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Criminal Procedure

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Criminal Procedure

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CRIMINAL PROCEDURE

I. RIGHTS OF PERSONS IN CUSTODY


In two unrelated decisions, *Craigo v. Marshall* and *Cronauer v. State* the West Virginia Supreme Court of Appeals addressed several issues which will affect the rights of persons already in custody. The court explained the requirements for issuance of a valid rendition warrant in connection with extradition proceedings, clarified the statutory mandate of appointing a committee to protect the interests of incarcerated persons, and set parameters upon the discretion of trial judges to determine when a prisoner may appear at trial. Through its holdings, the court stressed the need for maintaining prompt, fair administration of justice to protect the rights of incarcerated persons.

*Craigo v. Marshall* was one of two consolidated cases that involved the same legal issue of whether a prisoner may file a civil action without having a committee appointed. The petitioners, David Carr and Robert Craigo, were each serving sentences in excess of one year in the State Penitentiary in Moundsville. In 1984, both filed separate, unrelated civil actions in the Circuit Court of Kanawha County, and the trial court, *sua sponte*, dismissed both actions citing statutory authority as interpreted in *Waynesboro v. Lopinski*.

The correctional and penal statutes authorize the appointment of a committee on the motion of an interested party when a person “is confined in the penitentiary . . . for one year or more . . . .” It is further provided that a committee may sue and be sued on behalf of a convict for all causes of action which he might sue or be sued upon if he had not been incarcerated.

In reversing the decision of the trial court, the West Virginia Supreme Court of Appeals overruled a prior decision in *Waynesboro v. Lopinski* where the court had stated that “prisoner under penitentiary sentence of one year or more must sue or be sued through a duly qualified committee.” The court found this interpretation to be overly protective and restrictive of the civil rights of an incarcerated person. It ruled that a prisoner may file a civil action without having a committee appointed.

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3. Id. at 866-68.
4. *Craigo*, 331 S.E.2d at 512.
5. Id. at 515.
7. Id. at 511.
appointed pursuant to the statute and without using a next friend pursuant to Rule 17(c) of the West Virginia Rules of Civil Procedure.\(^\text{12}\)

In reaching its decision the court found support in public policy specifically recognizing the difficulty a prisoner faces in securing the appointment of a committee prior to the applicable statute of limitations. There is no tolling provision in the West Virginia statute of limitations with regard to a prisoner's claim during the period of his imprisonment. The court reasoned that, unless a prisoner is able to bring suit while imprisoned, he could lose his cause of action.\(^\text{13}\) This ruling, in essence, allows a prisoner to effectively waive his right to the appointment of a committee if he desires to initiate a civil action in his own name.\(^\text{14}\) When a prisoner is a defendant in a civil suit, however, there must be an express written waiver of his right to a committee or a guardian ad litem, or such suit cannot be directly maintained against him. Public policy supports this distinction because, as a defendant, the prisoner has not voluntarily elected to come into court.\(^\text{15}\)

The court next addressed the issue of when a prisoner may personally appear at trial. Recognizing that the right to appear at trial is in the discretion of the trial judge, the court adopted a balancing test, as prescribed in \textit{Stone v. Morris},\(^\text{16}\) to provide guidance to the judge in his determination. The eight factors which the court should consider in making its determination of whether a prisoner should appear at trial, as plaintiff or defendant, are: (1) the costs and inconvenience of transportation; (2) any potential danger or security risk of the prisoner to the court; (3) the substantiality of the matter at issue; (4) the need for an early determination of the matter; (5) the possibility of delaying trial until the prisoner is released; (6) the probability of success on the merits; (7) the integrity of the correctional system; and (8) the interests of the prisoner in presenting his testimony in person rather than deposition.\(^\text{17}\) In adopting the \textit{Stone v. Morris} test, the court did not discuss whether any particular weight should be given to the individual factors.

The second of the two cases defining rights of persons is custody, \textit{Cronauer v. State}\(^\text{18}\) involved the appeal of Betty Ann Cronauer from a trial court's order denying the appellant's petition for a writ of habeas corpus. The appellant was seeking habeas corpus relief from her arrest and custody pursuant to a warrant upon requisition (rendition warrant) issued by the Governor of West Virginia in response to a request by the Governor of California for the appellant's extradition to that State. Cronauer had been charged in California with violating a child custody statute.

The controversy began in 1980 in North Carolina when the appellant was ap-

\(^\text{13}\) \textit{Id.} at 513.
\(^\text{14}\) \textit{Id.} at 513-14.
\(^\text{15}\) \textit{Id.} at 514.
\(^\text{16}\) \textit{Id.} at 555 (citing \textit{Stone v. Morris}, 546 F.2d 730 (7th Cir. 1976)).
\(^\text{17}\) \textit{Craigo}, 331 S.E.2d at 515.
\(^\text{18}\) \textit{Cronauer}, 322 S.E.2d 862.
pointed by a North Carolina court as guardian for the estate of her deceased husband's five children. Soon after, a half sister of the children removed them to California and a year later was appointed full guardian of the five children by a California superior court.

Shortly before this last appointment, the appellant had removed two of the children from California and transported them back to North Carolina. A warrant was issued in California for the appellant's arrest and, although the State of North Carolina refused to extradite her to California, a North Carolina court ordered her to return the two children to the custody of their half sister. She complied, and her guardianship over the estates of the five children was terminated. In late 1981, the appellant was arrested in West Virginia on a fugitive from justice warrant and released on bond. She was later recommitted to jail for sixty days and her bond forfeited pursuant to West Virginia Code section 5-1-9(h). In August, 1982, the Governor of West Virginia issued a rendition warrant for the appellant's arrest in response to a request of extradition from the Governor of California and in September, 1982, the appellant was arrested again.

The appellant thereafter filed a petition for a writ of habeas corpus in the Circuit Court of Clay County pursuant to West Virginia Code section 5-1-9. She alleged that her arrest and confinement in the county jail was illegal because the face of the extradition documents issued by the Governor of West Virginia and the Governor of California did not clearly charge that a crime had been committed under California law. The trial court denied the petition but stayed the extradition of the appellant pending a decision by the West Virginia Supreme Court of Appeals.

In affirming the trial court's ruling, the West Virginia Supreme Court of Appeals found that the rendition warrant issued by the Governor of West Virginia complied with the mandates of the governing statute. The court also declared that a circuit court, when determining the sufficiency of a rendition warrant in a habeas corpus proceeding challenging the validity of custody in connection with extradition proceedings, may examine underlying documents filed by the demanding state in support of its request for extradition.

The court discussed the statutory requirements governing the extradition process, noting that numerous written documents are required. It had previously held that the procedures required of the demanding state must comply with the "clear and unambiguous" language of the authorizing statute or extradition will be denied.

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19 Id. at 864.
20 Id. at 864-65. See W. VA. CODE § 5-1-9(h) (1979).
21 Cronauer, 322 S.E.2d at 864-65.
22 Id. at 865. See W. VA. CODE § 5-1-9 (1979).
23 Cronauer, 322 S.E.2d at 864-65.
24 Id. at 868. See W. VA. CODE § 5-1-8(a) (1979).
25 Cronauer, 322 S.E.2d at 868.
26 Id.
The request for extradition from the demanding state must also include an "affidavit or sworn evidence that the demand or application is made in good faith for the punishment of crime . . . ." Finally, if the Governor decided that the demand should be complied with, he could issue a warrant of arrest which must substantially recite facts supporting its validity. The court found that all these conditions had been satisfied. It reasoned that the statement contained in the rendition warrant that the appellant "stands charged with the crime of violation of a child custody order" gave reasonable notice to the appellant of the nature of the crime charged in California. This met the demand that the warrant "substantially recite the facts necessary to the validity of its issuance." The court then referred to supporting documents accompanying the rendition warrant which set out in detail the specificity of the crime as further evidence that the appellant was aware of the crime with which she was charged. The court looked to the statutes of other jurisdictions and determined that the language in the rendition warrant was well within the standards adopted by states with similar statutes. The court concluded, after cursory discussion, that it is a well-settled rule that "the underlying documents may be examined to see if they can serve as a valid basis for a governor's rendition warrant."

II. Bail Revocation


Marshall v. Casey addressed procedural protection due an accused during bail revocation proceedings. In an action for habeas corpus and mandamus, the West Virginia Supreme Court of Appeals denied the relief sought by the petitioner due to a technicality, but affirmatively settled the procedural question of the necessity of a hearing and the requirement of stated reasons for the granting or denial of bail revocation.

In Marshall, the petitioner sought relief from the revocation of his bail in the Circuit Court of Kanawha County. The petitioner had been indicted for the felony offenses of sexual assault and burglary and was subsequently released upon bail. During his release, the petitioner was arrested for the misdemeanor offense of trespassing and a magistrate set the bail at $5,000 "cash only". On the day of his arrest for trespassing, the prosecutor filed a written motion to the circuit court

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28 Cronauer, 322 S.E.2d at 867. See W. VA. Code § 5-1-7(b) (1979).
29 Cronauer, 322 S.E.2d at 867.
30 Id. at 868.
31 Id. See W. VA. Code § 5-1-8(a) (1979).
32 Cronauer, 322 S.E.2d at 867-68.
33 Id. at 868.
35 Id. at 346-47.
to revoke the petitioner's bail upon the sexual assault and burglary charges. Circuit Judge Casey granted the motion and issued a capias for the petitioner's incarceration. The court's order was based solely upon the prosecutor's unverified and undocumented motion. A hearing was scheduled by the respondent to take place nine days later, but was never held due to the inability of the petitioner's counsel to attend. No hearing was rescheduled by the petitioner's counsel.36

Although the defendant had subsequently been incarcerated pursuant to a guilty plea on the initial charges, the court refused to find the question moot, on the grounds that "here was a question capable of repetition and yet would evade review."37 The court discussed generally the constitutional and statutory provisions relating to the granting and denial of bail and emphasized the importance of developing methods to safeguard the rights of accused in bail matters.38

The court held that Rule 46(h) of the West Virginia Rules of Criminal Procedure, relating to bail determination hearings, is compatible with the principle of due process applicable to bail revocation proceedings and that an accused whose bail is revoked may, by motion, challenge revocation. A hearing upon the motion must be provided.39 In this case however, the writs were denied because the petitioner failed to pursue the matter in circuit court after the scheduled hearing had been cancelled due to the fault of petitioner's counsel.40 The court, in effect, ruled that the petitioner had waived his right to another hearing by his failure to reschedule such hearing.

In concluding, the court did not specifically address the question of whether the scheduling of the first hearing nine days after the revocation of the petitioner's bail was in accordance with due process, although reference was made to the "five-day requirement" of Rule 46(h).41 The court's decision did, however, clarify any questions which prosecutors and judges alike may have with respect to the proper procedural protections to be afforded the accused in bail revocation proceedings.

III. JUVENILES

In re Mark E.P., 331 S.E.2d 813 (W. Va. 1985).

36 Id. at 347.
37 Id. at 347 n.4 (citing State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (W. Va. 1984)).
38 Id. at 348, see also U.S. CONST. AMEND III; W. VA. CONST., Art. III § 5.
39 Marshall, 324 S.E.2d at 351; see W. VA. R. CRIM. P. 46.
40 Marshall, 324 S.E.2d at 352.
41 Id.
In five recent decisions, the West Virginia Supreme Court of Appeals addressed issues which should affect the treatment of juvenile witnesses and offenders alike. Four of the cases, *State v. Highland*, *State v. Howerton*, *In re Mark E.P.*, and *State v. Ellsworth* dealt principally with the issue of when a juvenile offender may be transferred to criminal jurisdiction. A fifth decision, *Burdette v. Lobban*, should clarify any misunderstanding which may have existed as to whether a juvenile victim of sexual abuse could be interrogated by defense counsel in the absence of a court-appointed attorney. These decisions reflect the court's increasing concern for the protection of the rights of juveniles at every stage of criminal proceedings.

In *Burdette v. Lobban*, a five-year-old girl was the alleged victim of sexual abuse inflicted by her father. The petitioners sought a writ of prohibition to prevent the enforcement of an order by the circuit court permitting the child to be interrogated by defense counsel outside the presence of her attorney.

In awarding the writ, the court cited the clear language of the child abuse statute which provides that a child in a neglect or abuse proceeding shall have the right to be represented by counsel "at every stage of the proceedings." In support of its decision, the court relied on a previous holding that, in juvenile delinquency proceedings, an immature minor is incapable of waiving his or her right to counsel except upon the advice of counsel. The court expressed the concern that the five-year-old had undergone a horrifying experience already and deserved the protection of the court against the pressures which a defense attorney may consciously or unconsciously exert.

The court next addressed the issue of the competency of the testimony of a five-year-old. To resolve this problem, the court decided that a neutral child psychologist or psychiatrist should be appointed to inquire into the child's capacity. The court recognized that the child could not be forced to be interviewed by the psychiatrist or psychologist alone unless both the court and the guardian ad litem agree. In the absence of an interview, the court may refuse to allow the child to be a witness when there is no assurance of competency.

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47 *Id.*
48 *Id.* at 602.
49 *Id.* at 602-03 (citing W. VA. CODE § 49-6-2(a) (1984), which reads in part, "In any proceeding under the provisions of this article, the child, . . . shall have the right to be represented by counsel at every stage of the proceedings").
50 *Burdette*, 323 S.E.2d at 603 (citing State ex rel. J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981)).
51 *Burdette*, 323 S.E.2d at 603.
52 *Id.*
In *State v. Highland*, the petitioner sought a reversal of a final sentencing and transfer order by the Circuit Court of Taylor County. The petitioner had pleaded guilty to burglary and arson charges and had been sentenced to the West Virginia Penitentiary. As a juvenile, the petitioner was committed to the custody of the commissioner of corrections for confinement in a juvenile institution until he was eighteen.

As the petitioner’s eighteenth birthday neared, the circuit court on its own motion held a dispositional hearing to determine whether the petitioner should be transferred from the juvenile facility to the state penitentiary. Against the recommendation of the commissioner of corrections that the petitioner should be released, the circuit court ordered the petitioner transferred to the Huttonsville Correctional Center to serve the remainder of his sentence.

In reversing the order of the circuit court, the supreme court held that the proper statutory prerequisites had not been followed. The primary issue centered upon the language of West Virginia Code section 49-5-16(b) which authorizes a transfer “if, in the judgment of the commissioner of the department of corrections and the court which committed such child, such transfer is appropriate . . . .” The court rejected the argument of the State that the court alone had final discretion as to when a transfer to an adult facility is permitted and ruled, instead, that both the commissioner of corrections and the court must agree before a transfer is authorized. Without the assent of both, no transfer is permitted under the statute.

In *Highland*, the court recognized that the Legislature imposed the hearing and review procedure for a specific purpose—to examine any rehabilitative progress achieved by the youthful offender. Since the purpose of confining juveniles is rehabilitation, not punishment, the findings and recommendations of the juvenile treatment authorities should be given substantial weight in any transfer proceeding. The court concluded by discussing the four prerequisites to a lawful transfer of an individual from a juvenile facility to an adult institution. These are: “(1) the transferee must be at least eighteen years of age; (2) the sentencing court must deem the transfer appropriate; (3) the Commissioner of Corrections must deem the transfer appropriate; and (4) a hearing must be held by the sentencing court prior to the approved transfer to consider modification of the originally imposed sentence.” As noted above, the third requirement was not met in this case, therefore, requiring a reversal.

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54 Id. at 705.
55 Id. at 708.
56 *See W. VA. CODE* § 49-5-16(b) (Supp. 1985) (authorizing a transfer, “If, in the judgment of the commissioner of the department of corrections and the court which committed such child, such transfer is appropriate. . . .”).
57 *Highland*, 327 S.E.2d at 707; *W. VA. CODE* § 49-5-10(b) (Supp. 1984). The State contended that final proviso for pre-transfer hearing left all decisions under entire section be left to discretion of court.
58 *Highland*, 327 S.E.2d at 707.
59 Id. at 708.
State v. Howerton also involved the issue of transfer to criminal jurisdiction and, in addition, presented a unique question concerning the admissibility of out-of-court statements. James Ronald Howerton was convicted of second degree murder when he was seventeen years old. He was transferred from juvenile jurisdiction to adult criminal jurisdiction upon a finding by the trial court that probable cause existed to believe that he had committed a murder. The defendant did not exercise his right to a direct statutory appeal at the time of the transfer. In his appeal to the West Virginia Supreme Court of Appeals, the defendant challenged the validity of his transfer on the ground that the trial court failed to make adequate findings of fact and law, and, in addition, the defendant assigned five errors seeking reversal of his criminal conviction. The transfer decision and two of the assignments of error will be discussed below.

The court summarily disposed of the transfer issue relying on West Virginia Code section 49-5-10(f). This statute provides that notice of intent to appeal and a request for a transcript must be filed within ten days from entry of a transfer order. It also requires that a petition for appeal must be presented to the West Virginia Supreme Court of Appeals within forty-five days from entry of the transfer order, or the right of appeal and the right to object to the transfer order shall be waived and may not thereafter be asserted. Since the language of the statute was clear, the court had no trouble in denying the defendant's appeal. This ruling is consistent with other jurisdictions' views concerning the right of a defendant to appeal a transfer from juvenile to adult jurisdiction.

One of the defendant's principle assignments of error involved the admission of his oral confession which was given to a Huntington police officer while he was in custody. He asserted that the statement was admitted in violation of a provision of the juvenile law dealing with the admissibility of extrajudicial statements by juveniles.

The seventeen-year-old juvenile, in response to a phone call from a Huntington police officer, was brought to the juvenile unit of the police department by his parents and was subsequently advised that he was being placed under arrest. After being read his Miranda rights, the defendant confessed his involvement in a murder. This evidence undoubtedly bore heavily on his later conviction.

On appeal, the defendant maintained that the evidence should have been suppressed in accordance with West Virginia Code section 49-5-1(d), which provides: "extra judicial statements other than res gestae statements by a child under sixteen

60 Howerton, 329 S.E.2d 874.
61 Id. at 876.
62 Id. at 876-77. See W. Va. Code § 49-5-10(f) (1980) (which requires notice of intent to appeal within 10 days and required filing of petition within 45 days from entry of transfer order).
63 Howerton, 329 S.E.2d at 877.
64 Id.
65 Id. at 877, citing W. Va. Code § 49-5-1(d).
years of age, made to law enforcement officials or while the child is in custody and outside the presence of the child’s counsel shall not be admissible.” The defendant interpreted the prepositional phrases “by a child” and “under sixteen years of age” in the statute as modifying “res gestae statements” rather than “(e)xtra judicial statements.” The court disagreed, stating that such a construction “would lead to the absurd result of placing an evidentiary restriction on the admissibility of res gestae statements based on the age of the declarant.” The court, while briefly discussing the history of the statute, concluded that the provision was designed to protect juveniles under the age of sixteen years while in custody and outside the presence of the child’s counsel from making incriminating statements. Since the defendant was seventeen years old at the time of his confession, the court held that the lower court did not err in admitting his confession into evidence. A juvenile’s confession not subject to West Virginia Code section 49-5-1(d) must be closely scrutinized under the totality of the circumstances. Defendant’s confession was not challenged under the totality rule.

The defendant’s other assignment of error presented an interesting evidentiary matter. The defendant claimed that the trial court committed reversible error by admitting testimony concerning incriminating statements made by the defendant while under the influence of sodium amytal. This test was conducted by a psychiatrist who administered the drug to the defendant at the direction of defense counsel, and then reviewed the criminal episode with him. The interview was tape recorded, and the defendant obtained a copy of the tape. The defendant later took the tape to the home of an acquaintance and, in the presence of several people, played it. The defendant made the comment that it was his truth serum tape. One of the listeners testified at trial, over the defendant’s objection, as to several incriminating statements made on the tape. The tape itself was not introduced into evidence.

The court disagreed with the trial judge’s ruling that statements on the tape were a tacit admission but nonetheless refused to find that reversible error had been committed. Instead, the court held that the out-of-court statements by the defendant and the subsequent voluntary playing of the tape amounted to an adoptive admission. The court seemed to rely heavily on the facts that the defendant played the tape without prior urging, and that the statements recalled by the witness bore a close relation to the physical evidence of the crime.

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66 Howerton, 329 S.E.2d at 877.
67 Id. at 877-78.
68 Id. at 878.
69 Id. at 879.
70 Id.
71 Id. at 881.
72 Id. at 880-81.
The final two cases, *In re Mark E.P.* and *State v. Ellsworth*, also concerned the admissability of confessions obtained from juveniles outside the presence of counsel. Both of these cases followed the "totality of the circumstances" approach in *Howerton*, and an in-depth discussion of the court's decisions would merely result in repetition.

In conclusion, these cases, *Burdette*, *Highland*, *Howerton*, *Mark E.P.*, and *Ellsworth* demonstrate the court's efforts to assure that juvenile offenders and victims are given adequate protection in all phases of criminal proceedings. These cases suggest that the court is becoming increasingly concerned with the safeguards of due process for juveniles; that is, adequate representation by counsel and opportunity for hearing at all stages of criminal proceedings.

IV. VENUE


In *State v. Ginanni*, the court reaffirmed the guidelines set by the Legislature regarding a defendant's right to a change of venue. In reversing the defendant's conviction, the West Virginia Supreme Court of Appeals reaffirmed the principle that there must be a showing of good cause to warrant a change of venue in a criminal case, set constitutional parameters on what constitutes "good cause," and reaffirmed a prior holding that the fact that a jury free from exception can be impanelled is not conclusive, on a motion for a change of venue, that prejudice does not exist and will not justify the court in refusing to receive other evidence to support such a motion.

Robert Ginanni was convicted of sexual abuse in the first degree. He had previously been convicted of sexual assault. The only error assigned on appeal was the failure of the trial court to grant the appellant's motion for a change of venue. The appellant asserted that the evidence presented at the hearing on his motion to change venue was sufficient to show such a present hostile sentiment against him that he could not receive a fair trial in Ritchie County. The State argued

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73 *In re Mark E.P.*, 331 S.E.2d 813.
74 *Ellsworth*, 331 S.E.2d 503.
75 *Howerton*, 329 S.E.2d 874.
76 *Burdette*, 323 S.E.2d 601.
77 *Highland*, 327 S.E.2d 703.
78 *Howerton*, 329 S.E.2d 874.
79 *In re Mark E.P.*, 331 S.E.2d 813.
80 *Ellsworth*, 331 S.E.2d 503.
82 *Id.* at 190 (citations omitted).
83 *Id.* at 189.
that the trial court did not abuse its discretion, that a fair and impartial jury was selected, and that the appellant was given a fair trial.\textsuperscript{1}

At the hearing on the motion, the appellant presented twenty-one witnesses, seventeen of which said his reputation was bad or questionable.\textsuperscript{2} Fourteen of the witnesses also expressed their belief that a present hostile sentiment existed in the community toward the appellant.

During the selection of the jury, all except one had either heard of the case or prior cases concerning the appellant, or had heard of the appellant’s bad reputation. In the middle of the \textit{voir dire}, the defense counsel renewed the motion for a change of venue. In denying the motion, the trial court stated: "Well, if we cannot pick a jury, it will certainly have to be transferred. I do not think that is apparent, yet. \ldots"\textsuperscript{3}

In reversing the decision of the trial court, the court restated the grounds necessary for removal of a criminal trial to a county other than the one in which the alleged offense was committed.\textsuperscript{4} Holding that only the accused is entitled to change of venue upon petition and a showing of good cause, the court stated that the fact that a jury free from exception can be impanelled is not conclusive that the accused will receive a fair trial.\textsuperscript{5} The court rejected the reasons of the trial court for not granting a change of venue and found that the record disclosed evidence of hostile sentiment beyond the appellant’s home community.\textsuperscript{6} The court also stated that the "good cause" must exist at the time application for a change of venue is made.\textsuperscript{7}

The court’s decision reflects the fact that venue has lost the significance it once had when jurors were primarily witnesses to the alleged offense, and thus, it was necessary for a trial to be held in the community where the offense occurred. Today, jurors are judges instead of witnesses and the present venue cases are gradually reflecting this change in roles.

\textit{C. Chilton Wise, III}

\textsuperscript{1} Id. at 188.
\textsuperscript{2} Id. at 188-89.
\textsuperscript{3} Id. at 189.
\textsuperscript{4} Id. at 190 (citing State v. Pratt, 161 W. Va. 530, 244 S.E.2d 227 (1978) where the court defined "good cause shown" as being proof that a defendant cannot get a fair trial in a county because of extensive hostile sentiment). \textit{See also} W. Va. Const., art. III, § 14; W. Va. Code § 62-3-13.
\textsuperscript{5} Ginanni, 328 S.E.2d at 190.
\textsuperscript{6} Id. The trial court’s reasons were: (1) no witness had testified that appellant couldn’t get a fair trial, (2) evidence didn’t show hostile sentiment outside the area, and (3) an impartial jury had been selected in the appellant’s previous trial.
\textsuperscript{7} Id. at 190.
V. CONSTRUCTION OF THE RULES


In State v. Lambert,91 the court heard an appeal from a man that had been convicted of aiding in concealing stolen property. In one of the grounds on appeal, Lloyd Lambert asked the court to reverse his conviction because the lower court erred in admitting evidence the prosecution had failed to disclose as directed by a court discovery order governed by Rule 16 of the West Virginia Rules of Criminal Procedure. The evidence focused on statements that Lambert made to two witnesses.

In its discussion of the merits of this ground, the court pointed out that the new West Virginia Rules of Criminal Procedure, while being largely based on the Federal Rules of Criminal Procedure, nevertheless differ in many respects.92 Rule 16 of the West Virginia Rules considered in Lambert, varies substantially from its federal counterpart. The supreme court, in determining the consequences of the prosecutor's failure to abide by the rule, considered the variance between the two rules and decided to apply precedent from cases decided prior to the adoption of the new rules.93 Relying on State v. Grimm,94 the court found that, since Lambert had been given ample opportunity to interview the witnesses and because an in camera hearing was held prior to the trial where Lambert was apprised of the testimony, he could not claim surprise by the testimony of the two witnesses. Consequently, no prejudice resulted, and no reversible error was committed.95

The importance of this decision lies not in the court's substantive ruling, but in the method of review utilized. By considering the new rules in light of cases decided under the old rules, the court may well reach a different result than would the federal courts operating under a similar set of rules for criminal procedure.

VI. WAIVER OF COUNSEL


In State v. Armstrong,96 the court discussed the ability of a trial court to use prior uncounseled misdemeanor convictions for driving under the influence to

91 State v. Lambert, 331 S.E.2d 873 (W. Va. 1985). The court also discussed the application of the One Term Rule to the defendant's right to a speedy trial. Following precedent, the court quickly ruled that the Three Term Rule controlled here.

92 Id. at 878.

93 Id. at 878. W. Va. R. Crim. P. 16(a)(1)(A), adopted in 1981, provides that a defendant may discover on an order from the court all statements, made by him to any witness, which the prosecution intends to offer as evidence at trial. Conversely, the federal rule governing this, Fed. R. Crim. P. 16(a)(1)(A), allows only the discovery of such a statement when the defendant knew at the time it was made that the person to whom he was speaking was an officer of the law.


95 Lambert, 331 S.E.2d at 878.

enhance the sentence to be imposed on a defendant's conviction of a third offense. The defendant appealed his third conviction, arguing that the court could not use prior unrepresented convictions to impose a prison sentence. He also claimed he had not properly waived his right to an attorney under the sixth amendment.

Relying on Baldasar v. Illinois, the court stated that prior misdemeanor convictions where no imprisonment could have been imposed may not later be used to enhance a sentence of imprisonment, unless the individual was represented by counsel or waived the right to counsel.

This lead to the issue presented to the court of whether the defendant had made a valid waiver of counsel in the previous cases. Following the United States Supreme Court decision of Johnson v. Zerbst, the West Virginia Supreme Court of Appeals stated that waiver of counsel can never be presumed. The record must demonstrate, on a case-by-case basis, that the defendant knowingly and voluntarily waived such a fundamental right. The court also recognized, however, the difficulties inherent in this requirement because of the economic problems associated with preserving a record of minor court proceedings.

Having set forth this premise, the court examined the evidence of this case. The defendant suffered from mental retardation, although the court ruled that a less than normal intelligence is not in and of itself conclusive to find an involuntary waiver. As to the first trial, the court noted that the defendant signed a waiver of counsel form, albeit in the wrong place. The form was signed before the defendant had an initial meeting with any attorney and the guilty plea taken from the defendant was entered over a month after this waiver form was signed. Nothing in the record of the first conviction indicated the defendant's waiver except this form.

Given these facts, the court held that while the signing of a waiver form was prima facie evidence of a knowing and voluntary waiver of counsel, the presumption may be overcome by a preponderance of the evidence to the contrary. The particular circumstances of this case warranted a reversal because the court could not find that the defendant voluntarily waived his right to counsel in the first conviction. As to the second conviction, the testimony of the magistrate who ac-

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97 W. VA. CODE § 17C-5-2(f) (Supp. 1985) provides that while normally a conviction for a D.U.I. charge carries only a fine, the third conviction arising from such a charge converts the penalty into a felony, where a prison sentence is to be imposed.
98 U.S. CONST. Amend. VI.
99 Baldasar v. Illinois, 446 U.S. 222 (1980). This case dealt with a sentence enhancement for a second misdemeanor theft conviction, which was transformed into a felony by reason of a prior conviction.
100 Armstrong, 332 S.E.2d at 841.
102 Armstrong, 332 S.E.2d at 841.
103 Id. at 841-42.
104 Id. at 842 (citing State v. Hamrick, 160 W. Va. 673, 236 S.E.2d 247 (1977)).
105 Id.
106 Id. at 843.
cepted his plea indicated a waiver of counsel. This testimony supplemented a waiver form that the defendant signed.

Armstrong was a case of first impression in West Virginia, and the court followed the United States Supreme Court holding in Baldasar. However, this may be a restricted holding. First, the court indicated that magistrates were to be given more leeway in preserving a record, thereby detracting from the requirements of a clear showing of a knowing and voluntary waiver of counsel. Second, the court gives distinction to signed, pre-typed rights forms, holding that such forms are prima facie evidence of voluntariness. This recognition is supported by precedent in West Virginia, although support to the contrary has been indicated at the federal level. Furthermore, whether a waiver is made knowingly and intelligently will be decided on the particular facts of each case.

VII. Arrest, Search, and Seizure


During the survey period the court dealt with several aspects of search and seizure. In one case, State v. Cook, the court considered the admissibility of evidence seized in connection with a lawful arrest but without a search warrant. Several men had robbed and murdered a man in West Virginia. They fled to Cleveland, Ohio and attempted to transfer funds by using the victim’s stolen checkbook. As a result of this attempt, their whereabouts were discovered, and Ohio authorities arrested them in their hotel room. When the police burst into the room, they found the suspects sleeping. The suspects offered no resistance and were immediately handcuffed. The police searched the area around the bed, and after noticing some items on a dresser some distance away, one of the officers

107 Id.

108 Baldasar, 446 U.S. 222.

109 See State ex rel. Powers v. Boles, 149 W. Va. 6, 138 S.E.2d 159 (1964); State ex rel. Fountain v. King, 149 W. Va. 511, 142 S.E.2d 59 (1965). Both contain dialogue with the judge which is clear from the record.

110 In Carnely v. Cochran, 369 U.S. 506 (1962), the Court held that a mere statement in the record that waiver of assistance of counsel was presumed, absent anything else, could never show an intelligent waiver. Cf. Williford v. Estelle, 672 F.2d 552 (5th Cir. 1982) (where a question-answer form had been incorporated into the record, this was sufficient to support the finding of an intelligent waiver of counsel).

111 State v. Cook, 332 S.E.2d 147 (W. Va. 1985). Among other issues raised in his appeal, Cook argued that his confession was involuntary, as he was mentally retarded and lacked the ability to make such a waiver. The court disagreed, holding that voluntariness of a confession must be determined from the totality of the circumstances and not solely on less than normal intelligence.
made a closer examination. His examination revealed the checkbook and address book of the victim. This evidence was not taken by him but was actually seized by another group of officers after the suspects had been removed from the area.\textsuperscript{112}

The defendant argued that the search was conducted without a warrant, and, therefore, the evidence seized in that search was inadmissible. The court agreed with him. Quoting from \textit{State v. Moore},\textsuperscript{113} the court declared that extra-judicial searches are "\textit{per se} unreasonable," subject only to a few exceptions.\textsuperscript{114} The court held that the search was invalid, since it was conducted without a warrant.\textsuperscript{115} Furthermore, the search did not fall within any of the recognized exceptions to the rule including a search incident to arrest or search under the plain view doctrine.\textsuperscript{116} In order to fall within the exception of a search incident to arrest explained by the United States Supreme Court in \textit{Coolidge v. New Hampshire},\textsuperscript{117} the search must be limited to the immediate geographic area around the arrestee, where he could tamper with evidence or uncover weapons. Any items seized outside this area may only be obtained through the issuance of a valid search warrant. Applying this premise to the facts of this case, West Virginia's highest court noted that, since the suspects were around the bed when they were arrested, a search of the dresser was beyond the arrestee's area of control.\textsuperscript{118} The unlawful search was further complicated by the fact that the actual seizure was accomplished by another group of officers after the men were physically removed from the room and all possibility of tampering was eliminated.\textsuperscript{119} The court concluded that the police could have secured the area while a search warrant was issued.\textsuperscript{120}

In discussing the search incident to a lawful arrest exception, the court simultaneously addressed the issue of whether the evidence could be admitted under the plain view doctrine, another exception to the requirement of a search warrant. Again the court relied on \textit{Coolidge}, holding that a search of property in plain view is permissible where the police have probable cause to believe the articles are evidence of the crime. Also, the police must be acting within the law when the evidence is observed.\textsuperscript{121} The checkbook and address book were not of an incriminating nature. Nor did these items offer an element of ownership. Therefore, the search did not meet the requirements of the plain view doctrine.\textsuperscript{122} As a result of this analysis, the evidence taken from the dresser was held inadmissible and the defendant's conviction was reversed.

\textsuperscript{112} \textit{Id.} at 154-55.
\textsuperscript{113} \textit{State v. Moore}, 272 S.E.2d 804, 808 (W. Va. 1980).
\textsuperscript{114} \textit{Cook}, 332 S.E.2d at 154.
\textsuperscript{115} \textit{Id.} at 155.
\textsuperscript{116} \textit{Id.}
\textsuperscript{118} \textit{Cook}, 332 S.E.2d at 155.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 154.
\textsuperscript{122} \textit{Id.} at 155.
The court was not unanimous in its decision. Justice Brotherton dissented.\textsuperscript{123} He stressed the fact that the police were well aware that the arrestees had tried to use the victim’s checkbook and knew of its importance in the case. Since the officer immediately recognized an item on the dresser as a checkbook, he had enough probable cause to make a closer investigation and seize the evidence.\textsuperscript{124}

The West Virginia Supreme Court of Appeals reaffirmed its adherence to the \textit{Coolidge} plurality\textsuperscript{125} with regard to both of these issues. Even Justice Brotherton spoke in terms of probable cause and geographical area. This view, however, appears contrary to a recent United State Supreme Court decision. In \textit{Texas v. Brown},\textsuperscript{126} the United States Supreme Court held that evidence does not have to be immediately apparent in order to meet the requirements of the plain view doctrine. In fact, the Court intimated that something less than probable cause may be acceptable in these types of searches, both in sharp contrast with \textit{Coolidge} and this case.

The West Virginia court discussed another important issue in this case. Mark Price, a participant in the scheme, offered to testify at the appellant’s trial. His attorney, as well as the defendant’s attorney, told the trial judge that the witness would testify to two questions\textsuperscript{127} and, thereafter, invoke his privilege against self-incrimination under the fifth amendment. The trial judge refused to allow this testimony because the witness’ refusal to be subjected to cross-examination would prejudice the State’s case. The defendant claimed that the trial court erred in not permitting this witness to testify.

When a witness voluntarily testifies, the interests of the other party and the function of the court to ascertain the truth interplay in determining the scope and limits of the privilege against self-incrimination.\textsuperscript{128} The trial court failed to analyze the extent of the proposed testimony and its fifth amendment implications.\textsuperscript{129} In analyzing these delicate matters the judge must balance three competing interests: “the defendant’s interest in presenting his or her own witnesses to establish a defense, the witness’ interest in exercising his or her privilege against self-incrimination, and

\begin{itemize}
\item \textit{Id.} at 162 (Brotherton, J., dissenting).
\item \textit{Id.}
\item \textit{Coolidge}, 403 U.S. 443.
\item The two questions were as follows:
\begin{itemize}
\item Q. While the Jeep was parked at Hillcrest Drive, at any time did Roy Frye say, “I think you are going to rob me?”
\item A. No.
\item Q. Did Theodore Cook at any time other than initially helping Roy Frye out of the Jeep vehicle ever grab, hold onto, or in any way restrain Roy Frye?
\item A. No.
\end{itemize}
\item \textit{Cook}, 332 S.E.2d at 157.
\item \textit{Id.} at 158. The court relied on \textit{Brown v. United States}, 356 U.S. 148 (1958), which held that a witness may not claim the fifth amendment privilege when she has testified on a topic. She is subject to cross-examination.
\item \textit{Id.} at 157-58.
\end{itemize}
the prosecution’s interest in securing effective cross-examination.” The court suggested that an in camera hearing would provide a favorable atmosphere to explore the interests of the parties, the exact nature of the testimony, and the extent to which the witness sought to invoke his privilege. In the absence of such a hearing, the trial court ruling was in error.

The court was not in total agreement on the need in this case for detailed analysis of the testimony and subsequent cross-examination. Justice Brotherton dissented on this point also. He stated that since two attorneys had indicated that the witness would give limited testimony, nothing further was required. He felt the trial court had inquired as far as was necessary to rule on the issue. The inquiry was, in his view, equivalent to an in camera inquiry.

In State v. Schofield, the court dealt with the validity of a warrantless arrest of a suspect in her brother’s home. Kathy Schofield was a suspect in the murder of a man in West Virginia. After finding some incriminating evidence at her home in Ohio, the West Virginia authorities issued a warrant, contacted the Ohio authorities, and requested the suspect be arrested on a fugitive warrant. She was to be held pending extradition. The warrant, however, was invalid since the magistrate issued it solely on an officer’s statement that “James Gill was shot to death.” The Ohio officials, acting in good faith, went to the home of the suspect’s brother. They were invited in by him and subsequently arrested Ms. Schofield. After her conviction, the defendant challenged the legality of her arrest and the admission of her post arrest statement. She argued that her constitutional rights against unreasonable searches and seizures had been violated on the grounds that the warrant was invalid.

In discussing the merits of her argument, the court agreed that the West Virginia warrant was defective. But citing the case of United States v. Leon, the court noted that the exclusionary rule may not apply where an officer acted in objective reasonable reliance on a defective warrant issued by a magistrate. The court ruled, however, that this issue need not be reached because the circumstances of Schofield

10 Id. at 159.
11 Id.
12 Id. at 162-64.
13 Id. at 163.
14 State v. Schofield, 331 S.E.2d 829 (W. Va. 1985). Two other issues raised in this case deserve mentioning. The court held that it was “prima facie untimely” to raise the issue of competency to stand trial on the day the trial is to begin. This follows the rule that a defendant may waive this right unless raised in a reasonable time. Id. at 838. Also the court extended the rule set down in State v. Beck, 286 S.E.2d 234 (W. Va. 1981), to potentially prejudicial photographs, holding that the trial court did not abuse its discretion by not granting a mistrial on the grounds that jurors might have been exposed to published photographs of the defendant. Schofield, 331 S.E.2d at 839.
15 Id. at 833. The court stated that a magistrate could not merely be a “rubber stamp for the police,” but had to make an independent judgment based on probable cause. Id. at 834-35.
16 U.S. Const. amend. IV.
17 Schofield, 331 S.E.2d at 835.
19 Schofield, 331 S.E.2d at 835.
indicated a valid warrantless arrest. As the West Virginia court recognized previously in *State v. Taddler,* fourth amendment rights are personal in nature. Consequently, the defendant's rights were not infringed since she was arrested in her brother's home, not her own. The court stated that she could not have had a legitimate expectation of privacy while visiting. Even if her brother's rights were infringed, his right of privacy could not be relied upon by Ms. Schofield.

The court was, however, not unanimous in its decision. Justice McGraw strongly dissented. He argued that many of the ideas the majority relied on were only applicable to exigent circumstances. The emphasis on the "home" had been abandoned in *Katz v. United States.* The proper test according to McGraw was a two question analysis. "[F]irst, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" To Justice McGraw a private dwelling was sufficient to create this expectation, regardless of whose home it was.

The court in *Schofield* provided further refinement to the varying degrees of intrusiveness of the privacy interest and the fourth amendment implications of such intrusions.

During the survey period, the court also considered the power of police officers to conduct inventory searches. In *State v. Perry,* David Perry was pulled over for a glaring head light and an expired license plate. Upon investigation, the police officer discovered that the driver had no license or registration. After checking with police headquarters, the officer determined that the car was registered to the driver, ruling out his belief that the car might be stolen. The officer, however, informed Perry that he was charged with operating a vehicle without a license and that his vehicle would be towed. The officer did not allow the driver to make alternative arrangements to have the car taken away. The officer also felt it necessary to impound the car since he could not be sure the driver was the owner of the vehicle. Subsequently, the police began a routine inventory search, which uncovered a briefcase in the cab of the car. The officers opened the trunk and found some marijuana. This evidence was used to convict the driver of possession of marijuana, and forfeiture proceedings were initiated.

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140 Id.
141 State v. Tadder, 313 S.E.2d 667 (W. Va. 1984). This case held that a passenger in an automobile had no claim of privacy, since he had no property or possessory interest in the vehicle. He suffered no invasion of any legitimate expectation of privacy.
142 Schofield, 339 S.E.2d at 835.
143 Id.
144 Id. at 840 (McGraw, J., dissenting).
146 Schofield, 331 S.E.2d at 841 (McGraw, J., dissenting) (quoting Katz, 389 U.S. at 361 (Harlan, J., dissenting)).
147 Schofield, 331 S.E.2d at 836. See also State v. Peacher, 280 S.E.2d 559 (W. Va. 1981) (where the court implicitly recognized varying degrees of intrusiveness).
The defendant challenged the propriety of the search of the car on the ground that the police did not give him an opportunity to make other arrangements for the car's disposal. The court agreed, citing *State v. Goff*. The court held that a proper impoundment was a prerequisite to a valid inventory search. The court then discussed several grounds for a valid impoundment. Relying on *State v. Shingleton*, the court said that (1) where the car is left unattended or is obstructing traffic, (2) where there has been an accident and the driver is incapable of dealing with the vehicle, (3) when the car is abandoned or the owner is either physically or mentally incapable of disposing of the car, (4) where the car has been stolen or used in the commission of a crime, or (5) where an ordinance or statute provides for forfeiture of the vehicle, a valid impoundment may take place. In most of these situations, the owner or possessor will be unavailable or incapable of making arrangements. The court, however, stated that where the driver is present and fully capable of disposing of the car, the police must give the driver a reasonable opportunity to make other arrangements for the disposal of the vehicle. This may hold true even when the driver has been arrested.

None of the *Shingleton* grounds were present in *Perry*. As a consequence, the impoundment of the vehicle was improper. Therefore, any inventory search which followed was not proper, and the evidence was inadmissible.

This decision defines the first part of a four-part test which prescribes the conditions for a lawful inventory search as set forth in *Goff*. *Goff* represented West Virginia's adaptation of *South Dakota v. Opperman*. This decision may restrict the number of inventory searches conducted since the driver must be given an opportunity to make alternative arrangements to impoundment in most cases. Police must now inform the driver of that option instead of routinely impounding vehicles.

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150 *Perry*, 324 S.E.2d at 357. State v. Goff, 272 S.E.2d 457, 460 (W. Va. 1980), set down the elements of a valid inventory search:

(1) there was an initial lawful impoundment of the vehicle;

(2) the driver was not present at the time of the impoundment to make other arrangements for the safekeeping of his belongings;

(3) the inventory itself was prompted by a number of valuables in plain view inside the car; and

(4) there was no suggestion that the inventory search was a pretext for conducting an investigative search.

151 *Perry*, 324 S.E.2d at 358.


153 *Perry*, 324 S.E.2d at 359.

154 *Id.*

155 *Goff*, 272 S.E.2d at 460.


157 In this case, the true reason for impoundment was that it was common practice for that police department to impound a car when its driver was arrested for a misdemeanor traffic violation.
In *State v. Joseph T.*, the West Virginia Supreme Court of Appeals dealt with the issue of a search and seizure in the public school setting. In this case, school officials determined that a student had been drinking beer before school at the defendant's house. The assistant principal directed that the defendant's locker be searched for alcoholic beverages. While no beer was found in the locker, some wooden pipes and wrapping papers were discovered in the defendant's jacket pockets, suggesting that the locker contained marijuana. These items were left in place and the locker was closed until the principal returned with the student and a more detailed search was carried out. Marijuana was discovered in the locker and admitted into evidence in juvenile delinquency proceedings. On appeal, the defendant claimed that the search was not valid, and the evidence was, therefore, not admissible.

The court disagreed holding that a warrant was not required in a search at school where the school official had a reasonable suspicion that the search would turn up evidence of a violation of school regulations. Holding that probable cause was not necessary to justify a search by a school authority, the court relied heavily on a recent United States Supreme Court decision, *New Jersey v. T.L.O.* The court stated that due to special needs of authorities in public schools, school officials must not be held to the same standards as police officers. An educator will not be held to a probable cause standard, but he must have a "reasonable suspicion" that the search will produce incriminating evidence in order to initiate a warrantless search. The court continued by stating that the reasonable suspicion standard, while not as strict as probable cause, was still limited by the requirement that the official needed an initial justification for the search. Similarly, the extent of the search was limited by this reasonable suspicion.

Applying these principles to *Joseph T.*, the court found that, while the assistant principal may not have had sufficient probable cause to search the locker, his belief that there might be alcohol in the locker based on information from the defendant's companion gave rise to a reasonable suspicion that the defendant violated school rules. The extent of the search was not excessively intrusive inasmuch as the items uncovered gave rise to a suspicion that the locker contained marijuana.

*Joseph T.* brings West Virginia firmly in line with *T.L.O.* Consequently, the court adopted a more lenient standard for a warrantless search with regard

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159 *Joseph T.*, 336 S.E.2d at 737-38.
161 *Joseph T.*, 336 S.E.2d at 736.
162 *Id.* The court likened a search of the pockets of a jacket to the search of different compartments of a purse, which was held to be within the limits of the search in *T.L.O*.
163 *T.L.O.*, 105 S. Ct. 733.
to school officials. However, the search must still be within the reasonableness inquiry set down by *Terry v. Ohio*.\(^{164}\)

### VIII. Public Participation in Trials


In *State v. Franklin*,\(^ {165}\) the court dealt with the warrantless arrest of an individual and with prejudicial participation of the public in a trial. Larry Dale Franklin was involved in an auto accident in which he received only minor cuts, but where the other driver had been killed. Franklin was taken to the hospital and treated. A police officer was dispatched to the hospital, and he arrested Franklin for driving under the influence, resulting in death.\(^ {166}\) The arresting officer was not the officer that had investigated the accident, but he based his arrest on Mr. Franklin's demeanor, the smell of alcohol on Franklin's breath, and the fact that he knew that Franklin was the driver of the vehicle involved in the accident. Franklin challenged the lawfulness of his warrantless arrest.\(^ {167}\)

The court found that the arrest was proper. Noting the unusual circumstances of the offense charged against the defendant and that the offense could be either a misdemeanor or a felony, the court held that the police officer could make a lawful, warrantless arrest based on probable cause.\(^ {168}\) Furthermore, the court held that the arresting officer need not be the same person that investigated the accident.\(^ {169}\) Another officer may make the arrest at the hospital, when the suspect has been taken from the scene of the accident. The court held that ample probable cause existed to make a valid arrest.

This case is an extension of *State v. Byers*,\(^ {170}\) the first West Virginia case to address the question of an arrest for the subject offense. Under *Byers*, the officer making the arrest does not have to be the same officer who investigated the accident, assuming of course that probable cause exists. The question may arise, however, over whether the arresting officer may rely solely on information given to him by the investigating officer, or whether he must have other independent evidence to justify the arrest. This case included evidence that the arrestee could

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\(^{164}\) *Terry v. Ohio*, 392 U.S. 1 (1968). A frisk search could only be conducted when 1) the search was justified, and 2) the scope of the search was reasonably related to its original purpose.

\(^{165}\) *State v. Franklin*, 327 S.E.2d 449 (W. Va. 1985).

\(^{166}\) See W. VA. CODE § 17C-5-2 (1981).

\(^{167}\) The warrantless arrest issue was the threshold question to the appellant's first assignment of error, that being the trial court's refusal to suppress the results of a blood alcohol test. The court went on to find that the test was admissible.

\(^{168}\) *Franklin*, 327 S.E.2d at 452-53.

\(^{169}\) *Id*.

have been drinking, but the court did not elaborate on what elements must be present before sufficient probable cause exists.

Another important aspect of this case is the claim by the appellant that he was denied a right to a fair trial because obviously hostile spectators had influenced the jury. Before and during the trial, the sheriff and members of the organization Mothers Against Drunk Drivers171 had been actively campaigning in the courthouse lobby. Several members sat in front of the jury prominently displaying buttons espousing their cause. They were very orderly, and no demonstrations took place.

The court held that it was likely that the jury was pressured by this strong, albeit silent, showing of force.172 Franklin's conviction was reversed. The court found that such a blatant showing, where the participants were clearly distinguishable from other members of the public, could be a strong psychological influence on the jury. The court distinguished this case from State v. Richey,173 recognizing that in Richey the spectators were not distinguishable from the general public which has a right to attend criminal trials. In this case, lapel buttons were openly visible and the jury was aware of their meanings. Consequently, there was a clear likelihood that irreparable damage to the appellant's right to a fair trial occurred.

This decision brings West Virginia in line with other state court rulings on prejudicial public participation. However, the extent to which the public may participate is left open by Franklin. This case dealt with one extreme, that being intensive lobbying for a conviction. Richey, on the other hand, involved the reverse condition. The participants were barely distinguishable from the general public. Undoubtedly, further litigation will occur to distinguish more clearly the lines between prejudicial and non-prejudicial public participation.

IX. RIGHT TO COUNSEL


In State v. Samples,174 the court considered a defendant's right to counsel during interrogation. The appellant had been arrested by the police and had voluntarily waived his Miranda rights. After the waiver, he confessed to the murder of his step-brother and the step-brother's wife. He also claimed that he had shot at another

171 Mothers Against Drunk Drivers is referred to as M.A.D.D.
172 Franklin, 327 S.E.2d at 455.
173 State v. Richey, 298 S.E.2d 879 (W. Va. 1982). The trial in this case involved the sexual abuse of a teenage page at the state capitol. During the trial, several teenagers were present. They were not distinguishable from other members of the public.
174 State v. Samples, 328 S.E.2d 191 (W. Va. 1985). The court also held that the failure of the prosecutor to comply with a court ordered discovery of a statement the defendant had made, was fatal to the state's case as it prejudiced the defendant's case.
person on a prior occasion. Counsel was appointed for the charges in the murder of his step-brother and wife. He was sent to Weston State Hospital for psychiatric testing and remained there for eighteen days. Later that month, a police officer questioned the defendant concerning his statement about shooting at someone else. During this interrogation, Mr. Samples said that he was not really crazy, but he was just putting on an act for the doctors in Weston. This statement was admitted into evidence at trial, which greatly damaged the defendant’s sole defense, insanity. The appellant contended that the lower court erred in admitting the evidence because the questioning was done outside the presence of his counsel and no *Miranda* warning was given to him before the interrogation began. Furthermore, the State failed to disclose the second interview despite a general discovery order.

The court agreed, holding that counsel appointed for another offense need not be present at the questioning of a defendant on an unrelated offense; nevertheless, the defendant must be read his *Miranda* warnings before interrogation on the unrelated charge. The court held that they could not find that an intelligent waiver of the right to counsel had taken place. Relying on *State v. Clawson*, the court indicated that a waiver could never be assumed merely because the individual being questioned had previously waived the right to counsel on a separate charge. Each waiver must be independently made to insure an informed decision concerning waiver of counsel in every case.

X. Sentence Enhancement


The West Virginia Supreme Court of Appeals addressed an issue that had not been considered prior to *Turner v. Holland*. The court dealt with the trial court’s power to enhance the sentences on two offenses arising from one criminal transaction by two five-year enhancements (a five-year enhancement on each offense) based on a prior felony.

In this case, the defendant had been convicted of a sexual abuse and burglary charge. Both of these offenses arose out of one continuous criminal transaction. Since the appellant had been previously convicted of a felony, the trial judge added five years to both the sexual assault and burglary sentences.

175 *Id.* at 194.

176 *State v. Clawson*, 270 S.E.2d 659 (W. Va. 1980). This case dealt with a defendant who had retained counsel on an unrelated charge. The court stated that that fact bore no relationship to whether the defendant might have waived counsel on the present charge.


178 W. Va. Code § 61-11-18 (1984) provides “[T]hat [if] such person had been before convicted in the United States of a crime punishable by imprisonment in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeter-
The court held that this was improper. Relying on other cases interpreting the recidivist statute, the court held that, for the purposes of the statute, two offenses committed during the same transaction were to be treated as one. Absent any specific language in the statute, the court must construe the statute against the State. Therefore, an enhancement could only be imposed on one of the present sentences arising from a single criminal event. This error was corrected by merely ordering the trial court to remove one of the enhancements on the prison term, rather than reversing the lower court's ruling.

XI. JURY INSTRUCTIONS


This discussion provides opportunity to compare and contrast the West Virginia court's instructions regarding life with mercy and life without mercy. In *State v. Cook*, the appellant contended that the jury was mislead by an instruction that if he were convicted of life with a recommendation of mercy, he would be eligible for consideration for parole only after a minimum ten year sentence. He argued that the jury might believe he would be entitled to parole immediately after the ten year period based upon remarks of the prosecution in closing argument.

The court, relying on *State v. Lindsey*, recognized that the jury is to base its decision on the facts of the case and not on the possibility of parole; nevertheless, it was the mandatory duty of the trial court to instruct the jury about the possibility of parole. The court distinguished this case from others on which the appellant relied by noting that the trial court emphasized that "such eligibility in no way guarantee[ed] immediate release." This case follows precedent in West
Virginia and parallels many other jurisdictions. West Virginia, however, views the mention of parole as a mandatory instruction, while other jurisdictions may only allow it in the discretion of the trial judge.

In a related issue regarding instructions, the court dealt with the lower court’s instruction to the jury regarding both life without mercy and a sentence with recommendation of mercy. In *State v. Schofield*, the appellant claimed that the jury did not understand the gravity of her sentence. She contended that the jury believed that she would be eligible for parole at sometime later than ten years after her incarceration based upon the court’s instructions which explained recommendation of mercy. The jury, she claimed, did not understand that she would never go free.

At the trial her attorney did not object to this instruction. The court, therefore, held that appellant was precluded from raising this issue on appeal. However, the court continued to discuss the issue. It was noted that a first degree murder defendant is entitled to an instruction on the interrelationship between a recommendation of mercy and parole. The instruction given was not a misstatement of the law, nor was it misleading. Therefore, the lower court had not committed an error so egregious as to impair justice.

The court has taken two divergent though maybe not inconsistent views on the subject, mandating the mention of parole when recommending mercy, while not requiring the mention of a lack of parole when instructing about life without mercy.

*Brian A. Darst*

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188 *Id.* at 840. The court’s instruction read as follows:

Should you find the Defendant guilty of first degree murder without recommendation of mercy, she will be sentenced to prison for life. Should you find the defendant guilty of first degree murder with a recommendation of mercy, she must serve ten years in prison before she first becomes eligible for parole, which may or may not be awarded then or at a later date. . . .

*Id.* at 839.

189 *Id.* at 840.