IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1996 Term

No. 23044

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

v.

ROBERTO JOSE LOPEZ,
Defendant Below, Appellant

Appeal from the Circuit Court of Berkeley County
Honorable Judge David H. Sanders, Judge
Criminal Action No. 93-F-1

REVERSED AND REMANDED

Submitted: January 17, 1996
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The Opinion of the Court was delivered PER CURIAM.
JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself." Syllabus point 3, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

2. "The State must prove, at least 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." Syllabus point 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

3. "The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts. These rules constitute more than a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them." Syllabus point 7, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

4. "The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence." Syllabus point 8, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

5. "Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice,

confusion, or undue delay is disproportionate to the value of the evidence." Syllabus point 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

6. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible." Rule 402, West Virginia Rules of Evidence.

7. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." Rule 401, West Virginia Rules of Evidence.

Per Curiam:

The defendant in this proceeding, Roberto Jose Lopez, was sentenced to life in the State penitentiary without a recommendation of mercy for the felony murder of Elizer Peralta, who died as a result of burns sustained in an apartment fire which erupted on December 30, 1992. On appeal, the defendant claims that the Circuit Court of Berkeley County erred in admitting into evidence his gasoline-soaked clothing which was seized without a warrant. He also claims that the circuit court erred in admitting into evidence a handgun discovered near the fire scene and that the court erred in admitting a statement which he gave shortly after the eruption of the fire. The defendant further argues that the trial court erred in

admitting a gruesome photograph of the victim, Elizer Peralta, and that the trial court erred in refusing to accept a plea agreement which he and the State entered into.

After reviewing the issues raised and the record presented, this Court concludes that the trial court did commit reversible error by admitting into the evidence the clothing, and the statement, and, as a consequence, this Court reverses the defendant's conviction and remands this case for a new trial. The Court does not conclude that the trial court committed reversible error in rejecting the plea agreement, and since the rules relating to the admission of gruesome photographs have been altered since the defendant's trial, the Court believes that upon retrial the admissibility of the photograph should be

assessed under the new rules. The Court also believes that the relevancy of the handgun should be reassessed on retrial.

The evidence in this case shows that on December 30, 1992, the defendant, who was an undocumented Mexican alien working as an agricultural laborer, and who for practical purposes did not speak the English language, while visiting friends who lived in an apartment located on South Raleigh Street in Martinsburg, West Virginia, became involved in an argument and struggle. In the course of the struggle, one of the individuals present, Rene Cajero, displayed a handgun which another party, Maurillo Chaparro forcibly took from him. Maurillo Chaparro shortly thereafter forced Rene Cajero,

Fernando Martinez, and the defendant, Roberto Jose Lopez, to leave the apartment.

Some ten minutes later, Emigdio Olyera, who had remained in the apartment, left, and as he was leaving, he observed the parties who had been expelled from the apartment standing outside the building. One of them, Rene Cajero, indicated to Mr. Olyera that he was "waiting" for Maurillo Chaparro.

At around 10:50 p.m., Maurillo Chaparro, who had remained in the apartment, noticed smoke pouring under the door. He opened it, and a flaming bottle flew into the apartment. A serious fire erupted, and the Martinsburg City Fire Department was

called. In the course of the fire Elizer Peralta, who was also in the apartment, suffered second and third degree burns. He died the next day.

In investigating the fire, the Martinsburg City Fire Department quickly determined that gasoline had been used to start the fire and that a passing motorist, Darlene Mancherry, had seen a Mexican male, who appeared to be on fire, exiting the building at about the time the fire erupted. Ms. Moncherry later identified the defendant, Roberto Jose Lopez, as being that Mexican male. The investigation further revealed that shortly before the fire erupted, Virginia Turner, a sales clerk at a nearby 7-Eleven convenience store, had sold a male Mexican, whom she could not later identify,

approximately two dollars worth of gasoline. Lastly, a Martinsburg City Police detective discovered a gun just outside the burning building.

About an hour after the fire erupted, at around 11:43 p.m., the nearby Winchester, Virginia, Rescue Squad received a request to transport a burned Hispanic male to the Winchester Hospital. Because there was some suspicion that the individual had been involved in the Martinsburg fire, an officer of the Martinsburg City Police Department, Detective Smartwood, was contacted. This officer traveled to Winchester and met Officer Milholland of the Winchester City Police Department, who had earlier procured the services of a high school Spanish teacher as an interpreter. The

officers arrived at the Winchester Hospital at approximately 4:25 a.m. on December 31, 1992, and, before proceeding to contact the burn patient, who turned out to be the defendant in this proceeding, Roberto Jose Lopez, they stopped at a nursing station where they learned that the nurses had the patient's clothing out of view and that it was soaked with gasoline. They asked for it. The nurses produced it, and the police officers, without first obtaining a warrant, seized it.

The police officers and the interpreter then proceeded to the defendant's hospital room, where he gave a tape-recorded statement after he had been given his *Miranda* rights. In the statement he indicated that he had burned his hand when he spilled

boiling water on it at a stove and that he had singed his hair when he bent over the stove.

The defendant was indicted for arson and for the felony murder of Elizer Peralta during the February, 1993 term of the Grand Jury of Berkeley County. No trial was conducted under this indictment, however, and the defendant was reindicted during the May, 1993, term of the grand jury.

Prior to the scheduled trial date, counsel for the defendant and the Berkeley County Prosecuting Attorney's Office entered into plea bargain negotiations. The negotiations resulted in an agreement under which the defendant agreed to plead guilty to first degree

murder with a binding recommendation of mercy, and at a hearing conducted on September 3, 1993, the plea agreement was discussed before the circuit court, and the circuit court informed the parties that "[t]he court doesn't feel that it could in good conscience dispense that particular sentence merely by agreement," and the court refused to accept the agreement.

After the breakdown of the plea negotiations, a jury trial was conducted on September 25, 1993, and at the conclusion of that trial the defendant was convicted of the felony murder of Elizer Peralta and was sentenced to life in the penitentiary without a recommendation of mercy. Rene Cajero had earlier been charged

with and convicted of the same crime and had received the same sentence.

The first question in the present proceeding is whether the circuit court erred by admitting into evidence of the defendant's clothing, which was obtained at the nursing station at the Winchester Hospital. The defendant claims that this clothing was obtained by the State through an illegal search and seizure and that the trial court should have suppressed its use as evidence.

The record indicates that after the defendant reported to the Winchester Hospital his clothing was removed and placed in a bag by a nurse. As previously indicated, after Detective Smartwood and Officer Milholland arrived at the Winchester Hospital, but before they

had contacted the defendant, they learned that the clothing was in the possession of the nurses at the nursing station. They then asked for the clothing, and the nurses handed it over.

At a preliminary hearing conducted on July 14, 1993, Detective Smartwood explained the circumstances surrounding the taking of the clothing. The testimony proceeded as follows:

> Q: Why did the nurses offer Mr. Lopez's clothes?
>
> A: I believe Investigator Milholland inquired if -- if they had their clothes -- if they had his clothes. And they advised that they did.
>
> Q: Let me make sure I understand your testimony, when you approached the station you requested -- you asked the

nurses what room Mr. Lopez was in, is that correct?

A: I believe Investigator Milholland did, yes, sir.

Q: Okay. And they what did -- did Officer Milholland, I mean, how did the issue of clothes come up?

A: I believe he asked if they did have Mr. Lopez's clothing.

Q: Why did he ask them that?

A: He simply asked. He asked, they advised they did. They had it in a bag. He opened it up, again to myself there was an odor of gasoline upon the clothing. They gave Mr. -- Investigator Milholland that clothing, but we didn't -- I am sorry.

During the actual trial, Detective Smartwood described the taking of the clothing in the following manner:

A: We then went I believe to be the second floor of the hospital in Winchester.

Q: And, where on the second floor did you proceed to?

A: We went to the nurse's station there on the second floor.

Q: At that time did you or Investigator Milholland receive any physical evidence in this case?

A: Yes, Ma'am, we did. That's correct.

Q: And, what physical evidence did you receive?

A: Proceeding there at the nurse's station, we were given clothing of Mr. Lopez.

The State, during trial and on appeal, takes the position that the clothing was in plain view and that, as a consequence, the warrantless seizure of it was legal under the "plain view doctrine."

This Court, of course, has recognized that "[t]he Fourth Amendment of the *United States Constitution*, and Article III, Section 6, of the *West Virginia Constitution* protect an individual's reasonable expectation of privacy." Syllabus point 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981). However, as indicated in *Wagner v. Hedrick*, 181 W.Va. 482, 487, 383 S.E.2d 286, 291 (1989):

> A claim of protection under the Fourth Amendment and the right to challenge the legality of a search depends not upon a person's property right in the invaded place or article of

> personal property, but upon whether the person has a legitimate expectation of privacy in the invaded place or thing. *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576, 583 (1967). If a person is in such a position that he cannot reasonably expect privacy, a court may find that an unreasonable Fourth Amendment search has not taken place. (Footnote omitted.)

The Court believes that in the present case the threshold question as to the validity of the taking of the defendant's clothing is whether the clothing, while in the possession of the nurses, was in a place where the defendant had a reasonable expectation of privacy.

In addressing this question, the Court is aware that in *Wagner v. Hedrick, supra*, the challenged search was the warrantless search of the clothing of a patient in a hospital and that in that case

the Court held that the search was not unreasonable since the defendant did not have a reasonable expectation of privacy with regard to the clothing. In *Wagner v. Hedrick*, the facts show that the complaining party's clothes were removed at a hospital, and the hospital offered to take custody of them for safekeeping. The individual, however, declined the offer and elected to keep them in a basket under the bed in an area apparently frequented by many people. This Court, as previously indicated, found that the defendant, Wagner, did not have a reasonable expectation of privacy and specifically noted:

> [W]hen Wagner was given the opportunity to insure that his personal effects would be kept in a private place during his hospital stay, he chose not to do so. We note with interest the fact that Wagner rejected an offer by a hospital employee to have his personal effects . . . secured

> in the hospital safe, thus exposing his property to the possibility that it might be lost, misplaced, or even stolen . . . .

181 W.Va. at 488, 383 S.E.2d at 292.

On the other hand, other courts have indicated that the clothing of patients or others taken in an in-custodial process and retained by the custodian for safekeeping are maintained in a situation here the owner has a reasonable expectation of privacy. *See Morris v. Commonwealth*, 208 Va. 331, 157 S.E.2d 191 (1967); *People v. Hayes*, 154 Misc.2d 429, 584 N.Y.S.2d 1001 (1992); *United States v. Sanchez*, 46 C.M.R. (1972); *Fries v. Barnes*, 618 F.2d 988 (2nd Cir. 1980); and *Brett v. United States*, 512 F.2d 401 (9th Cir. 1969).

In *Morris v. Commonwealth*, *supra*, a defendant's clothes were removed and placed in a wardrobe apparently designated to protect such clothes, and, quite similar to

the situation in the case presently before the Court, police officers asked a nurse on duty for them. The nurse, without the defendant's consent, removed them and handed

them over.

The Virginia

court stated: "[W]e hold that the seizure by the offi

Constitution."

208 Va. at

334, 157

S.E.2d at 194.

In *People v. Hayes, supra,* the facts indicate that a detective determined that the clothing which a defendant had been wearing when he checked into a hospital was being held for him at the reception desk. The detective asked for it and seized it. The court determined that the seizure was improper and stated: "Hayes

relinquished his clothes to the hospital for a limited and specific time and purpose, fully expecting to recover them after his treatment . . . . Hayes' property rights to his belongings were violated when they were removed from the hospital without a warrant." 584 N.Y.S.2d at 1004.

In *United States v. Sanchez, supra,* a military enlisted man was charged with stealing a ring belonging to another enlisted person. The accused was hospitalized in a naval hospital and his clothes were locked in a clothing closet. Hospital personnel possessed keys to the closet and turned the clothing over to an investigator. The United States Navy Court of Military Review concluded that the accused

enlisted man had an expectation of privacy with regard to the clothes and ruled that they were illegally seized. The Court concluded:

> It is our view that portion of when his clothing was stowed was reserved for the exclusive use of appellant and that he had the right to expect some decree of privacy in the public closet . . . . Under the circumstances of the case, we find prosecution Exhibit 6 was improperly received into evidence.

In *Brett v. United States*, 412 F.2d 401 (9th Cir. 1969), the police arrested a man and conducted a superficial search incident to the arrest. They then placed his clothes in safekeeping. Still later, they conducted a warrantless search of his clothing. The court, recognizing that there was an expectation of privacy in the safe-keeping arrangement, said:

> We note that there was ample opportunity to apply for a search warrant, to submit to a magistrate the evidence which the officer deemed sufficient to justify the late search of appellant's stored clothing. In this case '[t]he need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take the decision into his own hands.' *Rent v. United States*, 209 F.2d 893, 899 (5th Cir. 1954).

413 F.2d at 406.

Similarly, the *Fries v. Barnes, supra*, the court suggested that a patient whose clothing was in the custody of a hospital had a sufficient expectation of privacy to raise constitutional questions when the clothing was seized in a warrantless search.

It appears to this Court that the crucial distinction between *Wagner v. Hedrick, supra,* and the other cases discussed above is that in *Wagner* the defendant refused to turn his clothing over to others for safekeeping and that he kept it in a semi-public area.

Overall, the Court believes that the facts in the present case are unlike those in *Wagner v. Hedrick* in that it appears that that clothing was in safe keeping with the hospital authorities. Under such circumstance, the Court believes that the defendant had a sufficiently reasonable expectation of privacy with regard to the clothing for it to be protected by the Fourth Amendment and Article III, section 6 of the West Virginia Constitution.

Having so concluded, this Court believes that for the warrantless search to be valid, it must have been conducted under one of the exceptions to the warrant rule. *See State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), *overruled on other grounds, State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991). As previously noted, the State has argued that it falls within the "plain view" exception.

In *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991), the Court discussed the plain view exception and in syllabus point 3 stated:

> The essential predicates of a plain view warrantless seizure are (1) that the officer did

> not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

In the present case, there is nothing to indicate that Detective Smartwood and Officer Milholland arrived at the Winchester Hospital in a manner which violated the Fourth Amendment. However, the testimony of Detective Smartwood, which has been quoted extensively above, unequivocally shows that the defendant's clothing was not in plain view at the time the officers arrived at the nursing station and that they actually learned that the

clothing was at the nursing station only after Officer Milholland specifically asked about it. Since it was not in plain view, this Court cannot conclude that it was in "plain view", which is the second predicate for a "plain view" search and seizure set forth in syllabus point 3 of *State v. Julius, Id.*, and consequently the Court cannot conclude that it was properly seized as the result of a plain view warrantless seizure.

In view of the overall circumstances, this Court finds that the seizure of the defendant's clothing was conducted outside the judicial process and was *per se* unreasonable. Further, the Court finds that the trial court erred in failing to suppress the clothing and admitting it into evidence during the defendant's trial.

The defendant next claims that the trial court erred in admitting into evidence a statement given by him at the Winchester Hospital to Detective Smartwood and Officer Milholland through Mr. C. B. Ashby, an interpreter of the Spanish language. The defendant argues that this statement was not voluntarily given and was admitted in violation of his constitutional right against self-incrimination.

The record shows that at the time of the taking of the statement the defendant was under the influence of Demerol, a painkiller which had been administered in conjunction with the treatment of his burns. The statement was tape recorded after the

police officers purportedly gave him his *Miranda* rights and after he purportedly waived those rights.

In the statement the defendant explained that he had burned himself while making coffee, and he denied that he had ever been in Martinsburg, West Virginia. Specifically, the colloquy in which his explanation was given proceeded as follows:

> A: I put water for the coffee and then I dropped the water. It was boiling, it was very hot because I put it full and then, I dropped the water and when I went to grab the pot water spilled over here and I did like so and I burned my hair on the stove, because it was in full volume.
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> Q: The stove?
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> I [interpreter]: He was heating water for co

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he was pouring . . .

A: Hot water

I: And he burned his hand, and when he bent over his head and hair got caught in the stove . . . with the

Q: And the stove caused that problem?

I: The stove?

A: The stove

I: Burned . . .

A: Yes, I burned myself

I: The stove caused the burn

A: When I leaned over I hit the stove and I burned

I: Uhum.

Q: How did the hand get burned?

I: The hand . . . the hand was burned by hot water, true?

A: I dropped the hot water.

I: He poured. He says . . . the hot water . . . he was pouring his coffee. He poured on his hand.

Q: Ah!

I: That is what caused him to bent over, I think, towards the stove . . . stove . . . the stove burned your hair

A: Yes, and when I bent over to grab the pot

I: He bend down to pick up

A: It was very hot here and when I grabbed the pot I bent, I burned myself on the stove.

I: I understand, yes . . . when he bent over to clean up, to pick up . . . that is when he stuck his head across the stove

Q: His hand got burned from the water . . .

I: Hot water

Q: He was heating for coffee

I: Yeah.

Q: Where did all this happen, then?

I: Roberto, where did all happen? In Winchester, here?

A: Yeah.

The defendant was later asked about gasoline on his clothes, and apparently the defendant denied there was gasoline on his clothes.

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[1]The defendant's actual intended response is unclear since it is obvious the interpreter was having difficulty translating at this point. The transcript shows that the interpretation proceeded as follows:

> Q: How he got gasoline in his clothes?
>
> I: There is "gaso" . . . gasoline in your clothes
>
> A: Ah?
>
> I: There is gasoline in your clothes
>
> A: No
>
> I: Yes, there is gasoline . . . It smells to gasoline . . . in your clothes . . . do you know . . . how can I be . . . gasoline . . . in the clothes
>
> A: No, no. I don't even remember.

The State apparently sought to introduce this statement to demonstrate that the defendant was not forthcoming about the origin of his burns, since his explanation was inconsistent with the fact that the defendant's clothing, which the officers had just seized, was soaked with gasoline.

I: Can't you remember?

A: Nothing

I: Nothing about gasoline . . . He doesn't know.

Q: He doesn't know how he got on or he doesn't think it is on?

I: He denied it is on there . . . but he doesn't

In challenging the voluntariness of the statement, the defense, in addition to pointing out that the defendant was in the hospital, under the influence of Demerol at the time he gave the statement, introduced evidence that the defendant had the mental capacity of a five-year-old. Further, Dr. Jesus Saavadera, a Spanish-speaking psychiatrist employed by the United States Public Health Service, testified that the defendant had the mental capacity of a five-year-old, that he had borderline mental functioning, and that he thought only in concrete terms. Dr. Saavadera indicated that the defendant was unable to understand abstract concepts such as the right to silence, and he expressed the opinion that at the time

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know how he got there

the defendant gave the statement "he was completely out of his mind."

Additionally, the defense introduced evidence that the translation which occurred during the taking of the statement was so defective that the defendant gave the statement without being meaningfully notified that he had the right to remain silent and without being notified that he had no duty to give a statement and should do so only if he voluntarily undertook to do so. Specifically, the defense called as an expert witness Mr. Edgar Martinez, an attorney and a federally court certified interpreter of the Spanish language. Mr. Martinez, who lived in Puerto Rico for thirty-three years and who had practiced law in the Spanish-speaking local courts

of Puerto Rico for nine years, testified that the interpreter used by Detective Smartwood and Office Milholland did not make an accurate translation of the officers' questions. He said:

> He [Mr. Ashby, Detective Smartwood and Officer Millholland's interpreter] did not make the accurate -- not only did he not literally transcribe it, he even omitted the use of the word like you have the right to remain silent . . . .
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> * * *
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> . . . It is very clear, that to me, that the translator was trying to help the policeman with whom he was in attendance to gather information about what was happening. And he [Ashby], on his own, was proffering questions that the policeman was not even asking . . . .
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> * * *
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> . . . In terms of the Spanish and English that is used and the way that it was brought together,

> uh, to me it was not an accurate translation and it would not convey to somebody, for example, that is supposedly being told that they have a right to remain silent, and what have you, they would not, in my opinion, get a clear understanding that they had that right and that they could have exercised it . . . .

The defense's claim that Mr. Ashby's interpretation was inadequate was supported by Dr. David Rojas, an expert for the State, who in a letter dated August 30, 1993, said:

> It is my opinion that given Mr. Lopez's poor command of the English language, he was not able to understand the Miranda rights as read in English. It is also my opinion that the interpreters' translation of the rights did not facilitate Mr. Lopez's understanding of his Miranda rights to the point of allowing him to answer questions entirely free and voluntary.

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[2]The trial court, apparently in the interest of expediting the

In syllabus point 5 of *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975), this Court stated:

> The State must prove, at least 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.

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proceedings, felt that it was unnecessary to adduce the actual testimony of Dr. Rojas. The court said:

> Nor do I think it necessitates having Dr. Rojas be here before, and be questioned, I will take it as given, because I don't see any variance in the representations made by either the State or the defense as to what that gentleman would say on the basis of the letter . . . .

See also, State v. Persinger, 169 W.Va. 121, 286 S.E.2d 261 (1982); *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980); *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979); and *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978).

In *State v. Persinger, supra*, the Court discussed the circumstances under which the question of voluntariness should be properly be judged. The Court stated:

> [T]he voluntariness of a confession is an inquiry that must be gauged by the totality of the circumstances under which it was given including the background, experience and conduct of the accused. *See Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).

169 W.Va. at 129, 286 S.E.2d at 267. Further, in *State ex rel. Williams V. Narick*, 164 W.Va. 632, 636, 264 S.E.2d 851, 855 (1980), the Court indicated to determine whether a statement was voluntary, one must ask whether the statement is "the product of an essentially free and unconstrained choice by its maker."

As has been previously indicated, the defendant in the present case, who was an undocumented Mexican alien, was hospitalized and was under the influence of Demerol at the time he gave the statement in issue in this case. There was also evidence that he was a migrant farm worker and an individual with low intellectual functioning and little education.

As indicated in *State v. Persinger, supra,* the voluntariness of a statement must be gauged by the totality of the circumstances under which it is given, including the background, experience, and conduct of the accused.

In the present case, the evidence rather clearly shows that the defendant was of low intellectual capacity and little education. At the time he gave the statement, he was in a disabling, hospital situation, and he was drugged. Further, he was an illegal alien, confronted by officers of an American state.

The circumstances were such as to suggest that he was not wholly aware that he had a legal right to refrain from making a statement.

Our law contemplates that in such a situation a statement given is not legally admissible into evidence unless the individual is clearly informed of his right to refrain from making a statement and unless the individual, of his own volition, decides to abandon his right to silence and to make a statement. *See State v. Rissler, supra.*

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[3]We perceive that the defendant's statement was incriminating for two basic reasons: (1) an attempt at exculpation which is shown to be false or which opens the accused to further investigation on specific facts can be highly damaging to an accused, and (2) the statement with which we are concerned dealt in considerable detail with the subjects of gasoline and its handling. The defendant's clothes were soaked with gasoline at the time he was admitted to the

In the present case, evidence was adduced, and the statement itself shows, that at the time of the taking of the statement, Mr. Ashby, the interpreter employed by Detective Smartwood and Officer Milholland, was struggling to translate and, in fact, did not communicate essential portions of the colloquy. The State's own expert, Dr. David Rojas, in his letter, said:

> [The defendant] was not able to understand the . . . rights as read in English. It is also my opinion that the interpreter's translation of the rights did not facilitate Mr.

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hospital, and the defendant's statement rather clearly suggests that he was not telling the truth and was unwilling to tell the police the truth. Further, it is obvious that the investigating officers considered the gasoline a key to solving this crime. They were aware that the defendant's clothes were gasoline-soaked before they went to the defendant's room, and during their questioning of him, when he did not raise the point, they specifically asked him about it.

> Lopez's understanding of his . . . rights to the point of allowing him to answer questions entirely freely and voluntarily.

This Court believes that the record fails to establish by a preponderance of the evidence, as is required by syllabus point 5 of *State v. Starr, supra,* that the statement was voluntary, and, under the circumstances, the Court believes that the trial court erred in admitting it into evidence.

The defendant next claims that the circuit court erred in permitting the admission into evidence of a gruesome photograph when, according to the defendant, the photograph was not relevant,

was not probative of a fact of any consequence, and was not essential to prove the offense.

The photograph in question was a black and white photograph which showed a fireman and an individual in civilian clothes loading a burned body onto a stretcher. In the background of the photograph was a brick building, which had on it a sign which stated "Grove Furniture" and along side of which firemen were obviously fighting a fire. The burned body was that of Elizer Peralta, the individual who died from injuries sustained in the fire. Mr. Peralta occupied only a small portion of the overall photograph. His body was badly charred, and fragments of clothing were hanging from it.

According to the State, the photograph was offered to establish a nexus between the victim's death and the fire involved in the present case. Defense counsel objected to the admission of the photograph and argued that it had little probative value and the probative value was substantially outweighed by the danger of unfair prejudice.

In assessing the admissibility of the photograph, the trial court relied upon the principles set forth in the case of *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1970), which sated the law on gruesome photographs at the time of the defendant's trial in September, 1993. Subsequent to the trial *State v. Rowe* was

overruled in *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Specifically, in syllabus point 6 of *State v. Derr* the Court stated:

> Whatever the wisdom and utility of *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979), and its progeny, it is clear that the *Rowe* balancing test did not survive the adoption of the West Virginia Rules of Evidence. Therefore, *State v. Rowe, supra,* is expressly overruled because it is manifestly incompatible with Rule 403 of the West Virginia Rules of Evidence.

In *State v. Derr*, the Court announced new rules for assessing the admissibility of gruesome photographs. In syllabus point 7, the Court stated:

> The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts. These rules constitute more than a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them.

In syllabus point 8, the Court stated:

> The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence.

Finally, in syllabus point 9, the Court stated:

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

It is obvious from what the Court has heretofore stated in this opinion that the defendant's conviction must be reversed for reasons other than the admission of the so-called gruesome photograph and the case must be remanded for a new trial. It is also obvious that it is impossible to state at this point what evidence will be adduced at the new trial relating to the relevancy and necessity for admitting the gruesome photograph, as well as to its potential prejudicial affect. Inasmuch as the defendant's conviction must be reversed on other grounds, this Court does not believe that it is necessary to determine whether the admission of the photograph by the trial court was appropriate in the defendant's trial, especially in view of the fact that the rules relating to the admission of such evidence have been altered by the decision in *State v. Derr, supra.*

The Court believes, however, that should defense counsel, upon remand, again interpose an appropriate objection to the admission of the gruesome photograph in issue or any gruesome photograph, the trial court should weigh the admission of that photograph in light of the factors set forth and explained in *State v. Derr, supra.*

A somewhat similar problem is presented by the gun discovered outside the building which the defendant allegedly set on fire. The State, as previously indicated, introduced evidence showing that the defendant had been present at an altercation involving a gun a short time prior to the eruption of the fire, and shortly after the

eruption of the fire a handgun was found outside the building. The State, so far as this Court can determine, in no way definitively connected the gun which was discovered with the crime or even with the altercation which preceded the fire. The authorities could identify no fingerprints on it, and there was no evidence suggesting that the defendant had ever possessed, used, or touched it.

The defendant at trial claimed, and on appeal claims, that the pistol was irrelevant to the crime charged, that it had no probative value, and that its introduction into evidence was improper under Rule 402 of the West Virginia Rules of Evidence.

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[4]The parties in their briefs do not identify precisely where in the record all the discussions relating to the admissibility of the gun occurred during the trial under review. The defendant's brief suggests that portions of the discussions may be missing from the official transcript. As a consequence, the Court can only speculate as

For the reasons previously stated, the defendant's conviction is being reversed on other grounds and this case must be retried. It is obviously unclear what the evidence will be on retrial, and it is not wholly clear how the State will attempt to establish the relevancy of the gun. For this reason, the Court does not feel that it is necessary to predetermine the relevancy of the evidence. The Court does note, however, that Rule 402 of the West Virginia Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals.

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to what the argument regarding relevancy may have been.

> Evidence which is not relevant is not admissible.

Further, Rule 401 of the West Virginia Rules of Evidence defines "relevant evidence". That rule states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Recently in *McDonald v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995), this Court examined this definition and concluded:

> Under Rule 401, evidence having *any* probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard

> favoring a broad policy of admissibility. For example, the offered evidence does not have to make the existence of a fact to be proved more probable than not or provide a sufficient basis for sending the issue to the jury.

Id. at 236, 455 S.E.2d 795. This is consistent with the statement in F. Cleckley, *Handbook on West Virginia Criminal Evidence*, 1995 Supp., page 13, that:

> . . . evidence that does not directly establish an element of an offense may be relevant to show the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which certain acts were performed.

On retrial, the trial court should assess the relevancy of the gun, if it is proffered into evidence, in accordance with applicable principles, and at the very least the Court believes the State must in

some way to establish the relevance of the gun to the crime, the defendant, or the events surrounding the crime. If the focus is on the incident preceding the crime, the State must establish some identity or connection between the gun involved in the incident and the gun which the State seeks to introduce.

Another assignment of error argued by the defendant is that the trial court erred in failing to seek appropriate information, in failing to make findings, and in failing to follow the appropriate standards and make a mature decision, as is required by Rule 11(e) of the West Virginia Rules of Criminal Procedure, when the court refused to accept the plea bargain agreement tendered to it by the State and accepted by the defendant.

Rule 11 of the West Virginia Rules of Criminal Procedure governs a trial court's handling of plea agreements, and Rule 11(e)(4) governs the rejection of a plea agreement. That rule states:

> Rejection of a plea agreement. -- If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant if the he or she persists in a guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

A close examination of Rule 11 indicates that it prescribes procedures to be followed where a defendant has actually entered a guilty plea pursuant to a plea bargain agreement. In stating that the court shall "afford the defendant the opportunity to then withdraw his plea [upon the rejection of a plea bargain agreement], and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement", the rule is clearly contemplating that a defendant's right to proceed to trial where a plea bargain is rejected shall be protected by a court's ensuring that the defendant shall have an opportunity to return to his status prior to entering the plea pursuant to the plea bargain agreement.

In the present case, the defendant did not enter a plea of guilty or a plea of *nolo contendere* in conjunction with the presentation of the plea bargain agreement to the court. In view of the fact that no plea had been entered, it is rather obvious to this Court that it was not necessary for the trial court to afford the defendant the right to withdraw his plea or to notify him that if he persisted with the guilty plea, or his plea of *nolo contendere*, the disposition of his case might be less favorable than that contemplated by the agreement. The only other requirement of Rule 11(e)(4) was that the court advise the defendant personally, either in open court or *in camera*, that the court was not bound by the agreement.

A fair reading of the remarks made by the court rather clearly indicates that the court did not feel that it was bound by the agreement and that it was rejecting the agreement. The court stated:

> . . . [T]he Court is of the opinion that binding pleas are always pleas which the Court has to be convinced it can square with its own -- with its own good conscience when it's asked to dispense a certain -- a certain sentence for a certain crime. And the nature of the plea to first degree with the binding disposition of mercy would be to bind this court to dispense that sentence as it has the appropriate sentence for this crime and it just appears to the Court from a view of the nature of the allegations contained in the case, the Court doesn't feel that it could in good conscience dispense that particular sentence merely by agreement, that it -- it -- the Court would reserve the right to be swayed by additional evidence and argument during the conduct of the trial, of course, but pretrial as a -- as a matter of being bound to give that

sentence, the Court would not accept to have its discretion bound in that manner.

Overall, the Court cannot conclude that the trial court's rejection of the plea agreement was violative of the defendant's rights or constituted prejudicial error.

For the reasons stated, the judgment of the Circuit Court of Berkeley County is reversed and the case is remanded for a new trial.

Reversed and remanded.