

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1995 Term

No. 22781

STATE OF WEST VIRGINIA
EX REL. CLAYTON COLLINS,
Petitioner

v.

HONORABLE THOMAS A. BEDELL, JUDGE
OF THE CIRCUIT COURT OF HARRISON COUNTY,
Respondent

Petition for Writ of Prohibition

WRIT GRANTED AS MOULDED

AND

No. 22783

STATE OF WEST VIRGINIA
EX REL. JOHN LESLIE PEEPLES,
Petitioner

v.

HONORABLE DAVID W. KNIGHT, JUDGE
OF THE CIRCUIT COURT OF MERCER COUNTY,
Respondent

Petition for Writ of Prohibition

WRIT DENIED

Submitted: April 4, 1995

Filed: June 19, 1995

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CHIEF JUSTICE McHUGH delivered the Opinion of the Court.

JUSTICE BROTHERTON did not participate.
JUDGE FOX sitting by temporary assignment.
RETIRED JUSTICE NEELY participated in consideration and decision
of case.

RETIRED JUSTICE NEELY reserves the right to file a dissenting
opinion.
JUSTICE CLECKLEY reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. ""In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches.

Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt."

Point 1 Syllabus, State ex rel. Appalachian Power Company v. Gainer, 149 W. Va. 740 [, 143 S.E.2d 351 (1965)].' Syl. pt. 3, State ex rel. W. Va. Housing Development Fund v. Copenhaver, 153 W. Va. 636, 171 S.E.2d 545 (1969)." Syl. pt. 3, State ex rel. Lambert v. County Comm'n, ___ W. Va. ___, 452 S.E.2d 906 (1994).

2. W. Va. Code, 50-5-13 [1994], which sets forth the appeal procedure in a criminal proceeding from magistrate court to circuit court, but which does not give the defendant a statutory

right to a jury trial de novo on the appeal to circuit court, does not violate W. Va. Const. art. III, § 14 or art. VIII, § 10.

3. A defendant's due process rights set forth in the W. Va. Const. art. III, § 10 and the U. S. Const. amend. XIV, § 1 are not violated when a non-lawyer magistrate presides over the trial because W. Va. Code, 50-5-13 [1994] provides meaningful review on appeal.

4. "'General and indefinite terms of one provision of a constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of another, necessarily and inexorably withdrawing from the operation of such general terms, a subject which, but for such implied withdrawal, would be embraced and governed by them.'" Syllabus Point 5, Lawson v. Kanawha County Court, 80 W. Va. 612, 92 S.E. 786 (1917)." Syl. pt. 1, State ex rel. Boards of Educ. v. Chafin, 180 W. Va. 219, 376 S.E.2d 113 (1988).

5. "'A constitutional amendment, as the last word from the people on a subject under consideration, should be given controlling effect where there is irreconcilable conflict between it and other constitutional provisions, but no such effect should be given where it and other provisions of the Constitution may be read together and harmonized without destroying the effect and purpose of any of them.'" Syllabus Point 3, Berry v. Fox, 114 W.

Va. 513, 172 S.E. 896 (1934)." Syl. pt. 2, State ex rel. Boards of Educ. v. Chafin, 180 W. Va. 219, 376 S.E.2d 113 (1988).

6. "Under ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syl. pt. 1, Adkins v. Bordenkircher, 164 W. Va. 292, 262 S.E.2d 885 (1980).

7. A procedural change in a criminal proceeding does not violate the ex post facto principle found in the W. Va. Const. art. III, § 4 and in the U. S. Const. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

8. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may

be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

McHugh, Chief Justice:

This opinion involves two separate petitions for writs of prohibition. One of the petitions was filed by Clayton Collins against the respondent, the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County. The other petition was filed by Leslie Peeples against the Honorable David Knight, Judge of the Circuit Court of Mercer County. The petitions will be consolidated for decision because both seek to prohibit a trial judge from denying a jury trial de novo in the circuit court on appeal from a criminal conviction in a magistrate court. For the reasons set forth below, petitioner Collins' writ of prohibition is granted as moulded; however, we deny petitioner Peeples' writ of prohibition.

I.

In June of 1994 significant statutory changes were made regarding the appeal of a criminal conviction in magistrate court to the circuit court. Although petitioner Collins' magistrate court trial had not been held, he had been arrested and had already waived his right to a jury trial in the magistrate court when the statutory changes occurred in June of 1994. Petitioner Peeples, however, was arrested in August of 1994, which was after the statutory changes had been made.

A.

Statutory Changes

Prior to June 10, 1994, a person convicted of a criminal offense in magistrate court had a statutory right to appeal his or her conviction to the circuit court and receive a trial de novo which included the right to a trial by jury. See W. Va. Code, 50-5-13 [1993]. At that time, there was no statutory provision which provided for the recordation of trials in magistrate court.

In 1994 a provision was added to W. Va. Code, 50-5-8 which required that jury trials in magistrate court be recorded electronically. See W. Va. Code, 50-5-8(e) [1994]. Additionally, W. Va. Code, 50-5-13 was amended to eliminate the statutory right to a jury trial de novo in circuit court on an appeal from the magistrate court in a criminal court proceeding.

The amendment to W. Va. Code, 50-5-13 was effective on June 10, 1994, and specifically provides that when there has been a jury trial in a criminal proceeding in magistrate court, the review on appeal to the circuit court is limited to the record of the magistrate court trial. See W. Va. Code, 50-5-13(b) [1994]. If a person waives the right to a jury trial in a criminal proceeding in magistrate court, then the review on appeal to the circuit court is limited to a "trial de novo triable to the court, without a jury." W. Va. Code, 50-5-13(b) [1994]. There is a provision which

authorizes the circuit court to impanel a jury on appeal if the circuit court finds that the defendant was "effectively denied a jury trial" in the magistrate criminal court proceeding. W. Va. Code, 50-5-13(c) (5) [1994], in relevant part. However, the amended statutory scheme, unlike the former statutory scheme, does not provide a right to a jury trial de novo on appeal from a criminal conviction in a magistrate court.

Under the amendments the circuit court has the authority to reverse, affirm, remand, or modify the magistrate judgment order pursuant to W. Va. Code, 50-5-13(c) [1994]. Further, the circuit court is required to consider whether the judgment of the magistrate is arbitrary, capricious, or an abuse of discretion; contrary to constitutional rights; in excess of statutory jurisdiction; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts. W. Va. Code, 50-5-13(c) (3) [1994], in relevant part. Thus, the circuit court takes on the role of a reviewing court, not unlike this Court, rather than a trial court when a criminal conviction from magistrate court is appealed to it under the 1994 amendments.

B.

Petitioner Clayton Collins

Petitioner Collins was arrested in December of 1993 and charged with four counts of third degree sexual abuse pursuant to

W. Va. Code, 61-8B-9 [1984]. On the day of his arrest, petitioner Collins waived his right to a jury trial in the magistrate court.

After numerous continuances were made by both parties and after the statutory amendments were effective, a non-jury trial was held in October of 1994, and petitioner Collins was convicted of all four counts of third degree sexual abuse. The petitioner was sentenced to ninety days in jail for each of the four counts. Two counts were to run concurrently with each other, but consecutively to the other two counts.

In October of 1994, petitioner Collins gave his notice of intent to appeal the judgment of conviction in magistrate court to the Circuit Court of Harrison County for a trial de novo and filed a "jury claim" seeking a trial by jury in the circuit court. The circuit court entered an order denying petitioner Collins' request for a trial by jury. Therefore, petitioner Collins is seeking a writ of prohibition from this Court in order to prohibit the circuit court from trying the case without a jury.

C.

Petitioner Leslie Peeples

In August of 1994, petitioner Peeples was arrested for driving under the influence of alcohol. Petitioner Peeples did not demand a jury trial in magistrate court. Following his trial,

petitioner Peeples was convicted of first offense DUI pursuant to W. Va. Code, 17C-5-2 [1994] and was sentenced to six months in jail.

Petitioner Peeples appealed his conviction to the Circuit Court of Mercer County, and demanded a trial by jury. The circuit court denied petitioner Peeples' request for a trial by jury. Thus, petitioner Peeples seeks the same relief as petitioner Collins.

II.

The petitioners maintain that Rule 20.1 of the West Virginia Rules of Criminal Procedure for Magistrate Courts and W. Va. Code, 50-5-13 [1994] violate West Virginia Constitution art. III, § 14 and art. VIII, § 10. There are two concerns as set forth by

Rule 20.1 of the West Virginia Rules of Criminal Procedure for Magistrate Courts follows the amended statutory scheme by setting forth how a criminal conviction in the magistrate court may be appealed to the circuit court:

Appeal to Circuit Court. (a) Except for persons represented by counsel at the time a guilty plea is entered, any person convicted of a misdemeanor in a magistrate court may appeal such conviction to the circuit court as a matter of right

. . . .

(d) An appeal of a magistrate court criminal proceeding tried before a jury shall be heard on the record in circuit court. An appeal of a criminal proceeding tried before a magistrate without a jury shall be by trial de novo in circuit court without a jury.

Rule 20.1 was adopted by an order entered on June 30, 1994, and was

the respondents: (1) does W. Va. Code, 50-5-13 [1994], which sets forth the appeal procedure from the magistrate court to the circuit court, but which does not give a defendant a statutory right to a jury trial de novo on appeal, violate the W. Va. Const. art. III, § 14 or art. VIII, § 10; and (2) does the fact that magistrates, who are not lawyers, preside over the only jury trial given to a defendant violate a defendant's due process rights set forth in the W. Va. Const. art. III, § 10 and the United States Constitution amend. XIV, § 1.

In addressing these concerns we are mindful of the following:

' "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Point 1 Syllabus, State ex rel. Appalachian Power Company v. Gainer, 149 W. Va. 740 [, 143 S.E.2d 351 (1965)].' Syl. pt. 3, State ex rel.

effective on July 1, 1994.

W. Va. Housing Development Fund v. Copenhaver,
153 W. Va. 636, 171 S.E.2d 545 (1969).

Syl. pt. 3, State ex rel. Lambert v. County Comm'n, ____ W. Va. ____,
452 S.E.2d 906 (1994).

A.

Our initial inquiry is whether W. Va. Code, 50-5-13 [1994], which sets forth the appeal procedure from the magistrate court to the circuit court, but which does not give a defendant a statutory right to a jury trial de novo on appeal, violates the West Virginia Constitution. We are mindful that the magistrate court system was established pursuant to the Judicial Reorganization Amendment of 1974. See State ex rel. Burdette v. Scott, 163 W. Va. 705, 706-9, 259 S.E.2d 626, 628 (1979).

There are two constitutional provisions which note the right to a trial by jury. W. Va. Const. art. III, § 14 provides, in relevant part, that "[t]rials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men[.]" (emphasis added). W. Va. Const. art. VIII, § 10 otherwise provides, in pertinent part, that a jury in a magistrate court "shall consist of six jurors who are qualified as prescribed by law."

As the respondents point out, the Supreme Court of the United States has held that a six-person jury satisfies the right to a trial by jury set forth in the U.S. Const. See Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) (The Supreme Court of the United States reviewed a life sentence imposed for robbery in

The petitioners argue that even if they had a jury in the magistrate court criminal proceeding, they are entitled to a twelve-person jury in the circuit court on appeal. However, the W. Va. Const. does not require a trial de novo with a twelve-person jury on an appeal from a magistrate court criminal proceeding. Indeed, W. Va. Const. art. VIII, § 10 states, in relevant part, that "[t]he legislature shall establish in each county a magistrate court or courts with the right of appeal as prescribed by law." (emphasis added). Thus, it is clear that while the W. Va. Const. does guarantee an appeal from magistrate court, the form of the appeal is to be determined by the legislature. There is no provision in the W. Va. Const. which mandates that a person has a right to have a twelve-person jury hear his or her case on appeal from the magistrate court. Accordingly, we hold that W. Va. Code, 50-5-13 [1994], which sets forth the appeal procedure in a criminal proceeding from magistrate court to circuit court, but which does not give the defendant a statutory right to a jury trial de novo on the appeal to circuit court, does not violate W. Va. Const. art. III, § 14 or art. VIII, § 10.

B.

the State of Florida after a guilty verdict by a six-person jury and held that the Sixth Amendment right to a trial by jury was satisfied by a six-person jury.)

Although raised clearly and expressly only by the respondents, we address whether a defendant's due process rights set forth in the W. Va. Const. art. III, § 10 or the United States Constitution amend. XIV, § 1 are violated when a magistrate, who is not a lawyer, presides over the only jury trial a defendant may have.

W. Va. Const. art. VIII, § 10 provides, in relevant part:

The legislature shall determine the qualifications and the number of magistrates for each court . . . provided . . . that the legislature shall not have the power to require that a magistrate be a person licensed to practice the profession of law, nor shall any justice or judge of any higher court establish any rules which by their nature would dictate or mandate that a magistrate be a person licensed to practice the profession of law.

(emphasis added). Additionally, the respondents point out that W. Va. Const. art. VIII, § 10 provides that magistrates shall have original jurisdiction over criminal matters which shall be heard by a jury consisting of six jurors and whose judgment is subject to appeal. Therefore, it is obvious that the framers of the W. Va. Const. were aware that criminal trials in a magistrate court may be presided over by a non-lawyer.

Furthermore, the respondents assert that the due process clauses of the W. Va. Const. and the United States Constitution are

not violated by having a lay magistrate preside over a criminal trial.

Although this Court has not discussed whether the use of a lay magistrate violates the due process clauses, this Court has discussed whether the use of a lay justice of the peace violates the due process clauses. In syllabus point 1, in part, of State ex rel. Moats v. Janco, 154 W. Va. 887, 180 S.E.2d 74 (1971) this Court held that a lay justice of the peace was authorized to exercise criminal jurisdiction:

[H]is lack of professional legal training and his inability to attain that status of a duly licensed attorney at law do not of themselves render his judgment of conviction of a defendant of a criminal offense of which the justice has jurisdiction violative of the due process clauses of the Federal and State Constitutions.

This Court further stated that

[t]hough no person may engage in the practice of law unless he is a duly licensed attorney at law, a justice of the peace, in the trial and disposition of a case of which he has

The due process clause in the W. Va. Const. is set forth in art. III, § 10 and states: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

The due process clause of the U. S. Const. is set forth in Amendment XIV, section 1 which states, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law[.]"

The justice of the peace system was abolished and replaced by the magistrate system in the Judicial Reorganization Amendment of 1974. See W. Va. Const. art. VIII, § 10 and State ex rel. Burdette v. Scott, supra.

jurisdiction, is not engaged in the practice of law but instead acts in a judicial capacity and is engaged in the discharge of a judicial function.

Id. at 891-92, 180 S.E.2d at 78. However, the respondents acknowledge that when Moats was decided the criminal defendant had a statutory right to a jury trial de novo on appeal to a circuit court from a criminal conviction before a justice of the peace.

The Supreme Court of the United States has not yet addressed whether the United States Constitution is violated if a criminal defendant does not have a lawyer-judge preside at his or her trial. The closest the Supreme Court of the United States has come to deciding the issue was in North v. Russell, 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976). In North the Supreme Court of the United States determined that Kentucky procedures provided for a trial de novo, which included the right to a trial by jury, before a lawyer-judge; therefore, the Supreme Court found it unnecessary to decide whether the proceeding before a lay officer, which resulted in a sentence of thirty days in jail for driving under the influence, violated the constitutional rights of the defendant.

However, the Supreme Court of the United States did note that "[o]ur concern in prior cases with judicial functions being performed by nonjudicial officers has . . . been directed at the need for

independent, neutral, and detached judgment, not at legal training."

Id. at 337, 96 S. Ct. at 2713, 49 L. Ed. 2d at 541.

Several state courts have addressed the issue and have found that due process rights are not violated when a criminal trial is presided over by a lay person. For instance, although not directly on point, the Supreme Court of New Mexico found that allowing a non-lawyer police court judge to preside over a criminal trial did not violate the state and federal constitutions. Tsiosdia v. Rainaldi, 547 P.2d 553 (N.M. 1976). In arriving at its conclusion the Supreme Court of New Mexico made the following observation:

[O]ur legal system is primarily of an adversary nature, and the guardianship of the defendant's rights lies chiefly with his attorney, not the judge. Rights not asserted by the defendant's attorney generally are waived. Furthermore, it is not the function of the judge to second guess the tactics or strategies of the defendant's attorney at each step of the defense of an accused. The judge's major function is to determine which of two espoused viewpoints--the attorney's or the prosecutor's--is applicable to the facts of the case before him. An unbiased and reasonably intelligent person should be able to choose fairly between such espoused viewpoints. Fairness in this context is not critically dependent upon the judge being a member of the bar; a judge must have wisdom and common sense which are at least as dependable as an education in guaranteeing the defendant a fair trial. As with district court judges, as a last resort the appellate process is able to correct the mistakes of law of a municipal court judge. We therefore hold that fairness is not so inextricably tied to the education of an

attorney that without such an education a municipal court judge cannot be fair.

Id. at 555 (footnotes omitted). We find the rationale of the Supreme Court of New Mexico to be persuasive.

Moreover, in a case which is factually similar to the cases now before us, the Supreme Court of Arizona found that the due process clause is not violated when a non-lawyer judge presides over a criminal trial if the decision of the non-lawyer judge is subject to meaningful review. Palmer v. Superior Court, 560 P.2d 797, 799 (Ariz. 1977). The Supreme Court of Arizona found that a law-trained judge is on the court to which the appeal is made and that court has a record of the proceeding before the lay judge. Additionally, the court to which the appeal is made has the authority to grant a trial de novo if it finds that there are deficiencies in the record.

Thus, the due process rights of the defendant are not violated. Id. See also Walker v. State, 420 S.E.2d 17 (Ga. Ct. App. 1992) (A defendant's due process rights were not violated just because his conviction, by a non-lawyer judge, was not entitled to de novo review by a lawyer judge); People v. Sabri, 362 N.E.2d 739 (Ill. App. Ct. 1977) (Based on the facts in that case, the court found that a defendant may be tried by a non-lawyer judge where there is the possibility of imprisonment without violating the due process clause); State v. Duncan, 238 S.E.2d 205 (S.C. 1977) (The due

process rights of the defendant are not violated by a non-lawyer magistrate presiding over the defendant's trial even if the defendant is not automatically entitled to a jury trial de novo on appeal) and Canady v. State, 687 P.2d 897 (Wyo. 1984) (The defendant's due process rights are not violated when a non-lawyer justice of the peace presides over his trial since the defendant has the right to appeal to a lawyer judge). But see Gordon v. Justice Court for Yuba Judicial District of Sutter County, 525 P.2d 72 (Cal. 1974), cert. denied, California v. Gordan, 420 U.S. 938, 95 S. Ct. 1148, 43 L. Ed. 2d 415 (1975) (Having a non-lawyer justice of the peace preside over a criminal trial which results in a jail sentence violates a defendant's due process rights since justice courts are not courts of record) and State v. Dunkerley, 365 A.2d 131 (Vt. 1976) (The Court held that conducting a criminal trial of a felony before a panel of non-lawyer judges would violate a defendant's due process rights).

Thus, there are other jurisdictions which have found that a defendant's due process rights are not violated when a non-lawyer judge presides over the trial. Moreover, in the cases before us, the amended statutory scheme has taken into consideration a defendant's due process rights.

For instance, magistrates are not completely unskilled in the law. Pursuant to W. Va. Code, 50-1-4 [1992] the legislature

has mandated that magistrates complete a "course of instruction in rudimentary principles of law and procedure" before assuming office.

Furthermore, magistrates are required to attend continuing educational classes regarding their duties in such capacity. Id.

As we previously stated, the amended statutory scheme provides that all jury trials "shall be recorded electronically." W. Va. Code, 50-5-8(e) [1994], in relevant part. This provision guarantees a record of the jury trial in the magistrate court in order to enable the reviewing court on appeal to ensure that a defendant was given a fair trial. The legislature additionally sought to protect indigents. For instance, indigents are entitled to a free copy of the designated portions of the transcript of the record upon which he or she relies upon in the appeal unless the circuit court, by order, chooses to "review the designated portions of the recording aurally." W. Va. Code, 50-5-13(c) (1) [1994].

On appeal, the reviewing court must consider a list of factors such as whether the judgment of the magistrate is arbitrary, capricious, or an abuse of discretion; contrary to constitutional rights; in excess of statutory jurisdiction; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts. See W. Va. Code, 50-5-13(c) (3) [1994].

Most importantly, the reviewing court has the authority to grant a jury trial de novo if it finds that the proceedings in the magistrate

court effectively denied the defendant a jury trial. W. Va. Code, 50-5-13(c) (5) [1994].

Accordingly, we hold that a defendant's due process rights set forth in the W. Va. Const. art. III, § 10 and the U. S. Const. amend. XIV, § 1 are not violated when a non-lawyer magistrate presides over the trial because W. Va. Code, 50-5-13 [1994] provides meaningful review on appeal.

III.

Petitioner Peeples generally asserts that he was denied equal protection of the law because if he had been arrested in a municipality and charged with violating an ordinance, he would have been entitled to a twelve-person jury trial in municipal court and to a twelve-person jury trial on appeal to the circuit court from the judgment in municipal court. More simply, as the respondent

We note that W. Va. Code, 50-5-13 [1994], which does not give a defendant a statutory right to a jury trial de novo on appeal to the circuit court only applies to criminal appeals from magistrate court and not to criminal appeals from municipal courts. W. Va. Code, 8-34-1 [1969], in relevant part, sets forth the appeal procedure from a municipal court: "Every person sentenced . . . [by a] municipal court judge to imprisonment or to the payment of a fine of ten dollars or more . . . shall be allowed an appeal de novo to the circuit [court.]"

Additionally, we note that although there is no specific equal protection clause in the W. Va. Const., we have found equal protection principles in the general language of W. Va. Const. art. III, § 10 which provides: "No person shall be deprived of life, liberty, or property without due process of law," and in W. Va. Const. art. III, § 17, which states: "The courts of this State shall be

notes, petitioner Peebles argues that the differences in procedure between the municipal and magistrate courts denies him equal protection of the law. We disagree.

We are mindful of the following:

1. 'General and indefinite terms of one provision of a constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of another, necessarily and inexorably withdrawing from the operation of such general terms, a subject which, but for such implied withdrawal, would be embraced and governed by them.' Syllabus Point 5, Lawson v. Kanawha County Court, 80 W. Va. 612, 92 S.E. 786 (1917).

2. 'A constitutional amendment, as the last word from the people on a subject under consideration, should be given controlling effect where there is irreconcilable conflict between it and other constitutional provisions, but no such effect should be given where it and other provisions of the Constitution may be read together and harmonized without destroying the effect and purpose of any of them.' Syllabus Point 3, Berry v. Fox, 114 W. Va. 513, 172 S.E. 896 (1934).

Syl. pts. 1 and 2, State ex rel. Boards of Educ. v. Chafin, 180 W. Va. 219, 376 S.E.2d 113 (1988).

open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." See State ex rel. Boards of Educ. v. Chafin, 180 W. Va. 219, 225, 376 S.E.2d 113, 119 (1988). We have also placed our equal protection principles under W. Va. Const. art. VI, § 39 which prohibits the enactment of special legislation. State ex rel. Boards of Educ. v. Chafin, supra.

The Judicial Reorganization Amendment of 1974 amended the W. Va. Const. and set forth specific requirements regarding the magistrate court system. As we have previously noted, W. Va. Const. art. VIII, § 10 mandates that a six-person jury is to be used in magistrate court. Moreover, the same constitutional provision mandates that the appeal from magistrate court is to be "prescribed by law." Therefore, the procedural differences between the municipal and magistrate courts were specifically authorized in the Judicial Reorganization Amendment of 1974.

Thus, based on the principles set forth in syllabus points 1 and 2 of Chafin, supra, the Judicial Reorganization Amendment of 1974, which specifically prescribes the procedures to be used in the magistrate court, controls the resolution of this issue. Accordingly, we find petitioner Peeples' equal protection argument to be without merit.

Because our state constitution concept of equal protection is coextensive or broader than that of the U. S. Const., it follows that since petitioner Peeples' assertion does not violate state equal protection principles that federal equal protection principles are likewise not violated. See syl. pt. 3, Robertson v. Goldman, 179 W. Va. 453, 369 S.E.2d 888 (1988) ("The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.") See also O'Dell v. Town of Gauley Bridge, 188 W. Va. 596, 601, 425 S.E.2d 551, 556 (1992).

IV.

Petitioner Collins asserts that since he waived his right to a jury trial in the magistrate court in 1993 before the amended statutes changing the appeal procedure from magistrate court were enacted, it would violate ex post facto principles found in W. Va. Const. art. III, § 4 and U. S. Const. art. I, § 10 if the amended appeal procedure was applied to his case. For reasons stated below, we disagree.

In syllabus point 1 of Adkins v. Bordenkircher, 164 W. Va. 292, 262 S.E.2d 885 (1980) this Court held:

Under ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.

In Adkins, this Court held that in order to avoid violating the ex post facto clauses of the W. Va. Const. and the U. S. Const., the new "good time" statute, which permitted the prison inmate to earn fewer good time credits than the former "good time" statute, was

The W. Va. Const. art. III, § 4 states, in relevant part: "No . . . ex post facto law . . . shall be passed." The U. S. Const. art. I, § 10 provides, in relevant part: "No State shall . . . pass any . . . ex post facto Law[.]"

Additionally, we are mindful that the ex post facto principle is applicable only in criminal matters. See Tanner v. Workers' Compensation Comm'r, 176 W. Va. 427, 430, 345 S.E.2d 29, 32 (1986).

not to be applied to those inmates in prison who committed crimes before the effective date of the new "good time" statute. Id. See also State v. George W. H., 190 W. Va. 558, 439 S.E.2d 423 (1993) (George W. H. involved the application of a new definition of forcible compulsion in a second degree sexual assault case to a defendant who committed the criminal act prior to the existence of the new definition of forcible compulsion, thus, violating ex post facto principles.)

The Supreme Court of the United States in Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) recognized that there has been confusion over whether procedural changes which deprive an accused of a substantial protection provided by law violate the ex post facto principle.

The Supreme Court of the United States found that analyzing an ex post facto question involving a procedural change by determining whether or not the change deprives the accused of substantial protections which the existing law gives to the accused of a crime is misleading. Id. Additionally, the Court in Collins found that labeling the questioned law change as procedural or substantive was also misleading. Id. Instead, the Supreme Court of the United States in Collins found that the following summary, previously enunciated in Beazell v. Ohio, 269 U.S. 167, 169-70, 46

S. Ct. 68, 70 L. Ed. 216, 217 (1925), best exemplifies the original understanding of the meaning of the ex post facto clause:

'It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.'

Collins, 497 U.S. at 42, 110 S. Ct. at 2719, 111 L. Ed. 2d at 39.

Therefore, if the questioned procedural change does not fit into the above framework, then the procedural change in the criminal proceeding is not prohibited as ex post facto according to the Supreme Court of the United States' analysis in Collins, supra.

Indeed, the Court in Collins overruled two of its prior cases which

This Court has not directly addressed the issue in Collins, supra, of how procedural changes should be analyzed pursuant to ex post facto principles. However, this Court in the following discussion failed to follow the above analysis set forth in Beazell, supra:

Mere procedural changes which affect only the mode of trial or the rules of evidence and which do not work to the substantial disadvantage of an accused are not customarily held to be within the ex post facto prohibition However, procedural changes can be ex post facto depending on their effect on the accused.

State v. R. H., 166 W. Va. 280, 289, 273 S.E.2d 578, 584 (1980), overruled on a different ground, State ex rel. Cook v. Helms, 170 W. Va. 200, 292 S.E.2d 610 (1981) (citations omitted).

did not fit into the framework established in Beazell. One case in particular is of interest: Thompson v. Utah, 170 U.S. 343, 18 S. Ct. 620, 42 L. Ed. 1061 (1898).

In Thompson the defendant was convicted by a jury of twelve persons of grand larceny when Utah was a territory. Subsequently, the defendant was granted a new trial, and Utah, in the meantime, was admitted into the Union as a State. The Constitution of the new state of Utah required that juries in noncapital cases consist of eight jury members. The defendant was retried with an eight-member jury and convicted. The Supreme Court of the United States reversed the conviction because the new state constitution deprived him of a substantial right by not allowing him to have a twelve-person jury, thus violating the ex post facto clause of the constitution. Id.

In Collins the Supreme Court of the United States revisited Thompson and in overruling its analysis of the ex post facto clause, stated: "The right to jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause."

In a concurring opinion in Collins, supra, some members of the Supreme Court of the United States asserted that the ex post facto clause should be construed more broadly than the majority construed it in Collins. Indeed, the concurring opinion stated that there was no

Collins, 497 U.S. at 51, 110 S. Ct. at 2724, 111 L. Ed. 2d at 45.

Cf. City of Seattle v. Hesler, 653 P.2d 631 (Wash. 1982) (After the State of Washington eliminated the de novo appeal procedure from courts of limited jurisdiction, the Supreme Court of Washington held that a change in the method of review on appeal does not offend the ex post facto clauses of the state and federal constitutions.)

We find the reasoning of the Supreme Court of the United States in Collins, supra, to be persuasive in interpreting the W. Va. Const. Moreover, the analysis in Collins, is not inconsistent with this Court's previous applications of the ex post facto principle.

See, e.g., Adkins, supra and George W. H., supra. In fact, this Court in George W. H., supra, at 564-65, 439 S.E.2d at 429-30, noted

need to overrule Thompson, supra. Other courts have acknowledged the reasoning of the Supreme Court of the United States in Collins, supra, that procedural questions should be analyzed pursuant to traditional ex post facto principles rather than pursuant to the "substantial protection" analysis. See Helton v. Fauver, 930 F.2d 1040, 1045 (3rd Cir. 1991); U. S. v. Porter, 909 F.2d 789, 793 (4th Cir. 1990); State v. Noble, 829 P.2d 1217, 1219-1220 (Ariz. 1992); Ridenhour v. State, 805 S.W.2d 639, 640-41 (Ark. 1991); Tapia v. Superior Court, 807 P.2d 434 (Cal. 1991); People v. District Court, 834 P.2d 181 (Colo. 1992); State v. Cohen, 604 A.2d 846, 852-53 (Del. 1992); State v. Nakata, 878 P.2d 699, 714-15 (Haw. 1994), cert. den., ___ U.S. ___, 115 S. Ct. 1095, 130 L. Ed. 2d 1063 (1995); State v. Joubert, 603 A.2d 861, 869 (Me. 1992); People v. Russo, 487 N.W.2d 698, 701 (Mich. 1992); State v. Wings, 867 S.W.2d 607 (Mo. Ct. App. 1993); State v. Crawley, 644 N.E.2d 724 (Ohio Ct. App. 1994); State v. Cookman, 873 P.2d 335, 342-43 (Or. Ct. App. 1994), cert. den., ___ U.S. ___, (No. 94-1590 May 22, 1995); Commonwealth v. Young, 637 A.2d 1313 (Pa. 1993); Ex parte Hallmark, 883 S.W.2d 672, 674 (Tex. Crim. App. 1994).

with approval the classic definition of an ex post facto law set forth in Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 650 (1798), which the Supreme Court of the United States in Collins similarly quoted with approval:

'"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the commission of the offence, in order to convict the offender."

Collins, 497 U.S. at 42, 110 S. Ct. at 2719, 111 L. Ed. 2d at 38-39 (emphasis in original and footnote added).

Accordingly, we hold that a procedural change does not violate the ex post facto principle found in the W. Va. Const. art. III, § 4 and in the U. S. Const. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives

As Collins points out, the above language regarding the rules of evidence in Calder, *supra*, was "not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." Collins, 497 U.S. at 43 n. 3, 110 S. Ct. at 2719 n. 3, 111 L. Ed. 2d at 39 n. 3 (citations omitted).

the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

In the case before us, the elimination of the trial de novo on appeal from a criminal proceeding in magistrate court does not alter the definition of a crime, deprive petitioner Collins of a defense, or increase his punishment. Thus, the elimination of a right to a trial by jury on appeal from the magistrate court criminal proceeding does not violate the ex post facto clauses of the W. Va. Const. or the U. S. Const.

However, as the respondent concedes, petitioner Collins was entitled to seek a jury trial in magistrate court once the right to a de novo jury trial on appeal to the circuit court was eliminated.

Pursuant to W. Va. Const. art. III, § 14 there is a right to a jury trial for any criminal offense when the penalty involves a period of incarceration. See, e.g., Scott v. McGhee, 174 W. Va. 296, 324 S.E.2d 710 (1984) (In the municipal courts a defendant is entitled to a trial by jury if the penalty involves any period of incarceration). Moreover, this right to a jury trial may only be waived by the voluntary and intelligent consent of the defendant.

See 21A Am. Jur. 2d Criminal Law § 677 (1981) ("[A] waiver of the right to jury trial must be shown to have been given freely and intelligently[.]" (footnote omitted)). See, e.g., Singer v. United States, 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965).

Cf. W. Va. R. Crim. P. 23 (A defendant may waive his or her right to a jury trial, but it must be done in writing and have the consent of the court and the consent of the State).

The record indicates that petitioner Collins waived his right to a jury trial in magistrate court before the statutory amendments were enacted; however, petitioner Collins' non-jury trial took place after the statutory amendments were enacted. The record does not reveal whether petitioner Collins was given an opportunity to voluntarily and intelligently waive his right to a trial by jury pursuant to the 1994 statutory amendments. Clearly, petitioner Collins could not have anticipated waiving his right to a jury trial on appeal in the circuit court when he waived his right to a jury trial in the magistrate court proceeding. The 1994 amendments, which took away a defendant's statutory right to a jury trial on appeal in the circuit court, had not yet been enacted. Therefore, the Circuit Court of Harrison County should determine whether petitioner Collins was given an opportunity to request a jury trial after the statutory amendments were enacted, and if not, afford petitioner Collins the opportunity to exercise his right to a trial by jury.

V.

In conclusion, we have held that we will not grant a writ of prohibition unless there is a substantial, clear-cut legal error in contravention of statutory, constitutional, or common laws:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

Based on our discussion above, petitioner Collins' writ of prohibition is granted as moulded, and we direct the Circuit Court of Harrison County to determine whether or not petitioner Collins was given the opportunity to request a trial by jury in magistrate court once the amended statutory provisions were enacted. However, we deny petitioner Peeples' writ of prohibition since he has failed to show that there is a substantial, clear-cut legal error in contravention of the constitution.

No. 22781 - Writ granted as moulded.
No. 22783 - Writ denied.