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State v. Stanley Exclusion of Statements Made by Illegally Seized Suspects

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STATE v. STANLEY EXCLUSION OF STATEMENTS MADE BY ILLEGALLY "SEIZED" SUSPECTS

I. INTRODUCTION

The United States Supreme Court has focused much of its attention in the last two decades on the administration of criminal justice. In at least two areas, the Court has directly influenced the manner in which the criminal law is enforced. In its search and seizure and its confession decisions, the Court has made direct demands upon law enforcement officers to comply with procedural safeguards for the protection of the basic constitutional rights of the individual citizen in his confrontations with the law.[1]

In the search and seizure and confession areas the sanction provided by the Court has been the same: exclusion of evidence secured in violation of its mandates.[2] Although at first those mandates focused primarily on the defendant's fifth amendment[3] right against self-incrimination, the focus shifted to the accused's rights under the fourth amendment[4] ban against an unreasonable search or seizure. When the defendant in a criminal case shows that evidence against him was obtained through the exploitation of an illegal search or seizure, the exclusionary rule requires that such evidence be suppressed.[5]

The Court has further defined and expanded the protections afforded the accused in rulings handed down since its landmark decisions of the 1960s.[6] The West Virginia Supreme Court of Appeals has strived to protect individual rights in accordance with those decisions. The 1981 case of *State v. Stanley*[7] presented the court with the opportunity to tailor the state's law on seizures,

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[1] V. BRODERICK, CRIMINAL DEFENSE TECHNIQUES § 3.01 (1982).

[2] "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206 (1960).

[3] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

[4] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[5] Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applicable to the states through the fourteenth amendment); Weeks v. United States, 232 U.S. 383 (1914) (exclusionary rule applicable to federal prosecutions).

[6] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Jackson v. Denno, 378 U.S. 368 (1964); Wong Sun v. United States, 371 U.S. 471 (1963).

[7] 284 S.E.2d 367 (W. Va. 1981).

confessions and *Miranda* warnings.[8] A voluntary detention which evolved into a "seizure" was held to be the basis for the exclusion of the appellant's later confession because the causal connection between the arrest and the confession had not been broken.[9] Furthermore, protection of the appellant's fifth amendment rights, through the giving of *Miranda* warnings, was held to be insufficient to free the statement from the "taint of illegal police conduct."[10]

II. STATEMENT OF THE CASE

The appellant, Mary Jo Stanley, fatally shot her father in the back of the head as he was beating her mother. The two women put the body in the family car and drove it out of town. By taking the victim's watch and ring, they hoped to make it appear that a robbery and murder had occurred. After returning to their house in another car, they called the police to make a missing person report. Two days later the Wayne County Sheriff's Department discovered the body in the car and notified the Huntington Police Department. An officer first talked with the victim's family on that date.

Five days later the officer returned to the victim's house and asked the appellant, her mother and children to come to the police department to assist in giving information about the victim. They consented, arriving at the station at 4 p.m. Each family member was given *Miranda* warnings before interrogation; they also signed waivers after tape-recorded statements. After the appellant's daughter and mother were questioned, the appellant was questioned. Her son was then questioned and, at about 11 p.m., she was interrogated again. During the final interrogation she admitted on tape that she had shot her father. Arrest warrants were then obtained for the appellant, her mother and her son.[11]

The trial court held that initially the appellant and her family were not deprived of their freedom of action in any significant way and were not abused, threatened or promised leniency. And, although it found that probable cause to arrest the appellant did not exist until after her statement was given, the court admitted the confession into evidence at trial. Stanley was convicted of second degree murder[12] in the Cabell County Circuit Court.[13]

In reversing the lower court, the West Virginia Supreme Court of Appeals held that the appellant had been "seized" because she was not free to leave police headquarters after her son was questioned. Therefore, it reasoned, her

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[8] Miranda v. Arizona, 384 U.S. 436 (1966), held that a defendant subjected to "custodial interrogation" has the right to the presence of counsel during such interrogation and the right to be informed of both his right to counsel and his right to remain silent.

[9] *Stanley*, 284 S.E.2d at 370.

[10] *Id.*

[11] 284 S.E.2d at 368-69.

[12] "Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree." W. VA. CODE § 61-2-1 (1977).

[13] 284 S.E.2d at 368.

subsequent confession was inadmissible because there were no intervening circumstances between the seizure and the confession to free her statement from the taint of illegal police conduct.[14]

Additionally, the court held that a retrial of the appellant would not constitute double jeopardy under the fifth amendment. Because the case was being reversed for constitutional error and not for insufficient evidence, the prosecution was not barred from presenting alternative evidence to prove its case at a second trial.[15]

III. Prior Law

A. *United States Supreme Court Decisions*

The common law requirement of voluntariness formerly constituted the primary limitation on the use of a defendant's incriminating statements at trial.[16] Voluntariness was determined by examining the totality of the circumstances; courts treated almost everything as relevant and nothing as controlling. Among the factors considered in determining the admissibility of a confession under the voluntariness test were the duration of the interrogation, the physical surroundings during the interrogation, whether the interrogator was attempting to elicit a confession in accord with police preconceptions, whether there was physical abuse or threats thereof, the health of the confessor, the confessor's prior experience with the law, and an almost endless list of other circumstances.[17] The illegality of an arrest had been just one factor to consider in determining the voluntariness of a statement.[18] A statement obtained during custody following an unjustified arrest was not regarded as inadmissible by virtue of the illegality of the detention alone.

Then, in 1963, the Supreme Court in *Wong Sun v. United States*[19] declared that the fourth amendment requirement that a seizure of the person be "reasonable" provided the basis for excluding statements obtained after an unreasonable arrest or detention. Much earlier the Supreme Court had ruled that evidence seized during an unlawful search could not constitute proof against the victim of the search.[20] Later, the exclusionary prohibition had been extended to exclude any derivative evidence discovered by using knowledge gained by the police through their illegal conduct.[21] This derivative evidence was dubbed the "fruit of the poisonous tree."[22] The primary evidence obtained in the search is the poisonous tree and the derivative evidence its fruits.[23]

The Court in *Wong Sun* extended the "fruit of the poisonous tree" doc-

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[14] *Id.* at 370.
[15] *Id.*
[16] C. McCormick, Handbook on the Law of Evidence § 147, § 149 (2d ed. 1972).
[17] *Id.* at § 149.
[18] Dailey v. United States, 261 F.2d 870 (5th Cir. 1958).
[19] *Wong Sun*, 371 U.S. 471 (1963).
[20] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
[21] Nardone v. United States, 308 U.S. 338 (1939).
[22] *Id.* at 341.
[23] W. Ringel, Searches & Seizures, Arrests and Confessions § 3.2 (2d ed. 1981).

trine beyond the traditional seizure of "papers and effects" to verbal statements obtained as a result of unlawful police action. The Court held that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion,"[24] and is thus inadmissible.

Despite *Wong Sun*'s holding that the government could not exploit the illegality of an arrest, the decision left the *basic* law relating to the admissibility of confessions unchanged.[25] The question upon challenge still was simply whether the statement offered was voluntary. *Wong Sun* merely added the causation factor: even though a confession made during an illegal detention is found to be voluntary, the confession is inadmissible if the illegal detention was an operative factor in causing it.[26] The next year the Supreme Court, in *Jackson v. Denno*,[27] prescribed the courtroom procedures which must be followed in determining the admissibility of any confession.

It was not until the 1966 decision of *Miranda v. Arizona*[28] that the privilege against compulsory self-incrimination was used to protect a person facing police interrogation. For the first time, the court expressly declared that fifth amendment protection against self-incrimination was required in state custodial interrogations[29] and that an accused's statements might be excluded at trial despite their voluntary character under traditional principles.[30]

After *Wong Sun* and *Miranda*, some courts incorrectly construed the interrelationship of the fourth and fifth amendment principles announced in the two cases.[31] Some reasoned that the giving of *Miranda* warnings was sufficient to "purge the taint" of the illegality. Because of its concern with such a holding by the Supreme Court of Illinois[32] the United States Supreme Court granted *certiorari* in *Brown v. Illinois*[33] in 1975.

The United States Supreme Court held the Illinois court had erred in

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[24] Wong Sun v. United States, 371 U.S. 471, 485 (1963).

[25] Ryon v. State, 29 Md. App. 62, 349 A.2d 393, 396 (Md. Ct. Spec. App. 1975), *aff'd*, 32 Md. App. 529, 363 A.2d 243 (1976).

[26] State v. Traub, 151 Conn. 246, 249-50, 196 A.2d 755, 757 (1963), *cert. denied*, 377 U.S. 960 (1964). In *Wong Sun*, the illegal custody of one defendant had terminated and his statement was obtained several days later during voluntary interrogation. His statement was held not to be the fruit of the arrest because "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" 371 U.S. at 491 (quoting Nardone v. United States, 308 U.S. 338, 341).

[27] 378 U.S. 368 (1964). The question of the voluntariness of a confession must be decided by the court, not the jury.

[28] 384 U.S. 436 (1966).

[29] Prior to *Miranda*, the Court's attention in reviewing involuntary confessions was directed to due process in the context of the trial. *Miranda* redirected the Court's focus to stationhouse process. BRODERICK, *supra* note 1, at § 3.02.

[30] 384 U.S. at 457.

[31] *E.g.*, People v. Robinson, 45 A.D.2d 909, 909-10, 358 N.Y.S.2d 230, 231-32 (1974); Murray v. State, 505 S.W.2d 589, 592 (Tex. Crim. App. 1974).

[32] Brown v. Illinois, 56 Ill. 2d 312, 307 N.E.2d 356 (1974), *rev'd*, 422 U.S. 590 (1975).

[33] 422 U.S. 590, 597 (1975).

adopting a per se rule that *Miranda* warnings in and of themselves break the causal connection between illegal arrests and subsequent statements.[34] Even if statements are found to be voluntary under the fifth amendment, the Court stressed, the fourth amendment issue remains.[35] The *Wong Sun* causation requirement means that the statement must not only "meet the fifth amendment standard of voluntariness, but that it [also] be 'sufficiently an act of free will to purge the primary taint.' "[36]

The Court rejected the Illinois court's *per se* rule and declined to adopt any alternative per se or "but for" rule to apply in such cases.[37] Instead, the Court explained that the question of whether a confession is the product of free will under *Wong Sun* should be answered on the facts of each case, with no single fact being dispositive.[38] While acknowledging that voluntariness is a threshold requirement and that *Miranda* warnings are an important element, the *Brown* decision listed other relevant factors to consider: the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct.[39]

Four years after *Brown*, the Court ruled that its fourth amendment protections applied equally to illegal seizures or detentions that do not amount to formal arrests. The court in *Dunaway v. New York*[40] held that, except for the "stop and frisk exception,"[41] the fourth amendment requires probable cause for intrusions upon the liberties of individuals even when a formal arrest has not been made.

The Court explained that detention for custodial interrogation, regardless of its label, intrudes so severely on interests protected by the fourth amendment that the traditional safeguards against illegal arrest must apply.[42] In addition, *Dunaway* reaffirmed the holding in *Brown* that *Miranda* warnings do not, without more, dissipate the taint of an illegal arrest.[43]

Thus, an examination of the United States Supreme Court's decisions shows the evolution of the law in this area. While at first tangible evidence seized during an unlawful search was excluded, the sanction was later extended

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[34] *Id.* at 603.
[35] *Id.* at 601-02.
[36] *Id.* at 602 (quoting *Wong Sun*, 371 U.S. at 486).
[37] *Id.* at 603.
[38] *Id.*
[39] *Id.* at 603-04.
[40] 422 U.S. 200 (1979). Dunaway was approached at his home, where he was asked to accompany police to the police station for questioning. He consented and was taken to an interrogation room where he was advised of his *Miranda* rights, which he waived. He later made inculpatory statements and drawings. The Court ruled that the officers had no probable cause to arrest him until he had made the statement.
[41] Terry v. Ohio, 392 U.S. 1 (1968). *Terry* for the first time recognized an exception to the requirement that fourth amendment seizures of persons must be based on probable cause. Officers are allowed to "momentarily" detain an individual to clarify an ambiguous situation on the basis of a reasonable suspicion, which is less than the usual requirement of probable cause.
[42] 442 U.S. at 216.
[43] *Id.* at 217.

to verbal statements obtained as a result of unlawful police action. The first cases dealing with the exclusion of verbal evidence were those in which the defendant had been formally arrested without probable cause. Later, the exclusion was held to also apply when a suspect had not been formally arrested, but had, nevertheless, been "seized" by the police.

B. *West Virginia Decisions*

West Virginia's Supreme Court of Appeals has consistently attempted to follow the principles emerging from these Supreme Court rulings.

In 1978, the West Virginia court was faced with determining whether a confession induced by illegally seized evidence should be excluded as "fruit of the poisonous tree." The decision in *State v. Williams*[44] relied on *Wong Sun* and held that the confession was a product of the exploitation of the illegally seized evidence and therefore should be excluded.[45]

After deciding *Williams,* which dealt only with confessions made after *evidence* had been illegally seized, the court had an opportunity in 1979 to consider what effect an illegal arrest had on the admissibility of a subsequent oral confession. In *State v. Canby*[46] the court, following the Supreme Court's reasoning in *Brown,* held that exclusion of a confession obtained as a result of an *illegal arrest without a warrant* is mandated unless the causal connection between the arrest and the confession has been clearly broken.[47] Additionally, although the defendants in *Canby* had been given *Miranda* warnings, the court held that the warnings alone did not negate causality.[48]

In 1980, the West Virginia court adhered to its *Canby* holding in *State v. Moore.*[49] The court excluded from evidence an object seized in an illegal search and inculpatory statements made by the defendant after he was illegally arrested. The court found the causal connection between the arrest and subsequent confession had not been broken.[50]

While previous West Virginia decisions had dealt with confessions obtained after traditional illegal arrests without a warrant (as in *Brown*), *Stanley* presented the court with the opportunity to apply its rulings to a *Dunaway seizure* situation.

IV. Analysis

The opinion in *State v. Stanley,* written by Justice Neely, displays a sound conclusion, considering the facts of the case. However, a more detailed discussion of the reasoning the court used in reaching its decision would have helped to guide lower courts and law enforcement officers in evaluating similar

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[44] 249 S.E.2d 758 (W. Va. 1978).
[45] *Id.* at 764.
[46] 252 S.E.2d 164 (W. Va. 1979).
[47] *Id.* at 167.
[48] *Id.*
[49] 272 S.E.2d 804 (W. Va. 1980).
[50] *Id.* at 816.

situations in the future.

In deciding first whether an illegal arrest had occurred, the court logically concluded that, although the appellant had voluntarily gone to the police department, she was later "seized" when she was not free to leave or her liberty was restrained.[51] Apparently this conclusion was based upon four facts: 1) the interrogation had become accusatory; 2) after the interrogation of her son, the appellant was no longer free to leave; 3) the appellant's uncle, who came to the station at midnight, was warned to leave; and 4) the appellant was never told she was free to leave.[52]

When viewed under definitions offered by other courts,[53] these facts adequately support the conclusion that Stanley was seized. The most frequent definition cited is that in *Terry v. Ohio*: "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[54]

Justice Neely, although listing factors to support the conclusion, did not explain *how* to determine when a seizure had occurred. Consequently, *Stanley* provides lower courts and law enforcement officers with little guidance for such determinations. Fortunately, though, the court may have somewhat cured this deficiency in a subsequent 1982 decision.

In *State v. Boswell*,[55] West Virginia rejected the seizure test enunciated by the Supreme Court in *United States v. Mendenhall*.[56] The *Mendenhall* Court ruled that there has been a seizure when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[57] In *Boswell*, Chief Justice Miller criticized this approach, finding that the legality of the seizure of a person cannot be resolved on the basis of a single factor. Instead, he reasoned, the "intensity of the initial inquiry"[58] should determine whether the threshold of seizure had been crossed. The less intense the initial inquiry, the less likely a seizure will be found.

Although West Virginia's court rejected *Mendenhall*'s seizure test, its defi-

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[51] 284 S.E.2d at 370.

[52] *Id.* at 369.

[53] Katz v. United States, 389 U.S. 347, 353 (1967) (any conduct of a government agent or official which intrudes upon a person's reasonable expectation of privacy is a search or seizure under the fourth amendment); Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967) (any exercise of police restraint over a person's freedom of movement may constitute a "seizure" within the fourth amendment, sustainable only if not unreasonable); State v. Stroud, 30 Wash. App. 392, 634 P.2d 316, 318 (1981) (there is a seizure for fourth amendment purposes "when in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"); People v. Privott, 66 A.D.2d 951, 411 N.Y.S.2d 711 (N.Y. App. Div. 1978) (for constitutional purposes, a "seizure" of a person contemplates a significant interference with the person's liberty of movement). *Cf.* Oregon v. Mathiason, 429 U.S. 492 (1977) (a person is not arrested under the fourth amendment if he freely elects to enter into or continue an encounter with police).

[54] 392 U.S. 1, 16 (1968).

[55] 294 S.E.2d 287 (W. Va. 1982).

[56] 446 U.S. 544 (1980).

[57] *Id.* at 554.

[58] 294 S.E.2d at 294.

nition of "intensity" somewhat parallels the characteristics of a seizure given by the *Mendenhall* Court. The term "intensity," the court explained, is designed to cover a variety of fact patterns which surround the initial inquiry between the police and the individual. It embraces not only the degree of physical intrusion, but also more subtle means of coercion or intrusion, including the number of officers involved, their demeanor, their conduct and the length of time the suspect was questioned.[59] Similarly, circumstances listed in *Mendenhall* include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance might be compelled."[60]

Although it could be argued that the *Stanley* court failed to sufficiently define a seizure, the court did attempt to aid police faced with situations in which guilty persons voluntarily accompany police in an effort to avert suspicion from themselves. Concerned with the possibility that such persons could later claim they were being held against their will, the court noted that police should protect the record "by making it clear to those whom they are about to interrogate that they are not under arrest and are free to leave."[61] It remains to be seen, however, what effect such a warning actually will have upon a court's determination of a seizure.

After determining that probable cause[62] for the arrest in *Stanley* did not exist, the court applied factors enunciated by the Supreme Court to determine whether Stanley's inculpatory statements were sufficiently a product of her free will to be admissible under the fourth amendment. Although not expressly stated, the opinion suggests that the court first considered the threshold question of the voluntariness of the confession. The court noted that "appellant and her family were not physically abused, threatened or promised leniency."[63]

A second factor relevant to an inquiry of whether a confession is a result of the exploitation of an illegal arrest is the use of *Miranda* warnings. Each member of the Stanley family was given the warning before interrogation. As in *Brown* and *Dunaway*, however, the court held that the giving of *Miranda* warnings alone is not enough to break the causal connection between the illegal arrest and the confession.[64] This reasoning is sound, since *Miranda* warnings in

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[59] *Id.*

[60] 446 U.S. at 554.

[61] 284 S.E.2d at 369. The *Dunaway* Court also noted that the defendant was not told he was "free to go." 442 U.S. at 212.

[62] "Probable cause to make an arrest without a warrant exists when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed." State v. Plantz, 155 W. Va. 24, 180 S.E.2d 614 (1971).

[63] 284 S.E.2d at 369.

[64] *Id.* at 368. The 1980 decision in *State v. Moore* had explained the policies underlying this determination. Quoting from *Brown*, the West Virginia court there reasoned that if *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, the effect of the exclusionary rule would be substantially diluted. 272 S.E.2d at 816. Fearful that police could obtain admissible evidence by simply giving *Miranda* warnings, the court noted that "any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a

no way inform a person of fourth amendment rights, including the right to be released from unlawful custody following an arrest made without a warrant or without probable cause.[65]

Other factors relevant in determining the effect of police misconduct (derived from the *Brown* and *Dunaway* decisions), are the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct.[66] The *Stanley* court did not expressly apply these factors to the case at bar; instead, it simply concluded that "no intervening circumstances between the illegal seizure of the appellant and her subsequent statement would free that statement from the taint of illegal police conduct."[67]

The United States Supreme Court has found such a limited inquiry insufficient. No single factor is sufficient to show the nexus between an illegal arrest and subsequent confession. Instead, a court must view the totality of the circumstances to determine whether the attenuation of the taint in a particular case is sufficient to permit the use of the challenged evidence.[68] More specifically, the Court's language in *Brown* is clear that the "purpose and flagrancy of the misconduct" is "particularly" relevant. The *Stanley* court's failure to consider this factor, while not crucial to the case at bar, leaves unclear what weight was assigned to it. Consequently, lower courts are left without proper guidance as to the weight and relevancy of each factor in evaluating the admissibility of confessions made after other types of illegal arrests.

In conducting the attenuation analysis, the Supreme Court has emphasized that courts must weigh the circumstances of each case in light of the policies served by the exclusionary rule.[69] At some point, society's interest in criminal conviction will outweigh the value of deterring police misconduct. In those cases, the exclusion of a confession ceases to further the deterrence policy.[70]

For example, when police misconduct is flagrant and committed with the purpose of abridging a suspect's rights, use of the exclusionary remedy as a deterrent is most appropriate.[71] Conversely, when the violation is technical[72] or

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'cure-all.'" *Id.* at 816.

[65] *Brown*, 422 U.S. at 601, n.6.

[66] *Id.* at 603-04.

[67] 284 S.E.2d at 370.

[68] United States v. Ceccolini, 435 U.S. 268 (1978).

[69] *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Ceccolini, 435 U.S. 268 (1978); Stone v. Powell, 428 U.S. 465 (1976); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Calandra, 414 U.S. 338 (1974).

[70] Comment, *The Fourth Amendment and Tainted Confessions: Admissibility as a Policy Decision*, 13 HOUS. L. REV. 753, 771 (1976); Brown v. Illinois, 422 U.S. 590, 608-12 (1975) (Powell, J., concurring in part).

[71] In *Brown*, two detectives of the Chicago police force broke into Brown's apartment and searched it. When Brown entered the apartment, he was told that he was under arrest, was held at gunpoint and was searched. He then was handcuffed and escorted to the squad car that eventually took him to the police station for interrogation. The Supreme Court placed emphasis on the fact that: "the arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which

occurs in good faith, deterrence is not needed and there is less need to invoke the rule.[73]

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at least very negligent, conduct which has deprived the defendant of some right."[74] Thus, in cases in which this underlying premise is missing, the deterrence objective of the rule would not be served. While the West Virginia court may have reached the proper conclusion in *Stanley*, a more detailed discussion of the weight of all the *Brown* factors, particularly that of "purpose and flagrancy," would aid in determining when the exclusionary rule should be invoked.

In a secondary issue, the *Stanley* court examined and reaffirmed[75] one aspect of West Virginia's law on double jeopardy.[76] Since Stanley's conviction was overturned[77] only because part of the State's case (the confession) was found to be inadmissible, the court held that a second trial would not violate the double jeopardy clause of the fifth amendment.[78] Conversely, the court noted, if the State had presented insufficient evidence to convict, it would not be given a second chance to mount evidence against the appellant.[79]

This holding is consistent with previous rulings of the West Virginia court and of the Supreme Court,[80] which have distinguished between reversal for evidentiary insufficiency and reversal for trial error. Essentially, they reason that reversal for trial error does not imply that the government has failed to prove its case. "Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence. . . ."[81]

Thus, if a case is reversed for trial error, the State should not be foreclosed from a chance to correct its error.[82] In balancing the defendant's rights and the state's interest in law enforcement, the defendant's rights will be sufficiently protected on retrial, since the tainted evidence will be excluded.

Relying on *State v. Frazier*, the *Stanley* court ruled that the determina-

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Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605.

[72] Justice Powell, in his concurrence in *Brown*, noted that two examples of technical violations are when "officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional." *Id.* at 611 (footnote omitted).

[73] *Id.* at 612 (Powell, J., concurring).

[74] Michigan v. Tucker, 417 U.S. 433, 447 (1974).

[75] 284 S.E.2d at 370.

[76] "[N]or shall any person, in any criminal case, be compelled to be a witness against himself, or to be twice put in jeopardy of life or liberty for the same offence." W. VA. CONST. art. III, § 5.

[77] When a defendant challenges his conviction by appeal or by post-verdict motion, he waives his right to be free from double jeopardy. State *ex rel.* Kincaid v. Spillers, 268 S.E.2d 137, 141 (W. Va. 1980).

[78] 284 S.E.2d at 370.

[79] *Id.*

[80] Burks v. United States, 437 U.S. 1 (1978); State v. Frazier, 252 S.E.2d 39 (W. Va. 1979).

[81] *Frazier*, 252 S.E.2d at 51 (quoting *Burks*, 437 U.S. at 15).

[82] *Frazier*, 252 S.E.2d at 53.

tion of evidentiary insufficiency must be "made upon the entire record submitted to the jury and not upon the residual evidence remaining after the appellate court reviews the record for evidentiary error."[83] After making such a review, the *Stanley* court determined that the record did not reveal evidentiary insufficiency and therefore a remand for a new trial on the basis of trial error would not infringe upon Stanley's right not to be subjected to double jeopardy.

V. CONCLUSION

The West Virginia Supreme Court of Appeals has extended the protections afforded the individual in his confrontation with the law. By excluding evidence obtained from the exploitation of an extensive investigatory detention, the court in *Stanley* has correctly utilized the fourth amendment exclusionary sanction. Additionally, the court has reaffirmed two of its prior holdings. First, the giving of *Miranda* warnings is not enough to break the causal connection between an illegal arrest and a confession. Also, a second trial will not violate the double jeopardy clause if reversal is for trial error rather than for evidentiary insufficiency. The determination of evidentiary insufficiency must be made upon the entire record submitted to the jury.

The impact of *Stanley* will be felt by the state's law enforcement officers. Clearly, a person cannot be detained beyond a very limited period of time without probable cause,[84] and any statements made during such a detention will be excluded at trial.

In applying the exclusionary sanction, the facts of each case should be studied to determine whether application of the rule will further the rule's twin purposes of deterring investigatory misconduct and preserving judicial integrity. As Justice Powell reasoned in *Brown*, technical violations of the fourth amendment and flagrantly abusive conduct should trigger significantly different judicial responses.[85] A clear showing of a lack of causation should be required for any evidence obtained when prior official conduct was flagrantly abusive of fourth amendment rights. On the other hand, the deterrent purposes of the rule will not be served if the violations are merely technical ones.[86]

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[83] 284 S.E.2d at 368, syl. pt. 3 (quoting *Frazier*, 252 S.E.2d at 53). The court in *Frazier* based this holding upon the Supreme Court's decision in Burks v. United States, 437 U.S. 1 (1978), which noted that the prosecution cannot complain, when upon all of the evidence "submitted to the jury," an appellate court concludes that such evidence was insufficient to warrant a jury conviction. *Id.* at 16. Recognizing the Supreme Court's emphasis on the initial failure of the prosecutor to muster evidence in its first proceeding, the West Virginia court reasoned that the focus is on the evidence introduced at trial and not on what is left after the appellate court completes its review. *Frazier*, 252 S.E.2d at 53. *See* Case Comment, *State v. Frazier*, 82 W. VA. L. REV. 703 (1980).

[84] Courts have held various lengths of time to be seizures. *E.g.*, Dunaway v. New York, 442 U.S. 200 (1979) (one hour); United States v. Webb, 480 F. Supp. 750 (E.D.N.Y. 1979) (four hours); United States v. Chamberlin, 609 F.2d 1318 (9th Cir. 1979), *cert. denied*, 101 S. Ct. 3148 (1981) (20 minutes).

[85] *Brown*, 422 U.S. at 610.

[86] Courts in other jurisdictions have utilized Justice Powell's approach in examining fourth amendment violations. *E.g.*, United States v. O'Looney, 544 F.2d 385 (9th Cir.), *cert. denied*, 429

In West Virginia, it remains to be seen whether the court will consider the purpose and flagrancy of police misconduct. If an illegal arrest in a future case is based only upon a technical violation, the court should properly weigh this factor in its decision.

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U.S. 1023 (1976) (Police had a wellfounded reasonable suspicion approaching probable cause to believe that the defendant had committed a crime. There were neither drawn guns nor police actions calculated to cause surprise, fear or confusion.); Commonwealth v. Sylvia, 1980 Mass. Adv. Sh. 749, 402 N.E.2d 489 (The arrest, effected at the reasonable hour of 8:30 a.m., was not designed to cause surprise, fear or confusion; the police acted in good faith under a defective warrant).

Several legal scholars predict that the United States Supreme Court will permit a "good faith" exception to the exclusionary rule. Over the protests of Justices Stevens, Brennan, and Marshall, the Court announced in December, 1982, that it will rehear an Illinois search and seizure case presenting such an issue. Illinois v. Gates, 103 S. Ct. 436 (U.S. 1982). The Court requested that the parties address the issue of whether the exclusionary rule should be modified "so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." The National Law Journal, Dec. 13, 1982, at 5, col. 1.