IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

_____

No. 22079

_____

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

BRIAN HOPKINS,
Defendant Below, Appellant

Appeal from the Circuit Court of Raleigh County
Honorable Thomas Canterbury, Judge
Criminal Case No. 93-F-371

AFFIRMED

Submitted: 21 September 1994
Filed: 8 December 1994

Darrell V. McGraw, Jr., Esq.
Attorney General
Shawn Anthony Taylor, Esq.
Assistant Attorney General
Charleston, West Virginia
Attorneys for the Appellee

Warren R. McGraw, II, Esq.
Beckley, West Virginia

Attorney for the Appellant

JUSTICE NEELY delivered the Opinion of the Court.
CHIEF JUSTICE BROTHERTON did not participate.
RETIRED JUSTICE MILLER sitting by temporary assignment.
JUSTICE CLECKLEY dissents, and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the defendant was both in custody and being interrogated at the time the admission was uttered." Syllabus Point 2, State v. Rowe, 163 W. Va. 593, 259 S.E.2d 26 (1979).

2. "'Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived.' Syl. pt. 4, State v. Michael, 141 W. Va. 1, 87 S.E.2d 595 (1955)." Syllabus Point 7, State v. Davis, 176 W. Va. 454, 345 S.E.2d 549 (1986).

3. Our holding in State v. Armstrong, 175 W. Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the U.S. Constitution and article III, section 14 of the West Virginia Constitution, "an uncounseled misdemeanor conviction, valid under Scott [v. Illinois, 440 U.S. 367 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."

Nichols ___ U.S. ___, ___, 114 S. Ct. 1921, 1928, 128 L.Ed.2d 745, 755 (1994).

Neely J.:

Brian Hopkins appeals his conviction for shoplifting, third offense and the fines imposed as part of his sentence. On appeal, Mr. Hopkins argues that his conviction should be reversed because the circuit court improperly used his prior uncounseled shoplifting convictions to enhance his sentence. Because a sentencing court is not prohibited from considering a defendant's previous valid uncounseled misdemeanor convictions in sentencing him for a subsequent offense, we affirm his conviction and the fines imposed as part of his sentence.

On 26 October 1992, Mr. Hopkins allegedly shoplifted two cigarette packs from the Food-4-Less grocery store in Beckley, West Virginia. Richard Pyatt, who is employed by the store as a security officer, saw Mr. Hopkins pick up and put two cigarette packs in his pocket. After two persons who accompanied Mr. Hopkins noticed Mr. Pyatt watching them, Mr. Hopkins left the cigarette sales area and walked down and up an aisle. Finally Mr. Hopkins, without paying, walked through the check-out counter, after which he was stopped by Mr. Pyatt. When Mr. Pyatt asked Mr. Hopkins where the two cigarette packs were, Mr. Hopkins responded that he did not have any cigarettes. When Mr. Pyatt told Mr. Hopkins the brands of

cigarettes, Mr. Hopkins said, "Man, you're slick; I didn't see you. How did you see me do that? Where were you at?" The persons who accompanied Mr. Hopkins told Mr. Pyatt that the cigarettes were in aisle nine, the makeup and hair spray area.

Mr. Pyatt then told Mr. Hopkins he was under arrest for shoplifting. After Mr. Hopkins showed Mr. Pyatt the cigarettes' location, Mr. Hopkins said, "Okay, man, you got your stuff back; let me go." Mr. Hopkins followed Mr. Pyatt to the store's security office where Mr. Hopkins' picture was taken with the cigarettes. Without advising Mr. Hopkins of his Miranda rights, Mr. Pyatt questioned Mr. Hopkins, who responded by giving a false name and address. Later as they were returning to the store's front, Mr. Hopkins walked out of the store. The Beckley City Police Department, who were called when Mr. Hopkins was first stopped, recognized Mr. Hopkins from the picture and arrested him several days later.

Mr. Hopkins was charged and convicted by a jury of third offense shoplifting. At trial the State introduced evidence of Mr. Hopkins' three prior convictions for shoplifting, two of which

[1]Miranda v. State of Arizona, 384 U.S. 436 (1966).

[2]In the security office, Mr. Pratt completed some "paper work" with Mr. Hopkins' answers. However, none of this "paper work" was

occurred in 1987, and one in 1988. Mr. Hopkins pled guilty to both 1987 convictions and pled nolo contendere to the 1988 conviction. For each prior conviction, the State presented a witness who had seen Mr. Hopkins shoplift and the final judgment sheet.

After the jury found Mr. Hopkins guilty, Mr. Hopkins was sentenced to a term of 1 to 10 years, and fined $500 for the conviction, $50 as a mandatory penalty, payable to the mercantile establishment, and the costs of the proceeding.

Mr. Hopkins appeals his conviction to this Court asserting the following assignments of error: (1) Mr. Hopkins' statements to Mr. Pyatt were improperly admitted into evidence; (2) The circuit court improperly failed to sever evidence of Mr. Hopkins' prior shoplifting convictions; (3) The circuit court improperly allowed uncounseled convictions to enhance the sentence; and (4) The $50 mandatory fine is an unconstitutional taking without due process.

I

---

admitted at trial.

Mr. Hopkins alleges that because Mr. Pyatt failed to advise him of his Miranda rights, his statement to Mr. Pyatt should not have been admitted. According to Mr. Pyatt, shortly after he stopped and asked Mr. Hopkins about the cigarettes and Mr. Pyatt told Mr. Hopkins the brands of the cigarettes allegedly taken, Mr. Hopkins said, "Man, you're slick; I didn't see you. How did you see me do that? Where were you at?" Because Mr. Hopkins objected to having the jury consider his statement to Mr. Pyatt, the circuit court held an in camera hearing. During the hearing, Mr. Pyatt testified that Mr. Hopkins was arrested after his "[m]an, you're slick . . ." statement and that Mr. Hopkins was not restrained in any way. Mr. Pyatt said that after they returned to the store's selling area, Mr. Hopkins who had followed him around the store and to the security office, simply walked out the store's front door before the police arrived.

The circuit court, first noting that Miranda warnings are required before an interrogation, found in this case that "there was no interrogation . . . of the defendant by this witness." The

[3]Although the record indicates that Mr. Pyatt stopped Mr. Hopkins beyond the store's checkout, Mr. Pyatt testified that he did not touch Mr. Hopkins or restrain him in any way. The record does not reflect if Mr. Pyatt was wear a security guard uniform or other employee identification.

circuit court found the statement to be spontaneous and not the result of an interrogation. Mr. Hopkin's objection to the use of his statement was not renewed after the circuit court made his decision.

We have long held that "Miranda warnings are required whenever a suspect has been formally arrested or subject to custodial interrogation, regardless of the nature or severity of the offense." Syl. pt. 1, State v. Preece, 181 W. Va. 633, 383 S.E.2d 815 (1989). In State v. Preece, the sole issue was when a traffic investigation escalated into an accusatory custodial environment, requiring

---

[4]In State v. Muegge, 178 W. Va. 439, 444, 360 S.E.2d 216, 221 (1987)(questionnaire completed by a private security guard after an alleged shoplifter refused to answer questions and requested his lawyer should not have been admitted), we stated:

> While no constitutional warnings are required to establish the admissibility of purely private conversations,. . . we hold that the procedural safeguards protecting the constitutional right not to be compelled to be a witness against oneself in a criminal case apply whenever a citizen is subject to custodial interrogation pursuant to statutory authority. [Footnote omitted.]

The State argues that most jurisdictions do not require private security guards to give Miranda warnings and urges that Muegge be overruled. However, the facts of this case do not require us to address the State's argument and we decline to do so.

Because Mr. Hopkins did not object to Mr. Pyatt's testimony about the false information given by Mr. Hopkins in the security office, we decline to consider whether this information should have been suppressed because the Miranda warnings were omitted.

Miranda warnings. State v. Preece held that Miranda warnings are required when "a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." Syl. pt. 3, in part, State v. Preece.

Recently the Supreme Court affirmed that "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Stansbury v. California, ___ U.S.___, ___, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293, 299 (1994)(per curiam), quoting, Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 711, 50 L.Ed.2d 714, 714 (1977)(per curiam). In Stansbury, the Supreme Court was concerned that the lower court's decision finding no custodial interrogation was premised on the interrogating "officer's subjective view that the individual under questioning is a suspect, if undisclosed. . . [or] if an officer's undisclosed assessment is that the person being questioned is not a suspect." ___ U. S. at ___, 114 S.Ct. at 1529-30, 128 L.Ed.2d at 299-300. Rather, the Supreme Court's "decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being

questioned." [Emphasis added.] ___ U.S. at ___, 114 S.Ct. at 1529, 128 L.Ed.2d at 298.

In Stansbury, the Supreme Court did not decide whether the Miranda warnings were required under Stansbury's circumstances, but rather, focused on when such warnings are required and the factors to be considered. The defendant in Stansbury was considered a potential witness and not the suspect in a homicide investigation concerning the death of a 10-year-old girl. At about 11:00 p.m., four plain clothes officers went to Mr. Stansbury's trailer and with three officers surrounding the door, one knocked. The officers told Mr. Stansbury they "were investigating a homicide to which Stansbury was a possible witness and asked if he would accompany them to the police station to answer some questions." ___ U.S. at ___, 114 S.Ct. 1527, 128 L.Ed.2d at 297. Mr. Stansbury agreed to be interviewed and rode to the police station in the front of the police car. Without informing Mr. Stansbury of his Miranda rights, the police questioned him about his activities on the night of the murder.

[5]Stansbury was convicted by a jury of "first-degree murder, rape, kidnapping, and lewd act on a child under the age of 14, and [the jury] fixed the penalty for first-degree murder at death." ___ U.S. at ___, 114 S.Ct. at 1028, 128 L.Ed.2d at 297. The Supreme Court found that the California Supreme Court, instead of focusing on the officers' subjective and undisclosed suspicions, should have examined the objective circumstances and remanded for such consideration.

After Mr. Stansbury informed the police that he left his trailer "about midnight in his housemate's turquoise, American-made car" (___ U.S. at ___, 114 S.Ct. at 1528, 128 L.Ed.2d at 297), the officers, aware of a witness' similar car description, asked the defendant about his prior convictions, which Stansbury described and which included rape, kidnapping and child molestation. At that point, Mr. Stansbury stopped the questioning and an officer advised the defendant of his Miranda rights. Thereafter, Mr. Stansbury "declined to make further statements, requested an attorney and was arrested." ___ U.S. at ___, 114 S.Ct. at 1528, 128 L.Ed.2d at 297.

The Supreme Court found that numerous statements in the California Supreme Court's opinion "are open to the interpretation that the court regarded the officers' subjective beliefs regarding Stansbury's status as a suspect (or nonsuspect) as significant in and of themselves, rather than as relevant only to the extent they influenced the objective conditions surrounding his interrogation." ___ U.S. at ___, 114 S.Ct. at 1530, 128 L.Ed.2d at 300. Although the State acknowledged that subjective opinions "do not bear upon the question [of] whether Stansbury was in custody, for the purposes of Miranda," the Supreme Court remanded the case to the California Supreme Court to determine if the objective circumstances show

defendant to have been in custody during the entire interview. ___ U.S. at ___, 114 S.Ct. at 1531, 128 L.Ed.2d at 301.

In the case now before this Court, Mr. Hopkins was stopped by a private security guard, in the public area of a grocery store, was not touched or restrained and was briefly asked about the cigarettes. His "[m]an you're slick. . ." statement was made immediately after the private security guard told him the names of the cigarette brands.

Miranda also acknowledged that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Miranda, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. In Rhode Island v. Innis, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297, 307-08 (1980), the Supreme Court discussed what constitutes questioning:

> [T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than

those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. [Footnotes omitted.]

In Syl. pt. 2, State v. Rowe, 163 W. Va. 593, 259 S.E.2d 26 (1979), we stated:

> Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the defendant was both in custody and being interrogated at the time the admission was uttered.

See Syl. pt. 6, State v. Garrett, 182 W. Va. 166, 386 S.E.2d 823 (1989)(voluntary statements made by a defendant before being placed in custody and without any form of questioning are admissible); State v. Stewart, 180 W. Va. 173, 375 S.E.2d 805 (1988)(per curiam); Franklin D. Cleckley, Handbook of West Virginia Criminal Procedure I-454 (2nd ed. 1993)("Miranda warnings are not required where a voluntary, spontaneous statement is given which is not the product of questioning or its functional equivalent. [Citations omitted.]").

In this case the record shows that Mr. Hopkins' freedom of action was not "curtailed to a degree associated with a formal arrest." Syl. pt. 3, in part, State v. Preece. Mr. Hopkins was not in custody. His statement was made in a public area of a grocery

store to a security guard. Mr. Hopkins was not touched or in any way restrained. In these circumstances, we find that a reasonable person would not have felt "the compulsive aspect of custodial interrogation." Stansbury, ___ U. S. at ___, 114 S.Ct. at 1529, 128 L.Ed.2d at 299, quoting, Beckwith v. United States, 425 U.S. 341, 346-47, 96 S.Ct. 1612, 1612, 48 L.Ed.2d 1, 1 (1976).

In addition, Mr. Hopkins' statements were spontaneous--a remark to Mr. Pyatt's information about the brands of cigarettes. When Mr. Hopkins said, "[m]an, you're slick. . .," he was not answering the question being asked, to-wit: "Where are the cigarettes?", no interrogation was occurring and Mr. Hopkins' freedom of action was not curtailed to the degree associated with a formal arrest.

In Syl. pt. 3, State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978), we stated:

> A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.

Accord Syl. pt. 4, State v. Preece, 181 W. Va. 633, 383 S.E. 2d 815 (1989); Syl. pt. 3, State v. George, 185 W. Va. 539, 408 S.E.2d 291 (1991). Given the evidence concerning Mr. Hopkins' statements and

their context, we find that the circuit court's decision that the statements were spontaneous and not the result of an interrogation was not "plainly wrong or clearly against the weight of the evidence."

II

Mr. Hopkins' second assignment of error is that the circuit court improperly failed to sever evidence of Mr. Hopkins' previous shoplifting convictions. W. Va. Code 61-3A-3(c) [1981] states:

> Third offense convictions. -- Upon a third or subsequent shoplifting conviction, regardless of the value of the merchandise, the defendant shall be guilty of a felony and shall be fined not less that five hundred dollars nor more than five thousand dollars, and shall be imprisoned in the penitentiary for one to ten years. At least one year shall actually be spent in confinement and not subject to probation.

In State v. Cozart, 177 W. Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986) discussing whether the State improperly admitted

---

[6]W. Va. Code 61-3A-1(a) [1981] states, in pertinent part:

> A person commits the offense of shoplifting if, with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, such person, alone or in concert with another person, knowingly:
> (1) Conceals the merchandise upon his or her person or in another manner. . . .

[7]W. Va. Code 61-3A-3(c) was amended in 1994 to provide for home detention as an alternative sentence.

evidence of a defendant's two prior convictions for driving under the influence (DUI), we said: "Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and McAboy [160 W. Va. 497, 236 S.E.2d 431 (1977)] is not applicable." See State v. Barker, 179 W. Va. 194, 199 n.12, 366 S.E.2d 642, 647 n.12 (1988); State v. Wilkerson, 181 W. Va. 126, 381 S.E.2d 241 (1989) (per curiam).

In this case, Mr. Hopkins was charged with shoplifting, third offense, and under the Code, the State was required to prove at least two prior convictions for shoplifting. Because evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

III

Mr. Hopkins next argues that his previous uncounseled convictions should not have been used to enhance his sentence. Although Mr. Hopkins' motion for acquittal made after testimony was closed was based on the alleged impermissible use of his previous convictions, Mr. Hopkins did not object to their admission and did not present any evidence showing that his previous convictions were invalid. In an in camera hearing, the State presented evidence showing that Mr. Hopkins had pled guilty in two of the cases and had pled nolo contendere to the other. In addition, Mr. Hopkins also pled guilty to a previous charge of third offense shoplifting in which he was represented by counsel.

The State argues that any error was waived by the defense's failure to object. "Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived." State v. Wheeler, 187 W. Va. 379, 386, 419 S.E.2d 447, 454 (1992). Accord Syl. pt. 7, State v. Davis, 176 W. Va. 454, 345 S.E.2d 549 (1986); Syl. pt. 4, State v. Michael, 141 W. Va. 1, 87 S.E.2d 595 (1955). Because a timely objection was not made, the State was denied the opportunity to ask the witnesses about Mr. Hopkins' guilty and nolo contendere

pleas and any waiver of rights. Once the motion to dismiss was made the State did supplement the record with information concerning Mr. Hopkins' guilty plea to another third offense shoplifting where he was represented by counsel.

Mr. Hopkins alleges that a dismissal is required by our holding in State v. Armstrong, 175 W. Va. 381, 332 S.E.2d 837 (1985). However, Mr. Hopkins' reliance is misplaced because Armstrong was based on Baldasar v. Illinois, 446 U.S. 222 (1980), which was overruled by the U. S. Supreme Court in Nichols v. U.S., ___ U. S. ___, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). In Nichols, the Supreme Court allowed enhancement of the defendant's sentence under the United States Federal Sentencing Guidelines based on the defendant's uncounseled misdemeanor conviction for DUI. The Supreme Court noted:

---

[8]Syl. pt. 1, State v. Armstrong, 175 W. Va. 381, 332 S.E.2d 837 (1985), states:

> Under the sixth amendment of the federal constitution and article III, section 14 of the West Virginia Constitution, unless an individual convicted of a misdemeanor was represented by counsel or knowingly and intelligently waived the right to counsel, such prior conviction may not be used to enhance a sentence of imprisonment for a subsequent offense.

> Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the [Federal] Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in Baldasar, "[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." [Citations omitted.]

Nichols, ___ U. S. at ___, 114 S.Ct. at 1927, 128 L.Ed.2d at 754.

In overruling Baldasar, the Supreme Court noted that Baldasar was a "per curiam opinion" that "provided no rationale for the result. . . ." Nichols, ___ U.S. at ___, 114 S.Ct. at 1926, 128 L.Ed.2d at 752. The Supreme Court also rejected the defendant's request for a warning that the conviction might be used for enhancement purposes be required because: (1) Most misdemeanor convictions "take place in police or justice courts which are not courts of record;" (2) A "drastic change in the procedures" would be needed "to memorialize any such warning;" and (3) The lack of clarity concerning such a warning's degree of specificity. The

[9] Nichols is part of a line of cases clarifying the issues surrounding the use of previous uncounseled convictions for enhancement purposes. See Parke v. Raley, 506 U. S. ___, 113 S.Ct. 517, 121 L.Ed.2d 391 (1993) (affording previous uncounseled convictions the presumption of regularity which could be overcome by a defendant's showing the absence of an valid waiver); Curtis v. U.S., ___ U.S. ___, ___, 114 S.Ct. 1732, 1738, 128 L.Ed.2d 517,

Supreme Court concluded, "[a]ccordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under Scott [v. Illinois, 440 U. S. 367 (1979)] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." ___ U. S. at ___, 114 S.Ct. at 1928, 128 L.Ed.2d at 755.

Our holding in Armstrong relied upon the now overruled Baldasar. Armstrong said that "it is well established that if no imprisonment could have been imposed for a particular misdemeanor conviction for the reasons stated in Argersinger and Scott, then that conviction may not be used as part of the basis for imprisonment under an enhancement statute. Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980)." Id. 175 W. Va. at 385, 332 S.E.2d at 841. Although Armstrong claims to be based on both the U.S. Constitution and the West Virginia Constitution, its reasoning was based on Baldasar, which according to the Supreme Court created "a conflict among state courts as well as Federal Courts of Appeals. [Footnotes omitted.]" Nichols, ___ U.S. at ___, 114 S.Ct. at 1925, 128 L.Ed.2d at 751. Because we find the Supreme Court's holding

---

528 (1994)(declining "to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in Gideon").

in Nichols persuasive, we overrule Armstrong and hold that under the sixth amendment to the U. S. Constitution and article III, section 14 of the West Virginia Constitution, "an uncounseled misdemeanor conviction, valid under Scott, because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nichols, ___ U.S. at ___, 114 S. Ct. at 1928, 128 L.Ed.2d at 755.

Because Mr. Hopkins' previous convictions for shoplifting are valid under Scott, we find these convictions are also valid when used to enhance punishment in this case and, therefore, reject Mr. Hopkins' third assignment of error.

IV

Finally, Mr. Hopkins argues that his $50.00 fine is an unconstitutional taking without due process because the statute "allows for the court to presume that the value of the merchandise is that which is stated by the mercantile establishment." Mr. Hopkins also maintains that because the merchandise was recovered, the merchant was unjustly enriched.

In addition to the minimum $500 fine and prison term imposed by W. Va. Code 61-3A-3(c) [1994] for third offense shoplifting, subsection (d) of the same Code section imposes a mandatory fine requiring "the defendant to pay a penalty to the mercantile establishment involved in the amount of fifty dollars, or double the value of the merchandise involved, whichever is higher." W. Va. Code 61-3A-3(d) [1994]. Mr. Hopkins' first argument is without merit because the value of the merchandise was never an issue. Mr. Hopkins was fined $50 which is clearly higher than the value of two cigarette packs and W. Va. Code 61-3A-3(d) [1994] does not prescribe how the value of the merchandise is to be established. A similar argument was rejected in State v. Day,

[10] Both subsections (c) and (d) of W. Va. Code 61-3A-3 were unchanged by the 1994 amendments. W. Va. Code 61-3A-3(d) [1994] provides:

> Mandatory penalty. -- In addition to the fines and imprisonment imposed by this section, in all cases of conviction for the offense of shoplifting, the court shall order the defendant to pay a penalty to the mercantile establishment involved in the amount of fifty dollars, or double the value of the merchandise involved, whichever is higher. The mercantile establishment shall be entitled to collect such mandatory penalty as in the case of a civil judgment. This penalty shall be in addition to the mercantile establishment's rights to recover the stolen merchandise.

___ W. Va. ___, 447 S.E.2d 576 (No. 21884 Filed July 19, 1994)(per curiam).

Mr. Hopkins' unjust enrichment argument is also without merit because it is based in civil law and not in criminal law. Although deference is given to the legislature's determination of the criminal penalties necessary to achieve both the punitive and remedial goals, the legislature's power is limited by the eighth amendment to the U. S. Constitution, which is applicable to the states through the due process clause of the fourteenth amendment. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." See Alexander v. U.S., ___ U. S. ___, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)(for eighth amendment purposes, RICO's forfeiture provisions are no different than a traditional fine); Austin v. U.S., ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)(forfeiture provisions under U.S.C. §§ 881(a)(4) and (a)(7) are a monetary punishment subject to the eighth amendment).

W. Va. Code 61-3A-3(d) [1994]'s mandatory fine payable to the mercantile establishment where the items were shoplifted is a form of statutory restitution that considers the transactional costs of prosecuting a defendant. We find nothing in the record

to indicate that Mr. Hopkins' fines are excessive, shocking, violative of fundamental fairness, disproportionate, without penological justification or unnecessarily painful.

For the above stated reasons, we affirm the decision of the Circuit Court of Raleigh County.

Affirmed.