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Criminal Procedure

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CRIMINAL PROCEDURE

State v. Bennett, 304 S.E.2d 35 (W. Va. 1983).
State v. Cooper, 304 S.E.2d 851 (W. Va. 1983).

Through two recent criminal cases, *State v. Bennett*[1] and *State v. Cooper*,[2] the West Virginia Supreme Court of Appeals readdressed several criminal procedure issues which affect trial judges and prosecutors alike. The court (1) set constitutional parameters upon the broad discretion given trial judges to impose sentences upon convicted defendants;[3] (2) reaffirmed limits to judicial intervention at trial, holding improper any intimation of the judge's opinion respecting a material issue;[4] and (3) reaffirmed the statutory mandate that prosecutors may not use a defendant's failure to testify as the subject of comment before the jury.[5] Through its holdings, the court expressed a great concern for maintaining the fair administration of justice, as well as for protecting the rights of defendants to impartial and error-free trials by jury.

State v. Bennett[6] (herein referred to as *Bennett II*) was the second of two trials wherein the appellant, Allen C. Bennett, was convicted for delivery of a controlled substance.[7] In *Bennett II*, the defendant was charged and convicted of delivery of a controlled substance, placidyl, to an undercover state policeman.[8] The West Virginia Supreme Court of Appeals, in a per curiam decision, reversed the conviction of Bennett due to three major errors which prejudiced him at trial.[9] These three errors were (1) the overruling of the defendant's challenges for cause against two prejudiced and biased jurors during voir dire;[10] (2) the judge's improper intimation of his opinion during questioning of a witness at trial;[11] and (3) the prosecuting attorney's repeated emphasis in his closing argument on the uncontradicted evidence in the case amounting to an emphasis on Bennett's failure to testify.[12]

The first reversible error occurred when the trial judge overruled the challenges for cause by Bennett's counsel against two prospective jurors. The prospective jurors then had to be removed from the jury panel through use

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[1] 304 S.E.2d 35 (W. Va. 1983) (per curiam).
[2] 304 S.E.2d 851 (W. Va. 1983).
[3] *Id.* at 857-59.
[4] 304 S.E.2d at 38.
[5] *Id.* at 38-39.
[6] *Id.* at 35.
[7] *See* State v. Bennett, 304 S.E.2d 28 (W. Va. 1983) (per curiam) (affirming conviction for delivery of a controlled substance, marijuana, despite an appeal asserting 13 assignments of error).
[8] 304 S.E.2d at 37.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 38.
[12] *Id.* at 39.

of peremptory strikes.[13] The court held that, although it was not an abuse of discretion for the trial court to refuse to excuse the prospective jurors simply because they knew appellant had been previously convicted of a crime, it was an abuse of the trial court's discretion to permit the prospective jurors to remain on the jury after they had admitted prejudice.[14]

One of the prospective jurors admitted that he was "very prejudiced against drug use," and that he thought persons guilty of delivery of controlled substances "ought to be hung."[15] The other prospective juror, aware of the appellant's past history, could only answer equivocally, "I think so," when asked if she could disregard previous information and base her verdict solely on the evidence presented at trial.[16] The court stressed that the refusal to remove these two jurors for cause after their admissions of prejudice and bias denied the appellant his right to a panel of twenty jurors, free from exception, before being called upon to exercise his peremptory strikes.[17] In reversing the lower decision, the court reaffirmed the principle that the true test of the qualifications of a juror to serve on the panel is "whether without bias or prejudice he [or she] can render a verdict solely on the evidence under the instructions of the court."[18] The holding of the court reflects the extreme care exercised by courts in general to preserve the constitutional right of an accused to an impartial jury and a fair trial.[19]

The second reversible error occurred when the trial judge, over defense objection, handed the state's testifying chemist a *Physician's Desk Reference* and instructed the witness to show a picture of the drug, placidyl, to the jury.[20] The state contended that the actions of the trial judge were for

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[13] *Id.*

[14] *Id.* at 37-38.

[15] *Id.* at 37.

[16] *Id.*

[17] *See* State v. Beck, 286 S.E.2d 234 (W. Va. 1981) (court recognized traditional right of a felony defendant to a panel of 20 jurors free from exception before exercising peremptory challenges, but affirmed conviction finding no error in refusal to strike jurors for cause); State v. Gargiliana, 138 W. Va. 376, 76 S.E.2d 265 (1953) (conviction reversed due in part to trial court's failure to dismiss prejudiced juror for cause from panel of 20 before peremptory challenges).

[18] State v. Beck, 286 S.E.2d 234, 239 (W. Va. 1982) (quoting State v. Wilson, 157 W. Va. 1036, 1043, 207 S.E.2d 174, 180 (1974)); *see also* West Virginia Dep't of Highways v. Fisher, 289 S.E.2d 213 (W. Va. 1982) (test is whether, without bias and prejudice, a juror can render a verdict solely on evidence under court instructions); State v. Camp, 110 W. Va. 444, 158 S.E. 664 (1931) (test is whether a juror can, without bias or prejudice, render a verdict solely upon evidence under court instructions disregarding any prior opinion).

[19] *See* Irvin v. Dowd, 366 U.S. 717 (1961) (prisoner was denied due process of law under the fourteenth amendment because the jury in the state trial was not impartial); Glasser v. United States, 315 U.S. 60 (1942) (right to a jury trial embraces the right to a proper trial); United States v. Puff, 211 F.2d 171 (2d Cir. 1954) (error occurs when judge without justification overrules a challenge for cause, leaving a juror not impartial on the panel).

[20] 304 S.E.2d at 38.

clarification only, and the defendant was not prejudiced thereby.[21] The supreme court found, however, that there was nothing in the testimony of the witness that required clarification. The book was not offered into evidence, and it would not have been admissible to identify the drug.[22] Further, the court found that the judge's actions only served to reinforce the chemist's testimony and to indicate the judge's opinion as to the identity of the drug.[23]

Finding the action of the judge highly improper and prejudicial to the defendant, the court held, consistent with past West Virginia cases,[24] that an intimation of a judge's opinion as to a material fact in issue constitutes reversible error.[25] Furthermore, the court stressed that a trial judge may not comment upon the weight of the evidence, the credibility of a witness, or indicate in any manner that he is partisan for either side.[26]

The court's holding follows the general fundamental principle that a trial judge should not do or say anything which would prejudice the parties involved in litigation.[27] "Whether or not a defendant is prejudiced" is the test generally used to determine if conduct by a judge constitutes reversible error.[28] By utilizing this test, the supreme court of appeals attempts to insure that criminal trials are conducted impartially. The court's holding requires a trial judge to be extremely cautious not to express an opinion either directly or by innuendo on any material matter within the exclusive province of the jury. The caution required by a trial judge in a criminal case is a recognition by the court that the trial judge occupies a unique position in the minds of jurors and as such is capable of unduly influencing them.[29] Nonetheless, until reaching the threshold level of prejudice, a trial judge has the right to in-

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] State v. McGee, 230 S.E.2d 832, 835-36 (W. Va. 1976), *overruled on other grounds*, State v. McAboy, 236 S.E.2d 431 (W. Va. 1977) (trial judge interrupted defense counsel's final argument improperly, but due to procedural default no error was found); *see also* State v. Crockett, 265 S.E.2d 268 (1979) (conviction reversed due to improper intervention and discriminatory conduct of trial judge); State v. Loveless, 140 W. Va. 875, 87 S.E.2d 273 (1955) (trial judge who improperly called and examined witness, intimated his belief in the defendant's guilt through this examination, and thus invaded the province of the jury).

[25] 304 S.E.2d at 38.

[26] *Id.*

[27] Travelers Ins. Co. v. Ryan, 416 F.2d 362 (5th Cir. 1969) (a judge's duty must be performed with strict neutrality and utmost impartiality).

[28] *Id. See* Annot., 49 A.L.R.3d 1186, 1193 (1973) (gestures or facial expressions of trial judge may be so prejudicial as to warrant mistrial or reversal); Annot., 34 A.L.R. 3d 1313, 1318 (1970) (prejudicial remarks by trial judge are generally a ground for reversal or new trial).

[29] *See* State v. McGee, 230 S.E.2d 832, 835-36 (W. Va. 1976), *overruled on other grounds*, State v. McAboy, 236 S.E.2d 431 (W. Va. 1977).

tervene in the trial to control its orderly process.[30] As held in the *Bennett II* opinion, the prejudice level is reached when a trial court judge (1) intimates an opinion (2) bearing upon a material matter (3) which is an issue within the exclusive province of the jury.[31]

The third reversible error occurred during closing argument. The prosecuting attorney repeatedly stated that "the State's evidence was uncontradicted or had not been denied, that certain evidence had not been introduced, and . . . the only witness who testified said [that] the defendant was guilty."[32] The court stressed that West Virginia Code Section 57-3-6[33] prohibits a prosecutor from using the failure of a defendant to testify as the subject of comment before the court or jury. Although isolated remarks that evidence is uncontradicted have been allowed by the court,[34] the repeated emphasis by the prosecuter concerning the uncontradicted evidence was held by the court to constitute reversible error.[35] Therefore, the court reversed the judgement of the trial court, and remanded the case for a new trial.[36]

By allowing isolated remarks, yet preventing repeated emphasis of uncontradicted evidence, the court balances the need of attorneys for some latitude during the heat of argument with the defendant's protected right not to take the stand. Pursuant to the fifth amendment to the Constitution of the United States[37] and article three, section five of the Constitution of West Virginia,[38] a defendant in a criminal case does not have to testify. As further protection, the West Virginia Code prohibits the use of the defendant's failure to testify from comment before the jury or court.[39]

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[30] *See* State v. Burton, 254 S.E.2d 129, 138 (W. Va. 1979) (conviction of defendant affirmed on review, finding conduct by trial judge not prejudicial).

[31] 304 S.E.2d at 38. *See also* State v. Wotring, 279 S.E.2d 182, 191 (W. Va. 1981) (comment by trial judge on non-material matter did not constitute reversible error); State v. Burton, 254 S.E.2d 129, 138 (W. Va. 1979).

[32] 304 S.E.2d at 38.

[33] W. VA. CODE § 57-3-6 (1966 & Supp. 1983) provides in pertinent part: "[The accused's] failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone."

[34] *See* State v. Clark, 292 S.E.2d 643 (W. Va. 1982) (isolated remark on uncontradicted evidence in prosecutor's closing argument held not to constitute a specific reference to defendant's failure to testify); State v. McClure, 253 S.E.2d 555 (W. Va. 1979) (single summary statement in closing argument by prosecutor that evidence as a whole was uncontradicted held not a violation of W. VA. CODE § 57-3-6); State v. Simon, 132 W. Va..322, 52 S.E.2d 725 (1949) (statement that the state had fully established its case and that none of the testimony had been denied held not a direct reference to the failure of the defendant to testify).

[35] 304 S.E.2d at 39.

[36] *Id.*

[37] U.S. CONST. amend. V.

[38] W. VA. CONST. art. 3, § 5 provides in pertinent part: "No person shall . . . be compelled to be a witness against himself."

[39] W. VA. CODE § 57-3-6 (1966 & Supp. 1983).

The reasoning followed in *Bennett II* was based upon several prior decisions of the West Virginia Supreme Court of Appeals which held that if a prosecutor's statements amount to a comment on the defendant's failure to testify, prejudicial error has occurred.[40] The holding in *Bennett II* illustrates the scrupulous protection provided by the court in not allowing a defendant's silence at trial to be treated or used as evidence against him.[41]

The West Virginia Supreme Court of Appeals was again given an opportunity to protect the rights of defendants in *State v. Cooper*.[42] The court addressed several issues: first, the admissibility of confessions; second, insufficiency of evidence; third, ineffective assistance of counsel; and fourth, sentencing proportional to the offense.

The appellant in *Cooper* was convicted of the statutory offense of robbery by violence[43] and sentenced for forty-five years to the West Virginia Penitentiary. He and his co-defendant had been arrested after trying to use stolen credit cards.[44] These cards were taken from the victim of the crime who, six days earlier, had been beaten, knocked unconscious, and robbed of his wallet, thirty-five dollars, and the credit cards.[45]

While at police headquarters, officers informed Cooper that the co-defendant had implicated him in the robbery.[46] Cooper then made his own statement about the robbery. Cooper's statement admitted that he and the co-defendant had reached for and taken the victim's billfold "at the same time" after punching the victim several times in response to a blow thrown by the drunk victim.[47] Cooper had been properly advised of his rights and had signed a waiver of rights form before making his statement.[48]

On appeal, the appellant argued that his confession should be invalidated.

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[40] State v. Noe, 230 S.E.2d 826 (W. Va. 1976) (prosecutor's statement that "you've either got an alibi or you don't" held a prejudicial comment on defendant's failure to testify); *see also* State v. Starcher, 282 S.E.2d 877 (W. Va. 1981) (comment that defendant was the only man who knew his own intent in transferring drugs was held a prejudicial comment on defendant's failure to testify); State v. Nuckolls, 273 S.E.2d 87 (W. Va. 1980) (repeated remarks ostensibly directed at defendant's insanity defense held to amount to a comment on defendant's failure to testify).

[41] *See* State v. Taylor, 57 W. Va. 228, 50 S.E. 247 (1905).

[42] State v. Cooper, 304 S.E.2d 851 (W. Va. 1983).

[43] W. VA. CODE § 61-2-12 (1977) provides in pertinent part:

If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten years.

[44] 304 S.E.2d at 852-53.

[45] *Id.* at 852.

[46] *Id.* at 853.

[47] *Id.*

[48] *Id.*

Cooper cited three reasons to support the invalidation: (1) his youth, (2) his low intelligence, and (3) the officers' comments to him that the co-defendant had implicated him in the robbery. Cooper argued that, due to these factors, his confession was involuntary and should therefore be inadmissible against him.[49]

In the court's analysis of the circumstances surrounding the appellant's confession, "no evidence of trickery, coercion, or duress" to induce the confession was found.[50] In fact, the court noted that the confession was properly admitted because the State had proved by a preponderance of the evidence that the confession was voluntary.[51] The court also found no evidence that Cooper was so youthful or subnormal in intelligence as to support invalidating his confession.[52] The court, therefore, held that the truthful statement by the police that the co-defendant confessed, which implicated Cooper, did not make the subsequent confession by the appellant inadmissible at trial.[53]

The appellant asserted next that the evidence at trial was insufficient to support the verdict against him.[54] The court applied the test enunciated in *State v. Starkey*[55] to determine the sufficiency of the evidence upon which the appellant was convicted. In applying the *Starkey* test, a court must review the facts surrounding the crime.[56] The court in *Cooper* did not state the facts it reviewed in making its determination that the evidence was not manifestly inadequate to support the verdict.[57] It is likely, however, that the appellant's admissible confession strongly influenced the court.

Cooper also claimed as error that his trial counsel representation was ineffective and inadequate.[58] As examples of counsel's ineffectiveness, Cooper

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[49] *Id. See* State v. Adkins, 289 S.E.2d 720 (W. Va. 1982) (intelligence a factor to be considered in determining whether a waiver of rights was voluntary); State v. Persinger, 286 S.E.2d 261 (W. Va. 1982) (confession held inadmissible due to police officer's inducement of defendant to cooperate in exchange for a good recommendation to a probation officer).

[50] 304 S.E.2d at 853; *see* State v. Goldizen, 93 W. Va. 328, 116 S.E. 687 (1923) ("Information from . . . [the attorney and sheriff] to . . . [the accused] that a confederate in the crime had confessed and placed the guilt on the accused, unaccompanied by any threat, inducement or promise of benefit by which he could escape from, or receive diminution of, punishment, from the consequences of the crime will not render the confession inadmissible.").

[51] 304 S.E.2d at 853; *see* State v. Goodmon, 290 S.E.2d 260 (W. Va. 1981).

[52] 304 S.E.2d at 853.

[53] *Id.*

[54] *Id.*

[55] State v. Starkey, 244 S.E.2d 219 (W. Va. 1978) (to set aside a verdict of guilty in a criminal case the reviewing court must (1) view the evidence in the light most favorable to the prosecution *and* (2) find that injustice had been done because the evidence was "manifestly inadequate" to support the guilty verdict, *but* (3) a verdict will not be set aside where the evidence is sufficient to convince impartial minds of the guilt of the accused beyond a reasonable doubt).

[56] 304 S.E.2d at 853.

[57] *Id.*

[58] *Id.* at 854.

complained that his counsel filed few pre-trial motions, failed to conduct investigations for developing a possible defense, called no witnesses at trial, did not object to many matters at trial, failed to have an expert examine his mental abilities, did not make an opening statement, did not move for reconsideration of his sentence, and failed to advise him to testify in his own defense.[59]

The court reasserted and applied the tests it had previously set forth in *State v. Thomas*:[60]

> If counsel's error, proven to have occurred, would not have changed the outcome of the case, it will be treated as harmless error . . . .
>
> Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interest, unless no reasonably qualified defense attorney would have so acted in the defense of the accused.[61]

Reviewing the trial court record, the court found most of counsel's alleged ineffective acts were not supported by any facts in the record, and the remainder not supported by the existing facts.[62] The appellant did not assert what pretrial motions should have been filed or why they should have been filed.[63] The record before the court did not reveal a lack of investigation, or any indications that Cooper was so mentally deficient that he should have been examined by an expert. The record did reveal that Cooper had told his attorney there were no witnesses to the crime. The court emphasized to Cooper that it was *his* decision whether to testify or not.[64] As the court considered each of the remaining alleged acts of ineffective assistance, it found that counsel's performance met the standard of a reasonable qualified attorney.[65]

Finally, the court looked at the forty-five year sentence imposed upon Cooper for his crime. Cooper asserted that the length of his sentence violated the principle of proportionality, articulated in the West Virginia Constitution.[66] The court found the sentence to be within the legislatively prescribed limits of ten years to life for robbery by violence.[67] The court further noted that a trial judge has broad discretion in determining the sentence to be im-

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[59] *Id.*

[60] State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974).

[61] *Id.* at 665-66, 203 S.E.2d at 461.

[62] 304 S.E.2d at 854.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] W. VA. CONST. art. III, § 5 (1982) provides in pertinent part: "Penalties shall be proportioned to the character and degree of the offence."

[67] W. VA. CODE § 61-2-12. *See infra* note 3.

posed.[68] Despite this broad discretion, however, the court stressed that sentencing must be tempered by article III, section five of the West Virginia Constitution.[69]

The court noted its continued adherence to the general rule of nonintervention with judicially imposed sentences that are within the legislative limits.[70] Nevertheless, the court carved out an exception, holding that lengthy sentences which affront the sensibilities and ignore proportionality principles will be reviewed.[71]

Two tests were stressed which could be used to determine whether a sentence is so disproportionate to a crime that it violates the constitution. The first is a subjective test.[72] If the sentence for the crime shocks the conscience of the court and society, then the inquiry stops and the sentence is unconstitutional.[73] The second test is the objective *Wanstreet* test.[74] Only if the sentencing passes the first subjective test will the court invoke the objective *Wanstreet* test. The objective test is a four-factor test which considers (1) the nature of the offense, (2) the legislative purpose behind the punishment, (3) a comparison of the punishment with what would be inflicted in other jurisdictions, and (4) a comparison of the punishment with other related offenses within the same jurisdiction.[75]

The court also pointed out that disparate sentences of co-defendants similarly situated may be indicative of grossly disproportionate, and thereby unconstitutional, sentencing.[76] The court cautioned, however, that disparate sentences are not per se unconstitutional, but must be evaluated with factors such as the amount of involvement by the defendant in the criminal transaction, his prior record, rehabilitative potential, and lack of remorse.[77] In *Cooper*, the co-defendant pleaded guilty to a lesser offense and was sentenced to one year in the county jail, whereas Cooper, pleading not guilty, was tried, convicted, and sentenced to forty-five years in the state penitentiary.[78]

In reviewing the information available concerning the appellant, the

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[68] 304 S.E.2d at 854-55; *see* State *ex rel.* Faircloth v. Catlett, 267 S.E.2d 736 (W. Va. 1980).

[69] W. VA. CONST. art. III, § 5; State v. Vance, 262 S.E.2d 423 (W. Va. 1980).

[70] 304 S.E.2d at 855; *see* State v. Newman, 108 W. Va. 642, 152 S.E. 195 (1930); Annot., 33 A.L.R.3d 335, 344 (1970).

[71] 304 S.E.2d at 855-56.

[72] *Id.* at 857.

[73] *Id.*

[74] Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W. Va. 1981). The four-factor test used in *Wanstreet* was first set down in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974).

[75] 304 S.E.2d at 857; *see also* Martin v. Leverette, 244 S.E.2d 39 (W. Va. 1978).

[76] 304 S.E.2d at 856; *see* Smoot v. McKenzie, 277 S.E.2d 624 (W. Va. 1981).

[77] 304 S.E.2d at 856.

[78] *Id.* at 853.

supreme court of appeals found that Cooper was nineteen at the time of the offense, used no weapon in commission of the crime, did not seriously or permanently injure the victim, had only a prior arrest for public intoxication, did not graduate from high school, lived on the streets, and needed "guidance and structure in his life."[79] The court found Cooper's sentence to be grossly disproportionate on its face to his crime, age, and prior record.[80] Therefore, the sentence was found shocking to the conscience of the court and to society.[81] Finding that the sentence was so offensive to our system of justice that it did not pass the first subjective test, the court suggested that the minimum sentence was more appropriate, and remanded the case for resentencing.[82]

In summary, the court in *Cooper* adopted a dual branch test to determine whether a sentence is disproportionately excessive to the crime committed. The first branch consists of two parts, the subjective test and the objective *Wanstreet* test. These tests determine if a sentence is unconstitutionally excessive in violation of proportionality principles. The second branch decides excessiveness on disparity principles. Under this second branch, the court looks at defendants similarly situated and considers factors such as amount of criminal involvement, prior record, rehabilitative potential, and lack of remorse, all in light of the length of the sentence imposed.

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[79] *Id.* at 855.
[80] *Id.* at 857.
[81] *Id.*
[82] *Id.* at 859.