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Criminal Law

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CRIMINAL LAW

I. PROPORTIONALITY

State v. Buck, 314 S.E.2d 406 (W. Va. 1984).

During the survey period, the West Virginia Supreme Court examined proportionality of sentencing of criminal defendants. The court defined four factors which trial courts should use to determine when a sentence is disproportionate to the offense.[1] In *State v. Buck*,[2] the supreme court held that a sentence of seventy-five years for aggravated robbery was unconstitutional in light of the four factors. Buck and a co-defendant, James Richards, robbed a store of $1,210.00. While the robbery was in progress, one of the co-defendants struck the cashier in the head. Both men were subsequently apprehended. Richards pleaded guilty to a reduced charge of grand larceny and was sentenced to one year in jail, while Buck, convicted of aggravated robbery, was sentenced to seventy-five years. On appeal, Buck contended that his seventy-five year sentence was disproportionate to the offense committed. The supreme court remanded and directed the trial court to exercise its sentencing discretion but the trial court reaffirmed the seventy-five year sentence. The defendant again appealed. On second appeal, the supreme court formulated four major considerations which trial courts should use in sentencing.

The first consideration reiterated the eleven points enumerated in *State v. Houston*[3] which included:

> 1) the moral character of the offender; 2) his mentality; 3) his habits; 4) his social environment; 5) his abnormal or subnormal tendencies; 6) his age; 7) his natural inclination or aversion to commit crime; 8) the stimuli which motivate his conduct; 9) conditions surrounding the defendant's family life; 10) prior criminal records; and 11) whether the defendant expressed remorse for his offense.[4]

The second factor required the court to compare the defendant's sentence with those imposed for related offenses.[5] The court noted the defendant received a much more severe sentence than he could have received for a more serious crime. For example, if Buck had killed the cashier instead of wounding him he could have been eligible for parole in a much shorter time period. The third consideration

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[1] W. VA. CONST. art. III, § 5 provides in pertinent part: "Penalties shall be proportioned to the character and degree of the offense."

[2] State v. Buck, 314 S.E.2d 406 (W. Va. 1984).

[3] State v. Houston, 273 S.E.2d 375 (W. Va. 1980). In *Houston*, defendants were convicted of robbery by violence and they appealed their respective sentences of 30 years and 40 years. The supreme court reversed, and announced guidelines to determine whether a sentence was disproportionate to the offense committed.

[4] *Buck*, 314 S.E.2d at 408.

[5] *Id.* (citing Wanstreet v. Bordenkircher, 276 S.E.2d 205, 210 (W. Va. 1981) and Martin v. Leverette, 244 S.E.2d 39, 43 (W. Va. 1978)).

compared punishment imposed in other states for the same offense. The court noted that Kentucky, Maryland, Ohio, and Pennsylvania have set maximum sentences below seventy-five years for aggravated robbery.[6] The last consideration viewed the disparity of sentences between co-defendants, as discussed in *State v. Cooper*.[7] The court in *Cooper* had noted that if defendants are similarly situated, some courts will reverse on disparity of sentence alone.[8]

In reviewing these considerations, the supreme court after commenting that Buck had never been convicted of a violent crime, found no justification for the disparity of sentences between the co-defendants. Thus Buck's sentence was found to be unconstitutionally disproportionate to his offense and the case was remanded again to the circuit court for sentencing consistent with the guidelines presented in the opinion.

II. DOUBLE JEOPARDY

State v. Collins, No. 15767 (W. Va. Jan. 27, 1984).

In an opinion involving a robbery of more than one victim, the supreme court clarified and defined how double jeopardy principles affect multiple charges growing out of the same offense.[9] Collins, along with a co-defendant, attempted to rob a Charleston area grocery store. During the attempt, Collins shot and wounded one of the store's employees. He was tried and convicted on all three counts of an indictment which charged him with attempted armed robbery of two employees and the malicious wounding of one of them. On appeal, the defendant argued the trial court erred in refusing to quash his indictment, since two of the counts grew out of a single transaction—the armed robbery.

Initially the court noted the confused state of the doctrine of double jeopardy.[10] Justice Neely, writing for the majority, commented that the court had never previously examined the issue of double jeopardy in the context of robberies which affect multiple victims.[11] The court began its analysis by examining the common law offense of robbery and the legislative intent behind the current robbery statute.[12]

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[6] *See* KY. REV. STAT. ANN. §§ 515.020, 532.060(2)(b) (Baldwin 1975) (ten to twenty years); MD. ANN. CODE art. 27, § 488 (1982) (twenty years); OHIO REV. CODE ANN. §§ 2911.01, 2929.11 (1982) (twenty-five years); 18 PA. CONS. STAT. ANN. §§ 1103(1), 3701 (Purdon 1983) (twenty years).

[7] State v. Cooper, 304 S.E.2d 851 (W. Va. 1983).

[8] *Id.* at 856.

[9] State v. Collins, No. 15767, slip op. (W. Va. Jan. 27, 1984).

[10] *Id.* at 5 (citing Burke v. United States, 437 U.S. 1 (1977)).

[11] For a procedural discussion on charges relating to the same offense, *see* State *ex rel.* Watson v. Ferguson, 274 S.E.2d 440 (W. Va. 1980).

[12] W. VA. CODE § 61-2-12 (1977), states as follows:

> If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting

The court determined the common law crime of robbery was primarily designed to protect individuals from being endangered. The court then examined the current robbery statute to determine whether it had modified the common law. It observed the robbery statute is included in the chapter that defines crimes against the person, rather than in the section that defines crimes against property. While the statute does not provide a definition of the crime of robbery, it does define attempt and actual commission of robbery as equivalent offenses.[13] Based on this analysis, the court determined the intent of the legislature, in codifying the offense of robbery, was to protect individuals from bodily and emotional terror. Therefore the court concluded the number of crimes committed depended on the number of persons placed in fear.[14]

In a lengthy discussion the court pointed to opposing opinions in case law from other jurisdictions, however these results were attributed to statutory schemes with different public policy objectives.[15] The West Virginia Legislature has spoken with clarity that an attempt to commit robbery is the same offense as the actual completion of a robbery. Additionally, the court found that in order for a robbery to occur two elements must co-exist: First, a person must be placed in fear; and second, property must be taken that was in their possession or under their control.[16] The court noted that in this case, although Collins had not taken property from both his victims, he had attempted to do so, and thus his multiple conviction was entirely proper.[17]

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of firearms, or other deadly weapon or instrumentality whatsoever, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten years. If any person commit, or attempt to commit, a robbery in any other mode or by any other means, except as provided for in the succeeding paragraph of this section, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than five nor more than eighteen years.

If any person (a) by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten nor more than twenty years; and if any person (b), in committing, or in attempting to commit, any offense defined in the preceding class (a) of this paragraph, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten years nor more than twenty-five years.

[13] *Collins*, No. 15767, slip op. at 8-9. This view is in accord with the Model Penal Code and at least twenty other states which include: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Maine, New Jersey, North Dakota, Ohio, Michigan, Oregon, Pennsylvania, Tennessee, and Texas.

[14] *Collins*, No. 15767, slip op. at 20.

[15] *Id.* at 14-17.

[16] *Id.* at 19.

[17] *Id.* at 20.

III. BURDEN OF PROOF

State v. Kopa, 311 S.E.2d 412 (W. Va. 1983).

A. *Overruling the "Alexander Instruction."*

In *State v. Kopa*,[18] the supreme court reluctantly agreed with the Fourth Circuit that an alibi instruction which places the burden of persuasion on the defendant unconstitutionally shifted the burden of proof. Previously, in *State v. Alexander*,[19] the court had determined a defendant's alibi was an affirmative defense. Thus it was not improper for a trial court to instruct a jury that the defendant had a burden to prove his alibi defense sufficiently to create a reasonable doubt in the minds of the jury.

In *Kopa*, the victim, Edna Karver, was found slain in her home. An autopsy revealed that she had died from a series of six stab wounds. Kopa and two co-defendants were arrested and indicted for first degree murder and felony murder. The trials of the three were severed, and Kopa was convicted of felony murder. During the trial, Kopa used an alibi defense. Various witnesses testified that he and the co-defendants were in a local bar for most of the evening when the murder took place. On appeal, Kopa claimed one of the trial court's instructions relating to the defense of alibi unconstitutionally shifted the burden of proof.[20]

In reversing Kopa's conviction, the supreme court reluctantly complied with the mandate of the Fourth Circuit Court of Appeals in *Adkins v. Bordenkircher*,[21] which invalidated the *Alexander* instruction.[22] The *Adkins* decision criticized the characterization of alibi as an affirmative defense,[23] stating that it unconstitutionally shifted the burden of proving every element of a crime beyond a reasonable doubt from the prosecution to the defendant.[24]

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[18] State v. Kopa, 311 S.E.2d 412 (W.Va. 1983).

[19] State v. Alexander, 245 S.E.2d 633 (W.Va. 1978).

[20] The instruction was substantially identical in form to the one approved in *State v. Alexander*, and read as follows:

> The Court instructs the jury that where the State of West Virginia has established a prima facie case and the defendant relies upon the defense of alibi, the burden is upon the defendant to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the defendant.

Kopa, 311 S.E.2d at 417.

[21] Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir. 1982) *cert. denied*, 459 U.S. 853 (1982).

[22] *Adkins* was decided approximately two weeks after Kopa had been convicted.

[23] West Virginia, along with a minority of jurisdictions, places an alibi in the category of an affirmative defense. *Kopa*, 311 S.E.2d at 417, n.2 (citing *e.g.*, Doshier v. State, 623 P.2d 242 (Alaska Ct. App. 1981); Harkness v. State, 267 Ark. 274, 590 S.W.2d 277 (Ark. 1979)). *See also* 22 C.J.S. *Criminal Law* § 40 (Cum. Supp. 1983); 22A C.J.S. *Criminal Law* § 574 (Cum. Supp. 1983). The *Adkins* court opined that this was contrary to the definition of an affirmative defense as set forth in Patterson v. New York, 432 U.S. 197 (1977). *Id.* at 417.

[24] *Id.* The *Adkins* court found this contrary to the burden of proof doctrine set out in Mullaney

The West Virginia Supreme Court of Appeals disagreed with this reasoning, arguing that the instruction did not relieve the prosecution from proving every element of the crime beyond a reasonable doubt, nor did it shift the burden of proof to the defendant.[25] However, the court noted the problem that would arise if the state court sustained convictions on an alibi instruction with certain release available through habeas corpus in the federal court. To forestall such a result the West Virginia court agreed with the Fourth Circuit and found that the *Kopa* instruction unconstitutionally shifted the burden of proof to the defendant, and overruled *State v. Alexander* on that point.[26]

B. *Retroactivity of Kopa*

The invalidation of the *Alexander* instruction in *Kopa* presented the court with the practical problem of whether its decision should be given full retroactive effect.[27] In deciding retroactivity, the court relied on *Bowman v. Leverette*,[28] which addressed the retroactive effect of decisions invalidating instructions at criminal trials.[29]

The threshold consideration of the *Bowman* analysis is a determination of whether the questionable instruction should be given full retroactive effect under the guidelines enunciated in *Mullaney v. Wilbur*.[30] In *Bowman*, the court made several distinctions between the type of instruction invalidated in *Mullaney* and the one invalidated in *Bowman*. First, the *Bowman* instruction did not have detailed recitation of facts, unlike the *Mullaney* instruction;[31] second, in *Mullaney*, the burden of proof was explicitly shifted to the defendant whereas in *Bowman*, it was not;[32] and third, the *Bowman* instruction did not create a conclusive presumption as did *Mullaney*.[33] Since the invalidated instruction was dissimilar to the *Mullaney* instruction, the *Bowman* court reasoned that it would not have full retroactive effect.

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v. Wilbur, 421 U.S. 684 (1975), and In Re Winship, 397 U.S. 358 (1970).

[25] Although alibi has long been characterized as an affirmative defense in West Virginia the prosecution has always had the burden of proving every element of the charge beyond a reasonable doubt. *Id.* at 422 (citing 1 H. LEE THE CRIMINAL TRIAL IN THE VIRGINIAS §§ 357 & 369 (2d. ed. 1940).

[26] *Kopa*, 311 S.E.2d at 418.

[27] Full retroactive effect was defined in State v. Gangwer, 283 S.E.2d 839 (W.Va. 1981) (syllabus point two) which stated: "The concept of 'full retroactivity' in a criminal case ordinarily means that the new rule is available not only for those cases in litigation or on appeal where point has been preserved but is also available by way of collateral attack on final judgment through a writ of habeas corpus." *Id.* at 840.

[28] Bowman v. Leverette, 289 S.E.2d 435 (W.Va. 1982).

[29] Instructions similar to the one used in *Bowman* had been struck down by the United States Supreme Court in Sandstrom v. Montana, 442 U.S. 510 (1979), and by the West Virginia Supreme Court of Appeals in State v. O'Connell, 256 S.E.2d 429 (1979), therefore the issue for resolution in *Bowman* was whether to give the *Sandstrom* and *O'Connell* holdings full retroactive application.

[30] Mullaney v. Wilbur, 421 U.S. 684 (1975).

[31] *Bowman*, 289 S.E.2d at 441.

[32] *Id.*

[33] *Id.* at 442.

Bowman set forth a three-pronged test to determine whether an invalidated instruction would be given full retroactive effect.[34] The first prong of the test, known as the "major purpose rule," has three aspects: 1) the major purpose of the new rule must be 2) to correct a flaw that substantially impairs the truth-finding function of trial and 3) thereby raises serious questions about the reliability of past verdicts. The second prong of the test considers the reliance placed upon the old doctrine. The third prong considers the effect on the administration of justice of a retroactive application of the new rule. The court noted that all three aspects of the first prong must be satisfied before there is a need to apply the second two prongs to the test.[35]

In applying this test, the court found that the *Kopa* instruction was distinguishable from the instruction overruled in *Mullaney* and similar to the instruction struck down in *Bowman*.[36] The *Kopa* instruction did not have a detailed recitation of the facts and there was no explicit shifting of the burden of proving each element of the crime from the prosecution to the defendant. Thus, the court was not bound by *Mullaney* and it applied the principles of *Bowman* to deny retroactive application of *Kopa*. The court found that using the *Alexander* instruction did not impair the truth-finding function of trial. Also, the opinion noted that because this state has used the *Alexander* instruction since before the turn of the century, courts would be unable to determine whether the giving of such an instruction was harmless error.[37] Therefore, the court held that the invalidation of the *Alexander* instruction would not be given full retroactive effect and was only applicable to those cases currently in litigation or on appeal where error had been properly preserved at trial.

IV. INSTRUCTIONS

A. *Lesser Offenses*

State v. Wyer, No. 15839 (W. Va. Mar. 21, 1984).

In *State v. Wyer*,[38] the court examined West Virginia's sexual assault statutes[39] to determine whether a defendant is entitled to jury instructions which include lesser

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[34] The three-pronged test applied in *Bowman* was first used by the United States Supreme Court in Linkletter v. Walker, 381 U.S. 618 (1965).

[35] *Kopa*, 311 S.E.2d at 420-21 (citing *Bowman*, 289 S.E.2d at 444-45).

[36] *Id.* at 420.

[37] *Id.* at 421-22.

[38] State v. Wyer, No. 15839, slip op. (W.Va. Mar. 21, 1984).

[39] W.VA. CODE § 61-8B-3 (1977), reads as follows:

(a) A person is guilty of sexual assault in the first degree when:

(1) He engages in sexual intercourse with another person by forcible compulsion; and

(i) He inflicts serious bodily injury upon anyone; or

(ii) He employed a deadly weapon in commission of the crime; or

(iii) The victim was not a voluntary social companion of the actor on the occasion of the crime; or

offenses. The defendant had entered his neighbor's house with a stocking over his head and a knife in his hand. He approached the victim and directed her to the bedroom where she performed oral sex on the defendant. The defendant claimed that the victim consented to the acts and at trial his defense counsel requested an instruction on the lesser included sexual offenses. The trial court refused and the jury found the defendant guilty of sexual assault in the first degree.[40]

On appeal, the supreme court affirmed the trial court's decision based on the principles set forth in *State v. Neider*.[41] In *Neider*, the court applied a two-part test to determine whether a defendant is entitled to instructions pertaining to lesser offenses. The first part of the inquiry focused on whether the charge inherently contained a lesser included offense.[42] The second part of the analysis required a factual determination of whether there was evidence to contradict the evidence of the elements of the greater offense which were different from the elements of the lesser included offense.[43]

In *Wyer*, the court determined first degree sexual assault did not inherently contain a lesser offense.[44] It observed that that the legislature had created a distinction between the elements of proof required for a conviction of first and second degree sexual assault by differentiating between a voluntary and nonvoluntary social companion. The court noted that this view is in accord with other jurisdictions[45] and the Model Penal Code.[46] The court then determined that under the first degree sexual assault statute the state need only prove the victim was a nonvoluntary social

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(2) He engages in sexual intercourse with another person who is incapable of consent because he is physically helpless; or

(3) He, being fourteen years old or more, engages in sexual intercourse with another person who is incapable of consent because he is less than eleven years old.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned not less than ten or more than twenty years, or fined not more than ten thousand dollars and imprisoned in the penitentiary not less than ten nor more than twenty years.

W.VA. CODE § 61-8B-4 (1977), reads as follows:

(a) A person is guilty of sexual assault in the second degree when:

(1) He engages in sexual intercourse with another person by forcible compulsion; or

(2) By forcible compulsion, he causes penetration, however slight, of the female sex organ or of the anus of any person, by any inanimate object for the purpose of gratifying the sexual desire of either party.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than five nor more than ten years, or fined nor more than ten thousand dollars and imprisoned in the penitentiary not less than five nor more than ten years.

[40] *Wyer*, No. 15839, slip op. at 1-2.

[41] State v. Neider, 295 S.E.2d 902 (W.Va. 1982).

[42] *Id.* at 904.

[43] *Id.* at 905.

[44] *Wyer*, No. 15839, slip op. (W.Va. Mar. 21, 1984).

[45] *Id.* at 8 (citing State v. Grover, 460 A.2d 581 (Mo. 1983), Tyre v. State, 412 A.2d 326 (Del. 1980)).

[46] *Id.* at 10. *See* MODEL PENAL CODE, Art. 213.1 (1962).

companion and the victim was subjected to sexual intercourse by forcible compulsion. However, where a voluntary social companion is the victim, the defendant is guilty of second degree sexual assault, unless the state, in addition, can show either the infliction of serious bodily injury or the use of a deadly weapon in the commission of the crime.[47] Therefore, the court held that the only instance in which an instruction on a lesser included offense could be given is when the victim is a voluntary social companion and there are no aggravating circumstances. Since Wyer's victim was not a voluntary social companion, the court held that he was not entitled to an instruction which included a lesser offense.[48]

It should be noted that subsequent to this decision, the legislature amended the sexual assault statute.[49] Under the new statute, sexual assault in the first degree requires sexual assault with serious bodily injury or use of a deadly weapon.[50] No longer can the prosecutor obtain a conviction of sexual assault in the first degree, solely because the victim was a nonvoluntary social companion. Thus, under the new statute, it is now more difficult to convict a defendant of sexual assault in the first degree, so that sexual assault in the second degree will be the primary focus of future convictions.

B. *Mercy*

State v. Kopa, 311 S.E.2d 412 (W. Va. 1983).

In *State v. Kopa*,[51] the question was whether the trial court erred when it

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[47] *Wyer*, No. 15839, slip op. at 10.

[48] *Id.* at 11-12.

[49] W.VA. CODE § 61-8B-3 (Supp. 1984) reads as follows:

(a) A person is guilty of sexual assault in the first degree when:

(1) Such person engages in sexual intercourse or sexual intrusion with another person and, in so doing:

(i) Inflicts serious bodily injury upon anyone; or

(ii) Employs a deadly weapon in the commission of the act; or

(2) Such person, being fourteen years old or more, engages in sexual intercourse of sexual intrusion with another person who is eleven years old or less.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than fifteen nor more than twenty-five years, or fined not more than ten thousand dollars and imprisoned in the penitentiary not less than fifteen nor more than twenty-five years.

W.VA. CODE § 61-8B-4 (Supp. 1984) reads as follows:

(a) A person is guilty of sexual assault in the second degree when:

(1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion; or

(2) Such person engages in sexual intercourse or sexual intrusion with another person who is physically helpless.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than than twenty years, or fined not more than ten thousand dollars and imprisoned in the penitentiary not less than ten nor more than twenty years.

[50] *Id.*

[51] *Kopa*, 311 S.E.2d 412.

instructed the jury it could return the following verdicts: first degree murder, first degree murder with the recommendation of mercy, or not guilty. The defendant contended the instruction of first degree murder with a recommendation of mercy offered the jury a compromise verdict in violation of West Virginia Code section 62-3-15.[52] The defendant requested a bifurcated trial where the jury could consider mercy only after it had found the defendant guilt of murder.[53]

The supreme court found this contention to be without merit under the principles of *Leach v. Hamilton*,[54] in which the court approved the unitary trial procedure. The supreme court also relied on the mandatory requirement that a trial court instruct the jury that it may add a recommendation of mercy to a first degree murder verdict.[55] Applying these principles in *Kopa*, the court found it mandatory for a trial court to instruct the jury that it may add a recommendation of mercy to a verdict of first degree murder. The duty exists over the objection of the defendant unless it affirmatively appears that the defendant fully understands the consequences of his request to have such an instruction omitted.[56]

V. Right To Counsel

State v. Wyer, No. 15839 (W. Va. Mar. 21, 1984).

In *State v. Wyer*,[57] the supreme court considered whether a defendant's written waiver of *Miranda* rights[58] will suffice to waive his sixth amendment right to counsel once the defendant has been arrested, brought before a magistrate, and has requested counsel.[59]

Wyer signed a form requesting counsel when he appeared before the magistrate. His confession was obtained the following day. At the suppression hearing, the officer who took the confession testified that he advised the defendant of his *Miranda*

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[52] W.Va. Code § 62-3-15 (1977), provides that if a person is found guilty by a jury of first degree murder he shall be sentenced to life imprisonment in the penitentiary without a possibility of parole. However, the statute further provides "that the jury may, in their discretion, recommend mercy . . . ."

[53] *Kopa*, 311 S.E.2d at 422.

[54] Leach v. Hamilton, 280 S.E.2d 62 (W. Va. 1980).

[55] *Kopa*, 311 S.E.2d at 422 (citing State v. Lindsey, 233 S.E.2d 734 (W. Va. 1977) (syllabus point three)). *See also* State v. Loveless, 139 W. Va. 454, 80 S.E.2d 442 (1954) (syllabus point three).

[56] *Id.* at 422-23.

[57] *Wyer*, No. 15839 (W. Va. Mar. 21, 1984).

[58] In Miranda v. Arizona, 384 U.S. 436 (1966) the Supreme Court determined that the fifth and fourteenth amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the defendant that he has the right to remain silent and also the right to the presence of an attorney. The court also indicated the procedures to be followed subsequent to the warnings.

[59] U.S. Const. amend. V reads as follows:

> No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

rights, but the defendant voluntarily executed a written waiver of those rights.[60] While there was some question raised at the suppression hearing as to whether the defendant had been properly represented by counsel at the time his confession was taken, the matter was not developed by the defendant's trial counsel. The defendant contended that his trial counsel was ineffective since, he failed to argue at the suppression hearing that the defendant's confession was taken in violation of his sixth amendment right to counsel.[61]

The supreme court noted that the primary purpose of the *Miranda* warning was to protect the accused's fifth amendment rights against self-incrimination, whereas the sixth amendment protects a defendant's right to counsel. The court cited *Brewer v. Williams*,[62] which distinguished *Miranda* rights from those rights granted by the sixth amendment.[63] The court continued its analysis by enunciating the guidelines established in *State v. Gravely*[64] which established when a defendant's sixth amendment right to counsel attaches. The *Gravely* court had relied heavily on *Kirby v. Illinois*,[65] which held that a defendant's sixth amendment right to counsel attaches when adversarial judicial proceedings have been initiated against him.[66] Thus the court found sixth amendment rights attached when Wyer was arrested, initially brought before the magistrate, and requested counsel.[67]

Having determined that Wyer's sixth amendment rights attached when he gave his confession, the court then addressed the issue of whether the defendant had waived these rights. Recognizing that the Supreme Court in *Kirby* had not defined specifically how and when a defendant waives his right to counsel, the court looked to *Brewer v. Williams*,[68] which recognized that sixth amendment rights could be

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compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[60] *Wyer*, No. 15839, slip op. at 13.

[61] *Id.* at 13.

[62] Brewer v. Williams, 430 U.S. 387 (1977).

[63] *Id.* at 397-98.

[64] State v. Gravely, 299 S.E.2d 375 (1982).

[65] Kirby v. Illinois, 406 U.S. 682 (1972).

[66] In *Kirby*, the Supreme Court stated this could be initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* at 689.

[67] *Wyer*, No. 15839, slip op. at 16.

[68] *Brewer*, 430 U.S. 387 (1977).

waived.[69] Relying on the reasoning of *Brewer*, the court concluded that there was no *per se* rule against waiver of the right to counsel.[70]

In the final part of its analysis, the court concluded a waiver of sixth amendment right to counsel should be judged by stricter standards than those of the fifth amendment.[71] The court reasoned that a defendant's willingness to waive his right to counsel, prior to the institution of an adversarial procedure, may produce positive benefits by giving a defendant a better opportunity to cooperate with officials and avoid any legal entanglement. Once formal proceedings have begun, however, the government commits the full weight of its prosecutorial forces against the defendant, and requires him to stand against those forces unassisted. This is markedly unfair unless there is a showing that a knowing and intelligent waiver of his sixth amendment right to counsel has occurred.[72] The court cited several decisions from other jurisdictions which suggested the same rationale.[73] Consequently, it held that:

> 1) The sixth amendment right to counsel, once attached, can only be waived by a written waiver signed by the defendant;
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> 2) It must be shown, in addition to the customary *Miranda* warnings, that at the time the waiver is executed, the defendant was aware that he was under arrest and had been informed of the nature of the charge against him;
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> 3) If at the time the waiver is sought, the defendant indicates his desire to have counsel at interrogation, that interrogation must cease until counsel is made available to him, unless the defendant initiates further communication with the police evidencing his desire to waive such sixth amendment rights to counsel.[74]

It should be noted however, in a strong dissenting opinion, Justice Harshbarger criticized the majority's holding and advocated adopting a *per se* rule against waiver of sixth amendment right to counsel. This rule would require all interrogation to cease once a defendant has requested counsel orally or in writing. Right to counsel could only be waived by a defendant after notice to counsel and upon his counsel's advice.[75]

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[69] The court in *Brewer* stated: "The court of appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." *Id.* at 405 (emphasis in original).

[70] *Wyer*, No. 15839, slip op. at 23.

[71] *Id.*

[72] *Id.* at 20-21.

[73] *Id.* (citing *Kirby*, 406 U.S. 682; United States v. Shaw, 701 F.2d 367 (5th Cir. 1983); United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980); and People v. Cunningham, 424 N.Y.S.2d 421, 49 N.Y.2d 203, 400 N.E.2d 360 (1980)).

[74] *Id.* at 23-24.

[75] *Id.* at 15-16 (Harshbarger, J., dissenting).

VI. Prosecutor's Duty To Prosecute

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (W. Va. 1984).

The West Virginia Supreme Court of Appeals, in *State ex rel. Hamstead v. Dostert*,[76] discussed at length the distinction between prosecutorial duty and prosecutorial discretion in seeking indictments. The court held that the line between duty and discretion is determined by the probable cause standard.

The case centered around a question of what charges should be brought where a death resulted from a domestic quarrel. When Judge Dostert learned that the prosecuting attorney, Mr. Hamstead, was seeking a grand jury indictment for involuntary manslaughter, he ordered the prosecutor to bring a murder charge. Hamstead indicated, based on the investigating officer's report and all available evidence, a charge of murder should not be sought and that he considered the matter solely within his discretion as a prosecutor.[77]

The judge impanelled a grand jury and instructed them to consider only a murder indictment and no lesser offenses. Hamstead informed the grand jury of the potential problem with evidence and asked them to determine if they desired a continuance from Judge Dostert.[78] After deliberating for a period of time, the grand jury requested that the court reporter read Judge Dostert's instructions once again. Upon hearing this request, the judge entered an Order in Mandamus directing the prosecutor to show cause why he should not immediately commence presenting evidence. Hamstead did not obey the mandamus, responding that the grand jury had not requested to hear any formal presentation, but desired to review the court's instructions. Judge Dostert ordered the prosecutor jailed until he was willing to obey the mandamus order. Hamstead subsequently filed a petition for writ of habeas corpus[79] and a writ to prohibit the Judge from interfering with the grand jury process.

The supreme court recognized that the duty to prosecute is found in both the West Virginia Constitution[80] and the West Virginia Code section 7-4-1.[81] The court cited *Skinner v. Dostert*,[82] in asserting that a prosecutor has discretion in the exer-

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[76] State *ex rel.* Hamstead v. Dostert, 313 S.E.2d 409 (W. Va. 1984).

[77] *Id.* at 412.

[78] *Id.* at 413.

[79] *Id.*

[80] W. Va. Const. art. IX, § 1, reads in pertinent part: "The legislature . . . shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers. . . ."

[81] W. Va. Code § 7-4-1 (1984) provides in pertinent part:

> It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material.

[82] Skinner v. Dostert, 278 S.E.2d 624 (W. Va. 1981) (the prosecuting attorney is vested with discre-

cise of his duties, but noted that this discretion is somewhat restricted by West Virginia Code section 7-4-1.[83] The court noted that the word "shall" in this statute affords a mandatory connotation, and discretion envisions a course of conduct that is "necessary and proper" in a particular case. What is necessary and proper, the court stated, "is necessarily represented by the probable cause standard." Therefore the line between prosecutorial duty and discretion is represented by whether, in a prosecutor's professional judgment, there is probable cause to believe an offense has been committed.[83] This discretion is subject to certain limitations including the prohibition against overcharging to induce guilty pleas.[84]

Following these guidelines, the court determined the Judge had interfered with the prosecutor's role, and that he wrongfully interfered with prosecutorial discretion when he attempted to usurp the power of the grand jury.[85] The court granted the prosecutor's requests for writs of habeas corpus and prohibition. Also, the court suggested that a private citizen, by writ of mandamus, could compel a prosecutor to act upon probable cause because a citizen has the right to compel a prosecutor to perform nondiscretionary duties.[86] The majority's determination that prosecutorial discretion is subject to judicial oversight, prompted Justice Neely, in a spirited dissent, to assail the shortcomings of this holding.

Although Neely agreed that Judge Dostert interfered with the prosecutor's discretion, he strongly disagreed that there was a mandatory requirement that a prosecutor indict in all cases where he believes that there is probable cause to do so. The dissent opined that by its very nature the exercise of discretion cannot be reduced to a formula.[87] Where serious crimes have been committed, broad prosecutorial discretion is critical because prosecutors may not wish to indict in a particular circumstance. The prosecutor may believe that the suspect would be more useful as a witness against others or he may be aware of a possible federal indictment that would carry a stiffer penalty.[88] The dissent also characterized the majority opinion as clearly wrong to suggest that a citizen can compel a prosecutor to indict a suspected criminal when that citizen believes probable cause exists.[89] This would burden the courts in criminal proceedings with the responsibility of "listening to unfounded charges from every self-appointed guardian of the public interest."[90]

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tion in the control of criminal causes, which is committed to him for the public good and for the vindication of the public interest). *Id.* at 631.

[83] *Hamstead*, 313 S.E.2d at 415.

[84] *Id.* at 416 (citing Standard 3-3.9(e) of THE AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE (1980)).

[85] *Id.* at 417.

[86] Generally, a citizen has the right to compel a public official to perform a nondiscretionary duty. *Id.* at 415 (citing The West Virginia Housing Dev. Fund v. Copenhaver, 153 W. Va. 636, 171 S.E.2d 545 (1969); Greenbrier County Airport Auth. v. Hanna, 151 W. Va. 479, 153 S.E.2d 284 (1967)).

[87] *Hamstead*, 313 S.E.2d at 421 (citing A.B.A. STANDARDS, *supra* note 84).

[88] *Id.* at 421-22.

[89] *Id.* at 425.

[90] *Id.*

VII. JUVENILES

A. *Preadjudicatory Detention*

State ex rel. M.C.H. and S.A.H. v. Kinder, No. 16203 (W. Va. May 9, 1984).

In *State ex rel. M.C.H. and S.A.H. v. Kinder*,[91] the supreme court was asked to set standards regarding the preadjudicatory detention of juveniles who have committed acts which would be crimes if they were adults. Two juveniles, ages seven and nine years, were arrested on a delinquency charge of breaking and entering and were taken to the police station for interrogation. The boys had been apprehended inside their school with approximately twelve dollars worth of money, toys, and candy in their possession. They were taken before a magistrate and ordered detained in secure confinement after they were unable to post the $5,000 bond set for each of them.[92] The children spent four days at the Kanawha Home for Children before counsel procured their release to their mother's custody.[93] Upon original jurisdiction to the supreme court, the boys' counsel argued that they should not have been committed to a prison-like facility because of their age, and the magistrate should not have conditioned their release on the posting of $5,000 bond for each.[94]

The supreme court noted that the underlying purpose of the juvenile code expresses a clear preference for allowing parents to retain custody of their children.[95] Relying on the statute, the court set a standard for determining when a child should be kept in secure detention. The court concluded seven factors should be considered in this determination:

> 1) the seriousness of the offense charged; 2) the likelihood of flight, or conversely stated, the probability of his appearance; 3) his prior juvenile record and regularity of appearances; 4) whether under all of the circumstances, he poses a substantial danger to himself or to the community; 5) his age, maturity, and general health; 6) his family background and the family's willingness to supervise his behavior; and 7) the availability of alternative sources of placement, short a secure detention facility, if the family is unavailable, unfit, or unwilling to exercise control over the child.[96]

In addition to these factors, the court stated "as a matter of common sense, the young children should not be placed in secure detention except in the most extraordinary cases."[97] The court noted that the juvenile statutes prohibit post-conviction

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[91] State *ex rel.* M.C.H. and S.A.H. v. Kinder, 317 S.E.2d 150 (W. Va. 1984).

[92] *Id.* at 151-52.

[93] *Id.* at 152. The court characterized the Kanawha Home for Children as a "spartan like setting."

[94] *Id.* at 158-59.

[95] W. VA. CODE § 49-5A-2 (1980) provides in pertinent part: "Unless the circumstances of the case otherwise require, taking into account the welfare of the child as well as the interest of society, such child shall be released forthwith into the custody of his parent or parents, relative, custodian or other responsible adult or agency."

[96] *Kinder*, 317 S.E.2d at 157.

[97] *Id.*

incarceration of juveniles under the age of ten for males and under the age of twelve for females.[98] But, the court also held that in extraordinary cases, where the offense is serious and there are no other alternatives bail may be appropriate because the facts of the case did not justify detention, the court determined both juveniles were unlawfully detained, and the imposition of $5,000 bail was unwarranted.[99]

B. *Right To Counsel*

Although the petitioner in *State ex rel. M.C.H. and S.A.H. v. Kinder* did not raise the issue of a juvenile's right to counsel at a detention hearing, the supreme court addressed the issue. The court noted that West Virginia Code section 49-5-1[100] conferred the right to counsel at all stages of any proceeding. This statute, when read *in pari materia* with West Virginia Code section 49-5-2[101] and West Virginia Code section 49-5-8,[102] granted the child the right to counsel at a detention hearing.

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[98] *Id.* (citing W. VA. CODE § 28-1-2(a) (1980 & Supp. 1984) and W. VA. CODE § 28-3-2 (1980 & Supp. 1984)).

[99] *Id.* at 159.

[100] W. VA. CODE § 49-5-1 (1980 & Supp. 1984) provides in pertinent part:
The child shall have the right to be effectively represented by counsel at all stages of proceedings under the provisions of this article. If the child, parent or custodian executes an affidavit showing that he cannot pay for an attorney appointed by the court or referee, the Court shall appoint counsel, to be paid as provided for in article twenty-one [§ 29-21-1, et seq], chapter twenty-nine of this Code.

[101] W. VA. CODE § 49-5-2 (1980) provides in pertinent part:
A child may be brought before the circuit court for proceedings under this article by the following means and no others:
(a) By juvenile petition praying that the child be adjudged neglected or delinquent;
(b) Certification or transfer to the juvenile jurisdiction of the circuit court, from the criminal jurisdiction of such court, from any foreign court or any court of this State before which such child is brought charged with the commission of a crime, as provided in section one, one-a or one-b [§ 49-5-1, 49-5-1a or 49-5-1b] of this article;
(c) By warrant, capias or attachment issued by a judge, referee or magistrate returnable to the circuit court, charging a child with an act of delinquency.

[102] W. VA. CODE § 49-5-8 (1980 & Supp. 1984) provides in pertinent part:
A child in custody must immediately be taken before a referee or judge of the circuit court and in no event shall a delay exceed the next succeeding judicial day: Provided, that if there be no judge or referee then available in the county, then such child shall be taken immediately before any magistrate in the county for the sole purpose of holding a detention hearing. The judge, referee or magistrate shall inform the child of his right to remain silent, that any statement may be used against him and of his right to counsel, and no interrogation shall be made without the presence of a parent or counsel. If the child or his parent, guardian or custodian has not retained counsel, counsel shall be appointed as soon as practicable. The referee, judge, or magistrate shall hear testimony concerning the circumstances for taking the child into custody and the possible need for detention in accordance with section two [§ 49-5A-2], article five-A of this chapter. The sole mandatory issue at the detention hearing shall be whether the child shall be detained pending further court proceedings. The court shall, if advisable, and if the health, safety and welfare of the child will not be endangered thereby, release the child on recognizance to his parents, custodians or an appropriate

Prior to *Kinder*, there had been some confusion surrounding this issue because of the holdings in *Arbogast v. R.B.C.*[103] and *Kearns v. Fox.*[104] In *Arbogast*, it was held that a juvenile had no right to counsel at a detention hearing occurring after he had been taken into custody on a warrant, where no juvenile petition had been filed. The absence of a petition meant that formal proceedings had not yet begun. The *Arbogast* court relied on *Kearns*, which held that a juvenile proceeding was initiated only after the filing of a juvenile petition. Subsequently, in *Kinder*, the supreme court indicated that a juvenile proceeding could be initiated by an arrest warrant[105] and overruled *Kearns* and *Arbogast* to the extent that they suggested the right to counsel was not available for a juvenile at a detention hearing. *Kinder* clarifies that juveniles have a right to counsel at their detention hearing.[106]

VIII. Arrest Powers

State v. Boggess, 309 S.E.2d 118 (W. Va. 1983).

The supreme court, in *State v. Boggess*,[107] defined a conservation officer's scope of authority in making arrests and executing search warrants when an offense is committed in his presence. Ransom was a conservation officer with the West Virginia Department of Natural Resources. During a routine patrol, he spotted an automobile parked in an area commonly used for dumping garbage. Ransom walked past the automobile and observed two men standing upon a concrete pad covered by a large sheet of plastic which contained approximately seventeen pounds of marijuana.[108] Ransom placed the two men under arrest and transported them to a magistrate's office. He then obtained a search warrant and upon searching the defendant's car, discovered a large bag of marijuana. The men were subsequently tried and found guilty of possessing marijuana with intent to deliver.[109]

On appeal, the defendant contended that Ransom's authority as a conservation officer was limited to matters concerning the West Virginia Department of Natural Resources and he had no authority to execute a search warrant relating to a violation of the West Virginia Uniform Controlled Substance Act.[110]

The court looked to the applicable statutes in affirming the defendant's con-

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agency; however, if warranted, the court may require bail, except that bail may be denied in any case where bail could be denied if the accused were an adult.

The judge of the circuit court or referee may, in conjunction with the detention hearing, conduct a preliminary hearing pursuant to section nine [§ 49-5-9], article five of this chapter: Provided, that all parties are prepared to proceed and the child has counsel during such hearing.

[103] Arbogast v. R.B.C., 301 S.E.2d 829 (W. Va. 1983).

[104] Kearns v. Fox, 268 S.E.2d 65 (W. Va. 1980).

[105] W. Va. Code § 49-5-2 (1980).

[106] *Kinder*, 317 S.E.2d at 155.

[107] State v. Boggess, 309 S.E.2d 118 (W. Va. 1983).

[108] *Id.* at 120.

[109] *Id.* at 120-21.

[110] W. Va. Code § 60A-1-101 to 60A-6-106 (1977 & Supp. 1984).

viction. West Virginia Code section 62-1A-3[111] provides that those persons authorized to execute search warrants include any other officer authorized by law. Section 20-7-4[112] and section 20-7-8[113] state that, in addition to the authority relating to the Department of Natural Resources, conservation officers have the authority to arrest any person committing a criminal offense in their presence.[114]

IX. Leaving The Scene of an Accident: Requisite Mens Rea

State v. Tennant, 319 S.E.2d 395 (W. Va. 1984)

In *State v. Tennant*,[115] the supreme court decided a person convicted of leaving the scene of an accident under West Virginia Code section 17C-4-1,[116] and section 17C-4-3,[117] must know that he was in an accident, and, in addition, know or have reason to know that injury resulted from such accident.[118] The defendant and two passengers were involved in a single car accident after being forced off the road by an oncoming car. Tennant said all he remembered was waking up on a gravel road and going to the nearest lighted house to call his sister-in-law. When she and the defendant arrived back at the scene of the accident, one of the passengers was found dead, pinned under the wrecked car.[119] The defendant was arrested and convicted of leaving the scene of an accident. On appeal, the defendant contended that the trial court failed to instruct the jury that the state must prove the defendant had knowledge of the accident and resulting injuries.[120]

The supreme court previously held in *State v. Masters*,[121] that an indictment or an arrest warrant under the hit and run statute need not allege knowledge, because this element was not made part of the language of such statutes. However, this holding was questioned in *Brumfield v. Wofford*,[122] and consequently, was limited to its facts. Neither *Masters* or *Wofford* addressed the issue of whether knowledge of the accident and resulting injuries must be established to support a criminal conviction of leaving the scene of an accident.[123]

The court noted that a majority of jurisdictions having similarly worded hit and run statutes have consistently held that knowledge of both the accident and

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[111] W. Va. Code § 62-1A-3 (1977).
[112] W. Va. Code § 20-7-4 (1981).
[113] W. Va. Code § 20-7-8 (1981).
[114] *Boggess*, 309 S.E.2d at 124.
[115] State v. Tennant, 319 S.E.2d 395 (W. Va. 1984).
[116] W. Va. Code 17c-4-1 (1974).
[117] W. Va. Code 17c-4-3 (1974).
[118] *Tennant*, 319 S.E.2d at 401.
[119] *Id.* at 397.
[120] *Id.* at 400-01.
[121] State v. Masters, 106 W. Va. 46, 144 S.E. 718 (1928).
[122] Brumfield v. Wofford, 143 W. Va. 332, 102 S.E.2d 103 (1958).
[123] *Tennant*, 319 S.E.2d at 400.

resulting injuries are implied in such statutes.[124] However, the court stated, "actual knowledge" of the resulting injury is not required. It is sufficient to show that the defendant should have reasonably anticipated that such an accident would result in injury or death to another person.[125] The court stated that to obtain a conviction for leaving the scene of an accident, the state must establish knowledge of the accident *and* the resulting injury.[126] Anything contrary in *Masters* was overruled.

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[124] *Id.* at 400-01 (citing Touchstone v. State, 42 Ala. App. 141, 155 So. 2d 349 (1963); Kimoktoak v. State, 584 P.2d 25 (Alaska 1978); State v. Porras, 125 Ariz. 490, 610 P.2d 1051 (1980); People v. Holford, 63 Cal. 2d 74, 403 P.2d 423, 45 Cal. Rptr. 167 (1965); Haire v. State, 155 So. 2d 1 (Fla. Dist. Ct. App. 1963); State v. Parish, 79 Idaho 75, 310 P.2d 1082 (1957); People v. Nunn, 77 Ill. 2d 243, 396 N.E.2d 27 (Ill. 1979); State v. Miller, 308 N.W.2d 4 (Iowa 1981); State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981); State v. Corpuz, 49 Or. App. 811, 621 P.2d 604 (1980); Commonwealth v. Kauffman, 470 A.2d 634 (Pa. Super. Ct. 1983); and State v. Szarek, 433 A.2d 193 (R.I. 1981); Herchenbach v. Commonwealth, 185 Va. 217, 38 S.E.2d 328 (1946)).

[125] *Tennant*, 319 S.E.2d at 401.

[126] *Id.*