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Confessions

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CONFESSIONS

State v. Sprouse, 297 S.E.2d 833 (W. Va. 1982).
State v. Williams, 301 S.E.2d 187 (W. Va. 1983).
State v. Jackson, 298 S.E.2d 866 (W. Va. 1982).

The West Virginia Supreme Court of Appeals decided several cases this year concerning the admissibility of confessions and other incriminating statements made by suspects before trial. The court held that once a suspect is released by a municipal judge after pleading guilty to a charge of public intoxication, his subsequent detention by the police is an "arrest" requiring probable cause before a confession obtained during that detention will be admissible.[1] The court also ruled on circumstances which may separate later confessions from an earlier inadmissible confession, dissipating the taint of the earlier confession and allowing the later ones to be admissible.[2] Finally, the court mandated that pre-trial psychiatric hearings be tape-recorded, that copies of the tape be given to counsel for the defense, to counsel for the state, and to the judge, and that an *in camera* hearing must be held to assure that no self-incriminating statements of the defendant are included in the psychiatrist's testimony.[3]

Confessions which are the product of illegal police activities have long been inadmissible in court.[4] The West Virginia Supreme Court of Appeals applied this rule during the survey period and held that the detention of a suspect following his release from jail on a separate charge is an arrest requiring probable cause; without it, confessions acquired during the later interrogation are inadmissible.[5] Further, the court held that where a confession is found to be inadmissible because of an illegal custodial search, subsequent confessions will also be held to be inadmissible where no evidence is presented to show that they are unconnected.[6]

In the first case,[7] the defendant Sprouse was arrested for public intoxication. He spent the night in a room in the local municipal building before appearing before a municipal judge the following morning.[8] Sprouse pleaded guilty to the charge of public intoxication and was released from custody.[9] He was not, however, permitted to leave the building, but instead was detained by detectives from the city police department.[10] He was given the required

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[1] State v. Sprouse, 297 S.E.2d 833 (W. Va. 1982).
[2] State v. Williams, 301 S.E.2d 187 (W. Va. 1983).
[3] State v. Jackson, 298 S.E.2d 866 (W. Va. 1982).
[4] *See* Halvonik, *Exclusionary Rules: An Introduction*, 33 HASTINGS L.J. 1057 (1982).
[5] State v. Sprouse, 297 S.E.2d 833 (W. Va. 1982).
[6] 301 S.E.2d 187.
[7] 297 S.E.2d 833.
[8] 297 S.E.2d at 834.
[9] *Id.* at 835.
[10] *Id.*

Miranda warnings, and, about two hours later, confessed to a theft.[11]

Sprouse was subsequently charged with theft in a multi-count indictment. He filed a pre-trial motion to have the confession suppressed as the product of a warrantless, unconstitutional arrest.[12] The circuit court denied the motion, noting that the defendant had made the confession after he was given his *Miranda* warnings.[13]

On appeal, the West Virginia Supreme Court of Appeals gave no weight to the State's contention that Sprouse's questioning was the result of his legal arrest for public intoxication.[14] Instead, the court concluded that Sprouse had been arrested for investigatory purposes.[15] The court looked to the reasons for the defendant's detention to determine whether the police had probable cause for the detention. Because the only testimony on record was an officer's statement that he had a "personal opinion" that the police "needed to talk" to Sprouse, the court concluded probable cause had not been established.[16]

Next, the court looked to see if the "causal connection" between the illegal arrest and the confession had been broken, which would still have permitted the introduction of the confession.[17] The giving of *Miranda* warnings was not sufficient to break the causal connection between Sprouse's detention and subsequent confession.[18]

In determing the admissibility of the confession, the court relied upon its holding in *State v. Stanley*.[19] *Stanley* lists three factors to be considered by a

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[11] *Id.*

[12] *Id.* at 834.

[13] *Id.* at 835.

[14] The State attempted to distinguish Dunaway v. New York, 442 U.S. 200 (1979), by saying that the defendant in *Dunaway* had been seized without probable cause, but that Sprouse had been arrested legally for public intoxication. The West Virginia Supreme Court of Appeals found no distinction and applied the *Dunaway* analysis.

In *Dunaway*, a defendant was taken into custody for interrogation without probable cause, read the *Miranda* warnings, and induced to give a confession. The United States Supreme Court held that the confession was an exploitation of the illegal arrest, and therefore inadmissible.

[15] 297 S.E.2d at 835. The court does not indicate upon what facts this conclusion is based.

[16] *Id.*

[17] This concept has its origins in constitutional analysis and is stated in *Dunaway* as follows: "[A]lthough a confession after proper *Miranda* warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a threshold requirement for Fourth Amendment analysis." 442 U.S. at 217, (quoting Brown v. Illinois, 422 U.S. 590 (1975)).

West Virginia has explicitly followed the federal rule: "[W]e . . . follow the wisdom of our federal brethren that exclusion of the confession is mandated only if it is a result of the illegal arrest and the causal connection between the illegal arrest and the confession has not been broken." State v. Canby, 252 S.E.2d 164, 167 (W. Va. 1979).

[18] 297 S.E.2d at 835.

[19] 284 S.E.2d 367 (W. Va. 1981).

court in determining whether a confession is the result of the exploitation of an illegal arrest: (1) The temporal proximity between the arrest and the confession; (2) the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and (3) the purpose or flagrancy of the officer(s)' conduct.[20]

The court found two of the three factors present in this case, requiring a reversal of Sprouse's conviction. First, the court found the temporal proximity between the arrest and conviction to be too close. The confession was given within ninety minutes of the illegal arrest, which did not allow the defendant sufficient time to reflect upon the consequences of his act. Moreover, the defendant had not been allowed to leave the municipal building where he had been detained.[21] Second, the court found that there were no intervening circumstances between the arrest and subsequent confession.[22] Finally, although the court noted that there was no evidence of purposeful or flagrant misconduct,[23] the temporal proximity and lack of intervening circumstances warranted a finding that the confession was inadmissible.[24]

In the case of *State v. Williams*,[25] the court looked at a series of confessions whose admissibility was in question due to an illegal custodial search by police. Williams had been accused in the beating deaths of Dorothy and Carlton Harris.[26] He was convicted of the murder of Dorothy Harris based on a confession obtained following the finding of incriminating evidence during a custodial search.[27] The conviction was later overturned and the confession held inadmissible.[28] Williams was then convicted of the murder of Carlton Harris, based on the introduction of four confessions made subsequent to the first.[29] Williams appealed, contending that those later confessions were the product of the same illegal search as the first confession and should also have been ruled inadmissible.[30]

In reversing and remanding the conviction, the West Virginia Supreme Court of Appeals stated that the inadmissibility of the first confession gave rise to a presumption of the invalidity of the confessions which followed it.[31]

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[20] *Id.* at 368.
[21] 237 S.E.2d at 836.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 301 S.E.2d 187.
[26] *Id.* at 188.
[27] *Id.*
[28] State v. Williams, 249 S.E.2d 758 (W. Va. 1980).
[29] 301 S.E.2d at 188.
[30] *Id.*
[31] *Id.* at 189. The admissibility of Williams' confession was the subject of two previous cases. In State v. Williams, 249 S.E.2d 758, the court found the first of Williams' confessions inadmissable, and stated that its inadmissibility gave rise to the presumption of the inadmissibility of

In order to use the subsequent confessions, the State must prove that the connection between the later confessions and the first inadmissible confession had become "so attenuated as to extinguish the taint of the first."[32]

In examining the series of events that led to the subsequent confessions, the court listed a series of factors, each of which contributed to its decision that the later confessions were connected to the first.[33] First, because the defendant was of limited intelligence,[34] it was questionable whether the defendant was capable of the "mental regrouping" required to make the later confessions separate from the first.[35] Second, the detention of the defendant was uninterrupted.[36] Third, there was no lawyer present during the repeated interrogation,[37] while the same police officers were present throughout.[38] Fourth and most important, the officers' own testimony indicated that the confessions seemed to be cumulative, not individual.[39]

While the holdings of *Sprouse* and *Williams* extend no new constitutional guarantees, they do clarify the application of basic principles in specific situations. In *Sprouse*, the court makes it quite clear that the legal arrest of a defendant cannot be used to support his continued detention and interrogation following his release by the court on those charges. *Williams* provides insight into the weight which will be allotted to the various factors in determining the extent to which subsequent confessions are connected to earlier statements. Analysis of the cases provides excellent examples of the reasoned application by the court of basic principles concerning the admissibility of confessions and the court's continued requirement of firm adherence to these principles.

Confessions and other incriminating statements made by a suspect of

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the subsequent confessions. *Id.* at 764. In State *ex rel.* Williams v. Narick, 264 S.E.2d 851 (W. Va. 1980), the court refused on procedural grounds to issue a writ prohibiting the use of the four later confessions at the trial court level.

[32] 301 S.E.2d at 189 (quoting State *ex rel.* Williams v. Narick, 264 S.E.2d 851, 855 (W. Va. 1980)).

[33] 301 S.E.2d at 859.

[34] *Id.* The court discussed psychiatric opinion which found the defendant to be highly amenable to suggestion: "The defense's psychiatric expert testified at length to the appellant's susceptibility to suggestion. Although the State's expert disagreed with the defense expert's conclusions on nearly every matter, he did admit of the appellant that 'you can put anything in his mouth.'" *Id.* at 859 n.1. In addition, the appellant had an I.Q. measured at 59, putting him in the category of extremely low intelligence. *Id.* at 859.

[35] *Id.*

[36] *Id.*

[37] *Id.* The court added that the appellant's confession did not fail on the basis of access to a lawyer, as he did not request counsel. However, it continued to say that advice of counsel could be found sufficient to break the causal connection in similar circumstances. *Id.* at 190 n.2.

[38] *Id.*

[39] *Id.* at 190-91.

questionable sanity were discussed by the supreme court in *State v. Jackson*.[40] The court strongly suggested that before admitting into evidence any confession made by a suspect claiming insanity, the trial court should carefully study the competency of the suspect to waive his right to counsel and his capacity to make a statement.[41] The court also held that incriminating statements made to a psychiatrist during a court-ordered psychiatric examination were inadmissible at trial.[42] Further, from the date of this decision, all such examinations must be tape-recorded and copies of the tape must be furnished to both counsel and the judge for a determination of which statements made during the examination are inadmissible.[43]

Benjamin Franklin Jackson had been a friend of Stephen Weems for several years.[44] One morning, Jackson bought a handgun, went to Weems' home, smoked marijuana with Weems, then shot and killed him.[45] Jackson hid on the hillside for several hours before surrendering to police and making a tape-recorded confession.[46] He was put into jail, at which time his lawyer immediately moved that Jackson be examined for mental illness.[47] Within the next few days, Jackson was ordered transferred to Weston State Hospital, where he was determined to be incompetent to stand trial due to chronic, undifferentiated schizophrenia.[48] Jackson remained incompetent for one and a half years.[49] He was later convicted of the first-degree murder of Weems.[50]

Jackson appealed, claiming as error the admission into evidence of his confession made on the same day as the shooting.[51] The three psychiatrists who examined Jackson at the hospital testified that they believed Jackson was mentally ill at the time he committed the offense.[52]

Because the case was reversed on other grounds,[53] the supreme court did

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[40] 298 S.E.2d 866.

[41] *Id.* at 869.

[42] *Id.* at 872. Jackson's trial predated the effective date of the West Virginia Rules of Criminal Procedure, although the rules are in accord with this decision. *See* W. VA. R. CIV. P. 12.2(c) (1982), which states in part: "No statement made by the accused in the course of any examination provided for by this rule . . . shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding."

[43] 298 S.E.2d at 873.

[44] *Id.* at 868.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* One psychiatrist believed that Jackson was responsible for his conduct. Dr. Knapp had been appointed by the court, and was used by the State for rebuttal at the trial. He did not, however, testify at the suppression hearing. *Id.*

[53] The supreme court reversed because the trial court failed to instruct the jury about the

not rule on the admissibility of the confession. However, the court took great care to point out that the law in West Virginia is that "[c]onfessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible."[54] Noting that the confession was made the day of the shooting, the court reasoned that if Jackson was mentally ill the day he committed the crime he was also mentally incompetent, so that he could not waive his right to counsel or make a valid statement.[55] Noting that the state had the burden of proving the admissibility of the confession by a preponderance of the evidence,[56] the supreme court suggested that further evidence be elicited as to the defendant's condition at the time the confession was made.[57] The trial court should carefully study the defendant's competency to waive his right to counsel and his capacity to make a statement.[58]

Jackson also argued that statements he made to the court-appointed psychiatrist should have been held inadmissible because they were made during a custodial interrogation without being prefaced by *Miranda* warnings and with no lawyer present.[59]

While the admissibility of statements made to a psychiatrist has been considered by other courts,[60] this was the first time this issue had been considered by the West Virginia court. The court began its analysis by stating that, if the defendant presents or intends to present an insanity defense, relying on expert psychiatric or psychological evidence, he may be compelled to participate in a psychiatric examination for competence to stand trial and for criminal responsibility.[61] For purposes of self-incrimination analysis, a court-ordered psychiatrist is a state agent who questions a defendant while he is in custody.[62] The defendant's self-incrimination privileges under the fifth

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consequences to a defendant of being adjudged criminally insane. "In any case where the defendant relies upon the defense of insanity, the defendant is entitled to any instruction which advises the jury about the further disposition of the defendant in the event of a finding of not guilty by reason of insanity which correctly states the law . . . . " State v. Nuckolls, 273 S.E.2d 87 (W. Va. 1980).

[54] *Id.* (quoting State v. Hamrick, 236 S.E.2d 247 (W. Va. 1977)).

[55] 298 S.E.2d at 868.

[56] State v. Woods, 289 S.E.2d 500 (W. Va. 1982). *See* State v. Wilcox, 286 S.E.2d 257 (W. Va. 1982).

[57] 298 S.E.2d at 868.

[58] *Id.* at 869.

[59] *Id.*

[60] Houston v. State, 602 P.2d 784 (Alaska 1979); State v. Corbin, 15 Or. App. 536, 516 P.2d 1314 (1973); Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (1971).

[61] 298 S.E.2d at 870.

[62] The Oregon court noted: "[T]he psychiatrist examining the defendent for the state is for all purposes an officer of the state and no different than any police officer when questioning a

amendment and West Virginia Constitution article III, section 5 are therefore implicated.[63]

The court noted that *Miranda* warnings are but one way of protecting a defendant's rights,[64] and, in this instance, possibly not the best way: "A defendant who pleads insanity does not have the privilege to 'remain silent' as *Miranda* warnings advise. His refusal to be examined—an event that necessarily involves talk—may result in sanctions such as preventing him from submitting his own medical evidence of insanity."[65] To better protect the rights of mentally ill defendants, the court mandated that an *in camera* hearing be held to excise any portions of the psychiatrist's testimony that include incriminating statements made to the psychiatrist by the defendant.[66] These procedures cannot be waived except upon the advice of counsel:

> When a court . . . orders a pre-trial psychiatric examination of a defendant, we can presume there is a question about defendant's competency or mental condition. To guarantee that state and federal constitutional rights are scrupulously honored in these circumstances, we find that no waiver of these rights will be effective without notice of counsel.[67]

The court then went on to discuss the defendant's right to counsel. While noting that several courts have not found a pre-trial psychiatric interview to be a "critical stage" requiring access to counsel,[68] the supreme court noted that the results of such examination bear greatly on defendant's fair trial rights and should include the right to assistance of counsel.[69] The court stopped short, however, of requiring counsel's presence at the examination.[70] Fearing that counsel's presence could affect the accuracy and effectiveness of

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defendant." State v. Corbin, 15 Or. App. 536, 544; 516 P.2d 1314, 1318 (1973). It was important that this be made known to the defendant: "The defendant must be aware that the psychiatrist is employed by his adversary and is not primarily a healer." *Id.* at 546, 516 P.2d at 1319.

[63] 298 S.E.2d at 871.

[64] *Id.* at 869. The *Miranda* court specifically left the selection of procedures to the states: "We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege so long as they are fully as effective as the *Miranda* warnings . . . . " Miranda v. Arizona, 384 U.S. 436, 490 (1966).

[65] 298 S.E.2d at 872. The court refused to consider the argument that by pleading not guilty by reason of insanity the defendant had waived his right to remain silent, holding that constitutional rights are not easily waived. *Id.* at 870. *Cf.* Estelle v. Smith, 451 U.S. 454 (1981).

[66] 298 S.E.2d at 872.

[67] *Id.* at 873. This reasoning is the same used by the court in State *ex rel.* J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981), in which it held a juvenile defendant may not waive his rights except on advice of counsel.

[68] *See, e.g.*, United States v. Baird, 414 F.2d 700 (2d Cir. 1969), *cert. denied* 396 1005 (1969); U.S. v. Trapnell, 495 F.2d 22 (2d Cir. 1974); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

[69] 298 S.E.2d at 872.

[70] *Id.* Some states have permitted counsel to be present. *See* Howe v. State, 611 P.2d 16 (Alaska 1980); State v. Corbin, 15 Or. App. 505, 539 P.2d 1113 (1973).

the examination,[71] the court instead noted that the mandatory tape-recording of the examination and the required *in camera* hearing to suppress incriminating statements would do away with the need for the presence of counsel at the examination.[72]

The court mandated tape-recording does not interfere with any doctor-patient privilege. Unlike several other states,[73] West Virginia does not statutorily recognize a psychiatrist-patient relationship as "privileged." Instead, the communication between the patient and psychiatrist is considered "confidential information," and may be disclosed under certain, statutorily specified circumstances.[74] One of these is when a defendant is a party to an involuntary psychiatric examination by order of the court.[75] This exception is not surprising, and is consistent with the law of other states.[76]

The lack of encroachment on a recognized privilege, however, does not mean that there are not other questions about the use of tape-recording in this instance. In requiring the taping of pre-trial psychiatric interviews, the court did not say to what extent the material from the tapes will be permitted to be used in court, or for what reasons the recorded material may be used. The Alaska case cited by the court suggested that tape-recording would aid in accuracy.[77] However, it is difficult to see what purpose tape-recordings

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[71] *See* Estelle v. Smith, 451 U.S. 454. The court notes a federal circuit court of appeals finding.

[72] 298 S.E.2d at 873. The court says "[i]f the dangers of not having counsel present are eliminated by legislation or rule, then no rights are violated." *Id. See* United States v. Wade, 388 U.S. 218, 239 (1967).

[73] All but two states (South Carolina and West Virginia) statutorily recognize some form of physician-patient, psychiatrist-patient, psychologist-patient, or psychotherapist-patient privilege. Schuman and Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 912 (1982) [hereinafter cited as *Privilege Study*].

[74] "(a) Communication and information obtained in the course of treatment or evaluation of any client or patient shall be deemed to be 'confidential information . . . .' " W. VA. CODE § 27-3-1 (1977).

[75] W. VA. CODE § 27-3-1 (1977) provides in part that confidential information may be disclosed:

> (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."

W. VA. CODE § 27-6A-1 (Supp. 1983) provides:

> (a) Whenever a court of record . . . believes a defendant in a felony case or a defendant in a misdemeanor case in which an indictment has been returned, or a warrant or summons issued, may be incompetent to stand trial or is not criminally responsible by reasons of mental illness, mental retardation, or addiction, it may . . . order an examination of such defendant to be conducted by one or more psychiatrists . . . .

[76] "Application of the privileges requires that a person consult one whom he reasonably believes to be a physician or psychotherapist for the purpose of treatment or diagnosis in contemplation of treatment. For example, examinations to prepare for judicial testimony or as a prerequisite for employment are outside the privilege." Schuman and Weiner, *Privilege Study*, *supra* note 73 at 908-12.

[77] 298 S.E.2d at 873 (quoting Houston v. State, 602 P.2d 784, 796 (Alaska 1979)).

would serve that could not be served as adequately by a written transcript,[78] or in what way a higher degree of accuracy would be gained by video-taping, which is preferred by the court.[79] One author feels that an additional reason for the right to assistance of counsel in this instance, and an additional purpose of the taping, is to provide the defendant with the basis for impeaching the psychiatrist's testimony:

> [T]o be acceptable the videotaping must record all aspects of the interview and accurately depict such factors as the environment in which the interview is conducted and the verbal and non-verbal communication of both the defendant and the psychiatrist in order to provide the absent attorney with a sound basis for preparing for cross-examination of the psychiatrist at trial.[80]

For this purpose tape-recording is a decidedly inadequate instrument. Even the preferred videotaping may not provide the attorney with the subtle nuances involved in the examination. This may be the reason why some courts which permit taping as a substitute for presence of counsel do so on a discretionary basis,[81] rather than apply the taping to all situations as has been done by the West Virginia Supreme Court of Appeals.

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[78] The court may have believed a court reporter would have been intrusive in the examination. However, copies of the transcriptions to the tapes could be made available to counsel and to the judge for the hearing. If anything, this would seem to be much less wieldy than the tapes.

[79] 298 S.E.2d at 873 n.9

[80] Note, *The Right to Counsel During Court-Ordered Psychiatric Examinations of Criminal Defendants*, 26 VILL. L. REV. 135, 164-65 (1981).

[81] The Alaska court stated: "We think that all such future psychiatric interviews should be tape-recorded in their entirety. This requirement will aid in attaining the goal of accuracy at trial and, in the discretion of the defendant and his counsel, offers a potentially adequate alternative to the physical presence of defense counsel during the psychiatric interview." Houston v. State, 602 P.2d at 796.