included in the charge of murder. Therefore, voluntary manslaughter cannot contain elements greater than those necessary to convict of murder. In West Virginia, voluntary manslaughter is considered a lesser included charge of murder. *State v. Guthrie*, 194 W.Va. 656 at 671, 461 S.E.2d 163 at 177 (1995). Gross provocation and heat of passion are therefore not essential elements and need not be proven. No error in refusing appellant's instruction.

HOMICIDE

Voluntary manslaughter (continued)

Elements of (continued)

State v. McGuire, (continued)

Finally, the Court found sufficient evidence to support the verdict. No error.

Omission of word “anger” from instruction on

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

HUNTING

Negligent killing

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

IMPEACHMENT

Criminal conviction

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Impeachment, Criminal conviction use for, (p. 232) for discussion of topic.

Polygraph statement

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

See EVIDENCE Impeachment, Prior inconsistent statements, (p. 232) for discussion of topic.

Prior inconsistent statement

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

See EVIDENCE Impeachment, Prior inconsistent statements, (p. 232) for discussion of topic.

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 210) for discussion of topic.

Prior voluntary statement without counsel

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

INDICTMENT

Amendments to

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

Appellant was convicted of DUI, first offense. Upon arrest appellant refused to take the secondary chemical test. He was cited for driving left of center and paid a fine for that charge the night of his arrest.

At the same time a criminal complaint was filed charging appellant with DUI, second offense following discovery of a prior offense; upon discovery of yet a third DUI offense, an indictment was returned charging appellant with DUI, third offense.

Prior to trial it was learned that the second offense was dismissed for failure to prosecute and the third offense was not properly documented. Trial proceeded on DUI, first offense, with defense counsel objecting to redaction of the indictment to reflect the change from third offense to first offense; counsel suggested dismissal and filing of a misdemeanor charge in magistrate court.

The judge did not change the indictment but the jury found appellant guilty or not guilty of DUI, first offense.

Syl. pt. 1 - "To the extent that *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955), stands for the proposition that 'any' change to an indictment, whether it be form or substance, requires resubmission to the grand jury for its approval, it is hereby expressly modified. An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment." Syl. pt. 2, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

Syl. pt. 2 - "Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An 'amendment of form' which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced." Syl. pt. 3, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

INDICTMENT

Amendments to (continued)

State v. Johnson, (continued)

Syl. pt. 3 - If the proof adduced at trial differs from the allegations in an indictment, it must be determined whether the difference is a variance or an actual or a constructive amendment to the indictment. If the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced, then the difference between the proof adduced at trial and the indictment is a variance which does not usurp the traditional safeguards of the grand jury. However, if the defendant is misled, is subjected to an added burden of proof, or is otherwise prejudiced, the difference between the proof at trial and the indictment is an actual or a constructive amendment of the indictment which is reversible error.

The Court noted that had the indictment been redacted the defendant would not have been misled in any way or subjected to additional proof, or otherwise prejudiced. Although the indictment and the proof were at variance, no harm was done. (Had the charges been expanded at trial a different result would be reached.) No error.

Effect of

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

Appellant was convicted of DUI, third offense. The indictment contained a typographical error relating to the date of appellant's second offense. Sua sponte, the trial court announced the correct date and ordered the indictment corrected.

Appellant claimed the prior offense should have been struck, allowing conviction of only DUI, second offense.

Syl. pt. 3 - "To the extent that *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955), stands for the proposition that 'any' change to an indictment, whether it be form or substance, requires resubmission to the grand jury for its approval, it is hereby expressly modified. An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment." Syllabus Point 2, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

INDICTMENT

Amendments to (continued)

Effect of (continued)

State v. Blankenship, (continued)

Syl. pt. 4 - “Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An ‘amendment of form’ which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced.” Syllabus Point 3, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

The Court noted that the record was silent as to whether appellant was misled, subjected to additional burden of proof or otherwise prejudiced. No error (but reversed and remanded on faulty instruction; see elsewhere, this Digest).

INDICTMENT

Common scheme or plan

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See JOINDER Multiple offenses, (p. 345) for discussion of topic.

Joinder of multiple offenses

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

State ex rel. State v. Hill, 491 S.E.2d 765 (1997) (Per Curiam)

Petitioner sought a writ of prohibition to enjoin respondent judge from dismissal of a murder indictment because of lack of joinder of common offenses and violation of double jeopardy principles. In 1985 the defendant was convicted of burglary, kidnaping and abduction with intent to defile. In 1996 he was indicted for the murder of his kidnaping victim; the victim's body has never been found but she was declared dead five years before the indictment pursuant to *W.Va. Code* 44-9-1. The defendant claims petitioner relied entirely upon facts which were known, or should have been know, at the time of the 1985 trial.

The Court reversed the abduction with intent to defile conviction, *State v. Hanna*, 180 W.Va. 598, 378 S.E.2d 640 (1989) but affirmed the burglary and kidnaping convictions. The Court noted that at defendant's trial defendant was questioned about statements he allegedly made to two others regarding killing the victim. The circuit court found that there was no showing that the alleged murder was not part of the "same act or transaction or acts or transactions" as the previously-tried offenses. Further, the trial court found that petitioner knew prior to the 1985 trial that defendant caused the victim's death.

Syl. pt. 1 - "The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be properly presented." Syl. Pt. 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

INDICTMENT

Joinder of multiple offenses (continued)

State ex rel. State v. Hill, (continued)

Syl. pt. 2 - “Rule 8(a) of the West Virginia Rules of Criminal Procedure compels the prosecuting attorney to charge in the same document all offenses based on the same act or transaction, or on two or more acts or transactions, connected together or constituting parts of a common scheme or plan, whether felonies, misdemeanors or both, provided that the offenses occurred in the same jurisdiction, and the prosecuting attorney knew or should have known of all the offenses, or had an opportunity to present all offenses prior to the time that jeopardy attaches in any one of the offenses.” Syl. Pt. 3, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

Syl. pt. 3 - “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. 4 - “A delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law, *U.S. Const.* Amend. XIV, and *W.Va. Const.* Art. 3, § 10. The presumption is rebuttable by the government.” Syl. Pt. 1, *State ex rel. Leonard v. Hey*, W.Va., 269 S.E.2d 394 (1980).

Syl. pt. 5 - “The effects of less gross delays upon a defendant’s due process rights must be determined by a trial court by weighing the reasons for delay against the impact of the delay upon the defendant’s ability to defend himself.” Syl. Pt. 2, *State ex rel. Leonard v. Hey*, W.Va., 269 S.E.2d 394 (1980).

The Court found petitioner was not required to join the murder offense to the prior charges. Under one of several possible scenarios, the Court found it plausible that defendant initially came to the house where the victim was staying with the intent to repair a damaged relationship. The original indictment had no reference to schemes to kill the victim. The Court even found in *Hanna, supra*, that there was sufficient evidence for the jury to believe defendant’s intent was to persuade the victim to continue their relationship. It is therefore possible to view defendant’s acts as not part of a common scheme or plan. Especially in light of the lack of a body the Court found no duty to join these offenses.

INDICTMENT

Joinder of multiple offenses (continued)

State ex rel. State v. Hill, (continued)

As to double jeopardy, the Court found the analysis applicable to joinder applied to double jeopardy; *i.e.*, there were different elements at issue for the various crimes. The Court rejected appellant's argument that *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983) prohibited prosecution (defendant there, in prosecution for felony murder could not be "separately tried or punished for both murder and the underlying enumerated felony")

The murder indictment here does not charge defendant with felony murder; proof of an underlying felony is not required. Although petitioner could not pursue felony murder charges based on the kidnaping charge, nothing prevents a murder indictment.

Finally, as to delay in bringing the murder charge, the Court noted the prosecution need only show that the delay was not deliberately caused to gain an advantage. *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989). The Court glided over the *Leonard* eleven year presumption, *supra*, by also noting the prosecution here, unlike that in *Leonard*, did not have all the facts at the time of the original indictment on other charges; further, the passage of time, in the absence of a body, becomes more important as an element of proof.

Upon remand petitioner is to explain the reasons for the delay and defendant given an opportunity to show prejudice; the court can then make a finding whether the delay was designed to get a tactical advantage. Writ granted; remanded.

Multiple offenses

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See JOINDER Multiple offenses, (p. 345) for discussion of topic.

INDICTMENT

Must include all crimes to convict

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

See INSTRUCTIONS Crime not charged, Effect of including, (p. 327) for discussion of topic.

Prior offenses included but not tried

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

Appellant was convicted of first offense DUI. Because of apparent evidence of two prior DUI offenses, he was indicted on third offense DUI. One charge, however, proved to have been dismissed and inadequate proof was not provided of the second.

The trial court offered to redact the indictment to conform with the evidence; defense counsel objected and moved to dismiss and refer the case to a magistrate for a misdemeanor first offense. The judge refused to dismiss and the jury was shown the original full indictment.

Syl. pt. 4 - “A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.’ Syllabus Point 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966).” Syl. pt. 2, *Young v. Young*, 194 W.Va. 405, 460 S.E.2d 651 (1995).

The Court refused to consider invited error.

Redaction of

Effect of not redacting

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See INDICTMENT Amendments to, (p. 303) for discussion of topic.

Sufficiency of

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See JOINDER Multiple offenses, (p. 345) for discussion of topic.

INDICTMENT

Sufficiency of (continued)

Burglary

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See INDICTMENT Sufficiency of, Burglary, (p. 310) for discussion of topic.

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

Petitioner sought writ of habeas corpus to reduce two consecutive one to fifteen year sentences on conviction of two counts of burglary.

The original indictment was for 27 counts, from which petitioner and the state agreed to a plea to the two counts of burglary and full restitution in return for dismissal of the remaining counts and no recidivist information. Petitioner's main contention on appeal was that a caption appeared over the two counts and in the description thereof in the indictment characterizing them as "breaking and entering" and therefore he should have been sentenced for breaking and entering.

Syl. pt. 2 - "An indictment for burglary must charge, that the offense was 'burglariously' committed; otherwise it is bad." Syl. pt. 2, *State v. Meadows*, 22 W.Va. 766 (1883).

Syl. pt. 3 - "Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge and offense under West Virginia law or for which the defendant was convicted." Syl. Pt. 1, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 4 - "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)." Syl. Pt. 1, *State v. Mullins*, 181 W.Va. 415, 383 S.E.2d 47 (1989).

INDICTMENT

Sufficiency of (continued)

Burglary (continued)

State ex rel. Thompson v. Watkins, (continued)

The Court noted that petitioner was correct in noting the defect in the indictment; however, petitioner failed to raise the issue timely. Finding harmless error, the Court noted the Code was correctly cited and the basic elements of burglary were set forth, despite the failure to use the word “burglary.” Petitioner should not have been misled and was put on notice of the charges. No error.

Multiple offenses

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

Murder

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder. Among other errors, she claimed the indictment was defective in that it should only have alleged second-degree murder instead of first. Further, the indictment does not contain the element of premeditation. In relevant part, it said appellant:

“committed the offense of ‘First-Degree Murder’ by unlawfully, feloniously, wilfully, maliciously, and deliberately shooting JERRY D. WHITE, with a .38 Caliber Revolver Smith and Wesson, with intent to cause his death, and causing his death, in violation of West Virginia Code 61-2-1 against the peace and dignity of the State”.

The prosecuting attorney read the indictment to the jury during opening argument and referred to it during closing; the indictment was given to the jury during deliberation. While a proper instruction was given outlining the elements of first-degree murder, appellant claimed the jury was misled by having an improper indictment before them.

INDICTMENT

Sufficiency of (continued)

Murder (continued)

State v. Miller, (continued)

Appellant claimed plain error here because no objections were made to opening or closing argument. However, a motion to dismiss the indictment was made and the issues here raised were discussed at pretrial proceedings.

Syl. pt. 1 - Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. pt. 2 - Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.

The Court noted the sufficiency of an indictment is based on minimal constitutional standards, based on practical considerations. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590, 620 (1974). An indictment need only (1) state the elements of the offense; (2) put the defendant on notice of the charges against him; and (3) allow a defendant to assert a prior acquittal or conviction for double jeopardy purposes.

Despite the fact that criminal statutes must be narrowly construed, *United States v. Resnick*, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed. 127 (1936), the Court found the indictment sufficient. Only the word “premeditation” was missing; the Court found the word “deliberate” was sufficient to cover the concept. *State v. Worley*, 82 W.Va. 350, 96 S.E. 56 (1918). No error.

Residence of assistant prosecuting attorney

State v. Macri, 487 S.E.2d 891 (1996) (Workman, J.)

See PROSECUTING ATTORNEY Assistants, Residence of, (p. 469) for discussion of topic.

INDICTMENT

Sufficiency of (continued)

Timely objection

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

See INDICTMENT Sufficiency of, Burglary, (p. 310) for discussion of topic.

INEFFECTIVE ASSISTANCE

Diminished capacity

Failure to raise as defense

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

Habeas corpus

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

Habeas relief requires a hearing

Nazelrod v. Hun, 486 S.E.2d 322 (1997) (Per Curiam)

See HABEAS CORPUS Evidentiary hearing required, (p. 272) for discussion of topic.

Hearing required

Nazelrod v. Hun, 486 S.E.2d 322 (1997) (Per Curiam)

See HABEAS CORPUS Evidentiary hearing required, (p. 272) for discussion of topic.

INEFFECTIVE ASSISTANCE

Standard for

State ex rel. Bailey v. Legursky, 490 S.E.2d 858 (1997) (Per Curiam)

Appellant was convicted of first-degree murder. The circuit court denied his habeas corpus petition claiming ineffective assistance of counsel. Appellant claimed his counsel: (1) failed to file motions for discovery, indicating he did not adequately investigate the case; (2) failed to cross-examine appellant's sister concerning his whereabouts the morning of the killing; (3) that trial counsel did not pursue a clear misstatement that he had not expressed remorse; (4) that trial counsel did not challenge a witness' statement that appellant had threatened to kill the victim; and (5) that trial counsel did not conduct a thorough *voir dire*.

The Court noted appellant relied on a "confession and avoidance" defense; appellant's use of drugs and alcohol and the facts of the shooting were not at issue. Counsel had eleven to twelve conferences with appellant and nearly 100 hours of trial preparation. The circuit court found specifically that counsel had made a "reasonably sufficient investigation" of the case.

Syl. pt. 1 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 2 - "In reviewing counsel performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - "A habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the petitioner an adequate opportunity to demonstrate his entitlement to relief." Syl. pt. 5, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).

INEFFECTIVE ASSISTANCE

Standard for (continued)

State ex rel. Bailey v. Legursky, (continued)

The Court found trial counsel had made reasonable strategic decisions. Although appellant claimed *voir dire* was ineffective, the only two objectionable jurors were struck from the panel. No error.

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

Appellant was convicted of first-degree murder in the death of his son and daughter. The circuit court denied his habeas corpus petition claiming ineffective assistance and coercion of his confession.

Appellant was estranged from his wife. He went to his wife's apartment about 9:00 p.m. one evening; shortly thereafter neighbors heard gunshots. Appellant appeared at the neighbor's house asking for an ambulance. At approximately 9:30 p.m. the police arrived and appellant spontaneously said "I shot them all." Appellant's wife and children were dead.

The police apprised appellant of his rights and took him into custody. The next day appellant was taken before a magistrate; he claimed to have arranged for counsel. At 4:00 p.m. that afternoon appellant was interrogated by a state trooper after the trooper once again advised him of his rights. Troopers present claimed appellant did not request an attorney. Appellant confessed to the killings.

Police obtained statements from numerous witnesses who said appellant had stated he was going to kill his wife. Further, police found evidence that appellant purchased a pistol of the type used and had been practicing with it just preceding the murders. Appellant was convicted of first-degree murder in both his son and daughter's killing and sentenced to life imprisonment, both with and without mercy. Having been denied on his appeal on January 19, 1980, appellant petitioned for writ of habeas corpus on August 20, 1987. For seven years the case languished; finally the Court issued an order on October 26, 1994 commanding that the Warden of the Penitentiary produce appellant before the circuit court. The circuit court ruled that counsel was effective, that appellant's confession was not coerced and that other trial error was not of constitutional magnitude and therefore could not be considered.

Syl. pt. 1 - "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syllabus Point 4 of *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. denied*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983).

INEFFECTIVE ASSISTANCE

Standard for (continued)

State ex rel. Wimmer v. Trent, (continued)

Syl. pt. 2 - “In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” Syllabus Point 5 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - “When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker.” Syllabus Point 7, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 196, 133 L.Ed.2d 131 (1995).

Appellant claimed that ineffective assistance was clear from counsel’s last-minute trial preparation. Although appellant had been given court-appointed counsel, he hired another attorney privately within weeks of the trial. Specifically, he claims a change of venue could have been obtained had counsel had time to conduct surveys to show local prejudice. He also claims counsel did not adequately interview witnesses; did not offer an instruction on diminished capacity due to alcohol consumption or seek a mental evaluation; and did not request an instruction on the voluntariness of the confession.

The Court found that counsel’s performance did not affect the outcome of the trial. On all of the above points, the state had substantial compelling evidence, even absent the confession itself. Appellant repeatedly threatened to kill his wife, he threatened to kill other family members, he bought the pistol used in the killings, he was at the scene where the murders took place, and he spontaneously said “I shot them all” when police arrived.

Finally, the Court found the trial court’s ruling on the voluntariness of the confession was not clearly wrong. Although the evidence was conflicting the Court found no evidence sufficiently compelling to reverse the circuit court. Affirmed.

INEFFECTIVE ASSISTANCE

Standard for (continued)

State ex rel. Strogen v. Trent, 469 S.E.2d 7 (1996) (Per Curiam)

Petitioner pled guilty to first-degree murder. Petitioner brought this writ of habeas corpus alleging ineffective assistance.

While being extradited from Texas on other charges, petitioner gave a tape-recorded statement to the transporting officers. The officers claimed to have given petitioner his *Miranda* warnings; they said petitioner did not insist on remaining silent and did not ask for an attorney. Petitioner, however, claimed he did not want to talk and asked for any attorney. He claimed the officers persisted and threatened that he would face a longer prison term on the unrelated charges if he did not talk.

After reviewing the prosecution's file and interviewing the officers, petitioner's appointed attorney concluded there were no grounds for excluding the tape. After pleading guilty petitioner filed a pro se habeas petition. Counsel was appointed but the circuit court found no grounds for excluding the tape. This Court refused an appeal from that ruling, resulting in this original petition.

Syl. pt. 1 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 2 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

INEFFECTIVE ASSISTANCE

Standard for (continued)

State ex rel. Strogen v. Trent, (continued)

Syl. pt. 3 - “The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel’s investigation. Although there is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel’s performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel’s strategic decisions are made after an inadequate investigation.” Syl. pt. 3, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

The Court found that petitioner’s counsel filed no motion whatsoever challenging the confession. Counsel clearly did not adequately investigate this issue; he did not question his client regarding the time spent with the officers and specifically failed to ask whether his client had tried to remain silent or requested an attorney. Writ granted.

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

Appellant was convicted of felony murder, attempted murder, kidnaping, aggravated robbery and grand larceny, all relating to an escape from the Work Release Center in Cass, West Virginia. On appeal he claimed his counsel was ineffective because the Division of Corrections housed him at Huttonsville during his trial at Petersburg. Appellant was returned to Huttonsville every evening, immediately upon the close of each day’s proceedings, thereby severely limiting his ability to confer with counsel.

Syl. pt. 1 - “Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his right [sic] and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.” Syllabus Point 2, *State ex rel. M.S.B. v. LeMaster*, 173 W.Va. 176, 313 S.E.2d 453 (1984).

INEFFECTIVE ASSISTANCE

Standard for (continued)

State v. Hottle, (continued)

The Court found the record inadequate to determine ineffective assistance; appellant's own brief did not contain specific instances of thwarted communication. No error.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his infant son. On appeal he claimed trial counsel was ineffective for failing to develop the issue of his mental status. Appellant claimed he was so enraged at the time of the killing as to be incapable of formulating the requisite intent, premeditation or malice.

Counsel is ineffective if he or she fails to investigate possible exculpatory or mitigating evidence. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995). But after a reasonable effort, an attorney is not deficient for failing to further investigate or develop an issue. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 695 (1984).

The Court noted all decisions made after reasonable investigation are presumed sufficient representation. Counsel is "constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise probably would have won." Footnote 22. No error.

Voluntariness of confession

Last-minute preparation

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

INEFFECTIVE ASSISTANCE

Voluntariness of confession (continued)

Failure to request instruction on

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

INFERENCE

Malice from use of a deadly weapon

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

INSANITY

Test for

State v. Lockhart, 490 S.E.2d 298 (1997) (Per Curiam)

Appellant was convicted of first-degree sexual assault, battery, burglary and assault during the commission of a felony. Upon a recidivist showing, appellant was sentenced to life imprisonment.

Appellant claimed he was prevented from presenting a defense based on “dissociative identity disorder” (also known as “multiple personality disorder”). He moved for a competency exam pursuant to *W.Va. Code 27-6A-1*, which motion was granted. Following examinations, two psychologists found appellant competent to stand trial. One psychologist, however, found that “because of the existence of a severe mental disease.....Mr. Lockhart is not criminally responsible for the sexual assault.” Appellant filed notice of intent to rely on an insanity defense pursuant to *R.Crim.P. 12.2*.

Although the circuit court said the jury would hear “the opinions of the professionals,” at trial objection was made to a psychiatrist’s testimony which resulted in the court’s refusing to allow “dissociative identity disorder” to be used as the basis for an insanity defense. The court refused counsel’s attempt to vouch the record using the psychologist’s testimony. Counsel was allowed to read into the record a summary of the psychologist’s testimony.

At trial the theory of “dissociative identity disorder” was not developed.

Syl. pt. 1 - “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 . . .’ Syllabus point 2, in part, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976).” Syl. pt. 3, *State v. Parsons*, 181 W.Va. 131, 381 S.E.2d 246 (1989).

Syl. pt. 2 - “When the accused’s mental condition at the time of the offense is an issue, evidence of the accused’s mental condition either before or after the offense is admissible so far as it is relevant to the accused’s mental condition either before or after toe offense is admissible so far as it is relevant to the accused’s mental condition at the time of the offense.” Syl. pt. 5, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986).

INSANITY

Test for (continued)

State v. Lockhart, (continued)

Syl. pt. 3 - “When the record in an action or suit is such that an appellate court can not in justice determine the judgment that should be finally rendered, the case should be finally rendered, the case should be remanded to the trial court for further development.” Syl. pt. 2, *South Side Lumber Co. v. Stone Construction C.*, 151 W.Va. 439, 152 S.E.2d 721 (1967).

Syl. pt. 4 - “Evidence which is immaterial and irrelevant to any issue in the case, and which tends to raise immaterial issue or to becloud the real issue, should be rejected.” Syl. pt. 1, *Siever v. Coffman*, 80 W.Va. 420, 92 S.E. 669 (1917).

Finding the record here totally inadequate, the Court remanded for further development of the “dissociative identity disorder.”

INSTRUCTIONS

Admissibility

Cumulative

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

Appellant was convicted of first-degree murder without mercy. He complained that the trial court erroneously refused his instruction that “the testimony of Kathy Agent (appellant’s girlfriend) must be received with great care and caution, and if you believe the testimony of her as an alleged accomplice was false, and that she was induced to testify falsely either by fear of punishment or hope of reward, you must disregard that testimony in its entirety.”

The trial court claimed its general charge covered the issue as follows: “the testimony of an accomplice is admissible in evidence, yet in considering such testimony as to matters connecting the defendant with the commission of the crime which are not supported by other evidence or circumstances, you should examine such testimony with great care and caution in determining what weight to give such testimony.”

The prosecution argued appellant waived any objections because he stood silent when the court asked him to “please speak up” regarding rejection of the instruction.

The court also rejected an instruction concerning the possibility that appellant’s girlfriend was the real killer. The prosecution claimed no evidence was presented so the instruction was properly rejected.

Syl. pt. 4 - “Instructions that are repetitious or are not supported by the evidence should not be given to the jury by the trial court.” Syl. Pt. 5, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. pt. 5 - “Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inference are considered in the light most favorable to the prosecution.” Syl. Pt. 12, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The Court agreed that the first rejected instruction was covered by the trial court’s general charge and the second instruction was unsupported by the evidence. No error.

INSTRUCTIONS

Admissibility (continued)

Standard for

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See INSTRUCTIONS Admissibility, Cumulative, (p. 325) for discussion of topic.

Collateral crimes

Limits on consideration of

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 183) for discussion of topic.

Confusing or incorrect

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

Confusing or misleading

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

INSTRUCTIONS

Crime not charged

Effect of including

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

Appellant was convicted of DUI third offense. Following his arrest, the arresting officer got information that appellant's license was revoked five days earlier. The instruction given at trial was that "any person who drives a vehicle in this state while under the influence of alcohol, or has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight, is guilty of a crime."

Syl. pt. 1 - An instruction which informs the jury that it can return a verdict of guilty of a crime charged in the indictment by finding that the defendant committed acts constituting a crime not charged in the indictment is reversible error.

The Court noted the instruction allowed the jury to find appellant guilty of two separate offenses, driving while intoxicated *or* driving with .10 concentration of alcohol (the "per se" violation), while the indictment charged him only with driving under the influence. Reversed and remanded.

Cumulative

Admissibility

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See INSTRUCTIONS Admissibility, Cumulative, (p. 325) for discussion of topic.

Deadly weapon

Presumption of malice

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

INSTRUCTIONS

Evidence sufficient to support

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his infant son. On appeal he objected to the refusal of an instruction which would have told the jury that they could find appellant guilty of manslaughter at most if they find that appellant's mental illness rendered him incapable of forming the requisite intent for murder.

The Court noted it reviews jury instructions *de novo*. *State v. Guthrie*, 194 W.Va. 656 at 671, 461 S.E.2d 163 at 177 (1995). The instruction must be clearly supported by the evidence, not an abstract discussion. See *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 887, 99 L.Ed.2d 54, 61 (1988); *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987); *State v. Bennett*, 157 W.Va. 702, 203 S.E.2d 699 (1974).

Further, failure to give an instruction is not error per se. The instruction must be correct and be supported by the evidence; the substance must not have been in the court's general charge; and failure to give the instruction must seriously impair the defense. Syllabus Point 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Because evidence regarding mental defect was excluded (See EVIDENCE Admissibility, Expert opinion, (p. 195) this Digest), the Court found no error. No evidence was introduced to support the giving of this instruction.

First-degree murder

Element of knowledge

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See HOMICIDE Murder by failing to provide medical care, Element of knowledge, (p. 293) for discussion of topic.

Homicide

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

INSTRUCTIONS

Homicide (continued)

Malice

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Knowledge

Right to instruction on

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See HOMICIDE Murder by failing to provide medical care, Element of knowledge, (p. 293) for discussion of topic.

Lesser included offenses

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

Appellant was convicted of second-degree murder in the death of his daughter-in-law. Appellant claimed the circuit court first decided to allow the jury to consider only first-degree murder, guilty or not guilty. Then the court allowed the jury to consider first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter and not guilty.

Syl. pt. 1 - 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.

The Court found the evidence showed the killing was intentional, for no justifiable reason and without provocation. The evidence further showed appellant had motive and opportunity. Because the prosecution announced it wanted lesser included offenses in the instructions appellant should not have been surprised at the trial court's change of mind.

Noting that appellant did not request a recess or continuance, the Court rejected appellant's request for new trial based on *Dietz v. Legursky*, 188 W.Va. 526, 425 S.E.2d 202 (1992). No error.

INSTRUCTIONS

Knowledge (continued)

Lesser included offenses (continued)

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

Appellant was convicted of aggravated robbery and kidnaping. He claimed the trial court erred by not instructing the jury on nonaggravated robbery. Appellant used an air gun rather than a firearm.

Syl. pt. 1 - “The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).” Syllabus point 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Syl. pt. 2 - “Under 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 the 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 [aggravated] robbery. The threat of the use of a firearm or other deadly weapon constitutes robbery by putting in fear.” Syllabus point 1, *State v. Young*, 134 W.Va. 771, 61 S.E.2d 734 (1950).

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 offense, then the defendant is not entitled to a lesser included offense instruction.” Syllabus point 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 4 - “Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by the Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution.” Syllabus point 12, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

INSTRUCTIONS

Knowledge (continued)

Lesser included offenses (continued)

State v. Phillips, (continued)

Clearly, non-aggravated robbery is a lesser included offense of aggravated robbery. The element of aggravated robbery which differs from non-aggravated robbery is the threat or presentation of firearms or other deadly weapon. However, since there was no question of fact as to whether appellant threatened with what appeared to be a firearm (he did), appellant was not entitled to an instruction on nonaggravated robbery. The critical issue is whether the person threatened was reasonably placed in fear of bodily harm.

In *Young, supra*, the defendant never even drew a weapon but merely gestured as if he had a gun; actual use of a firearm is not even necessary. See also, *State v. Massey*, 178 W.Va. 427, 359 S.E.2d 865 (1987); and *State v. Combs*, 175 W.Va. 765, 338 S.E.2d 365 (1985). No error.

Murder

Element of knowledge

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See HOMICIDE Murder by failing to provide medical care, Element of knowledge, (p. 293) for discussion of topic.

Inferring malice from use of firearm

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Second-degree not lesser included of felony murder

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

INSTRUCTIONS

Refusal to give

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

Appellant was convicted of second-degree murder in the death of his ex-girlfriend. He claimed on appeal that the trial court erred in not giving his instructions on circumstantial evidence, weight to be given evidence and the availability of self-defense.

Syl. pt. 5 - "Jury instructions are reviewed by determining the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed for an abuse of discretion." Syllabus point 15, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

Syl. pt. 6 - "A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a defense." Syllabus point 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The Court found the substance of appellant's instructions was included in the instructions given. No error in refusing instructions.

Re-reading to jury

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

INSTRUCTIONS

Right to be present when read

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

Self-defense

Effect of

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See HOMICIDE Murder, Accessory after the fact, (p. 292) for discussion of topic.

Felony-murder

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Instructions on, (p. 281) for discussion of topic.

Sufficiency of

Confusing or misleading

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

Generally

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

Appellant was convicted of possession of controlled substances with intent to deliver. He claimed that the elements of intent to deliver were not included in the jury instructions. The only relevant instruction was:

INSTRUCTIONS

Sufficiency of (continued)

Generally (continued)

State v. Lease, (continued)

It is the duty of the State to allege and prove criminal intent and if from the whole evidence, the jury has a reasonable doubt as to whether such intent existed, then you should find the petitioner not guilty. Intent may be shown by inferences from all the facts and circumstances in the case, including the actions of the petitioner and, if from all this you are satisfied beyond a reasonable doubt that the petitioner intended to do that which he did or that which was the immediate and necessary consequence of his act, you may find that intent has been shown.

Syl. pt. 3 - "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court noted that review of an instruction is usually under an abuse of discretion standard unless, as here, the instructions are alleged to fall short of the proper legal standard. However, trial counsel did not object to the lack of guidance so the review here is for plain error.

Since the truth-finding function was not impaired this instruction did not rise to the level of plain error. See *State v. Nicholas*, 182 W.Va. 199, 387 S.E.2d 104 (1989).

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See APPEAL Standard for review, Instructions, (p. 68) for discussion of topic.

INSTRUCTIONS

Sufficiency of (continued)

Generally (continued)

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

Appellant was convicted of child abuse and neglect with bodily injury, malicious assault and murder of a child by failure to provide medical care pursuant to *W.Va. Code* 61-8D-2. Appellant claimed an instruction allowed two separate theories for a murder conviction; trial counsel did not object.

The instruction read as follows:

A person is guilty of this offense when he or she is the custodian of a child and maliciously, intentionally, and with pre-mediation [sic] fails to supply said child necessary medical care, or knowingly allows another person to do so, causing the child's death.

Malice is a subjective state of mind in the defendant. It may be proven by evidence of circumstances surrounding the crime, such as words and conduct of the defendant both before and after the event. It also may be proved by [sic] a deliberate cruel act against another indicating a heart disregarding social duty and fatally bent on mischief.

Therefore, if you find from the evidence beyond a reasonable doubt that Julie Wyatt was the custodian of Derek Browning, a minor child, and that she maliciously, intentionally, and with mediation [sic] failed to supply the child necessary medical care, causing the child's death, then you should find her guilty of Murder by Failure to Provide Medical Care as charge in Count 3 of the Indictment.

INSTRUCTIONS

Sufficiency of (continued)

Generally (continued)

State v. Wyatt, (continued)

Syl. pt. 3 - “To trigger application of the ‘plain error doctrine’, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

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 631 (1978).’ Syllabus Point 4, *State v. Neary*, 179 W.Va. 115, 365 S.E.2d 395 (1987).” Syllabus point 9, *State v. Murray*, 180 W.Va. 41, 375 S.E.2d 405 (1988).

Syl. pt. 5 - “It is reversible error to give an instruction which is misleading and misstates the law applicable to the facts.” Syllabus point 4, *State v. Travis*, 139 W.Va. 363, 81 S.E.2d 678 (1954).

Syl. pt. 6 - “The trial court must instruct the jury on all essential elements of the offenses charged, and the failure to the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.” Syllabus, *State v. Miller*, 184 W.Va. 367, 400 S.E.2d 611 (1990).

Syl. pt. 7 - “ ‘. . . [I]t is usually not error for the trial court to comply with a request of the jury in the matter of re-reading to them instructions that they may wish to hear.’ *State v. Price*, 114 W.Va. 736, 740, 174 S.E. 518, 520 (1934).” Syllabus point 3, *State v. Pannell*, 175 W.Va. 35, 330 S.E.2d 844 (1985).

The Court found the instruction confusing, misleading and incorrect; it failed to include the necessary element of intent and was further confusing as to whether the jury could find appellant guilty for allowing another to fail to provide care. The trial court further muddied the water by including the element of premeditation which was not required by *W.Va. Code 61-8D-2*.

The trial court reread only part of the instructions to the jury when requested. The Court found no error in this but found plain error in the quoted instruction. Reversed and remanded.

INSTRUCTIONS

Voluntary manslaughter

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

Omission of word “anger”

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

INTENT

Diminished capacity to form

Failure to raise

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

INTERSTATE COMPACT ON MENTAL HEALTH

Due process required

State ex rel. White v. Todt, 475 S.E.2d 426 (1996) (McHugh, C.J.)

See MENTAL HYGIENE Commitment, Due process requirements, (p. 418) for discussion of topic.

INVOLUNTARY MANSLAUGHTER

Generally

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See INVOLUNTARY MANSLAUGHTER Sufficiency of evidence, (p. 340) for discussion of topic.

Sufficiency of evidence

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

Appellant was convicted of involuntary manslaughter. The victim, appellant's step-daughter's ex-boyfriend, visited appellant's home unannounced and proceeded to cause a disturbance (the victim appeared to be drunk). The victim struck appellant and others present. After being forcibly evicted several times, the victim refused to leave. His ex-girlfriend called the police.

At this point appellant went to his bedroom to retrieve a gun. When the victim's grandmother arrived to retrieve her grandson she found appellant and the victim yelling at each other through a screen door. At his grandmother's urging, the victim began to move away from the home but returned when appellant yelled that he would have to pay for damage to the door. Upon the grandmother's request, appellant closed the door but fired a shot through the door which struck the victim in the eye.

Appellant testified that he had already fired a warning shot, not witnessed by the grandmother; and that he asked the victim to go home five or six times. The testimony conflicted as to where the victim was standing when the shot was fired; appellant claimed the victim was banging on the door and he was trying to scare him while the grandmother said the victim was away from the door and not banging on it. Appellant testified that he was in fear of being hurt.

Appellant claimed he was clearly not the aggressor and the evidence was insufficient to convict.

Syl. pt. 1 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

INVOLUNTARY MANSLAUGHTER

Sufficiency of evidence (continued)

State v. Hughes, (continued)

Syl. pt. 2 - “A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent our prior cases are inconsistent, they are expressly overruled.” Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court noted appellant did not know the victim had made sexual advances toward his stepdaughter. Further, the victim was clearly unarmed and had been grabbed by appellant while appellant’s stepson hit the victim.

After reviewing the elements of involuntary manslaughter and self-defense, the Court found the prosecution established the requisite elements: appellant acted in an unlawful manner, the shot killed the victim, the victim was outside appellant’s home, appellant’s fear of bodily injury could have been found unreasonable and the victim’s intoxication could have reduced the threat. No error.

Unconsciousness as defense

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

Appellant was convicted of involuntary manslaughter. He had finished his work at a local plant and went to a bar where he sought someone to give him a ride to his car. He drank one-third of a can of beer, whereupon he began to feel sick. The bar owner’s daughter took him to his car. Appellant took an unopened can of beer with him.

INVOLUNTARY MANSLAUGHTER

Unconsciousness as defense (continued)

State v. Hinkle, (continued)

Later that evening appellant drove his car across the center line and collided head-on with an oncoming car, resulting in death to the passenger of the other car. Witnesses said appellant did not attempt to swerve, brake, change directions or stop. An investigation showed several empty cans of beer in appellant's car and an empty glass which smelled of beer on the ground outside the car. However, appellant's blood alcohol tested at less than the legal level for intoxication.

Appellant was hospitalized for his injuries; where it was discovered that he had an undiagnosed brain disorder in the area of the brain regulating consciousness. At trial, appellant's son testified that appellant had been having memory loss for several months prior to the accident. The treating radiologist testified that the disorder had developed four to eight months prior to the accident and was not caused by alcohol abuse.

The trial court instructed the jury that appellant was not intoxicated at the time of the accident and that appellant was suffering from a consciousness-related brain disorder. Appellant's insanity instruction was refused. Appellant's motion for acquittal and a new trial were denied.

Syl. pt. 1 - As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*,

Syl. pt. 2 - Unconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt.

Syl. pt. 3 - An instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime.

INVOLUNTARY MANSLAUGHTER

Unconsciousness as defense (continued)

State v. Hinkle, (continued)

Syl. pt. 4 - If a defendant is sufficiently appraised and aware of a preexisting condition and previously experienced recurring episodes of loss of consciousness, *e.g.*, epilepsy, then operating a vehicle or other potentially destructive implement, with knowledge of the potential danger, might well amount to reckless disregard for the safety of others. Therefore, the jury should be charged that even if it believes there is reasonable doubt about the defendant's consciousness at the time of the event, the voluntary operation of a motor vehicle with knowledge of the potential for loss of consciousness can constitute reckless behavior.

The Court held the crucial issue was whether the jury was properly instructed. The Court noted that an insanity instruction may have been appropriate here since the law on the defense of unconsciousness or automatism is not developed. This request preserved the issue for appeal.

Although the jury was instructed that appellant had a brain disorder, no instruction was given to focus on the relation of the disorder to the crime. Further, no evidence was introduced to show appellant knew, or should have known, about his disorder. (**Note:** the Court nearly reversed on this point, which would have barred retrial on double jeopardy grounds.) Finally, introduction of the presence of alcohol, despite clear proof that appellant was not intoxicated, may have prejudiced the jury. See *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Reversed and remanded.

JOINDER

Common scheme or plan

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See JOINDER Multiple offenses, (p. 345) for discussion of topic.

Discretion of judge

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See JOINDER Prejudicial, Separation permissible, (p. 346) for discussion of topic.

DUI and driving while suspended

State v. Ludwick, 475 S.E.2d 70 (1996) (Per Curiam)

See DUI Driving while suspended, Joinder with, (p. 159) for discussion of topic.

Failure to join

Effect of

State v. Johnson, 476 S.E.2d 522 (1996) (McHugh, C.J.)

See DOUBLE JEOPARDY Test for, (p. 149) for discussion of topic.

Failure to join multiple offenses

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

JOINDER

Multiple offenses

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

Appellant was convicted of felony-murder, attempted murder, kidnaping, aggravated robbery, and grand larceny, all relating to his escape from the Work Release Center at Cass, West Virginia. He claimed that joinder was improper because there was no common scheme or element connecting the various charges.

Because the events took place over several days, appellant claimed three general time periods are involved: theft of trucks and pistol; the killing, breaking and entering and theft of a car; events occurring at a local car dealer thereafter. The sheer number of charges was claimed to be prejudicial, causing convictions without sufficient evidence if even one of the charges were proven.

Syl. pt. 2 - “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 transactions, or are two or more acts or transactions connected together or constituting parts of a common scheme or plan.” Syllabus Point 1, *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980).” Syllabus Point 4, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

Syl. pt. 3 - “The joinder of related offenses to meet possible variance in the evidence is not ordinarily subject to a severance motion. In those other situations where there has been either a joinder of separate offenses in the same indictment or consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court.” Syllabus Point 6, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

The prosecution claimed appellant wrote a “manual” detailing his plan for revenge. The Court found evidence of a common scheme. No error in joinder.

JOINDER

Prejudicial

Separation permissible

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

Appellant was convicted of aggravated robbery, assault during a felony, obstructing a police officer and unauthorized taking of a vehicle. He was sentenced to life based as a recidivist, as well as other time periods on individual charges.

He claimed on appeal that assault during a felony was a lesser included offense of aggravated robbery and therefore convictions on both charges, with the resulting enhancement to life, violated double jeopardy principles. He also claimed the trial court should have severed the misdemeanor counts of obstruction and unauthorized taking from the aggravated robbery and assault during the commission of a felony.

Appellant was picked up by a Glen Penwell (not closely related) and taken to Penwell's residence. After drinking beer and watching a pornographic movie, they went to bed, where appellant suggested sex. Glen Penwell resisted, whereupon appellant knocked him unconscious, tied him to the bedposts and drove off with certain items of property in Penwell's vehicle.

Upon being chased by police, appellant wrecked the vehicle. After being handcuffed and placed in the police cruiser, appellant managed to drive off in the cruiser.

He was charged with aggravated robbery and assault during the commission of a felony for the original beating; and obstruction and unauthorized taking of a vehicle for stealing the officers' car.

Syl. pt. 6 - "Even where joinder or consolidation is proper under the West Virginia Rules of Criminal Procedure, the trial court may order separate trials pursuant to Rule 14(a) on the ground that such joinder or consolidation is prejudicial. The decision to grant a motion for severance pursuant to *W.Va.R.Crim.P.* 14 (a) is a matter within the sound discretion of the trial court." Syllabus point 3, *State v. Hatfield*, 181 W.Va. 106, 380 S.E.2d 670 (1988)." Syllabus, *State v. Ludwick*, 197 W.Va. 70, 475 S.E.2d 70 (1996).

Appellant argued that trying the counts together exposed appellant to the peril of the jury using evidence of one offense to convict of another even though proof of guilty would have been inadmissible in a separate trial. The Court held evidence of the unauthorized taking could have been admissible for purposes of showing flight; and evidence of the aggravated robbery would have been admissible for motive in taking the police cruiser. No error.

JUDGES

Abuse of discretion

Indictments

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See INDICTMENT Sufficiency of, Murder, (p. 311) for discussion of topic.

Instructions

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

Jury selection

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Juvenile placement

State ex rel. Ohl v. Egnor, 500 S.E.2d 890 (1997) (Davis, J.)

See JUVENILES Detention, Choice of center, (p. 386) for discussion of topic.

Writ of prohibition

State ex rel. Ohl v. Egnor, 500 S.E.2d 890 (1997) (Davis, J.)

See JUVENILES Detention, Choice of center, (p. 386) for discussion of topic.

JUDGES

Bifurcation

Discretion to grant

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See BIFURCATION Grounds for, (p. 111) for discussion of topic.

Continuances

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Delay

Mandamus to lie

State ex rel. Harris v. Zakaib, No. 23489 (10/15/96) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 361) for discussion of topic.

Discipline

Concurrent jurisdiction with Lawyer Disciplinary Board

In the Matter of Troisi, No. 24204 (6/18/98) (Maynard, J.)

See JUDGES Discipline, Generally, (p. 348) for discussion of topic.

Generally

In the Matter of Troisi, No. 24204 (6/18/98) (Maynard, J.)

Respondent circuit judge initiated a confrontation with a criminal defendant. Because the respondent was a member of the Judicial Investigation Commission, Judicial Disciplinary Counsel was disqualified and Lawyer Disciplinary Counsel investigated the complaint. The complaint was handled directly by the Court.

JUDGES

Discipline (continued)

Generally (continued)

In the Matter of Troisi, (continued)

Respondent was suspended without pay pending resolution of the complaint. Respondent subsequently pled nolo contendere to one count of battery and resigned as circuit judge. Following a finding of probable cause, the Court referred this matter to the Judicial Hearing Board which made recommendations; at the same time Lawyer Disciplinary Counsel made other recommendations.

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.” Syllabus Point 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - “A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee’s recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee’s findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.” Syllabus Point 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 3 - “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, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.” Syllabus Point 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), overruled on other grounds by *Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993).

JUDGES

Discipline (continued)

Generally (continued)

In the Matter of Troisi, (continued)

Syl. pt. 4 - “Pursuant to article VIII, section 8 of the *West Virginia Constitution*, this Court has the inherent and express authority to ‘prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof[.]’” Syllabus Point 5, *Committee On Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994).

Syl. pt. 5 - The Judicial Hearing Board may recommend or the Supreme Court of Appeals may consider the discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct. If discipline of a judge for a violation of the Rules of Professional Conduct is deemed appropriate, the Judicial Hearing Board or the Supreme Court of Appeals shall notify the judge and the Lawyer Disciplinary Board and give them an opportunity to be heard on the issue of lawyer discipline, if any, to be imposed. The Judicial Hearing Board shall have exclusive jurisdiction to recommend discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct for lawyers.

Syl. pt. 6 - The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a judge’s violation of the Rules of Professional Conduct: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

The Court noted that in addition to the sanctions recommended, the Court could impose additional sanctions inasmuch as the parties had agreed to them. *In the Matter of Hey*, 193 W.Va. 572, 457 S.E.2d 509 (1995). Noting that respondent had already resigned, had reimbursed the Judicial Hearing Board for costs, had given up back pay during his suspension, and served five days in jail, the Court declined to discipline respondent as a lawyer.

Further, the Court held the Lawyer Disciplinary Board has no jurisdiction to initiate lawyer disciplinary proceedings against a judge. The Judicial Hearing Board may refer matters to the Lawyer Disciplinary Board so that the lawyer board may be heard by the Court.

JUDGES

Discipline (continued)

Generally (continued)

In the Matter of Troisi, (continued)

Respondent is to undergo counseling, submit to supervision of his law practice for one year and take inactive active but not practicing status for not less than thirty days or until the details of supervision can be established.

Magistrates

In the Matter of Browning, 475 S.E.2d 75 (1996) (Per Curiam)

See MAGISTRATE COURT Discipline, Use of office to get witness to recant, (p. 411) for discussion of topic.

Options

In the Matter of Troisi, No. 24204 (6/18/98) (Maynard, J.)

See JUDGES Discipline, Generally, (p. 348) for discussion of topic.

Solicitation of votes

In the Matter of Starcher, 501 S.E.2d 772 (1998) (Holliday, J.)

Respondent wrote a letter to a local labor organization asking for an endorsement of his candidacy for the Supreme Court of Appeals. After outlining his labor affiliations, respondent assured his correspondent that “neither you nor labor will be disappointed with a justice such as me on the high court.” Respondent attached copies of biographical information regarding his opponent and highlighted his opponent’s company affiliations.

Following a stipulation as to the facts, the Hearing Board found respondent violated § 5C(2), *Code of Judicial Conduct* and recommended that respondent be admonished.

JUDGES

Discipline (continued)

Solicitation of votes (continued)

In the Matter of Starcher, (continued)

Syl. pt. 1 - “Under [Rule 4.5 of the West Virginia Rules of Disciplinary Procedure], the allegations of a complaint in a judicial disciplinary proceeding “must be proved by clear and convincing evidence.” Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 235, 314 S.E.2d 391, 399 (1983).” Syllabus Point 1, *In the Matter of Hey*, 192 W.Va. 221, 452 S.E.2d 24 (1994).

Syl. pt. 2 - “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 Point, *In the Matter of Hey*, 193 W.Va. 572, 457 S.E.2d 509 (1995).

Syl. pt. 3 - “Stipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and a judgment founded thereon will not be reversed. “Syllabus Point 1, *Butler v. Smith’s Transfer Corporation*, 147 W.Va. 402, 128 S.E.2d 32 (1962).

Syl. pt. 4 - In a disciplinary proceeding against a judge, in which the burden of proof is by clear and convincing evidence, where the parties enter into stipulations of fact, the facts so stipulated will be considered to have been proven as if the party bearing the burden of proof has produced clear and convincing evidence to prove the facts so stipulated.

Syl. pt. 5 - “When the language of a canon under the [Code of Judicial Conduct] is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction.’ Syl. pt. 1, *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).” *In the Matter of Starcher*, 193 W.Va. 470, 457 S.E.2d 147 (1995).

JUDGES

Discipline (continued)

Solicitation of votes (continued)

In the Matter of Starcher, (continued)

Syl. pt. 6 - “Publicly stated support”, as that term is used in Section 5C(2) of the Code of Judicial Conduct, is an endorsement or other statement of support for a judicial candidate, whether made by or on behalf of an individual, corporation, partnership, association, organization, political action committee or other entity, which may be or is intended to be disseminated to a person or persons, other than the judicial candidate, members of his or her committee, or the individual or individuals making the endorsement or other statement of support, either on their own behalf or on behalf of a corporation, partnership, association, organization, political action committee or other entity, and which may be or is intended to be disseminated to officers, employees, shareholders, partners, associates, members of a profession or organization, or to the public at large, or which may be published, and which is intended to or may have the effect of persuading, influencing or otherwise causing the person or persons to whom it is disseminated to vote for or otherwise support said judicial candidate.

Syl. pt. 7 - It is a violation of Section 5C(2) of the Judicial Code of Conduct for a judicial candidate to personally write a letter to a labor organization or certain of its representatives, seeking the endorsement of the labor organization, with the intention or reasonable expectation that the endorsement is to be disseminated to members of the organization or to the public at large, or to be published, or otherwise to be used to persuade or influence those to whom it is disseminated to vote for or otherwise support the judicial candidate.

The Court allowed the stipulation here to be treated as proof of the elements of the charges. The Court dismissed respondent’s claim that he could not have known the applicable standard at the time of his actions. The Court noted that even under the previous judicial code of ethics respondent’s actions were clearly prohibited.

Prohibitions in any case are clearly directed the individual candidate; a committee for a candidate is free to solicit support. Respondent’s actions were clearly prohibited. Admonishment.

JUDGES

Discretion

Admissibility of evidence

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See EVIDENCE Admissibility, Discretion of court, (p. 194) for discussion of topic.

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See EVIDENCE Admissibility, Balancing test, (p. 177) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 184) for discussion of topic.

Autopsies

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See EXPERT WITNESSES Physicians, Use of autopsy, (p. 253) for discussion of topic.

Bifurcation

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See BIFURCATION Grounds for, (p. 111) for discussion of topic.

Collateral crimes

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 183) for discussion of topic.

JUDGES

Discretion (continued)

Continuance

In re Mark M., 201 W.Va. 265, 496 S.E.2d 215 (1997) (Per Curiam)

See ABUSE AND NEGLECT Child's case plan, Requirements of, (p. 2) for discussion of topic.

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

State v. Snider, 196 W.Va. 513, 474 S.E.2d 180 (1996) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Continuance for purpose of applying new statute

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Detention centers

State ex rel. DHHR v. Frazier, 482 S.E.2d 663 (1996) (Workman, J.)

See JUVENILES Detention, Choice of center, (p. 385) for discussion of topic.

JUDGES

Discretion (continued)

Detention centers (continued)

State ex rel. Lewis v. Stephens, 483 S.E.2d 526 (1996) (Per Curiam)

See JUVENILES Detention, Capacity of centers, (p. 384) for discussion of topic.

Directed verdict

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See DIRECTED VERDICT Standard for review, (p. 139) for discussion of topic.

Exhumation of body

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See EXPERT WITNESSES Physicians, Use of autopsy, (p. 253) for discussion of topic.

For purposes of applying new statute

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Indictments

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See INDICTMENT Sufficiency of, Murder, (p. 311) for discussion of topic.

JUDGES

Discretion (continued)

Instructions

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See INSTRUCTIONS Refusal to give, (p. 332) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See INSTRUCTIONS Admissibility, Cumulative, (p. 325) for discussion of topic.

Joinder of charges

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See JOINDER Prejudicial, Separation permissible, (p. 346) for discussion of topic.

Jury selection

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Jury trial in magistrate court appeals

State v. Bergstrom, 474 S.E.2d 586 (1996) (Per Curiam)

See APPEAL Magistrate court, No right to jury trial, (p. 56) for discussion of topic.

JUDGES

Discretion (continued)

Plea bargain

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See PLEA BARGAIN Rejection of, (p. 443) for discussion of topic.

Questioning witness

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Restitution

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Sentencing

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Sentencing of juvenile

State v. Martin, 472 S.E.2d 822 (1996) (Per Curiam)

See JUVENILES Sentencing, Following probation violation, (p. 399) for discussion of topic.

Sequestration of witnesses

State v. Omechinski, 468 S.E.2d 173 (1996) (Cleckley, J.)

See WITNESSES Sequestration, Violation of, (p. 587) for discussion of topic.

JUDGES

Discretion (continued)

Which witness to sequester

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SEQUESTRATION Which witnesses to be sequestered, (p. 554) for discussion of topic.

Discretion for purposes of applying new statute

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Discretion to grant

State v. Snider, 196 W.Va. 513, 474 S.E.2d 180 (1996) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

Duties

Abuse and neglect findings

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997) (Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

Abuse and neglect priority

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

JUDGES

Duties (continued)

Duty to rule

State ex rel. Dotson v. Hoke, No. 23799 (12/6/96) (Per Curiam)

Relator sought writ of mandamus against respondent judge to compel him to rule on two writs of habeas corpus filed in 1993 and 1995. Although a hearing was scheduled for June, 1995, the record was silent as to whether it was held.

Relator sought writ of mandamus against respondent judge to compel him to rule on two writs of habeas corpus filed in 1993 and 1995. Although a hearing was scheduled for June, 1995, the record was silent as to whether it was held.

“Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case it unreasonably neglects or refused to do so.” *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

Writ granted; respondent directed to render decision within 30 days of the date of this order.

Improvement period in abuse and neglect

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See EVIDENCE Admissibility, Abuse to children not subject of abuse petition, (p. 175) for discussion of topic.

Plea bargain

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

JUDGES

Duties (continued)

Presentence reports

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

Probation orders

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J.)

See SENTENCING Probation revocation, (p. 548) for discussion of topic.

Record of opportunity to inspect pre-sentence report

State ex rel. Aaron v. King, 485 S.E.2d 702 (1997) (Davis, J.)

See SENTENCING Presentence report, Client's right to, (p. 543) for discussion of topic.

To rule in timely manner

State ex rel. Harris v. Zakaib, No. 23489 (10/15/96) (Per Curiam)

Relator was convicted of second-degree murder in 1989; he filed an appeal with the Court which was refused in 1990. In 1992, acting pro se, he filed a petition for habeas corpus in the circuit court which was denied.

In 1994, after obtaining counsel, he filed a supplemental petition for writ of habeas corpus, raising new grounds, which petition was also rejected. He then filed for writ of *coram nobis*, attempting to raise the same new issues. Respondent judge conducted a hearing 10 August 1995 but has not ruled.

On 28 May 1996, petitioner filed writ of mandamus to force the judge to rule. Rule to show cause was issued, returnable 10 September 1996.

JUDGES

Duties (continued)

To rule in timely manner (continued)

State ex rel. Harris v. Zakaib, (continued)

“Section 17 of Article III of the *West Virginia Constitution* provides that “justice shall be administered without sale, denial or delay.” Furthermore, Canon 3B(8) of the West Virginia Code of Judicial Conduct provides that “[a] judge shall dispose of all judicial matters promptly, efficiently, and fairly.” This Court has also pointed out that “judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission.” Syllabus Point 1, in part, *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984).

In applying the aforementioned provisions, this Court held in Syllabus Point 2 of *State ex rel. Patterson v. Aldredge*, *supra*:

“Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case it unreasonably neglects or refused to do so.” *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

The Court found mandamus proper and ordered Judge Zakaib to rule within 30 days.

Written reasons for detention

State ex rel. Lewis v. Stephens, 483 S.E.2d 526 (1996) (Per Curiam)

See JUVENILES Detention, Capacity of centers, (p. 384) for discussion of topic.

Elections

Solicitation of votes

In the Matter of Starcher, 501 S.E.2d 772 (1998) (Holliday, J.)

See JUDGES Discipline, Solicitation of votes, (p. 351) for discussion of topic.

JUDGES

Ethics

In the Matter of Troisi, No. 24204 (6/18/98) (Maynard, J.)

See JUDGES Discipline, Generally, (p. 348) for discussion of topic.

Evidence

Collateral crimes

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 183) for discussion of topic.

Habeas corpus

Findings required

State ex rel. Watson v. Hill, 488 S.E.2d 476 (1997) (Workman, C.J.)

See APPOINTED COUNSEL No right to, Habeas corpus petition, (p. 77) for discussion of topic.

Instructions

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See INSTRUCTIONS Admissibility, Cumulative, (p. 325) for discussion of topic.

Right to be present when read

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

JUDGES

Jurisdiction

Retaining while accused civilly committed

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Jury selection

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Juveniles

Placement of

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

See JUVENILES Treatment plan, Mandatory development of, (p. 402) for discussion of topic.

Magistrate court appeals

No right to jury trial in

State v. Bergstrom, 474 S.E.2d 586 (1996) (Per Curiam)

See APPEAL Magistrate court, No right to jury trial, (p. 56) for discussion of topic.

Plea bargain

Acceptance of

State v. Wolfe, 500 S.E.2d 873 (1997) (Per Curiam)

See PLEA BARGAIN Acceptance of, Effect, (p. 441) for discussion of topic.

JUDGES

Plea bargain (continued)

Duty regarding

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

Finding required

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Rejection of

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See PLEA BARGAIN Rejection of, (p. 443) for discussion of topic.

Sentencing of juvenile

State v. Martin, 472 S.E.2d 822 (1996) (Per Curiam)

See JUVENILES Sentencing, Following probation violation, (p. 399) for discussion of topic.

Voir dire

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY *Voir dire*, Circuit clerk conducting, (p. 377) for discussion of topic.

JUDGES

Presentence reports

Duty to make findings on

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

Questioning witness

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Restitution

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Same judge throughout proceeding

No requirement for

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See DUE PROCESS Same judge throughout proceeding, No requirement for, (p. 156) for discussion of topic.

Sequestering witness

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SEQUESTRATION Which witnesses to be sequestered, (p. 554) for discussion of topic.

JUDGES

Solicitation of votes

In the Matter of Starcher, 501 S.E.2d 772 (1998) (Holliday, J.)

See JUDGES Discipline, Solicitation of votes, (p. 351) for discussion of topic.

Voir dire

Delegating to circuit clerk

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY *Voir dire*, Circuit clerk conducting, (p. 377) for discussion of topic.

JURY

Bias

Disqualification of employee of alleged victim

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See JURY Disqualification, Employee of prosecution or law enforcement, (p. 373) for discussion of topic

Racial exclusion

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

Appellant was convicted of possession of heroin with intent to deliver. Appellant, who is black, complained on appeal that the prosecution was allowed to peremptory strike a black juror. The prosecution did not strike a similarly situated white juror.

The prosecution claimed no prima facie discrimination can be shown because one black male remained on the panel and the prosecution established a credible non-racial reason for striking the black person from the jury. Further, the prosecution claimed it need not give a reason for striking the white juror.

Syl. pt. 9 - "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the *U.S. Constitution* for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Syl. Pt. 1, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 10 - "To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are off a mind to discriminate.'" Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' [citations omitted.] *Batson v. Kentucky*, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 (1986)." Syl. Pt. 2, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

JURY

Bias (continued)

Racial exclusion (continued)

State v. Rahman, (continued)

Syl. pt. 11 - “The State may defeat a defendant’s prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory challenges to strike members of the defendant’s race from the jury.” Syl. Pt. 3, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 12 - Striking even a single black juror for racial reasons violates equal protection, even though other black jurors remain on the panel. The focus of the trial court’s analysis should be on whether the State’s reason for a challenged strike is pretextual, and not on the overall composition of the jury.

Syl. pt. 13 - In assessing a *Batson* challenge, the trial court must consider a party’s assertion that a similarly situated prospective juror was not challenged, both in determining whether the defendant has stated a prima facie case of discrimination, and in deciding whether the explanation given by the prosecution was a pretext for racial discrimination. In order for the trial court to make the latter determination, the State must articulate a credible reason for the different treatment of similarly situated black and white jurors.

The struck juror was one of two persons who had some experience working with substance abuse; the other was a white female whose experience was much more extensive. She was not struck. The Court held the prosecution had a duty to explain why in order to allow the circuit court to determine if the reason for striking the black person was a pretext. Remanded with directions.

Test for

State ex rel. Hill v. Reed, 483 S.E.2d 89 (1996) (Per Curiam)

See WITNESSES List of, Duty to disclose, (p. 587) for discussion of topic.

JURY

Bias (continued)

Test for (continued)

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder. On appeal she claimed error in that several jurors were not removed for cause. According to appellant one juror “believed a person could not be charged without being guilty,” while the other “repeatedly stated that she did not believe that intoxication could reduce culpability and indicated that homosexuals may be more violent or criminally inclined than heterosexuals.”

A third juror said alcohol should not be used as an excuse for hurting someone; he had a cousin who had been stabbed, which attack the juror attributed to alcohol. Two other prospective jurors clearly were prejudiced against homosexuals. Appellant is gay and killed the victim while intoxicated.

Syl. pt. 4 - The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror’s protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Syl. pt. 5 - Actual bias can be shown either by a juror’s own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.

Syl. pt. 6 - The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause. An appellate court should interfere with a trial court’s discretionary ruling on a juror’s qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.

The Court noted the first juror, upon additional questioning, stated she would have no problem returning a not guilty verdict if she believed someone to be not guilty. Trial counsel did not object. The second prospective juror gave inconsistent answers regarding intoxication as a defense but was peremptorily struck.

JURY

Bias (continued)

Test for (continued)

State v. Miller, (continued)

The third juror said he “probably” could render a not guilty verdict if the evidence demonstrated the defendant was sufficiently intoxicated. He was also peremptorily struck. Although counsel’s motion was denied to strike for cause the fourth and fifth jurors, they did not ultimately serve.

While a juror’s protestations of objectivity need not be taken at face value, the ultimate test is whether the juror can render a fair verdict. Actual prejudice must be shown. *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983). Here, if any prejudice existed it could have been cured by instructions. *Zafiro v. United States*, 506 U.S. 534, 540, 113 S.Ct. 933, 939, 122 L.Ed.2d 317, 326 (1993). Burden of showing actual prejudice was not met. No error; no abuse of discretion in refusing to strike for cause.

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

Appellant was convicted of felony-murder in a shooting death related to a drug deal. One of the prospective jurors said he would find appellant guilty even if the state failed to prove its case beyond a reasonable doubt. During subsequent *voir dire*, the juror changed his statement and said he would follow the proper standard. The circuit court denied appellant’s challenge for cause.

The second juror acknowledged that he had heard about the incident from his girlfriend who worked at a bar across the street from the crime scene. He also admitted that blacks had thrown rocks at his car (appellant is black) and that his relationship with blacks generally was mixed. The circuit court denied appellant’s motion to strike, holding that the juror did not exhibit animosity toward appellant or to blacks generally.

Syl. pt. 12 - “ ‘ “The true test to be applied with regard to qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court’s instructions and disregard any prior opinions he may have had.” *State v. Charlot*, 157 W.Va. 994, 1000, 206 S.E.2d 908, 912 (1974).’ Syl. pt. 1, *State v. Harshbarger*, 170 W.Va. 401, 294 S.E.2d 254 (1982).” Syllabus point 1, *Wheeler v. Murphy*, 192 W.Va. 325, 331, 452 S.E.2d 416, 422 (1994).

JURY

Bias (continued)

Test for (continued)

State v. Wade, (continued)

Syl. pt. 13 - “Actual bias can be shown by either a juror’s own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.” Syllabus point 5, *State v. Miller*, 197 W.Va. 588, 605, 476 S.E.2d 535, 552 (1996).

Syl. pt. 14 - “The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she should set aside any opinion he or she might hold and decide the case on the evidence, a juror’s protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.” Syllabus point 4, *State v. Miller*, 197 W.Va. 588, 605, 476 S.E.2d 535, 552 (1996).

Syl. pt. 15 - “The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause[.]. An appellate court . . . should interfere with a trial court’s discretionary ruling on a juror’s qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.” Syllabus point 6, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

The Court noted appellant used peremptory strikes to remove both jurors but can still claim error under *W.Va. Code* 62-3-3. Syl. Pt. 8, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995). Under the abuse of discretion standard of review, however, the Court found no error; the jurors were questioned individually by the trial court and answered satisfactorily. No error.

Witness list compelled

State ex rel. Hill v. Reed, 483 S.E.2d 89 (1996) (Per Curiam)

See WITNESSES List of, Duty to disclose, (p. 587) for discussion of topic.

JURY

Disqualification

Employee of alleged victim

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See JURY Disqualification, Employee of prosecution or law enforcement, (p. 373) for discussion of topic.

Employee of prosecution or law enforcement

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

Appellant was convicted of breaking and entering, petit larceny and conspiracy to commit petit larceny in the theft of nitrous oxide tanks from a hospital. One of the jurors was a former city police officer who worked full-time as a water plant operator but who was still an auxiliary officer. The trial court refused to strike for cause.

The Court, however, relied on *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973), which held the test is whether a juror can render an impartial verdict. Employees of the Department of Public Safety are, however, subject to strike for cause.

Syl. pt. 1 - "In a criminal case it is reversible error for a trial court to overrule a challenge for cause of a juror who is an employee of a prosecutorial or enforcement agency of the State of West Virginia." Syl. Pt. 5, *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973).

The trial court questioned the prospective juror regarding prejudice; he answered that "I don't really think so, but I always try to be fair." The Court noted that former law enforcement officers have been allowed to serve. *State v. White*, 171 W.Va. 658, 301 S.E.2d 615 (1983); *State v. Deskins*, 181 W.Va. 112, 380 S.E.2d 676 (1989). No error.

Generally

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

JURY

Disqualification (continued)

Generally (continued)

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See JURY Bias, Test for, (p. 371) for discussion of topic.

Disqualification of former law enforcement officers

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See JURY Disqualification, Employee of prosecution or law enforcement, (p. 373) for discussion of topic.

Instructions

Generally

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See INSTRUCTIONS Refusal to give, (p. 332) for discussion of topic.

Re-reading of

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

Right to be present when read

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

JURY

Magistrate court appeals

No right to jury trial

State v. Bergstrom, 474 S.E.2d 586 (1996) (Per Curiam)

See APPEAL Magistrate court, No right to jury trial, (p. 56) for discussion of topic.

Peremptory strikes

Striking black juror

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See JURY Bias, Racial exclusion, (p. 368) for discussion of topic.

Prejudicing

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Racial bias

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See JURY Bias, Test for, (p. 371) for discussion of topic.

Right to be present when instructions read

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

JURY

Right to jury trial

Waiver of

State ex rel. Ring v. Boober, 488 S.E.2d 66 (1997) (Maynard, J.)

Appellant was arraigned on charges of receiving and transferring stolen property. At the arraignment he signed a form titled “Initial Appearance: Rights Statements.” Which recited, *inter alia*, that he must notify the magistrate within twenty days of the initial appearance, or twenty days from his attorney’s appointment, that he wants a jury trial. The magistrate signed an acknowledgment at the bottom of the form saying he had explained the contents of the form and that waiver of the rights therein was made “knowingly and voluntarily.”

On May 11, 1995 counsel was appointed; following several continuances counsel filed written notice of request for jury trial on August 15, 1995. Upon the state’s objection, hearing was held before a magistrate who found appellant’s request untimely pursuant to *W.Va. Code* 50-5-8(b) and Rule 5(c) of the *Rules of Criminal Procedure for Magistrate Courts*. Appellant petitioned for writ of prohibition, the circuit court’s denial of which he then appealed.

Syl. pt. - The procedures set forth in *W.Va. Code* § 50-5-8(b) (1994) and Rule 5(c) of the West Virginia Rules of Criminal Procedure for Magistrate Courts are sufficient to inform a magistrate that the right to a jury trial, as provided for in Article III, Section 14 and Article VIII, Section 10 of the *West Virginia Constitution*, has been voluntarily, knowingly, and intelligently waived, so that *W.Va. Code* § 50-5-8-(b) and Rule 5(c) preserve a defendant’s constitutional right to a jury trial.

Here, the Court found the procedures constitutionally sufficient. Appellant’s signature on the rights statement and subsequent failure to request a jury trial constitute “an intentional, knowing and voluntary waiver.”

The Court noted that appellant could not withdraw his prior waiver because he failed to request a jury trial within the proper time period. Further, the Court dismissed appellant’s contention regarding the chilling effect of the possibility he might have to pay the cost of a jury if he were found guilty.

Finally, citing *State v. Redden*, 199 W.Va. 660, 487 S.E.2d 318 (1997), See JURY TRIAL Waiver of, Standards for, (p. 379) for discussion of topic. The Court found the information provided to appellant sufficient to enable him to waive his right to a jury knowingly and intelligently. No error.

JURY

Voir dire

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY Bias, Test for, (p. 370) for discussion of topic.

Circuit clerk conducting

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder. On appeal she claimed juror selection was improper. The circuit judge directed the circuit clerk to question jurors on general matters. Both counsel and the trial judge were present. Appellant claimed *W.Va. Code* 52-1-8 and 56-6-12 forbid the clerk's questions; and that *W.Va. Code* 52-1-8(b) was not followed in that several questions were omitted.

Syl. pt. 3 - To succeed on an abuse of discretion claim regarding the judicial management of a criminal trial, a defendant must point to a specific rule or statutory violation and then must show that the measures or procedures taken by the trial judge either actually or inherently were prejudicial.

The Court found no inherent bias in allowing the clerk to read general voir dire questions. Neither statute cited requires the judge to physically read the questions, nor was an objection made. While *voir dire* is a "critical stage" of the proceedings, *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246, 104 L.Ed.2d 923, 937 (1989), the clerk did not preside over the questioning. The judge was present at all times. See *United States v. Lee*, 943 F.2d 366, 369 (4th Cir. 1991).

Appellant did not state how omitting several questions prejudiced her. No error.

Discretion of court

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

Appellant was convicted of aggravated robbery. Appellant requested (and was refused) a psychiatrist to testify as to the reliability of eyewitness testimony. The trial court refused appellant's *voir dire* questions regarding whether a prospective juror or his or her family had been treated by a psychiatrist or psychologist; and whether they knew anything about psychiatry or psychology.

JURY

Voir dire (continued)

Discretion of court (continued)

State v. Taylor, (continued)

Syl. pt. 2 - “ ‘ ‘ ‘[T]he inquiry made of a jury on its *voir dire* are [sic] 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 (1994) [, *overruled on other grounds, State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), *overruled on other grounds, State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990)].” Syllabus Point 2, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987).’ Syllabus Point 5, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).” Syllabus Point 1, *Michael v. Sabado*, 192 W.Va. 585, 453 S.E.2d 419 (1994).

The Court found that whether the jury knew anything of psychiatry or psychology would not have had an effect on the case. No error.

Witness list compelled

State ex rel. Hill v. Reed, 483 S.E.2d 89 (1996) (Per Curiam)

See WITNESSES List of, Duty to disclose, (p. 587) for discussion of topic.

JURY TRIAL

Waiver of

Standards for

State v. Redden, 487 S.E.2d 318 (1997) (Starcher, J.)

Appellant was tried in a bench trial and found guilty of one count of first-degree sexual assault. During pre-trial appellant asked for another attorney (which request was ignored) and also waived his right to a jury trial. The trial court asked a series of questions designed to ascertain whether the appellant knew what the consequences of waiver were and whether the appellant really wanted to waive. Appellant answered “yes” to all questions.

Syl. pt. 1 - A trial court’s ultimate determination of the knowing, intelligent voluntariness of a criminal defendant’s waiver of the constitutional right to a jury trial is upon review a legal question requiring independent appellate determination. In such a case, although appellate review of the trial court’s ultimate determination is plenary and *de novo*, this Court will review specific findings of fact by the trial court which underlie its determination under the deferential “clearly erroneous” standard.

Syl. pt. 2 - “Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial.” Syllabus Point 5, *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988).

Syl. pt. 3 - The right to a jury trial is so fundamental that procedural safeguards must be employed, including making an appropriate record of any waiver of this right, to ensure that a defendant’s waiver of the right was made personally, knowingly intelligently and voluntarily. *State v. Neuman*, 179 W.Va. 580, 584, 371 S.E.2d 77, 81 (1988).

Syl. pt. 4 - When a criminal defendant in a circuit court proceeding seeks to waive the right to a jury trial, the preferred procedure is for the trial court: (1) to interrogate the defendant on the record concerning whether he understands the nature of the right he is waiving; (2) if the defendant is represented by counsel, to ascertain whether the defendant has consulted with counsel about the decision to waive a jury trial; (3) to spread upon the record sufficient information to demonstrate that the defendant’s jury trial waiver is made personally, knowingly, intelligently and voluntarily; and (4) to obtain the defendant’s signature on a written waiver of the right to a jury trial.

JURY TRIAL

Waiver of (continued)

Standards for (continued)

State v. Redden, (continued)

Syl. pt. 5 - Whether a criminal defendant's waiver of the right to a jury trial is personal, knowing, intelligent and voluntary is a matter to be determined by looking at the totality of the circumstances. In making such a determination, the fact that the defendant has personally executed a written document reflecting the waiver of the right to a jury trial, and the fact that the defendant had the advice of counsel at the time of waiver, are probative that the waiver was personal, knowing, intelligent----but they are not necessarily determinative.

Syl. pt. 6 - Especially in a serious case, a circuit court is well advised to ascertain on the record that a defendant who wishes to waive his right to jury trial knows that a jury is composed of the appropriate number of members of the community, that the defendant may participate in the selection of the jurors, that the verdict of the jury must be unanimous or as otherwise prescribed by law, and that a judge alone will decide guilt or innocence should the defendant waive the right to a jury trial. Additionally, a circuit court is well advised to ascertain on the record whether improper pressure or inducements, or a confused mental state, have affected the defendant's decision to waive the right to a jury trial. These suggested inquires are neither mandatory nor limiting.

Syl. pt. 7 - In a circuit court proceeding, when a criminal defendant's jury trial waiver is personal, knowing, intelligent, and voluntary as reflected in an on-the-record statement in open court, the failure to obtain a written waiver signed by the defendant does not in itself make the jury trial waiver invalid, despite the technical "writing" requirement of Rule 23(a) of the West Virginia Rules of Criminal Procedure. However, when the record contains no written waiver of the right to a jury trial personally signed by the defendant, as required by West Virginia Rules of Criminal Procedure 23(a), and a defendant contends that he or she did not personally, knowingly, intelligently, and voluntarily waive the right to a jury trial, the jury trial waiver is valid only when the record firmly establishes the defendant's personal, knowing, intelligent and voluntary waiver of the right to a jury trial.

The Court noted that appellant's counsel gave a clear explanation that waiver of a jury trial was a strategic decision with which appellant agreed. No allegation of ineffective assistance of counsel was raised.

JURY TRIAL

Waiver of (continued)

Standards for (continued)

State v. Redden, (continued)

The Court rejected appellant's claim of plain error but noted the trial court should have made specific factual findings regarding the waiver. Nonetheless, because appellant responded to eight questions clearly and unequivocally, was not intoxicated and was clearly informed by the court of the consequences of his decision, the Court found no error. The writing requirement of Rule 23(a) was held to be unnecessary here.

JUVENILES

Arrest

Warrantless

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

A cruising police officer noticed appellant, then seventeen years old, standing on a sidewalk one evening. He recognized him as someone whom he had given a traffic citation but who failed to appear in court. No *capias* warrant had been issued.

Upon being approached, appellant went with the officer to police headquarters. An “NCIC” search identified appellant as a runaway. Although appellant claimed to have returned home, he was arrested. Upon a search, appellant was found to be carrying crack cocaine. Appellant was charged with possession with intent to deliver, convicted and sent to the Industrial Home for Youth. On appeal, he claimed the cocaine should have been suppressed as a product of an unlawful search.

Syl. pt. - Under *W.Va. Code*, 49-5-8(b)(3) (1994), a juvenile may be taken into “custody” without a warrant or court order if the law enforcement official has reasonable grounds to believe the child is a runaway without just cause from the child’s parents and the health, safety, and welfare of the child is endangered. Thus, the mere fact that a juvenile is a runaway is insufficient to take a child into custody without a warrant or court order. The arresting officer also reasonably must believe the runaway’s health, safety, and welfare are also in jeopardy. To satisfy this latter requirement, there must be objective evidence that the juvenile: (1) was behaving in a self-destructive way; (2) was exposed to imminent physical harm; (3) was under the influence of drugs or alcohol; or (4) was incoherent and confused. In the absence of these types of circumstances, an officer should either obtain an arrest warrant or court order or deliver the juvenile to his or her parents.

The prosecution conceded that the juvenile was not delinquent. The Court noted that three types of police-citizen encounters are possible: (1) consensual, in which the individual agrees to speak with the police; (2) a limited investigative stop (*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); and (3) arrest.

Here, the outstanding offense giving rise to the stop was merely a traffic offense; the officer did not have authority to arrest appellant absent a *capias*. Further, it he was not processed on the traffic citation once in custody.

JUVENILES

Arrest (continued)

Warrantless (continued)

State v. Todd Andrew H., (continued)

Because transporting appellant to the police station required an arrest or consent, which requires probable cause, appellant must have consented to be transported since no probable cause to arrest existed. *State v. Jones*, 193 W.Va. 378, 456 S.E.2d 459 (1995). No record was made on this issue.

More importantly, the officer did not inform appellant that he was free to leave after taking him to the police station. See *State v. Mays*, 172 W.Va. 486, 307 S.E.2d 655 (1983). The search here resulted from an arrest based on a computer records search. The Court held that an unlawful arrest took place because express consent was not given, nor did police inform appellant he was free to leave.

Because appellant was a juvenile, the Court also construed taking into “custody” pursuant to *W.Va. Code* 49-5-8(b)(3), to be tantamount to arrest. The Court found the requirements of the statute, that the juvenile be “endangered” and that he is a runaway, were not met. Upon asking appellant to go with him, the officer did not know appellant to be a runaway. It was only following the computer search that the officer believed appellant to be a runaway; and the juvenile was still not considered in danger. No probable cause; cocaine should have been excluded. Reversed and remanded.

Confessions

Prompt presentment

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Detention

Capacity of center

State ex rel. DHHR v. Frazier, 482 S.E.2d 663 (1996) (Workman, J.)

See JUVENILES Detention, Choice of center, (p. 385) for discussion of topic.

JUVENILES

Detention (continued)

Capacity of center (continued)

State ex rel. Lewis v. Stephens, 483 S.E.2d 526 (1996) (Per Curiam)

Petitioner sought a writ of prohibition against two circuit judges to prevent them from ordering DHHR to take juveniles at detention centers which had exceeded their capacity.

Syl. pt. 1 - “Committing officials have a duty to explain in writing their reasons for detaining a child, their choice of placement, and if they require secured bail, their reasons for doing so. This duty is required by *W.Va. Code*, 49-5A-3 (1978).” Syl. Pt. 6, *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984).

Syl. pt. 2 - “No facility can accept any juveniles beyond their licensed capacity and must immediately report any attempt to force them to do so to the Department of Human Services and the Juvenile Justice Committee.” Syl. Pt. 4, *Facilities Review Panel v. Coe*, 187 W.Va. 541, 420 S.E.2d 532 (1992).

Syl. pt. 3 - “Notwithstanding the directive issued by this Court in *Facilities Review Panel v. Coe*, 187 W.Va. 541, 420 S.E.2d 532 (1992), which addresses a juvenile facility’s authority to accept additional juveniles upon reaching its capacity, a circuit court does not lack the authority to order that a juvenile be placed at a facility which is at capacity. When a court-ordered placement will result in the operation of a facility over capacity for more than a few days, the West Virginia Department of Health and Human Resources must determine whether to seek a waiver of the capacity requirement or seek the relocation of juveniles already placed at that particular facility to avoid the concerns of overcrowding discussed in *Coe*. The West Virginia Department of Health and Human Resources cannot abrogate its responsibility, as part of the executive branch of state government, to construct or establish the necessary in-state facilities for juvenile care and treatment.” Syl. Pt. 5, *State ex rel. West Virginia Dep’t of Health and Human Resources v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

Writ granted. Remanded for further findings.

JUVENILES

Detention (continued)

Choice of center

State ex rel. DHHR v. Frazier, 482 S.E.2d 663 (1996) (Workman, J.)

As legal custodian for a minor children, DHHR brought this writ of prohibition to prevent Judge Frazier from placing juvenile offenders in facilities which had already reached their licensed capacities. DHHR also asked that circuit judges be foreclosed from committing a juvenile to a specific facility.

Syl. pt. 1 - West Virginia § 49-5-13(b) (Supp.1996) expressly grants authority to the circuit courts to make facility-specific decisions concerning juvenile placements.

Syl. pt. 2 - West Virginia Code § 49-5B-7 (1996) places a mandatory duty upon the West Virginia Department of Health and Human Resources to prepare and submit to the Supreme Court, along with the Legislature and the governor, an annual report analyzing and evaluating the effectiveness of the programs and services carried out by the Department.

Syl. pt. 3 - Once a circuit court adjudicates a child delinquent pursuant to West Virginia Code § 49-1-4(3) or -(4) (1995) and finds that the child is so totally unmanageable, ungovernable and antisocial that the child is amenable to no treatment or restraint short of incarceration, then it is the responsibility of the West Virginia Department of Health and Human Resources to assist the court in making its placement determination by providing the court with full information on placement and services available both in and out of the community. It is the court's responsibility to determine the placement.

Syl. pt. 4 - "No facility can accept any juveniles beyond their licensed capacity and must immediately report any attempt to force them to do so to the Department of Human Services and the Juvenile Justice Committee." Syl. Pt. 4, *Facilities Review Panel v. Coe*, 187 W.Va. 541, 420 S.E.2d 532 (1992).

JUVENILES

Detention (continued)

Choice of center (continued)

State ex rel. DHHR v. Frazier, (continued)

Syl. pt. 5 - Notwithstanding the directive issued by this Court in *Facilities Review Panel v. Coe*, 187 W.Va. 541, 420 S.E.2d 532 (1992), which addresses a juvenile facility's authority to accept additional juveniles upon reaching its capacity, a circuit court does not lack the authority to order that a juvenile be placed at a facility which is at capacity. When a court-ordered placement will result in the operation of a facility over capacity for more than a few days, the West Virginia Department of Health and Human Resources must determine whether to seek a waiver of the capacity requirement or seek the relocation of juveniles already placed at that particular facility to avoid the concerns of overcrowding discussed in *Coe*. The West Virginia Department of Health and Human Resources cannot abrogate its responsibility, as part of the executive branch of state government, to construct or establish the necessary in-state facility for juvenile care and treatment.

Syl. pt. 6 - While a circuit court should give preference to in-state facilities for the placement of juveniles, if it determines that no in-state facility can provide the services and/or security necessary to deal with the juvenile's specific problems, then it may place the child in an out-of-state facility. In making an out-of-state placement, the circuit court shall make findings of fact with regard to the necessity for such placement.

Noting the express statutory authority for commitment of juveniles, the Court found clear authority for the circuit court to commit to any facility it chose. The Court criticized DHHR for its attitude of being "order-driven" and failure to provide either community-based programs or secure detention facilities.

Writ denied. DHHR ordered to produce the annual report required by *W.Va. Code* 49-5B-7(a) regarding placement of juveniles, *inter alia*.

State ex rel. Ohl v. Egnor, 500 S.E.2d 890 (1997) (Davis, J.)

Petitioner DHHR Secretary asked the Court to prohibit respondent judge from placing a juvenile in an out of state military school pursuant to a finding of delinquency. The child had been placed with his mother, his step-father and a local group home over a period of several years. After numerous modification hearings, the juvenile was banned from the local high school and another military school refused to accept him. The military school would have cost the state less money than the proposal championed by DHHR.

JUVENILES

Detention (continued)

Choice of center (continued)

State ex rel. Ohl v. Egnor, (continued)

Syl. pt. 1 - “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code*, 53-1-1.” Syllabus point 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

Syl. pt. 2 - “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syllabus point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Syl. pt. 3 - “West Virginia Code § 49-5-13(b) (Supp.1996) expressly grants authority to the circuit courts to make facility-specific decisions concerning juvenile placements.” Syllabus point 1, *State ex rel. W.Va. DHHR v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

Syl. pt. 4 - While *W.Va. Code* § 49-5-13(b) (1995) (Repl. Vol. 1996) expressly grants authority to the circuit courts to make facility-specific decisions concerning juvenile placements, that authority is not without limitation. Rather, the circuit courts must choose from the alternatives provided in *W.Va. Code* § 49-5-13(b) in selecting appropriate juvenile placements.

Syl. pt. 5 - A private military school does not fall within the meaning of a rehabilitation facility as contemplated by the Legislature in *W.Va. Code* § 49-5-13(b)(6) (1995) (Repl. Vol. 1996).

JUVENILES

Detention (continued)

Choice of center (continued)

State ex rel. Ohl v. Egnor, (continued)

Syl. pt. 6 - “While a circuit court should give preference to in-state facilities for the placement of juveniles, if it determines that no in-state facility can provide the services and/or security necessary to deal with the juvenile’s specific problems, then it may place the child in an out-of-state facility. In making an out-of-state placement, the circuit court shall make findings of fact with regard to the necessity for such placement.” Syllabus point 6, *State ex rel. W.Va. DHHR v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

Syl. pt. 7 - “Once a circuit court adjudicates a child delinquent pursuant to West Virginia Code § 49-1-4(3) or -(4) (1995) and finds that the child is so totally unmanageable, ungovernable and antisocial that the child is amenable to no treatment or restraint short of incarceration, then it is the responsibility of the West Virginia Department of Health and Human Resources to assist the court in making its placement determination by providing the court with full information on placements and services available both in and out of the community. It is the court’s responsibility to determine the placement.” Syl. pt. 3, *State ex rel. W.Va. DHHR v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

Syl. pt. 8 - “The language of *W.Va. Code* § 49-5D-3 [(1996) (Repl. Vol. 1996)] is mandatory and requires the Department of Health and Human Resources to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect.” Syl. pt. 3, *E.H. v. Matin*, 201 W.Va.463, 498 S.E.2d 35 (1997).

The Court emphasized the best interests of the child should control but despite the undisputed evidence that the juvenile was doing well at the military school, found the placement inappropriate. Writ of prohibition granted.

Choice of placement

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

See JUVENILES Treatment plan, Mandatory development of, (p. 402) for discussion of topic.

JUVENILES

Detention (continued)

DHHR duty to report on

State ex rel. DHHR v. Frazier, 482 S.E.2d 663 (1996) (Workman, J.)

See JUVENILES Detention, Choice of center, (p. 385) for discussion of topic.

Findings required for

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

See JUVENILES Treatment plan, Mandatory development of, (p. 402) for discussion of topic.

State ex rel. Lewis v. Stephens, 483 S.E.2d 526 (1996) (Per Curiam)

See JUVENILES Detention, Capacity of centers, (p. 384) for discussion of topic.

Military schools

State ex rel. Ohl v. Egnor, 500 S.E.2d 890 (1997) (Davis, J.)

See JUVENILES Detention, Choice of center, (p. 386) for discussion of topic.

Disposition

In the Matter of Willis Alvin M., 479 S.E.2d 871 (1996) Per Curiam)

See JUVENILES Incarceration, Reason for must be stated, (p. 390) for discussion of topic.

JUVENILES

Duties

Juvenile incarceration

In the Matter of Willis Alvin M., 479 S.E.2d 871 (1996) Per Curiam)

See JUVENILES Incarceration, Reason for must be stated, (p. 390) for discussion of topic.

Incarceration

Reason for must be stated

In the Matter of Willis Alvin M., 479 S.E.2d 871 (1996) Per Curiam)

Willis Alvin M. was found guilty by a jury of nighttime burglary, conspiracy to commit nighttime burglary, grand larceny and battery of one of his co-conspirators. The predisposition report noted that he had “a history of threatening and intimidating his peers” and as a result had been expelled from school. Appellant said because the burglary was his first offense “they won’t do anything to me.”

The trial court ordered a thirty-day evaluation. Although appellant’s behavior and academic performance were good during the evaluation, the psychologist noted he lacked empathy, was vengeful, prone to antisocial behavior, and denied responsibility for his actions. The psychologist recommended a structured placement like Davis Center. The court committed appellant to the Industrial School with recommendation that they transfer appellant to Davis Center. Appellant claims probation would have been more appropriate.

The Court found the circuit court allowed appellant the chance to submit evidence and properly considered all relevant circumstances. Affirmed.

Syl. pt. - “In a juvenile proceeding it is the obligation of a trial court to make a record at the dispositional stage when commitment to an industrial school is contemplated under *W.Va. Code*, 49-5-13(b)(5) [1978] and where incarceration is selected as the disposition, the trial court must set forth his reasons for that conclusion. In this regard the court should specifically address the following: (1) the danger which the child poses to society; (2) all other less restrictive alternatives which have been tried either by the court or by other agencies to whom the child was previously directed to avoid formal juvenile proceedings; (3) the child’s background with particular regard to

JUVENILES

Incarceration (continued)

Reason for must be stated (continued)

In the Matter of Willis Alvin M., (continued)

whether there are pre-determining factors such as acute poverty, parental abuse, learning disabilities, physical impairments, or any other discrete, causative factors which can be corrected by the State or other social service agencies in an environment less restrictive than an industrial school; (4) whether the child is amenable to rehabilitation outside an industrial school, and if not, why not; (5) whether the dual goals of deterrence and juvenile responsibility can be achieved in some setting less restrictive than an industrial school and if not, why not; (6) whether the child is suffering from no recognizable, treatable determining force and therefore is entitled to punishment; (7) whether the child appears willing to cooperate with the suggested program of rehabilitation; and (8) whether the child is so uncooperative or so ungovernable that no program of rehabilitation will be successful without the coercion inherent in a secure facility.” Syl. pt. 4, *State ex rel. D.D.H. v. Dostert*, 165 W.Va. 448, 269 S.E.2d 401 (1980).

Multidisciplinary team

State ex rel. Ohl v. Egnor, 500 S.E.2d 890 (1997) (Davis, J.)

See JUVENILES Detention, Choice of center, (p. 386) for discussion of topic.

Treatment plan

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

See JUVENILES Treatment plan, Mandatory development of, (p. 402) for discussion of topic.

Placement of

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

See JUVENILES Treatment plan, Mandatory development of, (p. 402) for discussion of topic.

JUVENILES

Plea bargain

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Preliminary hearing

State v. George Anthony W., 488 S.E.2d 361 (1996) (Per Curiam)

See JUVENILES Prompt presentment, (p. 392) for discussion of topic.

Prompt presentment

State v. George Anthony W., 488 S.E.2d 361 (1996) (Per Curiam)

Appellants were transferred to adult jurisdiction for the murder of Dortha Minor. They claimed the transfers were made as a result of confessions which should have been suppressed.

Because of a previous adjudication of delinquency, one of appellants, Stephon W., was on probation at the time of the killing. He had violated his probation so a *capias* was issued for his arrest on November 25, 1992 at 3:30 p.m. He was picked up shortly thereafter and taken to the city police station where he was questioned about the killing. He was taken before a circuit judge, where the police noted they wanted to question him further about the killing. Stephon W.'s appointed lawyer apparently did not advise him as to the killing; the court revoked probation for the violation.

After waiting for paper work at the courthouse, Stephon was taken back to the police station. He was put in a room with his mother and his aunt, both of whom were suspects in the case; his guardian was not allowed in. Shortly afterwards he informed police he would make a statement. He was given his *Miranda* rights and said George W. committed the crime in his presence.

At 6:30 p.m. he signed a waiver form (which apparently did not waive anything, nor did it advise of a right to attorney) and a written transcript of his statement. Around 8:20 the police located George. He and his stepfather were taken to the police station. Although he was not notified that he was under arrest, a detective testified that he was not free to leave. George was given his *Miranda* rights and signed the same "waiver" form. His mother agreed to let him talk with police.

JUVENILES

Prompt presentment (continued)

State v. George Anthony W., (continued)

In his subsequent statement George implicated Stephon in the killing. After the statement, an officer was assigned to Stephon. No attempt was made to arrange a detention hearing. A police officer said he did not call a magistrate because “the Magistrate wants the juvenile forthwith.” The police continued to question Stephon, during which questioning he admitted killing the victim. Stephon gave a second statement at 9:36 p.m. Finally both Stephon and George were taken before a magistrate.

A December 4, 1992 preliminary hearing found probable cause and on December 16, 1992 a transfer hearing was held. Defense counsel moved for continuances. Following appeal to this Court, a new transfer hearing was held, continuing for seven days. Motions to suppress were denied and transfer granted.

Syl. pt. - “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.” Syllabus point 3, *State v. Ellsworth J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

The Court found prompt presentment principles violated. *W.Va. Code* 49-5-8(d). The confessions were elicited pursuant to custody. *State v. Jones*, 193 W.Va. 378, 456 S.E.2d 459 (1995). Further, the primary purpose of the custody was interrogation. While directing further development of the record as to physical evidence, the Court found the confessions inadmissible. Reversed and remanded.

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

Appellant entered a conditional plea of guilty to second-degree murder, reserving the right to review adverse determinations of the suppression of a confession and transfer to adult jurisdiction based on that confession.

Appellant was arrested following the shooting of his friend and advised of his *Miranda* rights. Appellant’s mother arrived at the police station approximately two hours after the arrest. Following a brief conversation with her, both she and appellant signed forms waiving his rights. Appellant then confessed on tape that he had killed the victim ten minutes after hearing from his girlfriend that she had sex with the victim.

JUVENILES

Prompt presentment (continued)

State v. Hosea, (continued)

Syl. pt. 1 - Before accepting a conditional plea under W.Va.R.Crim.P. 11(a)(2), the circuit court and the prosecutor must assure that the pretrial issues reserved for appeal are case dispositive and are capable of being reviewed by this Court without a full trial. This requires the circuit court to make specific findings on the record of the issues to be resolved upon appeal and a further specific finding that those issues would effectively dispose of the indictment or suppress essential evidence which would substantially affect the State's ability to prosecute the defendant as charged in the indictment.

Syl. pt. 2 - The Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession was obtained as a result of the delay in the presentment of a juvenile after being taken into custody before a referee, circuit judge, or a magistrate when the primary purpose of the delay was to obtain a confession from the juvenile. The factual findings upon which the ultimate question of admissibility is predicated will be reviewed under the deferential standard of clearly erroneous.

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." Syllabus Point 3, *State v. Ellsworth J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

Syl. pt. 4 - "When a court finds that there is probable cause to believe that a juvenile has committed one of the crimes specified in *W.Va. Code*, 49-5-10(d)(1) (treason, murder, robbery involving the use of or presenting of deadly weapons, kidnaping, first-degree arson, and first-degree sexual assault), the court may transfer the juvenile to the court's criminal jurisdiction without further inquiry." Syllabus Point 2, in part, *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981).

The Court dismissed respondent's argument that the issues here were not dispositive and hence not reviewable. If appellant were not properly transferred the indictment was void for lack of jurisdiction.

Acknowledging that appellant could still be tried as a juvenile, the Court held the delay in taking appellant before a magistrate was not primarily for the purpose of obtaining a confession. The confession was admissible as a matter of law. See *State v. Ellsworth J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985); *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

JUVENILES

Prompt presentment (continued)

State v. Hosea, (continued)

Similarly, the Court found transfer proper in that there was probable cause to believe appellant committed murder. See *W.Va. Code* 49-5-10(d)(1); also, *In re Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982). No error.

Delay in taking before magistrate

In the Matter of Steven William T., 499 S.E.2d 876 (1997) (Workman, C.J.)

Appellant is a juvenile whose case was transferred to adult jurisdiction following first-degree murder charges. On appeal he claimed the lower court erred in transferring him to adult jurisdiction.

On 19 June 1995 Judy Jenkins was murdered in her own home. Appellant lived with the victim and her friend, Ms. Barbara Milburn, who had custody of appellant. Six months after the killing, Milburn confessed to police that she murdered the victim and that appellant had assisted her in disposing of the murder weapon.

Appellant was taken to police headquarters at 8 a.m., 18 December 1995 for questioning, along with his biological mother and Ms. Carla Whetzel. Based on a document claiming to give custody to Ms. Whetzel, the investigating officer thought Ms. Whetzel was appellant's guardian. Neither adult stayed in the room during the initial interview despite the officer's request that they remain. However, Ms. Whetzel signed the waiver of *Miranda* rights form and was present during subsequent questioning.

The first questioning confirmed that appellant had assisted in the disposal of the murder weapon. Although the officer later admitted during the transfer hearing that he had sufficient evidence at that point to arrest appellant for aiding and abetting, accessory after the fact, he said he wanted "more." Despite telling appellant he would be charged with aiding and abetting, the officer telephoned the prosecuting attorney to determine what evidence he needed. The interrogation ended around 10 a.m.

Subsequently, allegedly based on discrepancies in appellant's statement, the officer asked appellant to take a polygraph test. A polygraph examiner was called and at noon (the same day) spoke with appellant alone for approximately thirty to forty minutes. After crying and staring at the floor, appellant refused to take the test. Approximately two hours elapsed between the first interview and the polygraph exam, during which time appellant was free to move around.

JUVENILES

Prompt presentment (continued)

Delay in taking before magistrate (continued)

In the Matter of Steven William T., (continued)

Subsequent to his refusal to take the test, the investigating officer claimed appellant asked to speak with him alone in response to the officer's asking if he wanted to talk. Appellant then confessed to shooting the victim. At 1:30 p.m., in the presence of his mother and Ms. Whetzel appellant gave a statement in which he confessed to firing the first shot. The victim went to the bathroom where Ms. Milburn shot her a second time. Appellant was taken before a magistrate between 2 and 3 p.m.

In May, 1996, appellant told a clinical psychologist that he had confessed in order to protect Ms. Milburn and the that Ms. Whetzel had encouraged him. He claimed his only real involvement was in disposing of the weapon. The circuit court found appellant's confession admissible and held any delay in taking before a magistrate unavoidable and not for any impermissible purpose.

Syl. pt. 1 - "Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed. *W.Va. Code*, 49-5-10(a) [1977] [now, 49-5-10(e) [1996]].' Syl. pt. 1, *State v. Bannister*, 162 W.Va. 447, 250 S.E.2d 53 (1978)." Syl. Pt. 1, *In re H.J.D.*, 180 W.Va. 105, 375 S.E.2d 576 (1988).

Syl. pt. 2 - "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 3 - "The Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession was obtained as a result of the delay in the presentment of a juvenile after being taken into custody before a referee, circuit judge, or a magistrate when the primary purpose of the delay was to obtain a confession from the juvenile. The factual findings upon which the ultimate question of admissibility is predicated will be reviewed under a deferential standard of clearly erroneous." Syl. Pt. 2, *State v. Hosea*, 199 W.Va. 62, 483 S.E.2d 62 (1966).

JUVENILES

Prompt presentment (continued)

Delay in taking before magistrate (continued)

In the Matter of Steven William T., (continued)

Syl. pt. 4 - “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, J.R.*, 175 W.Va. 64, 331 S.E.2d 503 (1985).

Syl. pt. 5 - “Once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.” Syl. Pt. 2, in part, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

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 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).” Syl. Pt. 6, *State v. Moss*, 180 W.Va. 363, 376 S.E.2d 569 (1988).

Syl. pt. 7 - Where the law enforcement authorities seeking to interrogate a juvenile have knowledge regarding a potential conflict of interest between parent (or custodian) and child with respect to the matters which are the subject of the interrogation, such law enforcement authorities must make further inquiry regarding the appropriate person to be present with the juvenile pursuant to West Virginia Code § 49-5-2(1) (1996).

Noting that the purpose for the delay in presentment before a magistrate controls, the Court found the purpose here was to obtain a confession. Once probable cause for arrest was obtained, appellant should have been presented before a magistrate. The confession should have been suppressed.

Although the lack of prompt presentment required reversal, the Court also noted that appellant had allegedly been abused by the decedent, that he was emotionally and intellectually retarded and that he had no experience with the legal system. All of these factors weighed against admission of the confession.

JUVENILES

Prompt presentment (continued)

Delay in taking before magistrate (continued)

In the Matter of Steven William T., (continued)

Most troubling to the Court was the lack of adult guidance; *W.Va. Code* 49-5-2(l) required the presence of a parent or custodian. Even worse, even that presence can be rendered ineffective when a conflict of interest exists, as was clearly the case here. *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). Reversed and remanded.

Proof of age required

State ex rel. Blake v. Vickers, No. 23317 (6/14/96) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 400) for discussion of topic.

Rehabilitation

Following transfer to adult jurisdiction

State v. Robert K. McL., 496 S.E.2d 887 (1997) (Starcher, J.)

See JUVENILES Transfer to adult jurisdiction, Rehabilitation as factor, (p. 401) for discussion of topic.

Runaway

Custody without warrant

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

JUVENILES

Sentencing

Following probation violation

State v. Martin, 472 S.E.2d 822 (1996) (Per Curiam)

In March, 1993, appellant was sentenced to one to ten for malicious assault, with sentence suspended and probation granted; no alcohol or drugs was a condition of probation, along with AA and NA attendance. Appellant failed to report to his probation officer for three successive months and was convicted of aggravated robbery on 10 December 1993. He was sentenced to ten years for the aggravated robbery.

In March, 1994, the court suspended both sentences and placed appellant at the Anthony Center pursuant to *W.Va. Code 25-4-1, et seq.* Appellant participated in substance abuse programs while there. Following release from Anthony, the court again sentenced appellant to two to ten for the malicious assault and ten years for the aggravated robbery, sentences to run consecutively. However, sentences were again suspended and appellant was put on home confinement pursuant to *W.Va. Code 62-11B-1, et seq.*, again with the requirement of attending AA and NA meetings.

The prosecution subsequently sought revocation based on appellant's leaving his residence and consuming alcohol. The circuit court revoked probation and resentenced as previously.

Syl. pt. - "*W.Va. Code, 25-4-6*, does not allow a trial court discretion to impose any less than the original sentence when a male defendant, who has served at a youth correctional facility, violates his probation agreement." Syllabus, *State v. Patterson*, 170 W.Va. 721, 296 S.E.2d 684 (1982).

The Court rejected appellant's argument that the probation violations were disproportionate to the subsequent sentences and therefore unconstitutional. See *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983). The resentencing here related to the original offenses, not to the probation violations. Further, they were the minimum sentences required. No error.

Transfer to adult jurisdiction

In the Matter of Steven William T., 499 S.E.2d 876 (1997) (Workman, C.J.)

See JUVENILES Prompt presentment, Delay in taking before magistrate, (p. 395) for discussion of topic.

JUVENILES

Transfer to adult jurisdiction (continued)

Factors to consider

State ex rel. Blake v. Vickers, No. 23317 (6/14/96) (Per Curiam)

Relator sought to prohibit respondent judge from prosecuting Damien Bagut (a.k.a. Bobby Rivera) as a juvenile, seeking to have him tried as an adult. On 21 June 1995 respondent Bagut was arrested for murder in New York State. On 12 July 1995 a juvenile petition was filed and subsequently granted.

Relator sought trial as an adult based on *W.Va. Code* 49-5-10. At the transfer hearing altered documents were introduced showing Bagut was over fourteen years of age, as required. Defense counsel objected and the documents were excluded. Bagut was not transferred to adult jurisdiction and a hearing was set for 20 February 1996. Relator's motion for reconsideration was refused and relator sought to prevent Bagut's juvenile proceeding.

The Court noted that effective 2 June 1995, *W.Va. Code* 49-5-10(d) makes transfer mandatory when the juvenile is fourteen or older and there is probable cause to believe he has committed murder. Further, when a transfer hearing is insufficient, another hearing can be held; double jeopardy principles are not violated. *In re Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985).

The purpose of a transfer hearing now is to determine whether the juvenile is over fourteen and whether there is probable cause to believe he committed murder. The prosecution should be given an opportunity to correct the evidentiary defect. Writ granted.

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Proof of age

State ex rel. Blake v. Vickers, No. 23317 (6/14/96) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 400) for discussion of topic.

JUVENILES

Transfer to adult jurisdiction (continued)

Rehabilitation as factor

State v. Robert K. McL., 496 S.E.2d 887 (1997) (Starcher, J.)

Appellant, a juvenile, was transferred to adult jurisdiction following a finding of probable cause that he committed murder. On appeal he claimed the “automatic” transfer provisions of *W.Va. Code* 49-5-10(d) violate constitutional principles of due process and equal protection in that the court can no longer consider personal factors.

The statute was amended in 1995 to make transfer mandatory and to remove factors the court was to consider concerning transfer, namely, the mental and physical condition of the child, his emotional and physical maturity, attitude, home environment, school environment and other similar factors. Upon motion of the prosecuting attorney, and a showing of probable cause, transfer is now required.

Syl. pt. 1 - The provisions of *W.Va. Code*, 49-5-13 [1995] provide a “safety-valve” which assures that the “automatic transfer” provisions of our juvenile transfer law do not unconstitutionally divest and deprive a circuit court of its ability to meaningfully consider and weigh personal factors going to the suitability and amenability of a juvenile for the rehabilitative purposes of the court’s juvenile jurisdiction.

Syl. pt. 2 - The “automatic transfer” provisions of *W.Va. Code*, 49-5-10 [1995], when read in *pari materia* with the provisions of *W.Va. Code*, 49-5-13 [1995], do not unconstitutionally divest and deprive a circuit court of the ability to consider personal factors going to the amenability of a juvenile for the rehabilitative purposes of the court’s juvenile jurisdiction and to, in its discretion, return a child to juvenile jurisdiction.

The Court noted that under the 1978 version of the statute courts were not required to consider the enumerated factors currently struck. *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981). Conversely, the Court has held that circuit courts were not limited to the statutory factors in considering whether to transfer. *Cook, supra*.

JUVENILES

Transfer to adult jurisdiction (continued)

Rehabilitation as factor (continued)

State v. Robert K. McL., (continued)

The Court recognized that the prosecutorial discretion vested by statute clearly results in differing results for identical transgressions. Further, the prosecution is given no standards or basis for exercising his discretion and that discretion is unreviewable. Nonetheless, the Court found the sentencing provisions of *W.Va. Code* 49-5-13 restored to circuit courts sufficient discretion to direct a juvenile to treatment, rather than sentencing him as an adult, so as to save the “automatic” transfer provisions from fatal defects. No error.

Reversal of

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

Treatment plan

Mandatory development of

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

The circuit court presented two certified questions:

- (1) Whether multi disciplinary team plans must be developed pursuant to *W.Va. Code* 49-5D-3; and
- (2) Whether courts may place juveniles in facilities out of the area or out of the state only if: (a) if in accord with the plan or, if not in accord, then (2) following specific findings that the plan is inadequate to meet the juvenile’s needs.

JUVENILES

Treatment plan (continued)

Mandatory development of (continued)

E.H., et al. v. Matin, (continued)

R.A.R., one of the juveniles subject to this matter, was sixteen years old and in DHHR's custody at the beginning of this case. Although a resident of Marion County he had been placed in an out of state facility. His mother sought treatment for him at the Olympic Center in Preston County, where it was determined that R.A.R. should participate in Alcoholics Anonymous and weekly counseling sessions, along with being tested for treatment of attention deficit-hyperactivity disorder. He did not receive any of the recommended treatment.

R.A.R. subsequently stole money from his mother and was placed in Chestnut Ridge Hospital for thirty days, along with two years probation for petit larceny and battery. After testing positive for marijuana, R.A.R. was sent to the Northern Regional Juvenile Detention Facility for sixty days.

While on probation, R.A.R. ran away from home. Following apprehension he was sent to the Kanawha County Children's Home. Upon release he was sent to his grandparents. Following his skipping school he was sentenced to the High Plains Youth Center in Brush, Colorado for a term of fifteen months to two years. Following a habeas corpus petition, R.A.R. was resentenced to George Junior Republic, a facility in Grove City, Pennsylvania.

Although a multi disciplinary team was formed when R.A.R. was placed at George Junior, none was formed for the other placements. Even for the George Junior placement, the court did not consider the team's recommendations.

Syl. pt. 1 - "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982).

Syl. pt. 2 - Multidisciplinary treatment teams must assess, plan, and implement service plans pursuant to *W.Va. Code* § 49-5D-3.

Syl. pt. 3 - The language of *W.Va. Code* § 49-5D-3 is mandatory and requires the Department of Health and Human Resources to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect.

JUVENILES

Treatment plan (continued)

Mandatory development of (continued)

E.H., et al. v. Matin, (continued)

Syl. pt. 4 - “While a circuit court give preference to in-state facilities for the placement of juveniles, if it determines that no in-state facility can provide the services and/or security necessary to deal with the juvenile’s specific problems, then it may place the child in an out-of-state facility. In making an out-of-state placement, the circuit court shall make findings of fact with regard to the necessity for such placement.” Syllabus Point 6, *State v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

Syl. pt. 5 - Circuit courts may specify direct placements of juveniles in out-of-state facilities only: (1) if in accord with the plan(s) of the juvenile’s multidisciplinary team, or if not in accord with that plan(s), then (2) after the circuit court has made specific findings of fact, following an evidentiary hearing, that the plan(s) of the juvenile’s multidisciplinary treatment team is inadequate to meet the child’s needs.

The Court noted that out of state placements are very expensive and are not favored. Here, the record lacked a service plan and any goals. Had a team developed a realistic plan, the Court noted that placement at George Junior could have been made initially, avoiding a long and expensive process.

The Court answered both certified questions in the affirmative. An evidentiary hearing and specific findings must be made if a treatment plan is not followed.

LESSER INCLUDED OFFENSES

Aggravated robbery and nonaggravated robbery

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic.

Compared with

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

Felony murder

Second-degree murder not included

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See HOMICIDE Felony-murder, Second-degree not lesser included offense, (p. 283) for discussion of topic.

Test for

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

Instructions on

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

See INSTRUCTIONS Lesser included offenses, (p. 329) for discussion of topic.

LESSER INCLUDED OFFENSES

Murder

Accessory after the fact

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See HOMICIDE Murder, Accessory after the fact, (p. 292) for discussion of topic.

MAGISTRATE COURT

Appeals from

Denial of due process when penalty higher

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See DUE PROCESS Magistrate court conviction, Circuit court imposes higher penalty, (p. 155) for discussion of topic.

No right to jury trial

State v. Bergstrom, 474 S.E.2d 586 (1996) (Per Curiam)

See APPEAL Magistrate court, No right to jury trial, (p. 56) for discussion of topic.

Admonishment

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

Delay in service to pressure complainant

In the Matter of Browning, 475 S.E.2d 75 (1996) (Per Curiam)

See MAGISTRATE COURT Discipline, Use of office to get witness to recant, (p. 411) for discussion of topic.

Discipline

Admonishment

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

MAGISTRATE COURT

Discipline (continued)

Domestic violence petition

In the Matter of Verbage, 490 S.E.2d 323 (1997) (Per Curiam)

Respondent was assigned to work “on call” as a Cabell County Magistrate. He worked until close to midnight even though he was obviously ill. At 7:00 a.m. the next morning, while he was still “on call” and one hour before his assignment was to end, he received a 911 reference from a woman who wanted to file a domestic violence petition. He told the 911 operator to tell the woman another magistrate would be on duty; the other magistrate did in fact handle the filing.

Syl. pt. - “The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.” Syllabus Point 1 of *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

The Court found respondent violated Canons 1, 2 and 3 of the *Code of Judicial Conduct*. However, citing *In the Matter of Codispoti*, 186 W.Va. 710, 414 S.E.2d 628 (1992), the Court found mitigation in that the woman requesting assistance suffered no harm, despite respondent’s failure. Dismissed.

Ex parte communications

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

Extrajudicial advice

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

Rick Severe was arraigned on second offense DUI before respondent. Subsequently respondent was called by Severe’s uncle by marriage, who was also respondent’s cousin. Respondent visited his cousin at the cousin’s store and made numerous suggestions concerning how Severe could get his driver’s license back. In appreciation, the cousin presented respondent with gifts of china and an ashtray.

MAGISTRATE COURT

Discipline (continued)

Extrajudicial advice (continued)

In the Matter of Reese, (continued)

Respondent later told Severe that if Severe would go through DUI schooling and obtain an ignition interlock respondent would reduce the second offense DUI to first offense. Severe's attorney had apparently been trying to get Severe to his office and been told by Severe that he saw no need to come since the charges were to be reduced; upon inquiring of the prosecuting attorney if a plea agreement had been made, the attorney was told no agreement had been reached.

Meanwhile, respondent had *sua sponte* contacted the arresting officer to inquire as to whether he had objections to reducing the charges. Respondent later claimed the conversation regarded scheduling.

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).

Syl. pt. 2 - "The purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice." Syllabus, *In the Matter of Gorby*, 176 W.Va. 16, 339 S.E.2d 702 (1985).

The Court found respondent's conduct improper but not egregious. Admonishment.

Extra-judicial contact with family members

In the Matter of Rice, 489 S.E.2d 783 (1997) (Per Curiam)

Respondent's son-in-law was arrested for public intoxication and possession of a controlled substance. After he was arraigned and bail set by another magistrate, respondent asked the arresting officer and the prosecuting attorney for help, even suggesting dismissal of the charges.

MAGISTRATE COURT

Discipline (continued)

Extra-judicial contact with family members (continued)

In the Matter of Rice, (continued)

The charges were ultimately dismissed. The prosecuting attorney, who did not know that the defendant was respondent's son-in-law, wrote on the file "dismissed per officer's agreement per Magistrate Rice." (The prosecutor later testified that he did not move for dismissal as a result of respondent's actions.)

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)." Syl. Pt. 1, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

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 - "The purpose of judicial proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice.' Syllabus, *In the Matter of Gorby*, 176 W.Va. 16, 339 S.E.2d 702 (1985)." Syl. Pt. 1, *In the Matter of Phalen*, 197 W.Va. 235, 475 S.E.2d 327 (1996).

Citing *In the Matter of Boese*, 186 W.Va. 46, 410 S.E.2d 282 (1991) and *In the Matter of Neely*, 178 W.Va. 722, 364 S.E.2d 250 (1987) the Court found respondent had violated Canons @A and 2B. Admonished and costs assessed.

Remand

In the Matter of Browning, 475 S.E.2d 75 (1996) (Per Curiam)

See MAGISTRATE COURT Discipline, Use of office to get witness to recant, (p. 411) for discussion of topic.

MAGISTRATE COURT

Discipline (continued)

Use of office to get witness to recant

In the Matter of Browning, 475 S.E.2d 75 (1996) (Per Curiam)

Respondent was previously found to have failed to issue a domestic violence order and refused to cooperate with the Chief Magistrate concerning work hours. *In the Matter of Browning*, 192 W.Va. 231, 452 S.E.2d 34 (1994). While the allegations in the first case were pending, this matter was filed involving the delaying of a domestic battery warrant sought by Patricia Lynn Estep and attempts by respondent to get Ms. Estep to alter her testimony in the first matter.

The Judicial Hearing Board dismissed the complaint and the Judicial Investigation Commission appealed.

Syl. pt. - “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).

The evidence showed that Ms. Estep went to the magistrate court to obtain a domestic violence protective order in November, 1994. Although the order was issued by another magistrate, Ms. Estep discussed it with respondent; on 7 December 1994 Ms. Estep returned for a show cause order for contempt of the protective order. Respondent, at Ms. Estep’s request, continued the contempt hearing and issued a criminal domestic battery warrant. Respondent held the order from Friday until Monday, when the accused was expected to appear at respondent’s office.

Ms. Estep claimed respondent then accosted her and attempted to have her alter her previous testimony; she further stated that service of the criminal domestic battery warrant was delayed in order to afford respondent the opportunity to pressure Ms. Estep. Respondent’s daughter and another person visited Ms. Estep’s home to get her to alter the testimony.

The Court found the charges sufficiently serious to remand for a showing by respondent.

MAGISTRATE COURT

DUI

Ex parte communications

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

Ex parte communications

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

Extrajudicial advice

In the Matter of Reese, 495 S.E.2d 548 (1997) (Per Curiam)

See MAGISTRATE COURT Discipline, Extrajudicial advice, (p. 408) for discussion of topic.

Prompt presentment

Of juvenile

State v. George Anthony W., 488 S.E.2d 361 (1996) (Per Curiam)

See JUVENILES Prompt presentment, (p. 392) for discussion of topic.

Right to jury trial

Waiver of

State ex rel. Ring v. Boober, 488 S.E.2d 66 (1997) (Maynard, J.)

See JURY Right to jury trial, Waiver of, (p. 376) for discussion of topic.

MALICE

Inference of

Use of firearm

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Instructions on

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Presumption of

Use of deadly weapon

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Use of deadly weapon

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

MALICIOUS ASSAULT

Sufficiency of evidence

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

MANDAMUS

Abuse and neglect

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See ABUSE AND NEGLECT DHHR as client in civil abuse and neglect, (p. 9) for discussion of topic.

Access to legal records

State ex rel. William A. James, et al., Nos. 24144, 24145, 24146, 24`47, 24148 (10/03/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Inmate “law clerks”, (p. 452) for discussion of topic.

Appeal

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

See APPEAL Frivolous appeals, Determination of, (p. 52) for discussion of topic.

Coram nobis

Ruling on

State ex rel. Harris v. Zakaib, No. 23489 (10/15/96) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 361) for discussion of topic.

Grounds for

State ex rel. Aaron v. King, 485 S.E.2d 702 (1997) (Davis, J.)

See SENTENCING Presentence report, Client’s right to, (p. 543) for discussion of topic.

MANDAMUS

Inmate “law clerks”

State ex rel. William A. James, et al., Nos. 24144, 24145, 24146, 24`47, 24148 (10/03/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Inmate “law clerks”, (p. 452) for discussion of topic.

Judges’ duty to rule

State ex rel. Dotson v. Hoke, No. 23799 (12/6/96) (Per Curiam)

See JUDGES Duties, Duty to rule, (p. 360) for discussion of topic.

Sentencing

Conflict between federal and state sentences

State ex rel. Massey v. Hun, 478 S.E.2d 579 (1996) (Per Curiam)

See SENTENCING Conflict between state and federal sentences, (p. 528) for discussion of topic.

Transfer to federal custody

State ex rel. Massey v. Hun, 478 S.E.2d 579 (1996) (Per Curiam)

See SENTENCING Conflict between state and federal sentences, (p. 528) for discussion of topic.

MARIJUANA

Delivery of

Sentencing

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

MENTAL HYGIENE

Commitment

Due process requirements

State ex rel. White v. Todt, 475 S.E.2d 426 (1996) (McHugh, C.J.)

Appellant left a Nebraska psychiatric facility without permission. He was originally committed as a sex offender but was under an involuntary civil commitment when he left. Pursuant to the Interstate Compact on Mental Health, *W.Va. Code 27-14-1, et seq.*, Nebraska officials contacted the state director of health, the compact “administrator,” informing him that appellant may be in Roane County, where his parents lived.

The administrator issued an order authorizing police to take appellant to the William R. Sharpe, Jr. Hospital until he could be returned to Nebraska. Appellant was detained and taken to the hospital; without holding a hearing, the administrator attempted to return appellant to Nebraska. Following appointment of counsel, the circuit court denied appellant’s petition for habeas corpus, finding the terms of the Compact were met.

Syl. pt. 1 - “When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action.” Syl. pt. 2, *Bone v. W.Va. Dept. of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979).

Syl. pt. 2 - “Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the *West Virginia Constitution*, which are[:] First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.” Syl. pt. 2, *North v. W.Va. Bd. of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977).

MENTAL HYGIENE

Commitment (continued)

Due process requirements (continued)

State ex rel. White v. Todt, (continued)

Syl. pt. 3 - When a dangerous or potentially dangerous patient who has escaped from a mental health facility in another state is being detained in this State pursuant to article V of the Interstate Compact on Mental Health found in *W.Va. Code*, 27-14-1 [1957], the due process clause found in article III, § 10 of the *Constitution of West Virginia* requires, at a minimum, that before this State returns the dangerous or potentially dangerous patient to the state from where he or she has escaped, the dangerous or potentially dangerous patient be informed of the reason he or she is being detained, the dangerous or potentially dangerous be afforded a hearing to determine identification and the dangerous or potentially dangerous patient be afforded the opportunity to have the representation of counsel in the event he or she decides to challenge the identification.

Syl. pt. 4 - The due process clause found in article III, § 10 of the *Constitution of West Virginia* requires that laws provide explicit standards for those who apply them so as to prevent arbitrary and discriminatory enforcement of the laws.

Syl. pt. 5 - “As a general rule the Legislature, in delegating discretionary power to an administrative agency, such as a board or a commission, must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient guide such agency in the exercise of the power conferred upon it.’ Syl. pt. 3, *Quesenberry v. Estep*, 142 W.Va. 426, 95 S.E.2d 832 (1956).” Syl. pt. 3, *State ex rel. Mountaineer Park v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993).

Syl. pt. 6 - “The delegation by the legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their exercise, is not of itself unconstitutional.’ Point 8 Syllabus, *Chapman v. Huntington, West Virginia Housing Authority*, 121 W.Va. 319 [, 3 S.E.2d 502 (1939)].” Syl. pt. 5, *State ex rel. W.Va. Hous. Dev. Fund v. Copenhagen*, 153 W.Va. 636, 171 S.E.2d 545 (1969).

The Court noted the Compact does not provide a mechanism for returning escaped persons committed to mental institutions. However, *W.Va. Code* 27-5-1, *et seq.*, West Virginia’s civil commitment statutes, provides for a procedure. See *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974).

MENTAL HYGIENE

Commitment (continued)

Due process requirements (continued)

State ex rel. White v. Todt, (continued)

The Court held that the process due appellant to determine whether he should be returned is less than the process to which he was entitled upon his initial commitment in Nebraska. Thus, while appellant is due a hearing, the scope of that hearing is whether he should be returned, not whether he was properly committed or is dangerous. The identity of the person is the main question to be answered.

However, the Compact administrator may be the person who issues a detaining order. Because appellant is given counsel and had a hearing, due process was afforded. Further, the Court found the compact to be sufficiently precise in setting standards for enforcement. No error.

In lieu of criminal conviction

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

Appellant was found not guilty of second-degree murder by reason of mental illness. The circuit court maintained jurisdiction over appellant for forty years, the same time period the court believed appellant could receive as a sentence (later corrected to eighteen years). Appellant was committed to the Division of Health for that period or until such time as appellant could be treated in a community setting.

Appellant claimed it was error to deliberately continue her case until after the amended commitment statutes took effect (*W.Va. Code 27-6A-3*) and applying the amended version; she also maintained the statute was unconstitutional in that continuing court jurisdiction bears no relationship to the mental illness and therefore violates both due process and equal protection standards. (The statutory standard is the length of time the defendant would otherwise be sentenced to if found guilty.)

Syl. pt. 1 - Pursuant to West Virginia Code § 27-6A-3 (Supp.1996), to calculate the length of time a court may retain its jurisdiction in cases of acquittal by reason of mental illness, the court first must decide on the record what offense the acquittee otherwise would have been convicted and, then, determine the maximum sentence the acquittee could have received for that offense. Next, the court shall commit the acquittee to a mental health facility under the jurisdiction of the Division of Health, with the court retaining jurisdiction over the defendant for the maximum sentence period.

MENTAL HYGIENE

Commitment (continued)

In lieu of criminal conviction (continued)

State v. Smith, (continued)

Syl. pt. 2 - West Virginia Code §§ 27-6A-3 and -4 (Supp.1996), read in pari materia, generally provide a court flexibility in exercising and retaining its jurisdiction up to the maximum sentence period, with consideration given to the current mental state and dangerousness of a person found not guilty by reason of mental illness. If not sooner terminated by the court, its jurisdiction automatically will expire at the end of the maximum sentence period.

Syl. pt. 3 - “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).

Syl. pt. 4 - The purpose of West Virginia Code § 27-6A-3 (Supp.1996) is not to punish someone suffering a mental illness; rather, it is to treat the illness and protect society. If someone is found guilty by reason of mental illness, there is no conviction to warrant a punishment.

Consequently, *ex post facto* principles typically are not involved by the commitment of an insanity acquittee.

Syl. pt. 5 - “It is well settled as a general rule that the question of continuance is in the sound discretion of the trial court, which will not be reviewed by the appellate court, except in case it clearly appears that such discretion has been abused. Syl. Pt. 1 *Levy v. Scottish Union & Nat. Ins. Co.*, 58 W.Va. 546, 52 S.E. 449 (1905).’ Syl. Pt. 2, *Nutter v. Maynard*, 183 W.Va. 247, 395 S.E.2d 491 (1990).”

Quoting *Jones v. United States*, 463 U.S. 354 (1983) the Court found that persons acquitted of criminal charges by reason of insanity can be committed beyond the term of years demanded by the criminal statute if the nature and duration of the commitment bears a “reasonable relation to the purpose for which the individual is committed.” If the committed person is found to be sane or no longer dangerous he is entitled to release. *Id*, citing, in part, *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Cf. *Foucha v. Louisiana*, 504 U.S. 71 (1992), holding petitioner could not be committed indefinitely until he could prove he was no longer dangerous; violation of equal protection of law.

MENTAL HYGIENE

Commitment (continued)

In lieu of criminal conviction (continued)

State v. Smith, (continued)

Here, appellant was released six and one-half months after commitment to live with her sister and participate in community based treatment with significant restrictions. Appellant is to file written reports every six months. The Court found the circuit court's restrictions were sufficiently narrowly tailored to pass scrutiny. The Court found no error in the court's ex post facto application of the statutory change; the change applied to civil, not criminal law. *Shumate v. West Virginia Department of Motor Vehicles*, 182 W.Va. 810, 814 n.4, 392 S.E.2d 701, 705, n.4 (1990). Similarly, the Court found the court's continuance for the purpose of applying the new statute to be within the judge's discretion. Syl. Pt. 1, *Levy v. Scottish Union & National Insurance Co.*, 58 W.Va. 546, 52 S.E. 449 (1905); Syl. Pt. 2, *Nutter v. Maynard*, 183 W.Va. 247, 395 S.E.2d 491 (1990). No abuse of discretion; no error.

Criminal jurisdiction

Effect on commitment

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

Criminal jurisdiction compared with

State v. Smith, 482 S.E.2d 687 (1996) (Workman, J.)

See MENTAL HYGIENE Commitment, In lieu of criminal conviction, (p. 420) for discussion of topic.

MIRANDA RIGHTS

Assertion

When raised

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 513) for discussion of topic.

Waiver of

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

MIRANDA WARNINGS

Statements by defendant

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 515) for discussion of topic.

MULTIDISCIPLINARY TEAMS

Treatment plans

Mandatory development of

E.H., et al. v. Matin, 498 S.E.2d 35 (1997) (Maynard, J.)

See JUVENILES Treatment plan, Mandatory development of, (p. 402) for discussion of topic.

MULTIPLE OFFENSES

Indictment on

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

Joinder of

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

MURDER

Distinguished from voluntary manslaughter

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

Character of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

Co-counsel

No right to

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See APPOINTED COUNSEL Co-counsel in murder case, (p. 77) for discussion of topic.

Failure to provide medical care

Element of knowledge

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

See HOMICIDE Murder by failing to provide medical care, Element of knowledge, (p. 293) for discussion of topic.

Instructions

Malice

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

MURDER

Malice

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See HOMICIDE Instructions, Malice, (p. 289) for discussion of topic.

Self-defense

Character of victim

State v. Smith, 481 S.E.2d 747 (1996) (Per Curiam)

See HOMICIDE Self-defense, Character of victim, (p. 294) for discussion of topic.

Sentencing

Bifurcation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See BIFURCATION Grounds for, (p. 110) for discussion of topic.

NEGLIGENT KILLING

While hunting

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

OBSTRUCTING AN OFFICER

Defined

State v. Davis, 483 S.E.2d 84 (1996) (Per Curiam)

Appellant was found guilty of obstructing a police officer. The police officer answered a call that gunshots had been fired, possibly from appellant's residence. Appellant and his girlfriend had been in an argument. In response to questioning appellant said he may or may not have fired his gun and that he would do so "any f---ing place, any f---ing time he chose." Appellant informed the officer that the gun was loaded.

Since appellant became agitated when the officer suggested that he would confiscate the gun, the officer called for backup. After convincing appellant to exit the residence, they arrested appellant for obstructing an officer. While the magistrate court found appellant guilty of both assault and obstruction, the circuit court convicted of obstruction only.

Syl. pt. 1 - "This court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 114, 469 S.E.2d 114 (1996).

Syl. pt. 2 - "A person, upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate *W.Va. Code*, 61-5-17 [1931], because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person's right to freedom of speech. *U.S. Const.* amend. I; *W.Va. Const.* art III, § 7." Syllabus, *State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, 373 S.E.2d 484 (1988).

The Court defined "obstruct" as any action signifying direct or indirect opposition or resistance and held appellant's behavior to be obstruction. (See *W.Va. Code* 48-2A-14 relating to domestic violence. No error.

PARDON

Governor's power to

State ex rel. Forbes v. Caperton, 481 S.E.2d 780 (1996) (Workman, J.)

See SENTENCING Commutation of, Governor's power, (p. 527) for discussion of topic.

PAROLE

Restrictions on

Violative of double jeopardy

State v. Sears, 468 S.E.2d 324 (1996) (Cleckley, J.)

See DOUBLE JEOPARDY Parole restriction as multiple punishment, Legislative intent, (p. 146) for discussion of topic.

Revocation for failure to pay fine

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

Revocation of

State ex rel. Smith v. Duncil, 483 S.E.2d 272 (1996) (Per Curiam)

See HABEAS CORPUS Parole violations, (p. 274) for discussion of topic.

Basis for

State ex rel. Eads v. Duncil, 474 S.E.2d 534 (1996) (Albright, J.)

See PAROLE Revocation of, Necessity for record, (p. 433) for discussion of topic.

Domestic violence

State ex rel. Schoolcraft v. Merritt, No. 23850 (7/8/97) (Per Curiam)

Petitioner was convicted in West Virginia of counterfeiting; he was ultimately released on parole and allowed to move to Ohio pursuant to an interstate compact on parolees. After several months petitioner's parole officer and a police officer were summoned to petitioner's home on allegations of domestic battery. Petitioner refused to allow them to enter and allegedly struck the parole officer after entry. Petitioner was charged with five parole violations and a preliminary hearing was held in Ohio. Petitioner was represented by counsel.

PAROLE

Revocation of (continued)

Domestic violence (continued)

State ex rel. Schoolcraft v. Merritt, (continued)

Pursuant to *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996) the Parole Board heard the case; a quorum of the Board later met to hear a tape of the parole revocation hearing, along with recommendations. Petitioner was again represented by counsel. The Board revoked petitioner's parole.

On this writ, petitioner claimed he was denied the right to confront witnesses since the Board did not bring to the final parole hearing witnesses from the original preliminary hearing and that he was denied a prompt hearing since six months elapsed from the date of his arrest for domestic violence.

The Court noted that Parole Board Rule 11.01 requires the Board to receive a written transcript of the original hearing. Since petitioner got a full opportunity to present witnesses and to confront opposing witnesses at the preliminary hearing the Court found no error. The Court also noted that the victim testified again at the later parole revocation hearing.

W.Va. Code 62-12-19 requires a prompt hearing on parole revocation; Parole Board Rule 11.02(b) also requires that the final revocation hearing be held no later than thirty-five working days after the parolee got written notice of the charges or the date he was incarcerated. However, the thirty-five day period is tolled by the petitioner's absence from the state "for whatever reason."

Although the final hearing did not occur until six months after the violations the Court found no prejudice resulted from the delay. Writ denied.

Necessity for record

State ex rel. Eads v. Duncil, 474 S.E.2d 534 (1996) (Albright, J.)

Relator claimed the Parole Board improperly revoked his parole. Relator was convicted of breaking and entering and nighttime burglary. On March 31, 1994 he was released on parole, with terms that he complete an alcohol treatment program, find employment, submit to random drug testing, not leave his home county without his parole officer's consent and contact the officer regularly.

PAROLE

Revocation of (continued)

Necessity for record (continued)

State ex rel. Eads v. Duncil, (continued)

Relator dropped out of the treatment program because it focused on drug, not alcohol abuse. The parole officer arranged a second program and ordered relator to attend AA. He was also ordered to contact ten potential employers per day. He did not comply with either directive. The Department of Corrections notified him on March 30, 1995 that he seemed to be in violation and set a hearing for April 7, 1995. Following the April 7 hearing, it was determined appellant was in violation and a final hearing before one member of the Parole Board was scheduled for 18 May 1995.

That member found appellant in violation and issued an order dated June 15, 1995. It bore the typed signature "WEST VIRGINIA PAROLE BOARD" but was signed by the sole member who heard the evidence.

Syl. pt. 1 - "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Syl. pt. 2 - The record in parole revocation cases must affirmatively show that the documents and evidence produced in the revocation proceeding have been submitted to all duly appointed and qualified members of the West Virginia Board of Probation and Parole for consideration prior to the final decision, that the number of members considering such documents and evidence constituted a quorum for conduct of business by the Parole Board, and that a majority of the duly appointed and qualified members considering the documents and evidence must concur in any order revoking parole, either by signing the order or filing with the secretary of the Parole Board a written concurrence in such revocation, which may be then so certified by the chairman of the Parole Board, the secretary of the Parole Board, or a member of the Parole Board assigned to conduct the proceeding.

Syl. pt. 3 - The West Virginia Board of Probation and Parole must obey legislation and must act in a way which is not unreasonable, capricious, or arbitrary.

The Court noted the Administrative Procedures Act (*W.Va. Code 29A-1-1*) does not apply to parole matters. Further, the full rights afforded in a criminal prosecution are not required. *Sigman v. Whyte*, 165 W.Va. 356, 268 S.E.2d 603 (1980). Due process rights do apply, however. *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980).

PAROLE

Revocation of (continued)

Necessity for record (continued)

State ex rel. Eads v. Duncil, (continued)

Even more specifically, the Court found *W.Va. Code* 62-12-19 requires the Board to issue a ruling. Even though a hearing before the full Board is not required, *Dobbs v. Wallace*, 157 W.Va. 405, 201 S.E.2d 914 (1974), the full Board, not just a single member, must rule on the issue. Writ granted; remanded for consideration by the full Board.

(NOTE: the Court very clearly did not make this ruling retroactive: no prisoner incarcerated between the original Parole Board order here and the date of this opinion can be released on the basis of this opinion.)

Statutory compliance

State ex rel. Eads v. Duncil, 474 S.E.2d 534 (1996) (Albright, J.)

See PAROLE Revocation of, Necessity for record, (p. 433) for discussion of topic.

PHOTOGRAPHS

Admissibility

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See EVIDENCE Admissibility, Gruesome photographs, (p. 198) for discussion of topic.

PLAIN ERROR

Defined

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his infant son. In addition to numerous other assignments of error (see elsewhere, this Digest) he asserted numerous other matters not objected to at trial.

Syl. pt. 7 - An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

The Court engaged in a lengthy discussion of the reason for requiring objection to error at trial. Absent a miscarriage of justice, the Court refused to reverse. Affirmed.

State v. Marple, 197 W.Va. 47, 475 S.E.2d 47 (1996) (Cleckley, J.)

See PLAIN ERROR Generally, (p. 438) for discussion of topic.

Elements of

State v. Marple, 197 W.Va. 47, 475 S.E.2d 47 (1996) (Cleckley, J.)

See PLAIN ERROR Generally, (p. 438) for discussion of topic.

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

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

Defined

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

PLAIN ERROR

Generally

State v. Marple, 197 W.Va. 47, 475 S.E.2d 47 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder. Appellant did not testify at trial. The prosecuting attorney deliberately elicited testimony from the arresting officer regarding appellant's post-*Miranda* warning silence. Appellant's trial counsel did not object.

Syl. pt. 1 - Plain error review creates a limited exception to the general forfeiture policy pronounced in Rule 103(a)(1) of the West Virginia Rules of Evidence, in that where a circuit court's error seriously affects the fairness, integrity, and public reputation of the judicial process, an appellate court has the discretion to correct error despite the defendant's failure to object. The salutary and protective device recognizes that in a criminal case, where a defendant's liberty interest is at stake, the rule of forfeiture should bend slightly, if necessary, to prevent a grave injustice.

Syl. pt. 2 - For the purposes of West Virginia's "plain error" rule, a "plain" error is one that is clear and uncontroverted at the time of appeal.

Syl. pt. 3 - In determining whether the assigned plain error affected the "substantial rights" of a defendant, the defendant need not establish that in a trial without the error a reasonable jury would have acquitted; rather, the defendant need only demonstrate the jury verdict in his or her case was actually affected by the assigned but unobjected to error.

The Court noted the testimony regarding appellant's silence was in violation of *Doyle v. Ohio*, 426 U.S. 610, 92 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and *State v. Boyd*, 150 W.Va. 234, 233 S.E.2d 710 (1977). Nonetheless, evidentiary rulings are reviewed on an abuse of discretion standard. *McDougal v. McCammon*, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995). The error is reversible only if appellant was prejudiced. *State v. Guthrie*, 194 W.Va. 657, 684, 461 S.E.2d 163 (1995). Further, because the error was not preserved at trial, it can only be recognized under the plain error rule. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Here, the prosecution called 23 witnesses. The officer who commented on the post-*Miranda* silence was the first witness and the only one who noted the silence. The other evidence was overwhelming. Affirmed.

PLAIN ERROR

Indictment

Sufficiency of

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See INDICTMENT Sufficiency of, Murder, (p. 311) for discussion of topic.

Instructions

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See INSTRUCTIONS Sufficiency of, Generally, (p. 333) for discussion of topic.

Right to allocution

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

Standard for review

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

When reversible

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

Appellant was convicted of DUI, second offense based on an earlier conviction in Virginia and the current offense in West Virginia. The warrant charged appellant with DUI and stated that he “blew a .216 on the Intoxilyzer 5000.” The charge to the jury said:

Any person who drives a vehicle in this State while he is under the influence of alcohol or has an alcohol concentration in his blood of ten hundredths of one percent or more by weight shall be guilty of driving under the influence.

PLAIN ERROR

When reversible (continued)

State v. Williams, (continued)

Appellant claimed that *State v. Blankenship*, 198 W.Va. 290, 480 S.E.2d 178 (1996) controls, in that “an instruction which informs the jury that it can return a verdict of guilty of a crime charged in the indictment by finding that the defendant committed acts constituting a crime not charged in the indictment is reversible error.” Because no objection was raised, the Court focused only on the question of whether the error, *if any*, was plain error.

Syl. pt. 4 - “Assuming that an error is ‘plain,’ the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.” Syllabus Point 9, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Absent any showing that the error was prejudicial, the Court affirmed.

When unavailable

Forfeiture v. waiver

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See RIGHT TO BE PRESENT Critical stage, Jury instructions, (p. 492) for discussion of topic.

PLEA BARGAIN

Acceptance of

Effect

State v. Wolfe, 500 S.E.2d 873 (1997) (Per Curiam)

Appellant was denied probation following a guilty plea to two counts of first-degree sexual abuse. Pursuant to a “binding” plea agreement, never reduced to writing, appellant was to be sentenced to two consecutive sentences of one to five years, with the second to be suspended if appellant was accepted into a sexual abuse “program.”

Following his acceptance into a therapeutic program, appellant asked for probation on the second count. The trial court noted that the program was “not the kind of sexual treatment program that I had in mind” and refuse to grant probation.

Syl. pt. 1 - “Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court’s ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under the clearly erroneous standard. Second, in contrast, the circuit court’s articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed de novo.” Syl. Pt. 1, *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995).

Syl. pt. 2 - “Once a circuit court unconditionally accepts on the record a plea agreement under Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the circuit court is without authority to vacate the plea and order reinstatement of the original charge. Furthermore, after a defendant is sentenced on the record in open court, unilateral modification of the sentencing decision by the circuit court is not an option contemplated within Rule 11(e)(1)(C).” Syl. Pt. 4, *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995).

The Court found the trial court gave extensive reasons for refusing probation. *W.Va. Code* 62-12-2(e) requires a psychiatric examination and none was available at the treatment center appellant attended. Appellant failed to comply with minimum statutory requirements. No error in denying probation.

PLAIN ERROR

Breach of

Standard for review

State v. Wolfe, 500 S.E.2d 873 (1997) (Per Curiam)

See PLEA BARGAIN Acceptance of, Effect, (p. 441) for discussion of topic.

Finding of fact required

State ex rel. Thompson v. Watkins, 488 S.E.2d 894 (1997) (Per Curiam)

Petitioner was indicted on twenty seven counts but pled to two counts of burglary. The indictment, although containing the basic elements of burglary and the proper citation (*W.Va. Code* 61-3-11(a) referred to the charge as “breaking and entering.”

Petitioner claimed he was misled into thinking he pled to breaking and entering.

Syl. pt. 1 - “When a conviction rests upon a plea of guilty, the record must affirmatively show that the plea was intelligently and voluntarily made with an awareness of the nature of the charge to which the plea is offered and the consequences of the plea.’ Syllabus Point 1, *Riley v. Ziegler*, [161] W.Va. [290], 241 S.E.2d 813 (1978).” Syl. Pt. 1, *Potter v. Mohn*, 163 W.Va. 474, 256 S.E.2d 763 (1979).

The Court rejected petitioner’s argument, noting that the trial court read the plea agreement to petitioner in open court, trial counsel noted for the record that he had explained the agreement to petitioner and petitioner himself acknowledged that he understood that he was pleading to two counts of burglary. Writ denied.

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Judge’s duty to advise defendant

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

PLAIN ERROR

Juveniles

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Rejection of

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

Appellant was convicted of felony murder in an arson-related death. Prior to trial appellant agreed to plead to first-degree murder, with a recommendation of mercy. The circuit court ruled it could not “in good conscience dispense that particular sentence merely by agreement.”

The Court noted Rule 11(e)(4) of the *Rules of Criminal Procedure* applies only to guilty pleas and is intended to advise the defendant of the jeopardy he may be putting himself in and his right to reject the plea. Here, appellant did not enter a guilty plea so the trial court did not err by not allowing appellant to withdraw his plea. No error.

Standard for

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

Appellant pled guilty to possession of marijuana. As part of the agreement the prosecution agreed to dismiss two counts in exchange for a plea to a third count. Four days earlier appellant had pled guilty to violating his probation from a prior conviction for armed robbery and was sentenced to ten years. The plea at issue here required the prosecution to recommend the one to five years sentence for possession run concurrently with the prior sentence.

The circuit court explained to appellant that it was not bound by the sentencing part of the agreement even if the plea were accepted. The court did not inform appellant that he had a right to withdraw the plea if the court did not sentence in accordance with the agreement. Appellant was sentenced to one to five but after appellant began serving his term, the court ruled that the sentence was to run consecutively to the earlier sentence. Appellant orally waived his right to be present at the final sentencing hearing.

PLAIN ERROR

Standard for (continued)

State v. Stone, (continued)

Syl. pt.1 - “With the advent of Rule 11 of the West Virginia Rules of Criminal Procedure, a detailed set of standards and procedures now exists governing the plea bargaining process.’ Syllabus Point 1, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).” Syllabus Point 1, *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986).

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 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.” Syllabus Point 2, *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986).

Noting that appellant did not ask to withdraw his guilty plea, cf. *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986), the Court nonetheless found the record did not show whether appellant understood he could not withdraw his plea if the recommended agreement were accepted. Therefore, the Court could not find harmless error in the circuit court’s failure to advise appellant. The Court remanded to allow appellant to allow appellant either to “plead anew” or to allow the circuit court to grant specific performance of the concurrent sentence.

PLEADING AND JOINDER

Common scheme or plan

All offenses to be joined

State v. Hubbard, 491 S.E.2d 305 (1997) (Per Curiam)

Appellant was convicted of selling drugs to confidential informants in 1993; he claimed that drug-related offenses occurring in 1993 should have been joined with similar activities occurring in 1994. Appellant was indicted and convicted of the 1994 violations in 1995; he was then indicted and convicted on the 1993 violations.

Following the 1994 violations, appellant moved to dismiss the indictment for the 1993 offenses on the theory that the offenses were all part of one transaction. The prosecuting attorney said he was unaware of the 1993 charges when the conviction was obtained on the 1994 charges.

Syl. pt. 1 -“Rule 8(a) of the West Virginia Rules of Criminal Procedure compels the prosecuting attorney to charge in the same charging document all offenses based on the same act or transaction, or on two or more acts or transactions, connected together or constituting parts of a common scheme or plan, whether felonies, misdemeanors or both, provided that the offenses occurred in the same jurisdiction, and the prosecuting attorney knew or should have known of all the offenses, or had an opportunity to present all offenses prior to the time that jeopardy attaches in any one of the offenses.” Syl. Pt. 3, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

Syl. pt. 2 - “Pursuant to Rule 8(a) of the West Virginia Rules of Criminal Procedure, the burden of joining multiple offenses arising out of the same act or transaction, or constituting parts of a common scheme or plan, occurring within the same jurisdiction, and which are known or should have been known to the prosecuting attorney, or which the prosecuting attorney had an opportunity to attend the proceeding where the first offense is presented, which is prior to the time that the jeopardy attaches in any one of the offense, is upon the State not on the defendant. Syl. Pt. 4, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

Syl. pt. 3 - “In the event that the State fails to comply with the mandatory provisions of Rule 8(a), and all of the elements requiring mandatory joinder are extant, then the charging document addressing any subsequent offenses must be dismissed.” Syl. Pt. 5, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

PLEADING AND JOINDER

Common scheme or plan (continued)

All offenses to be joined (continued)

State v. Hubbard, (continued)

The Court noted that joinder is a procedural rule not constitutionally based. However, offenses unknown to the prosecution or not committed within the same county are not subject to mandatory joinder. *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996). No error.

POLICE

Entrapment

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

Fury service

Not automatically excluded from

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See JURY Disqualification, Employee of prosecution or law enforcement, (p. 373) for discussion of topic.

Interrogation by

Assertion of right to counsel

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 518) for discussion of topic.

Sequestration

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SEQUESTRATION Which witnesses to be sequestered, (p. 554) for discussion of topic.

Warrantless arrest

Exigent circumstances required

State v. Cheek, 483 S.E.2d 21 (1996) (Per Curiam)

See ARREST Warrantless, Exigent circumstances required, (p. 80) for discussion of topic.

POLICE OFFICER

Drugs and alcohol

Mentioned as reason for defendant's crimes

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EVIDENCE Collateral crimes, (p. 223) for discussion of topic.

POLICE POWER

Defined

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

PRESENTENCE REPORT

Client's right to

State ex rel. Aaron v. King, 485 S.E.2d 702 (1997) (Davis, J.)

See SENTENCING Presentence report, Client's right to, (p. 543) for discussion of topic.

Contents of confidential matters excluded

State ex rel. Aaron v. King, 485 S.E.2d 702 (1997) (Davis, J.)

See SENTENCING Presentence report, Client's right to, (p. 543) for discussion of topic.

Errors in

Findings required

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

See SENTENCING Presentence reports, Errors in, (p. 546) for discussion of topic.

PRINCIPLE IN FIRST-DEGREE

Defined

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

Distinguished from aiding and abetting

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

PRISON/JAIL CONDITIONS

Detention centers

State ex rel. DHHR v. Frazier, 482 S.E.2d 663 (1996) (Workman, J.)

See JUVENILES Detention, Choice of center, (p. 385) for discussion of topic.

State ex rel. Lewis v. Stephens, 483 S.E.2d 526 (1996) (Per Curiam)

See JUVENILES Detention, Capacity of centers, (p. 384) for discussion of topic.

Inmate “law clerks”

State ex rel. William A. James, et al., Nos. 24144, 24145, 14146, 24147, 24148 (10/03/97) (Per Curiam)

Petitioners requested writ of mandamus against the Commission of Corrections and the wardens of Huttonsville and Denmark Correctional Centers. A Division of Corrections policy forbade one inmate from having access to another inmate’s legal records. Since some inmates designated as “legal clerks” gave legal assistance petitioners claimed that the policy restricted their access to courts. Further, petitioners complained that prison officers confiscate and destroy certain documents they deem not to be “legal” in nature.

In response, Corrections claims no restriction is placed on legal documents but all personal property must fit within certain designated storage; when property is retained in excess of that storage capacity it is seized. Corrections also claimed that inmates have access to “clerks,” and the “clerk” may review another inmate’s records but may not keep the documents in a dormitory room.

The Court noted meaningful access to the courts is a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed. 2d 72 (1977); *Hickson v. Kellison*, 170 W.Va. 732, 296 S.E.2d 855 (1982). However, that right “is not completely unfettered.” *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

The Court found reasonable restrictions on the amount of legal papers an inmate may possess at any one time are permissible. *State ex rel. Osborne v. Kirby*, No. 23982 (7/11/97).

The limits here are reasonable. Writ denied.

PRISON/JAIL CONDITIONS

Punitive segregation

Denial of access to courts

State ex rel. Osborne v. Kirby, No. 23982 (7/11/97) (Per Curiam)

Petitioner sought writ of habeas corpus, alleging lack of meaningful access to the courts by being placed in punitive segregation at the Northern Regional Jail. Petitioner was not allowed to take to punitive segregation various materials relating to his numerous suits in both state and federal court.

Petitioner had refused to clean his cell window, claiming what appeared to be dried spit was actually dried semen, possibly contaminated with the AIDS virus, thrown into his cell by another inmate. He requested all the papers he had prior to lock-down and was given “about one foot of stacked legal material.” He did not get his journal notes or his address book.

“Inmates of county jails are guaranteed the same right of meaningful access to courts as other state prisoners under the due process clause of the Fourteenth Amendment. The availability of legal books, writing materials and stamps, telephone access to attorneys, notarial services, and legal assistance in preparing and filing legal papers have been held to be elements necessary to guarantee prisoners reasonable access to the courts.” See also, *Crain v. Bordenkircher*, 176 W.Va. 338, 342 S.E.2d 422 (1986); and *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D.W.Va. 1981).

The Court found that “meaningful” access to the courts was not denied here, despite some deleterious effect. Writ denied.

PRIVILEGES

Attorney-client privilege

Divorce attorney as witness

State v. Jarvis, 483 S.E.2d 38 (1996) (Albright, J.)

Appellant was convicted of first-degree murder in the death of his daughter-in-law. At the time of the killing she and appellant's son were undergoing a bitter divorce. At trial decedent's divorce attorney was allowed to testify. Appellant's son attempted to invoke attorney-client privilege, in that he was the administrator for decedent's estate.

Syl. pt. 2 - "In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential." Syllabus Point 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979)." Syllabus point 7, *State ex rel. United States Fidelity and Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

The testimony here concerned matters in the pending divorce settlement that were not in writing and to the legal effect of documents that were introduced into evidence. He did not testify as to conversations with the decedent identified as confidential. No violation of client confidence; further, appellant had no standing to claim privilege for a third party. See also, Rule 501, Rules of Evidence.

Clergy-communicant

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

Appellant was convicted of first-degree sexual assault and abuse by a custodian. Appellant was pastor of the Paw Paw Bible Church. He began counseling the victims' mother and soon befriended the victim and one of his sisters, inviting them to spend the night with appellant and his wife.

Ultimately, only the victim was invited; the visits progressed to approximately two nights per week. Appellant began engaging in anal intercourse with the boy, then seven years old.

PRIVILEGES

Clergy-communicant (continued)

State v. Potter, (continued)

Appellant was asked to report to the County Sheriff's office. Upon arriving, Deputy John A. Ketterman told him of the sexual abuse allegations (which included other boys). Deputy Ketterman later testified that he told Potter he was not under arrest and that he should leave because Ketterman did not want to speak further with him. Potter said he "had some things that he wanted to get off of his chest."

Ketterman went for a tape recorder, read Potter his *Miranda* rights and obtained a signed waiver of those rights. Ketterman told Potter again he could have an attorney present. Potter then admitted to sexually assaulting the boy. An arrest warrant issued the next day.

Potter received a visit from another clergyman, Martin Rudolph. It is unclear whether Potter believed their conversation to be confidential or whether he gave Rudolph permission to disclose the information. The trial court admitted appellant's confession and allowed Rudolph to testify regarding his conversation with appellant that appellant had sexually assaulted or abused male children.

Syl. pt. 3 - A communication will be privileged, in accordance with *W.Va. Code*, 57-3-9 (1992), if four tests are met: (1) the communication must be made to a clergyman; (2) the communication may be in the form of a confidential confession or a communication; (3) the confession or communication must be made to the clergyman in his professional capacity; and (4) the communication must have been made in the course of discipline enjoined by the rules of practice of the clergyman's denomination.

The Court found Reverend Rudolph was a clergyman within the meaning of *W.Va. Code* 57-3-9. Deferring ruling on whether a confession was made "in the course of discipline enjoined by the church" to which Rudolph belonged, the Court found appellant consented to the testimony, thereby waiving the privilege.

Even if improperly admitted, the Court found the testimony harmless error.

PROBABLE CAUSE

Finding of

Delay in taking before magistrate

In the Matter of Steven William T., 499 S.E.2d 876 (1997) (Workman, C.J.)

See JUVENILES Prompt presentment, Delay in taking before magistrate, (p. 395) for discussion of topic.

Investigatory stop

Muscatell v. Cline, No. 22945 (6/14/96) (Albright, J.)

(NOTE: Even though this matter involves administrative revocation of license, it is included because of the identity of issues in DUI cases.)

A state trooper received a radio call advising him to be on the lookout for a small blue vehicle traveling from Clarksburg to Grafton. The driver was allegedly involved in a hit and run accident and might be under the influence of alcohol. The information source was unknown at the time (it was another state trooper).

The information regarding the hit and run turned out to be false. The arresting trooper testified on direct that he observed appellant cross the center line but on cross-examination he acknowledged he had earlier (at the administrative hearing) said he observed no improper driving at the time of the stop.

When he detained appellant, the trooper noticed the strong odor of alcohol. Appellant had been crying. She failed the Alco Sensor III field test. The trooper then administered several other field tests, including the horizontal gaze nystagmus test; walk and turn test; and the one leg stand test. Appellant's license was ultimately revoked, with the Commissioner rejecting appellant's objections to the lack of trooper training on the HGN test and the trooper's probable cause to stop. Because no evidence was introduced of the trooper's observation of appellant for twenty minutes prior to taking the secondary chemical test, the results were excluded by the Commissioner.

Syl. pt. 1 - On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in *W.Va. Code* § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

PROBABLE CAUSE

Investigatory stop (continued)

Muscatell v. Cline, (continued)

Syl. pt. 2 - In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition of it by an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.

Syl. pt. 3 - “Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime” Syllabus point 1, in part, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 4 - “When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” Syllabus point 2, *State v. Stuart*, 192 W.Va. 428 at 429, 452 S.E.2d 886 at 887 (1994).

Syl. pt. 5 - For a police officer to make an investigatory stop of a vehicle the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In making such an evaluation, a police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability, and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard.

Syl. pt. 6 - Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.

The Court upheld the admission of the HGN test, in that the trooper was not trying to estimate appellant’s blood alcohol, but rather using it as a field sobriety test. *State v. Barker*, 179 W.Va. 194 at 198, 366 S.E.2d 642 at 646 (1988).

PROBABLE CAUSE

Investigatory stop (continued)

Muscatell v. Cline, (continued)

The Court noted that *Stuart, supra*, speaks directly to the anonymous tip as a reason to stop. An anonymous tip can be sufficient to allow an investigative stop based on reasonable suspicion if some independent investigation corroborates the tip. Here, the totality of the facts were insufficient to allow the stop based on the officer's knowledge of the car's color, the general direction of travel and the lack of damage presumably present from the alleged hit and run accident (there was confusion regarding whether the tip gave the make and model of the car).

However, the Court noted the Commissioner resolved in the trooper's favor the conflict in the trooper's testimony regarding his independent observation of erratic driving. The circuit court resolved the dispute the opposite way. The Court found the Commissioner had not sufficiently explained the basis of her decision but the trial court had insufficient evidence to find the Commissioner clearly wrong. Reversed and remanded, with direction to remand to the Commissioner.

Grounds for

State v. Bishop, 488 S.E.2d 453 (1997) (Per Curiam)

Appellant was convicted of DUI. An officer of the Weston city police was informed by an anonymous call that appellant was driving a small white car while intoxicated. On several prior occasions the officer had personally talked with appellant on the streets of Weston while he was intoxicated.

Upon spotting appellant in a white 1984 Chevette, the officer activated his flashing lights, whereupon appellant pulled over and exited the vehicle. Appellant waived his arms, said "what," and leaned against his vehicle. Appellant was unable to provide a driver's license, vehicle registration or proof of insurance. The officer detected an odor of alcohol on appellant's breath.

A license check of appellant's driver's license showed it was revoked. Appellant was charged with driving while revoked and DUI and found guilty in circuit court following an appeal.

PROBABLE CAUSE

Investigatory stop (continued)

Grounds for (continued)

State v. Bishop, (continued)

Syl. pt. 1 - “Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. To the extent *State v. Meadows*, 170 W.Va. 191, 292 S.E.2d 50 (1982), holds otherwise, it is overruled.” Syllabus Point 1, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 2 - “When evaluating whether or not particular acts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” Syllabus Point 2, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 3 - “A police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard.” Syllabus Point 4, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

The Court noted the anonymous call did describe a white vehicle which matched appellant’s car and indicated appellant was driving; further, the officer had personal knowledge that appellant was often intoxicated. No error.

Necessity for arrest

State v. Cheek, 483 S.E.2d 21 (1996) (Per Curiam)

See ARREST Warrantless, Exigent circumstances required, (p. 80) for discussion of topic.

Reasonable suspicion

Muscatell v. Cline, No. 22945 (6/14/96) (Albright, J.)

See PROBABLE CAUSE Investigatory stop, (p. 456) for discussion of topic.

PROBABLE CAUSE

Search warrants

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 506) for discussion of topic.

Sentencing following violation of

Juveniles

State v. Martin, 472 S.E.2d 822 (1996) (Per Curiam)

See JUVENILES Sentencing, Following probation violation, (p. 399) for discussion of topic.

Standard for

Search warrants

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 506) for discussion of topic.

To stop

Reasonable suspicion

Muscatell v. Cline, No. 22945 (6/14/96) (Albright, J.)

See PROBABLE CAUSE Investigatory stop, (p. 456) for discussion of topic.

Warrantless search

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

PROBATION

Conditions of

Violation of previous probation

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J)

See SENTENCING Probation revocation, (p. 548) for discussion of topic.

Judge's duty to clarify

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J)

See SENTENCING Probation revocation, (p. 548) for discussion of topic.

Revocation for failure to pay fine

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

Revocation hearing

Minimum for due process

State ex rel. Jones v. Trent, 490 S.E.2d 357 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions of accomplice, (p. 192) for discussion of topic.

Revocation of

Standard for sentencing

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J)

See SENTENCING Probation revocation, (p. 548) for discussion of topic.

PROBATION

Violation of

Duty to make record

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J)

See SENTENCING Probation revocation, (p. 548) for discussion of topic.

PROFESSIONAL RESPONSIBILITY

Discipline

Dual representation

Lawyer Disciplinary Board v. Frame, 479 S.E.2d 676 (1996) (Per Curiam)

See ATTORNEYS Professional responsibility, Dual representation, (p. 98) for discussion of topic.

Hearing panel subcommittee

Powers and duties

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

Judges

Solicitation of votes

In the Matter of Starcher, 501 S.E.2d 772 (1998) (Holliday, J.)

See JUDGES Discipline, Solicitation of votes, (p. 351) for discussion of topic.

Misappropriation of funds

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

Procedure for sanctions

Lawyer Disciplinary Board v. Kupec, No. 23011 (4/2/98) (Davis, C.J.)

See ATTORNEYS Professional responsibility, Misappropriation of funds, (p. 99) for discussion of topic.

PROFESSIONAL RESPONSIBILITY

Prosecuting attorney fails to disclose exculpatory evidence

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Reinstatement following suspension

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

Suspension

Roark v. Lawyer Disciplinary Board, 495 S.E.2d 552 (1997) (Workman, C.J.)

See ATTORNEYS Discipline, Reinstatement following, (p. 87) for discussion of topic.

PROHIBITION

Abuse and neglect

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996) (Workman, J.)

See ABUSE AND NEGLECT Guardians *ad litem*, Right to be heard, (p. 14) for discussion of topic.

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See ABUSE AND NEGLECT DHHR as client in civil abuse and neglect, (p. 9) for discussion of topic.

Generally

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996) (Workman, J.)

See ABUSE AND NEGLECT Guardians *ad litem*, Right to be heard, (p. 14) for discussion of topic.

Grounds for

State ex rel. Amy M. v. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996) (Workman, J.)

See ABUSE AND NEGLECT Guardians *ad litem*, Right to be heard, (p. 14) for discussion of topic.

Juvenile tried as adult

State ex rel. Blake v. Vickers, No. 23317 (6/14/96) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 400) for discussion of topic.

PROHIBITION

Prosecuting attorney may use

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

See PROSECUTING ATTORNEY Right to appeal, (p. 475) for discussion of topic.

PROMPT PRESENTMENT

Delay in taking before a magistrate

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 514) for discussion of topic.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Prompt presentment, (p. 521) for discussion of topic.

Juveniles

In the Matter of Steven William T., 499 S.E.2d 876 (1997) (Workman, C.J.)

See JUVENILES Prompt presentment, Delay in taking before magistrate, (p. 395) for discussion of topic.

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Juveniles

Delay in taking before magistrate

In the Matter of Steven William T., 499 S.E.2d 876 (1997) (Workman, C.J.)

See JUVENILES Prompt presentment, Delay in taking before magistrate, (p. 395) for discussion of topic.

State v. George Anthony W., 488 S.E.2d 361 (1996) (Per Curiam)

See JUVENILES Prompt presentment, (p. 392) for discussion of topic.

PROPORTIONALITY

Sentencing

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See SENTENCING Proportionality, (p. 550) for discussion of topic.

PROSECUTING ATTORNEY

Abuse and neglect

Civil actions distinguished from criminal

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See ABUSE AND NEGLECT DHHR as client in civil abuse and neglect, (p. 9) for discussion of topic.

Civil role distinguished from criminal

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

Appeal by

DUI case

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

Assistants

Residence of

State v. Macri, 487 S.E.2d 891 (1996) (Workman, J.)

The circuit court dismissed indictments against five different defendants because the assistant prosecuting attorney who either made the actual presentments or was present at the presentments was not a West Virginia resident or citizen. The assistant is full-time and has lived in Ohio since becoming a member of both the Ohio and West Virginia Bar.

PROSECUTING ATTORNEY

Assistants (continued)

Residence of (continued)

State v. Macri, (continued)

Syl. pt. 1 - An indictment is considered bad or insufficient pursuant to West Virginia Code § 58-5-30 (1966) when within the four corners of the indictment it: (1) fails to contain the elements of the offense to be charged and sufficiently apprise the defendant of what he or she must be prepared to meet; and (2) fails to contain sufficient accurate information to permit a plea of former acquittal or conviction.

Syl. pt. 2 - “The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court’s action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant’s right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.” Syl. Pt. 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

Syl. pt. 3 - “Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated [as] an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign.” Syl. Pt. 5, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

Syl. pt. 4 - An assistant prosecuting attorney is not a public officer under West Virginia Code § 7-7-8 (1993) for purposes of the citizenship requirement contained within Article IV, Section 4 of the *West Virginia Constitution*.

Syl. pt. 5 - “The position of assistant prosecuting attorney is a ‘public officer’ within the contemplation of *W.Va. Code*, 18-5-1a [1967], thereby rendering an individual occupying that position ineligible to serve as a member of any county board of education.” Syl. Pt. 2, *Carr v. Lambert*, 179 W.Va. 277, 367 S.E.2d 225 (1988), as modified.

PROSECUTING ATTORNEY

Assistants (continued)

Residence of (continued)

State v. Macri, (continued)

The Court allowed the prosecution's appeal despite appellee's arguments that the indictments were not challenged as insufficient, nor were they dismissed with prejudice. *W.Va. Code* 58-5-30. While denying a direct appeal, the Court allowed a writ of prohibition because the assistant prosecuting attorney could not reindict appellees.

Finding the assistant to be neither elected or appointed within the meaning of the State Constitution, the Court held he need not be a citizen of the State. Cf. *Carr v. Lambert*, 179 W.Va. 277, 367 S.E.2d 225 (1988). See also, *State ex rel. Crosier v. Callaghan*, 160 W.Va. 353, 236 S.E.2d 321 (1977). The Court distinguished *Carr, supra*, by saying the issue there (prosecuting attorney membership on a county Board of Education) required a different result since the prosecuting attorney represents the County.

The Court found an assistant prosecuting attorney's powers sufficiently limited to create an employer-employee relationship. Consequently, the Court "modified." Syllabus Point 2 of *Carr, supra*. Writ granted; indictments should not be dismissed.

Conduct at trial

Comment on appellant and witnesses

State v. Wyatt, 482 S.E.2d 147 (1996) (Albright, J.)

Appellant was convicted of child abuse causing bodily injury, malicious assault and murder by failing to provide medical care. She complained that the prosecution improperly commented on an expert witness' expertise; asked appellant about the expert witness despite the testimony having been excluded; asked appellant and her witnesses about appellant's bad character when appellant had not put her character at issue; made improper remarks about appellant's character during closing; and improperly elicited testimony regarding a five-year old child who witnessed the abuse.

PROSECUTING ATTORNEY

Conduct at trial (continued)

Comment on appellant and witnesses (continued)

State v. Wyatt, (continued)

Noting that defense counsel did not object, the Court found no error in most of these assignments. Syl. Pt. 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964); Syl. Pt. 3, *O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991); Syl. Pt. 5, *Voelker v. Frederick Business Properties*, 195 W.Va. 246, 465 S.E.2d 246 (1995). (However, the Court commented that the trial did not reflect fair prosecutorial conduct nor a vigorous defense.)

As to appellant's character, however, despite the lack of objections, the Court found questions posed about appellant's rumored association with satanic rituals were both irrelevant and highly prejudicial. The prosecutor occupies a quasi-judicial role and must set a tone of impartiality and fairness. Syl. Pt. 1, *State v. Hottinger*, 194 W.Va. 716, 461 S.E.2d 462 (1995). Reversed and remanded.

Reference to appellant's foul language

State v. Bradford, 484 S.E.2d 22 1 (1997) (Maynard, J.)

Appellant was convicted of first-degree murder in the killing of his father and second-degree sexual assault of his stepmother. On appeal he claimed the state referred to his use of foul language, made reference to the victim's dismemberment, referred to the Bible during closing argument and commented on appellant's silence, thereby prejudicing his case.

Syl. pt. 7 - “ “Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.” Syllabus point 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964).’ Syllabus point 3, *O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991).” Syl. pt. 10, *State v. Satterfield*, 193 W.Va. 503, 457 S.E.2d 440 (1995).

The Court noted that appellant failed to object to any of the matters at issue until after the jury returned its verdict; further appellant himself made several references to his foul language and to the dismemberment. The court was very careful to exclude gruesome photographs and the Medical Examiner cautioned from going into detail about the dismemberment. No error.

PROSECUTING ATTORNEY

Discipline

Failure to disclose exculpatory evidence

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Disqualification

Categories requiring

State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996) (Per Curiam)

See ATTORNEY Prosecuting, Disqualification, (p. 103) for discussion of topic.

Duty to charge all offenses in common scheme

State v. Hubbard, 491 S.E.2d 305 (1997) (Per Curiam)

See PLEADING AND JOINDER Common scheme or plan, All offenses to be joined, (p. 445) for discussion of topic.

Duty to represent DHHR in civil abuse and neglect

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

Abuse and neglect cases

State ex rel. Diva v. Kaufman, 200 W.Va. 555, 490 S.E.2d 642 (1997) (Davis, J.)

See ABUSE AND NEGLECT DHHR as client in civil abuse and neglect, (p. 9) for discussion of topic.

PROSECUTING ATTORNEY

Enhancement

Duty to issue information

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See SENTENCING Enhancement of, Notice of, (p. 538) for discussion of topic.

Ethical responsibility

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Ethics

Failure to disclose exculpatory evidence

Lawyer Disciplinary Board v. Hatcher, 483 S.E.2d 810 (1997) (McHugh, J.)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 86) for discussion of topic.

Residence of

Effect on indictment

State v. Macri, 487 S.E.2d 891 (1996) (Workman, J.)

See PROSECUTING ATTORNEY Assistants, Residence of, (p. 469) for discussion of topic.

PROSECUTING ATTORNEY

Right to appeal

State ex rel. Forbes v. Canady, 475 S.E.2d 37 (1996) (Recht, J.)

Petitioner sought prohibition of dismissal of an indictment for malicious wounding. The respondent judge ruled that the present offense was part of the same transaction for which the defendant was previously tried and acquitted. (See Rule 8(a), *W.Va.R.Crim. P.*)

Defendant was involved in a barroom fight and charged with public intoxication and destruction of property. One of the victims provided a statement to police that defendant threw a cue ball, striking her in the left eye and necessitating reconstructive surgery. The statement was not provided to the prosecution until two years after defendant's acquittal on the minor charges. Following indictment, defendant's motion to dismiss for failure to join the malicious wounding charge was granted. The prosecution filed this petition for appeal.

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." Syllabus Point 1, *State v. Jones*, 178 W.Va. 627, 363 S.E.2d 513 (1987).

Syl. pt. 2 - "The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the state must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented." Syllabus Point 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

Syl. pt. 3 - Rule 8(a) of the West Virginia Rules of Criminal Procedure compels the prosecuting attorney to charge in the same charging document all offenses based on the same act or transaction, or on two or more acts or transactions, connected together or constituting parts of a common scheme or plan, whether felonies, misdemeanors or both, provided that the offenses occurred in the same jurisdiction, and the prosecuting attorney knew or should have known of all the offenses, or had an opportunity to present all offenses prior to the time that jeopardy attaches in any one of the offenses.

PROSECUTING ATTORNEY

Right to appeal (continued)

State ex rel. Forbes v. Canady, (continued)

Syl. pt. 4 - Pursuant to Rule 8(a) of the West Virginia Rules of Criminal Procedure, the burden of joining multiple offenses arising out of the same act or transaction, or constituting parts of a common scheme or plan, occurring within the same jurisdiction, and which are known or should have been known to the prosecuting attorney, or which the prosecuting attorney had an opportunity to attend the proceeding where the first offense is presented, which is prior to the time that jeopardy attaches in any one of the offenses, is upon the State not on the defendant.

Syl. pt. 5 - In the event the State fails to comply with the mandatory provisions of Rule 8(a), and all of the elements requiring mandatory joinder are extant, then the charging document addressing any subsequent offense must be dismissed.

The Court allowed this appeal because the prosecution would be deprived of its right to prosecute if the indictment here were improperly dismissed. The Court hinted that failure to take action would normally bar the prosecution from further prosecution, but remanded because of an inadequate record concerning why the police did not inform the prosecution of the victim's injuries.

The Court rejected the prosecution's argument that *Gilkerson v. Lilly*, 169 W.Va. 412, 288 S.E.2d 164 (1982) provided opportunity for the second prosecution here. In *Gilkerson*, charges were pending simultaneously in both magistrate and circuit court; here the charges were sequential, following an significant intervening time period. Writ granted; remanded to determine what the prosecution knew and when they knew it.

RACIAL BIAS

Jury selection

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See JURY Bias, Racial exclusion, (p. 368) for discussion of topic.

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See JURY Bias, Test for, (p. 371) for discussion of topic.

RECIDIVISM

Double jeopardy

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

Sentencing

State ex rel. Chadwell v. Duncil, 474 S.E.2d 573 (1996) (Per Curiam)

See SENTENCING Enhancement, Based on enhanced misdemeanor, (p. 536) for discussion of topic.

Notice of

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See SENTENCING Enhancement of, Notice of, (p. 538) for discussion of topic.

Second offense DUI

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

See SENTENCING Enhancement, DUI as second felony, (p. 538) for discussion of topic.

REDUCTION OF SENTENCE

Motion for

Timeliness of

State v. Thornton, 478 S.E.2d 576 (1996) (Albright, J.)

See SENTENCING Reduction, Timeliness of motion, (p. 552) for discussion of topic.

REGIONAL JAIL

Trustee's work

Credit therefore

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee's work in regional jail, (p. 539) for discussion of topic.

RELIGIOUS BELIEFS

Admissibility

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See EVIDENCE Admissibility, Religious beliefs, (p. 212) for discussion of topic.

RELIGIOUS COMMUNICATION

Privileged under certain circumstances

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See PRIVILEGES Clergy-communicant, (p. 454) for discussion of topic.

RESTITUTION

Grounds for

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

Appellant was convicted of arson for burning his own grocery store. The circuit court ordered restitution in the amount of \$1,430,000.00 on behalf of the insurance company. Appellant claims the insurance company is not a “victim” under the victim protection statute; and also claims the amount is excessive.

Appellant testified at trial that he personally got \$200,000 net proceeds from the insurance settlement and that he made approximately \$120,000 from his business the year prior to the fire. At the time of trial, however, he claimed to be indigent.

The circuit court denied probation and sentenced appellant to two to 20 years of incarceration, along with the \$1,430,000 restitution. Appellant was ordered to sign over to the insurance company a certificate of deposit for \$121,000 held by federal authorities as a result of unrelated drug charges.

Syl. pt. 1 - The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant’s sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.

Syl. pt. 2 - Read *in pari materia*, the provisions of *W.Va. Code*, 61-11A-1 [1984], *W.Va. Code*, 61-11A-4(a) [1984], *W.Va. Code*, 61-11A-4(d) [1984], *W.Va. Code*, 61-11A-5(a) [1984] and *W.Va. Code*, 61-11A-5(d) [1984], establish that at the time of a convicted criminal defendant’s sentencing, a circuit court should ordinarily order the defendant to make full restitution to any victims of the crime who have suffered injuries, as defined and permitted by the statute, unless the court determines that ordering such full restitution is impractical.

Syl. pt. 3 - Under *W.Va. Code*, 61-11A-1 through -8 and the principles established in our criminal sentencing jurisprudence, the circuit court’s discretion in addressing the issue of restitution to crime victims at the time of a criminal defendant’s sentencing is to be guided by a presumption in favor of an award of full restitution to victims, unless the circuit court determines by a preponderance of the evidence that full restitution is impractical, after consideration of all of the pertinent circumstances, including the losses of any victims, the financial circumstances of the defendant and the defendant’s family, the rehabilitative consequences to the defendant and any victims, and such other factors as the court may consider.

RESTITUTION

Grounds for (continued)

State v. Lucas, (continued)

Syl. pt. 4 - For purposes of determining whether or what amount of restitution may be entered as a judgment against a defendant at the time of a criminal defendant's sentencing pursuant to *W.Va. Code*, 61-11A-4(a) [1984], the indigency of a defendant or the current ability or inability of a defendant to pay a given amount of restitution is not necessarily determinative or controlling as to the practicality of an award of restitution. If the court determines that there is a reasonable possibility that a defendant may be able to pay an amount of restitution, the court, upon consideration and weighing of all pertinent circumstances, is permitted but not required to determine that an award of restitution in such an amount is practical.

Syl. pt. 5 - When a court is determining the practicality of an award of restitution, a finding that there is a reasonable possibility of a defendant's payment of a restitution award must not be based solely on chance; there must be some concrete evidence specific to a defendant showing that the defendant has assets, earning potential or other present or potential resources, or similar grounds upon which the court may conclude that there is a reasonable chance that the defendant may be able to pay the restitution amount in question.

Syl. pt. 6 - When restitution is ordered at a criminal defendant's sentencing pursuant to the provisions of *W.Va. Code*, 61-11A-4(a) [1984], the circuit court is not required to spread its findings and conclusions on the record in every case in which full restitution is ordered. In cases where full restitution is ordered and where noncompliance with the restitution order will not in itself yield a potential penalty, the decision whether to make findings and assign reasons is committed to the sound discretion of the court. If the record contains sufficient data for the Supreme Court of Appeals to review the basis of the circuit court's order, the court need not assign specific reasons for its decision to order full restitution. However, if the record is insufficient, if potential penalties will be triggered by the defendant's failure to pay the restitution which has been ordered, or if less than full restitution is ordered, the circuit court must make appropriate findings and conclusions regarding the matters which it has considered, including but not limited to the losses sustained by any victims, the financial resources and earning ability of the defendant and the defendant's dependents, and the tailoring of the amount of restitution which a defendant must pay to the defendant's means and circumstances.

RESTITUTION

Grounds for (continued)

State v. Lucas, (continued)

Syl. pt. 7 - To facilitate appellate review and maximize the likelihood of well-reasoned decision-making in all cases when restitution is ordered pursuant to *W.Va. Code*, 61-11A-1 *et seq.* and particularly when large sums are involved, a circuit court is well advised to exercise its discretion and make full findings and conclusions on the record regarding restitution, even when such findings are not required.

Syl. pt. 8 - “Where a criminal defendant intends to and does obtain money or other benefit from an insurance company by committing a criminal act of arson”, the insurance company is a direct victim of the crime and is eligible for restitution under the provisions of *W.Va. Code*, 61-11A-4(a) [1984].

The Court noted that “impractical” in a restitution order does not necessarily mean impossible; the Court then set forth various considerations a circuit court might take into account in setting an amount to be paid in restitution. The Court noted that restitution should be reasonable so as to promote rehabilitation and comply with due process and equal protection of law. The circuit court is to be guided by a presumption in favor of restitution unless restitution is impractical.

Noting that present indigency does not govern earning potential, and that the restitution ordered here was not a condition of probation or parole, the Court found the circuit court’s award reasonable. Affirmed.

Standard for review

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Victims

Insurance companies as

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

RETROACTIVITY

Constitutional procedural rule

When to apply

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

Appellant was convicted of first-degree murder and sexual assault. The trial court did not make a determination on the record that appellant knowingly, voluntarily and intelligently waived his right to testify in his own behalf as required by *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988).

Syl. pt. 5 - The criteria to be used in deciding the retroactivity of new constitutional rules of criminal procedure are: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Thus, a judicial decision in a criminal case is to be given prospective application only if: (a) It established a new principal of law; (b) its retroactive application would retard its operation; and (c) its retroactive application would produce inequitable results.

In the absence of special circumstances the Court found *Neuman* did not apply here. See also, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). Affirmed in part.

RIGHT TO ALLOCUTION

Denial of

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

Appellant was convicted of disrupting a public meeting and wearing a mask in violation of *W.Va. Code* 61-6-19 and 22. He appeared at a county Board of Education meeting dressed as a devil in an attempt to convince the Board to change the school mascot, a red devil. He did not put his name and purpose of attending on a list of public questions and comments, nor did he divulge his true identity. When the meeting began he took advantage of a pause in the proceedings to begin his discussion and to “prance” about the room. He used no threatening language and made no physical contact with anyone but refused to desist when ruled out of order and left only upon the advance of the Board President.

Appellant claimed the statutes are unconstitutional as an abridgement of free speech under the First Amendment to the *United States Constitution* and Article III, § 7 and 16 of the *West Virginia Constitution*.

Syl. pt. 1 - “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 2 - “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - Because *W.Va. Code* §61-6-19 creates an offense without reference to speech, or the content thereof, it is a simple time, place, manner restriction on the right to petition and freedom of speech, a restriction which is wholly neutral with respect to the content of the restricted speech.

Syl. pt. 4 - Neither the First Amendment to the Constitution of the United States nor §§ 7 and 16 of the *West Virginia Constitution* preclude prosecution under the *W.Va. Code* § 61-6-22.

Syl. pt. 5 - Where no objection to the denial of allocution was made at trial, the error is subject to review for plain error.

Syl. pt. 6 - In the circuit and magistrate courts of this state, the judge or magistrate shall, *sua sponte*, afford to any person about to be sentenced the right of allocution before passing sentence.

RIGHT TO ALLOCUTION

Denial of (continued)

State v. Berrill, (continued)

The Court found appellant's behavior disruptive and therefore not protected speech under the First Amendment. Merely refraining from threatening or using violence does not ipso facto make speech protected. See *State v. Throne*, 175 W.Va. 452, 333 S.E.2d 817 (1985) and *Woodruff v. Board of Trustees, Cabell Huntington Hospital*, 173 W.Va. 604, 319 S.E.2d 372 (1984). (See also, other cases cited and distinguished in opinion.)

The Court noted that many cases have recognized a substantial interest in maintaining order in public meetings. "Expression, whether oral or written, or symbolized by conduct, is subject to reasonable time, place or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). "First Amendment rights 'are not a license to trample upon the rights of others. They must be exercised responsibly and without depriving others of their rights, the enjoyment of which is equally precious.'" *Barker v. Hardway*, 283 F.Supp. 228, 238 (S.D. W.Va. 1968).

Similarly, the state has a right to protect its citizens from violence and the fear and intimidation of being confronted by someone wearing a mask. See *State v. Miller*, 398 S.E.2d 547 (Ga. 1990). The focus is on concealment of identity, not on restricting speech. See *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Court made much of appellant's disruptive behavior and the fearful reactions of the audience. Neither statute here is either unconstitutionally vague or overbroad.

However, the Court did agree that Rule 19 of the Rules of Criminal Procedure for Magistrate Courts was violated. Rule 19 requires that before sentence is imposed, defendant's counsel must be given an opportunity to speak and the magistrate must give the defendant himself an opportunity to speak in mitigation. The Court noted failure to afford this right requires reversal. See *United States v. Cole*, 27 F.3d 996 (4th Cir. 1994); also, *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670, 673 (1961) supporting use of allocution.

The record reveals that neither appellant nor his counsel were given the opportunity to speak. Because appellant clearly did not engage in mean-spirited or egregious behavior, his right to address the magistrate court was even more crucial. Reversed in part and remanded for resentencing.

RIGHT TO ALLOCUTION

Denial of (continued)

State v. Posey, 480 S.E.2d 158 (1996) (Per Curiam)

Appellant was convicted of unlawful assault and attempted voluntary manslaughter. He was sentenced to one to five on the unlawful assault and one year for the voluntary manslaughter, to run consecutively. The trial court denied appellant the right to put on mitigating evidence at the sentencing hearing.

Syl. pt. 1 - "Rule 32(a)(1) of the West Virginia Rules of Criminal Procedure confers a right of allocution upon one who is about to be sentenced for a criminal offense." Syl. Pt. 6, *State v. Holcomb*, 178 W.Va. 455, 360 S.E.2d 232 (1987).

Syl. pt. 2 - "A trial judge should, ordinarily, hear testimony regarding whether a defendant should be placed on probation if that defendant is statutorily eligible for such probation. The extent of such testimony, however, is within the sound discretion of the trial judge." Syl. Pt. 2, *State v. Godfrey*, 170 W.Va. 25, 289 S.E.2d 660 (1981).

The Court noted that criminal defendants must be given notice and the opportunity to comment on sentencing. *Burns v. United States*, 501 U.S. 129, 137-138, 11 S.Ct. 2182, 2187, 115 L.Ed.2d 123 ---- (1991). Neither counsel nor appellant were allowed this opportunity. Reversed and remanded.

State v. West, 478 S.E.2d 759 (1996) (Per Curiam)

Appellant was found guilty of second-degree sexual assault and sentenced to 25 years. He was not given his right of allocution at sentencing.

Syl. pt. - "Rule 32(a)(1) of the *West Virginia Rules of Criminal Procedure* confers a right of allocution upon one who is about to be sentenced for a criminal offense." Syllabus point 6, *State v. Holcomb*, 178 W.Va. 455, 360 S.E.2d 232 (1987).

Reversed and remanded.

RIGHT TO APPEAL

Frivolous appeals

***Anders* brief**

State ex rel. Edwards v. Duncil, No. 23357 (5/15/96) (Per Curiam)

See APPEAL Frivolous appeals, Determination of, (p. 52) for discussion of topic.

RIGHT TO BE PRESENT

All stages of proceedings

State v. Hicks, 482 S.E.2d 641 (1996) (Per Curiam)

See RIGHT TO BE PRESENT Communication with jury, (p. 491) for discussion of topic.

Communication with jury

State v. Hicks, 482 S.E.2d 641 (1996) (Per Curiam)

Appellant was convicted of first-degree murder. It appears that jurors overheard remarks by spectators relating to the legal effect of telephone calls made to police and introduced by the prosecution for the purpose of showing why the investigation focused on appellant. The comments were to the effect that the telephone calls were meaningless and were apparently deliberately made so the jury could hear.

Although the judge intended to speak to the jury the next day she did not do so. Instead, she sent the court clerk, who apparently did so out of appellant's or his attorney's presence. Counsel did not object.

Syl. pt. - "The defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." Syllabus point 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Noting the right to be present at all critical stages, *Boyd, supra*, the Court defined critical stage as a point "where the defendant's right to a fair trial will be affected." Syl. Pt. 2, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981). Further, a trial judge's communications with the jury without counsel present has been ruled improper. *State v. Barker*, 176 W.Va. 553, 346 S.E.2d 344 (1986); see also, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

Not every communication by the court or court officer demands the defendant's presence. However, without a showing that the absence is harmless, the communication is suspect. Because a record was not made, the Court was unable to determine if the communication was harmless.

Despite the failure to object, only appellant could waive his right to be present. *State v. Hamilton*, 184 W.Va. 722, 403 S.E.2d 739 (1991). Reversed and remanded.

RIGHT TO BE PRESENT

Critical stage

Exhumation of victim

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See CRITICAL STAGE Right to be present, Exhumation of victim, (p. 131) for discussion of topic.

Jury instructions

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

Appellant was convicted of malicious wounding and battery. After the case went to the jury, the trial judge twice went to the jury room during deliberations to give further instructions as to elements of various offenses. Although the judge took the court reporter with him, no record was made. Upon returning the judge did relate to counsel on the record *in camera* what had taken place. Appellant's counsel made no objection.

Syl. pt. 5 - "In a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs." Syl. Pt. 3, *State ex rel. Redman v. Hedrick*, 185 W.Va. 709, 408 S.E.2d 659 (1991).

Syl. pt. 6 - The first inquiry under the "plain error rule" codified in Rule 52(a) of the West Virginia Rules of Criminal Procedure is whether "error" in fact has been committed. Deviation from a rule of law is error unless it is waived. Waiver is the intentional relinquishment or abandonment of a known right. When there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined.

The Court noted the right to be present can be waived. *Taylor v. United States*, 414 U.S. 17, 19-20, 94 S.Ct. 194, 195-96, 38 L.Ed.2d 174, 177-78 (1973). Further, although Rule 43, *West Virginia Rules of Criminal Procedure*, give a similar right, violations can be harmless error.

The Court found the reason for the rule is to avoid adverse inferences in the defendant's absence and to allow defendant to supply necessary information. *State v. Allen*, 193 W.Va. 172, 455 S.E.2d 541 (1994). Given the absence of *both* prosecution and defense counsel, the Court found harmless error. (The Court was influenced by the content of the instructions read to the jury; none related to the offenses for which appellant was actually convicted.)

RIGHT TO BE PRESENT

Critical stage (continued)

Jury instructions (continued)

State v. Crabtree, (continued)

Even had the error not been harmless, it was waived; the Court refused to find plain error. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). When a right is waived the error is not reviewable, even for plain error. Only a forfeiture is reviewable. *United States v. Tipton*, 90 F.3d 861, 873 (4th Cir. 1996); *United States v. David*, 83 F.3d 638, 641 n.5 (4th Cir. 1996). No error.

Sentencing

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

RIGHT TO CONFRONT

Abuse and neglect

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997)
(Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

Witness unavailable

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

RIGHT TO COUNSEL

Abuse and neglect

DHHR v. Scott C. and Amanda J., 200 W.Va. 304, 489 S.E.2d 281 (1997)
(Per Curiam)

See ABUSE AND NEGLECT Findings required, (p. 12) for discussion of topic.

Agent of police

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 515) for discussion of topic.

Assertion of

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Voluntariness, (p. 518) for discussion of topic.

Co-counsel in murder case

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See APPOINTED COUNSEL Co-counsel in murder case, (p. 77) for discussion of topic.

Inmate “law clerks”

Access to legal records

State ex rel. William A. James, et al., Nos. 24144, 24145, 24146, 24147, 24148 (10/03/97) (Per Curiam)

See PRISON/JAIL CONDITIONS Inmate “law clerks”, (p. 452) for discussion of topic.

RIGHT TO FREE SPEECH

Restrictions on

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

RIGHT TO JURY TRIAL

Waiver of

State ex rel. Ring v. Boober, 488 S.E.2d 66 (1997) (Maynard, J.)

See JURY Right to jury trial, Waiver of, (p. 376) for discussion of topic.

Standard for review

State v. Redden, 487 S.E.2d 318 (1997) (Starcher, J.)

See JURY TRIAL Waiver of, Standards for, (p. 379) for discussion of topic.

RIGHT TO REMAIN SILENT

Assertion of

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 513) for discussion of topic.

Effect on termination of parental rights

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

RIGHT TO TRANSCRIPT

Failure to provide

State ex rel. Johnson v. Jones, No. 23359 (5/15/96) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 575) for discussion of topic.

State ex rel. Stacy v. Hall, No. 23455 (6/26/96) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 575) for discussion of topic.

ROBBERY

Aggravated

Nonaggravated as lesser included offense of

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 330) for discussion of topic

SEARCH AND SEIZURE

Incident to investigative stop

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

Incident to lawful arrest

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

Investigatory stop

Grounds for

State v. Bishop, 488 S.E.2d 453 (1997) (Per Curiam)

See PROBABLE CAUSE Investigatory stop, Grounds for, (p. 458) for discussion of topic.

Warrantless search incident to

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

Juveniles

Conditions for warrantless arrest

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

SEARCH AND SEIZURE

Plain view exception

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 509) for discussion of topic.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

Probable cause for

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

Protective search

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

Admissibility of fruits of

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

Appellant was convicted of receiving stolen property. Gary Turpin discovered his home had been burglarized. Appellant's landlady gave Turpin permission to search appellant's apartment while appellant was gone. Turpin found his property and reported his findings to the police.

SEARCH AND SEIZURE

Protective search (continued)

Admissibility of fruits of (continued)

State v. Lacy, (continued)

Police officers obtained a warrant which permitted them to search for specific items. Although not listed on the warrant, when officers found bullets lying in plain view, they searched for a weapon, obtaining a handgun which had been reported stolen by Jean Johnson. Upon learning of Ms. Johnson's burglary, police obtained a second warrant which resulted in the recovery of more items. Ms. Johnson's daughter also told police of a burglary at her home. When both women accompanied police to appellant's apartment, further items were identified from both their residences.

At a subsequent suppression hearing appellant's counsel moved to suppress the items seized without a warrant. The circuit court held the items admissible under the plain view exception.

Syl. pt. 1 - When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. pt. 2 - In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the *United States Constitution* and Section 6 of Article III of the *West Virginia Constitution* is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

Syl. pt. 3 - A search warrant must particularly describe the place to be searched and the things or persons to be seized. In determining whether a specific warrant meets the particularity requirement, a circuit court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized. When a warrant is the authority for the search, the executing officer must act within the confines of the warrant.

SEARCH AND SEIZURE

Protective search (continued)

Admissibility of fruits of (continued)

State v. Lacy, (continued)

Syl. pt. 4 - Police may not use an initially lawful search as a pretext and means to conduct a broad warrantless search.

Syl. pt. 5 - Law enforcement officials may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified for law enforcement purposes. To determine whether the intrusion complained of was minimal, a circuit court must examine separately the interest implicated when the police feel a search for weapons is necessary to keep the premises safe during the search and the privacy interests of the defendant to be free of an unreasonable search and seizure of his or her residence. Only when law enforcement officers face a circumstance, such as a need to protect the safety of those on the premises, and a reasonable belief that links the sought after information with the perceived danger is it constitutional to conduct a limited search of private premises without a warrant.

Syl. pt. 6 - Neither a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons as long as a two-part test is satisfied: An officer must show there are specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable. If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons.

Syl. pt. 7 - The existence of a reasonable belief should be analyzed from the perspective of the police officers at the scene; an inquiring court should not ask what the *police* could have done but whether they had, at the time, a reasonable belief that there was a need to act without a warrant.

Syl. pt. 8 - A protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured.

The Court found admissibility of the handgun to be crucial; if it was improperly seized, all other items not listed on the first search warrant should have been excluded. The burden is upon the police to justify a more extensive search.

SEARCH AND SEIZURE

Protective search (continued)

Admissibility of fruits of (continued)

State v. Lacy, (continued)

The Court found no “exigent circumstances” justifying the search for the weapon. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Buzzard*, 194 W.Va. 544, 461 S.E.2d 50 (1995). A reasonable belief that a gun may be present is not sufficient; some clear safety hazard must also be present. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See also, *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (“articulable facts” may warrant a prudent officer to sweep an area for another person); and *United States v. Ford*, 56 F.3d 265, 312 U.S. App.D.C. 310 (1995).

The Circuit court must reexamine the officer’s beliefs, *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), viewed from their perspective. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). See also, *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

The Court rejected the circuit court’s initial finding that the gun was admissible under plain view. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). Remanded with instructions.

Safety of police officers

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Standard for review

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

SEARCH AND SEIZURE

Warrant

Probable cause for

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

Appellant was convicted of possession with intent to deliver a controlled substance. His ex-wife came to his house unexpectedly, having smoked marijuana and drunk alcohol to excess. Appellant physically ejected her and when she refused to leave the area, called police.

Upon her arrest for public intoxication and possession of marijuana, she informed police that appellant had illegal guns and drugs in his possession. Based on that information a search warrant was obtained. The search yielded marijuana, cocaine and other miscellaneous prescription drugs. On appeal he claimed the police officer's affidavit was insufficient to obtain the search warrant and omitted facts which would argue against probable cause.

Syl. pt. 1 - "To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading." Syl. Pt. 1, *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995).

Syl. pt. 2 - "A search warrant affidavit is not invalid even if it contains a misrepresentation, if, after striking the misrepresentation, there remains sufficient content to support a finding of probable cause. Probable cause is evaluated in the totality of the circumstances." Syl. Pt. 2, *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995).

The affidavit did not recite that the informant, appellant's ex-wife, had been placed under arrest for public intoxication and possession of marijuana, nor that she was trying to remove her's and appellant's child from the home, all of which argued for her unreliability. The informant's blood alcohol measured .095 and she did not specify the time period during which she claimed to observe drugs in the home.

The Court noted that recklessness may be inferred from omissions only where the omissions are critical to a finding of probable cause. Here, the omissions were not calculated or intentional; even had deleterious material been included probable cause would have been found. No error.

SEARCH AND SEIZURE

Warrant (continued)

Requirements for

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Warrantless search

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

Incident to arrest

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

Appellant was convicted of possession of heroin with intent to deliver. A police informant was supplied with money to give to an Albert Parker. After the exchange Parker drove to a motel, then delivered heroin to the informant.

Upon arrest, Parker agreed to cooperate with police. He admitted purchasing heroin on at the motel from someone named "Turbo." Officers observed a man matching Parker's description of "Turbo" drive away from the motel with another man. They stopped him and informed him he was the focus of an investigation and that he would be searched. During a pat-down, officers found eight bundles of heroin. A full search incident to the arrest followed.

Upon entering the motel room, officers found a Sandra Wright who gave them permission to look around. They found ten more bundles of heroin. Appellant admitted he rented the room and signed a written consent to search. A service technician later found seventy more bundles of heroin, along with a digital scale and ammunition. All three series of bundles were similarly marked.

SEARCH AND SEIZURE

Warrantless search (continued)

Incident to arrest (continued)

State v. Rahman, (continued)

Syl. pt. 1 - “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.” Syl. Pt. 3, *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987).

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.” Point 1, Syllabus, *State v. Plantz*, [155] W.Va. [24] [180 S.E.2d 614] [1971].’ Syllabus Point 3, *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973).” Syl. Pt. 7, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980).

Syl. pt. 3 - “A warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest.” Syl. Pt. 6, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), *overruled on other grounds by State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The Court noted the police were justified in their initial pat-down search in that a reasonable person would search for weapons. However, given the circumstances, police also had sufficient cause to arrest prior to the pat-down. A full search was permissible. No error.

Incident to investigative stop

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

SEARCH AND SEIZURE

Warrantless search (continued)

Plain view exception

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

Appellant was convicted of felony murder resulting from an apartment fire. Appellant lived in a Martinsburg apartment building with other agricultural workers. Following an argument, he and two others were evicted from one of the apartments by the resident. Some time later, smoke began pouring under the apartment door and a flaming bottle was thrown in resulting in a serious fire which killed another resident.

A passing motorist noticed a Mexican male, later identified as appellant, exiting the building on fire. A sales clerk testified that she sold two dollars worth of gasoline to a Mexican male shortly before the fire started. About an hour after the fire started, an ambulance service received a call to transport a burned Hispanic male (later identified as appellant) to a nearby hospital.

Martinsburg and Winchester, VA, city police went to the hospital and seized appellant's gasoline soaked clothing from nurses without a warrant. Along with an interpreter they questioned appellant; after being given *Miranda* warnings, appellant claimed he burned his hand on a stove. Appellant claimed the clothing should have been suppressed.

Syl. pt. 1 - "The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the items was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself." Syllabus point 3, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The Court found the key issue was whether the clothing was in a place where appellant had a reasonable expectation of privacy. Because appellant turned his clothes over to others for safe keeping, he had some expectation of privacy. Therefore, the warrantless search and seizure must have fallen under an exception. *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980); *Julius*, *supra*.

The Court rejected the prosecution's argument for a "plain view" exception. Reversed and remanded.

SEARCH AND SEIZURE

Warrantless search (continued)

Plain view exception (continued)

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

Protective search

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

SEARCH WARRANT

Basis for

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 506) for discussion of topic.

SELF-DEFENSE

Instructions on

Felony-murder

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Instructions on, (p. 281) for discussion of topic.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions

Admissibility

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

Appellant was convicted of second-degree sexual assault and first-degree murder in the rape of his stepmother and murder of his father. Following a search of the crime scene, appellant was found in the back of a recreational vehicle on his father's property.

Upon being given his *Miranda* rights, appellant was at first uncooperative and refusing to sign the form, indicating he understood his rights. He was taken to the local police detachment, where he was once again given his rights and refused to sign. He agreed to talk with a particular trooper. Appellant thereupon asked the officer if he was the only person under arrest; the officer addressed appellant if the officer could take notes. Appellant testified that he said "take all the notes you want to." The conversation continued, with appellant nodding and making statements concerning money hidden on his father's property, with a video tape recording appellant. The officer asked appellant if he knew how the victim's body was dismembered; appellant responded "I'm done talking."

At trial appellant testified that he and his stepmother were having sex at his father's home when he heard his father approach. Appellant claimed he went to the door, heard a shot and found his father dead on the porch. Upon returning to the living room he claimed to observe his stepmother with a rifle in her hands. Appellant admitted to removing his father's body and dismembering it.

Appellant claimed statements made after he said "I'm done talking" were inadmissible. The Court did not review the video tape because a transcript was not made; the tape was reviewed by the trial court and admitted at trial.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Admissibility (continued)

State v. Bradford, (continued)

Syl. pt. 1 - “To assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.” Syl. pt. 5, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

The Court found appellant’s assertion of his right to remain silent was sufficiently vague so as to allow the trial court to rule that appellant refused only to discuss the dismemberment. See *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994); cf. *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979); *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).

Appellant did not request an attorney. His rights were read to him and he specifically stated he would talk to a particular trooper, telling him it was all right to take notes. No error.

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

State v. Little, 498 S.E.2d 716 (1997) (Per Curiam)

Appellant was convicted of second-degree murder. Following a drug deal in which appellant cheated the buyer, the buyer stalked appellant and was apparently advancing toward appellant when appellant shot and killed him.

At 9:45 that evening appellant surrendered to police when he discovered the victim was dead. Appellant was given his *Miranda* rights. Following a conversation in private with his family, appellant agreed to make a statement. The investigating officer then allegedly told appellant that if he were telling the truth his actions might be self-defense. The officer then taped appellant’s confession at 10:18 p.m.

Appellant was taken before a magistrate the next morning and charged with first-degree murder. He claimed on appeal that the delay in taking him before a magistrate made the confession involuntary.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Admissibility (continued)

State v. Little, (continued)

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.” Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 2 - “This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.” Syllabus Point 2, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

The Court found no coercion by police either in obtaining the confession or in the delay in taking appellant before a magistrate. No error.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

Appellant was convicted of second-degree murder. During an adolescent romance, appellant’s girlfriend became pregnant. Following the birth of their baby, the couple split, resulting in the girlfriend’s harassing and threatening appellant, who had by then begun to see another woman. Appellant ultimately shot the ex and dumped her body at an abandoned mine site.

After several weeks an investigation focused on appellant, his girlfriend and appellant’s best friend. Police asked appellant to take a polygraph examination. Appellant had hired an attorney to contest the termination of his parental rights. Appellant’s attorney advised him not to take the test but agreed to allow police to interview appellant in the attorney’s office. The attorney later testified that he had told police sometime earlier he did not represent appellant on criminal charges; however, the attorney did alter a waiver of rights form to indicate appellant had an attorney.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Admissibility (continued)

State v. McKenzie, (continued)

Although the attorney also later testified he told police at the conclusion of the interview not to talk with his client unless he was contacted, the police did not remember that admonition and claimed the attorney clearly disavowed any criminal representation. Appellant denied knowing anything about the victim's disappearance. Both appellant and his girlfriend later took a polygraph test without counsel present. Following discovery of the body, appellant's girlfriend was once again questioned and confessed.

The same day, police questioned appellant for over two hours, finally giving a recorded statement, later reduced to writing. He was then taken before a magistrate. The following day police searched appellant's residence and his girlfriend's vehicle pursuant to a warrant.

Syl. pt. 1 - "To the extent that any of our prior cases could be read to allow a defendant to invoke his *Miranda* rights outside the context of custodial interrogation, the decisions are no longer of precedential value." Syllabus point 3, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

The Court rejected appellant's argument that his supposed desire to have counsel present precluded effective waiver of his *Miranda* rights. Appellant's confession to police occurred some three weeks after the initial meeting with counsel present; and that initial meeting was not custodial. A suspect cannot anticipatorily invoke *Miranda* protection. *Bradshaw, supra*.

If invoked at all, appellant's attempts to assert his rights prior to custodial interrogation was ineffective. A suspect not in custody has no rights. Even had appellant been in custody earlier, the break in custody negates invocation of rights. No error.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

Appellant killed his ex-girlfriend and was convicted of second-degree murder. Police asked his friend, Kevin Allen, to elicit an incriminating statement. Although Allen was unsuccessful, after appellant made a statement (and his current girlfriend confessed) he called Allen and admitted the killing. Allen claimed he was not given any benefit in return for testifying as to appellant's statement. Appellant claimed the police's use of Allen violated his Sixth Amendment right to counsel when confronted with a governmental agent.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Admissibility (continued)

State v. McKenzie, (continued)

The Court rejected appellant's argument that Allen was an agent of the police. Further, appellant initiated the conversation and Allen was not paid or otherwise compensated. Cf. *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). No error.

Juveniles

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Voluntariness

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

Appellant was convicted of felony murder in the apartment fire death of another resident of his apartment building. Police officers tracked appellant to a hospital where he was admitted for burns. He gave a statement while under the influence of Demerol, a painkiller. An interpreter was present (appellant does not speak English) and police gave appellant his *Miranda* rights, which he waived.

Appellant's explanation was inconsistent with his injuries and the gasoline on his clothing (which had been seized by police from nurses at the hospital). Appellant's Spanish-speaking psychiatrist testified that appellant had the mental capacity of a five year old and did not understand the right to silence. Further, appellant introduced evidence showing the translation that night was so inadequate as to fail to convey the right to silence; and that the translator appeared to be helping the police and asking questions the police did not ask.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Voluntariness (continued)

State v. Lopez, (continued)

Syl. pt. 2 - "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." Syllabus point 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

The Court cited numerous prior decisions on voluntariness of confessions. The totality of the circumstances must control. *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982). The accused's background, experience and conduct must be considered.

Here, appellant was of low intelligence, little education, did not speak English and was on drugs. Further, the translator was not effective. The prosecution failed to show by a preponderance of the evidence that the statement was voluntary. Reversed and remanded.

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

Appellant was convicted of first-degree sexual assault and abuse by a custodian. Appellant was pastor of the Paw Paw Bible Church. He began counseling the victims' mother and soon befriended the victim and one of his sisters, inviting them to spend the night with appellant and his wife.

Ultimately, only the victim was invited; the visits progressed to approximately two nights per week. Appellant began engaging in anal intercourse with the boy, then seven years old.

Appellant was asked to report to the County Sheriff's office. Upon arriving, Deputy John A. Ketterman told him of the sexual abuse allegations (which included other boys). Deputy Ketterman later testified that he told Potter he was not under arrest and that he should leave because Ketterman did not want to speak further with him. Potter said he "had some things that he wanted to get off of his chest."

Ketterman went for a tape recorder, read Potter his *Miranda* rights and obtained a signed waiver of those rights. Ketterman told Potter again he could have an attorney present. Potter then admitted to sexually assaulting the boy. An arrest warrant issued the next day.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Voluntariness (continued)

State v. Potter, (continued)

Potter received a visit from another clergyman, Martin Rudolph. It is unclear whether Potter believed their conversation to be confidential or whether he gave Rudolph permission to disclose the information. The trial court admitted appellant's confession and allowed Rudolph to testify regarding his conversation with appellant that appellant had sexually assaulted or abused male children.

Syl. pt. 1 - A defendant, in order to assert his or her right to counsel during a police interrogation, must make some affirmative indication that he or she desires to speak with an attorney or wishes to have counsel appointed. Absent such an affirmative showing by the defendant, the right to counsel is deemed waived.

Syl. pt. 2 - When a suspect willingly goes to the police station for questioning at the request of the investigating officer, and the suspect responds that he or she wishes to give a statement despite the officer's warnings regarding the severity of the allegations against the suspect, such statement is admissible as a voluntary confession, unless the suspect can show that he or she was in custody or that the statement was not voluntary.

The Court found appellant's ambiguous response to the deputy's inquiries insufficient to be a request for counsel. Appellant did not affirmatively assert his right to counsel. Further, the Court rejected appellant's claim that he was in custody at the time of the confession. See *State v. Honaker*, 193 W.Va. 51, 60-61, 454 S.E.2d 96, 105-06 (1994). The confession here was clearly voluntary; appellant was free to leave throughout the interview, and was even allowed to leave after giving the statement. No error.

State v. Rager, 484 S.E.2d 177 (1997) (Per Curiam)

Appellant was convicted of brandishing a firearm and robbery by use of a firearm. On appeal he claimed that his confession was involuntary.

Appellant ran from his victim as a police car approached and was immediately caught, handing over the exact amount of money the victim said had been stolen. After being taken into custody around midnight, appellant was taken to an interview room at approximately 1:25 a.m. Appellant waived his *Miranda* rights and admitted stealing the money and brandishing a weapon. He also said he was drunk at the time.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Confessions (continued)

Voluntariness (continued)

State v. Rager, (continued)

He also claimed that newly-discovered evidence came to light after trial concerning his intoxication and tampering with a witness. The witness did not testify.

Syl. pt. 1 - “As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.” Syllabus Point 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1994).

Syl. pt. 2 - “When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker.” Syllabus Point 7, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456, *cert. denied*, ___ U.S. ___, 116 S.Ct. 196, 133 L.Ed.2d 131 (1995).

The Court dismissed the newly discovered evidence claims, holding that no record had been developed and the circuit court had not had an opportunity to rule. Appellant should have sought relief by post-conviction remedy under Rule 33 of the *Rules of Criminal Procedure* or by petition for writ of habeas corpus. See *State v. Crouch*, 191 W.Va. 272, 445 S.E.2d 213 (1994).

Giving deference to the circuit court’s finding as to voluntariness, the Court found that sufficient evidence existed to justify the finding. No error.

Impeachment using

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Juvenile

Prompt presentment

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

Prior voluntary statement without counsel

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Impeachment, Prior voluntary statement without counsel, (p. 235) for discussion of topic.

Prompt presentment

State v. Hosea, 483 S.E.2d 62 (1996) (Recht, J.)

See JUVENILES Prompt presentment, (p. 393) for discussion of topic.

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

Appellant was convicted of second-degree murder in the killing of his ex-girlfriend. Following an investigation, appellant gave a confession at the police station and was taken to locate the murder weapon before being taken before a magistrate. He claimed on appeal that the weapon should have been excluded from evidence because of the failure to present him promptly before a magistrate.

Syl. pt. 2 - “ ‘ “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. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

The delay here did not result in recovery of the weapon because appellant had already confessed. No error.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Statement against penal interest

In the Interest of Anthony Ray Mc., 489 S.E.2d 289 (1997) (Davis, J.)

See EVIDENCE Admissibility, Hearsay, (p. 198) for discussion of topic.

Voluntariness

State ex rel. Wimmer v. Trent, 487 S.E.2d 302 (1997) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for, (p. 316) for discussion of topic.

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

Waiver of right

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

Appellant pled guilty to negligent killing while hunting, a misdemeanor. See *W.Va. Code 20-2-57*. He had taken the clip from his rifle but failed to remove a cartridge from the chamber. The gun went off, killing his companion. Both appellant and the victim were dressed in proper hunting apparel, had valid licenses, were hunting deer in season and showed no signs of drugs or alcohol.

The arresting DNR officer found appellant to be “polite” and “cooperative.” Appellant’s face was “flushed” and his eyes “watery.” Finding no motive for the killing, the Medical Examiner did not do an autopsy. Appellant claimed on appeal to circuit court that simple negligence is insufficient to trigger criminal responsibility; and that the requirement in *W.Va. Code 20-2-57* that the defendant give a statement to DNR officers was unconstitutional as violative of the Fifth Amendment. The circuit court denied both motions.

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Waiver of right (continued)

State v. Ivey, (continued)

Syl. pt. 1 - “The police is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As society becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions.” Syl. pt. 5 *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).” Syl. pt. 3, *City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988).

Syl. pt. 2 - “ “Where language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1986).” Syl. Pt. 1, *Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989).” Syl. pt. 3, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995).

Syl. pt. 3 - Under *W.Va. Code*, 20-2-57 [1991], it is unlawful for any person, while engaged in hunting pursuing, taking or killing wild animals or wild birds, to act with ordinary carelessness or ordinary negligence in shooting, wounding or killing any human being or livestock, or in destroying or injuring any other chattels or property. Any person violating *W.Va. Code*, 20-2-57 [1991] is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than ten thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned.

Syl. pt. 4 - “A defendant may waive his constitutional rights, as enunciated in *Miranda*, provided the waiver is made voluntarily, knowingly and intelligently.” Syllabus Point 2, *State v. Bragg*, 160 W.Va. 455, 235 S.E.2d 466 (1977).” Syl. pt. 6, *State v. Hambrick*, 177 W.Va. 26, 350 S.E.2d 537 (1986).

SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

Waiver of right (continued)

State v. Ivey, (continued)

The Court noted that the Legislature has the power to define ordinary negligence as criminal activity and rejected appellant's argument that more than ordinary negligence should be required, as for conviction of involuntary manslaughter and negligent (vehicular) homicide. The statute here is clear.

Further, appellant's argument regarding self-incrimination was rejected because appellant clearly voluntarily and knowingly waived his rights after being advised of his rights. No error.

SENTENCING

Abuse of discretion

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Allocution

Denial of

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

State v. Posey, 480 S.E.2d 158 (1996) (Per Curiam)

See RIGHT TO ALLOCUTION Denial of, (p. 489) for discussion of topic.

State v. West, 478 S.E.2d 759 (1996) (Per Curiam)

See RIGHT TO ALLOCUTION Denial of, (p. 489) for discussion of topic.

Allocution prior to

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

Appellate review of

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

SENTENCING

Appellate review of (continued)

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

Appellant was convicted of breaking and entering, petit larceny and conspiracy to commit breaking and entering. Given the six counts on which appellant was convicted, the minimum sentence he could have been given was three years, forty-five days and the maximum sentence twenty years, forty-five days. The trial court imposed a sentence as follows:

Count 1	Breaking and entering	1 - 10 years
Count 2	Entering without breaking	1 - 10 (concurrent with count 1)
Count 3	Petit larceny	45 days (consecutive)
Count 4	Petit larceny	1 year (concurrent)
Count 5	Conspiracy to commit count 1	1 - 5 years (consecutive)
Count 6	Conspiracy to commit count 2	1 - 5 years (consecutive)

Appellant objected to the sentence as disproportionate to the crimes.

Syl. pt. 4 - “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

The Court noted that proportionality analysis applies only to sentences without a statutorily fixed maximum or which involve recidivism. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). No error.

Bifurcation

Grounds for

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See BIFURCATION Grounds for, (p. 110) for discussion of topic.

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See BIFURCATION Grounds for, (p. 111) for discussion of topic.

SENTENCING

Cocaine

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

Commutation of

Governor's power

State ex rel. Forbes v. Caperton, 481 S.E.2d 780 (1996) (Workman, J.)

Governor Caperton attempted to commute the sentences of John Wayne Ford and Robert Meade Leach. Two prosecuting attorneys successfully sought writ of mandamus in the circuit courts below which declared the Governor's power to grant commutation of sentence void *ab initio*.

In addition to ruling from the bench after an expedited hearing, the trial judge denied appellant Ford appointed counsel, ruling he had no standing. Counsel on appeal appeared pro bono.

Syl. pt. - Under the general pardoning power granted in Article VII, Section 11 of the *West Virginia Constitution*, the Governor of this State has the constitutional authority to grant commutations in non-capital cases.

The court noted the power to pardon subsumes the lesser power to commute a sentence. 59 Am. Jur.2d *Pardon and Parole*, Sec. 23 (1987). See also, 67A C.J.S. *Pardon and Parole*, Sec. 33 (1978). The power to pardon can, however, be restricted by constitutional or statutory provisions.

The Court dismissed the argument that the State Constitution contemplated commutation of capital punishment, a penalty no longer available, and thus the Governor had no current powers to commute. After reciting the history of the provision, the Court found the specific provision as to death penalty cases was never intended to limit the Governor's general power to commute sentences pursuant to the more inclusive power to pardon. Reversed; Governor's orders reinstated.

SENTENCING

Conflict between state and federal sentences

State ex rel. Massey v. Hun, 478 S.E.2d 579 (1996) (Per Curiam)

Petitioner sought to compel state prison officials to transfer him to federal custody. He was sentenced in state court to serve his state sentences concurrently with his federal sentences and sentenced in federal court to serve his federal sentences consecutively with his state sentences. The Federal Bureau of Prisons refused to take custody until expiration of the state sentences.

Syl. pt. 1 - “A writ of mandamus will not issue unless three elements coexist--(1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy. Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).” Syllabus Point 1, *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994).

Syl. pt. 2 - “A writ of mandamus will not be issued in any case when it is unnecessary or when, if sued, it would prove unavailing, fruitless or nugatory.” Syllabus Point 6, *Delardas v. Morgantown Water Commission*, 148 W.Va. 776, 137 S.E.2d 426 (1964).

Deeming the federal prison system as immune, the Court declined to issue the writ; without cooperation by federal officials any action by state officials is ineffective. The Court recommended, however, that the circuit court reconsider petitioner’s sentence pursuant to Rule 35(b) of the *West Virginia Rules of Criminal Procedure*. This denial of writ of mandamus is to be considered an “order or judgment” allowing reconsideration.

Cruel and unusual

Disparate sentences

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

SENTENCING

Cruel and unusual (continued)

Proportionality

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

Appellant was found guilty of third degree sexual assault, sentenced to two consecutive one to five year prison terms and fined \$20,000, plus an additional \$1,518.54 in various costs, including repayment of appointed counsel costs. The trial court denied two motions for reduction of sentence without a hearing. Appellant claimed the fine was excessive and violated constitutional principles.

The trial court entered a general order after appellant's case was completed and appellant's first motion for reduction of sentence, which order required all costs, fines, penalties and restitution to be paid within thirty days of the date of the judgement order.

Syl. pt. 1 - "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)." Syl. Pt. 4, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

Syl. pt. 2 - "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, Section 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).

Syl. pt. 3 - "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 life recidivist sentence." Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 4 - "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 2, *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994).

SENTENCING

Cruel and unusual (continued)

Proportionality (continued)

State v. Murrell, (continued)

Syl. pt. 5 - “Before a trial court conditions its recommendation for a defendant’s parole upon the defendant’s payment of statutory fines, costs and attorney’s fees, the trial court must consider the financial resources of the defendant’s ability to pay and the nature of the burden that the payment of such costs will impose upon the defendant.” Syl. Pt. 1, *State v. Haught*, 179 W.Va. 557, 371 S.E.2d 54 (1988).

Syl. pt. 6 - “The right to the equal protection of the laws guaranteed by our federal and state constitutions blocks unequal treatment of criminal defendants based on indigency.” Syl. Pt. 1, *Robertson v. Goldman*, 179 W.Va. 453, 369 S.E.2d 888 (1988).

Syl. pt. 7 - An individual is not excused from the imposition of the maximum sentence allowed under a statute simply because he is indigent, even if that sentence includes the imposition of fines pursuant to statute. Consistent with the principles of *Williams v. Illinois*, 399 U.S. 235 (1970), and *Bearden v. Georgia*, 461 U.S. 660 (1983), however, while there is no prohibition against the imposition of the maximum penalty prescribed by law, indigent defendants may not be incarcerated solely because of their inability to pay court-ordered fines or costs.

W.Va. Code 29-21-16(g)(3) states that repayment of counsel costs cannot be mandated during a person’s incarceration unless funds are clearly available. The Court found this part of the order unenforceable; a hearing regarding appellant’s ability to pay must be held following his release from prison.

As to the other fines and costs assessed, the Court found them to be within permissible limits. Further, the trial court did not take into account any impermissible factors in setting the fines. *Bearden v. Georgia*, 461 U.S. 660 (1983) involved not the imposition of a fine but rather the attempt to revoke the appellant’s probation for failure to pay. Indigency is not protection against imposition of the fine.

However, the Court concluded that appellant cannot be incarcerated simply because of his inability to pay. Affirmed in part, reversed in part.

SENTENCING

Disparate sentences

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

Double jeopardy

Delivery of marijuana and cocaine

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

Appellant was convicted of delivery of marijuana and cocaine; and of conspiracy to deliver marijuana. He was sentenced to consecutive sentences of one to fifteen for delivery of cocaine, one to fifteen for delivery of marijuana and one to five for conspiracy to deliver marijuana. On appeal he claimed the delivery sentences violated double jeopardy principles in that both deliveries occurred during the same transaction.

He also claimed the sentence was incorrect in that delivery of marijuana is punishable by one to five, not one to fifteen. Finally, he claimed the sentences are disproportionate to the crimes.

Syl. pt. 6 - “The Double Jeopardy Clause of the Fifth Amendment of the *United States Constitution* consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” Syl. Pt. 1, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 7 - “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. 8 - “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).

SENTENCING

Double jeopardy (continued)

Delivery of marijuana and cocaine (continued)

State v. Broughton, (continued)

Syl. pt. 9 - “A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.” Syl. Pt. 7, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 10 - “In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create a separate offense.” Syl. Pt. 8, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 11 - “Prior to imposition of a sentence of incarceration for a defendant convicted of delivery of less than 15 grams of marijuana in violation of *W. Va. Code*, 60A-4-401(a), as amended, who, although not within the ‘without remuneration’ exception of *W. Va. Code*, 60A-4-402(c), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more appropriate.” Syl. Pt. 6, *State v. Nicaastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989).

Syl. pt. 12 - “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

SENTENCING

Double jeopardy (continued)

Delivery of marijuana and cocaine (continued)

State v. Broughton, (continued)

Syl. pt. 13 - Where a first-time offender who otherwise falls within the purview of *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989), is simultaneously convicted of a marijuana violation and a more serious offense, failure to consider the factors outlined in *Nicastro* is not reversible error. In such instance, the offender can no longer be deemed a small-time offender engaged in only a negligible amount of marijuana delivery, and the rationale underlying the implementation of the *Nicastro* factors is no longer germane. Thus, a determination regarding the appropriateness of examination of those factors is within the sound discretion of the lower court.

Syl. pt. 14 - “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.’” Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Syl. pt. 15 - “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, Section 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).

Syl. pt. 16 - “Disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant’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 codefendants 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).

The Court found two violations from the same transaction; however, one involved a narcotic drug and one a non-narcotic drug. Since the offenses are statutorily distinct and carry separate punishments, no violation of double jeopardy occurred.

SENTENCING

Double jeopardy (continued)

Delivery of marijuana and cocaine (continued)

State v. Broughton, (continued)

The prosecution conceded that remanding for resentencing on the delivery of marijuana charge was necessary. The Court noted that failure to consider the *Nicastro* factors in sentencing on the marijuana was not error here where simultaneous conviction of another more serious offense has occurred. Apparently, however, the lower court may consider these factors.

Finally, the Court approved of the trial court's consideration of the impact on the community as a consideration in sentencing. See *Nicastro*, 181 W.Va. at 562, 383 S.E.2d at 527. Nor was the sentence disproportionate. Remanded for resentencing.

Enhancement

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

Appellant was convicted of aggravated robbery, assault during a felony, obstructing a police officer and unauthorized taking of a vehicle. He was sentenced to life based as a recidivist, as well as other time periods on individual charges.

He claimed on appeal that assault during a felony was a lesser included offense of aggravated robbery and therefore convictions on both charges, with the resulting enhancement to life, violated double jeopardy principles.

Appellant was picked up by a Glen Penwell (not closely related) and taken to Penwell's residence. After drinking beer and watching a pornographic movie, they went to bed, where appellant suggested sex. Glen Penwell resisted, whereupon appellant knocked him unconscious, tied him to the bedposts and drove off with certain items of property in Penwell's vehicle.

Upon being chased by police, appellant wrecked the vehicle. After being handcuffed and placed in the police cruiser, appellant managed to drive off in the cruiser.

He was charged with aggravated robbery and assault during the commission of a felony for the original beating; and obstruction and unauthorized taking of a vehicle for stealing the officers' car.

SENTENCING

Double jeopardy (continued)

Enhancement (continued)

State v. Penwell, (continued)

Syl. pt. 1 - “A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.” Syllabus point 7, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 2 - “In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.” Syllabus point 8, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 3 - “It is always presumed that the legislature will not enact a meaningless or useless statute.” Syllabus point 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, Veterans of Foreign Wars of the United States*, 147 W.Va. 645, 129 S.E.2d 921 (1963).

The Court rejected appellant’s argument that double jeopardy principles bar separate prosecution for what he considered lesser and greater offenses committed as part of the same sequence of events. See *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977); *Payne v. Virginia*, 468 U.S. 1062, 104 S.Ct. 3573, 82 L.Ed.2d 801 (1984). Aggravated robbery and assault during the commission of a felony were clearly intended to be two separate crimes; even though the latter acts as an enhancement to the former, trial on both is not in violation of double jeopardy. See *W.Va. Code* 61-2-12 and 61-2-10, respectively. No error.

Enhanced misdemeanor used to enhance

State ex rel. Chadwell v. Duncil, 474 S.E.2d 573 (1996) (Per Curiam)

See SENTENCING Enhancement, Based on enhanced misdemeanor, (p. 536) for discussion of topic.

SENTENCING

Enhanced misdemeanor used to enhance (continued)

Amendment of information

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

See SENTENCING Enhancement of, Notice of, (p. 538) for discussion of topic.

Based on enhanced misdemeanor

State ex rel. Chadwell v. Duncil, 474 S.E.2d 573 (1996) (Per Curiam)

Appellant was convicted of third offense shoplifting, a felony, in 1984. He was subsequently pled guilty to two grand larceny counts and admitted the prior felony. The circuit court sentenced him to two concurrent sentences of one to ten years for grand larceny, with an enhancement of five years.

Appellant claimed that *W.Va. Code* 61-11-18 cannot be used to enhance because the shoplifting charge was itself an enhanced misdemeanor. Further, he claimed that he could have been indicted for either shoplifting or grand larceny for his recent crimes. And is thus the victim of prosecutorial misconduct. Finally, he claimed the punishment is disproportionate.

Syl. pt. 1 - “Habitual criminal proceedings providing for enhanced or additional punishment on proof of one or more prior convictions are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner.’ *State ex rel. Ringer v. Boles*, 151 W.Va. 864, 871, 157 S.E.2d 554, 558 (1967).” Syl. pt. 2 *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 2 - “Despite the fact that a third offense . . . felony conviction . . . results from an enhanced misdemeanor, the Legislature intended that this type of felony conviction be used for sentence enhancement in connection with the terms of the recidivist statute, West Virginia Code § 61-11-18 (Supp. 1995). To the extent that *State v. Brown*, 91 W.Va. 187, 112 S.E. 408 (1922), is inconsistent with this ruling, we hereby overrule that decision and its progeny.” Syl. pt. 3, in part, *State v. Williams*, 196 W.Va. 639, 474 S.E.2d 569 (1996).

SENTENCING

Enhanced misdemeanor used to enhance (continued)

Based on enhanced misdemeanor (continued)

State ex rel. Chadwell v. Duncil, (continued)

The Court noted the prosecuting attorney had discretion to charge in this manner. *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 278 S.E.2d 624 (1981); and claimants have a heavy burden in showing selective prosecution. *In the Interest of H.J.D.*, 180 W.Va. 105, 375 S.E.2d 576 (1988). Insufficient showing here.

Similarly, appellant did not meet the burden of showing the sentence is disproportionate to the crimes. Appellant engaged in a concentrated effort to steal from four stores in two counties. Cf. *State v. Lewis*, 191 W.Va. 635 at 639, 447 S.E.2d 570 at 574 (1994). This penalty does not offend the conscience, *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), nor stand at odds with the legislative intent or other states' enactments. *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). Writ denied.

Double jeopardy

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

See SENTENCING Double jeopardy, Enhancement, (p. 534) for discussion of topic.

DUI conviction in another state

State ex rel. Conley v. Hill, 487 S.E.2d 344 (1997) (Workman, C.J.)

See EVIDENCE DUI, Committed in another State, (p. 226) for discussion of topic.

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See EVIDENCE DUI, Conviction in another state, (p. 227) for discussion of topic.

SENTENCING

Enhanced misdemeanor used to enhance (continued)

DUI as second felony

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

Appellant was convicted of third offense DUI; pursuant to *W.Va. Code* 61-11-18, the prosecution asked that the maximum sentence be increased by five years. Appellant argued on appeal that the recidivist statute was not intended to cover offenses which are felonies solely by reason of repetition. See *State v. Brown*, 91 W.Va. 187, 112 S.E. 408 (1922); offenses made felonies by reason of repetition cannot be used to commit offender for life.

Syl. pt. 1 - "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Syl. pt. 2 - "The Legislature, when it enacts legislation, is presumed to know its prior enactments." Syl. Pt. 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953).

Syl. pt. 3 - Despite the fact that a third offense DUI felony conviction pursuant to West Virginia Code § 17C-5-2(j) (Supp. 1995) results from an enhanced misdemeanor, the Legislature intended that this type of felony conviction be used for sentence enhancement in connection with the terms of the recidivist statute, West Virginia Code § 61-11-18 (Supp. 1995). To the extent that *State v. Brown*, 91 W.Va. 187, 112 S.E. 408 (1922), is inconsistent with this ruling, we hereby overrule that decision.

The Court noted numerous other jurisdictions allowed enhancement. No error.

Enhancement of

Notice of

State v. Crabtree, 482 S.E.2d 605 (1996) (Cleckley, J.)

Appellant was convicted of malicious wounding and battery and sentenced to life as a recidivist. Appellant claimed the prosecution should not have been allowed to amend its information for enhancement during the proceedings; and that he should not have been convicted of recidivism under an information alleging two felonies arising from the same indictment.

SENTENCING

Enhancement of (continued)

Notice of (continued)

State v. Crabtree, (continued)

Syl. pt. 9 - “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].” Syl. Pt. 1, *State v. Cain*, 178 W.Va. 353, 359 S.E.2d 581 (1987).

The Court found no abuse of discretion in allowing amendment of the information. *Cain, supra*. No new offense was added. Further, allowing the jury to consider two separate felonies was harmless error; the information contained three separate felonies even if two were counted as one. No error.

Generally

State v. Houston, 475 S.E.2d 307 (1996) (Recht, J.)

See ENTRAPMENT Elements of, (p. 167) for discussion of topic.

Good time credit

Trustee’s work in regional jail

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee’s work in regional jail, (p. 539) for discussion of topic.

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

Appellant was sentenced to two consecutive one-to-five year sentences for first-degree sexual abuse. While at the regional jail awaiting transfer to Huttonsville, he performed 195 days of work as a trustee. He sought reduction of sentence based on “good time” credit, which petition was denied.

SENTENCING

Good time credit (continued)

Trustee's work in regional jail (continued)

State v. Jarvis, (continued)

The circuit court found *W.Va. Code* 17-15-4 applies only to persons sentenced to a county or regional jail; appellant was sentenced to the penitentiary. *W.Va. Code* 28-5-27 governs "good time" at the penitentiary.

Syl. pt. 1 - "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

Syl. pt. 2 - An inmate who has been sentenced to the West Virginia State Penitentiary and performs work as a trustee at a county or regional jail while awaiting transfer cannot accumulate "good time" credit for the work performed pursuant to the provisions of West Virginia Code § 17-15-4 (1996).

Syl. pt. 3 - The provisions of West Virginia Code § 28-5-27 (1992) solely govern the accumulation of "good time" for inmates sentenced to the West Virginia State Penitentiary.

The Court noted *W.Va. Code* 28-5-27 contains the language "there shall be no grants or accumulations of good time or credit to any inmate now or hereafter serving a sentence in the custody of the department of corrections *except in the manner provided in this section*. (emphasis added). No error.

Home confinement

As condition of bail

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

See SENTENCING Home confinement, Credit for time served pre-trial, (p. 541) for discussion of topic.

SENTENCING

Home confinement (continued)

Credit for time served pre-trial

State v. Hughes, 476 S.E.2d 189 (1996) (Workman, J.)

Appellant was convicted of involuntary manslaughter. He sought credit against his sentence for time served in home confinement as condition of bail while awaiting trial. Appellant contended his maximum sentence cannot exceed one year but he has been in either home confinement or at the Fayette County jail since 21 August 1993. See *W.Va. Code* 62-11B-4(a); home confinement can be a condition of bail. See also, *W.Va. Code* 62-1C-2; general bail provisions.

Syl. pt. 3 - Due to the penal nature of the Home Confinement Act, West Virginia Code §§ 62-11B-1 to -12 (1993), when a circuit court in its discretion, orders an offender confined to his home as a condition of bail, the offender must be an adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary or a juvenile adjudicated guilty of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult.

Syl. pt. 4 - When a person who has been arrested, but not yet convicted of a crime, is admitted to pre-trial bail with the condition that he be restricted to home confinement pursuant to West Virginia Code § 62-1C-2(c) (1992), the home confinement restriction is not considered the same as actual confinement in a jail, nor is it considered the same as home confinement under the Home Confinement Act, West Virginia Code §§ 62-11B-1 to -12 (1993). Therefore, the time spent in home confinement when it is a condition of bail under West Virginia Code § 62-1C-2(c) does not count as credit toward a sentence subsequently imposed.

The Court found the bail provisions, not the home confinement provisions, control here. Appellant was not an “offender” under the Code, so therefore is not entitled to credit for time served in home confinement. No error.

Increased severity of sentence denies due process

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See DUE PROCESS Magistrate court conviction, Circuit court imposes higher penalty, (p. 155) for discussion of topic.

SENTENCING

Homicide

Bifurcation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See BIFURCATION Grounds for, (p. 110) for discussion of topic.

Juveniles

Following violation of probation

State v. Martin, 472 S.E.2d 822 (1996) (Per Curiam)

See JUVENILES Sentencing, Following probation violation, (p. 399) for discussion of topic.

Legislative intent

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

Magistrate court conviction

Circuit court imposes higher penalty

State v. Williams, 490 S.E.2d 285 (1997) (Starcher, J.)

See DUE PROCESS Magistrate court conviction, Circuit court imposes higher penalty, (p. 155) for discussion of topic.

Marijuana

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

SENTENCING

Murder

Bifurcation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See BIFURCATION Grounds for, (p. 110) for discussion of topic.

Pardon

Governor's power to grant

State ex rel. Forbes v. Caperton, 481 S.E.2d 780 (1996) (Workman, J.)

See SENTENCING Commutation of, Governor's power, (p. 527) for discussion of topic.

Plea bargain

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

Effect on sentence

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

Presentence report

Client's right to

State ex rel. Aaron v. King, 485 S.E.2d 702 (1997) (Davis, J.)

Petitioners complained that the Kanawha County Probation Department refused to provide them with copies of their respective presentence investigative reports as required by Rule 32 of the *Rules of Criminal Procedure*.

SENTENCING

Presentence report (continued)

Client's right to (continued)

State ex rel. Aaron v. King, (continued)

Syl. pt. 1 - A writ of mandamus will not issue unless three elements coexist—(1) a clear right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.’ Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).” Syllabus point 5, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994).

Syl. pt. 2 - West Virginia Rule of Criminal Procedure 32 requires that a criminal defendant and his or her legal counsel be provided a copy of the presentence investigation report prepared in accordance with subsection (b) of the rule. To the extent that Syllabus point 1 of *State v. Byrd*, 163 W.Va. 248, 256 S.E.2d 323 (1979), states otherwise, our prior holding is hereby modified.

Syl. pt. 3 - A circuit court must, without exception, determine on the record that a defendant has had the opportunity to read and discuss the presentence investigation report with his counsel, and the record should demonstrate that such opportunity has been provided or extended to a defendant.

Syl. pt. 4 - West Virginia Rule of Criminal Procedure 32(b)(5), is mandatory in its requirement that the following information be excluded:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality;

or

(C) any other information that, if disclosed, might result in harm physical or otherwise, to the defendant or other persons.

Such information should be provided to the Court, but not to the defendant or his counsel, unless such information will be relied on in determining sentence, in which case it must be summarized by the court, in writing, and provided to the defendant or his counsel.

The Court noted that requirements for confidentiality are met by Rule 32(b)(5). Writ granted.

SENTENCING

Presentence report (continued)

Client's right to (continued)

State v. Francisco, 483 S.E.2d 806 (1996) (Per Curiam)

Appellant was convicted of aggravated robbery and first-degree murder. He was sentenced to forty years for the aggravated and life without mercy for the murder. Appellant was examined for competency and pled guilty to both charges. Following a hearing to determine if the plea was entered into knowingly and intelligently, the court ordered appellant to be examined at the Diagnostic and Classification Center at Huttonsville Correctional Center.

Copies of both the Huttonsville evaluation and the presentence investigative report were sent to defense counsel, the prosecuting attorney and to the court. However, the trial court also received a sentencing recommendation from Huttonsville which was placed under seal; neither defense counsel nor the prosecuting attorney received copies. Further, the judge wrote directly to the examiner at Huttonsville with specific questions concerning appellant's future dangerous conduct; the psychologist's reply was also put under seal although the judge's letter was sent to counsel.

Defense counsel did not object to the court's putting the reply letter under seal and did not present mitigating evidence at the sentencing hearing. Appellate counsel then moved to unseal the documents. The trial court refused to allow access to the Huttonsville sentencing recommendation or subsequent supplementary letter.

This Court denied appellant's writ of mandamus to force access. Following this appeal, the Court allowed access to both prosecution and defense counsel.

Syl. pt. 1 - "Where a presentence report has been prepared and presented the court shall, upon request, permit the defendant, or his counsel if he is so represented, prior to imposition of sentence, 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 shall afford the defendant or his counsel an opportunity to comment on the report, and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." Syl. pt. 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).

SENTENCING

Presentence report (continued)

Client's right to (continued)

State v. Francisco, (continued)

Syl. pt. 2 - “ “ ‘This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.’ Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).” Syl. pt. 2, *Duquesne Light Co. v. State Tax Dept.*, 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert. denied*, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985)’ Syl. pt. 2, *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1978).” Syl. pt. 7, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995).

The Court noted that presentence diagnostic reports should be treated in the same manner as investigative reports and access be given unless harm could result. *W.Va.R.Crim.P.* 32(c)(3) (A). However, the Court held the trial court's action correct. It refused to consider argument that the subsequent Huttonsville reply letter was an *ex parte* communication, holding trial counsel's failure to object made the issue unreviewable. No error.

Duty to make record on

State ex rel. Aaron v. King, 485 S.E.2d 702 (1997) (Davis, J.)

See SENTENCING Presentence report, Client's right to, (p. 543) for discussion of topic.

Errors in

State v. Craft, 490 S.E.2d 315 (1997) (McHugh, J.)

Appellant pled guilty to first-degree murder and sentenced to life without parole. He appealed the circuit court's denial of motion for reduction of sentence.

Appellant had entered a guilty plea in return for the prosecution's recommendation of life with mercy. The presentencing report noted an alleged prior assault which was never mentioned as a collateral crime during discovery. Appellant's counsel noted the lack of substantiation of the assault at the December 16, 1994 sentencing hearing. Following sentencing, appellant filed a motion for reduction in sentence on April 13, 1995. At the June 28, 1995 hearing, appellant's counsel repeated the lack of basis for the reference to violent behavior.

SENTENCING

Presentence report (continued)

Errors in (continued)

State v. Craft, (continued)

Syl. pt. 1 - Pursuant to *W.Va.R.Crim.P.* 32(c)(3)(D), if the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the West Virginia Board of Parole.

Syl. pt. 2 - “To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996).

Syl. pt. 3 - “ ‘ ‘ ‘ ‘ ‘This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.’ Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).” Syl. pt. 2, *Duquesne Light Co. v. State Tax Dept.*, 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert. denied*, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985).’ Syl. pt. 2, *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987).” Syl. pt. 7, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995).

Syl. pt. 4 - “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

While noting that the circuit court clearly failed in its duty to make findings as to the alleged inaccuracies, *W.Va.R.Crim.P.* 32(c)(3)(D), the Court noted that trial counsel did not object to the sentencing based on the trial court’s error. The issue was not preserved for appeal, nor was application of the plain error doctrine appropriate since the outcome was not determined by the court’s omission. No error.

SENTENCING

Probation revocation

State v. Duke, 489 S.E.2d 738 (1997) (Davis, J)

Appellant pled guilty to third-degree sexual assault and sentenced to one to five years, with the sentence suspended to three-years probation. During the probationary period appellant pled guilty to brandishing a knife and was sentenced to ninety days. Appellant's counsel filed a petition for extension of his "current probation by one year," which petition was granted.

Appellant tested positive for drugs. Upon petition for revocation, the trial court found that appellant had never been incarcerated for the brandishing charge, that his original probation was extended for one year and that the court never intended for the sexual assault probation to run consecutively to the original three year probation. Appellant was ordered to serve time in the penitentiary.

Appellant argued on appeal that the three year probation had run, thus imposing the original sexual assault sentence was improper; only imposition of the ninety day brandishing sentence should have been allowed.

Syl. pt. 1 - When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.

Syl. pt. 2 - Where a circuit court places a criminal defendant on probation for an offense he/she committed while on probation for a previous offense, the court must make clear on the record the precise nature of the subsequently imposed probationary term (*i.e.*, extension of prior probationary period or separate and distinct subsequent probationary term) and ensure that the defendant has a clear and thorough understanding of the circuit court's intent in placing him/her for the subsequent crime.

Syl. pt. 3 - In order to ensure the record is clear with regard to the circuit court's intention in placing a criminal defendant on probation for a subsequent offense where the defendant is currently on probation for a prior offense, and the defendant's understanding of the court's intention, the court should make three inquiries on the record as to the defendant's understanding of the circumstances surrounding the imposition of probation: (1) the possible penalties for the offenses committed, (2) the nature and conditions of probation, and (3) the consequences of a probation revocation.

SENTENCING

Probation revocation (continued)

State v. Duke, (continued)

Syl. pt. 4 - The first probation imposition inquiry requires the circuit court to inform the defendant of: (1) the minimum and maximum penalties to which the defendant could be sentenced for the prior, subsequent, and/or violation of probation offenses (if the court suspends imposition of sentence) or the minimum and maximum penalties to which the defendant has been sentenced (if the court suspends execution of sentence) and (2) the effect of the court's decision to suspend imposition or execution of sentence.

Syl. pt. 5 - Pursuant to the second probation imposition inquiry, the circuit court must ensure the defendant understands: (1) the defendant has no right to probation, and the decision to grant the conditional liberty of probation is entirely within the circuit court's discretion; (2) the nature of the probationary period imposed (*i.e.*, whether the court intends the probationary period to be an extension of a pre-existing probationary period for a prior offense or a separate and distinct term of probation for the subsequent offense); and (3) the condition attached to the imposition of probation.

Syl. pt. 6 - The third and final probation imposition inquiry directs the circuit court to advise the defendant that: (1) revocation of probation and the imposition of sentence or the execution of a suspended sentence could result if the defendant violates one or more conditions of probation and (2) upon revocation of probation, the court could impose sentence and/or execute sentence for the prior offense, the subsequent offense, and/or the offense constituting a violation of probationary conditions, but sentencing for the offense constituting a violation of probation is proper only if the defendant has been convicted of, or has pleaded guilty to, such offense.

Syl. pt. 7 - It is not sufficient for the circuit court to explain to a criminal defendant his/her rights in legal terminology alone, but rather the court should translate formal terms into language which a layperson defendant can understand.

The Court found the real issue presented was the propriety of the sentence imposed, rather than the propriety of the revocation. Applying the standards in Syl Pt. 1, above, the Court found no abuse of discretion in the revocation; appellant had violated his probation by both the brandishing charge and by using drugs. In addition, the trial court's finding of fact was sufficient.

SENTENCING

Probation revocation (continued)

State v. Duke, (continued)

However, as to the sentencing order itself the Court noted entry of a guilty plea is a serious waiver of a constitutional right. Despite the inquiry conducted by the Circuit Court (sexual abuse plea) and the magistrate court (brandishing plea), the Court found appellant was uncertain of the conditions. The question was whether there were two separate terms or whether the second grant of probation extended the first term.

The Court noted that granting of probation is a critical stage of criminal proceedings, as is the revocation of that grant, necessitating the safeguards outlined above. Here, the Court found the second probationary period to be separate and distinct. The prior three-year period having expired, the trial court lacked jurisdiction to commit appellant to the penitentiary. Reversed and remanded.

Proportionality

State v. Phillips, 485 S.E.2d 676 (1997) (Per Curiam)

Appellant was convicted of two counts of aggravated robbery and kidnaping and sentenced to forty-five years on each of the two counts of aggravated and fifty years on the kidnaping count, all to be served consecutively. He complained that his sentence was no proportionate to the offenses as required by *West Virginia Constitution*, Art. III. § 5.

Syl. pt. 5 - “ “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).’ Syllabus Point 1, *State v. Houston*, 166 W.Va. 202, 273 S.E.2d 375 (1980).” Syllabus point 8, *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982).

Syl. pt. 6 - “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.” Syllabus point 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

SENTENCING

Proportionality (continued)

State v. Phillips, (continued)

The Court rejected the State's argument that sentences within statutory limits are not subject to review. Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). The applicable statutes here had no upper limit. The Court noted the first test is really subjective and is whether the sentence shocks the conscience. *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

Here, appellant threatened eleven individuals in two restaurants, kidnaped an eighteen year old and took her on a high speed chase, with speeds to 125 miles per hour, through heavy fog, traveling the wrong way on an interstate highway. He thus endangered other motorists and ultimately crashed into police cruisers. In addition, appellant had a less than honorable military discharge and significant indications of substance abuse and antisocial behavior. The sentencing court noted appellant had no sense of guilt for his actions. The Court's conscience was not shocked.

Noting the legislative purpose of the statutory sentences, the comparable sentences in other states, and two prior decisions involving both aggravated robbery and kidnaping, *State v. Black*, 175 W.Va. 770, 338 S.E.2d 370 (1985) and *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983), the Court found the sentences here reasonable. (See also, numerous other decisions involving robbery cited in full opinion.) No error.

State v. Sampson, 488 S.E.2d 53 (1997) (Starcher, J.)

See SENTENCING Appellate review of, (p. 526) for discussion of topic.

Cruel and unusual punishment

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

SENTENCING

Recidivism

Second offense DUI

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

See SENTENCING Enhancement, DUI as second felony, (p. 538) for discussion of topic.

Reduction

Timeliness of motion

State v. Thornton, 478 S.E.2d 576 (1996) (Albright, J.)

Appellant was convicted of attempted aggravated robbery and sentenced to seventy-five years. Appellant filed numerous habeas corpus petitions, including one denied by the circuit court and this Court. Less than 120 days after denial, appellant filed a “motion for reduction of sentence” pursuant to Rule 35(b), West Virginia Rules of Criminal Procedure. The circuit court denied the motion as untimely, noting the underlying sentence was imposed in 1980, even though denial of the habeas petition was 31 May 1995.

Appellant claimed *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995), allowed him to file within 120 days of denial of his habeas petition.

Syl. pt. - Effective September 1, 1996, Rule 35(b) of the West Virginia Rules of Criminal Procedure, regarding a motion to reduce a criminal sentence, was modified to read as follows: “(b) *Reduction of Sentence*. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to grant a of probation shall constitute a permissible reduction of sentence under this subdivision.”

The Court viewed its denial of the habeas petition as entry of a judgment affirming appellant’s conviction. Reversed and remanded.

SENTENCING

Restitution

State v. Lucas, 496 S.E.2d 221 (1997) (Starcher, J.)

See RESTITUTION Grounds for, (p. 483) for discussion of topic.

Right to allocution prior to

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

Right to be present

State v. Stone, 488 S.E.2d 400 (1997) (Per Curiam)

See PLEA BARGAIN Standard for, (p. 443) for discussion of topic.

Sexual assault

Excessive fines

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

Trustee

Credit for “good time” at regional jail

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee’s work in regional jail, (p. 539) for discussion of topic.

SEQUESTRATION

Order violated

Effect of

State v. Omechinski, 468 S.E.2d 173 (1996) (Cleckley, J.)

See WITNESSES Sequestration, Violation of, (p. 587) for discussion of topic.

Police officer

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SEQUESTRATION Which witnesses to be sequestered, (p. 554) for discussion of topic.

Rebuttal witnesses

State v. Omechinski, 468 S.E.2d 173 (1996) (Cleckley, J.)

See WITNESSES Sequestration, Violation of, (p. 587) for discussion of topic.

Which witnesses to be sequestered

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

Appellant was convicted of second-degree murder. Two of the investigating officers were not sequestered despite appellant's request, pursuant to Rule 615 of the Rules of Evidence, that at least one of them be excluded.

Syl. pt. 7 - "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." Syllabus point 4, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Syl. pt. 8 - "The rule with regard to excluding police officers from a sequestration of witnesses is that it is not error to do so if the testimony of such police officers is not crucial to the state's case and not prejudicial to the defendant." Syllabus point 6, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

SEQUESTRATION

Which witnesses to be sequestered (continued)

State v. McKenzie, (continued)

The Court found neither officers' testimony was crucial to the case. No error here, but the Court suggested that only one officer not be sequestered in similar matters in the future and that officer should be called first.

SEXUAL ATTACKS

Evidence

Victim's statements as other offenses

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

See EVIDENCE Rape shield, Victim's statements about unrelated offense, (p. 243) for discussion of topic.

Sentencing

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

Sexual assault

Sentencing

State v. Murrell, 499 S.E.2d 870 (1997) (Workman, C.J.)

See SENTENCING Cruel and unusual punishment, Proportionality, (p. 529) for discussion of topic.

Victim's statements re: other attacks

State v. Quinn, 490 S.E.2d 34 (1997) (Starcher, J.)

See EVIDENCE Rape shield, Victim's statements about unrelated offense, (p. 243) for discussion of topic.

Witness list

Duty to disclose

State ex rel. Hill v. Reed, 483 S.E.2d 89 (1996) (Per Curiam)

See WITNESSES List of, Duty to disclose, (p. 587) for discussion of topic.

SIXTH AMENDMENT

Right to counsel

When police use agent

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 515) for discussion of topic.

STATUTES

DUI

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

See DUI Driving while revoked, After statutory revocation period, (p. 157) for discussion of topic.

Legislative intent

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

See DUI Driving while revoked, After statutory revocation period, (p. 157) for discussion of topic.

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See SENTENCING Double jeopardy, Delivery of marijuana and cocaine, (p. 531) for discussion of topic.

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee's work in regional jail, (p. 539) for discussion of topic.

State v. Whetzel, 488 S.E.2d 45 (1997) (Maynard, J.)

Appellant was convicted of being an accessory after the fact to second-degree arson and to conspiracy to enter without breaking although he was initially charged with arson and breaking and entering. He was ordered to pay restitution in the amount of \$30,000.00 and sentenced to two indeterminate consecutive one to five year sentences.

Appellant entered a plea bargain which required the state to stand silent on sentencing. During presentation of the plea, the court questioned appellant as to his understanding of the possibility of restitution if he pled guilty; appellant replied that he understood. His main question on appeal was whether restitution could be imposed.

STATUTES

Legislative intent (continued)

State v. Whetzel, (continued)

Syl. pt. 1 - “In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.” Syllabus Point 2, *Smith v. Workmen’s Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

Syl. pt. 2 - The Legislature, in adopting *W.Va. Code* § 61-11A-4 intended that accessories be required to make restitution for the physical, psychological or economic injury or loss to a victim caused by the commission of the principal offense.

The Court cited *W.Va. Code* 61-11A-4(a) as giving authorization for imposing restitution in any felony or misdemeanor conviction. Here, although appellant was convicted of a crime not specifically charged, the Court found the clear legislative intent to assist victims of crime made restitution proper. Restitution is covered by a statute separate and distinct from any statute establishing a criminal offense; further, the crime of accessory after the fact is not wholly distinct from the principal offense for which appellant was charged. No error.

Plain language

State ex rel. Eads v. Duncil, 474 S.E.2d 534 (1996) (Albright, J.)

See PAROLE Revocation of, Necessity for record, (p. 433) for discussion of topic.

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee’s work in regional jail, (p. 539) for discussion of topic.

STATUTES

Plain language (continued)

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

See SENTENCING Enhancement, DUI as second felony, (p. 538) for discussion of topic.

Restitution

State v. Whetzel, 488 S.E.2d 45 (1997) (Maynard, J.)

See STATUTES Legislative intent, (p. 558) for discussion of topic.

Privileged communication with clergy

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See PRIVILEGES Clergy-communicant, (p. 454) for discussion of topic.

Restitution

Accessories

State v. Whetzel, 488 S.E.2d 45 (1997) (Maynard, J.)

See STATUTES Legislative intent, (p. 558) for discussion of topic.

Standard for review

State v. Berrill, 474 S.E.2d 508 (1996) (Albright, J.)

See RIGHT TO ALLOCUTION Denial of, (p. 487) for discussion of topic.

State v. Jarvis, 487 S.E.2d 293 (1997) (Workman, C.J.)

See SENTENCING Good time credit, Trustee's work in regional jail, (p. 539) for discussion of topic.

STATUTES

Statutory construction

State v. Williams, 474 S.E.2d 569 (1996) (Workman, J.)

See SENTENCING Enhancement, DUI as second felony, (p. 538) for discussion of topic.

Criminal liability for workers compensation nonpayment

State ex rel. Nguyen v. Berger, 483 S.E.2d 71 (1996) (Recht, J.)

State v. Rife, 483 S.E.2d 71 (1996) (Recht, J.)

See WORKERS COMPENSATION Criminal liability for nonpayment, (p. 591) for discussion of topic.

DUI

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

See DUI Driving while revoked, After statutory revocation period, (p. 157) for discussion of topic.

Generally

State ex rel. Eads v. Duncil, 474 S.E.2d 534 (1996) (Albright, J.)

See PAROLE Revocation of, Necessity for record, (p. 433) for discussion of topic.

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

Legislative intent

State ex rel. Hall v. Schlaegel, No. 24581 (4/2/98) (Workman, J.)

See DUI Driving while revoked, After statutory revocation period, (p. 157) for discussion of topic.

STATUTES

Statutory construction (continued)

Privileged communication with clergy

State v. Potter, 478 S.E.2d 742 (1996) (Cleckley, J.)

See PRIVILEGES Clergy-communicant, (p. 454) for discussion of topic.

Workers compensation

Criminal liability for nonpayment

State ex rel. Nguyen v. Berger, 483 S.E.2d 71 (1996) (Recht, J.)

State v. Rife, 483 S.E.2d 71 (1996) (Recht, J.)

See WORKERS COMPENSATION Criminal liability for nonpayment, (p. 591) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Abuse and neglect

In re Joseph A. and Justin A., 199 W.Va. 438, 485 S.E.2d 176 (1997) (Maynard, J.)

See ABUSE AND NEGLECT Right to present evidence, (p. 22) for discussion of topic.

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

Conspiracy

State v. Broughton, 470 S.E.2d 413 (1996) (Workman, J)

See CONSPIRACY Elements of, (p. 125) for discussion of topic.

Double jeopardy

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See DUI Sufficiency of evidence, (p. 163) for discussion of topic.

DUI

State v. Knuckles, 196 W.Va. 416, 473 S.E.2d 131 (1996) (Per Curiam)

See DUI Sufficiency of evidence, (p. 163) for discussion of topic.

State v. Strock, 495 S.E.2d 561 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 191) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Felony-murder

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Lesser included offenses, (p. 282) for discussion of topic.

State v. Wade, 490 S.E.2d 724 (1997) (Davis, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 285) for discussion of topic.

Generally

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See HOMICIDE Sufficiency of evidence, (p. 296) for discussion of topic.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

State v. Williams, 480 S.E.2d 162 (1996) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 186) for discussion of topic.

Intent

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Generally (continued)

Premeditation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

Homicide

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 287) for discussion of topic.

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

Intent

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

Malicious assault

State v. Wright, 490 S.E.2d 736 (1997) (Per Curiam)

See DOUBLE JEOPARDY Test for, (p. 150) for discussion of topic.

Murder

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 287) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Murder (continued)

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See HOMICIDE Sufficiency of evidence, (p. 296) for discussion of topic.

Premeditation

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995) (Cleckley, J.)

See HOMICIDE Felony-murder, Sufficiency of evidence, (p. 284) for discussion of topic.

Standard for review

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See HOMICIDE Sufficiency of evidence, (p. 296) for discussion of topic.

Newly-discovered evidence

State v. Helmick, 495 S.E.2d 262 (1997) (Maynard, J.)

See EVIDENCE Newly-discovered evidence, Effect of, (p. 238) for discussion of topic.

Sufficiency of evidence

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See HOMICIDE Sufficiency of evidence, (p. 296) for discussion of topic.

Termination of parental rights

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

TATTOOS

Admissibility

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See EVIDENCE Admissibility, Tattoos, (p. 216) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Abuse and neglect

In re William John R., 200 W.Va. 627, 490 S.E.2d 714 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 32) for discussion of topic.

Best interests of the child

In the Matter of Elizabeth v. Hammack, 201W.Va. 158, 494 S.E.2d 925 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 34) for discussion of topic.

Best interest of the child

In the Matter of Elizabeth v. Hammack, 201W.Va. 158, 494 S.E.2d 925 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 34) for discussion of topic.

Foster parents

Role in proceedings

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

Improvement period

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Right to remain silent

Effect on termination

W.Va. DHHR ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Standard for, (p. 30) for discussion of topic.

Siblings

Contact with

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

Standard for

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

Appellants were long-term foster parents of the infant Jonathan G. having been given custody following physical abuse; they had physical custody from the age ten months to the age of four years. They were denied permanent visitation rights and were not allowed to participate in the hearing on termination of parental rights.

Further, they objected to the circuit court's returning of Jonathan to his biological parents and removal of DHHR from the case. DHHR protested the return of the child, as well as the prosecuting attorney's improper representation of DHHR, resulting in the removal.

At the first adjudication the circuit court found clear physical abuse, ordered a case plan, allowed visitation by the natural parents and directed the parents to participate in counseling. Because of the father's deafness and the mother's severe hearing impairment, an interpreter was ordered.

TERMINATION OF PARENTAL RIGHTS

Standard for (continued)

In re Jonathan G., (continued)

Syl. pt. 1 - The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with *Bowens v. Maynard*, 174 W.Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.

Syl. pt. 2 - "Parental rights may be terminated where there is clear and convincing evidence that the infant child suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 3 - "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 4 - "'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).' Syl. Pt. 3, *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987)." Syl. Pt. 3, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 5 - "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syl. Pt. 4, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

TERMINATION OF PARENTAL RIGHTS

Standard for (continued)

In re Jonathan G., (continued)

Syl. pt. 6 - “The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.” Syl. Pt. 5, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 7 - “At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court’s discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.” Syl. Pt. 6, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 8 - “It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.” Syl. Pt. 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Syl. pt. 9 - “In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child’s best interests, and if such continued association is in such child’s best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.” Syl. Pt. 4, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Syl. pt. 10 - “When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child’s wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child’s well being and would be in the child’s best interest.” Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

TERMINATION OF PARENTAL RIGHTS

Standard for (continued)

In re Jonathan G., (continued)

Syl. pt. 11- A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interest of the child.

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

In the Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997) (McHugh, J.)

See ABUSE AND NEGLECT Civil distinguished from criminal, Plea bargain, (p. 5) for discussion of topic.

Standard of proof

W.Va. DHHR ex rel. Wright v. Brenda C., 197 W.Va. 468, 475 S.E.2d 560 (1996) (Per Curiam)

See ABUSE AND NEGLECT Hearing required, (p. 16) for discussion of topic.

Visitation following

In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Standard for, (p. 569) for discussion of topic.

In re Katie S. and David S., 198 W.Va. 79, 479 S.E.2d 589 (1996) (Recht J.)

See ABUSE AND NEGLECT Termination of parental rights, (p. 26) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Visitation following (continued)

In re William John R., 200 W.Va. 627, 490 S.E.2d 714 (1997) (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Visitation following, (p. 32) for discussion of topic.

THREATS

Admissibility

State v. Degraw, 470 S.E.2d 215 (1996) (Workman, J.)

See EVIDENCE Admissibility, Threats against other than victim, (p. 218) for discussion of topic.

TRANSCRIPTS

Right to

Failure to produce

State ex rel. Johnson v. Jones, No. 23359 (5/15/96) (Per Curiam)

Relator was convicted of unspecified crimes. In September 1995 the trial judge ordered that a transcript be produced to aid in an appeal. In November 1995 relator filed petition for writ of mandamus to compel respondent to produce copies of transcripts, along with other court records in CA 94-J-155, apparently a juvenile matter. Upon denial, relator filed a similar petition with the Court. A rule to show cause was issued, returnable 23 April 1996, to which respondent replied 17 April 1996, claiming the transcript was being produced for appellant's counsel. The Court ordered production of the transcript.

State ex rel. Stacy v. Hall, No. 23455 (6/26/96) (Per Curiam)

On 31 January 1990 relator was convicted of first-degree murder. On 4 May 1990 relator's attorney filed notice of intent to appeal and requested a transcript, which request was filed with the Circuit Clerk. More than one year later, respondent claimed she had not received the request.

By letter of 21 November 1991, counsel once again requested a transcript. Since that date, respondent has written at least nine times requesting the transcript. Finally, on 30 May 1996, the Court issued a rule to show cause, returnable 25 June 1996. Respondent appeared on that date and offered no reason for her failure to produce the transcript. Respondent promised to complete the transcripts by 9 July 1996.

The Court held respondent has a clear duty to complete the transcripts. *W.Va. Code* 51-7-4; Rule 37(b), *West Virginia Rules of Criminal Procedure*. Further a court reporter is subject to Court control. Syllabus Point 3, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985).

The Court warned respondent that civil liability is a possibility. *State ex rel. Philyaw v. Williams*, 190 W.Va. 272, 438 S.E.2d 64 (1993). The Court reduced respondent's fee 20% (See Appendix B, Rule of Appellate Procedure) and ordered the transcript delivered by 9 July 1996. Writ granted.

TRANSFER TO ADULT JURISDICTION

Automatic transfer

Constitutionality of

State v. Robert K. McL., 496 S.E.2d 887 (1997) (Starcher, J.)

See JUVENILES Transfer to adult jurisdiction, Rehabilitation as factor, (p. 401) for discussion of topic.

Delay in taking before magistrate

In the Matter of Steven William T., 499 S.E.2d 876 (1997) (Workman, C.J.)

See JUVENILES Prompt presentment, Delay in taking before magistrate, (p. 395) for discussion of topic.

TRIAL

Bifurcation for sentencing

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996) (Per Curiam)

See BIFURCATION Grounds for, (p. 111) for discussion of topic.

UNCONSCIOUSNESS

Defense in criminal matters

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996) (Cleckley, J.)

See INVOLUNTARY MANSLAUGHTER Unconsciousness as defense, (p. 341) for discussion of topic.

VENUE

Change of venue

Sufficiency of proof for

State v. Penwell, 483 S.E.2d 240 (1996) (Per Curiam)

Appellant was convicted of aggravated robbery, assault during a felony, obstructing a police officer and unauthorized taking of a vehicle. He was sentenced to life based as a recidivist, as well as other time periods on individual charges.

Appellant was picked up by a Glen Penwell (not closely related) and taken to Penwell's residence. After drinking beer and watching a pornographic movie, they went to bed, where appellant suggested sex. Glen Penwell resisted, whereupon appellant knocked him unconscious, tied him to the bedposts and drove off with certain items of property in Penwell's vehicle.

Upon being chased by police, appellant wrecked the vehicle. After being handcuffed and placed in the police cruiser, appellant managed to drive off in the cruiser.

He was charged with aggravated robbery and assault during the commission of a felony for the original beating; and obstruction and unauthorized taking of a vehicle for stealing the officers' car.

He claimed that a change of venue was necessary because he and his brother were life-long residents of Jefferson County and convicted felons; thus, the Penwell name was associated with antisocial and criminal behavior. Further, local newspapers had provided headline news stories for several days and other media had similarly covered the story. Because he had been widely characterized as a dangerous person he could not get a fair trial.

The circuit court denied appellant's motion for change of venue but allowed him to reassert the motion after jury selection. During *voir dire*, jurors were questioned regarding their attitude towards appellant; although several said they had read about the case they said they could disregard prior knowledge.

Syl. pt. 4 - “ ‘ “A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county.” Point 2, Syllabus, *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967), *quoting* Point 1, Syllabus, *State v. Siers*, 103 W.Va. 30, 136 S.E. 503 (1927).’ Syllabus Point 2, *State v. Sette*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

VENUE

Change of venue (continued)

Sufficiency of proof for (continued)

State v. Penwell, (continued)

Syl. pt. 5 - “One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant.” Syllabus point 3, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Under an abuse of discretion standard, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), the Court could find no error. Two jurors had actually been struck for having opinions on appellant’s guilt.

VOIR DIRE

Circuit clerk asking questions

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996) (Cleckley, J.)

See JURY *Voir dire*, Circuit clerk conducting, (p. 377) for discussion of topic.

Discretion of court

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See JURY *Voir dire*, Discretion of court, (p. 377) for discussion of topic.

Witness list compelled

State ex rel. Hill v. Reed, 483 S.E.2d 89 (1996) (Per Curiam)

See WITNESSES List of, Duty to disclose, (p. 587) for discussion of topic.

VOLUNTARY MANSLAUGHTER

Elements of

State v. McGuire, 490 S.E.2d 912 (1997) (Workman, C.J.)

See HOMICIDE Voluntary manslaughter, Elements of, (p. 298) for discussion of topic.

Instructions

Omission of word “anger”

State v. Boxley, 496 S.E.2d 242 (1997) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 188) for discussion of topic.

WAIVER

Jury trial

State v. Redden, 487 S.E.2d 318 (1997) (Starcher, J.)

See JURY TRIAL Waiver of, Standards for, (p. 379) for discussion of topic.

Miranda rights

State v. Ivey, 474 S.E.2d 501 (1996) (McHugh, C.J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Waiver of right, (p. 522) for discussion of topic.

WARRANTS

Arrest without warrant

State v. Todd Andrew H., 474 S.E.2d 545 (1996) (Cleckley, J.)

See JUVENILES Arrest, Warrantless, (p. 382) for discussion of topic.

Particularity required

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

Search warrant

Validity of

State v. Lease, 472 S.E.2d 59 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 506) for discussion of topic.

Warrantless arrest

Exigent circumstances required

State v. Cheek, 483 S.E.2d 21 (1996) (Per Curiam)

See ARREST Warrantless, Exigent circumstances required, (p. 80) for discussion of topic.

Warrantless search

Incident to arrest

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

WARRANTS

Warrantless search (continued)

Plain view exception

State v. Lopez, 476 S.E.2d 227 (1996) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Plain view exception, (p. 509) for discussion of topic.

Protective search

State v. Lacy, 468 S.E.2d 719 (1996) (Cleckley, J.)

See SEARCH AND SEIZURE Protective search, Admissibility of fruits of, (p. 502) for discussion of topic.

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Incident to arrest, (p. 507) for discussion of topic.

WITNESSES

Court's questioning of

State v. Farmer, 490 S.E.2d 326 (1997) (Workman, C.J.)

See EVIDENCE Admissibility, Testimony elicited by judge, (p. 216) for discussion of topic.

Exclusion of

Matter of right

State v. Omechinski, 468 S.E.2d 173 (1996) (Cleckley, J.)

See WITNESSES Sequestration, Violation of, (p. 587) for discussion of topic.

Eyewitness identification

Denial of expert on

State v. Taylor, 490 S.E.2d 748 (1997) (Per Curiam)

See EXPERT WITNESSES Eyewitness identification, Denial of expert on, (p. 252) for discussion of topic.

Impeachment

Prior inconsistent statement

State v. Blake, 478 S.E.2d 550 (1996) (Cleckley, J.)

See EVIDENCE Impeachment, Prior inconsistent statements, (p. 232) for discussion of topic.

Impeachment of

State v. Rahman, 483 S.E.2d 273 (1996) (Workman, J.)

See EVIDENCE Impeachment, Criminal conviction use for, (p. 232) for discussion of topic.

WITNESSES

List of

Duty to disclose

State ex rel. Hill v. Reed, 483 S.E.2d 89 (1996) (Per Curiam)

Petitioner sought a writ of prohibition to prevent the judge from requiring petitioner to disclose a defense witness list in his trial for sexual abuse, abuse by a custodian and sexual assault. In order to keep his witness list confidential under Rule 16 (D) from reciprocal disclosure, he did not ask for prosecution disclosure.

Four days prior to trial, the prosecution asked for guidance in *voir dire* in the absence of witness lists. The circuit court required both sides to provide the court with lists on the first day of trial.

Syl. pt. - “The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.” Syl. Pt. 1, *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E.2d 480 (1974).

The Court noted discovery limits do not affect the court’s authority to compel disclosure necessary for *voir dire*. See *State v. Satterfield*, 193 W.Va. 503, 457 S.E.2d 440 (1995); *Depuy v. Allara*, 193 W.Va. 557, 457 S.E.2d 494 (1995); and *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E.2d 480 (1974). See also, *W.Va. Code* 56-6-12. Only disclosure can meet the goals of *voir dire*. Writ granted.

Sequestration

State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996) (Per Curiam)

See SEQUESTRATION Which witnesses to be sequestered, (p. 554) for discussion of topic.

Violation of

State v. Omechinski, 468 S.E.2d 173 (1996) (Cleckley, J.)

Appellant was convicted of six counts of cruelty to animals. A defense witness who discussed her testimony with the prosecution and a prosecution witness in violation of a sequestration order. The witness was called by the prosecution in rebuttal.

WITNESSES

Sequestration (continued)

Violation of (continued)

State v. Omechinski, (continued)

Defense counsel's objection was overruled. On appeal, counsel claimed the rebuttal testimony contradicted earlier testimony.

Syl. pt. 1 - Rule 615 of the West Virginia Rules of Evidence makes the exclusion of witnesses a matter of right, and the decision is no longer committed to the trial court's discretion.

Syl. pt. 2 - The purpose of Rule 615 of the West Virginia Rules of Evidence is to prevent the shaping of testimony by one witness to match that of another and to discourage fabrication and collusion. The rule applies to rebuttal witnesses as well, and it is not significant whether the rebuttal witness has testified earlier in the case-in-chief.

Syl. pt. 3 - A circumvention of Rule 615 of the West Virginia Rules of Evidence occurs where witnesses indirectly defeat its purpose by discussing with other witnesses who are subject to recall testimony they have given and events occurring in the courtroom.

Syl. pt. 4 - A failure to instruct the witnesses fully after Rule 615 of the West Virginia Rules of Evidence is invoked may cause reversal. When the Rule is invoked, the witnesses clearly should be directed clearly that they must all leave the courtroom, with the exceptions the rule permits, and that they are not to discuss the case or what their testimony has been or will be or what occurs in the courtroom with anyone other than counsel for either side.

Syl. pt. 5 - The rights granted under Rule 615 of the West Virginia Rules of Evidence are not self-executing. In the absence of a specific request by the complaining party, a defendant may not claim error as a result of the failure of the trial court to instruct witnesses as to the impact of a sequestration order.

Syl. pt. 6 - In criminal cases, when a trial court fails to comply with Rule 615 of the West Virginia Rules of Evidence, prejudice is presumed and reversal is required unless the prosecution proves by a preponderance of the evidence that the error was harmless.

WITNESSES

Sequestration (continued)

Violation of (continued)

State v. Omechinski, (continued)

Syl. pt. 7 - In making a ruling whether to exclude a rebuttal witnesses' testimony under Rule 615 of the West Virginia Rules of Evidence, a trial court should consider several factors including: (1) how critical the testimony in question is--that is, whether it involved controverted and material facts; (2) whether the information ordinarily is subject to tailoring such that cross-examination or other evidence could bring to light any deficiencies; (3) to what extent the testimony of the witness is likely to encompass the same issues as other witnesses'; (4) in what order the witnesses would testify; and (5) if any potential for bias exists which may motivate the witness to tailor his or her testimony.

The Court rejected the prosecution's argument that the trial court had not imposed the sequestration after a witness testified. Post-testimony time is covered, especially when, as here, discussions can be held with witnesses subject to recall.

The Court noted that defense counsel should have requested an instruction to the witnesses not to discuss the case. They refused to call the witnesses discussions plain error. Further, the prosecution witness was not influenced; it was the defense witness who initiated the discussion and her testimony is challenged.

Nonetheless, because the risk of prejudice is great, the Court presumed prejudice, absent a clear showing to the contrary. Here, however, no prejudice occurred. The most damaging evidence came from other witnesses. Affirmed.

Prior inconsistent statement

State v. Browning, 485 S.E.2d 1 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 209) for discussion of topic.

WITNESSES

Testimony implicating another

State v. Bradford, 484 S.E.2d 221 (1997) (Maynard, J.)

See EVIDENCE Admissibility, Testimony implicating another, (p. 217) for discussion of topic.

Unavailability

State v. Snider, 196 W.Va. 513, 474 S.E.2d 180 (1996) (Per Curiam)

See CONTINUANCE Grounds for, (p. 127) for discussion of topic.

Burden of showing

State v. Blankenship, 480 S.E.2d 178 (1996) (Recht, J.)

See EVIDENCE Admissibility, Unavailable declarant, (p. 219) for discussion of topic.

WORKERS COMPENSATION

Criminal liability for nonpayment

State ex rel. Nguyen v. Berger, 483 S.E.2d 71 (1996) (Recht, J.)

State v. Rife, 483 S.E.2d 71 (1996) (Recht, J.)

Petitioner Truong Van Nguyen, a corporate officer, was found criminally responsible for failure to pay workers compensation premiums and for failing to file quarterly reports. He petitions for writ of prohibition to prevent enforcement of the denial of his motion to dismiss charges. Conversely, the State appeals the granting of a motion to dismiss in an identical case involving Steve Rife, another corporate officer.

Syl. pt. 1 - Corporate officers can be criminally responsible, along with the corporation, for the failure to pay workers' compensation premiums and to file workers' compensation reports within the meaning of *W.Va. Code 23-1-16(a)* (1995).

Syl. pt. 2 - "Officers, agents, and directors of a corporation may be criminally liable if they cause the corporation to violate the criminal law while conducting corporate business." Syllabus Point 5, *State v. Childers*, 187 W.Va. 54, 415 S.E.2d 460 (1992).

Syl. pt. 3 - "The common law, if not repugnant of the Constitution of this State, continues as the law of this State unless it is altered or changed by the Legislature. Article VIII, Section 21 of the Constitution of West Virginia; Chapter 2, Article 1, Section 1, of the Code of West Virginia." Syllabus Point 3, *Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605 (1962).

Syl. pt. 4 - "The common law is not to be construed as altered or changed by statute, unless legislative intent to do so is plainly manifested." *Shifflette v. Lilly*, 130 W.Va. 297, 43 S.E.2d 289 [1947]." Syllabus Point 4, *Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605 (1962).

The Court rejected the argument that *W.Va. Code 23-1-16(a)* does not specify corporate officers as responsible for nonpayment. The common law holds officers or agents responsible if they cause criminal wrongdoing. See *Childers, supra*; Syl. Pt. 3, *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 425 S.E.2d 144 (1992). The rationale is that a corporation can only act through its agents.

See also, *Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866 (1982) (civil liability imposed on corporate officers for nonpayment of wages; criminal penalties were available). Reversed and remanded as to Steve Rife; writ denied to Truong Van Nguyen.

WRIT OF PROHIBITION

Abuse of discretion

Grounds for

State ex rel. Ohl v. Egnor, 500 S.E.2d 890 (1997) (Davis, J.)

See JUVENILES Detention, Choice of center, (p. 386) for discussion of topic.

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<i>Disciplinary Counsel v. Cunningham</i> , No. 24892 (W.Va. 6/12/98)	82, 84, 94, 98
<i>E.H., et al. v. Matin</i> , 498 S.E.2d 35 (W.Va. 1997)	364, 388, 389, 391, 402, 425
<i>In re Christine Tiara W.</i> , 479 S.E.2d 927 (W.Va. 1996)	1, 20, 45
<i>In re Jonathan G.</i> , 482 S.E.2d 893 (W.Va. 1996)	11, 14, 18, 21, 29, 32, 359, 568, 569, 572
<i>In re Joseph A. and Justin A.</i> , 485 S.E.2d 176 (W.Va. 1997)	4
<i>In re Katie S. and David S.</i> , 479 S.E.2d 589 (W.Va. 1996)	1, 19, 21, 25, 26, 32, 61, 568, 572
<i>In re Mark M.</i> , 496 S.E.2d 215 (W.Va. 1997)	2, 8, 25, 46, 61, 63, 127, 270, 355
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<i>In the Interest of Anthony Ray Mc.</i> , 489 S.E.2d 289 (W.Va. 1997)	56, 74, 122, 124, 198, 230, 231, 277, 402, 494, 513, 522
<i>In the Matter of Browning</i> , 475 S.E.2d 75 (W.Va. 1996)	172, 351, 407, 410, 411
<i>In the Matter of Elizabeth v. Hammack</i> , 494 S.E.2d 925 (W.Va. 1997)	25, 29, 34, 61, 568
<i>In the Matter of Jonathan P.</i> , 387 S.E.2d 537 (W.Va. 1989)	24, 28
<i>In the Matter of Reese</i> , 495 S.E.2d 548 (W.Va. 1997)	173, 407, 408, 412
<i>In the Matter of Rice</i> , 489 S.E.2d 783 (W.Va. 1997)	173, 409
<i>In the Matter of Starcher</i> , 501 S.E.2d 772 (W.Va. 1998)	173, 351, 362, 367, 463

<i>In the Matter of Steven William T.,</i> 499 S.E.2d 876 (W.Va. 1997)	395, 399, 456, 467, 576
<i>In the Matter of Taylor B.,</i> 491 S.E.2d 607 (W.Va. 1997)	5, 8, 21, 25, 29, 45, 61, 469, 473, 572
<i>In the Matter of Troisi,</i> No. 24204 (W.Va. 6/18/98)	85, 89, 348, 351, 363
<i>In the Matter of Verbage,</i> 490 S.E.2d 323 (W.Va. 1997)	173, 408
<i>In the Matter of Willis Alvin M.,</i> 479 S.E.2d 871 (W.Va. 1996)	389, 390
<i>Kemp v. State,</i> No. 23980 (W.Va. 12/16/97)	53, 129, 273
<i>Lawyer Disciplinary Board v. Allen,</i> 479 S.E.2d 317 (W.Va. 1996)	89, 97, 99, 172, 262
<i>Lawyer Disciplinary Board v. Frame,</i> 479 S.E.2d 676 (W.Va. 1996)	85, 93, 98, 105, 463
<i>Lawyer Disciplinary Board v. Hatcher,</i> 483 S.E.2d 810 (W.Va. 1997)	86, 95, 104, 172, 464, 473, 474
<i>Lawyer Disciplinary Board v. Kupec,</i> No. 23011 (W.Va. 4/2/98)	92, 93, 97, 99, 103, 174, 463
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<i>Office of Disciplinary Counsel v. Karr,</i> No. 23238 (W.Va. 2/15/96)	82, 93, 95, 104, 140, 172
<i>Roark v. Lawyer Disciplinary Board,</i> 495 S.E.2d 552 (W.Va. 1997)	87, 93-95, 103, 105, 106, 172, 464
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<i>State ex rel. Amy M. v. Kaufman</i> , 470 S.E.2d 205 (W.Va. 1996)	14, 59, 71, 270, 465
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<i>State ex rel. Eads v. Duncil</i> , 474 S.E.2d 534 (W.Va. 1996)	432, 433, 435, 559, 561
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<i>State ex rel. Hall v. Schlaegel</i> , No. 24581 (W.Va. 4/2/98)	157, 162, 558, 561
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<i>State ex rel. Jones v. Trent,</i> 490 S.E.2d 357 (W.Va. 1997)	122, 156, 192, 225, 461
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<i>State ex rel. Osborne v. Kirby,</i> No. 23982 (W.Va. 7/11/97)	121, 154, 271, 453
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