

**VOLUME VIII
OF THE
WEST VIRGINIA
CRIMINAL LAW DIGEST**

July 1998 through December 2000



**PREPARED BY:
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CRIMINAL LAW RESOURCE CENTER
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INTRODUCTION

This is Volume VIII of the WEST VIRGINIA CRIMINAL LAW DIGEST and contains cases issued by the West Virginia Supreme Court of Appeals from July 1998 through December 2000. Indexed in Volume VIII are cases affecting areas in which Public Defender Services is authorized to provide legal assistance: criminal, juvenile, child abuse and neglect, contempt, mental hygiene matters, extradition and appeals from or post-conviction challenges to the final trial of an eligible proceeding.

Volume VIII is divided into different topics and is cross-indexed throughout according to the issues discussed by the Court. In briefing the cases, every attempt has been made to be faithful to the language of the Court. Nonetheless, any summary of a case is not intended to be used as a substitute for a thorough reading of the case. It should be noted as well that slip opinions may be revised before they are published and the cases may be subject to rehearing petitions. It is always safest to check with the Office of the Clerk of the Supreme Court of Appeals regarding the status of recently decided cases before relying on them for authority.

We welcome any comments or suggestions on this publication as well as any ideas you may have regarding other ways in which the Resource Center may assist you. If you detect an error in this publication, need additional copies or are interested in previously issued volumes of the Criminal Law Digest, contact Iris Brisendine, Criminal Law Resource Center at:

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ABUSE AND NEGLECT

Abandonment

In re Emily and Amos B., ___ W.Va. ___, 540 S.E.2d 542 (2000)
No. 26915 (Davis, J.)

See ABUSE AND NEGLECT Improvement period, Commencement, (p. 17) for discussion of topic.

State ex rel. W.Va. Department of Health and Human Resources v. Hill,
207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

See ABUSE AND NEGLECT Termination of parental rights, Disposition hearing, (p. 45) for discussion of topic.

Burden of proof

In re Jeffries, 204 W.Va. 360, 512 S.E.2d 873 (1998)
No. 25198 (Starcher, J.)

Couple seeking to adopt 2 ½-year-old child of unwed mother (who consented to adoption) alleged that father had abandoned the child because he failed to support, visit or communicate with the child. Father appeared and denied abandoning the child, insisting that he had been unable to locate her and that he did not know he could provide support. The circuit court found that the father did not know where the child resided and was prevented from contacting her and, therefore, had not abandoned her. The prospective adoptive parents who had been joined as necessary parties appealed.

Syl. pt. 1 - “A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.” Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d 798 (1969).

ABUSE AND NEGLECT

Abandonment (continued)

Burden of proof (continued)

In re Jeffries, (continued)

Syl. pt. 2 - For a natural parent to avoid the presumption that he or she has abandoned a child who is over the age of 6 months, *W.Va. Code*, 48-4-3c(a)(1) [1997] requires the parent to financially support the child, within the means of the parent. Furthermore, *W.Va. Code*, 48-4-3c(a)(2) [1997] requires the parent to visit or otherwise communicate with the child when the parent: (1) knows where the child resides; (2) is physically and financially able to do so; and (3) is not prevented by the person or authorized agency having the care or custody of the child. If there is evidence in a subsequent adoption proceeding that the natural parent has both failed to financially support the child, and failed to visit or otherwise communicate with the child in the 6 months preceding the filing of the adoption petition, a circuit court shall presume the child has been abandoned.

Syl. pt. 3 - “The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof.” Syllabus Point 6, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

The Court held that the trial court had clearly erred in its factual finding that the father did not know where the child resided because the record contained no evidence of efforts by the father to find the child and, therefore, the father did not rebut the presumption of abandonment established by *W.Va. Code* § 48-4-3c(a).

Reversed and remanded.

ABUSE AND NEGLECT

Abused child defined

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998)
No. 25160 (Maynard, J.)

In the course of proceedings held on DHHR's petition alleging that a 5-month-old child had been abused, the testimony from doctors indicated that the infant's broken leg was probably the result of abuse and not the result of falling off the couch as the parents had alleged. No satisfactory explanation for the child's broken ribs was given. The court found that the child was neglected because he was abused while in the parents custody, although who inflicted the abuse was never established. The lower court denied DHHR's request for termination of parental rights and ordered reunification of the child with his parents. The foster parents, who had temporary custody, appealed.

Syl. pt. 2 - "Implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or 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." Syllabus Point 1, *W.Va. Dept. of Health & Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (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. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syllabus Point 3, *In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997).

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 the face of knowledge of the abuse, have taken no action to identify the abuser." Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

ABUSE AND NEGLECT

Abused child defined (continued)

In re Harley C., (continued)

The Court first discussed the differences between an abused child and a neglected one and noted that caselaw had expanded the statutory definition of an abused child to include situations in which a child's health is harmed or threatened but where the parent or custodian fails to cooperate in identifying the perpetrator of the abuse. See *W.Va. DHHR v. Doris S.* Because the parents' testimony about how the injuries occurred conflicted with the medical testimony and because the parents apparently never attempted to identify the abuser, the Court held that the lower court erred in not adjudicating the child as having been abused and in failing to terminate the parents' custody.

Reversed and remanded.

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

See ABUSE AND NEGLECT Proof of, (p. 37) for discussion of topic.

Child abuse creating risk of injury

Risk defined

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

The appellant was convicted by jury trial of child abuse by creating a risk of injury, destruction of property and fleeing from an officer. Errors asserted on appeal included: insufficient evidence to establish child abuse as a matter of law; improper denial of a suppression motion involving statements the appellant made while in custody; and improper admission of rebuttal testimony.

ABUSE AND NEGLECT

Child abuse creating risk of injury (continued)

Risk defined (continued)

State v. Snodgrass, (continued)

Syl. pt. 2 - “Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.” Syllabus Point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).

Syl. pt. 3 - The offense of child abuse creating a risk of injury as set forth in *W.Va. Code* § 61-8D-3(c) (1996) is committed when any person inflicts upon a minor physical injury by other than accidental means and by such action, creates a substantial possibility of serious bodily injury or death.

The Court reversed and remanded this case on another issue and felt compelled to provide guidance on remand regarding the meaning of the term “risk” as it applies to the offense of child abuse creating a risk of bodily injury since the term is not statutorily defined. The Court held that risk for purposes of *W.Va. Code* § 61-8D-3 (c) means the substantial possibility of loss or injury. The remaining assignments were not discussed.

Reversed and remanded on other grounds.

Concurrent placement/reunification

Planning

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

ABUSE AND NEGLECT

Constitutionality of statute

Void for vagueness

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

Appellants, husband and wife, were convicted of intentional neglect of an incapacitated adult pursuant to *W.Va. Code* § 9-6-15. Appellants had left the wife's father alone for several days during extremely hot weather. The elderly Mr. Carlson, then 78 years of age, was found sitting on the porch in his underwear, a robe and boots. He had urinated and defecated on himself. Later examination showed maggot larvae in his pubic region and raw, irritated and swollen feet. His toenails were approximately one inch in length and had begun to curl up under his toes.

Nearby stood a bucket into which Mr. Carlson had apparently urinated. When asked why he was not seated in a more comfortable chair nearby he claimed he was not allowed to sit there. A search of the house found no edible food. Dirty dishes and pans were piled on counters and the sink. There were no working light bulbs in the kitchen, dining room and on the porch. Mr. Carlson was found to be dehydrated and suffering from pneumonia and dementia.

The appellants set forth numerous arguments including the statute is unconstitutionally vague and there is insufficient evidence to support the conviction.

Syl. pt. 1- "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syllabus Point 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 2 - "Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute." Syllabus Point 2, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

ABUSE AND NEGLECT

Constitutionality of statute (continued)

Void for vagueness (continued)

State v. Bull, (continued)

Syl. pt. 3 - “Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.” Syllabus Point 3, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 4 - “ ‘When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.’ Point 3 Syllabus, *Willis v. O’Brien*, 151 W.Va. 628, 153 S.E.2d 178 [1967]. “Syllabus Point 4, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 5 - *W.Va. Code*, 9-6-15(b) [1984] is not unconstitutionally vague and violative of *U.S. Const.* amend. XIV, Sec. 1, or of *W.Va. Const.* art. III, Sec. 10 or Sec. 14.

Syl. pt. 9 - “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 the statutory language of *W.Va. Code* § 9-6-15(b) was not vague or overbroad when read in conjunction with the pertinent definition of “incapacitated adult”, “abuse”, “neglect”, “emergency” and “emergency situation” supplied in § 9-6-1. The Court also found the evidence sufficient to prove the necessary elements of the crime and noted that an abused adult need not be under a legal guardianship for the crime to occur.

Affirmed.

ABUSE AND NEGLECT

Definitions

Abused child

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998)
No. 25160 (Maynard, J.)

See ABUSE AND NEGLECT Abused child defined, (p. 3) for discussion of topic.

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

See ABUSE AND NEGLECT Proof of, (p. 37) for discussion of topic.

Due to parent's terminal illness

In the Interest of Micah Alyn R., 202 W.Va. 400, 504 S.E.2d 635 (1998)
No. 24878 (Maynard, J.)

In July 1996, a mother with AIDS voluntarily placed her HIV-inflicted 2 ½-year-old child in foster care because of her inability to properly care for the child. She later sought full custody, but in July 1997, DHHR filed for termination of parental rights based on abuse and neglect (the father's rights had been terminated on grounds of abandonment). The allegations included instances in which the mother had shaken and slapped the child and in which she had failed to administer the child's medications. A support specialist testified that the mother had shown improvement over the preceding 3 months, and the mother herself said that she was feeling much stronger and able to care for the child. The guardian *ad litem* recommended deferring a decision on termination of parental rights, and visitation was continued under the placement agreement. At a hearing 3 months later, DHHR alleged that the mother was having problems complying with the visitation and treatment plan and recommended termination of her rights subject to post-termination visitation. After hearing, the court found that the child was abused and neglected, terminated the mother's parental rights and granted post-termination visitation. She appealed claiming insufficiency of

ABUSE AND NEGLECT

Due to parent's terminal illness (continued)

In the Interest of Micah Alyn R., (continued)

evidence of abuse and neglect noting that the incidents of abusive behavior were minimal and committed while she was under a great deal of stress. As to neglect, at the time of the hearing she was administering the medications correctly.

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).

Syl. pt. 2 - When a parent is unable to properly care for a child due to the parent's terminal illness, so that conditions which would constitute neglect of the child occur and continue to be threatened, termination of parental rights, without consent, is contrary to public policy, even though there is no reasonable likelihood that the conditions of neglect will be substantially corrected in the future. In such circumstances, a circuit court should ordinarily postpone or defer any decision on termination of parental rights. However, such deference on the parental rights termination issue does not require a circuit court to postpone or defer decisions on custody or other issues properly before the court. In fact, efforts towards locating prospective adoptive parents shall be made so long as every measure is taken to foster and maintain the bond and ongoing relationship between the parent and child.

ABUSE AND NEGLECT

Due to parent's terminal illness (continued)

In the Interest of Micah Alyn R., (continued)

The Court first found that the evidence supported the finding that the child was abused and neglected under *W.Va. Code* § 49-1-3(a)(1) & 49-1-3(g)(1)(A) (1994). Moreover, the Court agreed with the lower court that there was “no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected.” *W.Va. Code* § 49-6-5(b). Nevertheless, the Court noted the real reason for the problems lay in the mother's and child's medical conditions and that termination was too drastic a measure. Therefore, the Court formulated the following rule: If a parent is unable to care for a child “due to the parent's terminal illness” such that that inability causes and threatens what could be deemed neglect, termination of parental rights is nevertheless contrary to public policy even if there is no reasonable likelihood that the conditions of neglect will be substantially corrected in the future. Courts faced with such situations should defer termination rulings while efforts at locating prospective adoptive parents goes forward. Foster parents' right should be protected as well through the development of permanency plans.

Reversed and remanded.

Evidence sufficient to terminate improvement period

Standard of proof

DHHR ex rel. McClure v. Daniel B., 203 W.Va. 254, 507 S.E.2d 132 (1998) No. 25002 (Per Curiam)

See ABUSE AND NEGLECT Improvement period, Termination, (p. 24) for discussion of topic.

ABUSE AND NEGLECT

Findings required

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

See ABUSE AND NEGLECT Proof of, (p. 37) for discussion of topic.

Foster parents

Right to visitation

In the Matter of Zachery William R., 203 W.Va. 616, 509 S.E.2d 897 (1998) No. 25012 (Per Curiam)

Parents' custodial rights were terminated and the child was placed in foster care. After 3 years with the foster family, adoption proceedings were almost completed when a teenage acquaintance of the family accused them of sexually abusing her. DHHR ended the foster placement and placed the child elsewhere. The accuser later retracted the accusations, and the foster parents then petitioned for visitation with the child. The lower court concluded that visitation would not be in the child's best interest and denied the petition. The former foster parents, joined by the guardian *ad litem*, appealed.

Syl. pt. 1 - "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 interests of the child." Syllabus Point 11, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996).

ABUSE AND NEGLECT

Foster parents (continued)

Right to visitation (continued)

In the Matter of Zachery William R., (continued)

Syl. pt. 2 - “The best interests of a child are served by preserving important relationships in that child’s life.” Syllabus Point 2, *State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 429 S.E.2d 492 (1993).

Syl. pt. 3 - “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.” Syllabus Point 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

The Court explained that a child has a right to continued contact with persons with whom the child has formed an emotional bond. In this case, the Court concluded that the lower court did not have a sufficient record to deny visitation to the former foster parents. The Court also expressed concern with the lower court’s failure to look into the retracted allegations of sexual abuse. [NOTE: Although the right here is the child’s rather than the foster parents’, no mention is made of the effect, if any, of the guardian *ad litem*’s decision to join in the foster parents’ appeal.]

Reversed and remanded with directions.

Role in proceedings

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998)
No. 25160 (Maynard, J.)

Five-month-old was injured and diagnosed with a rotational fracture of the femur; x-rays revealed two healing broken ribs. DHHR filed a petition alleging that the child was abused, and the child was immediately removed

ABUSE AND NEGLECT

Foster parents (continued)

Role in proceedings (continued)

In re Harley C., (continued)

from the home and placed with foster parents. At the adjudicatory hearing, the parents admitted neglect but denied physically abusing the child. DHHR sought termination of parental rights because no explanation had been given for the child's injuries. The court found no evidence to terminate parental rights and ordered that the child be reunified with his parents. The court also granted the foster parents' motion to intervene in accordance with the rule set forth in *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996), but denied them access to the court file. The Supreme Court granted the foster parents' emergency petition to stay the lower court's reunification order and granted them full access to the court file. The foster parents then appealed the dispositional order.

Syl. pt. 1 - Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions.

The parents and the guardian *ad litem* argued that the foster parents had no standing to bring the appeal. The Court disagreed, noting that the order allowing them the right to intervene in the action below conferred on the foster parents all the rights and responsibilities of any other party to the action.

Reversed.

In re Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999) No. 26639 (Davis, J.)

In mid-1998, DHHR removed 3 children from their home on allegations of neglect and placed them in foster care with the appellants. During a subsequent improvement period, one of the children confided to her foster mother that she had been sexually abused by her biological mother during a supervised visit; the incident was reported by appellants to DHHR. That

ABUSE AND NEGLECT

Foster parents (continued)

Role in proceedings (continued)

In re Michael Ray T., (continued)

child's behavior in the foster home had been troublesome -- the appellants had requested that she be placed in respite care -- and worsened after the alleged abuse. Visitation with the mother was temporarily suspended, but problems continued between the child and the foster parents, and DHHR warned that the children might have to be removed if the situation did not improve.

After visitation with the mother was re-instituted, other instances of abuse were reported. Believing that DHHR was taking inadequate action, the appellants wrote to several government officials (e.g., Senator Rockefeller) outlining the allegations. Citing a breach of confidentiality and a concern for the overall situation in the foster home, the children were removed from the appellants' home and placed elsewhere. The appellants then moved to intervene in the ongoing abuse and neglect hearings and to have the children returned. The motion to intervene was denied by the circuit court on the ground that only foster parents with physical custody have such a right. The court also refused to consider the request that the children be returned, noting that the proper vehicle would be a petition for a writ of mandamus. Appellants appealed.

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." Syllabus point 1, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996).

ABUSE AND NEGLECT

Foster parents (continued)

Role in proceedings (continued)

In re Michael Ray T., (continued)

Syl. pt. 2- “ ‘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. point 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).” Syllabus point 3, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996).

Syl. pt. 3- “Cases involving children must be decided not just in the context of competing sets of adults’ rights, but also with a regard for the rights of the child(ren).” Syllabus point 7, *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995).

Syl. pt. 4- Former foster parents do not have standing to intervene in abuse and neglect proceedings involving their former foster child(ren).

Syl. pt. 5- A circuit court may, in its sound discretion, permit former foster parents to present evidence regarding their former foster child(ren) to assist the court in assessing the best interests of such child(ren) subject to an abuse and neglect proceeding.

Syl. pt. 6 - The responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record presented to this Court.

Syl. pt. 7 - “ ‘ “In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.” Syllabus Point 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971).’ Syl. pt. 1, *Shackleford v. Catlett*, 161 W.Va. 568, 244 S.E.2d 327 (1978).” Syllabus point 3, *Voelker v. Frederick Business Properties Co.*, 195 W.Va. 246, 465 S.E.2d 246 (1995).

ABUSE AND NEGLECT

Foster parents (continued)

Role in proceedings (continued)

In re Michael Ray T., (continued)

The Court affirmed. In *In re Jonathan G.*, the Court held that *current* foster parents could participate in abuse and neglect hearings to provide the court with pertinent information, but the level and type of participation was left to the circuit court. Declaring that the situation presented in the instant appeal, that of *former* foster parents seeking a role in the abuse hearings, to be one of first impression, the Court first held that such persons had no standing to participate or intervene (the terms are used interchangeably). The basis of this decision is the need for the quick resolution of neglect proceedings and a recognition that the focus of such hearings is the welfare of the children, not the rights of the various adults involved. Despite the lack of standing, the Court went on to evaluate whether the denial of the appellants' intervention motion was an abuse of discretion. Recognizing that former foster parents could have relevant information to assist the court in deciding neglect cases, the Court held that they *may* (as was done in this case) appear for the purpose of providing such information without being allowed to intervene completely.

The Court also noted that the appellants might have other vehicles by which they could contest the DHHR's removal of the children from their home, e.g., mandamus or habeas corpus. The Court then went on to discuss the appellants' contention that the circuit court erred in refusing their motion for custody. Instead of merely referring to the holding regarding the lack of a right of intervention, the Court cited the lack of a sufficient record regarding the reasons the children were removed from the appellants' home and refused to consider the issue.

Affirmed.

ABUSE AND NEGLECT

Hearing

Required for parental rights termination

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

Improvement period

Commencement

In re Emily and Amos B., ___ W.Va. ___, 540 S.E.2d 542 (2000)
No. 26915 (Davis, J.)

This appeal was brought by the Department of Health and Human Resources (DHHR) to challenge the dispositional order of the circuit court in an abuse and neglect case which denied DHHR's motion to terminate the parental rights of the children's parents and granted each parent a one-year improvement period which was to commence at some future, indeterminate, date.

By previous order, the circuit court adjudicated the children to be abused and neglected after finding that each of the parents had abandoned them. Based on this finding, DHHR was required by law to file a motion to terminate the parental rights of both parents.

The two errors assigned by DHHR were that: 1) a delayed dispositional improvement period is beyond the intent of the law; and 2) DHHR's motion to terminate the parental rights should have been granted.

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

ABUSE AND NEGLECT

Improvement period (continued)

Commencement (continued)

In re Emily and Amos B., (continued)

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 re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).’ Syllabus Point 1, *In re George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).” Syllabus point 1, *In re Travis W.*, 206 W.Va. 478, 525 S.E.2d 669 (1999).

Syl. pt. 2 - “ ‘[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’ Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syllabus point 7, in part, *In re Carlita B.*, 185 W.Va. 613 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 3 - “Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody.” Syllabus point 8, in part, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Syl. pt. 4 - “ ‘ “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. 613 185 W.Va. 613, 408 S.E.2d 365 (1991).’ Syllabus point 3, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996).” Syllabus point 2, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999).

ABUSE AND NEGLECT

Improvement period (continued)

Commencement (continued)

In re Emily and Amos B., (continued)

Syl. Pt. 5 - The commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period.

Syl. pt. 6 - At all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirements provided by *W.Va. Code* § 49-6-2 (1996) (Repl. Vol. 1999), *W.Va. Code* § 49-6-5 (1998) (Repl. Vol. 1999), and *W.Va. Code* § 49-6-12 (1996) (Repl. Vol. 1999).

Syl. pt. 7 - “A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.” Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970).

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 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).” Syllabus point 8, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

The Court agreed with the first assignment of error and held that a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing on which the improvement period is granted.

ABUSE AND NEGLECT

Improvement period (continued)

Commencement (continued)

In re Emily and Amos B., (continued)

Although noting that quick resolution to this case was needed, the Court found that it could not render an opinion regarding the lower court's decision not to terminate parental rights since the appellate record did not contain pertinent transcripts of the proceedings leading up to the dispositional order. Instead, the Court vacated the dispositional order and provided instruction (Syl. pts 7, 8) for the lower court's reconsideration of the matter.

Reversed in part, vacated in part, and remanded.

Extension findings required

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999) No. 25800 (Workman, J.)

After DHHR filed charges of neglect against the mother, the circuit court transferred temporary custody of her child to DHHR. A 60-day improvement period was granted on December 29, 1997. At an adjudicatory hearing 5 weeks later, the mother admitted the charges of neglect. Noting the absence of physical abuse, the court granted a 90-day improvement period during which the mother was to achieve certain goals, e.g., obtain employment and "maintain an alcohol-free environment for the children without negative social behaviors." During the improvement period, she was jailed for 12 days on a petit larceny charge and 17 days for battery and revocation of probation.

At the June 22, 1998 dispositional hearing, the mother moved for a 60-day extension of the improvement period based on her compliance with some of the court-imposed conditions, e.g., attendance at 10 counseling sessions and the commencement (3 weeks earlier) of GED classes. The court denied this motion and terminated the mother's parental rights. The mother appealed based on the denial of an extension of the improvement period as

ABUSE AND NEGLECT

Improvement period (continued)

Extension findings required (continued)

In re Jamie Nicole H., (continued)

well as the trial court's reliance on her failure to substantially or timely meet certain conditions of the improvement period - obtain employment and work toward a GED - because such conditions were irrelevant to her fitness as a parent.

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 re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. pt. 2 - Pursuant to West Virginia Code § 49-6-12(g) (1998), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.

ABUSE AND NEGLECT

Improvement period (continued)

Extension findings required (continued)

In re Jamie Nicole H., (continued)

Syl. pt. 3 - Since the procedural mechanisms for objecting to and modifying a family case plan are clearly in place, a parent cannot wait until the improvement period has lapsed to raise objections to the conditions imposed on him/her. The rules of procedure which govern abuse and neglect proceedings clearly require that a party seeking to modify a family case plan must act promptly and inform the court as soon as possible of the need for modification.

Syl. pt. 4 - “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).

Although the Court held that objections to the plan must be raised during the improvement period and that appellant’s failure to object prior to the appeal foreclosed consideration of any objections to the plan, the Court did assess the reasonableness of the disputed conditions.

Noting that *W.Va. Code* § 49-6-12(g) allows up to a 3-month extension of the improvement period upon a finding that certain conditions have been met, the Court found no abuse of discretion because (1) she had not sought to modify the plan until after the post-adjudicatory period had ended; (2) she had made little effort to comply with the plan; and (3) the GED/employment conditions were not unreasonable under the facts of this case.

ABUSE AND NEGLECT

Improvement period (continued)

Extension findings required (continued)

In re Jamie Nicole H., (continued)

With regard to the disputed conditions, the Court noted that the family case plan had been developed by DHHR with her input and consent and, further, that she made no objection to the plan at the February 2, 1999 adjudicatory hearing. The Court also noted that, while it was unlikely that a court would terminate parental rights solely on the basis of a failure to acquire a GED or adequate housing (footnote 17), the termination was ordered for reasons “far more crucial” to her failure to meet minimal standards for parenting.

The Court, *sua sponte*, noted the virtual absence of evidence in the record of a parent/child emotional bond and the lack of any provision in the trial court’s order for any post-termination relationship. The issue had been raised briefly at the June, 1998, dispositional hearing, and the trial court took the matter under advisement. After being informed by DHHR during oral argument on May 14, 1999, that a hearing on the issue had been scheduled for the following week, the Court found it to be “utterly irresponsible” that a year elapsed without resolution of the issue and remanded with directions to resolve the issue of the post-termination relationship.

The Court also directed the trial court on remand to resolve the case of the parental rights of the biological father of one of the children. The Court emphasized the need to resolve such issues in order to enable DHHR to prepare a “permanency plan.”

Affirmed but remanded with directions.

ABUSE AND NEGLECT

Improvement period (continued)

Termination

DHHR ex rel. McClure v. Daniel B., 203 W.Va. 254, 507 S.E.2d 132 (1998) No. 25002 (Per Curiam)

DHHR petitioned to terminate parental rights on grounds of neglect and abuse, with the crux of the petition being that the parents had essentially abandoned the child to foster care while they engaged in an acrimonious 6 year divorce battle. The court ruled that the father had neglected the child. He immediately moved for a 6-month post-adjudication improvement period, which was granted with conditions that he find housing, attend substance abuse counseling and remain drug/alcohol free. After a review hearing held 3 months later, the guardian and DHHR moved to terminate the improvement period on the grounds of non-compliance with the conditions set by the court, e.g., failure to find adequate housing or to abstain from drugs and alcohol. The court denied the motion, and the guardian *ad litem* appealed. DHHR filed a brief as an appellee supporting the appellant's position.

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).

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

Improvement period (continued)

Termination (continued)

DHHR ex rel. McClure v. Daniel B., (continued)

Although the trial court apparently did not explain its ruling in any great detail, the Court held that the decision to deny the motion to terminate the improvement period was clearly erroneous. The Court explained that *W.Va. Code* §49-6-12(f) mandates that “the court shall forthwith terminate the improvement period” whenever the DHHR demonstrates that the respondent “has failed to participate in any provision of the improvement period. . .”. Here, the father clearly did not adhere with the conditions of the improvement period order.

Reversed and remanded.

Joinder of necessary parties

In the Matter of Tracy C., 205 W.Va. 602, 519 S.E.2d 885 (1999)
No. 25840 & 25841 (Per Curiam)

See ABUSE AND NEGLECT Placement, (p. 29) for discussion of topic.

Medical and school records

Access

West Virginia DHHR v. Clark, ___ W.Va. ___, 543 S.E.2d 659 (2000)
No. 27915 (Per Curiam)

See JUVENILES Medical and school records, Access, (p. 516) for discussion of topic.

ABUSE AND NEGLECT

Modification of case plan

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

Neglect defined

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998)
No. 25160 (Maynard, J.)

See ABUSE AND NEGLECT Abused child defined, (p. 3) for discussion of topic.

Notice

Abandonment

In re Jeffries, 204 W.Va. 360, 512 S.E.2d 873 (1998)
No. 25198 (Starcher, J.)

See ABUSE AND NEGLECT Abandonment, Burden of proof, (p. 1) for discussion of topic.

Out-of-state orders

DHHR ex rel. Hisman v. Angela D., 203 W.Va. 335, 507 S.E.2d 698 (1998) No. 24670 (Per Curiam)

Appellant, an Ohio resident, filed a petition in Ohio in November 1995 seeking custody of an infant that he claimed had been living with him for over a year. A month later, the mother signed a consent to permit appellant to adopt the child, and the Ohio court issued an order placing the child with appellant in anticipation of adoption; this order specifically found that the child was a resident of Ohio. Two months later, the West Virginia DHHR

ABUSE AND NEGLECT

Out-of-state orders (continued)

DHHR ex rel. Hisman v. Angela D., (continued)

filed a neglect and abuse petition against the mother regarding the child, whose whereabouts were unknown, and emergency custody was given to DHHR. (DHHR obtained physical custody a month later when the child's grandmother brought the child to DHHR at the agency's request). Four months later, appellant filed a motion to dismiss the abuse and neglect petition on alleged lack of jurisdiction in West Virginia. The West Virginia court found that Ohio did not exercise jurisdiction consistent with the provisions of the Uniform Child Custody Jurisdiction Act, *W.Va. Code* §§ 48-10-1 *et seq.*, and that jurisdiction was properly in the West Virginia courts. Appeal of the jurisdictional issue was taken.

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." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 2- "Under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. Sec. 1738A (1982), our courts are required to enforce an out-of-state child custody modification decree if: (1) the initial decree was consistent with the act; (2) the court in the first state had jurisdiction under its laws to modify the initial decree; and (3) a child or one of the contestants in such proceeding has remained a resident of the first state." Syl. Pt. 2, *Arbogast v. Arbogast*, 174 W.Va. 498, 327 S.E.2d 675 (1984).

Syl. pt. 3 - "Before an out-of-state child custody decree can be enforced here, it must be demonstrated that the court making the decree had jurisdiction of the parties and of the subject matter of the dispute." Syl. Pt. 3, *Arbogast v. Arbogast*, 174 W.Va. 498, 327 S.E.2d 675 (1984).

Syl. pt. 4 - "The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982), extends full faith and credit principles to child custody decrees and requires every state to enforce sister state custody determinations that are consistent with the act." Syllabus Point 1, *Arbogast v. Arbogast*, 174 W.Va. 498, 327 S.E.2d 675 (1984)." Syl. Pt. 1, *Sheila L. v. Ronald P.M.*, 195 W.Va. 210, 465 S.E.2d 210 (1995).

ABUSE AND NEGLECT

Out-of-state orders (continued)

DHHR ex rel. Hisman v. Angela D., (continued)

Syl. pt. 5 - “The Uniform Child Custody Jurisdiction Act, *W.Va. Code* §§ 48-10-1 to -26 (1986), is premised on the theory that the best interests of a child are served by limiting jurisdiction to modify a child custody decree to the court which has the maximum amount of evidence regarding the child’s present and future welfare.” Syl. Pt. 1, *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990).

Syl. pt. 6 - “Notwithstanding their intent to require states adopting the Uniform Child Custody Jurisdiction Act to recognize custody decrees entered by sister states, the Act’s drafters in no uncertain terms provided jurisdiction to both the original ‘custody court’ and other courts to determine whether modification of the initial custody decree is in the best interest of the child.” Syl. Pt. 2, *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990).

The Court analyzed the UCCJA and its federal counterpart, the Parental Kidnaping Prevention Act (28 USC 1728A), the latter of which was designed to require every state to recognize and enforce custody determinations of other states *if* such determinations were made in conformity with the PKPA. The Court then agreed with the trial court that Ohio had failed to obtain jurisdiction because there was no showing that the child was a resident of Ohio at the time of the Ohio order.

Affirmed.

Petition amendment

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

See ABUSE AND NEGLECT Proof of, (p. 37) for discussion of topic.

ABUSE AND NEGLECT

Placement

In the Matter of Tracy C., 205 W.Va. 602, 519 S.E.2d 885 (1999)
No. 25840 & 25841 (Per Curiam)

In an abuse and neglect proceeding, custody was granted to the child's grandmother despite substantial evidence that such placement was inappropriate because the grandmother had lost custody of all 5 of her children based in part on physical abuse. The DHHR joined the mother in appealing the decision. The guardian *ad litem* supported the trial court's placement decision but asserted error in the trial court's failure to join as necessary parties a child born while this case was pending as well as that child's father.

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 re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

The Court held that the custody decision was clearly erroneous since the preponderance of the evidence did not support placement of the child with the grandmother. The Court directed the lower court on remand to examine the best interests of all of the children and to mandate DHHR develop a plan to transition custody of the child from the grandmother to the mother.

As to the guardian *ad litem's* joinder of parties claim, the Court stated that *W.Va. Code* § 49-6-3(a) (1998) required that the child born while the abuse and neglect proceeding was pending be joined and that *W.Va. Code* § 29-6-19(b) (1992) required joinder of the father of this child.

Reversed and remanded.

ABUSE AND NEGLECT

Plea agreement void against public policy

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

See PLEA AGREEMENT, Limitation on use, When void against public policy, (p. 594) for discussion of topic.

Post-termination parental visitation

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

The M. family had an extensive history with DHHR and other social service agencies. The parents, both retarded, were unable to properly care for the children and their home, their 3 children had been removed from the home on 2 prior occasions and returned after improvement periods. Pursuant to an emergency petition filed by DHHR in August 1998, the children were removed again and placed in foster care. At a December 1998 dispositional hearing, child protective services workers testified about the children's severe behavioral problems and, in particular, the adverse effects of the monthly visitation with their parents following the August removal from the home. A psychologist who had evaluated the children in 1994 testified that the appropriateness of post-termination visitation would depend on the permanency plans -- if adoption was a possibility, then visitation pending adoption was not desirable, though he would not oppose post-adoption visitation; if, on the other hand, permanent foster care was planned, then he believed that specialized care could control the children's adverse reactions to visitation.

Parental rights were terminated by order dated December 29, 1998. The order also found that visitation should not take place pending a custody review scheduled for March 1, 1999. Prior to such hearing, however, the parents appealed the December order denying visitation (the circuit court held the hearing on March 1 but held an order in abeyance pending the outcome of the appeal). The parents did not contest the adjudication of neglect or the termination of parental rights.

ABUSE AND NEGLECT

Post-termination parental visitation (continued)

In re Billy Joe 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 re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

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).

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 - Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive

ABUSE AND NEGLECT

Post-termination parental visitation (continued)

In re Billy Joe M., (continued)

long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement.

Syl. pt. 5 - Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings.

Syl. pt. 6 - A permanency plan for abused and neglected children designating their permanent placement should generally be established prior to a determination of whether post-termination visitation is appropriate.

The Court reversed and remanded with directions to “implement a permanency plan” for the children and to further evaluate the potential for successful post-termination visitation both after the plan was implemented and in the interim. The Court stressed the need for “concurrent planning” in abuse and neglect cases, meaning that DHHR should develop contingency permanent-placement plans at the same time it is attempting to reunify the family so as to maximize the chances for successful placements and to better enable the court to evaluate whether post-termination visitation with the natural parents is desirable. Although post-termination visitation is the right of the child to continue to associate with those with whom the child has developed close emotional ties (footnote 10), the parents are permitted to assert such right themselves despite the termination of their own parental rights.

Reversed and remanded.

ABUSE AND NEGLECT

Prior acts of abuse

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

DHHR sought custody and termination of parental rights of an infant on the day of the child's birth, the grounds being that the mother had previously lost custody of 2 other children as a result of abuse and neglect petitions (one of these resulted in voluntary relinquishment); the father of the newborn had also lost his rights to one of the other children for abuse and neglect (the third child had a different father). DHHR took emergency custody of the child from the hospital when the child was 2 days old, and the court held a hearing 3 days later to examine the merits of this taking and entered an order allowing custody to remain with DHHR pending further hearings. Then next hearing was held 6 weeks later. After this hearing, the court ruled that the prior terminations of custody of the mother's 2 children (and the father's one child) was an insufficient ground for termination in the absence of evidence of neglect or abuse of the newborn. Accordingly, the court returned custody to the mother and dismissed the case. DHHR and the guardian *ad litem* appealed.

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 re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

ABUSE AND NEGLECT

Prior acts of abuse (continued)

In re George Glen B., (continued)

Syl. pt. 2 - Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.

Syl. pt. 3 - “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 re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 4 - When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3)(1998), prior to the lower court’s making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

Syl. pt. 5 - Where an abuse and neglect petition is filed based on prior involuntary termination(s) of parental rights to a sibling, if such prior involuntary termination(s) involved neglect or non-aggravated abuse, the parent(s) may meet the statutory standard for receiving an improvement period with appropriate conditions, and the court may direct the Department of Health and Human Resources to make reasonable efforts to reunify the parent(s) and child. Under these circumstances, the court should give due consideration to the types of remedial measures in which the parent(s) participated or are currently participating and whether the circumstances leading to the prior involuntary termination(s) have been remedied.

ABUSE AND NEGLECT

Prior acts of abuse (continued)

In re George Glen B., (continued)

Syl. pt. 6 - “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 abused 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).

Syl. pt. 7 - “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).

While *W.Va. Code* §49-5-6b(a)(3) requires DHHR to seek termination where a parent’s custodial rights to a sibling have been previously involuntarily terminated, the court must still review whether the problems that led to such prior termination have been remedied by the parent(s). Although an earlier case had held that prior acts of abuse directed toward other children are relevant in such cases and *could* be admitted at the court’s discretion, the Court first found that where a termination is based solely on previous termination of custodial rights to a child’s sibling(s), the lower court *must* allow development of evidence surrounding the prior involuntary termination and of any efforts a parent has taken to remedy the problems leading to such termination. Second, if the prior termination involved neglect or non-aggravated abuse, the court *may* order an improvement period under *W.Va. Code* §49-6-12 (1998) and *may* order DHHR to attempt to reunify parent(s) and child; in the case of aggravated abuse leading to a prior termination, the court “may be justified” in ordering termination outright.

Reversed and remanded with directions.

ABUSE AND NEGLECT

Prior termination of custodial rights

Effect of

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

Evidence required

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

Priority of proceedings

In re Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999)
No. 26639 (Davis, J.)

See ABUSE AND NEGLECT Foster parents, Role in proceedings, (p. 13) for discussion of topic.

Priority status

In re Emily and Amos B., ___ W.Va. ___, 540 S.E.2d 542 (2000)
No. 26915 (Davis, J.)

See ABUSE AND NEGLECT Improvement period, Commencement, (p. 17) for discussion of topic.

ABUSE AND NEGLECT

Proof of

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

Protective service workers visited the home of Emily G. after receiving a call that she might be neglecting her 14-month-old daughter. The workers found a home in disarray, with no running water, no cooking stove and a single kerosene heater perched on a dresser near flammable objects. The workers noticed that the child appeared hungry and was being fed bits of the mother's dinner. The child was also dirty. The workers also expressed concern about the mother's boyfriend, and the mother told them that the boyfriend had been in prison for killing his wife and his cellmate; she had also heard rumors that he was a child molester. The workers visited 2 days later and found no improvement. At this time, the mother admitted that the boyfriend was living with her.

The workers initiated an emergency petition that same day, including an allegation that the mother had lost custody of 2 other children on the grounds of neglect and abuse. The circuit court issued an order giving emergency custody to DHHR.

At the first hearing 2 months later, the mother requested and received a pre-adjudication improvement period. Monitoring and frequent hearings occurred thereafter, and a psychological report opined that the mother had among other problems a severe personality disorder but that she nevertheless might be able to manage an infant with a responsible companion or with supervision. The report concluded that if she did not respond to the requirements of the improvement period, then termination of parental rights should be considered. DHHR and the child advocate's office reported a lack of progress.

A year later, the child's guardian *ad litem* moved for termination of the improvement period. A hearing was held at which the court determined that the child was not neglected within the meaning of *W.Va. Code* §49-1-3(g)(1)(A). In so ruling, the court seemed to focus only on the situation as of the date the DHHR petition was filed. The guardian *ad litem* appealed.

ABUSE AND NEGLECT

Proof of (continued)

State v. Julie G., (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.” Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. pt. 2 - In making a determination of whether a child is an abused and/or neglected child as defined in *W.Va. Code* § 49-1-3 (1994) (Repl. Vol. 1996), a court must consider evidence of a parent’s progress, or lack thereof, during the pre-adjudication improvement period. However, pursuant to *W.Va. Code* § 49-6-2(c) (1996) (Repl. Vol. 1996), such evidence is proper only if it relates back to conditions that existed at the time of the filing of the abuse and/or neglect petition, and that were alleged in such petition. Evidence regarding a parent’s pre-adjudication improvement period may not be used to informally amend a previously-filed petition. The proper method of presenting new allegations to the circuit court is by requesting permission to file an amended petition pursuant to Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

Syl. pt. 3 - ““““*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

ABUSE AND NEGLECT

Proof of (continued)

State v. Julie G., (continued)

this burden.’ Syllabus Point 1, *In 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. 4 - Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

The focus of the Court’s opinion was on the scope of the evidence to be considered in an abuse and neglect proceeding. Although the statute requires that the court’s “findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof” (*W.Va. Code* §49-6-2(c)), the same section also provides that “where relevant, the court shall consider the efforts of the state department to remedy the alleged circumstances...” and “the court shall make a determination based upon the evidence...”. The Court held that facts developed during the improvement period must be considered where relevant; however, to be relevant, such evidence must “relate back to the conditions existing at the time of the filing [of the petition] . . .”. New allegations must be presented by way of an amendment to the petition pursuant to Rule 19 of the Rules of Procedure for Abuse and Neglect Proceedings, and such amendments may be allowed at any time prior to the final adjudicatory hearing provided the adverse party has adequate time to respond.

ABUSE AND NEGLECT

Proof of (continued)

***State v. Julie G.*, (continued)**

In this case, the Court found that the circuit court had improperly limited its focus to the time the petition was filed. The Court reviewed the record itself (including post-petition events) and reversed the lower court's finding that the child was not neglected. It also held that the mother was an abusing parent. [Note: Although the case was remanded for further proceedings, it is not clear what proceedings were envisioned].

Reversed and remanded.

Review of factual findings

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

Standard for review

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

ABUSE AND NEGLECT

Standard for review (continued)

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998)
No. 25160 (Maynard, J.)

See ABUSE AND NEGLECT Abused child defined, (p. 3) for discussion of topic.

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

In the Matter of Tracy C., 205 W.Va. 602, 519 S.E.2d 885 (1999)
No. 25840 & 25841 (Per Curiam)

See ABUSE AND NEGLECT Placement, (p. 29) for discussion of topic.

Discovery in post-conviction *habeas corpus* proceeding

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

Plea agreement

State v. Parr, ___ W.Va. ___, 542 S.E.2d 69 (2000)
No. 27871 (Per Curiam)

See PLEA AGREEMENT No admission of guilt, (p. 596) for discussion of topic.

ABUSE AND NEGLECT

Supervised visitation modification

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

Syl. pt. 2 - “If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without “*credible evidence*” (*Mary D. v. Watt*, 190 W.Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best interests of the children should determine the pace of any visitation modification to assure that the children’s emotional and physical well being is not harmed.” Syllabus Point 4, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

Affirmed in part and remanded with directions.

Termination of parental rights

Abandonment

State ex rel. W.Va. Department of Health and Human Resources v. Hill,
207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

See ABUSE AND NEGLECT Termination of parental rights, Disposition hearing, (p. 45) for discussion of topic.

Adoption or permanent placement following

State v. Tammy R., 204 W.Va. 575, 514 S.E.2d 631 (1999)
No. 25348 (Per Curiam)

Mark J. and Tammy R., the biological parents of Kia, were sentenced to long prison terms for murder (life and 8-10 years, respectively) for which the State sought to terminate their parental rights on grounds of abandon

ABUSE AND NEGLECT

Termination of parental rights (continued)

Adoption or permanent placement following (continued)

State v. Tammy R., (continued)

ment. Although a hearing on the termination was held on March 13, 1998, the final written order was not filed until July 14, 1998. The parents were not permitted to participate in the final dispositional hearing held on June 22, 1998 at which the child's permanent placement was decided. As recommended by DHHR and Kia's guardian *ad litem*, the court ordered that the child be placed in permanent foster care with her grandmother.

In her appeal of the placement order, the mother complained about having been prohibited from participating in the dispositional hearing. She also contended that the grandmother was not fit and, in any event, an adoptive home should be preferred to placement with a family member.

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, *Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. pt. 2 - "In determining the appropriate permanent out-of-home placement of a child under *W.Va. Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody,

ABUSE AND NEGLECT

Termination of parental rights (continued)

Adoption or permanent placement following (continued)

State v. Tammy R., (continued)

care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found." Syllabus point 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998).

In a finding not reflected in a syllabus point, the Court determined that the biological mother had a right to participate in the dispositional hearing under *W.Va. Code* § 49-6-2(c) as a party because the order terminating her parental rights was not entered until after the hearing. The Court, however, determined that the error was harmless because the circuit court was aware of "all the material evidence" that the mother wanted to introduce at the placement hearing. The Court then fully addressed the merits of the mother's objection to the placement despite the intervening termination order.

With regard to the mother's objection to the placement, the Court first noted that under *State v. Michael M.*, an adoptive home is the preferred placement where parental rights have been terminated for abuse or neglect. However, the Court found that the trial court had "considered adoption" but had determined that the only other adoptive home available for Kia was with a couple that the mother knew wished to adopt Kia (and who had been deemed suitable by DHHR). Although these prospective adoptive parents had had a relationship with the child's parents, they had not had one with the child. In affirming the trial court's foster care placement with the grandmother, the Court recognized the long relationship between her and the child, and it held that such placement was "in the child's best interests."

Affirmed.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Disposition hearing

State ex rel. W.Va. Department of Health and Human Resources v. Hill, 207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

This writ of mandamus was sought to compel a circuit judge to conduct disposition hearings in six child abuse and neglect cases involving 11 children so as to resolve the parental right status of seven fathers who allegedly abandoned their children. The rights of the mothers had already been terminated. In four of the abuse and neglect cases, the circuit judge fashioned an “agreed” order signed by counsel for the father, the prosecuting attorney and the guardian *ad litem* for the children which terminated the parental rights of the “unknown” father without a disposition hearing. [Since the validity of this practice was not raised, the Court addressed it in footnote 4.] In the fifth abuse and neglect case, the court terminated the parental rights of the mother (and her boy friend) but the parental rights of the father were not addressed. In the final abuse and neglect case, paternity had not been established but the mother alleged who the father was. The record showed that the judge entered an order before dismissing this latter case stating that the issue of the father’s parental rights was a moot point that would be considered at the adoption hearing.

Syl. pt. 1 - “ ‘ ‘ ‘A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal 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 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).” Syllabus point 2, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995).’ Syllabus point 2, *Ewing v. Board of Education of Summers County*, 202 W.Va. 228, 503 S.E.2d 541 (1998).” Syl. Pt. 1, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999).

ABUSE AND NEGLECT

Termination of parental rights (continued)

Disposition hearing (continued)

State ex rel. W.Va. Department of Health and Human Resources v. Hill,
(continued)

Syl. pt. 2 - “In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* are made, prior to terminating an individual’s parental rights.” Syl. Pt. 2, *In re Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998).

Syl. pt. 3 - In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 (1999) and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

The Court granted the writ and ordered the circuit judge to hold a proper disposition hearing in each case in order to address and resolve the issue of whether the father’s parental rights should be terminated.

Writ granted as moulded.

Evidence of prior abuse

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Evidentiary standards

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

Hearing required

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

By order entered on June 9, 1997, the court awarded DHHR temporary custody of appellant's children. A preliminary hearing was waived and an adjudicatory hearing held November 7, 1997. The court found the children were neglected and directed DHHR to retain custody.

An improvement period was granted and a case plan was developed, dated December 10, 1997. Although a hearing was set for April 10, 1998, the parties advised the court that an agreement was reached wherein appellant stipulated that she had failed to comply with the terms of the improvement period and that the mother was incapable of parenting the children. The court adopted the "findings" and ordered termination on May 19, 1998.

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. 1, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998).

ABUSE AND NEGLECT

Termination of parental rights (continued)

Hearing required (continued)

In re Beth, (continued)

Syl. pt. 2 - In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* are made, prior to terminating an individual's parental rights.

The Court noted that abuse and neglect proceedings involve two phases: the first is to determine if the abuse or neglect has occurred (*W.Va. Code* 49-6-2(c)); the second is to decide on placement of the children (*W.Va. Code* 49-6-5 (1996)). In the second phase the parent is entitled to "a meaningful opportunity to be heard..." *W.Va. Code* § 49-6-2(c). See also, *West Virginia Department of Welfare ex rel. Eyster v. Keese*, 171 W.Va. 1, 297 S.E.2d 200 (1982). The parties cannot waive a hearing.

Reversed and remanded.

Intellectual capacity of parents

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

Parent's terminal illness

In the Interest of Micah Alyn R., 202 W.Va. 400, 504 S.E.2d 635 (1998)
No. 24878 (Maynard, J.)

See ABUSE AND NEGLECT Due to parent's terminal illness, (p. 8) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Plea agreement void against public policy

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

See PLEA AGREEMENT, Limitation on use, When void against public policy, (p. 594) for discussion of topic.

Prior acts of abuse

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

Prior termination of parental rights

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

This appeal involves a case previously reviewed by the Court regarding procedures surrounding the termination of parental rights of a child who was born to a couple after their parental rights to other children were terminated (voluntarily and involuntarily) as a result of abuse and neglect proceedings. The Court had found in the earlier appeal that the trial court erred in dismissing the abuse and neglect petition without allowing an evidentiary hearing to occur and the case was remanded for further hearing. [See case cite in Syl. pt. 4 below.]

As a result of the hearings on remand, the circuit court concluded that there was no evidence of abuse or neglect of George and that the appellees had substantially remedied the circumstances surrounding the termination of their parental rights of George's siblings. Nonetheless, the court also concluded that an improvement period and gradual transition of George to

ABUSE AND NEGLECT

Termination of parental rights (continued)

Prior termination of parental rights (continued)

In re George Glen B., Jr., (continued)

the custody of the parents was necessary and placed full responsibility for this to occur with a private agency while leaving the technical custody of George with DHHR until the transition was completed. The adjudicatory hearing was set for 90 days from the temporary custody order. During the course of the proceedings, the circuit court chided DHHR for being overly zealous by filing the abuse and neglect petition and taking emergency custody of George.

The issues appealed by DHHR in the present case include whether: DHHR has a statutory duty to file abuse and neglect petitions or join in other actions to terminate parental rights when involuntary termination of parental rights to other children has previously occurred; a circuit court has the authority to order an improvement period *de facto*; the circuit court may delegate its responsibility to develop and monitor a plan for gradual transition of custody; and there is any time limit within which an adjudicatory hearing must be held after any temporary custody order is entered.

Syl. pt. 1 - When the parental rights of a parent to a child have been involuntarily terminated, *W.Va. Code*, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.

Syl. pt. 2 - While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in *W.Va. Code*, 49-6-5b(a)(3) [1998], the Department must still comply with the evidentiary standards established by the Legislature in *W.Va. Code*, 49-6-2 [1996] before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in *W.Va. Code*, 49-6-3 [1998] before a court may grant the Department the authority to take emergency, temporary custody of a child.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Prior termination of parental rights (continued)

In re George Glen B., Jr., (continued)

Syl. pt. 3 - “Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.” Syllabus Point 2, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

Syl. pt. 4 - “When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court’s making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).” Syllabus Point 4, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

Syl. pt. 5- The presence of one of the factors outlined in *W.Va. Code*, 49-6-5b(a)(3) [1998] merely lowers the threshold of evidence necessary for the termination of parental rights. *W.Va. Code*, 49-6-5b(a)(3) [1998] does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to *W.Va. Code*, 49-6-2 [1996].

ABUSE AND NEGLECT

Termination of parental rights (continued)

Prior termination of parental rights (continued)

In re George Glen B., Jr., (continued)

Syl. pt. 6 - “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.” Syllabus Point 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Syl. pt. 7 - When a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren).

The Court reviewed the provisions of *W.Va. Code* § 49-6-5b (a)(3) and concluded that DHHR has a statutory duty to file petitions or join existing proceedings to terminate parental rights when an involuntary termination of parental rights to siblings has occurred in prior proceedings. Such actions included taking emergency custody of children under such circumstances. The Court found that this statutory provision does not eliminate the duty of DHHR, it merely lowers the threshold of evidence necessary to terminate parental rights under such circumstances. In this case, the record reflected that there was substantial evidence showing remedy of the problems which existed when the appellees’ parental rights were previously terminated.

It was found that the *de facto* establishment of an improvement period for reunification purposes was within the discretion of the trial court and that the statutory provisions set forth in *W.Va. Code* § 49-6-5 were not invoked in cases in which abuse and neglect was not found. However, the trial court went too far when it delegated all reunification responsibilities to a private agency. The Court reiterated that the burden of crafting a plan for gradual transition of custody lies with the court and cannot be delegated and directed the circuit court to act immediately to develop and oversee a concrete plan

ABUSE AND NEGLECT

Termination of parental rights (continued)

Prior termination of parental rights (continued)

In re George Glen B., Jr., (continued)

to expeditiously reunify George with his parents. Finally, the Court found the circuit court was incorrect in setting the adjudicatory hearing beyond the 30-day period required by Rule 25 of the Rules of Procedure for Child Abuse and Neglect.

Affirmed in part; reversed in part and remanded.

Standard for review

State v. Tammy R., 204 W.Va. 575, 514 S.E.2d 631 (1999)
No. 25348 (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Adoption or permanent placement following, (p. 42) for discussion of topic.

Transition plan

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

Visitation following

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Visitation following (continued)

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

When against public policy

In the Interest of Micah Alyn R., 202 W.Va. 400, 504 S.E.2d 635 (1998)
No. 24878 (Maynard, J.)

See ABUSE AND NEGLECT Due to parent's terminal illness, (p. 8) for discussion of topic.

Third party

Evidentiary standard

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

During the pendency of a contested divorce, the father attempted to obtain temporary custody of the couple's 5-year-old child on the ground of alleged sexual abuse of the child by the mother's boyfriend. The lower court did not find that a preponderance of the evidence showed that the child had been sexually abused. The father and the child's guardian *ad litem* appealed claiming that the lower court incorrectly applied a preponderance of evidence standard and was clearly wrong in not finding that the child had been sexually abused.

Note: (No syllabus point on this issue.)

ABUSE AND NEGLECT

Third party (continued)

Evidentiary standard (continued)

Sharon B.W. v. George B.W., (continued)

The Court explained that the “any credible evidence” standard for review of sexual abuse allegations as set forth in *Mary D. v. Watt* applies to cases where a visiting or custodial parent is accused of such abuse. The Court found that the preponderance of evidence standard was properly used to determine if the mother’s boyfriend as a third party had sexually abused the child.

Affirmed in part and remanded with directions.

ABUSE OF DISCRETION

Standard for review

Bail exoneration

State v. Hedrick, 204 W.Va. 547, 514 S.E.2d 397 (1999)
No. 25360 (Davis, J.)

See BAIL Exoneration, Standard for review, (p. 197) for discussion of topic.

Competency evaluation prior to trial

State ex rel. Webb v. McCarty, ___ W.Va. ___, 542 S.E.2d 63 (2000)
No. 27765 (Per Curiam)

See COMPETENCY Evaluation prior to trial, (p. 210) for discussion of topic.

Contempt

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See CONTEMPT Civil, For invoking right against self-incrimination, (p. 224) for discussion of topic.

Cross-examination

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See CROSS-EXAMINATION Limitations, (p. 230) for discussion of topic.

ABUSE OF DISCRETION

Standard for review (continued)

Cross-examination (continued)

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

Discovery

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

Disqualification of counsel

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000)
No. 26851 (Davis, J.)

See ATTORNEYS Conflict of interest, Prior representation of opposing party witness in related matter, (p. 161) for discussion of topic.

Evidentiary rulings

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

ABUSE OF DISCRETION

Standard for review (continued)

Evidentiary rulings (continued)

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

ABUSE OF DISCRETION

Standard for review (continued)

Evidentiary rulings (continued)

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

Incarcerated witnesses testifying in shackles and/or prison clothing

State v. Allah Jamaal W., ___ W.Va. ___, 543 S.E.2d 282 (2000)
No. 27770 (Davis, J.)

See WITNESSES Incarcerated, Attire and restraints, (p. 807) for discussion of topic.

ABUSE OF DISCRETION

Standard for review (continued)

Instructions

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See INSTRUCTIONS Standard for review, (p. 461) for discussion of topic.

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

ABUSE OF DISCRETION

Standard for review (continued)

Instructions (continued)

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

Jury bias

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999)
No. 26438 (Per Curiam)

See JURY Peremptory strike, Use in lieu of cause, (p. 498) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See JURY Bias, Test for, (p. 494) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See JURY Bias, Test for, (p. 495) for discussion of topic.

Limitation on evidence of mistaken identity

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See DEFENSES Mistaken identity, (p. 243) for discussion of topic.

ABUSE OF DISCRETION

Standard for review (continued)

Mistrial for manifest necessity

State ex rel. Bailes v. Jolliffe, ___ W.Va. ___, 541 S.E.2d 571 (2000)
No. 27912 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 554) for discussion of topic.

Photographic array

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

Plea agreement

State v. Sears, ___ W.Va. ___, 542 S.E.2d 863 (2000)
No. 27766 (Starcher, J.)

See PLEA AGREEMENT Basis to accept or reject, (p. 588) for discussion of topic.

Specific instructions

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

AGGRAVATED ROBBERY

Sufficiency of evidence

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Aggravated robbery, (p. 756) for discussion of topic.

AGREEMENT ON DETAINERS

Dismissal of indictment when trial not held in 180 days

Federal statutory construction

State v. Somerlot, ___ W.Va. ___, 544 S.E.2d 52 (2000)
No. 27907 (Scott, J.)

The appellant tendered a conditional guilty plea to the charge of conspiracy to commit a felony, reserving for appeal the issue of denial of a motion to dismiss the indictment. The appellant claims that the indictment should have been dismissed pursuant to the Interstate Agreement on Detainers Act because the State failed to try him within 180 days from the date the prosecutor received his request for disposition of the charges.

Syl. pt. 1 - “The failure of the State to bring the accused to trial within 180 days following the State’s receipt of the petitioner’s notice of imprisonment and request for final disposition of the case, pursuant to the Agreement on Detainers, *W.Va. Code*, 62-14-1, article III (a) and article V(c) [1971], mandates the dismissal of the indictments pending against the petitioner, where there was no motion for continuance made by the State and the delay was not reasonable or necessary.” Syllabus, *State ex rel. Modie v. Hill*, 191 W.Va. 100, 443 S.E.2d 257 (1994).

Syl. pt. 2 - The 180-day time period set forth in Article III(a) of the Interstate Agreement on Detainers Act, West Virginia Code §§ 62-14-1 to -7 (2000), does not commence until the prisoner’s request for final disposition of the charges against him has actually been delivered to the court and to the prosecuting officer of the jurisdiction that lodged the detainer against him.

Since the resolution of the issue was deemed to be a federal question subject to federal construction and interpretation, the Court examined federal law. In so doing, the Court relied on *Fex v. Michigan*, 507 U.S. 43 (1993) to arrive at the holding that actual delivery of the request for disposition of charges to both the prosecutor and the court are necessary to trigger the commencement of the relevant 180-day period. The record reflected that the request for final disposition was actually delivered to the prosecuting attorney’s office, however, the same was not sent to the lower court. Consequently, the Court found no error in the lower court’s ruling.

Affirmed.

AGREEMENT ON DETAINERS

Waiver of time limits

State v. Onapolis, ___ W.Va. ___, 541 S.E.2d 611 (2000)
No. 27060 (Maynard, C. J.)

The appellant appealed the lower court's refusal to dismiss the indictment against her based on the argument that she was not brought to trial within the time limits of the Agreement on Detainers (*W.Va. Code* § 62-14-1 *et seq.*). She further argued that the time constraints in the statute were not affected by the continuance she had sought and obtained.

Syl. pt. 1 - "The Agreement on Detainers, to which West Virginia is a party, is activated when a detainer is lodged against a prisoner in another party jurisdiction. *W.Va. Code*, 62-14-1 *et seq.*" Syllabus Point 1, *Moore v. Whyte*, 164 W.Va. 718, 266 S.E.2d 137 (1980).

Syl. pt. 2 - A defendant waives his or her rights under the Agreement on Detainers, *W.Va. Code* §§ 62-14-1 to 7, when the defendant or defendant's counsel requests or agrees to a trial date outside the statutory time limits.

Syl. pt. 3 - The time limits contained in the Agreement on Detainers, *W.Va. Code* §§ 62-14-1 to 7, are tolled when a defendant or defense counsel requests or agrees to a delay in the defendant's trial. The days which elapse between the request or agreement and the trial are tolled.

The Court defined the issues as determining which article of the statute governs when the statutory time period begins to run, and what effect a defendant's motion for a continuance has on the statutory time limits. However, the Court found there was no need to resolve the first issue since the appellant requested a continuance before the time expired under either Article III (when the prosecutor received the request for disposition) or Article IV (when the appellant arrived in the state) of the statute. In accord with *New York v. Hill*, 528 U.S. 110 (2000), the Court held that defendants waive their rights under the detainer statute when either the defendant or the defendant's counsel requests or agrees to a trial date outside the statutory time limits. The Court further held that the detainer statute time limits are tolled between when the request or agreement causing such delay occurs and the date of trial.

Affirmed.

AIDING AND ABETTING

Concerted action

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Principal in first and second degree defined

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

ALLOCUTION

Right to

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required,
(p. 715) for discussion of topic.

APPEAL

Abuse and neglect

Standard for review

DHHR ex rel. McClure v. Daniel B., 203 W.Va. 254, 507 S.E.2d 132 (1998) No. 25002 (Per Curiam)

See ABUSE AND NEGLECT Improvement period, Termination, (p. 24) for discussion of topic.

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998) No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999) No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999) No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998) No. 25160 (Maynard, J.)

See ABUSE AND NEGLECT Abused child defined, (p. 3) for discussion of topic.

APPEAL

Abuse and neglect (continued)

Standard for review (continued)

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

In the Matter of Tracy C., 205 W.Va. 602, 519 S.E.2d 885 (1999)
No. 25840 & 25841 (Per Curiam)

See ABUSE AND NEGLECT Placement, (p. 29) for discussion of topic.

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

See ABUSE AND NEGLECT Proof of, (p. 37) for discussion of topic.

State v. Tammy R., 204 W.Va. 575, 514 S.E.2d 631 (1999)
No. 25348 (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Adoption or permanent placement following, (p. 42) for discussion of topic.

Abuse of discretion

Plea agreement

State v. Sears, ___ W.Va. ___, 542 S.E.2d 863 (2000)
No. 27766 (Starcher, J.)

See PLEA AGREEMENT Basis to accept or reject, (p. 588) for discussion of topic.

APPEAL

Aggravated robbery

Sufficiency of evidence

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Aggravated robbery, (p. 756) for discussion of topic.

Agreement on Detainers

Standard for review

State v. Somerlot, ___ W.Va. ___, 544 S.E.2d 52 (2000)
No. 27907 (Scott, J.)

See AGREEMENT ON DETAINERS Dismissal of indictment when trial not held in 180 days, Federal statutory construction, (p. 64) for discussion of topic.

Bail exoneration

Standard for review

State v. Hedrick, 204 W.Va. 547, 514 S.E.2d 397 (1999)
No. 25360 (Davis, J.)

See BAIL Exoneration, Standard for review, (p. 197) for discussion of topic.

APPEAL

Clearly erroneous standard

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

Conclusions of law

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

Confession of error

State v. Nett, 207 W.Va. 410, 533 S.E.2d 43 (2000)
No. 26963 (Per Curiam)

See JURY Bias, (p. 493) for discussion of topic.

Continuance beyond term of indictment

Standard for review

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review, (p. 795) for discussion of topic.

APPEAL

Discretion

Evidentiary rulings

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

APPEAL

Discretion (continued)

Evidentiary rulings (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Discretion to review

Questions not presented below

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

APPEAL

Discretion to review (continued)

Questions not presented below (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Evidence

Disclosure standards

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See EVIDENCE Impeachment of witness, Prior statements, (p. 343) for discussion of topic.

Discretion of court

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

APPEAL

Evidence (continued)

Discretion of court (continued)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

APPEAL

Evidence (continued)

Discretion of court (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Evidence admissibility

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

APPEAL

Evidentiary rulings

Standard for review

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

Failure to inform defendant of right to testify

Harmless error

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

Failure to object

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

During trial for attempt to injure by poison, the prosecutor made statements during opening and closing arguments that the defendant did not object to at trial but which she raised as error on appeal.

APPEAL

Failure to object (continued)

State v. Davis, (continued)

Syl. pt. 10 - “If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks.” Syllabus Point 5, in part, *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987).

Syl. pt. 11 - “Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.” Syllabus Point 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945).

Without setting forth the prosecutor’s statements the Court held that failure to object at trial waived the right to object later on appeal. In a footnote, the Court declined to subject the claim to plain error review, noting only that the statements in question did not warrant use of the plain error doctrine.

Affirmed.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

Improper remarks of prosecutor

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

The appellant was convicted of the felony offense of obtaining money by false pretenses. The offense involved a driveway repaving scheme.

APPEAL

Failure to object (continued)

Improper remarks of prosecutor (continued)

State v. Blankenship, (continued)

One challenge to the conviction was that the trial court erred by not granting a motion for a mistrial based on improper remarks made by the prosecutor during closing argument.

Syl. pt. 7 - “Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a . . . [forfeiture] of the right to raise the question thereafter in the trial court or in the appellate court.” Syllabus point 1, in part, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995).

The Court found that the trial court correctly ruled that the appellant’s failure to object to the statements before the jury retired for deliberations served as a forfeiture of the right to have the problem corrected.

Affirmed.

Plain error review

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

See PLAIN ERROR Alternate juror participating in deliberations, (p. 581) for discussion of topic.

Failure to preserve issue

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

APPEAL

Failure to preserve issue (continued)

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

The appellant was a teacher who was convicted of three counts of third degree sexual assault of a student. During the course of the jury trial, the State called other students as witnesses to explain similar experiences that they had with the teacher. One of these witnesses had made a pretrial statement regarding counseling she had attended, however the trial court precluded the defense from questioning the witness regarding her mental health history. The appellant claimed the trial court erred by incorrectly limiting his ability to challenge the credibility of this witness.

Syl. pt. 10 - "If a party offers evidence to which an objection is sustained, that party, in order to preserve the rejection of the evidence as error on appeal, must place the rejected evidence on the record or disclose what the evidence would have shown, and the failure to do so prevents an appellate court from reviewing the matter on appeal." Syl. Pt. 1, *Horton v. Horton*, 164 W.Va. 358, 264 S.E.2d 160 (1980).

Syl. pt. 11 - "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syl. Pt. 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

Syl. pt. 12- "The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in the case of manifest abuse or injustice." Syl. pt. 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956)." Syllabus, *State v. Wood*, 167 W.Va. 700, 280 S.E.2d 309 (1981).

APPEAL

Failure to preserve issue (continued)

State v. McIntosh, (continued)

Syl. pt. 13 - “Evidence of psychiatric disability may be introduced when it affects the credibility of a material witness’ testimony in a criminal case. Before such psychiatric disorder can be shown to impeach a witness’ testimony, there must be a further showing that the disorder affects the credibility of the witness and that the expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder.” Syl. Pt. 5, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).

The record reflected that the mental health history the appellant was restricted from using to challenge the credibility of a witness was not preserved for appeal since the appellant did not vouch the record nor request an *in camera* examination, leaving the Court with no basis on which to evaluate whether the trial court erred in excluding this evidence. Nonetheless, the Court went on to discuss the law and review standards applicable to cross-examination and concluded that had the issue been properly preserved, there was no manifest abuse or injustice found in the trial court’s ruling on the matter.

Affirmed.

False evidence

Effect of

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

APPEAL

Findings of fact

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See APPEAL Standard for review, Findings of fact, (p. 118) for discussion of topic.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See MIRANDA WARNINGS, When required, (p. 552) for discussion of topic.

Forfeiture in relation to illegal drug transaction

Sufficiency of evidence

State v. Burgraff, ___ W.Va. ___, 542 S.E.2d 909 (2000)
No. 27716 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Forfeiture in relation to illegal drug transaction, (p. 768) for discussion of topic.

APPEAL

Harmless error

Failure to inform defendant of right to testify

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

False evidence

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

Standard for review

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

Indictment

Amendment to

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See INDICTMENT Amendment to (p. 429) for discussion of topic.

APPEAL

Indictment (continued)

Standard for review

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See INDICTMENT Sufficiency of, Neglect of incapacitated adult, (p. 439)
for discussion of topic.

Sufficiency of

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See INDICTMENT Sufficiency of, Neglect of incapacitated adult, (p. 439)
for discussion of topic.

Indictment delay

Standard for review

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See INDICTMENT Due process, Delay in indicting, (p. 432) for discussion
of topic.

Interpretation of statute

Standard for review

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514)
for discussion of topic.

APPEAL

Instructions

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

Erroneous

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See INSTRUCTIONS Erroneous, Effect of, (p. 455) for discussion of topic.

Inference of malice

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

Standard for review

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See INSTRUCTIONS Standard for review, (p. 461) for discussion of topic.

APPEAL

Instructions (continued)

Standard for review (continued)

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See INSTRUCTIONS Erroneous, Effect of, (p. 455) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

APPEAL

Instructions (continued)

Standard for review (continued)

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

Sufficiency of

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

Invited error

Effect of

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

APPEAL

Invited error (continued)

Evidence admissibility

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Jury bias

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999)
No. 26438 (Per Curiam)

See JURY Peremptory strike, Use in lieu of cause, (p. 498) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See JURY Bias, Test for, (p. 494) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See JURY Bias, Test for, (p. 495) for discussion of topic.

Juvenile

Pretransfer hearing waiver

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

See JUVENILES Plea agreement, Pretransfer hearing waiver, (p. 521) for discussion of topic.

APPEAL

Juvenile delinquency

Standard for review

State v. Allah Jamaal W., ___ W.Va. ___, 543 S.E.2d 282 (2000)
No. 27770 (Davis, J.)

See WITNESSES Incarcerated, Attire and restraints, (p. 807) for discussion of topic.

Juvenile plea

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

Mistrial denial

Standard for review

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 556) for discussion of topic,

Moot questions

Capable of repetition

State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865
(2000) No. 27061 (Davis, J.)

See TERMINATION OF PARENTAL RIGHTS Due process requirements, Incarcerated parent's attendance at dispositional hearing, (p. 786) for discussion of topic.

APPEAL

Nonjurisdictional issue (continued)

Not reviewed below (continued)

State v. Sapp, (continued)

Syl. pt. 5 - “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.” Syllabus Point 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Syl. pt. 6 - “It is improper for a prosecutor in this State to “[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of the accused . . .” ABA Code DR7-106(C)(4) in part.’ Syllabus Point 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).” Syllabus Point 3, *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987).

Syl. pt. 7 - “Instructions that are repetitious or are not supported by the evidence should not be given to the jury by the trial court.” Syllabus Point 7, *State v. Cokeley*, 159 W.Va. 664, 226 S.E.2d 40 (1976).

Syl. pt. 8 - “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).” Syllabus Point 1, *State v. McGuire*, 200 W.Va. 823, 490 S.E.2d 912 (1997).

APPEAL

Nonjurisdictional issue (continued)

Not reviewed below (continued)

State v. Sapp, (continued)

The record reflected that defense counsel did not object to the admission of the autopsy photograph and the Court observed that the photo showed a cleaned wound without blood, gore or contorted facial expressions and as such its admission did not skew the fairness of the trial.

The appellant's contention that the trial court permitted an improper attack of his character by allowing evidence of other crimes (i.e., illegal possession and use of drugs) was also found to be without merit. The Court found that no objection was raised at trial. Even so, the trial court gave a limiting instruction to the jury cautioning them that the alleged possession and use of drugs was admitted solely for the purpose of proving motive or intent.

The insufficiency of the jury panel or the jury selection process were not questioned at trial and the Court summarily dismissed the issues saying that they had no legal or factual merit. Likewise, no merit was found in the allegation that the prosecutor expressed his personal opinion as to the credibility of the appellant and his guilt or innocence during closing argument. No objection was raised at the time the remarks were made and the Court found that the record disclosed that the appellant was not prejudiced by the remarks which only involved statements regarding evidence presented at trial.

The Court also found no basis for the stale prosecution claim. No objection was raised at trial on this issue and the appellant contributed to any delay by not objecting to a continuance request of the State and by subsequently seeking a continuance on his own motion.

APPEAL

Nonjurisdictional issue (continued)

Not reviewed below (continued)

State v. Sapp, (continued)

The error asserted regarding the jury instructions was that the jury charge did not include an instruction on: 1) voluntary and involuntary manslaughter; and voluntary intoxication in relation to provocation. The Court first noted that the appellant's defense at trial was that someone else committed the murder. No evidence was presented at trial that could support the necessary elements of voluntary or involuntary manslaughter. As to the voluntary intoxication and provocation instructions, the record revealed that defense counsel agreed to the removal of these instructions based on the testimony presented at trial and further agreed that the entire jury charge was proper.

Affirmed.

Plain error

Alternate juror participating in deliberations

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

See PLAIN ERROR Alternate juror participating in deliberations, (p. 581) for discussion of topic.

Defined

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

APPEAL

Plain error (continued)

Defined (continued)

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

Defendant was convicted of second-degree murder. At trial, he testified that he was squirrel hunting when he mistook “glimpses of red” for a squirrel and shot the victim from 50 yards away. In response to a direct question from the prosecutor, the pathologist testified that the “manner of death” was a homicide; defendant’s counsel made no objection. On appeal, he argued that the doctor’s opinion that the manner of death was homicide went to an ultimate issue and constituted plain error.

Syl. pt. 1 - “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. 2 - “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.” Syllabus Point 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The Court found no error, plain or otherwise. First, the 1985 adoption of Rule 704 of the Rules of Evidence permits an opinion “otherwise admissible” to embrace an ultimate issue. Second, “homicide” is simply the killing of another and is not, without more, a crime. The Court recounted the doctor’s testimony and pointed out that the term “homicide” was used to differentiate the “manner of death” from other manners of death, i.e., suicide, accidental or natural.

Affirmed.

APPEAL

Plain error (continued)

Evidentiary rulings

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

Forfeiture of right and waiver of error distinguished

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

See PLAIN ERROR Alternate juror participating in deliberations, (p. 581) for discussion of topic.

Generally

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153) for discussion of topic.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

APPEAL

Plain error (continued)

Instructions

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

Plea agreements

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153)
for discussion of topic.

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of
topic.

Standard for review

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of
topic.

APPEAL

Plain error (continued)

Standard for review (continued)

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See APPEAL Plain error, Defined, (p. 94) for discussion of topic.

Juvenile delinquency

State v. Allah Jamaal W., ___ W.Va. ___, 543 S.E.2d 282 (2000)
No. 27770 (Davis, J.)

See WITNESSES Incarcerated, Attire and restraints, (p. 807) for discussion of topic.

***Sua sponte* recognition of**

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

Plea agreement breach

Standard for review

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

APPEAL

Plea agreement breach (continued)

Standard for review (continued)

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

Plea agreement when guilt not admitted

Standard for review

State v. Parr, ___ W.Va. ___, 542 S.E.2d 69 (2000)
No. 27871 (Per Curiam)

See PLEA AGREEMENT No admission of guilt, (p. 596) for discussion of topic.

Prejudicial joinder

Standard for review

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See JOINDER Prejudicial, Discretion of court, (p. 474) for discussion of topic.

Preserving issue for appeal

City of Philippi v. Weaver, ___ W.Va. ___, 540 S.E.2d 563 (2000)
No. 27259 (Per Curiam)

See APPEAL Time for filing, (p. 148) for discussion of topic.

APPEAL

Preserving issue for appeal (continued)

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See APPEAL Failure to object, Improper remarks of prosecutor, (p. 78) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See APPEAL Failure to object, (p. 77) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

APPEAL

Preserving issue for appeal (continued)

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

Prosecutorial misconduct

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Reference to sexual history, (p. 635) for discussion of topic.

APPEAL

Prosecutorial misconduct (continued)

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 632) for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 634) for discussion of topic.

Standard for review

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Reference to sexual history, (p. 635) for discussion of topic.

APPEAL

Prosecutorial misconduct (continued)

Standard for review (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 632) for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 634) for discussion of topic.

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

APPEAL

Question of law

Standard for review

DHHR ex rel. Hisman v. Angela D., 203 W.Va. 335, 507 S.E.2d 698 (1998) No. 24670 (Per Curiam)

See ABUSE AND NEGLECT Out-of-state-orders, (p. 26) for discussion of topic.

West Virginia DHHR v. Clark, ___ W.Va. ___, 543 S.E.2d 659 (2000) No. 27915 (Per Curiam)

See JUVENILES Medical and school records, Access, (p. 516) for discussion of topic.

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999) No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999) No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000) No. 26573 (Scott, J.)

See MAGISTRATE COURT When criminal proceeding initiated, (p. 538) for discussion of topic.

APPEAL

Question of law (continued)

Standard for review (continued)

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See INDICTMENT Sufficiency of, Neglect of incapacitated adult, (p. 439) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See QUESTION OF LAW Standard for review, (p. 654) for discussion of topic.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See MIRANDA WARNINGS, When required, (p. 552) for discussion of topic.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

APPEAL

Question of law (continued)

Standard for review (continued)

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See INDICTMENT Dismissal of, Appeal by State, (p. 430) for discussion of topic.

Removal of public official

Proof required

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

APPEAL

Reversal

Erroneous instruction

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See INSTRUCTIONS Erroneous, Effect of, (p. 455) for discussion of topic.

Ruling granting prohibition relief

Standard for review

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514)
for discussion of topic.

Search and seizure

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)
No. 26568 (Scott, J.)

See SEARCH AND SEIZURE Plain view, (p. 689) for discussion of topic.

Standard for review

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See SEARCH AND SEIZURE Standard for review, (p. 691) for discussion
of topic.

APPEAL

Search and seizure (continued)

Standard for review (continued)

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

Sentence reconsideration

Standard for review

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

Sentence reduction

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

Sentencing

Standard for appellate review

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

APPEAL

Sentencing (continued)

Standard for review

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

Standard for review

Abuse and neglect

DHHR ex rel. McClure v. Daniel B., 203 W.Va. 254, 507 S.E.2d 132
(1998) No. 25002 (Per Curiam)

See ABUSE AND NEGLECT Improvement period, Termination, (p. 24)
for discussion of topic.

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing
required, (p. 47) for discussion of topic.

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30)
for discussion of topic.

APPEAL

Standard for review (continued)

Abuse and neglect (continued)

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

In re Harley C., 203 W.Va. 594, 509 S.E.2d 875 (1998)
No. 25160 (Maynard, J.)

See ABUSE AND NEGLECT Abused child defined, (p. 3) for discussion of topic.

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

In the Matter of Tracy C., 205 W.Va. 602, 519 S.E.2d 885 (1999)
No. 25840 & 25841 (Per Curiam)

See ABUSE AND NEGLECT Placement, (p. 29) for discussion of topic.

State v. Julie G., 201 W.Va. 764, 500 S.E.2d 877 (1997)
No. 24580 (Davis, J.)

See ABUSE AND NEGLECT Proof of, (p. 37) for discussion of topic.

APPEAL

Standard for review (continued)

Abuse and neglect (continued)

State v. Tammy R., 204 W.Va. 575, 514 S.E.2d 631 (1999)
No. 25348 (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Adoption or permanent placement following, (p. 42) for discussion of topic.

Abuse of discretion

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999)
No. 26438 (Per Curiam)

See JURY Peremptory strike, Use in lieu of cause, (p. 498) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See CONTEMPT Civil, For invoking right against self-incrimination, (p. 224) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

APPEAL

Standard for review (continued)

Abuse of discretion (continued)

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Hedrick, 204 W.Va. 547, 514 S.E.2d 397 (1999)
No. 25360 (Davis, J.)

See BAIL Exoneration, Standard for review, (p. 197) for discussion of topic.

APPEAL

Standard for review (continued)

Abuse of discretion (continued)

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

APPEAL

Standard for review (continued)

Abuse of discretion (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See JURY Bias, Test for, (p. 494) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See JURY Bias, Test for, (p. 495) for discussion of topic.

APPEAL

Standard for review (continued)

Agreement on Detainers

State v. Somerlot, ___ W.Va. ___, 544 S.E.2d 52 (2000)
No. 27907 (Scott, J.)

See AGREEMENT ON DETAINERS Dismissal of indictment when trial not held in 180 days, Federal statutory construction, (p. 64) for discussion of topic.

Bail exoneration

State v. Hedrick, 204 W.Va. 547, 514 S.E.2d 397 (1999)
No. 25360 (Davis, J.)

See BAIL Exoneration, Standard for review, (p. 197) for discussion of topic.

Child custody

Dale Patrick D. v. Victoria Diane D., 203 W.Va. 438, 508 S.E.2d 375 (1998) No.s 25017 & 25018 (Per Curiam)

See DOMESTIC VIOLENCE Effect on custody disputes, (p. 256) for discussion of topic.

Clearly erroneous

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

APPEAL

Standard for review (continued)

Contempt

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See CONTEMPT Civil, For invoking right against self-incrimination, (p. 224) for discussion of topic.

Continuance beyond term of indictment

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review, (p. 795) for discussion of topic.

Evidence admissibility

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

APPEAL

Standard for review (continued)

Evidence admissibility (continued)

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

Evidentiary rulings

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

APPEAL

Standard for review (continued)

Evidentiary rulings (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

Exclusion of evidence

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See DUE PROCESS Rape shield law, (p. 271) for discussion of topic.

Factual findings

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, "Unit of prosecution" for uttering, (p. 748) for discussion of topic.

APPEAL

Standard for review (continued)

False evidence

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

Final disposition

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering, (p. 748) for discussion of topic.

Findings of fact

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

The appellant was convicted of automobile breaking and entering, grand larceny and conspiracy to commit grand larceny. One of his challenges to the convictions was that there was insufficient factual evidence to support them.

APPEAL

Standard for review (continued)

Findings of fact (continued)

State v. Cottrill, (continued)

Syl. pt. 2 - “A reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice.” Syllabus point 3, *State v. Sprigg*, 103 W.Va. 404, 137 S.E. 746 (1927).

The evidence was sufficient to uphold the convictions under a deferential standard of review.

Affirmed in part, reversed in part, and remanded.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See *MIRANDA WARNINGS*, When required, (p. 552) for discussion of topic.

Forfeiture of a right

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153) for discussion of topic.

APPEAL

Standard for review (continued)

Harmless error

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

Indictment

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See INDICTMENT Sufficiency of, Neglect of incapacitated adult, (p. 439) for discussion of topic.

State v. Duncan, 204 W.Va. 411, 513 S.E.2d 459 (1998)
No. 24485 (Per Curiam)

See INDICTMENT Incorrect counts, Prejudicial to defendant, (p. 435) for discussion of topic.

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

APPEAL

Standard for review (continued)

Indictment delay

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See INDICTMENT Due process, Delay in indicting, (p. 432) for discussion of topic.

Interpretation of statute

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514) for discussion of topic.

Instructions

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See INSTRUCTIONS Standard for review, (p. 461) for discussion of topic.

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

APPEAL

Standard for review (continued)

Instructions (continued)

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See INSTRUCTIONS Erroneous, Effect of, (p. 455) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

Jury bias

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999)
No. 26438 (Per Curiam)

See JURY Peremptory strike, Use in lieu of cause, (p. 498) for discussion of topic.

APPEAL

Standard for review (continued)

Jury bias (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See JURY Bias, Test for, (p. 494) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See JURY Bias, Test for, (p. 495) for discussion of topic.

Jury verdict

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

Syl. pt. 1 - “A reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice.” Syllabus point 3, *State v. Sprigg*, 103 W.Va. 404, 137 S.E. 746 (1927).

Affirmed.

Mistrial denial

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 556) for discussion of topic,

APPEAL

Standard for review (continued)

Photographic array

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

Plea agreement breach

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

Plea agreement when guilt not admitted

State v. Parr, ___ W.Va. ___, 542 S.E.2d 69 (2000)
No. 27871 (Per Curiam)

See PLEA AGREEMENT No admission of guilt, (p. 596) for discussion of topic.

APPEAL

Standard for review (continued)

Prejudicial joinder

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See JOINDER Prejudicial, Discretion of court, (p. 474) for discussion of topic.

Prosecutorial misconduct

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Reference to sexual history, (p. 635) for discussion of topic.

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

APPEAL

Standard for review (continued)

Prosecutorial misconduct (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 632) for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 634) for discussion of topic.

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

Question of law

DHHR ex rel. Hisman v. Angela D., 203 W.Va. 335, 507 S.E.2d 698 (1998) No. 24670 (Per Curiam)

See ABUSE AND NEGLECT Out-of-state-orders, (p. 26) for discussion of topic.

APPEAL

Standard for review (continued)

Question of law (continued)

West Virginia DHHR v. Clark, ___ W.Va. ___, 543 S.E.2d 659 (2000)
No. 27915 (Per Curiam)

See JUVENILES Medical and school records, Access, (p. 516) for discussion of topic.

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999)
No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See MAGISTRATE COURT When criminal proceeding initiated, (p. 538) for discussion of topic.

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

APPEAL

Standard for review (continued)

Question of law (continued)

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See INDICTMENT Sufficiency of, Neglect of incapacitated adult, (p. 439)
for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See QUESTION OF LAW Standard for review, (p. 654) for discussion of
topic.

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering,
(p. 748) for discussion of topic.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See *MIRANDA* WARNINGS, When required, (p. 552) for discussion of
topic.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

APPEAL

Standard for review (continued)

Question of law (continued)

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No. 26194 (Davis, J.)

See INDICTMENT Dismissal of, Appeal by State, (p. 430) for discussion of topic.

Questions not presented below

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

Appellant was charged with the mutually exclusive offenses of sexual assault in the second degree and sexual assault of a wife. The trial court dismissed the second degree sexual assault charge *sua sponte*, but only after the jury had learned of the charge. On appeal, the appellant charged prosecutorial misconduct, arguing that the State knew he was married and that the second degree sexual assault was brought solely to prejudice him before the jury. The State argued on appeal that the error, if any, was harmless.

APPEAL

Standard for review (continued)

Questions not presented below (continued)

State v. Guthrie, (continued)

Syl. pt. 9 - “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 (1974).

The Court refused to address the merits of the issue because the appellant was raising the issue for the first time on appeal. Under the “raise or waive” rule, the Court explained that the appellant should have raised the issue by filing a pretrial motion to dismiss the charge. Having failed to do that, the appellant both invited the error (and any resulting prejudice) and failed to make a record capable of review.

Affirmed.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Rape shield law test

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See DUE PROCESS Rape shield law, (p. 271) for discussion of topic.

APPEAL

Standard for review (continued)

Ruling granting prohibition relief

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514) for discussion of topic.

Search and seizure

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See SEARCH AND SEIZURE Standard for review, (p. 691) for discussion of topic.

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

Sentence reconsideration

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

State v. Shaw, ___ W.Va. ___, 541 S.E.2d 21 (2000)
No. 27471 (Per Curiam)

See SENTENCING Discretion, (p. 704) for discussion of topic.

APPEAL

Standard for review (continued)

Sentence reduction

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

Sentencing

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

State v. Shaw, ___ W.Va. ___, 541 S.E.2d 21 (2000)
No. 27471 (Per Curiam)

See SENTENCING Discretion, (p. 704) for discussion of topic.

Specific instructions

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

APPEAL

Standard for review (continued)

Sufficiency of evidence

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 776) for discussion of topic.

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 776) for discussion of topic.

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See RECEIVING STOLEN PROPERTY Generally, (p. 659) for discussion of topic.

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

APPEAL

Standard for review (continued)

Sufficiency of evidence (continued)

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 758) for discussion of topic.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 766) for discussion of topic.

APPEAL

Standard for review (continued)

Sufficiency of evidence (continued)

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual offenses, (p. 763) for discussion of topic.

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 777) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Aggravated robbery, (p. 756) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Identity of perpetrator, (p. 769) for discussion of topic.

APPEAL

Standard for review (continued)

Sufficiency of evidence (continued)

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To uphold conviction, (p. 783) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 778) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 770) for discussion of topic.

APPEAL

Standard for review (continued)

Sufficiency of evidence (continued)

State v. Williams, ___ W.Va. ___, 543 S.E.2d 306 (2000)
No. 27914 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 780) for discussion of topic.

Sufficiency of evidence for self-defense

State v. Wykle, ___ W.Va. ___, 540 S.E.2d 586 (2000)
No. 27662 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Self-defense, (p. 774) for discussion of topic.

Sufficiency of indictment

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

Suppression motion

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

APPEAL

Standard for review (continued)

Suppression motion (continued)

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See SEARCH AND SEIZURE Standard for review, (p. 691) for discussion of topic.

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Use-immunity

State v. Beard, 203 W.Va. 325, 507 S.E.2d 688 (1998)
No. 24644 (Workman, J.)

See IMMUNITY Subsequent prosecution, Use of testimony, (p. 424) for discussion of topic.

APPEAL

Standard for review (continued)

Venue

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See VENUE Change of, Standard for review, (p. 800) for discussion of topic.

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See VENUE Change of, Standard for review, (p. 800) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See VENUE Change, Standard for review, (p. 801) for discussion of topic.

Voluntariness of confession

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

APPEAL

Standard for review (continued)

Voluntariness of confession (continued)

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

State

Dismissal of indictment

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

See APPEAL Time for filing, (p. 150) for discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See INDICTMENT Dismissal of, Appeal by State, (p. 430) for discussion of topic.

Statutes (also see main heading STATUTORY CONSTRUCTION)

Constitutionality

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

APPEAL

Statutes (continued)

Interpretation of

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See ABUSE AND NEGLECT Child abuse creating risk of injury, Risk
defined, (p. 4) for discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See STATUTES Statutory construction, Generally, (p. 744) for discussion
of topic.

“Unit of prosecution” for uttering

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering,
(p. 748) for discussion of topic.

APPEAL

Sufficiency of evidence

Forfeiture in relation to illegal drug transaction

State v. Burgraff, ___ W.Va. ___, 542 S.E.2d 909 (2000)
No. 27716 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Forfeiture in relation to illegal drug transaction, (p. 768) for discussion of topic.

Homicide

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 758) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 770) for discussion of topic.

APPEAL

Sufficiency of evidence (continued)

Self-defense

State v. Wykle, ___ W.Va. ___, 540 S.E.2d 586 (2000)
No. 27662 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Self-defense, (p. 774) for discussion of topic.

Standard for review

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 776) for discussion of topic.

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 776) for discussion of topic.

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See RECEIVING STOLEN PROPERTY Generally, (p. 659) for discussion of topic.

APPEAL

Sufficiency of evidence (continued)

Standard for review (continued)

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 758) for discussion of topic.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 766) for discussion of topic.

APPEAL

Sufficiency of evidence (continued)

Standard for review (continued)

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual offenses, (p. 763) for discussion of topic.

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 777) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Aggravated robbery, (p. 756) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Identity of perpetrator, (p. 769) for discussion of topic.

APPEAL

Sufficiency of evidence (continued)

Standard for review (continued)

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To uphold conviction, (p. 783) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 778) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 770) for discussion of topic.

APPEAL

Sufficiency of evidence (continued)

Standard for review (continued)

State v. Williams, ___ W.Va. ___, 543 S.E.2d 306 (2000)
No. 27914 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 780) for discussion of topic.

Sufficiency of indictment

Standard for review

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

Suppression motion

Standard for review

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See SEARCH AND SEIZURE Standard for review, (p. 691) for discussion of topic.

APPEAL

Suppression motion (continued)

Standard for review (continued)

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Time for filing

City of Philippi v. Weaver, ___ W.Va. ___, 540 S.E.2d 563 (2000)
No. 27259 (Per Curiam)

This is an appeal of a conviction for first-offense driving under the influence (DUI) following a jury trial in a municipal court. The trial was recorded on video tape.

The appeal was not timely filed. It appears that the errors assigned were: permitting a juror to be prompted during jury polling; allowing crass remarks to be made by the prosecutor; letting a non-lawyer preside at the trial; not being afforded a *de novo* appeal in circuit court; unreliability of the instrument used to record the appellant's breath sample; the video taped record was indecipherable; and counsel at trial was ineffective.

APPEAL

Time for filing (continued)

City of Philippi v. Weaver, (continued)

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.’ Syllabus Point 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. 2 - “A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.” Syl. Pt. 1, *Maples v. West Virginia Dept. of Commerce, Div. of Parks and Recreation*, 197 W.Va. 318, 475 S.E.2d 410 (1996).

Syl. pt. 3 - “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.” Syl. Pt. 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The Court first concluded that the appeal should not be considered because it was not filed timely. It then briefly examined the errors raised, found that the appellant failed to preserve any substantive matters for appeal and upheld the lower court’s decision.

Affirmed.

APPEAL

Time for filing (continued)

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1998)
No. 25826 (McGraw, J.)

By order entered July 16, 1998, the lower court dismissed one count of an indictment prior to trial on the ground that the indictment failed to properly allege an element of the offense. On August 13, 1998, the State filed its petition for appeal with the circuit court clerk, and the petition and record was received by the Supreme Court of Appeals on September 10, 1998. The defendant argued that the Court had no jurisdiction because the State failed to present its petition to the Supreme Court within 30 days of judgment as required by *W.Va. Code* § 58-5-30, which governs appeals by the State of dismissals of faulty indictments.

Syl. pt. 1 - An appeal pursued by the State under *W.Va. Code* § 58-5-30 (1998) is timely presented to this Court if the petition for appeal is filed with the clerk of the circuit court where the judgment or order being appealed was entered within 30 days following such entry.

The Court held that the State's appeal of a dismissal of an indictment is timely filed when the petition is filed with the circuit court clerk within 30 days of the entry of the dismissal order. How a case is "presented" to the Supreme Court of Appeals is governed by the W.Va. Rules of Appellate Procedure. Rules 4(a) and (b) provide that the petition for an appeal of a circuit court order "*shall be filed in the office of the clerk of the circuit court . . .*" (emphasis in opinion); Rule 37(b)(3) similarly provides that statutorily authorized appeals by the State are initiated by filing a petition for appeal with the circuit court clerk.

In addition to noting that "presenting" a petition to the Supreme Court of Appeals is not necessarily the same as "filing" with the Supreme Court Clerk, the Court noted that *W.Va. Code* § 58-5-30 also provides that *other* provisions of article 5, chapter 58 apply to appeal petitions under that section, and that *W.Va. Code* § 58-5-3 and 6 refer to filing "in accordance with the rules of appellate procedure . . .".

Reversed and remanded.

APPEAL

Unpreserved error

Plain error review

State v. Coleman, ___ W.Va. ___, 542 S.E.2d 74 (2000)
No. 27807 (Per Curiam)

See INSTRUCTIONS Driving under the influence, *Prima facie* evidence of intoxication, (p. 454) for discussion of topic.

Unpreserved issue

Plain error

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

Use-immunity

Standard for review

State v. Beard, 203 W.Va. 325, 507 S.E.2d 688 (1998)
No. 24644 (Workman, J.)

See IMMUNITY Subsequent prosecution, Use of testimony, (p. 424) for discussion of topic.

APPEAL

Venue

Standard for review

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See VENUE Change of, Standard for review, (p. 800) for discussion of topic.

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See VENUE Change of, Standard for review, (p. 800) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See VENUE Change, Standard for review, (p. 801) for discussion of topic.

Voluntariness of confession

Standard for review

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

APPEAL

Voluntariness of confession (continued)

Standard for review (continued)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Waiver of error

Contrasted with forfeiture of a right

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

Two individuals other than the appellant were interviewed by police as part of a murder investigation and both had supplied information about the condition of the victim's body that had not been revealed to the public. One of the individuals implicated the appellant in the murder, and the other admitted that he had helped dispose of the body. All three were indicted for murder. At a hearing on the State's notice of intent to use the statements at the appellant's trial (under the Rule 804(b)(3) penal interest exception to the hearsay rule) the appellant's counsel expressly stated on the record that he had no objection to the statements and that he believed that the statements helped his case. At the appellant's trial, in which neither of the co-defendants testified but at which the appellant did testify and denied committing the murder, the statements were introduced, and again the appellant's counsel stated that he did not object to their introduction. Appellant was convicted and on appeal raised the introduction of the statements as violative of Rule 804(b)(3) of the Rules of Evidence and of the Confrontation Clause.

APPEAL

Waiver of error (continued)

Contrasted with forfeiture of a right (continued)

State v. Davis, (continued)

Syl. pt. 1 - “Under the ‘plain error’ doctrine, ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is ‘plain.’ To be ‘plain,’ the error must be ‘clear or obvious.’” Syllabus Point 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Noting that the failure to object to the statements implied that the appellant was proceeding under a plain error analysis, the Court explained the difference between waiver of error and forfeiture of a right in the context of plain error review. Quoting *State v. Miller*, at length, the Court explained that the “knowing and intentional relinquishment or abandonment of a known right” is a waiver, the effect of which cannot be reviewed because it is not error. On the other hand, forfeiture or failing to object “does not ‘extinguish’ the error” and review is permitted, albeit under the plain error analysis outlined in *United States v. Olano*, 507 U.S. 725, 113 S.Ct 770, 123 L.Ed.2d 508 (1993). Here, any error regarding the introduction of the statements was clearly waived and could not form the basis of a reversal of the conviction.

Affirmed.

APPOINTED COUNSEL

Condition of confinement

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999)
No. 25823 (McGraw, J.)

See CONDITION OF CONFINEMENT Appointed counsel, (p. 215) for discussion of topic.

ARREST

Citizen's arrest

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)
No. 25403 (Davis, J.)

See POLICE Territorial jurisdiction, (p. 607) for discussion of topic.

Miranda warnings

When required

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See MIRANDA WARNINGS When required, (p. 553) for discussion of topic.

Misdemeanor

In presence of police officer

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)
No. 25403 (Davis, J.)

See POLICE Territorial jurisdiction, (p. 607) for discussion of topic.

When occurs

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

Appellant, a minor, was a suspect in a shooting death. Two detectives went to his high school and he was called from his classroom to an assistant principal's office. The police had no warrant and, as they conceded at the transfer hearing, they did not have probable cause to arrest the appellant. According to the detectives, they asked the appellant to accompany them to

ARREST

When occurs (continued)

In re James L.P., (continued)

the station house to discuss a matter under investigation and the appellant agreed. At about 10:00 a.m., they drove the appellant to the station house where the appellant signed a “Juvenile Interview and Miranda Rights Form” acknowledging, *inter alia*, that he was not under arrest and that he was “free to leave at any time.” After initially denying any involvement in the shooting, the appellant finally confessed and gave a statement at noon. Appellant’s mother testified that she was contacted by police at 10:45 a.m. and that she arrived at the station house at 11:15 a.m. but was not allowed to see her son until after he had given his statement.

Appellant was transferred to the court’s adult jurisdiction pursuant to *W.Va. Code*, 49-5-10(d)(1), which mandates such a transfer where there is probable cause to believe a juvenile has committed murder.

The trial court rejected the appellant’s argument that the confession was obtained illegally because it was the product of an illegal arrest and the police had failed to follow the statutory “prompt presentment” and “parental notification” requirements of *W.Va. Code* § 49-5-8(c)(1) and (4) (1998). After taking evidence *in camera*, the trial court accepted the detectives’ version of the events surrounding the confession and ruled that the appellant had freely and intelligently waived his “*Miranda* rights”.

The transfer order was appealed.

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).” Syllabus Point 1, *In the Matter of Steven William T.*, 201 W.Va. 654, 499 S.E.2d 876 (1997).

ARREST

When occurs (continued)

In re James L.P., (continued)

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).” Syllabus Point 2, *In the Matter of Steven William T.*, 201 W.Va. 654, 499 S.E.2d 876 (1997).

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 the deferential standard of clearly erroneous.’ Syl. Pt. 2, *State v. Hosea*, 199 W.Va. 62, 483 S.E.2d 62 (1996).” Syllabus Point 3, *In the Matter of Steven William T.*, 201 W.Va. 654, 499 S.E.2d 876 (1997).

Syl. pt. 4 - “ ‘A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of *Miranda* warnings is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and the purpose or flagrancy of the official misconduct.’ Syllabus point 2, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).” Syllabus Point 6, *State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481 (1990).

Syl. pt. 5 - “ ‘An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.’ Syllabus point 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).” Syllabus Point 3, *State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481(1990).

ARREST

When occurs (continued)

In re James L.P., (continued)

The Court focused on the trial court’s ruling that the appellant was not under arrest or in custody prior to making his confession. After extensively reciting the differing versions of events given at the transfer hearing, the Court found that the police version was “credible” and his mother’s “was weak, lacked credibility and persuasive force... .” Therefore, the Court ruled that, in the absence of an arrest, the confession was voluntary and should not be suppressed; concomitantly the “prompt presentment” and “parental notification” requirements both of which are triggered by taking a juvenile into “custody” never came into play here.

In footnote 9, the Court restricted its ruling on the admissibility of the confession to the transfer hearing, expressly leaving open the possibility of a different result in another context.

In dissent, Justice Starcher argued that without evidence that the police affirmatively told the appellant at the school that he was free to leave, the youth was in custody as soon as he left the school with the police because a reasonable high school student in the same situation would not have felt free to leave. Justice Starcher would have remanded to permit further evidence to be taken regarding the events at the school.

Affirmed.

ATTORNEYS

Appeal

Duty to file

Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) No. 23938 (Per Curiam)

See ATTORNEYS Discipline, Failure to repay funds and failure to act, (p. 174) for discussion of topic.

Appointment

Condition of confinement

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999) No. 25823 (McGraw, J.)

See CONDITION OF CONFINEMENT Appointed counsel, (p. 215) for discussion of topic.

Duty to advise client of

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998) No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

Non-eligible forfeiture proceeding

State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998) No. 24582 (Davis, C.J.)

See GUARDIAN AD LITEM Appointment of, Non-eligible forfeiture proceeding, (p. 391) for discussion of topic.

ATTORNEYS

Attorney-client privilege

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel, (p. 180) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998) No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

Conflict of interest

Prior representation of opposing party witness in related matter

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000) No. 26851 (Davis, J.)

This writ of prohibition was filed to challenge the removal based on conflict of interest of a court appointed attorney for a juvenile.

The attorney-petitioner had represented another juvenile who was expected to be called as a witness for the State and testify against the juvenile in the instant case. The petitioner asserted that the juvenile in the instant case had waived any potential conflict of interest.

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).” Syllabus point 1, *State ex rel. Sims v. Perry*, 204 W.Va. 625, 515 S.E.2d 582 (1999).

ATTORNEYS

Conflict of interest (continued)

Prior representation of opposing party witness in related matter (continued)

State ex rel. Michael A.P. v. Miller, (continued)

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.’ Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).” Syllabus point 1, *State ex rel. Youth Services Systems, Inc. v. Wilson*, 204 W.Va. 637, 515 S.E.2d 594 (1999).

Syl. pt. 3 - “ ‘A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer’s representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.’ Syl. Pt. 1, *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (1991).” Syllabus point 2, *Musick v. Musick*, 192 W.Va. 527, 453 S.E.2d 361 (1994).

Syl. pt. 4 - In a juvenile proceeding, the decision whether to grant or deny a motion to disqualify a lawyer due to a conflict of interest is within the sound discretion of the circuit court, even where the interested parties have waived any conflict.

ATTORNEYS

Conflict of interest (continued)

Prior representation of opposing party witness in related matter (continued)

State ex rel. Michael A.P. v. Miller, (continued)

The Court held that the decision regarding disqualification of counsel is within the discretion of the trial court regardless of whether any conflict of interest has been waived by a party.

Writ denied.

Discipline

Admonishment

Lawyer Disciplinary Board v. Kupec, 204 W.Va. 643, 515 S.E.2d 600 (1999) No. 23011 (Per Curiam)

See ATTORNEYS Discipline, Misappropriation of funds, (p. 184) for discussion of topic.

Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999) No. 24221 (Per Curiam)

See ATTORNEYS Discipline, Responsibility as supervisor or partner, (p. 191) for discussion of topic.

Alcohol or drug addiction

Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999) No. 22430 (Per Curiam)

Seven complainants – clients, former clients, doctors of clients or of former clients – testified in a disciplinary hearing about the respondent’s reported failure to act in a timely manner regarding filing pleadings, returning files and improperly retaining funds.

ATTORNEYS

Discipline (continued)

Alcohol or drug addiction (continued)

Lawyer Disciplinary Board v. Hardison, (continued)

Respondent testified about his problems with alcohol and drug addiction and his attempts to control them, including AA participation, anti-addiction medication and psychiatric counseling. He had placed himself on inactive status with the State Bar in November 1996. However, he denied that his alcohol contributed to the conduct giving rise to the complaints.

The Disciplinary Board found violations in some but not all of the cases; the Office of Disciplinary Counsel contested some of the “no violation” findings. Respondent contested only the recommended disposition, which included a 90-day suspension, drug/alcohol screening and an 18-month period of supervised practice when he was reinstated.

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. On the other hand, substantial deference is given to the [Board’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).’ Syllabus Point 2, *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).” Syllabus Point 3, *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995).

Syl. pt. 2 - “The principle purpose of attorney disciplinary proceedings is to safeguard the public’s interest in the administration of justice.” Syllabus Point 3, *Daily Gazette v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705 (1984).

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.” Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 783 (1985).

ATTORNEYS

Discipline (continued)

Alcohol or drug addiction (continued)

Lawyer Disciplinary Board v. Hardison, (continued)

Without ruling on any of the specific findings that were being contested by the Office of Disciplinary Counsel, the Court discoursed extensively on its view that alcoholism was an illness and that respondent's problems were rooted in his addiction. Therefore, the Court fashioned a sanction that was in some ways even more rigorous than the one proposed by the Board. The Court's sanctions included an indefinite suspension under which respondent could apply for reinstatement upon verification of total abstinence for one year.

Suspension of licence with conditions.

Annulment

Lawyer Disciplinary Board v. Askin, 203 W.Va. 320, 507 S.E.2d 683 (1998) No.s 22684 & 23313 (Per Curiam)

See ATTORNEYS Discipline, Criminal contempt, (p. 168) for discussion of topic.

Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) No. 23938 (Per Curiam)

See ATTORNEYS Discipline, Failure to repay funds and failure to act, (p. 174) for discussion of topic.

Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1999) No. 24285 (Workman, C.J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 166) for discussion of topic.

ATTORNEYS

Discipline (continued)

Candor toward tribunal

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

Conviction of crimes

Lawyer Disciplinary Board v. Askin, 203 W.Va. 320, 507 S.E.2d 683 (1998) No.s 22684 & 23313 (Per Curiam)

See ATTORNEYS Discipline, Criminal contempt, (p. 168) for discussion of topic.

Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1999) No. 24285 (Workman, C.J.)

The respondent pleaded guilty to the embezzlement of \$500,000 from a woman for whom he had been appointed committee. State Bar Disciplinary Counsel recommended that the Supreme Court annul his law license under Rule 3.18 of the Rules of Lawyer Disciplinary Procedure. This rule requires that disciplinary counsel prepare formal charges upon receipt of a conviction order concerning a crime “that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer” No mitigation hearing was requested.

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

ATTORNEYS

Discipline (continued)

Conviction of crimes (continued)

Office of Lawyer Disciplinary Counsel v. Jordan, (continued)

Syl. pt. 2 - “Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics’ burden of proving an ethical violation arising from such conviction.” Syl. Pt. 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 3 - “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. 4 - Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: “In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of any aggravating or mitigating factors.”

Syl. pt. 5 - Although Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates the factors to be considered in imposing sanctions after a finding of lawyer misconduct, a decision on discipline is in all cases ultimately one for the West Virginia Supreme Court of Appeals. This Court, like most courts, proceeds from the general rule that, absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.

ATTORNEYS

Discipline (continued)

Conviction of crimes (continued)

Office of Lawyer Disciplinary Counsel v. Jordan, (continued)

Syl. pt. 6 - “Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. Pt. 2, *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970).

Syl. pt. 7 - “ ‘In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.’ Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).” Syl. Pt. 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

The Court accepted the recommendation and annulled the respondent’s license. The Court noted that it was irrelevant whether the respondent committed the crime in the context of a traditional lawyer-client relationship and held that, absent extenuating circumstances, conversion of client funds is grounds for disbarment.

Annulment.

Criminal contempt

Lawyer Disciplinary Board v. Askin, 203 W.Va. 320, 507 S.E.2d 683 (1998) No.s 22684 & 23313 (Per Curiam)

Appellant, a criminal defense attorney, was held in criminal contempt and sentenced to 7 months by a federal district court for refusing to testify in a criminal trial of one of his former clients after he was given immunity. Disciplinary counsel recommended that his license be annulled.

ATTORNEYS

Discipline (continued)

Criminal contempt (continued)

Lawyer Disciplinary Board v. Askin, (continued)

Syl. pt. 1 - “Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics’ burden of proving an ethical violation arising from such conviction.” Syl. Pt. 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

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.” Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 3 - “Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. Pt. 2, *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970).

Syl. pt. 4 - “ ‘In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.’ Syllabus Point 3, *Committee on Legal Ethics v. Walker*, [178 W.Va. 150], 358 S.E.2d 234 (1987).” Syl. Pt. 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

The Court held that the contempt conviction involved a crime reflecting on the appellant’s honesty, trustworthiness and fitness as a lawyer which warranted annulment of his law license. The Court noted that it was irrelevant whether the crime was classified as a misdemeanor or a felony since the sole question is whether the crime reflected on the lawyer’s honesty.

ATTORNEYS

Discipline (continued)

Criminal contempt (continued)

Lawyer Disciplinary Board v. Askin, (continued)

The Court also ordered restitution, payment of costs of the disciplinary proceeding and submission of a plan to properly maintain an IOLTA account if he sought reinstatement.

Annulment.

Dismissal of complaint

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

Engaging in conduct prejudicial to the administration of justice

Lawyer Disciplinary Board v. Artimez, ___ W.Va. ___, 540 S.E.2d 156 (2000) No. 25804 (Davis, J.)

The Lawyer Disciplinary Board (LDB) charged the respondent with having an inappropriate sexual relationship with a client's wife and improperly settling the client's claims of professional misconduct.

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).

ATTORNEYS

Discipline (continued)

Engaging in conduct prejudicial to the administration of justice (continued)

Lawyer Disciplinary Board v. Artimez, (continued)

Syl. pt. 2 - “Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Legal Ethics Committee . . . are to be given substantial consideration.” Syllabus point 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

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.” Syllabus point 3, *Committee on Legal Ethics of The West Virginia State Bar v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

Syl. pt. 4 - “In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.” Syllabus point 3, *Committee on Legal Ethics of The West Virginia State Bar v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

Syl. pt. 5 - “In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform system 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 of The West Virginia State Bar v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), *overruled on other grounds by Committee on Legal Ethics of The West Virginia State Bar v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993).

ATTORNEYS

Discipline (continued)

Engaging in conduct prejudicial to the administration of justice (continued)

Lawyer Disciplinary Board v. Artimez, (continued)

Syl. pt. 6 - Lawyers should not engage in sexual relations with their clients' spouses in any type of case. Since no existing provision of the West Virginia Rules of Professional Conduct specifically prohibits a sexual relationship between a lawyer and his/her client's spouse, we find, at this time, that a lawyer's conduct in this regard is not, in and of itself, a breach of professional responsibility. Nevertheless, a lawyer's sexual relationship with his/her client's spouse may violate other rules of professional conduct.

The Court refused to extend Rule 1.7 (b) or any other Rule of Professional Conduct to include a sexual relationship with anyone other than a client. Even though no sanction could be imposed under the rules for this conduct alone, the Court held that lawyers should not engage in sexual relations with their clients' spouses in any type of case.

The Court did find that the respondent had violated Rule 8.4 (d) of the Rules of Professional Conduct when he drafted and entered into a contract to pay money to his client in return for the client releasing the respondent from civil and professional liability involving the respondent's sexual relationship with the client's wife. The Court also found mitigating factors that influenced their decision regarding sanctions. Since the conduct on which the contract was based was not a clear violation of an existing disciplinary rule, the respondent fully cooperated with the LDB's investigation and the respondent had not had any prior instances of professional misconduct in nearly 20 years of practicing law, the respondent was sanctioned with a public reprimand and costs of the disciplinary proceeding.

Reprimand.

ATTORNEYS

Discipline (continued)

Ex parte communications

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

Failure to abide by client's decision

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

Failure to communicate with client

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

Failure to diligently act

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

ATTORNEYS

Discipline (continued)

Failure to file appeal

Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) No. 23938 (Per Curiam)

See ATTORNEYS Discipline, Failure to repay funds and failure to act, (p. 174) for discussion of topic.

Failure to repay funds and failure to act

Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) No. 23938 (Per Curiam)

Disciplinary board recommended the annulment of the respondent's law license based on 3 incidents:

(1) An expert retained by respondent testified in a 1993 personal injury action in which respondent's client eventually was awarded \$220,000 in 1994. The expert was not paid the full amount of his fee and sued respondent for \$3960. Respondent confessed judgment and immediately paid \$1000. The expert then filed an ethics complaint in late 1996, and respondent finally paid the remainder owed at a 1998 hearing before the Board. It was also discovered that the respondent had over-withheld \$2160 of the \$220,000 judgment and could not account for the discrepancy;

(2) After successfully representing a client in a black lung claim (but before the respondent filed his motion for attorney fees), respondent asked for and received a \$10,000 loan from the client in 1993 that was to be repaid by May 1993. When the loan was not repaid on time, the client filed an ethics complaint in 1995. The loan was repaid in full during a deposition in the ethics proceeding in 1998;

ATTORNEYS

Discipline (continued)

Failure to repay funds and failure to act (continued)

Lawyer Disciplinary Board v. Battistelli, (continued)

(3) Respondent failed to respond to a motion to dismiss in an employment case for 6½ years, and the case was dismissed in 1993. Respondent filed a notice of intent to appeal and informed his client that he intended to appeal. No appeal was ever filed and the client filed an ethics complaint in 1995.

The Board found violations in each case and recommended annulment of the respondent's license.

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

Syl. pt. 2 - " "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. On the other hand, substantial deference is given to the [Board'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. Point 2, *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995)." Syl. Pt. 3, *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995).

ATTORNEYS

Discipline (continued)

Failure to repay funds and failure to act (continued)

Lawyer Disciplinary Board v. Battistelli, (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 of the West Virginia State Bar v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 783 (1985).

Syl. pt. 4 - “Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: ‘In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of any aggravating or mitigating factors.’” Syl. Pt. 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998).

Syl. pt. 5 - “Although Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates the factors to be considered in imposing sanctions after a finding of lawyer misconduct, a decision on discipline is in all cases ultimately one for the West Virginia Supreme Court of Appeals. This Court, like most courts, proceeds from the general rule, that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.” Syl. Pt. 5, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998).

Syl. pt. 6 - “Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. Pt. 2, *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970).

ATTORNEYS

Discipline (continued)

Failure to repay funds and failure to act (continued)

Lawyer Disciplinary Board v. Battistelli, (continued)

Syl. pt. 7 - “ ‘In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.’ Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).” Syl. Pt. 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syl. pt. 8 - “The repayment of funds wrongfully held by an attorney does not negate a violation of a disciplinary rule. Any rule regarding mitigation of the disciplinary punishment because of restitution must be governed by the facts of the particular case.” Syl. Pt. 4, *Committee on Legal Ethics of West Virginia State Bar v. Hess*, 186 W.Va. 514, 413 S.E.2d 169 (1991).

The Court agreed with the Board’s recommendation. The late payment of the expert violated Rule 1.15(9), which requires “prompt” payment of client funds owed a third party. The fact of repayment was not a defense but could be considered as a mitigating factor. With regard to the loan case, the Court found a violation of Rule 1.8(a), which prohibits a lawyer from obtaining a loan from a client without adequate security to protect the client. In so ruling, the Court rejected the respondent’s defense that he was no longer acting as the client’s attorney after the black lung award had been recovered and, therefore, the loan could not be the basis for discipline. The Court discussed the nature of the attorney-client relationship at length, particularly with regard to the “elusive concept” as to when such relationship begins and ends. The Court eschewed any bright line rule, choosing instead to look at such factors as the length of time after conclusion of the case for which the attorney was hired but during which the “influence which the relationship creates” continues and the “personal perception of the client.” With regard to the third incident, the Court found a host of violations, from failing to file the appeal to failing to keep the client informed.

ATTORNEYS

Discipline (continued)

Failure to repay funds and failure to act (continued)

Lawyer Disciplinary Board v. Battistelli, (continued)

The Court also discussed the respondent's argument that the 2-year statute of limitations had passed in some of the alleged violations. In the loan case, although 2 years had passed between the loan and the filing of the complaint, the Court noted that the client could not have reasonably known that there was a violation until he had consulted another attorney.

Annulment.

Failure to respond to disciplinary counsel

Lawyer Disciplinary Board v. Keenan, ___ W.Va. ___, 542 S.E.2d 466 (2000) No. 25161 (Per Curiam)

This disciplinary proceeding involved complaints of 8 clients. The Lawyer Disciplinary Board (LDB) charged the respondent with failing: to prepare a deed; to act with reasonable diligence; to keep his client reasonably informed; to promptly render a full accounting to a client; to properly terminate his representation with clients; and to respond or to respond in a timely manner to a demand for information from the Office of Disciplinary Counsel (ODC) [Rules 1.2 (a), 1.3, 1.4 (a), 1.15 (b), 1.16 (d), 8.1 (b), respectively, of the Rules of Professional Conduct]. Only one count involved representation of a criminal defendant for which the violation was not responding in a timely manner to the ODC. Among other sanctions, the Hearing Panel Subcommittee recommended that the respondent be suspended from the practice of law for 3 months.

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

ATTORNEYS

Discipline (continued)

Failure to respond to disciplinary counsel (continued)

Lawyer Disciplinary Board v. Keenan, (continued)

judgment. On the other hand, substantial deference is given to the [Board'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. 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), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.E.2d 783 (1985).

Syl. pt. 3 - "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

The Court found that the record substantiated the charges but modified the recommended sanctions of the Hearing Panel Subcommittee. The sanctions imposed were: 1) public censure; 2) supervised practice of law for 2½ years; 3) evaluation and treatment for alcoholism and bipolar illness; 4) participation in Alcoholics Anonymous; 5) 6 hours of continuing legal education on office management; and 6) payment of the disciplinary proceeding costs.

Public censure, supervised practice, education and costs.

ATTORNEYS

Discipline (continued)

Failure to respond to disciplinary counsel (continued)

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

A lawyer who was admitted to practice law in Pennsylvania and West Virginia had an office in Pennsylvania and was retained to represent a party involved in an accident in West Virginia. When the client became dissatisfied with the lawyer's representation, he filed a legal malpractice action against him in federal court in Virginia. The malpractice suit was dismissed after the lawyer agreed to pay \$25,000; he paid \$10,000 right away and signed a note to pay the balance within a year. He thereafter paid nothing for 5 years and the client went back to federal court and obtained a judgment for the unpaid balance. The client then filed an ethics complaint against the lawyer in West Virginia regarding the failure to pay the full settlement amount. The lawyer stipulated to the conduct alleged but attributed the failure to honor the settlement agreement to various mental and personal problems. A Disciplinary Panel recommended no sanctions because it found that the lawyer had not *knowingly* violated Rules 8.1 (repeated failure to respond to the ethics complaint) or 8.4 (conduct reflecting adversely on the practice of law). The Office of Disciplinary Counsel appealed.

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 judgement. 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).

ATTORNEYS

Discipline (continued)

Failure to respond to disciplinary counsel (continued)

Lawyer Disciplinary Board v. Swisher, (continued)

Syl. pt. 2 - “An attorney violates West Virginia Rule of Professional Conduct 8.1(b) by failing to respond to requests of the West Virginia State Bar concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint.” Syllabus Point 1, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340 , 419 S.E.2d 4 (1992).

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).

Using a *de novo* review, the Court found that the attorney’s failure to pay the settlement agreement in full and failure to respond to the ethics complaint investigation constituted violations of the Rules of Professional Conduct. The Court then suspended the lawyer’s law license until he paid the federal court judgment in full, completed the Multi-state Professional Responsibility Examination, and paid all costs of the disciplinary proceeding.

Suspension with conditions for reinstatement.

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

ATTORNEYS

Discipline (continued)

Failure to satisfy judgment

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel (p. 180) for discussion of topic.

Incapacitation

Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999) No. 22430 (Per Curiam)

See ATTORNEYS Discipline, Alcohol or drug addiction, (p. 163) for discussion of topic.

Incompetent representation

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

The respondent was charged with numerous violations of the Rules of Professional Conduct in his representation of 3 criminal defendants. Specifically, the respondent was charged with failing to provide competent representation, failing to act with reasonable diligence in representing a client, failing to abide by a client's decisions; proffering false evidence, engaging in conduct intended to disrupt a tribunal, failing to communicate with a client about plea offers and the effects of accepting those offers in light of federal sentencing guidelines, making statements about a judge with reckless disregard as to their truth or falsity, and failing to respond to demands for information from the Office of Disciplinary Counsel (ODC).

ATTORNEYS

Discipline (continued)

Incompetent representation (continued)

Lawyer Disciplinary Board v. Turgeon, (continued)

Syl. pt. 1 - “Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, effective July 1, 1994, requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence. Prior cases which required that ethics charges be proved by full, preponderating and clear evidence are hereby clarified.” Syllabus Point 1, *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

Syl. pt. 2 - “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.” Syllabus Point 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

The Court concluded that the ODC proved by clear and convincing evidence that the respondent violated Rule 1.1 (competence), Rule 1.2 (abiding by a client’s decisions), Rule 1.3 (diligence), Rule 1.4 (communicating with a client), Rule 3.3 (candor toward a tribunal), Rule 3.5 (disruptive conduct), and Rule 8.1 (responding to ODC) of the Rules of Professional Conduct. In addition to suspending the license of the respondent to practice law for 2 years, the Court imposed the following mandatory conditions for reinstatement: 12 hours of continuing legal education on ethics; supervised practice for a 2-year period; demonstration by expert medical and psychological testimony of his capability to practice law; and payment of the costs of the disciplinary proceeding.

Suspension of license with conditions for reinstatement.

ATTORNEYS

Discipline (continued)

Misappropriation of funds

Lawyer Disciplinary Board v. Kupec, 204 W.Va. 643, 515 S.E.2d 600 (1999) No. 23011 (Per Curiam)

An attorney appointed as a special commissioner in a partition action sold the subject property and placed the proceeds in his firm's client trust account, which account was routinely used for the payment of firm expenses. The Lawyer Disciplinary Board found that this unauthorized use of the proceeds constituted misappropriation of funds held in trust and a violation of disciplinary rules 8.4(c) (misappropriation) and 8(d) ("conduct prejudicial to the administration of justice"). The Panel recommended a 6-month suspension.

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." Syllabus Point 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

The Court, exercising *de novo* review of the Board's application of the law to the facts, reduced the penalty to an admonishment because the evidence showed only that the attorney was negligent in the handling of the funds. The Court referred to the ABA standards that recommend a sliding scale of punishment for misappropriation violations, from disbarment for intentional actions through admonishment for mere negligent handling of funds in which there is little or no harm to the fund's owner.

Admonishment.

ATTORNEYS

Discipline (continued)

Misappropriation of funds (continued)

Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1999) No. 24285 (Workman, C.J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 166) for discussion of topic.

Misconduct in another jurisdiction

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel, (p. 180) for discussion of topic.

Misconduct related to client funds

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel, (p. 180) for discussion of topic.

ATTORNEYS

Discipline (continued)

Mitigating factors

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

Disciplinary charges were filed against a prosecutor for talking to a represented criminal defendant outside the presence of the defendant's counsel (Rules of Professional Conduct 4.2), falsely stating that there had been no verbal plea offers, and failing to disclose an executed plea agreement to a co-defendant in a murder case until 3 months after it had been executed (Rules of Professional Conduct 3.4(c) & 3.8(b)).

With regard to the first charge, defendant's counsel arrived late for a preliminary hearing to find his client and his client's father speaking to a state trooper and the respondent prosecutor. The respondent informed defendant's counsel that they had been trying to "work out the case." The remaining disciplinary charges involved 3 co-defendants in a murder case. Counsel for one of these defendants filed a discovery motion for any "considerations" given to any expected witnesses against his client. Although the respondent had been involved in or apprised of plea negotiations involving some of the co-defendants, including negotiations involving a promise to drop charges in Kanawha County against one of the 3 co-defendants in return for testimony in a Lincoln County murder case, nothing was revealed in response to the discovery motion. Although the trial judge made the duty to respond to the request a continuing one, the prosecutor waited 3 months before revealing a plea agreement that was executed by one of the co-defendants the day after the hearing.

The Disciplinary Hearing Panel found various mitigating factors, such as the prosecutor's recent graduation from law school (4 ½ years earlier), no assistant prosecutor to rely on, an extremely political milieu, and "a judge who felt compelled to try to do her job for her." The Hearing Panel recommended that the Court issue an admonishment but no costs. The respondent objected to neither the findings nor the recommended disposition.

ATTORNEYS

Discipline (continued)

Mitigating factors (continued)

Lawyer Disciplinary Board v. Jarrell, (continued)

Syl. pt. 1 - “A *de novo* standard applies to a review of the adjudicatory record made before the . . . [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. On the other hand, substantial deference is given to the . . . [Board’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 of W.Va. State Bar 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.” Syl. Pt. 3, *Committee on Legal Ethics of W.Va. State Bar v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 783 (1985).

Syl. pt. 3 - “Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.” Syl. Pt. 3, *Committee on Legal Ethics of W.Va. State Bar v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syl. pt. 4 - “ ‘ “In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate” Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976) [, *overruled in part on other grounds*, *Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993)].’ Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986).” Syl. Pt. 4, in part, *Committee on Legal Ethics of W.Va. State Bar v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

ATTORNEYS

Discipline (continued)

Mitigating factors (continued)

Lawyer Disciplinary Board v. Jarrell, (continued)

Syl. pt. 5 - Generally, ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office and, therefore, the imposition of disciplinary sanctions is warranted. In rare instances, however, where extraordinary mitigating circumstances are present, it is not mandatory that a disciplinary sanction upon a lawyer holding public office be imposed.

The Court characterized the case as one of “first impression regarding whether the Board must discipline a lawyer holding public office even where extraordinary mitigating circumstances exist.” The Court recognized that violations by a public officer warrant sanctions because the public trust is involved. However, the Court also held that sanctions are not mandatory where, such as here, “extraordinary mitigating factors” are present. These mitigating factors were that the respondent was relatively inexperienced, that she had no peer to turn to for advice, that she committed no criminal offense, that she intended to do the right thing, and that no harm came from the violations. The recommended admonishment was not adopted and the charges against the respondent were dismissed.

Dismissal of compliant.

Pretrial publicity

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

A number of county officials and county residents filed a petition to remove the prosecuting attorney from office on various grounds of misfeasance and malfeasance in office. The Supreme Court appointed a 3-judge panel to hear the charges. The panel concluded that the prosecutor had violated 2 of the allegations by engaging in the outside practice of law (*W.Va. Code* §7-7-4(c)) and engaging in pretrial publicity (Rule of Professional Conduct 3.6 & 3.8) but that these did not warrant removal from office. The panel did

ATTORNEYS

Discipline (continued)

Pretrial publicity (continued)

In re Sims, (continued)

recommend suspension from the practice of law and repayment of funds that it determined the prosecutor had obtained in prohibited practice of law. The petitioners appealed (the prosecutor neither filed briefs nor appeared at oral argument).

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. W.Va. Public Employees Ins. Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982).

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.” Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 3 - “Section 7, Article 6, Chapter 6 Code, [1985], expressly requires that to remove a person from office the charge against him must be established by satisfactory proof.” Syllabus Point 3, *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970).

Syl. pt. 4 - “ ‘To warrant removal of an official pursuant to Code, [1985], § 6-6-7, clear and convincing evidence must be adduced to meet the statutory requirement of satisfactory proof.’ Point 9, Syllabus, *Evans v. Hutchinson*, [158] W.Va. [359], 214 S.E.2d 453 (1975).” Syllabus Point 3, *In the Matter of Boso*, 160 W.Va. 38, 231 S.E.2d 715 (1977).

The Court reversed and ordered the prosecutor removed from office. Relying on *W.Va. Code* § 6-6-7 (1985), the Court held that upon satisfactory proof of “official misconduct, malfeasance in office ...”, the only available sanction was removal from office. The Court recognized the difficulty in deciding whether a particular act or series of acts constituted “misconduct” or “malfeasance,” and noted that the 3-judge panel had never in fact con-

ATTORNEYS

Discipline (continued)

Pretrial publicity (continued)

In re Sims, (continued)

cluded that the allegations it found to be proved constituted “misconduct or malfeasance.” The Court then conducted its own analysis of the allegations found to have been proven. The pretrial publicity allegation involved: a public statement about a criminal complaint he had filed against the assessor and his comments to a newspaperman that he was working on an indictment of the assessor; a statement to the newspaper that the Tax Department was probing the county assessor’s office; and a comment prior to a murder trial that “we have tried two men involved in these murders already: This will be a very similar trial with similar witnesses testifying. We anticipate a similar verdict.” The Court found that each of the alleged violations constituted misconduct within the meaning of the statute and ordered removal pursuant to the statute.

Reversed.

Prosecuting attorney

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

Public censure and supervised practice

Lawyer Disciplinary Board v. Keenan, ___ W.Va. ___, 542 S.E.2d 466 , (2000) No. 25161 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel, (p. 178) for discussion of topic.

ATTORNEYS

Discipline (continued)

Public reprimand

Lawyer Disciplinary Board v. Artimez, ___ W.Va. ___, 540 S.E.2d 156 (2000) No. 25804 (Davis, J.)

See ATTORNEYS Discipline, Engaging in conduct prejudicial to the administration of justice, (p. 170) for discussion of topic.

Removal from office of prosecutor

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999) No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

Responsibility as supervisor or partner

Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999) No. 24221 (Per Curiam)

In an ethics proceeding involving allegations that the respondent failed to properly list his client's assets on a form required by statute in divorce actions, the disciplinary board's Hearing Panel Subcommittee found no knowing violation on the respondent's part. However, with regard to an alteration of an assets form by an associate in the respondent's firm, the Subcommittee found that, while there was no evidence to support a finding that the respondent deliberately sought to deceive the other side, there was sufficient evidence that his conduct violated Rule 8.4(d) (conduct "prejudicial to the administration of justice") and recommended that his license be suspended for 12 months.

ATTORNEYS

Discipline (continued)

Responsibility as supervisor or partner (continued)

Lawyer Disciplinary Board v. Veneri, (continued)

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. On the other hand, substantial deference is given to the [Board’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. 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), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.E.2d 783 (1985).

The recommended disposition was reduced to an admonishment. While it appears that the respondent was not aware of the alteration that formed the basis of the recommended disciplinary action, the Court pointed to Rule 5.1(c), which makes a lawyer responsible if he is a partner or has direct supervisory authority over another and “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” That the alteration might have been technically correct was deemed irrelevant.

Admonishment.

ATTORNEYS

Discipline (continued)

Sexual relationship with client's wife

Lawyer Disciplinary Board v. Artimez, ___ W.Va. ___, 540 S.E.2d 156 (2000) No. 25804 (Davis, J.)

See ATTORNEYS Discipline, Engaging in conduct prejudicial to the administration of justice, (p. 170) for discussion of topic.

Standard for review

Lawyer Disciplinary Board v. Askin, 203 W.Va. 320, 507 S.E.2d 683 (1998) No.s 22684 & 23313 (Per Curiam)

See ATTORNEYS Discipline, Criminal contempt, (p. 168) for discussion of topic.

Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) No. 23938 (Per Curiam)

See ATTORNEYS Discipline, Failure to repay funds and failure to act, (p. 174) for discussion of topic.

Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999) No. 22430 (Per Curiam)

See ATTORNEYS Discipline, Alcohol or drug addiction, (p. 163) for discussion of topic.

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

ATTORNEYS

Discipline (continued)

Standard for review (continued)

Lawyer Disciplinary Board v. Kupec, 204 W.Va. 643, 515 S.E.2d 600 (1999) No. 23011 (Per Curiam)

See ATTORNEYS Discipline, Misappropriation of funds, (p. 184) for discussion of topic.

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel (p. 180) for discussion of topic.

Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999) No. 24221 (Per Curiam)

See ATTORNEYS Discipline, Responsibility as supervisor or partner, (p. 191) for discussion of topic.

Suspension with conditions for reinstatement

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel (p. 180) for discussion of topic.

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

ATTORNEYS

Disqualification

Juvenile client waiver irrelevant

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000)
No. 26851 (Davis, J.)

See ATTORNEYS Conflict of interest, Prior representation of opposing party witness in related matter, (p. 161) for discussion of topic.

Hiring of

Duty to advise client

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

Ineffective assistance of counsel

Becton v. Hun, 205 W.Va. 139, 516 S.E.2d 762 (1999)
No. 25364 (Workman, J.)

See INEFFECTIVE ASSISTANCE OF COUNSEL Plea proposal, Failure to communicate, (p. 443) for discussion of topic.

Prosecuting attorney

Ethical violations by

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

ATTORNEYS

Prosecuting attorney (continued)

Personal opinion forbidden

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

Pretrial publicity

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

Removal from office

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

BAIL

Exoneration

Standard of review

State v. Hedrick, 204 W.Va. 547, 514 S.E.2d 397 (1999)
No. 25360 (Davis, J.)

Appellant bonding company acted as surety on posting bail bonds of \$455,000 to insure the appearance of its suretee, a criminal defendant. The suretee failed to appear at a March 4, 1998 hearing, and the court granted the State's motion for forfeiture of the bond.

At a March 23, 1998 hearing, the court granted the State's motion for judgment in the full amount of the bond while denying the bonding company's request for a moratorium on execution of the judgment while it attempted to locate the defendant. A writ of execution was issued the next day.

On April 10, the criminal defendant surrendered to authorities in Florida. The bonding company subsequently moved for exoneration of the judgment for the forfeited bonds. The court exonerated all but \$100,000, and the bonding company appealed.

Syl. pt. 1 - A trial court's decision on whether to remit, under Rule 46(e)(4) of the West Virginia Rules of Criminal Procedure, a previously forfeited bail bond will be reviewed by this Court under an abuse of discretion standard.

Syl. pt. 2 - The surety bears the burden of establishing that the trial court abused its discretion in refusing to remit, pursuant to Rule 46(e)(4) of the West Virginia Rules of Criminal Procedure, all or part of a previously forfeited bail bond.

Syl. pt. 3 - When a trial court is asked to remit all or part of a previously forfeited bail bond, pursuant to Rule 46(e)(4) of the West Virginia Rules of Criminal Procedure, the court shall consider the following criteria to the extent that they are relevant to the particular case under consideration: (1) the willfulness of the defendant's breach of the bond's conditions; (2) the cost, inconvenience and prejudice suffered by the government as a result of the breach; (3) the amount of delay caused by the defendant's default and the

BAIL

Exoneration (continued)

Standard of review (continued)

State v. Hedrick, (continued)

stage of the proceedings at the time of his or her disappearance; (4) the appropriateness of the amount of the bond; (5) the participation of the bondsman in rearresting the defendant; (6) whether the surety is a professional or a friend or member of the defendant's family; (7) the public interest and necessity of effectuating the appearance of the defendant; and (8) any explanation or mitigating factors presented by the defendant. These factors are intended as a guide and do not represent an exhaustive list of all of the factors that may be relevant in a particular case. All of the factors need not be resolved in the State's favor for the trial court to deny remission in full or in part. Moreover, it is for the trial court to determine the weight to be given to each of these various factors.

The applicable standard of review for exoneration of a bail obligor presented an issue of first impression. Relying on the permissive language in Rule 46(e)(4) of the W.Va. Rules of Criminal Procedure and federal case law interpreting the federal counterpart to the West Virginia rules regarding bond, the Court adopted an abuse of discretion standard to review decisions regarding remitting or refusing to remit a previously forfeited bail bond.

After reviewing a number of federal cases, the court listed 8 factors that a court "shall consider" to the extent each such factor is relevant to a particular case. The trial court is to determine the weight it places on each relevant factor.

Although not listed specifically in a syllabus point, the deterrence of future violations is noted in the discussion.

The Court found no abuse of discretion and affirmed the order denying remission.

Affirmed.

BAILIFF

Court's control

State ex rel. Farley v. Spaulding, 203 W.Va. 275, 507 S.E.2d 376 (1998)
No. 24965 (McCuskey, J.)

A county commission hired a civilian to oversee security at the courthouse, and the circuit judge issued administrative orders outlining the security officer's duties and authority, including the power to make arrests and to escort prisoners to and from the courthouse. The sheriff filed a petition for an original writ of prohibition asking the Supreme Court to stop the enforcement of the administrative orders.

Syl. pt. 1 - "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is *a fortiori* that the judiciary must have such control in order to maintain its independence." Syllabus Point 2, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

Syl. pt. 2 - In order for a court to invoke use of its inherent power to require resources, the court must demonstrate that such resources are reasonably necessary for the performance of its responsibilities in the administration of justice. Although courts must be cautious not to reach beyond the power of the judicial branch, it is crucial for the judiciary to be able to invoke such power as is reasonably necessary to maintain itself as an independent and *equal* branch of our government." Syllabus Point 3, in part, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

Syl. pt. 3 - "A court may use the legal resources available to it to defend those interests it is constitutionally bound to protect, including, but not limited to, *ex parte* orders in necessary circumstances in administrative matters within the court's inherent authority." Syllabus Point 5, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

Syl. pt. 4 - "A bailiff is an officer of the court to which he or she is assigned, subject to its control and supervision, and responsible for preserving order and decorum, taking charge of the jury, guarding prisoners, and other services which are reasonably necessary for the court's proper functioning." Syllabus Point 2, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

BAILIFF

Court's control (continued)

State ex rel. Farley v. Spaulding, (continued)

Syl. pt. 5 - The sheriff, though an important law enforcement officer, does not have the complete or the exclusive control of the internal police affairs of the county. By virtue of [Article IX, Section 11 of the West Virginia Constitution] the county court has the authority to superintend and administer, subject to such regulations as may be prescribed by law, the police affairs of the county." *Hockman v. Tucker County Court*, 138 W.Va. 132, 137, 75 S.E.2d 82, 85 (1953).

Syl. pt. 6 - A county commission has the authority to employ individuals to perform security functions for the county judiciary, but this authority is limited insofar as it cannot properly be exercised in a manner which impairs or supplants the power and duty of the county sheriff, under *W.Va. Code* § 51-3-5 (1923) and Rule VII of the West Virginia *Trial Court Rules* (1960), to select one or more deputy sheriffs to serve as court bailiff and to provide a sufficient number of bailiffs for every court of record in the county.

Syl. pt. 7 - The judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court, has the inherent administrative power to designate and authorize persons to perform security services necessary to the safe and efficient operation of the county judiciary, provided that such administrative action does not impair or supplant the power and responsibility of the county sheriff to furnish deputy sheriffs to serve as court bailiffs for the county's courts.

The Court granted the writ in part. Recognizing the inherent power of the courts to require that necessary resources be made available to enable it to perform its functions, the Court approved the circuit court's order to the extent that it provided general courthouse security. However, it disapproved such order to the extent that it encroached upon the sheriff's statutory duty to act as bailiff and to "attend" the court, maintain courtroom security, and to escort prisoners. The Court also approved the county commission's hiring of the civilian officers.

Writ granted, in part, and denied, in part.

BIFURCATION

Grounds for

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

BONDSMEN

Liability

State v. Hedrick, 204 W.Va. 547, 514 S.E.2d 397 (1999)
No. 25360 (Davis, J.)

See BAIL Exoneration, Standard of review, (p. 197) for discussion of topic.

BURDEN OF PROOF

Defense of another

Burden shifting

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

Insanity evidence

State to prove sanity at time offense committed

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Self-defense

Shifting burden

State v. Wykle, ___ W.Va. ___, 540 S.E.2d 586 (2000)
No. 27662 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Self-defense, (p. 774) for discussion of topic.

BURDEN OF PROOF

Waiver of plea agreement right by defendant

Beyond reasonable doubt

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

CERTIFIED QUESTION

Appointed counsel

Condition of confinement

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999)
No. 25823 (McGraw, J.)

See CONDITION OF CONFINEMENT Appointed counsel, (p. 215) for discussion of topic.

Disclosure of law enforcement internal affairs investigatory material

McClay v. Jones, ___ W.Va. ___, 542 S.E.2d 83 (2000)
No. 27776 (Scott, J.)

See RECORDS Disclosure in civil case, Law enforcement internal affairs investigatory materials, (p. 663) for discussion of topic.

Magistrate availability for prompt presentment purposes

Rogers v. Albert, et al., ___ W.Va. ___, 541 S.E.2d 563 (2000)
No. 27680 (Per Curiam)

See MAGISTRATES Availability, Prompt presentment, (p. 540) for discussion of topic.

CHARGING DOCUMENT

When criminal proceeding initiated in magistrate court

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See MAGISTRATE COURT When criminal proceeding initiated, (p. 538)
for discussion of topic.

CHILD CUSTODY

Domestic violence

Dale Patrick D. v. Victoria Diane D., 203 W.Va. 438, 508 S.E.2d 375 (1998) No.s 25017 & 25018 (Per Curiam)

See DOMESTIC VIOLENCE Effect on custody disputes, (p. 256) for discussion of topic.

Jurisdiction

DHHR ex rel. Hisman v. Angela D., 203 W.Va. 335, 507 S.E.2d 698 (1998) No. 24670 (Per Curiam)

See ABUSE AND NEGLECT Out-of-state-orders, (p. 26) for discussion of topic.

Out-of-state orders

Enforcement

DHHR ex rel. Hisman v. Angela D., 203 W.Va. 335, 507 S.E.2d 698 (1998) No. 24670 (Per Curiam)

See ABUSE AND NEGLECT Out-of-state-orders, (p. 26) for discussion of topic.

COLLATERAL ACTS/CRIMES

Admissibility

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

COLLATERAL ACTS/CRIMES

Admissibility (continued)

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

COMPETENCY

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

Evaluation prior to trial

State ex rel. Webb v. McCarty, ___ W.Va. ___, 542 S.E.2d 63 (2000)
No. 27765 (Per Curiam)

The appellant was indicted for third offense shoplifting. Court-appointed counsel requested a mental examination which was granted. Numerous continuances were granted creating a delay of a year because of scheduling and other problems in completing the examination. To end the delay, the trial court set the date for trial and announced that the trial would proceed whether or not the examination was completed by that time. The trial court based its decision on a finding that the appellant had failed to cooperate in completing the examination. The appellant sought a writ of prohibition to require the lower court to allow her to complete the psychiatric examination before going to trial.

Syl. pt. 1 - "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

Syl. pt. 5 - "When a trial judge is made aware of a possible problem with defendant's competency, it is abuse of discretion to deny a motion for psychiatric evaluation. To the extent *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975), differs from this rule, it is overruled." Syl. pt. 4, *State v. Demastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

COMPETENCY

Evaluation prior to trial (continued)

State ex rel. Webb v. McCarty, (continued)

Syl. pt. 6 - “When a trial judge orders a competency examination under *W.Va. Code* § 27-6A-1(a) (1983) (Repl. Vol. 1999), but the examination is not undertaken in the manner required by that statute, the court must grant a subsequent motion for a competency evaluation made by the defendant and order any such examinations as are necessary to comport with *W.Va. Code* § 27-6A-1(a).” Syl. pt. 5, *State v. Paynter*, 206 W.Va. 521, 526 S.E.2d 43 (1999).

The Court found that delay alone is not a reason to forego a mental examination once it is determined that the competency of the defendant is in doubt. Therefore, the trial court abused its discretion by not allowing the petitioner to obtain a mental examination prior to trial.

Writ of prohibition (mandamus*) granted as moulded.

[* The terms writ of prohibition and writ of mandamus are used interchangeably in the opinion.]

COMPETENCY TO PLEAD

Suicide attempt

Effect of

State v. Hatfield, 206 W.Va. 125, 522 S.E.2d 416 (1999)
No. 25368 (Per Curiam)

This is a continuation of a case previously before the Court [see *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991)] which was remanded for further hearing to develop the record as to why trial counsel opposed the defendant pleading guilty to the charges and whether the defendant understood the advice that counsel offered. The judgment order which accompanied the opinion in *Hatfield I* stated, “said judgment be, and same is hereby, set aside, reversed and annulled (see footnote 4).”

The pertinent facts of *Hatfield I* include that the appellant attempted suicide while in the hospital recuperating from wounds incurred during his arrest on an indictment for murder and malicious wounding. He again attempted suicide after he was found competent to stand trial. Thereafter, he pled guilty to the charges against the advice of both of his trial lawyers and was sentenced to life without mercy.

On remand, the circuit court sought to have the appellant examined again by a psychiatrist, but the appellant refused. A competency hearing was conducted at which the appellant’s counsel testified that they believed the appellant was incompetent to plead guilty and was bent on self-destruction. Appellant was questioned as to his understanding of his lawyer’s statements, and he testified that he understood them; he then stated his desire to withdraw his guilty pleas. Nevertheless, the court reaffirmed the earlier pleas and the previous sentences on the ground that the appellant was competent to plead in 1989. Appellant appealed, arguing that the first appeal had resulted in vacation of the earlier pleas and that the trial court was therefore required to accept the plea of not guilty.

Syl. pt. 1 - “Where a circuit court has found that a defendant in a criminal case where the possible punishment is life imprisonment without mercy is competent to stand trial, but subsequent to the competency hearing, the defendant attempts to commit suicide, then against advice of counsel indicates his desire to plead guilty to the charges in the indictment, before taking the plea of guilty, the trial judge should make certain inquiries of the

COMPETENCY TO PLEAD

Suicide attempt (continued)

Effect of (continued)

State v. Hatfield, (continued)

defendant and counsel for the defendant in addition to those mandated in *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975). The court should require counsel to state on the record the reason why counsel opposes the guilty plea. The court should then ask the defendant to acknowledge on the record that he understands is counsel's statements and if in view of them he still desires to plead guilty. If the defendant then states he still desires to plead guilty, the court may accept the plea." Syl. Pt. 6, *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991).

The Court framed the issue as whether *Hatfield I* served to vacate the appellant's earlier pleas or to simply order reconsideration of the guilty pleas in light of more fully developed evidence. The Court noted that the first appeal was clearly an attempt to permit the appellant to withdraw his guilty pleas but the remand opinion did not reverse the convictions. Rather, it was intended to permit further inquiry into whether the appellant was competent "on the date he originally entered his guilty pleas." That inquiry having been conducted, the Court affirmed.

Affirmed.

CONCERTED ACTION

Test for

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

CONDITION OF CONFINEMENT

Appointed counsel

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999)
No. 25823 (McGraw, J.)

A number of inmates in the penitentiary and Northern Regional Jail filed actions complaining of various conditions of confinement, e.g., inadequate medical care, lack of access to a law library, improper transfers to punitive custody. The circuit court consolidated the petitions and certified to the Supreme Court the question of whether such inmates had a right to a public defender.

Syl. pt. 1 - “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

Syl. pt. 2 - The terms “a public defender” and “the public defender” refer to a staff attorney of the legislatively created public defender service, as defined in West Virginia Code § 29-21-2 (1996), and should not be confused with the term “appointed counsel.”

Syl. pt. 3 - An inmate seeking relief as to the conditions of his or her confinement, such as medical care or inmate classification or reinstatement as an inmate employee, is *not* entitled to representation by the public defender, even though all other eligibility conditions have been met.

The Court distinguished between a public defender and appointed counsel, pointing out that the former is defined in *W.Va. Code* §29-21-2 (1996) as a full time employee of a public defender corporation. The services of a public defender are restricted by statute, and the Court could not find that the inmates’ petitions fell into any of the statutorily-defined categories. The Court specifically addressed the statutory language permitting the appointment of public defenders in “proceedings brought to obtain extraordinary relief” and noted that this category was limited by the preceding phrase “proceedings which are ancillary to an eligible proceeding.” In *Quesinberry v. Quesinberry*, 191 W.Va. 65, 69, 443 S.E.2d 222, 226 (1994), the Court

CONDITION OF CONFINEMENT

Appointed counsel (continued)

State ex rel. White v. Trent, (continued)

denied payment of attorney's fees to a lawyer appointed as guardian *ad litem* for an inmate in a civil action because no statutory authority for such payment existed. Similarly, the Court held that the appointment of a public defender in a conditions of confinement case was not authorized.

Certified question answered.

CONFESSIONS

Admissibility

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Delay in taking before a magistrate

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Discretion of court

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See RIGHT TO COUNSEL Waiver after right asserted, (p. 672) for discussion of topic.

CONFESSIONS

Juveniles

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

Standard for review

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Suppression of

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

CONFESSIONS

Voluntariness

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

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Delay in taking before a magistrate

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No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

CONFRONTATION CLAUSE

Evidence

When analysis applied

State v. Baylor, ___ W.Va. ___, 542 S.E.2d 399 (2000)
No. 27771 (Per Curiam)

The appellant was convicted as a result of a jury trial of malicious assault.

The victim was the neighbor of the appellant. The neighbor received face and head injuries during a fight which occurred after the appellant arrived at the neighbor's house. The appellant had gone to the neighbor's house after the neighbor discovered 2 people had secretly entered the house in the early morning hours to meet with the neighbor's daughter and her girlfriend.

The appellant contended that the conviction should be overturned and a new trial ordered because the trial court allowed into evidence 2 pages of hospital medical records involving the treatment of the victim. Specifically it was argued that: 1) the medical records contained inadmissible hearsay since the doctor whose statements were in the record was not available for cross-examination; and 2) it denied the appellant his constitutional right to confront a witness.

The appellant contended that the evidence was key to proving malicious intent.

Syl. pt. - "The burden [in a Confrontation Clause analysis] 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." Syllabus Point 13, *In Interest of Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997) (citation omitted).

CONFRONTATION CLAUSE

Evidence (continued)

When analysis applied (continued)

State v. Baylor, (continued)

The Court noted that the trial court “apparently” allowed the records into evidence as a business record under Rule 803 (6) of the Rules of Evidence. The Court reiterated its prior rulings regarding such records by stating that even if records fall within a hearsay exception, the admissibility of the records must also be analyzed to assure that the constitutional protection of the Confrontation Clause (*West Virginia Constitution* Article III, § 14) are met. Nonetheless, the Court found that an analysis of the trial court’s ruling on the admissibility of the records was not necessary because there was ample evidence beside the medical records which supported the jury finding that the severity of the victim’s injuries were inflicted maliciously.

Affirmed.

Rape shield law

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See DUE PROCESS Rape shield law, (p. 271) for discussion of topic.

Right to rehabilitation

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

CONFRONTATION CLAUSE

Witness unavailable

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

Appellant was convicted of first-degree murder. At trial in 1996, a state pathologist testified that the victim's wounds "were consistent with being inflicted with a screwdriver," a conclusion based on an autopsy report in 1994 by another state pathologist who had since relocated to another state. In a motion for a new trial, the appellant alleged that this testimony violated his confrontation clause rights because the State failed to demonstrate that the preparer of the report was unavailable as required by *State v. James Edward S.* The trial court denied the motion.

Syl. pt. 1 - "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution 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).

Syl. pt. 2 - We modify our holding in *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), to comply with the United States Supreme Court's subsequent pronouncements regarding the application of its decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to hold that the unavailability prong of the Confrontation Clause inquiry required by syllabus point one of *James Edward S.* is only invoked when the challenged extrajudicial statements were made in a prior judicial proceeding.

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).

Despite the appellant's failure to preserve the issue by properly objecting to the testimony at trial, the Court took the opportunity to explain that 2 recent United States Supreme Court opinions had modified the rule announced in *James Edward S.*. The holding in *James Edward S.* was decided on Confrontation Clause principles and required that extrajudicial statements only be admitted if it is demonstrated that the declarant is unavailable to testify

CONFRONTATION CLAUSE

Witness unavailable (continued)

State v. Kennedy, (continued)

and that the out of court statement is reliable. Based on *White v. Illinois*, 502 U.S. 345 (1992), the Court modified the application of the availability analysis only to those situations when the challenged extrajudicial statement is made in a prior judicial proceeding. The autopsy report from which the pathologist testified was not a statement made in a prior judicial proceeding, so the State was not required to demonstrate the preparer's unavailability. The Court found the reliability prong of the *James Edward S.* analysis was satisfied in this case by referencing the decisions of other courts which have found autopsy reports are included within the public record exception to hearsay and noting that the Court has consistently held that one pathologist may testify as to the cause of death by referring to an autopsy report prepared by another.

Affirmed.

CONTEMPT

Civil

For invoking right against self-incrimination

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

Defendant was convicted on 3 charges arising from the theft of goods from an automobile. During the sentencing hearing, the trial judge asked the defendant to disclose the location of the stolen property. After the defendant invoked his 5th Amendment right against self incrimination, the prosecutor stated that any information given regarding the stolen goods would not be used in the event of a new trial, and the court granted immunity “in this regard.” The defendant continued to refuse to answer and the trial court held him in contempt. The defendant then stated that he didn’t take the property. The court found the answer unresponsive and ordered him confined until he did answer the question. Defendant appealed the contempt order.

Syl. pt. 3 - “In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.” Syllabus point 1, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

Syl. pt. 6 - “Code, 57-5-2, is comprehensive in its terms, both in divesting a witness, who is compelled to give self-criminating testimony or produce evidence which will criminate him, of the privilege of refusing to so testify or produce such evidence, which the witness has under Article V (Fifth Amendment) of the Constitution of the United States, and Section 5, Article III of the Constitution of West Virginia that ‘No person . . . shall be compelled in any criminal case to be a witness against himself . . .’, and in providing, *inter alia*, that a person so compelled to testify or to furnish such evidence shall not be prosecuted for the offense in regard to which he is so compelled to testify or furnish evidence, and in clothing such involuntary witness with complete immunity in regard to such compelled self-criminating evidence.” Syllabus point 3, *State v. Abdella*, 139 W.Va. 428, 82 S.E.2d 913 (1954).

CONTEMPT

Civil (continued)

For invoking right against self-incrimination (continued)

State v. Cottrill, (continued)

Syl. pt. 7 - “The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order.” Syllabus point 3, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

The Court found that the trial court did not err in imposing a civil contempt sanction.

The Court relied on *W.Va. Code* § 57-5-2, which permits a court to compel self-incriminating testimony and prohibits the use of such testimony in any subsequent proceeding other than a perjury prosecution. Although the statute also provides that a person compelled to provide evidence “shall not be prosecuted for the offense” about which the compelled testimony pertains, the Court appears to limit the immunity to use immunity only.

Affirmed in part, reversed in part, and remanded.

Standard for review

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See CONTEMPT Civil, For invoking right against self-incrimination, (p. 224) for discussion of topic.

CONVICTIONS

Challenges to

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Introduction at trial

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Status elements of current offense

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Bifurcation

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

CONVICTIONS

Stipulation

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Uncounseled pleas

State ex rel. Webb v. McCarty, ___ W.Va. ___, 542 S.E.2d 63 (2000)
No. 27765 (Per Curiam)

See RECIDIVIST OFFENSES Uncounseled pleas to prior convictions, (p.
661) for discussion of topic.

COURT COSTS

Magistrate court

Assessed upon guilty plea

State ex rel. Canterbury v. Paul, 205 W.Va. 665, 520 S.E.2d 662 (1999)
No. 25890 (Maynard, J.)

Despite a directive from the Supreme Court's Administrative Office, a magistrate was refusing to assess \$55.00 in costs in criminal cases when a defendant pleaded guilty. The 1996 version of *W.Va. Code* §50-3-2 required such assessment "in each criminal case tried in a magistrate court in which the defendant is convicted." The Regional Jail and Prison Authority, which received \$40.00 of each such assessment for the repayment of construction bonds, sought an original writ of prohibition.

Syl. pt. 1 - Pursuant to *W.Va. Code* § 50-3-2 (1996), a magistrate shall assess \$55.00 in court costs in each case that results in a conviction, regardless of whether the conviction is the result of a plea or a trial.

The Court looked at a number of sources to determine whether the disputed language was intended to cover guilty pleas. First, the funding scheme for the jail authority showed a legislative intent to require all convicted defendants to pay for jail construction, regardless of whether the defendant was convicted by plea or trial. Second, the Court looked to the current (1999) version of the statute, which clarified that even defendants who plead are to be assessed the fee. The Court ordered the magistrate (together with the administrative office) to make a good faith effort to notify all those who had not been required to pay the fee to now pay it.

Writ granted.

COURT RECORDS

Hearsay exception

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

CROSS-EXAMINATION

Credibility challenge

Discretion of court

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

Limitations

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

The appellant was convicted by a jury of first-degree sexual abuse of an 11-year-old girl. During the trial, the victim's mother testified that her child was afraid of men as a result of the attack. The trial court did not permit the appellant to cross-examine the mother regarding domestic violence petitions which she had filed against her husband in order to rebut the inference that the victim was afraid of men because of the appellant's attack.

The appellant contended that the trial court erred by precluding information about the domestic violence petitions in the cross-examination of the mother which deprived him of the right to introduce rebuttal evidence and challenge the credibility of the witness. He also asserted trial court error in not allowing the investigating officer to be cross-examined about flaws in his investigation.

Syl. pt. 1 - "A defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses." Syllabus Point 1, *State v. Crockett*, 164 W.Va. 435, 265 S.E.2d 268 (1979).

CROSS-EXAMINATION

Limitations (continued)

State v. Graham, (continued)

Syl. pt. 2 - “Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term ‘credibility’ includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness’ character. The third rule is that the trial judge has discretion as to the extent of cross-examination.” Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

The Court did not find “manifest abuse or injustice” with the trial court’s decision not to allow cross-examination of the mother regarding the domestic violence petitions since the victim’s fear of her stepfather was not determinative of the guilt or innocence of the accused for sexual assault. Likewise, no error was found regarding the cross-examination of the investigating officer since the record reflected that defense counsel questioned the officer about the failings of the investigation he performed.

Affirmed.

Pre-trial silence

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

CROSS-EXAMINATION

Pre-trial silence (continued)

Prior inconsistent statements

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

DEFENSE OF ANOTHER

Doctrine explained

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

Appellant and her husband (Cooks) had long been the target of harassment and threats by their neighbor, Buckler, over a fence that the Cooks had built on their land. Buckler, a huge man over 6'4" tall and weighing over 300 pounds, was a suspect in an investigation regarding a threatening letter sent to the United States' President bearing Mr. Cook's name. Rocks and nails were thrown on the Cook's property, their fence was torn down, and a homemade bomb was exploded by Buckler that shook the Cooks' home. When the Cooks sought legal help to stop the harassment, Buckler agreed to apologize but instead threatened to kill the Cooks if they ever contacted authorities again. After their nearby cabin had been vandalized, the appellant called the police who told her that they would speak to Buckler about the matter.

Shortly thereafter, the appellant saw Buckler throwing rocks onto her property in her husband's direction. Appellant fired a shotgun into the air, reloaded and walked to her husband. They pleaded with Buckler to leave them alone and informed him that the police had been contacted. Buckler then told Mr. Cook "you're a G__ d__ dead man. I warned you, I told you never to call them." As Mr. Cook walked away, Buckler attacked him. While Buckler had Mr. Cook on the ground, the appellant tried to help and was struck by Buckler. As Buckler continued to beat Mr. Cook, the appellant fired one shot at his shoulder and he died shortly thereafter.

Appellant was indicted for first-degree murder and convicted of second degree murder. She was sentenced to a 25 year prison term. On appeal, she challenged the sufficiency of the evidence to support the conviction because the State did not prove beyond a reasonable doubt that she did not act in defense of another.

DEFENSE OF ANOTHER

Doctrine explained (continued)

State v. Cook, (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).

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.” Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 3 - To establish the doctrine of defense of another in a homicide prosecution, a defendant must show by sufficient evidence that he or she used reasonable force in a situation where the defendant had a reasonable belief of the lawfulness of his or her intervention on behalf of another person who was in imminent danger of death or serious bodily harm from which such person could save himself/herself only by using force, including deadly force, against his or her assailant, but was unable to do so.

Syl. pt. 4 - The burden of proof placed upon a defendant asserting the doctrine of defense of another is not a high standard. To properly assert the defense of another doctrine, a defendant must introduce “sufficient” evidence of the defense in order to shift the burden to the State to prove beyond a reasonable doubt that the defendant did not act in defense of another.

DEFENSE OF ANOTHER

Doctrine explained (continued)

State v. Cook, (continued)

The focus of the appeal was on appellant's use of the defense of defense-of-another. The Court traced the evolution of the doctrine. Currently in this state, defense-of-another is an affirmative defense that requires a defendant to show that she had a reasonable belief in the lawfulness of her intervention on another's behalf and that the other person was in imminent danger of death or serious injury from which the other person could only save himself by using force, including deadly force, but was unable to do so. The Court adopted the self-defense burden of proof and burden-shifting scheme for use in defense-of-another cases. In other words, if there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in defense-of-another, the State must then prove beyond a reasonable doubt that the defendant did not act in defense-of-another. The defendant must actually believe in the necessity of the force used and that belief must be objectively reasonable.

Applying the law to this case, the Court emphasized that (1) Mr. Cook was retreating to his home when he was attacked, (2) he was legally able to use force, including deadly force, because he was unable to free himself from the much larger Buckler who was viciously beating him and he was therefore in imminent danger of serious injury; (3) in light of her husband's defenseless posture, appellant was permitted to intervene; (4) after her initial attempt to help proved unsuccessful, the force ultimately used was reasonable. The Court discounted the State's only contradictory evidence which was the testimony of Buckler's 12-year-old son. The Court held that the State failed to prove that the appellant did not act in the defense-of-another, and the conviction was vacated.

Vacated and remanded.

DEFENSE COUNSEL

Prejudice to State's case

Mistrial for manifest necessity

State ex rel. Bailes v. Jolliffe, ___ W.Va. ___, 541 S.E.2d 571 (2000)
No. 27912 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 554) for discussion of topic.

DEFENSES

Compulsion

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)
No. 26568 (Scott, J.)

See DEFENSES Medical necessity, (p. 242) for discussion of topic.

Defense of another

Doctrine explained

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

Insanity

Dissociative identity disorder

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

The appellant was convicted of first-degree sexual assault, battery, burglary and assault during the commission of a felony. In *Lockhart I*, 200 W.Va. 470, 490 S.E.2d 298 (1997), the appellant challenged the convictions on the ground that the trial court erred in excluding expert testimony showing that he suffered from Dissociative Identity Disorder (DID) to support an insanity defense. Since the lower court did not permit defense counsel to vouch the record with the expert's intended testimony, the Court remanded the case for further development of the record. After hearing the proffered expert's testimony, the lower court again found that the defense of insanity should not be presented to the jury. This ruling was appealed on numerous grounds but only the issue of DID was properly developed for review.

DEFENSES

Insanity (continued)

Dissociative identity disorder (continued)

State v. Lockhart, (continued)

Syl. pt. 1 - “The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court’s decision will not be reversed unless it is clearly wrong.’ Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991), *cert. denied*, 502 U.S. 908, 112 S.Ct.301, 116 L.Ed.2d 244 (1991).” Syllabus point 1, *West Virginia Division of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999).

Syl. pt. 2 - “In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court’s initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony’s reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory’s actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.” Syllabus point 2, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

Syl. pt. 3 - “The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both ‘reliable’ and ‘relevant.’ Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct.2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, [511] U.S. [1129], 114 S.Ct.2137, 128 L.Ed.2d 867 (1994), the reliability requirement is met only by a finding by the trial court under Rule 104(a) of the West Virginia Rules of Evidence that the *scientific* or technical theory which is the basis for the test results is indeed ‘scientific, technical, or specialized knowledge.’ The trial court’s determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question

DEFENSES

Insanity (continued)

Dissociative identity disorder (continued)

State v. Lockhart, (continued)

of law that we review *de novo*. On the other hand, the relevancy requirement compels the trial judge to determine, under Rule 104(a), that the scientific evidence 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' W.Va.R.Evid. 702. Appellate review of the trial court's rulings under the relevancy requirement is under an abuse of discretion standard. *State v. Beard*, 194 W.Va. 740, 746, 461 S.E.2d 486, 492 (1995)." Syllabus point 3, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

Syl. pt. 4 - "When scientific evidence is proffered, a circuit court in its 'gatekeeper' role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct.2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, [511] U.S. [1129], 114 S.Ct.2137, 128 L.Ed.2d 867 (1994), must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand." Syllabus point 4, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

Syl. pt. 5 - "The question of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, [511] U.S. [1129], 114 S.Ct. 2137, 128 L.Ed. 2d 867 (1994) only arises if it is first established that the testimony deals with 'scientific knowledge.' 'Scientific' implies a grounding in the methods and procedures of science while 'knowledge' connotes more than subjective belief or unsupported speculation. In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to 'scientific knowledge' and, in doing so, to analyze not what the experts say, but what basis they have for saying it." Syllabus point 6, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

DEFENSES

Insanity (continued)

Dissociative identity disorder (continued)

State v. Lockhart, (continued)

Syl. pt. 6 - “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, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case.” Syllabus point 2, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976), *overruled on other grounds by State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 7 - “‘There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.’ Syl. pt. 2, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979).” Syllabus point 6, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986).

Syl. pt. 8 - Expert testimony regarding Dissociative Identity Disorder *may* be admissible in connection with a defendant’s assertion of an insanity defense. However, the admissibility of specific expert testimony regarding Dissociative Identity Disorder must be evaluated on a case-by-case basis.

The Court identified 2 issues it needed to address in the case: 1) whether DID is recognized as a basis for an insanity defense in West Virginia; and 2) whether the trial court abused its discretion in the instant case by not allowing the expert to testify at trial regarding this condition. As to the first issue, after finding that there is a general acceptance of DID in numerous courts in connection with an insanity defense, the Court held that expert testimony of DID may be admissible in support of an insanity defense in West Virginia. The Court determined that the admissibility of specific expert testimony regarding the disorder must be evaluated on a case-by-case basis.

DEFENSES

Insanity (continued)

Dissociative identity disorder (continued)

State v. Lockhart, (continued)

In reaching its conclusion that the trial court did not abuse its discretion in excluding the expert's testimony in this case, the Court considered the relevance and reliability of the proffered testimony with regard to whether the appellant, at the time of the crime, lacked the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of law. Since the expert said he was unable express an opinion regarding the mental state of the appellant at the time of the crime, it was found to be irrelevant. The Court also found the expert's testimony to be unreliable and speculative because the expert admitted that in this case he had applied a less rigid than normal standard to make a DID diagnosis. As such, the testimony would not have been helpful to a jury in determining whether or not the accused was sane at the time the acts were committed.

Affirmed.

Self-defense

Shifting burden

State v. Wykle, ___ W.Va. ___, 540 S.E.2d 586 (2000)
No. 27662 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Self-defense, (p. 774) for discussion of topic.

Standard for review

State v. Wykle, ___ W.Va. ___, 540 S.E.2d 586 (2000)
No. 27662 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Self-defense, (p. 774) for discussion of topic.

DEFENSES

Self-defense (continued)

Test for

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Shifting burden of proof

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Medical necessity

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)
No. 26568 (Scott, J.)

The appellant was growing marijuana in her home for her personal medicinal use to offset the effects of multiple sclerosis. The appellant entered a conditional guilty plea to the felony offense of manufacturing a controlled substance, reserving her right to appeal pretrial evidentiary rulings. The lower court had granted the State's motion *in limine* to not allow any testimony or defense based on the medicinal qualities of marijuana on multiple sclerosis. The appellant claimed that this ruling foreclosed her from asserting the affirmative defenses of compulsion and medical necessity.

Syl. pt. 3 - Medical necessity is unavailable as an affirmative defense to a marijuana charge in West Virginia because the Legislature has designated marijuana as a Schedule I controlled substance with no exception for medical use.

DEFENSES

Medical necessity (continued)

State v. Poling, (continued)

The Court found that the record did not show that the defense had presented sufficient evidence of compulsion to raise a reasonable doubt about her criminal intent to commit the offense charged and that medical necessity is not a recognized defense of a marijuana charge in West Virginia since the Legislature designated the drug as a controlled substance with no exception for medical use.

Affirmed.

Mistaken identity

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000) No. 26898 (Per Curiam)

This is an appeal of a conviction and sentence for possession with intent to deliver a controlled substance.

At trial the appellant asserted an identity defense, claiming that his twin brother was actually the person who was in the car at the time the drugs were found and the arrest occurred. The trial court limited the appellant's questioning of a police officer to the issue of whether the twin brother was the person arrested.

Syl. pt. 2 - "In a criminal case, the admissibility of testimony implicating another person as having committed a crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error." Syllabus point 1, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).

DEFENSES

Mistaken identity (continued)

State v. Parr, (continued)

The Court stated that the limitation on the cross-examination of a witness regarding identity of the accused was within the discretion of the trial judge and in this case served to avoid “pure speculation”.

Affirmed.

Self defense

Character of victim

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman’s syndrome, Admissibility, (p. 322) for discussion of topic.

Sufficiency of evidence

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

DETAINER

Waiver of time limits

State v. Onapolis, ___ W.Va. ___, 541 S.E.2d 611 (2000)
No. 27060 (Maynard, C. J.)

See AGREEMENT ON DETAINERS Waiver of time limits, (p. 65) for discussion of topic.

DISCIPLINARY PROCEEDINGS

Attorneys

Prosecuting attorney

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

Standard for review

Lawyer Disciplinary Board v. Artimez, ___ W.Va. ___, 540 S.E.2d 156 (2000) No. 25804 (Davis, J.)

See ATTORNEYS Discipline, Engaging in conduct prejudicial to the administration of justice, (p. 170) for discussion of topic.

Lawyer Disciplinary Board v. Askin, 203 W.Va. 320, 507 S.E.2d 683 (1998) No.s 22684 & 23313 (Per Curiam)

See ATTORNEYS Discipline, Criminal contempt, (p. 168) for discussion of topic.

Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) No. 23938 (Per Curiam)

See ATTORNEYS Discipline, Failure to repay funds and failure to act, (p. 174) for discussion of topic.

DISCIPLINARY PROCEEDINGS

Attorneys (continued)

Standard for review (continued)

Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999) No. 22430 (Per Curiam)

See ATTORNEYS Discipline, Alcohol or drug addiction, (p. 163) for discussion of topic.

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

Lawyer Disciplinary Board v. Keenan, ___ W.Va. ___, 542 S.E.2d 466 (2000) No. 25161 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel, (p. 178) for discussion of topic.

Lawyer Disciplinary Board v. Kupec, 204 W.Va. 643, 515 S.E.2d 600 (1999) No. 23011 (Per Curiam)

See ATTORNEYS Discipline, Misappropriation of funds, (p. 184) for discussion of topic.

Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) No. 23946 (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to disciplinary counsel (p. 180) for discussion of topic.

DISCIPLINARY PROCEEDINGS

Attorneys (continued)

Standard for review (continued)

Lawyer Disciplinary Board v. Turgeon, ___ W.Va. ___, ___ S.E.2d ___, (2000) No. 25189 (Per Curiam)

See ATTORNEYS Discipline, Incompetent representation, (p. 182) for discussion of topic.

Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999) No. 24221 (Per Curiam)

See ATTORNEYS Discipline, Responsibility as supervisor or partner, (p. 191) for discussion of topic.

Judicial officers

Family law master

In re Hamrick, 204 W.Va. 357, 512 S.E.2d 870 (1998)
No. 24482 (Per Curiam)

See FAMILY LAW MASTER Discipline, Charges dismissed, (p. 383) for discussion of topic.

Magistrates

In re McCormick, 206 W.Va. 69, 521 S.E.2d 792 (1999)
No. 23971 (Per Curiam)

See MAGISTRATES Discipline, On-call requirements and responsibilities, (p. 543) for discussion of topic.

DISCIPLINARY PROCEEDINGS

Judicial officers (continued)

Magistrates (continued)

In the Matter of Binkoski, 204 W.Va. 664, 515 S.E.2d 828 (1999)
No.'s 25042 & 25176 (Per Curiam)

See MAGISTRATES Discipline, Consent agreement, (p. 541) for discussion of topic.

In re Tennant, 205 W.Va. 92, 516 S.E.2d 496 (1999)
No. 23906 (Workman, J.)

See MAGISTRATES Discipline, Solicitation of votes, (p. 545) for discussion of topic.

Standard for review

In re Hamrick, 204 W.Va. 357, 512 S.E.2d 870 (1998)
No. 24482 (Per Curiam)

See FAMILY LAW MASTER Discipline, Charges dismissed, (p. 383) for discussion of topic.

In re McCormick, 206 W.Va. 69, 521 S.E.2d 792 (1999)
No. 23971 (Per Curiam)

See MAGISTRATES Discipline, On-call requirements and responsibilities, (p. 543) for discussion of topic.

In re Tennant, 205 W.Va. 92, 516 S.E.2d 496 (1999)
No. 23906 (Workman, J.)

See MAGISTRATES Discipline, Solicitation of votes, (p. 545) for discussion of topic.

DISCIPLINARY PROCEEDINGS

Judicial officers (continued)

Standard for review (continued)

In the Matter of Binkoski, 204 W.Va. 664, 515 S.E.2d 828 (1999)
No.'s 25042 & 25176 (Per Curiam)

See MAGISTRATES Discipline, Consent agreement, (p. 541) for discussion of topic.

DISCOVERY

Civil cases

Law enforcement internal affairs investigatory materials

McClay v. Jones, ___ W.Va. ___, 542 S.E.2d 83 (2000)
No. 27776 (Scott, J.)

See RECORDS Disclosure in civil case, Law enforcement internal affairs investigatory materials, (p. 663) for discussion of topic.

Disclosure of defense witness information

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

The appellant was convicted by jury trial of child abuse by creating a risk of injury, destruction of property and fleeing from an officer.

The appellant had provided a list of potential witnesses in advance of trial without addresses or phone numbers. The circuit court made a pretrial ruling that unless the defense supplied the phone and address information to the State by a time certain the witnesses would not be permitted to testify at trial. One witness for whom the additional information was supplied was not reachable through the information that was supplied and the trial court precluded his testimony even though the witness was present.

The appellant vouched the record as to what the testimony would have been if the witness had testified and in essence the proffered testimony would have supported the appellant's claim of self-defense.

The primary assignment of error was that the circuit court unconstitutionally refused to allow a defense witness to testify.

DISCOVERY

Disclosure of defense witness information (continued)

State v. Snodgrass, (continued)

Syl. pt. 1 - “Where a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article [III], section 14 of the West Virginia Constitution to preclude the witness from testifying.” Syllabus Point 1, *State v. Ward*, 188 W.Va. 380, 424 S.E.2d 725 (1991).

The Court found that the trial court’s refusal to allow the defense witness to testify was reversible error because the record did not reflect that the appellant willfully refused to disclose the location of the witness and the testimony was crucial to the appellant’s theory of the case.

Reversed and remanded.

Discretion of court

Pre-trial identification

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

DISCOVERY

Failure to disclose

Exculpatory evidence

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

Photographic array

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

Post-conviction *habeas corpus* proceeding

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

Pre-trial identification

Photographic array

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

DISCOVERY

Pre-trial identification (continued)

Right to

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

Appellant was convicted of delivery of crack cocaine. One of the main issues at trial was an undercover officer's identification of the appellant. On cross-examination, the officer stated he did not know the appellant but recognized him immediately in a photo array.

Appellant's counsel asked to see the photo array, but the prosecution objected on the grounds that the photos were used in investigations. Appellant was denied access and the trial court ruled that the officer had an "independent recollection" of the appellant.

A second officer also testified that he knew the appellant and that he had gone to school with the appellant's brother. The officer stated he got the appellant's name from a photo album of "past offenders." He claimed that he could have gotten the appellant's name without reference to the album. The defense pointed out that the appellant had several brothers, all of whom looked alike. It was undisputed that the officer confused the brother with whom he went to school with another brother.

Appellant claimed error in the trial court's refusal to allow inspection of the photo array.

Syl. pt. 1 - "Subject to certain exceptions, pretrial discovery in a criminal case is within the sound discretion of the trial court." Syl. Pt. 8, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983), *cert. denied*, 464 U.S. 934, 104 S.Ct. 338, 78 L.Ed.2d 307 (1983).

Syl. pt. 2 - "A defendant must be allowed to examine any photographic display used by the government during pre-trial identification procedures, to determine whether it improperly suggested his identity." Syl. Pt. 7, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

DISCOVERY

Pre-trial identification (continued)

Right to (continued)

State v. Garrett, (continued)

The Court found the officer did not have an independent recollection of the appellant. More importantly, when a photo array is used in the identification process it must be shown to the accused. (For guidance as to how sensitive information is to be disclosed, see *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975)).

Reversed and remanded.

Witnesses

Prior statements

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

DOMESTIC VIOLENCE

Effect on custody disputes

Dale Patrick D. v. Victoria Diane D., 203 W.Va. 438, 508 S.E.2d 375 (1998) No.s 25017 & 25018 (Per Curiam)

Custodial mother and a guardian *ad litem* brought action for supervised visitation based on allegations of sexual abuse of a child by the father. The family law master found no such abuse and recommended supervised visitation progressing toward unsupervised visitation, and the circuit court affirmed the report. Mother and guardian appealed.

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*.” Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Syl. pt. 2 - ““Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account[.]” Syl. pt. 1, in part, *Henry v. Johnson*, 192 W.Va. 82, 450 S.E.2d 779 (1994).” Syl. Pt. 2, *Mary Ann P. v. William R. P.*, 197 W.Va. 1, 475 S.E.2d 1 (1996).

Syl. pt. 3 - “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 re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

DOMESTIC VIOLENCE

Effect on custody disputes (continued)

Dale Patrick D. v. Victoria Diane D., (continued)

Syl. pt. 4 - “In visitation as well as custody matters, we have traditionally held paramount the best interests of the child.” Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

Despite extensive evidence of sexual abuse, the Court found no clear error regarding the lower court’s findings even though it noted that the family law master’s conclusion that the mother’s allegations were baseless attempts to deny the father visitation appeared to be in error. The Court expressed concern that the evidence of domestic violence by the father directed at the mother was not sufficiently considered below and remanded for further fact-finding on the potential of such domestic abuse having a deleterious effect on the child. On remand, the parties were directed to agree on a family therapist.

Affirmed in part, reversed in part and remanded.

Priority status

In re McCormick, 206 W.Va. 69, 521 S.E.2d 792 (1999)
No. 23971 (Per Curiam)

See MAGISTRATES Discipline, On-call requirements and responsibilities, (p. 543) for discussion of topic.

DOUBLE JEOPARDY

Legislative intent

Multiple punishment

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering, (p. 748) for discussion of topic.

Test for

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

Appellants were convicted of willful creation by a custodian of an emergency situation for an incapacitated adult and of misdemeanor battery. Appellants worked in a personal care home and were restraining a patient who suffered from schizophrenia and mild retardation and engaged in behavior dangerous to himself and others.

The appellants contend on appeal that the convictions for the 2 crimes arose from the same incident and involved the same victim and thereby violated double jeopardy principles by allowing 2 penalties for one offense.

Syl. pt. 7 - “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).

DOUBLE JEOPARDY

Legislative intent (continued)

Test for (continued)

State v. Easton & State v. True, (continued)

Syl. pt. 8 - “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).

After determining that it was not clear whether the Legislature intended to permit multiple sentences for the same offense, the Court looked at the statutes to determine whether the offenses were indeed the same. In concluding that the convictions did not violate double jeopardy, the Court found that the offenses required different elements of proof and therefore were separate and distinct offenses.

Affirmed.

Mistrial

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

After the defense had rested its case in the first-degree murder trial of the appellant, the State moved for a mistrial because it had just discovered that one of the jurors was related to the accused (second cousins). Although satisfied that the fact was not intentionally withheld from the court, the trial judge declared a mistrial without objection from the defense. After being retried and convicted in the subsequent trial, the appellant raised double jeopardy in his direct appeal. The State argued that the appellant had waived the double jeopardy claim by failing to raise it in the trial court as required by *State v. Carroll*, 150 W.Va. 765, 149 S.E.2d 309 (1966).

DOUBLE JEOPARDY

Mistrial (continued)

State v. Swafford, (continued)

Syl. pt. 2 - “Termination of a criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial.” Syllabus Point 4, *Keller v. Ferguson*, 177 W.Va. 616, 355 S.E.2d 405 (1987).

Syl. pt. 3 - “ ‘The “manifest necessity” in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription.’ [Syllabus Point 2,] *State v. Little*, 120 W.Va. 213, [197 S.E. 626 (1938)].” Syllabus Point 2, *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730 (1964), *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.E.2d 30 (1964).

The Court avoided the waiver issue altogether and decided that it was not an abuse of the trial court’s discretion to declare a mistrial in the first trial because the declaration resulted from manifest necessity. The trial court had reasoned that the family relationship might prejudice the State, while the defendant also might be prejudiced inasmuch as the very questioning of the juror might result in him feeling pressure to convict because his impartiality had been questioned. Noting further that kinship within the 9th degree was *prima facie* grounds for disqualification of a juror, the Court found that the trial court had “no choice but to grant a mistrial once this relationship was disclosed.”

Reversed and remanded.

Manifest necessity

State ex rel. Bailes v. Jolliffe, ___ W.Va. ___, 541 S.E.2d 571 (2000)
No. 27912 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 554) for discussion of topic.

DOUBLE JEOPARDY

Mistrial (continued)

Manifest necessity (continued)

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See DOUBLE JEOPARDY Mistrial, (p. 259) for discussion of topic.

Multiple punishment

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See DOUBLE JEOPARDY Legislative intent, Test for, (p. 258) for discussion of topic.

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering, (p. 748) for discussion of topic.

DOUBLE JEOPARDY

Test for

Legislative intent

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See DOUBLE JEOPARDY Legislative intent, Test for, (p. 258) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Blood tests

Reporting requirements

In re Burks, 206 W.Va. 429, 525 S.E.2d 310 (1999)
No. 25897 (Starcher, J.)

The appellant was arrested for DUI. He requested a blood test and was taken by police officers to a hospital where such a test was performed. After his license was suspended by the Division of Motor Vehicles (DMV), his lawyer wrote to the arresting officer asking for the type and result of the blood test. The officer replied that such information could be obtained from the hospital.

At the administrative hearing to contest the license suspension, the driver raised two points: (1) the arresting officer's failure to mail DMV his affidavit within 48 hours of the arrest as required by *W.Va. Code* § 17C-5A-1, deprived DMV of jurisdiction to consider the matter; and (2) the officer's failure to provide the blood-test information was prejudicial. Although DMV rejected both arguments, the circuit court accepted both and overturned the suspension.

Syl. pt. 1 - A law enforcement officer's failure to strictly comply with the DUI arrest reporting time requirements of *W.Va. Code*, 17C-5A-1(b) [1994] is not a bar or impediment to the commissioner of the Division of Motor Vehicles taking administrative action based on the arrest report, unless there is actual prejudice to the driver as a result of such failure.

Syl. pt. 2 - A person who is arrested for driving under the influence who requests and is entitled to a blood test, pursuant to *W.Va. Code*, 17C-5-9 [1983], must be given the opportunity, with the assistance and if necessary the direction of the arresting law enforcement entity, to have a blood test that insofar as possible meets the evidentiary standards of 17C-5-6 [1981].

Syl. pt. 3 - The requirement that a driver arrested for DUI must be given a blood test on request does not include a requirement that the arresting officer obtain and furnish the results of that requested blood test.

DRIVING UNDER THE INFLUENCE

Blood tests (continued)

Reporting requirements (continued)

***In re Burks*, (continued)**

With regard to the statutory 48-hour mailing deadline, the Court held that “technical and nonprejudicial noncompliance with reporting time requirements” would not pose a jurisdictional impediment to administrative action by DMV. It is unclear how prejudice might be shown and at what point it might act as a jurisdictional bar to an administrative hearing.

With regard to the officer’s failure to provide the blood-test results to the appellant the Court held that the statutes imposed no such obligation on the officer.

Reversed.

Breach of peace

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)
No. 25403 (Davis, J.)

See POLICE Territorial jurisdiction, (p. 607) for discussion of topic.

Home confinement

State v. Yoak, 202 W.Va. 331, 504 S.E.2d 158 (1998)
No. 24505 (Maynard, J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Home confinement, (p. 265) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Sentencing

Home confinement

State v. Yoak, 202 W.Va. 331, 504 S.E.2d 158 (1998)
No. 24505 (Maynard, J.)

Two cases were consolidated to address the same issue on appeal. Each appellant was convicted of third offense DUI and sentenced to prison. The trial court ruled that it did not have the power to order home confinement as an alternative sentence for DUI convictions.

Syl. pt. 1 - The 1994 amendment contained in *W.Va. Code* § 17C-5-2(o) and presently codified at *W.Va. Code* § 17C-5-2(p) (1996) has effectively overruled *State ex rel. Hagg v. Spillers*, 181 W.Va. 387, 382 S.E.2d 581 (1989), and *State ex rel. Moomau v. Hamilton*, 184 W.Va. 251, 400 S.E.2d 259 (1990), by permitting circuit courts to consider the alternative sentence of home incarceration pursuant to *W.Va. Code* § 62-11B-1 *et seq.* when an individual has been convicted of third offense driving under the influence of alcohol under *W.Va. Code* § 17C-5-2(k) (1996).

The Court remanded for resentencing. The 1996 amendments to the DUI laws provides for a 1 to 3 year sentence for third offense DUI; however, *W.Va. Code* §17C-5-2(p) expressly allows for home detention as an alternative sentence to any period of incarceration.

Remanded.

Stipulation to prior conviction

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

DRIVING UNDER THE INFLUENCE

Sentencing (continued)

Stipulation to prior conviction (continued)

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Third offense

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

State v. Yoak, 202 W.Va. 331, 504 S.E.2d 158 (1998)
No. 24505 (Maynard, J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Home confinement,
(p. 265) for discussion of topic.

DUE PROCESS

Confiscation of inmate computers

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998)
No. 25155-25158 (Maynard, J.)

See PRISON/JAIL CONDITIONS Computers, Confiscation of, (p. 612) for discussion of topic.

Curfew ordinance

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

See STATUTES Ordinance, Constitutionality, (p. 739) for discussion of topic.

Disclosure of inducements to witness

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

Exculpatory evidence

Failure to disclose

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

DUE PROCESS

Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 640) for discussion of topic.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 640) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Indictment delay

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See INDICTMENT Due process, Delay in indicting, (p. 432) for discussion of topic.

DUE PROCESS

Inmates

Confiscation of computers

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998)
No. 25155-25158 (Maynard, J.)

See PRISON/JAIL CONDITIONS Computers, Confiscation of, (p. 612) for discussion of topic.

Right to rehabilitation

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

Jury verdict

Alternative theories of first-degree murder

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

See HOMICIDE First-degree murder, Instructions to distinguish type, (p. 417) for discussion of topic.

Juvenile

Pretransfer hearing

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

See JUVENILES Plea agreement, Pretransfer hearing waiver, (p. 521) for discussion of topic.

DUE PROCESS

Parole review

State ex rel. Carper v. Parole Board, 203 W.Va. 583, 509 S.E.2d 864 (1998) No. 25184 (Starcher, J.)

See PAROLE Hearings, *Ex post facto* application of time for review, (p. 576) for discussion of topic.

State ex rel. Haynes v. W.Va. Parole Board, 206 W.Va. 288, 524 S.E.2d 440 (1999) No. 26006 (Per Curiam)

See PAROLE Hearings, *Ex post facto* application of time for review, (p. 577) for discussion of topic.

Pre-trial silence

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

Prompt presentment

Rogers v. Albert, et al., ___ W.Va. ___, 541 S.E.2d 563 (2000)
No. 27680 (Per Curiam)

See MAGISTRATES Availability, Prompt presentment, (p. 540) for discussion of topic.

DUE PROCESS

Property interest

Computers in jails

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998)
No. 25155-25158 (Maynard, J.)

See PRISON/JAIL CONDITIONS Computers, Confiscation of, (p. 612) for discussion of topic.

Rape shield law

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

During a trial for sexual assault of his wife, defendant proffered evidence that the victim had told hospital personnel that she had last had sexual intercourse 2 months prior to the assault. A post-assault examination revealed sperm with the DNA from two men, but none from the defendant. The trial court refused to permit introduction of this evidence under the rape shield law. On appeal the defendant contended that his due process right to a fair trial had been violated because relevant evidence bearing on the credibility of the victim had been excluded.

Syl. pt. 5 - "In light of the judicially-sanctioned procedures set out in *State v. Green*, [163] W.Va. [681], 260 S.E.2d 257 (1979), the provisions of *W.Va. Code*, 61-8B-12, limiting the defendant's right to present evidence of the victim's prior sexual conduct are constitutional under the provisions of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution." Syllabus point 1, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

Syl. pt. 6 - The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion.

DUE PROCESS

Rape shield law (continued)

State v. Guthrie, (continued)

The Court announced the due process test it would apply to trial court decisions to exclude evidence based on the rape shield law (see Syl. pt. 5). In applying the test to this case, the Court found that there was no evidence in the record about the victim's statements to hospital personnel regarding her prior sexual contacts which made the proffered reason to use the evidence baseless although it characterized the evidence as marginally relevant. The Court ultimately found the State had a compelling interest in excluding the evidence in order to protect rape victims from humiliation and harassment as well as to minimize deterrents to reporting incidents of rape.

Affirmed.

Termination of parental rights

Incarcerated person

State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865 (2000)
No. 27061 (Davis, J.)

See TERMINATION OF PARENTAL RIGHTS Due process requirements, Incarcerated parent's attendance at dispositional hearing, (p. 786) for discussion of topic.

ENDANGERMENT

Of incapacitated adult

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

EQUAL PROTECTION

Home confinement

Indigents' right

State v. Shelton, 204 W.Va. 311, 512 S.E.2d 568 (1998)
No. 25019 (McCuskey, J.)

See SENTENCING Home confinement, Indigents' right to, (p. 708) for discussion of topic.

EVIDENCE

Abuse and neglect

Prior acts of abuse

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

Termination of improvement period

DHHR ex rel. McClure v. Daniel B., 203 W.Va. 254, 507 S.E.2d 132
(1998) No. 25002 (Per Curiam)

See ABUSE AND NEGLECT Improvement period, Termination, (p. 24) for discussion of topic.

Third party standard

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See ABUSE AND NEGLECT Third party, Evidentiary standard, (p. 54) for discussion of topic.

Admissibility

Audiotape of witness conversation

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

EVIDENCE

Admissibility (continued)

Battered woman's syndrome

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Character of accused

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

Appellant was convicted of first-degree murder. The trial court allowed testimony that the appellant had beaten someone in 1992 because the appellant believed the person had told authorities about the activities of one of the appellant's friends. The same witness also testified that the appellant asked him to tell the victim "what happened to people who put out statements on other people."

Note: (No syllabus point on this issue.)

The Court found no error in the trial court's application of the procedures in *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). The record showed the trial court determined the evidence showed motive, intent, plan and mode of operation, found the probative value of the evidence outweighed any prejudicial effect, and instructed the jury that the evidence could only be used to show the appellant acted according to a plan.

Affirmed in part, reversed in part, and remanded with directions.

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

The appellant was convicted by a jury of first-degree sexual abuse of an 11-year-old girl. The State introduced evidence at trial of a previous conviction for first-degree sexual assault of another 11-year-old girl.

The appellant challenged the propriety of the lower court's decision to allow the prior crime evidence. Specifically, he asserted that the State gave untimely notice of the intent to use the evidence and the notice neither sufficiently described the prior crime nor its intended use. The appellant further contended that an improper jury instruction was given about the limited purpose of the evidence.

Syl. pt. 4 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Syllabus Point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 5 - "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), *modified*, Syllabus Point 1, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

Syl. pt. 6 - "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

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Graham, (continued)

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).

Syl. pt. 7 - "Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, [176] W.Va. [688], 347 S.E.2d 208 (1986), it is overruled." Syllabus Point 2, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

The Court noted that the disclosure outside the original time frame mandated by the lower court was not fatal since the appellant knew of the State's intent to use the evidence over 3 months before trial. The untimely notice, therefore, did not create surprise nor did it deny the appellant the opportunity to prepare a defense. As to the sufficiency of the contents of the notice, the Court found that the notice fully described the prior conviction and that the State intended to use the evidence to prove the lustful disposition of the accused toward children and concluded that the trial court correctly found the evidence admissible. The Court also found the instruction regarding the limited purpose of the evidence to be adequate.

Affirmed.

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

Appellant was convicted of first-degree murder in the death of his girlfriend and another man. The prosecution advised defense counsel that extensive evidence of wrongful acts would be introduced pursuant to Rule 404(b) of the Rules of Evidence. Following a hearing, the trial court admitted the evidence. Although originally joined, the murder trials were severed. The trial court allowed evidence regarding the other murder into each trial and gave limiting instructions.

Appellant claimed the evidence of prior domestic violence between the victim and himself and of the second murder should not have been admitted.

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).

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

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Hager, (continued)

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 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b)." Syl. Pt. 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 4 - "Other criminal act evidence admissible as part of the *res gestae* or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose." Syl. Pt. 1, *State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978).

The Court noted the trial court correctly considered the evidence in light of the procedures set forth in *McGinnis*, *supra*.

Affirmed.

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

At a murder trial involving a victim who was bludgeoned to death in January 1994, a witness was allowed to testify that some months before the crime she had seen the appellant, near the victim's house with something under his coat. The appellant had told her that he was looking for the victim because he had kissed his (appellant's) sister and given her a rash. Another witness testified that he had also seen the appellant near the house with a baseball bat under his coat and that the appellant had told him at a party that he was "going to get" the victim. Prior to allowing this testimony, the trial court held an *in camera* hearing to determine its admissibility under Rule 404(b) to show plan, premeditation and motive, and found (1) by a preponderance of evidence that the conduct did in fact occur and (2) it was relevant and (3) under the balancing test of Rule 403, its probative value outweighed its prejudicial effect. The court did not, however, give the cautionary instruction as to the limited purpose for which the evidence was being admitted, as required by *State v. McGinnis*.

Syl. pt. 7 - "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

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Horton & State v. Allen, (continued)

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 Point 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

Syl. pt. 8 - "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syllabus Point 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956).

The Court found no error in the trial court's analysis of the evidence. It also found no reversible error in the failure to give the limiting instruction because the appellant failed to request it and the prosecutor noted the limited use of the evidence in his closing argument.

Affirmed.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000) No. 26849 (Per Curiam)

The appellant was a teacher who was convicted of three counts of third degree sexual assault of a student. During the course of the jury trial, the State called other students to testify about similar experiences that they had with the teacher which covered a period of 1 to 13 years.

One of the grounds on which the conviction was appealed was that the admission of evidence of the collateral acts was improper. Specifically, the appellant claimed that most of the collateral act evidence was irrelevant, the testimony in its cumulative form was unfairly prejudicial, the trial court incorrectly applied the principles of Rule 404 (b) (Rules of Evidence) and of *Edward Charles L.* and the limiting instruction was flawed.

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. McIntosh, (continued)

Syl. 1 - “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b).” Syl. Pt. 1, *Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 2 - “Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), it is overruled.” Syl. Pt. 2, *Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 3 - “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).

Syl. pt. 4 - “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

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. McIntosh, (continued)

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. 5 - "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." Syl. Pt. 3, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Syl. pt. 6 - "The general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection." Syllabus Point 3, *State v. Gangwer*, [169] W.Va. [177], 286 S.E.2d 389 (1982)." Syl. Pt. 2, *State v. Mullins*, 171 W.Va. 542, 301 S.E.2d 173 (1982).

Syl. pt. 7 - "A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syl. Pt. 1, *Maples v. West Virginia Dept. of Commerce, Div. of Parks and Recreation*, 197 W.Va. 318, 475 S.E.2d 410 (1996).

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. McIntosh, (continued)

Syl. pt. 8 - “Whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. Pt. 5, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945).

Syl. pt. 9 - “As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.” Syl. Pt. 6, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982).

The Court applied the *LaRock* test to the evidence and found no error. The record showed that the trial court found the evidence probative of a material issue other than character and its probative value outweighed its prejudicial effect. The Court did not find that the trial court inappropriately merged the principles of Rule 404 (b) and those of *Charles Edward L.* The lower court’s concurrent examination of the evidence in light of the requirements of both of these authorities was found to be proper. After lengthy discussion of cases from other states regarding the issue of remoteness, the Court found that under the facts of the instant case the testimony did not involve incidents that were too remote to void their admissibility since it supported a continuing pattern of conduct related to the instant offense. The weight of the remote evidence was within the province of the jury. Finding no constitutional deficiency in the limiting instruction involving this evidence, the Court found further review of the issue waived because the trial court incorporated the limiting instruction proposed by the appellant who did not otherwise object or attempt to clarify the instruction with the lower court.

Affirmed.

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

Defendant was admitted to a hospital with complaints of pain that he related to cocaine ingestion. Shortly after his discharge, a drive-through convenience store was robbed. At a pre-trial conference on the day of his trial for aggravated robbery, the State announced that it intended to introduce evidence of the defendant's cocaine use in two ways: (1) to show motive by arguing that the defendant was addicted to and needed money for drugs; and (2) as the reason for his admission to the hospital. In the absence of evidence that the defendant was addicted to cocaine, the trial court rejected the State's first basis. The trial court, however, deemed the reason for the hospital admission to be relevant. No balancing test was conducted under Rule 403 of the Rules of Evidence.

The prosecutor neither alluded to the defendant's alleged cocaine addiction during his opening statement nor did he elicit evidence about it from any of the State's witnesses. However, the defendant was questioned by his counsel on direct about his use of cocaine and how, although addicted, he never stole to obtain money to buy drugs. On cross-examination, the defendant was questioned in more depth about his addiction, his finances and the frequency and cost of his cocaine use. On appeal it was contended that the court erred in permitting the State to introduce evidence of addiction.

Syl. pt. 3 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus point 3, *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983).

Syl. pt. 4 - " 'A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.' Syl. Pt. 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966)." Syllabus point 4, *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996).

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Mann, (continued)

Syl. pt. 5 - “Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a . . . [forfeiture] of the right to raise the question thereafter in the trial court or in the appellate court.” Syllabus point 1, in part, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995).

The Court found no error in the trial court’s decision to permit the introduction of evidence of the cocaine-related reason for the defendant’s admission to the hospital, despite the failure to conduct the probative versus prejudicial value balancing test under Rule 403. The basis of this holding was simply that it was necessary for the jury to know that the defendant did not receive treatment for an injury that would have rendered him physically unable to commit the offense about an hour after his discharge.

With regard to the introduction of evidence of addiction, the Court noted that the State’s cross-examination of the appellant involved prior bad acts but that the appellant invited the introduction of such evidence by testifying on direct that he was addicted but that he had sufficient income to support such addiction without stealing. The Court explained that the invited error rule is “a branch of the doctrine of waiver” that seeks to allocate responsibility for an error and thereby advance judicial economy and integrity.

Affirmed.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

Appellant was tried for second-degree murder involving the killing of a 16-year-old in the woods with a hunting rifle. Appellant's defense at trial was that he was squirrel hunting at the time when he saw a "glimpse of red" some 50 yards away and thought it was a squirrel. The State sought to introduce evidence that appellant had a history of threats and violent acts, including brandishing and firing weapons in a threatening manner in attempts to keep people away from his property, and argued this evidence was necessary to show malice and that the shooting was not an accident. After conducting an *in camera* hearing pursuant to *State v. McGinnis*, the trial court found that the defendant committed the threatening acts alleged, that such acts were sufficiently similar to the charged crime, and that the prejudicial effect was not outweighed by the probative value. The trial court also instructed the jury as to the limited purpose for which the evidence was being admitted. Appellant was convicted of murder and appealed.

Syl. pt. 3 - "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).

Syl. pt. 4 - "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 occur

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Scott, (continued)

ed 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 Point 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The Court rejected the appellant's argument that the evidence was not sufficiently probative. Under an abuse of discretion standard, the Court noted first that Rule 404(b) was an inclusive rule that permits all relevant evidence unless the sole purpose is to show criminal disposition. Moreover, the trial court followed the procedure set forth in *McGinnis*.

Affirmed.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998) No. 25204 (Per Curiam)

Appellant was convicted of entering without breaking, larceny and conspiracy. Some of the subject property was located in an old church which Phillip Ramey and his wife purchased from Ruby Foley. The sales contract for the church specified that certain items in the church were to remain the seller's property and the seller was given a reasonable time to remove the specified items. However, within several days of the signing of the contract, the appellant and the Rameys entered the church and removed

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Zacks, (continued)

all of the property as well as property from another location. The appellant claimed at trial that he assisted the Rameys because of their assertions that they owned the property which was removed.

The trial court granted defense counsel's motion *in limine* to exclude evidence of subsequent "bad acts" in another venue involving the appellant. During trial, an *in camera* hearing was held to determine the admissibility of the testimony of Mrs. Ramey regarding other similar crimes that she had committed with the appellant. Notwithstanding the defense objection that the testimony was not corroborated by police records or other means, the trial court allowed the evidence to be admitted. During cross examination, Mrs. Ramey admitted she had received a grant of immunity from the United States Attorney in exchange for her statement to police that items had been stolen and taken across state lines.

One of the contentions on appeal was that the trial court erred in admitting evidence of unrelated crimes based on several theories: no notice was provided to the defense regarding use of such evidence; the evidence was not corroborated; an acceptable reason for using such evidence was not presented to the court; the balancing test of probative value in relation to prejudicial effect was not conducted by the trial court; and the amount of "bad act" evidence allowed to be introduced was excessive.

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." Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Zacks, (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) [, *overruled on other grounds*, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990)]. 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 Point 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The Court found that the State is not required under Rule 404 (b) of the Rules of Evidence to provide notice to the defense of its intent to use collateral crime evidence; evidence of collateral crimes does not need to be corroborated (*United States v. Bailey*, 990 F.2d 119 (4th Cir. 1993)); and a permissible reason for using such evidence was reflected in the record by statements of the trial judge and the limiting instruction given to the jury. Although no formal pronouncement was made on the record, the Court found that when the record was viewed as a whole it was apparent that the trial judge did perform the required balancing test pursuant to Rules 401-403

EVIDENCE

Admissibility (continued)

Character of accused (continued)

State v. Zacks, (continued)

of the Rules of Evidence before allowing the collateral acts evidence to be admitted. Finally, the Court found that the appellant had not objected at trial to the amount of collateral crime evidence admitted and, furthermore, had injected a new reason to admit additional collateral crime evidence due to the cross examination of Mrs. Ramey.

Affirmed.

Character of victim

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998) No. 24979 (Per Curiam)

Appellant was convicted of first-degree murder. His defense at trial was that the victim provoked him and he acted in self defense.

On appeal he asserts that the trial court erred by prohibiting the victim's former girlfriend from testifying about the victim's violent character.

Syl. pt. 3 - "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

The record reflected that the trial court incorrectly found the character evidence about the victim inadmissible on the premise that the appellant had to know at the time of the alleged crime about the incidents to which the witness would testify. Citing *Dietz v. Legursky*, 188 W.Va. 526, 425 S.E.2d 202 (1992), the Court found the basis for the trial court's decision faulty

EVIDENCE

Admissibility (continued)

Character of victim (continued)

State v. Boggess, (continued)

since no prior knowledge about the victim's character is necessary under Rule 404 of the Rules of Evidence. Nonetheless, the Court did not find the trial court abused its discretion because the record showed that the judge had expressed his concern that the evidence was more prejudicial than probative (Rule 403, Rules of Evidence) which was a permissible reason to exclude the testimony.

Affirmed.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Coconspirator's statement

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153) for discussion of topic.

Collateral acts/crimes

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

EVIDENCE

Admissibility (continued)

Collateral acts/crimes (continued)

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

EVIDENCE

Admissibility (continued)

Collateral acts/crimes (continued)

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Confessions

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See RIGHT TO COUNSEL Waiver after right asserted, (p. 672) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

Appellant was convicted of first-degree murder in the death of the appellant's girlfriend and another man. Three days after the murders the appellant surrendered to the Kermit city police and confessed after he was informed of his rights.

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Hager, (continued)

The police did not tell the appellant that his family had hired a lawyer. Police contend they had no knowledge of the lawyer, but the appellant claimed they knew. The attorney was waiting for the appellant in Williamson, assuming the appellant would be transported there; instead the appellant was interrogated at Kermit. The trial court found the appellant did not have counsel at the time the confession was given and that the appellant knowingly, intelligently and voluntarily waived counsel.

Syl. pt. 5 - “A defendant who is being held for custodial interrogation must be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney’s retention or appointment. This rule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel.” Syl. Pt. 1, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985).

Syl. pt. 6 - “When this Court reviews challenges to the findings and conclusion 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 Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

Syl. pt. 7 - “On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.” Syl. Pt. 3, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Hager, (continued)

The Court found no clear error in the trial court's factual finding that no counsel had been retained. While it did not have to reach the question of whether the police are obligated to inform the defendant when they know that legal counsel has been retained, the Court noted that its holding in *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985) supporting such obligation would need to be reviewed in light of *Moran v. Burbine*, 475 U.S. 412 (1986) should the issue come before it.

Affirmed.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998) No. 25006 (Maynard, J.)

Appellant was convicted of first-degree murder, second-degree arson and providing false information to police.

The appellant and victim lived on a farm owned by the victim's mother. The appellant and her son went to the police station to report that the victim had been shot. Several months later, a suspicious fire burned a barn at the farm where the appellant still lived.

During the course of the investigation, the appellant made 18 statements to the police. She sought to suppress 2 statements which involved the basis for the charge of providing false information to an officer. She asserted on appeal that these statements should have been suppressed because they were the result of custodial interrogation.

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Milburn, (continued)

Syl. pt. 3 - “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.” Syllabus Point 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Syl. pt. 4 - “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 law, or, based on the entire record, it is clear that a mistake has been made.” Syllabus Point 2, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Syl. pt. 5 - “Whether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances.” Syllabus Point 2, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995), *cert. denied*, 516 U.S. 872, 116 S.Ct. 196, 133 L.Ed.2d 131 (1995).

Syl. pt. 6 - “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).

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Milburn, (continued)

Syl. pt. 7 - “Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability.” Syllabus Point 6, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988).

Syl. pt. 8 - “ ‘The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.’ Syllabus Point 6, *State v. Persinger*, [169] W.Va. [121], 286 S.E.2d 261 (1982), as amended.” Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. pt. 9 - “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; (2) whether each statement was against the penal interest of the declarant; (3) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable.” Syllabus Point 8, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

The Court noted the appellant was considered a victim and was not under arrest at the time either of the first 2 statements were made. No abuse of discretion was found.

As to the statement involving the arson confession, the Court examined the record to find that: the appellant went to the police of her own accord on the day the statements were made; the officer clearly informed the appellant of her rights which she acknowledged and signed a waiver form; the officer told the appellant that she was not under arrest and was free to leave at any time; the appellant did not appear to be drug impaired at the time the statements were given; and any videotapes which may have been in the room where the confession was taken were not placed there to make the

EVIDENCE

Admissibility (continued)

Confessions (continued)

State v. Milburn, (continued)

appellant anxious. The Court concluded that there was no evidence that the appellant was detained against her will or was coerced into confessing to the arson. The Court also found that the statement including the murder confession was voluntarily given and not the result of police coercion because the record showed that the appellant was informed that she was not under arrest and free to leave and she had agreed to stay and answer questions about the murder.

The Court also did not find that the prompt presentment rule had been violated either after the appellant confessed to the arson or after she confessed to the murder. The Court pointed out the record showed that after the arson confession the appellant was told she was not under arrest and was informed that she was free to go, and that the purpose for the police questioning the appellant further was to identify the perpetrator of the murder whom the police did not think was the appellant. The Court found that the delay which occurred after the murder confession was due to completing paperwork and the unavailability of a magistrate.

Affirmed.

Discretion of court

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

EVIDENCE

Admissibility (continued)

Discretion of court (continued)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

EVIDENCE

Admissibility (continued)

Discretion of court (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

Dissociative identity disorder testimony

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Expert

Wilson v. Wilson, ___ W.Va. ___, 452 S.E.2d 402 (2000)
No. 27759 (Per Curiam)

See EVIDENCE Expert, (p. 334) for discussion of topic.

Expert opinion

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See EVIDENCE Expert, Qualifying as, (p. 336) for discussion of topic.

EVIDENCE

Admissibility (continued)

Expert opinion (continued)

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Gruesome photographs

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Gruesome photographs, Admissibility, (p. 338) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

EVIDENCE

Admissibility (continued)

Hearsay

State v. Baylor, ___ W.Va. ___, 542 S.E.2d 399 (2000)
No. 27771 (Per Curiam)

CONFRONTATION CLAUSE Evidence, When analysis applied, (p. 220)
for discussion of topic.

State v. Harris, 207 W.Va. 275, 531 S.E.2d 340 (2000)
No. 26733 (Starcher, J.)

See EVIDENCE Hearsay, Excited utterance of an anonymous or unidentified declarant, (p. 339) for discussion of topic.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

Appellant was convicted of sexual abuse and sexual assault.

After abuse and neglect allegations were raised, the appellant's 2 children and 2 stepchildren (ranging in age from infant to 5 years) were removed and placed with a foster family and the foster parents observed the children engaging in inappropriate sexual activity with each other.

The children were interviewed using anatomically correct dolls and referred to a psychologist, who later testified that C.T., one of the children, indicated that the appellant had sexual intercourse with his sister and forced him to have oral sex with the appellant and with his mother. C.T. also used phrases which indicated sexual activity and was able to demonstrate sexual positions.

C.T. was 8 years old at the time of the trial and testified about "the game" the appellant made him play with his sister's "bird" and about being made to touch the private parts of both his mother and the appellant. C.T. claimed the appellant had "peed" in C.T.'s mouth.

EVIDENCE

Admissibility (continued)

Hearsay (continued)

State v. James B., (continued)

Appellant claimed that the foster mother, the investigating officer, DHHR social worker and the psychologist were allowed to introduce into evidence inadmissible hearsay based on C.T.'s statements.

Syl. pt. 1 - “ ‘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. 3, *State v. Bennett*, 183 W.Va. 570, 396 S.E.2d 751 (1990).

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.” Syl. Pt. 7, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - “The following [is] . . . not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. W.Va.R.Evid. 803(4).” Syl. Pt. 4, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

The Court agreed with the trial court’s conclusion that the statements of the foster mother and trooper were not hearsay since they were not admitted for the truth of the matters asserted but to show why the foster mother and officer took the actions they took. The Court also noted that even if the statements were hearsay, C.T. testified at trial and no substantive additions were made to the child’s testimony by these witnesses.

EVIDENCE

Admissibility (continued)

Hearsay (continued)

State v. James B., (continued)

The record revealed that the questioned testimony of the DHHR worker was solicited on cross-examination by defense counsel. The Court found the appellant was foreclosed from objecting to the admission of these statements based on its decision in *State v. Bennett*, 183 W.Va. 570, 396 S.E.2d 751 (1990).

The Court made note that no objection was raised to the hearsay statements associated with the psychologist's testimony and therefore reviewed this assigned error under the plain error standard. It concluded that the psychologist's testimony about statements made to her by C.T. were related to medical diagnosis and treatment and were properly admitted under Rule of Evidence 803 (4), as that rule had been applied in *Charles Edward L.*

Affirmed.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 569) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

EVIDENCE

Admissibility (continued)

Impeachment

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See CROSS-EXAMINATION Limitations, (p. 230) for discussion of topic.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

EVIDENCE

Admissibility (continued)

Impeachment (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Invited error

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Juvenile records

State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)
No. 26195 (Starcher, C.J.)

See JUVENILES Records, Use for rebuttal or impeachment, (p. 526) for discussion of topic.

EVIDENCE

Admissibility (continued)

Medical history

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Medical records of blood alcohol tests

State v. Coleman, ___ W.Va. ___, 542 S.E.2d 74 (2000)
No. 27807 (Per Curiam)

See INSTRUCTIONS Driving under the influence, *Prima facie* evidence of intoxication, (p. 454) for discussion of topic.

Opinion of lay witnesses

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

At a trial for 3rd offense DUI and driving on a suspended license, the evidence was that a car crashed into a tree and the police were called by a nearby resident. The police found documents in the car with the appellant's name. While still at the scene, the police learned that the appellant had called a wrecker and asked that the car be towed. They also learned that the appellant was at another's home so they proceeded to this home and found the appellant. They noticed a strong odor of alcohol and performed a sobriety test, which he failed. They also found the car keys in his pocket. Appellant had a cut on his head. The police took the appellant to the scene of the accident where a nearby resident identified him as the person at the scene immediately after the crash. Two other nearby residents who had also come to the scene shortly after the accident testified that they saw only the appellant there. Each was then allowed, over the appellant's objections, to give his opinion that the appellant was the driver. Appellant and his nephew both testified that the nephew was driving. Appellant was convicted.

EVIDENCE

Admissibility (continued)

Opinion of lay witnesses (continued)

State v. Nichols, (continued)

Syl. pt. 1 - “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syllabus point 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Syl. pt. 2 - In order for a lay witness to give opinion testimony pursuant to Rule 701 of the West Virginia Rules of Evidence (1) the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue.

The Court reformulated its current rule for determining the admissibility of lay opinion evidence. Formerly the opinion was admissible if it was rationally based on the perception of the witness and if it was helpful to a clear understanding of the witness’s testimony or determination of a fact in issue. As a result of this case, opinion testimony is admissible if the trial court determines: (1) the opinion is based on personal perception, (2) it has a rational connection to the facts and (3) the opinion is helpful to understanding the testimony or to determining a fact in issue. The Court then applied this test to the testimony of the two residents and found that the first two components were satisfied. However, the Court found the lay opinions that the appellant was the driver were not “helpful” to the jury because the jury could draw its own conclusions from the fact testimony of these witnesses.

The Court further held the admission of such opinions was not harmless error because it went to the heart of the appellant’s defense that another person was driving the car and had fled immediately after the accident, and therefore the jury could have accorded too much weight to such opinion.

Reversed.

EVIDENCE

Admissibility (continued)

Opinion on sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

Plain error

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Prior bad acts

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

EVIDENCE

Admissibility (continued)

Prior bad acts (continued)

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

EVIDENCE

Admissibility (continued)

Prior bad acts (continued)

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Prior convictions as elements of crime

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense, (p. 331) for discussion of topic.

Prior inconsistent statement

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

EVIDENCE

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

Appellant was convicted of felony-murder in the death of Randall Burge who died as a result of morphine he received a few hours prior to his death.

One witness at trial testified that she had seen the appellant inject the victim with morphine 3 times just hours before he died. An error assigned on appeal was that the trial court excluded evidence in the form of video and audio tapes involving this witness. The video contained the statement of the witness to the arresting officer soon after the victim died. The audio tape involved an alleged telephone conversation between the witness and the appellant's mother in which the witness purportedly requested money in exchange for leaving town to avoid testifying at the trial.

The appellant claimed that the trial court erred by not allowing the video to be admitted because: 1) it was necessary to refresh the memory of the witness; 2) it was substantive evidence proven by the witness' testimony that her memory was better when the statement was given than at trial; and 3) it was needed for impeachment purposes. The appellant also claimed that the audiotape should have been admitted as a prior inconsistent statement because the requirements of Rule 613 (b) of the Rules of Evidence were satisfied.

Syl. pt. 7 - "A videotaped interview containing a prior inconsistent statement of a witness who claims to have been under duress when making such statement or coerced into making such statement is admissible into evidence if: (1) the contents thereon will assist the jury in deciding the witness' credibility with respect to whether the witness was under duress when making such statement or coerced into making such statement; (2) the trial court instructs the jury that the videotaped interview is to be considered only for purposes of deciding the witness' credibility on the issue of duress or coercion and not as substantive evidence; and (3) the probative value of the videotaped interview is not outweighed by the danger of unfair prejudice." Syllabus Point 2, *State v. King*, 183 W.Va. 440, 396 S.E.2d 402 (1990).

EVIDENCE

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Rodoussakis, (continued)

Syl. pt. 8 - “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.” Syllabus Point 1, *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996).

Syl. pt. 9 - “A trial court is afforded wide discretion in determining the admissibility of videotapes and motion pictures.” Syllabus Point 1, *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986).

The Court observed that Rule 612 of the Rules of Evidence does not require the entire document which is used to refresh memory be shown or read to the jury unless an adverse party requests it be admitted. Additionally, it noted that an entire document is not generally admitted for impeachment purposes unless allegations of coercion or duress are alleged and the demeanor of the witness is necessary to the resolution of the allegation. No error was found in the trial court’s ruling that only parts of the video could be introduced to either refresh the memory of the witness or impeach her. The record showed that the trial court provided opportunities for defense counsel to introduce relevant portions of the videotape or a transcription of the tape for these purposes but counsel did not pursue the alternatives. Likewise, the Court did not agree with the contention that the video should have been admitted because it was substantive evidence since the appellant did not attempt to admit it as a recorded recollection under Rule 803 (5) of the Rules of Evidence.

EVIDENCE

Admissibility (continued)

Prior inconsistent statement (continued)

State v. Rodoussakis, (continued)

With respect to the audiotape, the Court found that the witness was not advised of the existence of the tape until the day after she testified and therefore had no opportunity to respond to it which made it inadmissible under Rule 613 (b) of the Rules of Evidence.

Affirmed.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Psychiatric disability

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

Rule 404(b)

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

EVIDENCE

Admissibility (continued)

Rule 404(b) (continued)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

EVIDENCE

Admissibility (continued)

Rule 404(b) (continued)

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Sexual abuse expert opinion

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

Appellant was convicted of sexual abuse and sexual assault.

After abuse and neglect allegations were raised, the appellant's 2 children and 2 stepchildren (ranging in age from infant to 5 years) were removed and placed with a foster family and the foster parents observed the children engaging in inappropriate sexual activity with each other.

The children were interviewed using anatomically correct dolls and referred to a psychologist. The psychologist testified at trial that the children had been sexually abused.

On appeal it was contended that the expert's testimony went beyond the scope of offering an opinion because she speculated that the appellant committed the crime.

Syl. pt. 1 - " '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. 3, *State v. Bennett*, 183 W.Va. 570, 396 S.E.2d 751 (1990).

EVIDENCE

Admissibility (continued)

Sexual abuse expert opinion (continued)

State v. James B., (continued)

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.” Syl. Pt. 7, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 4 - “Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury. Syl. Pt. 7, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Since no objection was raised to the testimony at trial or post-trial, the Court reviewed the issue under a plain error standard.

The Court noted on cross-examination of the psychologist that the child’s honesty was questioned, as well as the possibility that the child may have been “coached.” The record also disclosed that the psychologist was extensively examined as to why she believed the children were assaulted. No error was found. In accord with Syl. Pt. 7, *State v. Miller*, any error did not “seriously affect the fairness, integrity, or public reputation of the judicial proceedings.”

Affirmed.

EVIDENCE

Admissibility (continued)

Scope of testimony

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See WITNESSES Mode and order of interrogation, (p. 810) for discussion of topic.

Victim's acts of violence

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Victim's character

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See EVIDENCE Admissibility, Character of victim, (p. 292) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

EVIDENCE

Admissibility (continued)

Videotape

State v. Williams, ___ W.Va. ___, 543 S.E.2d 306 (2000)
No. 27914 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 780) for discussion of topic.

Videotape of witness statement

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

Writing used to refresh memory

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Autopsy results

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

EVIDENCE

Battered woman's syndrome

Admissibility

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

The appellant was indicted for the first-degree murder of her domestic partner and was convicted by jury trial of second-degree murder. During the trial, the appellant presented evidence that she suffered mental disorders through the expert testimony of a psychiatrist who had treated her and 2 psychologists. The appellant did not assert self-defense at trial, but one psychologist said she had been abused by the victim as well as her former husband of 29 years and that she was a “classic battered spouse.” When this psychologist began to relate particular instances of abuse of which the appellant had informed him, the trial court sustained the objection of the State concluding that such hearsay evidence should only be admissible for the limited purpose of providing a factual basis for the psychologist’s expert opinion. Thereafter, the psychologist testified about the general comments made to him by the appellant regarding her relationship with the victim. The lower court did not allow the appellant to introduce additional evidence regarding the nature of prior incidents of abusive behavior involving the victim or the ex-husband. On appeal, the appellant contended that the trial court erred by refusing to allow her to fully develop the testimony and evidence concerning battered woman’s syndrome.

Syl. pt. 1 - “ “In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was at the time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him, as well as threats made to other parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof.” Syllabus Point 1, *State v. Hardin*, 91 W.Va. 149, 112 S.E. 401 (1922).’ Syllabus Point 3, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982).” Syl. Pt. 2, *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983).

EVIDENCE

Battered woman's syndrome (continued)

Admissibility (continued)

State v. Riley, (continued)

Syl. pt. 2 - "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. 3 - " "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).' Syl. pt. 4, *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983)." Syl. Pt. 2, *State v. Franklin*, 191 W.Va. 727, 448 S.E.2d 158 (1994).

Syl. pt. 4 - "Expert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome." Syl. Pt. 5, *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987).

The Court found that the testimony of the psychologist regarding battered woman's syndrome was not precluded from being introduced but that its purpose was properly limited. Noting that the appellant did not claim self-defense, the Court relied on *State v. Collins*, 154 W.Va. 771, 180 S.E.2d 54 (1971) to find that some of the testimony that she sought to have introduced regarding the dangerous character of the victim was improper. Based on the abuse of discretion standard, the Court found no clear error in the trial court's evidentiary rulings.

Affirmed.

EVIDENCE

Character of accused

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

EVIDENCE

Character of accused (continued)

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Character of victim

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See EVIDENCE Admissibility, Character of victim, (p. 292) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

EVIDENCE

Character of victim (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Coconspirator's statement

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153) for discussion of topic.

Collateral acts/crimes

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

EVIDENCE

Collateral acts/crimes (continued)

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

EVIDENCE

Collateral acts/crimes (continued)

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Court records hearsay exception

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Witness unavailable

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

Cross-examination

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See CROSS-EXAMINATION Limitations, (p. 230) for discussion of topic.

EVIDENCE

Defendant's testimony

Waiver of right to remain silent

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

Disclosure

Timeliness

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

Discretion of court

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

EVIDENCE

Discretion of court (continued)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

EVIDENCE

Dissociative identity disorder testimony

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Driving under the influence

Stipulation to prior conviction

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d (1999)
No. 26009 (Davis, J.)

Appellant's offer to stipulate to prior DUI convictions in a trial for 3rd offense DUI was denied by the trial court. Appellant was convicted, and he appealed.

Syl. pt. 3 - When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled.

EVIDENCE

Driving under the influence (continued)

Stipulation to prior conviction (continued)

State v. Nichols, (continued)

Syl. pt. 4 - A defendant who has been charged with an offense that requires proof of a prior conviction to establish a status element of the offense charged, and who seeks to contest the existence of an alleged prior conviction, may request that the trial court bifurcate the issue of the prior conviction from that of the underlying charge and hold separate jury proceedings for both matters. The decision of whether to bifurcate these issues is within the discretion of the trial court. In exercising this discretion, a trial court should hold a hearing for the purpose of determining whether the defendant has a meritorious claim that challenges the legitimacy of the prior conviction. If the trial court is satisfied that the defendant's challenge has merit, then a bifurcated proceeding should be permitted. However, should the trial court determine that the defendant's claim lacks any relevant and sufficient evidentiary support, bifurcation should be denied and a unitary trial held.

Syl. pt. 5 - At a hearing to determine the merits of a defendant's challenge of the legitimacy of a prior conviction pursuant to Syllabus point 4 of *State v. Nichols*, ___ W.Va. ___, 541 S.E.2d 310 (1999), the defendant has the burden of presenting satisfactory evidence to show that the alleged prior conviction is invalid as against him or her.

In overturning its previous holding in *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), the Court adopted the reasoning of the United States Supreme Court in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 664, 136 L.Ed.2d 574 (1997). The Court went farther than *Old Chief*, however, and held that a stipulation to status elements of a currently charged offense precludes even mentioning the fact of such elements to the jury. A status element of an offense in this case was defined as proof of prior conviction(s).

The Court directed that when such a stipulation is made, the record must show that a colloquy occurred with all parties present during which the stipulation was precisely explained and the defendant's offer to stipulate was made knowingly and voluntarily.

EVIDENCE

Driving under the influence (continued)

Stipulation to prior conviction (continued)

State v. Nichols, (continued)

NOTE: THE COURT EXPRESSLY STATED IN FOOTNOTE 24 THAT THE OVERRULING OF *HOPKINS* COULD NOT BE USED BY ANY “DEFENDANT CONVICTED AND SENTENCED BEFORE THE FILING DATE OF THIS OPINION” (DECEMBER 3, 1999).

The Court also found it necessary on constitutional grounds to address the use of a bifurcated trial when a defendant does not offer to stipulate a prior conviction which is a status element of the charged offense. While the Court did not make bifurcation mandatory, it set forth the procedure trial courts are to follow in order to properly apply their discretion. The trial court is to hold a hearing on the motion to bifurcate in order to determine if the defendant’s challenge to a prior conviction has merit. The defendant has the burden at such hearing to make a “satisfactory” showing of an invalid conviction.

Reversed.

Exclusion

Rape shield law test

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See DUE PROCESS Rape shield law, (p. 271) for discussion of topic.

EVIDENCE

Exculpatory

Failure to disclose

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 640) for discussion of topic.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 640) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Expert

Wilson v. Wilson, ___ W.Va. ___, 452 S.E.2d 402 (2000)
No. 27759 (Per Curiam)

The case involved a contest of a lower court custody decision. The lower court disregarded the testimony of a psychologist because it was hearsay.

EVIDENCE

Expert (continued)

Wilson v. Wilson, (continued)

Syl. pt. 3 - “Rule 703 of the *West Virginia Rules of Evidence* allows an expert to base his opinion on (1) personal observations; (2) facts or data, admissible in evidence, and presented to the expert at or before trial; and (3) information otherwise inadmissible in evidence, if this type of information is reasonably relied upon by experts in the witness’ field.” Syllabus Point 2, *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994).

Note: Syl. pts. 1 & 2 are irrelevant to criminal law.

The Court found that the lower court abused its discretion by discounting the testimony of the expert on these grounds based on the language of Rule 703 of the Rules of Evidence and its previous holding in *Mayhorn v. Logan Medical Foundation*.

Reversed and remanded.

Dissociative identity disorder testimony

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Expert witness

Battered woman’s syndrome

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman’s syndrome, Admissibility, (p. 322) for discussion of topic.

EVIDENCE

Expert witness (continued)

Opinion on sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

Qualifying as

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

During the pendency of a contested divorce, the father made an emergency motion for change of temporary custody of the couple's 5-year-old child on the ground of alleged sexual abuse of the child by the mother's boyfriend. The emergency motion was granted by the circuit court and the father filed a petition with the family law master to change custody. After refusing to comply with the family law master's order to make the child available for psychological examination by the mother's expert, the circuit court issued an order to compel the appellant to comply. At this point, the appellant filed a writ of prohibition with the Supreme Court. The earlier decision of the Court remanded the case for further proceedings to address the issue of expert evaluation of the child among other things.

On remand, a hearing was held at which one of the clinical psychologists for the appellant was not qualified as an expert in child sexual abuse. He nonetheless was allowed to testify. Another psychologist presented by the appellant who never interviewed the child but relied on the notes of the first psychologist was qualified as an expert. Additionally, the psychologist retained by the mother was accepted as an expert witness.

Both the father and the guardian *ad litem* appealed the lower court decision, including the court's refusal to qualify the one psychologist as an expert.

EVIDENCE

Expert witness (continued)

Qualifying as (continued)

Sharon B.W. v. George B.W., (continued)

Syl. pt. 1 - “In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert’s area of expertise covers the particular opinion as to which the expert seeks to testify.” Syllabus Point 5, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

After applying the test announced in *Gentry v. Mangum*, the Court found that the trial court erred in not qualifying the psychologist as an expert. However, the error was not found to be a ground for reversal because the lower court allowed the witness to testify.

Affirmed in part and remanded with directions.

Failure to disclose witness

When prejudicial

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See PROSECUTING ATTORNEY Non-disclosure of witness, When prejudicial, (p. 646) for discussion of topic.

EVIDENCE

Gruesome photographs

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

Admissibility

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

In separate trials for first-degree murder, the appellants each objected to the introduction of a video of the crime scene taken shortly after the victim was discovered. The video included footage of the beaten body of the victim. The motions were overruled, and the appellants were convicted of first-degree murder. The argument raised on appeal was that the video, even in its edited version, was more prejudicial than probative.

Syl. pt. 6 - “Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counter-factors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse.” Syllabus Point 10, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The Court viewed the video and found that, under Rule 401, the video was properly deemed relevant because it allowed the jury to view the scene under the same lighting as the witness viewed it the night of the crime. Under the broad discretion of the trial court to perform the balancing test of Rule 403, the court found no ‘clear abuse of discretion’. In so ruling, the Court noted that the trial court had excised much of the footage of the victim’s body at the request of both the state and the defendants.

Affirmed.

EVIDENCE

Harmless error

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

Hearsay

Confrontation clause

State v. Baylor, ___ W.Va. ___, 542 S.E.2d 399 (2000)
No. 27771 (Per Curiam)

CONFRONTATION CLAUSE Evidence, When analysis applied, (p. 220)
for discussion of topic.

Court records exception

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Excited utterance of an anonymous or unidentified declarant

State v. Harris, 207 W.Va. 275, 531 S.E.2d 340 (2000)
No. 26733 (Starcher, J.)

The appellant was convicted of domestic battery after a bench trial. The appellant cites trial court error in basing the conviction on hearsay evidence. Specifically, the appellant contended that the trial court wrongly allowed testimony of police officers reciting statements of the victim who was not available to testify and statements of an unidentified person in the crowd at the scene of the crime.

EVIDENCE

Hearsay (continued)

Excited utterance of an anonymous or unidentified declarant (continued)

State v. Harris, (continued)

Syl. pt. 1 - “In order to qualify as an excited utterance under *W.Va.R.Evid.* 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition.” Syllabus Point 7, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

Syl. pt. 2 - When a court in a criminal case is evaluating whether to apply the “excited utterance” exception of *W.Va.R.Evid.* 803(2) to a hearsay statement offered against the defendant by an unknown, anonymous, declarant, the court should ordinarily conclude that the statement does not meet the criteria for the 803(2) exception, unless the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence.

The record reflected that the victim’s statements were admissible under the excited utterance exception to hearsay. The Court went on to extend the excited utterance exception to include anonymous or unidentified declarants when “the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence.” The Court did not encourage the regular admission of such evidence, but as the concurring opinion of Justice Davis notes, the opinion does not articulate any definition, test or standards that trial courts should apply in determining what constitutes “exceptional indicia of reliability” or any limits on the “ends of justice and fairness”.

Affirmed.

EVIDENCE

Impeachment

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See CROSS-EXAMINATION Limitations, (p. 230) for discussion of topic.

Juvenile records

State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)
No. 26195 (Starcher, C.J.)

See JUVENILES Records, Use for rebuttal or impeachment, (p. 526) for discussion of topic.

Medical history

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Prior convictions

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Prior inconsistent statement

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

EVIDENCE

Impeachment (continued)

Prior inconsistent statement (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Psychiatric disability

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

Witness unavailable

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

EVIDENCE

Impeachment of witness

Prior statements

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

The appellant was convicted of malicious wounding as the result of a jury trial. The appellant asserted that the trial court erred in denying a motion for a mistrial based on one of the State's witnesses during cross-examination improperly referring to a polygraph test, or in the alternative for the prosecution's failure to provide the defense with the statements made during the course of the polygraph test which could have been used to impeach that witness.

Syl. pt. 1 - "Rule 26.2 of the West Virginia Rules of Criminal Procedure imposes certain conditions for the disclosure of the prior statements of a witness, who is not the defendant, to the adverse party for purposes of impeachment. There are four basic conditions that must be met to require disclosure under Rule 26.2. First, a witness' prior statement being sought for the purpose of impeaching the direct testimony of that witness must satisfy the definition of a witness' prior statement pursuant to Rule 26.2(f). Second, the statement must be possessed by the proponent of the witness. Third, the witness' prior statement must relate to the subject matter of the witness' testimony on direct examination. Fourth, the prior statement need not be disclosed earlier than the conclusion of the witness' testimony on direct examination." Syllabus Point 5, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

The record reflected that the prosecution did not elicit evidence of the polygraph test, the trial judge had provided cautionary instruction regarding the initial testimony about the polygraph test, defense counsel refused the trial judge's offer to repeat the cautionary instruction, and the prosecution obtained a copy of a narrative report prepared by the polygraph examiner which was supplied to the defense during a recess. The Court upheld the trial court's denial of the mistrial motion.

Affirmed.

EVIDENCE

Inadmissible

Cure at trial

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 556) for discussion of topic,

Instructions

Lesser-included offense

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See INSTRUCTIONS Lesser-included offense, (p. 458) for discussion of topic.

Invited error

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

EVIDENCE

Juvenile records

Rebuttal or impeachment

State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)
No. 26195 (Starcher, C.J.)

See JUVENILES Records, Use for rebuttal or impeachment, (p. 526) for discussion of topic.

Medical history

Hearsay

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Medical records of blood alcohol tests

State v. Coleman, ___ W.Va. ___, 542 S.E.2d 74 (2000)
No. 27807 (Per Curiam)

See INSTRUCTIONS Driving under the influence, *Prima facie* evidence of intoxication, (p. 454) for discussion of topic.

Newly discovered

Sufficient for new trial

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

EVIDENCE

Newly discovered (continued)

Sufficient for new trial (continued)

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 569) for discussion of topic.

Nondisclosure of witness

When prejudicial

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See PROSECUTING ATTORNEY Disclosure of evidence, When prejudicial, (p. 646) for discussion of topic.

Opinion of lay witness

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

Opinion on sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

EVIDENCE

Plain error

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Prior bad acts

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

EVIDENCE

Prior bad acts (continued)

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

EVIDENCE

Prior convictions

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

Defendant was indicted on 1 count of 3rd offense DUI. The trial court denied his motion to bifurcate the issue of guilt on the DUI from the issue of the 2 prior DUI convictions, although the court did permit a stipulation of guilt regarding the 2 prior convictions to be read to the jury in lieu of testimony. Defendant was convicted, and he appealed only the bifurcation issue.

Syl. pt. - “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syllabus Point 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

The Court held that prior DUI convictions are elements of 3rd offense DUI (*W.Va. Code* § 17C-5-2(k)) rather than mere sentencing factors and, therefore, the fact of such convictions are admissible in the State’s case-in-chief. The Court characterized the issue as an evidentiary one, and it held that the trial court did not abuse its discretion in admitting the evidence via stipulation. The Court added, however, that the jury must be allowed to consider the evidence of the prior convictions whether it be by stipulation or by evidence at trial. This holding was later reversed by implication in *State v. Nichols*, ___ W.Va. ___, 541 S.E.2d 310 (1999), in which the Court held that an offer to stipulate to the “status elements” of an offense, i.e., the prior DUI convictions, must be honored and any evidence of prior convictions in such cases must be kept from the jury.

Affirmed.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

Appellant was convicted of third offense shoplifting. The trial court denied her motion to stipulate prior shoplifting convictions and to exclude evidence of those convictions. Further, the court allowed impeachment of the appellant based on the prior convictions which were introduced into evidence via the testimony of a court clerk.

EVIDENCE

Prior convictions (continued)

State v. Morris, (continued)

The appellant challenged the trial court's ruling on evidentiary issues involving the prior convictions. Specifically, she asserted that the trial court erred in: 1) denying her motion to stipulate to prior shoplifting convictions; 2) denying her motion to exclude the prior convictions; 3) allowing use of the prior convictions to impeach her; and 4) allowing the hearsay testimony of a court clerk to establish a prior conviction.

Syl. pt. 1 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. pt. 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

The Court noted that *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), required evidence of the prior convictions as a necessary element of the crime charged. The prosecution must prove those elements to the jury. This position was later reversed in *State v. Nichols*, ___ W.Va. ___, 541 S.E.2d 310 (1999 p. 309 *infra*) in which the Court held that an offer to stipulate the "status element" of an offense (e.g., prior convictions) has to be honored and any evidence of prior convictions in such cases has to be kept from the jury.

As to improper impeachment, the Court found the prosecution merely asked the appellant if she had been convicted of shoplifting on 2 prior occasions. A cautionary instruction was given on the use of the prior convictions solely to prove elements of the current offense. The court found no error in the admission of the evidence for impeachment.

The Court found no merit in the appellant's contention that Rule 803(8)(B) of the Rules of Evidence precluded the admission of evidence of the second conviction by the testimony of a magistrate court clerk. The Court found the records admissible under Rule 803(8)(A) as a public record exception to hearsay.

Affirmed.

EVIDENCE

Prior convictions (continued)

Bifurcation

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Status elements

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Stipulation

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

EVIDENCE

Prior inconsistent statement

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

A DNA test performed on the victim of an alleged sexual assault revealed that the victim had had intercourse with 2 individuals other than the appellant and that the appellant's DNA had not been found. At trial, the victim testified that she had given her medical history to hospital personnel at the time of the DNA testing and a doctor testified that he took the history. Neither, however, testified about the victim's alleged statement that she had not had intercourse for 2 months prior to the alleged assault. The trial court denied the appellant's attempt to introduce DNA evidence for impeachment purposes.

Syl. pt. 4 - "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." Syllabus point 1, *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996).

The Court held that the mere mention of having given a medical history, without any testimony regarding the specific portion of the history that is alleged to be inconsistent with other evidence, does not open the door for impeachment under Rule 613 of the Rules of Evidence. The door was not opened by the prosecutor's statement during closing argument that the victim had been truthful to police and hospital personnel. The Court noted that no case was provided or found that involved Rule 613(b) of the Rules of Evidence as a result of statements made during closing argument. The proper remedy for the error alleged by the appellant was for the defense to object during the argument and to move for a curative instruction.

Affirmed.

EVIDENCE

Prior inconsistent statement (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

Pre-trial silence

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

Prior statements of witness

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See EVIDENCE Impeachment of witness, Prior statements, (p. 343) for discussion of topic.

Probation revocation

Rules of Evidence not applicable

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

See SENTENCING Enhancement of, No contest plea sufficient, (p. 706) for discussion of topic.

EVIDENCE

Rape shield law

DNA test results

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

Appellant was convicted of sexual assault of his wife. The trial court had granted the State's motion *in limine* to exclude the results of DNA tests that were performed on the appellant's wife shortly after the alleged assault that found sperm containing DNA from 2 or more individuals but none from the appellant. The lower court noted that the evidence might be admissible for impeachment, depending on the wife's testimony.

At trial, the appellant sought to introduce evidence that the wife had told hospital personnel during her post-assault examination that she had last had intercourse 2 months earlier, a claim refuted by the DNA test results. The trial court granted the State's motion to exclude the evidence under the rape shield statute (*W.Va. Code* § 61-8B-11).

Syl. pt. 1 - As a general matter, *W.Va. Code* § 61-8B-11(b) (1986) (Repl. Vol. 1997) bars the introduction of evidence in a sexual assault prosecution concerning (1) specific instances of the victim's sexual conduct with persons other than the defendant, (2) opinion evidence of the victim's sexual conduct and (3) reputation evidence of the victim's sexual conduct.

Syl. pt. 2 - *W.Va. Code* § 61-8B-11(b) (1986) (Rep. Vol. 1997) provides an exception to the general exclusion of evidence of prior sexual conduct of a victim of sexual assault. Under the statute, evidence of (1) specific instances of the victim's sexual conduct with persons other than the defendant, (2) opinion evidence of the victim's sexual conduct and (3) reputation evidence of the victim's sexual conduct can be introduced solely for the purpose of impeaching the credibility of the victim only if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

EVIDENCE

Rape shield law (continued)

DNA test results (continued)

State v. Guthrie, (continued)

Syl. pt. 3 - Rule 404(a)(3) of the West Virginia Rules of Evidence provides an express exception to the general exclusion of evidence coming within the scope of our rape shield statute. This exception provides for the admission of prior sexual conduct of a rape victim when the trial court determines *in camera* that evidence is (1) specifically related to the act or acts for which the defendant is charged and (2) necessary to prevent manifest injustice.

The Court held that the DNA results did not fall under any of the exceptions to *W.Va. Code* § 61-8B-11(b) or Rule 404(a)(3) of the Rules of Evidence collectively known as the “rape shield law.”

Under the statute, evidence of the victim’s sexual conduct with persons other than the defendant is inadmissible except to impeach the victim’s credibility after the victim has opened the door by first introducing evidence of her previous sexual conduct. Inasmuch as the wife never testified about her prior conduct, the DNA evidence did not come within the statutory exception.

Under the rule of evidence component of the rape shield law, evidence of prior sexual conduct may be admitted if the trial court finds (at an *in camera* hearing) that the evidence is “specifically related” to the criminal acts charged and “is necessary to prevent manifest injustice.”

The Court held that the DNA test result, to the extent the appellant sought to introduce it as evidence that the wife had had recent intercourse with others and lied about this fact to hospital personnel, did not fall within the exception to the evidentiary rule’s exclusion of such evidence because the wife’s prior sexual conduct was not related to the conduct with which the appellant was charged. In footnote 8, however, the Court asserted that “we would reach a different result had Mr. Guthrie sought to introduce DNA

EVIDENCE

Rape shield law (continued)

DNA test results (continued)

State v. Guthrie, (continued)

evidence, without more, as substantive exculpatory evidence of his innocence.” The Court does not explain whether the “substantive exculpatory evidence of his innocence” would include the test findings of DNA of the other individuals or only the finding that none of the appellant’s DNA had been found.

Affirmed.

Remoteness

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

Rule 103(a)(1)

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

See PLAIN ERROR Alternate juror participating in deliberations, (p. 581) for discussion of topic.

Rule 104

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

EVIDENCE

Rule 104(a)

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Rule 106

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

Rule 401

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Gruesome photographs, Admissibility, (p. 338) for discussion of topic.

EVIDENCE

Rule 401 (continued)

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Rule 402

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Rule 403

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See EVIDENCE Admissibility, Character of victim, (p. 292) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

EVIDENCE

Rule 403 (continued)

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Gruesome photographs, Admissibility, (p. 338) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Rule 404

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See EVIDENCE Admissibility, Character of victim, (p. 292) for discussion of topic.

Rule 404(a)(3)

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Rape shield law, DNA test results, (p. 354) for discussion of topic.

EVIDENCE

Rule 404(b)

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 276) for discussion of topic.

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 279) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

EVIDENCE

Rule 404(b) (continued)

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 288) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 289) for discussion of topic.

Rule 611(a)

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See WITNESSES Mode and order of interrogation, (p. 810) for discussion of topic.

Rule 612

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

EVIDENCE

Rule 612 (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Rule 613

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

Rule 613(b)

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

Rule 701

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

EVIDENCE

Rule 702

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Rule 703

Wilson v. Wilson, ___ W.Va. ___, 452 S.E.2d 402 (2000)
No. 27759 (Per Curiam)

See EVIDENCE Expert, (p. 334) for discussion of topic.

Rule 803(4)

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Rule 803(5)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

EVIDENCE

Rule 803(6)

State v. Baylor, ___ W.Va. ___, 542 S.E.2d 399 (2000)
No. 27771 (Per Curiam)

CONFRONTATION CLAUSE Evidence, When analysis applied, (p. 220)
for discussion of topic.

Rule 803(8)

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Rule 804(a)

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 569) for discussion of topic.

Rule 804(b)(3)

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153)
for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of
topic.

EVIDENCE

Rule 804(b)(4)

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 569) for discussion of topic.

Rule 1101(b)(3)

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

See SENTENCING Enhancement of, No contest plea sufficient, (p. 706) for discussion of topic.

Scientific

Reliability and relevance

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Stipulation to prior conviction

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense, (p. 331) for discussion of topic.

EVIDENCE

Sufficiency of

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See RECEIVING STOLEN PROPERTY Generally, (p. 659) for discussion of topic.

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

EVIDENCE

Sufficiency of (continued)

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 758) for discussion of topic.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 766) for discussion of topic.

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual offenses, (p. 763) for discussion of topic.

EVIDENCE

Sufficiency of (continued)

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Aggravated robbery, (p. 756) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To uphold conviction, (p. 783) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

EVIDENCE

Sufficiency of (continued)

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 770) for discussion of topic.

Forfeiture in relation to illegal drug transaction

State v. Burgraff, ___ W.Va. ___, 542 S.E.2d 909 (2000)
No. 27716 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Forfeiture in relation to illegal drug transaction, (p. 768) for discussion of topic.

Standard for review

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Identity of perpetrator, (p. 769) for discussion of topic.

To support conviction

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 776) for discussion of topic.

EVIDENCE

Sufficiency of (continued)

To support conviction (continued)

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 776) for discussion of topic.

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 777) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 778) for discussion of topic.

State v. Williams, ___ W.Va. ___, 543 S.E.2d 306 (2000)
No. 27914 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 780) for discussion of topic.

Suppression of

Investigatory stop by DNR officers

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

EVIDENCE

Suppression of (continued)

Standard for review

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See SEARCH AND SEIZURE Standard for review, (p. 691) for discussion of topic.

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Victim's character

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See EVIDENCE Admissibility, Character of victim, (p. 292) for discussion of topic.

EVIDENCE

Victim's character (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Variance with indictment

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See INDICTMENT Variance between evidence and proof, (p. 441) for discussion of topic.

Witnesses

Defendant's testimony at trial

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

Duty to disclose inducements to testify

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

EVIDENCE

Witnesses (continued)

Expert

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See EVIDENCE Expert, Qualifying as, (p. 336) for discussion of topic.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Lay opinion

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

Nondisclosure of

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 640) for discussion of topic.

EVIDENCE

Witnesses (continued)

Nondisclosure of (continued)

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See PROSECUTING ATTORNEY Non-disclosure of witness, When prejudicial, (p. 646) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Prior statements

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

EVIDENCE

Witnesses (continued)

Prior statements (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Unavailable

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

Writing used to refresh memory

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

EVIDENCE

Writings

Rule of completeness

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

A person working undercover for the police, told the appellant that he wanted to buy drugs. The appellant relayed this message to Lawson, who left and returned with the drugs which Lawson then gave to the appellant in return for \$60. At trial for possession with intent to distribute cocaine, a dispute arose as to whether the appellant gave the undercover agent \$10 in change.

Sergeant Ballard, who had debriefed the undercover officer after the cocaine purchase, testified for the State. On cross-examination, he could not recall if the undercover officer had reported getting change from the appellant. Using his debriefing notes provided by defense counsel to refresh his memory, Sergeant Ballard read from the report to the effect that Lawson, not the appellant, had provided the change. On redirect, the State introduced the entire debriefing notes over defendant's objection. The trial court allowed the admission of the notes on the ground that the defendant had introduced part of the notes. The admission of the debriefing notes in their entirety is alleged as error on appeal.

Syl. pt. 1 - "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

Syl. pt. 2 - " 'An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.' Syl. pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971)." Syl. Pt. 2, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986).

EVIDENCE

Writings (continued)

Rule of completeness (continued)

State v. Gray, (continued)

Syl. pt. 3 - “ ‘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).

The Court found no abuse of discretion in the admission of the entire notes. The common law “rule of completeness,” as incorporated in Rule 106 of the Rules of Evidence, permits the introduction of any part of a written statement that “ought in fairness” be considered in conjunction with any other part of the same statement that was introduced by the other party. Even when the writing is used without being introduced, as it was in this case to refresh memory, Rule 106 applies if that initial use is “tantamount to the introduction of the [document] into evidence.” The Court concluded that reading into the record from a document was tantamount to introducing that document for Rule 106 purposes and that even if the remainder of the document would be otherwise inadmissible, the need for clarification should take precedence over exclusionary rules. The Court added that the appellant waived any hearsay objection to the remainder of the notes because he initially introduced a portion of the notes to be read into the record.

Any remaining portions of the statement used or introduced must, in order to be relevant under Rules 401 & 402, be necessary to provide context to the initially used portion. Here, the Court seemed unconcerned that the trial court permitted the introduction of the entire document without any consideration of the need to provide context to the sentence read by Sergeant Ballard. Moreover, the Court neither explains what was in the remainder of the report nor why it was necessary to provide a context for the single sentence read by Sergeant Ballard.

EVIDENCE

Writings (continued)

Rule of completeness (continued)

State v. Gray, (continued)

The Court alternatively found that, even if the admission of the remainder of the debriefing notes was in error, such error was harmless in light of the other evidence. The Court noted that the debriefing may have actually helped the appellant inasmuch as the notes did not serve to contradict his theory that he did not give the change.

Affirmed.

Writing used to refresh memory

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

EX POST FACTO

Conditions for parole

State ex rel. Carper v. Parole Board, 203 W.Va. 583, 509 S.E.2d 864 (1998) No. 25184 (Starcher, J.)

See PAROLE Hearings, *Ex post facto* application of time for review, (p. 576) for discussion of topic.

Insanity defense

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997) No. 23998 (Per Curiam)

See INSANITY Instructions, (p. 450) for discussion of topic.

Parole consideration

State ex rel. Carper v. Parole Board, 203 W.Va. 583, 509 S.E.2d 864 (1998) No. 25184 (Starcher, J.)

See PAROLE Hearings, *Ex post facto* application of time for review, (p. 576) for discussion of topic.

Procedural changes

State ex rel. Haynes v. W.Va. Parole Board, 206 W.Va. 288, 524 S.E.2d 440 (1999) No. 26006 (Per Curiam)

See PAROLE Hearings, *Ex post facto* application of time for review, (p. 577) for discussion of topic.

EXPERT WITNESS

Battered woman's syndrome

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Psychologist

Opinion on sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

Qualifying as such

Two-part test

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See EVIDENCE Expert, Qualifying as, (p. 336) for discussion of topic.

EXTRADITION

Issue review limited

In re Extradition of Andrew Chandler, 207 W.Va. 520, 534 S.E.2d 385 (2000) No. 26906 (Maynard, C. J.)

This case involves an appeal of the denial of *habeas corpus* relief from arrest and custody pursuant to extradition proceedings initiated by Ohio. Extradition was sought for the crime of failing to pay child support.

The appellant admitted that there is no defense to extradition but was requesting the Court to inject a “balancing of the equities and due process” analysis into the extradition proceedings of the asylum state.

Syl. pt. 1 - “ ‘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.’ Point 2, Syllabus, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971).” Syllabus Point 1, *State ex rel. Gonzales v. Wilt*, 163 W.Va. 270, 256 S.E.2d 15 (1979).

Syl. pt. 2 - Pursuant to *W.Va. Code* § 5-1-9(k) (1937), the guilt or innocence of an accused as to the crime for which he or she is charged may not be inquired into by the governor or in any proceeding after the demand for extradition is made by the demanding state by a charge of crime in legal form, except that the identity of the person held as the person charged with the crime may be questioned.

Syl. pt. 3 - “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 questions in the first instance.” Syllabus Point 1, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971).

EXTRADITION

Issue review limited (continued)

In re Extradition of Andrew Chandler, (continued)

The Court reiterated that under West Virginia law the court which is deciding the validity of custody regarding extradition proceedings is limited in its review to determining whether the proper papers are filed and procedures are followed. Any other argument regarding constitutional questions or legal challenge to the charges brought needs to be addressed in the court of the state which is demanding extradition.

Affirmed.

FAMILY LAW MASTER

Discipline

Charges dismissed

In re Hamrick, 204 W.Va. 357, 512 S.E.2d 870 (1998)
No. 24482 (Per Curiam)

At a hearing regarding disputed child support matters, the family law master admonished one of the parties in an intemperate manner. Based on a complaint filed by the offended party, the Judicial Investigation Commission filed charges alleging that the master violated Canon 3(B)(4) of the Code of Judicial Conduct that requires a judge to be “patient, dignified and courteous” to all in the judicial setting. The Judicial Hearing Board recommended dismissal of the charges based on its finding that the master’s comments were made “in order to maintain control of the courtroom,” which was based in turn on a finding that the litigant had unintentionally filed a false claim with the court. The Commission objected, maintaining that the outburst warranted discipline.

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, *West Virginia Judicial Inquiry Comm’n v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

The Court dismissed the charges. While noting that it did not condone the master’s behavior, the Court deferred to the Board’s recommendation in this “fact driven” case. Attorney’s fees were not awarded because the master’s counsel had not obtained approval of his fee schedule prior to rendering services, as required by Rule 4.13 of the Rules of Judicial Disciplinary Procedure.

Dismissed.

FELONY-MURDER

Overdose of controlled substance

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

FIFTH AMENDMENT

Pre-trial silence

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

Testimony at trial

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

FINDINGS OF FACT

Standard for review

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See APPEAL Standard for review, Findings of fact, (p. 118) for discussion of topic.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See MIRANDA WARNINGS, When required, (p. 552) for discussion of topic.

FIRST AMENDMENT

Curfew ordinance

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

See STATUTES Ordinance, Constitutionality, (p. 739) for discussion of topic.

FORFEITURE

Appointment of counsel

Non-eligible proceeding

State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998)
No. 24582 (Davis, C.J.)

See *GUARDIAN AD LITEM* Appointment of, Non-eligible forfeiture proceeding, (p. 391) for discussion of topic.

***In rem* action**

State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998)
No. 24582 (Davis, C.J.)

See *GUARDIAN AD LITEM* Appointment of, Non-eligible forfeiture proceeding, (p. 391) for discussion of topic.

FOURTH AMENDMENT

Search and seizure

Plain view

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)
No. 26568 (Scott, J.)

See SEARCH AND SEIZURE Plain view, (p. 689) for discussion of topic.

Standard for review

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

GRAND JURY

Indictments

Amendment to

State v. Duncan, 204 W.Va. 411, 513 S.E.2d 459 (1998)
No. 24485 (Per Curiam)

See INDICTMENT Incorrect counts, Prejudicial to defendant, (p. 435) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

See INDICTMENT Amendment to (p. 429) for discussion of topic.

GUARDIAN AD LITEM

Appointment of

Non-eligible forfeiture proceeding

State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998)
No. 24582 (Davis, C.J.)

This case involves a civil forfeiture action brought pursuant to *W.Va. Code* § 60A-7-701 to obtain property believed to have been substantially connected to the drug dealing of an inmate previously convicted of drug charges. The circuit court appointed a public defender to act as guardian *ad litem* for the inmate in the proceedings, though the order of appointment expressly noted that the public defender was not to act as the inmate's counsel. After a trial in which the inmate appeared *pro se*, the forfeiture was granted. In the final order, the court appointed the public defender to represent the inmate in any appeal taken in the matter. The defender's motion to withdraw as guardian *ad litem* was denied, and she filed an original writ of prohibition in which she contended that the appeal was frivolous and that to file one would subject her to sanctions.

Syl. pt. 1 - “In the absence of an express written waiver of his [or her] right to a committee under *W.Va. Code*, 28-5-36, or a guardian *ad litem* under Rule 17(c) of the West Virginia Rules of Civil Procedure, a suit cannot be directly maintained against a prisoner.’ Syl. pt. 2, *Craig v. Marshall*, 175 W.Va. 72, 331 S.E.2d 510 (1985).” Syllabus point 3, *Jackson Gen. Hosp. v. Davis*, 195 W.Va. 74, 464 S.E.2d 593 (1995).

Syl. pt. 2 - A forfeiture action brought under the *West Virginia Contraband Forfeiture Act*, *W.Va. Code* §§ 60A-7-701, *et seq.*, is an action *in rem* that is brought against the item(s) sought to be forfeited, and not an action against the owner of such item(s).

Syl. pt. 3- -Rule 17(c) of the West Virginia Rules of Civil Procedure does not require appointment of a guardian *ad litem* for an otherwise unrepresented convict whose property is subject to a civil forfeiture action pursuant to the *West Virginia Contraband Forfeiture Act*, *W.Va. Code* §§ 60A-7-701, *et seq.*, as such an action is maintained against the property, and is not directly maintained against the owner convict.

GUARDIAN AD LITEM

Appointment of (continued)

Non-eligible forfeiture proceeding (continued)

State ex rel. Lawson v. Wilkes, (continued)

The Court granted the writ. It first found that the forfeiture proceeding was one *in rem* that was directed against the property and, therefore, was not a civil action that was maintained against the inmate. Therefore, Rule 17(b) of the Rules of Civil Procedure did not require the appointment of a guardian *ad litem* in the first place and certainly did not permit the appointment of counsel to appeal the forfeiture.

Writ granted as moulded.

HABEAS CORPUS

Appointed counsel not required

State ex rel. Farmer v. Trent, 206 W.Va. 231, 523 S.E.2d 547 (1999)
No. 25855 (Per Curiam)

The appellant's convictions for first-degree murder, kidnaping and conspiracy were affirmed on direct appeal. He then sought post conviction habeas relief in the circuit court. This is an appeal involving the circuit court's decisions to dismiss the habeas petition and to set aside an order of appointment of counsel.

When the *pro se* habeas petition was filed, the circuit judge appointed counsel and directed counsel to file an amended petition. An amended petition was not filed within the prescribed 90-day period and counsel subsequently requested an extension of the filing period. The State responded to the extension request by filing a motion to set aside the order appointing counsel and to deny the habeas petition. After determining that the petition's sole issue regarding juror impartiality had been waived, the lower court dismissed the petition because it did not comply with the provisions of *W.Va. Code* § 53-4A-4(a). The court also set aside the order of appointment of counsel.

Syl. pt. 1 - "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, *Purdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

Syl. pt. 2 - "A judgment will not be reversed for any 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. 1, *State v. Knuckles*, 196 W.Va. 416, 473 S.E.2d 131 (1996).

The Court framed the issue as whether the circuit court's dismissal of the *pro se* petition without allowing appointed counsel to file an amended petition denied the appellant his right to counsel, due process and a fair hearing under the post-conviction habeas statute. In order to decide this issue, the Court had to first determine if the juror partiality question raised in the *pro se* habeas petition could be decided from the record before the circuit court.

HABEAS CORPUS

Appointed counsel not required (continued)

State ex rel. Farmer v. Trent, (continued)

The record revealed that juror had reported to the trial judge that her doctor advised her she could not continue to serve as a member of the jury panel. Neither counsel objected to the trial judge talking with the juror alone regarding this development. Both counsel questioned the juror afterwards and the State moved to dismiss the juror to which the defense objected. The juror was allowed to remain on the panel. The Court found that the record was sufficient for the lower court to decide that the issue of juror impartiality raised in the habeas petition had been waived and the petition did not justify a full evidentiary hearing or appointment of counsel.

Affirmed.

Basis for dismissal without hearing

State ex rel. Farmer v. Trent, 206 W.Va. 231, 523 S.E.2d 547 (1999)
No. 25855 (Per Curiam)

See *HABEAS CORPUS* Appointed counsel not required, (p. 393) for discussion of topic.

Defendant's right to testify

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See *RIGHT TO TESTIFY AT TRIAL* Failure to inform, Harmless error, (p. 670) for discussion of topic.

HABEAS CORPUS

Distinguished from writ of error

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See RIGHT TO TESTIFY AT TRIAL Failure to inform, Harmless error, (p. 670) for discussion of topic.

Extradition

Issue review limited

In re Extradition of Andrew Chandler, 207 W.Va. 520, 534 S.E.2d 385
(2000) No. 26906 (Maynard, C. J.)

See EXTRADITION Issue review limited, (p. 381) for discussion of topic.

Findings required

Banks v. Trent, 206 W.Va. 255, 523 S.E.2d 846 (1999)
No. 26499 (Per Curiam)

Appellant petitioned for habeas relief from his convictions for robbery and assault and respective 36 year and 1-10 year sentences. He claimed that he received ineffective assistance of counsel and that the trial court had made prejudicial comments to the jury. Without a hearing, the lower court entered an order that “a cognizable claim has not been stated” and denied the petition.

HABEAS CORPUS

Findings required (continued)

Banks v. Trent, (continued)

Syl. pt. 1 - “West Virginia Code section 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.” Syllabus Point 1, *State ex rel. Watson v. Hill*, 200 W.Va. 201, 488 S.E.2d 476 (1997).

The Court reversed and remanded with directions to make “findings of fact and conclusions of law” in accordance with *W.Va. Code* § 53-4A-7(c). Although the decision to hold a hearing is discretionary, the court must at least set out, as to each contention raised in the petition, the factual and legal grounds for denial and, further, whether each contention raised a federal or state right.

Reversed and remanded with directions.

Juveniles

State ex rel. Steven Michael M. v. Merrifield, 203 W.Va. 723, 510 S.E.2d 797 (1998) No. 25190 (Per Curiam)

See JUVENILES Detention, Length of placement in treatment center, (p. 509) for discussion of topic.

New grounds for relief

State ex rel. McClure v. Trent, 202 W.Va. 338, 504 S.E.2d 165 (1998) No. 24202 (Per Curiam)

Petitioner had been convicted of first-degree murder and malicious wounding in 1987. Pursuant to a 1993 Supreme Court order concerning cases in which former state Trooper Fred Zain had been involved, he filed a habeas petition with the Supreme Court in 1994 seeking reversal of the convictions on the grounds that the state serologist had provided fraudulent

HABEAS CORPUS

New grounds for relief (continued)

State ex rel. McClure v. Trent, (continued)

testimony at his trial. The Supreme Court remanded the case and in 1996 the petition was denied by the circuit court on the grounds that the Zain testimony was not prejudicial because it did nothing to incriminate the defendant and, moreover, the other evidence was sufficient to convict. Thereafter, the petitioner filed motions to set aside judgment and to produce documents of law enforcement agencies. The basis for the motion to produce documents was that there was newly discovered evidence of a pattern of withholding exculpatory evidence in habeas cases in Kanawha County. The court denied the motions, noting that the proper procedure would be to file a new habeas petition.

Syl. pt. 1 - “All judgments or decrees become final at the expiration of the term in which they are entered or after entry thereof in vacation.” Syllabus Point 1, *Pyles v. Coiner*, 152 W.Va. 473, 164 S.E.2d 435 (1968).

Syl. pt. 2 - “The general rule is that a valid final judgment cannot be set aside by the trial court after the term has adjourned or after entry thereof in vacation.” Syllabus Point 2, *Pyles v. Coiner*, 152 W.Va. 473, 164 S.E.2d 435 (1968).

Syl. pt. 3 - “ ‘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.’ Syllabus Point 2, *State v. Adkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).” Syllabus Point 3, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993).

HABEAS CORPUS

New grounds for relief (continued)

***State ex rel. McClure v. Trent*, (continued)**

The Court found that the “newly discovered evidence” motion was asserted too late. *W.Va. Code* §53-4A-6 forbids amendment after entry of a “final order,” and the earlier order denying the initial petition was entered during the term of court that had ended prior to the filing of the post-judgment motion. The trial court was without jurisdiction to grant the motion.

As an alternative basis for affirming the trial court’s refusal to consider the newly discovered evidence allegation, the Court noted that the petitioner had failed to demonstrate that exculpatory evidence had been withheld by the State in his case.

With regard to the Zain evidence, the Court found that the other evidence at trial was sufficient to sustain the convictions. The Court also noted that Zain’s testimony did not inculcate the petitioner in any way but instead was consistent with the crime (he testified that the blood at the scene was the victim’s) and the evidence had been subjected to retesting by other serologists.

Affirmed.

Post-conviction

Application of new and/or amended rules

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

HABEAS CORPUS

Post-conviction (continued)

Discovery

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

Standard for determining ineffective assistance

Becton v. Hun, 205 W.Va. 139, 516 S.E.2d 762 (1999)
No. 25364 (Workman, J.)

See INEFFECTIVE ASSISTANCE OF COUNSEL Plea proposal, Failure to communicate, (p. 443) for discussion of topic.

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

Standard for review

State ex rel. McLaurin v. Trent, 203 W.Va. 67, 506 S.E.2d 323 (1998)
No. 24901 (Per Curiam)

An inmate brought a habeas petition to contest his convictions on 2 counts of kidnaping and 7 counts of first-degree sexual assault. The proceeding was brought in the Supreme Court pursuant to the 1993 *Zain* order and was remanded to the circuit court. The lower court denied the appellant's motion for production of reports of law enforcement agencies involved in the case which was based on the contention that the county prosecutor's office had a pattern of withholding exculpatory evidence in *Zain* cases. The circuit

HABEAS CORPUS

Standard for review (continued)

***State ex rel. McLaurin v. Trent*, (continued)**

court also ordered additional DNA testing in accordance with the remand order. Without holding a hearing, the court vacated the convictions related to one of the 3 victims and denied relief as to the other convictions. The appellant claimed on appeal that the circuit court erred in not conducting a hearing on the habeas petition, improperly considering post trial DNA test results, not vacating all convictions and denying the motion for discovery.

Syl. pt. 1 - “Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976).

Syl. pt. 2 - “Where improper evidence of a non-constitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State’s case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant’s guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, 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.” Syllabus Point 3, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 438 S.E.2d 501 (1993).

The failure to hold a hearing was determined to be permitted under the habeas rules. The Court noted further that the *Zain* order did not mandate a hearing in every case remanded thereunder. The Court found that the trial court properly conducted the *Zain* analysis in each instance, i.e., by excluding the questioned evidence and determining that there was sufficient evidence remaining to support the verdicts. With regard to the trial court’s refusal to order production of law enforcement reports, the Court determined that the appellant had failed to demonstrate that the alleged pattern of withholding evidence existed.

Affirmed.

HABEAS CORPUS

Timeliness of motions

State ex rel. McClure v. Trent, 202 W.Va. 338, 504 S.E.2d 165 (1998)
No. 24202 (Per Curiam)

See *HABEAS CORPUS* New grounds for relief, (p. 396) for discussion of topic.

Transfer to another court

State ex rel. McLaughlin v. Vickers, 207 W.Va. 405, 533 S.E.2d 38 (2000)
No. 26835 (Maynard, C.J.)

This writ of prohibition was sought in order to stop the respondent judge from transferring a petition for a writ of *habeas corpus* to another court after not ruling on the petition for 13 months.

Syl. pt. 1 - “Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.” Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

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).

HABEAS CORPUS

Transfer to another court (continued)

***State ex rel. McLaughlin v. Vickers*, (continued)**

Syl. pt. 3 - “ Under *W.Va. Code*, 53-4A-3(b), the court receiving a writ of *habeas corpus* has three choices as to where to return the writ: ‘before (i) the court granting it, (ii) the circuit court, or a statutory court, of the county wherein the petitioner is incarcerated, or (iii) the circuit court, or the statutory court, in which, as the case may be, the petitioner was convicted and sentenced.’” Syllabus Point 2, *Adams v. Circuit Court of Randolph County*, 173 W.Va. 448, 317 S.E.2d 808 (1984).

Syl. pt. 4 - “ Given the office and function of the writ of *habeas corpus*, a circuit court should act with dispatch. Accordingly, a circuit court must transfer *habeas corpus* applications promptly, if transfer is appropriate. If it does not make a prompt transfer, it is required to render a decision on the merits of the writ.” Syllabus Point 3, *Adams v. Circuit Court of Randolph County*, 173 W.Va. 448, 317 S.E.2d 808 (1984).

Syl. pt. 5 - In determining whether a *habeas corpus* petition is suitable for transfer to another court, the circuit court should consider whether the allegations set forth in the habeas petition relate to the petitioner’s conviction and/or sentencing. If the petition does contain such allegations, then practical considerations and judicial economy ordinarily dictate that it be transferred to the county wherein the petitioner was convicted and sentenced. However, if the petition challenges the conditions of confinement or raises other purely legal questions or issues unrelated to the petitioner’s conviction and/or sentencing, the writ should be returnable to the court in the county in which the petitioner is confined. In any event, the circuit court should act with dispatch and render a prompt decision.

HABEAS CORPUS

Transfer to another court (continued)

***State ex rel. McLaughlin v. Vickers*, (continued)**

Although the Court was concerned with how long the habeas petition had been pending, it noted that the lower court acted promptly when counsel brought the matter to the judge's attention, the judge determined that there was probable cause to believe that the petitioner might be entitled to relief before transferring the writ and the petition involved more than pure legal issues that warranted an evidentiary hearing. The Court found the decision to transfer to the court where the conviction and sentencing occurred to be reasonable because the records or witnesses necessary to conduct an evidentiary hearing on the matters raised were located where the petition was transferred.

Writ denied.

HARMLESS ERROR

Adherence to procedure regarding acceptance of guilty plea

State v. Valentine, ___ W.Va. ___, 541 S.E.2d 603 (2000)
No. 27618 (Maynard, C.J.)

See PLEA AGREEMENT Guilty plea withdrawal, (p. 593) for discussion of topic.

Effect of

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

Failure to inform defendant of right to testify

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See RIGHT TO TESTIFY AT TRIAL Failure to inform, Harmless error, (p. 670) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

HARMLESS ERROR

False evidence

Material effect on jury verdict

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

Non-constitutional evidentiary issue

Test for

State ex rel. McLaurin v. Trent, 203 W.Va. 67, 506 S.E.2d 323 (1998)
No. 24901 (Per Curiam)

See HABEAS CORPUS Standard for review, (p. 399) for discussion of topic.

Standard for review

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

Testimony by defendant

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

HEARSAY

Admissibility

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 569) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Excited utterance

State v. Harris, 207 W.Va. 275, 531 S.E.2d 340 (2000)
No. 26733 (Starcher, J.)

See EVIDENCE Hearsay, Excited utterance of an anonymous or unidentified declarant, (p. 339) for discussion of topic.

HEARSAY

Expert opinion exception

Wilson v. Wilson, ___ W.Va. ___, 452 S.E.2d 402 (2000)
No. 27759 (Per Curiam)

See EVIDENCE Expert, (p. 334) for discussion of topic.

HOME CONFINEMENT

Alternative sentence

Third offense DUI

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

Conditions for

State v. Yoak, 202 W.Va. 331, 504 S.E.2d 158 (1998)
No. 24505 (Maynard, J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Home confinement, (p. 265) for discussion of topic.

Generally

State v. McGuire, 207 W.Va. 459, 533 S.E.2d 685 (2000)
No. 27258 (Scott, J.)

See HOME CONFINEMENT Post-conviction bail condition, Credit for time served, (p. 409) for discussion of topic.

Indigents' right to

State v. Shelton, 204 W.Va. 311, 512 S.E.2d 568 (1998)
No. 25019 (McCuskey, J.)

See SENTENCING Home confinement, Indigents' right to, (p. 708) for discussion of topic.

HOME CONFINEMENT

Post-conviction bail condition

Credit for time served

State v. McGuire, 207 W.Va. 459, 533 S.E.2d 685 (2000)
No. 27258 (Scott, J.)

The appellant's conviction for voluntary manslaughter was previously affirmed by the Court. This appeal asserts error of the lower court in denying the appellant credit for time served in a home incarceration program as a condition of post-conviction bail.

Syl. pt. 1 - "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. 3, *State v. Hughes*, 197 W.Va. 518, 476 S.E.2d 189 (1996).

Syl. 2 - "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." Syl. Pt. 4, *State v. Hughes*, 197 W.Va. 518, 476 S.E.2d 189 (1996).

Syl. 3 - Pursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62-11B-1 to -12 (1997 & Supp. 1999), when an offender is placed on home incarceration as a condition of post-conviction bail, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory,

HOME CONFINEMENT

Post-conviction bail condition (continued)

Credit for time served (continued)

State v. McGuire, (continued)

statutory requirements enunciated in West Virginia Code § 62-11B-5, then the offender is entitled to receive credit toward any sentence imposed for time spent on home incarceration, whether or not the offender violates the terms and conditions of home incarceration and whether or not the order specifically references the Home Incarceration Act.

This opinion makes it clear that a person who is convicted of a crime and is placed on home incarceration as a condition of post-conviction bail may receive credit for time served if the minimum criteria set forth in Syl. pt. 4 are met in the order imposing home incarceration.

Affirmed.

HOMICIDE

Categories of first-degree murder

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Concerted action

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Elements

First-degree murder

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Felony-murder

Overdose of controlled substance

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

Appellant was convicted of felony-murder in the death of Randall Burge who died as a result of morphine he received a few hours prior to his death.

HOMICIDE

Felony-murder (continued)

Overdose of controlled substance (continued)

State v. Rodoussakis, (continued)

The appellant asserted trial court error in allowing the case to go to the jury because the felony-murder statute does not apply to drug overdose cases and there was insufficient evidence to establish that the morphine administered by the appellant caused the death.

Syl. pt. 1 - “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.” Syllabus Point 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996).

Syl. pt. 2 - “When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus Point 1, *State ex rel. Fox v. Board of Trustees of the Policemen’s Pension or Relief Fund of the City of Bluefield, et al.*, 148 W.Va. 369, 135 S.E.2d 262 (1964), *overruled on other grounds*, *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995).

Syl. pt. 3 - Pursuant to *W.Va. Code* § 61-2-1 (1991), death resulting from an overdose of a controlled substance as defined in *W.Va. Code* § 60A-4-401 *et seq.* and occurring in the commission of or attempt to commit a felony offense of manufacturing or delivering such controlled substance, subjects the manufacturer or deliverer of the controlled substance to the felony-murder rule.

Although the appellant did not raise the issue of inapplicability of the felony-murder statute below, the Court decided to address it because it was an issue of first impression which concerns interpretation of a statute. The Court concluded that the legislative intent of the statute was clear and held that the felony-murder statute applies to drug overdose cases.

HOMICIDE

Felony-murder (continued)

Overdose of controlled substance (continued)

State v. Rodoussakis, (continued)

The insufficient evidence error as framed on appeal also was not raised below. The argument made to the trial court was there was insufficient evidence to show that an overdose of morphine caused the death. Since there was no reason why the appellant could not have raised the argument that the evidence did not sufficiently establish that the morphine administered by the appellant caused the death, the Court considered the issue waived.

Affirmed.

First-degree murder

Accessory before the fact

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Alternative theories

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

See HOMICIDE First-degree murder, Instructions to distinguish type, (p. 417) for discussion of topic.

HOMICIDE

First-degree murder (continued)

Concerted action

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

Appellant was convicted of first-degree murder of her husband and was sentenced to life without mercy. The actual shooting of the victim was carried out by their teenage son. The son pled guilty to second-degree murder. Appellant was convicted as the principal (aider or abettor) in the second degree.

Appellant's expert witness testified that the appellant was a "textbook case" of post-traumatic stress disorder due to being battered by the victim for nearly 20 years. The State's expert agreed. Appellant was married to the victim twice. There was testimony that she remarried out of fear of retaliation. Appellant and others testified extensively as to the victim's threats and abuse toward the appellant. Appellant sought help frequently and once escaped to a shelter in Tennessee.

The day of the murder the appellant and her son observed the victim near the appellant's trailer. Appellant testified that her son became very upset and she told him, "Well, I'll go get the gun and kill him and get it over with. I can't take it anymore." Both the appellant and her son testified that they went to Ritter Hollow to locate the victim and kill him. At least two witnesses testified that the appellant did not appear to be upset. They located the victim at a friend's house. Appellant testified she asked the friend to tell the victim to go to her mother's residence because she wanted to talk to him.

Appellant testified that by the time she located the victim she had changed her mind about killing him and that she merely wanted to show him her gun and warn him to stay away from her trailer.

Appellant and her son waited for the victim in the car outside her mother's house, with the loaded gun in the car. The appellant decided to walk to her mother's house leaving her son in the car with the loaded gun. As she walked toward the house she said she heard shots and ran toward her son. Her son testified that he shot his father.

HOMICIDE

First-degree murder (continued)

Concerted action (continued)

State v. Miller, (continued)

Appellant claimed on appeal that there was insufficient evidence to sustain her conviction as principal in the second degree. Appellant argued that she had abandoned her intent to kill her ex-husband which was demonstrated by her leaving the gun with her son and walking toward her mother's house. Appellant also claimed that the lower court erred in excluding "shared criminal intent" language from a jury instruction.

Syl. pt. 1- "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." Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 2 - "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).

Syl. pt. 3 - "Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, a person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a principal in the second degree, or as a principal in the first degree in the commission of such offense." Syllabus Point 8, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

HOMICIDE

First-degree murder (continued)

Concerted action (continued)

State v. Miller, (continued)

Syl. pt. 4 - “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.” Syllabus Point 10, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 5 - “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, 387 S.E.2d 812 (1989).

Syl. pt. 6 - “For a criminal defendant to claim that he withdrew from a criminal venture so as to avoid criminal responsibility, he must show that he disavowed the criminal purpose sufficiently in advance of the act to give his confederates a reasonable opportunity to withdraw, if they so desired, and did so in such a manner as to communicate to them his disapproval of or opposition to the criminal act.” Syllabus Point 12, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 7 - “Whether malice exists in a particular case is usually a question for the jury, and although in perfectly clear cases, the courts have held that the evidence was not sufficient to show malice even where the jury had found to the contrary, yet malice is a subjective condition of mind, discoverable only by words and conduct, and the significance of the words and conduct of an accused person, whenever there can be doubt about such significance, addresses itself peculiarly to the considerations of the jury.” Syllabus Point 1, *State v. Evans*, 172 W.Va. 810, 310 S.E.2d 877 (1983).

HOMICIDE

First-degree murder (continued)

Concerted action (continued)

State v. Miller, (continued)

The Court found sufficient evidence to support the jury's findings that: 1) the appellant was a principal in the second degree; 2) she had not abandoned her plan to murder her husband; and 3) the requisite malice and intent to commit the crime existed. The exclusion of the "shared criminal intent" language in a jury instruction was not found to be reversible error since the general instruction to the jury addressed the issue.

Affirmed.

Elements

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Instructions to distinguish type

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

Based largely on his confession, the appellant was convicted on 7 counts of first-degree murder for the deaths resulting from an apartment fire that he had set and the convictions were upheld on appeal. In a *habeas* petition, he contended that the trial court erred in refusing to require the State to elect between its alternative theories of willful premeditated murder or felony-murder (arson). Both theories were argued to the jury, and the verdict form simply gave the jury the option of the various degrees of murder (e.g., murder first-degree, with mercy). Arson, however, was not separately charged. Relief was denied and he appealed.

HOMICIDE

First-degree murder (continued)

Instructions to distinguish type (continued)

Stuckey v. Trent, (continued)

Syl. pt. 1 - “Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976).

Syl. pt. 2 - “W.Va. Code, 61-2-1, enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, starving; (2) by any wilful, deliberate and premeditated killing; (3) in the commission of, or attempt to commit, arson, rape, robbery or burglary.” Syllabus point 6, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978).

Syl. pt. 3 - “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 killing 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.” Syllabus point 9, *State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481 (1990).

Syl. pt. 4 - “The granting of a motion to force the State to elect rests within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion.” Syllabus point 3, *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992).

HOMICIDE

First-degree murder (continued)

Instructions to distinguish type (continued)

Stuckey v. Trent, (continued)

Syl. pt. 5 - In West Virginia, (1) murder by any willful, deliberate and premeditated killing, and (2) felony-murder constitute alternative means under *W.Va. Code*, 61-2-1 [1987], of committing the statutory offense of murder of the first degree; consequently, the State's reliance upon both theories at a trial for murder of the first degree does not, *per se*, offend the principles of due process, provided that the two theories are distinguished for the jury through court instructions; nor does the absence of a jury verdict form distinguishing the two theories violate due process, where the State does not proceed against the defendant upon the underlying felony.

The Court distinguished *State v. Giles*, on the ground that Giles was charged with both felony-murder and the underlying felony. In *Giles*, however, the Court had also held that the State must submit instructions that distinguish between willful premeditated killing and felony murder "if, under the facts of the case, the jury can find the defendant guilty of either category of first degree-murder." Here, the appellant was not prejudiced when the State was not required to elect a single theory or the jury was not required to agree on a single theory. The Court relied on the plurality opinion in *Schad v. Arizona*, 501 U.S. 624 (1991), in reaching its conclusion that due process is not affected when a jury is not required to agree on one of the alternative means of satisfying the mental state that first-degree murder presupposes.

Affirmed.

Poisoning

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

HOMICIDE

Instructions

Inference of malice

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

Malice

Inference of

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

Proof of

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Murder

Accessory before the fact

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

HOMICIDE

Murder (continued)

Concerted action

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Premeditation

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

Principal in second-degree

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Self-defense

Character of victim

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

HOMICIDE

Self-defense (continued)

Character of victim (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Instructions

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

Sufficiency of evidence

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

HOMICIDE

Sufficiency of evidence (continued)

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Instructions

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

Self-defense

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

IMMUNITY

Civil contempt

For invoking right against self-incrimination

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See CONTEMPT Civil, For invoking right against self-incrimination, (p. 224) for discussion of topic.

Subsequent prosecution

Use of testimony

State v. Beard, 203 W.Va. 325, 507 S.E.2d 688 (1998)
No. 24644 (Workman, J.)

The appellant had been convicted of first-degree murder in the Rainbow family murder case. His initial appeal resulted in a remand for a *Kastigar* hearing to determine whether the State could prove that its indictment and conviction were obtained without violating the use immunity agreement it had granted the appellant for any after-the-fact involvement he may have had regarding the Rainbow murders. The immunity did not extend to any involvement of the appellant as a principal or accessory before the fact. The lower court found that no immunized information was used to obtain the indictment or conviction.

The appeal of this ruling claimed error in the following ways:

- 1) Immunized information was relied on to obtain the indictment because the State read to the grand jury the appellant's statement which was given to Florida police upon the appellant's arrest that included his alibi for the date of the murders;
- 2) Reliance on immunized information to obtain the conviction was demonstrated when the State altered its position as to the time frame of the murders in order to refute the alibi defense;

IMMUNITY

Subsequent prosecution (continued)

Use of testimony (continued)

State v. Beard, (continued)

3) Immunized information had to be relied upon for the State to have identified an eyewitness and other key witnesses as well as to obtain the appellant's time card for the date of the murders.

Syl. pt. 1 - "When a previously immunized witness is prosecuted, a hearing must be held pursuant to *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), for the purpose of requiring the State to demonstrate by a preponderance that all of the evidence it proposes to use was derived from legitimate sources wholly independent of the immunized testimony." Syl. Pt. 6, *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995).

Syl. pt. 2 - Once a defendant is granted use-immunity, out of an abundance of caution, the State should, when possible, insulate any investigators and prosecutors who are familiar with the immunized statement from subsequent investigation and prosecution of the compelled witness and/or seal any incriminating documents obtained as the result of a grant of immunity.

In order to determine the standard to be applied to its review, the Court first had to conclude that the lower court followed the *Kastigar* procedures. The record reflected that the 2-prong procedure was followed since: 1) the State demonstrated by a preponderance of evidence that the evidence used to indict and convict was obtained independent of any use-immunized testimony; and 2) for any evidence where the State did not meet its burden, the reviewing court determined whether the admission of such evidence was harmless beyond a reasonable doubt. Since the proper procedure was followed, the Court applied a clearly erroneous standard to its review.

The Court concluded:

Reading of statement to grand jury: The Court found no error with the lower court's finding that the statement contained no incriminating information.

IMMUNITY

Subsequent prosecution (continued)

Use of testimony (continued)

State v. Beard, (continued)

Altered time frame: Although the time specific testimony of the medical examiner and another witness with regard to the time of death changed at trial, the Court observed that the time of death is incapable of precise determination and other witnesses identified from independent sources supported an earlier time of death.

Eyewitness, key witnesses, time card: The Court noted that the record did not support that a person the appellant purported to be “the” eyewitness actually served that purpose at trial. Further, although that witness had identified other persons who were present at the time of the murder, those eyewitnesses were located through independent sources.

The Court made some additional observations about how the State should proceed after granting immunity, including that the State needs to communicate to relevant officials who have participated in the investigation that use immunity has been granted. Further, in line with *United States v. Hampton*, 775 F.2d 1479 (11th Cir. 1985), the State should insulate those individuals who are apprised of the immunized testimony from subsequent investigation or prosecution of the case. Neither of these procedures were followed in the instant case.

Affirmed.

IMPEACHMENT

Juvenile records

State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)
No. 26195 (Starcher, C.J.)

See JUVENILES Records, Use for rebuttal or impeachment, (p. 526) for discussion of topic.

Prior convictions

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Prior inconsistent statement

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

IMPEACHMENT

Psychiatric disability

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

INDICTMENT

Amendment

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See INDICTMENT Variance between evidence and proof, (p. 441) for discussion of topic.

Amendment to

State v. Duncan, 204 W.Va. 411, 513 S.E.2d 459 (1998)
No. 24485 (Per Curiam)

See INDICTMENT Incorrect counts, Prejudicial to defendant, (p. 435) for discussion of topic.

State v. Zacks, 204 W.Va. 504, 513 S.E.2d 911 (1998)
No. 25204 (Per Curiam)

Appellant was indicted for 1 count of breaking and entering, 1 count of conspiracy to commit larceny and 2 counts of larceny. The State subsequently amended the indictment to change the breaking and entering count to entering without breaking. The appellant was convicted after a jury trial on all four counts.

The amendment to the indictment was challenged on appeal as usurping the grand jury's authority under Art. III, § 4 of the *West Virginia Constitution* because it was a substantive change. The appellant contended that the change was substantive because its effect was to lower the level of proof the State needed to establish.

Syl. pt. 3 - "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).

INDICTMENT

Amendment to (continued)

State v. Zacks, (continued)

The Court concluded that since breaking without entering was a lesser included offense the amendment to the indictment was a change in form rather than substance.

Affirmed.

Common scheme or plan

State v. Jenkins, 204 W.Va. 347, 512 S.E.2d 860 (1998) No. 24738 (Per Curiam)

See JOINDER Mandatory, Multiple offenses, (p. 472) for discussion of topic.

Dismissal of

Appeal by State

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999) No. 25826 (McGraw, J.)

See APPEAL Time for filing, (p. 150) for discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999) No 26194 (Davis, J.)

Former State Police serologist was indicted for defrauding the State by accepting salary and witness fees while providing false reports and testimony. The indictment was dismissed on alternative grounds by the trial court, namely, (1) the statute cited in the indictment, *W.Va. Code* § 61-3-24(a) & (b), did not include acts of which the State was the alleged victim, and (2) the indictment was vague as to what portions of the salary were fraudulently obtained. The State appealed.

INDICTMENT

Dismissal of (continued)

Appeal by State (continued)

State v. Zain, (continued)

Syl. pt. 1 - An indictment is considered bad or insufficient pursuant to West Virginia Code § 58-5-30 (Supp. 1999) 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. 7 - “ ‘An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.’ Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).” Syllabus point 8, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998).

The Court permitted the appeal under *W.Va. Code* § 58-5-30, which allows the State to appeal dismissals of indictments when such dismissal is based on the trial court’s finding that the indictment is “bad or insufficient.”

The Court then found error with the lower court’s dismissal of the indictment because any vagueness or ambiguity regarding the charges could be remedied by a bill of particulars. Additionally, the Court found that the State could be a victim of the charged offenses (see p. 744 *infra*).

Reversed and remanded.

Delay in indicting

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See INDICTMENT Due process, Delay in indicting, (p. 432) for discussion of topic.

INDICTMENT

Dismissal of (continued)

Failure to join

State v. Jenkins, 204 W.Va. 347, 512 S.E.2d 860 (1998)
No. 24738 (Per Curiam)

See JOINDER Mandatory, Multiple offenses, (p. 472) for discussion of topic.

Due process

Delay in indicting

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

In 1981, the appellant and her husband rushed their son to the hospital and he was soon flown to a Pittsburgh hospital where doctors discovered dangerously high levels of insulin in his body. The child sustained massive brain injuries. In 1982, the appellant rushed her three-year-old daughter to the hospital. On the night of admission, a hospital nurse observed the appellant who was also an RN give her daughter an injection without a doctor's authorization. The daughter died the next day. An autopsy revealed beads containing caffeine in her stomach. The initial investigation of the crimes began immediately and was renewed in 1995. Appellant was indicted in 1996 for attempting to poison her son and for first-degree murder of her daughter. Appellant moved to dismiss based on pre-indictment delay.

A hearing on the motion was held in which the State showed that appellant's husband would not speak to investigators until the investigation was reopened in 1995, at which time he admitted that the appellant had been alone with each child when they became ill immediately prior to being taken to the hospital. Also, certain inconsistent statements attributed to the husband and wife during their adoption of a child came to light.

INDICTMENT

Due process (continued)

Delay in indicting (continued)

State v. Davis, (continued)

Appellant argued to the lower court that the indictment delay prejudiced any attempt to attack the accuracy of the insulin tests done on her son because of unknown or unavailable information or specimens. With regard to the murder charge, the appellant argued that the beads allegedly taken from her daughter's stomach were not available for independent testing. The trial court simply found no "showing of any prejudice."

The appellant claimed on appeal that the failure to dismiss for pre-indictment delay violated her due process rights under state and federal constitutions.

Syl. pt. 3 - "The Due Process Clause of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution require the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the State's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." Syllabus Point 2, *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989).

Because the trial court held an evidentiary hearing on the motion to dismiss the indictment, the Court applied a clearly erroneous (rather than *de novo*) standard to its review.

The Court explained the analysis that applied to claims of pre-indictment delay. If the defendant can show that the identity and location of the defendant was known throughout a period of 11 years or more between commission of an offense and arrest or indictment, the delay is presumed prejudicial. The State may rebut the presumption by demonstrating that the delay was not done to gain a tactical advantage. If the presumption does not arise because the delay is less than 11 years or the defendant is unable to show that the prosecutor knew the identity and location of the defendant, then the defendant must prove that the delay was deliberate to gain a tactical advantage *and* that it caused actual prejudice in presenting a defense.

INDICTMENT

Due process (continued)

Delay in indicting (continued)

State v. Davis, (continued)

The Court found that the trial court correctly ruled that the presumption did not arise because the appellant failed to show that the State had sufficient evidence to support a conviction prior to the new investigation in 1995. The Court noted in its discussion that the State's failure to proceed with reasonable diligence in investigating a case and proceeding to indictment and trial "after discovering sufficient facts to justify indictment and trial" is itself a due process violation (citing in footnote 20 Syl. pt. 1, *State v. Carrico*, 189 W.Va. 40, 427 S.E.2d 474 (1993)). The Court, however, did not go so far as to say that a delay caused by inadequate investigation itself is a violation.

The Court found that the State did not discover "missing pieces" to the case against the appellant until 1995 and that the appellant had presented no evidence of deliberate delay. The Court also did not find that the trial court's factual finding of no prejudice to the appellant to be "clearly erroneous."

Affirmed.

Failure to try within 3 terms following

Arraignment

State v. Carter, 204 W.Va. 491, 513 S.E.2d 718 (1998)
No. 25186 (Maynard, C.J.)

See THREE-TERM RULE Generally, (p. 793) for discussion of topic.

INDICTMENT

Good cause for dismissal

Discretion of court

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review, (p. 795) for discussion of topic.

Incorrect counts

Prejudicial to defendant

State v. Duncan, 204 W.Va. 411, 513 S.E.2d 459 (1998)
No. 24485 (Per Curiam)

Appellee individually and his welding company sub-contracted on the construction of Mount Olive Correctional Facility. The general contractor paid a total of \$3,000,000 for the installation of steel doors which failed to work. Following an investigation by the Legislature's Commission on Special Investigations, the Kanawha County Prosecuting Attorney brought charges for obtaining money by false pretenses via contract with the State (*W.Va. Code* § 5A-3-30) and obtaining money by false pretenses (*W.Va. Code* § 61-3-24).

The appellees successfully argued below that the grand jury was prejudiced because *W.Va. Code* § 5A-3-30 prohibits only fraud against the State, while *W.Va. Code* § 61-3-24 prohibits fraud against parties other than the State. Since both the general contractor and the State were listed as victims, appellee claimed prejudice. The trial court dismissed the indictment.

The State appealed the dismissal.

INDICTMENT

Incorrect counts (continued)

Prejudicial to defendant (continued)

State v. Duncan, (continued)

Syl. pt. 1 - “To the extent that *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1995), 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).

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.” Syllabus Point 3, *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995).

After noting that dismissal of an indictment is only appropriate when a violation has occurred which has substantially influenced the grand jury (*United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50 (1986)), the Court found that the trial court had erred in the dismissal in this case. The Court found that false pretense crimes under *W.Va. Code* § 61-3-24 may be committed against anyone, including the State. While the general contractor was improperly listed as a victim of the *W.Va. Code* § 5A-3-30 offense, the Court determined that an amendment to the indictment pursuant to Rule 7 (e) of the Rules of Criminal Procedure was the appropriate way to correct the error. Such correction would not serve to prejudice the defendants because the change would not mislead them, subject them to an additional burden of proof or cause confusion as to the proof needed at trial.

Reversed and remanded.

INDICTMENT

Sufficiency of

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See INDICTMENT Dismissal of, Appeal by State, (p. 430) for discussion of topic.

Burglary

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

An indictment for violation of *W.Va. Code* § 61-3-11(a) provided that the appellee “committed the felony offense of ‘burglary’ by breaking and entering, in the nighttime a dwelling house . . . with intent to commit a crime therein, in violation of *W.Va. Code* § 61-3-11(a), as amended” The appellee claimed the absence of the term “feloniously and burglariously” rendered this count in the indictment insufficient. The trial court agreed and dismissed the count prior to trial, and the State appealed.

Syl. pt. 2 - Assessment of the facial sufficiency of an indictment is limited to its “four corners,” and, because supplemental pleadings cannot cure an otherwise invalid indictment, courts are precluded from considering evidence from sources beyond the charging instrument.

Syl. pt. 3 - “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.” Syl. pt. 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 4 - The requirements set forth in West Virginia Rules of Criminal Procedure 7 were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.

INDICTMENT

Sufficiency of (continued)

Burglary (continued)

State v. Wallace, (continued)

Syl. pt. 5 - The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.

Syl. pt. 6 - An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and West Virginia Rules of Criminal Procedure 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.

Syl. pt. 7 - An indictment for burglary under W.Va. Code § 61-3-11(a) (1993) that contains a plain, concise and definite written statement of the essential facts constituting such offense as required by West Virginia Rules of Criminal Procedure 7(c)(1), is sufficient notwithstanding the omission of an allegation that the offense was committed “burglariously.” To the extent that *State v. Meadows*, 22 W.Va. 766 (1883), and its progeny are inconsistent with this conclusion, they are expressly overruled.

At the outset, the Court noted that the *de novo* review of the facial sufficiency of an indictment is limited to the document itself. Turning to the contents of the indictment in the instant case, the Court found that the document was sufficient even though it did not contain the term “burglariously” and thereby overruled its holding in *State v. Meadows*. The Court held that the sufficiency of the contents of an indictment is governed by Rule 7 of the Rules of Criminal Procedure and Article II, § 14 of the W.Va. Constitution, but not by the Sixth Amendment of the U.S. Constitution. The Court noted that *Meadows* had been decided under common law

INDICTMENT

Sufficiency of (continued)

Burglary (continued)

State v. Wallace, (continued)

pleading principles and the stringency placed on precise wording in pleadings was changed with the adoption of the Rules of Criminal Procedure. The Court further stated that the minimum requirements of the contents of an indictment are the elements of the offense charged which gives a defendant “fair notice” of the charge against which he or she must defend and affords the defendant protection against double jeopardy. The Court noted that citation to the statute of the offense is sufficient by itself to inform the defendant of the elements of a charged offense.

Reversed and remanded.

Enhancement of sentence

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

See SENTENCING Enhancement of, No contest plea sufficient, (p. 706) for discussion of topic.

Neglect of incapacitated adult

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

The appellants are husband and wife who were convicted of neglect of an incapacitated adult. The victim was the wife’s elderly father who had been left unattended while the appellants left the state to visit a relative. The father was diagnosed with dehydration, pneumonia and dementia after he was removed from unsafe and unclean living conditions.

INDICTMENT

Sufficiency of (continued)

Neglect of incapacitated adult (continued)

State v. Bull, (continued)

Two of the errors assigned on appeal involved the indictments, namely, that they lacked specificity of the crimes charged and improperly used disjunctive language.

Syl. pt. 6 - “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.” Syllabus Point 1, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 7 - “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.” Syllabus Point 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. pt. 8 - “An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.” Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

INDICTMENT

Sufficiency of (continued)

Neglect of incapacitated adult (continued)

State v. Bull, (continued)

In upholding the validity of the indictments, the Court found that they fully apprised the appellants of the charges in order to prepare a defense and to protect them from double jeopardy. The Court specifically noted that the indictment tracked the language of the offense statute as well as related definitional statutes, a bill of particulars was obtained by the appellants which afforded the appellants further details regarding the charges and the disjunctive language in the indictments merely stated alternative manners by which the charged offense could be committed.

Affirmed.

Variance between evidence and proof

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000) No. 26849 (Per Curiam)

The appellant was a teacher who was convicted of three counts of third degree sexual assault of a student. The indictment alleged specific months and years when the crimes were committed while the evidence showed that they occurred in different months.

The appellant claimed on appeal that a fatal variance existed between the indictment and the proof presented at trial.

Syl. pt. 14 - "A variance in the pleading and the proof with regard to the time of the commission of a crime does not constitute prejudicial error where time is not of the essence of the crime charged." Syl. Pt. 4, *State v. Chaffin*, 156 W.Va. 264, 192 S.E.2d 728 (1972).

INDICTMENT

Variance between evidence and proof (continued)

State v. McIntosh, (continued)

Syl. pt. 15 - “The variance between the indictment and the proof is considered material where the variance misleads the defendant in presenting his defense to the charge and exposes him to the danger of being put in jeopardy again for the same offense.” Syl. Pt. 7, *State v. Fairchild*, 171 W.Va. 137, 298 S.E.2d 110 (1982).

Syl. pt. 16 - “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.” Syl. Pt. 3, *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996).

The Court noted that the defendant did not present an alibi defense and time was not of the essence of the crimes charged and then concluded that the defendant had not been prejudiced in any way by the variance.

Affirmed.

When time variance with proof material

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See INDICTMENT Variance between evidence and proof, (p. 441) for discussion of topic.

INEFFECTIVE ASSISTANCE OF COUNSEL

Plea proposal

Failure to communicate

Becton v. Hun, 205 W.Va. 139, 516 S.E.2d 762 (1999)
No. 25364 (Workman, J.)

In 1989, the appellant was sentenced to 40 years in the penitentiary after a jury convicted him of one count of aggravated robbery. In 1996, he reviewed his file and discovered a letter from the prosecutor to his trial counsel that offered a plea bargain under which the appellant would plead to one count of aggravated robbery (he was charged with four counts) in exchange for a recommendation of a 10 year sentence from the prosecutor. In a habeas petition, he alleged ineffective assistance of counsel. At the hearing, he testified that the plea proposal was never communicated to him. He and his sister testified that the best offer communicated to them was a guilty plea in exchange for a recommended sentence of 15-40 years. Trial counsel testified that he had no memory of the details of the appellant's case but that it was his usual practice to forward all plea proposals to his clients. A search for a record of a communication to the appellant was unsuccessful.

The habeas court assumed that the plea proposal was never communicated. Relief was denied, however, on the ground that any such failure to communicate the proposal did not affect the outcome because the particular trial judge did not accept binding or conditional pleas.

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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Plea proposal (continued)

Failure to communicate (continued)

Becton v. Hun, (continued)

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).

Syl. pt. 3 - Objective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances.

Syl. pt. 4 - “One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence.” Syl. Pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court held that, absent extenuating circumstances, trial counsel’s failure to communicate any and all plea bargain proposals constitutes ineffective assistance of counsel under the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Court concluded that appellant had proven by a preponderance of evidence that trial counsel failed to communicate the plea proposal and that such failure constituted ineffective assistance of counsel.

An ineffective assistance claim also requires a showing that “there is a reasonable probability that, but for counsel’s unprofessional error, the result of the proceedings would have been different.” *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114, 117-18 (1995). The Court found that a new trial was not

INEFFECTIVE ASSISTANCE OF COUNSEL

Plea proposal (continued)

Failure to communicate (continued)

Becton v. Hun, (continued)

warranted because the fairness of the first trial was not being questioned and the outcome (conviction of one count) was the same as envisioned by the plea proposal. However, the Court felt that a recommendation of 10 years pursuant to a plea agreement might have prompted the trial court to impose a lighter sentence and that this possibility was a “reasonable probability.” Therefore, the Court reversed and remanded with directions that the lower court resentence with the State recommending a 10 year sentence.

Reversed and remanded.

Standard for determining

Becton v. Hun, 205 W.Va. 139, 516 S.E.2d 762 (1999)
No. 25364 (Workman, J.)

See INEFFECTIVE ASSISTANCE OF COUNSEL Plea proposal, Failure to communicate, (p. 443) for discussion of topic.

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

The petitioner’s convictions for 3 counts of second-degree sexual assault of a minor were affirmed on appeal. In a habeas petition, he raised several claims of ineffective assistance of his two attorneys during his criminal trial for:

- 1) failing to call a **specific witness** who would have contradicted the victim’s testimony regarding the time the assault occurred;
- 2) failing to seek a **continuance** after the late disclosure of evidence by the State;

INEFFECTIVE ASSISTANCE OF COUNSEL

Standard for determining (continued)

State ex rel. Edgell v. Painter, (continued)

- 3) failing to object to closing **remarks of the prosecutor** regarding the credibility of the victim and the guilt of the petitioner; and
- 4) failing to object to the method by which the trial **judge communicated with the jury** during deliberations.

The circuit court denied the relief and the petitioner appealed.

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. P. 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).

Syl. pt. 3 - “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.” Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

INEFFECTIVE ASSISTANCE OF COUNSEL

Standard for determining (continued)

State ex rel. Edgell v. Painter, (continued)

Specific Witness: The record of the omnibus habeas hearing reflected that the witness in question testified she could not elaborate on her activity log which had been introduced into evidence through another witness at trial. The circuit court had concluded after hearing testimony from that witness and from the petitioner's trial counsel that the decision not to call the witness in question was a proper tactical decision. While the Court agreed that the tactical decision was reasonable in order to protect the log contents from being directly impeached, it found that trial counsel had not contacted nor attempted to contact the potential witness. This failure indicated deficient performance under the objective standard leg of the *Strickland/Miller* test. However, when the Court applied the second part of the *Strickland/Miller* test, it found that nothing was presented by the petitioner at the omnibus hearing which demonstrated that the outcome of the trial would have been different had the witness testified and therefore found that counsels' performance was acceptable.

Continuance: The record showed that the State did not produce a scrapbook compiled by the victim concerning the sexual assault until the day before trial. Trial counsel testified at the omnibus hearing that they had adequate opportunity to review the evidence and prepare a response. The Court found the petitioner did not show why a continuance was needed or would have produced a different outcome.

Prosecutor's Closing Argument: The Court found that the remarks complained of were not personal opinions of the prosecutor and that since they were reasonable inferences from the trial evidence, an objection was not warranted.

Judge/jury Communication: The trial court's failure to reconvene the jury to respond to written inquiries was deemed not to be a ground for relief despite the holding in *State v. Allen*, 193 W.Va. 172, 455 S.E.2d 541 (1994). Although *Allen* held that the proper method is to reconvene a jury and reinstruct in open court, the Court explained that *Allen* involved *ex parte*

INEFFECTIVE ASSISTANCE OF COUNSEL

Standard for determining (continued)

State ex rel. Edgell v. Painter, (continued)

Judge/jury Communication: (continued)

judge-jury communications about which neither counsel was informed. In this case, counsel was consulted beforehand, and the written response from the judge was substantially correct. The probability-of-a-different-result prong of *Strickland/Miller* was not satisfied and the Court concluded no impropriety occurred.

Affirmed.

INMATES

Elements for retaliation claim

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998)
No. 25155-25158 (Maynard, J.)

See PRISON/JAIL CONDITIONS Computers, Confiscation of, (p. 612) for discussion of topic.

INSANITY

Instructions

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

Appellant was convicted of second-degree murder. She assigned as error the trial court's modification of two proffered instructions regarding the consequences of a verdict of not guilty by reason of insanity. The appellant contended that the court incorrectly incorporated in the instructions the 1995 statutory change to *W.Va. Code* § 27-6A-3, which addresses the court's jurisdiction of persons found not guilty by reason of insanity. The appellant claimed that the former statute should have been relied upon because the offense was committed prior to the enactment of the amendment.

Syl. pt. 7 - "In any case where the defendant relies upon the defense of insanity, the defendant is entitled to any instruction which advises the jury about the further disposition of the defendant in the event of a finding of not guilty by reason of insanity which correctly states the law; however, when the court gives an instruction on this subject which correctly states the law and to which the defendant does not object, the defendant may not later assign such instruction as error." Syl. Pt. 2, *State v. Nuckolls*, 166 W.Va. 259, 273 S.E.2d 87 (1980).

The Court noted that the application of this statutory revision was discussed in *State v. Smith*, 198 W.Va. 702, 482 S.E.2d 687 (1996), but that *Smith* had not been decided at the time of trial in the instant case. *Smith* had announced that it was the time of acquittal rather than the time when the offense was committed that determined which version of the statute in question applied. After reviewing the lower court's instruction, the Court found that the 1995 law was adequately and correctly reflected.

Affirmed.

INSANITY

Not guilty by reason of

Placement after subsequent conviction

State v. Catlett, 207 W.Va. 740, 536 S.E.2d 721 (1999)
No. 25404 (Workman, J.)

Appellant was found not guilty by reason of insanity in 1997 for an arson committed in 1995 and was committed to a state mental institution subject to the court “retaining jurisdiction” for the length of the possible sentence for arson (2-20 years). In an unrelated case, he was convicted of first-degree murder in 1998 in a trial at which the jury rejected his insanity defense. The prosecutor moved the court in the arson case to “dismiss its continuing jurisdiction” over the appellant so he could be sent to the penitentiary to serve his life sentence on the murder conviction. The court held a hearing and made findings regarding the appellant’s mental state, including that he continued to be dangerous and that there were no secure mental health facilities in the state. Without releasing jurisdiction, the court ordered the appellant placed with the Department of Corrections. Appellant appealed the transfer from the mental hospital to the prison.

Syl. pt. 1 - “*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. 2, *State v. Smith*, 198 W.Va. 702, 482 S.E.2d 687 (1996).

Syl. pt. 2 - Where a defendant is found not guilty of a criminal charge by virtue of the defense of insanity, and subsequently is found guilty of another criminal charge, the intervening conviction constitutes a judicial determination that the defendant is no longer mentally ill, and no longer a danger to self or others, as those terms are used in *West Virginia Code* § 27-6A-4 (1999), and the defendant can be sentenced accordingly.

INSANITY

Not guilty by reason of (continued)

Placement after subsequent conviction (continued)

State v. Catlett, (continued)

The Court found that although *W.Va. Code* § 27-6-4 seems to require that a defendant found not guilty by reason of insanity be committed to a mental health facility until the committing court either finds he is no longer a danger to himself or others or is no longer mentally ill, the murder conviction rendered subsequent to the not guilty verdict served as a judicial determination that the appellant was no longer mentally ill.

Affirmed; remanded with directions.

INSTRUCTIONS

Collateral acts/crimes evidence

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

Discretion

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

INSTRUCTIONS

Driving under the influence

Prima facie evidence of intoxication

State v. Coleman, ___ W.Va. ___, 542 S.E.2d 74 (2000)
No. 27807 (Per Curiam)

The appellant was convicted of third offense DUI. One basis for challenging the conviction was the trial court incorrectly used a *prima facie* evidence of intoxication instruction when the hospital blood test results introduced into evidence were not supported by proof that the tests were completed in the statutorily prescribed manner. He also sought reversal of his conviction on the ground that he was unfairly prejudiced since the jury was informed of his previous DUI convictions contrary to the holding in *State v. Nichols*, ___ W.Va. ___, 541 S.E.2d 310 (1999).

Syl. pt. 1 - “Medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject to subpoena and shall not be deemed inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d (Supp.1994).” Syllabus Point 2, *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 454 S.E.2d 77 (1995).

Syl. pt. 2 - “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.” Syllabus Point 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

While agreeing that the instruction was improperly included in the charge to the jury, the Court found that the error was not preserved because objection was not made until after the appellant was convicted. Therefore, the issue was reviewed under the plain error doctrine. In light of the entire record, the Court did not find that the instructional error resulted in a miscarriage of justice and affirmed the conviction.

INSTRUCTIONS

Driving under the influence (continued)

Prima facie evidence of intoxication (continued)

State v. Coleman, (continued)

The Court quickly disposed of the second issue by stating that the instant case was tried before *Nichols* was handed down and the appellant had not made any claim for bifurcation or stipulation at trial.

Affirmed.

Erroneous

Effect of

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

Appellant was convicted of first-degree murder and sentenced to life without the possibility of parole. He appealed claiming the trial court improperly instructed the jury on when he would be eligible for parole if the jury recommended mercy. The jury did not recommend mercy.

Syl. pt. 1 - "In a criminal trial, where it is clear that an erroneous instruction was given and this Court cannot confidently declare beyond a reasonable doubt that such instruction in no way contributed to the conviction or affected the outcome of the trial, the conviction must be reversed and a new trial granted." Syllabus Point 2, *State v. Romine*, 166 W.Va. 135, 272 S.E.2d 680 (1980).

The Court noted that the question of whether a jury was properly instructed is a matter of law and reviewable *de novo*. *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). The trial court's instruction stating the accused would be eligible for parole in 10 years was clearly wrong in that *W.Va. Code* § 62-12-13(a)(5) required a minimum of 15 years before parole eligibility (the Code was amended a year before the appellant committed the crime).

INSTRUCTIONS

Erroneous (continued)

Effect of (continued)

State v. Doman, (continued)

The Court found that the improper instruction on parole eligibility could have affected the jury on the question of mercy, but the jury's underlying finding of guilty was not affected by the instruction. Therefore, the judgment was reversed and the case remanded solely on the question of mercy.

Affirmed in part, reversed in part, and remanded with directions.

First-degree murder

Concerted action

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

To include felony-murder and premeditated

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

See HOMICIDE First-degree murder, Instructions to distinguish type, (p. 417) for discussion of topic.

INSTRUCTIONS

Generally

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

Inference of malice

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 777) for discussion of topic.

Insanity defense

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See INSANITY Instructions, (p. 450) for discussion of topic.

Lesser-included offense

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See INSTRUCTIONS Standard for review, (p. 461) for discussion of topic.

INSTRUCTIONS

Lesser-included offense (continued)

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

The appellant's daughter died as a result of receiving an overdose of caffeine. At the trial for first-degree murder by poison, the trial court, without defense objection, did not instruct the jury on the lesser-included offense of manslaughter. Appellant was convicted, and she raises the failure to include such instruction as error.

Syl. pt. 9 - "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." Syllabus Point 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

The Court applied a plain error analysis because of the lack of objection at trial.

Relying on the 2-part test announced in *State v. Jones*, the Court found the first part of the inquiry answered by its previous decisions in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) and *State v. McGuire*, 200 W.Va. 823, 490 S.E. 2d 912 (1997) which state that manslaughter is a lesser included offense of murder. However, the second part of the test was not satisfied since there was not sufficient evidence admitted at trial that would tend to prove the lesser included offense of manslaughter. The appellant had argued that the jury could have found that the appellant administered the caffeine only to make the daughter ill but the Court found that the evidence that the appellant presented at trial foreclosed such a finding by the jury.

Affirmed.

INSTRUCTIONS

Lesser-included offense (continued)

Waiver of misdemeanor statute of limitation

State v. Boyd, ___ W.Va. ___, 543 S.E.2d 647 (2000)
No. 27661 (Maynard, C.J.)

See STATUTE OF LIMITATION Misdemeanor offenses, May be waived, (p. 730) for discussion of topic.

Murder

Inference of malice

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

The petitioner was convicted of first-degree murder with a recommendation of mercy. Her direct appeal of that conviction, based on the same grounds as this petition, had been refused previously as was an appeal of the denial of her *habeas corpus* petition in the circuit court. A federal petition for *habeas corpus* relief included these errors among others and it too was refused.

One of the issues raised in this post-conviction habeas petition involved improper jury instructions. It was alleged that the jury charge allowed the jury to infer essential elements of malice, wilfulness, deliberation and intent because a deadly weapon was used and that it failed to inform the jury that all elements of a crime must be proven beyond a reasonable doubt.

Syl. pt. 4 - "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." Syllabus Point 2, *State v. Browning*, 199 W.Va. 417, 485 S.E.2d 1 (1997).

The Court reviewed the jury instruction issues and found no error when the instructions were read as a whole.

Writ denied.

INSTRUCTIONS

Self-defense

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

Appellant was convicted of first-degree murder. His defense at trial was that the victim provoked him and he acted in self-defense. On appeal the appellant claimed the trial court erred in refusing 3 instructions relating to provocation by the victim and self-defense. Despite the prosecution's claim, the appellant maintained the evidence supported his theory and that the instructions were not duplicative.

Syl. pt. 1 - "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, as 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).

Syl. pt. 2 - "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." Syl. Pt. 1, in part, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

The Court found that the proposed instructions were substantially covered in the lower court's jury charge and that the appellant's ability to effectively present his defense to the jury was not impaired.

Affirmed.

INSTRUCTIONS

Standard for review

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

The appellant was convicted of the felony offense of obtaining money by false pretenses. The offense involved a driveway repaving scheme.

The appellant assigned error to the trial court's denial of his request for jury instructions involving: what constitutes a false pretense charge; the inclusion of the lesser included misdemeanor false pretense offense; proof that fraudulent intent and false representation had to occur simultaneously; and the omission of any instruction that statements of value are just expressions of opinion ("puffing" instruction).

Syl. pt. 2 - "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syllabus point 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).

Syl. pt. 3 - "A trial court's refusal to give a requested instruction is reversible only if: (1) the instruction is a correct statement of the 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 given defense." Syllabus point 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 4 - "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." Syllabus point 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985).

INSTRUCTIONS

Standard for review (continued)

State v. Blankenship, (continued)

Syl. pt. 5 - “When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict.” Syllabus point 6, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

Syl. pt. 6 - “One to whom a representation is made may believe it to be true and act thereon without making inquiry or investigation to determine its truth.” Syllabus point 3, *Morrison v. Bank of Mount Hope*, 124 W.Va. 478, 20 S.E.2d 790 (1942).

The Court found: the false pretense instruction given to the jury was adequate; the evidence of the amount of money by which the victims were defrauded did not warrant the lesser included offense instruction; the general instruction given by the lower court with regard to intent cured the omission of a specific instruction; and the “puffing” instruction was an incomplete statement of the law and was correctly rejected by the trial court.

Affirmed.

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

INSTRUCTIONS

Standard for review (continued)

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See INSTRUCTIONS Erroneous, Effect of, (p. 455) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

The appellant was convicted of aggravated robbery by a jury. He claimed trial court error for rejecting jury instructions involving the issues of burden of proof, weight to be given evidence and identification.

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 the 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 given defense." Syllabus point 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The Court concurred with the trial court's finding that the proffered instructions were already addressed in other instructions. The Court also noted that the appellant's claim of error for each instruction did not indicate how he was prejudiced by the use of the alternative instruction.

Affirmed.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

INSTRUCTIONS

Standard for review (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

Appellant was convicted of felony-murder in the death of Randall Burge who died as a result of morphine he received a few hours prior to his death. Testimony was adduced that the appellant tried to buy morphine through Lawrence Graham. Curtis Cassey testified that the appellant tried to buy morphine from Cassey through Graham. Cassey also said the appellant told him that someone had died as a result of Cassey's morphine.

The trial court refused to give the appellant's instruction that Graham and Cassey were accessories before the fact which would have apprised the jury that their testimony was to be viewed with caution because of their role as accessory or accomplice.

Syl. pt. 10 - A trial court may properly refuse an instruction not supported by sufficient evidence.

Syl. pt. 11 - "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." Syllabus Point 12, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The Court found that the trial court did not abuse its discretion in refusing to give the instruction because there was insufficient evidence that the witnesses were accomplices to the crime.

Affirmed.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

INSTRUCTIONS

Sufficiency of

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

In a trial involving sexual offenses against a minor, the defendant proffered an instruction to the effect that if the victim's testimony is uncorroborated, the jury should "scrutinize said testimony with great care and caution" The instruction was refused and that decision was appealed.

Syl. pt. 2 - "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." Syllabus Point 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found no error. Discussing the appellant's reliance on *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981) approving similar language, the Court stated that a so-called "Payne instruction" was limited to uncorroborated and uncontradicted *identification* testimony of a *prosecution* witness.

Affirmed.

INSTRUCTIONS

Uncorroborated victim's testimony

***State v. Payne* distinguished**

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

INTENT

First-degree murder

Elements of

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Instructions

Inference of malice

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

Malice

State v. Burgess, 205 W.Va. 87, 516 S.E.2d 491 (1999)
No. 25801 (Maynard, J.)

See MALICE Definition, (p. 548) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

INTERROGATION

Miranda warnings

When required

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See *MIRANDA WARNINGS* When required, (p. 553) for discussion of topic.

Right to counsel

After dismissal of charges

State ex rel. Sims v. Perry, 204 W.Va. 625, 515 S.E.2d 582 (1999)
No. 25629 (Davis, J.)

See *RIGHT TO COUNSEL* After dismissal of charges, Statements induced by police, (p. 667) for discussion of topic.

INVITED ERROR

Evidence admissibility

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Effect of

State ex rel. Farmer v. Trent, 206 W.Va. 231, 523 S.E.2d 547 (1999)
No. 25855 (Per Curiam)

See *HABEAS CORPUS* Appointed counsel not required, (p. 393) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 286) for discussion of topic.

JAIL

Place of incarceration

State ex rel. Canterbury v. Mineral County Commission, 207 W.Va. 381, 532 S.E.2d 650 (2000) No. 27328 (Starcher, J.)

See SENTENCING Jail, Place of incarceration, (p. 710) for discussion of topic.

JOINDER

Common scheme or plan

State v. Jenkins, 204 W.Va. 347, 512 S.E.2d 860 (1998)
No. 24738 (Per Curiam)

See JOINDER Mandatory, Multiple offenses, (p. 472) for discussion of topic.

Discretionary when charged in magistrate court

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

Petitioner was stopped by a DNR officer and issued a citation for two hunting violations: possession of an uncased gun in a vehicle and hunting between sunset and sunrise. The DNR officer noticed alcohol on the petitioner's breath and called for a state trooper. The trooper who responded conducted field sobriety tests and arrested the petitioner for DUI and he was later charged with driving on a license suspended for DUI.

Four days later, the petitioner appeared before a magistrate, pleaded guilty to the hunting offenses and paid a fine. He then moved to dismiss the DUI charges that were pending in magistrate court because they had not been joined with the hunting offenses, contrary to the joinder requirement of West Virginia Rules of Criminal Procedure, Rule 8(a)(2). The motion was denied by the magistrate. After a petition for a writ of prohibition was denied by the circuit court, he filed a petition in the Supreme Court for (1) a writ of mandamus to require the prosecutor to dismiss the charges and (2) a writ of prohibition to force the magistrate to dismiss the charges.

Syl. pt. 1 - "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

JOINDER

Discretionary when charged in magistrate court (continued)

State ex rel. Bosley v. Willet, (continued)

Syl. pt. 2 - “A writ of mandamus will not issue unless three elements coexist--(1) a clear legal 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).

Although the parties argued whether the circumstances met the criteria for mandatory joinder under Rule 8(a)(2) of the Rules of Criminal Procedure, the Court concluded that the matter was controlled by Rule 16A of the Rules of Criminal Procedure for the Magistrate Courts, under which joinder of offenses is discretionary.

Although each court system has its own set of procedural rules, the magistrate rules are supplemented by the circuit court rules, “whenever specifically provided in one of the [circuit court] rules.” Because the circuit court criminal procedure rule governing joinder, Rule 8(a)(2), does not provide that it also governs magistrate proceedings, the magistrate joinder rule controls.

Writs denied.

Mandatory

Multiple offenses

State v. Jenkins, 204 W.Va. 347, 512 S.E.2d 860 (1998)
No. 24738 (Per Curiam)

Appellant was convicted of forgery and uttering a bad check. On appeal, she claimed the circuit court should have dismissed the forgery charge.

JOINDER

Mandatory (continued)

Multiple offenses (continued)

State v. Jenkins, (continued)

Appellant was originally convicted for uttering a bad check. When the conviction was overturned, she was reindicted for both forgery and uttering. Appellant moved to dismiss the forgery count on the grounds the prosecution knew, or should have known, that the forgery charge was a possibility before the original indictment and failure to join the charges at that time precluded further prosecution. The motion was denied resulting in this appeal.

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.” Syllabus Point 3, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

Syl. pt. 2 - “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.” Syllabus Point 5, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

The Court found it clear under Rule 8(a) of the Rules of Evidence that joinder of the forgery and uttering charges at the outset was required.

Affirmed in part and reversed in part.

JOINDER

Prejudicial

Discretion of court

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

Appellant was convicted of first-degree murder, second degree arson and providing false information to police. Appellant and the victim had lived on a farm owned by the victim's mother. Apparently the appellant and the victim "maintained an intimate relationship."

Appellant and her son reported the shooting. The investigation initially centered on a man with whom the victim had allegedly had an affair. Several months later a suspicious fire burned a barn at the farm where the appellant still lived. Ultimately, the appellant confessed to both the arson and the murder.

On appeal she claimed the murder and arson charges should have been severed because joinder of the charges was prejudicial. Relying on *State v. Ludwick*, 197 W.Va. 70, 475 S.E.2d 70 (1996), the appellant argued that the evidence pertaining to one offense would be inadmissible in a separate trial of the other offense, the cumulation of the evidence in one trial improperly influenced the jury to find her guilty because she was a "bad person" and she was denied her Fifth Amendment rights by the joinder because she could not be cross-examined on one charge without being open to examination on all charges.

Syl. pt. 1 - "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 (1989).

Syl. pt. 2 - A defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedures when evidence of each of the crimes charged would be admissible in a separate trial for the other.

JOINDER

Prejudicial (continued)

Discretion of court (continued)

State v. Milburn, (continued)

The Court concurred with the circuit court's conclusions that the murder and arson offenses were part of a common scheme or plan, and that even if the charges were severed the evidence of the other offense would likely be admissible in the trial of the other offense. The Court then noted that the evidence against the appellant was equally strong for each crime making it unlikely that the jury would have rendered a verdict based on the cumulation of evidence. Finally, the Court said that the appellant had not convincingly shown that she had important testimony on one count and a strong need to refrain from testifying on the other count.

Affirmed.

JUDGES

Discipline

Evidentiary rulings

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 282) for discussion of topic.

Family law master

In re Hamrick, 204 W.Va. 357, 512 S.E.2d 870 (1998)
No. 24482 (Per Curiam)

See FAMILY LAW MASTER Discipline, Charges dismissed, (p. 383) for discussion of topic.

Discretion

Admissibility of confession

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See RIGHT TO COUNSEL Waiver after right asserted, (p. 672) for discussion of topic.

Cross-examination

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

JUDGES

Discretion (continued)

Cross-examination limitation

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See CROSS-EXAMINATION Limitations, (p. 230) for discussion of topic.

Discovery

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

Discovery in post-conviction *habeas corpus* proceeding

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

Dismissal of indictment for good cause

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review, (p. 795) for discussion of topic.

JUDGES

Discretion (continued)

Disqualification of counsel

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000)
No. 26851 (Davis, J.)

See ATTORNEYS Conflict of interest, Prior representation of opposing party witness in related matter, (p. 161) for discussion of topic.

Evidentiary rulings

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Gray, 204 W.Va. 248, 511 S.E.2d 873 (1998)
No. 25149 (Per Curiam)

See EVIDENCE Writings, Rule of completeness, (p. 376) for discussion of topic.

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

JUDGES

Discretion (continued)

Evidentiary rulings (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See PRIVILEGES Attorney-client privilege, (p. 616) for discussion of topic.

Facility-specific placement of juveniles

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

Incarcerated witnesses testifying in shackles and/or prison clothing

State v. Allah Jamaal W., ___ W.Va. ___, 543 S.E.2d 282 (2000)
No. 27770 (Davis, J.)

See WITNESSES Incarcerated, Attire and restraints, (p. 807) for discussion of topic.

Instructions

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See INSTRUCTIONS Standard for review, (p. 461) for discussion of topic.

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

JUDGES

Discretion (continued)

Instructions (continued)

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See INSTRUCTION Standard for review, (p. 463) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See INSTRUCTIONS Sufficiency of, (p. 465) for discussion of topic.

JUDGES

Discretion (continued)

Jury bias

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999)
No. 26438 (Per Curiam)

See JURY Peremptory strike, Use in lieu of cause, (p. 498) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See JURY Bias, Test for, (p. 494) for discussion of topic.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999)
No. 26352 (Per Curiam)

See JURY Bias, Test for, (p. 495) for discussion of topic.

Mistrial for manifest necessity

State ex rel. Bailes v. Jolliffe, ___ W.Va. ___, 541 S.E.2d 571 (2000)
No. 27912 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 554) for discussion of topic.

Photographic array

State v. Garrett, 204 W.Va. 13, 511 S.E.2d 124 (1998)
No. 24997 (Per Curiam)

See DISCOVERY Pre-trial identification, Right to, (p. 254) for discussion of topic.

JUDGES

Discretion (continued)

Plea agreement

State v. Sears, ___ W.Va. ___, 542 S.E.2d 863 (2000)
No. 27766 (Starcher, J.)

See PLEA AGREEMENT Basis to accept or reject, (p. 588) for discussion of topic.

Plea agreement decision when no admission of guilt

State v. Parr, ___ W.Va. ___, 542 S.E.2d 69 (2000)
No. 27871 (Per Curiam)

See PLEA AGREEMENT No admission of guilt, (p. 596) for discussion of topic.

Sentencing

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

State v. Shaw, ___ W.Va. ___, 541 S.E.2d 21 (2000)
No. 27471 (Per Curiam)

See SENTENCING Discretion, (p. 704) for discussion of topic.

JUDGES

Discretion (continued)

Severance of charges

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See JOINDER Prejudicial, Discretion of court, (p. 474) for discussion of topic.

Termination of parental rights

State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865 (2000)
No. 27061 (Davis, J.)

See TERMINATION OF PARENTAL RIGHTS Due process requirements, Incarcerated parent's attendance at dispositional hearing, (p. 786) for discussion of topic.

Testimony by defendant

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

Voluntariness of confession

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

See RIGHT TO COUNSEL Waiver after right asserted, (p. 672) for discussion of topic.

JUDGES

Discretion (continued)

Witnesses

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See WITNESSES Mode and order of interrogation, (p. 810) for discussion of topic.

Duties

Hearing to terminate parental rights

State ex rel. W.Va. Department of Health and Human Resources v. Hill,
207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

See ABUSE AND NEGLECT Termination of parental rights, Disposition hearing, (p. 45) for discussion of topic.

Juvenile placement

State ex rel. Jessica P. v. Wilkes, 202 W.Va. 323, 504 S.E.2d 150 (1998)
No. 24992 (Per Curiam)

See JUVENILES Placement, Findings required, (p. 518) for discussion of topic.

Juvenile pretransfer hearing

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

See JUVENILES Plea agreement, Pretransfer hearing waiver, (p. 521) for discussion of topic.

JUDGES

Duties (continued)

Juvenile proceedings

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514) for discussion of topic.

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

State ex rel. Daniel M. v. W.Va. DHHR, 205 W.Va. 16, 516 S.E.2d 30 (1999) No. 25796 (Maynard, J.)

See JUVENILES Detention, Out-of-state placements, (p. 511) for discussion of topic.

State v. Craig D., 205 W.Va. 269, 517 S.E.2d 746 (1998)
No. 25195 (Per Curiam)

See JUVENILES Committed to Department of Corrections custody, Findings precedent to, (p. 504) for discussion of topic.

JUDGES

Duties (continued)

Juvenile proceedings (continued)

Pretransfer hearing

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

See JUVENILES Plea agreement, Pretransfer hearing waiver, (p. 521) for discussion of topic.

Treatment of guilty plea offer

State v. Valentine, ___ W.Va. ___, 541 S.E.2d 603 (2000)
No. 27618 (Maynard, C.J.)

See PLEA AGREEMENT Guilty plea withdrawal, (p. 593) for discussion of topic.

Duty

Transition plan in abuse and neglect cases

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

JUDGES

Habeas Corpus

Findings required

Banks v. Trent, 206 W.Va. 255, 523 S.E.2d 846 (1999)
No. 26499 (Per Curiam)

See *HABEAS CORPUS* Findings required, (p. 395) for discussion of topic.

Transfer decision

State ex rel. McLaughlin v. Vickers, 207 W.Va. 405, 533 S.E.2d 38 (2000)
No. 26835 (Maynard, C.J.)

See *HABEAS CORPUS* Transfer to another court, (p. 401) for discussion of topic.

Plea agreement

Accurate information regarding possible sentence

State ex rel. Gill v. Irons, 207 W.Va. 199, 530 S.E.2d 460 (2000)
No. 26854 (Per Curiam)

See *PLEA AGREEMENT* Waiver of rights, Accurate information regarding possible sentence, (p. 600) for discussion of topic.

Responding to inquiry by jury

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See *INEFFECTIVE ASSISTANCE OF COUNSEL* Standard for determining, (p. 445) for discussion of topic.

JUDGES

Rules of criminal procedure

Relationship between circuit court and magistrate court rules

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

Standard for review

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 556) for discussion of topic,

Directed verdict

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

Discovery requests for law enforcement internal affairs material

McClay v. Jones, ___ W.Va. ___, 542 S.E.2d 83 (2000)
No. 27776 (Scott, J.)

See RECORDS Disclosure in civil case, Law enforcement internal affairs investigatory materials, (p. 663) for discussion of topic.

JUDGES

Standard for review (continued)

Excited utterance

State v. Harris, 207 W.Va. 275, 531 S.E.2d 340 (2000)
No. 26733 (Starcher, J.)

See EVIDENCE Hearsay, Excited utterance of an anonymous or unidentified declarant, (p. 339) for discussion of topic.

Failure to comply with discovery request

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See DISCOVERY Disclosure of defense witness information, (p. 251) for discussion of topic.

Juror bias

State v. Nett, 207 W.Va. 410, 533 S.E.2d 43 (2000)
No. 26963 (Per Curiam)

See JURY Bias, (p. 493) for discussion of topic.

Limitation on evidence of mistaken identity

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See DEFENSES Mistaken identity, (p. 243) for discussion of topic.

JUDGES

Standard for review (continued)

Prior involuntary termination of parental rights

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

Scientific evidence admissibility

State v. Lockhart, ___ W.Va. ___, 542 S.E.2d 443 (2000)
No. 27053 (Davis, J.)

See DEFENSES Insanity, Dissociative identity disorder, (p. 237) for discussion of topic.

Timely disclosure of evidence by state

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

JUDGES

Witnesses

Examination by court at trial

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

The appellant was convicted and sentenced for possession with intent to deliver a controlled substance. At trial the appellant asserted an identity defense, claiming that his twin brother was actually the person who was in the car at the time the drugs were found and the arrest occurred. The trial court *sua sponte* called the twin brother as a witness after the State had rested its case.

The appellant claimed that the trial court erred in calling the witness after the conclusion of the State's case.

Syl. pt. 4 - "A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case." Syllabus point 4, in part, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

While the calling of a witness by the trial court is not a usual occurrence, the Court found doing so in this case was within the trial court's discretion. The Court noted that the trial court did not step out of its impartial role in calling the witness because the testimony was taken outside the jury's presence. It further found that the holding in *State v. Loveless*, 140 W.Va. 875, 87 S.E. 2d 273 (1955) did not limit a trial court from calling a witness before either the State or the defense rested its case.

Affirmed.

JUDGMENTS

Final

Set aside improper

State ex rel. McClure v. Trent, 202 W.Va. 338, 504 S.E.2d 165 (1998)
No. 24202 (Per Curiam)

See *HABEAS CORPUS* New grounds for relief, (p. 396) for discussion of topic.

When final

State ex rel. McClure v. Trent, 202 W.Va. 338, 504 S.E.2d 165 (1998)
No. 24202 (Per Curiam)

See *HABEAS CORPUS* New grounds for relief, (p. 396) for discussion of topic.

JURY

Alternate participating in deliberations

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

See PLAIN ERROR Alternate juror participating in deliberations, (p. 581) for discussion of topic.

Bias

State v. Nett, 207 W.Va. 410, 533 S.E.2d 43 (2000)
No. 26963 (Per Curiam)

This is an appeal of a conviction and sentence for third offense driving under the influence of alcohol (DUI). While the appellant asserted numerous errors, the sole issue addressed in the opinion is whether the trial court's refusal to strike two jurors for cause constituted reversible error.

Syl. pt. 1 - "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." Syllabus point 4, *State v. Miller*, 197 W.Va. 588 , 476 S.E.2d 535 (1996).

Syl. pt. 2 - "This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred." Syllabus point 8, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

Syl. pt. 3 - "When a juror on his *voir dire* admits that he has formed and expressed an opinion of the guilt or innocence of the accused, and expresses any degree of doubt as to whether such previously formed opinion would affect his judgment in arriving at a just and proper verdict in the case, it is error to admit him on the panel." Syllabus point 4, *State v. Johnson*, 49 W.Va. 684, 39 S.E. 665 (1901).

JURY

Bias (continued)

State v. Nett, (continued)

The Court chose to reverse and remand the case for a new trial based on its review of the record of *voir dire* involving one of the two jurors named. The record showed that the juror did not know if he could fairly and impartially decide the case since he had two friends killed in DUI incidents.

Reversed and remanded.

Test for

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999)
No. 26438 (Per Curiam)

See JURY Peremptory strike, Use in lieu of cause, (p. 498) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

Appellant was convicted of kidnaping and aggravated robbery. Testimony was admitted that the appellant and others deliberately targeted a homosexual and the victim testified that he was a homosexual. The trial court struck two jurors who indicated a bias against homosexuals. Appellant contended that the jurors were struck because of their religion.

Syl. pt. 11 - “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. 4, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

JURY

Bias (continued)

Test for (continued)

State v. Salmons, (continued)

Syl. pt. 12 - A trial judge is entitled to rely upon his/her self-evaluation of allegedly biased jurors when determining actual juror bias. The trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instructions. Therefore, his/her assessment is entitled to great deference.

The Court noted that both jurors who were struck said their bias against homosexuals was a result of their religious beliefs. However, the trial court record showed the reason for striking was the jurors' bias toward homosexuals, not their religious beliefs. (See *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Affirmed.

State v. Williams, 206 W.Va. 300, 524 S.E.2d 655 (1999) No. 26352 (Per Curiam)

During *voir dire* in a sexual offense trial, a prospective juror asked the judge: "If it's all written down . . . to me he would be guilty if it's all written down here, or the police wouldn't have written it down." The judge explained about indictments and then asked: "[D]o you still perceive because he has been accused that he's probably guilty?," to which the juror replied "Well, I was thinking it was written down, it (sic) was ultimately guilty." In denying a defense motion to strike for cause, the court explained that when the indictment process was explained, "I think the gentleman took it to heart."

Additionally when a panel of prospective jurors was asked if they would be affected if evidence of similar but uncharged conduct was introduced, 10 said they would. The 10 were then asked if they would follow instructions to limit how the evidence of other non-charged acts could be used, 7 said they could not and they were dismissed. The court denied a defense motion to strike the remaining 3 jurors for cause.

JURY

Bias (continued)

Test for (continued)

State v. Williams, (continued)

Both issues were raised on appeal.

Syl. pt. 1 “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.” Syllabus Point 4, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

With regard to the single juror, the Court characterized the issue as being one “heavily influenced by demeanor or credibility” and deferred to the trial court’s determination that the juror understood what an indictment was. The Court used similar reasoning in finding no error in the lower court’s refusal to strike the 3 jurors, noting that the trial judge was in “the best position to judge the sincerity of a juror’s pledge to abide by the court’s instruction”

Affirmed.

Inquiry by jury

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

JURY

Peremptory strikes

Striking black juror

State ex rel. Rahman v. Canady, 205 W.Va. 84, 516 S.E.2d 488 (1999)
No. 25843 (Per Curiam)

In a former direct appeal of a conviction, the relator raised a *Batson* issue regarding the State's peremptory strike of a black juror. The Court held that the trial court erred in permitting the strike without first requiring the State to explain why it did not strike a similarly situated white juror and then determining whether the explanation was credible or a pretext for racial discrimination. The Court remanded for "a hearing on the *Batson* challenge" in which the trial court was to allow the State to explain the inconsistency in its challenges.

On remand, the State and relator filed legal memoranda on the *Batson* issue, and the trial court entered an order expressing its hope that the filing of these memoranda satisfied the directives of the court's remand order. A hearing was held at the relator's urging, but the trial judge said he would not make a determination in the case. The trial court thereafter merely affirmed its prior ruling. The relator brought a petition for mandamus to require a determination of the *Batson* issue.

Syl. pt. 1 - "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal 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).

Syl. pt. 2 - "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 if it unreasonably neglects or refuses to do so." Syllabus, *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

JURY

Peremptory strikes (continued)

Striking black juror (continued)

State ex rel. Rahman v. Canady, (continued)

The Court found that the trial court followed the first prong of the remand order by affording the State an opportunity to articulate its reasons for the apparently inconsistent peremptory strikes. However, the Court concluded that the second prong of determining whether such explanation was pretextual was not satisfied, and the trial court was ordered to make such ruling.

Writ issued.

Use in lieu of cause

State v. Christian, 206 W.Va. 579, 526 S.E.2d 810 (1999) No. 26438 (Per Curiam)

Appellant was charged with voluntary manslaughter. At trial, he moved to strike a potential juror for cause after she stated that she was the aunt of an eyewitness who one of the persons present at the shooting and that the prospective juror had heard about the case from the mother of the eyewitness. She also knew the woman who was in the car with the eyewitness and the defendant when the shooting took place. The trial court denied the motion after conducting individual *voir dire* of the juror and allowing counsel to question her as well. Appellant was convicted of voluntary manslaughter and sentenced to 12 years. When resentenced 3 years later as part of the process to transfer him to an adult facility, he appealed and raised the issue of the denial of the motion to strike for cause.

Syl. pt. 1 - “An appellate court only 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, in part, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

JURY

Peremptory strikes (continued)

Use in lieu of cause (continued)

State v. Christian, (continued)

Syl. pt. 2 - “The language of *W.Va. Code* § 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court’s error.” Syllabus point 8, *State v. Phillips*, 194 W.Va. 569, 588, 461 S.E.2d 75, 94 (1995).

Syl. pt. 3 - “When a prospective juror is closely related by consanguinity to a prosecuting witness or to a witness for the prosecution, who has taken an active part in the prosecution or is particularly interested in the result, he should be excluded upon the motion of the adverse party.” Syllabus point 2, *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E.2d 480 (1974).

The Court found that because a defendant has a statutory right to an unbiased jury *before* he uses his peremptory strikes, the denial of a motion to strike for cause is grounds for reversal even if the contested juror is struck by a peremptory strike. The Court explained the general rule, that a prospective juror related to a victim or prosecution witness who has taken an active role in the prosecution or who is particularly interested in the result should be excluded on motion, is not a *per se* rule requiring removal of any related juror. Such determination necessitated the review of the facts in each case. In the instant case, the Court found prejudice in that the prospective juror was an eyewitness’s aunt and it was possible that she would vote to convict the appellant in order to preclude later attempts to charge her nephew.

Reversed and remanded.

JURY

Prejudicing

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Reference to sexual history, (p. 635) for discussion of topic.

JUVENILE REFEREE

Statutory officer

Limitations

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514)
for discussion of topic.

JUVENILES

Arrest

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

Commitment to department of corrections custody

Findings precedent to

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

Thomas L. was 15 years old when he sold 2 marijuana cigarettes to some friends and then went driving with them. The car crashed and another juvenile was killed. Thomas was charged as a juvenile with delivery of a controlled substance. He entered into a plea agreement in which the State agreed not to oppose probation in return for his guilty plea.

Three separate dispositional hearings were held over 2 months. At the first hearing, the court learned that Thomas had substance abuse problems and that he had been hospitalized twice for alcohol poisoning, but that he had been receiving counseling and was making “good progress.” The court ordered the probation officer to investigate alternatives to placement in an industrial home. At the second hearing, continued progress in counseling was reported and discussions were had about placement in a group home. The court then ordered an investigation of a facility that “would provide both punishment and rehabilitation.” At the final hearing, the court learned that Thomas had tested positive for marijuana and that he had been suspended from school for inappropriate touching of a female student. The court ordered placement in an industrial home. On appeal, Thomas argued that the placement was influenced by the death of the car’s occupant and by the presence of the victim’s parents at the hearing; the court overlooked his progress in counseling; and the industrial home was not the least restrictive alternative.

JUVENILES

Commitment to department of corrections custody (continued)

Findings precedent to (continued)

In the Interest of Thomas L., (continued)

Syl. pt. 1 - “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 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.” Syllabus Point 4, *State ex rel. D. D. H. v. Dostert*, 165 W.Va. 448, 269 S.E.2d 401 (1980).

The Court found that the trial court, prior to placement in the industrial home, developed a record that demonstrated that all relevant facts and alternative dispositions had been examined. These included lengthy discussions of alternative placements and reports from a psychologist and appellant’s drug and alcohol counselor. With regard to the possibility of a group home placement, the court noted that “this would not really serve the ends of justice” because the appellant would essentially be in the same position as going to school, a concern that the Court found legitimate in light

JUVENILES

Commitment to department of corrections custody (continued)

Findings precedent to (continued)

In the Interest of Thomas L., (continued)

of the failed drug test. The Court also found no evidence that the parents of the crash victim influenced the lower court's decision, noting that they had made their feelings known previously and that they did not participate in the final hearing.

Affirmed.

State v. Craig D., 205 W.Va. 269, 517 S.E.2d 746 (1998)
No. 25195 (Per Curiam)

Appellant, a 17 year old, robbed a motel clerk by presenting what he later contended was a toy gun. He took \$219 and fled. Appellant was charged with "aggravated robbery." As part of a plea agreement he agreed to plead to "unaggravated robbery." The prosecution recommended supervision by the probation department pursuant to *W.Va. Code* § 49-5-13(b)(3).

Based on a review of the probation department's "social summary," the court placed the appellant in the custody of the Department of Corrections until he is 19 years of age. Appellant claimed the court did not make a necessary finding that no less restrictive alternative was available.

Syl. pt. 1 - "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 whether there are pre-determining factors such as acute poverty, parental abuse, learning disabilities, physical impairments, or any other dis

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Commitment to department of corrections custody (continued)

Findings precedent to (continued)

State v. Craig D., (continued)

crete, 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.” *State ex rel. D.D.H. v. Dostert*, 165 W.Va. 448, 269 S.E.2d 401 (1980).

The Court noted the circuit court explored the seriousness of the offense and the likelihood of rehabilitation.

Affirmed.

Record of reason required

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

State v. Craig D., 205 W.Va. 269, 517 S.E.2d 746 (1998)
No. 25195 (Per Curiam)

See JUVENILES Committed to Department of Corrections custody, Findings precedent to, (p. 504) for discussion of topic.

JUVENILES

Confidentiality of records

State ex rel. Garden State Newspapers, Inc., v. Hoke, 205 W.Va. 611, 520 S.E.2d 186 (1999) No. 26219 (Maynard, J.)

Two juveniles sued the school board and school officials (in their personal capacity) for damages and injunctive/declaratory relief in a case involving the board's disciplinary policy as well as the suspension of one of the juveniles. The circuit judge ordered the entire proceeding closed and all the records sealed. A local newspaper sought an original writ of prohibition to keep the proceedings open.

Syl. pt. 1 - "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

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).

JUVENILES

Confidentiality of records (continued)

State ex rel. Garden State Newspapers, Inc., v. Hoke, (continued)

Syl. pt. 3 - “Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair trial is accorded the defendant.” Syllabus Point 1, *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E.2d 544 (1980).

Syl. pt. 4 - The open courts provision of Article III, Section 17 of the Constitution of West Virginia guarantees a qualified constitutional right on the part of the public to attend civil court proceedings.

Syl. pt. 5 - “Unless a statute provides for confidentiality, court records *shall* be open to public inspection.” Syllabus Point 2, in part, *Richardson v. Town of Kimball*, 176 W.Va. 24, 340 S.E.2d 582 (1986).

Syl. pt. 6 - The qualified public right of access to civil court proceedings guaranteed by Article III, Section 17 of the Constitution of West Virginia is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or other compelling public policies. In performing this analysis, the trial court first must make a careful inquiry and afford all interested parties an opportunity to be heard. The trial court must also consider alternatives to closure. Where the trial court closes proceedings or seals records and documents, it must make specific findings of fact which are detailed enough to allow appellate review to determine whether the proceedings or records are required to be open to the public by virtue of the constitutional presumption of access.

Syl. pt. 7 - This state recognizes a compelling public policy of protecting the confidentiality of juvenile information in all court proceedings.

JUVENILES

Confidentiality of records (continued)

State ex rel. Garden State Newspapers, Inc., v. Hoke, (continued)

After declaring that the hearing was one that was “presumptively open” because it was not covered by any statute requiring it to be closed, such as domestic hearings or juvenile criminal hearings, the Court held that there was a “compelling public policy” in this case that permitted closure, i.e., the extensive use of the plaintiff’s education records and the various statutes that required that such records be kept confidential.

Writ denied.

Detention

Facility-specific placements

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

Findings required for

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

JUVENILES

Detention (continued)

Findings required for (continued)

State v. Craig D., 205 W.Va. 269, 517 S.E.2d 746 (1998)
No. 25195 (Per Curiam)

See JUVENILES Committed to Department of Corrections custody, Findings precedent to, (p. 504) for discussion of topic.

Length of placement in treatment center

State ex rel. Steven Michael M. v. Merrifield, 203 W.Va. 723, 510 S.E.2d 797 (1998) No. 25190 (Per Curiam)

Relator sought a writ of habeas corpus against DHHR and New Hope Treatment Center on the grounds he was illegally detained. He also sought a writ of prohibition against Judge Rodney Merrifield relating to prior juvenile proceedings.

Steven M.'s mother filed a juvenile petition charging him with truancy, false pretenses and possession of obscene materials. Pursuant to a plea agreement he was placed at New Hope, initially for a 60-day evaluation. At the end of the evaluation he was sent to a local center and then released to his mother and put on probation.

Subsequently, his mother filed another petition charging fraudulent use of a telephone. The prior order was modified and a one-year improvement period added. Steven M. was placed at New Hope to complete its program.

Relator claimed he was held unlawfully at New Hope for 19 months pursuant to the first charge when the period of confinement only should have been one year.

Syl. pt. 1 - "A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers." Syl. pt. 1, *State ex rel. UMWA Intern. Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985).

JUVENILES

Detention (continued)

Length of placement in treatment center (continued)

State ex rel. Steven Michael M. v. Merrifield, (continued)

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.” Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

The Court noted the actual period of confinement was 16 months, which period did not exceed the maximum time possible under the original charge and the improvement period.

The Court noted relator’s petition was vague as to what the circuit court was to be prohibited from doing.

Habeas Corpus dismissed as improvidently granted.

JUVENILES

Detention (continued)

Out-of-state placements

State ex rel. Daniel M. v. W.Va. DHHR, 205 W.Va. 16, 516 S.E.2d 30 (1999) No. 25796 (Maynard, J.)

After being adjudged delinquent, a dispositional hearing was held and the trial court ordered that the petitioner be placed in a specific locked in-patient psychiatric facility in Virginia and that the placement be funded by DHHR.

The court specifically found that this facility was the only one “available to accept a juvenile involved with explosives and/or arson.” DHHR objected to this placement and contended that a correctional setting was more appropriate. No appeal was filed from this dispositional order.

When the petitioner determined that DHHR was not paying for the court-ordered placement, he sought a writ of mandamus to compel compliance.

Syl. pt. 1 - “ ‘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).” Syllabus Point 6, *State ex rel. Ohl v. Egnor*, 201 W.Va. 777, 500 S.E.2d 890 (1997).

Syl. pt. 2 - Once a circuit court enters a final disposition order that fully complies with *W.Va. Code* § 49-5-13(b) (1997) and *State ex rel. Ohl v. Egnor*, 201 W.Va. 777, 500 S.E.2d 890 (1997), the West Virginia Department of Health and Human Resources cannot ignore or refuse to comply with the order. The Department of Health and Human Resources may seek relief by appealing the circuit court’s order to the West Virginia Supreme Court of Appeals.

JUVENILES

Detention (continued)

Out-of-state placements (continued)

State ex rel. Daniel M. v. W.Va. DHHR, (continued)

Despite DHHR's failure to file a direct appeal, the Court reviewed the lower court's placement order to determine if it met the statutory directives as well as the mandates of the Court in *State ex rel. Ohl v. Egnor*, 201 W.Va. 777, 500 S.E.2d 890 (1997).

The Court found that the dispositional order met the various requirements for making out-of-state placements, including a finding of fact that no in-state facility could provide the necessary services and/or security.

Only after finding that these directives were met did the Court hold that DHHR's duty to comply with the payment order was a "nondiscretionary legal duty."

The Court granted a writ of mandamus ordering DHHR to pay for the out-of-state placement.

Writ granted.

State ex rel. Jessica P. v. Wilkes, 202 W.Va. 323 , 504 S.E.2d 150 (1998) No. 24992 (Per Curiam)

See JUVENILES Placement, Findings required, (p. 518) for discussion of topic.

JUVENILES

Disposition

Acceptance of plea

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

Duty to make record

State v. Craig D., 205 W.Va. 269, 517 S.E.2d 746 (1998)
No. 25195 (Per Curiam)

See JUVENILES Committed to Department of Corrections custody, Findings precedent to, (p. 504) for discussion of topic.

Record of reason required

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

Disqualification of counsel

Discretion of court

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000)
No. 26851 (Davis, J.)

See ATTORNEYS Conflict of interest, Prior representation of opposing party witness in related matter, (p. 161) for discussion of topic.

JUVENILES

Improvement period

Juvenile referee limitations

In re Greg H., ___ W.Va. ___, 542 S.E.2d 991 (2000)
No. 27769 (Per Curiam)

The juvenile appellant was the subject of a delinquency petition. At the preliminary hearing before a magistrate sitting as a juvenile referee, the appellant sought a 1-year improvement period which the referee granted. The State sought a writ of prohibition in the circuit court based on the claim that a juvenile referee is not vested with authority under *W.Va. Code* § 49-5-9 (b) to grant improvement periods. The writ was granted and this appeal resulted.

The appellant contended that the term “court” in *W.Va. Code* § 49-5-9 (b) should be interpreted to include juvenile referees because they are permitted under *W.Va. Code* § 49-5-9 to conduct preliminary hearings and the Court’s discussion in *E.B., Jr. v. Canterbury*, 183 W.Va. 197, 394 S.E.2d 892 (1990) said that a juvenile is entitled to move for an improvement period at the preliminary hearing in a juvenile proceeding.

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.” Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 2 - “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).

JUVENILES

Improvement period (continued)

Juvenile referee limitations (continued)

In re Greg H., (continued)

The Court observed that as statutorily created positions, the authority of juvenile referees is limited to that conferred by statute. The Court noted that the relevant definition of the term “court” contained in *W.Va. Code* § 49-1-4 (3) specifically states that reference to court means the circuit court unless specifically denoted otherwise. The Court then distinguished another portion of the statute where the generic use of the term court necessarily had to include a juvenile referee but found that in the context before it the term court was limited to the circuit court. As a result, the Court held that a juvenile referee does not have statutory authority to grant improvement periods, nullifying any inference to the contrary in *E.B., Jr. v. Canterbury*.

Affirmed.

Incarceration

Findings precedent to

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

See JUVENILES Plea agreement, Pretransfer hearing waiver, (p. 521) for discussion of topic.

JUVENILES

Medical and school records

Access

West Virginia DHHR v. Clark, ___ W.Va. ___, 543 S.E.2d 659 (2000)
No. 27915 (Per Curiam)

As the result of an investigation concerning abuse and neglect allegations of specific students at the respondent school, DHHR petitioned the circuit court to obtain the medical and school records of all students at the school and to require the school to produce all students and staff for interviews with DHHR investigators. The lower court ordered the school to produce the records for an *in camera* inspection by the court. The court further ruled *W.Va. Code* § 49-1-1 *et seq.* did not authorize the relief sought by DHHR and stated that to require the requested information be provided would result in a violation of constitutional rights involving self-incrimination since the information may result in criminal prosecution. The appeal filed by DHHR contended that it was entitled to the information pursuant to *W.Va. Code* § 49-6A-9 as part of its investigation of abuse and neglect allegations.

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 - “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. 178, 469 S.E.2d 114 (1996).

Syl. pt. 3 - “This state recognizes a compelling public policy of protecting the confidentiality of juvenile information in all court proceedings.” Syllabus Point 7, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W.Va. 611, 520 S.E.2d 186 (1999).

JUVENILES

Medical and school records (continued)

Access (continued)

DHHR v. Clark, (continued)

The Court treated the request for records differently than the request to conduct interviews. In dealing with the records, the Court concluded that DHHR has a statutory duty to investigate the abuse and neglect allegations involving specific students and was entitled to review school and medical records of these students. However, absent probable cause, DHHR has no right to a wholesale review of records. The Court did not find the same limitation on the DHHR's right to interview the children, but concluded that DHHR had adequately met its duty to investigate and no further interviews needed to be conducted.

In footnote 5, the Court noted that *W.Va. Code* § 49-6-4 sufficiently protects the appellee's constitutional rights and declined to uphold the circuit court's ruling with regard to self-incrimination.

Affirmed.

Placement

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

Facility-specific placement

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

JUVENILES

Placement (continued)

Findings required

In the Interest of Thomas L., 204 W.Va. 501, 513 S.E.2d 908 (1998)
No. 25353 (Per Curiam)

See JUVENILES Commitment to Department of Corrections, Findings precedent to, (p. 502) for discussion of topic.

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

See JUVENILES Plea to allegations in petition, Colloquy required before admission accepted, (p. 523) for discussion of topic.

State ex rel. Jessica P. v. Wilkes, 202 W.Va. 323, 504 S.E.2d 150 (1998)
No. 24992 (Per Curiam)

Juvenile pleaded no contest to misdemeanor domestic battery and assault. At the dispositional hearing, the State recommended that she be placed in an out-of-state facility on the ground that she had left the children's home shelter where she was being detained. Her counsel recommended placement in an in-state center, and the parents and DHHR concurred in this recommendation. Her probation officer recommended placement in one of two other in-state centers. The court ordered her placed in the out-of-state center, and she sought a writ of prohibition contesting the placement.

Syl. pt. 1 - "Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

JUVENILES

Placement (continued)

Findings required (continued)

State ex rel. Jessica P. v. Wilkes, (continued)

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 - “While *W.Va. Code* § 49-5-13(b) (1995) (Repl. Vol. 1996) expressly grants authority to the circuit court 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.” Syllabus Point 4, *State ex. rel. Ohl v. Egnor*, 201 W.Va. 777, 500 S.E.2d 890 (1997).

Syl. pt. 4- “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).

JUVENILES

Placement (continued)

Findings required (continued)

State ex rel. Jessica P. v. Wilkes, (continued)

The Court found that although a trial court has discretion to make facility-specific decisions, an out-of-state center can only be ordered after a full evidentiary hearing is held and written findings made regarding the necessity for such placement (citing Syl. pt. 6, *State ex rel. W.Va. DHHR v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996) and *E.H. v. Matin*, 201 W.Va. 462, 498 S.E.2d 35 (1997)). Here, although a hearing was held, no such findings were made.

Writ granted.

Length of placement in treatment center

State ex rel. Steven Michael M. v. Merrifield, 203 W.Va. 723, 510 S.E.2d 797 (1998) No. 25190 (Per Curiam)

See JUVENILES Detention, Length of placement in treatment center, (p. 509) for discussion of topic.

Out-of-state facilities

State ex rel. Daniel M. v. W.Va. DHHR, 205 W.Va. 16, 516 S.E.2d 30 (1999) No. 25796 (Maynard, J.)

See JUVENILES Detention, Out-of-state placements, (p. 511) for discussion of topic.

State ex rel. Jessica P. v. Wilkes, 202 W.Va. 323, 504 S.E.2d 150 (1998) No. 24992 (Per Curiam)

See JUVENILES Placement, Findings required, (p. 518) for discussion of topic.

JUVENILES

Plea agreement

Pretransfer hearing waiver

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

The appellant was a juvenile at the time he was charged with aggravated robbery. The trial court had granted the State's motion to transfer the case to adult jurisdiction. The appellant waived indictment and agreed to plead guilty to the aggravated robbery charge if the State would recommend that he be sentenced for 6 months to 2 years at the Anthony Center followed by 5 years probation. As part of the plea agreement, the State would recommend that the defendant be sentenced for up to 20 years in the penitentiary in the event the juvenile failed to successfully complete the program at the Anthony Center or comply with the conditions of probation. The binding plea agreement was not reduced to writing but reference to the imposition of the 20 year sentence for failing to succeed in the Anthony Center program was incorporated in the court's order of conviction (which was not signed by counsel for either party). However, the court's conditional sentencing order which was initialed by counsel for both parties did not include reference to the 20 year sentence but instead said that once the program at the Anthony Center was completed then the defendant would be returned to the court for sentencing.

The juvenile got into fights while at the Anthony Center and based on the contents of letters from the warden at the Center the lower court found that the juvenile had failed the Anthony Center program and then sentenced him to 20 years in the penitentiary without holding an evidentiary hearing.

The issues on appeal included whether the court was required to hold an evidentiary hearing to determine if the juvenile was indeed unfit to continue with the Anthony Center program, and whether the juvenile had waived his right to the statutorily prescribed hearing to reconsider and modify the imposed sentence by entering the plea agreement.

JUVENILES

Plea agreement (continued)

Pretransfer hearing waiver (continued)

State v. Hayhurst, (continued)

Syl. pt. 1 - “A youthful male offender, sentenced to confinement in a special center pursuant to *W.Va. Code*, 25-4-6, is entitled to an evidentiary hearing when he is returned, as unfit, to the sentencing court and faces resentencing to the penitentiary; and he is entitled to counsel to assist him in the hearing before the sentencing court.” Syl. Pt. 2, *Watson v. Whyte*, 162 W.Va. 26, 245 S.E.2d 916 (1978).

Syl. pt. 2 - “The test for determining whether a departure from *State v. Highland*, 174 W.Va. 525, 327 S.E.2d 703 (1985), and *W.Va. Code*, 49-5-16(b) (1982), is permitted is two-fold: (1) Was the particular circumstance (the basis for the proposed departure) adequately taken into consideration at the time the plea agreement was accepted by the circuit court; and (2) If it was, were the plea and the plea agreement a knowing and intelligent waiver of the rights provided by *Highland* and *W.Va. Code*, 49-5-16(b). Thus, the most important inquiry is whether there is evidence of a knowing and intelligent waiver.” Syl. Pt. 1, *State v. Harris*, 195 W.Va. 43, 464 S.E.2d 363 (1995).

Syl. pt. 3 - “Except in specific, well-defined circumstances, a pretransfer hearing pursuant to *W.Va. Code*, 49-5-16(b) (1982), is not necessary when all the significant information is already in the breast of the circuit court and there is no significant dispute between the parties as to the accuracy and relevancy of the information.” Syl. Pt. 2, *State v. Harris*, 195 W.Va. 43, 464 S.E.2d 363 (1995).

JUVENILES

Plea agreement (continued)

Pretransfer hearing waiver (continued)

State v. Hayhurst, (continued)

In keeping with its prior decisions, the Court found that the trial court erred in not conducting an evidentiary hearing with due process protections regarding whether transfer to an adult facility was proper. Further, if it is found that the transfer is necessary, then the court needs to hear evidence on the juvenile's progress toward rehabilitation in order to determine the appropriate sentence to impose. The Court recognized that the right to a hearing on reconsideration and modification of sentence could be waived but noted that in this case the oral plea agreement and subsequent orders and records in the proceedings did not consistently reflect a recommended or agreed upon sentence and therefore precluded an effective waiver.

Reversed and remanded with directions.

Plea to allegations in petition

Colloquy required before admission accepted

In the Matter of Harry W., 204 W.Va. 583, 514 S.E.2d 814 (1999)
No. 25349 (Per Curiam)

A petition charging the appellant as being a juvenile with a violent disposition alleged that he had threatened his mother and that it was not safe for him to remain in his mother's home. An improvement period was ordered, but a petition to revoke was filed a few months later after the appellant had allegedly threatened his teachers and his own life. After the revocation petition was filed, he allegedly injured his brother. He was temporarily sent to a juvenile facility where a psychologist evaluated him and concluded that the appellant should be placed in a residential facility.

JUVENILES

Plea to allegations in petition (continued)

Colloquy required before admission accepted (continued)

In the Matter of Harry W., (continued)

At a hearing on the petition, the lower court asked the appellant's counsel if his client admitted or denied the allegations in the petition. Counsel told the court that his client wished to admit the allegations that he had threatened his mother and father and that he understood his defenses and that he had a right to a jury or bench trial. The court accepted the admission and took evidence on the appropriate disposition. The court ordered that the appellant be committed to Elkins Mountain School or some similar facility. On appeal, the appellant contended that the trial court did not follow proper procedures in accepting the plea and, further, that the court's placement order was an abuse of discretion.

Syl. pt. 1 - "A juvenile may not knowingly and intelligently admit or deny allegations against him unless the judge informs him of the nature of the charges, lesser included offenses, possible defenses, his constitutional and statutory rights, each constitutional right which is waived by the plea, and the maximum penalty to which he may be subjected." Syllabus Point 2, *State ex rel. J. M. v. Taylor*, 166 W.Va. 511, 276 S.E.2d 199 (1981).

Syl. pt. 2 - "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 v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

The Court held that *W.Va. Code* § 49-5-11, which provides that a juvenile's admission of allegations in a petition may be accepted if the court finds the juvenile understood his rights and voluntarily and intelligently admitted the facts, may only be satisfied by the court expressly apprising the juvenile of the charges and the consequences of admitting the facts. The failure to conduct such a colloquy renders the admissions invalid as previously noted in *State ex rel. J.M. v. Taylor*. Although this rule is presented as inflexible, the Court noted that the particular facts of this case, i.e., the juvenile was apparently wavering as to whether to admit the allegations, made it "particularly incumbent" to conduct the appropriate colloquy.

JUVENILES

Plea to allegations in petition (continued)

Colloquy required before admission accepted (continued)

In the Matter of Harry W., (continued)

The placement order was reversed and the case remanded to permit the trial court to conduct a new adjudicatory hearing at which the judge was to conduct the colloquy prescribed by *Taylor*.

The Court also addressed the argument that the trial court had abused its discretion in placing the juvenile in the Elkins Mountain School or some similar facility and it ruled that, assuming the proper colloquy was conducted on remand, such a “facility specific” ruling was authorized by statute if it was supported by the evidence.

Reversed and remanded with directions.

Pretransfer hearing waiver

State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000)
No. 26564 (Per Curiam)

See JUVENILES Plea agreement, Pretransfer hearing waiver, (p. 521) for discussion of topic.

Probation revocation

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

JUVENILES

Records

Use for rebuttal or impeachment

State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)
No. 26195 (Starcher, C.J.)

On the State's motion, a felony-murder trial was bifurcated into a guilt phase and a punishment (mercy/no mercy) phase. The trial court also granted the State's motion to unseal the defendant's juvenile records. Appellant was convicted and the jury recommended no mercy on one of the counts. Appellant appealed both the bifurcation issue as well as the juvenile records decision.

Syl. pt. 1 - "*W.Va. Code*, 49-5-17(d) [1978], does not authorize a court to permit juvenile law enforcement records to be used in a criminal case as evidence in chief in the State's case." Syllabus Point 1, *State v. Van Isler*, 168 W.Va. 185, 188, 283 S.E.2d 836, 838 (1981).

Syl. pt. 2 - *W.Va. Code*, 49-5-17 [1997] does not prohibit the use of juvenile law enforcement records against a defendant in a criminal case as rebuttal or impeachment evidence.

Although the Court accepted only the records ruling for appeal, it added a long discussion of the bifurcation issue in footnote 1. The Court noted that as a trial management technique, the decision to bifurcate did not change the respective burdens of proof and other evidentiary rules applicable to a unitary trial. It noted further that a defendant "would ordinarily proceed first at the mercy phase" of such a trial.

At the mercy phase, the appellant's mother testified that he was "a good kid". On cross-examination, the State questioned her about the fact that she had filed a delinquency petition against him, though the petition itself was not introduced into evidence.

JUVENILES

Records (continued)

Use for rebuttal or impeachment (continued)

State v. Rygh, (continued)

On appeal, the Court began its discussion by quoting the statute that prohibits the release of juvenile records and citing *State v. Van Isler*, which prohibited the use of such records in the State's case-in-chief and then held that the "logical corollary" was that the statute does not prohibit the use of such records in rebuttal or for impeachment. In the instant case, the record was used to rebut the mother's testimony that her son was a good kid and was therefore permissible.

Affirmed.

Restitution

Basis for granting

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999)
No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

State v. Kristopher G., 201 W.Va. 703, 500 S.E.2d 519 (1997)
No. 24025 (Per Curiam)

Eleven and 9 year old brothers were adjudged delinquent for burglary and destruction of a mobile home and its contents. Evidence was adduced of repair costs of repairable items and replacement of those that could not be repaired. In addition to placing the juveniles on probation (one year of supervised probation for each and terms of unsupervised probation that would last until each reached the age of 17 or 18), the court ordered that the two (plus another who was not a party to this appeal) were jointly and severally liable for \$7,947.00 in damages to the home and the juveniles' mother was held liable as well for the entire amount. The mother was unemployed and had a monthly income of \$714.00.

JUVENILES

Restitution (continued)

Basis for granting (continued)

State v. Kristopher G., (continued)

The appellant challenged the amount of restitution as excessive. They further claimed that the parental liability statute established the maximum amount for which their mother could be liable.

Syl. pt. 1 - “A trial judge may order restitution as part of a ‘program of treatment or therapy’ designed to aid in the rehabilitation of the child in a juvenile case when probation is granted under *W.Va. Code*, 49-5-13 [1978]. Such order, *however*, must be reasonable in its terms and within the child’s ability to perform.” The Syllabus of, *State v. M.D.J.*, 169 W.Va. 568, 289 S.E.2d 191 (1982).

Syl. pt. 2 - “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.” Syllabus Point 5, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).

The Court first explained that restitution may be ordered as part of a program of treatment or rehabilitation. While no such program was ordered here, the Court accepted that the lower court ordered the restitution for “therapeutic and rehabilitative purposes” and, therefore, the restitution met the “treatment/ program” test. However, the order was found deficient on two other grounds: (1) there was no indication that the children had a ‘reasonable chance’ of paying the amount; and (2) the amount was partially based on replacement costs, although the analogous adult restitution statute, *W.Va. Code* §61-11A-4(b)(1), speaks of valuation of damaged items in terms of fair market value. The Court then remanded for evaluation of an amount based on fair market value and one that the juveniles could realistically pay within the probation periods imposed.

JUVENILES

Restitution (continued)

Basis for granting (continued)

State v. Kristopher G., (continued)

NOTE: In footnote 4, the Court criticized the “extraordinarily long” probation periods imposed and directed the lower court to reconsider the periods to insure that they were not being set merely to enforce the restitution award. The Court also refused to reach the issue of the mother’s liability in an amount greater than the parental liability statute; the mother was not a party to the appeal.

Reversed and remanded.

Source of payment

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999)
No. 26117 (Stone, J.)

Juvenile who punched a fellow student was adjudged a delinquent after a trial for battery. The victim sustained medical bills of \$471.25. The court, after learning that the juvenile received monthly SSI benefits of \$500.00, ordered that he make restitution. The final order did not mention SSI.

Syl. pt. 1 - “Where the issue on appeal from the circuit court is clearly a question of law or involving the 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. 1, *University of W.Va. Board of Trustees on Behalf of W.Va. Univ. v. Fox*, 197 W.Va. 91, 475 S.E.2d 91 (1996).

Syl. pt. 2 - “The Social Security Act, specifically 42 U.S.C. § 407(a), prohibits any transfer or assignment at law or in equity of future social security payments; accordingly, contributions to individual social security accounts cannot be included as part of marital property subject to equitable distribution at the time of divorce.” Syl. Pt. 4, *Loudermilk v. Loudermilk*, 183 W.Va. 616, 397 S.E.2d 905 (1990).

JUVENILES

Restitution (continued)

Source of payment (continued)

In re Michael S., (continued)

Syl. pt. 3 - Pursuant to Title 42, §§ 1383(d)(1) (1994) and 407(a) (1994) of the United States Code, a circuit court may not order a juvenile criminal defendant to pay restitution from his future supplemental security income benefits because such benefits are not subject to execution, levy, attachment, garnishment or other legal process.

Syl. pt. 4 - “A trial judge may order restitution as part of a ‘program of therapy’ designed to aid in the rehabilitation of the child in a juvenile case when probation is granted under *W.Va. Code*, 49-5-13 [1978]. Such order, however, must be reasonable in its terms and within the child’s ability to perform.” Syllabus, *State v. M.D.J.*, 169 W.Va. 568, 289 S.E.2d 191 (1982).

The Court noted its previous finding that federal law protects SSI benefits from legal process, and, therefore, found the trial court erred in ordering restitution be paid from such benefits.

In addition, the Court held that the trial court failed to follow the guidelines for juvenile restitution cases set forth in *State v. M.D.J.* This procedure requires findings that (1) the restitution is part of a treatment or therapy program, and (2) the amount is within the juvenile’s ability to pay. Inasmuch as the appellant was a 15 year old with an IQ of 55, restitution was unreasonable.

Reversed.

Self-incrimination

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

JUVENILES

Transfer to adult jurisdiction

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

Transportation to hearings

West Virginia Department of Military Affairs v. Berger, 203 W.Va. 468,
508 S.E.2d 628 (1998) No. 25140 (Davis, C.J.)

The Division of Juvenile Services filed a writ of prohibition to stop a circuit judge from entering further orders directing the Division to transport juveniles from detention centers to court for hearings.

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).

JUVENILES

Transportation to hearings (continued)

West Virginia Department of Military Affairs v. Berger, (continued)

Syl. pt. 3 - “ “ “ “The primary object in construing a statute is to ascertain and give effect to the intent of the legislature.” Syl. Pt. 1, *Smith v. State Workmen’s Compensation Comm.*, 159 W.Va. 108, 219 S.E.2d 361 (1975).’ Syl. Pt. 2, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).” Syllabus point 2, *Lee v. West Virginia Teachers Retirement Board*, 186 W.Va. 441, 413 S.E.2d 96 (1991).’ Syl. pt. 2, *Francis O. Day Co., Inc. v. Director, Division of Environmental Protection*, 191 W.Va. 134, 443 S.E.2d 602 (1994).” Syllabus point 4, *Hosaflook v. Consolidation Coal Co.*, 201 W.Va. 325, 497 S.E.2d 174 (1997).

Syl. pt. 4 - The Division of Juvenile Services of the West Virginia Department of Military Affairs and Public Safety must provide for the transportation, to and from court appearances, of juveniles who are being detained, prior to adjudication of delinquency, at one of the detention centers it operates and maintains. *W.Va. Code* § 49-5A-6a(b) (1997) (Supp. 1998).

The Court rejected the Division’s argument that until adjudication as delinquents, juveniles are in the custody of the court making the sheriff responsible for transportation. Construing the juvenile statutes, the Court concluded that, while not expressly set out, the legislative intent to place this responsibility with the Division is “clear.” *First*, the Court pointed to the Division’s overall statutory responsibility (§ 49-5E-1) for the safe custody of detained children “throughout the entire juvenile justice process.” *Second*, the Division has the duty to develop a comprehensive plan of a statewide predispositional detention system for juveniles, including plans for transportation. *Third*, analogizing regional jails to a juvenile system, the Court noted that regional jails must transport its inmates, therefore the Division as the parallel authority for juveniles should do the same for juveniles housed in juvenile detention centers.

Writ denied.

KIDNAPING

Sentencing

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

After breaking into the home of a woman in Charleston and obtaining her gun, the appellant ordered the victim to call the victim's daughter to come over with her car. When the daughter and her husband arrived, the appellant ordered the husband to drive him to Clarksburg. He informed everyone that he would not hurt the husband and in fact allowed him to call his wife 3 times during the trip to Clarksburg. While on the trip, he kept talking about killing policemen and fired his gun out the window once. He was finally stopped at a roadblock and captured after the husband knocked the gun out of his hands to keep him from shooting at the policeman.

Appellant pleaded guilty to kidnaping and aggravated robbery. The State agreed to stand silent on the kidnaping sentence and recommended an 84 year sentence on the robbery conviction. He was sentenced to life without mercy on the kidnaping count and to a concurrent sentence of 84 years on the robbery. He appealed claiming 1) that he could not receive life without mercy because the victim was "returned without bodily harm," and 2) the sentences imposed violated the proportionality clause of the state constitution.

Syl. pt. 1 - In order for a defendant to be sentenced for a kidnaping conviction to a term of years not less than twenty or a term or years not less than ten as provided in *W. Va. Code* § 61-2-14a (1965), the circuit court must make a finding that the victim was "returned or permitted to be returned" in addition to making findings as to whether the defendant inflicted bodily harm on the victim and whether ransom, money, or any other concession was made.

Syl. pt. 2 - A kidnaping victim who is rescued by the police has not been "returned or permitted to be returned" as set forth in *W. Va. Code* § 61-2-14a (1965).

KIDNAPING

Sentencing (continued)

State v. King, (continued)

Syl. pt. 3 - “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 - “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).

The Court found that *W.Va. Code* §61-2-14a (1965) provides that in all kidnaping cases “where the [victim] is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him, . . .” the maximum term is 10 years. In *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994), the Court held that the issue of whether the victim was “harmed”, was a sentencing factor rather than an element of the crime and, therefore, is an issue properly decided by the court rather than the jury. *Farmer*, however, did not involve the issue of a victim “returned without harm.” The Court held that this is also a sentencing factor to be decided by the court. As a matter of statutory construction, the victim in the instant case was not “returned or permitted to return” by the appellant because he was only rescued after he was forcibly disarmed and captured.

The Court also rejected the proportionality argument. Under the subjective component of the test used to gauge proportionality, the Court looked to all the circumstances of the crimes, from the initial break-in of the home of an 82-year-old woman through the final capture at the roadblock, as well as the appellant’s criminal history (previous convictions for daytime burglary and breaking and entering), and held that the sentence did not “shock the conscience of the court and society.” Under the objective prong of the test,

KIDNAPING

Sentencing (continued)

State v. King, (continued)

the Court looked at the nature of the offense, the legislative intent behind the punishment, and examined how other jurisdictions treat similar offenses. Here, several persons' lives were threatened which supported the harsh treatment.

Affirmed.

LESSER-INCLUDED OFFENSE

Murder

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See INSTRUCTIONS Lesser-included offense, (p. 458) for discussion of topic.

Statute of limitation for misdemeanor offenses

State v. Boyd, ___ W.Va. ___, 543 S.E.2d 647 (2000)
No. 27661 (Maynard, C.J.)

See STATUTE OF LIMITATION Misdemeanor offenses, May be waived, (p. 730) for discussion of topic.

Two-part test

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

See INSTRUCTIONS Standard for review, (p. 461) for discussion of topic.

MAGISTRATE COURT

Administrative rules

Rule 1

Rogers v. Albert, et al., ___ W.Va. ___, 541 S.E.2d 563 (2000)
No. 27680 (Per Curiam)

See MAGISTRATES Availability, Prompt presentment, (p. 540) for discussion of topic.

Assessment of court costs

State ex rel. Canterbury v. Paul, 205 W.Va. 665, 520 S.E.2d 662 (1999)
No. 25890 (Maynard, J.)

See COURT COSTS Magistrate court, Assessed upon guilty plea, (p. 228) for discussion of topic.

Criminal complaint

Effect of motion to transfer

State v. Leonard, ___ W.Va. ___, 543 S.E.2d 655 (2000)
No. 27909 (Per Curiam)

See STATUTE OF LIMITATION Misdemeanor offenses, Calculation, (p. 729) for discussion of topic.

Joinder of multiple offenses

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

MAGISTRATE COURT

Right to trial in

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See MAGISTRATE COURT When criminal proceeding initiated, (p. 538)
for discussion of topic.

Rules of criminal procedure

Relationship between circuit court and magistrate court rules

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in
magistrate court, (p. 471) for discussion of topic.

When criminal proceeding initiated

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

The appellant was convicted by jury trial of third offense DUI, driving while his license was revoked for DUI and no proof of insurance. At the time the police officer arrested the defendant he also issued a citation for driving on a revoked license and no proof of insurance. These charges were included in the indictment with the felony DUI charge and the prosecution dismissed the citation charging the misdemeanor offenses pending in magistrate court.

The appellant contended the trial court erred by denying him the right to have a trial in magistrate court when the charges are initially brought in that court.

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.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

MAGISTRATE COURT

When criminal proceeding initiated (continued)

State v. Bruffey, (continued)

Syl. pt. 6 - A defendant's right to trial in magistrate court under West Virginia Code § 50-5-7 (1994) attaches when a criminal proceeding has been initiated in that forum. In situations where a plea of not guilty is entered in answer to a traffic or other citation, a criminal proceeding is initiated under the Rules of Criminal Procedure for the Magistrate Courts of West Virginia, not with the filing of the citation, but when a written and verified complaint has been filed and a finding of probable cause has been made by the magistrate.

Under the Rules of Criminal Procedure for the Magistrate Courts of West Virginia (Rules 3, 4 and 7), the Court found that a criminal proceeding is initiated in magistrate court not with the filing of a citation but when a written and verified complaint is filed and a finding of probable cause has been made on the contents of the complaint by a magistrate. Therefore, the Court concluded that there was no trial court error since a right to trial in magistrate court does not attach until a criminal proceeding is initiated by complaint filed in that tribunal.

No error. (Reversed and remanded on other grounds.)

MAGISTRATES

Availability

Prompt presentment

Rogers v. Albert, et al., ___ W.Va. ___, 541 S.E.2d 563 (2000)
No. 27680 (Per Curiam)

This case presented the certified question of whether Rule 1(b) of the Administrative Rules for Magistrate Courts is constitutional. The plaintiff in the underlying case had brought a civil action to obtain declaratory and injunctive relief based on his claim that he had been deprived of his constitutional right to a prompt initial appearance before a magistrate following a warrantless arrest. He argued that Rule 1 (b), which governs availability of magistrates beyond normal office hours, is unconstitutional because a person arrested without a warrant is not taken before a magistrate immediately.

Syl. pt. 1 - “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

Syl. pt. 2 - “It is the law of West Virginia that no person may be imprisoned or incarcerated prior to presentment before a judicial officer and the issuance of a proper commitment order.” Syl. pt. 2, on rehearing, *State ex rel. Harper v. Zegeer*, 170 W.Va. 743, 296 S.E.2d 873 (1982).

The plaintiff first argued that *Harper v. Zegeer* established that a person may not be imprisoned before being presented to a judicial officer. The Court disagreed with this reading and said that the cited language from *Harper* was simply a restatement of the common-law rule that a person cannot be arrested and held in custody for an unreasonable period of time without being presented before a neutral judicial officer. The Court noted that both *W.Va. Code* § 62-1-5 and Rule 5 (a) of the Rules of Criminal Procedure which were cited as authority in *Harper* speak in terms of “unnecessary delay” with regard to presentment before a judicial officer.

MAGISTRATES

Availability (continued)

Prompt presentment (continued)

Rogers v. Albert, et al., (continued)

The Court also refused the invitation to impose a stricter time requirement for presentment before a judicial officer under the state constitution than the parameters which were established under the federal constitution in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The majority in *McLaughlin* set a 48-hour period and Justice Scalia advocated in his dissent for a 24-hour period within which a person needs to be brought before a magistrate. The Court found that the time limits within which a person arrested without a warrant is to be brought before a magistrate does not exceed 24-hours under Rule 1(b) and on that basis concluded that the rule is constitutional under Article III, § 6 of the *West Virginia Constitution*.

Certified question answered.

Discipline

Admonishment

In re Tennant, 205 W.Va. 92, 516 S.E.2d 496 (1999)
No. 23906 (Workman, J.)

See MAGISTRATES Discipline, Solicitation of votes, (p. 545) for discussion of topic.

Consent agreement

In the Matter of Binkoski, 204 W.Va. 664, 515 S.E.2d 828 (1999)
No.'s 25042 & 25176 (Per Curiam)

Sitting magistrate pleaded guilty to first offense DUI and possession of less than 15 grams of marijuana. He was suspended from his duties, and the Judicial Hearing Board filed a complaint alleging violations of Canons 1 and 2A of the Code of Judicial Conduct which require the maintenance of high

MAGISTRATES

Discipline (continued)

Consent agreement (continued)

In the Matter of Binkoski, (continued)

standards of conduct and compliance with the law. A second complaint was filed a few months later charging that the magistrate had attempted to persuade a witness to the events which led to his convictions to be “less than totally truthful and candid...”. In September 1998, he proposed an agreement that was accepted by the Board and which provided for a one-year suspension without pay, random drug tests and weekly treatment sessions until the end of his term with the failure of one drug test resulting in resignation of his position. He resigned in January 1999, prior to the submission of the recommendations of the Board to the Court.

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 - “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 deemed the provisions of the proposed agreement moot in light of the resignation, and imposed censure, the strongest “and only remaining reasonable sanction” available in light of the intervening resignation.

Public censure ordered.

MAGISTRATES

Discipline (continued)

On-call requirements and responsibilities

In re McCormick, 206 W.Va. 69, 521 S.E.2d 792 (1999)
No. 23971 (Per Curiam)

Magistrate was charged by the Judicial Investigation Commission with 3 violations of the on-call requirement found in Rule 1 of the Administrative Rules for the Magistrate Court of West Virginia. In one incident, there was a factual dispute about whether the magistrate had advised (incorrectly) a state trooper to release a person whom the police suspected of violating a domestic violence order. The Board credited the magistrate's version of events and recommended no action because the person was not arrested and the on-call requirement never came into play. Another incident involved a failure to conduct a timely initial appearance, but the Board again found no violation because the magistrate had checked to see if she was needed.

In one incident, however, a person involved in a domestic squabble telephoned the magistrate about obtaining a protective order. The magistrate testified that she told the victim that the incident would not support the issuance of an order and that what was needed was to start divorce proceedings. The Board credited the magistrate's version of events and found no violation because the allegations (based on what the magistrate stated was told her) would in fact not have supported the issuance of a protective order.

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. 1, *In re Browning*, 192 W.Va. 231, 452 S.E.2d 34 (1994).

Syl. pt. 2 - “Domestic violence cases are among those that our courts must give priority status. In *W.Va. Code*, 48-2A-1, *et seq.*, the West Virginia Legislature took steps to ensure that these cases are handled both effectively and efficiently by law enforcement agencies and the judicial system.” Syl. Pt. 6, *In re Browning*, 192 W.Va. 231, 452 S.E.2d 34 (1994).

MAGISTRATES

Discipline (continued)

On-call requirements and responsibilities(continued)

In re McCormick, (continued)

The Court upheld the Board in the first two incidents, noting that the police should not seek (and the magistrate should not offer) legal advice but instead should go to the prosecutor for such advice. The Court also noted that the regional jail authority should make appropriate transportation arrangements for prisoners and the magistrate is not obliged to make such arrangements.

In the third incident, the court disagreed with the Board and found a violation because the magistrate should have gone to the courthouse and taken testimony immediately upon learning that the person telephoning wanted to file a domestic violence petition. Such requests should not be screened over the phone. The Court also noted that improper *ex parte* communications may have occurred over the telephone while the magistrate was screening the request. A public reprimand was issued.

Dismissed, in part, and public reprimand.

Public censure

In the Matter of Binkoski, 204 W.Va. 664, 515 S.E.2d 828 (1999)
No.'s 25042 & 25176 (Per Curiam)

See MAGISTRATES Discipline, Consent agreement, (p. 541) for discussion of topic.

Public reprimand

In re McCormick, 206 W.Va. 69, 521 S.E.2d 792 (1999)
No. 23971 (Per Curiam)

See MAGISTRATES Discipline, On-call requirements and responsibilities, (p. 543) for discussion of topic.

MAGISTRATES

Discipline (continued)

Solicitation of votes

In re Tennant, 205 W.Va. 92, 516 S.E.2d 496 (1999)
No. 23906 (Workman, J.)

After leaving a fundraiser for his magistrate candidacy, the sitting magistrate encountered two local attorneys who had been invited to the fundraiser but had not attended. These attorneys testified at the magistrate's disciplinary hearing that the magistrate asked them why they had not contributed to his campaign. One of the attorneys also testified that the magistrate said that "the going rate for contributions from attorneys was \$500" and that the attorney would get adverse rulings if he failed to contribute. The same attorney also testified that the magistrate restated the same comments to him when they encountered each other 2 months later. The magistrate characterized the statements at the first encounter as "joking" and "off the cuff" and he denied the allegations regarding the second encounter.

Respondent was charged with violating Canon 5C(2) of the Code of Judicial Conduct, which provides that a "candidate shall not personally solicit or accept campaign contributions" The Canon permits a candidate to establish committees that may solicit and accept funds on the candidate's behalf.

The magistrate was subsequently elected. In the first case before the magistrate, the attorney filed a motion to transfer the case to another magistrate and attached an affidavit reciting the two pre-election encounters. The motion and affidavits was forwarded to the Disciplinary Commission by an unknown party.

The Judicial Hearing Board recommended that respondent be admonished for improper conduct.

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 Comm'n v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

MAGISTRATES

Discipline (continued)

Solicitation of votes (continued)

In re Tennant, (continued)

Syl. pt. 2 - “When the language of a canon under the Judicial Code of Ethics 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 re Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

Syl. pt. 3 - “When a candidate . . . for a judicial office that is to be filled by public election between competing candidates personally solicits . . . campaign funds, such action is in violation of Canon 7B(2) of the Judicial Code of Ethics.” Syl. Pt. 2, in part, *In re Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

Syl. pt. 4 - When a judicial candidate, whether or not an incumbent, personally solicits campaign contributions, such conduct violates Canon 5C(2) of the Code of Judicial Conduct.

The Court noted that when the solicitation canon was last amended, the instructive language of “should not” was replaced with the prohibitive language “shall not” with regard to judicial candidates personally soliciting or accepting campaign funds. The Court rejected the respondent’s contention that no violation of the canon occurred because he was joking and concluded that just because the candidate may have asserted the comments in jest does not insure that the person hearing the comment arrives at that conclusion. Underlying the Court’s reasoning for ordering admonishment was concern for the integrity of the judicial system if candidates were allowed to coerce lawyers to make contributions in return for favorable treatment.

Admonishment and costs ordered.

MAGISTRATES

Juvenile referee role

Limitations

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514)
for discussion of topic.

MALICE

Definition

State v. Burgess, 205 W.Va. 87, 516 S.E.2d 491 (1999)
No. 25801 (Maynard, J.)

Appellant was convicted of the felony offense of maliciously killing an animal (*W.Va. Code* § 61-3-27). The evidence showed that the appellant had killed a grazing cow in a field by shooting it in the eye. He was captured when he returned with the apparent intent to butcher the cow.

Syl. pt. 1 - When a person unlawfully dispatches a domestic animal belonging to another person by using a commonly accepted, humane method, and there is no evidence of any other form of malice, the killing is not malicious and consequently does not violate *W.Va. Code* § 61-3-27 (1994).

The Court concluded that the State failed to prove that the killing was done maliciously because it was in fact done in the most “humane, instantaneous, painless method known.” Absent evidence of any other form of malice, it is not a violation to kill another’s animal if a “commonly accepted, humane method” is used. In footnote 2, the Court notes that malice could be demonstrated by the *reason* for the killing, e.g., vengeance or spite. In the instant case, the pivotal point appears to have been that the cow was killed for its meat.

Vacated and remanded.

Inference of

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

MALICE

Killing of an animal

State v. Burgess, 205 W.Va. 87, 516 S.E.2d 491 (1999)
No. 25801 (Maynard, J.)

See MALICE Definition, (p. 548) for discussion of topic.

Proof of

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 777) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

MANDAMUS

Generally

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

See PLEA AGREEMENT, Limitation on use, When void against public policy, (p. 594) for discussion of topic.

State ex rel. Rahman v. Canady, 205 W.Va. 84, 516 S.E.2d 488 (1999)
No. 25843 (Per Curiam)

See JURY Peremptory strikes, Strike black juror, (p. 497) for discussion of topic.

State ex rel. Sams v. Kirby, ___ W.Va. ___, 542 S.E.2d 889 (2000)
No.'s 26647, 26910, 27308, 27309, 26911 Consolidated (Per Curiam)

See PRISON/JAIL CONDITIONS State's duty, (p. 614) for discussion of topic.

State ex rel. Stull v. Davis, 203 W.Va. 405, 508 S.E.2d 122 (1998)
No.s 24459, 24470 & 24472 (McCuskey, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 615) for discussion of topic.

MANDAMUS

Generally (continued)

State ex rel. W.Va. Department of Health and Human Resources v. Hill, 207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

See ABUSE AND NEGLECT Termination of parental rights, Disposition hearing, (p. 45) for discussion of topic.

Jail/prison conditions

Confiscation of computers

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998) No. 25155-25158 (Maynard, J.)

See PRISON/JAIL CONDITIONS Computers, Confiscation of, (p. 612) for discussion of topic.

Placement of juveniles

State ex rel. Daniel M. v. W.Va. DHHR, 205 W.Va. 16, 516 S.E.2d 30 (1999) No. 25796 (Maynard, J.)

See JUVENILES Detention, Out-of-state placements, (p. 511) for discussion of topic.

Refusal by lower court

Standard for review

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998) No. 25155-25158 (Maynard, J.)

See PRISON/JAIL CONDITIONS Computers, Confiscation of, (p. 612) for discussion of topic.

MIRANDA WARNINGS

Duty to advise

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

When required

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

While he was being transported in a police car after his arrest but before receiving *Miranda* warnings, the appellant made some spontaneous incriminating statements about hitting his wife and having had sex with her. Appellant tried unsuccessfully to have these statements suppressed at his trial for sexual assault of his wife, but they were admitted on the ground that they were not uttered in response to “questioning” by police.

Syl. pt. 7 - “On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.” Syllabus point 3, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 8 - The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation. To the extent that language in *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989), and its progeny, may be read to hold differently, such language is expressly overruled.

The Court specifically disowned dictum in *State v. Preece*, that *Miranda* warnings are required “upon arrest of a suspect”. Instead, it emphasized that *Miranda* warnings must only be given prior to “custodial interrogation” because only in such a situation does the “inherent compulsion” arise that *Miranda* was intended to counteract.

Affirmed.

MIRANDA WARNINGS

When required (continued)

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

Appellant was convicted of third offense shoplifting. She was observed putting a sweatshirt into a bag by a store employee. She approached another employee, accused him of watching her and then left the store. The second employee followed her out, accused her of stealing the sweatshirt and persuaded her to return to the store, whereupon he the called police. Appellant dropped the sweatshirt and left the store.

A police officer located the appellant and persuaded her to return to the store. Based on the two employees' statements, the officer issued a shoplifting citation. The trial court ruled that a *Miranda* warning was not required since the appellant was not in custody when she returned to the store with the officer.

Syl. pt. 2 - "*Miranda* warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense." Syl. pt. 1, *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989).

The Court agreed that the appellant was not in custody and found that she had even invited the officer to examine the contents of her purse.

Affirmed.

MISTRIAL

Manifest necessity

State ex rel. Bailes v. Jolliffe, ___ W.Va. ___, 541 S.E.2d 571 (2000)
No. 27912 (Per Curiam)

Petitioner was charged with felony offenses arising from several shooting incidents in 1999. He had been acquitted of similar shooting incidents occurring in 1997. The court found the evidence of the 1997 shootings admissible in the 1999 trial under Rule 404 (b) of the Rules of Evidence for the sole purpose of showing identity.

During cross-examination of the officer who investigated the 1997 incidents, defense counsel asked if the defendant had been found guilty or not guilty of charges related to the incidents. The trial court found the State was prejudiced by the injection of the prior trial information and declared a mistrial based on manifest necessity. A new trial was scheduled.

The petitioner sought a writ of prohibition contending that the trial court erred in finding manifest necessity to declare a mistrial and that a retrial would violate his constitutional protections against multiple prosecutions for the same offenses.

Syl. pt. 1 - "In the trial of a criminal case the trial court, acting under *Code*, 62-3-7, may, for manifest necessity, discharge the jury and order a new trial. Such action will not afford basis for a plea of former jeopardy." Syllabus Point 1, *State v. Shelton*, 116 W.Va. 75, 178 S.E. 633 (1935).

Syl. pt. 2 - "When an accused pleads not guilty to a valid indictment and a jury is sworn to try the issue thereby raised, jeopardy begins, subject to *Code*, 62-3-7, which provides '* * * in any criminal case the court may discharge the jury when it appears that they cannot agree on a verdict or that there is manifest necessity for such discharge.' If a jury, without rendering a verdict, is discharged, in conformity with the statute, jeopardy is set at naught." Syllabus Point 1, *State v. Little*, 120 W.Va. 213, 197 S.E. 626 (1938).

Syl. pt. 3 - "Improper conduct of defense counsel which prejudices the State's case may give rise to manifest necessity to order a mistrial over the defendant's objection." Syllabus Point 4, *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984).

MISTRIAL

Manifest necessity (continued)

State ex rel. Bailes v. Jolliffe, (continued)

Syl. pt. 4 - “Unless the occasion for mistrial is a manifest necessity beyond the control of the prosecutor or judge, the prosecution should not be permitted to move for and obtain a mistrial.” Syllabus Point 2, *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984).

Syl. pt. 5 - “Where a prosecutor claims that the defense has by its actions prejudiced the jury, he is entitled to obtain a mistrial, without double jeopardy barring a retrial, if it can be shown: (1) that the conduct complained of was improper and prejudicial to the prosecution, and (2) that the record demonstrates the trial court did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial.” Syllabus Point 5, *Keller v. Ferguson*, 177 W.Va. 616, 355 S.E.2d 405 (1987).

Syl. pt. 6 - “The determination of whether ‘manifest necessity’ that will justify ordering a mistrial over a defendant's objection exists is a matter within the discretion of the trial court, to be exercised according to the particular circumstances of each case.” Syllabus Point 3, *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984).

The Court first disposed of the double jeopardy claim by citing previous cases finding there is no former jeopardy problem when a mistrial is declared because of manifest necessity. The Court then turned its attention to whether there was abuse of discretion in finding manifest necessity to declare a mistrial. The Court found that the record reflected that the trial court carefully reviewed options to remedy the situation without furthering the prejudice to either party and found no satisfactory solution.

Writ of prohibition denied.

MISTRIAL

Manifest necessity (continued)

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

The appellant was indicted for arson and underwent a competency/criminal responsibility evaluation at the State's request after which he was released on bond. He was arrested for murder while he was free on bond and during the arraignment on the murder charge he attempted to escape.

The appellant was first brought to trial on the arson charge where he was found not guilty by reason of mental illness and placed in a mental health facility for a period not to exceed 20 years. He escaped from the mental health facility.

A different outcome was reached in his murder trial where the appellant was convicted of first degree murder for which he was sentenced to prison for life without mercy. He was also convicted of attempted escape from a public safety officer for which a one-to-three year sentence was imposed.

Issues raised in the appeal of the murder conviction included a mistrial should have been declared after a State's expert witness mentioned the existence of excluded evidence and the trial court incorrectly ordered the appellant's removal from a mental health facility to the custody of the Department of Corrections to serve his prison sentences.

Syl. pt. 5 - "The "manifest necessity" in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription.' [Syllabus Point 2], *State v. Little*, 120 W.Va. 213, [197 S.E. 626 (1938)]." Syllabus Point 2, *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730 (1964), *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.E.2d 30 (1964).

Syl. pt. 6 - "Where the trial court erroneously permits inadmissible matters to be introduced into evidence, such error does not create a manifest necessity for a mistrial within the meaning and intent of Code, 1931, 62-3-7." Syllabus Point 1, *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730 (1964), *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.E.2d 30 (1964).

MISTRIAL

Manifest necessity (continued)

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

Syl. pt. 7 - “ ‘ “Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error.” Syl. pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).’ Syl. pt. 3, *State v. Lusk*, 177 W.Va. [517], 354 S.E.2d 613 (1987).” Syllabus Point 2, *State v. Ayers*, 179 W.Va. 365, 369 S.E.2d 22 (1988).

The Court found that the expert witness’s inadmissible testimony was remedied by a curative instruction which was one of three alternative instructions that defense counsel had proposed to the trial court. The Court refused to reconsider its prior decision regarding the transfer of custody from a mental health facility to the Department of Corrections on the basis of *res judicata* (*State v. Catlett*, 207 W.Va. 747, 536 S.E.2d 721 (1999)).

Affirmed.

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See DOUBLE JEOPARDY Mistrial, (p. 259) for discussion of topic.

Prosecutorial misconduct

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

MULTIPLE OFFENSES

Discretionary joinder

Magistrate court

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

Mandatory joinder

Circuit court

State v. Jenkins, 204 W.Va. 347, 512 S.E.2d 860 (1998)
No. 24738 (Per Curiam)

See JOINDER Mandatory, Multiple offenses, (p. 472) for discussion of topic.

Prejudicial joinder

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See JOINDER Prejudicial, Discretion of court, (p. 474) for discussion of topic.

Uttering

“Unit of prosecution”

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering, (p. 748) for discussion of topic.

MURDER

Categories of first-degree

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Character of victim

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Concerted action

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Elements of first-degree

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

MURDER

Felony-murder

Overdose of controlled substance

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

Felony-murder and premeditated

Election to proceed on

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

See HOMICIDE First-degree murder, Instructions to distinguish type, (p.
417) for discussion of topic.

First-degree murder

Accessory before the fact

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for
discussion of topic.

Alternative theories

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

See HOMICIDE First-degree murder, Instructions to distinguish type, (p.
417) for discussion of topic.

MURDER

First-degree murder (continued)

Elements

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Instructions to distinguish type

Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998)
No. 24528 (Workman, J.)

See HOMICIDE First-degree murder, Instructions to distinguish type, (p. 417) for discussion of topic.

Poisoning

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

Instructions

Inference of malice

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

MURDER

Malice

Inference of

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See INSTRUCTIONS Murder, Inference of malice, (p. 459) for discussion of topic.

Jury question

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Proof of

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Premeditation

Sufficiency of evidence

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

MURDER

Principal in second-degree

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Self-defense

Character of victim

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

Instructions

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

MURDER

Sufficiency of evidence

Defense of another

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

Generally

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

Premeditation

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, Premeditation, (p. 772) for discussion of topic.

MURDER

Sufficiency of evidence (continued)

Self-defense

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

NEW TRIAL

Newly discovered evidence

Sufficient for new trial

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

Brown was convicted after a jury trial of two counts of first-degree sexual assault and one count of first-degree sexual abuse involving his 6-year-old stepdaughter.

At trial, one of the State's principal witnesses was Brown's then 12-year-old son who testified that he had seen Brown on top of A.R. at the time of the sexual assault incident. During sentencing, it was revealed that a police report that had not been previously disclosed to Brown (despite defense requests for any evidence that contained potentially exculpatory evidence) contained a record of the son's observation to be that A.R. was on top of Brown at the time of Brown's misconduct. The police report also revealed the new information that the son had given A.R. candy to encourage her to tell him about the sexual abuse and assault episodes.

In ruling on Brown's motion for new trial on the basis of newly discovered evidence, the circuit court first compared the son's statement in the report with his testimony at trial. The court also noted the absence of testimony about the candy-for-story exchange.

In discussing the factors to be considered in awarding a new trial, the court ruled that the new evidence could produce a different outcome for a variety of reasons: (1) the candy-for-story evidence buttressed the defense theory of false memories and impeached the State's theory that the victim was only interviewed twice before she talked of abuse; (2) the impeachment of the son would have been materially strengthened by the use of the prior inconsistent statement. After acknowledging that impeachment evidence is generally an insufficient basis for a new trial, the court explained that the evidence here was an attack on the son's "ability to accurately testify to what he allegedly saw" rather than "an attack on his honesty or whether he was present or elsewhere." The court concluded that the outcome of the trial "would have

NEW TRIAL

Newly discovered evidence (continued)

Sufficient for new trial (continued)

State ex rel. Kahle v. Risovich, (continued)

been different” had the questioned evidence been properly disclosed because, based on the court’s observation of the son’s testimony at trial, all of the State’s other evidence “paled in comparison to the detailed description” of the son’s observation of the specific sexual acts. After the circuit court granted a new trial on the grounds of newly discovered evidence, the prosecutor petitioned the Supreme Court for a writ of prohibition to prevent a retrial.

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 promptly presented.’ Syllabus Point 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).” Syllabus point 2, *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996).

Syl. pt. 2 - “ ‘ “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

NEW TRIAL

Newly discovered evidence (continued)

Sufficient for new trial (continued)

State ex rel. Kahle v. Risovich, (continued)

or impeach a witness on the opposite side.” Syllabus, *State v. Frazier*, 162 W.Va. [9]35, 235 [253] S.E.2d 534 (1979), quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894)[, overruled in part, on other grounds, by *State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955)]. Syl. Pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).’ Syl. Pt. 1, *State v. O’Donnell*, 189 W.Va. 628, 433 S.E.2d 566 (1993).” Syllabus point 1, *State v. Crouch*, 191 W.Va. 272, 445 S.E.2d 213 (1994).

Syl. pt. 3 - “ ‘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).” Syllabus point 4, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

The Court acknowledged that the new evidence could not have been discovered before trial and that it was material. However, the Court disagreed with the trial court about the probable effect such evidence would have had on the outcome.

The Court characterized the newly discovered evidence “as impeachment evidence, with inculpatory, rather than exculpatory, value.” While acknowledging the inconsistency between the statements, the Court reasoned that the statement in the police report “nevertheless places Brown at the scene of the crime in a rather compromising situation with his then 6-year-old stepdaughter.” With respect to the candy-for-story evidence, the Court noted that it was questionable that Brown could even use the evidence because the son never testified about any discussions with his stepsister about the alleged assault and the evidence was of dubious utility because the son had never attested that the statement was his own.

Even when evidence is wrongfully withheld, a new trial should only be granted if there is a “reasonable probability” that the outcome of the trial would have been different had such evidence been introduced.

NEW TRIAL

Newly discovered evidence (continued)

Sufficient for new trial (continued)

State ex rel. Kahle v. Risovich, (continued)

The Court concluded that the introduction of the police statement regarding the inconsistent testimony of the defendant and victim and the candy-for-story exchange would not have produced a different result on retrial. There was sufficient evidence to support the conviction. The standard for review of an order granting a new trial is not addressed.

Writ of prohibition granted as moulded, with directions to the circuit court to proceed with execution of the sentences imposed.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999) No. 25367 (Workman, J.)

After his conviction for murder, the appellant moved for a new trial on the grounds of newly discovered evidence, and he introduced testimony from 3 witnesses. One witness, his sister-in-law, testified that the appellant's wife had confessed to the murder and had shown her some of the victim's jewelry. Soon after the murder, the witness had told police that the appellant had admitted to the murder yet at trial she recanted and said she had no information. The second witness at the motion hearing, who had not testified at trial, contradicted a trial witness's testimony about the persons seen at what later turned out to be the scene of the crime. The third witness at the motion hearing admitted a romantic relationship with the appellant's wife and said that the wife told him that she had killed the victim.

The trial court denied the motion, ruling that the first witness's testimony was cumulative in that the appellant had already presented the theory that his wife committed the murder at trial; that the second witness's testimony was merely for impeachment purposes; and that the third witness's testimony lacked any indicia of trustworthiness.

NEW TRIAL

Newly discovered evidence (continued)

Sufficient for new trial (continued)

State v. Kennedy, (continued)

Syl. pt. 5 - “ ‘ “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. 935, 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).” Syl. Pt. 1, *State v. O’Donnell*, 189 W.Va. 628, 433 S.E.2d 566 (1993).

The Court affirmed on somewhat different grounds. With regard to the first and third witnesses, the Court concluded that the testimony offered would not be admissible in a second trial. The testimony of each regarding the confession of the appellant’s wife was hearsay. However, because the wife was “unavailable” under Rule 804(a) of the Rules of Evidence because she had invoked the Fifth Amendment during the hearing on the new trial motion, the witnesses’ testimony might be admissible under Rule 804(b)(4) as a statement against interest exception to the hearsay rule *if* the appellant was able to show that “corroborating circumstances clearly indicated the trustworthiness of the statement” in question. The Court found that the appellant had failed to make such a showing in either case. The Court concurred with the trial court regarding the remaining witness’ testimony being inadmissible because it was offered solely to impeach another witness.

Affirmed.

NEW TRIAL

Transcript omissions

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See TRIAL Transcript omissions, (p. 799) for discussion of topic.

NOTICE

Statutory notice of crime

Specificity required

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

OFFENSES

Child abuse creating risk of injury

Risk defined

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See ABUSE AND NEGLECT Child abuse creating risk of injury, Risk defined, (p. 4) for discussion of topic.

Status elements

Bifurcation

State v. Fox, 207 W.Va. 239, 531 S.E.2d 64 (1998)
No. 25171 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense, (p. 331) for discussion of topic.

Prior convictions

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense, (p. 331) for discussion of topic.

OFFENSES

Status elements (continued)

Stipulation

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Driving under the influence, Stipulation to prior offense,
(p. 331) for discussion of topic.

Uttering

Unit of prosecution

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering,
(p. 748) for discussion of topic.

ONE-TERM RULE

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review,
(p. 795) for discussion of topic.

PAROLE

Hearings

Ex post facto application of time for review

State ex rel. Carper v. Parole Board, 203 W.Va. 583, 509 S.E.2d 864 (1998) No. 25184 (Starcher, J.)

In 1997, *W.Va. Code* § 62-12-13 was amended to decrease the frequency of parole hearings for prisoners serving sentences of life with mercy. Formerly parole reviews were held annually for prisoners serving such sentences. Petitioner began serving a life sentence in 1978. He was denied parole on February 11, 1998 and was informed by the Parole Board that his next parole eligibility review would occur in February 2000.

The Board interpreted the statutory change as allowing it to refuse to review the petitioner's parole status annually. The petitioner filed a writ of mandamus claiming that the application of the 1997 amendment to his parole status *ex post facto* was unconstitutional.

Syl. pt. 1 - "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." Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

Syl. pt. 2 - Under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the 1997 amendment to *W.Va. Code*, 62-12-13(a)(5) [1997] that allows parole review hearings to be conducted within a period of up to 3 years following the denial of parole for prisoners serving sentences of life imprisonment with the possibility of parole may be applied retroactively to prisoners whose relevant offenses occurred prior to the effective date of the statutory amendment.

Syl. pt. 3 - To pass constitutional muster under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the provisions of *W.Va. Code* 62-12-13(a)(5) [1997] allowing up to 3 years between parole reviews for prisoners serving terms of life imprisonment with the possibility of parole must be applied on a case-by-case basis to prisoners whose offenses

PAROLE

Hearings (continued)

Ex post facto application of time for review (continued)

State ex rel. Carper v. Parole Board, (continued)

occurred at a time when the law prescribed annual parole reviews, The Board of Parole may only extend the period between parole review hearings for such prisoners beyond 1 year if the Board has made a case-specific individualized determination with reasoned findings on the record showing why there will be no detriment or disadvantage to the prisoner from such an extension. Additionally, due process requires that such a prisoner receiving a review period of more than 1 year must be afforded the opportunity to submit information for the Board's consideration during any extended period requesting that a review be granted before the expiration of the extended period.

The Court noted that review of the Parole Board's actions was subject to an "abuse of discretion/arbitrary and capricious" standard of review. The Court then held that the legislative amendment may be retroactively applied to prisoners serving terms for offenses committed prior to the effective date of the amendment if certain conditions are met. In order to pass constitutional muster the Parole Board in such cases must make an individualized determination with recorded findings as to why the prisoner is not disadvantaged by the extension. Additionally, the prisoner has to be given an opportunity to submit information to the Board during this extended hearing period which may convince the Board to conduct an earlier review.

Writ granted as moulded.

State ex rel. Haynes v. W.Va. Parole Board, 206 W.Va. 288, 524 S.E.2d 440 (1999) No. 26006 (Per Curiam)

An inmate serving 4 concurrent life sentences with mercy first became eligible for parole in 1990. After a hearing every year through 1997, he was denied parole by the Parole Board. In 1998, the Parole Board invoked the 1997 amendments to the parole statute, *W. Va. Code* § 62-12-13(a)(5), which

PAROLE

Hearings (continued)

Ex post facto application of time for review (continued)

State ex rel. Haynes v. W.Va. Parole Board, (continued)

permitted the Board to wait up to 3 years before conducting another parole hearing, and scheduled the next hearing for 2 years in the future. Petitioner filed a habeas petition in which he argued that the statutory extension of parole hearing dates violated the state and federal constitutional *ex post facto* provisions.

Syl. pt. 1 - “Under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the 1997 amendment to *W.Va. Code*, 62-12-13(a)(5) [1997] that allows parole review hearings to be conducted within a period of up to 3 years following the denial of parole for prisoners serving sentences of life imprisonment with the possibility of parole may be applied retroactively to prisoners whose relevant offenses occurred prior to the effective date of the statutory amendment.” Syllabus Point 2, *State ex rel. Carper v. West Virginia Parole Board*, 203 W.Va. 583, 509 S.E.2d 864 (1998).

Syl. pt. 2 - “To pass constitutional muster under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the provisions of *W.Va. Code*, 62-12-13(a)(5) [1997] allowing up to 3 years between parole reviews for prisoners serving terms of life imprisonment with the possibility of parole must be applied on a case-by-case basis to prisoners whose offenses occurred at a time when the law prescribed annual parole reviews. The Board of Parole may only extend the period between parole review hearings for such prisoners beyond 1 year if the Board has made a case-specific individualized determination with reasoned findings on the record showing why there will be no detriment or disadvantage to the prisoner from such an extension. Additionally, due process requires that such a prisoner receiving a review period of more than 1 year must be afforded the opportunity to submit information for the Board’s consideration during any extended period requesting that a review be granted before the expiration of the extended period.” Syllabus Point 3, *State ex rel. Carper v. West Virginia Parole Board*, 203 W.Va. 583, 509 S.E.2d 864 (1998).

PAROLE

Hearings (continued)

Ex post facto application of time for review (continued)

State ex rel. Haynes v. W.Va. Parole Board, (continued)

In *State ex rel. Carper v. West Virginia Parole Board*, the Court held that the statute in question was, with the addition of certain court-imposed procedural safeguards, constitutional. Thus, under *Carper*, a prisoner who committed a crime prior to the effective date of the 1997 amendment (when the statute required annual parole hearings) could nonetheless have his next hearing scheduled for up to 3 years in the future if case-specific findings are made on the record by the Board and the prisoner is given the right to submit information requesting earlier review. However, the Court also ruled in *Carper* that these procedural safeguards applied only prospectively (except as to Carper himself). The Court declined petitioner's invitation to overrule *Carper* and denied relief. The result is that any inmate who received a hearing set-off under the 1997 amendment prior to the issuance of the opinion in *Carper* on December 14, 1998, has no right to the procedural protections mandated by *Carper*.

Writ denied.

PERSONAL OPINION

Forbidden during argument

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

PLAIN ERROR

Alternate juror participating in deliberations

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

Before a jury was chosen in the appellant's trial for multiple counts of child sexual abuse, the judge asked counsel if there was any objection to having 13 jurors deliberate up to the time a verdict was rendered. The prosecutor noted that she had no objection as long as the alternate did not participate in discussions, and the judge noted that would be a problem and that he would excuse the alternate before deliberations began; defense counsel made no objection. After presentation of the case, however, the judge apparently forgot to release the alternate and he participated in deliberations. After a guilty verdict was returned and the jury was excused, the defense counsel moved for a new trial on the ground that the alternate was not excused. The motion was denied.

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. This 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." Syllabus Point 1, *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996).

Syl. pt. 2 - When a defendant fails to object to an alternate juror retiring to the jury room with the regular jurors, we will consider the circumstances under the plain error rule of West Virginia Rule of Criminal Procedure 52(b). We expressly overrule and no longer adhere to the rigid standard of *State v. Hudkins*, 35 W.Va. 247, 13 S.E. 367 (1891), which states that when thirteen jurors are impaneled and render a verdict, the judgment of the circuit court must be reversed and set aside.

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).

PLAIN ERROR

Alternate juror participating in deliberations (continued)

State v. Lightner, (continued)

Syl. pt. 4 - “Under the ‘plain error’ doctrine, ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is ‘plain.’ To be ‘plain,’ the error must be ‘clear or obvious.’” Syllabus Point 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Court first held that the presence of an alternate during deliberations was not such a fundamental error as to require reversal in every case. Because the defense failed to object prior to deliberations, the Court employed a plain error review. First, there was certainly error; Rule 24(c) of the W.Va. Rules of Criminal Procedure requires the discharge of the alternate prior to deliberations. Second, the error was plain; everyone could see the 13th juror go into and return from the jury room. However, the third prong of prejudice was not apparent. Contrary to the appellant’s argument that such error is inherently prejudicial, the Court noted that (1) the alternate was chosen in the same manner as the other jurors; (2) 12 is not a magic number; nothing in the federal constitution requires a jury of 12, and a defendant may even waive a jury or stipulate to a jury of less than 12. In the absence of a showing that the error affected the outcome, it was not “plain error” subject to correction. The 1891 case of *State v. Hudkins*, which required reversal if 13 jurors participated in deliberations, was expressly overruled.

Affirmed.

PLAIN ERROR

Defined

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See APPEAL Plain error, Defined, (p. 94) for discussion of topic.

Evidentiary rulings

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Forfeiture of right and waiver of error distinguished

State v. Lightner, 205 W.Va. 657, 520 S.E.2d 654 (1999)
No. 25822 (Maynard, J.)

See PLAIN ERROR Alternate juror participating in deliberations, (p. 581)
for discussion of topic.

Generally

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See PLAIN ERROR Standard for review, (p. 585) for discussion of topic.

PLAIN ERROR

Generally (continued)

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Instructions

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See INSTRUCTIONS Self-defense, (p. 460) for discussion of topic.

Plea agreement breach

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153)
for discussion of topic.

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of
topic.

PLAIN ERROR

Standard for review

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

In a prosecution for first-degree murder by poisoning, the trial court failed to instruct the jury that it must find that the murder was done with malice. Instead, the court instructed the jury that in order to convict it must first find that the defendant had the specific intent to poison the victim, that she intended to kill or seriously injure the victim “or that she did so because her conduct evidenced a depraved heart.” The defendant did not object to the instruction but raised it as error on appeal.

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.” Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 5 - “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.” Syllabus Point 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 6 - *W.Va. Code* § 61-2-1 (1991) enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, starving; (2) by any wilful, deliberate and premeditated killing; and (3) in the commission of, or attempt to commit, *inter alia*, arson, sexual assault, robbery or burglary.

PLAIN ERROR

Standard for review (continued)

State v. Davis, (continued)

Syl. pt. 7 - “*W.Va. Code*, 61-2-1, was not designed primarily to define the substantive elements of the particular types of first degree murder, but rather was enacted to categorize the common law crimes of murder for the purpose of setting degrees of punishment.” Syllabus Point 5, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978).

Syl. pt. 8 - Specific intent to kill, premeditation and deliberation are not elements of the crime of first degree murder by means of poison pursuant to *W.Va. Code* § 61-2-1 (1991). Rather, in order to sustain a conviction for first degree murder by poison pursuant to *W.Va. Code* § 61-2-1, the State must prove that the accused committed the act of administration of poison unlawfully, willfully and intentionally for the purpose of or with the intent to kill, do serious bodily harm or that the accused’s conduct evinced a depraved heart.

The Court refused to find any error, plain or otherwise. The Court initially concluded that “malice,” at least in regard to first-degree murder, is “essentially a form of criminal intent.” (Citing *State v. Starkey*, 161 W.Va. 517, 523, 244 S.E.2d 219, 223 (1978)). With regard to murder by poison, the “malice” element includes (1) intent to kill, (2) intent to do seriously bodily harm, *or* (3) conduct which evidences a depraved heart. The administration of the poison must be intentional, willful and unlawful. Under this standard, the instruction given, when read as a whole, was not erroneous.

Affirmed.

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

PLAIN ERROR

Standard for review (continued)

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See APPEAL Plain error, Defined, (p. 94) for discussion of topic.

***Sua sponte* recognition of**

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

Unpreserved error

State v. Coleman, ___ W.Va. ___, 542 S.E.2d 74 (2000)
No. 27807 (Per Curiam)

See INSTRUCTIONS Driving under the influence, *Prima facie* evidence of intoxication, (p. 454) for discussion of topic.

Unpreserved issue

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

PLEA AGREEMENT

Acceptance of

Effect

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

Basis to accept or reject

State v. Sears, ___ W.Va. ___, 542 S.E.2d 863 (2000)
No. 27766 (Starcher, J.)

The appellant was indicted for aggravated robbery and battery. The State proposed a plea agreement which included reduction of the charges to unlawful wounding. The appellant did not accept the plea offer tendered by the State until the day before trial. The trial court did not accept the plea agreement solely because it had been presented so close to trial. The “local rule” in the jurisdiction was that the court would not entertain a plea agreement after a pre-trial hearing unless the defendant plead to the exact charges in the indictment.

The jury trial was begun the following day and resulted in the appellant being convicted of both charges for which he received consecutive sentences of 60 years for aggravated robbery and 1 year for battery.

Syl. pt. 1 - “West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain.” Syllabus Point 5, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. pt. 2 - “A court’s ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.” Syllabus Point 4, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

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Basis to accept or reject (continued)

State v. Sears, (continued)

Syl. pt. 3 - “As to what is meant by a plea bargain being in the public interest in the fair administration of justice, there is the initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant and that there is a factual basis for his guilty plea. Rule 11(d) and (f). In addition to these factors, which enure to the defendant’s benefit, we believe that consideration must be given not only to the general public’s perception that crimes should be prosecuted, but to the interests of the victim as well.” Syllabus Point 5, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

Syl. pt. 4 - “A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant’s prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.” Syllabus Point 6, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

Syl. pt. 5 - When a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court.

The issue was reviewed *de novo*. The Court recognized that Rule 11 of the Rules of Criminal Procedure vested the trial court with discretion in accepting or rejecting guilty pleas. However, the record revealed that the trial court had rejected the proffered plea agreement without examining the merits of the agreement in light of the standards articulated in *Myers v. Frazier*. As a result, the Court held that it is abuse of discretion for a trial court to refuse to consider the substantive terms of a plea agreement for no other reason than the time it is presented to the court.

Reversed and remanded.

PLEA AGREEMENT

Breach of

State ex rel. Gill v. Irons, 207 W.Va. 199, 530 S.E.2d 460 (2000)
No. 26854 (Per Curiam)

See PLEA AGREEMENT Waiver of rights, Accurate information regarding possible sentence, (p. 600) for discussion of topic.

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

Plain error

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

Appellant was convicted of first-degree murder. He agreed to plead guilty in exchange for three promises: 1) other charges were to be dismissed; 2) the prosecution would stand silent at sentencing with regard to whether mercy should be granted; and 3) the prosecution would stand silent with regard to the appellant's use of a firearm in the murder.

The trial court held a hearing and determined after extensive questioning that the appellant had entered into the agreement knowingly and voluntarily. After the court accepted the plea, the appellant sought to withdraw it. After another hearing the motion to withdraw was denied.

At sentencing, the prosecution violated the agreement by arguing that the appellant should be denied the possibility of parole and noted the crime was committed with a firearm. Defense counsel did not object. Even at a reconsideration hearing, defense counsel did not notify the court that the agreement was violated. Reconsideration was denied.

PLEA AGREEMENT

Breach of (continued)

Plain error (continued)

State v. Myers, (continued)

Syl. pt. 1 - This Court's application of the plain error rule in a criminal prosecution is not dependent upon a defendant asking the Court to invoke the rule. We may, *sua sponte*, in the interest of justice, notice plain error.

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." Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - The analysis of whether an "error" occurred under the plain error doctrine in the context of a plea agreement necessarily involves two determinations: (1) whether there existed in a plea agreement an enforceable right which benefitted the defendant, and (2) whether the defendant waived or forfeited the benefits of such a right.

Syl. pt. 4 - When a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable "right" inures to both the State and the defendant not to have the terms of the plea agreement breached by either party.

Syl. pt. 5 - In order to establish that there has been a known waiver of a plea agreement right by a defendant, the State has the burden of showing such a waiver. To carry this burden, the State must show more than the mere fact that a defendant remained silent at the time the plea agreement right was violated by the State, or that the defendant failed to raise the violation in a post-verdict motion. To meet its burden, the State must point to some affirmative evidence in the record which establishes beyond a reasonable doubt that a defendant intentionally relinquished or abandoned a plea agreement right. Examples of how the State may meet this burden include, but are not necessarily limited to, demonstrating on the record: (1) that a document was signed by the defendant and his/ her counsel waiving a plea agreement right, or (2) that the defendant or his/her counsel stated in open court that a previous plea agreement right had been relinquished or abandoned.

PLEA AGREEMENT

Breach of (continued)

Plain error (continued)

State v. Myers, (continued)

Syl. pt. 6 - Under plain error analysis, an error may be “plain” in two contexts. First, an error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and trial court knew or should have known at the time of the prosecution. Second, an error may be plain because of a new legal principle that did not exist at the time of the prosecution, *i.e.*, the error was unclear at the time of trial; however, it becomes plain on appeal because the applicable law has been clarified.

Syl. pt. 7 - For the purposes of plain error analysis, when there exists a plea agreement in which the State has promised to remain silent as to specific sentencing matters and the State breaches such agreement by advocating specific matters at a sentencing hearing, prejudice to the defendant is presumed. In this situation, the burden then shifts to the State to prove beyond a reasonable doubt that its breach of the plea agreement did not prejudice the outcome of the proceeding. The mere showing that the trial court would have sentenced a defendant upon the same terms, even without such a breach, will not satisfy the State’s burden.

Syl. pt. 8 - Whenever the State violates a sentencing neutrality provision of a plea agreement, the violation seriously affects the fairness, integrity and public reputation of the proceeding.

Syl. pt. 9 - When a plea agreement has been breached by the State, it is the province of this Court, or the trial court in the first instance, and not the defendant, to decide whether to grant specific performance of the plea agreement or permit withdrawal of the guilty plea.

Due to the prosecution’s egregious conduct, the Court ignored numerous federal authorities and chose to review the plea under the doctrine of plain error. Analogizing the nature of a plea agreement to a unilateral contract, the Court noted that the only way for a defendant to trigger performance by the State is to plead guilty. The obvious detriment which thereby accrued here offended the Court.

PLEA AGREEMENT

Breach of (continued)

Plain error (continued)

State v. Myers, (continued)

Similarly, the Court dismissed the State's argument that failure to object to the violations during sentencing and resentencing constituted waiver of the agreement. Despite the forfeiture of the plea agreement right by the failure to object, the prosecution's breach was too serious to overlook.

Reversed and remanded.

Guilty plea withdrawal

State v. Valentine, ___ W.Va. ___, 541 S.E.2d 603 (2000) No. 27618 (Maynard, C.J.)

Appellant plead guilty to voluntary manslaughter. In return for the guilty plea, the State agreed not to oppose a request for a 3-year sentence. Prior to the sentencing hearing, the appellant made a personal written request to withdraw his plea. This *pro se* request was followed by a formal motion to withdraw the plea filed by the appellant's lawyer. At the sentencing hearing, the withdrawal motion was denied and a determinate 15-year sentence was imposed. The appeal of the denial of the motion claims that the trial court committed reversible error in not strictly adhering to the requirements of Rule 11(e) of the Rules of Criminal Procedure by failing to advise the appellant that a plea could not be withdrawn after it was accepted even if the court did not abide by the specific sentence requested.

Syl. pt. 1 - "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

PLEA AGREEMENT

Guilty plea withdrawal (continued)

State v. Valentine, (continued)

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).

Syl. pt. 2 - The harmless error rule of Rule 11(h) of the West Virginia Rules of Criminal Procedure should be applied when the factual evidence is clear that no substantial rights of the defendant were disregarded.

Syl. pt. 3 - The omission of the statement required by Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure must be deemed harmless error unless there is some realistic likelihood that the defendant labored under the misapprehension that his plea could be withdrawn.

The Court found that while the lower court may not have strictly adhered to the requirements of Rule 11(e) of the Rules of Criminal Procedure, the record disclosed that the omission was harmless error under part (h) of Rule 11 because the appellant was not misled and none of his substantial rights were disregarded.

Affirmed.

Limitation on use

When void against public policy

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

A petition for a writ of prohibition and/or writ of mandamus was filed with the Supreme Court to bar prosecution of the petitioner on a 15 count indictment charging him with sexual abuse and assault of his stepchildren. The petitioner contended that a plea agreement made with the prosecutor during a separate abuse and neglect proceeding prevented his prosecution on the charges set forth in the indictment.

PLEA AGREEMENT

Limitation on use (continued)

When void against public policy (continued)

State ex rel. Lowe v. Knight, (continued)

In the plea agreement, the petitioner had agreed to terminate his parental rights in exchange for the State's promise to limit future criminal prosecution in the matter to one count of child abuse resulting in injury. The circuit court had incorporated the plea agreement by reference into a parental rights termination order. Thereafter, the State obtained the 15 count indictment previously referenced.

Syl. pt. 1 - "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

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).

PLEA AGREEMENT

Limitation on use (continued)

When void against public policy (continued)

State ex rel. Lowe v. Knight, (continued)

Syl. pt. 3 - “A writ of mandamus will not issue unless three elements coexist--(1) a clear legal 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).

Syl. pt. 4 - “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.” Syllabus Point 2, *In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997).

The Court found the plea agreement void as a matter of public policy: not only is it improper for a prosecutor to use the threat of criminal prosecution in civil abuse and neglect case, but an agreement terminating parental rights is only valid when it is entered into free of duress.

Writ or prohibition and/or mandamus denied.

No admission of guilt

State v. Parr, ___ W.Va. ___, 542 S.E.2d 69 (2000)
No. 27871 (Per Curiam)

The lower court had refused to accept a plea agreement in which the appellant would plead guilty to petit larceny in exchange for the State making no sentence recommendation and dismissing the remaining charges. The appellant informed the court when the agreement was presented that he was willing to plead guilty as long as he could do so without admitting guilt. The lower court refused to accept the “*Frazier*” plea. As a result, the appellant went to trial and was convicted of entering without breaking and petit larceny.

PLEA AGREEMENT

No admission of guilt (continued)

State v. Parr, (continued)

The dispositive issue on appeal was whether the trial court erred in refusing to accept the plea.

Syl. pt. 1 - “ An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him.” Syl. Pt. 1, *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987).

Syl. pt. 2 - “Although a judge would be remiss to accept a guilty plea under circumstances where the weight of the evidence indicates a complete lack of guilt, a court should not force any defense on a defendant in a criminal case, particularly when advancement of the defense might end in disaster.” Syl. Pt. 2, *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987).

An abuse of discretion standard was applied to the review. Finding that the trial court failed to follow the guidelines set forth in *Kennedy v. Frazier*, the Court concluded that the trial court abused its discretion by forcing a defense on the appellant which was not supported by the evidence and would result in “disaster”, *i.e.*, a higher penalty.

Reversed and remanded with convictions vacated.

Sentencing

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

PLEA AGREEMENT

Standard for enforcement

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

Standard for review

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

Appellant was indicted in circuit court for two felony offenses of larceny and burglary and with several (non-drug related) misdemeanors in the magistrate court. He entered into a written plea agreement with the prosecutor on November 10, 1997 under which he would plead guilty to the two felonies and in return the prosecutor would dismiss “all charges now pending or under investigation.” The court accepted the agreement the same day. Sentencing was postponed to allow a presentence report to be prepared.

During the same period, the state police and federal authorities were investigating the appellant for drug offenses. On November 14, 1997, the state police turned over the results of the investigation to the same prosecutor who had signed the plea agreement. The appellant was indicted 5 days later.

Appellant moved to dismiss the drug indictments. The court denied the motion on the grounds that the prosecutor and defense attorney were unaware of the drug investigation at the time of the plea agreement. The court also permitted the reformation of the agreement so that the state could proceed with the drug charges.

PLEA AGREEMENT

Standard for review (continued)

State v. Palmer, (continued)

The “plea order” in the original cases was entered on January 7, 1998, and it did not include the language that all charges “then pending or under investigation” would be dismissed. He was sentenced. Reserving his right to appeal the drug charges, he later pleaded guilty to them as well. He then appealed the denial of his motion to dismiss the drug charges.

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*.” Syllabus Point 1, *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995).

Syl. pt. 2 - “A prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon.” Syllabus, *State ex rel. Grey v. McClure*, 161 W.Va. 488, 242 S.E.2d 704 (1978).

The Court rejected the State’s argument that the plea agreement only became enforceable when entered in the form of a “plea order” by the circuit court, which in this case was not entered until January 1998 and which did not include the “pending or under investigation” language. The Court stated that it is the date of the entry of the guilty plea that triggers the constitutional protections. Applying contract law principles, the Court then held that there was no exception to the dismissal promise of the State in the original agreement.

PLEA AGREEMENT

Standard for review (continued)

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

The Court noted that the state trooper who was investigating the drug crimes was also the person who had investigated the other crimes, but that it was irrelevant that the prosecutor was unaware of the drug investigation. In footnote 4, however, the Court notes that a different result might be reached if the drug investigation had been ongoing at the time of the plea agreement but that the appellant's name had not yet surfaced in that investigation.

The Court reversed the conviction on the drug charges and remanded with directions to dismiss the charges.

Reversed and remanded.

Waiver of plea agreement by defendant

Proof required

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

Waiver of rights

Accurate information regarding possible sentence

State ex rel. Gill v. Irons, 207 W.Va. 199, 530 S.E.2d 460 (2000)
No. 26854 (Per Curiam)

The petitioner plead guilty to charges of malicious assault upon a police officer, wanton endangerment and 2 counts of attempted murder for which he received a sentence of 10 to 30 years. The guilty plea was part of a plea agreement. At the plea hearing, the circuit judge explained that the aggregate minimum and maximum sentence that could be imposed was 6 to

PLEA AGREEMENT

Waiver of rights (continued)

Accurate information regarding possible sentence (continued)

State ex rel. Gill v. Irons, (continued)

30 years. At the sentencing hearing, the petitioner was informed that the minimum sentence was 6½ years and the maximum was 30 years. The sentencing order imposed consecutive sentences of 3 to 15 years for malicious assault, 5 years for wanton endangerment, and 1 to 5 years on each of the 2 attempted murder charges. The petition for a writ of prohibition was filed to halt the execution of the sentencing order based on breach of the plea agreement.

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. 2 - “When a trial court explains the maximum possible sentence provided by law to a defendant, such explanation must be accurate and not confusing, misleading or coercive.” Syllabus Point 2, *Riley v. Ziegler*, 161 W.Va. 290, 241 S.E.2d 813 (1978).

The Court found no breach of the plea agreement because it did not contain specific sentencing information and the record did not reflect that the sentencing judge had promised a specific sentence in return for the guilty plea. Instead, the Court concluded that the petitioner had not been informed accurately of the possible sentence which may be imposed and therefore could not have intelligently waived his constitutional rights before entering a guilty plea.

Writ granted.

POLICE

Anonymous informant

Corroboration

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

Duty to advise attorney hired

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

Impoundment of vehicle

Inventory search

State v. York, 203 W.Va. 103, 506 S.E.2d 358 (1998)
No. 24477 (Per Curiam)

See SEARCH AND SEIZURE Incident to lawful arrest, (p. 687) for discussion of topic.

Investigatory stop

Game-kill surveys

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

POLICE

Investigatory stop (continued)

Grounds for

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

Search for concealed weapon

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Warrantless search, (p. 685) for discussion of topic.

Search incident to

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

POLICE

Official capacity

Off-duty

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

When the appellant's attempt to cash a check at a store was denied, she became belligerent and was approached by an off-duty municipal policeman who was in uniform and was moonlighting as a security guard at the store. The appellant scuffled with the officer, who restrained her and called for on-duty officers who later arrived and arrested the appellant. Following her conviction in magistrate court of obstructing a police officer, assaulting a police officer and disorderly conduct, she filed an appeal in the circuit court which was dismissed. One ground on which the appellant challenged the convictions for offenses against a police officer was that the off-duty police officer in this case was not acting in his official capacity at the time the incidents occurred.

Syl. pt. 1 - "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).

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." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." Syl. Pt. 1, *University of W.Va. Board of Trustees ex rel. W.Va. Univ. v. Fox*, 197 W.Va. 91, 475 S.E.2d 91 (1996).

POLICE

Official capacity (continued)

Off-duty (continued)

State v. Phillips, (continued)

Syl. pt. 3 - “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. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

Syl. pt. 4 - “It is general law that where a public peace officer, within his territorial jurisdiction, undertakes to discharge a duty which comes within the purview of his office, he is presumed to act in his official capacity. For his services in such connection he may have recompense only as fixed by law. A promise of a third person, whether individual or corporate, to remunerate him for such services is against public policy.” Syl. Pt. 3, *State v. Orth*, 178 W.Va. 303, 359 S.E.2d 136 (1987).

Syl. pt. 5 - A municipal police officer on off-duty status is not relieved of his obligation as an officer to preserve the public peace and to protect the public in general pursuant to West Virginia Code § 8-14-3 (1998). Indeed, such police officers are considered to be under a duty to act in their lawful and official capacity twenty-four hours a day.

Syl. pt. 6 - An off-duty municipal police officer employed by a private entity as a security guard retains his or her official police officer status even in the private employment, unless it is clear from the nature of the officer’s activities that he or she is acting in an exclusively private capacity or engaging in his or her private business. To the extent that syllabus point three of *State v. Orth*, 178 W.Va. 303, 359 S.E.2d 136 (1987), implies that a police officer cannot act in his or her lawful and official capacity while also working privately as a security guard, it is hereby overruled.

Syl. pt. 7 - “A trial court’s refusal to give a requested instruction is reversible only if: (1) the instruction is a correct statement of the 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 given defense.” Syl. Pt. 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

POLICE

Official capacity (continued)

Off-duty (continued)

State v. Phillips, (continued)

The Court took the opportunity to clarify that police officers are considered to be under a duty to act in their lawful and official capacity 24-hours a day when acting within their territorial jurisdiction. It further clarified that this duty includes reacting to criminal activity at all times, and that it can be carried out at the same time that an officer is moonlighting as a security guard, unless it is clear that the officer was acting “in an exclusively private capacity.” The Court distinguished *State v. Orth*, in which the Court was troubled by a moonlighting officer’s delay in serving warrants at his private employer’s request so that other debt collection methods could be tried first. The Court noted that the *Orth* case involved an officer acting at the direction of his private employer, whereas in the instant case the officer exercised his own judgment.

Affirmed.

Records disclosure

Law enforcement internal affairs investigatory materials

McClay v. Jones, ___ W.Va. ___, 542 S.E.2d 83 (2000)
No. 27776 (Scott, J.)

See RECORDS Disclosure in civil case, Law enforcement internal affairs investigatory materials, (p. 663) for discussion of topic.

POLICE

Territorial jurisdiction

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)
No. 25403 (Davis, J.)

City police officer, in uniform and driving a police cruiser, was driving home after his shift had ended when he observed a car being driven erratically. Because he was outside the city limits, he radioed the county sheriff with jurisdiction in the area and asked if a deputy was nearby. When he was informed that no deputy was available, the officer activated his cruiser's lights and siren and stopped the car. He then instructed the driver to wait until a sheriff's deputy could arrive. A deputy later arrived, conducted sobriety tests and arrested the driver.

The driver was subsequently charged with third offense DUI and driving while his license was revoked for DUI. The trial court granted the defendant's motion to suppress all evidence obtained after the stop because the city officer was operating outside his territorial jurisdiction and, therefore, all evidence flowing from the stop was illegally obtained. The court denied the State's motion for a continuance and then granted the defendant's motion to dismiss the indictment because the State was unable to proceed. The State then sought a writ of prohibition.

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 promptly presented.' Syllabus point 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992)." Syllabus point 2, *State ex rel. Sims v. Perry*, 204 W.Va. 625, 515 S.E.2d 582 (1999).

Syl. pt. 2 - A law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen and may make an extraterritorial arrest under those circumstances in which a private citizen would be authorized to make an arrest.

POLICE

Territorial jurisdiction (continued)

State ex rel. State v. Gustke, (continued)

Syl. pt. 3 - Under the common law, a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when that misdemeanor constitutes a breach of the peace.

Syl. pt. 4 - Driving while under the influence of alcohol, a controlled substance or drugs, as prohibited by *W.Va. Code* § 17C-5-2(d) (1996) (Repl. Vol. 1996), constitutes a breach of the peace. Consequently, it is a misdemeanor offense for which a private citizen may arrest.

After an extensive review of cases from other jurisdictions, the Court concluded that (1) the city officer did not have *official* authority to arrest outside his territorial jurisdiction (the Court declined to address the issue raised by the State regarding the effect of *W.Va. Code* § 61-5-14, which makes it a crime to refuse to assist any sheriff in “the apprehending or securing of any person for a breach of the peace... .”); (2) such an officer has only the same common law rights as a private citizen to effect an arrest; (3) under the common law, a private citizen may arrest another who commits a misdemeanor in his presence if that misdemeanor is a breach of the peace and it is in the process of being committed, immediately after it has been committed, or while there is continuing danger of it being committed again;” (4) drunk driving constitutes a breach of the peace; and (5) the fact that the city police officer used the “color of his office,” *i.e.*, police car’s lights and siren and his police uniform, to effect the arrest is irrelevant. On this last point, the Court explained that the “color of office” doctrine only acts to suppress evidence that is gathered by means of the improper assertion of authority. In this case, the city police officer only stopped the car. The evidence was gathered by the deputy sheriff who was authorized to act in that territory.

The Court ruled that the trial court erred in suppressing the evidence gathered after the initial stop and, consequently, a writ was granted prohibiting the court from enforcing its order dismissing the indictment.

Writ granted.

POST-CONVICTION *HABEAS CORPUS* RULES

Application

Discovery

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

This writ of prohibition sought to stop the implementation of the lower court's ruling that the Rules of Civil Procedure rather than the Post-conviction *Habeas Corpus* Rules applied to resolution of a discovery dispute in a habeas proceeding which was pending at the time the habeas rules were adopted.

The habeas petitioner in the underlying case wanted to depose two assistant prosecutors. A party is entitled to discovery as a matter of ordinary course under the Rules of Civil Procedure, whereas discovery is only available when the reviewing court finds it would assist in resolving a factual dispute under the Post-conviction Habeas Rules.

Syl. pt. 1 - "'Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.' Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syllabus point 2, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984).

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

POST-CONVICTION *HABEAS CORPUS* RULES

Application (continued)

Discovery (continued)

State ex rel. Parsons v. Zakaib, (continued)

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 - In proceedings under the West Virginia Post-Conviction Habeas Corpus Act, *W.Va. Code* §§ 53-4A-1 to -11, discovery is available only where a court in the exercise of its discretion determines that such process would assist in resolving a factual dispute that, if resolved in the petitioner's favor, would entitle him or her to relief.

Syl. pt. 4 - When, during the pendency of a proceeding, a new procedural rule is promulgated, or an existing procedural rule is amended, a circuit court, in its discretion, may nevertheless revert to the previous rule where application of the new or amended rule would be impracticable or work injustice in that proceeding. A circuit court should, however, make every effort to apply the new or amended procedural rule to any matter pending at the time the new rule becomes effective.

The Court found that the lower court exceeded its discretion in determining that the Rules of Civil Procedure applied since imposition of the pertinent Habeas Corpus Rule was both feasible and did no injustice to the parties. The Court took the opportunity to explain how any new rules, including amended rules, are to be applied to pending cases as embodied in Syl. pt. 4.

Writ granted, as moulded.

PRIORITY STATUS

Abuse and neglect proceedings

In re Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999)
No. 26639 (Davis, J.)

See ABUSE AND NEGLECT Foster parents, Role in proceedings, (p. 13)
for discussion of topic.

Domestic violence proceedings

In re McCormick, 206 W.Va. 69, 521 S.E.2d 792 (1999)
No. 23971 (Per Curiam)

See MAGISTRATES Discipline, On-call requirements and responsibilities,
(p. 543) for discussion of topic.

PRISON/JAIL CONDITIONS

Computers

Confiscation of

State ex rel. Anstey v. Davis, 203 W.Va. 538, 509 S.E.2d 579 (1998)
No. 25155-25158 (Maynard, J.)

The Court consolidated appeals of five inmates at Mount Olive Correctional Center who complained that respondents took their personal computers without due process of law and in retaliation for litigation brought by inmates.

The Commissioner issued a policy directive giving inmates 30 days to dispose of their computers, after which time they would be seized and sent from the facility.

Syl. pt. 1 - Our standard of appellate review of a circuit court's decision to refuse to grant relief through an extraordinary writ of mandamus is *de novo*.

Syl. pt. 2 - "A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the 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).

Syl. pt. 3 - Prison inmates have no constitutional right to possess personal computers in their cells.

Syl. pt. 4 - "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

Syl. pt. 5 - "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Syllabus Point 3, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

PRISON/JAIL CONDITIONS

Computers (continued)

Confiscation of (continued)

State ex rel. Anstey v. Davis, (continued)

Syl. pt. 6 - To have a property interest, an individual must demonstrate more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement to it under state or federal law. Additionally, the protected property interest is present only when the individual has a *reasonable* expectation of entitlement deriving from the independent source.

Syl. pt. 7 - The elements of an inmate's claim under a retaliation theory are the inmate's invocation of a specific constitutional right, the defendant's intent to retaliate against the inmate for his or her exercise of that right, a retaliatory adverse act, and causation, *i.e.*, but for the retaliatory motive the complained of incident would not have occurred.

Syl. pt. 8 - 95 C.S.R. 2, § 18.5 (1996), which concerns the security of the personal property of prisoners, does not mandate the storing of personal property by prison administrators but merely states the procedures to be followed if personal property is stored.

The Court noted that deference should be shown to prison administrators. *Drake v. Airhart*, 162 W.Va. 98, 245 S.E.2d 853 (1978). Finding neither a constitutional right to possess a computer nor a vested property right, the Court found the Commissioner to be within his rights to make a policy regarding seizure of computers. See *W.Va. Code* §§ 28-5-2 and 28-5-3. No due process of law is required.

Further, the Court found that meaningful access to the courts is not denied. Similarly, the Court rejected the contract-based detrimental reliance claim (*i.e.*, that inmates relied on being able to use computers in their cells) and noted that the individual petitioners here did not state a claim of retaliation for exercising a fundamental constitutional right. Neither did the Court find a duty incumbent on the Commissioner to store the computers.

Writs denied and decision affirmed.

PRISON/JAIL CONDITIONS

Rehabilitation

Constitutional right to

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

State's duty

State ex rel. Sams v. Kirby, ___ W.Va. ___, 542 S.E.2d 889 (2000)
No.'s 26647, 26910, 27308, 27309, 26911 Consolidated (Per Curiam)

The petitioners are inmates sentenced to Department of Correction (DOC) facilities who are serving their sentences in regional or county jails. They sought a writ of mandamus to compel their transfer to a DOC facility in order to participate in the rehabilitative programs to which they are entitled.

Syl. pt. - "Before this Court may properly issue a writ of mandamus three elements must 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 the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." Syl. pt. 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

The Court noted that the Legislature countered prior holdings of the Court with the enactment of Senate Bill 98 during the 2000 legislative session which in effect eliminated the rehabilitative purpose for incarceration and permitted DOC to contract with any county or regional jail to house persons placed in its custody. Nonetheless, the Court found the housing arrangement for the petitioners inappropriate and ordered DOC and the Regional Jail Authority to work with a newly named Special Master to develop a long-range plan to transfer the inmates to DOC facilities. The Special Master is to report to the Court "as soon as practicable" and petitions for writs of mandamus subsequently filed regarding this matter will be held in abeyance until the Court has reviewed the Special Master's report.

Writs granted as moulded.

PRISON/JAIL CONDITIONS

State's duty to incarcerate

State ex rel. Stull v. Davis, 203 W.Va. 405, 508 S.E.2d 122 (1998)
No.s 24459, 24470 & 24472 (McCuskey, J.)

A number of inmates who had been sentenced to the penitentiary but who were still housed in county and regional jails filed a mandamus petition in the Supreme Court seeking transfer to state prison or release. The Division of Corrections contended that it was unable to house all persons committed to its custody because of overcrowding.

Syl. pt. 1 - "Before this Court may properly issue a writ of mandamus three elements must 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 the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." Syllabus point 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

Syl. pt. 2 - "The statutory scheme of this state places a nondiscretionary duty upon the Division of Corrections to incarcerate those inmates who are sentenced to the penitentiary in a state penal facility operated by the Division of Corrections. Hence, the Division of Corrections is prohibited from lodging inmates in a county or regional jail facility absent the availability of space in these facilities once the inmates have been sentenced to a Division of Corrections facility." Syllabus point 1, *State ex rel. Smith v. Skaff*, 187 W.Va. 651, 420 S.E.2d 922 (1992).

The Court granted some relief. Finding a nondiscretionary duty on the part of the State to house all prisoners committed to it, the Court ordered the corrections department to submit: 1) within 60 days a "full and complete plan for the immediate transfer to division facilities of at least 50% of all inmates currently lodged in county and regional jails who are awaiting such transfer"; 2) and as soon as practicable a long range plan for the transfer of all such prisoners.

Writs granted as moulded.

PRIVILEGES

Attorney-client privilege

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

Appellant was convicted of felony-murder in the death of Randall Burge who died as a result of morphine he received a few hours prior to his death.

At trial, the appellant sought to have an attorney who was retained by one of the witnesses testify that his client's testimony was given in return for the prosecution's promise not to seek a third offense DUI charge against the client. At an *in camera* hearing, the attorney invoked attorney-client privilege. The trial court excluded the attorney's testimony, ruling that there was insufficient evidence to show that the witness was aware of the inducement since the relevant conversation between the prosecuting attorney and retained counsel was by telephone without the client participating in the conversation.

The appellant contended on appeal that the **trial court** erred in holding that the client did not testify to anything that could be impeached by the testimony of his attorney; the testimony sought was **not confidential information** subject to the attorney-client privilege; and if the attorney-client privilege did apply to the communication, the client **waived the privilege** when he testified that no inducement was offered for his testimony.

Syl. pt. 4 - A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.

Syl. pt. 5 - Confidential communications made by a client or an attorney to one another are protected by the attorney-client privilege.

Syl. pt. 6 - It is the substance of the communication between an attorney and a client that is protected by the attorney-client privilege and not the fact that there have been communications.

The question was whether the communication was the proffered testimony or merely whether the communication occurred. The Court found the purpose of Anderson's testimony was clearly to impeach Hutsenpiller. The substance of the communication was necessary.

PRIVILEGES

Attorney-client privilege (continued)

State v. Rodoussakis, (continued)

Trial court: In reviewing the *in camera* testimony of the attorney, the Court found that it was general and vague and without more could not conclude that the trial court abused its discretion in excluding the testimony.

Not confidential information: The Court agreed with the appellant's contention that only the substance of an attorney-client communication is protected by the privilege and not the fact that the attorney and the client had communicated. The Court then found that the substance of the communication between the attorney and his client in the instant case was privileged in that any discussion of the State's agreement regarding the client's testimony would involve the attorney as a confidential legal advisor.

Waiver of privilege: The Court noted that the client had not testified about any conversation that he had with his attorney and did not deny any communication between his attorney and the prosecutor regarding the State's proposed agreement. The Court concluded that the client's testimony denying the existence of an agreement with the State was not divulging privileged information and therefore did not serve as a waiver of the attorney-client privilege.

Affirmed.

PROBATION

Revocation proceedings

Rules of evidence not applicable

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

See SENTENCING Enhancement of, No contest plea sufficient, (p. 706) for discussion of topic.

PROHIBITION

Discretionary use to correct or for non-jurisdictional defects

State ex rel. Wright v. Stucky, 205 W.Va. 171, 517 S.E.2d 36 (1999)
No. 25839 (Starcher, C.J.)

See SELF-INCRIMINATION Civil case, Right to assert privilege during discovery, (p. 695) for discussion of topic.

Generally

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865 (2000)
No. 27061 (Davis, J.)

See TERMINATION OF PARENTAL RIGHTS Due process requirements, Incarcerated parent's attendance at dispositional hearing, (p. 786) for discussion of topic.

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

See PLEA AGREEMENT, Limitation on use, When void against public policy, (p. 594) for discussion of topic.

State ex rel. Michael A.P. v. Miller, 207 W.Va. 114, 529 S.E.2d 354 (2000)
No. 26851 (Davis, J.)

See ATTORNEYS Conflict of interest, Prior representation of opposing party witness in related matter, (p. 161) for discussion of topic.

PROHIBITION

Generally (continued)

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review, (p. 795) for discussion of topic.

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

State ex rel. Sims v. Perry, 204 W.Va. 625, 515 S.E.2d 582 (1999)
No. 25629 (Davis, J.)

See RIGHT TO COUNSEL After dismissal of charges, Statements induced by police, (p. 667) for discussion of topic.

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)
No. 25403 (Davis, J.)

See POLICE Territorial jurisdiction, (p. 607) for discussion of topic.

State ex rel. Steven Michael M. v. Merrifield, 203 W.Va. 723, 510 S.E.2d 797 (1998) No. 25190 (Per Curiam)

See JUVENILES Detention, Length of placement in treatment center, (p. 509) for discussion of topic.

West Virginia Department of Military Affairs v. Berger, 203 W.Va. 468, 508 S.E.2d 628 (1998) No. 25140 (Davis, C.J.)

See JUVENILES Transportation to hearings, (p. 531) for discussion of topic.

PROHIBITION

Grounds for

State ex rel. Jessica P. v. Wilkes, 202 W.Va. 323, 504 S.E.2d 150 (1998) No. 24992 (Per Curiam)

See JUVENILES Placement, Findings required, (p. 518) for discussion of topic.

State ex rel. McLaughlin v. Vickers, 207 W.Va. 405, 533 S.E.2d 38 (2000) No. 26835 (Maynard, C.J.)

See *HABEAS CORPUS* Transfer to another court, (p. 401) for discussion of topic.

State ex rel. Steven Michael M. v. Merrifield, 203 W.Va. 723, 510 S.E.2d 797 (1998) No. 25190 (Per Curiam)

See JUVENILES Detention, Length of placement in treatment center, (p. 509) for discussion of topic.

Juveniles

State ex rel. Jessica P. v. Wilkes, 202 W.Va. 323, 504 S.E.2d 150 (1998) No. 24992 (Per Curiam)

See JUVENILES Placement, Findings required, (p. 518) for discussion of topic.

State ex rel. Steven Michael M. v. Merrifield, 203 W.Va. 723, 510 S.E.2d 797 (1998) No. 25190 (Per Curiam)

See JUVENILES Detention, Length of placement in treatment center, (p. 509) for discussion of topic.

PROHIBITION

Juveniles (continued)

West Virginia Department of Military Affairs v. Berger, 203 W.Va. 468, 508 S.E.2d 628 (1998) No. 25140 (Davis, C.J.)

See JUVENILES Transportation to hearings, (p. 531) for discussion of topic.

Prosecuting attorney

Generally

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999) No. 25403 (Davis, J.)

See POLICE Territorial jurisdiction, (p. 607) for discussion of topic.

Grant of new trial

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999) No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

Suppression rulings

State ex rel. Sims v. Perry, 204 W.Va. 625, 515 S.E.2d 582 (1999) No. 25629 (Davis, J.)

See RIGHT TO COUNSEL After dismissal of charges, Statements induced by police, (p. 667) for discussion of topic.

PROHIBITION

Standard for relief

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

See PLEA AGREEMENT, Limitation on use, When void against public policy, (p. 594) for discussion of topic.

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

See TRIAL Continuance beyond term of indictment, Standard for review, (p. 795) for discussion of topic.

Standard for review

State ex rel. Webb v. McCarty, ___ W.Va. ___, 542 S.E.2d 63 (2000)
No. 27765 (Per Curiam)

See COMPETENCY Evaluation prior to trial, (p. 210) for discussion of topic.

PROMPT PRESENTMENT

Confession

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

PROPORTIONALITY

Cruel and unusual

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SENTENCING Cruel and unusual, Proportionality, (p. 701) for discussion of topic.

State v. Williams, 205 W.Va. 552, 519 S.E.2d 835 (1999)
No. 25815 (Per Curiam)

See SENTENCING Cruel and unusual, Proportionality, (p. 702) for discussion of topic.

Sentencing

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Proportionality, Factors to consider, (p. 720) for discussion of topic.

PROPORTIONALITY

Sentencing (continued)

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SENTENCING Cruel and unusual, Proportionality, (p. 701) for discussion of topic.

State v. Williams, 205 W.Va. 552, 519 S.E.2d 835 (1999)
No. 25815 (Per Curiam)

See SENTENCING Cruel and unusual, Proportionality, (p. 702) for discussion of topic.

PROSECUTING ATTORNEY

Appeal

Dismissal of indictment

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

See APPEAL Time for filing, (p. 150) for discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See INDICTMENT Dismissal of, Appeal by State, (p. 430) for discussion of topic.

Burden of proof

Waiver of plea agreement by defendant

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

Conduct at trial

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

The appellant was convicted by a jury of first-degree sexual abuse of an 11-year-old girl. During the trial, the victim's mother testified that her child was afraid of men as a result of the attack. The trial court did not permit the appellant to cross-examine the mother regarding domestic violence petitions which she had filed against her husband in order to rebut the inference that the attack made the child fearful of men. The prosecutor spoke of the victim's fear of men because of the sexual abuse incident in his closing argument.

PROSECUTING ATTORNEY

Conduct at trial (continued)

State v. Graham, (continued)

The appellant contended that the trial court erred in allowing the prosecution to make the statement after denying him the opportunity to cross-examine the mother about the domestic violence petitions.

Syl. pt. 3 - “The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.” Syllabus Point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

The Court did not find that the trial court abused its discretion since the record did not show the prosecutor made any reference to the accused not challenging the mother’s testimony regarding the victim’s fear of men nor did he state that there could be no other reason for the victim’s fear but the sexual abuse incident.

Affirmed.

Comments on defendant’s silence

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000) No. 26657 (Per Curiam)

This appeal is from a conviction of voluntary manslaughter with the use of a firearm for which the appellant was sentenced to a 15 year prison term. Both issues on appeal involve the prosecuting attorney’s commenting on the appellant’s post-*Miranda* silence, once during cross-examination and again during closing argument.

The incident which gave rise to charging the appellant with voluntary manslaughter involved a bar brawl. The appellant was cut on the arm with a knife by the victim and the appellant responded to the attack by shooting the victim in the shoulder. Patrons at the bar attacked the appellant and the appellant said that it was during this scuffle that his gun discharged accidentally and killed the victim. Due to the severe beating he received

PROSECUTING ATTORNEY

Conduct at trial (continued)

Comments on defendant's silence (continued)

State v. Walker, (continued)

from the bar patrons, the appellant was taken to the hospital where a police officer informed him of his *Miranda* rights and asked if the appellant wanted to make a statement. The appellant declined to make a statement but as the officer was leaving the room the appellant stated, "I'm sorry I shot the old man. It was an accident."

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

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." Syllabus point 2, *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996).

Syl. pt. 3 - "Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syllabus point 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

PROSECUTING ATTORNEY

Conduct at trial (continued)

Comments on defendant's silence (continued)

State v. Walker, (continued)

The State argued that the issues raised on appeal were not properly preserved for appeal since defense counsel did not contemporaneously object to the cross examination and no objection was raised during closing argument. The Court, however, found that as long as the trial court had the opportunity to rule on the objection the issue is preserved for appeal. Further, the Court found that objection to the closing argument remarks was not necessary to preserve the issue for appeal. Analogizing from its decision in *Lacy v. CSX Transp. Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999), syl. pt. 3 in which an objection to a motion *in limine* preserved a similar issue regarding the closing argument, the Court said that “to preserve error with respect to objections to closing argument by the State, a defendant need not contemporaneously object when the defendant has previously made an objection concerning the substance of the argument and obtained a ruling on the objection by the trial court.” This clarification was not incorporated as a syllabus point in the *Per Curiam* opinion.

The Court did not agree with the State's contention that the prosecution's cross-examination of the appellant was proper because it involved a prior inconsistent statement. Moreover, the Court said that the unsolicited statements of the appellant at the hospital did not nullify his assertion of his *Miranda* rights. Additionally, the record amply supported the prosecution's improper reference to the appellant's post-*Miranda* silence.

Reversed and remanded.

[The dissent by Maynard and concurrence by Starcher may be noteworthy. Maynard does not agree that the timeliness of objections is not relevant ...under another fact pattern this conclusion may not result especially since the extension of *Lacy v. CSX* was not made a syllabus point and this is a *Per Curiam* opinion. Starcher on the other hand thinks that the silence protection should be extended to pre-*Miranda* statements and “invites” an examination of such in a subsequent case.]

PROSECUTING ATTORNEY

Conduct at trial (continued)

Comment on pre-trial silence

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

Appellant was convicted of first-degree murder in the death of his girlfriend and another man. Despite his confessions to police that he committed both murders, at trial the appellant blamed the murder of his girlfriend on a companion. The prosecutor was allowed to question the appellant with respect to his failure to disclose this explanation in the original confessions.

Appellant claimed he had no duty to explain his initial silence and that the cross-examination constituted impermissible comment on his right to remain silent. The prosecution maintained the questioning was to point out the prior inconsistent statements.

Syl. pt. 8 - “ ‘Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.’ Syl. Pt. 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).” Syl. Pt. 1, *State v. Oxier*, 175 W.Va. 760, 338 S.E.2d 360 (1985).

The Court found the standard in *Doyle v. Ohio*, 426 U.S. 610 (1976) was modified in *Anderson v. Charles*, 447 U.S. 404 (1980) so as to allow cross-examination on prior inconsistent statements.

Affirmed.

Failure to object

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See APPEAL Nonjurisdictional issue, Not reviewed below, (p. 90) for discussion of topic.

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Conduct at trial (continued)

Improper comments to jury

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See APPEAL Failure to object, (p. 77) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

During closing argument in the appellant's trial for murder in which she had asserted a battered woman's syndrome defense, the prosecutor noted the absence of physical symptoms to indicate any abuse and he also questioned whether the appellant was drinking the day of the murder. No objection was made by the defense. Objections were made, however, to the prosecutor's comment that "40 days is not a punishment," an apparent reference to the consequences to a not-guilty-by-reason-of-insanity verdict, and to his characterization of the insanity defense as a "license to kill". Appellant was convicted of second-degree murder.

Syl. pt. 5 - "A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

PROSECUTING ATTORNEY

Conduct at trial (continued)

Improper comments to jury (continued)

State v. Riley, (continued)

Syl. pt. 6 - “Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

The Court declined appellant’s invitation to use plain error review because it found no error in the prosecutor’s comments about the absence of symptoms and drinking beer. With regard to the comments about the insanity defense and its consequence, the Court stated the four part test in *State v. Sugg*, and held without analysis that such comments did not “clearly prejudice the accused or result in manifest injustice”.

Affirmed.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

PROSECUTING ATTORNEY

Conduct at trial (continued)

Improper comments to jury (continued)

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

Appellant had accompanied some female friends to the home of a man (victim) who had invited to pay the girls to strip dance for him. The appellant, a male friend and the girls had decided to trick the victim out of the money and to use force if necessary. When the ruse failed, the appellant and the male friend went into the house and the male friend put a gun to the victim's head and demanded the money. The victim refused and struggled with the men. The girls ran out and heard a gunshot in the house. The men then ran out and, as two of the girls testified, they saw the appellant raise his arm and then heard another gunshot. The victim was found dead of a gunshot wound the next day in his neighbor's yard.

Appellant was tried for first-degree murder and conspiracy to commit a felony. During closing, the prosecutor stated that "where would the State have been in this case if those girls had a good lawyer like [appellant's trial counsel] and they had said 'we ain't telling you nothing -- we got constitutional rights, we ain't telling nothing'. Where would we be? All five of them would be walking the street, wouldn't they?" Appellant's mistrial motion was denied, and he was convicted. On appeal he raised the statement of the prosecutor alluding to the appellant's failure to testify as a violation of his right to remain silent.

Syl. pt. 1 - "Remarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitute reversible error and defendant is entitled to a new trial." Syllabus Point 5, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).

The Court reversed the conviction on the ground that the prosecutor's statements amounted to a reference to appellant's failure to testify, based on (1) the reference to the victim's inability to testify (2) the reference to defense counsel that suggested that he had advised his client not to testify because of his guilt and (3) emphasis on the co-defendants' decision to testify instead of asserting their right to not do so.

Reversed and remanded.

PROSECUTING ATTORNEY

Conduct at trial (continued)

Reference to sexual history

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

Appellant was convicted of first-degree murder in the death of his girlfriend and another man. One argument on appeal was that the conviction should be reversed because improper references of the prosecutor regarding the appellant's sexual activity with younger women inflamed the jury.

The trial record showed that the prosecuting attorney asked if the appellant had slept with a State witness. Defense counsel's objection to the question was sustained and the jury was told to disregard the question. The prosecutor also mentioned in closing argument that the appellant was involved sexually with younger women to which no objection was made by the defense.

Syl. pt. 9 - "Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Syl. pt. 10 - "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)." Syl. Pt. 3, *O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991).

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Conduct at trial (continued)

Reference to sexual history (continued)

State v. Hager, (continued)

The Court summarily concluded that its review of the remarks in light of the test announced in *State v. Sugg* resulted in its finding that reversal was not warranted. It further noted that defense counsel did not object to the remarks made during closing argument and thereby waived the right to complain about them on appeal.

Affirmed.

Conflict of interest

Prior relationship with accused

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

Appellant was convicted of sexual assault in 1994. In a 1997 habeas proceeding, he requested that the circuit court appoint a special prosecutor because one of his trial counsel was currently employed in the prosecutor's office. After holding a hearing, the request was denied and the appellant raised the denial in the appeal of the ruling denying the habeas relief.

Syl. 4 - "Pursuant to Rule 1.11 of the West Virginia Rules of Professional Conduct, the fact that an assistant prosecuting attorney previously represented a criminal defendant while in private practice does not preclude the prosecutor's office as a whole from participation in further prosecution of criminal charges against the defendant, provided that the circuit court has held a hearing on any motion to disqualify filed on this basis and determined that the assistant prosecutor has effectively and completely been screened from involvement, active or indirect, in the case." Syl. Pt. 2, *State ex rel. Tyler v. MacQueen*, 191 W.Va. 597, 447 S.E.2d 289 (1994).

PROSECUTING ATTORNEY

Conflict of interest (continued)

Prior relationship with accused (continued)

State ex rel. Edgell v. Painter, (continued)

State ex rel. Tyler v. MacQueen, permits a prosecuting attorney's office to represent the State in such circumstances if there is a hearing and a showing is made that the former defense counsel has been "effectively and completely screened from involvement, active or indirect, in the case." The Court found no error because the appellant had failed to show that there was not adequate screening. The Court also noted that it was proper for the former counsel now in the prosecutor's office to consult with the other defense trial counsel.

Affirmed.

Discipline

Pretrial publicity

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

Standard for review

Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) No. 24009 (Risovich, J.)

See ATTORNEYS Discipline, Mitigating factors, (p. 186) for discussion of topic.

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Disclosure of evidence

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See EVIDENCE Impeachment of witness, Prior statements, (p. 343) for discussion of topic.

Timeliness

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See EVIDENCE Admissibility, Character of accused, (p. 277) for discussion of topic.

Duty to disclose inducements to witness

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

In a habeas attacking his first-degree murder conviction, the petitioner argued that the State's failure to disclose an agreement with a critical witness regarding charges against that witness should have been grounds for a new trial. Several persons, including a person named Workman, were present at the time the victim was killed, but their stories differed as to who did what. In response to a pre-trial defense discovery motion for any plea agreements with any witnesses, the State denied the existence of any. At an *in camera* hearing held prior to Workman's testimony, the State again denied that there was any agreement with Workman.

At the habeas hearing, the former prosecutor who tried the murder case testified first that he thought there was an agreement with Workman, but later changed his mind. Workman's counsel testified that there was no written agreement, but it was his understanding that helpful testimony would result in the charges against his client being dropped. A former fellow inmate of the petitioner testified that Workman and another person involved in the events surrounding the murder told him that they would not serve time if they got "their story straight." The trial court denied relief.

PROSECUTING ATTORNEY

Duty to disclose inducements to witness (continued)

State ex rel. Yeager v. Trent, (continued)

Syl. pt. 1 - “The prosecution must disclose any and all inducements given to its witnesses in exchange for their testimony at the defendant’s trial. Syl. Pt. 2, *State v. James*, 186 W.Va. 173, 411 S.E.2d 692 (1991).

Syl. pt. 2 - “Although it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict.” Syl. Pt. 2, *In re an Investigation of the W.Va. State Police Crime Lab., Serology Div.*, 190 W.Va. 321 , 438 S.E.2d 501 (1993).

The Court reversed and ordered a new trial. Acknowledging that there was evidence on both sides, the Court resolved the doubt in the petitioner’s favor and found an inducement existed.

Having found a due process violation, the Court discussed whether the failure to disclose the plea agreement was material. Because evidence reflecting on the credibility of a key prosecution witness may amount to an exculpatory matter that is required to be disclosed, see *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989), and because Workman was the only one to testify about certain events during the night of the murder, the Court found that the denial of the defenses’s ability to attack his credibility was sufficiently critical.

Reversed and remanded.

Exculpatory evidence

Failure to disclose

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

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Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

Appellant was convicted of first-degree murder. He claimed the prosecution failed to disclose a letter relating to a plea agreement with a person who had driven the appellant to the crime scene. The results of a polygraph examination of the driver were also withheld.

Appellant requested disclosure of “any statement of any witness that is in this State’s possession that related to the subject matter concerning this charge against Rodney Doman.” The request was predicated on Rule 16 of the Rules of Criminal Procedure. The prosecution disclosed statements of proposed witnesses.

NOTE: Although not listed specifically in a syllabus point, the issue is noted in the discussion.

After the request was made, a plea was struck with the driver. The driver never appeared at trial, nor did his name appear on either the prosecution’s or the defense’s witness list. The Court found Rule 16 did not require disclosure.

Affirmed in part, reversed in part, and remanded with directions.

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

Appellant was convicted of first-degree murder. In a motion for a new trial, he contended that the prosecutor failed to disclose a 19-page statement given by the appellant’s wife regarding their whereabouts on the night of the murder. Two days after the victim’s body was found, the wife gave a one-page statement to the police in which she said that the appellant left their home at 9:30 p.m. on the night of the murder and returned at about midnight or 1:00 a.m. The appellant received this statement. In a 19-page second

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Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Kennedy, (continued)

statement given to the police a year later, the wife described traveling with the appellant to his boss's home on the evening in question and returning to their home at about 9 or 9:30 p.m., after which her husband left again. While not contradicting the first statement, the second statement added some details about the night of the murder. At the hearing on the new trial motion, the appellant's lawyer testified that the second statement was not in the prosecutor's file that he was permitted to examine, but the trial court found that the defendant had not shown this by clear and convincing evidence and denied the motion. In his appeal, the appellant claims the State violated *Brady* by failing to give him access to the second statement.

Syl. pt. 4 - "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).

The Court concluded no due process violation pursuant to *Brady* occurred because the second statement was not inconsistent with the statement that the appellant admits he did receive the first and nothing in the second statement tended to exculpate the appellant.

Affirmed.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

Appellant was convicted of kidnaping and aggravated robbery. His sentences of 30 years for aggravated robbery and life with mercy for kidnaping were to run concurrently.

PROSECUTING ATTORNEY

Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Salmons, (continued)

The appellant was part of a group of persons who decided to find a homosexual man, rob him and steal his car to drive to Florida. The group went to a homosexual bar in Charleston and upon leaving went to the alley behind the bar where they assaulted the victim. The group robbed, beat and forced the victim to accompany them in the victim's car to various destinations in and outside of the state.

The appellant claimed on appeal that a statement given to police by a patron at the bar on the night of the crimes was never provided to the appellant. The potential witness told police that the victim said he was taking the appellant home. The appellant claimed violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Rule 26.2 of the Rules of Criminal Procedure and Rule 612(b) of the Rules of Evidence.

The appellant had requested a "police grand jury report" pursuant to the provisions of Rule 26.2 for purposes of cross-examining the officer who compiled it. The request was denied by the trial court. The appellant argued that had he been allowed to view the report he would have become aware of the witness in question because the report contained that person's statement. Similarly, the appellant argued that had the report been properly produced at trial pursuant to Rule 612(b), he would have become aware of the undisclosed witness.

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." Syl. pt. 17, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - As a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the trial court on a post-trial motion.

PROSECUTING ATTORNEY

Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Salmons, (continued)

Syl. pt. 3 - When a defendant assigns an error in a criminal case for the first time on direct appeal, the state does not object to the assignment of error and actually briefs the matter, and the record is adequately developed on the issue, this Court may, in its discretion, review the merits of the assignment of error.

Syl. pt. 4 - “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).

Syl. pt. 5 - Rule 26.2 of the West Virginia Rules of Criminal Procedure imposes certain conditions for the disclosure of the prior statements of a witness, who is not the defendant, to the adverse party for purposes of impeachment. There are four basic conditions that must be met to require disclosure under Rule 26.2. First, a witness’ prior statement being sought for the purpose of impeaching the direct testimony of that witness must satisfy the definition of a witness’ prior statement pursuant to Rule 26.2(f). Second, the statement must be possessed by the proponent of the witness. Third, the witness’ prior statement must relate to the subject matter of the witness’ testimony on direct examination. Fourth, the prior statement need not be disclosed earlier than the conclusion of the witness’ testimony on direct examination.

Syl. pt. 6 - Rule 26.2(f) of the West Virginia Rules of Criminal Procedure defines “statement” to mean (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness; (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical or other recording or a transcription thereof; or (3) a statement, however taken or recorded or a transcription thereof, made by the witness to a grand jury.

PROSECUTING ATTORNEY

Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Salmons, (continued)

Syl. pt. 7 - Rule 612 of the West Virginia Rules of Evidence enumerates the conditions under which a writing or object used to refresh a witness' memory either (1) while testifying or (2) before testifying may be made available to the adverse party. If the writing or object is used while a witness is testifying, it is mandatory that it be produced. However, if the writing or object is used by the witness before testifying, the determination as to whether the writing or object is to be produced is discretionary with the trial court.

Syl. pt. 8 - For the purposes of Rule 612 of the West Virginia Rules of Evidence, "writing" or "object" includes songs, photographs, sound recordings, and even scents or allusions. It does not matter if the writing or object is an original or a copy.

Syl. pt. 9 - Under Rule 612(b) of the West Virginia Rules of Evidence, if a witness, before testifying, uses a writing or object to refresh his/her memory for the purpose of testifying, then, if the trial court finds that the interests of justice so require, an adverse party is entitled to have the writing or object, if practicable, at the trial.

Syl. pt. 10 - Rule 612(c) of the West Virginia Rules of Evidence provides, in relevant part, that "[i]f it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto."

It was clear from the record that the withheld statement was not known to the defense at trial. Nonetheless, the Court chastised defense counsel for not presenting the issue to the lower court as a motion for a new trial based on newly-discovered evidence under Rule 33 of the Rules of Criminal Procedure rather than raising it for the first time before the Court.

PROSECUTING ATTORNEY

Exculpatory evidence (continued)

Failure to disclose (continued)

State v. Salmons, (continued)

In reviewing the record, the Court concluded that a *Brady* violation did not occur because no evidence showed that the victim was forcibly removed from the bar, making the withheld statement neither exculpatory nor useful for impeachment. The Court also did not find that the trial court abused its discretion in denying the request for the “police grand jury report” and held that the report is not a statement within the meaning of Rule 26.2 (f) of the Rules of Criminal Procedure. Likewise, no abuse of discretion was found with the trial court’s denial of the request to make the report available under Rule 612 of the Rules of Evidence. The Court concluded that Rule 612 is not a rule of discovery and instead is intended as a mechanism to ascertain the credibility of a witness’s memory. Since the testimony of the officer who prepared the report did not relate or allude to the statements of the undisclosed witness, the information the appellant wanted to obtain in the report was irrelevant and under Rule 612 (c) should have been excised by the trial court if it were released to the adverse party.

Affirmed.

Joinder of charges

Discretionary

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

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Joinder of charges (continued)

Mandatory

State v. Jenkins, 204 W.Va. 347, 512 S.E.2d 860 (1998)
No. 24738 (Per Curiam)

See JOINDER Mandatory, Multiple offenses, (p. 472) for discussion of topic.

Prejudicial

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See JOINDER Prejudicial, Discretion of court, (p. 474) for discussion of topic.

Non-disclosure of witness

When prejudicial

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

Appellant was convicted of sexual abuse and sexual assault involving his children and stepchildren.

After abuse and neglect allegations were raised, the appellant's 2 children and 2 stepchildren (ranging in age from infant to 5 years) were removed and placed with a foster family and the foster parents observed the children engaging in inappropriate sexual activity with each other.

One of the children, C.T., was 8 years old at the time of trial and he testified about the details of the sexual acts the appellant made him perform.

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Non-disclosure of witness (continued)

When prejudicial (continued)

State v. James B., (continued)

The appellant claimed that C. T. should not have been allowed to testify because the prosecution failed to disclose him as a witness. The prosecution noted that C. T. was not slated to be a witness until after defense counsel objected to the admission of statements C.T. made to his foster mother. Defense based its objection on violation of his client's constitutional right to cross-examination of his accuser since C.T. was not going to be called as a witness. The State then announced, the day before C.T. testified, that he would be called as a witness.

Syl. pt. 5 - "The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syl. Pt. 1, in part, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

The Court concluded that the trial court did not abuse its discretion in allowing the child to testify because the witness did not cause surprise to the defense on any material issue.

Affirmed.

Personal opinion

Forbidden during closing argument

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

PROSECUTING ATTORNEY

Personal opinion (continued)

Forbidden during closing argument (continued)

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

During closing argument in a trial in which the defendant testified, the prosecutor noted that defense counsel did not deny his client's guilt in either the opening statement or at any time during trial. The trial court sustained defense counsel's objection and told the jury that what either lawyer says "is not evidence in this case". Following the closing argument, the court *sua sponte* instructed the jury that defense counsel did not give "his personal view of whether his client is guilty or is not" because he was not permitted to do so. Defense counsel moved for mistrial after the jury began its deliberations; the motion was denied, and the defendant was convicted.

Syl. pt. 2 - It is improper for a prosecuting attorney to suggest or argue to the jury, directly or indirectly, that defense counsel believes that his or her client is guilty.

The Court applied and further explained the four-part test to determine if improper prosecutorial remarks warrant reversal set forth in *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995):

(1) degree to which the remarks tended to mislead the jury and prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) strength of the State's case; and (4) whether the remarks were deliberately introduced to divert the jury's attention to extraneous matters.

With regard to the prejudicial effect of the remarks, the Court noted that Rule 3.4 of the Rules of Professional Conduct prohibit a lawyer from stating a personal opinion as to the guilt or innocence of an accused.

PROSECUTING ATTORNEY

Personal opinion (continued)

Forbidden during closing argument (continued)

State v. Stephens, (continued)

In two footnotes, the Court suggests that the general deterrence of prosecutorial misconduct is a larger concern than the effect of the misconduct in a particular case. In footnote 5, the Court suggests that the quantum of evidence is irrelevant to the analysis, thereby casting doubt on the continued viability of the third *Sugg* factor. In footnote 6, the Court reiterates the need to deter such misconduct by striking a balance in favor of a mistrial in order to minimize the incentive to engage in such misconduct. The Court's finding that the prosecutor's remarks in the instant case were a "deliberate choice" seems to underlie the opinion.

In finding that the trial court abused its discretion, the Court held that it is improper for a prosecutor to suggest or argue defense counsel's opinion of his client directly or indirectly to the jury. As part of this holding, the Court provided instruction for handling future occurrences of this nature by allowing a trial court to presume that prejudice is caused by such argument as a basis for declaring a mistrial.

Reversed and remanded.

Plea agreement breach

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

State v. Palmer, 206 W.Va. 306, 524 S.E.2d 661 (1999)
No. 26112 (Per Curiam)

See PLEA AGREEMENT Standard for review, (p. 598) for discussion of topic.

PROSECUTING ATTORNEY

Prohibition

When available

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

State ex rel. Sims v. Perry, 204 W.Va. 625, 515 S.E.2d 582 (1999)
No. 25629 (Davis, J.)

See RIGHT TO COUNSEL After dismissal of charges, Statements induced by police, (p. 667) for discussion of topic.

State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)
No. 25403 (Davis, J.)

See POLICE Territorial jurisdiction, (p. 607) for discussion of topic.

Use-immunity procedures

State v. Beard, 203 W.Va. 325, 507 S.E.2d 688 (1998)
No. 24644 (Workman, J.)

See IMMUNITY Subsequent prosecution, Use of testimony, (p. 424) for discussion of topic.

PROSECUTION

Prejudice to State's case

Mistrial for manifest necessity

State ex rel. Bailes v. Jolliffe, ___ W.Va. ___, 541 S.E.2d 571 (2000)
No. 27912 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 554) for discussion of topic.

When commenced

State v. Boyd, ___ W.Va. ___, 543 S.E.2d 647 (2000)
No. 27661 (Maynard, C.J.)

See STATUTE OF LIMITATION Misdemeanor offenses, May be waived,
(p. 730) for discussion of topic.

State v. Leonard, ___ W.Va. ___, 543 S.E.2d 655 (2000)
No. 27909 (Per Curiam)

See STATUTE OF LIMITATION Misdemeanor offenses, Calculation, (p.
729) for discussion of topic.

PUBLIC DEFENDER

Defined

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999)
No. 25823 (McGraw, J.)

See CONDITION OF CONFINEMENT Appointed counsel, (p. 215) for discussion of topic.

Eligible proceeding

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999)
No. 25823 (McGraw, J.)

See CONDITION OF CONFINEMENT Appointed counsel, (p. 215) for discussion of topic.

Non-eligible forfeiture proceeding

State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998)
No. 24582 (Davis, C.J.)

See GUARDIAN AD LITEM Appointment of, Non-eligible forfeiture proceeding, (p. 391) for discussion of topic.

QUESTION OF LAW

Standard for review

DHHR ex rel. Hisman v. Angela D., 203 W.Va. 335, 507 S.E.2d 698 (1998) No. 24670 (Per Curiam)

See ABUSE AND NEGLECT Out-of-state-orders, (p. 26) for discussion of topic.

West Virginia DHHR v. Clark, ___ W.Va. ___, 543 S.E.2d 659 (2000) No. 27915 (Per Curiam)

See JUVENILES Medical and school records, Access, (p. 516) for discussion of topic.

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999) No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999) No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000) No. 26573 (Scott, J.)

See MAGISTRATE COURT When criminal proceeding initiated, (p. 538) for discussion of topic.

QUESTION OF LAW

Standard for review (continued)

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See INDICTMENT Sufficiency of, Neglect of incapacitated adult, (p. 439) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See CONTEMPT Civil, For invoking right against self-incrimination, (p. 224) for discussion of topic.

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

Defendant was convicted after a jury trial of conspiracy to commit grand larceny, breaking and entering an auto, and grand larceny, all three charges arising out of a theft committed with two others of approximately \$8000 worth of audio equipment from an auto. He received consecutive sentences of 1-10 years on the conspiracy conviction, 12 months on the breaking and entering conviction, and 1-10 years on the grand larceny conviction. Defendant appealed the conspiracy sentence on the ground that it exceeded the statutory maximum of 5 years (*W.Va. Code* § 61-10-31).

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).

QUESTION OF LAW

Standard for review (continued)

State v. Cottrill, (continued)

Syl. pt. 4 - “The general rule supported by the weight of authority is that a judgment rendered by a court in a criminal case must conform strictly to the statute which prescribes the punishment to be imposed and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void.’ Point 3, Syllabus, *State ex rel. Nicholson v. Boles*, 148 W.Va. 229[, 134 S.E.2d 576 (1964)].” Syllabus point 1, *State ex rel. Boner v. Boles*, 148 W.Va. 802, 137 S.E.2d 418 (1964), *overruled on other grounds by State v. Eden*, 163 W.Va. 370, 256 S.E.2d 868 (1979).

Syl. pt. 5 - “When a sentence imposed in a criminal case is void, either because of lack of jurisdiction or because it was not warranted by statute for the particular offense, the court may set aside such void sentence and pronounce a valid sentence even though the execution of the void sentence has commenced, and without regard to the time when, or the term within which, such void sentence was imposed.” Syllabus point 6, *State ex rel. Boner v. Boles*, 148 W.Va. 802, 137 S.E.2d 418 (1964), *overruled on other grounds by State v. Eden*, 163 W.Va. 370, 256 S.E.2d 868 (1979).

In the absence of any indication in the sentencing order or transcript of the sentencing hearing as to why the sentence exceeded the statutory maximum, the sentence is void. The Court noted that, although an increased sentence was possible under the recidivist statute (*W.Va. Code* § 61-11-18), the procedure for imposing an enhanced sentence was not followed.

Affirmed in part, reversed in part, and remanded.

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See *MIRANDA WARNINGS*, When required, (p. 552) for discussion of topic.

QUESTION OF LAW

Standard for review (continued)

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See INDICTMENT Dismissal of, Appeal by State, (p. 430) for discussion of topic.

Statutes

Standard for review

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See QUESTION OF LAW Standard for review, (p. 654) for discussion of topic.

QUESTION OF LAW

Statutes (continued)

Standard for review (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See SEXUAL OFFENSES Sexual abuse, Custodian defined, (p. 726) for
discussion of topic.

REASONABLE SUSPICION

Investigatory stop

Game-kill surveys

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

Grounds for

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

RECEIVING STOLEN PROPERTY

Generally

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

Numerous rifles were recovered from appellant's van, and he was convicted of 3 counts of receiving or aiding in the concealment of stolen property.

Syl. pt. 6 - "Under the provisions of *W.Va. Code*, 61-3-18 [1931] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property." Syl. Pt. 9, *State v. Hall*, 171 W.Va. 212, 298 S.E.2d 246 (1982).

The State conceded that only a single count was sustainable because the evidence failed to demonstrate that the defendant received or concealed the rifles at different times or different places.

Reversed and remanded with directions to set aside two of the convictions.

RECIDIVISM

Sentencing

No contest plea sufficient to enhance

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

See SENTENCING Enhancement of, No contest plea sufficient, (p. 706) for discussion of topic.

RECIDIVIST OFFENSES

Uncounseled pleas to prior convictions

State ex rel. Webb v. McCarty, ___ W.Va. ___, 542 S.E.2d 63 (2000)
No. 27765 (Per Curiam)

The petitioner was indicted for third offense shoplifting. Uncounseled, no contest pleas were the basis of the 2 previous shoplifting convictions.

Because a requested competency evaluation was not completed for almost a year after it was granted, the lower court set the case for trial and announced that the trial would proceed whether or not the psychiatric evaluation was done. It was on this basis that a petition for a writ of prohibition was filed.

A challenge to the validity of the 2 prior shoplifting convictions was also raised in the petition. Essentially, the petitioner claimed that the prior convictions should not be considered as the basis of a third offense charge because she should have had the benefit of counsel before making pleas to those charges since they carried a *de facto* risk of incarceration.

Syl. pt. 2 - “When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled.” Syl. pt. 3, *State v. Nichols*, ___ W. Va. ___, 541 S.E.2d 310 (1999).

RECIDIVIST OFFENSES

Uncounseled pleas to prior convictions (continued)

State ex rel. Webb v. McCarty, (continued)

Syl. pt. 3 - “Our holding in *State v. Armstrong*, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the *U.S. Constitution* and article III, section 14 of the *West Virginia Constitution*, ‘an uncounseled misdemeanor conviction, valid under *Scott [v. Illinois]*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.’ *Nichols [v. United States]* [511] U.S. [738], [749], 114 S.Ct. 1921, 1928, 128 L.Ed.2d 745, 755 (1994).” Syl. pt. 3, *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994).

Syl. pt. 4 - “A conviction derived from a plea of *nolo contendere* may be used for purposes of this state’s recidivist sentencing laws.” Syl. pt. 3, *State v. Evans*, 203 W.Va. 446, 508 S.E.2d 606 (1998).

The Court made it clear that the portion of its ruling in *State v. Hopkins* which found that uncounseled misdemeanor convictions for which no jail time was imposed could constitutionally be used as the basis for an increased penalty for a recidivist offense was not overruled by *State v. Nichols*. Although the trial in the instant case had not occurred and a challenge to the sentence was not at issue, in footnote 3 the Court reiterated its holding in *State v. Evans* which upheld the use of pleas of *nolo contendere* for recidivist sentencing.

Writ granted as moulded on other grounds.

RECORDS

Disclosure in civil case

Law enforcement internal affairs investigatory materials

McClay v. Jones, ___ W.Va. ___, 542 S.E.2d 83 (2000)
No. 27776 (Scott, J.)

Three questions were certified to the Court relative to civil discovery of records of a police internal affairs investigation which was conducted by the State Police when police misconduct was alleged. The State Police refused disclosure of the materials based on the argument that they were privileged documents under federal common law as well as statutory and regulatory provisions of the state's Freedom of Information Act.

Syl. pt. 1 - "A common law privilege is accorded the government against the disclosure of the identity of an informant who has furnished information concerning violations of law to officers charged with the enforcement of the law. However, disclosure may be required where the defendant's case could be jeopardized by nondisclosure." Syl. Pt. 1, *State v. Haverty*, 165 W.Va. 164, 267 S.E.2d 727 (1980).

Syl. pt. 2 - The provisions of this state's Freedom of Information Act, West Virginia Code §§ 29B-1-1 to -7 (1998), which address confidentiality as to the public generally, were not intended to shield law enforcement investigatory materials from a legitimate discovery request when such information is otherwise subject to discovery in the course of civil proceedings.

Syl. pt. 3 - Records and information compiled by an internal affairs division of a police department are subject to discovery in civil litigation arising out of alleged police misconduct if, upon an *in camera* inspection, the trial court determines that the requesting party's need for the material outweighs the public interest in maintaining the confidentiality of such information.

Syl. pt. 4 - Before a circuit court is required to engage in an *in camera* inspection of records and information compiled by an internal affairs division of a police department to make a determination regarding the production of such documents through discovery, the party opposing disclosure must first make a substantial threshold showing that specific harms are likely to result from the disclosure of the requested materials.

RECORDS

Disclosure in civil case (continued)

Law enforcement internal affairs investigatory materials (continued)

McClay v. Jones, (continued)

The Court did not find an absolute privilege existed on any grounds. However, the Court found that a balancing of interests needed to occur when disclosure was challenged to such discovery requests in civil proceedings. The Court concluded that when a party opposes disclosure by making a “substantial threshold showing” that specific harm will result from the disclosure, the trial court needs to conduct an *in camera* inspection of the records to determine whether the requesting party’s need for the material outweighs the public interest in maintaining confidentiality of the records.

Certified questions answered.

Juvenile medical and school records

Access

West Virginia DHHR v. Clark, ___ W.Va. ___, 543 S.E.2d 659 (2000)
No. 27915 (Per Curiam)

See JUVENILES Medical and school records, Access, (p. 516) for discussion of topic.

RESTITUTION

Basis for granting

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999)
No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

Fair market value

State v. Kristopher G., 201 W.Va. 703, 500 S.E.2d 519 (1997)
No. 24025 (Per Curiam)

See JUVENILES Restitution, Basis for granting, (p. 527) for discussion of topic.

Juveniles

Fair market value

State v. Kristopher G., 201 W.Va. 703, 500 S.E.2d 519 (1997)
No. 24025 (Per Curiam)

See JUVENILES Restitution, Basis for granting, (p. 527) for discussion of topic.

Source of payment

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999)
No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

RESTITUTION

Source of payment

In re Michael S., 206 W.Va. 291, 524 S.E.2d 443 (1999)
No. 26117 (Stone, J.)

See JUVENILES Restitution, Source of payment, (p. 529) for discussion of topic.

RIGHT TO COUNSEL

After dismissal of charges

Statements induced by police

State ex rel. Sims v. Perry, 204 W.Va. 625, 515 S.E.2d 582 (1999)
No. 25629 (Davis, J.)

In 1995, on the appellant's motion and over the objection of the State, arson charges were dismissed by the magistrate after a preliminary hearing for lack of evidence. Appellant was represented by retained counsel. Two years later, acting on a tip from the appellant's girlfriend that another person had been hired by the appellant to commit the arson, the police obtained the hired person's cooperation.

The hired person went to the appellant's home and elicited incriminating statements from the appellant. Appellant was reindicted on the same charges that had been dismissed in 1995. Appellant moved to suppress the statements. The trial court granted the motion on the ground that "the statement was taken in violation of the defendant's Sixth Amendment right to counsel as established in *Massiah v. United States*, 377 U.S. 201 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977) and their progeny." At the State's request the court also found that the 1995 dismissal of the charges was not done to facilitate the taking of the incriminating statement and that there were no "judicial proceedings of any kind pending" at the time the statement was made. In a second order, the trial court found that the police had induced the statement in circumvention of the appellant's right to counsel which had attached when he had been charged in 1995.

The State sought a writ of prohibition to prohibit the trial court from enforcing the suppression order.

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).

RIGHT TO COUNSEL

After dismissal of charges (continued)

Statements induced by police (continued)

State ex rel. Sims v. Perry, (continued)

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 - “The Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against a defendant whether by way of formal charges, preliminary hearing, indictment, information, or arraignment.” Syllabus point 1, *State v. Bowyer*, 181 W.Va. 26, 380 S.E.2d 193 (1989).

Syl. pt. 4 - Unless a criminal defendant can show that the government has obtained a dismissal of adversarial judicial criminal proceedings against him or her in order to circumvent his or her constitutional rights, once such criminal proceedings have been dismissed, the right to the assistance of counsel granted by the Sixth Amendment to the United States Constitution no longer applies, regardless of whether the defendant is represented by counsel.

The Court held that a defendant’s Sixth Amendment right to counsel does not continue after dismissal of charges on a defendant’s motion to dismiss for insufficient evidence. The Court added that where the State obtains dismissal of the charges and the defendant is able to show that the dismissal was done in order to “circumvent [the defendant’s] constitutional rights”, the right to counsel is unaffected by the dismissal of the charges to the extent that the State may not interrogate the defendant without counsel present nor may it use informants to interrogate the suspect.

RIGHT TO COUNSEL

After dismissal of charges (continued)

Statements induced by police (continued)

State ex rel. Sims v. Perry, (continued)

The Court indicates that the Sixth Amendment right to counsel would *not* terminate if the charges were dismissed by the State “for the specific purpose of continuing its investigation.”

In discussing the appellant’s argument that the use of the informant violated his substantive due process rights, the Court noted that it need not reach the issue because the appellant had adduced no evidence that the police knew he was still represented by counsel.

Finding that the trial court abused its authority and deprived the State of its right to prosecute the case, the Court granted the writ.

Writ granted.

Condition of confinement

State ex rel. White v. Trent, 205 W.Va. 546, 519 S.E.2d 649 (1999)
No. 25823 (McGraw, J.)

See CONDITION OF CONFINEMENT Appointed counsel, (p. 215) for discussion of topic.

RIGHT TO COUNSEL

Failure to inform

Harmless error

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

The petitioner was convicted of first-degree murder with a recommendation of mercy. Her direct appeal of that conviction, based on the same grounds as this petition, had been refused previously as was an appeal of the denial of her *habeas corpus* petition in the circuit court. A federal petition for *habeas corpus* relief included these errors among others and it too was refused.

One of the allegations raised in this post-conviction habeas petition involved the denial of a fair trial due to the trial court's failure to advise the petitioner of her right to testify (*Neuman* instruction).

Syl. pt. 1 - "Our post-conviction habeas corpus statute, *W.Va. Code* § 53-4A-1 *et seq.* (1981 Replacement Vol.), clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with reasonable diligence, discover." Syllabus Point 1, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806 (1984).

Syl. pt. 2 - "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syllabus Point 4, *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).

Syl. pt. 3 - "A violation of *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988), is subject to a harmless error analysis. A rebuttable presumption exists that a defendant represented by legal counsel has been informed of the constitutional right to testify. When a defendant is represented by legal counsel, a *Neuman* violation is harmless error in the absence of evidence that a defendant's legal counsel failed to inform him/[her] of the right to testify, or that the defendant was coerced or misled into giving up the right

RIGHT TO COUNSEL

Failure to inform (continued)

Harmless error (continued)

State ex rel. Hall v. Liller, (continued)

to testify. When a defendant represents him/[her]self at trial, a *Neuman* violation is harmless error where it is shown that the defendant was in fact aware of his/her right to testify and that the defendant was not coerced or misled into giving up the right to testify.” Syllabus Point 15, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

The Court noted that the record was unclear as to whether the petitioner was advised by the trial court of her right to testify. After the petitioner had filed her direct appeal, the State filed a motion to correct the record pursuant to Rule 36 (dealing with clerical mistakes) of the West Virginia Rules of Criminal Procedure. A hearing was held on the motion, after which an order was entered amending the record to indicate that the petitioner had been given her *Neuman* instruction. The Court did not accept this basis to reconstruct a substantive stage of a trial. However, the Court relied on its previous holding in *State v. Salmons*, in finding that even without the instruction such omission is harmless error unless proof is presented that the defendant had been misled or coerced.

Writ denied.

Forfeiture proceeding

State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998)
No. 24582 (Davis, C.J.)

See *GUARDIAN AD LITEM* Appointment of, Non-eligible forfeiture proceeding, (p. 391) for discussion of topic.

RIGHT TO COUNSEL

Waiver after right asserted

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

Appellant was convicted of nonaggravated robbery and sentenced to a prison term of 5 to 18 years.

The incident giving rise to the charge was a purse snatching which occurred in a parking lot. The appellant voluntarily went to the magistrate court the day following the crime and requested appointment of counsel during the initial appearance. According to the appellant, he was suffering from withdrawal symptoms from smoking crack cocaine for 24-hours prior to presenting himself to the magistrate. He was committed to the custody of a police officer for transport to the regional jail. The police officer was aware of the appellant's condition and notified the jail that the appellant might be suffering from withdrawal symptoms. During the transport, the appellant discussed the crime with the officer and informed the officer where he had discarded the purse.

The appellant sought to suppress his confession to the officer on the grounds that he had not waived his right to counsel when the officer began questioning him. The trial judge ruled the statements were voluntarily made without violation of the accused's constitutional rights.

As one of his grounds for appeal, the appellant claimed that the trial court erred in not suppressing the statements.

Syl. pt. 1 - "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syllabus Point 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

Syl. pt. 2 - "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." Syllabus Point 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

RIGHT TO COUNSEL

Waiver after right asserted (continued)

State v. Albright, (continued)

Syl. pt. 3 - “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court found that although conflicting evidence was presented, the record adequately supported the trial court’s conclusion that the appellant had initiated the conversation with the officer and voluntarily discussed the crime with him and thereby served as an effective recantation of his request for counsel.

No error.

RIGHT TO REHABILITATION

Inmates

Due process requires

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

RIGHT TO REMAIN SILENT

Assertion of

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 634) for discussion of topic.

Prior inconsistent statements

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

Testimony at trial

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

RIGHT TO TESTIFY AT TRIAL

Trial

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

Appellant was convicted of aggravated robbery and kidnaping. At trial, the appellant indicated he would not present any evidence. The trial court did not inquire as to whether the appellant knew he had a right to testify, nor whether the appellant was making a knowing, voluntary and intelligent waiver of that right.

Syl. pt. 13 - “A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant’s waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.” Syl. pt. 7, *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988).

Syl. pt. 14 - “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syl. pt. 5, *State v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Syl. pt. 15 - A violation of *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988), is subject to a harmless error analysis. A rebuttable presumption exists that a defendant represented by legal counsel has been informed of the constitutional right to testify. When a defendant is represented by legal counsel, a *Neuman* violation is harmless error in the absence of evidence that a defendant’s legal counsel failed to inform him/her of the right to testify, or that the defendant was coerced or misled into giving up the right to testify. When a defendant represents him/herself at trial, a *Neuman* violation is harmless error where it is shown that the defendant was in fact aware of his/her right to testify and that the defendant was not coerced or misled into giving up the right to testify.

RIGHT TO TESTIFY AT TRIAL

Trial (continued)

State v. Salmons, (continued)

Despite the State's concession that *Neuman, supra*, was violated, the Court found the violation harmless. The Court noted that the record did not show that the appellant was unaware of his constitutional right to testify.

Affirmed.

RULES

Application of new and/or amended rules

State ex rel. Parsons v. Zakaib, 207 W.Va. 385, 532 S.E.2d 654 (2000)
No. 27469 (McGraw, J.)

See POST-CONVICTION *HABEAS CORPUS* RULES Application, Discovery, (p. 609) for discussion of topic.

RULES OF CRIMINAL PROCEDURE

Controlling authority

State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999)
No. 25826 (McGraw, J.)

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

Relationship between circuit court and magistrate court rules

State ex rel. Bosley v. Willet, 204 W.Va. 661, 515 S.E.2d 825 (1999)
No. 25476 (Per Curiam)

See JOINDER Common scheme or plan, Discretionary when charged in magistrate court, (p. 471) for discussion of topic.

SEARCH AND SEIZURE

Anonymous informant

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

Consent for search

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See SEARCH AND SEIZURE Standard for review, (p. 691) for discussion of topic.

Impoundment of vehicle

Inventory search

State v. York, 203 W.Va. 103, 506 S.E.2d 358 (1998)
No. 24477 (Per Curiam)

See SEARCH AND SEIZURE Incident to lawful arrest, (p. 687) for discussion of topic.

Incident to investigatory stop

Grounds for warrantless search

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

County police received an anonymous tip that a man was selling drugs out of a van in a grocery parking lot. The caller described the van. Trooper Williams was then informed by county police that the van matching that description was in the parking lot. As Williams proceeded toward the lot,

SEARCH AND SEIZURE

Incident to investigatory stop (continued)

Grounds for warrantless search (continued)

State v. Brewer, (continued)

he was further informed by another policeman, Sergeant Roberts, that he (Roberts) had heard from a confidential informant that the appellant had been selling crack cocaine from his van and that he kept a loaded pistol in a overhead compartment in the van. Williams and Roberts then stopped a gray van as it was pulling into a restaurant parking lot. After the appellant exited the van, a patdown revealed nothing. Williams then looked in the van, observed an overhead compartment matching the confidential informant's description, opened the compartment and retrieved a loaded pistol. Another policeman arriving on the scene then looked inside the van with a flashlight and observed several rifles on the floor. A search of the van uncovered crack cocaine and 15 rifles.

Brewer's motion to suppress the evidence seized from the van was denied. He was convicted on 3 counts of receiving stolen property (the drug charge was severed).

Syl. pt. 1 - "On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference." Syl. Pt. 3, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 2 - "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." Syl. Pt. 1, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 3 - "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." Syl. Pt. 2, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

SEARCH AND SEIZURE

Incident to investigatory stop (continued)

Grounds for warrantless search (continued)

State v. Brewer, (continued)

Syl. pt. 4 - “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. 4, *State v. Stuart*, 192 W Va. 428, 452 S.E.2d 886 (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. 5, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

The Court found that the initial stop and subsequent search of the van were based on reasonable articulable suspicion of criminal activity.

The Court found that the previously-obtained information from the confidential informant about the appellant’s drug sales, coupled with the anonymous tip about a gray van in the vicinity, provided the necessary reasonable suspicion to justify the initial stop. The Court also found that the anonymous tip and prior information from the confidential informant also justified the search for and seizure of the firearm in the overhead compartment. With regard to the stolen rifles seized from the vans, the Court noted simply that the testimony about their discovery “was properly presented at trial.”

Affirmed in part, reversed in part, and remanded with directions.

SEARCH AND SEIZURE

Incident to investigatory stop (continued)

Grounds for warrantless search (continued)

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

Appellant juvenile was charged with possession of marijuana and given a pre-adjudicatory one-year improvement period which was revoked when he failed to stay in school. He then conditionally admitted possessing marijuana and was placed on probation, reserving the right to appeal the denial of his motion to suppress the marijuana. After probation was revoked on the ground that he once again possessed marijuana, he appealed the suppression ruling.

At the suppression hearing, the facts were that a city police officer was patrolling a school parking lot in response to several calls about students smoking in the lot. He saw the 15-year-old appellant with a cigarette and approached him and the appellant threw the cigarette down. The officer asked a few questions, and the appellant denied having any cigarettes. The officer testified that the appellant was nervous and that for his own and others' safety he patted the appellant down, lifted up the appellant's shirt and saw a baggie of marijuana in his waistband. At no time was the appellant told that he was under arrest. The officer also testified that nothing (beyond the appellant's nervousness, which the officer said was a usual reaction of juveniles who are approached by a policeman) indicated that the appellant posed any danger to anyone.

The circuit court denied the suppression motion, saying that while there was no evidence that the appellant was armed, an officer would generally be justified in patting down or lifting up the shirt of a juvenile whom he observed "committing a misdemeanor offense." The juvenile appealed this ruling on the ground that the search was unreasonable.

SEARCH AND SEIZURE

Incident to investigatory stop (continued)

Grounds for warrantless search (continued)

State v. Matthew David S., (continued)

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. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

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. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Syl. pt. 3 - “ ‘Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. *U.S. Const.* amend. IV., *W.Va. Const.* art. III, § 6.’ Syl. Pt. 3, *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987).” Syl. Pt. 1, *State v. Rahman*, 199 W.Va. 144, 483 S.E.2d 273 (1996).

SEARCH AND SEIZURE

Incident to investigatory stop (continued)

Grounds for warrantless search (continued)

State v. Matthew David S., (continued)

The Court first examined whether the lower court clearly erred in determining that, under the particular circumstances of this case, the officer had an objectively reasonable belief that the appellant was armed and dangerous. Without any analysis beyond reciting the lower court's statement that an officer is generally justified in patting down a juvenile whom he has observed "committing a misdemeanor offense, throw away a cigarette, and if there's a crowd around," the Court found no error.

The Court then discussed the seizure aspect of the appeal because it was unclear whether the officer first felt the baggie and then asked the appellant to raise his shirt or if he only first became aware of it after he asked the appellant to raise the shirt. In either case, given the holding that the patdown was proper, the seizure would have been permissible; if discovered via patdown, then the illicit nature of the baggie would have been "immediately apparent" by touch, and if the baggie was only discovered after the officer raised the appellant's shirt, the seizure was still legal because the raising of the shirt was less intrusive than the patdown.

Affirmed.

Warrantless search

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

This is an appeal of a conviction and sentence for possession with intent to deliver a controlled substance.

SEARCH AND SEIZURE

Incident to investigatory stop (continued)

Warrantless search (continued)

State v. Parr, (continued)

After receiving a tip from a confidential informant regarding the appellant or his twin brother, police drove to the area where the informant said drug trafficking was occurring. As an officer approached the appellant's car, the appellant reached into the pocket of his trousers. The officer reached through the open car window, removed the appellant's hand from the pocket and then the officer reached into the pocket and removed a bag containing crack cocaine.

The appellant claimed that the trial court erred by allowing the admission of evidence from an illegal search.

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." Syllabus point 3, *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987).

The record reflected the officer stated the two reasons he had for reaching into the appellant's pocket were to see if the appellant had a weapon or drugs. The Court concluded that the search was a permissible constitutional intrusion because the officer believed his safety was at risk and the evidence obtained as a result of the search was therefore admissible.

Affirmed.

SEARCH AND SEIZURE

Incident to lawful arrest

State v. York, 203 W.Va. 103, 506 S.E.2d 358 (1998)
No. 24477 (Per Curiam)

Appellant was pulled over for a traffic violation by a city policeman. A radio check revealed that the appellant's license had expired. The officer then decided to arrest the appellant and to impound the vehicle. Prior to having the car towed, the officer noticed two small jewelry boxes on the floor of the car and decided to perform an inventory search prior to the towing. The subsequent search uncovered 2 VCRs in the trunk, one of which had a repair tag containing a local resident's name. The resident was called to the scene and he identified the VCR as his and he also informed the police that his house had been broken into that day. Appellant's motion to suppress the items found in the car was denied and he was convicted of daytime burglary. As a result of post-trial motions, the court realized that the appellant had improperly been required to shoulder the burden of proof in the suppression hearing, and a second suppression hearing was held, leading to the same result.

Syl. pt. 1 - "The right to an inventory search begins at the point where the police have a lawful right to impound the vehicle." Syllabus Point 1, *State v. Goff*, 166 W.Va. 47, 272 S.E.2d 457 (1980).

The Court found that the search fell short under the analysis for impoundment searches outlined in *State v. Goff*. First, the Court held that there was no "reasonable cause" for impoundment. Although the officer testified that the unattended vehicle would have constituted a minor obstruction on the town's narrow road, the Court found that the real reason for the impoundment was the officer's belief that it might contain evidence of a crime. Moreover, even if the impoundment was proper, an inventory search must be prompted by valuables in plain view. The officer had testified that an inventory would have been conducted as standard procedure even if nothing had been visible in the car. The Court further noted that a driver must, upon his arrest near his car, be given a chance to make arrangements to dispose of the car prior to its impoundment.

Reversed and convictions set aside.

SEARCH AND SEIZURE

Investigatory stop

Game-kill surveys

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

The sole issue on appeal is whether the trial court erred by not suppressing evidence obtained by DNR officers when they randomly stopped the appellant's car to conduct a "game-kill" survey. As a result of the trial court's ruling, the defendant entered a conditional plea agreement to plead guilty to the offense of possession of a controlled substance with the intent to deliver, reserving the right to appeal the constitutionality of the search of his car.

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 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, 452 S.E.2d 886 (1994).

Syl. pt. 3 - "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond all reasonable doubt." Syllabus Point 1, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

SEARCH AND SEIZURE

Investigatory stop (continued)

Game-kill surveys (continued)

State v. Legg, (continued)

Syl. pt. 4 - A conservation officer may constitutionally conduct a stop of a vehicle for purposes of allowing the officer to conduct a game-kill survey pursuant to *W.Va. Code*, 20-7-4(5) [1994], or for other law enforcement purposes, so long as the officer has 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.

The Court disagreed with the State's contention that conservation officers are legally empowered by *W.Va. Code* § 20-7-4 to stop any individual or vehicle without articulable reasonable suspicion to conduct game-kill surveys. The Court refused to find the statutory provision regarding the authority to conduct game-kill surveys unconstitutional, however, since the surveys may be carried out without violating constitutional protections.

The Court also explained in footnote 11 that it was not asked to address game-kill checkpoints or roadblocks in this case but suggested that they are analogous to "sobriety checkpoints". Along these lines, the Court suggested that DNR promulgate operational guidelines for game-kill surveys akin to the standards required for sobriety checkpoints in order to satisfy constitutional protections.

Reversed and remanded.

Plain view

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)
No. 26568 (Scott, J.)

The appellant entered a conditional guilty plea to the felony offense of manufacturing a controlled substance, reserving her right to appeal pretrial evidentiary rulings. One of these rulings denied her motion to suppress evidence which thereby precluded the affirmative defenses of compulsion and medical necessity.

SEARCH AND SEIZURE

Plain view (continued)

State v. Poling, (continued)

The appellant was growing marijuana in her home for her personal medicinal use to offset the effects of multiple sclerosis. A police officer arrived at the appellant's home to serve a subpoena on the appellant's husband involving an unrelated matter. While waiting for someone to reply to his knock at the door, the officer looked through the window in the top portion of the door which was at his eye level and he saw marijuana plants. He left the residence when no one answered his knock, obtained a search warrant and then returned to the residence with two other officers to carry out the search in which 21 marijuana plants were photographed, videotaped and then seized. The appellant argued that the police officer's looking through her uncovered front door window amounted to an unjustified warrantless search which should serve to invalidate the search warrant that was obtained and the admission into evidence of the marijuana seized as a result of the search. The prosecution contended that no privacy interests were at stake since the items in question were in plain view and no precautions were taken to obstruct that view. The trial court summarily denied the motion to suppress without stating findings of fact or the basis of the denial.

Syl. pt. 1 - "'The State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as an automobile in motion, searches made in hot pursuit, searches around the area where an arrest is made, things that are obvious to the senses, and property that has been abandoned, as well as searches and seizures made that have been consented to.' Point 1 Syllabus, *State v. Angel*, 154 W.Va. 615 [, 177 S.E.2d 562 (1970)]." Syl. Pt. 4, *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973).

Syl. pt. 2 - "If officers are lawfully present and observe what is then and there immediately apparent, no search warrant is required in such instance, and the testimony by the officers with regard to the evidence which they observed is entirely proper." Syl. Pt. 3, *State v. Angel*, 154 W.Va. 615, 177 S.E.2d 562 (1970).

SEARCH AND SEIZURE

Plain view (continued)

State v. Poling, (continued)

The Court found that the plain view exception applied to the evidence sought to be suppressed and that it was not reversible error for the trial court not to have stated the reasons for its ruling on this motion.

Affirmed.

Reasonable suspicion

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998) No. 25013 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 680) for discussion of topic.

Safety of police officers

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999) No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

Standard for review

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998) No. 23893 (Per Curiam)

Appellants, who matched the description given by a witness to an assault, were walking down a town street about 3 a.m. near the scene of the reported assault when a police officer stopped and asked them where they were going. Satisfied with their response, the officer left. The officer was radioed soon thereafter and told to find the appellants for questioning. He found the appellants nearby and asked them to come to the station house for

SEARCH AND SEIZURE

Standard for review (continued)

State v. Horton & State v. Allen, (continued)

questioning. According to the testimony of the officer at the suppression hearing, the appellants agreed and drove with the officer to the station house when they were placed in separate rooms and read the *Miranda* warning; each then signed a waiver.

After 45 minutes elapsed, the officers at the scene of the crime radioed the officer at the station house and asked him if the appellants would allow their clothing to be examined. According to the officer who was apparently unaware that the victim had been killed, the appellants agreed and were given orange jumpsuits. After a piece of body tissue and some blood were found on the clothing, the appellants were arrested and charged with first-degree murder. Their motion to suppress statements made to the police at the station house prior to their arrest and the evidence obtained from the clothing was denied and they were convicted.

Syl. pt. 1 - “When reviewing a ruling on a motion to suppress, an appellant 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.” Syllabus Point 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

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 law, or, based on the entire record, it is clear that a mistake has been made.” Syllabus Point 2, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

SEARCH AND SEIZURE

Standard for review (continued)

State v. Horton & State v. Allen, (continued)

Syl. pt. 3 - “Whether a consent to search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” Syllabus Point 8, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980).

The Court focused on the alleged detention for questioning at the station house and held that the appellants’ decision to come to the station house, their statements prior to their arrest, and the decision to allow their clothing to be examined, were all voluntary. Inasmuch as neither appellant testified at the suppression hearing, the Court examined the officer’s testimony and found that it supported the finding of voluntariness. The Court deemed it irrelevant that the officer testified that he would not have allowed either appellant to leave the station house because neither attempted to leave nor were they told they could not leave.

Affirmed.

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999) No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

Warrantless search

Incident to investigatory stop

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000) No. 26898 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Warrantless search, (p. 685) for discussion of topic.

SEARCH AND SEIZURE

Warrantless search (continued)

Incident to lawful arrest

State v. York, 203 W.Va. 103, 506 S.E.2d 358 (1998)
No. 24477 (Per Curiam)

See SEARCH AND SEIZURE Incident to lawful arrest, (p. 687) for discussion of topic.

Incident to lawful investigative stop

State v. Matthew David S., 205 W.Va. 392, 518 S.E.2d 396 (1999)
No. 25802 (Per Curiam)

See SEARCH AND SEIZURE Incident to investigatory stop, Grounds for warrantless search, (p. 683) for discussion of topic.

Plain view

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)
No. 26568 (Scott, J.)

See SEARCH AND SEIZURE Plain view, (p. 689) for discussion of topic.

SELF-INCRIMINATION

Civil case

Right to assert privilege during discovery

State ex rel. Wright v. Stucky, 205 W.Va. 171, 517 S.E.2d 36 (1999)
No. 25839 (Starcher, C.J.)

The Wrights were defendants in a civil action involving an assault that was also the basis for criminal charges against them. They moved for a protective order in the civil case to protect them from being required to answer discovery questions that might tend to incriminate them.

The circuit court in the civil action refused to issue such an order with respect to depositions on the ground that their rights against self-incrimination were adequately protected by *W.Va. Code* § 57-2-3, which provides that “[i]n a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.” Concluding that the depositions were “legal examinations” within the ambit of this section, the court ruled that the Wrights would “not be permitted to assert their 5th Amendment Right against self-incrimination with respect to questions posed to them during their civil depositions.” The court also ordered that the deposition transcripts not be disseminated and that all persons attending such depositions be prohibited from discussing information gleaned from the Wrights at such deposition, “outside the context of prosecuting this civil action.” The Wrights sought a writ of prohibition from the Court to prohibit the enforcement of the order barring them from asserting their Fifth Amendment rights.

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.” Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

SELF-INCRIMINATION

Civil case (continued)

Right to assert privilege during discovery (continued)

State ex rel. Wright v. Stucky, (continued)

Syl. pt. 2 - Neither the statutory limitation created by *W.Va. Code, 57-2-3* [1965], nor a protective order under Rule 26(c) of the *West Virginia Rules of Civil Procedure*, provide the “use immunity” protection that permits a court to require a person to answer questions in civil discovery, over a constitutional objection based on the Fifth Amendment to the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution*, where the answers to the questions may be self-incriminating.

The Court explained that the constitutionally based limitation on the use of self-incriminating statements (commonly known as “use immunity”) was broader than the analogous rights conferred by *W.Va. Code § 57-2-3*. Under the state and federal constitutions, self-incriminating testimony cannot be compelled unless “neither the testimony nor its fruits are available in a criminal proceeding.” The statutory provision, on the other hand, addresses only the admissibility of compelled statements in court, but does not address other possible uses, such as in an investigation.

The Court noted that some federal courts have held that a protective order cannot prevent a grand jury from obtaining a civil deposition transcript by subpoena and, further, that it is not clear whether a protective order would bind strangers to the litigation, such as criminal investigators.

The Court also noted, however, that the privilege should ordinarily be invoked in response to specific questions rather than as a blanket refusal to participate in discovery.

The Court concluded that the constitutional privilege against self-incrimination may always be invoked in a civil proceeding, and prohibition may be used to stop the enforcement of any order that seeks to compel self-incriminating testimony in a civil action.

Writ granted as moulded.

SELF-INCRIMINATION

Criminal case

Confession admissibility

In re James L.P., 205 W.Va. 1, 516 S.E.2d 15 (1999)
No. 25343 (Per Curiam)

See ARREST When occurs, (p. 156) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 295) for discussion of topic.

State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)
No. 25006 (Maynard, J.)

See EVIDENCE Admissibility, Confessions, (p. 297) for discussion of topic.

Prosecutorial misconduct

Pre-trial silence

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

SENTENCING

Amendment of statutory penalty

Election by defendant

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

Appellant was convicted of driving on a suspended license and sentenced to 48 hours in jail. He appealed the conviction on the ground of insufficient evidence and the sentence on the ground that the sentencing statute had been amended after the commission of the offense and no longer required a jail term.

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).

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 that our prior cases are inconsistent, they are expressly overruled.” Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

SENTENCING

Amendment of statutory penalty (continued)

Election by defendant (continued)

State v. Cline, (continued)

Syl. pt. 3 - “This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.” Syllabus Point 4, *Wheeling Downs Racing Association v. West Virginia Sportservice, Inc.*, 157 W.Va. 93, 199 S.E.2d 308 (1973).

Syl. pt. 4 - The statute in force at the time of the commission of an offense governs the character of the offense, and generally the punishment prescribed thereby, unless, as provided by our statute, the defendant elects to be punished as provided in an amendment thereof.” Syllabus Point 4, *State v. Wright*, 91 W.Va. 500, 113 S.E. 764 (1922).

Syl. pt. 5 - “When a general savings statute specifically provides for the application of mitigated penalties upon the election of the affected party, he is entitled to choose the law under which he wishes to be sentenced. *W.Va. Code* § 2-2-8.” Syllabus Point 2, *State ex rel. Arbogast v. Mohn*, 164 W.Va. 6, 260 S.E.2d 820 (1979).

Appellant argued that *W.Va. Code* § 17C-15-5a requires every motor vehicle to be “equipped with at least one rear tail lamp...” making the basis for his license suspension and the stop by the police invalid. The Court never reached this statutory issue, stating instead that the offense underlying the suspension was failing to pay the citation. Additionally, the Court found that the license suspension and police stop arguments were deemed waived because they were not raised below. The Court also concluded that the record showed sufficient evidence to support the conviction.

After the appellant was sentenced, the penalty provisions were amended to remove the mandatory 48-hour jail term. *W.Va. Code* § 17B-4-3(a). The Court agreed that *W.Va. Code* § 2-2-8 permits a defendant to elect to be punished under an amendment to the penalty provisions of the statute of conviction.

Affirmed in part, reversed in part, and remanded.

SENTENCING

Concurrent and consecutive

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

Conviction subsequent to acquittal by reason of insanity

State v. Catlett, 207 W.Va. 740, 536 S.E.2d 721 (1999)
No. 25404 (Workman, J.)

See INSANITY Not guilty by reason of, Placement after subsequent conviction, (p. 451) for discussion of topic.

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

See MISTRIAL Manifest necessity, (p. 556) for discussion of topic,

Cruel and unusual

Proportionality

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

SENTENCING

Cruel and unusual (continued)

Proportionality (continued)

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

Defendant was convicted of aggravated robbery, which involved the nighttime robbery of \$1300 from a convenience store clerk with the threatened use a pistol.” He appealed his 30 year sentence on proportionality grounds.

Syl. pt. 7 - “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).

Using the standard two-tier analysis, the Court first found that the sentence did not ‘shock the conscience’ and noted that it was within statutory limits. With regard to the second tier’s objective test, the Court examined four factors and found that the sentence was valid under each:

(1) Nature of offense. The Court noted that the offense was a felony which the appellant committed by using a weapon to threaten the clerk who was alone, the traumatizing effect on the clerk, the use of a mask, and the late hour of the offense.

(2) Legislative purpose. The Court explained that the open-ended punishment of 10 years to life allowed by statute is a recognition of the seriousness of the offense as well as a grant of discretion to permit consideration of aggravating and mitigating circumstances in an individual case.

(3) Comparison with other jurisdictions. The Court looked at a sampling of similar cases from around the country and found similarity with the sentence in this case.

SENTENCING

Cruel and unusual (continued)

Proportionality (continued)

State v. Mann, (continued)

(4) Comparison of punishment in other West Virginia cases. The Court distinguished two aggravated robbery sentences (of 40 and 75 years) that were vacated and in doing so the Court imported several additional factors into the analysis that are based on the individual's circumstances: age, prior record, probation officer's recommendation, effect of the offense on the victim and defendant's expression of remorse.

Affirmed.

State v. Williams, 205 W.Va. 552, 519 S.E.2d 835 (1999) No. 25815 (Per Curiam)

Appellant and 3 friends were invited by a male acquaintance of one of them to strip dance for him for \$100 each. They agreed to come back and do so, but they later agreed among themselves to trick the man by taking the money and leaving on a pretense before they danced. The next day, the appellant and 2 of the others disclosed their plan to 2 male friends who asked to take part, adding that they would use force if the girls' trick was unsuccessful. One of the men mentioned taking a gun, but the appellant said it was unnecessary, and the men agreed not to take it.

The 5 drove to the house and the men stayed in the car while the girls went in. The victim showed them a wad of bills, after which the appellant went out to the car for a moment. Soon after she returned to the house, the men rushed in with a gun and demanded the money. A struggle ensued, and the victim was shot and killed.

Appellant was indicted for murder, and she agreed to cooperate with the prosecution. The State agreed to dismiss the murder charge in return for her guilty plea for attempted aggravated robbery. The State further agreed to advise the court of her cooperation. Appellant was later sentenced to 50 years. On appeal, she claimed that the sentence was disproportionate under the state and federal constitutions.

SENTENCING

Cruel and unusual (continued)

Proportionality (continued)

State v. Williams, (continued)

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. 2 - “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).

The Court conducted the 2-tier analysis governing proportionality for sentences applied to sentencing statutes having no fixed term of punishment.

In applying the subjective test announced in *State v. Phillips*, the Court did not find that the sentence was so offensive that it “shocks the conscience” given all of the circumstances that surrounded the offense. The Court specifically noted that the offense committed was a violent crime resulting in death in which the appellant had set the chain of events in motion and invited the men to accompany the group.

Under the objective test contained in *Wanstreet v. Bordenkircher*, the Court considered: (1) the nature of the offense and the legislative reasons for the punishment allowed, e.g., the potential for violence; and (2) comparable sentences for similar offences. After surveying a number of cases from West Virginia and other jurisdictions involving similar facts, the Court

SENTENCING

Cruel and unusual (continued)

Proportionality (continued)

State v. Williams, (continued)

concluded that the sentence was not disproportionate to the offense. However, in distinguishing two West Virginia cases in which the Court had found the sentences to be disproportionate, the Court indicated that some other factors should be considered as part of the objective analysis: (1) the adult criminal record of the defendant or the lack thereof; (2) use of a weapon; (3) the extent of the victim's injury; (4) association of the defendant with hardened criminals; (5) expression of remorse; and (6) the disparity of sentences among co-defendants.

Affirmed.

Discretion

State v. Shaw, ___ W.Va. ___, 541 S.E.2d 21 (2000) No. 27471 (Per Curiam)

The appellant had just turned 18 when he set 5 fires while he was a member of a volunteer fire department. The fires involved 3 homes, a barn and a trash dumpster. He was indicted on 3 counts of first-degree arson and 3 counts of conspiracy to commit a felony. He pled guilty to 1 count of first-degree arson and 1 count of fourth-degree arson.

Although he was not sentenced as a youthful offender, he began serving his sentence at the Anthony Center. The Center found him "unfit" for continued placement because he was not sentenced pursuant to the Youthful Offenders Act and the Center was unable to provide the medical treatment for his diabetic condition. He was placed in a regional jail to serve his sentence. At this time he filed a motion for reconsideration of sentencing, asserting that he was a good candidate for probation. He appealed the denial of probation, refusal to sentence under the Youthful Offenders Act and denial of the reconsideration motion.

SENTENCING

Discretion (continued)

State v. Shaw, (continued)

Syl. pt. 1 - “In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 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. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syl. pt. 2 - “‘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).” Syl. Pt. 7, *State v. Layton*, 189 W.Va. 470, 432 S.E.2d 740 (1993).

Syl. pt. 3 - “The decision of a trial court to deny probation will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion.” Syl. Pt. 2, *State v. Shafer*, 168 W.Va. 474, 284 S.E.2d 916 (1981).

The appellant cited 11 factors as to why he was a good candidate for probation but made no further argument to advance his claim. Noting that the circuit court is vested with broad discretionary authority to suspend a sentence and place an offender on probation or to commit an offender to a juvenile center, the Court found no abuse of discretion in the instant case. The Court summarily found no abuse of discretion regarding the denial of the reconsideration motion since no ground to support the error was offered by the appellant.

Affirmed.

SENTENCING

Driving under the influence

Alternative sentencing

State v. Yoak, 202 W.Va. 331, 504 S.E.2d 158 (1998)
No. 24505 (Maynard, J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Home confinement, (p. 265) for discussion of topic.

Enhancement

No contest plea sufficient

State ex rel. Webb v. McCarty, ___ W.Va. ___, 542 S.E.2d 63 (2000)
No. 27765 (Per Curiam)

See RECIDIVIST OFFENSES Uncounseled pleas to prior convictions, (p. 661) for discussion of topic.

Enhancement of

No contest plea sufficient

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

Appellant Lewis pled guilty to daytime burglary and second offense DUI. While on probation he pled no contest to a separate domestic battery charge. The circuit court revoked the appellant's probation and he appealed, claiming that Rule 410 of the Rules of Evidence forbade use of the no contest plea in revoking his probation.

SENTENCING

Enhancement of (continued)

No contest plea sufficient (continued)

State v. Evans & State v. Lewis, (continued)

Appellant Evans was found guilty of burglary and petit larceny. Based on 5 prior felony convictions, the prosecution filed an information for enhancement of sentence pursuant to *W.Va. Code* §§ 61-11-18 and 19. Evans was sentenced to life imprisonment. On appeal he argued that his plea of *nolo contendere* to escape and resisting an officer should not be used pursuant to Rule 11(e)(6)(B) of the Rules of Criminal Procedure. The prosecution argued that *W.Va. Code* § 61-11-18 allowed for use of convictions, however obtained.

Syl. pt. 1 - Pursuant to the clear language of Rule 1101(b)(3) of the West Virginia Rules of Evidence, the provisions of this state's rules of evidence are not applicable during criminal proceedings that involve probation revocation.

Syl. pt. 2 - "Where an indictment properly charges a conviction of a first offense as a basis for a superimposed penalty for a second offense therein charged, the record of the first conviction and sentence thereunder, as charged, is sufficient, without respect to defendant's pleas in the first conviction, whether guilty, not guilty or *nolo contendere*." Syl. Pt. 2, *State v. Moss*, 108 W.Va. 692, 152 S.E. 749 (1930).

Syl. pt. 3 - A conviction derived from a plea of *nolo contendere* may be used for purposes of this state's recidivist sentencing laws.

The Court initially disposed of the argument set forth by Appellant Lewis by noting that the Rules of Evidence expressly are inapplicable to probation hearings [Rule 1101(b)(3)].

As to the Evans' appeal the Court held that a conviction obtained as a result of a no contest plea may be used for the purpose of the recidivist sentencing laws. In such instances, the prohibited use of a no contest plea under both the Rules of Evidence and Rules of Criminal Procedure is not at issue because it is not a proceeding to prove the defendant committed the crime.

Affirmed.

SENTENCING

Home confinement

Alternative sentence for third offense DUI

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

Indigents' right to

State v. Shelton, 204 W.Va. 311, 512 S.E.2d 568 (1998)
No. 25019 (McCuskey, J.)

Appellant was convicted of DUI and sentenced to 8 weeks in the regional jail. The sentence was stayed until the appellant could petition for home confinement. Since the appellant was indigent, he petitioned the county commission to pay for the cost of home confinement.

The county commission determined it had no legal authority to pay the costs. Similarly, the circuit court found it had no authority either to order the waiver of the costs nor to order the county commission to pay the costs.

Syl. pt. 1 - "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." Syllabus Point 1, *Robertson v. Goldman*, 179 W.Va. 453, 369 S.E.2d. 888 (1988).

Syl. pt. 2 - "An order for home incarceration of an offender under section four [§ 62-11B-4] of this article shall include . . . [a] requirement that the offender pay a home incarceration fee set by the circuit judge or magistrate. If a magistrate orders home incarceration for an offender, the magistrate shall follow a fee schedule established by the supervising circuit judge in setting the home incarceration fee." *W.Va. Code* § 62-11B-5 (7) [1994].

SENTENCING

Home confinement (continued)

Indigents' right to (continued)

State v. Shelton, (continued)

Syl. pt. 3 - When convicts are otherwise eligible for home incarceration, the setting of a fee for home incarceration by a circuit judge or magistrate, and establishing a fee schedule for home incarceration costs by a supervising circuit judge, must take into account the ability of individual offenders to pay those costs, so that indigents are not unfairly denied access to home incarceration as an alternative form of sentencing.

The Court noted it had previously found a violation of equal protection principles occurred where incarceration was ordered because a convict could not pay a fine [*Hendershot v. Hendershot*, 164 W.Va. 190, 202, n.13, 263 S.E.2d 90, 97, n.13 (1980)] or because a defendant was unable to post bond in a case where the charge did not carry a jail sentence (*Robertson v. Goldman*), 179 W.Va. 453, 369 S.E.2d 888 (1988). The Court held that absent direction in the home incarceration statute [*W.Va. Code* § 62-11B-5(7)] regarding application of the statute to those unable to pay the fees, the sentencing judicial officer has a constitutional duty to take into account the ability of offenders to pay home incarceration fees so that a harsher sentence is not imposed simply because of a person's financial status. Further, the Court found that the home incarceration fee schedule set by supervising circuit judges needs to be flexible to meet these ends.

Vacated and remanded.

Post-conviction bail condition

Credit for time served

State v. McGuire, 207 W.Va. 459, 533 S.E.2d 685 (2000)
No. 27258 (Scott, J.)

See HOME CONFINEMENT Post-conviction bail condition, Credit for time served, (p. 409) for discussion of topic.

SENTENCING

Jail

Place of incarceration

State ex rel. Canterbury v. Mineral County Commission, 207 W.Va. 381, 532 S.E.2d 650 (2000) No. 27328 (Starcher, J.)

The Regional Jail Authority sought to compel a county commission to send its prisoners to serve their jail terms in the regional jail rather than a local incarceration program the county commission had established. The Authority argued that *W.Va. Code* § 31-20-10(g) mandates that where a regional jail is operational, people serving jail sentences have to be incarcerated in the regional jail.

Syl. pt. - *W.Va. Code*, 31-20-10 [1998] requires that all persons serving jail sentences must serve them in a regional jail, when one is available in the region where the sentencing county is located -- subject to an exception for holding facility confinement that is “appropriate under the standards and procedures” for holding facilities. *Id.* Those standards and procedures, *West Virginia Code of State Regulations* 95-3-36.23 [1993], provide for no more than 72-hour confinement in a holding facility.

The Court agreed with the Regional Jail Authority and noted that the statute’s only exception entailed confinement in a holding facility for no more than 72 hours.

Writ granted.

Juvenile

Original sentence imposed when probation revoked

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

SENTENCING

Kidnaping

Factual determination by court

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

Multiple offenses

Same transaction

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

Appellant fled in his car when a city police officer attempted to stop him for a traffic violation. He abandoned his car and hid in another car where he was finally captured and handcuffed. However, he then escaped on foot after scuffling with police. The next day he was spotted at a friend's house but he again fled on foot and eluded the police. Later that same day, he was seen in a neighbor's garage, and the police surrounded the premises. Appellant then stole the neighbor's car, ran it through the garage doors and fled the police until he lost control of the car, crashed and fled on foot. He was finally captured and indicted on 18 counts, including 2 counts of fleeing from an officer in a vehicle and 3 counts of fleeing from an officer by any means other than a vehicle. The jury acquitted on one of the fleeing-in-a-vehicle counts. He was convicted of 13 counts, all misdemeanors, and sentenced to a total of over 7 years in jail, with all the sentences to run consecutively. He appealed the sentences contending that: 1) the consecutive sentences resulted in an aggregate term which constituted cruel and unusual punishments; 2) the sentences violated the constitutional proportionality standards; 3) being sentenced to a jail rather than the penitentiary denied him rehabilitation; and 4) multiple flight convictions and sentences for a single course of conduct exposed him to double jeopardy.

SENTENCING

Multiple offenses (continued)

Same transaction (continued)

State v. Allen, (continued)

Syl. pt. 1 - “As a general rule, . . . 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, in part, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - The plain language of *W.Va. Code* § 61-11-17 (1988) (Repl. Vol. 1997) places the imposition of punishment for misdemeanor offenses within the discretion of the sentencing court where there exists no law otherwise providing for such punishment.

Syl. pt. 3 - “When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively.” Syllabus point 3, *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979).

Syl. pt. 4 - “ ‘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).” Syllabus point 7, *State v. Easton*, 203 W.Va. 631, 510 S.E.2d 465 (1998).

Syl. pt. 5 - “ ‘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).” Syllabus point 8, *State v. Easton*, 203 W.Va. 631, 510 S.E.2d 465 (1998).

SENTENCING

Multiple offenses (continued)

Same transaction (continued)

State v. Allen, (continued)

Syl. pt. 6 - *W.Va. Code* § 61-5-17(b) (1997) (Repl. Vol. 1997) does not prohibit multiple simultaneous convictions for the offense of nonvehicular flight when, during one extended episode of flight, a defendant commits intervening acts of a criminal nature, such that the various instances of flight are separate and distinct occurrences.

Syl. pt. 7 - “A reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice.” Syllabus point 3, *State v. Sprigg*, 103 W.Va. 404, 137 S.E. 746 (1927).

With regard to the cruel and unusual punishment claim, the Court examined the relevant statutes and found that all but the 6-month sentence for joyriding were within the limits prescribed by the statutes. The joyriding statute (*W.Va. Code* § 17A-8-4) under which the appellant was sentenced did not define the punishment for the offense and, therefore, the sentencing judge had discretion to determine the appropriate sentence under the general sentencing provisions of *W.Va. Code* § 61-11-17. The Court also noted that the lower court had discretion to direct that the sentences be served consecutively under *W.Va. Code* § 61-11-21. Finally, the Court found that the Legislature later amended the joyriding statute to include a sentence of up to 6 months. The Court found no error because the sentences were all within statutory limits and there was not a showing that the sentencing court was influenced by some impermissible factor to arrive at its sentencing decision.

The Court also rejected appellant’s proportionality attack on the sentences. Noting that the sentences were presumptively proportionate because they fell within statutory limits, the Court explained that constitutional proportionality standards basically apply only to sentences without maximums or life recidivist sentences (citing *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 531, 276 S.E.2d 205 (1981)) and, further, that other states had approved cumulative sentences for misdemeanor convictions.

SENTENCING

Multiple offenses (continued)

Same transaction (continued)

State v. Allen, (continued)

The Court declined to address the appellant's equal protection argument which claimed that his jail sentences denied him the right to rehabilitation afforded to penitentiary inmates. The Court found that the record was not developed as to differentiate between the programs at the jail as opposed to those offered in prison. In footnote 26, however, the Court added that habeas relief might be available to raise his conditions of confinement argument.

Finally, the Court rejected the argument that the multiple flight convictions/sentences for what he argued was a single course of conduct exposed him to double jeopardy. First, the crimes of fleeing in a vehicle and fleeing by means other than a vehicle clearly contain different elements. Second, the "numerous intervening occurrences" during the 2 day adventure rendered the "various instances of flight as separate and distinct" rather than "one continuous episode of flight."

Affirmed.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See DOUBLE JEOPARDY Legislative intent, Test for, (p. 258) for discussion of topic.

Plea agreement

State ex rel. Gill v. Irons, 207 W.Va. 199, 530 S.E.2d 460 (2000)
No. 26854 (Per Curiam)

See PLEA AGREEMENT Waiver of rights, Accurate information regarding possible sentence, (p. 600) for discussion of topic.

SENTENCING

Plea bargain

Breach of

State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998)
No. 25004 (Davis, J.)

See PLEA AGREEMENT Breach of, Plain error, (p. 590) for discussion of topic.

Presentence investigation and report

When required

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

The appellant was convicted by jury trial of third offense DUI, driving while his license was revoked for DUI and no proof of insurance. At the time the police officer arrested the defendant he also issued a citation for driving on a revoked license and no proof of insurance. The defense had requested a presentence investigation and report which the trial court denied and then immediately imposed sentence without advising the appellant of his right to allocution.

The appellant contended the trial court erred by refusing to order a presentence investigation and report and failing to apprise him of the right to allocution prior to sentencing.

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.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

SENTENCING

Presentence investigation and report (continued)

When required (continued)

State v. Bruffey, (continued)

Syl. pt. 2 - “In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. 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. Questions of law are subject to a *de novo* review.” Syl. Pt. 2, *Walker v. West Virginia Ethics Comm’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. pt. 3 - Rule 32(b) of the West Virginia Rules of Criminal Procedure requires that a presentence investigation be made by the probation officer and a presentence report submitted to the trial court before sentence is imposed on a criminal defendant, unless the defendant waives a presentence investigation and report, or the court finds that the information in the record enables it to meaningfully exercise its sentencing authority, and the court explains on the record its finding that the information in the record enables it to meaningfully exercise its sentencing authority.

Syl. pt. 4 - “Rule 32(a)(1) [now Rule 32(c)(3)(C)] 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. 5 - “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.” Syl. Pt. 6, *State v. Berrill*, 196 W.Va. 578, 474 S.E.2d 508 (1996).

SENTENCING

Presentence investigation and report (continued)

When required (continued)

State v. Bruffey, (continued)

The record showed that the judge believed a mandatory penitentiary sentence was imposed by statute for the conviction of third offense DUI and therefore a presentence investigation and report were unnecessary. The Court noted that this was an erroneous legal conclusion since home incarceration is an allowable alternative sentence to a third offense DUI conviction and warranted reconsideration by the lower court. Additionally, the Court found reversible error in the trial court's denial of the appellant's right to allocution prior to sentencing.

Affirmed in part; reversed in part; and remanded with directions.

Probation revocation

Youthful offender

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999) No. 26349 (McGraw, J.)

Appellant was sentenced to two 18 year sentences for aggravated robbery in 1996. He later filed a motion under Rule 35(b) of the Rules of Criminal Procedure for reduction of sentence, which was granted, and he was committed to the Anthony Center for youthful offenders. He completed the Anthony program and was placed on 3 years probation. After he violated the conditions of probation, it was revoked and he was sentenced to two 25 year concurrent terms. He appealed the increased sentences.

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).

SENTENCING

Probation revocation (continued)

Youthful offender (continued)

State v. Richards, (continued)

Syl. pt. 2 - “ ‘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.’ Syllabus point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).” Syllabus point 1, *Sowa v. Huffman*, 191 W.Va. 105, 443 S.E.2d 262 (1994).

Syl. pt. 3 - “ ‘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.’ Point 2 Syllabus, *Terry v. Sencindiver*, 153 W.Va. 651[, 171 S.E.2d 480 (1969)].” Syllabus point 3, *Bounds v. State Workmen’s Compensation Comm’r.*, 153 W.Va. 670, 172 S.E.2d 379 (1970).

Syl. pt. 4 - Where a criminal defendant has been placed on probation after successfully completing a program of rehabilitation under the Youthful Offenders Act, *W.Va. Code* §§ 25-4-1 to -12, and such probation is subsequently revoked, the circuit court has no discretion under *W.Va. Code* § 25-4-6 to impose anything other than the sentence that the defendant would have originally received had he or she not been committed to a youthful offender center and subsequently placed on probation.

The Court found that the circuit court erred by imposing a harsher sentence than that which was initially contemplated. The Court reached its decision by examining the Youthful Offenders Act (*W.Va. Code* §§ 25-4-1 *et seq.*) and finding that a circuit court is under an obligation to place an offender who successfully completes a youthful offender program on probation and if probation is revoked the circuit court is bound to impose the original sentence. In footnote 5, the Court recognized that not all offenders committed to youthful offender programs receive a definite sentence prior

SENTENCING

Probation revocation (continued)

Youthful offender (continued)

State v. Richards, (continued)

to commitment. In such cases, the Court said that it is impermissible for the circuit court to consider conduct of the offender following successful completion of the program in determining the appropriate sentence to impose; there is no similar limitation placed on the sentencing court when an offender has not successfully completed a youthful offender program.

Reversed and remanded with directions.

Proportionality

Cruel and unusual

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SENTENCING Cruel and unusual, Proportionality, (p. 701) for discussion of topic.

SENTENCING

Proportionality (continued)

Cruel and unusual (continued)

State v. Williams, 205 W.Va. 552, 519 S.E.2d 835 (1999)
No. 25815 (Per Curiam)

See SENTENCING Cruel and unusual, Proportionality, (p. 702) for discussion of topic.

Factors to consider

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

Appellant was convicted of first-degree sexual assault of a minor. He was sentenced to 15 to 35 years in the penitentiary. His motion for reconsideration of the sentence was denied. On appeal he claimed his sentence was unconstitutionally disproportionate to the crime.

Syl. pt. 4 - “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. 5 - “In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

SENTENCING

Proportionality (continued)

Factors to consider (continued)

State v. Goff, (continued)

Appellant noted that the crime involved a chance meeting on a basketball court and that no weapon was used and no physical injury resulted. The Court found that psychological injury to the minor was substantial and concluded “without hesitation” that the crime “shocks the conscience.”

Considering the nature of the offense, the purpose in punishment, comparing punishments for other offenses and the punishments required by other jurisdictions, the Court concluded that the punishment is not disproportional.

Affirmed.

Recidivism

No contest plea sufficient

State v. Evans & State v. Lewis, 203 W.Va. 446, 508 S.E.2d 606 (1998)
No. 25000 (Workman, J.)

See SENTENCING Enhancement of, No contest plea sufficient, (p. 706) for discussion of topic.

Reconsideration

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Reduction, Standard for appellate review, (p. 722) for discussion of topic.

SENTENCING

Reconsideration (continued)

Standard for appellate review

State v. Shaw, ___ W.Va. ___, 541 S.E.2d 21 (2000)
No. 27471 (Per Curiam)

See SENTENCING Discretion, (p. 704) for discussion of topic.

Reduction

Standard for appellate review

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

Appellant, 18 at the time of the offense, was convicted of first-degree sexual assault of a minor and sentenced to 15 to 35 years; his motion for reconsideration of the sentence was denied. At the original sentencing the appellant refused to admit his crime and the court found rehabilitation impossible.

As part of his motion for reconsideration, the appellant admitted his offense and offered evidence at the subsequent hearing that commitment to the Anthony Center for treatment was appropriate. In refusing the motion, the trial court found the risk of further crime substantial and that commitment to Anthony Center would “depreciate the seriousness of the defendant’s crime.”

Syl. pt. 1 - “In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 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. 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

SENTENCING

Reduction (continued)

Standard for appellate review (continued)

State v. Goff, (continued)

Syl. pt. 2 - “Inmates incarcerated in West Virginia state prisons have a right to rehabilitation established by *W.Va. Code* Secs. 62-13-1 and 62-13-4 [1997], and enforceable through the substantive due process mandate of article 3, section 10 of the West Virginia Constitution.” Syl. Pt. 2, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

Syl. pt. 3 - “A sentencing judge, in evaluating a defendant’s potential for rehabilitation and in determining the defendant’s sentence, may consider the defendant’s false testimony observed during the trial.” Syl. Pt. 2, *State v. Finley*, 177 W.Va. 554, 355 S.E.2d 47 (1987).

The Court noted the trial court made four specific findings: (1) that the appellant needed “correctional treatment” best provided by a correctional institution; (2) that the appellant posed a substantial danger; (3) that placement at Anthony Center would make the crime seem less serious than it was; and (4) that the sentence was appropriate based on the appellant’s lack of remorse (both at trial and at sentencing).

The Court rejected the appellant’s contention that his testimony at trial was unconstitutionally used against him. He told the jury under oath that he did not commit the crime. After sentencing, and then only for the purposes of reduction of sentence, he finally admitted his crime. The trial court properly considered the appellant’s false testimony.

The Court noted that no evidence was offered to show that the appellant could not receive appropriate rehabilitation in a correctional facility. Further, the appellant was unable to show that Anthony Center offered a unique sexual rehabilitation program not offered elsewhere.

Affirmed.

SENTENCING

Right to allocution prior to

State v. Bruffey, 207 W.Va. 267, 531 S.E.2d 332 (2000)
No. 26573 (Scott, J.)

See SENTENCING Presentence investigation and report, When required, (p. 715) for discussion of topic.

Waiver of rights

Accurate information regarding possible sentence

State ex rel. Gill v. Irons, 207 W.Va. 199, 530 S.E.2d 460 (2000)
No. 26854 (Per Curiam)

See PLEA AGREEMENT Waiver of rights, Accurate information regarding possible sentence, (p. 600) for discussion of topic.

SEXUAL OFFENSES

Babysitter as “custodian”

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See SEXUAL OFFENSES Sexual abuse, Custodian defined, (p. 726) for discussion of topic.

Evidence

Admissibility of hearsay

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 304) for discussion of topic.

Opinion of sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

Sentencing

Proportionality

State v. Goff, 203 W.Va. 516, 509 S.E.2d 557 (1998)
No. 25009 (Per Curiam)

See SENTENCING Proportionality, Factors to consider, (p. 720) for discussion of topic.

SEXUAL OFFENSES

Sexual abuse

Custodian defined

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

Appellant was charged with sexually molesting a four-year-old child. He allegedly committed the act while he was babysitting the child for a half hour and was thereby charged under *W.Va. Code* §61-8D-5(a), which makes it a separate offense for a “custodian” of a child to molest a child in his “care, custody or control.” He was convicted. On appeal he argued that the trial court erred in failing to direct a verdict on the charge of sexual abuse by a custodian because a babysitter is not encompassed by the term custodian in *W.Va. Code* § 61-8D-5.

Syl. pt. 1 - A babysitter may be a custodian under the provisions of *W.Va. Code*, 61-8D-5 [1998], and whether a babysitter in fact a custodian under this statute is a question for the jury.

The Court employed a *de novo* review of the statutory interpretation argument. Appellant pointed out that the terms “custodian” and “babysitter” are both used in the abuse and neglect statute, *W.Va. Code* §49-1-3(e)(1) and, therefore, a strict construction of the penal statute of conviction should be interpreted to exclude babysitters. However, the Court held that the penal statute under which the appellant was charged could include a babysitter within the term “custodian” who is defined therein as “a person over the age of fourteen years who has or shares actual physical possession or care and custody on a full-time or temporary basis” regardless of a court order or agreement granting custody. The Court also found that the question was properly submitted to the jury (the jury instruction on this point is not reproduced in the opinion).

Reversed and remanded.

SEXUAL OFFENSES

Sufficiency of evidence

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual offenses, (p. 763) for discussion of topic.

SIXTH AMENDMENT

Compulsory process

Disclosure of information

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See DISCOVERY Disclosure of defense witness information, (p. 251) for discussion of topic.

Right to counsel

When terminates

State ex rel. Sims v. Perry, 204 W.Va. 625, 515 S.E.2d 582 (1999)
No. 25629 (Davis, J.)

See RIGHT TO COUNSEL After dismissal of charges, Statements induced by police, (p. 667) for discussion of topic.

STATUTE OF LIMITATION

Criminal cases

Not jurisdictional and subject to waiver

State v. Boyd, ___ W.Va. ___, 543 S.E.2d 647 (2000)
No. 27661 (Maynard, C.J.)

See STATUTE OF LIMITATION Misdemeanor offenses, May be waived, (p. 730) for discussion of topic.

Misdemeanor offenses

Calculation

State v. Leonard, ___ W.Va. ___, 543 S.E.2d 655 (2000)
No. 27909 (Per Curiam)

The appellant was convicted of third offense DUI and driving while his license was revoked for DUI, first offense. Both the felony and misdemeanor offenses were charged by criminal complaint in magistrate court where the appellant waived his right to a preliminary hearing. The misdemeanor charge was dismissed in the magistrate court and became part of the indictment that was obtained a year after the misdemeanor offense was committed.

The lower court refused to dismiss the misdemeanor charge finding that it was not time-barred by the 1-year statute of limitation governing misdemeanor offenses (*W.Va. Code* § 61-11-9) because there had been a “continuance of prosecution” from the magistrate court to the circuit court.

Syl. pt. - “The provision of *Code*, 61-11-9, which provides that ‘A prosecution for a misdemeanor shall be commenced within one year after the offense was committed,***’, read in *pari materia* with *Code*, 62-2-1, which provides that ‘Prosecutions for offenses against the State, unless otherwise provided, shall be by presentment or indictment’ serves to bar a conviction of a misdemeanor had under an indictment for a felony, which embraces the misdemeanor, where the indictment was not returned within one year after the offense charged therein was committed.” Syllabus Point 5, *State v. King*, 140 W.Va. 362, 84 S.E.2d 313 (1954).

STATUTE OF LIMITATION

Misdemeanor offenses (continued)

Calculation (continued)

State v. Leonard, (continued)

The Court first observed that the magistrate's order dismissing the charge without prejudice simply permitted the prosecuting attorney to reinstate the charge in the circuit court. There was no "transfer" between the courts and no continuation of prosecution. The misdemeanor charge was not initiated in the circuit court within the 1-year statute of limitation and therefore was time-barred.

Reversed.

May be waived

State v. Boyd, ___ W.Va. ___, 543 S.E.2d 647 (2000)
No. 27661 (Maynard, C.J.)

Appellant was initially charged by criminal complaint and brought before a magistrate for an initial appearance the same day that the offenses were committed. He was indicted over a year later for the felony offense of possession of a controlled substance with the intent to deliver and 2 related misdemeanor charges. The misdemeanor charges were dismissed as barred by the statute of limitation governing misdemeanor offenses. The jury trial on the remaining felony count resulted in a conviction for the lesser included misdemeanor offense of possession of a controlled substance. In reliance on *State v. King*, 140 W.Va. 362, 84 S.E.2d 313 (1954), the conviction was challenged on appeal as time-barred.

Syl. pt. 1 - The filing of a criminal complaint charging possession with intent to deliver a Schedule I controlled substance, in violation of *W.Va. Code* § 60A-4-401(a), commences prosecution on that offense and tolls the statute of limitations.

STATUTE OF LIMITATION

Misdemeanor offenses (continued)

May be waived (continued)

State v. Boyd, (continued)

Syl. pt. 2 - Inasmuch as Rule 3 of the West Virginia Rules of Criminal Procedure and Rule 3 of the West Virginia Rules of Criminal Procedure for Magistrate Courts provide that a filed complaint is a “charging instrument initiating a criminal proceeding[,]” the holding of Syllabus Point 5 of *State v. King*, 140 W.Va. 362, 84 S.E.2d 313 (1954), is hereby clarified. The statute of limitations does not bar conviction of a lesser included offense when prosecution has earlier commenced by filing a criminal complaint within the statute of limitations. Filing the complaint tolls the running of the statute of limitations.

Syl. pt. 3 - When a defendant is not indicted within one year of the date on which an offense is committed but requests the circuit court to instruct the jury on a time-barred lesser included offense, the defendant by that act waives the statute of limitations defense contained in *W.Va. Code* § 61-11-9.

The Court noted that unlike *State v. King*, the felony prosecution was initiated by criminal complaint which was filed on the same day that the offense occurred. The Court found that the statute of limitation does not bar conviction of a lesser included offense when a criminal complaint is filed within the statutory period. The Court went on further to say that even if the case was time-barred, the appellant waived any time limit defense when he requested a lesser included offense instruction. In reaching this conclusion, the Court announced that the statute of limitation in a criminal case is not jurisdictional and therefore may be waived.

Affirmed.

STATUTE OF LIMITATION

Misdemeanors

When tolled

State v. Boyd, ___ W.Va. ___, 543 S.E.2d 647 (2000)
No. 27661 (Maynard, C.J.)

See STATUTE OF LIMITATION Misdemeanor offenses, May be waived,
(p. 730) for discussion of topic.

STATUTES

Agreement on detainers

Federal statutory construction

State v. Somerlot, ___ W.Va. ___, 544 S.E.2d 52 (2000)
No. 27907 (Scott, J.)

See AGREEMENT ON DETAINERS Dismissal of indictment when trial not held in 180 days, Federal statutory construction, (p. 64) for discussion of topic.

Waiver of time limits

State v. Onapolis, ___ W.Va. ___, 541 S.E.2d 611 (2000)
No. 27060 (Maynard, C. J.)

See AGREEMENT ON DETAINERS Waiver of time limits, (p. 65) for discussion of topic.

Amendment to penalty

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

STATUTES

Change in

Effect on double jeopardy

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

Penalty election

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

Constitutionality

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

Void for vagueness

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See ABUSE AND NEGLECT Constitutionality of statute, Void for vagueness, (p. 6) for discussion of topic.

STATUTES

Contemporaneous statute to control

Penalty election

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998) No. 25057 & No. 25058 (Davis, C.J.)

Appellants were convicted of willful creation by a custodian of an emergency situation for an incapacitated adult and of misdemeanor battery. Appellants worked in a personal care home and were restraining a resident who suffered from schizophrenia and mild retardation and engaged in behavior dangerous to himself and others.

Following the victim's escape from custody and serious self-injury, the home assigned a counselor to monitor the victim. Upon being attacked, the counselor called for help and the appellants responded. For the next 2 hours the appellants repeatedly struck the victim, kicked him and cursed him. Medical records showed numerous contusions but no broken bones.

Following the appellants' conviction, but before sentencing, the Legislature repealed *W.Va. Code* § 9-6-15(b) and enacted *W.Va. Code* § 61-2-29, all relating to abuse of an incapacitated person. Appellants were subsequently sentenced to one year for battery and an indeterminate term of 2 to 10 years for creation of an emergency.

Syl. pt. 2 - "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syllabus point 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 4 - "The statute in force at the time of the commission of an offense governs the character of the offense, and generally the punishment prescribed thereby, unless, as provided by our statute, the defendant elects to be punished as provided in an amendment thereof." Syllabus point 4, *State v. Wright*, 91 W.Va. 500, 113 S.E. 764 (1922).

STATUTES

Contemporaneous statute to control (continued)

Penalty election (continued)

State v. Easton & State v. True, (continued)

Syl. pt. 5 - “[A] change in the definition and penalty of [a] crime is not a change in the procedure for the punishment thereof as is contemplated in Sec. 9, Chap. 13, Code [current *W.Va. Code* § 2-2-8 (1923) (Repl. Vol. 1994)], which provides that where a law is repealed, the offense committed or penalty or punishment incurred before the repeal took effect shall not be affected, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place.” Syllabus point 2, in part, *State v. Sanney*, 91 W.Va. 477, 113 S.E. 762 (1922).

Syl. pt. 6 - When a criminal defendant is convicted of a crime and the penal statute defining the elements of the crime and prescribing the punishment therefor is repealed or amended after his/her conviction of the crime but before he/she has been sentenced therefor, the sentencing court shall apply the penalties imposed by the statute in effect at the time of the offense, except where the amended penal statute provides for lesser penalties. If the amended penal statute provides lesser penalties for the same conduct proscribed by the statute in effect at the time of the offense, the defendant shall have an opportunity to elect under which statute he/she wishes to be sentenced, consistent with the statutory mandate contained in *W.Va. Code* § 2-2-8 (1923) (Repl. Vol. 1994) and our prior directive set forth in Syllabus point 2 of *State ex rel. Arbogast v. Mohn*, 164 W.Va. 6, 260 S.E.2d 820 (1979).

The Court found that former *W.Va. Code* 9-6-15(b) and related definitive provisions in *W.Va. Code* § 9-6-1 set forth the elements of the crime with sufficient particularity to put persons on notice of the proscribed conduct and the penalties which may be imposed.

STATUTES

Contemporaneous statute to control (continued)

Penalty election (continued)

State v. Easton & State v. True, (continued)

The Court noted that the statute in force at the time of the offense usually governs the offense and punishment but reiterated that a lesser sentence could be imposed when the sentencing provisions in a later enacted statute are less stringent. Here, the new statute did not include the crime of willful creation of an emergency situation; further, since the appellants were not punished prior to the new statute taking effect, the appellants argued that they cannot now be sentenced under a repealed statute.

The Court relied on *State ex rel. Arbogast v. Mohn*, 164 W.Va. 6, 260 S.E.2d 820 (1979) in holding that when a person is convicted under a statute which is amended or repealed after the conviction but before sentencing occurs, the sentencing court is to apply the penalties imposed by the statute in effect at the time the offense was committed unless the statutory amendment provides for a lesser penalty.

Affirmed.

De novo review

State v. Cottrill, 204 W.Va. 77, 511 S.E.2d 488 (1998)
No. 25203 (Per Curiam)

See QUESTION OF LAW Standard for review, (p. 654) for discussion of topic.

Kidnaping

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

STATUTES

Mandatory connotation of “shall”

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

Notice of prohibited conduct

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

Ordinance

Certainty and definiteness

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

See STATUTES Ordinance, Constitutionality, (p. 739) for discussion of topic.

STATUTES

Ordinance (continued)

Constitutionality

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

This case involved the appeal of a final order which upheld a Charleston curfew ordinance as constitutional and valid under the laws of the state. The appellants claimed that the ordinance violated *W.Va. Code* § 49-5-8(b) because it allowed juveniles to be taken into custody without warrant or court order. They also asserted that the ordinance deprived them of the constitutional guarantees of equal protection, freedom of speech and association, due process and unreasonable searches and seizures. Some of the appellants argued that the ordinance also interfered with the constitutional right to parental privacy.

Syl. pt. 1 - “When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.” Syllabus point 3, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967).

Syl. pt. 2 - “The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

Syl. pt. 3 - “A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syllabus point 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 4 - “Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute.” Syllabus point 2, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

STATUTES

Ordinance (continued)

Constitutionality (continued)

Sale v. Goldman, (continued)

Statutory violation claim. The Court found that the legislative authority to create ordinances generally and curfew ordinances specifically was contained in *W.Va. Code* §§ 8-12-5 (44) and 7-1-12 respectively. The Court also found that the authority to enforce ordinances flowed from the grant of authority to establish them. In examining the enforcement provisions of the ordinance, the Court found them to be in concert with the restrictions of *W.Va. Code* 49-5-8(b) in that both allowed a police officer to take a juvenile into custody with or without a warrant or court order if the offense is committed in the officer's presence.

Constitutional Challenges. The Court applied a rational basis analysis to the due process claim and concluded that the restriction the ordinance places on free movement of juveniles was rationally related to the city's legitimate interest in the welfare of juveniles. While the Court concluded that a rational basis analysis was the proper standard of review for claims of youth based on discrimination, it deemed the equal protection argument waived since no substantive argument was set forth by the appellants. The claim involving unreasonable search and seizure was also deemed waived for similar reasons as reflected in footnote 22.

The Court did not find the ordinance to be unconstitutionally vague because it did not state the precise activities excepted from its scope. One of the exceptions examined by the Court included reference to the First Amendment rights of free exercise of religion, freedom of speech and the right of assembly. The Court found that the parameters of the First Amendment exception were best tested on a case-by-case basis. The vagueness challenge also related to undefined terms in the ordinance. The Court found that some of the terms in question were defined within the ordinance and the meaning of the remaining terms would be known by persons of ordinary intelligence.

On the parental rights issue, the Court found that the ordinance's impact on parental rights was too minimal to be an unconstitutional infringement.

Affirmed.

STATUTES

Ordinance (continued)

Notice of prohibited conduct

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

See STATUTES Ordinance, Constitutionality, (p. 739) for discussion of topic.

Overdose of a controlled substance

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

Penalty change

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

STATUTES

Penalty election

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

Receiving stolen property

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See RECEIVING STOLEN PROPERTY Generally, (p. 659) for discussion of topic.

Sentencing

Discretion when statute silent

State v. Allen, ___ W.Va. ___, 539 S.E.2d 87 (1999)
No. 25980 (Davis, J.)

See SENTENCING Multiple offenses, Same transaction, (p. 711) for discussion of topic.

STATUTES

Standard for review

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See SEXUAL OFFENSES Sexual abuse, Custodian defined, (p. 726) for
discussion of topic.

Statutory construction

State ex rel. Canterbury v. Mineral County Commission, 207 W.Va. 381,
532 S.E.2d 650 (2000) No. 27328 (Starcher, J.)

See SENTENCING Jail, Place of incarceration, (p. 710) for discussion of
topic.

Ambiguous criminal statute

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See STATUTES Statutory construction, Generally, (p. 744) for discussion
of topic.

STATUTES

Statutory construction (continued)

Constitutionality

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See ABUSE AND NEGLECT Constitutionality of statute, Void for vagueness, (p. 6) for discussion of topic.

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

Generally

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514) for discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

Former State Police serologist indicted on multiple counts of obtaining money “from another” under false pretenses, as proscribed by *W.Va. Code* § 61-3-24(a) & (b). The crux of the charges was that the defendant provided false reports and testimony in criminal cases and in so doing took his salary (from the State) or expert witness fees (from a county commission) “with intent to defraud the State” because he had taken an oath to uphold the laws of the State. The trial judge dismissed the indictment on alternative grounds: (1) the conduct charged was not violative of the statute cited in the indictment because (a) the “another” from whom the money was allegedly obtained refers to “another person” and (b) based on an earlier zoning case

STATUTES

Statutory construction (continued)

Generally (continued)

State v. Zain, (continued)

in which the term “person” was held to not include the State, neither the State nor public corporations are “persons” within the meaning of the statute; and (2) the indictment was too vague because it did not state with particularity the amount of salary received fraudulently and, further, the conduct charged could lead to indictments under the same statute for such conduct as napping on the job. The State appealed.

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.” Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. pt. 3 - The State of West Virginia and its political subdivisions are within the meaning of the terms “person” and “another” as those terms are used in *W.Va. Code* §§ 61-3-24(a) and (b) (1981) (Repl. Vol. 1984), *W.Va. Code* §§ 61-3-24(a) and (b) (1988) (Repl. Vol. 1989) and *W.Va. Code* §§ 61-3-24(a) and (d) (1994) (Repl. Vol. 1997).

Syl. pt. 4 - “In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant.” Syllabus point 5, *State ex rel. Morgan v. Trent*, 195 W.Va. 257, 465 S.E.2d 257 (1995).

Syl. pt. 5 - “ “ “ “ “The primary object in construing a statute is to ascertain and give effect to the intent of the legislature.’ Syl. Pt. 1, *Smith v. State Workmen’s Compensation Com’r.*, 159 W.Va. 108, 219 S.E.2d 361 (1975).” Syl. Pt. 2, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).’ Syllabus point 2, *Lee v. West Virginia Teachers Retirement Board*, 186 W.Va. 441, 413 S.E.2d 96 (1991).” Syl. pt. 2, *Francis O. Day Co., Inc. v. Director, Division of Environmental Protection*, 191 W.Va. 134, 443 S.E.2d 602 (1994).’ Syllabus point 4, *Hosaflook v. Consolidation Coal Co.*, 201 W.Va. 325, 497 S.E.2d 174 (1997).” Syllabus point 3, *West Virginia Department of Military Affairs and Public Safety, Division of Juvenile Services v. Berger*, 203 W.Va. 468, 508 S.E.2d 628 (1998).

STATUTES

Statutory construction (continued)

Generally (continued)

State v. Zain, (continued)

Syl. pt. 6 - “ ‘Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.’ Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States, a Corporation*, 144 W.Va. 137, 107 S.E.2d 353 (1959).” Syllabus point 5, *State ex rel. Goff v. Merrifield*, 191 W.Va. 473, 446 S.E.2d 695 (1994).

Applying a *de novo* standard of review to the statutory construction argument, the Court first noted that the rule of lenity, which requires courts to construe penal statutes in favor of the defendant, cannot be used to yield an absurd result. Using traditional methods of statutory construction to ascertain legislative intent, the Court explained why excluding the State from the ambit of possible victims under *W.Va. Code* § 61-3-24 “defied common sense”: (1) there is no general statute criminalizing fraud against the State; (2) the term “person” is commonly understood to have a broader meaning than a natural person; (3) many other statutes in the Code specifically define “person” to include the State; (4) other jurisdictions have included the State as a possible victim in similar fraud statutes; and (5) the case relied on by the circuit court was distinguished as involving a zoning dispute with the sovereign rather than a crime against the State.

With regard the vagueness basis of the dismissal, the Court simply noted that any problem regarding what amounts were fraudulently obtained could be cleared up by a bill of particulars. Regarding the trial court’s concern that the use of the statute to indict State employees for napping on the job or lying to a superior, the Court stated that these were simply not the facts at issue in this case, adding that the charged conduct subjected numerous defendants to unwarranted convictions.

Reversed and remanded.

STATUTES

Statutory construction (continued)

Legislative intent

State ex rel. Canterbury v. Paul, 205 W.Va. 665, 520 S.E.2d 662 (1999)
No. 25890 (Maynard, J.)

See COURT COSTS Magistrate court, Assessed upon guilty plea, (p. 228)
for discussion of topic.

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See STATUTES Statutory construction, Generally, (p. 744) for discussion
of topic.

West Virginia Department of Military Affairs v. Berger, 203 W.Va. 468,
508 S.E.2d 628 (1998) No. 25140 (Davis, C.J.)

See JUVENILES Transportation to hearings, (p. 531) for discussion of
topic.

STATUTES

Statutory construction (continued)

Undefined words and terms

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See ABUSE AND NEGLECT Child abuse creating risk of injury, Risk defined, (p. 4) for discussion of topic.

“Unit of prosecution” for uttering

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

The appellant entered a plea agreement in which she pled guilty to uttering charges in exchange for dismissal of the remaining charges of forgery and obtaining goods by false pretenses. At the plea hearing, it was established that the appellant altered the amounts of several money orders, forged endorsements on each and presented them at a bank for deposit and cash. The appellant received a sentence of 1 to 10 years of imprisonment for each of the 10 counts of uttering; 8 of the sentences were to run consecutively and 2 were to run concurrently with the 8. The conviction and sentence were not appealed.

The appellant petitioned the circuit court twice for a writ of *habeas corpus* contending that the consecutive sentences imposed violated double jeopardy principles by imposing multiple punishments for a single crime. Both of these petitions were dismissed without hearing. She then filed a habeas petition with the Supreme Court which was granted for the purpose of directing the circuit court to conduct an omnibus habeas hearing. At the conclusion of omnibus hearing, the circuit court ruled that the appellant’s double jeopardy claim had not been waived when she entered a guilty plea and the uttering charges to which she pled guilty constituted one continuous transaction. To remedy the sentencing error, the court ordered from the bench that all ten counts be served concurrently; however, the written order imposed 2 consecutive terms. The appellant filed a motion to correct this sentence but it was never acted on and this appeal was filed.

STATUTES

Statutory construction (continued)

“Unit of prosecution” for uttering (continued)

State v. Green, (continued)

The appellant’s contention in this appeal is that since the lower court determined that her guilty plea was to one continuous transaction then the multiple sentences imposed violated double jeopardy principles which should be remedied by reducing her sentence to a single 1 to 10 year term. The State cross-assigned error and claimed that the lower court incorrectly ruled that uttering several instruments during one transaction constituted a single crime.

Syl. pt. 1 - “In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. 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. Questions of law are subject to a *de novo* review.” Syl. pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995).

Syl. pt. 2 - “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. 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.” Syl. pt. 3, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996).

Syl. pt. 4 - “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).

STATUTES

Statutory construction (continued)

“Unit of prosecution” for uttering (continued)

State v. Green, (continued)

Syl. pt. 5 - “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).

The Court noted that what constitutes a “unit of prosecution” for uttering had not been defined previously. It further determined that when double jeopardy claims involve multiple charges under the same statutory provision the intent of the Legislature has to be determined in order to define the unit of prosecution. The *Blockburger* test is not applicable to such double jeopardy claims. The Court concluded it is clear under the language of *W.Va. Code* § 61-4-5 (a) that the unit of prosecution for uttering is each time a person utters a forged document. In so finding, the Court reversed the ruling of the lower court which found the appellant’s multiple convictions to be a double jeopardy violation.

Reversed and remanded.

Sufficiency of notice

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See STATUTES Contemporaneous statute to control, Penalty election, (p. 735) for discussion of topic.

STATUTORY CONSTRUCTION

Agreement on Detainers

Federal issue

State v. Somerlot, ___ W.Va. ___, 544 S.E.2d 52 (2000)
No. 27907 (Scott, J.)

See AGREEMENT ON DETAINERS Dismissal of indictment when trial not held in 180 days, Federal statutory construction, (p. 64) for discussion of topic.

Ambiguous criminal statute

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See STATUTES Statutory construction, Generally, (p. 744) for discussion of topic.

Constitutionality

State v. Bull, 204 W.Va. 255, 512 S.E.2d 177 (1998)
No. 25179 (Starcher, J.)

See ABUSE AND NEGLECT Constitutionality of statute, Void for vagueness, (p. 6) for discussion of topic.

State v. Legg, 207 W.Va. 686, 536 S.E.2d 110 (2000)
No. 26732 (Starcher, J.)

See SEARCH AND SEIZURE Investigatory stop, Game-kill surveys (p. 688) for discussion of topic.

STATUTORY CONSTRUCTION

Generally

In re Greg H., ___ W.Va. ___, 542 S.E.2d 919 (2000)
No. 27769 (Per Curiam)

See JUVENILES Improvement period, Juvenile referee limitations, (p. 514)
for discussion of topic.

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

See STATUTES Ordinance, Constitutionality, (p. 739) for discussion of
topic.

State ex rel. Canterbury v. Mineral County Commission, 207 W.Va. 381,
532 S.E.2d 650 (2000) No. 27328 (Starcher, J.)

See SENTENCING Jail, Place of incarceration, (p. 710) for discussion of
topic.

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for
discussion of topic.

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See STATUTES Statutory construction, Generally, (p. 744) for discussion
of topic.

STATUTORY CONSTRUCTION

Kidnaping

Legislative intent

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

Legislative intent

State ex rel. Canterbury v. Paul, 205 W.Va. 665, 520 S.E.2d 662 (1999)
No. 25890 (Maynard, J.)

See COURT COSTS Magistrate court, Assessed upon guilty plea, (p. 228)
for discussion of topic.

Sale v. Goldman, ___ W.Va. ___, 539 S.E.2d 446 (2000)
No. 27315 (Per Curiam)

See STATUTES Ordinance, Constitutionality, (p. 739) for discussion of
topic.

State v. King, 205 W.Va. 422, 518 S.E.2d 663 (1999)
No. 25813 (Maynard, J.)

See KIDNAPING Sentencing, (p. 533) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

STATUTORY CONSTRUCTION

Legislative intent (continued)

State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999)
No 26194 (Davis, J.)

See STATUTES Statutory construction, Generally, (p. 744) for discussion of topic.

West Virginia Department of Military Affairs v. Berger, 203 W.Va. 468, 508 S.E.2d 628 (1998) No. 25140 (Davis, C.J.)

See JUVENILES Transportation to hearings, (p. 531) for discussion of topic.

Mandatory connotation of “shall”

In re Sims, 206 W.Va. 213, 523 S.E.2d 273 (1999)
No. 25957 (Per Curiam)

See ATTORNEYS Discipline, Pretrial publicity, (p. 188) for discussion of topic.

State v. Richards, 206 W.Va. 573, 526 S.E.2d 539 (1999)
No. 26349 (McGraw, J.)

See SENTENCING Probation revocation, Youthful offender, (p. 717) for discussion of topic.

STATUTORY CONSTRUCTION

Plain meaning

Uttering

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000)
No. 27000 (Per Curiam)

See STATUTES Statutory construction, “Unit of prosecution” for uttering, (p. 748) for discussion of topic.

Receiving stolen property

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See RECEIVING STOLEN PROPERTY Generally, (p. 659) for discussion of topic.

Undefined words and terms

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See ABUSE AND NEGLECT Child abuse creating risk of injury, Risk defined, (p. 4) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Accessory before the fact

Instructions

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See INSTRUCTIONS Standard for review, (p. 464) for discussion of topic.

Aggravated robbery

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

Appellant was convicted of aggravated robbery. At trial, a nurse testified that the appellant was treated for back pain on the night of the robbery and that he was discharged at 8:40 p.m. She also testified as to his attire, that he had a pistol, and that the car he drove to the hospital was gone shortly after his discharge. A store clerk testified that he was robbed at 9:30 p.m. by a man with a pistol who wore clothes similar to that which nurse had described the appellant as wearing. A passerby testified that the robber fled in a maroon Buick with plates matching the car of the appellant's wife. The appellant's defense was that he had remained at the hospital waiting for a friend who was also being treated. In addition to his alibi, the appellant argued that the store clerk's description of the robber as 5'11" and 240 pounds was at substantial variance with the appellant's actual size of 5'7" and under 200 pounds.

One assignment of error on appeal was that the circumstantial evidence did not support the conviction.

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).

SUFFICIENCY OF EVIDENCE

Aggravated robbery (continued)

State v. Mann, (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.” Syllabus point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court rejected the sufficiency-of-evidence argument, noting simply that even wholly circumstantial evidence that points to the defendant may be sufficient if it agrees as to the time, place, motive, means and conduct of the offense.

Affirmed.

Concerted action

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Endangerment of incapacitated adult

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998)
No. 25057 & No. 25058 (Davis, C.J.)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 766) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Felony-murder

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411)
for discussion of topic.

Homicide

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

Appellant, a registered nurse, was indicted in 1996 of attempting to poison her son in 1981 and of the first-degree murder of her daughter in 1982. At trial, evidence showed that in 1981, the appellant's 2-month-old son was rushed to a hospital after an apparent seizure. He was soon flown to a Pittsburgh hospital where it was discovered that he had a dangerously high level of insulin and insulin had not been prescribed. The treating doctor in Pittsburgh reported this finding to the child's doctor in West Virginia and recommended that he report suspected child abuse to West Virginia officials but the report was never made. The child sustained massive brain damage.

In 1982, the appellant's 3-year-old daughter was admitted to the hospital because of vomiting and complaints of burning urine. On the night of the admission, a nurse observed the appellant injecting her daughter without authorization from a physician. The daughter died the next morning. An autopsy revealed caffeine pills in her stomach that a doctor testified had to have been fed to her over a short period. Defendant's husband testified that he found empty diet pill containers containing caffeine in the couple's garbage on the night of the death.

Defendant was convicted of both charges. On appeal, she attacked the sufficiency of evidence.

SUFFICIENCY OF EVIDENCE

Homicide (continued)

State v. Davis, (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).

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.” Syllabus Point 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Although some points were in dispute, e.g., whether the appellant’s husband was, as he testified, at home on the morning their son was brought to the hospital or whether, as other evidence showed, that he was at work, the Court found the evidence to be sufficient.

Affirmed.

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, (p. 770) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Homicide (continued)

Self-defense

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

Instructions

Malice

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 777) for discussion of topic.

Malice

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Murder

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Murder (continued)

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

First-degree

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

Self-defense

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

Appellant was convicted of first-degree murder. His defense at trial was that the victim provoked him and he acted in self-defense. Relying on *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978), the appellant claimed on appeal that the evidence was sufficient to direct a verdict in his favor based on provocation by the victim.

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).

SUFFICIENCY OF EVIDENCE

Murder (continued)

Self-defense (continued)

State v. Boggess, (continued)

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 the testimony that the appellant was “retreating” or backing away from a confrontation did not in itself satisfy the requirement of a “retreat” for self-defense purposes. Viewing the evidence in the light most favorable to the prosecution, the Court found no error.

Affirmed.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for Review, (p. 765) for discussion of topic.

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Principal in second-degree

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

Receiving stolen property

State v. Brewer, 204 W.Va. 1, 511 S.E.2d 112 (1998)
No. 25013 (Per Curiam)

See RECEIVING STOLEN PROPERTY Generally, (p. 659) for discussion of topic.

Sexual offenses

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

Appellant was convicted of sexual abuse and sexual assault involving his children and stepchildren.

After abuse and neglect allegations were raised, the appellant's 2 children and 2 stepchildren (ranging in age from infant to 5 years) were removed and placed with a foster family and the foster parents observed the children engaging in inappropriate sexual activity with each other.

At trial testimony was offered by one of the children, the foster care mother, a state police officer, an expert psychologist who interviewed the children as well as a DHHR case worker. One of the contentions on appeal was that the conviction was not supported by the evidence because the only substantive evidence was the testimony of the child which was confusing and contradictory.

SUFFICIENCY OF EVIDENCE

Sexual offenses (continued)

State v. James B., (continued)

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.” Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found that there was ample evidence on which the jury could find guilt and that the Court would not reassess the credibility determination of the jury.

Affirmed.

Standard for review

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Murder, Self-defense, (p. 761) for discussion of topic.

State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999)
No. 25924 (Per Curiam)

See SENTENCING Amendment of statutory penalty, Election by defendant, (p. 698) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See SUFFICIENCY OF EVIDENCE Homicide, (p. 758) for discussion of topic.

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

Appellant was convicted of the murder of his live-in girlfriend. At trial, the evidence included the statements of 2 individuals who gave details of the case, including that the appellant had sexually assaulted the victim and then killed her. These statements included information that was only known to police, *e.g.*, the location of the body. A neighbor of the appellant and of the victim testified that she saw the appellant, one of the witnesses and another person putting what looked like a body wrapped in a sheet into the trunk of a car. On appeal of his murder conviction, the appellant challenged the sufficiency of the evidence to support his conviction.

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.” Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

State v. Davis, (continued)

The Court affirmed, finding that the record revealed evidence supporting the conviction under *State v. Guthrie*. [Although it was noted in the facts section of the opinion that the victim's body contained semen that could not be linked to the appellant or either of the witnesses who were also indicted for the crime, this fact is not mentioned in the section on the sufficiency of the evidence].

Affirmed.

State v. Easton & State v. True, 203 W.Va. 631, 510 S.E.2d 465 (1998) No. 25057 & No. 25058 (Davis, C.J.)

Appellants were convicted of willful creation by a custodian of an emergency situation for an incapacitated adult and of misdemeanor battery. Appellants worked in a personal care home and were restraining a patient who suffered from schizophrenia and mild retardation and engaged in behavior dangerous to himself and others.

Following the patient's escape from custody and serious self-injury, the home assigned a counselor to monitor him. Upon being attacked, the counselor called for help and the appellants responded. The appellants cursed and repeatedly struck and kicked the patient resulting in numerous contusions but no broken bones.

One of the errors assigned on appeal was that the evidence was not sufficient to support the convictions. Specifically, they claimed that no evidence established that they intended to abuse the victim or that they created an emergency situation for the victim.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

State v. Easton & State v. True, (continued)

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.” Syllabus point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court reviewed the record and found that intent was established by evidence that the appellants did not stop their efforts once the victim was restrained but continued to beat the victim for 2 ½ hrs. Likewise, the continued physical abuse of the victim severely threatened the victim’s health and safety which constituted an emergency situation.

Affirmed.

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual offenses, (p. 763) for discussion of topic.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999)
No. 25767 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Aggravated robbery, (p. 756) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

State v. Miller, 204 W.Va. 374, 513 S.E.2d 147 (1998)
No. 25168 (Per Curiam)

See HOMICIDE First-degree murder, Concerted action, (p. 414) for discussion of topic.

State v. Phillips, 205 W.Va. 673, 520 S.E.2d 670 (1999)
No. 25811 (Workman, J.)

See POLICE Official capacity, Off-duty, (p. 604) for discussion of topic.

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To uphold conviction, (p. 783) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See HOMICIDE Felony-murder, Overdose of controlled substance, (p. 411) for discussion of topic.

Forfeiture in relation to illegal drug transaction

State v. Burgraff, ___ W.Va. ___, 542 S.E.2d 909 (2000)
No. 27716 (Per Curiam)

The appellant's former husband had pled guilty to a felony drug delivery charge. The appellees filed a forfeiture action to take ownership of the appellant's house and 2 adjoining lots pursuant to *W.Va. Code* § 60A-7-703 (a)(7) because the house was where the former husband had conducted the drug sales.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Forfeiture in relation to illegal drug transaction (continued)

State v. Burgraff, (continued)

Syl. pt. - “Under West Virginia Code, 60A-7-703(a)(6) (1988), the State, in forfeiting property, is required to demonstrate that there is probable cause to believe there is a substantial connection between the property seized and the illegal drug transaction. This finding is in addition to the initial finding of probable cause that an illegal act under the drug law has occurred.” Syllabus Point 5, *Frail v. \$24,900.00 in U.S. Currency*, 192 W.Va. 473, 453 S.E.2d 307 (1994).

After reviewing the evidence, the Court found that it did not establish a substantial connection between the appellant’s property and her former husband’s drug dealing. Therefore, there was insufficient evidence for a jury to conclude that the appellant’s property represented the fruits of illegal drug activity which would support forfeiture.

Reversed.

Identity of perpetrator

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

The appellant was convicted and sentenced for possession with intent to deliver a controlled substance. At trial the appellant asserted an identity defense, claiming that his twin brother was actually the person who was in the car at the time the drugs were found and the arrest occurred.

On appeal, the appellant argued that the trial court erred in not granting a judgment for acquittal because the State failed to establish that the appellant was the person arrested.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Identity of perpetrator (continued)

State v. Parr, (continued)

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.” Syllabus point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court interpreted this assignment as a challenge to the sufficiency of evidence to support the conviction. The Court found no error since the jury was shown a videotaped confession that could serve to establish the identity of the perpetrator.

Affirmed.

Malice

State v. Scott, 206 W.Va. 158, 522 S.E.2d 626 (1999)
No. 25442 (Per Curiam)

Appellant was convicted of second degree murder involving the death of a 16-year-old who had been killed in the woods with a hunting rifle. Among other errors, the appellant asserted that the State failed to prove the necessary element of malice.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Malice (continued)

State v. Scott, (continued)

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.” Syllabus Point 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.” Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found the evidence sufficient to support the conviction.

Affirmed.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Murder

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

Premeditation

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)
No. 26649 (Per Curiam)

The appellant was indicted for arson and underwent a competency/criminal responsibility evaluation at the State's request after which he was released on bond. He was arrested for murder while he was free on bond and during the arraignment on the murder charge he attempted to escape.

The appellant was first brought to trial on the arson charge where he was found not guilty by reason of mental illness and placed in a mental health facility for a period not to exceed 20 years. He escaped from the mental health facility.

A different outcome was reached in his murder trial. The trial court refused to direct a verdict of acquittal by reason of insanity and the appellant was convicted of first-degree murder for which he was sentenced to prison for life without mercy. He was also convicted of attempted escape from a public safety officer for which a 1 to 3 year sentence was imposed.

One of the issues raised in the appeal of the murder conviction was that there was insufficient evidence to sustain the conviction because there was no evidence that he was criminally responsible for his actions at the time of the offense and the evidence of premeditation was inadequate to support a first-degree murder conviction.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Premeditation (continued)

State v. Catlett, (continued)

Syl. pt. 1 - “ ‘ “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).” Syllabus Point 3, *State v. Taylor*, 200 W.Va. 661, 490 S.E.2d 748 (1997).

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).” Syllabus Point 1, *State v. Hughes*, 197 W.Va. 518, 476 S.E.2d 189 (1996).

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 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).” Syllabus Point 2, *State v. Hughes*, 197 W.Va. 518, 476 S.E.2d 189 (1996).

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Premeditation (continued)

State v. Catlett, (continued)

Syl. pt. 4 - “Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.” Syllabus Point 5, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found that the record contained adequate evidence to support the conviction both in terms of mental capacity and premeditation.

Affirmed.

Second-degree murder

State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999)
No. 25408 (Davis, J.)

See DEFENSE OF ANOTHER Doctrine explained, (p. 233) for discussion of topic.

Self-defense

State v. Wykle, ___ W.Va. ___, 540 S.E.2d 586 (2000)
No. 27662 (Per Curiam)

The appellant was indicted on a single count indictment charging malicious assault. He was convicted by a jury of the lesser included offense of unlawful assault.

The incident giving rise to the malicious wounding charge involved a verbal argument which escalated to the point that the appellant stabbed the victim with a knife 9 times over various parts of his body. The appellant claimed that his actions were in self defense.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

Self-defense (continued)

State v. Wykle, (continued)

On appeal it is contended that the trial court erred by denying the appellant's motion for acquittal because the State failed to prove beyond a reasonable doubt that the appellant did not act in self-defense.

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).

Syl. pt. 2 - "Once there is sufficient evidence to create a reasonable doubt that [an assault] resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syllabus point 4, *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

The record supported a theory of self-defense since the appellant was not the initial aggressor, did not have weapon on his person at the time of the attack and he had told the victim that he did not want to fight. However, the Court noted that the critical point was whether the appellant used excessive force to defend himself. The Court found it reasonable for the jury to conclude that the use of a deadly weapon was unjustified under the circumstances.

Affirmed.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction

State v. Albright, ___ W.Va. ___, 543 S.E.2d 334 (2000)
No. 27773 (Per Curiam)

Appellant was convicted of nonaggravated robbery for snatching the purse of an elderly woman in a parking lot and was sentenced to a term of 5 to 18 years in prison.

Following the trial, the defense filed a motion for judgment of acquittal claiming that the State failed to introduce evidence proving an element of the offense, namely, “intimidation that induces fear of bodily harm.” The denial of the motion was appealed.

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.” Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The record showed that while the victim did not specifically testify she feared bodily harm at the time of the robbery her testimony taken as a whole could have been the basis for the jury to conclude such fear existed.

No error.

State v. Blankenship, ___ W.Va. ___, 542 S.E.2d 433 (2000)
No. 27461 (Per Curiam)

The appellant was convicted of the felony offense of obtaining money by false pretenses. The offense involved a driveway repaving scheme.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction (continued)

State v. Blankenship, (continued)

One of the grounds for appeal was that the evidence did not support the conviction because the elements of obtaining money by false pretenses as defined in *State v. Moore*, 166 W.Va. 97, 273 S.E.2d 821 (1980), were not proven at trial.

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 reviewed the elements of the charged offense in light of the evidence and concluded that there was sufficient evidence for a jury to return a guilty verdict.

Affirmed.

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000) No. 26560 (Per Curiam)

The appellant was convicted of malicious wounding as the result of a jury trial. The appellant claimed that there was insufficient evidence to support the conviction because the State had not proven that any type of weapon had been used in maiming the victim. The appellant claimed that even if circumstantial evidence allowed the inference of use of a weapon, the trial court erred in giving a jury instruction that said malice too may be inferred by the jury if the jury concluded that the circumstances did not provide the defendant with an excuse, justification or provocation for his conduct.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction (continued)

State v. Lewis, (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 that our prior cases are inconsistent, they are expressly overruled.” Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court found that there was sufficient evidence in the record that a weapon had been used and the malice instruction was proper.

Affirmed.

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000) No. 26899 (Per Curiam)

In 1995 the appellant and friends came from Ohio to a West Virginia campsite to celebrate the Fourth of July. The celebration included drinking and using drugs. One evening during the trip, one of the campers was hit on the top of his head with a piece of firewood and he subsequently died from the injuries.

The appeal of the conviction assigned various errors including that the State failed to prove venue and the evidence was not sufficient to support the conviction.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction (continued)

State v. Sapp, (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 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).” Syllabus Point 1, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

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 that our prior cases are inconsistent, they are expressly overruled.” Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. pt. 3 - “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 court judge to resolve all evidentiary conflicts and credibility questions in the prosecution’s favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution’s theory of guilt.” Syllabus Point 2, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction (continued)

State v. Sapp, (continued)

The record reflected that venue was proven in various ways during the course of the trial.

The appellant's contention that the evidence did not support the conviction was based on the fact that people who were present at the time of the murder were intoxicated and gave various renditions of the details of what had occurred. The Court found the only contradictory substantive evidence was contained in the testimony of the appellant and the jury could justifiably reach its conclusion of guilt beyond a reasonable doubt based on all of the testimony presented.

Affirmed.

State v. Williams, ___ W.Va. ___, 543 S.E.2d 306 (2000) No. 27914 (Per Curiam)

The appellant was convicted for the offense of wrongful injury to timber, was sentenced to 30 days in prison and fined treble damages totaling over \$9,000. He contended on appeal that the trial court erred by refusing to direct a verdict of acquittal when there was insufficient evidence to support the conviction. He also claimed reversible error based on: 1) the prosecution urging the jury during closing argument to disregard legal concepts to arrive at its decision; and 2) the admission of a videotape into evidence.

Syl. pt. 1 - "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

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction (continued)

State v. Williams, (continued)

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).

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).

Syl. pt. 3 - “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 court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.” Syl. Pt. 2, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To support conviction (continued)

State v. Williams, (continued)

Syl. pt. 4 - “In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.” Syl. Pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 98 (1984).

Syl. pt. 5 - “In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged. . . .” Syl. Pt. 4, in part, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), *overruled in part on other grounds by Jones v. Warden, West Virginia Penitentiary*, 161 W.Va. 168, 241 S.E.2d 914 (1978).

After reviewing the record, the Court found that the evidence presented at trial did not establish that the appellant had knowledge that he had entered onto the victim’s property. The Court noted that even if there was proof of knowledge it would not support the statutory element of malice. The Court specifically found that the State presented no evidence of malice toward the victim, intent to enter the victim’s land or malicious removal of the timber. Consequently, the conviction and sentence were vacated. Given this decision, the Court did not find it necessary to review the assigned errors of prosecutorial misconduct and improper admission of evidence.

Reversed and remanded for entry of judgment of acquittal.

SUFFICIENCY OF EVIDENCE

Standard for review (continued)

To uphold conviction

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

Appellant was convicted of 2nd degree murder. She had introduced evidence at trial regarding her mental illness and battered spouse syndrome. She alleged on appeal that the evidence was not sufficient to uphold the conviction.

Syl. pt. 8 - “ ‘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).” Syl. Pt. 3, *State v. Williams*, 198 W.Va. 274, 480 S.E.2d 162 (1996).

The Court found that the record disclosed competing State evidence from a forensic psychiatric expert which was a sufficient basis for the conviction.

Affirmed.

TERMINATION OF PARENTAL RIGHTS

Abuse and neglect

Abandonment

State ex rel. W.Va. Department of Health and Human Resources v. Hill, 207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

See ABUSE AND NEGLECT Termination of parental rights, Disposition hearing, (p. 45) for discussion of topic.

Adoption or permanent placement following

State v. Tammy R., 204 W.Va. 575, 514 S.E.2d 631 (1999)
No. 25348 (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Adoption or permanent placement following, (p. 42) for discussion of topic.

Disposition hearing

State ex rel. W.Va. Department of Health and Human Resources v. Hill, 207 W.Va. 358, 532 S.E.2d 358 (2000); No. 26844 (Scott, J.)

See ABUSE AND NEGLECT Termination of parental rights, Disposition hearing, (p. 45) for discussion of topic.

Evidence of prior abuse

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Abuse and neglect (continued)

Hearing required

In re Beth, 204 W.Va. 424, 513 S.E.2d 472 (1998)
No. 25210 (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Hearing required, (p. 47) for discussion of topic.

Intellectual capacity of parents

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

Parent's terminal illness

In the Interest of Micah Alyn R., 202 W.Va. 400, 504 S.E.2d 635 (1998)
No. 24878 (Maynard, J.)

See ABUSE AND NEGLECT Due to parent's terminal illness, (p. 8) for discussion of topic.

Prior acts of abuse

In re George Glen B., 205 W.Va. 435, 518 S.E.2d 863 (1999)
No. 26202 (Workman, J.)

See ABUSE AND NEGLECT Prior acts of abuse, (p. 33) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Abuse and neglect (continued)

Standard for review

State v. Tammy R., 204 W.Va. 575, 514 S.E.2d 631 (1999)
No. 25348 (Per Curiam)

See ABUSE AND NEGLECT Termination of parental rights, Adoption or permanent placement following, (p. 42) for discussion of topic.

Third party evidentiary standard

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See ABUSE AND NEGLECT Third party, Evidentiary standard, (p. 54) for discussion of topic.

Due process requirements

Incarcerated parent's attendance at dispositional hearing

State ex rel. Jeanette H. v. Pancake, 207 W.Va. 154, 529 S.E.2d 865 (2000)
No. 27061 (Davis, J.)

A writ of prohibition was sought when a lower court refused to enter an order to transport an incarcerated parent to a dispositional hearing where her parental rights might be terminated. The petitioner alleged that by precluding her physical presence at this hearing the lower court was violating her right to due process.

The petitioner filed a motion to dismiss the petition since she was released on parole before this case was decided. Although the issue was moot as it related to the petitioner, the Court rendered this opinion because the issue is capable of repetition.

TERMINATION OF PARENTAL RIGHTS

Due process requirements (continued)

Incarcerated parent's attendance at dispositional hearing (continued)

State ex rel. Jeanette H. v. Pancake, (continued)

Syl. pt. 1 - “ ‘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).” Syllabus point 1, *State ex rel. Durkin v. Neely*, 166 W.Va. 553, 276 S.E.2d 311 (1981).

Syl. pt. 2 - “ ‘A case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.’ Syllabus point 1, *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984).” Syllabus point 2, *State ex rel. Davis v. Vieweg*, 206 W.Va. 83, 529 S.E.2d 103 (2000).

Syl. pt. 3 - “Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.” Syllabus point 1, *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989).

Syl. pt. 4 - “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).

TERMINATION OF PARENTAL RIGHTS

Due process requirements (continued)

Incarcerated parent's attendance at dispositional hearing (continued)

State ex rel. Jeanette H. v. Pancake, (continued)

Syl. pt. 5 - "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. 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.' Syllabus Point 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973)." Syllabus point 1, *In Interest of Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Syl. pt. 7 - "'West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his [or her] child, without notice and the opportunity for a meaningful hearing.' Syl. pt. 2, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973)." Syllabus point 1, *West Virginia Department of Welfare ex rel. Eyster v. Keesee*, 171 W.Va. 1, 297 S.E.2d 200 (1982).

TERMINATION OF PARENTAL RIGHTS

Due process requirements (continued)

Incarcerated parent's attendance at dispositional hearing (continued)

State ex rel. Jeanette H. v. Pancake, (continued)

Syl. pt. 8 - "The specific procedural protections accorded to a due process liberty or property interest generally require[] consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any[,] of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Syllabus point 5, *Major v. DeFench*, 169 W.Va. 241, 286 S.E.2d 688 (1982).

Syl. pt. 9 - "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." Syllabus point 2, *North v. West Virginia Board of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977).

Syl. pt. 10 - Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court.

Syl. pt. 11 - In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best

TERMINATION OF PARENTAL RIGHTS

Due process requirements (continued)

Incarcerated parent's attendance at dispositional hearing (continued)

State ex rel. Jeanette H. v. Pancake, (continued)

interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

The Court recognized the well-established principle that a parent has a constitutionally protected liberty interest in retaining custody of a child which, therefore, entitles a parent to due process protections if that interest is placed in jeopardy. The Court noted that parents whose parental rights are subject to termination are entitled to a meaningful hearing [*W.Va. Code* §§ 49-6-2 (c), 5(a)]. However, the right to testify and to present and cross-examine witnesses does not require a parent's physical presence at a dispositional hearing. The decision regarding whether an incarcerated parent may attend a dispositional hearing involving the possible termination of parental rights is within the discretion of the circuit court. The Court set forth factors which a circuit court must balance in exercising this discretion properly (see Syl. pt. 11 above).

Writ dismissed.

TERMINATION OF PARENTAL RIGHTS

Evidentiary standards

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

Prior termination of parental rights

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

Standard for review

In re Emily and Amos B., ___ W.Va. ___, 540 S.E.2d 542 (2000)
No. 26915 (Davis, J.)

See ABUSE AND NEGLECT Improvement period, Commencement, (p. 17) for discussion of topic.

Threat of prosecution/plea agreement void against public policy

State ex rel. Lowe v. Knight, ___ W.Va. ___, 544 S.E.2d 61 (2000)
No. 27911 (Per Curiam)

See PLEA AGREEMENT, Limitation on use, When void against public policy, (p. 594) for discussion of topic.

TERMINATION OF PARENTAL RIGHTS

Transition plan

In re George Glen B., Jr., 207 W.Va. 346, 532 S.E.2d 64 (2000)
No. 26742 (Starcher, J.)

See ABUSE AND NEGLECT Termination of parental rights, Prior termination of parental rights, (p. 49) for discussion of topic.

Visitation following

In re Billy Joe M., 206 W.Va. 1, 521 S.E.2d 173 (1999)
No. 25888 (Workman, J.)

See ABUSE AND NEGLECT Post-termination parental visitation, (p. 30) for discussion of topic.

In re Emily and Amos B., ___ W.Va. ___, 540 S.E.2d 542 (2000)
No. 26915 (Davis, J.)

See ABUSE AND NEGLECT Improvement period, Commencement, (p. 17) for discussion of topic.

In re Jamie Nicole H., 205 W.Va. 176, 517 S.E.2d 41 (1999)
No. 25800 (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Extension findings required, (p. 20) for discussion of topic.

When against public policy

In the Interest of Micah Alyn R., 202 W.Va. 400, 504 S.E.2d 635 (1998)
No. 24878 (Maynard, J.)

See ABUSE AND NEGLECT Due to parent's terminal illness, (p. 8) for discussion of topic.

THREE-TERM RULE

Generally

State v. Carter, 204 W.Va. 491, 513 S.E.2d 718 (1998)
No. 25186 (Maynard, C.J.)

Carter was in custody awaiting trial on federal charges and was being housed in the Eastern Regional Jail when he assaulted correctional officers in August 1994. He was indicted a month later on 4 counts of malicious assault. He was acquitted of the federal charges for which he was being held in December 1994 but remained in federal custody to face probation revocation charges. He was sentenced to 3 years for the revocation charges in January 1995. During the time he was serving this sentence, West Virginia made several attempts -- 4 *capias* orders, a detainer, and an extradition warrant -- to secure his appearance to face the state assault charges. Appellant was finally returned to West Virginia, apparently pursuant to the extradition warrant that was signed by the Governor on December 1996, and he was arraigned on the assault charges on March 6, 1997. He was tried and convicted the following July. He appealed the denial of his pretrial motion for dismissal of the indictment on the ground of violation of the three-term rule.

Syl. pt. 1 - Pursuant to *W.Va. Code* § 62-3-21 (1959), when an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute.

The Court characterized the issue as whether the three-term rule begins to run from the indictment or the arraignment. It first distinguished two recent cases in which the three-term rule was applied. In both *State v. Adkins*, 182 W.Va. 443, 388 S.E.2d 316 (1989) and *State ex rel. Webb v. Wilson*, 182 W.Va. 538, 390 S.E.2d 9 (1990), the initial indictments were dismissed on the ground of improper impaneling of the grand jury; superceding indictments were then obtained, but only after 3 terms from the date of the original indictments had passed. The Court stated that *Webb* and *Adkins* were intended to prohibit the State from circumventing the 3 term rule by obtaining superceding indictments whenever the 3 term rule operated to

THREE-TERM RULE

Generally (continued)

State v. Carter, (continued)

prohibit prosecution under the original indictments. In Carter's case, however, the question is whether the 3 term rule was tolled prior to arraignment. The Court held pursuant to *W.Va. Code*, § 62-3-21 that the three-term rule begins to run from the date of arraignment rather than the date of the indictment.

Affirmed.

Period begins on arraignment date

State v. Carter, 204 W.Va. 491, 513 S.E.2d 718 (1998)
No. 25186 (Maynard, C.J.)

See THREE-TERM RULE Generally, (p. 793) for discussion of topic.

TRIAL

Continuance beyond term of indictment

Standard for review

State ex rel. Murray v. Sanders, ___ W.Va. ___, 539 S.E.2d 765 (2000)
No. 27830 (Per Curiam)

The petitioner was originally indicted on 2 counts of first-degree sexual assault. The State moved to dismiss the indictment without prejudice to cure a perceived flaw. Trial on the same charges in an amended indictment was set beyond the one-term rule (*W.Va. Code* § 62-3-1) but within the three-term rule (*W.Va. Code* § 62-3-21). The petitioner moved the trial court to dismiss the second indictment because he had not been tried within the one-term rule. The trial court denied the motion and a petition for a writ of prohibition was filed with the Supreme Court.

Syl. pt. 1 - “In determining whether to grant a writ 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 the 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.” Syllabus point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Syl. pt. 2 - “The determination of what is good cause, pursuant to *W.Va. Code* § 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court[.]” Syllabus point 2, in part, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

TRIAL

Continuance beyond term of indictment (continued)

Standard for review (continued)

State ex rel. Murray v. Sanders, (continued)

Syl. pt. 3 - “Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to *W.Va. Code* § 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to *W.Va. Code* § 62-3-1, only in furtherance of the prompt administration of justice.” Syllabus point 4, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

The Court framed the question as “whether dismissal of an indictment and a subsequent re-indictment on the same charges constitutes a ‘continuation’ of the first indictment, within the ‘good cause’ standard of *W.Va. Code* § 62-3-1 (2000).” By citing its previous decision in *State v. Lambert*, 175 W.Va. 141, 331 S.E.2d 873 (1985), the Court readily disposed of the State’s contention that *W.Va. Code* § 62-3-1 did not apply because the second indictment was a new proceeding. The Court next examined the record to determine if the dismissal of the initial indictment was based on good cause. The Court refused to find that the trial court abused its discretion in finding good cause since the defense had presented no evidence that the State sought dismissal for improper reasons or that the defendant had suffered substantial prejudice because of the delay. The Court noted that review of a challenge to a one-term rule decision is less strict than a three-term rule decision since the constitutional right to a speedy trial is embodied in the three-term rule statute (*W.Va. Code* § 62-3-21).

Writ of prohibition denied.

TRIAL

Examination of witness by court

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See JUDGE Witnesses, Examination by court at trial, (p. 491) for discussion of topic.

Prosecuting attorney

Improper comments to jury

State ex rel. Edgell v. Painter, 206 W.Va. 168, 522 S.E.2d 636 (1999)
No. 25896 (Per Curiam)

See INEFFECTIVE ASSISTANCE OF COUNSEL Standard for determining, (p. 445) for discussion of topic.

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)
No. 25812 (Maynard, J.)

See APPEAL Failure to object, (p. 77) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comment on pre-trial silence, (p. 631) for discussion of topic.

State v. Hager, 204 W.Va. 28, 511 S.E.2d 139 (1998)
No. 25172 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Reference to sexual history, (p. 635) for discussion of topic.

TRIAL

Prosecuting attorney (continued)

Improper comments to jury (continued)

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 632) for discussion of topic.

State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)
No. 25893 (Starcher, J.)

See PROSECUTING ATTORNEY Personal opinion, Forbidden during closing argument, (p. 648) for discussion of topic.

State v. Swafford, 206 W.Va. 390, 524 S.E.2d 906 (1999)
No. 25844 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Improper comments to jury, (p. 634) for discussion of topic.

Prosecuting attorney's comments

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

See PROSECUTING ATTORNEY Conduct at trial, (p. 627) for discussion of topic.

TRIAL

Right of defendant to testify

State ex rel. Hall v. Liller, 207 W.Va. 696, 536 S.E.2d 120 (2000)
No. 26832 (Per Curiam)

See RIGHT TO TESTIFY AT TRIAL Failure to inform, Harmless error, (p. 670) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

Transcript omissions

State v. Graham, ___ W.Va. ___, 541 S.E.2d 341 (2000)
No. 27459 (Maynard, C. J.)

The appellant was convicted by a jury of first-degree sexual abuse of an 11-year-old girl. One of the assertions on appeal was that the trial transcript was so incomplete that it denied him a record for the appeal.

Syl. pt. 8 - Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal.

The Court found the transcript omissions did not result in any identifiable prejudice in relation to any issue raised on appeal.

Affirmed.

VENUE

Change of

Standard for review

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

In the appeal of his first-degree murder conviction, the appellant raised the denial of his motion for change of venue.

Syl. pt. 3 - “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).

Although several jurors had stated that they had heard about the case and had read general newspaper accounts, each also said that he could be impartial or “totally fair.” The Court found that it could not conclude that the appellant had demonstrated that the “jurors had such fixed opinions that they could not judge [the appellant] impartially.”

Affirmed.

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

Appellant was convicted of first-degree murder. He claimed that the trial court erred in refusing his request for a change of venue. Of 400 persons interviewed, 63% had heard of the appellant and 18% had formed an opinion of his guilt; but 82% had either not heard of the appellant or had not formed an opinion.

Syl. pt. 2- “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).

VENUE

Change of (continued)

Standard for review (continued)

State v. Doman, (continued)

The Court found the appellant did not demonstrate that a fair trial was impossible.

Affirmed in part, reversed in part, and remanded with directions.

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998) No. 23893 (Per Curiam)

Both appellants moved for a change of venue of their first-degree murder trial. In support of their motion, the appellants presented the results of a telephone poll conducted in the county of 300 residents that asked various questions about their knowledge of the crime and any biases. Although the trial court denied the motion, it did call 60-75 prospective jurors and questioned those with knowledge of the case about whether that would keep them from being unbiased.

Syl pt. 4 - “To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests upon defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.” Syllabus Point 2, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946).

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 opinion 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).

VENUE

Change of (continued)

Standard for review (continued)

State v. Horton & State v. Allen, (continued)

In finding no abuse of discretion, the Court noted that the poll conducted for the appellants showed that 48% of those contacted were “potentially unbiased jurors.” With regard to appellant Horton’s additional argument that his trial came only 15 days after Allen’s highly publicized trial and at least 15 of the prospective jurors in his case were aware of the outcome, the Court merely noted that these jurors “did not have fixed opinions which would prevent them from being impartial.”

Affirmed.

Proof

State v. Sapp, 207 W.Va. 606, 535 S.E.2d 205 (2000)
No. 26899 (Per Curiam)

See SUFFICIENCY OF EVIDENCE Standard for review, To support conviction, (p. 778) for discussion of topic.

WAIVER

Failure to object

State v. Horton & State v. Allen, 203 W.Va. 9, 506 S.E.2d 46 (1998)
No. 23893 (Per Curiam)

See EVIDENCE Admissibility, Character of accused, (p. 281) for discussion of topic.

Of error

State v. Davis, 204 W.Va. 223, 511 S.E.2d 848 (1998)
No. 25175 (Per Curiam)

See APPEAL Waiver of error, Contrasted with forfeiture of right, (p. 153) for discussion of topic.

WITNESSES

Challenge to credibility

Psychiatric disability

State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (2000)
No. 26849 (Per Curiam)

See APPEAL Failure to preserve issue, (p. 80) for discussion of topic.

Character of victim

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

See EVIDENCE Admissibility, Character of victim, (p. 292) for discussion of topic.

Defendant's testimony at trial

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See RIGHT TO TESTIFY AT TRIAL Trial, (p. 676) for discussion of topic.

Improper cross-examination

State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)
No. 26657 (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments on defendant's silence, (p. 628) for discussion of topic.

WITNESSES

Disclosure by defense of information

State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000)
No. 27313 (Maynard, C.J.)

See DISCOVERY Disclosure of defense witness information, (p. 251) for discussion of topic.

Discovery

Prior statements

State ex rel. Kahle v. Risovich, 205 W.Va. 317, 518 S.E.2d 74 (1999)
No. 25889 (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 566) for discussion of topic.

Expert

Wilson v. Wilson, ___ W.Va. ___, 452 S.E.2d 402 (2000)
No. 27759 (Per Curiam)

See EVIDENCE Expert, (p. 334) for discussion of topic.

Battered woman's syndrome

State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997)
No. 23998 (Per Curiam)

See EVIDENCE Battered woman's syndrome, Admissibility, (p. 322) for discussion of topic.

WITNESSES

Expert (continued)

Opinion on sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

Qualifying as

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See EVIDENCE Expert, Qualifying as, (p. 336) for discussion of topic.

Impeachment

Prior convictions

State v. Morris, 203 W.Va. 504, 509 S.E.2d 327 (1998)
No. 24714 (Per Curiam)

See EVIDENCE Prior convictions, (p. 349) for discussion of topic.

Prior inconsistent statements

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

WITNESSES

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Prior statements

State v. Lewis, 207 W.Va. 544, 534 S.E.2d 740 (2000)
No. 26560 (Per Curiam)

See EVIDENCE Impeachment of witness, Prior statements, (p. 343) for discussion of topic.

Incarcerated

Attire and restraints

State v. Allah Jamaal W., ___ W.Va. ___, 543 S.E.2d 282 (2000)
No. 27770 (Davis, J.)

The appellant was adjudicated delinquent for striking a police officer and was committed for one year to the Industrial Home for Youth.

WITNESSES

Incarcerated (continued)

Attire and restraints (continued)

State v. Allah Jamaal W., (continued)

The appellant had filed a pre-trial motion requesting that 3 of his witnesses who were incarcerated be permitted to testify at the jury trial without wearing restraints or prison clothing. The trial court summarily denied the motion resulting in this appeal.

Syl. pt. 1 - An adjudication of delinquency is subject to the same standards of review on appeal as is an adult criminal conviction.

Syl. pt. 2 - “A criminal defendant has no constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire.” Syllabus point 3, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

Syl. pt. 3 - The issue of whether a witness for the defendant should be physically restrained or required to wear prison attire while testifying before a jury is, in general, a matter within the sound discretion of the trial judge and will not be reversed absent a showing of an abuse of that discretion.

Syl. pt. 4 - The trial judge should not permit an incarcerated defense witness to appear at trial in the distinctive attire of a prisoner. However, the burden is upon the defendant to timely move that an incarcerated witness be permitted to testify at trial in civilian clothes. If the trial judge denies the motion, the judge must set forth on the record the reasons for denying said motion.

Syl. pt. 5 - An incarcerated defense witness should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to prevent escape, provide safety, or maintain order in general. The burden is upon the defendant to timely move that an incarcerated defense witness be permitted to testify at trial without physical restraints. If the trial judge orders such restraint, the judge must enter into the record of the case the reasons therefor.

WITNESSES

Incarcerated (continued)

Attire and restraints (continued)

State v. Allah Jamaal W., (continued)

Syl. pt. 6 - Whenever the wearing of prison attire or physical restraint of a defense witness occurs in the presence of jurors trying the case, the judge should instruct those jurors that such attire or restraint is not to be considered in assessing the evidence and determining guilt.

The Court found the State's confession of error warranted and agreed with the appellant that standards be set to determine the propriety of a trial court's decision in such instances. After reviewing dicta in *State ex rel. McMannis v. Mohn* as well as cases from other jurisdictions, the Court set forth the following procedures and standards: 1) the defense must make a timely request to have the witness appear unrestrained and/or in civilian attire before the jury; 2) if the trial judge denies the motion then the security reason(s) for the denial must be on the record; 3) whenever a defense witness is required to wear restraints and/or prison clothing while testifying before a jury, the judge "should" instruct the jurors that the attire or restraint is not to be considered in assessing the evidence and/or determining guilt.

The Court added in footnote 13 that if an incarcerated witness is allowed to appear in civilian clothing, then the defense is responsible for supplying the clothing. Additionally, footnote 17 makes it clear that an evidentiary hearing on the defense motion is not required and the ruling may be based on pleadings or oral arguments of counsel.

In footnote 7, the Court also disposed of the State's suggestion that the case was moot because the appellant had served his sentence.

Reversed and remanded.

WITNESSES

Inducements

Prosecuting attorney's duty to disclose

State ex rel. Yeager v. Trent, 203 W.Va. 716, 510 S.E.2d 790 (1998)
No. 25011 (Per Curiam)

See PROSECUTING ATTORNEY Duty to disclose inducements to witness, (p. 638) for discussion of topic.

Judge examining

State v. Parr, 207 W.Va. 469, 534 S.E.2d 23 (2000)
No. 26898 (Per Curiam)

See JUDGE Witnesses, Examination by court at trial, (p. 491) for discussion of topic.

Mode and order of interrogation

State v. Boggess, 204 W.Va. 267, 512 S.E.2d 189 (1998)
No. 24979 (Per Curiam)

Appellant was convicted of first-degree murder. After the defense rested and the prosecution did not put on a rebuttal case, the trial court allowed the appellant to call an investigator for the limited purpose of offering testimony to impeach 2 prosecution witnesses. When the witness exceeded the limits set forth by the trial court, the testimony was terminated and struck from the record.

On appeal it was claimed that the trial court erred by terminating and striking the investigator's testimony.

Syl. pt. 4 - "Under Rule 611(a) of the West Virginia Rules of Evidence [1985], the trial judge has discretion to 'exercise reasonable control over the mode and order of interrogating witnesses in presenting evidence . . .'; and in doing so, he must balance the fairness to both parties." Syl. Pt. 2, *Gable v. Kroger Co.*, 186 W.Va. 62, 410 S.E.2d 701 (1991).

WITNESSES

Mode and order of interrogation (continued)

State v. Boggess, (continued)

The Court found the circuit court had limited the investigator's testimony to (1) the prosecution witness' prior inconsistent statement and (2) a visit to a defense witness. The witness exceeded that scope of inquiry and the trial court did not abuse its discretion by ending the testimony and striking existing portions from the record.

Affirmed.

Opinion of lay witness

State v. Nichols, ___ W.Va. ___, 541 S.E.2d 310 (1999)
No. 26009 (Davis, J.)

See EVIDENCE Admissibility, Opinion of lay witnesses, (p. 309) for discussion of topic.

Prior inconsistent statements

Admissibility

State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)
No. 25790 (Davis, J.)

See EVIDENCE Prior inconsistent statement, (p. 352) for discussion of topic.

State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)
No. 25170 (Maynard, J.)

See EVIDENCE Admissibility, Prior inconsistent statement, (p. 314) for discussion of topic.

WITNESSES

Prior inconsistent statements (continued)

Admissibility (continued)

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Failure to disclose

State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998)
No. 24793 (Per Curiam)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 640) for discussion of topic.

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

Psychologist

Opinion on sexual abuse

State v. James B., 204 W.Va. 48, 511 S.E.2d 459 (1998)
No. 24671 (Per Curiam)

See EVIDENCE Admissibility, Sexual abuse expert opinion, (p. 318) for discussion of topic.

WITNESSES

Qualifying as expert

Two-part test

Sharon B.W. v. George B.W., 203 W.Va. 300, 507 S.E.2d 401 (1998)
No. 24638, 24639 (Per Curiam)

See EVIDENCE Expert, Qualifying as, (p. 336) for discussion of topic.

Unavailable

State v. Kennedy, 205 W.Va. 224, 517 S.E.2d 457 (1999)
No. 25367 (Workman, J.)

See CONFRONTATION CLAUSE Witness unavailable, (p. 222) for discussion of topic.

Writing used to refresh memory

State v. Salmons, 203 W.Va. 561, 509 S.E.2d 842 (1998)
No. 24967 (Davis, J.)

See PROSECUTING ATTORNEY Exculpatory evidence, Failure to disclose, (p. 641) for discussion of topic.

ZAIN CASES

State ex rel. McClure v. Trent, 202 W.Va. 338, 504 S.E.2d 165 (1998)
No. 24202 (Per Curiam)

See *HABEAS CORPUS* New grounds for relief, (p. 396) for discussion of topic.

State ex rel. McLaurin v. Trent, 203 W.Va. 67, 506 S.E.2d 323 (1998)
No. 24901 (Per Curiam)

See *HABEAS CORPUS* Standard for review, (p. 399) for discussion of topic.