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Constitutional Law

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CONSTITUTIONAL LAW

The West Virginia Supreme Court of Appeals handed down several decisions upholding individual rights during the past year. By unanimously awarding relief to the petitioners in those cases, the court demonstrated its commitment to the protection of fundamental constitutional guaranties. In the first of these cases, the court called for the absolute exclusion of self-incriminating remarks secretly obtained from an accused by police, holding that use of such information at trial is violative of an accused's right to counsel. In the second case, the court recognized the importance of the right of free speech by finding that any regulation of that right must very specifically serve an appropriate government purpose. Finally, the court held that a defendant's exercise of his right to a trial by jury in municipal court may not give rise to the substitution of charges under a State statute carrying the possibility of a longer jail sentence. The court also considered an equal protection challenge to the State's salary system for its magistrates. In that case, a majority held that the salary classifications, which were based upon the population each magistrate serves, were rationally related to a proper State purpose.

I. Assistance of Counsel

Farruggia v. Hedrick, 322 S.E.2d 42 (W. Va. 1984).

In *Farruggia v. Hedrick*[1] the court found that the petitioner's sixth amendment[2] rights had been violated at his trial for first-degree arson. Since the court did not grant an appeal to that conviction, Farruggia petitioned the court for a writ of habeas corpus, challenging the use at trial of incriminating conversations which had been secretly recorded by the Raleigh County Sheriff's Department. Although the trial judge ordered the jury to ignore testimony based on these conversations, the West Virginia Supreme Court of Appeals held that Farruggia had a right to its absolute exclusion at trial.[3]

When the petitioner was indicted for first-degree arson, he did not waive his right to counsel, but instead retained an attorney. After having been released on bail, he met with his alleged co-conspirator Gibson. Gibson was secretly cooperating with the sheriff's department in exchange for the dropping of charges against him. Gibson had been equipped with transmitters which allowed the conversations between Farruggia and him, one in an automobile and one at Farruggia's attorney's office, to be monitored and recorded. During these conversations the petitioner made some self-incriminating remarks, although he continually insisted that he was innocent of the charges against him. While the recordings were not actually played at trial, parts of the prosecution's questioning were based on direct quotes from the conversations.[4]

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[1] Farruggia v. Hedrick, 322 S.E.2d 42 (W. Va. 1984).

[2] U.S. Const., amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for defence."

[3] *Farruggia*, 322 S.E.2d at 43.

[4] *Id.*

Relying on the United States Supreme Court's decision in *Massiah v. United States*,[5] the West Virginia court found that Farruggia's constitutional right to the assistance of counsel[6] had been violated. In *Massiah*, the Supreme Court held that any use of incriminating statements "deliberately elicited" from an accused after indictment and without the benefit of counsel is a violation of the sixth amendment's guaranty of assistance of counsel in all criminal prosecutions.[7] Justice Neely, who wrote for the West Virginia Supreme Court of Appeals in *Farruggia*, emphasized that *Massiah* is still "an iron-clad, rigidly enforced rule . . . [which] prohibits the introduction at trial of incriminating statements deliberately extracted from an accused by any agent of the government in the absence of counsel."[8] In support of *Massiah's* continued importance, Justice Neely pointed to the Supreme Court's recent decision in *United States v. Henry*.[9] There, even though the government did not actively induce the petitioner's incriminating comments, the creation of circumstances likely to evoke such statements from the petitioner was held to be sufficient under the "deliberately elicited" standard.[10] In *Farruggia*, Gibson had great incentive to aid the authorities in inducing the petitioner's remarks, since the charges against him were dropped in exchange for his help. Therefore, the court held that the activities of the sheriff's department "deliberately elicited" the petitioner's statements within the meaning of *Massiah*.

The primary criticism of decisions such as *Farruggia* is that they stand in the way of justice by excluding from trial highly reliable evidence.[11] However, the overriding importance of fundamental constitutional guaranties such as those enunciated in *Farruggia* continue to be reinforced by the courts. Protection of those guaranties guards the innocent, as well as the guilty, against unconstitutional intrusions by government agencies.

Another concern created by *Massiah* and *Farruggia* is the effect of those decisions upon the admissibility of voluntary confessions.[12] Of particular significance in the *Farruggia* case was the surreptitious manner by which the incriminating statements were obtained. Without knowing that he was being "interrogated," it was impossible for the petitioner to intelligently waive his right to counsel. With these factors in mind, the *Farruggia* decision should have no significant impact on the validity of a voluntary confession made in the absence of counsel. In the case of a truly voluntary statement, a waiver could still apply.

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[5] Massiah v. United States, 377 U.S. 201 (1964). Petitioner, charged with narcotics violations, was overhead making self-incriminating statements when a co-conspirator allowed police to place a listening device in his automobile.

[6] U.S. CONST. amend. VI.

[7] *Massiah*, 377 U.S. at 205-06.

[8] *Farruggia*, 322 S.E.2d at 44.

[9] United States v. Henry, 447 U.S. 264 (1980).

[10] *Id.* at 270-71.

[11] *See Massiah*, 337 U.S. at 208 (White, J., dissenting).

[12] *Id.* at 209.

II. FREEDOM OF SPEECH

West Virginia Citizens Action Group v. Daley, 324 S.E.2d 713 (W. Va. 1984).

A Fairmont municipal ordinance regulating the hours during which door-to-door solicitation could be conducted was subjected to a constitutional challenge in *West Virginia Citizens Action Group v. Daley*.[13] The court granted a writ of mandamus to the petitioners and declared the ordinance unconstitutional, holding that allowing solicitation only "between 9:00 a.m. and sunset"[14] impermissibly abridged the petitioners' first amendment[15] free speech rights.

The petitioners, the West Virginia Citizens Action Group, a nonprofit consumer advocacy group, wished to canvass in Fairmont between the hours of 4:00 p.m. and 9:00 p.m. A city ordinance, however, restricted such activity to the hours between 9:00 a.m. and sunset. The ordinance further provided that permits to canvass would be revoked for violations of this provision. The petitioners, maintaining that the city intended to enforce the ordinance, sought a writ of mandamus seeking to have the ordinance declared unconstitutional.[16]

Recognizing the appropriateness of a mandamus action in attacking the constitutionality of an ordinance,[17] the court articulated the necessary elements which must be present to grant a writ of mandamus: "(1) a clear right in the petitioner to the relief sought; (2) a clear legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy."[18] The court then rejected the argument by the respondents, Fairmont city officials, that the elements required for a mandamus in this action did not exist. Justice McGraw, who wrote the opinion, cited the mandatory language of the ordinance,[19] the penalties for violating the ordinance,[20] and the lack of another

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[13] West Virginia Citizens Action Group v. Daley, 324 S.E.2d 713 (W. Va. 1984).

[14] *Id.* at 715 (quoting Fairmont Ordinance 711.12).

[15] U.S. CONST. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances." This applies to the States through U.S. CONST. amend. XIV, § 1, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[16] *West Virginia Citizens Action Group*, 324 S.E.2d at 716.

[17] *Id.* at 717 (citations omitted).

[18] *Id.* at 716 (citing State *ex rel.* Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969)).

[19] *Id.* at 715 (quoting Fairmont Ordinance 711.12), "'[t]he effective hours of the charitable solicitation permit *shall* be between 9:00 a.m. and sunset. Solicitations *shall* be prohibited during other hours.'" (emphasis added).

[20] *Id.* at 716 (quoting Fairmont Ordinance 711.12, § 5), "'if any permit holder . . . has violated any of the terms of this permit or has otherwise violated the provisions of this ordinance, then it shall be the duty of the City Clerk to revoke the permit . . . ;'" and (quoting Fairmont City Code § 101.99) "'[w]henever . . . in any ordinance . . . any act is prohibited . . . where no specific penalty is otherwise provided, whoever violates any such provision shall be fined not more than five hundred dollars ($500.00) or imprisoned not more than thirty days, or both.'"

"equally convenient, beneficial, and effective" remedy[21] as supporting the writ.

The court then addressed the merits of the challenge. It recognized the tradition of door-to-door canvassing and the protections afforded it by the first amendment. In particular, the court noted the importance of this form of disseminating information and ideas to the "causes of the little people,"[22] which are not usually well enough financed to reach the public by other means. The court also noted that "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."[23] In *West Virginia Citizens Action Group*, therefore, the content of the information was recognized as being squarely within the purpose of first amendment guaranties.

Although door-to-door canvassing has been afforded first amendment protection,[24] it may be subject to reasonable restriction. The court recognized the government's legitimate interests in preventing crime, protecting citizens' privacy, and preventing fraud.[25] When weighing these interests against the fundamental right of free speech, however, the court warned that regulations enforcing these governmental purposes "must be drawn with both clarity and specificity in order to pass constitutional muster."[26]

In this case, the use of the term "sunset" in the ordinance without definition was held to be so ambiguous as to have a chilling effect on the exercise of free speech rights. In order to avoid the possible consequences of violating the ordinance, individuals might have been encouraged to curtail their door-to-door activities. The court also pointed to the possibility that the imprecise meaning of "sunset" might be used in such a way as to discriminate against certain groups. Thus, the ordinance was held to be void for vagueness.[27]

Another basis for holding the ordinance unconstitutional was its overbreadth in not allowing for any evening canvassing.[28] In order to strike a good balance between individual rights and government interests, the regulation may not be any more restrictive than necessary to meet those interests.[29] This involves the weighing of "ample alternative channels of communication"[30] against "less restrictive alter-

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[21] *Id.* (citing Hardin v. Foglesong, 117 W. Va. 544, 186 S.E. 308 (1936), and rejecting respondents' suggestion that an appeal or injunctive relief might provide adequate remedy for petitioners if the ordinance were enforced).

[22] *Id.* at 718 (citing Schneider v. State, 308 U.S. 147 (1939)).

[23] *Id.* (citing Garrison v. Louisiana, 379 U.S. 64 (1964)).

[24] *Schneider*, 308 U.S. 147.

[25] *West Virginia Citizens Action Group*, 324 S.E.2d at 719 (citing Martin v. City of Struthers, 319 U.S. 141 (1943) and Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[26] *Id.*

[27] *Id.* at 726.

[28] *Id.*

[29] *Id.* at 721 (citing United States v. O'Brien, 391 U.S. 367 (1968)).

[30] *Id.* at 724 (citing Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981)).

natives for advancing the governmental interests."[31] In *West Virginia Citizens Action Group*, the court favored use of less restrictive alternatives by the city[32] in order that the petitioners' first amendment rights not be abridged.

Even in the absence of first amendment guaranties, the Fairmont ordinance would have been found unconstitutional under the West Virginia Constitution. In a detailed discussion, Justice McGraw noted that while the United States Constitution guarantees only the right to "petition" the government,[33] the State Constitution provides the right to "'reform, alter, or abolish the government.'"[34] Because "the petitioners' activities serve as catalyst and conduit for the expression of the needs and desires of the public with respect to their governmental institutions,"[35] the court considered those activities to be just the type intended to be protected by the State Constitution. The decision in this case, then, strengthened a firmly established commitment by the State to protect speech rights.

III. Trial by Jury

Scott v. McGhee, 324 S.E.2d 710 (W. Va. 1984).

In *Scott v. McGhee*[36] the West Virginia Supreme Court of Appeals reaffirmed the constitutional mandate that municipal courts provide for trial by jury in any case that involves the possibility of a jail sentence.[37] Scott sought a writ of prohibition to prevent the respondent municipal judge from dismissing the municipal charges against him and advising the prosecutor to bring State charges carrying a stiffer sentence.

The relator, Scott, was charged with violation of two city ordinances, discharging a firearm and carrying a dangerous weapon. The maximum term of imprisonment available for any municipal ordinance violation in West Virginia is thirty days.[38] On the other hand, conviction under State law based on the same conduct would have carried a jail term of at least six months.[39]

When Scott appeared before the municipal judge and demanded a jury trial, the judge ordered the charges to be dropped and told the prosecutor that he could

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[31] *Id.* at 724-25.

[32] *Id.* at 725 ("registration and identification procedures; the enforcement of laws criminalizing fraud, burglary, and trespass; and the enforcement of laws requiring compliance with no solicitation signs and requests not to be disturbed").

[33] U.S. Const. amend. I.

[34] *West Virginia Citizens Action Group*, 324 S.E.2d at 725 (quoting W. Va. Const. art. III, § 3).

[35] *Id.* at 726.

[36] Scott v. McGhee, 324 S.E.2d 710 (W. Va. 1984).

[37] Champ v. McGhee, 270 S.E.2d 445 (W. Va. 1980) (applying Hendershot v. Hendershot, 263 S.E.2d 90 (W. Va. 1980) (interpreting W. Va. Const. art. III, § 14)).

[38] *Scott*, 324 S.E.2d at 711 n.2 (citing W. Va. Code § 8-11-1 (1984) and 8-12-5(57) (1984)).

[39] *Id.* (citing W. Va. Code § 61-7-1 (1984)).

bring new charges under State law. This was standard procedure in Bluefield municipal court in a case in which the judge felt imprisonment to be the appropriate penalty.[40] Otherwise, no jury is required if a judge states that he will not impose a jail sentence or the accused waives his right to a jury trial.[41]

While the court stated in *Champ v. McGhee*[42] that a municipal court has the option of bringing State or local charges, it did not suggest that an accused could be subjected to the possibility of a longer jail term simply for having exercised his right to a trial by jury.[43] In other words, municipal authorities must choose in the first instance under which law they will seek a conviction and may not bring more serious charges in response to an exercise of constitutional rights. In *Scott*, the accused was left with a choice between waiving his right to a jury trial or being subjected to the possibility of a longer sentence. His constitutional right to a jury trial was abridged so severely as to do away with it almost completely.

The court began its analysis in *Scott* by relying on its decision in *Champ* in which it was determined that the West Virginia Constitution requires even municipal courts to provide for trial by jury in any case involving potential imposition of a jail term.[44] Then the court applied the principle of *Blackledge v. Perry*:[45] constitutional due process prohibits subjecting an accused to more serious charges merely for having exercised an important right.[46] Applying that principle in *Scott*, the court held that municipal charges may not be dropped, thus subjecting a defendant to State charges providing for a longer period of incarceration, merely because he has requested a trial by jury.[47] Writing for the court, Justice Harshbarger also stated that the Bluefield ordinance was unconstitutional in that it did not allow for jury trials in municipal court.[48] The court's decision in *Scott* protects an individual's right to a jury trial, as provided in the West Virginia Constitution, while also mandating that municipalities fulfill that constitutional duty.

IV. Equal Protection

State ex rel. *West Virginia Magistrates Association v. Gainer*, 332 S.E.2d 814 (W. Va. 1985).

The West Virginia Supreme Court of Appeals considered an equal protection claim in *State* ex rel. *West Virginia Magistrates Association v. Gainer*.[49] The peti-

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[40] *Scott*, 324 S.E.2d at 712.
[41] *Id.* (citing *Champ*, 270 S.E.2d at 447).
[42] *Champ*, 270 S.E.2d 445.
[43] *Scott*, 324 S.E.2d at 712.
[44] *Champ*, 270 S.E.2d at 448.
[45] Blackledge v. Perry, 417 U.S. 21 (1974).
[46] *Id.* (right to *de novo* appeal).
[47] *Scott*, 324 S.E.2d at 713.
[48] *Id.*
[49] State ex rel. West Virginia Magistrates Ass'n v. Gainer, 332 S.E.2d 814 (W. Va. 1985).

tioners challenged the salary system for West Virginia magistrates as being violative of both State[50] and federal[51] constitutional equal protection guaranties. The court found the system constitutional in a four to one decision.

By its petition for a writ of mandamus, the magistrates asked the court to order the State Auditor and the Administrative Director of the Supreme Court of Appeals to provide the same annual salary, $25,125, for all magistrates. The State Legislature developed a pay system for West Virginia magistrates based upon the population each serves.[52] Each county is allowed a certain number of magistrates[53] which is divided into the total population of the county in order to determine the population served by an individual magistrate. This in turn determines the salary he or she receives.[54] The petitioners contended that this system does not provide the magistrates "equal pay for equal work" as required by the court in *Donaldson v. Gainer.*[55]

The grounds for this complaint were the equal protection provisions of the federal and State constitutions. Analysis of the magistrates' claim first involved recognition that no fundamental rights were involved; an economic classification was at issue. The court applied a rational basis test in this case. Such a test has been used by the United States Supreme Court in equal protection cases involving an economic classification.[56] Justice Neely, writing for the majority, set forth factors to be looked at in considering an equal protection claim under the West Virginia Constitution. They are "whether the classification is a rational one based on social, economic, historic, or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally."[57] There is, however, a presumption that the Legislature has acted within its constitutional authority in enacting a statute containing an economic classification.[58] The burden is, therefore, placed upon the statute's challenger to demonstrate that the classification is arbitrary and wholly lacking a rational relationship to a permissible State interest.

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[50] W. VA. CONST. art. VI, § 39, as interpreted in State *ex rel.* City of Charleston v. Bosley, 268 S.E.2d 590 (W. Va. 1980).

[51] U.S. CONST. amend. XIV, § 1 provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[52] W. VA. CODE § 50-1-3 (1984) provides that magistrates serving less than 10,000 people will be paid $17,250 per year; those serving between 10,000 and 15,000 will be paid $20,625 per year; and those serving over 15,000 will be paid $25,125 per year.

[53] W. VA. CODE § 50-1-2 (1984).

[54] W. VA. CODE § 50-1-3 (1984).

[55] Donaldson v. Gainer, 294 S.E.2d 103 (W. Va. 1982), which involved the same equal protection challenge presented in *Magistrates Ass'n.* That challenge failed for lack of a factual showing that all magistrates did equal work. The petitioners in *Magistrates Ass'n* attempted to make such a showing.

[56] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).

[57] *Magistrates Ass'n*, 332 S.E.2d at 816, (quoting Atchison v. Erwin, 302 S.E.2d 78 (W. Va. 1983)).

[58] State *ex rel.* Heck's v. Gates, 149 W. Va. 421, 141 S.E.2d 369 (1965).

In *Magistrates Association* the petitioner produced time sheets in an effort to show that there was no reasonable basis for paying magistrates different salaries based upon the population they served. By showing that all the magistrates involved worked full time, either in handling cases or on call, the petitioners attempted to persuade the court that all did equal work, thus requiring equal pay.[59] In other words, the Legislature's allotment of salary on the basis of population served was not rationally related to the State's purpose in paying magistrates according to the work they performed. The majority was not swayed by the petitioners' offer of proof, however, pointing to the quality rather than quantity of work as being determinative of whether one magistrate's work was equal to another's.

In considering the question of equal work, the opinion recited many statistics, comparing the busiest to the least busy counties in terms of their "per magistrate case disposition rate[s]."[60] As an extreme example of the differences in these numbers, in 1983 Wirt County had a rate of 400 cases per magistrate, or a cost of $62.81 per case attributable to the magistrate's salary (if paid at the top salary, $25,125 per year). During the same period Mercer County had a rate of 4,610 cases per magistrate, or a cost of $5.45 per case attributable to the magistrate's salary (at $25,125).[61] While these figures in themselves seem to show a rational basis for the differences in salaries, the court also looked at the number of hours spent in "judicial activity"[62] as an indicator of the difference in the magistrates' work. Magistrates in more populous counties spent a much greater proportion of their on-duty time "performing judicial functions"[63] than those in less populous counties.[64] The disparities in caseload disposition and number of hours spent in actually dealing with those cases were, thus, seen as indicators of unequal work.

The petitioners asserted that the twenty-four hour on-call status of magistrates in smaller counties made up for the lower number of hours spent in the courtroom. The court specifically found in *Donaldson*, however, that being on-call is not equivalent to "performance of a magistrate's judicial function."[65] While recognizing that it might be argued that the on-call time makes the work of small county magistrates "comparable"[66] to that of large county magistrates, the court held that it was not equal. Comparability was viewed as a subjective determination which lay more appropriately with the Legislature.

Because the petitioners failed to demonstrate that all magistrates did equal work

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[59] *Donaldson*, 294 S.E.2d at 112.
[60] *Magistrates Ass'n*, 332 S.E.2d at 817.
[61] *Id.* at 816-17.
[62] *Id.* at 817.
[63] *Donaldson*, 294 S.E.2d at 112.
[64] *Magistrates Ass'n*, 332 S.E.2d at 817.
[65] *Donaldson*, 294 S.E.2d at 112.
[66] *Magistrates Ass'n*, 332 S.E.2d at 818.

without regard to the population they served, the court held that there was no equal protection violation under either the federal or State Constitution. In fact, statistics included in the opinion tended to show a correlation between the volume of judicial duties performed by a magistrate and the number of people he or she serves.

In a dissenting opinion,[67] Justice McGraw took a different approach to the concept of equal work. While the majority saw it as a matter of the type of work being done, Justice McGraw's opinion was that full-time duty is full-time duty, regardless of the number of cases disposed of or hours spent in the courtroom. While more populous counties had larger caseloads, less populous counties had more on-call time to offset their lower case disposition rate. What the majority suggested might be called "comparable,"[68] Justice McGraw would have held to be "equal." He, therefore, would have found an equal protection violation.

As *Magistrates Associations* shows, equal protection challenges concerning merely an economic classification, rather than one involving a fundamental right or a suspect class, will rarely succeed. First, there is a strong presumption that the classification is valid with respect to the purpose it is intended to serve. In this way courts defer to legislative judgment. Second, a court's role in such a case is limited. For example, in *Gainer*, the court felt it would have been overstepping its authority to hold that "comparable" work was "equal" work within the meaning of constitutional equal protection. Again, there was deference to the Legislature. Cases such as this remind us that the branches of government are coequal, and that the judicial branch is not always given the last word.

Renatha S. Hodgson

[67] *Id.*
[68] *Id.*