IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

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OF WEST VIRGINIA

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29993

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

RAY LEWIS DILLINER,
Defendant Below, Appellant

Appeal from the Circuit Court of Wood County
Honorable Jeffrey B. Reed, Judge
Criminal Action No. 00-F-12

REVERSED AND REMANDED

Submitted: May 1, 2002
Filed: July 2, 2002

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JUSTICE MAYNARD delivered the Opinion of the Court.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "[W.Va.] Code, 56-6-5, which provides for the submission of interrogatories to a jury in the trial of any issue or issues does not apply to trials in criminal cases." Syllabus Point 5, *State v. Greater Huntington Theatre Corp.*, 133 W.Va. 252, 55 S.E.2d 681 (1949).

2. The submission of special interrogatories to a jury in a criminal case when not authorized by statute constitutes reversible error.

3. A record of the accuracy inspection of an intoxilyzer or breathalyzer machine performed by a certified breath test operator and prepared in accordance with 64 C.S.R. §§ 10-7.1, *et seq.*, is admissible under the public records exception to the hearsay rule found in W.Va.R.Evid. 803(8)(B).

4. The law enforcement limitation on admissibility of public records found in W.Va.R.Evid. 803(8)(B) does not prohibit the admission under Rule 803(8)(B) of a record of the accuracy inspection of an intoxilyzer machine performed by a certified breath test operator and prepared in accordance with 64 C.S.R. §§ 10-7.1, *et. seq.*, where the certified breath test operator is a law enforcement officer. The accuracy check of an intoxilyzer is an administrative function that is not performed pursuant to the investigation of any particular person.

Maynard, Justice:

This case is before this Court upon appeal of a final order of the Circuit Court of Wood County entered on October 4, 2000. In that order, the circuit court sentenced the appellant and defendant below, Ray Lewis Dilliner, to one-to-three years in the penitentiary and imposed a $3,000.00 fine for his conviction of third offense driving under the influence of alcohol (hereinafter "third offense DUI"). In this appeal, the appellant contends that the circuit court erred by not setting aside the guilty verdict because it was inconsistent with special interrogatories answered by the jury. The appellant also contends that the circuit court erred by admitting into evidence the results of his intoxilyzer test.

This Court has before it the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, the final order of the circuit court is reversed and this case is remanded for a new trial.

I. FACTS

On September 19, 1999, at approximately 12:30 a.m., the appellant was stopped as he was driving south on Grand Central Avenue in Vienna, West Virginia, by Sergeant G. M. Deem of the Vienna Police Department. According to Sergeant Deem, he stopped the appellant because his vehicle was weaving and drifting into the next lane. When Sergeant Deem

approached the appellant, he noticed the odor of alcohol. He asked the appellant if he had been drinking, and the appellant replied that he had not. Sergeant Deem then asked the appellant to exit his vehicle and perform a series of field sobriety tests.[1]

The appellant passed the first series of field sobriety tests but failed the horizontal gaze nystagmus test and the preliminary breath test. Consequently, the appellant was taken to the police station and given an intoxilyzer test which showed a blood alcohol concentration of .156 percent. The appellant was arrested. Subsequently, he was indicted for third offense DUI and driving a motor vehicle with an alcohol concentration in his blood of ten hundredths of one percent or more by weight. The indictment alleged that the appellant has been previously convicted of DUI twice in Marietta, Ohio.[2]

Prior to trial, the appellant moved to suppress the results of his intoxilyzer test, but the motion was denied. At trial, the appellant testified that he had not consumed any alcohol during the twenty-four hour period immediately prior to his arrest. He further testified that he owned a body shop and that hours before his arrest he had painted an automobile without using a protective mask. The appellant maintained that the vapors from the paint and other

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[1]These tests were captured on videotape and were viewed by the jury during the appellant's trial.

[2]The appellant stipulated to these convictions at trial.

chemicals he used while painting accounted for the results of his intoxilyzer test.

In support of his testimony, the appellant presented the expert testimony of Robert J. Belloto, Jr., R.Ph., Ph.D. Dr. Belloto testified that he had examined the various chemical products used by the appellant to paint the automobile before his arrest. He further testified that these chemicals metabolize in the human body in such a manner that they are expelled as alcohol and thus could cause a false reading on an intoxilyzer test.

Thereafter, the jury found the appellant guilty of both counts in the indictment. In response to interrogatories relating to their findings of guilt, the jury indicated the verdicts were based upon a combination of the appellant drinking alcohol and inhaling chemicals while painting his car. The jury further indicated that it did not believe that the appellant inhaled the chemicals to cause himself to become intoxicated. Based on the jury's responses to the interrogatories, the appellant moved to set aside the verdicts. Alternatively, the appellant requested a new trial. After considering the motions, the circuit court set aside the verdict on count two, driving a motor vehicle with an alcohol concentration of ten hundredths of one percent or more, by weight, and entered a not guilty verdict. However, the court denied the motion with regard to the first count and sentenced the appellant to one-to-three years in the penitentiary and imposed a $3,000.00 fine. This appeal followed.

II. DISCUSSION

A. The Special Interrogatories

The appellant first contends the jury's finding of guilt with respect to the third offense DUI charge was inconsistent with its answers to the special interrogatories, and, therefore, the circuit court erred by not setting aside his conviction. As noted above, after the jury returned its guilty verdict, the circuit court asked the jury to answer special interrogatories relating to their findings of guilt. The interrogatories with respect to the third offense DUI charge and the jury's answers thereto were as follows:

> You have found the Defendant guilty of driving under the influence of alcohol by being under the influence of alcohol. Was this verdict as a result of the Defendant: (Check all appropriate lines)
>
> _____ drinking alcohol
>
> _____ painting his car and inhaling the chemicals
>
> ___T___ a combination of both
>
> If you find that the Defendant was driving under the influence of alcohol as a result of painting his car and inhaling the chemicals, do you further find that the painting of his car was done in such a manner to knowingly cause himself to become intoxicated?
>
> _____ Yes ___T___ No

The appellant claims that the jury's answers to the interrogatories clearly establish that the jury did not find him guilty of driving under the influence as set forth in W.Va. Code § 17C-5-2(k) (1996). While we understand the appellant's argument, we reverse the appellant's conviction for a different reason.

This Court has long since held that special interrogatories should not be submitted to juries in criminal cases. In *State v. Boggs*, 87 W.Va. 738, 749, 106 S.E. 47, 51-52 (1921), this Court stated that:

> Statutes permitting findings to be required in response to interrogatories are held not to apply to criminal cases, for the reason that to so apply them would be to impair the right of trial by jury secured by the Constitution. It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.

(Citation omitted). This Court concluded in *Boggs* that "special interrogatories cannot be propounded to the jury in criminal cases." *Id.*, 87 W.Va. at 749-50, 106 S.E. at 52. In *State v. Bowles*, 109 W.Va. 174, 176, 153 S.E. 308, 308 (1930), this Court reiterated that "[t]he practice of submitting interrogatories is not followed in the trial of criminal cases." Finally, in Syllabus Point 5 of *State v. Greater Huntington Theatre Corp.*, 133 W.Va. 252, 55 S.E.2d 681 (1949), this Court held that "[W.Va.] Code, 56-6-5, which provides for the submission of interrogatories to a jury in the trial of any issue or issues does not apply to trials in criminal cases."

While the issue of submitting special interrogatories to juries in criminal cases has not come before this Court since *State v. Greater Huntington Theatre Corp.*, several other jurisdictions have addressed the issue more recently. Generally, special interrogatories in criminal cases remain disfavored and discouraged. *United States v. Acosta*, 149 F.Supp.2d

1073, 1075 (E.D.Wis. 2001). It is believed that special interrogatories may "coerce the jurors into rendering a guilty verdict," *State v. Sheldon*, 301 N.W.2d 604, 614 (N.D. 1980), or "destroy[ ] the ability of the jury to deliberate upon the issue of guilt or innocence free of extraneous influences." *State v. Simon*, 79 N.J. 191, 199, 398 A.2d 861, 865 (1979). *See also United States v. Sababu*, 891 F.2d 1308, 1325 (7th Cir. 1989) (special verdicts are disfavored in criminal cases because they conflict with the basic tenet that juries must be free from judicial control and pressure in reaching their verdicts); *United States v. Coonan*, 839 F.2d 886, 891 (2d. Cir. 1988) (there is some belief that eliciting "yes" and "no" answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt whereas a more generalized assessment might result in an acquittal); *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir. 1976) (danger that special verdicts might be devices for bringing judicial pressure to bear on juries in reaching their verdicts).

Although some courts have permitted the use of special interrogatories in criminal cases,[3] we believe that they should not be permitted except where provided for by statute. Since *State v, Greater Huntington Theatre Corp.* was decided, the Legislature has

[3]*See State v. Steen*, 615 N.W.2d 555, 559 (2000) (special interrogatories approved in criminal trials where the special findings benefitted the defendant, were neither inherently prejudicial, nor predeterminative of the jury's verdict); *People v. Ribowsky*, 77 N.Y.2d 284, 291, 568 N.E.2d 1197, 1201 (1991) (special interrogatories not prejudicial to defendant because they allowed the court to verify that the jury followed its instructions); *Commonwealth v. Golston*, 373 Mass. 249, 260-61, 366 N.E.2d 744, 752 (1977) (submitting two questions to jury to answer if they found defendant guilty of murder not error).

provided for the submission of special interrogatories to juries in criminal cases in certain limited circumstances.[4] Primarily, the statutory authorization of special interrogatories in criminal cases is for sentencing purposes. In that context, the reasons for prohibiting the use of special interrogatories do not exist.

However, special interrogatories like those used in the case at bar invade the province of the jury. There is the strong possibility that such special interrogatories will lead the jury to believe that the court wants a particular verdict. Additionally, special interrogatories infringe upon the power of the jury to arrive at a general verdict without having to support it by reasons. Simply put, special interrogatories in criminal cases are contrary to the basic principle of law that jury deliberations should be free from extraneous influences. Therefore, we hold that the submission of special interrogatories to a jury in a criminal case when not authorized by statute constitutes reversible error. Accordingly, the appellant's conviction is reversed, and this case is remanded for a new trial.

B. The Accuracy Inspection Report

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[4]*See, e.g.*, W.Va. Code § 62-12-2 (1999) (providing for the submission of a special interrogatory to the jury for the purpose of determining an accused's eligibility for probation where it is alleged that the accused attempted to commit a felony with the use, presentment, or brandishing of a firearm); W.Va. Code § 60A-4-406 (2000) (providing for the submission of a special interrogatory to the jury to determine whether an accused convicted of distribution of a controlled substance is eligible for parole).

While we reverse the appellant's conviction because the circuit court erred by submitting the special interrogatories to the jury, we feel it is necessary to address another assignment of error raised by the appellant. The appellant also contends that the circuit court erred by admitting into evidence the intoxilyzer accuracy inspection report and the results of his intoxilyzer test. During his trial, the State offered the accuracy inspection report as foundational evidence to support the admission of the appellant's actual breath test results. The State presented the accuracy inspection report to establish that the intoxilyzer machine used to test the appellant's blood alcohol level had been checked for accuracy in compliance with the requirements of the West Virginia Division of Health. The appellant objected to the admission of the report asserting that it was hearsay. However, the circuit court allowed the accuracy inspection report to be admitted into evidence without testimony from its author or any other person. Specifically, the circuit court concluded that since the document was authentic pursuant to Rule 902 of the West Virginia Rules of Evidence, it was also reliable, and therefore admissible. The appellant now argues that the circuit court erred in its finding. According to the appellant, even though a document is authentic, it still must conform to the other evidentiary rules prior to its admission.

The State concedes that the circuit court erred by concluding that a finding of authenticity can be equated with a finding of admissibility against a hearsay objection, and acknowledges this Court's statement in *State v. Jenkins*, 195 W.Va. 620, 625, 466 S.E.2d 471, 476 (1995):

> A trial judge's finding of authenticity does not guarantee admissibility. The trial judge also must evaluate whether the evidence is admissible pursuant to the rules of evidence governing relevancy, hearsay, privileges, or any other applicable rules of evidence.

The State maintains, however, that the accuracy inspection report was admissible as a public record pursuant to Rule 803(8)(B) of the West Virginia Rules of Evidence so that the appellant's conviction should not be reversed. According to Rule 803(8)(B) of the West Virginia Rules of Evidence:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel[.]

According to the State, the accuracy inspection report falls squarely within the confines of W.Va.R.Evid. 803(8) because 64 C.S.R. § 10-7.1(f) requires that "[t]he designated instrument shall have its accuracy checked in accordance with subsection 7.2 of this rule. Each law enforcement agency shall maintain a record of such accuracy checks including the type of test employed and the date of such accuracy checks." Further, 64 C.S.R. § 10-7.3(c) requires that the individual testing the intoxilyzer machine must be a certified breath test operator. Therefore, concludes the State, the Code of State Rules requires the accuracy test to be

performed, thus making it a matter "observed pursuant to duty imposed by law" as stated in Rule 803(8)(B), and a record of such accuracy checks must be maintained, thus making it a matter of which there is "a duty to report," as stated in Rule 803(8)(B).

The appellant responds that Rule 803(8)(B) specifically excludes reports of matters observed by police officers and other law enforcement personnel. Because in the instant case, the accuracy inspection test was performed by D.W. DeBord, a sergeant in the Parkersburg division of the West Virginia State Police, the appellant concludes that the report would not be admissible.

We agree with the State that the accuracy inspection report was admissible under W.Va.R.Evid. 803(8)(B) because we find that the law enforcement exclusion in Rule 803(8)(B) is not applicable to the instant circumstances. The State directs our attention to a leading evidentiary treatise on the Federal Rules of Evidence which explains:

> In adding the exclusionary clauses, Congress was responding to one dominant concern: that law enforcement officers would create dossiers purporting to describe accurately the actions of criminal defendants and that these dossiers would be offered in lieu of live testimony. Such evidence was thought to be unreliable and was barred in criminal cases if offered against the defendant.
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> . . . .
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> Under the predominant view, laboratory reports and the like are admissible, because the Rule is designed to exclude a different type of report, i.e., police-generated reports that are prepared

> under adversarial circumstances, which are subject to manipulation by authorities bent on convicting a particular criminal defendant.

3 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* 1684 (7th ed. 1998). In addition, we are persuaded by the reasoning of the courts in *United States v. Wilmer,* 799 F.2d 495 (9th Cir. 1986); *Steiner v. State,* 706 So.2d 1308 (Ala.Crim.App. 1997); and *State v. Ruiz,* 120 N.M. 534, 903 P.2d 845 (N.M.Ct.App. 1995).

In *Wilmer,* the defendant was convicted of driving while intoxicated and his license was suspended based on events occurring at an air force base. The United States Court of Appeals for the Ninth Circuit found that evidence of the calibration certificate of the maintenance officer who calibrated the breathalyzer machine was admissible under Rule 803(8). The court rejected the defendant's challenge to the report's admissibility based on the law enforcement exclusion in Rule 803(8)(B). Specifically, the court recognized that "the exclusionary provisions of Rule 803(8)(B) were intended to apply to observations made by law enforcement officials at the scene of a crime or the apprehension of the accused and not 'records of routine, nonadversarial matters' made in a nonadversarial setting." *Wilmer*, 799 F.2d at 500-01 (citation omitted).

Likewise, in *Steiner,* the defendant challenged the introduction into evidence of the logbook indicating that the Intoxilyzer 5000 machine was properly calibrated on the basis that the logbook fell within the law enforcement exception because the machine was tested by

a State Trooper. The Court of Criminal Appeals of Alabama rejected this challenge. The court reasoned:

> Other jurisdictions have applied the law enforcement exception "only to matters observed or investigated by police in adversarial, investigative circumstances where those involved may well have a motivation to misrepresent in order to secure a conviction." Charles Gamble, *McElroy's Alabama Evidence, §* 266.01(5) (5th ed. 1996) (citations omitted). The inspection of the calibration of the I-5000 is an administrative function that is not performed pursuant to the investigation of any particular person. Therefore, we hold that a certified copy of the logbook relating to the I-5000 is admissible under the business records exception to the rule against hearsay when offered to show that the device was inspected to insure that the device had been properly calibrated.

Steiner, 706 So.2d at 1312.

Finally, in *Ruiz,* the Court of Appeals of New Mexico found that a calibration log and intoxilyzer printout were admissible under Rule 803(8), and not excluded by the law enforcement exclusion in that rule. The Court explained:

> Courts in other jurisdictions have considered the law enforcement limitation on the business or public records exceptions. These courts generally have ruled that language patterned on Federal Rule of Evidence 803(8) "does not prohibit introduction of records of a routine, intra-police, or machine maintenance nature, such as intoxilyzer calibration logs." *Ward,* 474 N.E.2d at 302; *see United States v. Wilkinson,* 804 F.Supp. 263, 266-67 (D. Utah 1992); *Huggins,* 659 P.2d at 616. In affirming the admission of certificates indicating routine breathalyzer inspections by police personnel, the Oregon Court of Appeals outlined the parameters of the law enforcement limitations and the hearsay rule:

> We conclude that, in adopting [Federal Rule of Evidence] 803(8)(B), Congress did not intend to change the common law rule allowing admission of public records of purely "ministerial observations." Rather, Congress intended to prevent prosecutors from attempting to prove their cases through police officers' reports of their observations during the investigation of crime.
>
> . . . . .
>
> [T]he certificates of breathalyzer inspections do not concern observations by the police officers in the course of a criminal investigation. Rather, they relate to the routine function of testing breathalyzer equipment to insure that it gives accurate readings. *See United States v. Grady*, *supra*, 544 F.2d [598] at 604. The testing and certification under [Oregon Revised Statute] 487.815(3)(c) is not done in the adversarial context of a particular case that might cloud law enforcement personnel's perception. A review of the congressional debate reveals that [Federal Rule of Evidence] 803(8)(B) was intended to preclude only the admission of police reports made in the course of investigation of a particular crime in lieu of the officers' in court testimony, not records of routine, nonadversarial matters such as those in question here.

State v. Smith, 66 Or.App. 703, 675 P.2d 510, 512 (1984).

Ruiz, 120 N.M. at 538, 903 P.2d at 849.

We agree with the reasoning in the cases discussed above. The accuracy inspection report of an intoxilyzer sets forth matters observed pursuant to a duty imposed by the Code of State Rules which also requires that these matters be reported. Accordingly, we hold that a record of the accuracy inspection of an intoxilyzer or breathalyzer machine

performed by a certified breath test operator and prepared in accordance with 64 C.S.R. §§ 10-7.1, *et seq.*, is admissible under the public records exception to the hearsay rule found in W.Va.R.Evid. 803(8)(B). Further, we hold that the law enforcement limitation on admissibility of public records found in W.Va.R.Evid. 803(8)(B) does not prohibit the admission under Rule 803(8)(B) of a record of the accuracy inspection of an intoxilyzer machine performed by a certified breath test operator and prepared in accordance with 64 C.S.R. §§ 10-7.1, *et seq.*, where the certified breath test operator is a law enforcement officer. The accuracy check of an intoxilyzer is an administrative function that is not performed pursuant to the investigation of any particular person.

We emphasize, however, that a defendant may subpoena and compel the attendance at court of the certified breath test operator who conducted the accuracy inspection of the intoxilyzer and examine the operator concerning his or her compliance with the applicable rules and methodology in conducting the inspection. Should a defendant choose to subpoena that person, the State has a responsibility to have the certified operator available and responsive to timely process.

Moreover, we find that the admission of an accuracy inspection report pursuant to the West Virginia Rules of Evidence does not violate the appellant's constitutional right to confront witnesses. This Court has held that when the challenged extrajudicial statement was

not made in a prior judicial proceeding, the only requirement for admission of the extrajudicial statement under the Confrontation Clause is proving the reliability of the witness's out-of-court statement. *See* Syllabus Point 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990); Syllabus Point 2, *State v. Kennedy,* 205 W.Va. 224, 517 S.E.2d 457 (1999). We have further recognized that "reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception." *James Edward S.*, 184 W.Va. at 414, 400 S.E.2d at 849. The public records exception in W.Va.R.Evid. 803(8) is a firmly rooted hearsay exception. *Kennedy,* 205 W.Va. at 230, 517 S.E.2d at 463 ("Numerous courts have recognized the fact that the public records exception is a firmly established exception which satisfies the Confrontation Clause").

As noted above, the accuracy inspection report was admitted by the circuit court on improper grounds. We have held, however, that "'[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.' Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965)." Syllabus Point 5, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996). Based on the above discussion, we find that the accuracy inspection report was properly admissible pursuant to W.Va.R.Evid. 803(8)(B). Therefore, we find no

error in the admission of the accuracy inspection report.[5]

III. CONCLUSION

Accordingly, for the reasons set forth above, the appellant's conviction is reversed, and this case is remanded for a new trial.

Reversed and remanded.

[5]We also find no merit to the appellant's claim that the State did not show a sufficient chain of custody for the simulator test fluid used by the police department as part of the process to test the appellant's breath for blood alcohol content.