

FILED

January 2, 2007

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

Benjamin, Justice, concurring:

Because the majority opinion in this case not only accurately states the facts and underlying circumstances present in this case, but also correctly applies the law, I concur. Specifically, the transfer of this case to the court's criminal jurisdiction was proper, affirmation of that transfer should have been affirmed. The conviction below, however, should be reversed on prompt presentment grounds. I specifically disagree with the dissenting opinion in this case since that opinion neglects to reference a number of matters crucial under the law of this State, including a number of highly questionable actions involving the investigation of Appellant which occurred at the State Police Detachment and Appellant's status not only as a juvenile, but specifically as a juvenile with an I.Q. between 64 and 69, who was functionally illiterate (with reading, writing and math skills at no more than the first grade level).

Appellant first accompanied law enforcement personnel to the victims' home at between 1:30 a.m. and 2:00 a.m. He remained with law enforcement personnel during their investigation of the murders of Warden Groves and Mary Hicks, until some time around 5:30 a.m. and 6:00 a.m. During this time, Appellant gave a statement to Trooper Douglas

Starcher. As the majority opinion holds, there was no legal problem with this statement.

From a custody standpoint, the following hours were crucial to this case. While the dissenting opinion glosses over First Sergeant Dale Fluharty's interrogation of Appellant as apparently not of importance, the facts indicate otherwise. Specifically, in response to an indication that he could leave, Appellant contended that Sergeant Fluharty, "asked me if I was getting smart with him and he would rip my F—ing head off", after which he contends he was told he could not leave the detachment.¹ Sergeant Fluharty said he did not threaten the Appellant. However, there was more in the record, not referenced in the dissenting opinion, which removes this action from the realm of "he said, he said" to leaning in favor of Appellant. Specifically, the Appellant told Sergeant Karl Streyle, a State Police polygraph tester, of the outburst. According to Sergeant Streyle, when he asked Sergeant Fluharty about his use of profanity and otherwise intimidating Appellant, Sergeant Fluharty shrugged and told Sergeant Streyle that he had no patience for interviewing any more. The record also reflects that Sergeant Fluharty later entered Sergeant Streyle's interview of Appellant very upset and told Appellant in a raised voice that new evidence had been found and warned Appellant to tell what he knew. Sergeant Streyle indicated that Appellant's demeanor changed when Sergeant Fluharty entered the room and that he appeared frightened.

¹ Sergeant Fluharty was apparently not recording this interrogation, so there is no record of actually what transpired during the interrogation.

Of additional importance, Sergeant Streyle indicated that the Appellant thereafter invoked his right to counsel, indicating that he wanted an attorney before he talked with anyone else. Sergeant Streyle properly stopped his interview at that point, and testified that he informed Sergeant Fluharty and Trooper Starcher of Appellant's invocation of the right to counsel and to remain silent. Again absent from the dissenting opinion is reference to Sergeant Streyle's memorandum regarding the circumstances of his time at the detachment. Specifically, Sergeant Streyle reported that he received a request from a fellow officer to omit from the routine report any mention of the Appellant asserting his right to counsel and to remain silent.²

At about 7:45 p.m., the Appellant was advised that he was under arrest by detachment commander, Sergeant Jeff Cooper, who had been away from the detachment most of the day while investigating the double murder. Notwithstanding the Appellant's invocation of his right to counsel and to remain silent, Sergeant Cooper proceeded to interview the Appellant using a tape recorder. This taped interview was used during the Appellant's criminal trial and the jury received a copy of the transcribed audio tape. The Appellant was finally taken before the magistrate for an initial appearance at 11:00 p.m.

² Trooper Starcher testified that he was not told by Sergeant Streyle of the Appellant's invocation of the right to counsel and to remain silent. Sergeant Fluharty testified that Sergeant Streyle did tell him of the invocation.

To his credit, Sergeant Cooper later testified that he was not told that the Appellant had invoked his right to counsel and to remain silent, and that if he had been he would not have attempted to take a statement from the Appellant. Obviously, Sergeant Cooper properly understood the legal infirmities related to the State's use of this tainted interview. I must therefore disagree with the dissenting opinion that the State's use of this recorded interview was acceptable. It was not. In view of the applicable law cited in the majority opinion, and what a reasonable person in Appellant's position would have believed, the statements Appellant made to Sergeant's Streyle and Cooper were inadmissible on prompt presentment grounds. The delay was excessive under the factual circumstances of this case.