11-1445

IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF WEST VIRGINIA

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BRUCE W. DEWEESE
JACKSON COUNTY
CIRCUIT CLERK
RIPLEY, WV 25271

STATE OF WEST VIRGINIA,

Plaintiff,

VS.

CRIMINAL CASE NO.: 10-F-89
THOMAS C. EVANS, III, JUDGE

RONALD C. DAVIS,

Defendant.

ORDER

On this the 16th day of September 2011, came the State by James P. McHugh and Roger D. Williams, Prosecuting Attorneys, in and for this County and State, and the Defendant, in person, and by counsel, Kevin Postalwait and Pancho Morris, for post-trial motions and sentencing.

Counsel for Defendant filed a motion for new trial. After argument of counsel and for reasons stated on the record, the Court DENIED Defendant's Motion for New Trial. Defendant's exception was noted and saved on the record. The Court then ADJUDGED the Defendant guilty of first degree murder and first degree arson.

The Court then afforded counsel for the Defendant the opportunity to speak on behalf of the Defendant and addressed the Defendant personally and asked him if he wished to make a statement in his own behalf and/or to present any information in mitigation of punishment. The Court also heard from the State of West Virginia.

Thereafter, the Court did proceed to pronounce the sentence of the law against him, and nothing being offered or alleged in delay of judgment, the Court sentences the Defendant as follows:

For the offense of **First Degree Murder**, the Defendant is committed to the custody of the Commissioner of the West Virginia Department of Corrections for confinement in the penitentiary for **life** therein to be safely kept and treated in all respects in accordance with the law, without eligibility for parole. (TCG)

For the offense of **First Degree Arson**, the Defendant is committed to the custody of the Commissioner of the West Virginia Department of Corrections for confinement in the penitentiary for ~~not less than one year nor more than~~ twenty years (TCG) therein to be safely kept and treated in all respects in accordance with the law.

It is further ORDERED that said sentences are to run consecutively.

The Court then advised the Defendant of his right to appeal including his right to an attorney, and ORDERED that the Circuit Clerk furnish the Defendant with a written statement of his post-conviction rights.

The Defendant is remanded into the custody of the Department of Corrections.

The Clerk of this Court shall send attested copies of this Order to (1) James P. McHugh, Prosecuting Attorney; (2) Kevin Postalwait, counsel for the Defendant; (3) Sheriff of Jackson County; (4) South Central Regional Jail; and (5) Department of Corrections.

All of which is, accordingly, ORDERED.

ENTERED this 19th day of September 2011.

Thomas C. Evans, III, Judge

PREPARED BY:

James P. McHugh (#6008)
Prosecuting Attorney

A TRUE COPY, CERTIFIED THIS THE SEP 19 2011

BRUCE W. DEWEESE
JACKSON COUNTY
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ENTERED THE 19 DAY OF Sept 2011

ORDER BOOK 32 PAGE

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA:

STATE OF WEST VIRGINIA,

Plaintiff,

vs. // CRIMINAL CASE NO.: 10-F-89
Judge Thomas C. Evans, III)

RONALD C. DAVIS,

Defendant.

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BRUCE W. DEWEES
JACKSON COUNTY
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RIPLEY, WV 25271

ORDER

(Re: Defendant's Motion to Suppress)

Pending is the Defendant's Motion to Suppress, whereby the Defendant seek an order suppressing all statements given by the Defendant, including those to "law enforcement officers, fire fighters, medical personnel, and inmates/cell mates/detainees."

In the motion, it is alleged that Defendant was interrogated by law enforcement and agents of the state, maybe done in violation of his constitutional rights.

The parties were afforded an opportunity to present evidence and argument regarding this motion.

The State proffered that it intends to offer statements of the Defendant made at the alleged crime scene to first responders (EMS, Fire Dept. personnel); statements made by Defendant to his wife and step-daughter at Huttonsville Correctional Center; statements made to other persons incarcerated with the Defendant. With the exception of law enforcement officers, there is no evidence that any of the individuals to whom Defendant purportedly made statements were agents of the State of West Virginia.

Statements made to first responders were in connection with whether Defendant was injured and needed treatment.

In this case, the Defendant was initially asked questions by Lieutenant Chris Metz (in the presence of Sgt. Todd Roberts), when they first arrived on the scene. This was late in the evening of September 23, 2010. It was reported to the officers by 911 that Defendant had killed Cathy Parsons and burned her trailer. When the officers arrived, it was a chaotic situation. The officers initial questioning of the Defendant was pre-Miranda/pre-arrest, "on the scene" type questioning. Lt. Metz performed a brief ***Terry*** frisk on the Defendant when he first had contact with him, based on allegations that Defendant possessed and had brandished a knife (Tr., 5/13/11, p. 72).[1] The initial questions of Lt. Metz and the Defendant's responses were not recorded (Id., p. 127). Basically, Lt. Metz asked Davis what had happened, if he knew the whereabouts of Cathy Parsons and how Davis' pant leg got burned (Id., pp. 72-75, 116). When Lt. Metz talked to Davis, he was primarily concerned with the whereabouts and welfare of Cathy Parsons (Id., p. 116). The questions that Lt. Metz asked the Defendant were of a distinctly general nature, similar to questions that would be asked of any witness to a fire. The general nature of the initial questioning is apparent from the report of Sgt. Todd Roberts who wrote that Lt. Metz asked Davis "what happened and focused on the whereabouts of Cathy Parsons. " See Criminal Investigation Report ("CIR") in this case together with the "Actions Taken" Summaries of Lt. Metz and Sgt. Roberts.

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[1]A *Terry* frisk is not an arrest and is a temporary action taken to ensure the safety of the officer. It is not coercive and does not require Miranda warnings. ***See, e.g. Berkemer v. McCarthy***, 468 U.S.420 (1984) "a traffic stop is much like a *Terry* frisk, is typically of short duration, and relatively nonthreatening, such that it does not constitute custody for *Miranda* purposes."

At the time of all of the pre-*Miranda* statements to Lt. Metz, Defendant was not under arrest and was not threatened. He was not handcuffed or otherwise restrained. Although Lieutenant Metz conceded at one point that he would not have allowed Defendant, Davis, to leave if he had attempted to do so (Id., Metz, p. 124), the fact is that the Defendant did not ask to go, he was not told that he could not go, and he was not placed in hand-cuffs or physically restrained until after the completion of his mirandized statement (Tr., Faber, 11/14/11 Hearing, p. 28, 35; Tr. Metz, 5/13/11, p. 124).

It is a well-recognized rule "that the *Miranda* safeguards were never intended to apply to the typical 'on the scene' investigation." ***Damron v. Haines***, 223 W.Va. 135, 141, 672 S.E.2d 271, 278 (2008). In that regard, the United States Supreme Court stated in *Miranda* that "[o]ur decision is not intended to hamper the traditional function of police officers in investigating crime . . . . [g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

As a result, preliminary questions at the scene of a crime, in a non-custodial setting are not rendered inadmissible because of a failure to obtain a Miranda waiver.

An officer's subjective intention is of little consequence. The test is objective- whether the Defendant would have objectively believed his freedom to be restricted and whether there is an actual restriction on the Defendant's freedom as to render him in custody. ***See Davis v. Allsbock***, 778 F.2d 168 (4th Cir. 1985). In ***State v. Hopkins***, 192 W.Va. 483, 453 S.E.2d 317 (1994), the Supreme Court of Appeals held that the

question whether a person is in custody for purposes of Miranda requirements is answered by the objective circumstances of the interrogation. The court reiterated that it does not depend on the subjective view of either the person interrogated or the officers who conduct the interrogation.

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In Syllabus Point 2 of ***State v. Middleton***, 220 W.Va. 89, 640 S.E.2d 152 (2006), this Court held that,

> The factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.

Here, the initial questioning was not lengthy; there were two officers present (although, at one point, Deputy Anderson arrived), only one of whom asked any questions; the questioning was of a general nature and was not recorded; there was no physical restraint at the time of the questions; the responses of the Defendant were largely self-serving and were not accompanied by any attempt on the part of the Defendant to immediately leave the scene or terminate the interview. While some of the witnesses may have made statements to implicate the Defendant, the investigation was still in its infancy at this point. The answers of the Defendant were, by all accounts, voluntary. The Defendant was not arrested - - and was not in custody - - until after he made a statement preceded by *Miranda* warnings.

In ***State v. Wickline***, 399 S.E.2d 42(1990), the West Virginia Supreme Court of Appeals held that police officers on the scene of a murder who were questioning the decedent's wife did not have to give *Miranda* warnings until the Defendant disclosed

that she had killed her husband. The Defendant had not been under arrest and was not subject to custodial interrogation. Such questioning was considered a "crime scene" interview. While the Jackson County Sheriff Deputies received reports that Davis started the fire, the Defendant never did confess this to police officers.

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Under the totality of the circumstances, such preliminary questioning falls squarely into the "on-the-scene" exception to *Miranda.*

Before the Defendant was questioned at length, he was read his rights by Captain Faber. His responses to Captain Faber's post-*Miranda* statements were recorded, first in the notes of Lieutenant Metz, and then by digital recorder. Before any notes were taken, Captain Faber read the Defendant his rights using a rights warning card that he carried in his shirt pocket (Tr., 4/14/11 Hearing, p. 10).

When questioned by Lt. Metz and Capt. Faber, during post-Miranda, pre-arrest, questioning, Davis clearly understood the questions and formulated coherent responses (See Hearing Exhibit 2, Digitally recorded statement of Davis from 9/24/10). There were no threats, no coercion, no promises and no other unlawful inducements (Tr., 4/14/11, p. 12). The Defendant's statements were voluntary.

Pursuant to Syllabus point 5 of ***State v. Starr***, 216 W.Va. 242(1975), the State must show by a preponderance of the evidence that "confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." In this regard, the State contends that all of the Defendant's statements to police officers on the night of the crime were voluntary. The initial on-the-scene statements that the Defendant made to others have no *Miranda* protection. The State contends that Miranda warnings were

not even required when the officers questioned Davis and started recording his answers. Of course, that question is academic, because the *Miranda* warnings were given. After the warnings were given and acknowledged, the Defendant had certainly waived the protection of such rights by acknowledging his rights and continuing to talk.

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At the pretrial hearings, Defendant's counsel suggested in cross examination that the pre-Miranda statements of the Defendant would prevent use of the post-Miranda statements of the Defendant. Without conceding that the brief initial questioning by Lt. Metz was inappropriate, or the product of a custodial interrogation; even if it was, it is important to note that the Unites States Supreme Court has refuted Defendant's suggestion in ***Oregon v. Elstad***, 470 U.S. 298 (1985), holding that "a suspect who has once responded to unwarned, yet noncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." Of course in this case, the Defendant did not confess, but rather, has made a series of statements that are inconsistent with the anticipated testimony of the other witnesses that has been collected over the course of the investigation. In addition, it is clear that even Capt. Faber collected independent information upon which to question the Defendant (Tr., 4/14/11, p. 33).

There was significant evidence that Defendant was intoxicated at the time he interacted with the police officers. Each officer testified that in fact he was intoxicated. It is not argued by the Defendant that his intoxication rendered involuntary his statements and admissions to the police, both before being advised of his Miranda rights and afterwards. (See Tr., Pre-Trial Hearing, August 12, 2011).

Even though it is not relied on by the defense, nonetheless, the court has an obligation to assess whether the statements made by Defendant were voluntary. In *Corpus Juris Secundum*, Criminal Law § 1256, the writer noted generally that:

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> Declarations, admissions, or confessions of an accused, otherwise voluntary, generally are not to be excluded merely because he or she was intoxicated...at the time of making them, provided that the accused had sufficient mental capacity to know what he or she was saying. Although incriminating statements are not voluntary if attributable to intoxication, intoxication alone is not sufficient to negate an otherwise voluntary act. Thus, the fact that the accused's confession is taken while he or she is under the influence of alcohol is not dispositive of the issue of voluntariness.

Similarly, in ***State v. Hickman***, 175 W. Va. 709, 722, 338 S.E.2d 188 (1985), the Court considered the confession of a defendant who was intoxicated. Based on the evidence, the Court determined that the "defendant was not intoxicated at the time of the confessions to such an extent that as a matter of law he was not capable of intelligently waiving his rights."

Likewise, in ***State v. Hall,*** 174 W. Va. 599, 328 S.E.2d 206 (1985) the West Virginia Supreme Court affirmed a Circuit Court finding that a confession was voluntary notwithstanding a defendant's intoxication. Citing 9 A.L.R.6th 1, *Sufficiency of Showing that Voluntariness of Confession or Admission Was Affected by Alcohol or Other Drugs—Self Intoxication.*

The Supreme Court of Appeals has determined that the issue of whether intoxication has rendered a statement involuntary is a matter within the discretion of the trial judge, ***see State v. Guthrie***, 315 S.E.2d 397(1984); ***State v. Haller***, 363 S.E.2d 719 (1987) as long as a Defendant has the capacity to voluntarily and intelligently waive his rights. ***State v. Hambrick***, 350 S.E.2d 537(1986).

In this case, the Defendant, while under the influence of alcohol, clearly understood the questioning by Lt. Metz. When Capt. Faber read the Defendant his rights, the Defendant indicated he understood his rights. Capt. Faber has talked to 100's of intoxicated Defendants and he was of the opinion the Defendant was lucid and understood what he was discussing (Faber, 4/14/11, pp. 20, 32; Metz, 5/13/11, p. 77)). According to Capt. Faber, the Defendant was in sufficient possession of his faculties to give a reliable statement (Faber 4/14/11, p. 22). According to Capt. Faber, the Defendant had significant experience with the criminal justice system such that he would be familiar with his rights. This is an important factor for the Court to consider. e.g. *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391, 61 USLW 4007 (1992). The officers photographed the Defendant at the scene (Ex.8, 5/13/11 Hearing). In the photos, the Defendant appears to be in control of his faculties. The Defendant even had the presence of mind to ask both Captain Faber (Faber, 5/13/11 Hearing, p. 53), and Fire Chief Pierson for a ride to the interstate.

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After the Defendant was arrested, he was transported to the County Courthouse for the seizure of his clothes. Captain Faber observed him while taking his clothes and photographed him. He was able to cooperate.

During the Defendant's taped interview, it is apparent that the Defendant plainly understood the officers' questions and was able to formulate coherent responses to the questions, even to manufacture stories according to officer Faber. (Tr., 4/14/11 Hearing, p. 13). This is a very significant fact to the court. The Defendant was standing when talking to officers. He was not falling down (Tr., 4/14/11, p. 18). He clearly had sufficient possession of his mental faculties and mental capacity to know what he was

saying and give a reliable, albeit untruthful and self-serving, statement (Tr., 4/14/11, p. 13). As the Defendant was being questioned, he was formulating his responses carefully and he gave various accounts as he was asked about the problems with his statements (Tr., 4/14/11, p. 19).

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There is no question the Defendant comprehended what was occurring. During the events, the Defendant was described by several parties as standing/sitting on the hillside, petting a dog, watching the fire. At times, he interacted with people in the area of the fire. He was not passed out or incapacitated. Under the circumstances of the case, and to the extent that *Miranda* even applies to the statements to Captain Faber, the Defendant's waiver of his rights and subsequent statements were not rendered involuntary by his intoxication.

Based on the foregoing, it is ORDERED that the motion to suppress the statements provided by the Defendant is denied and overruled.

The Clerk shall forward attested copies of this order to the Prosecuting Attorney and defense counsel: Kevin Postalwait and Poncho Morris.

All of which is ORDERED, accordingly.

ENTER: August 25, 2011

Thomas C. Evans, III, Circuit Judge

ENTERED THE 26th DAY OF August 2011

ORDER BOOK 132 PAGE 14

Bruce W Dewees
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

Case No. 10-F-89
(Judge Thomas C. Evans, III)

RONALD DAVIS,

Defendant.

ORDER

(Re: Defendant's Motion to Dismiss Or in the Alternative to Suppress Evidence)

On the 17th day of June, 2011 came the Defendant, Ronald Davis, by his Counsel, Kevin B. Postalwait and Pancho Morris, and the State of West Virginia by its Prosecuting Attorney, James P. McHugh, and Assistant Prosecuting Attorney, Roger Williams, for hearing on the Defendant's Motion to Dismiss or in the Alternative Suppress Evidence.

The Court, having heard testimony and other evidence makes the following findings of fact and conclusions of law:

Findings of Fact

From a preponderance of the evidence, the court finds as follows:

1. Defendant, Ronald Davis, is charged by Indictment with First Degree Murder and First Degree Arson, allegedly occurring on September 23, 2010, on First Creek Road, near Kentuck, in Jackson County, W. Va. The alleged victim was Cathy Parsons and it was her dwelling - - a mobile home - - that was the subject of the alleged arson.

2. The police and firefighters responded to the scene on First Creek Road between approximately 11 p.m. and 11:53 p.m. of September 23, 2010. The police were dispatched with a report that Defendant killed Cathy Parsons and burnt the trailer with the alleged victim in it.

Assistant State Fire Marshall Jason Baltic (hereinafter "ASFM Baltic") responded to the scene of the fire while it was being extinguished by firefighters. Also, the police were on the scene conducting an investigation. Upon arrival, ASFM Baltic conducted an investigation into the origin of the fire, assisted at some point later by Deputy Fire Marshal Domingo. Practically all of the mobile home, except for the steel frame, was consumed in the fire.

3. ASFM Baltic completed the investigation during the early morning hours (approximately 5 a.m.) of September 24, 2010 and left the scene, and the scene of the fire was then left unattended.

The remains of the alleged victim, Cathy Parsons, were recovered in the course of extinguishing the fire and investigating the origin of the fire.

4. At the time of the fire, the alleged victim, Cathy Parsons, lived in a mobile home immediately adjacent to the mobile home of her daughter, Eltina Parsons Harper and son-in law, Allen Michael Harper. By the measurements of Dep. Sheriff Lt. Metz, the back door of the Harper mobile home was a mere 25 feet from the front porch of the Cathy Parsons mobile home (State's Ex 9A). Prior to the fire, the Harper family lived in their home with four children: Charles Sheets, Michael Sheets, Nakara Parsons and Jonathan Parsons. According to Michael Harper, after the fire, the Harper family went to live temporarily with the parents of Michael Harper. The parents of Michael Harper

also lived in a small two-bedroom mobile home. While living at the residence of Harper's parents, the four children slept in the living room of the mobile home. Soon after the fire, Allen Michael Harper asked Dep. Sheriff Capt. Herbert Faber for permission to clean up the remains of the Cathy Parsons mobile home. Harper stated that his parents were asking him how long he would have to stay with them. In addition, Mrs. Harper would not return to the scene of her mother's brutal murder, until the stark reminder of the burned out shell of a mobile home had been removed. Mr. Harper did not want to expose the children to a constant reminder of their grandmother's death. Upon receiving the request from Mr. Harper on September 29, 2010, Capt. Faber contacted ASFM Baltic and asked ASFM Baltic for permission to clean up the fire scene. ASFM Baltic concluded that his investigation of the fire scene itself was complete and authorized the release of the scene to the family.

5. After receiving permission to clean up the scene, Allen Harper hired a bulldozer and completed the removal. Some of the metal was sold for scrap, and the balance of the material at the scene was buried nearby.

6. There was no evidence that the actions of either the Sheriff's Department or the State Fire Marshal's office were taken in "bad faith" or were undertaken to limit the Defendant's access to evidence. To the contrary, Capt. Faber, the chief law enforcement officer in the investigation specifically contacted ASFM Baltic, the lead Fire Marshal assigned to the case to seek permission to allow Mr. Harper to clean up the scene. ASFM Baltic responded as he has done in other cases and released the scene.

7. ASFM Baltic is one of ten (10) fire investigators in the entire State of West Virginia. He investigates dozens of cases every year. His normal practice, and the

normal practice of ASFM Domingo, is to release the scene to family members soon after the fire. The longest ASFM Domingo has ever held a site was four days and that was a site where a fire consumed a portion of a city block and the investigation was ongoing for the four days.

8. Due to manpower limitations, it is not practical to retain a fire scene indefinitely and this is not recommended by NFPA 921. Logically, the failure to have 24-hour security would expose the State to an argument of fire scene contamination.

9. Eyewitnesses informed the police, who informed the ASFMs at the scene, that that the fire was first seen on the porch area of the alleged victim's mobile home.

10. In inspecting the fire scene in the location where the porch had been located, ASFM Baltic used his olfactory senses to detect the possible presence of ignitable liquids in this area. No sample was taken, because ASFM Baltic did not detect any odor consistent with ignitable fluids. However, a sample of a piece of cloth from an area underneath the body of Cathy Parsons was obtained, because an unusual odor was detected. This same was submitted to a forensic lab for testing. The sample taken and tested proved to be negative for the presence of ignitable liquids.

11. The ASFM took approximately fifty-three pictures of the fire scene. However, he did not excavate or "dig out" the scene of the fire. A report indicating that the cause and origin of the fire was "undetermined" and was later amended - - after witness interviews - - to reflect the fire was incendiary in nature and the origin of the fire was the front porch area.

12. Pursuant to 87 C.S.R. 1, the West Virginia Fire Code, the State Fire Marshal adopted as regulatory law National Fire Protection Association 921 Guide for Fire and

Explosion Investigations, 2008 edition, commonly referred to as NFPA 921 on July 1, 2010.

13. The defense witness Douglas Carpenter was qualified as an expert on NFPA 921, methodology of fire investigation, origin and cause determination, fire dynamics, and fire protection engineering. Mr. Carpenter testified NFPA 921 is the recognized standard of care in the fire investigation community. Additionally, Mr. Carpenter stated the proper methodology for fire investigation under NFPA 921 is the scientific method. He continued by explaining the scientific method involves recognizing the need, defining the problem, collecting data, analyzing the data, developing a hypothesis, testing the hypothesis, and then selecting a final hypothesis. Mr. Carpenter stated according to section 17.1 of NFPA 921 the origin of the fire is one of the most important hypotheses that an investigator develops and tests, and generally, if the origin cannot be determined, the cause cannot be determined, and generally, if the correct origin is not identified, the subsequent cause determination will also be incorrect. Mr. Carpenter explained NFPA 921's emphasis on where to take samples for ignitable liquids by pointing out section 22.2.7.3.2 which states irregular patterns may indicate the presence of an ignitable liquid. If the investigator observes patterns associated with a liquid accelerant, he or she may also observe the remains of a container used to hold the liquid. The investigator should ensure that samples are taken from any area where ignitable liquids are suspected to be present.

14. Mr. Carpenter testified additionally that the appropriate and only scientifically reliable method for confirming the presence of ignitable liquids, which is relevant to the

question of whether a fire was of incendiary origin, is by use of gas chromatography-mass spectrometry using ASTM standard protocols.

15. Section 17.3.3.15 of NAFA 921 states that "...[w]itness statements regarding the location of the origin create a need for the fire investigator to conduct as thorough an investigation as possible to collect data that can support or refute the witness statements. When witness statements are not supported by the investigator's interpretation of the physical evidence, the investigator should evaluate each separately."

16. As to the spoliation of evidence issue Mr. Carpenter points out NFPA 921 11.3.5 addresses the issue and spoliation of evidence refers to the loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation. Spoliation of evidence may occur when the movement, change, or destruction of evidence, or the alteration of a scene significantly impairs the opportunity of other interested parties to obtain the same evidentiary value from the evidence, as did any prior investigation. The defense expert also pointed out that NFPA 921 addresses the issue of how long to preserve a crime scene in section 16.3.7 which takes into account practical considerations and says the precautions in this section should not be interpreted as requiring the unsafe or infinite preservation of the fire scene. It may be necessary to repair or demolish the scene for safety or for other practical reasons. Once the scene has been documented by interested parties and the relevant evidence removed, there is no reason to continue to preserve the scene. The decision as to when sufficient steps

have been taken to allow resumption of normal activities should be made by all interested parties.

17. The defense expert testified that in a case such as this where the fire is considered a the "total burn" (as that term is defined by § 3.3.169 of NFPA 921) of the mobile home, then the presence of ignitable fluids in the area of the porch would be disclosed from samples of the area, but only if the flammable liquids had soaked into the ground. Mr. Carpenter also opined to a reasonable degree of scientific certainty that if witness statements were accurate, then there is a reasonable expectation an ignitable liquid would be found. This is assuming of course that the ignitable fluids had soaked into the ground before the fire.

18. The defendant's expert also stated to a reasonable degree of scientific certainty the standard of care for fire investigations was not followed in the investigation of the fire scene in this case, because:

A. the fire scene as it now exists does not have the same evidentiary value as it did prior to the destruction and further there is not suitable substitute evidence to investigate the fire scene; and,

B. the fire scene was not preserved to the appropriate standard of care.

C. The ASFM failed to notify the Defendant or counsel regarding the destruction of the fire scene.

19. ASFM Baltic and ASFM Domingo prepared lengthy responses to Mr. Carpenter's report (State's Ex. 14 and 15). ASFM Baltic has investigated an estimated 600 fires. ASFM Domingo has investigated an estimated 1,300 fires. Both AFSM Baltic and Domingo discussed their decision relating to the testing of soil samples in the

vicinity of the porch. They chose not to take samples for a variety of reasons including the fact that they did not smell accelerant in the area; ASFM Domingo did not expect to locate accelerants in that area as a result of the "total burn" (as that term is defined by § 3.3.169 of NFPA 921) of the mobile home; and, even if they had hypothetically smelled accelerants in the area, they could not correlate them to any identifiable burn patterns due to the "total burn" nature of the structure. Both ASFM Baltic and ASFM Domingo assert that their use of smell is consistent with normal and customary fire investigation practices (State's Ex. 14, p. 2-3; State's Ex. 15, p. 6, para. 17). Even Mr. Carpenter conceded, that it is routine for investigators to use their sense of smell to locate areas where accelerant may have been used.

In his report, ASFM Baltic noted that NFPA 921 is a "Guide," rather than a "Standard" (State's Ex. 14, p. 1). ASFM Domingo agrees (State's Ex. 15, p. 1). This is significant because, as a "Guide," "[d]eviations from these procedures, however, are not necessarily wrong or inferior but need to be justified." State's Ex. 14, p. 1, citing NFPA 921 § 1.3. While the Legislature may be wholly justified in adopting NFPA 921 by reference, the Legislature incorporates what it incorporates, no more. Where there is room for subjective determinations of an investigator, and where there are conflicting guidelines that differ from circumstance to circumstance, as there are with NFPA 921, then that is all the Legislature adopts. NFPA is a "Guide," not a "Standard."

Conclusions of Law

19. NFPA 921 defines "spoliation of evidence" as the loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation. Spoliation of

evidence may occur when the movement, change, or destruction of evidence, or the alteration of a scene significantly impairs the opportunity of other interested parties to obtain the same evidentiary value from the evidence, as did any prior investigation.

20. The test for sanctions for the government's failure to preserve evidence was set forth in ***State vs. Osakalumi***, 194 W.Va. 758, 461 S.E.2d 504, in Syllabus Point 2, which provides:

"When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of other evidence produced at the trial to sustain the conviction."

21. The primary authority on the preservation of a crime scene, in a situation similar to this is ***State v. Lanham,*** 219 W.Va. 710, 639 S.E.2d 802(2006). In ***Lanham***, like what is raised in this case, the Defendant raised legal challenges with regard to the State's alleged destruction of potentially exculpatory evidence located in a mobile home. In ***Lanham,*** the victim's mobile home - - the scene of a burglary and a shooting - - was turned back over to family members three (3) days after the murder and the family proceeded to repair bullet holes and clean up blood stains. The Defendant in that case

claimed he was denied the opportunity to inspect the crime scene and conduct independent testing. In finding no violation of the State's duty to preserve the crime scene, the West Virginia Supreme Court of Appeals noted:

"According to the investigating officers, under the supervision of Trooper Stout, they collected evidence, took pictures, conducted a test of bullet trajectory, and gathered all of the information necessary to complete their investigation. The investigation was completed on June 2, 2004, and the trailer was returned to the Moore family." ***Lanham***, 219 W.Va. at 714, 639 S.E. 2d at 806.

The Supreme Court of Appeals considered and distinguished the holdings of other "evidence preservation" cases, i.e., ***State v. Osakalumi***, 194 W.Va. 758, 461 S.E.2d 504 (1995) and ***State v. Thomas***, 187 W.Va. 686, 421 S.E.2d 227(1992).

For example, in ***Osakalumi***, the issue in the case was whether a sixteen-year-old boy shot himself in the head or whether he was murdered. The critical piece of evidence was a couch where a bullet hole was discovered two months after the shooting had occurred. Even after discovering the bullet hole, police officers left the bloodied couch at the crime scene. A few days later the couch was taken to the police department for storage, but subsequently disposed of at the Mercer County landfill due to an unpleasant odor.

Similarly, in ***Thomas***, the State did not preserve the critical bloodstain sample for independent testing by the defendant nor did the State preserve the results of the test it performed. The State did not photograph any of the electrophoresis results leading to

the deprivation of the defendant's right to a full and fair cross-examination of the expert who performed the electrophoresis test.

In ***Lanham***, like the facts of the instant case, but unlike the facts of ***Osakalumi*** and ***Thomas, supra***, the State did not rely on scientific test results of the unpreserved evidence to make its case against Mr. Lanham. Further, the State did not otherwise rely on missing evidence to convict Mr. Lanham, relying instead on the eyewitness testimony of the persons present at the crime scene. The court, therefore, found no merit to the Mr. Lanham's claim that the State should not have returned custody of the trailer to the occupant (who cleaned up the blood and repaired the bullet holes), prior to Defendant being afforded an opportunity to inspect the trailer.

In the instant case, there was no scientific test of the remains of the fire scene that was unpreserved or destroyed that implicates the Defendant, Ronald Davis. According to the State, all of the evidence submitted for scientific testing has been preserved and is available for the defendant (Defendant's boots and clothes; samples of the victim's tissues; urine taken from the victim during the post-mortem as part of the Report of Death Investigation of the State Medical Examiner). ***Osakalumi*** and ***Thomas*** are simply not applicable to this case.

Here, as in ***Lanham***, the officers took multiple photographs of the scene and took measurements to create a "to-scale" diagram of the scene. In ***Lanham***, the Court found that these photos were a documentation of the scene.

According to the Prosecuting Attorney, this case, like ***Lanham***, is composed primarily of eye-witnesses (which NFPA 921 authorizes as acceptable evidence of fire

origin, standing alone. See NFPA § 17.1.2) and the Defendant has the opportunity and sufficient information to cross-examine the witnesses.

22. The court finds significance in the nature of the unpreserved evidence in this case, which primarily involves a failure to take samples from the area of the porch of the mobile home, the area where witnesses stated they first saw the fire burning. The ASFM did not detect an odor of ignitable fluids at this location. Because of the fact that the fire was a "total burn" there was no ignitable fluid burn pattern present to suggest the presence of ignitable fluids. For these reasons, samples were not taken and, thus, no scientific test was performed.

So, as it stands, the State has no physical evidence proving the presence of ignitable fluids to corroborate eyewitness testimony that the fire originated at the location of the porch (and also to prove the fire was of incendiary origin). The failure to take samples and perform scientific testing, therefore, appears to potentially harm the State's case, not the Defendant's case.

As it stands now, the ASFM is going to testify that he did not detect the presence of ignitable fluids in the area of the porch and, thus, did not sample. The court is at a loss to see how this harms the Defendant's case. If the samples had been taken and the result of testing was positive for the presence of ignitable fluids, that certainly would not have benefitted the Defendant's case. If samples were taken and the results were negative for ignitable fluids, then the permissible inferences are equivocal: it might mean that no ignitable fluids were involved in the area of the porch, but it also might mean that gas was splashed on the porch and the home, ignited and was fully consumed in the fire (as opposed to soaking into the ground). Either way, the same

argument exists without the scientific testing. Thus, the court is unable to find that the failure to take these samples or to otherwise preserve the scene for independent testing by the Defendant is prejudicial or unfair to the Defendant and his right to due process of law relating to being provided an adequate opportunity to prepare for trial.

Moreover, W. Va. Code § 29-3-12(f), which defines the rights of a fire marshal with respect to fire scene investigations, appears to limit the ability of a fire marshal to remain at a building, structure or premises, without a warrant, even if the initial entry was pursuant to exigent circumstances. A Fire Marshal cannot retain a fire scene if he needs a warrant to enter it. Of course, W.Va. Code § 29-3-12(f) is inconsistent with the rules set forth in ***Michigan v. Clifford***, 464 U.S. 287, 104 S.Ct. 641, (U.S.Mich.,1984) and ***Michigan v. Tyler,*** 436 U.S. 499, 511, 98 S.Ct. 1942 (1951)and, if strictly construed, has no applicability to the Sheriff's deputies and fire fighters, including those who actually located the body of Cathy Parsons.

Lengthy retention of the fire scene is also at odds with W. Va. Code § 29-3A-3 which authorizes a "chief of any fire department" to control a fire scene for forty-eight hours. The statutory authority to retain the scene thus appears to expire at the end of 48 hours. This is somewhat consistent with the testimony of ASFM Baltic that it is customary for him not to retain a fire scene and ASFM Domingo's testimony that the longest he recalls staying on a scene is four (4) days.

In this case, like Lanham, a young family was living in a trailer adjacent to the scene of their mother-in-law/mother/grandmother's murder. They did not want to return to their home with the constant reminder of Ms. Parsons' murder just a few feet from their residence. They asked permission to clean up the scene of the fire and

permission was granted as soon as practical so that they could resume their lives, which included restoring electric and water service to their home.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore ORDERED that the Defendant's Motion to Dismiss Or in the Alternative to Suppress Evidence (based on a failure to preserve the fire scene) is denied and overruled.

The Clerk of this court shall forward attested copies of this Order to (1) the Prosecuting Attorney for Jackson County, (2) Public Defender's Office attn: Kevin B. Postalwait and Pancho Morris; and (3) the South Central Regional Jail.

All of which is ORDERED, accordingly.

ENTER: June 24, 2011

Thomas C. Evans III, Circuit Judge

A TRUE COPY, CERTIFIED THIS THE

JUN 27 2011

Bruce W DeMees
CLERK CIRCUIT COURT
OF JACKSON COUNTY, WEST VIRGINIA

ENTERED THE 24th DAY OF June 2011
ORDER BOOK 130 PAGE 418

Bruce W DeMees
CLERK CIRCUIT COURT