Volume 85 | Issue 3 Article 19

April 1983

Constitutional

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CONSTITUTIONAL—CRIMINAL

I. Hunger Strikers

State ex rel. White v. Narick, 292 S.E.2d 54 (W. Va. 1982)

Two major cases this survey period required the court to strike a balance between the state's interest in preserving an ordered society and humanitarian concerns for those who violate its laws. In *State ex rel. White v. Narick,*[1] the issue was whether the state could permit a prisoner in its custody to starve himself to death. A convicted murderer who was incarcerated in the state penitentiary at Moundsville went on a hunger strike, and sought an injunction against prison officials who wanted to force feed him.[2] After the circuit court denied him the injunction, the prisoner sought a writ from the supreme court.

The court first noted that prisoners retain many constitutional rights.[3] However, these rights may be limited by the state whenever it is necessary to prevent interference with "orderly prison administration."[4] In the case of a hunger strike, the state's legitimate interest in keeping order in the prisons is supplemented by the more basic compelling state interest in preserving human life, and outweighs the prisoner's rights of privacy and freedom of expression.[5]

II. Alcoholism

State ex rel. Harper v. Zegeer, 296 S.E.2d 873 (W. Va. 1982)

In *State ex rel. Harper v. Zegeer,*[6] the court held that the criminal punishment of chronic alcoholics for public intoxication is cruel and unusual in violation of the state constitution.[7] Harper, the petitioner, was arrested and incarcerated a dozen times within a year for public intoxication. He petitioned by habeas corpus to test the constitutionality of jailing chronic alcoholics for being drunk in public.[8]

In its analysis, the court agreed with numerous cited authorities that alcoholism is a disease,[9] and its victims are under an "overwhelming compulsion" to drink.[10] This compulsion renders the act of drinking involuntary, and so a diagnosis of alcoholism should be a defense to that act. The court was careful to note that *only* those acts symptomatic of the disease may be excused by alcoholism.[11]

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[1] 292 S.E.2d 54 (W. Va. 1982).
[2] *Id.* at 55.
[3] *Id.* at 56.
[4] *Id.*
[5] *Id.* at 57.
[6] 296 S.E.2d 873 (W. Va. 1982).
[7] *Id.* at 875.
[8] *Id.* at 874.
[9] *Id.*
[10] *Id.* at 878.
[11] *Id.*

Since the presence of alcoholics in public places may pose a threat to others and to themselves, the court held that the state has a legitimate right to remove them from public places.[12] However, incarceration in many of the county and city jails in this state is cruel and unusual punishment because they are "unfit for humans."[13] Therefore, the court "urged" the legislature to enact a "comprehensive plan" for dealing with alcoholics in a humane and beneficial manner."[14] Funding for such a plan might, the court suggested, come from the savings realized by not jailing as many people, from the alcoholic beverage tax, or from formula grant money.

III. Unreasonable Search and Seizure

Blackburn v. State, 290 S.E.2d 22 (W. Va. 1982)
State v. Totten, 289 S.E.2d 491 (W. Va. 1982)
State v. Weigland, 289 S.E.2d 508 (W. Va. 1982)

During the survey period, several cases gave the court a chance to further define the parameters of the constitutional protections against unreasonable searches and seizures. In *Blackburn v. State*,[15] the court held that the warrantless recording of the defendant's conversation, with the consent of the other participant to the conversation, did not violate any constitutional right to privacy stemming from Article 3, section 6 of the West Virginia Constitution.[16] The defendant in *Blackburn* was indicted on three separate counts of being an accessory before the fact to the crimes of arson, attempted murder, and malicious wounding. After his conviction on the arson charge, the defendant appealed, arguing that evidence of the other crimes and of a tape recorded conversation between him and an informant were improperly admitted.

The evidence showed that the defendant's wife had been previously married and that there was a dispute with her ex-husband over the custody of a child from the prior marriage. The ex-husband had brought abduction charges against the defendant and his wife in Virginia. When numerous assaults against the ex-husband failed to persuade him to drop the charges, the defendant hired someone to burn down the house belonging to the ex-husband's father. By doing this, the defendant hoped to lure the ex-husband back to West Virginia so the defendant could "deal with" him.[17]

First, the court held that the evidence of the collateral crimes was admissible because it showed motive, intent, and a common plan. The fact that the defendant had procured the commission of other crimes against the same group of victims, with the same person acting as his intermediary in each case, showed how as well as why defendant hired someone to commit the arson.[18]

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[12] *Id.*
[13] *Id.* at 879.
[14] *Id.* at 880.
[15] 290 S.E.2d 22 (W. Va. 1982).
[16] W. Va. Const. art. III, § 6.
[17] *Blackburn*, 290 S.E.2d at 28.
[18] *Id.* at 28-29.

Second, turning to the search and seizure issue, the court noted that the United States Supreme Court held in *United States v. White*[19] that protection under the fourth amendment does not extend to circumstances in which the government obtains consent to surveillance from another participant to the conversation. Electing not to grant greater protection of the right of privacy under the state constitution, the court affirmed the defendant's conviction.[20]

The propriety of a warrantless search of a vehicle was the primary issue in *State v. Totten.*[21] The defendant in that case was originally stopped for speeding, but a search of his car revealed an unlicensed handgun. The arresting officer testified that he searched the car because the name on the defendant's driver's license had been mentioned to him by four or five reliable informants as a drug dealer, and that one of the informants had told him that the defendant was always armed while engaged in drug transacting.[22] Citing *State v. Moore,*[23] the court held that, "[o]nce the vehicle is lawfully stopped for a legitimate state interest, probable cause may arise to believe that the vehicle is carrying weapons, contraband, or evidence of the commission of a crime, and . . . if exigent circumstances are present, a warrantless search may be made."[24] Since some of the informants had proven reliable in the past,[25] the information supplied by them was sufficient for probable cause to arise. Therefore, the search of the car did not violate the defendant's constitutional rights.

In *State v. Weigand,*[26] the court held that marijuana plants seized from the defendant's property without a search warrant were properly seized and admitted into evidence under the "open fields" doctrine. That doctrine was first enunciated by the Supreme Court in *Hester v. United States,*[27] when it upheld the warrantless seizure of a jug of bootleg whiskey dropped by the defendant as he ran across an open field. *Hester* was modified by *Katz v. United States,*[28] which required that the seizure must not violate the defendant's reasonable expectation of privacy.

Since the marijuana plants in *Weigand* were spotted from a public highway by law enforcement officers, and were on property that carried no indicia of privacy, they were within the "open fields" exception.

IV. PRESENCE

State v. Tiller, 285 S.E.2d 371 (W. Va. 1981)
State v. Conley, 285 S.E.2d 454 (W. Va. 1981)

The right of the accused to be present at criminal proceedings against

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[19] 401 U.S. 745 (1971).
[20] *Blackburn,* 290 S.E.2d at 32.
[21] 289 S.E.2d 491 (W. Va. 1982).
[22] *Id.* at 493.
[23] 272 S.E.2d 804 (W. Va. 1980).
[24] *Totten,* 289 S.E.2d at 494.
[25] *Id.* at 493.
[26] 289 S.E.2d 508 (W. Va. 1982).
[27] 265 U.S. 57 (1924).
[28] 389 U.S. 347 (1967).

him[29] extends only to any "critical stage of the proceedings," defined as "where the defendant's right to a fair trial will be affected."[30] So said the court in *State v. Tiller.* The defendant in *Tiller* argued that his absence during a pretrial hearing, some conferences at the bench, and a conference in chambers, violated his fundamental right to be present during his trial for second-degree murder.[31] The court noted that the defendant had been present at the start of the trial, and was afterwards free on bond, that he had been informed of his obligation to remain during the trial, but had chosen to voluntarily absent himself from the proceedings. Under those circumstances, the defendant's absence "will be deemed a waiver" of his rights.[32]

The holding in *Tiller* was expanded a few days later to include at least some involuntary absences. In *State v. Conley,*[33] the defendant was incarcerated in the state penitentiary and the trial court had refused a defense motion to require his presence at a post-trial hearing on his motion to reconsider his sentence. When the court denied the motion to reconsider, Conley appealed, assigning as error the refusal of the trial court to require his presence at the hearing, and the alleged breach of a plea bargain agreement by an assistant prosecutor who had opposed the defense motion.

The court, in its analysis of the issues, invoked *Tiller* to support a finding that the defendant did not have a right to be present. "Conley's absence . . . could not have affected the fairness of his trial . . ." the court said, so under *Tiller* the post-trial hearing was not a "critical stage."[34]

Conley's second assignment of error was that the state breached the plea bargain arrangement which had induced him to enter a guilty plea. He asked for the right to withdraw his guilty plea, or for specific performance. The court noted that the state had agreed to make no recommendation as to probation at Conley's initial sentencing, but held that the agreement did not extend to the hearing on Conley's motion to reconsider the sentence.[35]

V. MISCELLANEOUS

State ex rel. Workman v. Fury, 283 S.E.2d 851 (W. Va. 1981)
Pugh v. Leverette, 286 S.E.2d 415 (W. Va. 1982)
State ex rel. Miller v. Smith, 285 S.E.2d 500 (W. Va. 1981)

In *State ex rel. Workman v. Fury,*[36] the court ordered dismissal with prejudice of an indictment charging the appellant with third degree sexual assault. He had been denied a speedy trial for no reason other than the convenience of the trial court, which customarily did not conduct jury trials dur-

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[29] Guaranteed by U.S. CONST. amend. VI; W. VA. CONST. art. III, § 14.
[30] 285 S.E.2d 371 (W. Va. 1981).
[31] *Id.* at 372.
[32] *Id.* at 376.
[33] 285 S.E.2d 454 (W. Va. 1981).
[34] *Id.* at 456.
[35] *Id.*
[36] 283 S.E.2d 851 (W. Va. 1981).

ing the June term. Citing the guarantees to a speedy trial in the state constitution and the Code,[37] the court said there are some good causes for a continuance, but that the convenience of the trial court is not one of them.

In *Pugh v. Leverette,*[38] the court said that the tender of a guilty plea to a capital offense must be voluntarily, knowingly, and intelligently made. Pugh was sentenced in 1964 to life without parole, after he pled guilty to the crime of rape. He said that a court appointed attorney had told him that he had no good defense and would be sentenced to the electric chair if found guilty, but that if he changed his plea to guilty, he could get out in ten years.[39] There was also evidence in the record of physical coercion and verbal threats which were made because the defendant was black and the rape victim was white.

No record was made of the proceedings or the taking of the plea, and the state argued that, absent a record, the court must assume that the required procedures were followed. The court first determined that the law in West Virginia in 1964 required that a defendant tendering a guilty plea be asked in open court whether he understood the nature of the charge against him, his rights, and the consequences of a guilty plea.[40] Then, looking at the facts and exhibits before it, especially the deposition of the judge who accepted Pugh's plea,[41] the court concluded that those procedures were not followed and therefore resulted in a void conviction.

The state contended that, even if the conviction was void, the defendant was barred from appealing for relief because of the thirteen year time lapse between the conviction and the appeal.[42] The court refused to accept this novel application of the equitable doctrine of laches, and noted that the Code provides that a petition for habeas corpus may be filed anytime after the conviction.[43]

In *State ex rel. Miller v. Smith,*[44] the court held that a person has a lawful right to personally complain about a criminal offense to a grand jury, even if the prosecuting attorney objects, and a writ of prohibition may be granted to keep such a prosecuting attorney from trying to sway the grand jury not to hear a person's claim. The petitioner in *Miller* alleged that he had been maliciously wounded by two policemen who used the chemical mace on him. When the prosecuting attorney decided not to present the matter to the grand jury, he decided to present it himself. However, the prosecuting attorney successfully attempted to dissuade the grand jury from hearing his evidence,[45] whereupon petitioner sought a writ of prohibition.

Justice McGraw, writing for the court, traced the historic development of

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[37] W. VA. CONST. art. III, § 14; W. VA. CODE § 62-3-21 (1977).
[38] 286 S.E.2d 415 (W. Va. 1982).
[39] *Id.* at 418.
[40] *Id.* at 420.
[41] *Id.*
[42] *Id.* at 421.
[43] W. VA. CODE § 53-4A-1 (1981).
[44] 285 S.E.2d 500 (W. Va. 1981).
[45] *Id.* at 502.

the grand jury system and concluded that it was intended to serve the dual functions of screening cases to determine whether there is probable cause to believe that the accused has committed a crime, and to protect citizens against unreasonable or malicious prosecution.[46] If the grand jury is not accessible to the public, because of interference by the prosecuting attorney, then it cannot perform these functions and becomes merely a prosecutorial tool.[47] The attempts of the prosecuting attorney to persuade the grand jury not to hear evidence usurped the judicial powers of both the circuit court and the grand jury, and prohibition was the appropriate remedy to prevent such usurpation.[48]

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[46] *Id.* at 504.
[47] *Id.*
[48] *Id.* at 507.