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Evidence

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EVIDENCE

I. HEARSAY TESTIMONY

A. *Transfer Hearings Under West Virginia Code Section 25-4-6*

State v. Stuckey, 324 S.E.2d 379 (W. Va. 1984).

In West Virginia, hearsay evidence has been defined as testimony by a witness in court, about statements of another made out of court, to prove the truth of the asserted matter.[1] Generally, this evidence is incompetent and inadmissable.[2] In *State v. Fraley*,[3] the West Virginia Supreme Court of Appeals dealt with hearsay evidence in a probation revocation hearing. The court ruled that hearsay is not admissible, but, if the evidence is erroneously allowed, it reaches constitutional proportions and becomes reversible error only where all the evidence offered is hearsay. Recently, in *State v. Stuckey*[4] the court reiterated this position (without citing *Fraley*) and considered the ramifications of allowing hearsay at a transfer hearing pursuant to West Virginia's "youthful male offender" law.[5]

Eighteen year-old Stuckey pled guilty to breaking and entering. His sentence was suspended and he was ordered to the Anthony Center for six months to two years. During a basketball game at the Center, the appellant was allegedly involved in a heated argument with an officer and was charged with taking part in or instigating a riot. After the Center officials conducted a hearing, Stuckey was transferred to the Circuit Court of Marion County for a court hearing. The circuit court sentenced him to one to ten years in the penitentiary.

On appeal, Stuckey's first assignment of error was that the State had presented no eye witnesses in the circuit court proceeding. The State's only witness was a panel member at the initial hearing who was not present during the alleged basketball incident. Consequently, the appellant reasoned that the circuit court's opinion rested solely on hearsay evidence.[6]

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[1] State v. Richey, 298 S.E.2d 879, 891 (W. Va. 1982).

[2] F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 334 (1978).

[3] State v. Fraley, 163 W. Va. 542, 258 S.E.2d 129 (1979).

[4] State v. Stuckey, 324 S.E.2d 379 (W. Va. 1984).

[5] W. VA. CODE § 25-4-6 (1980) provides in part:

> The judge of any court with original criminal jurisdiction may suspend the imposition of sentence of any male youth convicted of or pleading guilty to a criminal offense, other than an offense punishable by life imprisonment, who has attained his sixteenth birthday but has not reached his twenty-first birthday at the time of the commission of the crime, and commit him to the custody of the West Virginia commissioner of public institutions to be assigned to a center. The period of confinement in the center shall be for a period of six months, or longer if it is deemed advisable by the center superintendent, but in any event such period of confinement shall not exceed two years. If, in the opinion of the superintendent, such male offender proves to be an unfit person to remain in such a center, he shall be returned to the court which committed him to be dealt with further according to law. In such event, the court may place him on probation or sentence him for the crime for which he has been convicted. In his discretion, the judge may allow the defendant credit on his sentence for time he has spent in the center.

[6] *Stuckey*, 324 S.E.2d at 380.

The question before the supreme court was whether hearsay evidence is inadmissible in a youth transfer hearing under West Virginia Code section 25-4-6, as it is in a probation revocation hearing. It was assumed in *Stuckey* that the petitioner was entitled to the same due process considerations that are provided in probation revocation cases. *Watson v. Whyte*[7] clearly listed those procedures including the right "to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation). . . ." *Watson* also provided that these safeguards were available to youthful male offenders under section 25-4-6. However, there was no previous West Virginia case law specifically dealing with the question of whether hearsay evidence could be admitted in a resentencing hearing under section 25-4-6 without disturbing the due process guarantees provided for in *Watson*.

The court turned to other jurisdictions and found that in several, while a decision to revoke probation cannot be based on hearsay alone, the admission of hearsay is not reversible error.[8] Alabama,[9] Illinois,[10] and Kansas[11] courts all conclude that hearsay testimony standing alone is not competent to sustain the state's burden of proof in a probation revocation hearing. In *State v. Caron*,[12] the Maine Supreme Court took the issue one step further, stating that for policy reasons a minor use of hearsay was appropriate, perhaps even desirable, in certain probation revocation hearings. But the Maine court held that if hearsay evidence is "unreasonably abundant" or "its substantive reliability highly suspect," due process standards may be violated.[13] The West Virginia Supreme Court of Appeals noted that the trend indicates tolerance of a minor use of hearsay in probation revocation proceedings provided there is additional competent evidence to support the decision.[14]

The West Virginia Supreme Court of Appeals reasoned that a limited use of hearsay must also be applicable to transfer hearings under section 25-4-6, given their similarity to probationary hearings.[15] The court also noted that in juvenile hearings pursuant to West Virginia Code section 49-5-10, another analogous situation, hearsay is admissable, so long as the transfer is not entirely based upon it. However, the transfer in *Stuckey* was based solely on hearsay because the State's only witness testified to the appellant's behavior during the incident even though she had not witnessed it. Therefore, the entire testimony was hearsay and its admission was reversible error.[16] Through this holding the court reinforced *Fraley's* holding

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[7] Watson v. Whyte, 162 W. Va. 26, 245 S.E.2d 916, 919-20 (1978).
[8] *Stuckey*, 324 S.E.2d at 381.
[9] Hill v. State, 350 So.2d 716 (Ala. Crim. App. 1977).
[10] People v. White, 33 Ill. App. 3d 523, 338 N.E.2d 81 (1975).
[11] State v. Carter, 5 Kan. App. 2d 201, 614 P.2d 1007 (1980).
[12] State v. Caron, 334 A.2d 495 (Me. 1975).
[13] *Id.* at 498.
[14] *Stuckey*, 324 S.E.2d at 381-82.
[15] *Id.* at 382.
[16] *Id.*

that in transfer proceedings which are not part of the criminal prosecution, hearsay testimony is not unequivocally prohibited.

The appellant's second argument was that the circuit court committed him to the penitentiary without considering alternative dispositions under section 25-4-6. The statute codifies the holding of *Gagnon v. Scarpelli*,[17] where the United States Supreme Court approved *Morrissey v. Brewer's*[18] two-step inquiry. As adopted by the West Virginia court, the circuit court should address two questions when dealing with a returned youthful offender:

> first, whether the offender is unfit to remain at the center, and second, if it is determined that he is, whether the circuit court should hear evidence on the question of disposition. On the basis of that evidence, the circuit court should determine what disposition should be made of the offender.[19]

In light of the fact that the trial court not only allowed hearsay testimony unsupported by any competent evidence, but also failed to follow the two-step *Morrissey* inquiry, the West Virginia Supreme Court of Appeals reversed the Marion County Circuit Court's judgment and remanded the case for reconsideration.[20]

B. *The Dead Man's Statute*

Miami Coal Co. v. Hudson, 332 S.E.2d 114 (W. Va. 1985).

Keller v. Hartman, 333 S.E.2d 89 (W. Va. 1985).

During the survey period, the West Virginia Supreme Court of Appeals addressed another aspect of hearsay testimony, that is, the specific parameters of West Virginia's dead man's statute.[21]

Miami Coal Co. v. Hudson[22] involved the alleged embezzlement of $189,000 from the Miami Coal Company by the firm's bookkeeper. The corporation is a closely held family operation. Adolph Konya ran the business from 1971 until his death in 1976. He and his wife, Mary, were the sole stockholders, and when Adolph died, Mary became the sole shareholder and company president. Adolph's sister, Irene Hudson, was the corporation's bookkeeper until her death in 1979. After

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[17] Gagnon v Scarpelli, 411 U.S. 778 (1973).

[18] Morrissey v Brewer, 408 U.S. 471 (1972).

[19] *Stuckey*, 324 S.E.2d at 382.

[20] *Id.* at 383.

[21] W. VA. CODE § 57-3-1 (1966) provides in pertinent part that "no party to any action, suit or proceeding, nor any person interested in the event thereas, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic. . . ."

[22] Miami Coal Co. v. Hudson, 332 S.E.2d 114 (W. Va. 1985).

1975, only she wrote company checks. The corporation's apparent custom and practice was for Irene Hudson to make all corporate payments.[23] In 1978, Miami Coal's accountant told Mary Konya that he suspected that Irene was embezzling company funds. Mary inspected the cancelled checks of 1976 and 1977 and felt that her name and her husband's name had been forged on a number of company checks.[24] Because of her fondness for Irene, Mary took no action against her until her death when she sued Irene's estate.

There was abundant testimony at trial that recipients of the corporate checks had performed no service for the company other than supplying the check bearers with merchandise. Mary denied signing the checks and denied the authenticity of her husband's signature. The corporation's accountant also testified that Irene had almost absolute control over the corporation checkbook. The supreme court felt that, in weighing this testimony, there was no indication that Irene was authorized to sign the checks.[25]

There were four assignments of error on appeal and three of them were dispatched relatively easily. In the first assignment of error, the appellant claimed that Mary's testimony as to the propriety of the expenditures and their inconsistency with corporation custom and practice was improperly admitted because she lacked the personal knowledge to make these assertions. According to *Browning v. Hoffman*,[26] a witness cannot testify without personal knowledge of the subject matter. The supreme court dismissed this claim, reasoning that, in a closely held family operation, a major stockholder and wife of the corporate head would be sufficiently familiar with the inner workings of the company to determine that the checks were inconsistent with prior custom and practice. Certainly Mary would at least be qualified to attest to the authenticity of her and her husband's signatures. The court concluded that arguably the testimony might not be entitled to great deference but that it was admissible.[27]

The court consolidated two of the other assignments of error in their analysis. The appellant contended that the trial court should have either directed a verdict or set aside the jury's verdict because the evidence was insufficient to prove that certain checks had been converted to the Hudsons' use. The court responded that it is not necessary to prove that the corporate funds were converted to the Hudsons' use,[28] but rather, that "any distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights . . . may be treated as a conversion."[29] In addition, the court noted that the jury could have brought back a larger

[23] *Id.* at 116.
[24] *Id.* at 117.
[25] *Id.*
[26] Browning v. Hoffman, 90 W. Va. 568, 111 S.E. 492, 500 (1922).
[27] *Miami*, 332 S.E.2d at 118.
[28] *Id.* at 121.
[29] *Id.* at 121 (quoting Pine and Cypress Mfg. Co. v. American Engineering Construction Co., 97 W. Va. 471, 472, 125 S.E. 375 (1924)).

verdict than the $115,000 awarded the plaintiff since the original claim was for more than $189,000. Consequently, the evidence did not "preponderate against the verdict of the jury,"[30] and those two assignments of error also failed.

The final assignment of error was the alleged violation of West Virginia Code section 57-3-1, West Virginia's dead man's statute which bars a witness' testimony regarding personal transactions between the witness and a deceased person. The appellant argued that, if Irene did sign Adolph Konya's name on company checks, only Adolph could verify whether he had authorized her to do so and that any knowledge Mary had of the genuineness of the signature was derived through a "personal transaction" between Mary and Adolph, which is violative of section 57-3-1.

The court noted that the statute is designed to prevent a witness from taking undue advantage of a deceased person in that the decedent is unable to refute the witness' statements or explain his view of a transaction between the parties. Further, testimony of this nature is hearsay which is generally considered dangerous and inferior evidence. The court cited *Beamer v. Clayton*,[31] which not only raised these concerns, but also presented the flip side of the discussion. In *Beamer*, the court stated that "in transactions between parties to a will or deed, (where) the testator or grantor is dead, his or her declarations as to what actually took place are in most instances the best if not the only evidence thereof. . . ."[32]

While the trial court recognized that the dead man's statute could be relevant to the present case, they refused to enforce it. On appeal, the supreme court agreed with the appellant only insofar as that the statute should be applied to negate Mary Konya's testimony if it concerned a "personal transaction." Quoting *Freeman v. Freeman*, West Virginia's supreme court posited that a personal transaction has been construed to "include every method whereby one person may derive impressions or information from the conduct, condition or language of another."[33] In West Virginia, among other things, car accidents, contracts, services performed, and assaults are all considered personal transactions.[34]

In order to clarify the personal transaction issue, the West Virginia Supreme Court of Appeals looked to the test that they had announced thirty years earlier in *Kuhn & Hoover v. Shreve*[35] which stated that any testimony that could be disputed by the decedent if he were alive and testifying should be excluded under the dead man's statute. The court cautioned that, while this test is correct, it is only meant

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[30] Estate of Bayliss v. Lee, 315 S.E.2d 406, 412 (1984) (established the "preponderate against the verdict of the jury" standard).

[31] Beaner v. Clayton, 82 W. Va. 580, 96 S.E. 969 (1918).

[32] *Id.* at 584, 96 S.E. at 971.

[33] Freeman v. Freeman, 71 W. Va. 303, 309, 76 S.E. 657, 659 (1912) (quoting Holcomb v. Holcomb, 95 N.Y. 316 (1884)).

[34] Note, *Reevaluation of the Dead Man's Statute*, 69 W. VA. L. REV. 327, 335 (1967).

[35] Kuhn & Hoover v. Shreve, 141 W. Va. 170, 177, 89 S.E.2d 685, 690 (1955).

to exclude testimony about information *derived dependently* from the transaction with the decedent. In the present case, since Mary's knowledge of her husband's handwriting was derived independently of any personal transaction between them, the court asserted that this testimony was opinion evidence rather than hearsay and should not be excluded by section 57-3-1. Nor would it be excluded in a majority of jurisdictions. Most courts consider testimony bearing on the authenticity of a decedent's signature as independently obtained opinion evidence and admissible as such.[36]

Three months later, West Virginia's supreme court heard *Keller v. Hartman*,[37] another case involving the dead man's statute. *Keller* was an appeal from a jury verdict in a declaratory judgment affirming Hartman's ownership of a right-of-way across the property of Wayne Byrd.[38] The Pendleton County Commission had determined that Mr. Byrd, a stroke victim, was unable to manage his business affairs and was therefore incompetent,[39] so they appointed a committee for Mr. Byrd.

Although the appeal mainly addressed the easement questions, evidentiary issues were also raised. Mr. Byrd's committee claimed that Hartman's testimony regarding a conversation with Mr. Byrd should have been disallowed under West Virginia's dead man's statute because Byrd had been declared "incompetent" to manage his business affairs, and therefore, was insane for purposes of the statute. The appellee did not argue that the statute was inapplicable. Rather he claimed that an exclusion under the statute operated to permit his testimony.[40] The court raised the issue of the statute's applicability *sua sponte* reasoning that, while the Pendleton County Commission's adjudication of Mr. Byrd as "incompetent" to manage his business affairs justified the appointment of a committee, it did not indicate the incompetent was "insane" within the meaning of the dead man's statute.[41] Therefore, they held that the statute was inapplicable and the testimony admissible. In support of this analysis, the court pointed to *Sayre v. Weatherholt*[42] to illustrate that the statute has been narrowly construed to allow testimony unless "clearly excluded by the language and purpose of the statute."[43]

It is uncertain whether the policy concerns set out in *Miami Coal* are best served by allowing testimony regarding communications with Wayne Byrd because there

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[36] *Miami*, 332 S.E.2d at 119-20.

[37] Keller v. Hartman, 333 S.E.2d 89 (W. Va. 1985).

[38] *Id.*

[39] *Id.* at 93.

[40] In the comments following W. VA. CODE § 57-3-1, it states that where the executor or other personal representative of an estate [in this case Mr. Keller as committee for Mr. Byrd] testifies against the claim of an interested party, such testimony under this section serves to open the case for complete inquiry concerning the transaction testified to by such executor or other personal representative. Coleman v. Wallace, 143 W. Va. 669, 104 S.E.2d 349 (1958). Appellant Keller had previously testified as to conversations with Byrd.

[41] *Keller*, 333 S.E.2d at 94.

[42] Sayre v. Weatherholt, 88 W. Va. 543, 107 S.E. 293 (1921).

[43] *Keller*, 333 S.E.2d at 94.

are not enough facts narrated in the *Keller* opinion to determine whether the testimony was unduly advantageous to the appellee. Regardless, this testimony should have been excluded using the *Kuhn* test even with *Miami Coal's* limitation (*i.e.*, that to be excluded, the witness' knowledge of a fact must be derived dependently from a communication with the deceased). The appellee's information had clearly been obtained in this manner. Thus, the *Keller* holding hinges on the term "incompetent." If Mr. Byrd was unable to testify in his own behalf or refute other witness' testimony, it is difficult to perceive why mental incompetency was not considered "insanity" for the purposes of this statute. To do otherwise seems to elevate form over substance.

Perhaps, the *Keller* opinion should be confined to its facts. The court may simply be saying that a person adjudicated incompetent by a county commission in an appointment of committee hearing is not "insane" under section 57-3-1. But, there has been substantial criticism of section 57-3-1 and similar statutes in other jurisdictions.[44] The general feeling is that these statutes should either be eliminated entirely (a step few legislators would be willing to take) or reformed to allow the admission of an interested party's testimony in certain qualified situations. For example, a reformed statute could allow the interested party's testimony while also admitting relevant hearsay attributed to the decedent.[45]

Perhaps the West Virginia Supreme Court of Appeals is sending a message to the legislators that they will continue to constrict the use of the dead man's statute and render it inoperable in a wide range of situations until the lawmakers initiate statutory reform. In any case, until there is legislative movement in this direction, *Miami Coal* and *Keller* mandate a very narrow construction of West Virginia's dead man's statute.

II. VIDEOTAPED DEPOSITIONS

State ex rel. *Bennett v. Keadle*, 334 S.E.2d 643 (W. Va. 1985).

In *State* ex rel. *Bennett v. Keadle*,[46] the West Virginia Supreme Court of Appeals granted a writ of mandamus to amend an order allowing videotaped depositions. In the process, the court provided guidelines for an area of law previously uncharted in West Virginia. The court did not address the limits of a trial court's discretion to grant a motion to videotape in *Keadle*.[47] Rather, this decision discussed the propriety of certain procedures once permission to videotape is obtained.

At trial, the appellant listed a number of procedural requests in his motion to videotape. Their denial prompted a petition for a writ of mandamus. The peti-

[44] *See generally* Note, *Reevaluation of the Dead Man's Statute*, 69 W. VA. L. REV. 327 (1967); Dadisman, *The West Virginia Dead Man's Statute*, 60 W. VA. L. REV. 239 (1958).

[45] Note, *Reevaluation of the Dead Man's Statute*, 69 W. VA. L. REV. 327, 340 (1967).

[46] State *ex rel.* Bennett v. Keadle, 334 S.E.2d 643 (W. Va. 1985).

[47] *Id.* at 645.

tioner first requested that no court reporter be present to make a stenographic transcript because he was unable to pay a stenographer in addition to the videotaping costs. He cited Rule 30(b)(4) of the West Virginia Rules of Civil Procedure which provides for the recording of depositions by other than stenographic means, claiming that the Rule is intended to minimize costs as long as accuracy of transcription is not jeopardized.[48] The petitioner claimed that the other procedures he outlined would insure accuracy, and therefore Judge Keadle was without authority to deny his request. Those procedures included: (1) the party taking the deposition would provide the other side with a typed transcript of the proceeding for a charge per page and a copy of the videotape at cost and (2) both deposition officer and video operator could be employees of the attorneys of either party.[49] Nevertheless, the trial court denied this request and insisted upon a stenographic transcript in addition to the videotape.[50] Specifically, Judge Keadle responded that, since a judge has authority to deny a motion to videotape, he logically must have the authority to reasonably restrict the use of videotapes when granting the motion.[51]

However, in the mandamus action, the supreme court found that the language and intent of Rule 30(b)(4) and the corresponding Federal Rule of Civil Procedure 30(b)(4) supported the petitioner's argument. Specifically, the court pointed to the advisory committee note accompanying Rule 30(b)(4) of the Federal Rules of Civil Procedure which indicates that the intent of the drafters was to reduce costs of discovery and that the court's function was to provide safeguards to protect the accuracy of the testimony.[52] Further, the court stated that if a party found those precautions inadequate, the express language of the West Virginia Rules of Civil Procedure placed the cost of additional protection (*i.e.*, a stenographic transcription) with the party desiring it.[53] Thus, the court found that the financial allocation was misplaced by the trial court and that portion of the order was in error.

Next, the petitioner moved the trial court to rule that the notary public administering the oath at the deposition be an employee of either counsel. Rule 28(c) requires a notary public, independent of either party or attorney, to be present to administer the oath.[54] The trial court's order directed only that the officer be a person authorized by law. The supreme court noted exceptions where the trial court could order, or the parties could stipulate, that an otherwise unqualified person administer the oath.[55] This would produce the desired financial savings. However, the court held that, in the absence of these exceptional situations, the monetary benefits of an employee of a party or counsel administering the oath must give way to the higher interest of neutrality in deposition procedures. Thus,

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[48] *Id.* at 645-46.
[49] *Id.* at 647-48.
[50] *Id.*
[51] *Id.* at 646.
[52] *Id.* at 647.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 648.

the court held that the respondent judge did not abuse his discretion by calling for strict adherence to Rule 28(c).[56]

The petitioner also moved that an employee of either party's counsel be permitted to operate the video equipment. The trial court's order had only said that the party taking the deposition supply an operator who would not participate in the interrogation process.[57] The supreme court addressed the specific issue of whether the operator must be independent of either party's counsel. The court looked to the West Virginia Rules of Civil Procedure and found that the Rules do not address the qualifications of a video operator in a deposition with specificity. Rule 30(c) provides only that either the deposition officer or someone acting under his direction and in his presence shall record the testimony of the witnesses. Although the court recognized that an operator could manipulate the visual effects to slant witness' testimony, the court felt other economical alternatives were available to protect objectivity other than requiring that the operator be independent. For example, a monitor screen could be set up to project what is occurring as the deposition is being recorded.[58] Given the paucity of criteria in the Rule, the court saw no reason to require an independent video operator unless the trial judge determined that no reasonable alternative existed to assure the accuracy and trustworthiness of the record.[59] The court ruled that if a viable alternative exists, as in the instant case, the video operator can be an employee of either counsel with no resulting infringement of Rule 30(b)(4). As a further observation the court noted that people could serve as both recording technicians and deposition officials provided they satisfied the requirements of the latter.

Further, the court recognized the importance of maintaining the trial court's discretionary role in formulating orders pursuant to Rule 30(b)(4). Perhaps because videotape depositions are a relatively new phenomenon, the court offered a few additional suggestions that are worth heeding.

First, the court recommended that attorneys include a written transcript with the videotape and that it be certified and filed with the trial court pursuant to Rule 30(f). This assures that a transcript can be provided if a party requests it under Rule 30(c), and it will be available to satisfy the Rule 30(e) requirement of examining and reading of the transcript by the witness. Further, the trial court may order that the videotape be filed as well, so counsel would be well advised to make a duplicate videotape.

Second, the court stated that inability to pay for a stenographic transcript is not a prerequisite under Rule 30(b)(4) to permission to videotape. Weighed in the balance, the court recognized many advantages to videotaping over traditional transcription in addition to cost saving, and the court felt that it would be improper to focus exclusively on the cost saving rationale.

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[56] *Id.*
[57] *Id.*
[58] *Id.* at 648-49.
[59] *Id.* at 649.

Finally, the court encouraged stipulation of mutually acceptable procedures including videotaping under Rule 29. The court felt that, since litigants and their attorneys are more familiar than the trial court with the creative as well as the abusive potential of videotaped depositions, they could fashion, by stipulations or detailed motions, specific objections and counterproposals to create the most efficient and effective orders in this area.[60]

III. Criminal Prosecution

State v. Clements, 334 S.E.2d 600 (W. Va. 1985).

In *State v. Clements*,[61] the West Virginia Supreme Court of Appeals heard the appeal of convicted murderer, Calvin Clements, which consisted of twenty-eight assignments of error. In affirming Clements' conviction, the court clarified several rules of evidence and, most significantly, extended the rule set out in *State v. McAboy*.[62]

On August 18, 1981, Belinda Harper and Paula Grey disappeared from a laundromat in Wheeling, West Virginia. Acting on an anonymous tip, the police questioned appellant, Clements, at his home regarding their disappearance. Clements admitted being at the laundromat and seeing the two missing women and gave the police a taped statement to that effect. Also, the appellant allowed the police to search his van. Blood was found in the vehicle that was later matched with the blood of family members of Belinda Harper.

In April 1982, the bodies of the two women were found in a garbage dump. Yellow plastic tubing was found tied around Belinda Harper's neck.[63] After the discovery of the bodies, federal agents obtained a warrant to search the appellant's home for an illegal firearm. The federal agents requested that Wheeling police officers accompany them, even though Clements' home was outside the jurisdiction of the Wheeling police department.[64] During the search, the officers found the illegal firearm. Additionally, a Wheeling police officer found yellow plastic tubing similar to that found around Belinda Harper's neck. The tubing was partially buried near Clements' home. Clements was arrested on a federal firearms charge. On July 1, 1982, a grand jury indicted the appellant on two counts of murder and two counts of kidnapping. Clements was initially found guilty on all counts. This verdict was overturned and the appellant was retried. At the second trial, Clements was acquitted of the kidnapping charges, but he was found guilty of the first degree murder of Belinda Harper and the voluntary manslaughter of Paula Gray.

On appeal, the petitioner alleged a host of errors, contending, among other

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[60] *Id.* at 650.
[61] State v. Clements, 334 S.E.2d 600 (W. Va. 1985).
[62] State v. McAboy, 160 W. Va. 497, 236 S.E.2d 431 (1977).
[63] *Clements*, 334 S.E.2d at 604.
[64] *Id.*

things: the prosecutor was guilty of misconduct;[65] the State failed to prove venue;[66] the trial court improperly denied a motion for a change of venue[67] and separate trials;[68] and the prosecutor used an impermissible "golden rule argument."[69] The West Virginia Supreme Court of Appeals dismissed all these assignments of error and several miscellaneous points "not requiring lengthy discussion."[70]

There were some evidentiary issues among these minor concerns, one dealing with evidence improperly brought before the grand jury. Acting upon the presumption that every indictment is founded on proper evidence, the court held that the commission of evidentiary errors before a grand jury is not grounds for reversal where the prosecution corrects the errors and they are not repeated before the petit jury.[71]

Another secondary holding was that, where a police inventory is not compulsory but voluntarily prepared and an important piece of evidence is omitted, the omission does not mandate suppression of the evidence since the defendant is not prejudiced.[72] However, the court indicated that the holding would have been different if there was a showing of surprise in addition to the omission.[73]

Finally, the petitioner argued that the State had tried to introduce collateral crimes in open court without the jury present. Although the evidence was deemed inadmissible by the trial court, the appellant claimed this public release prejudiced his right to a fair trial. The court held that, while an *in camera* hearing would have been preferable and the public in general may have been prejudiced, the appellant failed to show that the evidence may have prejudiced the jury. Thus, the error was harmless.[74]

Turning to the first major evidentiary issue, the court considered the appellant's claim that the tape recorded interview with the Wheeling police was improperly admitted because it failed to satisfy three of the admissibility requirements established by the West Virginia Supreme Court of Appeals in *State v. Harris*.[75] First, Clements alleged that there were additions and deletions made to the recording. The court responded that this objection would not be considered on appeal because the

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[65] *Id.*

[66] *Id.* at 605.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 609.

[71] *Id.* at 610.

[72] *Id.*

[73] *Id.* n.8.

[74] *Id.*

[75] In State v. Harris, 286 S.E.2d 251, 255 (W. Va. 1982), the West Virginia Supreme Court of Appeals set forth seven criteria that must be met before tape recorded inculpatory statements may be admitted into evidence and played to the jury. The three requirements at issue in *Clements* were "[1] . . . a showing that changes, additions or deletions have not been made; [2] an identification of the speakers; and [3] a showing that the testimony was voluntarily made without any kind of inducement."

appellant failed to raise the issue at trial. Second, Clements contended that all the speakers in the recording were not identified. In response, the court countered that *Harris* requires only that "the principle speakers be identified, not necessarily every noise."[76] Since all the "principal speakers" were identified in the instant case, the requirement was satisfied. Third, the petitioner asserted that his testimony was not made voluntarily. But the record showed that Clements had been asked by the police if he wished to keep talking and he replied affirmatively. Thus, the court held that this was a sufficient showing of voluntariness and they found no error in respect to the tape recording.

The appellant raised two questions regarding the yellow plastic tubing found in the search: "1) did the Wheeling police officers have the authority to aid in the search by the . . . [federal] agents in an area outside their jurisdiction, and 2) was the yellow tubing the product of an illegal search?"[77]

In answering the first query, the court found authority in a federal statute that provides that federal agents can bring other persons along to help them conduct a search pursuant to a warrant provided that the agent is present who obtained the warrant and the officer is acting in the execution of the warrant.[78] The court held that the Wheeling officers were lawfully assisting the federal agents pursuant to federal law.

The court also disallowed the appellant's claim that the yellow tubing was the product of an illegal search. West Virginia case law[79] soundly rejects the notion that an initially legal search can be used to carry out a broader, unauthorized search. Thus, the law mandates that items seized by the police that are not listed on the search warrant, such as the tubing in the instant case, are inadmissible as evidence.

However, the court cited *State v. Stone*,[80] where it developed a three pronged test to determine when items confiscated in this manner fall under the "plain view" exception and may nevertheless be admitted as evidence. First, according to *Stone*, the evidence obtained must be in plain sight without the benefit of search. In the instant case, the tubing was sticking out of the ground for anyone to see. Second, the police must have a legal right to be where they are when they make the plain sight observation. Here, the federal agents had a legitimate search warrant; the Wheeling police officers were lawfully assisting; and it was reasonable to search the area surrounding the house for firearms which is where the tubing was found. Third, the police must have probable cause to believe the evidence seen constitutes evidence of crime. The tubing found near Clement's home resembled the tubing found around Belinda Harper's neck, and the supreme court felt that this gave

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[76] *Clements*, 334 S.E.2d at 606.
[77] *Id.* at 607.
[78] *Id.* (citing 18 U.S.C. § 3105 (1982)).
[79] *See, e.g.*, State v. Moore, 272 S.E.2d 804, 814 (W. Va. 1980).
[80] State v. Stone, 268 S.E.2d 50, 54 (W. Va. 1980).

probable cause to believe the item was evidence of a crime. Thus, the "plain view" exception applied, and the evidence was properly admitted.

Also, the appellant cited as error the introduction of evidence in the second trial that was not offered by the prosecution in the first trial. Clements claimed that the proferring of medical testimony comparing the blood found in the van with that of members of Belinda Harper's family was improper because it was not newly discovered. However, the court held that where a second trial is ordered, the fact that the prosecution refrained from presenting an item of evidence at the first trial is not grounds for an objection to its admission in any subsequent trial.[81] Nor did the court find appellant's surprise testimony argument compelling because the State had forewarned the defendant of the general nature of the doctor's testimony and the doctor's actual statements only deviated slightly from what the defense was told to expect.

The final allegation of error was that the trial court had improperly allowed the prosecution to introduce evidence of the defendant's previous conviction of a federal firearms violation to impeach his credibility. The defendant argued that the rule established in *State v. McAboy* should have excluded the introduction of prior conviction evidence. In *McAboy*, the court provided that: " . . . in the trial of a criminal case, a defendant who elects to testify may have his credibility impeached by showing prior convictions of perjury or false swearing, but it is impermissible to impeach his credibility through *any other prior convictions.*"[82]

Clements had been previously convicted pursuant to a federal statute that prohibits false statements or presentation of false identification when purchasing firearms. Although this is not the same crime as perjury or false swearing, the court explained that their true intention in *McAboy* was only to limit impeachment by evidence of prior convictions when a defendant's character is not at issue to those crimes that go "directly to the credibility of the defendant."[83]

Although *McAboy* implied that a defendant could be impeached only by prior convictions of perjury and false swearing, the West Virginia Supreme Court of Appeals expanded the interpretation to permit admissibility of past crimes of "perjury or false swearing *and criminal convictions of making false statements with intent to deceive . . .* " to impeach a witness whose character is not at issue.[84] In *State v. Clements*, Clements' previous conviction met this new requirement, so the court determined that the trial court correctly allowed impeachment by that offense.

Frank Venezia

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[81] *Clements*, 334 S.E.2d at 607.
[82] *McAboy*, 160 W. Va. at 497, 236 S.E.2d at 432 (emphasis added).
[83] 18 U.S.C. § 922(a)(6) (1982).
[84] *McAboy*, 160 W. Va. at 508, 236 S.E.2d at 437.
[85] *Clements*, 334 S.E.2d at 609 (emphasis added).