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IV. CRIMINAL LAW

A. *Penal and Remedial Statutes*

In *State ex rel. Department of Transportation, Division of Highways v. Sommerville*,³³¹ Justice McHugh was called upon to determine if the state statute regulating the weight of trucks was remedial or criminal. The court held initially that “[w]here a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein.”³³²

Justice McHugh then said:

W.Va. Code, 17C-17-10(a) [1976] authorizes a police officer or a member of a Division of Highways' official weighing crew to “require the driver of any vehicle or combination of vehicles on any highway to stop and submit such vehicle or combination of vehicles to a weighing[,]” even where the driver refuses to comply pursuant to *W.Va. Code*, 17C-17-10(c) [1976] and is thus subject to a criminal penalty.³³³

Justice McHugh stated in *State ex rel. Palumbo v. Graley's Body Shop, Inc.*³³⁴ that

[t]he question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction, and requires

³³⁰ *Id.* at Syl. Pt. 1.

³³¹ 412 S.E.2d 269 (W. Va. 1991).

³³² *Id.* at Syl. Pt. 1.

³³³ *Id.* at Syl. Pt. 2 (alteration in original).

³³⁴ 425 S.E.2d 177 (W. Va. 1992).

the application of a two-level inquiry adopted by the United States Supreme Court in *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). First, courts must determine whether the legislature indicated, either expressly or impliedly, a preference for labeling the statute civil or criminal. Second, if the legislature indicates an intention to establish a civil remedy, courts must consider whether the legislature, irrespective of its intent to create a civil remedy, provided for sanctions so punitive as to transform the civil remedy into a criminal penalty. As part of the second level of the inquiry, courts should be guided by the following factors identified by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644, 661 (1963): “Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]”³³⁵

B. *Controlled Substances*

Justice McHugh pointed out in *State v. Rector*³³⁶ that “[c]onstructive possession of a controlled substance, *W.Va. Code*, 60A-4-401(c), and constructive delivery or possession with intent to deliver a controlled substance, *W.Va. Code*, 60A-4-401(a), arise from separate offenses.”³³⁷ The decision in *Rector* went on to hold that “[i]t is reversible error for a trial judge to instruct a jury in a criminal trial of a defendant charged with a marijuana violation that the defendant may be found guilty of ‘possession and delivery of a controlled substance’ when such instruction considers ‘possession and delivery of a controlled substance’ as a single offense.”³³⁸

The question of sustaining a conviction for delivery of a controlled substance, when nothing of value is received in return, was addressed by Justice McHugh in *State v. Ashworth*.³³⁹ The court held initially that

[u]nder the circumstances of this criminal case, the evidence was sufficient to sustain the verdict of the jury that the defendant was

³³⁵ *Id.* at Syl. Pt. 1 (alteration in original).

³³⁶ 280 S.E.2d 597 (W. Va. 1981).

³³⁷ *Id.* at Syl. Pt. 4.

³³⁸ *Id.* at Syl. Pt. 5.

³³⁹ 292 S.E.2d 615 (W. Va. 1982).

guilty of the offense of delivery of marihuana in violation of *W.Va. Code*, 60A-4-401(a)(1)(ii) [1971], where the evidence indicated that the defendant transferred the marihuana from a third party to an undercover police officer.³⁴⁰

Justice McHugh concluded in *Ashworth*:

Where the evidence indicated that the defendant delivered marihuana in violation of *W.Va. Code*, 60A-4-401(a)(1)(ii) [1971], from a third party to an undercover police officer, a conviction of the defendant under that statute was proper, even though it was not shown by the evidence at trial that the defendant received compensation, pecuniary or otherwise, with respect to the transaction.³⁴¹

In *State v. Boggess*,³⁴² Justice McHugh held that “[a]n instruction given to the jury in a case involving an alleged violation of the West Virginia Uniform Controlled Substances Act, *W.Va. Code*, 60A-1-101, et seq., which instruction defined ‘marihuana’ by following verbatim the statutory definition of ‘marihuana’ found in *W.Va. Code*, 60A-1-101(n) [1981], was not error.”³⁴³

Justice McHugh stated in *State v. Nicastro*³⁴⁴ that “[a]n indictment alleging a violation of *W.Va. Code*, 60A-4-401(a), as amended, is sufficient to sustain a conviction for delivery of marihuana, even though the indictment omits stating whether the alleged offense was committed with or without remuneration.”³⁴⁵ *Nicastro* went on to hold:

Prior to imposition of a sentence of incarceration for a defendant convicted of delivery of less than 15 grams of marihuana in violation of *W.Va. Code*, 60A-4-401(a), as amended, who, although not within the “without remuneration” exception of *W.Va. Code*, 60A-4-402(c), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more

³⁴⁰ *Id.* Syl. Pt. 3.

³⁴¹ *Id.* at Syl. Pt. 4.

³⁴² 309 S.E.2d 118 (W. Va. 1983).

³⁴³ *Id.* at Syl. Pt. 3.

³⁴⁴ 383 S.E.2d 521 (W. Va. 1989).

³⁴⁵ *Id.* at Syl. Pt. 3.

appropriate.³⁴⁶

Justice McHugh addressed issues involving prosecution of health care providers for unlawful distribution of controlled substances in the case of *State v. Young*.³⁴⁷ The decision held initially that

[u]nder *W.Va. Code*, 60A-4-401(a), as amended, which is part of West Virginia's Uniform Controlled Substances Act, the elements of the offense of a felonious constructive delivery of a controlled substance by a purported prescription issued by a registered physician, dentist or other registered practitioner are as follows:

- (1) the defendant constructively delivered a controlled substance requiring a valid prescription by the issuance of a purported prescription on behalf of a purported patient who received the controlled substance from a pharmacist who filled such prescription; and
- (2) the defendant issued such prescription intentionally or knowingly outside the usual "course of professional practice or research," thereby not engaging in the authorized activities of a "practitioner," as defined in *W.Va. Code*, 60A-1-101(v), as amended; in other words, such prescription was issued intentionally or knowingly without a legitimate medical, dental or other authorized purpose.³⁴⁸

Young indicated that

[a] count in an indictment charging that a registered practitioner violated *W.Va. Code*, 60A-4-401(a), as amended, by 'knowingly, intentionally, unlawfully and feloniously' delivering a controlled substance by prescribing the substance even though it was 'not necessary in the medical treatment and care' of the purported patient sufficiently states the elements of the offense.³⁴⁹

It was further stated that

W.Va. Code, 60A-5-506(a) [1971], excusing the State from having to negate, in an indictment or at trial, any exemption or exception under West Virginia's Uniform Controlled Substances Act, is not applicable to a prosecution of a registered practitioner for

³⁴⁶ *Id.* at Syl. Pt. 6.

³⁴⁷ 406 S.E.2d 758 (W. Va.1991).

³⁴⁸ *Id.* at Syl. Pt. 1.

³⁴⁹ *Id.* at Syl. Pt. 2.

feloniously prescribing a controlled substance in violation of *W.Va. Code*, 60A-4-401(a), as amended. Therefore, an indictment in such a prosecution must charge that the prescriptions were issued without a legitimate medical, dental or other authorized purpose, and the State must prove such element of the offense, as well as all other elements of the offense, beyond a reasonable doubt. This burden of proof includes the burden of the State, in its case in chief, to go forward with the evidence on the lack of such legitimate purpose for the prescriptions.³⁵⁰

Justice McHugh concluded in *Young* that

[a] count in an indictment charging that a registered practitioner violated *W.Va. Code*, 60A-4-401(a), as amended, in that he or she merely ‘delivered’ a controlled substance by prescribing the substance is fatally defective because it does not set forth all of the essential elements of the offense, particularly the lack of a legitimate medical, dental or other authorized purpose for the purported prescription.³⁵¹

C. *Burglary*

In *State v. Ocheltree*,³⁵² Justice McHugh held that “[t]he intent to commit a felony or any larceny is an essential element of the crime of burglary under *W.Va. Code*, 61-3-11(a) [1973]. It is well settled, however, that such intent may be inferred by the jury from the facts and circumstances of the case.”³⁵³

D. *Conspiracy*

Justice McHugh was called on to expound upon the state’s general conspiracy statute in *State v. Less*.³⁵⁴ The court stated as an initial matter that “*W.Va. Code*, 61-10-31(1), is a general conspiracy statute and the agreement to commit any act which is made a felony or misdemeanor by the law of this State is a conspiracy to commit an ‘offense against the State’ as that term is used in the statute.”³⁵⁵

Justice McHugh then held in *Less* that “[t]he terms of *W.Va. Code*, 61-10-31(1), are clear and unambiguous on their face and are of sufficient

³⁵⁰ *Id.* at Syl. Pt. 4.

³⁵¹ *Id.* at Syl. Pt. 8.

³⁵² 289 S.E.2d 742 (W. Va. 1982).

³⁵³ *Id.* at Syl. Pt. 3.

³⁵⁴ 294 S.E.2d 62 (W. Va. 1981).

³⁵⁵ *Id.* at Syl. Pt. 1.

definiteness to give a person of ordinary intelligence fair notice that agreeing to commit an act made a felony or misdemeanor by the law of this State is prohibited.”³⁵⁶ The opinion went on to hold that “[i]n order for the State to prove a conspiracy under *W.Va. Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.”³⁵⁷

Justice McHugh concluded in *Less* with the following rule of law:

Where the jury is permitted, but not required, to infer from the evidence that the defendant had the intent necessary for conspiracy to commit an offense against the State, and the jury is properly and adequately advised of the State’s duty to prove that intent beyond a reasonable doubt, the giving of the instruction “that the jury may infer that a person intends to do that which he does, or which is the natural or necessary consequence of his act,” is not error.³⁵⁸

E. Larceny

Justice McHugh held in *State v. Riley*³⁵⁹ that

[a] person who is present and participating with others in the taking of property in the commission of a larceny is chargeable with the entire value of the goods taken, even though such person may not have personally taken away each and every one of the items subject to the larceny.³⁶⁰

F. Arson

Justice McHugh addressed the crime of arson in *State v. Jones*.³⁶¹ The court stated:

Arson in the third degree, *W.Va. Code*, 61-3-3 [1957], is a lesser included offense of arson in the first degree, *W.Va. Code*, 61-3-1 [1935]; thus, where a criminal defendant, an inmate of a county jail, admitted at trial that he started a fire in his cell block, and the evidence at trial was in conflict as to whether he intended to burn

³⁵⁶ *Id.* at Syl. Pt. 3.

³⁵⁷ *Id.* at Syl. Pt. 4.

³⁵⁸ *Id.* at Syl. Pt. 7.

³⁵⁹ 282 S.E.2d 623 (W. Va. 1981).

³⁶⁰ *Id.* at Syl. Pt. 3.

³⁶¹ 329 S.E.2d 65 (W. Va. 1985).

the jail within the meaning of this State's arson in the first degree statute, *W.Va. Code*, 61-3-1 [1935], or intended to burn the personal property of a fellow-inmate within the meaning of this State's arson in the third degree statute, *W.Va. Code*, 61-3-3 [1957], the defendant, indicted for arson in the first degree, was entitled to an instruction upon arson in the third degree, as a lesser included offense under the indictment.³⁶²

Justice McHugh addressed several issues involving arson in *State v. Mullins*.³⁶³ It was noted initially that “[a]n indictment for a charge of first degree arson is sufficient to sustain a conviction if, in charging the offense, it makes reference to *W.Va. Code*, 61-3-1, as amended, and fully informs the defendant of the particular offense with which the defendant is charged.”³⁶⁴ The opinion held that “[a] building which contains an apartment, intended for habitation, whether occupied, unoccupied or vacant, is a ‘dwelling house’ for purposes of *W.Va. Code*, 61-3-1, as amended.”³⁶⁵ *Mullins* stated that “[t]o sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime.”³⁶⁶

G. *Criminal Child Abuse and Neglect*

Justice McHugh was called to address issues involving the criminal abuse and neglect statute in the case of *State v. DeBerry*.³⁶⁷ Justice McHugh held that

[i]n order to obtain a conviction under *W.Va. Code*, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term “neglect,” as that term is defined by *W.Va. Code*, 61-8D-1(6) [1988], which definition is “the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health.” Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under *W.Va.*

³⁶² *Id.* at Syl. Pt. 2.

³⁶³ 383 S.E.2d 47 (W. Va. 1989).

³⁶⁴ *Id.* at Syl. Pt. 2.

³⁶⁵ *Id.* at Syl. Pt. 3.

³⁶⁶ *Id.* at Syl. Pt. 5.

³⁶⁷ 408 S.E.2d 91 (W. Va. 1991).

Code, 61-8D-4(b) [1988].³⁶⁸

H. *Criminal Hunting Accident*

In *State v. Ivey*,³⁶⁹ Justice McHugh set out the elements for the offense of causing harm while hunting. The court held that

[u]nder *W.Va. Code*, 20-2-57 [1991], it is unlawful for any person, while engaged in hunting, pursuing, taking or killing wild animals or wild birds, to act with ordinary carelessness or ordinary negligence in shooting, wounding or killing any human being or livestock, or in destroying or injuring any other chattels or property. Any person violating *W.Va. Code*, 20-2-57 [1991] is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than ten thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned.³⁷⁰

I. *Criminal Trespass*

Justice McHugh held in *State v. Ocheltree*³⁷¹ that “[c]riminal trespass, as defined by *W.Va. Code*, 61-3B-2 [1978], is not a lesser included offense of burglary by breaking and entering, as defined by *W.Va. Code*, 61-3-11(a) [1973].”³⁷²

J. *Trafficking in Stolen Goods*

In *State v. Hall*,³⁷³ Justice McHugh set out the elements of the offense of trafficking in stolen goods. The court stated that

[t]he essential elements of the offense created by *W.Va. Code*, 61-3-18 [1931] are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a

³⁶⁸ *Id.* at Syl. Pt. 1.

³⁶⁹ 474 S.E.2d 501 (W. Va. 1996).

³⁷⁰ *Id.* at Syl. Pt. 3.

³⁷¹ 289 S.E.2d 742 (W. Va. 1982).

³⁷² *Id.* at Syl. Pt. 2.

³⁷³ 298 S.E.2d 246 (W. Va. 1982).

dishonest purpose.³⁷⁴

The opinion in *Hall* also held that

[u]nder 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.³⁷⁵

K. Carrying Deadly Weapon Without License

Justice McHugh ruled in *State v. Hodges*³⁷⁶ that

[t]he absence of a license is an element of the crime of carrying a dangerous or deadly weapon without a license and the burden of proof as to this element must be borne by the State. To the extent it diverges from this opinion, *State v. Merico*, 77 W.Va. 314, 87 S.E. 370 (1913) is hereby overruled.³⁷⁷

In *Cline v. Murensky*,³⁷⁸ Justice McHugh addressed two issues involving the offense of carrying a deadly weapon without a license. The court first held:

Where in magistrate court a petitioner was charged with and entered a plea of guilty to the misdemeanor offense of brandishing a weapon, *W.Va. Code*, 61-7-10 [1925], the State was not precluded from subsequently seeking an indictment and prosecuting that petitioner for the misdemeanor offense of carrying a weapon without a license, *W.Va. Code*, 61-7-1 [1975], where, although those two offenses arose from the same criminal transaction, the plea of guilty to brandishing a weapon was taken in magistrate court shortly after the offenses were committed, and prior to the taking of that plea, the prosecuting attorney had no knowledge of or opportunity to attend that magistrate court

³⁷⁴ *Id.* at Syl. Pt. 6.

³⁷⁵ *Id.* at Syl. Pt. 9.

³⁷⁶ 305 S.E.2d 278 (W. Va. 1983).

³⁷⁷ *Id.* at Syl. Pt. 6.

³⁷⁸ 322 S.E.2d 702 (W. Va. 1984).

proceeding.³⁷⁹

The court next held in *Cline* that “[t]he statutory offenses of brandishing a weapon, *W.Va. Code*, 61-7-10 [1925], and carrying a weapon without a license, *W.Va. Code*, 61-7-1 [1975], even when arising from a single criminal transaction, do not constitute the ‘same offense’ under constitutional prohibitions against double jeopardy.”³⁸⁰

The determination of whether an instrument is dangerous or deadly was examined by Justice McHugh in *State v. Choat*.³⁸¹ The court stated:

When the instrument involved in a prosecution under *W.Va. Code*, 61-7-1 [1975] is not one specifically enumerated in the statute, the issue as to whether it is a “dangerous or deadly weapon” is essentially a factual determination and must be submitted to the jury, unless the trial court can determine as a matter of law that under the evidence in the case the jury could not have concluded that the weapon was dangerous or deadly. To the extent that this Court’s holding in *Village of Barboursville ex rel. Bates v. Taylor*, 115 *W.Va.* 4, 174 *S.E.* 485 (1934), is inconsistent with this opinion, it is hereby overruled.³⁸²

L. *Worthless Check Offenses*

In *State v. Hays*,³⁸³ Justice McHugh addressed issues involving the crimes of obtaining property for worthless checks and issuing worthless checks. It was held initially that “*W.Va. Code*, 61-3-39 [1977] and *W.Va. Code*, 61-3-39a [1977] are not unconstitutionally vague in violation of *U.S. Const. amend. XIV, Sec. 1*, or *W.Va. Const. art. III, Sec. 10*.”³⁸⁴ *Hays* also held that

[a] violation of *W.Va. Code*, 61-3-39a [1977] is not a lesser included offense of *W.Va. Code*, 61-3-39 [1977]. Consequently, a defendant who is accused of violating *W.Va. Code*, 61-3-39 [1977] is not entitled to a ‘lesser included offense’ instruction reflecting the elements of *W.Va. Code*, 61-3-39a [1977].³⁸⁵

³⁷⁹ *Id.* at Syl. Pt. 2.

³⁸⁰ *Id.* at Syl. Pt. 3.

³⁸¹ 363 *S.E.2d* 493 (W. Va. 1987).

³⁸² *Id.* at Syl. Pt. 5.

³⁸³ 408 *S.E.2d* 614 (W. Va. 1991).

³⁸⁴ *Id.* at Syl. Pt. 2.

³⁸⁵ *Id.* at Syl. Pt. 5.

M. *First Degree Murder*

Justice McHugh held in *State v. Kopa*³⁸⁶ that

[i]t is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action.³⁸⁷

In *State v. Phillips*,³⁸⁸ Justice McHugh said that “[i]f, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means, and conduct it concurs in pointing to the accused as the perpetrator of the crime, he [or she] may properly be convicted.”³⁸⁹

Issues involving murder by lying-in-wait were presented to Justice McHugh in *State v. Harper*.³⁹⁰ He said:

“Lying in wait” as a legal concept has both mental and physical elements. The mental element is the purpose or intent to kill or inflict bodily harm upon someone; the physical elements consist of waiting, watching and secrecy or concealment. In order to sustain a conviction for first degree murder by lying in wait pursuant to *W.Va. Code*, 61-2-1 [1987], the prosecution must prove that the accused was waiting and watching with concealment or secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person.³⁹¹

Harper concluded that

[w]here, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the

³⁸⁶ 311 S.E.2d 412 (W. Va. 1983).

³⁸⁷ *Id.* at Syl. Pt. 3.

³⁸⁸ 342 S.E.2d 210 (W. Va. 1986).

³⁸⁹ *Id.* at Syl. Pt. 4 (alteration in original).

³⁹⁰ 365 S.E.2d 69 (W. Va. 1987).

³⁹¹ *Id.* at Syl. Pt. 2.

elements of that offense are present.³⁹²

Justice McHugh addressed the issue of establishing the corpus delicti based upon a confession in the case of *State v. Garrett*.³⁹³ The court held:

The corpus delicti may not be established solely with an accused's extrajudicial confession or admission. The confession or admission must be corroborated in a material and substantial manner by independent evidence. The corroborating evidence need not of itself be conclusive but, rather, is sufficient if, when taken in connection with the confession or admission, the crime is established beyond a reasonable doubt.³⁹⁴

N. *Perjury and False Swearing*

Justice McHugh held in *State v. Wade*³⁹⁵ that

[a] "lawfully administered" oath or affirmation is an essential element of the crimes of perjury, *W.Va. Code*, 61-5-1 [1931], and false swearing, *W.Va. Code*, 61-5-2 [1931]; and a "lawfully administered" oath or affirmation, as that phrase is used in *W.Va. Code*, 61-5-1 [1931], and *W.Va. Code*, 61-5-2 [1931], is an oath or affirmation authorized by law and taken before or administered by a tribunal, officer or person authorized by law to administer such oaths or affirmations.³⁹⁶

O. *Kidnapping*

Justice McHugh was asked in *State v. Brumfield*³⁹⁷ whether incidental confinement of a correction officer by an escaping inmate constituted kidnapping. The court held:

Where an inmate, by force, has unlawfully confined a correctional officer for a minimal period of time within the walls of a correctional facility in order to facilitate his escape, and movement of that officer was slight and did not result in exposure to an increased risk of harm, a conviction for the offense of

³⁹² *Id.* at Syl. Pt. 4.

³⁹³ 466 S.E.2d 481 (W. Va. 1995).

³⁹⁴ *Id.* at Syl. Pt. 5.

³⁹⁵ 174 W.Va. 381 (W. Va. 1985).

³⁹⁶ *Id.* at Syl. Pt. 1.

³⁹⁷ 358 S.E.2d 801 (W. Va. 1987).

kidnaping pursuant to *W.Va. Code*, 61-2-14a [1965] will be reversed where the confinement was incidental to the escape and the inmate has not utilized the officer as a hostage nor as a shield to protect that inmate or others from bodily harm or capture or arrest after that inmate or others have committed a crime.³⁹⁸

P. Driving Under the Influence

In *State ex rel. Crank v. City of Logan*,³⁹⁹ Justice McHugh had to determine whether municipalities could create DUI ordinances that carried penalties that were less than that which was provided by statute. He held that “[p]ursuant to *W.Va. Code*, 17C-5-11(b), as amended, a municipal ordinance must impose the same penalty for driving under the influence of alcohol as is prescribed for the corresponding state offense.”⁴⁰⁰

Q. Forgery

The case of *State v. Phalen*⁴⁰¹ involved prosecution for the crime of forgery. Justice McHugh wrote that

[i]t is a jury question as to whether the requisite intent to commit forgery, pursuant to *W.Va. Code*, 61-4-5 [1961], is present when a person who has given a false name later admits the name given was false. Additionally, a jury may find that giving a false name on a police fingerprint card constitutes forgery since the act prejudices the legal rights of the State by frustrating the State’s authority to administer justice.⁴⁰²

R. Application of Habitual Offender Statute

At issue in *Justice v. Hedrick*⁴⁰³ was the use of an out-of-state conviction to enhance the punishment of the defendant’s in-state conviction. Justice McHugh wrote that “[w]here a defendant has been convicted of a crime in another jurisdiction, which defendant in West Virginia would have been treated as a juvenile offender, such prior conviction may not be used in subsequent West Virginia proceedings to enhance the defendant’s sentence pursuant to the West

398 *Id.* at Syl. Pt. 3.

399 363 S.E.2d 135 (W. Va. 1987).

400 *Id.* at Syl.

401 452 S.E.2d 70 (W. Va. 1994).

402 *Id.* at Syl. Pt. 4.

403 350 S.E.2d 565 (W. Va. 1986).

Virginia Habitual Criminal Statute.”⁴⁰⁴

He concluded the opinion stating that “[w]hether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, *W.Va. Code*, 61-11-18, -19 [1943], depends upon the classification of that crime in this State.”⁴⁰⁵

S. *Collateral Estoppel*

In the case of *State v. Porter*,⁴⁰⁶ Justice McHugh held that “[t]he principle of collateral estoppel applies in a criminal case where an issue of ultimate fact has once been determined by a valid and final judgment. In such case, that issue may not again be litigated between the State and the defendant.”⁴⁰⁷

V. CIVIL PROCEDURE

A. *Motion to Dismiss*

Relying on the decision in *Chapman v. Kane Transfer Co.*,⁴⁰⁸ Justice McHugh held in *Dunlap v. Hinkle*⁴⁰⁹ that “[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴¹⁰

B. *Summary Judgment*

Justice McHugh took the opportunity in *Brown v. Bluefield Municipal Building Commission*⁴¹¹ to restate a rule of law fashioned in *Masinter v. Webco Co.*⁴¹² The court in *Brown* held that “[e]ven if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment.”⁴¹³

⁴⁰⁴ *Id.* at Syl. Pt. 2.

⁴⁰⁵ *Id.* at Syl. Pt. 3.

⁴⁰⁶ 392 S.E.2d 216 (W. Va. 1990).

⁴⁰⁷ *Id.* at Syl. Pt. 1.

⁴⁰⁸ 236 S.E.2d 207 (W. Va. 1977).

⁴⁰⁹ 317 S.E.2d 508 (W. Va. 1984).

⁴¹⁰ *Id.* at Syl. Pt. 2.

⁴¹¹ 280 S.E.2d 101 (W. Va. 1981).

⁴¹² 262 S.E.2d 433 (W. Va. 1980).

⁴¹³ 280 S.E.2d at Syl.