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Evidence

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EVIDENCE

I. SIMILAR TRANSACTIONS

Gough v. Lopez, 304 S.E.2d 875 (W. Va. 1983).

When evidence of similar transactions is offered for the purpose of showing notice rather than actual similarity of the circumstances, the West Virginia Supreme Court of Appeals held that such evidence is admissible. Any question of remoteness-in-time of the evidence should not affect its admissibility, but should only affect the weight given to the evidence by the jury.¹

The plaintiff in *Gough* appealed the trial court's grant of summary judgment in favor of the defendant, Westinghouse. Gough and Lopez were both employed by the Westinghouse corporation in Fairmont, West Virginia. A few days after a collision in the company parking lot between the two employees, Lopez assaulted Gough with a blunt instrument, causing him to become totally and permanently disabled.

At the lower court proceedings, the plaintiff sought to introduce evidence of three previous unprovoked attacks by the defendant on another Westinghouse employee. All of these attacks had occurred in 1973, five years before the attack on the plaintiff. The trial court judge held the evidence of these prior attacks to be inadmissible on three grounds:

(1) the 1973 alleged assaults were too remote in time to be relevant to the alleged assault against Gough, (2) inasmuch as Lopez was acquitted during a contested peace bond proceeding in Marion County relating to one or more of the 1973 assaults, that acquittal diminished Gough's justification for introducing the 1973 assaults in his action against Westinghouse, and (3) because Westinghouse, had no apparent legal basis to discipline or discharge Lopez with respect to the 1973 alleged assaults, particularly in view of the acquittal with respect to the peace bond proceeding, evidence of the 1973 assaults would not be admissible against Westinghouse at trial.²

The plaintiff's purpose for introducing this evidence was to show that Westinghouse had notice of the defendant's dangerous propensities, and that it was therefore negligent in failing to warn the plaintiff of the impending danger.³

Generally, evidence of previous similar happenings is not admissible to show negligence regarding the event in question, unless the conditions surrounding the occurrences are substantially similar.⁴ The trial judge in this case held that the proffered evidence was too remote in time to meet the

¹ 304 S.E.2d 875 (W. Va. 1983).

² *Id.* at 878.

³ *Id.* at 877.

⁴ *See generally*, Annot., 70 A.L.R.2d 167, 198; E. CLEARY, MCCORMICK ON EVIDENCE 473-76 (2d ed. 1972); F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 262-63 (1978).

"substantially similar" requirement.⁵ However, the judge failed to consider whether the evidence might be admissible under an exception to the similar happenings rule.

The supreme court of appeals found that the evidence was being offered to show notice, and that "under the circumstances of this case, remoteness is not a proper ground for the exclusion at the trial against Westinghouse of evidence relating to the alleged assaults."⁶ The ruling in this case, therefore, marks West Virginia's recognition of the general rule that evidence of similar happenings will be admissible when offered to show that a defendant had notice, or knowledge, of a dangerous condition.⁷

Under these circumstances, the court found that the remoteness of the evidence was not a sufficient reason for excluding it. Rather, the remoteness should only affect the question of its weight before the jury.⁸ The result of this decision is that evidence of similar happenings, offered to show notice or knowledge on the part of a defendant, is an exception to the general rule that prior transactions are inadmissible to show negligence on a later occasion.⁹ In light of this determination, the supreme court of appeals held the trial judge had abused his discretion, and ordered that the case be reversed and remanded.¹⁰

II. TREATISES

Thornton v. C.A.M.C., 305 S.E.2d 316 (W. Va. 1983).

In *Thornton v. C.A.M.C.*,¹¹ the West Virginia Supreme Court of Appeals held that when an expert witness refuses to voluntarily recognize the authoritativeness of a medical treatise, the cross-examining party can prove its authoritativeness by other means, such as through other expert testimony or by judicial notice. Once the authoritativeness of the treatise is established, the expert may be cross-examined regarding its contents.¹²

The *Thornton* case involved a medical malpractice claim. At trial, the plaintiff's attorney attempted to question witnesses on direct examination and on cross-examination concerning the contents of a medical treatise. The

⁵ 305 S.E.2d at 878; see also Annot. 70 A.L.R.2d 167, 208-09.

⁶ 305 S.E.2d at 878.

⁷ See generally, E. CLEARY, MCCORMICK ON EVIDENCE 474-75 (2d ed. 1972); F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 264 (1978).

⁸ 305 S.E.2d at 879. The court also rejected the trial court's other two reasons for not allowing the admission of the similar happenings evidence.

⁹ See *supra* note 4.

¹⁰ 305 S.E.2d at 879.

¹¹ 305 S.E.2d 316 (W. Va. 1983).

¹² *Id.* (syllabus point 4 by the court).

trial court judge refused to allow the treatise to be used on direct examination, but did allow its use on cross-examination.

On appeal, the plaintiff's attorney urged the court to adopt Federal Rule of Evidence 803(18), and to hold that medical treatises are an exception to the hearsay rule and may therefore be used for substantive as well as impeachment evidence.¹³ The court, however, found the record to be insufficient concerning the plaintiff's attempted use of the treatise on direct examination and refused to reach the merits on that issue.¹⁴ On the issue of cross-examination, the supreme court of appeals noted that although most jurisdictions allow the use of treatises on cross-examination, they vary with regard to the foundation which must be laid before the treatise may be utilized.¹⁵

The West Virginia court adopted the most liberal rule regarding the use of treatises in the cross-examination of expert witnesses. In West Virginia the expert does not have to rely on the treatise in forming his opinion in the case in order to be cross-examined concerning it. If the witness acknowledges the treatise's authoritativeness, he may be cross-examined regarding its contents. If the expert refuses to acknowledge the treatise's authoritativeness, the cross-examiner may establish the authoritativeness by judicial notice or by the testimony of another expert witness. The expert may then be cross-examined regarding the treatise.¹⁶

¹³ The text of FED. R. EVID. 803(18) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) *Learned treatises*—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

¹⁴ 305 S.E.2d at 320. "The record is incomplete in this area, apparently because the plaintiff's attorney utilized the provisions of Rule 4A of our Rules of Appellate Procedure, which permits an appeal without the necessity of an evidentiary transcript." *Id.*

¹⁵ *Id.* at 322; see also, E. CLEARY, MCCORMICK ON EVIDENCE § 321, 743 (2d. ed. 1972); Annot., 60 A.L.R.2d 77 (1958). The differing uses are summarized in 31 AM. JUR. 2d *Expert and Opinion Evidence* § 67 at 576-77 (1967):

(1) [S]ome courts have held that where the expert has relied generally or specifically upon the authorities, he may be attacked upon the basis of authorities which are not necessarily the same as those which he has himself used; (2) another group of cases takes the view that the expert may be examined upon the basis of treatises which he has himself recognized as having authoritative status, whether or not he relied thereon in forming his opinion; and (3) there are many cases recognizing that the cross-examiner may use treatises the authority of which is established in any acceptable manner, to test the qualifications of the witness, regardless of whether that witness has relied upon or recognized the treatise. (footnotes omitted)

¹⁶ 305 S.E.2d at 322.

III. ADVERSE PUBLICITY

State v. Williams, 305 S.E.2d 251 (W. Va. 1983).

A criminal defendant who seeks a mistrial based on the dissemination of adverse publicity during trial must accompany his request with evidence showing that the jurors were in fact exposed to the publicity.¹⁷ Furthermore, the proper method of determining whether there has been actual exposure is to poll the jury at the time the motion for the mistrial is made.¹⁸ By failing to poll the jury when the motion for mistrial is tendered, the defendant waives his right to assert the possible prejudicial effect of the publicity in any later motion for a new trial.¹⁹

In the *Williams* case, the defendant and a friend were jointly indicted for murder, arson and robbery. The two trials were severed, and the friend, whose trial was held first, was convicted of robbery, but was acquitted on the murder and arson charges. After his arrest, the friend made a statement to the police which implicated the defendant.

At the close of the first day of the defendant's trial the court admonished the jury to ignore any publicity concerning the trial. That same evening the local newspaper published an article covering the trial which detailed the friend's earlier statement to the police. Importantly, the friend did not testify at the defendant's trial. Therefore, the statement which implicated the defendant was never admitted into evidence.

The following morning the defendant's counsel moved for a mistrial based on the alleged prejudicial nature of the article. The defendant's counsel was offered an opportunity to poll the jury to determine whether any of the jurors were exposed to the article or were prejudiced by it. The counsel refused to poll the jury for two reasons: first, he was concerned that polling the jury at such an early stage of the trial would raise suspicions and doubts in the jurors' minds, and second, he did not want to draw their attention to the article.²⁰ The motion for a mistrial was denied and the trial continued.

At the close of the trial, the jury returned a verdict convicting the defendant on all three charges. Defendant's counsel again raised the issue of the prejudicial publicity in his motion for a new trial. In support of the motion, he filed the affidavits of two witnesses stating that they saw a juror carrying a copy of the newspaper containing the inflammatory article into the jury room. This motion for a new trial was also denied, and the defendant asserted this denial as error on appeal.

¹⁷ *State v. Williams*, 305 S.E.2d 251 (W. Va. 1983) (syllabus point 4 by the court).

¹⁸ *Id.* (syllabus point 5).

¹⁹ *Id.* (syllabus point 6).

²⁰ *Id.* at 262.

The supreme court found that the newspaper article in this case was highly prejudicial. "There is little question in our minds as to the possibly prejudicial nature of the information contained in the newspaper article which appeared on the first day of trial."²¹ The court noted, however, that although the article was highly prejudicial, there was no showing that the jury had been exposed to it. "In the absence of a showing of juror exposure to prejudicial publicity during the course of trial, it will be presumed that the jurors followed the trial court's instructions to avoid or ignore such publicity."²²

The court recognized, however, that showing actual exposure to prejudicial publicity would be difficult without an opportunity to question the jurors. For this reason the court held that the proper method for showing jury exposure to prejudicial publicity is to poll the jury when the motion for the mistrial is made.²³

In this case, however, counsel for the defendant expressly declined to poll the jury, but attempted to reassert the possible prejudicial effect of the article as grounds supporting his motion for a new trial. The court stated, "We do not think that a defendant should be permitted to refuse an opportunity to question the jurors as to their exposure to publicity during the course of trial, hoping for a favorable verdict, and then to raise the issue of prejudice upon return of an unfavorable verdict."²⁴

Although the court's holding makes it clear that the failure to poll the jury when moving for a mistrial will result in a waiver of the defendant's right to assert the prejudicial publicity as grounds for a new trial, the court recognized that under some circumstances a defendant will be entitled to a new trial notwithstanding the previous refusal to poll the jury. Unfortunately, the ambiguity surrounding these circumstances is the most troubling aspect of the *Williams* case. The court appears to set forth two different standards for deciding when a defendant is entitled to a new trial based on the dissemination of prejudicial publicity during trial. At one point the court states, "To overcome the failure to inquire of the jurors at the proper time the evidence must demonstrate that there was, at least, actual exposure to the prejudicial publicity and, at most, actual prejudice resulting therefrom."²⁵ This standard appears to require either a showing of actual exposure or a showing of actual prejudice before the defendant is entitled to a new trial.

²¹ *Id.* at 260.

²² *Id.* at 261.

²³ *Id.* The court expressly disapproved the standard in some jurisdictions which requires a showing of actual prejudice before the defendant may poll the jury. *See also* *State v. Williams*, 230 S.E.2d 742 (W. Va. 1976).

²⁴ 305 S.E.2d at 261-62.

²⁵ *Id.* at 262.

However, the court also sets forth a more stringent requirement mandating a showing that some member of the jury was in fact improperly influenced by the publicity disseminated during trial.²⁶

The effect of this decision for a practicing attorney is that, regardless of his or her strategic concerns, the jury must be polled when moving for a mistrial based on prejudicial publicity disseminated during the client's trial.

An attorney who fails to poll the jury to discover actual exposure or prejudice will risk waiving the right to assert the prejudicial publicity in a motion for a new trial, unless the usual circumstances required to overcome that failure can be shown. Unfortunately, it is difficult to determine precisely what kind of showing will be required. Given the cost of a new trial, both in terms of time and money, the court will undoubtedly want to limit granting them to occasions when they are absolutely necessary. Therefore, it is likely that the court will apply the more stringent of the standards stated in the *Williams* case, and require a showing that a juror was improperly influenced by the publicity. This is not an easy task since the trial is complete and the jury gone when the motion for a mistrial is usually made.

IV. USING JUVENILE RECORDS

State v. Lucas, 299 S.E.2d 21 (W. Va. 1982).

In *State v. Lucas*, the West Virginia Supreme Court of Appeals reiterated its position that juvenile records, or testimony derived from them, cannot be used in adult criminal proceedings.²⁷

In the *Lucas* case, state police received the names of the defendant and another man in connection with the breaking and entering and robbery of a school building in Wheeling, West Virginia. The school was dusted for fingerprints, and the defendant's name and Federal Bureau of Investigation (FBI) number were submitted to the FBI for a fingerprint comparison. The comparison positively identified one of the fingerprints found at the school as belonging to the defendant. The fingerprints on file with the FBI were taken when the defendant was a juvenile.

Defendant's counsel filed a motion *in limine* seeking to prohibit the introduction of any testimony concerning the fingerprint comparison at the defendant's trial. The defendant's motion was overruled and testimony concerning the comparison, along with the fingerprint card used in making the comparison, were admitted into evidence.

The prosecution in *Lucas* asserted that the expungement requirements in West Virginia Code section 49-5-17 did not apply to federal bodies, and that

²⁶ *Id.* (syllabus point 6).

²⁷ 299 S.E.2d 21 (W. Va. 1982).

juvenile records on file with a federal body may be used in adult criminal proceedings. The court disagreed, and stated that the legislative intent was clear, and that juvenile records could only be used for the purposes enumerated in the statute.²⁸

The court therefore held that the "West Virginia Code . . . does not authorize a court to permit juvenile law enforcement records to be used in a criminal case as evidence in chief in the state's case."²⁹ The court further refused to expand upon the legislatively created exceptions to the general rule expunging all juvenile records.³⁰

Although protecting the confidentiality of juvenile proceedings is an important goal, the West Virginia Supreme Court of Appeals must be careful not to be overly protective in situations where such protection could lead to other constitutional conflicts. In *Davis v. Alaska*,³¹ the United States Supreme Court noted that there are occasions when the confidentiality of juvenile records must be sacrificed. In *Davis* the Supreme Court held unconstitutional the application of an Alaska statute which had the effect of deny-

²⁸ W. VA. CODE § 49-5-17(d) (1980) provides in part:

(d) Notwithstanding this or any other provision of this Code to the contrary, juvenile records and law enforcement records shall not be disclosed or made available for inspection, except that the court may, by written order pursuant to a written petition, permit disclosure or inspection when:

(1) A court having juvenile jurisdiction has the child before it in a juvenile proceeding;

(2) A court exercising criminal jurisdiction over the child requests such records for the purpose of a presentence report or other dispositional proceeding;

(3) The child or counsel for the child requests disclosure or inspection of such records;

(4) The officials of public institutions to which a child is committed require such records for transfer, parole or discharge considerations; or

(5) A person doing research requests disclosure, on the condition that information which would identify the child or family involved in the proceeding shall not be divulged.

(e) No individual, firm, corporation or other entity shall, on account of a person's prior involvement in a proceeding under this article, discriminate against any person in access to, terms of, or conditions of employment, housing, education, credit, contractual rights or otherwise.

(f) No records of a juvenile convicted under the criminal jurisdiction of the court pursuant to subdivision one, subsection (d), section ten [§ 49-5-10] of this article shall be expunged.

(g) Any person who willfully violates this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars, or confined in jail not more than six months, or both such fine and imprisonment, and shall be liable for damages in the amount of three hundred dollars or actual damages, whichever is greater.

²⁹ 299 S.E.2d 21 (syllabus point 1 by the court).

³⁰ *Id.* at 23 (quoting *State v. Van Isler*, 283 S.E.2d 836 (W. Va. 1981)).

³¹ 415 U.S. 308 (1974).

ing the defendant his sixth amendment right to confront his accuser. The prosecution had successfully moved for a protective order which prevented any reference to the juvenile record of the witness who was on probation by order of a juvenile court. The defendant wished to show that the witness might be subject to undue police pressure given his status as a juvenile probationer. When these two interests conflict, the Supreme Court held that the defendant's right to a fair trial outweighed the state's interest in protecting the confidentiality of the juvenile record.

The Court's holding in *Davis* should serve as a warning to West Virginia courts that the state's interest in preserving the confidentiality of juvenile records may not be applied so as to hinder another party in the exercise of his constitutional rights.³²

V. BURDENS OF PROOF

State v. Hodges, 305 S.E.2d 278 (W. Va. 1983).

Because the absence of a license is an element of the crime of carrying a deadly weapon without a license, the state must bear the burden of proving that element.³³ In *State v. Hodges* the defendant appealed his conviction for carrying a gun without a license, asserting as error the State's failure to establish, *prima facie*, that he did not possess a valid license.

The West Virginia statute making it a crime to carry an unlicensed weapon reads in part, "If any person, without a state license therefore . . . carry about his person any revolver or pistol . . . or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor. . . ."³⁴ The prosecution relied on existing authority which required the accused to prove the existence of a valid license.³⁵ This older rule was premised on the belief that the defendant was in the better position to easily show the existence of the license.³⁶ However, the West Virginia Supreme Court of Appeals held that the previous rule was incorrect.

The new rule, as stated by the court in *Hodges*, recognizes that the absence of a license is an essential element of the crime of carrying a deadly weapon without a license. Therefore, the burden of proving the nonexistence

³² At least one of our West Virginia Supreme Court Justices appears to be aware of this fact. In *Jeffery v. McHugh*, 273 S.E.2d 837 (W. Va. 1981), the majority held that the juvenile records of a deceased juvenile were to remain confidential. Justice Neely dissented "because the result is absurd." He noted that "[o]nce the rights of the living are at stake, those rights must take precedence over the right of a dead child to be protected in his reputation." *Id.* at 839 (Neely, J., dissenting).

³³ *State v. Hodges*, 305 S.E.2d 278 (W. Va. 1983).

³⁴ W. VA. CODE § 61-7-1 (1977).

³⁵ *State v. Merico*, 77 W. Va. 314, 87 S.E. 370 (1915).

³⁶ 305 S.E.2d at 283 (quoting *State v. Merico*, 77 W. Va. 314, 87 S.E. 370 (1915)).

of the license lies with the state. Rather than breaking new ground in the *Hodges* decision, the court has merely extended an already familiar principle that the state must prove all the essential elements of a crime beyond a reasonable doubt.³⁷

In addition to changing the burden of proof, the court set forth procedures to guide the state when attempting to prove the absence of a license.

The statute governing licensing procedures for weapons requires the clerk of the circuit court to submit to the Superintendent of the Department of Public Safety a certified list of all persons licensed to carry weapons in that county.³⁸ Therefore, the court held that the state will be deemed to have met its burden of proof if a reasonable search of the Superintendent's records fails to show any record of the license.³⁹ The defendant may then introduce evidence proving that he does in fact have a valid license.⁴⁰

The court's decision in *Hodges* adds to the consistency and fairness of the state's criminal law. By requiring the state to prove the absence of a license beyond a reasonable doubt, the court will be better able to protect the accused's right to a presumption of innocence until he is proven guilty. The United States Supreme Court has held that it is violative of a defendant's due process rights if he must negative an element of the offense with which he is charged.

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.⁴¹

In light of this, the decision in *Hodges* may be viewed as the correction of an essential unfairness which existed in our criminal justice system.

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³⁷ 305 S.E.2d at 284 and authorities cited therein.

³⁸ W. VA. CODE § 61-7-2 (1977).

³⁹ 305 S.E.2d at 285.

⁴⁰ *Id.*

⁴¹ *In re Winship*, 397 U.S. 358, 364 (1970) (quoting *Spieser v. Randall*, 357 U.S. 513 (1958)).