Volume 80
Issue 2 *Numbers 2 & 3*

Article 10

January 1978

Criminal Procedure--Recent Developments in West Virginia--Boyd, Mcaboy, and Cannellas

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CRIMINAL PROCEDURE—RECENT DEVELOPMENTS IN WEST VIRGINIA—*BOYD, MCABOY,* AND *CANNELLAS*

In the past year, the West Virginia Supreme Court of Appeals has been noticeably active in the area of criminal procedure. In dealing with a variety of evidentiary and constitutional issues, the court has consistently taken a position which provides almost zealous protection to the criminal defendant. Such a protective position is most apparent not only in the court's reaffirmation of historical safeguards, but also in the court's extension of these safeguards. Basically, the court has exhibited an increased willingness to closely examine trial records, to utilize broad judicial review, and to overrule previous decisions where necessary in order to promote a strict protection of the accused's rights. An analysis of the major cases and their impact on the court's previous position reveals the extent to which the court has afforded greater protections to the criminal defendant in the past year.

One of the first evidentiary issues addressed by the court was a criminal defendant's impeachment at trial. In *State v. Boyd,*[1] the defendant argued on appeal that his constitutional rights were violated when impeachment using pretrial silence was permitted at trial. In that case, after the defendant had surrendered, he admitted that he had shot and killed the victim, and he volunteered the location of the murder weapon. At that time, he gave no other information. At trial, for the first time, he claimed self-defense. The prosecutor then attempted to impeach the defendant by questioning him about why he had not revealed the self-defense story to the police. Defense counsel objected, but the trial judge overruled and instead gave the jury an instruction indicating that the defendant was not required to make a statement to the police. On appeal, the court found that it was reversible error to allow the prosecution to cross-examine the defendant about his pretrial silence or to comment on that silence before the jury.

The *Boyd* court was careful to point out that even though reference during trial to the defendant's pretrial silence is prohibited, the defendant may still be impeached by use of voluntary pretrial inconsistent statements. The opinion goes further, however, to state that before any such prior inconsistent statement may be used for impeachment, the trial court must conduct an *in*

[1] 233 S.E.2d 710 (W. Va. 1975).

camera hearing, with the defendant present, to determine the voluntariness of such statement. The hearing must be conducted *sua sponte* if necessary. This holding reflects a new and stronger protective position than that previously taken by the court.

In 1962, in *State v. Stevenson,*[2] the court held that the trial court must determine voluntariness of a pretrial confession. If the defendant denies making the prior statement, a question of fact arises which is to be submitted to the jury for consideration. Under *Stevenson,* the trial judge was not required to determine by preliminary examination whether the confession was voluntarily made. Four years later, this inconsistency was clarified somewhat in *State v. Fortner,*[3] when the West Virginia Supreme Court clearly held that it was the duty of the trial court to conduct a hearing, *sua sponte* if necessary, to determine voluntariness prior to admission of any confession, and that failure to do so was reversible error.

Boyd extends this rationale to any inconsistent statement, and further requires that where such statement is admissible to impeach the criminal defendant, but covers only part of the relevant information, it is error to permit the prosecution to force the accused to acknowledge or justify his pre-trial silence in any area where he has made no statement at all.[4] Under the *Boyd* approach, the trial court must maintain close control of the cross-examination of any defendant who has made no pre-trial statement or has made only limited admissions, in order to insure that the prosecutor's tactics will not result in any reference to the defendant's pre-trial silence or involuntary statements.

Another issue relating to impeachment of a criminal defendant at trial arose in *State v. McAboy.*[5] The defendant in the case appealed his murder conviction on the grounds that it was impermissible to allow the prosecution to impeach him at trial by use of a prior felony conviction. The court found that only convictions for perjury and false swearing are admissible for impeachment purposes because these are the only crimes which directly relate to the

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[2] 147 W. Va. 211, 127 S.E.2d 638 (1962), *cert. denied,* 372 U.S. 938 (1962).

[3] 150 W. Va. 571, 148 S.E.2d 669 (1969).

[4] This is clearly a departure from the position taken by the United States Supreme Court in Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S. 714 (1975). These cases allow impeachment of the defendant's credibility by use of prior inconsistent statements obtained in violation of *Miranda* procedures, without consideration of the voluntariness of such statement, on the theory that *Miranda* should not be allowed to promote perjury.

[5] 236 S.E.2d 431 (W. Va. 1977).

defendant's credibility. As a result of *McAboy,* West Virginia has declared a policy, based on constitutional protections, which is among the most restrictive in the nation.

The original position taken by West Virginia on this issue was best stated in *State v. White,*[6] where the court found that "impeaching evidence must be confined to reputation for truth, and does not embrace moral character in general. Therefore, evidence of the commission of other crimes is not admissible as impeaching testimony."[7] The underlying rationale for such a prohibition was that the jury would consider the revelation of other convictions as an indication of guilt in the case at hand. West Virginia subsequently began to carve out exceptions to the *White* rule and seemed to adopt an *ad hoc* balancing test which allowed the use of a greater variety of prior convictions for impeachment purposes.[8] This position was more clearly adopted in *State v. Friedman,*[9] which interpreted a state statute[10] to allow the use of prior convictions to impeach the defendant when he took the stand. The argument was that by voluntarily becoming a witness, the defendant opened up cross-examination to include any area. The defendant's only safeguard was to request a limiting instruction explaining to the jury that the former convictions brought out on such cross-examination related only to the question of credibility, and not to the question of guilt. The *Friedman* court noted, however, that the trial court was not required to give such an instruction *sua sponte.*

Over thirty years after the *Friedman* decision, in *State v. McGee,*[11] the court adopted a stricter approach to the use of prior convictions for impeachment. In the language of the court, the "trial court is required to consider the probative value of such a

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[6] 81 W. Va. 516, 94 S.E. 972 (1918).

[7] *Id.* at 521, 94 S.E. at 974.

[8] *See generally* State v. Woods, 155 W. Va. 344, 184 S.E.2d 130 (1971); State v. LaRosa, 129 W. Va. 634, 41 S.E.2d 121 (1946); State v. McMillion, 127 W. Va. 197, 32 S.E.2d 625 (1944); State v. Friedman, 124 W. Va. 4, 18 S.E.2d 653 (1942).

[9] 124 W. Va. 2, 18 S.E.2d 653 (1942).

[10] W. VA. CODE § 57-3-6 (1966).

> At any trial . . . for a felony or misdemeanor, the accused shall, with his consent . . . be a competent witness . . . and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness, but his failure to testify shall create no presumption against him nor be the subject of any comment before the court or jury by anyone.

[11] 230 S.E.2d 832 (W. Va. 1976).

line of questioning measured against the risk of substantial danger of undue prejudice to the accused."[12] If no risk of substantial danger is found, then the former conviction may be admitted into evidence, but the trial court must then be given an explanatory, limiting instruction.

The *McAboy* court, then, has restricted the use of prior convictions even further, for only convictions for perjury and false swearing may be introduced on the issue of credibility, unless the defendant affirmatively places his good character in issue. Once he places his character in issue, the *McGee* balancing test is applicable to determine whether other types of prior convictions are admissible.

The second major issue addressed by the court in the past year involves the criminal defendant's constitutional right to presence. In *State v. Boyd,*[13] during defense counsel's closing argument, an objection was raised by the prosecution. The objection was followed by an off-the-record, *in camera* hearing between the trial judge and the attorneys, without the defendant's presence. In line with strict protection of the defendant's rights, the holding in the case was that such an *in camera* conference was a stage of the proceeding at which the defendant's presence was constitutionally required. The opinion goes on to resolve two ambiguities in this area of the law.

The first ambiguity involves a question of what stages of a criminal proceeding require the defendant's presence. Prior to 1938, West Virginia generally recognized a defendant's right to presence,[14] and in that year, in *State v. Martin,*[15] interpreted sections of the West Virginia Code[16] to mean that the defendant must be present at all stages of the trial affecting him, and that such presence must appear in the record. That decision left open, however, the determination of which stages affected the defendant's rights sufficiently to require his presence. This question remained unanswered through 1958, though the court resolved at least some

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[12] *Id.* at 837.

[13] 233 S.E.2d 710 (W. Va. 1977).

[14] State v. Snider, 81 W. Va. 522, 94 S.E. 981 (1918) (motion to strike evidence); State v. Grove, 74 W. Va. 702, 82 S.E. 1019 (1914) (post trial argument for new trial); State v. Sutter, 71 W. Va. 371, 76 S.E. 811 (1912) (when motion was argued).

[15] 120 W. Va. 229, 197 S.E. 727 (1938).

[16] W. VA. CODE § 62-3-2 (1977 Replacement Vol.). "A person indicted for felony shall be personally present during the trial therefor."

of the ambiguities when it held that the defendant need not be present when a matter not part of the criminal trial itself and which could not affect any of his rights was being considered.[17] Again, however, the court did not sufficiently define which parts of the proceedings could be carried on without affecting the defendant's rights. The *Boyd* court defined a critical stage as one where the defendant's right to a fair trial will be affected. "Generally, all matters starting with the commencement of the actual trial require the presence of the accused through final judgment."[18] Pretrial ministerial matters, such as consultations between prosecution and defense counsel, routine orders filing motions, or clerical matters, however, are specifically excluded. The *in camera* evidentiary hearing in *Boyd* occurred during the trial and so was a critical stage requiring presence of the defendant.

The second ambiguity concerns the effect of the harmless error rule on the defendant's right to be present. In *State v. Thomas*,[19] the court found that where harmless error was applicable, the burden was on the state to show that any error resulting from the violation of the defendant's rights was harmless beyond a reasonable doubt. *Thomas*, however, did not specifically hold that the harmless error doctrine applied to rights created in the West Virginia Constitution. In *State ex rel Grob v. Blair*,[20] the court went on to find that the right to presence was both constitutional and statutory in nature, but was subject to the harmless error rule. The case thus extended *Thomas* to the right to presence created by the West Virginia Constitution. The harmless error test actually set forth by the *Grob* court, however, differed from the *Thomas* test, for the *Grob* court shifted the burden to the defendant to "demonstrate a possibility of prejudice" in order to show that the harmless error test was not applicable.[21] The *Boyd* court clearly reaffirmed the position taken in *Thomas* and placed the burden back on the state to prove that there was harmless error in the constitutional violation. Furthermore, such harmless error can only be proven if a sufficient record of all the proceedings is preserved. Because there was no record of the *in camera* hearing in

[17] State *ex rel* Burkhamer v. Adams, 143 W. Va. 557, 103 S.E.2d 777, *cert. denied*, 358 U.S. 869 (1958) (defendant not present in court when matter of fees to be paid to examining physician was considered).

[18] 233 S.E.2d at 719.

[19] 203 S.E.2d 445 (W. Va. 1974).

[20] 214 S.E.2d 330 (W. Va. 1974).

[21] *Id.* at 337.

Boyd, the state was conclusively unable to prove harmless error in the violation of the defendant's constitutional right to be present.

The final major area in which the recent court extended protections to the criminal defendant is the area of a defendant's constitutional right to effective assistance of counsel. Though West Virginia has long recognized a criminal defendant's right to effective counsel, the court has traditionally applied the "mockery of justice" test to determine such effectiveness.[22] In other words, assistance of counsel was deemed effective absent a gross miscarriage of justice. In 1974, in *State v. Thomas,*[23] this position was modified, for the court adopted "the normal and customary skill test." Under this test, the court undertook a closer review of defense counsel's actions and balanced them against those expected of an attorney reasonably competent in the conduct of a criminal trial. Shortly thereafter, the court began to set out specific instances in which counsel would be deemed ineffective,[24] such as failure to properly prepare for trial or failure to prosecute a timely appeal. During the same period, however, in *Carter v. Bordenkircher,*[25] the court reaffirmed its position that not every error made by counsel would render the assistance ineffective. Counsel cannot be required to explore every possible defense, and tactics used during trial should not be open to "second guessing" upon review. These decisions set forth general guidelines for a determination of effectiveness of counsel, and specifically left control of the tactical aspects of the case in the hands of the individual defense attorney.

In *Cannellas v. McKenzie,*[26] the court adopted a stricter review of the effectiveness of defense counsel. In that case, the defendant was convicted of rape. After raising the defense of consent at trial, counsel for the defendant apparently made the tactical decision to attack the credibility of the prosecutrix as the major thrust of the defense. On appeal, the court took the unprecedented step of declaring that specific acts of the defense counsel constituted ineffective assistance, even though such acts could ordinarily be

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[22] State *ex rel* Blankenship v. Boles, 149 W. Va. 377, 141 S.E.2d 68 (1965); W. VA. CONST. art. III, § 14. *See* Gideon v. Wainright, 372 U.S. 335 (1963); State *ex rel* Duncan v. Boles, 149 W. Va. 334, 140 S.E.2d 798 (1965).

[23] 203 S.E.2d 445 (W. Va. 1974).

[24] *See generally* State *ex rel* Owens v. King, 149 W. Va. 637, 142 S.E.2d 880 (1965); State *ex rel* Robison v. Boles, 149 W. Va. 516, 142 S.E.2d 55 (1965); State *ex rel* Favors v. Tucker, 143 W. Va. 130, 100 S.E.2d 411 (1957), *cert. denied,* 357 U.S. 908 (1958).

[25] 226 S.E.2d 711 (W. Va. 1976).

[26] 236 S.E.2d 327 (W. Va. 1977).

classed as "tactical decisions." Furthermore, the decision reveals a willingness to use broad judicial review to extract specific instances of conduct from the record which could be thought to be ineffective, even though those instances were not raised on appeal.

Assistance was found to be ineffective, for instance, because counsel failed to question prospective jurors on *voir dire* examination regarding a prejudicial newspaper article. The decision regarding questioning of these jurors would seem to be a judgment call to be made by counsel and would depend upon his evaluation of the impact of the news article versus the impact created by putting the article in issue on *voir dire*. If the publicity was not thought to be prejudicial or was circulated on a limited basis, questioning prosepctive jurors on their attitudes toward the article might only serve to clarify the negative aspects in their minds.[27] In light of the fact that jurors have been seated under conditions far more prejudicial than casual exposure to a questionable article,[28] a rule requiring *voir dire* examination of this point would seem overly mechanical since jurors will likely be seated unless they clearly indicate that the adverse publicity actually had a prejudicial effect.[29]

An equally difficult question may arise regarding the *Cannellas* court's holding that failure to assign insufficiency of evidence as grounds for appeal constitutes ineffective assistance of counsel. While West Virginia originally held that the jury verdict in a criminal trial would not be set aside unless it was manifestly against the weight of the evidence,[30] this test has been modified periodically. A later interpretation of the rule held that the verdict would not be set aside where reasonable men could differ as to the verdict, unless it was clearly wrong or had no evidence to support it.[31] As a corollary, the court held that the appellate court can not invade the province of the jury unless the evidence upon which the verdict is based is patently incredible, since the appellate court does not have the benefit of viewing the demeanor of the witness.[32]

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[27] I. OWEN, DEFENDING CRIMINAL CASES BEFORE JURIES, 117-20 (1973).

[28] State v. Taft, 143 W. Va. 365, 102 S.E.2d 152 (1958). In *Taft*, prospective jurors present in court as spectators during the trial of defendant, who was charged with unlawful transportation of intoxicating liquors, were permitted to be seated as jurors in a second trial of the same defendant on drunk driving charges.

[29] *Id.* (by implication).

[30] State v. Toler, 129 W. Va. 575, 41 S.E.2d 850 (1946).

[31] State v. Voiers, 134 W. Va. 690, 61 S.E.2d 521 (1950).

[32] State v. Bailey, 151 W. Va. 796, 155 S.E.2d 850 (1967).

The current position would allow the verdict to stand if there is substantial evidence upon which the jury might have found the defendant guilty beyond a reasonable doubt.[33]

In *Cannellas,* however, the court made a determination that the clothing worn by the victim was critical to the state's case and then determined that without this evidence there would have been insufficient grounds for conviction.[34] Defense counsel chose not to challenge the admission of the clothing, but instead produced a witness, the prosecutrix's companion on the night of the rape, to testify about inconsistent statements regarding the clothing which were made by the prosecutrix at the preliminary hearing. Since the testimony of the proxecutrix, her companion, and her mother (another witness) would seem to supply sufficient basis for a conviction under the current test even without the clothing, it would seem incongruous to require counsel to base his appeal on insufficient evidence where oral evidence and demeanor of the various witnesses is the deciding factor. While the prior position was based on a determination that the appellate court should not pass upon the sufficiency of evidence without benefit of viewing the demeanor of trial witnesses, *Cannellas* seems to institute broad review of the evidence based solely on the record of trial proceedings, whether or not the insufficiency issue is raised on appeal. Though the decision is a clear attempt to protect the criminal defendant from incompetent counsel, the result may be to force all defense attorneys to assign insufficiency of evidence as grounds for appeal in order to protect not the defendant, but themselves. Furthermore, the court may now take on the burden of reviewing the sufficiency of the evidence in all cases without the benefit of viewing the demeanor of witnesses.[35] This is perhaps the most outstanding aspect of the case.

The *Cannellas* court also held that it was improper for defense counsel to introduce evidence that the defendant was a married man. Since consideration of a defendant's marital status has been allowed where no objection is made,[36] it seems unduly harsh to disallow introduction of this fact by the defense to demonstrate lack of motive. The effect of the holding will be to prevent attorneys from presenting this potentially helpful evidence as a portion of the rape defense.

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[33] State v. West, 153 W. Va. 325, 168 S.E.2d 716 (1969).
[34] 236 S.E.2d 327 (W. Va. 1977) (by implication).
[35] *Id.* (by implication).
[36] *See* State v. Beacraft, 126 W. Va. 895, 30 S.E.2d 541 (1944).

In *Cannellas,* then, the court set up specific procedures which must be followed by all defense counsel in areas considered "tactical" under *Thomas,* and in so doing moved away from the "reasonable skill" test set out by *Thomas.* The court has, in effect, begun to invade the province of the defense attorney to decide tactical matters. Although the court made it clear that the decision to regard defense counsel as ineffective in this case was made not on the basis of a single act, but rather on the cumulative effect of the attorney's decisions, it will be difficult for appointed counsel to avoid the conclusion that he must affirmatively comply with the specific suggestions of the court, or be found ineffective.

As a result of *Boyd, McAboy,* and *Cannellas,* the current focus of the court seems to be on extension of protection to the criminal defendant. While this trend could continue, prediction of the court's future position on any given issue is difficult because the dissents in each of the cases indicate that there is some dissatisfaction with such a judicial undertaking. For example, it seems clear from *Cannellas* that the court intends to carefully review the conduct of defense counsel to protect the accused from infractions in what the court sees as a minimum standard of conduct. The dissenting justice in that case, however, would have found the assistance of defense counsel effective and thus would have properly applied the spirit of *Thomas.* He argued that each of the decisions made by defense counsel was tactical and hence not properly subject to review.

Despite the uncertainty in prediction, the criminal decisions, as well as the recent mandates of the legislature requiring counsel in quasi-criminal actions such as child neglect[37] and juvenile hearings,[38] seem to indicate that the court can be expected to offer further protection to classes of civil litigants.[39] While this protection will probably not take the form of reversal of civil cases where a review of the record demonstrates a lack of fundamental fairness due to ineffective counsel, it will likely be extended through a more active disciplinary review of the actions of civil counsel.[40] Since the

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[37] W. VA. CODE § 49-6-2 (Cum. Supp. 1977).

[38] W. VA. CODE § 49-5-8 to -9 (Cum. Supp. 1977).

[39] *See generally* Wheeling Dollar Sav. v. Hanes, 237 S.E.2d 499 (W. Va. 1977) (overruling prior cases which interpreted West Virginia law to exclude adopted children from a share of the proceeds of *inter vivos* trusts).

[40] *See generally* Comm. on Legal Ethics of W. Va. State Bar v. Pence, 240 S.E.2d 668 (W. Va. 1977); Comm. on Legal Ethics of W. Va. State Bar v. Jones, 239 S.E.2d 133 (W. Va. 1977); Comm. on Legal Ethics of W. Va. State Bar v. Daniel, 235 S.E.2d 369 (W. Va. 1977).

basic philosophy of the court may be reflected in other civil cases as well, the court is likely to place a greater emphasis on the rights of injured plaintiffs in the area of negligence and products liability.[41]

The court will probably continue to take a generally broad approach in all areas, while retaining the power to decide some cases on narrow grounds, and will consistently employ a very broad scope of judicial review in its efforts to insure fairness. For this reason, the court may appear to fluctuate in its approach to constitutional and other issues from time to time, but will continue expansion of protection of individual rights.

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[41] Dawson v. Canteen Corp., 212 S.E.2d 82 (W. Va. 1975).