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Confessions

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CRIMINAL

CONFESSIONS

A number of cases dealing with the admission of confessions made by criminal defendants were decided by the court during the survey period. The cases generally involved the application and interpretation of existing doctrines, although some for the first time in West Virginia. Several of the decisions set to rest unresolved questions while others create new areas of uncertainty.

I. *In Camera* VOLUNTARINESS HEARINGS

State ex rel. White v. Mohn, 283 S.E.2d 914 (W. Va. 1981)

With the decision of *State ex rel. White v. Mohn,*[1] the failure of a trial court to hold an *in camera* voluntariness hearing prior to the admission of a confession by a criminal defendant is no longer reversible error. The *Mohn* decision overruled the portion of *State v. Fortner*[2] that declared that the failure to hold the hearing would result in automatic reversal. The court instead adopted the procedure set forth by the United States Supreme Court in *Jackson v. Denno.*[3]

The new procedure provides that a case must be remanded to the trial court for a voluntariness hearing when a confession is admitted without one. The determination of voluntariness made at the hearing is to be used as the basis for allowing the conviction to stand or to be set aside.

The court had previously adopted this procedure in other areas.[4] In *State v. Clawson,*[5] the court discussed the procedure in relation to voluntariness hearings. That discussion was, however, limited to dictum since the case was reversed on other grounds.

The *Mohn* holding does not affect the trial court's duty established in *Fortner* to conduct voluntariness hearings, whether requested or not.[6] The adoption of the *Jackson v. Denno* procedure merely provides an alternative to automatic reversal when trial courts fail to hold the hearings.

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[1] 283 S.E.2d 914 (W. Va. 1981).

[2] 150 W. Va. 571, 148 S.E.2d 669 (1966), *overruled,* 283 S.E.2d 914 (W. Va. 1981).

[3] 378 U.S. 368 (1964). In *Jackson,* the Court determined that failure of a state trial court to hold a constitutionally mandated voluntariness hearing did not justify the granting of a writ of *habeas corpus* or automatic reversal. The Court remanded to the state court to conduct a voluntariness hearing. The determination of voluntariness made at that hearing would govern whether the defendant would have his conviction affirmed or receive a new trial. *Id.* at 394.

[4] *See* State v. Brewster, 261 S.E.2d 77, 82 (W. Va. 1979) (remand to determine if shackling of defendant during trial was warranted); State v. Lawson, 267 S.E.2d 438 (W. Va. 1980) (remand for blood tests).

[5] 270 S.E.2d 659, 671 (W. Va. 1980). *Jackson v. Denno* was referred to by the court in *Fortner* as containing a "collation of the rules obtaining in the various states regarding the admission of confessions in evidence." 150 W. Va. at 579, 148 S.E.2d at 674.

[6] 150 W. Va. at 579, 148 S.E.2d at 674.

II. Tests for Voluntariness and Prompt Presentment

State v. Persinger, 186 S.E.2d 261 (W. Va. 1982)
State v. Mitter, 289 S.E.2d 457 (W. Va. 1982)

The "totality of the circumstances" test for gauging the voluntariness of confessions was adopted by the court in *State v. Persinger.*[7] The decision also involved strict application of the prompt presentment statute.[8]

The defendant in *Persinger* had been arrested by a deputy sheriff and city police officer for sexual assault. The defendant was transported to the city police station where he was advised of and waived his rights. The defendant gave two tape recorded statements to police. In the first statement, he denied committing the offense. However, in the second statement the defendant said he had lied in the first statement and made an inculpatory statement in which he admitted that he had engaged in sexual intercourse with the victim. After making the second statement the defendant was transported to the county jail and incarcerated.

The trial court found the second statement to have been voluntarily given and admitted it into evidence. The defendant was subsequently convicted of third degree sexual assault.

The supreme court reversed the conviction, holding that the second confession should not have been admitted. The court stated that the "totality of the circumstances" test, which examines the background, experience and conduct of the accused, was the proper test to determine voluntariness.[9] The court briefly discussed the application of the totality test in the defendant's case, but found the statement to be involuntary because of several errors committed by police.

In examining the trial court record, the court observed that the defendant had requested counsel between his first and second statement. Therefore, the court held that the continued police interrogation of the defendant violated his *Miranda* rights and rendered the second statement involuntary.[10]

The court also indicated that the defendant's confession may have been rendered involuntary by a violation of the prompt presentment statute.[11] The

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[7] 286 S.E.2d 261 (W. Va. 1982). The totality test was adopted to examine confessions by minors in State v. Laws, 251 S.E.2d 769, 772 (W. Va. 1978).

[8] W. Va. Code § 62-1-5 (1977).

[9] 286 S.E.2d at 267. The *Persinger* court attributed the use of the "totality" test to gauge voluntariness to Edwards v. Arizona, 451 U.S. 477 (1981). However, the *Persinger* court stated that *Edwards* held that a confession is "involuntary" if rendered without counsel after counsel had been requested. 286 S.E.2d at 267. Actually, the Supreme Court held the confession in *Edwards* to be "inadmissible" because the right to counsel had been violated. 451 U.S. at 487. *See also* State v. McNeal, 251 S.E.2d 484, 487 (W. Va. 1979); *see infra* notes 42-44 and accompanying text (discussion on the court's use of "inadmissible" and "involuntary").

[10] 286 S.E.2d at 271.

[11] 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

court adopted a rule that makes it unreasonable and unnecessary to delay an arraignment for the sole purpose of obtaining a confession from a defendant. The delay factor is critical in evaluating voluntariness. However, the focus is not on the length, but on the purpose of the delay.[12]

Finally, the court identified another reason it felt the confession should have been excluded. An officer told the defendant during the interrogation that if he cooperated, the officer would "give a good recommendation to the probation officer at the time of presentence investigation."[13] Under *State v. Parson,*[14] statements "calculated to foment hope for leniency in the mind of the accused" result in a confession being rendered involuntary.[15] The *Persinger* court applied the *Parson* test and found the statement was inadmissible.[16]

The *Persinger* rule detailing the requirement of the prompt presentment statute was applied in *State v. Mitter.*[17] In *Mitter,* the court held that a confession obtained in violation of the statute was inadmissible.[18]

The defendant in *Mitter* was suspected in an unsolved murder and was requested by letter to appear at the prosecuting attorney's office for questioning. The defendant appeared, waived his rights, and made an inculpatory statement. After that statement was reduced to writing, police continued to question the defendant about major discrepancies that existed between his statement and known facts of the case. A second statement was obtained several hours after the first; this statement more in line with the known facts. After that confession was transcribed, the defendant was formally arrested and arraigned before a magistrate.

The trial court record revealed that a magistrate had been alerted that his services would be required before the first statement was obtained.[19] Additionally, one of the officers testified that he believed probable cause to arrest existed before the defendant gave the first statement, although another officer testified that probable cause existed only after the first inculpatory statement was made.[20] The trial court had agreed with the second officer and ruled that probable cause did not exist until after the first statement was obtained.

The supreme court held the first statement was admissible and the delay to transcribe it did not violate the prompt presentment statute.[21] The court found, however, that the second statement, which was admitted by the trial court, was inadmissible because, in its view, the delay in arraignment following

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which the arrest is made.

See also W. VA. R. CRIM. P. 5(a) (effective October 1, 1981).

[12] 286 S.E.2d at 270.

[13] *Id.* at 271.

[14] 108 W. Va. 705, 152 S.E. 745 (1930).

[15] *Id.* at 708, 152 S.E. at 746.

[16] 286 S.E.2d at 273.

[17] 289 S.E.2d 457 (W. Va. 1982).

[18] *Id.* at 461-62.

[19] *Id.* at 460.

[20] *Id.* at 461.

[21] *Id.*

the first statement was for the "explicit purpose of rendering a useable confession. . . ."[22]

Although impossible to determine when the defendant was arrested, in the sense that his liberty was restrained, the court felt it reasonable to assume the defendant was not free to leave after the first statement was made. The court held that under those circumstances, the prompt presentment statute required him to be arraigned without unreasonable delay.[23] The delay to obtain the second confession was, therefore, considered unreasonable and unnecessary and rendered the confession inadmissible.

The *Persinger* and *Mitter* holdings may present problems in their application. The strict prompt presentment rule adopted by the court could prevent law enforcement officers from taking prearraignment statements from cooperative suspects arrested with warrants even if a rights waiver is obtained. Police must also become acutely aware of when courts may construe a suspect to be under arrest in an interrogation setting if inculpatory statements are made. The impact of the prompt presentment rule in these situations is made harsher since a suspect who requests court appointed counsel at arraignment is prevented from making admissible statements to police until after counsel is appointed.[24] The rule as adopted may significantly reduce the ability of police to conduct a thorough and proper investigation.[25]

III. Use of Inadmissible Confessions for Impeachment

State v. Goodmon, 290 S.E.2d 260 (W. Va. 1981)
State v. Vance, 285 S.E.2d 437 (W. Va. 1981)
State v. Goff, 289 S.E.2d 473 (W. Va. 1982)

Deciding an issue of first impression in West Virginia, the court held in *State v. Goodmon*[26] that inadmissible confessions voluntarily rendered may be used for impeachment purposes. The majority decision adopts the federal rule set forth by the United States Supreme Court in *Harris v. New York*[27] and *Oregon v. Haas.*[28]

In *Goodmon,* the defendant confessed to his girlfriend, in the presence of police officers, that he murdered her sister. The court found that this confession was properly admitted at trial.[29]

After making these statements, the defendant was arrested and arraigned before a magistrate. He requested court appointed counsel at his arraignment.

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[22] *Id.* at 462.

[23] *Id.*

[24] *See, e.g.,* Edwards v. Arizona, 451 U.S. at 487; State v. Goodmon, 290 S.E.2d 260, 266 (W. Va. 1981); State v. Vance, 285 S.E.2d 437, 441 (W. Va. 1981).

[25] For a collection of decisions on the application of prompt presentment statute requirements by other state and federal courts, see 19 A.L.R.2d 1331 (and Later Case Service).

[26] 290 S.E.2d 260 (W. Va. 1981).

[27] 401 U.S. 222 (1971).

[28] 420 U.S. 714 (1975).

[29] 290 S.E.2d at 266.

Counsel had not yet been appointed when police officers obtained taped and written statements from the accused at the county jail where he was incarcerated. These statements were ultimately held to be inadmissible at trial and were excluded from the State's case in chief. However, earlier in the trial reference was made to these statements by two police officers.

The defendant took the stand at trial and during direct examination, in an attempt to further explain why these statements were not admitted, stated that they had been made under duress. The trial judge agreed to allow the prosecution to use the inadmissible second confession for the limited purpose of impeachment on the issue of voluntariness. The defendant was convicted of murder and sentenced to life without mercy.

The supreme court affirmed the conviction and the opinion by Justice McHugh discussed the rationale of the United States Supreme Court in *Harris* and *Haas*. Both of those cases involved *Miranda* rights violations by police officers which rendered voluntary confessions inadmissible. The Supreme Court in *Harris* indicated that trustworthiness was established by the lack of evidence showing involuntariness or coercion[30] and held the confession to be admissible impeachment evidence as to the general credibility of the defendant.[31]

The court noted the similarity between the facts in *Haas* and the facts in *Goodmon*. Additionally, the court observed that the trial judge in *Goodmon* had limited the use of the inadmissible confession to the issue of voluntariness by an instruction given before the reading and playing of the confession. The court adopted the *Harris* and *Haas* holding that inadmissible confessions voluntarily rendered are "admissible impeachment evidence on the issue of the general credibility of the defendant as a witness."[32]

Justice McGraw, joined by Justice Harshbarger, dissented. The dissent stated that the test for voluntariness of confessions under constitutional provisions against self incrimination ought to be "whether or not the defendant agrees at trial to the use of the words from his own mouth against him."[33] The dissent also stated that under this test, the West Virginia Constitution should require inadmissible statements, even those voluntarily rendered, to be excluded from any use at trial.[34]

The *Goodmon* holding was held to be controlling in the unanimous decision of *State v. Vance*,[35] filed the same day as the majority opinion in *Goodmon*.[36] That case also involved a statement which was held to be inadmissible

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[30] 401 U.S. at 224.

[31] *Id.* at 225-26.

[32] 290 S.E.2d at 268.

[33] *Id.* at 270 (McGraw, J., dissenting).

[34] *Id.* The dissent restricted application of this test to the West Virginia Constitution. This avoids conflict with the holding in *Haas* that a state may not impose greater restrictions on police activity under the federal constitution when the Supreme Court has specifically refused to impose them. *Haas*, 420 U.S. at 719.

[35] 285 S.E.2d 437 (W. Va. 1981).

[36] December 18, 1981. The unanimous opinion in *Vance* was written by Justice McGraw who

at trial level because the accused made a statement without counsel after having requested court appointed counsel at his arraignment. The trial court held an *in camera* hearing, determined that the statement was rendered voluntarily, and allowed the statement to be used as impeachment evidence. The supreme court affirmed the action.

However, the court refused to allow an involuntary statement to be used as impeachment evidence in *State v. Goff*.[37] The trial court in *Goff* had held the defendant's inculpatory statement to police to be involuntary because of the defendant's low IQ and his past relationship with the police as a part-time informant. However the trial court allowed the prosecution to use the statement for impeachment purposes. The defendant was subsequently convicted.

The supreme court identified two levels of involuntariness. The first level of involuntariness identified is procedural in nature and encompasses the *Miranda* rights.[38] A confession found to be involuntary on this level is excluded from the state's case in chief. The second level of involuntariness focuses on the trustworthiness of a confession. This level appears to be the traditional voluntariness inquiry which requires confessions to be obtained without coercion. A confession found involuntary on this level cannot be used for any purpose at trial.[39]

The court held that since the defendant's statement had been found to be involuntary on the second level, it was inadmissible at trial for any purpose.[40] Accordingly, the court reversed the conviction and remanded the case for a new trial.

The adoption of the *Harris* and *Haas* holdings brings West Virginia in line with the substantial majority of the states that have considered the issue.[41]

The varying use of the "involuntary" classification by the court in recent decisions may be a source of confusion. In *Persinger*, the court held that a *Miranda* rights violation rendered a statement "involuntary."[42] *Goodmon* authorized the use, as impeachment evidence, of a statement found to be "inadmissible" because of a *Miranda* rights violation if the statement was voluntarily rendered.[43] It appears that the court used the term "involuntary" in *Persinger* in the same context as "inadmissible" was used in *Goodmon*. The two levels of voluntariness identified in *Goff* should be read as an attempt to clarify the previous use of terms. Unfortunately, trial courts, prosecutors and practitioners may not recognize that certain statements characterized as "in-

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had dissented in *Goodmon*. Justice McGraw noted his previous dissent, but found the court bound by the majority holding in *Goodmon* in the disposition of *Vance*. 285 S.E.2d at 442.

[37] 289 S.E.2d 473 (W. Va. 1982).

[38] The first level of involuntariness is more commonly referred to under the more general heading of admissibility. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. at 487; *see also Goodmon*, 290 S.E.2d at 266.

[39] 289 S.E.2d at 476; *see also* Mincey v. Arizona, 437 U.S. 385 (1978).

[40] 289 S.E.2d at 477.

[41] *See Goodmon*, 290 S.E.2d at 267 n.7.

[42] 286 S.E.2d at 271; *see supra* notes 7-10 and accompanying text.

[43] 290 S.E.2d at 267-68; *see supra* notes 26-32 and accompanying text.

voluntary" in *Persinger* are considered "inadmissible" in the *Goodmon* analysis and can be used as impeachment evidence. *Goff* recognized the anomaly in the two level distinction but did not correct it.

An additional area of uncertainty is whether statements which cannot be used at trial because of non-*Miranda* procedural violations may be used as impeachment evidence under *Goodmon*. The *Mitter* holding characterized the prompt presentment violation as rendering the statement inadmissible and appeared to use the term in the traditional sense.[44] It would, therefore, seem likely that a statement violative of the prompt presentment provisions would be admissible as impeachment evidence under *Goodmon* and *Goff*. Where other procedural violations may fit into the analysis is, however, uncertain.

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[44] 298 S.E.2d at 462; *see supra* notes 17-23 and accompanying text.