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Criminal Procedure

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CRIMINAL PROCEDURE

ACORD v. HEDRICK, 342 S.E.2d 120 (W. Va. 1986).

Criminal Procedure—Evidence—Ineffective Assistance of Counsel—Private Prosecutor

The defendant was convicted of first-degree sexual assault. This case was the appointed defense attorney's first criminal case, although his cocounsel had been a judge for 16 years. The victim's family hired an attorney to prosecute the case. The defendant claimed that the private prosecutor "overmatched" his court-appointed counsel, resulting in several reversible errors and depriving the defendant of effective assistance of counsel.

To buttress his claim, the defendant asserted that the prosecution improperly questioned witnesses about items stolen on the night of the assault. The prosecution also questioned the defendant's accomplices, and one of them testified that he had pled guilty to grand larceny as a result of the events of the night the alleged assault occurred. The jury was given an instruction limiting its consideration of the guilty plea.

The defendant also claimed that he told the arresting officer that he did not know anything about a crime being committed. The prosecution offered testimony by the officer that the defendant "had nothing to say about the matter." The court instructed the jury that the testimony was not to be considered as an incriminating statement but was to be considered only for impeaching the defendant's prior testimony. The defendant petitioned the court for a writ of habeas corpus.

The West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether the retention of a private prosecutor is per se improper; (2) whether the testimony concerning the stolen items was admissible; (3) whether the court erred in admitting the accomplice's guilty plea; (4) whether the officer's testimony concerning the defendant's post-arrest silence was admissible; (5) whether the defendant was deprived of due process by prosecutorial "overmatch" or ineffective assistance of counsel.

The court held: (1) The retention of a private prosecutor is perfectly just, legal, and fair in many cases, and is consistent with West Virginia Code section 7-7-8; (2) the testimony concerning the stolen items was admissible to establish the identity of the person charged with the crime, which is one of the exceptions under the collateral crime rule; (3) the accomplice's guilty plea was admitted to show his credibility, and the court committed no error since it gave the jury the proper limiting instruction; (4) the officer's testimony concerning the defendant's post-arrest silence was admissible to impeach the defendant's prior statement; (5) the defendant made no showing of actual prejudice that would support a claim of prosecutorial "overmatch" or ineffective assistance of counsel. A

mere imbalance between defense counsel and prosecution does not invalidate a criminal trial.

FEATHERS v. DETRICK, 336 S.E.2d 922 (W. Va. 1985).

Criminal Procedure, Extradition—Parole Violation—Probable Cause

The appellant was convicted in Indiana of criminal offenses. After being released from prison on parole, he violated the terms of his parole and came to West Virginia. Although no judicial determination had been made regarding whether appellant had violated the terms of his parole, he was scheduled to be extradited from West Virginia to Indiana. The court authorized the extradition, and the appellant appealed.

On appeal, the court addressed the issue of whether such an extradition was proper. The supreme court held that the Uniform Extradition Act does not require, as a prerequisite to the extradition of an alleged parole violator, a judicial determination by the demanding state of probable cause to believe that the person demanded has broken the terms of his or her parole. Therefore, the extradition was proper.

FOX v. STATE, 347 S.E.2d 197 (W. Va. 1986).

Criminal Procedure—Habeas Corpus—Probation—Restitution

After pleading guilty to two counts of breaking and entering, petitioner was placed on probation on the condition that he pay restitution. This condition of restitution was included without an inquiry into the offender's ability to pay. When the petitioner subsequently violated the terms of his probation by failing to pay restitution, his probation was revoked, and he was sentenced to imprisonment at the state penitentiary. A writ of habeas corpus was then filed.

The court considered whether a condition of probation requiring an offender to pay restitution is valid where the trial court makes no inquiry into the offender's ability to pay such restitution without undue hardship on the offender or his family.

The court determined that an inquiry into an offender's ability to pay is statutorily required before the court may condition probation on reimbursement of the costs of services rendered a defendant under the public defender law. In addition, the sentencing court must conduct a hearing and make a finding on the record with respect to the ability of the offender to pay restitution. Since the trial court had no authority to include the restitution as a condition of the petitioner's original probation, his violation of that condition cannot void the probation sentence.

Justice Neely dissented to the requirement that the trial court make an inquiry into the offender's ability to pay restitution prior to including restitution as a condition of probation.

GOOD v. HANDLAN, 342 S.E.2d 111 (W. Va. 1986).

Criminal Procedure—Prohibition—Right to Speedy Trial—Three-term Rule

Relator was indicted in the January 1984 term and charged with second degree murder. She moved for continuances in the January and May 1984 terms. The relator requested a prompt trial in the September 1984 term, but the State requested that she undergo a mental examination. In the May 1985 term, a joint motion of the parties was granted, and allowed the matter to be continued generally. In the September 1985 term, it was discovered that the presentence reports had not been properly delivered. The relator then sought to prohibit the court from trying her case because of the delay in bringing her case to trial.

The court considered the following issues: (1) Whether a defendant's right to a speedy trial is violated when continuances, granted with good cause, have delayed trial beyond three terms of court; and (2) whether the trial court's ordering of a second mental examination of the relator was sufficient good cause to avoid the provisions of the three-term rule.

The court decided that relator's right to a speedy trial is not violated when her case is continued for good cause over several terms of court, and a continuance granted in order to conduct a second mental examination constituted sufficient good cause.

HASAN v. HOLLAND, 342 S.E.2d 144 (W. Va. 1986).

Criminal Procedure

This was a proceding in habeas corpus by the petitioner, an inmate of the West Virginia State Penitentiary at Moundsville. The petitioner contended that the application of West Virginia Code section 28-5-27, the current "good time" statute, to inmates such as himself, who were convicted of crimes committed prior to the effective date of the statute, violated the constitutional prohibitions against ex post facto laws. Petitioner had been convicted of two counts of breaking and entering and was sentenced. At this time inmates were eligible for "good time," West Virginia Code section 28-5-28 (1977), in addition to "warden's good time," West Virginia Code section 28-5-27a (1951), and "good time" for overtime work, West Virginia Code section 28-5-27b, West Virginia Code section 28-5-27 (Supp. 1985) which was enacted in 1984, expressly repeals all former "good time" provisions, makes "good time" available to all inmates, and is applicable retroactively to those crimes committed prior to its effective date. The writ of habeas corpus was discharged.

The West Virginia Supreme Court of Appeals addressed whether enactment of the 1984 "good time" statute was disadvantageous to petitioner, and therefore violated ex post facto laws when it was applied retroactively to petitioner.

The court held that the new "good time" provisions, West Virignia Code section 28-5-27, did not operate to the detriment of the petitioner, and therefore

was not violative of ex post facto laws. The petitioner was entitled to more "good time" under the new statute than could have been earned under the prior statute.

KENNEDY v. STATE, 342 S.E.2d 251 (W. Va. 1986).

Criminal Procedure—Prohibition

A criminal indictment charged the petitioner with two counts of obtaining money by false pretenses. Petitioner claimed that the indictment, arising out of contract negotiations, represented an abuse of the criminal process as it essentially involved a contractual question rather than a criminal one. Petitioner also claimed that the indictment itself was legally insufficient and that his right of access to the complainant had been violated. Respondent Judge Narick denied motions to dismiss. The petitioner then sought relief by petition for writ of prohibition.

The court considered the following issues: (1) Whether a case arising from contractual negotiations and alleging felonious intent constitutes substantial error if it is resolved through the criminal process; (2) whether an indictment is insufficient when it alleges that an actual fraud has knowingly and falsely been committed; (3) whether complainant and her private counsel interfered with petitioner's constitutional rights of confrontation and assistance of counsel by preventing the petitioner from interviewing the complainant about the criminal action.

The court held that there is no substantial legal error committed by allowing a case arising from contract negotiations to be adjudicated through the criminal process. An indictment itself is not insufficient provided it follows the language of the statute, fully informs the accused of the offense with which he is charged, and enables the court to determine the statute on which the charge is based. Finally, petitioner's constitutional rights were not interfered with by complainant's actions. While a prosecutor may not instruct a witness to refuse to speak with the defense, a witness may not be forced to do so, absent extraordinary and compelling circumstances.

In re MENDEZ, 344 S.E.2d 396 (W. Va. 1985).

Canon 3, West Virginia Judicial Code of Ethics—Criminal Law—Criminal Procedure

The Judicial Hearing Board in July 1985, found Mendez, a Magistrate in Logan County, in violation of Canon 3A (1) and Canon 3A (4) of the Judicial Code of Ethics for suspending the sentence of a convicted offender whom he had sentenced to a jail term, and for engaging in *ex parte* communications with the offender's father concerning the proceeding. The Board recommended that Mendez be publicly censured.

The issues addressed by the West Virginia Supreme Court of Appeals were: (1) Whether a magistrate in West Virignia has the power to suspend a sentence imposed in a criminal case; and (2) whether Mendez's efforts to contact the Logan County circuit judges and the prosecuting attorney, and his reliance upon the statement of an assistant prosecuting attorney who told him he could find no law that would preclude Mendez from suspending the Craddock sentence should weigh as mitigating factors to his actions.

In affirming the Judicial Hearing Board's ruling, the court held that a magistrate in West Virginia has no power to suspend a sentence imposed in a criminal case, and Mendez thus committed a legal error in suspending the sentence of Mark Craddock. Even if Mendez had had such authority, he acted in this case upon the unverified, *ex parte* representation of Craddock's father that the jail sentence was harmful to Mark Craddock's medical ailment. Since the ailment was not disclosed to Mendez at the time of sentencing, and in view of the fact that Mark Craddock was serving his sentence upon weekends only, the Judicial Hearing Board was correct in finding that "no urgency existed" to suspend the sentence. Mendez's efforts to contact officials for authorization were commendable and showed the absence of improper motive; however, Mendez's actions were sufficiently egregious to warrant public censure.

PRATT v. HOLLAND, 338 S.E.2d 236 (W. Va. 1985).

Appointment of Counsel—Criminal Procedure—Habeas Corpus

After relator's conviction for armed robbery in 1976, he indicated his intent to appeal. He received his copy of the trial transcript in two portions. For reasons not made known to the court, no appeal was taken after the transcript was received. In 1982, relator's counsel filed an application for a writ of habeas corpus in the Circuit Court of Marion County. The court denied the relator's request for discharge from confinement because there was found no "extraordinary dereliction" on the part of the State in providing him with an opportunity to appeal. On appeal, the court addressed whether this denial was proper.

The West Virginia Supreme Court of Appeals decided a defendant can not be discharged from confinement on the ground that he has been denied a right to a meaningful appeal where any dereliction on the part of the State to appoint counsel was corrected. The court pointed out that while the State is constitutionally obliged to appoint effective counsel to assist an indigent criminal defendant in his appeal, once this has been done there rests on the indigent criminal defendant some responsibility to make known to the court his counsel's inaction.

RANDOLPH v. CIRCUIT COURT OF DODDRIDGE COUNTY, No. 17097, slip op. (W. Va. Apr. 4, 1986).

Criminal Procedure—Habeas Corpus—Indigent Defendant

Petitioner was convicted of receiving and transferring stolen property. After the sentencing, petitioner indicated his intent to appeal. Because the trial transcript received by petitioner's counsel was not paid for, the trial court revoked petitioner's appeal bond, thus depriving him of an opportunity to appeal.

In its consideration of whether an indigent criminal defendant who is denied the opportunity to appeal is legally entitled to relief, the court decided that an indigent criminal defendant does indeed have the right to appeal his conviction. He also has the right to receive a copy of his trial transcript without cost to him.

SELLERS v. BROADWATER, 342 S.E.2d 198 (W. Va. 1986).

Criminal Procedure—Plea Bargaining—Prohibition

According to a plea bargaining agreement, the petitioner agreed to plead guilty to all counts of sexual abuse in exchange for probation. After he had partially fulfilled the conditions of his probation, the mother of the victims requested that the plea bargain agreement be set aside and a new trial initiated. The trial judge complied with her request. A writ of prohibition was then filed by the petitioner.

The issue considered by the court was whether, after a plea bargain agreement has been reached in a criminal case and the defendant has partially performed the conditions of his bargained-for sentence, a court may vacate the order accepting the plea bargain.

The court held that in criminal cases in which the defendant has already partially satisfied the conditions of his bargained-for sentence, an order affecting that sentence is limited to cases in which the sentence is reduced. Attempts to increase the penalty violate principles of double jeopardy.

STATE v. ADKINS, 346 S.E.2d 762 (W. Va. 1986).

Criminal Procedure—Search and Seizure

Upon receiving a "tip" from an unidentified party, police presented a sworn affidavit and complaint for a search warrant to a magistrate. They then searched the home of appellant's girlfriend for controlled substances. Appellant was subsequently convicted of possession with intent to deliver a controlled substance.

The court considered the following issues: (1) Whether the determination of probable cause for issuance of a search warrant must be based solely on facts contained within the four corners of the affidavit, and (2) whether a defendant who is more than a casual visitor to an apartment or dwelling in which illegal drugs have been seized has a right to challenge the search and seizure of the illegal drugs which he is accused of possessing.

The court held that the determination of probable cause for issuance of a search warrant must be based solely on facts contained within the four corners

of the affidavit. Thus, facts revealed later, such as the reliability of sources, may not be alleged in subsequent proceedings. The court, while noting the good faith reliance exception acknowledged in *United States v. Leon*, 468 U.S. 897 (1984), did not find it applicable in a "bare bones" affidavit situation. The court also held that a defendant who is more than a casual visitor to an apartment or dwelling in which illegal drugs have been seized has the right to challenge the search and seizure of the illegal drugs which he is accused of possessing.

Justice Neely dissented as to the necessity to rely solely on the facts contained in the affidavit in order to determine probable cause for the issuance of the search warrant.

STATE v. BALL, 337 S.E.2d 310 (W. Va. 1985).

Criminal Procedure—Juvenile Offender

Before pleading guilty to multiple homicides, the appellant entered into a plea agreement whereby he was to plead guilty to the homicides he committed as a juvenile in exchange for a sentence which would allow for his disposition at the Anthony Center for Youthful Male Offenders instead of the State Penitentiary. At the sentencing hearing, however, the trial court felt that it did not have the authority to allow a defendant who had been sentenced to life imprisonment to be placed in a home for youthful offenders and sentenced him to the West Virginia State Penitentiary. Appellant instituted an appeal claiming that the court failed to follow the plea agreement.

On appeal, the court addressed the issue of whether a juvenile sentenced to life imprisonment may nonetheless serve a portion of his sentence at an institution other than a penitentiary.

The court stated that "[t]he entire tenor of section 49-5-13 of the West Virginia Code is to provide substantial flexibility for sentencing of persons who committed offenses when they were juveniles" and therefore a juvenile sentenced to life imprisonment may serve a portion of his sentence at an institution other than a penitentiary. The court has the authority to sentence a person who commits a homicide while a juvenile to the Anthony Center for Youthful Male Offenders even though he is sentenced as an adult.

STATE v. BARKER, 346 S.E.2d 344 (W. Va. 1986).

Ineffective Assistance of Counsel

Appellant was convicted of grand larceny after a police officer discovered stolen goods in his vehicle. The officer had examined the truck parts, which were in plain sight, and realized that the serial numbers had been removed. Appellant contends that his conviction should be reversed due to communications between the trial judge and the jury outside the presence of the appellant and his counsel, ineffective assistance of counsel, and failure of the trial judge

to fully instruct the jury on the essential elements of the offense charged.

The court considered the following issues: (1) Whether the trial judge erred by giving a note to the jury directing it to "continue deliberating" without having the appellant or his counsel present for such communication; (2) whether assistance of counsel can be considered ineffective when counsel fails to move to suppress evidence which was obtained through a legal search of appellant's truck; (3) whether the trial judge erred by failing to properly instruct the jury as to an essential element of the offense alleged.

The court held that: (1) The trial judge erred by communicating with the jury outside the presence of the appellant or his counsel, but, because the reversal of appellant's conviction was made on other grounds, the harmlessness of the error was not discussed; (2) assistance of counsel may not be considered ineffective where counsel fails to move to suppress evidence obtained legally from the appellant's vehicle; (3) the trial judge erred by omitting an essential element from his instruction to the jury defining the alleged offense.

STATE v. BLACK, 338 S.E.2d 370 (W. Va. 1985).

Confessions—Exclusionary Rule—Penalty

Appellant and another individual allegedly robbed a motel and kidnapped two of its employees. Before learning of the robbery, a police officer stopped the vehicle which appellant was driving. After the appellant passed the field sobriety test, he was permitted to leave. The police officer who administered the test had noticed two metal boxes on the seat of the vehicle. The testimony of the police officer concerning the two metal boxes was allowed at trial even though evidence concerning the later illegal seizure of the boxes was suppressed. Before the trial of this case, appellant approached the prosecutor and voluntarily made several admissions to him. The appellant claimed that the introduction of this extra-judicial statement at trial was error. Finally, appellant also claimed that the sentence imposed on him was disproportionate to the crimes committed.

The court addressed the following issues: (1) Whether the exclusionary rule applies to evidence about which the prosecution learns from an independent source who has no connection with the illegal search and seizure; (2) whether a confession by the defendant to a prosecutor without the presence of the defendant's counsel is admissible where it appears that there was no inducement or threat made by the prosecutor and the defendant was not in custody; (3) whether a sentence which is within the statutory boundaries as punishment for the crime is disproportionate to that crime when the sentencing court took other proportionality factors into account in making its decision.

The court held that: (1) The exclusionary rule does not apply when the state learns from an independent source about the evidence sought to be suppressed; (2) a statement made to the prosecutor while the defendant was not in custody

or involved in custodial interrogation and without inducement by the prosecutor is admissible at trial; (3) after a court has followed the general pattern of determination as to the proportionality of a defendant's sentence and decides upon a sentence which is within the statutory boundaries created for the particular crime, that sentence is not considered disproportionate.

STATE v. CABELL, 342 S.E.2d 240 (W. Va. 1986).

Criminal Procedure—Plea Bargaining

Appellant was charged with five felony offenses. According to a plea bargain agreement, the appellant agreed to plead guilty to two counts if the prosecutor would seek dismissal of the three remaining counts and would recommend a thirty year sentence on the aggravated robbery charge. The circuit court, however, did not inform the appellant that he would have no right to withdraw his guilty pleas if the court decided not to accept the prosecutor's sentencing recommendation. At the sentencing hearing, the court chose not to follow the prosecutor's recommendation and instead imposed a harsher sentence. Appellant's motion to withdraw his guilty pleas was denied.

The supreme court considered whether a guilty plea obtained through a plea bargaining agreement should stand when the defendant is not informed that he would have no right to withdraw his plea in the event that the court chose not to follow the prosecutor's sentencing recommendations.

In deciding the issue, the court emphasized that in complying with Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure, a trial court has two options to meet its mandatory requirements. It may initially advise the defendant at the time the guilty plea is taken that if the court does not accept the recommended sentence, the defendant will have no right to withdraw the guilty plea. As a second option, the trial court may conditionally accept the guilty plea pending a presentence report without giving the cautionary warning required by Rule 11(e)(2). However, if it determines at the sentencing hearing not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea. Since neither option was followed, the defendant must be permitted to withdraw his guilty plea.

STATE v. COMBS, 338 S.E.2d 365 (W. Va. 1985).

Criminal Procedure, Lineup—Evidence

Appellant allegedly robbed a convenience store. The owner of the convenience store recognized the perpetrator and later identified him by his voice and other physical characteristics at a lineup conducted at police headquarters. During portions of the State's cross-examination and closing argument, the appellant contended that the prosecution used tactics which constituted misconduct. The appellant also contended that the evidence was insufficient to support the giving

of an instruction on aggravated robbery as aggravated robbery implies the use of a gun.

The court faced the following issues on appeal: (1) Whether evidence of a police lineup in which the defendant was the shortest participant and the witness described the perpetrator as being short should be suppressed as being unduly suggestive; (2) whether prosecutorial tactics constitute misconduct of a magnitude warranting reversal when the prosecutor commented on the exculpatory information given to the police concerning the alleged perpetrator's whereabouts; (3) whether evidence is insufficient to support the giving of an instruction on aggravated robbery when the defendant only gestured indicating the existence of a gun in his coat.

The court held that the reliability of the lineup procedure far outweighed its suggestiveness and that the prosecutor's comments on the exculpatory information given to the police concerning the alleged perpetrator's whereabouts did not constitute misconduct of a magnitude warranting reversal. None of the questions or comments of the prosecuting attorney implied the existence of a legal duty to come forward and disclose exculpatory information prior to trial. The court also found that the instruction on aggravated robbery was warranted because a gesture indicating the existence of a gun is enough to prove a defendant guilty of armed robbery.

STATE v. COX, 338 S.E.2d 227 (W. Va. 1985).

Criminal Procedure—Sexual Misconduct

The appellant was convicted of two counts of first degree sexual abuse in a trial where the option of a sexual misconduct verdict, a lesser offense, was not offered to the jury. This option was not given by the trial court because evidence produced at trial proved the existence of force and threats, thus there was no choice for the jury. This "forcible compulsion" was not an element of sexual misconduct. It was, however, an element of the offenses of sexual abuse and sexual assault.

On appeal, the court faced the question of whether, when evidence proves the existence of threats made by the defendant, it is error for a trial court to refuse to allow the jury to consider the crime of sexual misconduct when the element of "forcible compulsion" is not present in the definition of sexual misconduct.

The court held that where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction. "Forcible compulsion" is an element of sexual abuse and sexual assault, but not of the offense of sexual misconduct. Thus, an instruction for the lesser offense of sexual misconduct would have been inappropriate.

STATE v. DAVIS, 345 S.E.2d 549 (W. Va. 1986).

Criminal Procedure—Evidence—Pretrial Identification—Search and Seizure

The appellant was convicted of aggravated robbery after he allegedly robbed a convenience store. Due to the information of several witnesses, the police went to appellant's home and searched without a warrant. They later received a warrant and searched the home a second time. The appellant contended that the admission at trial of clothing seized at the second search was improper. Appellant, in addition to several other assignments of error, contended that in-court identification by a witness who had participated in an allegedly unconstitutional photographic lineup was improper. Although the appellant was not identified when he was first presented to witnesses at a physical lineup, he was identified when he was depicted in a photo in which he was wearing military attire. This clothing was similar to that of the perpetrator.

The supreme court considered the following issues: (1) Whether, after an initial warrantless, illegal search, evidence obtained in a legal second search is admissible when the information in the affidavit requesting the second search has no connection with the original warrantless search; and (2) whether admission into evidence of an in-court identification by a witness who had no reliable basis for the identification other than a pretrial photographic identification which created a substantial likelihood of misidentification was proper.

The court concluded that evidence obtained in a legal second search is admissible when the information in the affidavit requesting the warrant for the second search has no connection with the information obtained through a previous illegal search. The court also held that allowance of an in-court identification by a witness who had no reliable basis for such identification other than a pretrial photographic identification procedure was improper due to the substantial likelihood of misidentification created by that pretrial photographic procedure.

STATE v. ELLIS, 342 S.E.2d 285 (W. Va. 1986).

Criminal Procedure—Evidence—Extrajudicial Statement

The appellant was charged with the shotgun wounding of his sister. Appellant's counsel filed a motion asking for copies of any statements made by the appellant to any other person involved in the case, but the prosecution failed to furnish such information. The prosecution, however, did produce such evidence at trial which helped lead to a conviction of the appellant.

On appeal, the court addressed the issue of whether it is error to allow the State to introduce prejudicial evidence of any inculpatory extrajudicial statement allegedly made by appellant when that statement had not been disclosed after the pretrial discovery motion requiring its disclosure.

The court held nondisclosure is prejudicial where the defense is suprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case. The testimony went to the credibility of the appellant and was prejudicial.

STATE v. GRAVELY, 342 S.E.2d 186 (W. Va. 1986).

Criminal Law—Criminal Procedure—Evidence

Appellant was convicted of aggravated robbery and sentenced to fifteen years in the penitentiary, but conviction was reversed due to the trial court's admission of testimony regarding identification of the appellant obtained in violation of his right to counsel. At retrial, the appellant, when informed by the court that he had no legal right to both represent himself, and at the same time have court appointed counsel assist him, stated he wanted to represent himself and was again convicted and sentenced as above. Appellant was denied his writ of habeas corpus alleging that he did not knowingly waive his right to counsel, and that he was denied his right to appeal.

On appeal, the West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether the court erred in admitting testimony relating to the pretrial identification of the appellant; and (2) whether the court erred in finding that appellant waived his right to counsel with full knowledge and comprehension of that right and of the dangers in relinquishing it.

The supreme court held that the admission of the testimony of the robbery victim, which related to the pretrial identification of the appellant in the basement of the courthouse after the appellant had left the magistrate's office where he expressed a desire to be represented by counsel, was merely cumulative of other evidence before the jury and was harmless beyond a reasonable doubt. Furthermore, there was no error in the trial court's finding that the appellant knowingly and intelligently elected to proceed without counsel. In this case, failure to warn the appellant of the dangers of self-representation is not reversible error where the record indicates appellant's familiarity with the court system and awareness of the consequences of his decision.

STATE v. HARLOW, 346 S.E.2d 350 (W. Va. 1986).

Criminal Procedure—Habeas Corpus—Plea Bargaining

According to a plea bargain agreement, relator was to plead guilty to one count of attempted delivery of a controlled substance and plead nolo contendere to two counts of petit larceny by information. In exchange for his plea, the State was to make a nonbinding recommendation for probation and move to dismiss one count of delivering the controlled substance. In the probation report, the prosecutor made remarks concerning the relator's lack of cooperation. This, the relator contended, constituted a breach of the prosecutor's agreement ac-

cording to the bargain and thus the relator moved to withdraw his pleas. His motion was denied.

The supreme court considered whether the prosecutor's statement to the probation officer concerning relator's lack of cooperation constituted a fair and just reason for withdrawal of one's guilty pleas when the prosecutor had previously agreed to recommend probation.

The court held that negative statements made by a prosecutor who had agreed to recommend probation constitutes a fair and just reason to withdraw the defendant's guilty pleas. Such withdrawal would not unduly prejudice the State.

STATE V. HUTCHINSON, 342 S.E.2d 138 (W. Va. 1986).

Criminal Procedure—Evidence—Ineffective Assistance of Counsel

Appellant was allegedly involved in a gas station robbery. After receiving his Miranda warnings at the police station, the appellant indicated his desire to have a lawyer present. A voice sample was then taken without the attorney present. Appellant was later convicted of nonaggravated robbery. He contended that the pretrial voice identification should have been suppressed because the police asked him to give the voice sample after he had requested to speak with an attorney. He also contended that the lawyer's failure to object to the judge's unconstitutional alibi instruction constituted ineffective assistance of counsel.

The West Virginia Supreme Court of Appeals considered the following issues: (1) Whether the pretrial voice identification should have been suppressed because the police asked the appellant to give it after he had requested the presence of an attorney; and (2) whether a lawyer's failure to object to an unconstitutional alibi instruction constitutes ineffective assistance of counsel when such instruction had previously been considered applicable.

The court held that after a defendant expresses a clear, unequivocal desire to be afforded presence of counsel, he is to be dealt with as if he actually is represented. The request to give a voice sample, however, does not implicate the privilege against self-incrimination. Thus, evidence obtained through the use of the voice sample does not have to be suppressed. The court also decided that counsel exhibited the normal and customary degree of skill even though he did not object to the instruction given by the court. The court noted that "counsel is normally not expected to foresee future new developments in the law or...to research parallel jurisdictions...[or] federal rules of evidence in preparation for a state proceeding."

STATE v. JENKINS, 346 S.E.2d 802 (W. Va. 1986).

Criminal Procedure—Ineffective Assistance of Counsel

The defendant was convicted of second degree sexual assault. On appeal, the defendant alleged ineffective assistance of counsel, error by the trial judge in preventing the defense counsel from conducting meaningful cross-examinations, and error by the trial judge in interrupting the trial with allegedly predudicial remarks about defense counsel's performance.

Addressing these issues, the court found that in determining the effectiveness of assistance of counsel, a court must measure counsel's performance by the normal and customary degree of skill possessed by attorneys who are knowledgable in the area of criminal law. The ineffective assistance of counsel must be proved by the preponderance of the evidence. The court also determined that a judge is not precluded from intervening into the trial process as long as his intervention does not prejudice the case of the defendant.

STATE v. MATNEY, 346 S.E.2d 818 (W. Va. 1986).

Criminal Law—Criminal Procedure—Evidence—Juror Competency—Self-defense

The Circuit Court of Mingo County had adjudged the defendant guilty of second degree murder and sentenced him to an indeterminate term of five to eighteen years imprisonment, for the killing of Ermel Lester in a tavern with a .22 caliber revolver after Lester threatened the defendant by swinging a pipe at him. The last two shots were fired after the victim was lying on the floor of the tavern. There was a history of hostility between the two men, defendant had told a third person he would kill the victim one day, and defendant expressed no remorse at the crime.

The court determined three issues in the case: (1) Whether it was reversible error to instruct the jury on both first and second degree murder without a showing of malice, when the evidence showed the defendant had acted in the heat of passion under great provocation; (2) whether the evidence adduced at trial was sufficient to prove beyond a reasonable doubt that the defendant did not act in self-defense; (3) whether the State's dismissal of a juror for cause was error, when the juror stated that he knew both the defendant and the victim and that "it would be hard" to render a fair verdict.

The court determined that the evidence was such that the jury could have found beyond a reasonable doubt that the killing was not done in self-defense as a matter of law. The defendant was not even struck by the weapon wielded by the victim. It is not error to give instructions on murder of the first and second degree if there is "any evidence tending, in any appreciable degree, to prove such offense." Moreover, the action of a trial court in striking a juror is largely discretionary. In any case where it is in doubt, the doubt must be resolved in favor of the challenge. The juror's responses to questioning certainly raised a substantial question as to whether he would be able to be fair and impartial.

STATE v. MILLER, 336 S.E.2d 910 (W. Va. 1985).

Criminal Procedure—Evidence—Kidnapping—Sexual Assault

The appellant allegedly asked two girls to help him locate his dog. After he had made various stops, he drove one of the girls out to a wooded area and sexually assaulted her. He was convicted of both kidnapping and first degree sexual assault.

The conviction was appealed to the West Virginia Supreme Court of Appeals on several assignments of error. On appeal, the court initially decided that it was not a violation of double jeopardy principles for a defendant to be convicted of both kidnapping and first degree sexual assault where the defendant exercised control over the victim for a significant amount of time even before the assault. Kidnapping is not merely incidental to sexual assault where the defendant exercised this type of control. In deciding whether the acts that technically constitute kidnapping are incidental to another crime, courts should examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased rate of harm. The court also held that a victim is not a "voluntary social companion" of a defendant simply because the victim voluntarily becomes a companion prior to the beginning of an assault. In addition, the court stated that an indictment is sufficient when it follows the language of the statute, enables the court to determine the statute on which the charge is based, and fully informs the accused of the particular offense with which he is charged. Furthermore, defendant and his counsel do not have a right to be present at the grand jury proceedings from which the defendant's indictment results. The court also noted that rulings on the admissibility of evidence are within the trial court's discretion and are left undisturbed absent a clear abuse of discretion and that it was not error for the trial court to refuse to require the State to give the defendant a copy of police reports where defendant's counsel made no motion requesting these reports.

STATE v. MINOR, 341 S.E.2d 838 (W. Va. 1986).

Criminal Procedure—Probation Revocation

The appellant, convicted of welfare fraud, was sentenced to imprisonment in the county jail for a term of twelve months. After being placed on probation, appellant's probation officer filed with the court a petition to revoke her probation on the ground that the appellant had failed to abide by certain of its conditions. Specifically, the probation officer alleged that she had failed to make any restitution payments. The court revoked her probation and ordered her to serve the remainder of the sentence in the county jail. Appellant contends that the state did not establish the violation by a clear preponderance of the evidence.

The issue confronting the court was whether, in a proceeding to revoke an individual's probation for violation of probation conditions, the State meets its

burden of proof when it proves only that the individual failed to pay restitution.

The court held that the State must also prove that the failure to pay restitution was contumacious. The State in the present case did not meet that burden.

STATE v. OXIER, 338 S.E.2d 360 (W. Va. 1985).

Criminal Procedure—Pretrial Silence

Appellant was convicted of breaking and entering. During the trial, he was cross-examined about his pretrial silence on the issue of his alibi. The prosecutor commented on the same during his closing argument. The prosecutor also misstated the law in regard to his explanation of "reasonable doubt" to the jury. Following his conviction, the appellant instituted his appeal.

The court addressed the following issues: (1) Whether a prosecutor may cross-examine a defendant in regard to his pretrial silence or comment on the same to the jury, and (2) whether a prosecutor's misstatement of the law in closing argument, after the jury has already been correctly instructed, constitutes reversible error when the accused is not prejudiced.

The court decided that a prosecutor may not cross-examine a defendant in regard to his pretrial silence or comment on the same to the jury. Thus, the prosecutor committed reversible error. The court also held that when the accused is not prejudiced, misstatement by the prosecutor of a concept that has previously been correctly explained to the jury does not constitute reversible error.

STATE v. SANDLER, 336 S.E.2d 535 (W. Va. 1985).

Criminal Procedure—Evidence—Self-representation

Appellant was arrested for driving under the influence of alcohol. He submitted to a breath test which was not preserved by the police. At trial, he became dissatisfied with his appointed counsel and requested new counsel. Because this request was denied, appellant elected to proceed without counsel. After the jury retired for deliberations they requested more evidence. The trial judge allowed the reopening of the trial for the introduction of more evidence on the part of the prosecution. The jury then found the appellant guilty. The defendant appealed the conviction on several assignments of error.

On appeal, the court held that court-appointed counsel may not be dismissed absent a conflict of interest, a breakdown in attorney-client communication, or some conflict which may lead to an unjust verdict. However, defendant is entitled to relief when he proceeds without counsel and is not properly warned about the dangers of self-representation. The court also concluded that even though due process does not require law enforcement agencies to preserve breath samples obtained during the testing for alcohol consumption, introduction of

additional evidence after the close of a case but before the jury returns a verdict may be cause for reversal where the reopening was handled in a prejudicial manner.

STATE v. SWIGER, 336 S.E.2d 541 (W. Va. 1985).

Criminal Procedure

Pretrial psychological examinations concluded that the appellant was mentally retarded and incompetent to stand trial. Approximately a year and a half after the criminal incident, the appellant was diagnosed at a state medical facility as having an improved mental condition with the competency to stand trial. Subsequently, a doctor who previously examined the appellant concluded again that the appellant was incompetent to stand trial. After a hearing the circuit court found the appellant competent to stand trial. Appellant was convicted of two felonies and sentenced to two concurrent penitentiary terms. He contended that he was not guilty by reason of insanity and that he was not competent to stand trial.

On appeal, the West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether appellant's counsel was ineffective in allegedly not submitting evidence during the hearing of the appellant's incompetency to stand trial; (2) whether the evidence submitted during the hearing established the appellant's incompetency to stand trial; (3) whether one found incompetent to stand trial shall be periodically reviewed.

The court held that defense counsel at a competency hearing who does not call witnesses who could have directly testified that the appellant was incompetent to stand trial is not ineffective in his assistance to his client where such missing testimony would be only cumulative of testimony already given. The lack of such testimony is harmless error because the circuit court committed error in finding that the appellant was competent to stand trial. One who is sane at the time of the acts cannot be tried when mentally incapacitated, and one is only competent when exhibiting the ability to consult rationally and understandably with his counsel, while also factually understanding the proceedings against him. Furthermore, the circuit court committed reversible error in finding the appellant competent to stand trial on testimony less than certain, and where other testimony arising from the results of two examinations maintained that the appellant was incompetent to stand trial. This case was reversed and remanded for proceedings including a determination of whether appellant is competent to stand trial, and if found incompetent, appellant's competency to stand trial shall be periodically reviewed.

STATE v. VANMETRE, 342 S.E.2d 450 (W. Va. 1986).

Criminal Procedure—Jurors

Appellant was jointly indicted with four other individuals for the offense of grand larceny. The same jury was permitted to hear the trials of the appellant and the other joint indictees.

On appeal, the court addressed whether this procedure constituted reversible error.

The court reversed and remanded the case on the grounds that the same juror should not be permitted to hear the trials of two defendants who are charged with the same offense but tried separately.

STATE v. WALLACE, 337 S.E.2d 321 (W. Va. 1985).

Criminal Procedure—Evidence

After the appellant allegedly robbed a supermarket, he left tracks in the snow as he fled the area. The police, following the tracks, were able to locate and arrest the appellant. The evidence at trial, which was primarily circumstantial, included the results of a comparison between hair taken from the ski mask worn by the perpetrator and hair from the appellant. At the close of the trial, the court instructed the jury as to the punishment for carrying a deadly weapon without a license even though the prosecution did not directly prove that the appellant did not have such a license. The defendant was convicted of attempted aggravated robbery and unlawfully carrying a deadly weapon. The defendant appealed his conviction on several grounds.

On appeal, the court held that a conviction should not be set aside on the ground that the verdict is contrary to or not supported by the evidence when circumstantial evidence is enough to convince impartial minds of the guilt of the defendant. The court stated that hair samples may be admitted into evidence when an expert witness is not absolutely certain that the hair came from the defendant as long as the tests are scientifically reliable. However, the court did find that it is improper to instruct a jury as to the punishment for carrying a dangerous or deadly weapon without a license when the prosecution does not directly prove that a defendant lacked a license. The absense 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 that element must be borne by the State.

STATE ex rel. *DeVAUL v. FELTZ*, No. 16771, slip op. (W. Va. Dec. 6, 1985).

Criminal Procedure—Notice of Appeal—Prohibition

After being convicted of trespassing by respondent, relator appealed to the Circuit Court of Marion County. Although the prosecuting attorney sent relator a letter informing him of the date and time of his appeal, the letter returned unclaimed. Since the relator received no information concerning his appeal, he was not present for the proceeding and his case was remanded.

On appeal, the court addressed the issue of whether the Circuit Court of Marion County followed the proper procedure for informing the relator of his pending appeal.

The West Virginia Supreme Court of Appeals held that when a court fails to inform an appellant of the date and time of his proceeding and the appellant is therefore not in attendance, he must be given another opportunity to voice his appeal.

STATE ex rel. *EVERETT v. HAMILTON*, 337 S.E.2d 312 (W. Va. 1985).

Criminal Procedure—Habeas Corpus

Petitioner, convicted of voluntary manslaughter, was sentenced to life imprisonment pursuant to the West Virginia Habitual Criminal Statute due to his two prior felony convictions. One of these two prior felony convictions was later reversed. His sentence was thereafter reduced at a hearing at which petitioner was not present. He claimed that the imposition of the reduced sentence without his presence was void.

The court considered whether, after a defendant's sentence had originally been enhanced under the recidivist statute, his presence is required at a hearing in which that enhanced sentence is modified.

The court held that a defendant's presence is not required when his sentence is being reduced from its original form. Although a criminal defendant has the right to be present at almost every stage of his trial, a resentencing is unrelated to the underlying truth process. Therefore, his presence is not required.

STATE ex rel. *LEVITT v. BORDENKIRCHER*, 342 S.E.2d 127 (W. Va. 1986).

Criminal Procedure—Evidence—Felony Murder—Habeas Corpus—Ineffective Assistance of Counsel

Petitioner allegedly shot a child while trying to rob her and her sister. He gave a voluntary tape recorded confession to the police which provided sufficient evidence to convict him of first degree murder under the felony-murder doctrine. Petitioner's counsel did not move to suppress that confession. The issue before the court was whether petitioner was denied effective assistance of counsel.

The court held that where there are no grounds to support a motion to suppress certain evidence, a defendant is not denied effective assistance of counsel when that counsel fails to object to the inclusion of that evidence. Counsel's performance is measured by the normal and customary degree of skill possessed by lawyers in like practice. Questions involving strategy, tactics, and other arguable courses of action will not be grounds for the claim of ineffective assistance of counsel, unless no reasonably qualified defense attorney would have so acted in the defense of the accused.

STATE ex rel. *SUTTON v. KEADLE*, 342 S.E.2d 103 (W. Va. 1985).

Criminal Procedure—Prohibition—Three-term Rule

The relator was initially indicted during the January 1984 term of the Circuit Court of Upshur County on felony charges. The three regular annual terms of that circuit court commence in January, April, and September. At the time of the indictment, relator was serving a sentence for an unrelated offense in another county. No effort was made to prosecute the relator during three regular terms of court. Thus, the relator presented a motion to dismiss on the gounds that the State had failed to prosecute him according to the guidelines of the three-term rule, section 62-3-21 of the West Virginia Code. Following denial of his motion by the court, the relator sought a writ of prohibition to prevent his trial on the two count felony indictment.

The court was faced with the question of whether a defendant, incarcerated under a sentence in one county while there are criminal charges pending in another county, is entitled to relief under the provisions of the three-term rule when the prosecutor in the county where the charges are pending does not secure the defendant's return for trial in accordance with the provisions of that rule.

The court found it apparent from the language of the three-term statute that it "begins to run at the term subsequent to the term that the indictment or presentment is returned into a court of competent jurisdiction." This fact is independent of the defendant's physical location. Therefore, the court decided that a defendant was entitled to relief under the circumstances but added that if, however, the defendant was awaiting trial in another county instead of simply being incarcerated there under a separate sentence, the three-term rule would not apply in the county in which other criminal charges are pending.

VANMETRE v. SAVASTEN, No. 17117, slip op. (W. Va. July 9, 1986).

Criminal Procedure—Prohibition—Three-term Rule

The relator was indicted for burglary in the September 1983 term of the Circuit Court of Morgan County. At the time of his indictment, relator was incarcerated in a jail in Maryland. He remained in Maryland until being delivered to Grant County, West Virginia, to await sentencing on a separate charge of grand larceny. He remained in the Grant County jail until he was sentenced in October 1984 on the grand larceny charge after which he was incarcerated at the Huttonsville Correctional Center. The three regular annual terms of the Circuit Court of Morgan County begin in January, April, and September. In November, 1985, the relator filed a motion to dismiss on the grounds that the State had failed to prosecute him on his burglary charge within three terms of court, as required by section 62-3-21 of the West Virginia Code. This motion was denied.

The West Virginia Supreme Court of Appeals found that the three-term rule is applicable when a defendant is incarcerated awaiting sentence on a separate charge and granted the requested writ of prohibition.

The court noted that once a defendant's whereabouts is known to a prosecutor, that prosecutor is under a duty to exercise reasonable diligence to obtain custody for the purpose of offering him a speedy trial.

WHITT v. HOLLAND, 342 S.E.2d 292 (W. Va. 1986).

Criminal Procedure—Habeas Corpus—Ineffective Assistance of Counsel

Petitioner sought a writ of habeas corpus due to the alleged ineffective assistance of his counsel at the appellate level. Petitioner contended that he was denied a right to assist his counsel in the preparation of his appeal.

The issue faced by the court involved whether the assistance of counsel should be considered ineffective when cousel failed to communicate with the petitioner during the appeal and presented an inadequate appeal petition.

The court concluded that the standard for judging the effectiveness of counsel's assistance involves the question of whether counsel exhibited the normal and customary degree of skill possessed by attorneys engaged in such practice. Petitioner was denied his right to effective assistance of counsel on appeal.

WORLEY v. HENDRICK, No. 17118, slip op. (W. Va. July 11, 1986).

Criminal Procedure—Habeas Corpus—Trial Transcript

Petitioner, convicted of first degree murder and sentenced to life imprisonment, requested a copy of his original trial transcript on June 9, 1984. By March 13, 1986, petitioner had not received his transcript. He thereafter filed a writ of habeas corpus seeking discharge on the basis of extraordinary dereliction. The transcript was not filed until May 21, 1986.

The appellate court considered the question of whether a prisoner is entitled to discharge from confinement due to the State's extraordinary dereliction in failing to provide a trial transcript.

The court determined that the State was not extraordinarily derelict in providing relator's transcript to such an extent as to demand the prisoner's release.

Susan K. Brown

See also,

CRIMINAL LAW:
Craigo v. Hey, 345 S.E.2d 814 (W. Va. 1986).
State v. Carper, 342 S.E.2d 277 (W. Va. 1986).

State v. Fitcher, 337 S.E.2d 918 (W. Va. 1985).
State v. Taylor, 337 S.E.2d 923 (W. Va. 1985).
State v. Wallace, 337 S.E.2d 321 (W. Va. 1985).
State v. William T., 338 S.E.2d 215 (W. Va. 1985).

EVIDENCE:

State v. Acord, 336 S.E.2d 741 (W. Va. 1985).
State v. Berry, 342 S.E.2d 259 (W. Va. 1986).
State v. Dolin, 347 S.E.2d 208 (W. Va. 1986).
State v. Hager, 342 S.E.2d 281 (W. Va. 1986).
State v. Hatala, 345 S.E.2d 310 (W. Va. 1986).
State v. Sexton, 346 S.E.2d 745 (W. Va. 1985).
State v. Simmons, 337 S.E.2d 314 (W. Va. 1985).
State v. Thompson, 342 S.E.2d 268 (W. Va. 1986).
State v. York, 338 S.E.2d 219 (W. Va. 1985).
In re *Vance*, 337 S.E.2d 916 (W. Va. 1985).