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Evidence

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EVIDENCE

I. CREDIBILITY OF WITNESSES

State v. Kopa, 311 S.E.2d 412 (W. Va. 1983).

In ruling that the credibility of a witness may be attacked by any party, including the party calling him,[1] the West Virginia Supreme Court of Appeals adopted rule 607 of the Federal Rules of Evidence[2] and overruled prior cases expounding a contrary rule.[3] In West Virginia, the prior rule was that one may not impeach his own witness absent entrapment, hostility or surprise.[4]

During the trial of Kopa for first-degree murder, the prosecution sought to introduce prior inconsistent statements made by its own witness, the defendant's girlfriend, when her testimony contradicted her prior statement to the police. In that statement, she claimed responsibility for an anonymous telephone call to the rescue squad instructing them to send an ambulance to the victim's residence. However, during the defendant's preliminary hearing and before the grand jury, she denied ever making the call. At trial, she again denied making her original statement. The trial judge allowed the prosecution to impeach its witness with her prior statement to the police but admonished the jury that the statement could only be considered for credibility purposes and not for the truth of the matter asserted.[5]

On appeal of his conviction for murder, the defendant asserted that the trial court erred when it allowed the prosecution to impeach its own witness with a prior inconsistent statement that was unsworn and which the prosecution knew would be refuted at trial.[6] Without determining whether the trial court erred in finding that the witness had become hostile, the supreme court of appeals held that the statements were properly admitted for impeachment purposes.[7]

The court stated[8] that its purposes for rejecting the previous rule is set forth in the following notes of the Advisory Committee:

> The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witness as worthy of belief, since

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[1] State v. Kopa, 311 S.E.2d 412 (W. Va. 1983).

[2] FED. R. EVID. 607 states: The credibility of a witness may be attacked by any party, including the party calling him.

[3] The *Kopa* decision overruled State v. Wayne, 245 S.E.2d 838 (W. Va. 1978); State v. Ferguson, 270 S.E.2d 166 (W. Va. 1980); State v. McAboy, 236 S.E.2d 431 (W. Va. 1977); Hartley v. Crede, 140 W. Va. 133, 82 S.E.2d 672 (1954); State v. Blankenship, 137 W. Va. 1, 69 S.E.2d 398 (1952); Lambert v. Armentrout, 65 W. Va. 375, 64 S.E. 260 (1909); Stout v. Sands, 56 W. Va. 663, 49 S.E. 428 (1904).

[4] *Kopa*, 311 S.E.2d at 423. *See also* F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 157 (1978).

[5] *Kopa*, 311 S.E.2d at 423. *See also* State v. Spadafore, 220 S.E.2d 655 (W. Va. 1975).

[6] *Kopa*, 311 S.E.2d at 423.

[7] *Id.* at 424.

[8] *Id.* at 423.

> he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary.[9]

The court cautioned, however, that the adoption of rule 607 does not free either party to introduce otherwise inadmissible evidence into trial under the guise of impeachment.[10] Only by allowing this testimony for impeachment purposes and by so instructing the jury can such testimony be admitted without violating the standards laid down in *State v. Spadafore*.[11]

In affirming another evidentiary ruling by the *Kopa* trial court, the supreme court of appeals held it was not error to refuse to admit the taped results of an out-of-court voice experiment proffered by the defendant.[12] The court found that the validity of the results was questionable primarily because the experiment was not conducted under substantially similar circumstances.[13] The court also noted that the lack of participation by the prosecution and the tardiness of the offer of the tapes to the trial court also tended to cast an aura of unreliability over the results.[14]

At the lower court proceedings, the rescue squad member testified that at approximately 4:00 a.m. on the morning after the murder, he was awakened by a telephone call while on voluntary duty. He indicated that during the seven to eight second telephone conversation, a female voice directed him to dispatch an ambulance to 136 Pine Street, the address of the victim. In the experiment conducted by defense counsel, his secretary placed a call to the rescue squad's office and the rescue squad member consented to listen to the voices of five different women, including

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[9] FED. R. EVID. 607 advisory committee note. *See* United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963), criticizing the traditional rule. *See generally* F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 22 (Supp. 1983).

[10] *Kopa*, 311 S.E.2d at 423.

[11] State v. Spadafore, 220 S.E.2d 655 (W. Va. 1975). In syllabus point one of *Spadafore*, the court stated that:

> In a criminal case prior out-of-court statements made to a witness cannot be admitted into evidence for the truth of the matter asserted unless they were made under oath in a judicial atmosphere during the taking of a deposition or at a former trial and were subject at the time to cross-examination by the opposing party's counsel.

[12] *Kopa*, 311 S.E.2d at 425.

[13] The court stated that:

> The results of an out-of-court experiment will not be admitted into evidence unless the party seeking to admit such evidence demonstrates that the conditions under which the experiment was conducted were substantially similar to those of the original conditions sought to be recreated and the question of whether to admit such evidence for consideration by the jury is within the sound discretion of the trial court. . . . However, '[w]hile there is no fixed standard of determining the degree of similarity required, the general rule is that the conditions should be substantially or proximately similar, and that the similarity need extend only to those conditions which govern or substantially affect the result.' (citation deleted).

Id. at 424.

[14] *Kopa*, 311 S.E.2d at 425.

the defendant's girlfriend's voice. He then attempted to identify one of them as the voice of the anonymous caller who had made the call some four months earlier. Each woman spoke the words "send an ambulance to 136 Pine Street and hurry," in a manner "as if they were actually calling an ambulance." At the conclusion of the experiment, the rescue squad member requested a repeat of two of the voices and then proceeded to choose a voice other than that of the defendant's girlfriend as the one most similar to the anonymous caller.[15] The court did not discuss which conditions of the experiment were not substantially similar enough to allow the results to be admitted. The primary differences seem to be the time the call was made and the fact that the secretary first placed the call and then requested the witness' participation.

Although the trial court's evidentiary rulings were affirmed, the supreme court found error in the lower court's burden of proof instructions and reversed Kopa's conviction on those grounds.[16]

II. PRIVILEGES

State v. Simmons, 309 S.E.2d 89 (W. Va. 1983).

Addressing itself for the first time to the meaning of West Virginia Code section 27-3-1(a)[17] as it relates to confidentiality, the West Virginia court refused to recognize the statute created any sort of a general psychotherapist-patient privilege.[18] The defendant was convicted of second degree murder in the shooting death of a woman allegedly having an affair with her husband. At the state's request, only two days prior to trial, the court ordered a psychiatric examination of the defendant. Although the state filed a discovery motion requesting reports of all mental examinations, the defense failed to provide reports by its examining psychiatrist. As both doctors practiced together at the Wheeling Medical Clinic, the prosecution's psychiatrist had access to the defendant's medical reports. Although he testified at trial to having seen some of these records, the defendant made no objection to this testimony.

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[15] *Id.*

[16] See CRIMINAL LAW section of this survey.

[17] W. Va. Code § 27-3-1(a) (1980) states:

Communications and information obtained in the course of treatment or evaluation of any client or patient shall be deemed to be "confidential information" and shall include the fact that a person is or has been a client or patient, information transmitted by a patient or client or family thereof for purposes relating to diagnosis or treatment, information transmitted by persons participating in the accomplishment of the objectives of diagnosis or treatment, all diagnoses or opinions formed regarding a client's or patient's physical, mental or emotional condition; any advice, instructions or prescriptions issued in the course of diagnosis or treatment, and any records or characterization of the matters hereinbefore described. It does not include information which does not identify a client or patient, information from which a person acquainted with a client or patient would not recognize such client or patient, and uncoded information from which there is no possible means to identify a client or patient.

[18] State v. Simmons, 309 S.E.2d 89 (W. Va. 1983).

One of the several issues raised by the defendant on appeal was that the prosecution's examining psychiatrist violated West Virginia Code section 27-3-1(a) and also violated the defendant's physician-patient privilege with her treating physician when he reviewed some of the defendant's records on file at the Wheeling Medical Clinic. On the issue of whether a violation of the defendant's physician-patient privilege had occurred, the court found that since no objection was made at trial, and since the records introduced by the defendant were available to the state's examining physician when he testified, the defendant was not actually prejudiced and the court refused any further consideration of this issue. The court noted, however, that for the defendant to have prevailed on this point, provided a timely objection had been made, she would have been required to demonstrate that a general physician-patient privilege existed in this state and that it would then have been necessary to determine if the privilege extended to medical records obtained by a third party.[19]

On the same grounds, the court held that although there may have been a violation of West Virginia Code section 27-3-2(a) when the state's examining psychiatrist unilaterally obtained the defendant's records, this violation did not constitute reversible error.[20] Noting that the statute was vague, the court identified the elements of a privilege statute[21] and held that section 27-3-1(a) merely provides for confidentiality of communications and information obtained in the course of treatment and evaluation of persons who may have mental or emotional conditions or disorders, subject to the exceptions set out in section 27-3-1(b).[22]

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[19] *Id.* at 95 n.6.

[20] *Id.* at 97.

[21] The court stated that:

We do not view the statute as creating any sort of a general psychotherapist-patient privilege. Typically, a privilege statute identifies a specified relationship between two parties and is limited to information that is essential to the confidential relationship which forms the basis of the privilege. W. Va. Code, 27-3-1, does not define the relationship it is intended to protect, identifies only one party, i.e., the client or patient, and is written so broadly that the confidentiality is not limited to information essential to any confidential relationship (citations omitted).

Id. at 96.

[22] The language of W. Va. Code § 27-3-1(b) (1980) is:

Confidential information may be disclosed:

(1) In a proceeding under section four [§ 27-5-4], article five of this chapter to disclose the results of an involuntary examination made pursuant to sections two, three [§§ 27-5-2, 27-5-3] or four, article five of this chapter;

(2) In a proceeding under article six-A [§ 27-6A-1 et seq.] of this chapter to disclose the results of an involuntary examination made pursuant thereto;

(3) Pursuant to an order of any court based upon a finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section;

(4) To protect against a clear and substantial danger of imminent injury by a patient or client to himself or another; and

(5) For treatment or internal review purposes, to staff of the mental health facility where the patient is being cared for or to other health professionals involved in treatment of the patient.

The court pointed out that access to records held by a third party can be obtained under section 27-3-1(b)(3), which permits a court to order production of such material if it finds that the information is sufficiently relevant to a proceeding before the court to outweigh the confidentiality established by this section. The proper procedure is to request the court to make a finding under this exception in order to procure the information requested.[23]

In additional rulings on other issues raised an appeal the supreme court upheld the trial court's granting of the state's motion for a psychiatric examination two days before trial and found that the late request was not prejudicial under syllabus point two of *State v. Grimm*.[24] At trial, the lower court had admitted into evidence the defendant's tape recorded statement to the police which was made after the defendant had requested an attorney. Although it had ruled the statement inadmissible for other purposes, the trial court permitted it into evidence for impeachment purposes. Agreeing that the statement was properly admissible for impeachment purposes under syllabus point four of *State v. Goodman*,[25] the supreme court affirmed the circuit court's verdict.[26]

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[23] *Simmons*, 309 S.E.2d at 97.

[24] State v. Grimm, 270 S.E.2d 173 (W. Va. 1980) held that:

When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.

Id. at 174 (syllabus point two).

[25] State v. Goodman, 290 S.E.2d 260 (W. Va. 1981) held that:

[W]here a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible as evidence in the State's case in chief.

Id. at 263 (syllabus point two).

[26] The court stated that the better practice is not to have the state obtain its court-ordered psychiatric examination from a psychiatrist who is associated with the defense psychiatrist. *Simmons*, 309 S.E.2d at 97 n.13.

Although it upheld the trial court's refusal to give what, in substance, was a diminished capacity defense, the West Virginia court appeared to open the door to that defense in West Virginia. The court found that "for purposes of this case, we need not decide whether a diminished capacity defense is available in our jurisdiction since even if it were, the defendant's proof did not meet that standard." *Id.* at 98.

The defendant did not offer any psychiatric testimony to the effect that by virtue of some mental disease or defect, she was incapable of forming the specific intent required either for first-degree murder, i.e., premeditation, deliberate intent to kill, or for second-degree murder, i.e., malice aforethought. *Id.* at 99. *See* State v. Starkey, 244 S.E.2d 219 (W. Va. 1978).

In its discussion, the court corrected the opinion in 22 A.L.R.2d 1228 (1968) that State v. Flint, 142 W. Va. 509, 96 S.E.2d 677 (1957) rejected the diminished capacity defense and indicated that, in a proper case, it could be utilized to negate the elements of specific intent by showing the existence

III. INSUFFICIENCY OF EVIDENCE

State v. Clayton, 317 S.E.2d 499 (W. Va. 1984).

In *State v. Clayton*,[27] the West Virginia Supreme Court of Appeals answered a constitutional question[28] raised in *Green v. Massey*[29] and *State v. Frazier*[30] and addressed in a footnote in *State v. Brant*.[31] The court ruled that the double jeopardy clauses of the United States and West Virginia Constitutions do not prohibit the retrial of a defendant on a lesser included offense when a judgment of acquittal on murder charges has been entered for the defendant because of insufficient evidence.[32]

This case was before the court for the second time. In *Clayton I*[33] it held that the jury should not have been instructed on either first or second degree murder since there was no proof of malice.[34] The case was remanded for a new trial because there was insufficient evidence to support a verdict of first or second degree murder. On remand, the trial court included an instruction about inferring malice; the prosecutor also argued malice and in closing asked the jury to return a second degree murder verdict.

Following the United States Supreme Court, the West Virginia court has ruled that the state and federal double jeopardy clauses prohibit retrial of a defendant on any charge for which he has received a judgment of acquittal or a court's determination that there was insufficient evidence to prove that charge.[35] This rule precluded the state's trying the defendant for a crime that included malice as one of its elements, from introducing additional evidence on malice, from instructing the jury on it and from arguing it to the jury.

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of a mental disease or defect which rendered the defendant incapable of forming the requisite intent. Although not operating as an excuse, this defense could apparently be used to reduce the offense to a lesser included one. *Simmons*, 309 S.E.2d at 98 n.15.

[27] State v. Clayton, 317 S.E.2d 499 (W. Va. 1984).

[28] In State v. Frazier, 252 S.E.2d 39 (W. Va. 1979), the court stated:

> There is no question that *Greene* avoided determining what the outcome would be if the evidence was sufficient to support a verdict of a lesser included offense:
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> "Given our decision today to remand this case for reconsideration by the Court of Appeals, the state could, consistent with the Double Jeopardy Clause, try Greene for a lesser-included offense in the event that his first-degree murder conviction is voided."

Id. at 52.

[29] Greene v. Massey, 437 U.S. 19 (1978), *cert. denied*, 104 S. Ct. 718 (1984).

[30] *Frazier*, 252 S.E.2d 39.

[31] State v. Brant, 252 S.E.2d 901, 904 n.2 (W. Va. 1979).

[32] *Clayton*, 317 S.E.2d 499.

[33] State v. Clayton, 277 S.E.2d 619 (W. Va. 1981).

[34] *Id.* at 623.

[35] *Clayton*, 317 S.E.2d at 500-01 (citing State v. Frazier, 252 S.E.2d 39 (W. Va. 1979); Burke v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978); Hudson v. Louisiana, 450 U.S. 40 (1981)).

In reversing Clayton's conviction a second time because the court and prosecutor violated Clayton's double jeopardy rights by presenting the issues of malice and murder to a second jury, the court was merely following its earlier holdings in *Frazier*[36] and *Brant*.[37] The court, however, without discussion, answered an important constitutional question by allowing Clayton to be retried for the lesser included offenses of voluntary manslaughter.

IV. NEWLY DISCOVERED EVIDENCE

State v. King, 313 S.E.2d 440 (W. Va. 1984).

In applying the well-established principles for granting a new trial on the basis of newly discovered evidence under rule 33 of the West Virginia Rules of Criminal Procedure,[38] the supreme court ruled that due diligence requires a defendant to attempt to secure a witness' evidence at trial and that a defendant's failure to do so will preclude his later using that as "newly discovered evidence" for a new trial.[39] The court followed a number of other jurisdictions in holding that it must be determined at trial whether a witness will exercise his fifth amendment right not to incriminate himself before a defendant may be allowed to plead reasonable excuse for his failure to present that evidence.[40]

At the trial of this matter, the defendant, King, was convicted of uttering a forged instrument in violation of West Virginia Code section 61-4-5. Upon receipt of a notarized letter from William Carter, defendant's cellmate, confessing to the charge, King's counsel filed a motion for a new trial on the basis of newly discovered evidence. At the hearing on the motion for a new trial, King testified that he and Carter were confined together prior to his trial and that during that time Carter

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[36] *Frazier*, 252 S.E.2d 39.

[37] *Brant*, 252 S.E.2d 901.

[38] W. VA. R. CRIM. P. 33 provides that a court, upon motion, may grant a new trial if required in the interest of justice. The court's traditional statement of the law about the requirements for a new trial on the basis of newly discovered evidence is:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

State v. Frazier, 253 S.E.2d 534 (1979) (quoting Halstead v. Horton, 38 W. Va. 727, 18 S.E. 953 (1894) (syllabus point one)).

[39] State v. King, 313 S.E.2d 440 (W. Va. 1984).

[40] *Id.* at 444 (citing State v. McDonough, 350 A.2d 556 (Me. 1976); Goates v. Fortune Lincoln Mercury, Inc., 446 S.W.2d 913 (Tex. Civ. App. 1969)).

had confessed to King. Carter, against the advice of counsel and without a grant of immunity, testified at the hearing that he committed the offense. The trial court denied a new trial on the grounds that the confession was not newly discovered and that due diligence was not exercised to present the evidence at trial.[41] The defendant appealed asserting he could not have secured Carter's confession at trial because, if called as a witness, he would have invoked his fifth amendment right to remain silent.

In affirming the lower court's decision, the supreme court noted that the only thing new about the confession was that it was in writing, that it was within the defendant's knowledge prior to trial and that testimony implicating Carter had been presented at trial and rejected by the jury.[42] The court further noted that the defendant's failure to subpoena Carter or to even ask him to testify undermined any claim of diligence on his part.[43] The court found no merit in the defendant's assertion that Carter would have invoked his fifth amendment right to remain silent if called as a witness.[44] The court quoted *State v. McDonough* which held in part that "in order to raise a declarant's constitutional immunity for the purpose of satisfying the unavailability requirement for the admission of a declaration against interest, the declarant must actually be produced and refuse to testify."[45]

V. ADMISSIBILITY

Naum v. Halbritter, 309 S.E.2d 109 (W. Va. 1983).
Ours v. West Virginia Department of Motor Vehicles, 315 S.E.2d 634 (W. Va. 1984).

The West Virginia Supreme Court of Appeals used *Naum v. Halbritter*[46] as an opportunity to provide trial courts with guidelines for admitting hearsay evidence which is against the penal interest of the declarant. Refusing to extend its limited exception to the hearsay rule for statements against penal interests,[47] the supreme

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[41] *King*, 313 S.E.2d at 442.

[42] *Id.*

[43] *Id.* at 444.

[44] *Id.*

[45] *Id.* (quoting State v. McDonough, 350 A.2d at 560-61).

[46] Naum v. Halbritter, 309 S.E.2d 109 (W. Va. 1983).

[47] This exception, first laid down in State v. Williams, 249 S.E.2d 752 (W. Va. 1978) (syllabus point two) stated:

> Hearsay evidence which is against the penal interest of the extra-judicial declarant is admissible even though it does not fall within a recognized West Virginia exception to the hearsay rule if it possesses sufficient indicia of reliability to satisfy the court that it is trustworthy in accordance with the following rule: A statement has circumstantial guarantees of trustworthiness if the court determines that (A) the statement is offered in evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance

court underscored the qualification that such evidence must be accompanied by sufficient indicia of reliability before it becomes admissible.[48] In ruling that this exception to the hearsay rule will be applied only when other factors make statements against penal interests appear credible, the West Virginia court is in accord with the federal courts.[49]

The petitioner, the prosecuting attorney of Ohio County, testified before a grand jury investigating the death of a local prostitute. He stated that he knew the victim only as a waitress at a bar he occasionally visited. Subsequently, the prosecutor was indicted by that grand jury for false swearing.[50] In rebutting the claim that the petitioner had only passing knowledge of the deceased, the special prosecutor relied solely on the decedent's statements to friends and family that she had had intimate relations with the petitioner. When the presiding judge at the lower court ruled these out-of-court statements admissible, the petitioner sought a writ of prohibition from the supreme court.[51] Noting its general reluctance to reverse an interlocutory evidentiary ruling, the supreme court nevertheless believed that, under the circumstances, a writ of prohibition was an appropriate remedy for the petitioner at this stage in the proceedings.[52]

In finding that the statements were not against penal interest as the declarant ran no real risk of prosecution, the court ruled that the penal interest exception must be limited at least to statements admitting a particular crime for which prosecution is possible at the time.[53] Stating that the admission of hearsay statements requires a balancing test, Justice Neely ruled that the court would not allow statements that are only nominally against the penal interest of the declarant when they could destroy the life and reputation of a criminal defendant.[54]

In examining the reliability of the statements, the court looked at any self-interest the declarant might further in making the statements and the conflict in facts between the differing versions told to different people. The court concluded that the justifications for the exception for statements against penal interests simply

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of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

[48] *Id.* at 112 (citing State v. Williams, 309 S.E.2d 109 (W. Va. 1983)).

[49] *Id.* (citing Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Harris, 501 F.2d 1 (9th Cir. 1974)). *See also* F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 56 (Supp. 1983).

[50] *Naum*, 309 S.E.2d at 111.

[51] *Id.*

[52] *Id.* at 112. For an outline of the circumstances in which a writ of prohibition is appropriate, see Hinkle v. Black, 262 S.E.2d 744 (W. Va. 1979).

[53] *Naum*, 309 S.E.2d at 113 (citing United States v. Dovico, 380 F.2d 325 (2nd Cir.), *cert. denied*, 389 U.S. 944 (1967)).

[54] *Id.*

did not fit the facts of this case.[55] The court further expressed its belief that where the crucial witness for the prosecution will be unavailable for any form of cross-examination, a serious constitutional issue exists concerning an accused's right to confront witnesses against him.[56] The court cited with approval the ruling in *Dutton v. Evans*[57] which allowed the use of an out-of-court admission only when the evidence presented was tangential to the central issue in the case and was heavily corroborated. Although underscoring the fact that the primary basis for its awarding the writ was that the evidence was inadmissible hearsay, the court expressed grave reservations about whether the defendant's constitutional rights were adequately protected.[58]

Following a number of other jurisdictions,[59] the West Virginia Supreme Court of Appeals, in *Ours v. West Virginia Department of Motor Vehicles*,[60] ruled that police automobile accident reports and reports prepared by other parties to the accident may not be the sole evidence relied upon by the Commissioner of the Department of Motor Vehicles in a suspension hearing conducted pursuant to West Virginia Code section 17D-3-15.[61] The court carefully limited its holding to proceedings under this specific code provision.

Following an automobile accident, the Commissioner, pursuant to statute,[62] sent the plaintiff a proposed order of suspension since she was not covered by

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[55] The court stated that:

> Statements against penal interest are often found admissible because it is presumed that individuals would not make statements that placed their own liberty in danger unless those statements were accurate. Truth would seem to be the only possible reason for making such remarks. In this case, however, it is not difficult to find other motivations. A woman who is known to be a prostitute does not reduce her standing by claiming intimate relations with the local prosecutor. In fact, she may enhance her reputation. Furthermore, if her criminal associates were attempting to demean the prosecutor, it would be to their advantage to have her plant such a rumor. Those alternative motivations could be explored on cross-examination if it were possible for Ms. McLaughlin to appear in the courtroom. The question of her credibility would then go to the jury. Since she is not available for cross-examination, however, those alternative explanations of her out-of-court statements cast sufficient doubt on their reliability to make them inadmissible.

Id. at 113-14.

[56] *Id.* at 114.

[57] Dulton v. Evans, 400 U.S. 74 (1970).

[58] *Naum*, 309 S.E.2d at 115.

[59] *Ours v. West Virginia Dep't. of Motor Vehicles*, 315 S.E.2d 634 (W. Va. 1984) (citing Carlson v. Kozlowski, 172 Conn. 263, 374 A.2d 207 (1977); Spaulding v. Howlett, 59 Ill. App.3d 249, 375 N.E.2d 437 (1978); *see also* Rule v. Rhode Island Dept. of Transp., 427 A.2d 1305 (R.I. 1981) (accident reports are not admissible in this type of proceeding). *But see* Vance v. Department of Public Safety, 308 So.2d 325 (La. App. 1975); Cross v. Waguepack, 308 So.2d 321 (La. App. 1975); Chmela v. Department of Motor Vehicles, 88 Wash.2d 385, 561 P.2d 1085 (1977)).

[60] *Ours*, 315 S.E.2d 634.

[61] W. VA. CODE § 17D-3-15 (1974), in pertinent part, states that upon the request of a person from whom the commissioner has required security following the occurrence of a vehicular accident, the commissioner shall afford the person an opportunity to be heard concerning such security requirements.

[62] W. VA. CODE § 17D-3-3 (1974).

automobile insurance. The order informed the plaintiff that her operator's license and vehicle registration would be suspended if she failed to perform one of the various options calculated to insure her financial responsibility for the accident. The plaintiff was also informed of her right to an administrative hearing, which she requested in lieu of exercising the above options. At the hearing, the Commissioner concluded that there was "a reasonable possibility that a civil judgment could be rendered against [the plaintiff] as a direct result of her involvement in the accident"[63] and suspended her license and registration.[64] The plaintiff appealed the Commissioner's order to the circuit court, pursuant to West Virginia Code section 29A-5-4,[65] contending that the Commissioner had erred by admitting into evidence the hearsay accident reports of the police officer and the other party to the accident and by relying upon them in reaching a decision. After the circuit court affirmed the Commissioner's order, the plaintiff brought this action before the supreme court of appeals.

Although the supreme court held that the accident reports were admissible under the official records exception to the hearsay rule, it ruled that such reports may not be the sole basis of the Commissioner's determination that a reasonable possibility of judgment exists against a person from whom security will then be required.[66]

Finding that the Commissioner's decision was made upon unlawful procedures outlined in *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*[67] which substantially prejudiced the rights of the appellant,[68] the court reversed the final judgment of the circuit court and remanded the case to the Commissioner for further proceedings consistent with its opinion.

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[63] *Ours*, 315 S.E.2d at 637.

[64] W. VA. CODE § 17D-3-15 (1974) establishes the right of a person from whom security has been required under article 3 to an administrative hearing and provides that "the scope of such hearing shall be whether there is a reasonable possibility of judgment being rendered against the person requesting the hearing as a result of the accident in question."

[65] W. VA. CODE § 29A-5-4 (1980).

[66] *Ours*, 315 S.E.2d at 634.

[67] The court held in syllabus point two of Shepherdstown Volunteer Fire Dep't. v. West Virginia Human Rights Comm'n, 309 S.E.2d 342 (1983):

> Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

[68] *Ours*, 315 S.E.2d at 640.

VI. GRUESOME PHOTOGRAPHS

State v. Wilson, 310 S.E.2d 486 (W. Va. 1983).

Applying the principles set down in *State v. Rowe*[69] for admitting gruesome photographs into evidence, the court found that the photograph at issue in *State v. Wilson*[70] was not of essential evidentiary value, was prejudicial, and was thus inadmissible.

The defendant had been convicted of second degree murder of an elderly man during the commission of a robbery. After denying several of the state's attempts to have a color photograph of the bloody, beaten, mangled face of the victim introduced into evidence, the trial court finally admitted it on the grounds that the defense had made the condition of the victim a major issue at trial. The defendant's principle theory was that a co-indictee had inflicted the fatal blows with a brick. The state asserted that the photograph showed no brick imprints on the victim's face.

The court found that the manner in which the victim's face had been mangled could not be determined in the slightest from the photograph. Holding that the photograph was not essential to the state's case under any of the theories for which it was offered into evidence, the court reversed the decision of the circuit court and remanded the case for a new trial.[71]

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[69] State v. Rowe, 259 S.E.2d 26 (1979) (at syllabus point one) stated that:

Gruesome photographs are not *per se* inadmissible, but they must have something more than probative value because by the preliminary finding that they are gruesome, they are presumed to have a prejudicial and inflammatory effect on a jury against a defendant. The State must show that they are of essential evidentiary value to its case.

[70] State v. Wilson, 310 S.E.2d 486 (W. Va. 1983).

[71] *Id.*