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Issue 5 *Issue 5, A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

Article 8

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Criminal Law

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P. *Retroactivity of Procedural Rule*

In *State v. Blake*,[161] the specific issue of retroactivity relating to a new constitutional rule of criminal procedure was addressed:

> The criteria to be used in deciding the retroactivity of new constitutional rules of criminal procedure are: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Thus, a judicial decision in a criminal case is to be given prospective application only if: (a) It established a new principle of law; (b) its retroactive application would retard its operation; and (c) its retroactive application would produce inequitable results.[162]

IV. CRIMINAL LAW

A. *First Degree Murder*

First degree murder was thoroughly discussed in *State v. Guthrie*.[163] The focus of that case was the elements of premeditation and deliberation. As a general statement, Justice Cleckley held that "[a]lthough premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed."[164] The opinion further elaborated,

> [i]n criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing

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161 478 S.E.2d 550 (W. Va. 1996).

162 *Id.* at Syl. Pt. 5.

163 461 S.E.2d 163 (W. Va. 1995).

164 *Id.* at Syl. Pt. 5.

> which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extent that *State v. Schrader* is inconsistent with our holding today, it is expressly overruled.[165]

B. Double Jeopardy Defense

Principles of double jeopardy were set out in *State v. Sears*:[166]

> In order to establish a double jeopardy claim, the defendant must first present a *prima facie* claim that double jeopardy principles have been violated. Once the defendant proffers proof to support a nonfrivolous claim, the burden shifts to the State to show by a preponderance of the evidence that double jeopardy principles do not bar the imposition of the prosecution or punishment of the defendant.[167]

Justice Cleckley then ruled,

> [t]he strength of a double jeopardy claim is whether a defendant is facing multiple punishment for the same course of conduct. To determine if a particular statutory sanction constitutes punishment for double jeopardy purposes, courts should consider: (1) whether the statute serves solely a remedial purpose or serves to punish and deter criminal conduct and (2) whether the Legislature tied the sanction to the commission of specific offenses.[168]

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165 *Id.* at Syl. Pt. 6 (citation omitted).

166 468 S.E.2d 324 (W. Va. 1996).

167 *Id.* at Syl. Pt. 2.

168 *Id.* at Syl. Pt. 4.

Sears concluded with a ruling on a specific double jeopardy claim. The opinion held that "[a] prior conviction which is used as the predicate to establish the crime of wanton endangerment with a firearm also cannot be used to enhance a defendant's punishment under W. Va. Code, 62-12-13 (1988), the parole statute, in the absence of explicit legislative authority."[169]

C. *Automatism Defense*

In *State v. Hinkle*,[170] Justice Cleckley addressed the defense of automatism. The opinion held that

> [u]nconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt.[171]

State v. Hinkle also held that "[a]n instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime."[172] Finally, *Hinkle* held,

> [i]f a defendant is sufficiently appraised and aware of a preexisting condition and previously experienced recurring episodes of loss of consciousness, e.g., epilepsy, then operating a vehicle or other potentially destructive implement, with knowledge of the potential danger, might well amount to reckless disregard for the safety of others. Therefore, the jury should be charged that even if it believes there is a reasonable doubt about the defendant's consciousness at the time of the event, the voluntary operation of a motor vehicle with knowledge of the potential for loss of consciousness can constitute reckless behavior.[173]

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169 *Id.* at Syl. Pt. 6.

170 489 S.E.2d 257 (W. Va. 1996).

171 *Id.* at Syl. Pt. 2.

172 *Id.* at Syl. Pt. 3.

173 *Id.* at Syl. Pt. 4.

D. *Defense of Collateral Estoppel*

A few principles of collateral estoppel were discussed in the criminal setting of *State v. Miller*.[174] In *Miller* the defendant unsuccessfully argued that being found not to have committed assault on a state hospital patient at an administrative employee grievance hearing collaterally estopped prosecution for criminal battery based upon the same conduct. Justice Cleckley articulated the general requirements for collateral estoppel as follows:

> Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[175]

The *Miller* opinion noted that consideration must be given to the litigating forums in determining whether collateral estoppel will bar a prosecution:

> Relitigation of an issue is not precluded when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in two courts. Where the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims, a compelling reason exists not to apply collateral estoppel.[176]

Justice Cleckley concluded in *Miller* that "[f]or purposes of issue preclusion, issues and procedures are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rule, even though the factual settings of both suits may be the same."[177]

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174 459 S.E.2d 114 (W. Va. 1995).

175 *Id.* at Syl. Pt. 1.

176 *Id.* at Syl. Pt. 2.

177 *Id.* at Syl. Pt. 3.