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Criminal Law

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CRIMINAL LAW

I. SEARCH AND SEIZURE


During the survey period the West Virginia Supreme Court of Appeals had the opportunity to further define the extent of the rights protected under the fourth amendment. In spite of a continuing dilution of fourth amendment rights by the United States Supreme Court, the West Virginia Supreme Court of Appeals has remained a staunch defender of those rights. The court may decide to use the West Virginia Constitution in order to safeguard these rights to a higher degree than required by the United States Supreme Court.

In *State v. Aldridge* the West Virginia Supreme Court of Appeals held that a police officer's request for a murder-by-stabbing suspect to remove his gloves is not an unconstitutional search. The court determined that the intrusion was so minimal that it did not constitute a violation of the defendant's reasonable expectation of privacy.

Aldridge had been observed with friends at the victim's residence on the day of the killing and was sought for questioning. Two state troopers stopped Aldridge the next day on the street to ask him some questions. It was a warm afternoon and the officers noted the defendant was wearing gloves. Aldridge was asked to remove the gloves. He did, and the troopers saw a laceration on his hand. The defendant was arrested several weeks later, after another individual reported to police that Aldridge had displayed the wound in public and admitted to killing the victim.

At trial, Aldridge claimed that the trooper's testimony concerning the injured hand was inadmissible. He asserted that he had been subjected to an unconstitutional, nonconsensual search when he was required to remove his gloves, thus violating his reasonable expectation of privacy under the fourth amendment. On appeal, the supreme court followed the reasoning of *State v. Boswell* and concluded that the seizure was so minimal, that the traditional probable cause rule was not applicable. This reasoning parallels a series of United States Supreme Court decisions beginning with *Terry v. Ohio*.

In *Aldridge*, the court recognized that the concern underlying most

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1 304 S.E.2d 671 (W. Va. 1983).
2 *Id.* at 673.
3 294 S.E.2d 287, 295 (W. Va. 1982). The *Boswell* court held that a police officer walking over to a defendant's parked van, tapping on the window, and asking for identification was not an illegal seizure.
4 392 U.S. 1 (1968).
search and seizure problems is the need to protect an individual's reasonable expectation of privacy. The court stated that the defendant "had, at most, only a very limited reasonable privacy interest in keeping a glove on his cut hand." The defendant's argument was further weakened because he had displayed his wound in public. The West Virginia Supreme Court of Appeals cited the United States Supreme Court in *United States v. Dionisio* which held that the fourth amendment does not provide protection for what a person knowingly exposes to the public.

The court in *Aldridge* took a common sense approach in balancing the tension between effective law enforcement and the need to protect fourth amendment rights. Realizing the trivial invasion of Aldridge's privacy (especially considering his prior public disclosures) and recognizing the need to give police officers some flexibility in street encounters with suspects, the court held the search constitutional.

The court in *State v. Shingleton* dealt with the question of whether the warrantless search of an automobile that had been stopped for speeding violated defendant's fourth amendment rights.

In *Shingleton* the defendant was stopped by an Ohio state trooper for speeding. At the time of the stop, the trooper noticed two rolls of coins in the back seat of the car. Shingleton was charged with speeding and was required to follow the trooper to the Washington County Sheriff's Office to post an appearance bond.

Shortly after Shingleton and the trooper entered the Sheriff's office, the trooper heard a broadcast over a radio scanner stating that police should be on the lookout for old coins taken in a recent robbery. The trooper asked Shingleton about the rolls of coins in the car and Shingleton replied that they were empty. The trooper questioned this fact and Shingleton became nervous and his answers contradictory. The car was then searched, and money bags from a West Virginia bank were discovered. Shingleton was subsequently convicted in West Virginia on a two-count indictment for breaking and entering and for grand larceny. The trial court allowed the evidence discovered during the search to be admitted, finding that a valid search under the "automobile exception" was conducted.

On appeal, the defendant claimed that the warrantless search of his
automobile was unconstitutional. The court had little trouble finding that the automobile was legitimately stopped. The court then focused its inquiry on the exigent circumstances requirement of the automobile exception. It concluded that probable cause was established to search the vehicle because of the trooper's observation of the coin rolls, Shingleton's suspicious behavior, and Shingleton's contradictory statements. Focusing on the mobility of the car and the time required to obtain a warrant, the court found that exigent circumstances were sufficient to justify the warrantless search. With the legal arrest, probable cause and exigent circumstances requisites met, the court concluded that the warrantless search was constitutional.

The decision in Shingleton simply reaffirms the court's adherence to the well-settled rule that some searches of automobiles may be conducted without search warrants because of the auto's mobility and the diminished expectation of privacy. Shingleton is consistent with the court's prior holdings, and with the guidelines of the United States Supreme Court in this area.

Two areas of fourth amendment law were analyzed in State v. Hall: (1) probable cause as it relates to information obtained from unnamed informants and, (2) the required specificity of the description of property to be seized. The Hall court condoned the use of unnamed informants (with certain restrictions) and found the specificity of the description of items to be seized sufficient.

The defendant, Earl Hall, was convicted of fifteen counts (eleven felonies and four misdemeanors) of buying, receiving and aiding in the concealment of stolen property. At trial, he sought to suppress the items seized by the police pursuant to two search warrants. Hall argued that the first search warrant was unconstitutional because there was not probable cause to indicate criminal activity and because the descriptions of the items to be seized were overbroad. He further argued that since the first search warrant was invalid

12 The guarantee of freedom from unreasonable searches and seizures recognizes a necessary difference between a search of a dwelling house for which a search warrant may readily be obtained and a search of a ship, row boat, wagon or automobile for contraband goods where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the jurisdiction in which the warrant must be sought. J. KLOTTER & J. KANOVITCH, CONSTITUTIONAL LAW FOR POLICE § 4.10 at 150 (1971).
13 Shingleton, 301 S.E.2d at 627.
14 Id.
15 Id.
16 See State v. Moore, 272 S.E.2d 804 (W. Va. 1980) (holding that once a vehicle is stopped for some legitimate state interest probable cause may arise or exigent circumstances may be present which justify a warrantless search).
18 298 S.E.2d 246 (W. Va. 1982).
the second warrant was also invalid because it was issued to seize property observed during a previous illegal search.

Initially, the court examined the circumstances giving rise to the issuance of the first warrant. Hall asserted that the reliance on an unnamed informant to establish probable cause was improper under State v. Stone. In Stone the trooper obtaining the search warrant gave no facts concerning his informant's reliability and the informant had not personally viewed the property. Stone required that the facts which support reliability and the existence of criminal activities must be set forth before a magistrate, prior to the issuance of a warrant. In Hall, the court concluded that the facts had been properly set forth by the police officer to the magistrate, and therefore, the Stone deficiencies were not present. Construing Stone and Hall together, it can be fairly implied that the information underlying the informant's reliability and the existence of the enterprise must be expressed to the magistrate under the oath but does not have to appear in the affidavit for the warrant.

The defendant also contended that the search warrant description of items to be seized was insufficient. The court rejected this argument, relying on the Kansas case of State v. Walker, where a description of items similar in specificity was held to be constitutional. The court reasoned that there could be no confusion under the terms of the search warrant as to what was to be confiscated.

The court has again upheld the use of unnamed informants in procuring search warrants. The Hall decision further clarifies the necessary procedures to be followed when unnamed informants are used, in order to safeguard fourth amendment rights. The court's common sense approach to the specificity required in search warrants imposes a reasonable restriction on

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19 A West Virginia State Policeman received information from a confidential informant that a large quantity of tools, construction equipment, clearance lights marked Alfab, Inc., and one to two thousand pens with Gilmer Fuel Company printed on them were lying on and around a certain farm. By checking with various police departments, the policeman confirmed that the pens and lights had been stolen.

A warrant was obtained from a magistrate. The warrant listed which items were to be seized, i.e., "hand tools, power tools, clearance lights contained in a cardboard box with the name Alfab, Inc., Smithville, West Virginia, pens inscribed with the name of Gilmer Fuel Company inscribed thereon . . . ." He informed the magistrate that he had confirmed they were stolen and he added that his informant had viewed them personally. Hall, 298 S.E.2d at 249.


21 Id. at 53.

22 Id. at 251.


24 Hall, 298 S.E.2d at 252.
law enforcement. The court demands that the description be clear enough to avoid confusion. However, that standard does not require overly-detailed descriptions which would amount to an unnecessary or insurmountable burden for police.

The application of Hall to future unnamed informant cases is uncertain in view of the very recent United States Supreme Court decision in Illinois v. Gates. The Gates decision of 1983 relaxed the requirements of the exclusionary rule in informant cases.

In Gates, the police were tipped off to a drug ring by an anonymous letter. The Supreme Court relaxed its prior "two-pronged test" for the use of unnamed informants which required: (1) that the informant's basis of knowledge be revealed, and (2) that sufficient facts be presented to establish either the informant's "veracity" or his "reliability." The Court in Gates adopted the much more lenient "totality of the circumstances" test. Applying that test, the anonymous letter passed muster, and the evidence seized was not excluded.

Whether the West Virginia Supreme Court of Appeals will follow the Gates decision remains questionable. The court has in the past used the West Virginia Constitution in order to adopt stronger procedural protections than those of the United States Supreme Court. Although the West Virginia Supreme Court of Appeals has not expressly, as yet, used the West Virginia Constitution in that context with regard to fourth amendment rights, the court has alluded to this possibility in footnote 2 of State v. Canby.

In State v. Mays the court held that a voluntary confession obtained pursuant to an illegal arrest was inadmissible even though the defendant's fifth amendment rights had been adequately protected by Miranda warnings and regardless of the police officer's possible "good faith" reason for prolonging the interrogation.

Defendant voluntarily confessed to a murder during a nine hour seizure.
The *Mays* court reasoned that since defendant was never told he was free to go he was under de facto arrest.\(^2\) The prompt presentment statute\(^3\) requires that an individual under arrest must be presented to a magistrate without unnecessary delay. The court, following the rationale of two 1982 cases, *State v. Persinger*\(^4\) and *State v. Mitter*,\(^5\) applied a strict application of the prompt presentment statute and found the nine hour delay violative of the statute. Once the court found that there had been an illegal arrest, it applied *State v. Stanley*\(^6\) which held that a confession obtained by exploitation of an illegal arrest was inadmissible despite the fact that defendant's fifth amendment rights had been protected by *Miranda* warnings.

The State argued that the extended interrogation was conducted in good faith with the purpose of allowing the suspect to prove his innocence. The court rejected this argument and reasoned that at the appellate level it is difficult to make distinctions based upon the subjective reason for the seizure.\(^7\) Therefore, the court stated,

> By establishing a clear rule that police investigatory interrogations without presentment to a magistrate are allowable only when the suspect is expressly informed that he is not under arrest, is not obligated to answer any questions and is free to go, we hope to establish a system sufficiently flexible that the innocent are allowed to prove their blamelessness and the police are able effectively and legally to interrogate those who are ultimately proven guilty.\(^3\)

The decision in *Mays* demonstrates the court's heightened level of commitment to fourth amendment rights. By making the strong, fast rule that a suspect under arrest must be presented to a magistrate without unnecessary

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\(^1\) Id. at 658.

\(^2\) The defendant then requested a polygraph. The polygraph operator arrived after one hour and thirty minutes. Again proper *Miranda* warnings were given along with a proper waiver form. Another fifty minutes passed and now, five hours after his seizure (and before the polygraph test was administered), defendant orally confessed to the killing. A stenographer arrived two hours and twenty minutes after his oral confession and Mays signed the transcripts confession to the crime. Nine hours after the original seizure Mays was presented to the magistrate and the warrant was served upon him. During this nine hour seizure, Mays was never told he was free to go.

*Mays*, 307 S.E.2d at 656-57.

\(^3\) *W. Va. Code § 62-1-5* (1977). The statute reads in part:

> An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a [magistrate] of the county in which the arrest is made.

\(^4\) 286 S.E.2d 261 (W. Va. 1982).

\(^5\) 289 S.E.2d 457 (W. Va. 1982).


\(^7\) *Mays*, 307 S.E.2d at 658.

\(^8\) Id.
delay, regardless of the possible good intentions of the interrogator, the court minimizes possibilities of future confusion in this area. This holding should help protect citizens from future lengthy, illegal interrogations. On the other hand, it is doubtful that this ruling will hinder future interrogations of nonarrested suspects because all the police have to tell the suspect is that, "he/she is free to go and does not have to answer any questions."

II. SPEEDY TRIALS

State v. Foddrell, 297 S.E.2d 829 (W. Va. 1982).

The issue analyzed by the court in State v. Foddrell was whether defendant had been denied his constitutional right to a speedy trial. The defendant was indicted for robbery in 1973, several months after the crime occurred. He was arrested in Detroit in 1978, and stood trial in West Virginia in 1979. Following his conviction, the defendant appealed to the West Virginia Supreme Court of Appeals. The court affirmed his conviction, but remanded to the trial court to ascertain if the defendant was deprived of his right to a speedy trial by this six year lapse.

The sole issue in Foddrell was whether the State used due diligence in seeking the defendant. Foddrell introduced evidence that he lived openly in Detroit during the five years after his indictment and could easily have been found. Conversely, the State introduced evidence to show that it had taken reasonable steps to locate and arrest the defendant. The court applied the test adopted in State v. Cox to determine whether the defendant had been denied his constitutional right to a speedy trial. In Cox the court adopted the four-factor balancing test promulgated by the United States Supreme Court in Barker v. Wingo. The factors to be weighed under the test are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his rights and (4) prejudice to the defendant.

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297 S.E.2d 829 (W. Va. 1982).

The court reasoned that a delay of almost six years between indictment and trial clearly warrants further inquiry. Id. at 832.

Defendant claimed that he used his correct name and address in the Detroit telephone directory to apply for and receive a Michigan driver's license and to file yearly city, state, and federal taxes. Id. at 831.

The police interviewed numerous persons in McDowell County following the robbery in an attempt to discover the appellant's whereabouts. The investigator reports that he was in Martinsville, Virginia and notified other police departments that the appellant was a fugitive through NCIC computer and contact with the FBI. A capias was issued. The prosecuting authorities responded immediately to the 1975 report that the appellant was in New York, indicating their intent to seek extradition, and acted without delay to obtain custody of the appellant upon being notified of his arrest in Detroit in 1978. Id. at 832.


297 S.E.2d at 832.


Foddrell, 297 S.E.2d at 830 (quoting State v. Cox, 253 S.E.2d 517 (W. Va. 1979)).
Applying this test in Foddrell, the court found that the State had acted with due diligence to secure custody of the appellant for trial. However, the court also stressed the facts that the appellant knew the police were looking for him but did not contact them, appellant did not present documentary evidence supporting his claims of "open" living in Detroit, and appellant failed to show he was prejudiced by the delay.

The Foddrell decision does not reveal how much weight "deficiencies" such as those appearing in this case carry in the balancing process. Therefore, there are no "black and white" parameters to define the minimum standard that a police department must meet in its search for indictees. It should be assumed the court will continue to review the facts of each case individually in order to determine if the defendant was afforded his right to a speedy trial.

III. CONTEMPT


In *In re Yoho* the court held that an unjustified refusal to testify before a grand jury after receiving immunity constituted direct civil contempt and that a summary disposition of the matter did not violate defendant's due process rights.

Defendant, Robert Yoho, was indicted for two drug violations. The state offered to *nolle* both charges if he would testify as to his drug sources. Yoho refused to testify because he feared retaliation. Yoho was subpoenaed to testify before the Wetzel County Grand Jury and was granted immunity. He reiterated his refusal to testify for fear of harm to himself and his family. Yoho was warned that he was in contempt of court and could be incarcerated. Yoho acknowledged this, but maintained his refusal to testify. The court sentenced him to confinement in the Wetzel County Jail until he testified. A stay was granted pending this appeal.

The threshold question of whether fear of retaliation is justification for refusal was disposed of by the court by citing *Piemonte v. United States* and numerous circuit court decisions. It is a well-settled principle that fear of harm cannot justify a refusal to testify before a grand jury. This principle is grounded in the notion that if such refusals to testify were permitted then criminals would be encouraged to silence potential witnesses with threats and violence, thereby undermining the search for truth.

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* Foddrell, 297 S.E.2d at 832.
* Id.
* 301 S.E.2d 581 (W. Va. 1983).
* In re Yoho, 301 S.E.2d at 583.
* Id.
The primary issue decided by the Yoho court was whether the trial court had correctly labeled Yoho's refusal to testify a direct contempt. This classification is important because if it is classified a direct civil contempt then the West Virginia Code provides for a summary disposition.\(^5\) If the refusal to testify is merely an indirect criminal contempt then the Code sets strict limits as to the application of summary disposition.\(^6\)

The question of direct versus indirect contempt arises because Yoho's refusal to testify was made to a grand jury rather than in the presence of the court. The United States Supreme Court in *Harris v. United States*\(^7\) and other jurisdictions have held that grand jury witnesses' refusal to testify are indirect contempts and that summary disposition is erroneous. However, the West Virginia Supreme Court of Appeals found that Yoho's refusal to testify before the grand jury was a direct contempt and cited numerous other jurisdictions which concur.\(^8\)

The court next ascertained whether this was a civil or criminal contempt. The court focused upon the purpose of the sanction. Since Yoho was incarcerated for an indefinite amount of time (until he purged himself) and the purpose of the sanction was coercive in nature, the court found that the trial court had correctly labelled this as a civil contempt.\(^9\)

Defendant claimed that a summary disposition deprived him of his due
process rights. The court cited\textsuperscript{59} \textit{Chesapeake \& Ohio System Federation, Brotherhood of Maintenance of Way Employees v. Hash},\textsuperscript{59} which reemphasized that the basic procedural safeguards of due process rights are \textit{notice} and the \textit{opportunity to be heard}. The court found that Yoho had notice since he was warned both before and after his refusal to testify that his actions were contemptuous. Yoho was present with his counsel and had ample opportunity to be heard. Therefore, the court found that Yoho's due process rights were adequately protected.\textsuperscript{60}

The court in \textit{Yoho} has given the grand jury a useful tool to compel witnesses to testify. This tool, however, is not to be used contrary to a person's due process rights. The \textit{Yoho} ruling is further tempered by the court's emphasis that: (1) a civil contempt sanction is inappropriate where a defendant has no ability to purge himself; (2) the civil contempt sanction must cease when defendant does purge himself; and (3) a civil contempt sanction must cease at the end of the grand jury's term.\textsuperscript{61}

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\textsuperscript{59} \textit{Id.} at 585-86. \textit{Cf.} Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966) (recommending that civil sanctions to coerce testimony, if feasible, be attempted prior to resort to criminal penalties).

\textsuperscript{60} 294 S.E.2d 96, 101 (W. Va. 1982).

\textsuperscript{61} \textit{In re Yoho}, 301 S.E.2d at 587.

\textit{Id.}