02-4-4

Received
Feb 14, 2002
Pat Nichols

FORM NO. 17—D.P.S.

State of West Virginia
DEPARTMENT OF PUBLIC SAFETY

Detachment File Number	REPORT OF INVESTIGATION	Headquarters File Number
3120-4377		
DATE OF REPORT	STATION	COUNTY
April 12, 2001	Parsons	Tucker
INITIAL OR SUPPLEMENTARY	REPORT MADE BY	STATUS OF INVESTIGATION
Initial	Sr. Tpr. K. L. Keplinger	Complete
SUBJECT OF INVESTIGATION		
Unattended Death		

VICTIM: Ryan Christopher Lewis
246 Prospect Street
East Long Meadow MA, 01028
DOB: 01-30-87, white, male, 5'2", 90 pounds, brown hair, blue eyes, SSN: 593-72-5568

WEATHER: Cloudy, rain showers, roads and ground Wet, temperature mid 30's.

DATE OF DEATH:
Between 1930 hours to 2000 hours, Tuesday, February 13, 2001.

PLACE OF DEATH:
Tucker County, Dryfork District, in a wooded rural area located approximately 1.5 miles east of State Route 32, in an area commonly known as Beardon Knob, Canaan Valley.

DISCOVERED BY: Stephanie Holbrook
4505 Elm Street
Chevy Chase MD 20815
Public Service Number: (301)907-3690

LIST OF EXHIBITS:

Approximately thirty-one (31) photographs of the victim and the location of the occurrence obtained by the undersigned officer. These photographs are attached to the detachment file copy of this report.

One (1) copy of the Tucker County Medical Examiner's Report of [redacted] This report is attached to the detachment file copy of this report.

One (1) green in color nylon bag containing assorted personal effects and clothing of the victim, secured from Sandy Schmiedeknecht at the Davis office, Alldredge Academy by Sgt. R. L. Stump. This bag is currently secured in the Parsons Detachment Evidence room, bearing evidence number 01-08.

One (1)green in color nylon bag containing assorted personal items and foodstuffs, belonging to the victim, secured from Sandy Schmiedeknecht at the Davis office, Alldredge Academy by Sgt. R. L. Stump. This bag is currently secured in the Parsons Detachment Evidence room, bearing evidence number 01-09.

LIST OF EXHIBITS:

One (1) length of woven fabric rope, approximately 20-25 feet in length, with loop, secured from the scene by the undersigned officer. This rope is currently secured in the Parsons Detachment evidence room, bearing evidence number 01-15.

One (1) audio taped statement of Stephanie Holbrook, obtained by Sgt. R. L. Stump on Friday March 2, 2001 at 1812 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of Anthony Newman, obtained by Sgt. R. L. Stump on Friday, March 2, 2001 at 1723 Hours. This tape is secured in the Parsons Detachment Evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of Barrett Stuck, obtained by Sgt. R. L. Stump on Friday, March 2, 2001 at 1711 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of Christopher McKinnes, obtained by Sgt. R. L. Stump on Friday March 2, 2001 at 1845 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

LIST OF EXHIBITS:
(Continued)

One (1) audio taped statement of Dana Shot, obtained by Sgt. R. L. Stump on Friday, March 2, 2001 at 1938 hours. This tape is secured in the Parsons Detachment Evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of Shane Weisbrod, obtained by Sgt. R. L. Stump on Friday, March 2, 2001, at 1918 hours. This tape is secured in the Parsons Detachment Evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of John Westin White, obtained by the undersigned officer, on Saturday, February 24, 2001 at 0940 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-16. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of L. Jay Mitchell, obtained by the undersigned officer, on Wednesday, March 7, 2001 at 1400 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-17. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of Sarah Hubbard, obtained by the undersigned officer, On Wednesday, March 7, 2001 at 1430 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-17. A transcribed copy of this statement is attached to this report.

LIST OF EXHIBITS:
(Continued)

One (1) audio taped statement of Travis Palmer, obtained by the undersigned officer, on Wednesday, March 7, 2001 at 1500 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-17. A transcribed copy of this statement is attached to this report.

One (1) audio taped statement of Joshua Saville, obtained by the undersigned officer, on Wednesday, March 7, 2001 at 1530 hours. This tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-17. A transcribed copy of this statement is attached to this report.

One (1) copy of the personal file of [redacted], obtained by the undersigned officer on Saturday, February 24, 2001 at 1130 hours from Mr. Lance Wells at the Davis Office, Alldredge Academy. The original of this file is currently secured at the Alldredge Academy and Tucker County Prosecuting Attorney W. M. Miller advised that he will subpoena same when it is needed. A copy of this file is attached to this report.

One (1) copy of a personal guidance manual for [redacted] from the Alldredge Academy, obtained by the undersigned officer on Saturday, February 24, 2001 at 1135 hours from Mr. Lance Wells at the Davis Office, Alldredge Academy. The original of this manual is currently secured by the Alldredge Academy, and Tucker County Prosecuting Attorney W. M. Miller advised that he will subpoena same when needed. A copy of this manual is attached to this report.

LIST OF EXHIBITS:
(Continued)

One (1) copy of the personal log of [redacted], obtained by the undersigned officer from Paul Lewis on Saturday, February 24, 2001, at approximately 1500 hours. The original of this log is secured by Paul Lewis, and a copy is attached to this report.

ACTION TAKEN: On Tuesday, February 13, 2001 at 2003 hours, the undersigned officer received notification from Tucker Communications of a possible unattended death located approximately 1.5 miles east of State Route 32, near Canaan Heights. Tucker comm advised that the undersigned would be met at Canaan Heights by a person who would guide the undersigned to the scene.

On this same date, at 2024 hours the undersigned arrived at Canaan Heights, and was met on scene by John "Westin" White, who advised that an individual named [redacted] had hung himself at a camping area used by his organization, the Alldredge Academy. White further advised that the victim was a client of the Alldredge Academy, and was currently undergoing the wilderness phase of the treatment program administered by the Academy.

The undersigned further noted that several Tucker County E.M.S. and fire personnel were already on scene at Canaan Heights, and were proceeding to the scene of the incident. The undersigned officer proceeded on foot to the location of the victim, and arrived at approximately 2045 hours.

ACTION TAKEN: (Continued) Upon arrival the undersigned officer found that the victim had been moved from his original location to a small wood and tin building, and that members of the Tucker County E.M.S. were on scene, and were attempting resuscitation on the victim. The undersigned spoke to Sarah Hubbard who then took the undersigned officer to the original scene. The undersigned officer noted that a small diameter, woven fabric cord had been tied to a branch in a tree approximately 13'8" from ground level, which had a loop tied in the end of it, approximately four to four and one-half feet from ground level. The undersigned officer secured several photographs of the cord, and these photographs are attached to the file copy of this report. The undersigned officer further secured this cord, and it is currently secured in the Parsons Detachment evidence room, bearing evidence number 01-15.

On this same date, at 2100 hours, the undersigned officer spoke to Sarah Hubbard. Ms. Hubbard advised that she was a field counselor with the Alldredge Academy, and that she had been present when [redacted] was found. Ms. Hubbard further stated that prior to this incident that [redacted] had been in the "wilderness" phase of the program for seven days. Ms. Hubbard further stated that he seemed to be doing well but was homesick. Ms. Hubbard further advised that on Monday, February 12, 2001, that Ryan had taken a knife issued to him by the Alldredge Academy, to superficially cut himself on the wrist. Ms. Hubbard stated that Ryan then went to Josh Saville, another counselor and stated to him, "Take this before I hurt myself some more." Ms. Hubbard advised that [redacted] asked several times if he would be allowed to go home.

ACTION TAKEN: [redacted] was told by Travis Palmer that he would not be allowed to leave. Ms. Hubbard advised the undersigned that Westin White was advised about the knife incident. Ms. Hubbard stated that on Tuesday evening, around 1930 hours, that [redacted] left to collect wood for his fire for later. Ms. Hubbard further stated that when he was missed at approximately 1950 hours, that she went to assist Travis Palmer and Josh Saville in looking for him. Ms. Hubbard advised that she found the victim around 1955 hours, and called the other instructors, and began first aid. The undersigned obtained a one page hand written statement from Ms. Hubbard, and a copy is attached to this report.

On this same date, at 2115 hours, the undersigned officer spoke to Joshua Saville. Mr. Saville advised that on Monday, Ryan Lewis approached him, and handed him a knife, saying "Take this before I hurt myself some more." Saville advised that he asked Ryan what he meant by hurt, and [redacted] said "too late" and showed Saville some "superficial" scratches on his left forearm. Saville advised that he was new to the program so he got Travis Palmer and that Travis talked to [redacted] about the incident.

Saville advised that L. Jay Mitchell and J. Westin White were advised about this incident on Tuesday Morning, when they arrived to speak to the students. Saville further advised that on Tuesday, February 13, 2001, at approximately 1930 hours, that he was doing random checks, when he noticed that [redacted] was missing, and he began to call for him.

ACTION TAKEN: (Continued) Saville then alerted Sarah and Travis, and then began to look for [redacted] as well. A one page, handwritten statement was obtained from Mr. Saville, and a copy is attached to this report.

On this same date, at 2130 hours, the undersigned officer obtained a one page, handwritten statement from Travis Palmer, who advised the he picked [redacted] up from Keyser on the day that he went into the woods, and that Ryan seemed to be homesick, and asked to go home.

Mr. Palmer further advised that on Monday evening that Joshua Saville brought [redacted] to him and Saville advised Palmer of [redacted]'s attempt to cut himself. Palmer stated that he spoke to Ryan for approximately one half hour, and that Ryan then promised him that he would not do anything else to hurt himself. Mr. Palmer further advised that on Tuesday, February 13, 2001 that he advised L. Jay Mitchell and Westin White about the knife incident, but that they did not speak to [redacted] individually, and that they planned to speak to him later the next day. Palmer further advised that on Tuesday, February 13, 2001 at around 1930-1945 hours, that the majority of the kids were sent out to gather firewood for their fire for later. Palmer stated that at approximately 1950 hours that Josh Saville advised him and Ms. Hubbard that he could not locate [redacted], and they began to look for him.

Palmer then stated that at approximately 2000 hours that Sarah called for help, and that both he and Saville went to her.

ACTION TAKEN: (Continued) Palmer advised that when he arrived that [redacted] was hanging from a tree, and that his feet were not touching the ground. Palmer advised that he lifted [redacted] up so that Sarah could loosen him from the rope, and that they began first aid. A one page, handwritten statement was obtained from Palmer, and a copy of this statement is attached to this report.

On this same date, at 2114 hours, the victim, [redacted]s was pronounced dead at the scene by Dr. Edwin Rader. The victim was transported from the scene by Tucker County E.M.S., and was taken to Tucker Community Care, where Tracey Elza, Tucker County Medical Examiner, conducted her initial exam. She then contacted Dr. Jack Frost, West Virginia State Medical Examiner, to request an autopsy be performed. A copy of Ms. Elza's initial report was obtained by the undersigned officer, and is attached to this report.

As of the writing of this report, the undersigned officer has not received a copy of Dr. Frost's report. When this report is received, it will be attached to the Detachment File copy of this report.

On Thursday, February 15, 2001, the undersigned officer met with the Lewis family at the Alldredge Academy, at 1300 hours. On this same date, the undersigned officer took Paul Lewis, [redacted]s father to the scene of the incident. Also on this date, the undersigned officer secured several photographs, in the daylight, of the scene, and these photographs are attached to the Detachment File copy of this report.

ACTION TAKEN: (Continued) On Friday, February 16, 2001, at 1100 hours the undersigned officer met with Richard Young, Institutional investigative Unit, WV DHHR at the Parsons Detachment. Mr. Young advised the undersigned that the WV DHHR would be conducting a parallel investigation into possible abuse/neglect issues involving the Alldredge Academy. Both individuals then proceeded to the Tucker County Prosecuting Attorney's office, and advised W. M. "Mont" Miller of the investigation. Mr. Miller advised the undersigned officer to complete the unattended death investigation, and then present it to him, for any possible criminal charges.

On Friday, February 23, 2001, at 1400 hours, the undersigned officer spoke to L. Jay Mitchell and scheduled a meeting with Westin White for 0900 hours Saturday, February 24, 2001.

On Saturday, February 24, 2001, the undersigned officer spoke to J. Westin White. Mr. White advised that he was familiar with [redacted]'s background prior to his arrival, and that he briefed all three field counselors prior to Ryan's arrival. White further stated that he was told about the incident with [redacted] and the knife, on Tuesday, February 13, 2001, in the AM hours. White advised that he did not speak to [redacted] specifically about the incident, and did not speak to [redacted] outside of a group setting at all during the rest of the day.

White stated that he and L. Jay Mitchell planned to speak to [redacted] one-on-one on the following day. An audio taped statement was obtained by the undersigned officer, and this tape is currently secured in the Parsons Detachment

evidence room, bearing evidence number 01-16.

ACTION TAKEN: (Continued) A transcribed copy of this statement is attached to this report.

On Friday, March 2, 2001, Sgt R. L. Stump met with Ms. Shevawn Walter, and Sandy Prather, both WV DHHR IIU investigators, and all three individuals proceeded to Davis in an attempt to interview the students present with [redacted].

Once on scene, all units walked into where the students were located, and obtained statements from Barrett Stuck, Anthony Newman, Stephanie Holbrook, Christopher McKinnes, Shane Weisbrod, and Dana Shot. These statements were audio-taped, and these tapes are secured in the Parsons Detachment evidence room, bearing evidence number 01-16. A transcribed copy of each of these statements are attached to this report.

On Wednesday, March 7, 2001, at 1400 hours, the undersigned officer interviewed L. Jay Mitchell. Mitchell stated that he was not aware of the prior attempts by [redacted] to harm himself until after the incident. Mitchell did advise that he was present when Travis Palmer and Josh Saville told him and Westin White about the incident with the knife, and that he did not speak to Ryan concerning this incident that day.

Mr. Mitchell advised that he and White planned to speak to [redacted] on the following day. Mitchell stated that [redacted] appeared to be happy, and was looking forward to speaking to himself and White on the following day.

ACTION TAKEN: (Continued) Present during this interview was an individual named David Hummell, who advised the undersigned that he was an attorney, and was representing the Alldredge Academy, and also all the counselors involved, in both civil and criminal matters. This statement was audio taped, and this tape is secured in the Parsons Detachment evidence room, bearing evidence number 01-17. A transcribed copy of this statement is attached to this report.

On this same date, at 1430 hours, the undersigned officer interviewed Sarah Hubbard. Ms. Hubbard advised that she was not aware of the prior attempts by [redacted] at self injury. Ms. Hubbard then restated the facts that she had previously advised the undersigned officer of on scene, on February 13, 2001. Ms. Hubbard further advised that she remembered that Ryan was not off his feet, and that he was in a slumped over type of posture in the rope, with his knees flexed. Ms. Hubbard further advised that the victim was facing toward the small Jeep road going through the camp area. An audio taped statement was obtained from Ms. Hubbard. This tape is currently secured in the Parsons Detachment evidence room, bearing evidence number 01-17. A transcribed copy of this interview is attached to this report.

On this same date, at approximately 1500 hours, the undersigned officer interviewed Travis Palmer. Mr. Palmer advised that he was not told by anyone in the Alldredge Academy about the two prior incidents of attempts at self injury by Ryan Lewis. Mr. Palmer further restated the facts that he relayed to the undersigned officer while at the scene on February 13, 2001.

ACTION TAKEN: (Continued) An audio taped statement was obtained from Mr. Palmer. This tape is currently secured in the Parsons Detachment evidence room, bearing evidence number 01-17, and a transcribed copy of this statement is attached to this report.

On this same date, at 1530 hours, the undersigned officer spoke to Joshua Saville. Mr. Saville stated that he was not told by anyone of any prior acts of self injury by Ryan Lewis by anyone at the Alldredge Academy. Mr. Saville restated the facts that he advised the undersigned officer of at the scene, on February 13, 2001. This interview was audio taped. This audio tape is currently secured in the Parsons Detachment evidence room, bearing evidence number 01-17, and a transcribed copy of this statement is attached to this report.

On Wednesday, April 4, 2001, the undersigned officer spoke to Paul Lewis, R[redacted]s father. M[redacted] advised that he spoke to Dr. Frost, and that Dr. Frost stated that no drugs were found during the examination of [redacted] L[redacted] M[redacted] advised that [redacted] was on a prescription medication named "Zoloft" for depression, and that he turned the prescription over to Travis Palmer. The undersigned officer contacted Dr. Frost's office on Friday, April 6, 2001, at 1400 hours. The undersigned officer spoke to Carla Coulson, Dr. Frost's secretary. Ms. Coulson advised that Dr. Frost was not available, but that Dr. Frost had requested additional blood work be done, in an attempt to determine if this medication was present in the victim. As of the writing of this report, the undersigned officer has not received a copy of the Medical Examiners report.

ACTION TAKEN: (Continued) When this is received it will be attached to the file copy of this report, and if any investigative leads are determined, they will be followed up and a supplemental report will be filed.

As of the writing of this report, the undersigned officer has concluded that this incident was a self inflicted intentional act which caused the death of the victim. However, this case has been discussed with the Tucker County Prosecuting Attorney and it has been decided to present this investigation to the June term of the Tucker County Grand Jury for possible indictment of employees and operators of the Alldredge Academy for *Child Neglect Resulting in Death.*

This investigation revealed that the operators of the Alldredge Academy knew of the attempt of the victim to cut his wrists the day before this incident occurred, and took no action to prevent further actions or injuries by the victim.

As of the writing of this report, this investigation should be considered complete.

WITNESSES: Stephanie Holbrook
4505 Elm St.
Chevy Chase, MD
Public Service Number: (301) 907-3690

Can testify to discovering the victim on scene, to the actions and disposition of the victim during the program, and to the condition of the victim at the scene.

WITNESSES: (Continued)

Barrett William Burd Stuck
6220 North Ridgeway Ave.
Chicago, IL
Public Service Number: (373) 588-1017

Can testify to the attitude and demeanor of the victim during this program.

Anthony George Zane Newman
2733 Hall St. O S/E
East Grand Rapids, MI
Public Service Number: (616) 956-1135

Can testify to speaking to the victim, to the victim's attitude and demeanor during the program and to the conditions of the scene.

Christopher Black McKinless
5034 North 36th St.
Arlington, VA
Public service Number: (703) 241-4941

Can testify to speaking to the victim, to the victim's attitude and demeanor during the program, and to the conditions of the scene.

Shane Weisbrod
4205 Cabernet Ct.
Pleasanton, CA
Public Service Number: (925) 461-8673

Can testify to speaking to the victim, to the victim's attitude and demeanor during the program, and to the conditions of the scene.

WITNESSES: (Continued)

Dana Nichol Shot
1011 9 Nedra Drive
Great Falls, VA
Public Service Number: (703) 759-0486

Can testify to speaking to the victim, to the victim's attitude and demeanor during the program, and to the conditions of the scene.

Sarah Hubbard
Rt. 2, Box 279-3
Parsons, WV
Public Service Number: 463-3343

Can testify to being present when the victim was discovered, to being a counselor to the victim during the wilderness program, to removing the victim from the rope, to administering first aid to the victim prior to E.M.S. arrival, to observing cuts on the victim's arm the day previous to this incident, to being present when L. Jay Mitchell and Westin White were advised about the incident with the knife, to the attitude and demeanor of the victim during the program and to the condition of the victim and scene.

WITNESSES: (Continued)

Travis Palmer
Rt. 2, Box 279-3
Parsons, WV
Public Service Number: 463-3343

Can testify to being a counselor for [redacted] during the program, to speaking to [redacted] after the knife incident, to observing cuts on the victim's arm, to advising L. Jay Mitchell and Westin White about the knife incident, to assisting with removing the victim from the rope, to administering first aid to the victim prior to E.M.S. arrival, to the attitude and demeanor of the victim during the program, and to the condition of the scene and the victim.

Joshua Saville
HC 63, Box 2300
Romney, WV
Public Service Number: 822-5123

Can testify to being a counselor for Ryan during the program, to speaking to [redacted] after the knife incident, to observing cuts on the victim's arm, to advising L. Jay Mitchell and Westin White about the knife incident, to assisting with removing the victim from the rope, to administering aid to the victim prior to E.M.S. arrival, to the attitude and demeanor of the victim during the program, and to the condition of the scene and the victim.

WITNESSES: (Continued)

Westin White
P.O. Box 310
Davis, WV
Public Service Number: 259-4806

Can testify to being the field supervisor for the Alldredge Academy, to briefing all counselors on the victims background, to being advised of the knife incident, to the attitude and demeanor of the victim during his meeting with the group, to reporting the incident, and to the conditions of the scene and the victim.

L. Jay Mitchell
P. O. Box 310
Davis, WV
Public Service Number: 259-4806

Can testify to being director of the Alldredge Academy, to being present when Travis Palmer, Joshua Saville, and Sarah Hubbard advised that the victim cut himself with a knife, to speaking to the victim during several group sessions the day of the incident, and to the victim's attitude and demeanor that day.

Sandy Schmiedeknect
P. O. Box 92
Davis, WV
Public Service Number: 259-2270

Can testify to securing the clothing and personal effects of the victim, and to releasing these items to Sgt. R. L. Stump.

WITNESSES: (Continued)

David W. Hummell, Jr.
80-12th Street
Suite 307
Wheeling, WV
Public Service Number 232-5022

Can testify to being present during the statement of L. Jay Mitchell, and the taped statements of Sarah Hubbard, Travis Palmer, and Joshua Saville.

Dr. Edwin Rader
Mt. Top Medical Clinic
William Ave
Davis, WV
Public Service Number: 259-5588

Can testify to being present at the scene of the incident, to declaring the death of the victim, and to the conditions of the victim and the scene.

Tracey Elza
Tucker County Coroners Office
Parsons, WV
Public Service Number: 478-2511

Can testify to examining the victim, and to the condition of the victim upon arrival at Tucker Community Care.

WITNESSES:
(Continued)

Dr. James L. Frost
Deputy Chief Medical Examiner
West Virginia Medical Examiners Office
North Central Region
2567 University Avenue, Suite 5025
Morgantown WV 26505
Public Service Number: 285-3133

Can testify to performing the autopsy on the deceased, and to determining the cause of death of the deceased.

Richard Young
Institutional Investigative Unit
WV DHHS
350 Capitol St, Room 691
Charleston WV
Public Service Number: 558-7980

Can testify to meeting with the undersigned officer, to speaking to Tucker County Prosecutor W. M. Miller, and to conducting an investigation into the Alldredge Academy for the WV DHHS.

Shevawn Walter
Institutional Investigative Unit
WV DHHS
P.O. Box 6165
Wheeling WV
Public Service Number: 232-4411

Can testify to assisting Sgt. R. L. Stump with the statements obtained from Stephanie Holbrook, Anthony Newman, Christopher McKinles, Barrett Stuck, Dana Shot, and Shane Weisbrod.

WITNESSES: (Continued)

Sandra Prather
Institutional Investigative Unit
WV DHHR
350 Capital Street, Room 691
Charleston WV
Public Service Number: 558-7980

Can testify to assisting Sgt. R. L. Stump with the statements obtained from Stephanie Holbrook, Anthony Newman, Christopher McKinles, Barrett Stuck, Dana Shot, and Shane Weisbrod.

Sgt. R. L. Stump
P. O. Box 113
Parsons, WV
Public Service Number: 478-3101

Can testify to obtaining statements from Barrett Stuck, Anthony Newman, Stephanie Holbrook, Christopher McKinless, Shane Weisbrod, and Dana Shot.

Sr. Tpr. K. L. Keplinger
West Virginia State Police
P.O. Box 113
Parsons, WV
Public Service Number: 478-3101

Can testify to being the officer in charge of the within investigation, to photographing and documenting the scene, and to the facts as set forth in this report.

MILES TRAVELED AND HOURS SPENT: Miles 82 Hours 65

SR. TPR J. L. K

Senior Trooper, Parsons, Troop 3

COPY TO: The Superintendent
Prosecuting Attorney
Detachment File

C

Supreme Court of Appeals of West Virginia.

STATE ex rel. Rhonda L. OSBURN
v.
Phyllis Jean COLE, Clerk, etc., et al. and Fairmont General Hospital.

No. 15787.

Dec. 14, 1983.
Concurring Opinion March 6, 1984.

Unemployment compensation claimant, whose benefits had been suspended by the Department of Employment Security after she refused, based on the privilege against self-incrimination, to reveal the name and location of a casual employer for whom she had worked during a period for which she received benefits, sought review of the suspension through writ of certiorari. The Circuit Court, Kanawha County, Herman Canady, J., affirmed the suspension, and claimant sought review. The Supreme Court of Appeals, Miller, J., held that the suspension of benefits was proper and the requested information did not violate the Fifth Amendment privilege against self-incrimination.

Affirmed.

McGraw, J., filed concurring opinion.

Harshbarger, J., filed dissenting opinion.

West Headnotes

[1] **Social Security and Public Welfare** ⇐562.1
356Ak562.1 Most Cited Cases
(Formerly 356Ak562)

A claimant seeking unemployment compensation benefits has the burden of proving eligibility.

[2] **Social Security and Public Welfare** ⇐551
356Ak551 Most Cited Cases

Once a claimant has been determined eligible to receive unemployment compensation benefits, there is a continuing burden on claimant to provide the required information in order to prevent the benefits from being terminated.

[3] **Social Security and Public Welfare** ⇐562.1
356Ak562.1 Most Cited Cases
(Formerly 356Ak562)

An unemployment compensation claimant, who fails to provide all required information, based on assertion of the Fifth Amendment privilege against self- incrimination, still has burden of proving eligibility for benefits. U.S.C.A. Const.Amend. 5; Code, 21A-7-1; Const. Art. 3, § 5.

[4] **Witnesses** ⇐293.5
410k293.5 Most Cited Cases
(Formerly 410k293 1/2)

[4] **Witnesses** ⇐297(7)
410k297(7) Most Cited Cases

Fifth Amendment privilege against self-incrimination is not limited to context of criminal trials but can be claimed in any proceeding, whether it is criminal or civil, administrative or judicial, investigatory or adjudicatory. U.S.C.A. Const.Amend. 5; Code, 21A-7-1; Const. Art. 3, § 5.

[5] **Criminal Law** ⇐393(1)
110k393(1) Most Cited Cases

Suspension of claimant's unemployment compensation benefits on ground that she refused to supply required information concerning the name and location of a casual employer for which she worked during period she was receiving benefits was proper, even though she refused to supply the information by asserting the Fifth Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

[6] **Criminal Law** ⇐393(1)
110k393(1) Most Cited Cases

The Fifth Amendment privilege against self-incrimination is not violated by information required to be furnished under state mandatory self-reporting systems which are essential to the fulfillment of a regulatory statute, where the information sought is facially neutral, the information required is directed at the public at large and not to a selective group inherently suspect of criminal activities, the area of inquiry is essentially noncriminal and regulatory and not permeated with criminal statutes, and the possibility

of incrimination is not substantial. U.S.C.A. Const.Amend. 5.

****364 *596** Syllabus by the Court

1. The Fifth Amendment privilege against self-incrimination is not limited to the context of criminal trials but can be ****365** claimed in any proceeding, whether it is ***597** criminal or civil, administrative or judicial, investigatory or adjudicatory.

2. The Fifth Amendment privilege against self-incrimination is not violated by information required to be furnished under State mandatory self-reporting systems which are essential to the fulfillment of a regulatory statute where (1) the information sought is facially neutral; (2) the information required is directed at the public at large and not to a selective group inherently suspect of criminal activities; (3) the area of inquiry is essentially noncriminal and regulatory and not permeated with criminal statutes; and (4) the possibility of incrimination is not substantial.

James A. Esposito, Roger D. Curry, Fairmont, for petitioner.

No Appearance, for respondents.

MILLER, Justice:

This case involves an issue relating to the assertion of the Fifth Amendment privilege against self-incrimination in the context of a claim for unemployment compensation. [FN1] The petitioner, Rhonda L. Osburn, was declared ineligible to receive unemployment compensation benefits because of her failure to furnish certain information to the Commissioner of Employment Security as she is required to by regulations promulgated under W.Va.Code, 21A-7-1. [FN2]

FN1. "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const.Amend. V. *See also* W.Va. Const. art. III, § 5.

FN2. W.Va.Code, 21A-7-1, provides: "Claims for benefits shall be made in accordance with the rules and regulations prescribed by thecommissioner." Department of Employment Security, Adm.Reg. 21A-2, Series I, § 13.01 (1982), provides:
"Initial, new, or additional claims for total unemployment shall be made on Form WVUC-B-6, as revised, setting forth (a) that the individual claims benefits, (b) that he has registered for work, (c) such other information as is required thereby. This claim for benefits for total unemployment shall constitute the individual's claim for benefits or waiting-period credit."

Ms. Osburn was employed as a registered surgical nurse at Fairmont General Hospital prior to January, 1980. After leaving her employment, she filed for, and was ruled eligible to receive, unemployment compensation benefits. In September, 1980, Ms. Osburn was instructed to file a "Fact Finding Report" with the Commissioner of Employment Security concerning casual employment during July, 1980. Ms. Osburn indicated in the Fact Finding Report that for a period of four days, from July 28 to August 1, 1980, she was employed outside of the State of West Virginia and earned wages totaling $80.00. She declined to reveal the name or the location of her employer, as required by the form.

At the time, Ms. Osburn was under investigation by the West Virginia Department of Public Safety and the Office of the Prosecuting Attorney of Marion County with regard to an indictment which had been returned against her. A part of the investigation concerned a telephone call from an out-of- state location to a State Trooper at the Fairmont Detachment from an individual identifying herself as "Rhonda Osburn." The caller led the trooper to believe that she had been involved in the crime charged in the indictment.

When the Fact Finding Report was required to be filed, the police were attempting to trace Ms. Osburn to a specific out-of-state location. Ms. Osburn asserted that to reveal her employer's name and out-of-state address might result in incriminating evidence with regard to the pending criminal charges. She, therefore, asserted her privilege against answering incriminating questions and refused to state the precise location of her casual job. [FN3]

FN3. There is no claim made that the information on which she claimed the privilege was not in fact incriminating. It appears from the appellant's brief that after the criminal charges were resolved, Ms. Osburn did provide the full information requested. Once the information was provided, her benefits should have been reinstated if she otherwise remained eligible. The record does not reveal whether the Commissioner of Employment Security ever terminated Ms. Osburn's ineligibility status.

**366 The Department of Employment Security suspended her unemployment benefits indefinitely, *598 but did not disqualify her. The trial examiner, the Board of Review of the Department of Employment Security, and the Circuit Court of Kanawha County have each affirmed the suspension of her benefits.

[1][2][3] The petitioner essentially is arguing that even though all of the required information was not provided, she should still be allowed to receive her benefits. She claims that to deny her benefits penalizes her for exercising a constitutional right. The petitioner would have an exception carved out of the general rule that the claimant has the burden of proving eligibility for benefits [FN4] when the claimant's failure to carry that burden is a result of the exercise of the privilege against self-incrimination. We decline to create such an exception.

FN4. We have traditionally held that when a claimant seeks unemployment compensation benefits, the burden of proving eligibility is upon the claimant. Thomas v. Rutledge, W.Va., 280 S.E.2d 123, 130 (1981). *See also* Duenas-Rodriguez v. Industrial Commission, 199 Colo. 95, 606 P.2d 437 (1980); *Howell v. Administrator,* 174 Conn. 529, 391 A.2d 165 (1978); *Howard* v. Department of Employment, 100 Idaho 314, 597 P.2d 37 (1979). Once an applicant has been determined eligible to receive benefits. there is a continuing burden to provide the required information in order to prevent the benefits from being terminated. As stated in *Baker v.* Department of Employment Security, 564 P.2d 1126, 1127 (Utah 1977), "[t]he initial and continuing burden of proof to establish eligibility to receive benefits" remains with the claimant.

[4] There can be little doubt that the Fifth Amendment privilege against self-incrimination is not limited to the context of criminal trials but "can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *In re Gault,* 387 U.S. 1, 47, 87 S.Ct. 1428, 1454, 18 L.Ed.2d 527, 557 (1967). *See also* Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965) (administrative proceeding); *Quinn v. United States,* 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 (1955) (legislative hearing); *United States v. Monia,* 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376 (1943) (grand jury); *McCarthy v. Arndstein,* 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924) (civil case). [FN5]

FN5. For commentaries on the use of the privilege in civil litigation, *see* Bennett, *Representing a Defendant in Simultaneous Criminal and Administrative Proceedings: A Practical Approach,* 27 Am.U.L.Rev. 381 (1978); Daskal, *Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies,* 64 Marquette L.Rev. 243 (1980); Litchford, *The Privilege Against Self-Incrimination in Civil Litigation,* 57 Fla.Bar J. 139 (1983); Comment, *Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination,* 24 U.Fla.L.Rev. 541 (1972); Comment, *The Privilege Against Self-Incrimination in Civil Litigation,* 1968 U.Ill.L.Forum 75 (1968); Comment, *Use of the Privilege Against Self-Incrimination in Civil Litigation,* 52 Va.L.Rev. 322 (1966).

Two rather distinct lines of United States Supreme Court cases have emerged in the self-incrimination area. One line of cases involves reporting systems in which classes of citizens or taxpayers have been required to provide information to the government

under its regulatory or taxing powers. The other line of cases involves specific investigations of individuals who have a special relationship with the government, such as government contractors or public employees.

The first significant "reporting" case decided by the Supreme Court was *United States v. Sullivan,* 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), in which the defendant was convicted of willfully refusing to file an income tax return. The Court recognized that the defendant could have exercised the Fifth Amendment privilege by raising specific objections to certain questions, but could not completely refuse to file a return. "It would be an extreme if not an extravagant application of the 5th Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." 274 U.S. at 263-64, 47 S.Ct. at 607, 71 L.Ed. at 1040.

In **367*Albertson v. Subversive Activities Control* Board, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), suspected members of the Communist Party of the United States had been ordered by the Board to register themselves as party members. *599 The Court noted that "an admission of membership may be used to prosecute the registrant" under at least two federal statutes and this fact "presents sufficient threat of prosecution to support a claim of the privilege." 382 U.S. at 77, 86 S.Ct. at 198, 15 L.Ed.2d at 171. The Government argued that under *United States v. Sullivan, supra,* it would be possible to exercise the privilege against self-incrimination as to some questions but that *Sullivan* would not support the failure to file the form at all. The Court in rejecting this argument made this distinction:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." 382 U.S. at 79, 86 S.Ct. at 199, 15 L.Ed.2d at 172.

Subsequently, the United States Supreme Court, citing *Albertson,* decided three cases on the same day, all of which involved reporting requirements. In the first case, *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), the defendant was convicted of willfully failing to register and to pay an occupational tax for engaging in the business of accepting wagers. The defendant, asserting his privilege against self-incrimination, refused to register and pay the tax because the information could be used in a separate proceeding to prosecute him for gambling. Although the Court did not declare the tax unconstitutional, it held "that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for their failure to comply with their requirements." Marchetti, 390 U.S. at 61, 88 S.Ct. at 709, 19 L.Ed.2d at 905.

The Court reached the same conclusion in *Grosso* v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). Grosso was convicted of willful failure to pay the excise tax imposed on wagering because he asserted that payment would have obliged him to incriminate himself in violation of the Fifth Amendment privilege. The Court concluded that since it was reasonable to expect the tax payment information to be given to state and federal prosecutors, the defendant could not be compelled to provide information which would ultimately be incriminating in another forum. The Supreme Court noted that these reporting requirements are aimed at individuals in " 'an area permeated with criminal statutes,' where [they are] 'inherently suspect of criminal activities.' *Albertson* v. SACB, 382 U.S. 70, 79 [86 S.Ct. 194, 199, 15 L.Ed.2d 165]." 390 U.S. at 64, 88 S.Ct. at 712, 19 L.Ed.2d at 910.

Finally, in *Haynes v. United States,* 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968), the Court again allowed the defendant to successfully assert his Fifth Amendment privilege by withholding information. The defendant was convicted of knowingly possessing an unregistered sawed-off shotgun in violation of federal gun registration requirements. The defendant argued that if he registered the gun, it would have subjected him to prosecution for violation of other provisions of federal gun laws. The Court reversed his conviction largely because the registration requirement was "unfair." [FN6] The Court noted in *Haynes* that not everyone who possessed a firearm must have it registered. Instead, the

registration requirement is aimed at those who have already violated some other provision. "The registration requirement is thus directed **368 principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions." Haynes, 390 U.S. at 96, 88 S.Ct. at 730, 19 L.Ed.2d at 932.

FN6. *See* Powell and Jones, *Self-Incrimination and Fair Play--Marchetti, Grosso and Haynes Examined,* 18 Am.U.L.Rev. 114 (1968).

*600 The distinction between *Sullivan,* on the one hand, and *Marchetti, Grosso,* and *Haynes,* on the other, is that in *Sullivan* the government was seeking neutral information as part of an essentially noncriminal, regulatory scheme, and the Fifth Amendment claim was "extreme" and "extravagant" because it was too general. In *Marchetti, Grosso,* and *Haynes,* the information sought by the government was not neutral, but was directed at specific criminal activity, and the Fifth Amendment claims were directed at the threatened prosecutorial use of the information. Moreover, in *Marchetti* and *Grosso,* filing the form and paying the gambling tax would expose them to prosecution under anti-gambling statutes. Yet, if they did not file the gambling tax form and pay the tax, they could be prosecuted under the gambling tax statute. Thus, a substantial exposure to criminal prosecution occurred in either event.

The distinctions drawn in *Albertson* between its facts and *Sullivan's* were adopted as a controlling rule in *California v. Byers,* 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971). [FN7] In *Byers,* the defendant was charged with passing another vehicle without maintaining a safe distance, and in a second count with failing to comply with California's "hit and run" statute which required a driver of a vehicle involved in an accident to stop at the scene and give his name and address. The defendant claimed the secondcount violated his Fifth Amendment privilege. If he were required after an accident to comply with the "hit and run" statute by stopping and giving his name and address, he argued that he would supply information that would be self-incriminating, presumably on any violations of the motor vehicle law arising from the accident.

FN7. Although the Chief Justice's opinion is characterized as a plurality opinion of four members of the Court, Mr. Justice Harlan concurred in the result and formulated a test not substantially different.

The Supreme Court in *Byers* began with a recognition of the difficult task of drawing the line between permissible and prohibited compelled disclosure. [FN8] The Court then proceeded to analyze the statute utilizing the *Albertson* standards: Is the information sought by the government neutral on its face? Is the information requirement directed at the public at large or at a selective group inherently suspect of criminal activities? Is the area of inquiry essentially noncriminal and regulatory or is it permeated with criminal statutes? Would compliance with the disclosure requirement subject the party to substantial hazards of self-incrimination? The Court concluded that the statute did not violate the Fifth Amendment right against self- incrimination. [FN9] *See also* Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976).

FN8. "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." 402 U.S. at 427, 91 S.Ct. at 1537, 29 L.Ed.2d at 17.

FN9. A number of federal courts of appeals have applied the *Byers* test to uphold a variety of government reporting requirements against the claim that they violated the privilege against self-incrimination. *E.g.,* United States v.

Dichne, 612 F.2d 632 (2d Cir.1979), *cert. denied,* 445 U.S. 928, 100 S.Ct. 1314, 63 L.Ed.2d 760 (1980) (Currency and Foreign Transaction Reporting Act, 31 U.S.C. § 1101); *Field v. Brown,* 610 F.2d 981 (D.C.Cir.1980), *cert. denied,* 446 U.S. 939, 100 S.Ct. 2160, 64 L.Ed.2d 792 (Department of Defense directive requiring retired officers to report transactions with government); *United States v. Stirling,* 571 F.2d 708 (2d Cir.1978), *cert. denied,* 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (S.E.C. registration forms).

**369 The appellant relies on the second line of cases illustrated by *Lefkowitz v. Turley,* 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973), and which involved governmental investigations of individuals. In *Lefkowitz,* two architects refused to testify before a grand jury and also refused to sign a waiver of immunity from prosecution. The district attorney then threatened to utilize a *601 statute authorizing cancellation of their existing contracts and barring them from future contracts with the state for five years if they refused to testify and waive immunity. The Supreme Court, on a challenge that the statute violated the Fifth Amendment privilege against self- incrimination, held that it did. The Court after reviewing earlier compelled testimony cases stated:

"We agree with the District Court that *Garrity* [*v.* New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967)], *Gardner* [*v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968)], and *Sanitation Men* [*v. Sanitation* Comm'r, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968)] control the issue now before us. The State sought to interrogate appellees about their transactions with the State and require them to furnish possibly incriminating testimony by demanding that they waive their immunity and by disqualifying them as public contractors when they refused. It seems to us that the State intended to accomplish what *Garrity* specifically prohibited-- to compel testimony that had not been immunized. The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device. A waiver secured under threat of substantial economic sanction cannot be termed voluntary." 414 U.S. at 82-83, 94 S.Ct. at 324-25, 38 L.Ed.2d at 284. [FN10]

FN10. The Court did recognize in *Lefkowitz, supra,* that the State might compel such testimony so long as it or its fruits are unavailable for use against the defendant:

"We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. Kastigar v. United States, [406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)]. Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment. *Shillitani v.* United States, 384 U.S. 364 [86 S.Ct. 1531, 16 L.Ed.2d 622] (1966). Also, given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." 414 U.S. at 84, 94 S.Ct. at 325-26, 38 L.Ed.2d at 285-86.

The vice in *Lefkowitz* and its related cases lies in the element of compulsion initially exercised by the state to secure testimony which it desired, even though it may have been incriminating, and without any concurrent offer of immunity against further prosecution. Here, the element of compulsion is absent as the State is not directly seeking to secure incriminating testimony from the appellant but is requesting information to warrant payment of continued benefits. We, therefore, conclude that *Lefkowitz* and its related line of compelled testimony cases are not applicable.

[5] The analysis which has emerged from the reporting cases can be applied to Ms. Osburn's

claim of the Fifth Amendment privilege. The information sought by the Department of Employment Security is facially neutral. There is nothing inherently suspicious about asking an applicant for unemployment compensation where and by whom they were employed. Although the request for this information was not made on the public at large, the group upon which it was made (unemployment compensation claimants) is not suspect of criminal activities. Additionally, while the unemployment compensation scheme may provide for criminal penalties for fraud, the system is hardly permeated with criminal statutes. The purpose of the unemployment **370 compensation system is to provide benefits for victims of unfortunate economic circumstances, not to trap them into criminal prosecutions. Finally, no criminal penalty was imposed for failure to comply with the reporting statute. Thus, the appellant's exercise of her privilege against self- incrimination did not expose her to the *Albertson, Marchetti* and *Grosso* situation where the failure to file the reporting form was itself a crime.

*602 This issue has arisen in several state unemployment cases and the courts have denied benefits but without any real discussion of the self-incrimination issues. In *Bastas v. Board of Review,* 155 N.J.Super. 312, 382 A.2d 923 (1978), unemployment compensation benefits were denied because the applicant, claiming the privilege against self-incrimination, refused to provide an alien registration card or any proof that she could lawfully work in this country. Without any analysis of the assertion of the privilege in this context, the denial of the applicant's unemployment compensation was affirmed.

In *Alonso v. State,* 50 Cal.App.3d 242, 123 Cal.Rptr. 536 (1975), *cert. denied,* 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752, the court also concluded that a claimant who cannot prove eligibility for unemployment compensation benefits is not entitled to receive them. The claimant refused to provide information with respect to his immigration status, claiming not that the information was incriminating, but that it was irrelevant. The court, in disagreeing with the claimant's argument, also found that the information was not privileged under the Fifth Amendment. Just as in *Bastas v. Board of Review, supra,* no relevant analysis of the Fifth Amendment issue was offered.

A rather thorough discussion of the self-incrimination issue was made in *15,844* Welfare Recipients v. King, 474 F.Supp. 1374 (D.Mass.1979). In that case, welfare recipients sought an injunction against certain state officials claiming that some of the reporting practices initiated as a result of an earlier welfare fraud investigation violated their privilege against self-incrimination. Part of the procedure attacked was a requirement for collateral verification of nonemployment or face termination of benefits. The court summarized *Byers* principles and held the collateral verification procedures were not improper. [FN11]

FN11. The relevant language from *15,844* Welfare Recipients v. King, 474 F.Supp. at 1385, is:
"First, the Fifth Amendment privilege is not violated by mandatory self- reporting essential to fulfillment of the objectives of a regulatory statute where disclosures are not extracted from a highly selective group inherently suspect of criminal activities but rather apply to the general public and to activities that are generally lawful and where the possibility of incrimination is not substantial. *California v. Byers,* 1971, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9; *United States v. Stirling,* 2 Cir. 1978, 571 F.2d 708, 727-28. All of these conditions are met by the verification requirement in this case. It is essential to redetermining eligibility and thus to allocating scarce welfare resources fairly; the welfare assistance field is not one 'permeated with criminal statutes,' *Byers, supra,* 402 U.S. [424] at 430, 91 S.Ct. 1535 [at] 1539 [29 L.Ed.2d 9]; the self-reporting requirement serves a regulatory, non-criminal purpose and AFDC recipients are not 'a highly selective group inherently suspect of criminal activities.' The state's regulatory interest is, therefore, compelling."

On an analogous issue, in *Blumenthal v. Federal* Communications Commission, 318 F.2d 276 (D.C.Cir.1963), petitioners had applied for radio operator licenses. Their applications were dismissed because the applicants failed to respond adequately to questions concerning their

membership in organizations advocating the violent overthrow of the government. Petitioners asserted their Fifth Amendment privilege and claimed that the Commission should issue the licenses as they otherwise would be punished for exercising their privilege against self-incrimination. The court rejected their claim stating:

"The Fifth Amendment privilege protects a person who invokes it from self- accusation; but when he seeks a license at the hands of an agency acting under the standard of the public interest, and information substantially relevant to that standard is withheld under the privilege, **371 as may be done, the need for the information and the cooperation of the applicant with respect to it remains. The agency cannot be required to act without the information. To hold otherwise would carry the privilege beyond its purpose. While its invocation may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply." *603 318 F.2d at 279. (Footnote omitted) [FN12]

FN12. As the D.C. District Court noted in another case, *Pinkney v. District of* Columbia, 439 F.Supp. 519 (D.C.D.C.1977), although the plaintiff had a difficult choice, it was not one of constitutional dimensions because there was no compulsion involved.

See also Copeland v. Secretary of State, 226 F.Supp. 20 (S.D.N.Y.1964).

[6] In conclusion, we adhere to the test formulated in *Albertson v. Subversive Activities Control Board, supra,* and *California v. Byers, supra,* that the Fifth Amendment privilege against self-incrimination is not violated by information required to be furnished under State mandatory self-reporting systems which are essential to the fulfillment of a regulatory statute where (1) the information sought is facially neutral; (2) the information required is directed at the public at large and not to a selective group inherently suspect of criminal activities; (3) the area of inquiry is essentially noncriminal and regulatory and not permeated with criminal statutes; and (4) the possibility of incrimination is not substantial.

As previously discussed, we find that the requested information did not violate the Fifth Amendment privilege against self-incrimination. The Commissioner of Employment Security could require the disclosure of Ms. Osburn's employer's name and address, and in the absence of obtaining the information could suspend Ms. Osburn's benefits for the involved period.

For the foregoing reasons, we affirm the judgment of the Circuit Court of Kanawha County.

Affirmed.

McGRAW, Justice, concurring:

Although I concur with the conclusion reached, several points should be clarified. First, merely because claimants for governmental benefits cannot utilize the fifth amendment without forfeiting their right to those benefits in certain circumstances does not mean that claimants can be compelled to waive their fifth amendment privilege. The only compulsion in general will be economic. Second, as indicated in footnote three of the majority opinion, once a claimant finally does disclose the information requested, benefits must be reinstated as if the claimant had initially complied, as long as the claimant is not otherwise ineligible for benefits. Therefore, a claimant for benefits could continue to refuse to disclose the information requested until final disposition of pending criminal charges, and then, upon disclosure of the information, the claimant would be entitled to receive those benefits which had previously been denied. For example, in this case, because Ms. Osburn eventually provided the information requested, the majority correctly notes that her suspended benefits should be reinstated. With these clarifications, I concur with the majority opinion.

HARSHBARGER, Justice, dissenting:

I dissent because to force Ms. Osburn to reveal what she thought to be incriminating information about herself in order to obtain unemployment compensation benefits to which she was otherwise clearly entitled to allow her to eat and maintain her life, is violently unconstitutional.

What is the difference between this fact situation and one in which detectives deprive a suspect of food and drink to force an incriminating statement from him or her? The only difference is the subtlety of this method--it is not blatant because the instrument of deprivation is seemingly bland government regulations.

**372 In compliance with government instructions, Ms. Osburn voluntarily reported four days of casual employment and her income from that out-of-state work. Her report informed the unemployment compensation commissioner about her temporary work--a fact that he would not have otherwise known. She gave information necessary for determining the extent of her eligibility, that is, when she worked and how much she earned; but refused to report the name and address of her employer because that information might have incriminated her in a separate criminal investigation unrelated to unemployment benefit entitlement. *604 *The veracity of her report was unchallenged.*

I would decide this case for Ms. Osburn. She provided the government with sufficient evidence to prove her eligibility. No one challenged the authenticity of her employment data, and requiring her, under threat of deprivation of funds for living, to give additional information jeopardizing her constitutional right against self-incrimination, is unconstitutional coercion. I would reverse the trial court and reinstate her benefits.

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Supreme Court of Appeals of
West Virginia.

STATE of West Virginia, Plaintiff Below, Appellee,
v.
Doug JONES, Defendant Below, Appellant.

No. 22377.

Submitted Jan. 18, 1995.
Decided March 6, 1995.

Defendant was convicted in the Circuit Court of Kanawha County, Charles E. King, J., of principal in second-degree to first-degree murder, and he appealed. The Supreme Court of Appeals, Cleckley, J., held that: (1) arrest of defendant was illegal, and (2) connection between defendant's illegal arrest and his confession was not sufficiently attenuated as to dissipate the taint.

Reversed and remanded.

West Headnotes

[1] **Arrest** ⇐70(2)
35k70(2) Most Cited Cases

Because police lacked probable cause to arrest when defendant was being questioned by officers, prompt presentment rule was not triggered. Code, 62-1-5; Rules Crim.Proc., Rule 5(a).

[2] **Arrest** ⇐70(2)
35k70(2) Most Cited Cases

De facto arrest is sufficient to invoke prompt presentment rule when defendant is taken into custody and there is probable cause justifying arrest. Code, 62-1-5; Rules Crim.Proc., Rule 5(a).

[3] **Arrest** ⇐68(3)
35k68(3) Most Cited Cases

Where police, lacking probable cause to arrest, ask suspect to accompany them to police headquarters and then interrogate him, during which time he is not free to leave or his liberty is restrained, the police have violated Fourth Amendment. U.S.C.A. Const.Amend. 4.

[4] **Arrest** ⇐68(3)
35k68(3) Most Cited Cases

Defendant was placed into custody when he was involuntarily transported from crime scene three miles to police station for questioning and held for three hours without ever being told he was free to leave, and since police lacked probable cause to arrest defendant at that time, detention was illegal. Const. Art. 3, § 6.

[5] **Arrest** ⇐63.5(7)
35k63.5(7) Most Cited Cases

Controlling factors in determining whether stop was converted into arrest are: length, duration, and purpose of detention; extent and nature of questioning of suspect; location of detention and interrogation; whether suspect was advised that he was free to leave and was not required to answer questions; and use of force or other physical restraints during stop.

[6] **Arrest** ⇐63.5(7)
35k63.5(7) Most Cited Cases

In determining whether *Terry* stop has converted into custodial detention, courts should analyze suspect's perception that he did not remain at liberty to disregard police officer's request for information.

[7] **Arrest** ⇐63.5(1)
35k63.5(1) Most Cited Cases

Limited police investigatory interrogations are allowable when suspect is expressly informed that he is not under arrest, he is not obligated to answer questions and is free to go. Const. Art. 3, § 6.

[8] **Arrest** ⇐63.5(1)
35k63.5(1) Most Cited Cases

If police merely question suspect on the street without detaining him against his will, state constitutional protection against unreasonable searches and seizures is not implicated and no justification for officer's conduct need be shown; at point where reasonable person believes he is being detained and is not free to leave, then stop has occurred and constitutional protection is triggered, requiring that officer have reasonable suspicion that criminal activity is afoot. Const. Art. 3, § 6.

[9] **Arrest** ⚖63.4(1)
35k63.4(1) Most Cited Cases

If nature and duration of detention arise to level of full-scale arrest or its equivalent, probable cause, must be shown; thus, police cannot seize an individual, involuntarily take him to police station and detain him for interrogation purposes while lacking probable cause to arrest. Const. Art. 3, § 6.

[10] **Criminal Law** ⚖394.4(9)
110k394.4(9) Most Cited Cases

Confession obtained by exploitation of illegal arrest is inadmissible.

[11] **Criminal Law** ⚖519(8)
110k519(8) Most Cited Cases

Giving of *Miranda* warnings is not enough, by itself, to break causal connection between illegal arrest and confession; in considering whether confession is result of exploitation of illegal arrest, court should consider temporal proximity of arrest, and confession, presence or absence of intervening circumstances in addition to *Miranda* warnings and purpose or flagrancy of official misconduct.

[12] **Criminal Law** ⚖519(8)
110k519(8) Most Cited Cases

Connection between defendant's illegal arrest and his confession was not sufficiently attenuated as to dissipate the taint, where defendant confessed approximately an hour after being transported to police station. Const. Art. 3, § 6.

****460 *379** Syllabus by the Court

1. "Where police, lacking probable cause to arrest, ask suspects to accompany them to police headquarters and then interrogate them ... during which time they are not free to leave or their liberty is restrained, the police have violated the Fourth Amendment." Syllabus Point 1, in part, *State v.* Stanley, 168 W.Va. 294, 284 S.E.2d 367 (1981).

2. If the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the West Virginia Constitution is not implicated and no justification for the officer's conduct need be shown. At the point where a reasonable person believes he is being detained and is not free to leave, then a stop has occurred and Section 6 of Article III is triggered, requiring that the officer have reasonable**461 *380 suspicion that criminal activity is afoot. If the nature and duration of the detention arise to the level of a full-scale arrest or its equivalent, probable cause must be shown. Thus, the police cannot seize an individual, take him involuntarily to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest.

3. "Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go." Syllabus Point 2, State v. Mays, 172 W.Va. 486, 307 S.E.2d 655 (1983).

4. "A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of *Miranda* warnings is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and the purpose or flagrancy of the official misconduct." Syllabus Point 2, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

Mary Beth Kershner, Asst. Pros. Atty., Charleston, for appellee.

Nelson R. Bickley, Bickley & Jacobs, Charles R. Webb, Pepper & Nason, Charleston, for appellant.

CLECKLEY, Justice:

The appellant and defendant below, Doug Jones, was convicted in May, 1993, by a jury in the Circuit Court of Kanawha County of the crime of principal in the second degree to first degree murder for the death of Frankie Stafford. He was sentenced to life in prison and received a recommendation of mercy. On appeal to this Court, he assigns as error the delay in presenting him before a magistrate and the reliability of a confession admitted into evidence, which he claims he never made. After reviewing the record, we find the defendant's rights under the Fourth Amendment to the United States

Constitution and Article 3, § 6 of the West Virginia Constitution were violated when he was transported involuntarily to the police station and detained for interrogation and was not "expressly informed that he [was] not under arrest, ... [was] not obligated to answer questions and [was] free to go." *State v.* Mays, 172 W.Va. 486, 489, 307 S.E.2d 655, 658 (1983). Accordingly, we reverse his conviction.

I.
BACKGROUND

On March 4, 1991, the defendant and John Boyce met in the afternoon and began drinking beer at a bar in Kanawha City. They picked up Frankie Stafford to join them around 2:00 p.m. Throughout the day the men drove around in Mr. Boyce's car and consumed a large quantity of beer. They went to a baseball park at Kanawha State Forest and drank a half gallon of vodka. At approximately 9:00 p.m., they drove to the home of Pamela Parsons. Upon their arrival at her home, it was obvious to Ms. Parsons that the men had been drinking.

The trio left Ms. Parsons's home and drove toward Davis Creek. An argument broke out, and the men climbed out of the car. The record evidence is conflicting as to what occurred next; however, it is clear that Mr. Stafford was beaten with a tire iron and thrown in the trunk of the car. The defendant believed Mr. Stafford was dead.

Mr. Boyce and the defendant returned to the home of Ms. Parsons around 1:00 p.m. and washed the blood from their hands. She was unaware of what had occurred and believed the men were covered with red clay. She gave them a wash cloth to clean the steering wheel of the car. Mr. Stafford regained consciousness and Ms. Parsons testified she could hear him yelling from the trunk. However, she believed they were playing a practical joke on Mr. Stafford and did not question what she heard.

Mr. Boyce and the defendant drove to Kirby Hollow in the Kanawha State Forest area. When the car became stuck in the mud, they let Mr. Stafford out of the trunk of the car. The men began fighting again. Mr. **462 *381 Boyce became enraged when Mr. Stafford would not walk to get help. Mr. Boyce removed the shoe laces from his sneakers and strangled Mr. Stafford. They rolled Mr. Stafford's body down a hill and wrapped it in a carpet.

The defendant and Mr. Boyce walked to get help so that the car could be pulled from the mud. They went to Randy Hubbard's house, but he was unable to pull the car out with his car. They went to Mark Baire's house and waited in his truck for awhile. The defendant later walked home. When Mr. Baire came out early the next day, he pulled the car out of the mud. Mr. Boyce confessed to Mr. Baire that he strangled Mr. Stafford. [FN1]

FN1. Mr. Boyce stayed at his mother's house for three days. When he heard the police had picked up the defendant, he fled the State. Two weeks later, he was apprehended in Brownsville, Texas. On March 21, 1991, Mr. Boyce gave a statement to Trooper J.W. Gundy of the West Virginia State Police at the Texarkana Jail.

The police began an investigation after receiving the following leads: a large amount of blood was reported on the road where the murder occurred, along with a tire iron and what appeared to be human hair; a missing person's report was filed for Mr. Stafford; Mr. Baire gave a statement to the police; and it was learned that Mr. Stafford was last in the company of Mr. Boyce and the defendant.

On March 7, 1991, at approximately 7:00 p.m., Trooper J.W. Gundy went to the defendant's home and asked if the defendant would answer some questions. The defendant voluntarily went with Trooper Gundy, and they talked in the patrol car. The defendant was not informed of his *Miranda* rights. [FN2] He stated that he had been drinking with Mr. Boyce and Mr. Stafford and that he could only remember waking up at the baseball field. He denied any knowledge of the whereabouts of Mr. Stafford.

FN2. *See* Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Trooper Gundy asked the defendant to show him where Mr. Boyce lived. They drove to the house and spoke with Mr. Boyce's sister,Jeannie Morris.

They walked up a pipeline right-of-way behind the house to where the car was stuck in the mud. At the top of the hill, they met with Sergeant Gordon Clark who had arrived on the scene earlier with Trooper Hutchinson to look for a body where the blood and tire iron were found. Sergeant Clark advised the defendant of his *Miranda* rights and began questioning him as to the whereabouts of Mr. Stafford. [FN3] The defendant insisted he knew nothing and reiterated the version of the events he gave to Trooper Gundy.

FN3. Obviously, there is a serious question whether *Miranda* rights were necessary at this point. First, as will be discussed in note 10, *infra*, the State admitted the defendant had been taken into custody at this point. Second, as *Miranda* warnings are necessary only prior to custodial interrogation, the issuance of *Miranda* warnings may transform a legal *Terry* stop into an illegal arrest. *See* State v. Farley, 192 W.Va. 247, 254 n. 10, 452 S.E.2d 50, 57 n. 10 (1994); *United States v. Obasa*, 15 F.3d 603 (6th Cir.1994).

Sergeant Clark transported the defendant to the police station and left him sitting in the waiting area of the station. Trooper G.K. Barnette arrived at the station at approximately 11:00 p.m. and recognized that the defendant was very upset. He asked the defendant if he was alright and if he would like to follow him. The defendant went with him to the back of the secretary's room at the station. He was not given *Miranda* warnings at the police station. Trooper Barnette asked the defendant if he wanted to talk about what happened. The defendant broke down, began crying, and admitted he hit Mr. Stafford with the tire iron a couple of times when the men were fighting. He stated that he helped Mr. Boyce place the victim in the trunk. The defendant also admitted that he held Mr. Stafford when Mr. Boyce choked him.

II.
DISCUSSION

On appeal, the defendant requests we find his stationhouse confession inadmissible because of the unjustified delay in presenting him to a magistrate. He contends that probable cause to arrest existed when he was **463 *382 picked up by the police at 7:00 p.m. To support his claim that the police had probable cause, the defendant contends the police knew that Mr. Stafford was missing, that he was last seen in the company of the defendant and Mr. Boyce, and that Mr. Baire reported that Mr. Boyce confessed to the murder. [FN4] He argues the reason the police did not immediately make a formal arrest and take him before a magistrate was because they were trying to secure a confession, a practice condemned in *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

FN4. The defendant also argues that at this time the police obtained Ms. Parsons' statement. However, it appears from the record that Ms. Parsons contacted the police after watching televised footage of the defendant's arrest.

[1][2] At the suppression hearing, the State asserted, and the circuit court agreed, that until the defendant confessed and/or the body of Mr. Stafford was discovered, there was no probable cause to arrest. Because we also believe the police lacked probable cause to arrest when the defendant was being questioned by the officers, we find the prompt presentment rule was not triggered. [FN5]

FN5. We reject the notion that a violation of the prompt present rule may be based on illegal custodial detention alone. Rather, we believe that a *de facto* arrest is sufficient to invoke the prompt presentment rule when the defendant is taken into custody and there is probable cause justifying an arrest. Our prior cases support this view. Syllabus Point 3 of State v. Wickline, 184 W.Va. 12, 399 S.E.2d 42 (1990), states:
" 'Our prompt presentment rule contained in W.Va.Code, 62-1-5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.' Syllabus Point 2, *State v.* Humphrey, 177 W.Va. 264, 351 S.E.2d

613 (1986)."

[3] However, these facts raise the far more significant question of whether the police violated the defendant's rights under Section 6 of Article III of the West Virginia Constitution [FN6] when, without probable cause, he was taken into custody and transported to the police station for interrogation without his consent. [FN7] Clearly, the police cannot seize an individual, take him involuntarily to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In Syllabus Point 1, in part, of **464*383*State v.* Stanley, 168 W.Va. 294, 284 S.E.2d 367 (1981), we state:

> "Where police, lacking probable cause to arrest, ask suspects to accompany them to police headquarters and then interrogate them ... during which time they are not free to leave or their liberty is restrained, the police have violated the Fourth Amendment."

With this in mind, we turn to the facts and law supporting the defendant's claim for reversal.

A.
Illegal Detention Issue

[4] A fair reading of the record reveals the defendant voluntarily left his house and answered questions for Trooper Gundy in the police car. It is

FN6. This Court has traditionally interpreted this section in harmony with federal case law construing the Fourth Amendment to the United States Constitution. *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973).

FN7. The defendant raises the issue of whether the police were required to give *Miranda* warnings before he was interrogated at the police station. After the police had brought the defendant to the police detachment, he was left in the waiting area of the detachment for approximately one hour when he was observed to be "real upset" by Trooper G.K. Barnette. The officer interrogated the defendant without giving *Miranda* warnings because Trooper Barnette had been told that other officers had given the *Miranda* warnings at the crime scene three hours earlier. We agree with the defendant that this case possibly could be decided on the failure to give the basic *Miranda* warnings once he was interrogated at the detachment. Under *Miranda*, police must advise a suspect of his right to remain silent and his right to counsel before each custodial interrogation. The issue here is whether the initial warnings became so stale due to the intervening circumstances that the subsequent interrogation at the detachment must be considered separate and distinct. In deciding whether the prior warnings are stale, the North Carolina Supreme Court held:

> "[W]here no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required." *State v. McZorn*, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975).

Several courts, including *McZorn*, have suggested the following factors should be considered in making this determination: (1) the length of time between the giving of the first warnings and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect. *See* State v. Myers, 345 A.2d 500 (Me.1975) (enumerated same factors as *McZorn*). Application of these factors favors the defendant's argument that *Miranda* warnings were necessary before the subsequent interrogation. We choose, however, to base the reversal in this case on the clearer illegal detention issue.

likewise fair to conclude the defendant volunteered to show Trooper Gundy the location of Mr. Boyce's home. While at the Boyce residence, the idea to walk over the right-of-way to the top of the hill originated with Ms. Morris. Based on this evidence, we find the defendant was not in custody or was otherwise detained when the group reached the top of the hill. However, the situation quickly changed.

When the defendant met Trooper Clark, he was advised of his *Miranda* rights and was interrogated. [FN8] He was then driven to the South Charleston Police Barracks. The defendant was not told he was free to leave, but instead was asked to sit in the waiting area of the detachment. More significantly, as admitted by the State and found by the trial court below, the police lacked probable cause to transport and hold the defendant for questioning at the police station.

> FN8. The defendant raises the fact that Trooper Hutchinson testified that when the defendant was questioned on the top of the hill, he believed the defendant was in custody. In resolving the custody issue, this Court does not consider as dispositive Trooper Hutchinson's subjective views that were not communicated to the defendant. The United States Supreme Court states in Stansbury v. California, 511 U.S. 318, ----, 114 S.Ct. 1526, 1530, 128 L.Ed.2d 293, 300 (1994): "[A]n officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave."

Our cases recognize the limited nature of an investigative stop, commonly referred to as a "seizure," under *Terry v. State of Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *State v.* Boswell, 170 W.Va. 433, 438, 294 S.E.2d 287, 292 (1982), we state: "Because stopping a person involves less intrusion on the individual's privacy, the seizure's validity is ordinarily tested by less severe standards than the probable cause standard that is necessary to effect an arrest." In *Stanley*, we adopted *Dunaway* and held, unlike investigative stops, "detention for custodial interrogation" may not be based on reasonable suspicion alone. Rather, we suggested in *Stanley*, when the detention of a suspect goes beyond the narrowly prescribed scope of a *Terry* stop, the detention must be supported by probable cause. [FN9]

> FN9. *See* George E. Dix, *Nonarrest* Investigatory Detentions in Search and Seizure Law 1985 Duke L.J. 849, 942 (1985) (unlike a typical custodial interrogation, in which a party may face a wide-ranging barrage of questions with no prospect of relief, a *Terry* inquiry must be pointed and brief).

In *Dunaway*, the United States Supreme Court invalidated a New York law permitting custodial stationhouse detention and interrogation based on reasonable suspicion of involvement in the crime under investigation. The Supreme Court made it clear that under *Terry* the traditional Fourth Amendment requirements of probable cause and a search warrant are not necessary and, upon proper balancing of interests, limited stops could be made upon reasonable suspicion. However, the Supreme Court added that for any type of detention more intrusive than a *Terry* stop, the "requisite balancing has been performed in centuries of precedent and is embodied in the principle that seizures are reasonable only if supported by probable cause." 442 U.S. at 213, 99 S.Ct. at 2257, 60 L.Ed.2d at 837. The rule in *Dunaway* was reaffirmed in Florida v. Royer, 460 U.S. 491, 499, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 237 (1983), **465 *384 when the Supreme Court stated "reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative."

The demarcating line between "investigative stops" not requiring probable cause and detentions for which probable cause is required is indistinct. [FN10] The Supreme Court said in *Royer:*

FN10. The discussion regarding custodial detention is largely academic because the State has conceded and admitted the defendant was taken into custody and held for approximately three hours before he confessed to his involvement in the killing.

In response to the trial court's questioning, Assistant Prosecuting Attorney Patrick O'Neal admitted that:

"[I]t does appear that when they got to the top of the hill [Kirby Holler], whatever Trooper Gundy's perception was, Sergeant Clark's perception, and Trooper Hutchison's perception, was that some sort of custody had developed, that this was just what the Miranda case talks about, custodial interrogation, and that is why the first thing that Sergeant Clark did was to pull the plastic card from his pocket and read the rights."

Later, in the same exchange, the trial court again revisited the issue of custody that occurred after the defendant had been transferred to the detachment:

"The Court: Now once again, for the record, Mr. O'Neal, the defendant, even though he has not been arrested-- "Mr. O'Neal: Is in custody.

"The Court: --is in custody. He is not free to leave.

"Mr. O'Neal: That's correct. Apparently that was the perception of at least most of the witnesses at that point.

"The Court: Well, I was wondering if that is the State's position, whether he was in custody down there. Is that your position? Are you admitting that he was, as the law defines custody, in custody?

"Mr. O'Neal: Your Honor, if he had gotten up and walked out the door, I don't know what would have happened. But I am certainly willing to say that at that point he believed he was in custody, and I believe that is the crucial thing.

"The Court: As far as the law is concerned in these situations, was he in custody.

"Mr. O'Neal: I believe so.

"The Court: Okay. All right, he was in custody."

"The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." 460 U.S. at 500, 103 S.Ct. at 1325, 75 L.Ed.2d at 238.

[5] There are several factors, however, we find significant in shedding light on the point at which a stop is converted into an "arrest." [FN11] First, Dunaway referred to the detention permitted under Terry as being a brief "momentary" encounter which is designed to clarify an ambiguous situation, and not an occasion for a lengthy investigation to develop probable cause. As stated in *Royer:* "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." 460 U.S. at 500, 103 S.Ct. at 1325, 75 L.Ed.2d at 237. In *United States v. Sharpe,* 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), the Supreme Court refused to adopt a twenty minute *per se* rule for an investigative stop. [FN12] The Supreme Court instead adhered to the reasonableness standard to evaluate such conduct. Reasonableness depends on " 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " 470 U.S. at 681, 105 S.Ct. at 1573, 84 L.Ed.2d at 613, *quoting* Terry, 392 U.S. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d at 905.

FN11. The controlling factors are: (1) the length, duration, and purpose of the detention; (2) the extent and nature of the questioning of the suspect; (3) the location of the detention and interrogation; (4) whether the suspect was advised that he was free to leave and was not required to answer questions; and (5) the use of force or other physical restraints during the stop.

FN12. To aid in the determination of whether a stop has crossed the boundary and become the equivalent of an arrest, the "twenty minute" rule was proposed by the Model Code of Pre-Arraignment Procedure. "In evaluating whether an investigative detention is unreasonable,"

the Supreme Court in *Sharpe* cautioned that "common sense and ordinary human experience must govern over rigid criteria." 470 U.S. at 685, 105 S.Ct. at 1575, 84 L.Ed.2d at 615.

The facts of this case are not clear as to why it was necessary to detain the defendant **466 *385 for the lengthy period he was held beginning at the crime scene and continuing at the police detachment for approximately three hours. We are particularly concerned that the police required the defendant to remain in the waiting area of the detachment for approximately one hour. "Prolonged detention will, at some point in time, be the practical equivalent of full arrest." *Franklin v. United States,* 382 A.2d 20, *modified on other grounds,* 392 A.2d 516 (D.C.1978), *cert. denied sub nom.,* Dickerson v. United States, 440 U.S. 948, 99 S.Ct. 1428, 59 L.Ed.2d 637 (1979). Under these circumstances and considering our precedent discussed above, we cannot find that the police acted reasonably and diligently. [FN13]

FN13. In *State v. Werner,* 117 N.M. 315, 318, 871 P.2d 971, 974 (1994), the Supreme Court of New Mexico suggested "common sense and ordinary human experience" as stated by *Sharpe* were relied upon to determine that a forty-five minute detention in the back of a locked patrol car constituted a *de facto* arrest. Parenthetically, the court observed that although placing the defendant in the back of a patrol car is not an arrest *per se,* after balancing the nature of the intrusion with the officers' justifications for the detention, the detention exceeded the limits of an investigative stop. The court found that the amount of time taken by the police was an important factor in the analysis:
"The concept of diligence has an aspect of speed or haste. As soon as the investigation requires awaiting the development of circumstances off the scene, the validity of the investigatory stop becomes suspect. If authorities, acting without probable cause, can seize a person, hold him in a locked police car for over forty-five minutes while gathering witnesses, and keep him available for arrest in case probable cause is later developed, the requirement for probable cause for arrest has been turned upside down." 117 N.M. at 319, 871 P.2d at 975.

Second, in *Dunaway,* the Supreme Court held that when police take a suspect to the stationhouse for interrogation, they must either have probable cause or the consent of the suspect. When a suspect is "taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room," this type of stationhouse questioning is a custodial equivalent to a formal arrest. 442 U.S. at 212, 99 S.Ct. at 2256, 60 L.Ed.2d at 836. The pivotal factor in *Dunaway,* as in the present case, is the transportation of the defendant to the police station without his consent. [FN14] Similarly, in *Royer,* the Supreme Court held that detaining and relocating a suspect to a private office were equivalent to an arrest. The Supreme Court suggested that only safety or security would justify the relocation of a suspect during an investigative detention on less than probable cause.

FN14. At oral argument, counsel for the defendant indicated the distance between the scene of the crime and the police detachment was about three miles. This fact was uncontested by the State.

The facts in the present case are indistinguishable from those in *Dunaway* and *Royer.* Indeed, the facts in both of these cases are far more favorable to the police than in the case *sub judice.* In *Dunaway,* the defendant was *Mirandized* after he was taken to the police station. Here, the *Miranda* rights were given before the "seizure" took place and were not later repeated at the detachment. In *Royer,* the suspect was taken only feet away to a private office. Here, the defendant was driven three miles from the crime scene to the detachment. [FN15]

FN15. *See also* United States v. Parr, 843 F.2d 1228 (9th Cir.1988) (although detention of suspect in police car for three-quarters of an hour as an investigative detention, not an arrest, was upheld, court pointed out there is no

bright-line rule for determining when a stop turns into an arrest; most cases hold that the line is crossed when the suspect is transported to the police station).

[6][7] Third, and perhaps most significant, in determining whether a *Terry* stop has converted into a custodial detention, courts should analyze the suspect's perception that he did not remain at liberty to disregard the police officer's request for information. In the present case, the defendant was never informed that he was free to leave the detachment. All the cases discussed above have focused on whether the police advised the defendant he was free to leave. Again, we begin with Dunaway where the Supreme Court emphasized that the defendant "was never informed that he was 'free to go.' " [FN16] **467*386442 U.S. at 212, 99 S.Ct. at 2256, 60 L.Ed.2d at 836. In *Royer,* the Supreme Court stated: "Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained.... As a practical matter, Royer was under arrest." 460 U.S. at 503, 103 S.Ct. at 1327, 75 L.Ed.2d at 240. In *Stanley,* this Court indicated that the police could avoid false claims of illegal detentions by "making it clear to those to whom they are about to interrogate that they are not under arrest and are free to leave." 168 W.Va. at 298, 284 S.E.2d at 370. Finally, in Syllabus Point 2 of *State* v. Mays, 172 W.Va. 486, 307 S.E.2d 655 (1983), we set forth the following bright-line rule:

> "Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go."

[8][9] In summary, if the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the West Virginia Constitution is not implicated and no justification for the officer's conduct need be shown. At the point where a reasonable person believes he is being detained and is not free to leave, then a stop has occurred and Section 6 of Article III is triggered, requiring that the officer have reasonable suspicion that criminal activity is afoot. If the nature and duration of the detention arise to the level of a fullscale arrest or its equivalent, probable cause must be shown. Thus, the police cannot seize an individual, take him involuntarily to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest. [FN17]

FN16. The Court in *Dunaway* pointed out that once the suspect had been picked up and taken to the police station, "[h]e was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.... The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, ... obviously do not make petitioner's seizure even roughly analogous" to a *Terry* stop. 442 U.S. at 212, 99 S.Ct. at 2256, 60 L.Ed.2d at 836. (Citation omitted). *See also* Moore v. Ballone, 658 F.2d 218 (4th Cir.1981) (the above language in *Dunaway* limited the expression in *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), that the lack of probable cause to arrest a suspect is always an indication that the stationhouse questioning is noncustodial).

FN17. The West Virginia law in this area is rather confounded. In a series of cases beginning with Justice Stewart's plurality opinion in *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the United States Supreme Court developed the "no seizure" concept; the notion that it was permissible for an officer to approach a person, ask a few questions, ask for identification, and even ask for permission to search. Since this brief encounter did not amount to a seizure, no justification, i.e., reasonable suspicion, was necessary. *See* Florida v. Royer, supra; Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). In these cases, the Supreme Court defined a seizure as circumstances where a

reasonable person would believe that he was not free to leave or free to decline to answer questions or otherwise terminate the encounter. Of course, the assumption in this definition carries its own refutation. Consequently, in *State v. Boswell, supra,* Justice Miller rejected Justice Stewart's definition from *Mendenhall* in favor of an approach based on the intensity of the encounter. Interestingly, Justice Miller also said in *Boswell* that a police/citizen encounter involving a criminal investigation procedure "must originate from some suspicious circumstance involving the defendant." 170 W.Va. at 440, 294 S.E.2d at 294. However, a year later in *State v. Mays, supra,* Justice Neely recognized the "no seizure" notion from Florida v. Royer, but then went on to adopt the "free to go" rule, i.e., "police investigatory interrogations without presentment to a magistrate are allowable only when the suspect is expressly informed that he is not under arrest, is not obligated to answer any questions and is free to go[.]" 172 W.Va. at 489, 307 S.E.2d at 658. What aroused this rule was that the defendant in *Mays,* like the present case, had been taken to police headquarters.

This decision seeks to clarify the law in West Virginia. By today's decision, we recognize the "no seizure" notion justifying *brief* police/citizen encounters irrespective of reasonable suspicion. Any further questioning, i.e., investigative interrogation, would have to be either justified by *Terry*-type suspicion or accompanied by the "free to go, etc." *Mays* warning, the latter ensuring the voluntariness of the encounter. Involuntary detention, like that which occurred in *Mays* and in this case, would amount to an arrest requiring probable cause and compliance with the prompt presentment standards.

Although it is not crucial to the outcome, it is important to clearly decipher when the defendant was first placed in custody. He was not in custody when he was in the company of Trooper Gundy, Sergeant Clark, and Trooper Hutchinson walking along the pipeline right-of-way. "The defendant voluntarily went with Trooper Gundy[.]" And this is true regardless of the subjective views of the officers. We find the defendant was placed in custody when he was involuntarily transported to the police detachment.

**468 *387 Based upon the foregoing discussion, we find the defendant was placed under "custodial detention" which legally can be done only if there is probable cause. We further find that under the objective standard reiterated in *Stansbury v.* California, a reasonable person in the defendant's situation would feel he was in custody.

Accordingly, we find the police violated the defendant's rights under Section 6 of Article III of the West Virginia Constitution by placing him in custody and transporting him to the police station when the State concedes the defendant was in custody and the police lacked probable cause to arrest.

B.
Attenuation: Purging the Taint

[10][11] We must next decide whether the causal connection between the lawless conduct of the police and the challenged evidence has become so attenuated as to dissipate the taint. *See* Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Canby,* 162 W.Va. 666, 252 S.E.2d 164 (1979). The attenuation doctrine was first announced by the Supreme Court in *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 267, 84 L.Ed. 307, 312 (1939): "[While] [s]ophisticated argument may prove a causal connection" between the unlawful detention and the confession, the circuit court, and later this Court, may determine "[a]s a matter of good sense ... [that] such connection may have become so attenuated as to dissipate the taint." In *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the Supreme Court elaborated on the factors that must be considered in determining whether the taint has been dissipated. These same factors were adopted by this Court in Syllabus Point 2 of *State v.* Stanley, 168 W.Va. 294, 284 S.E.2d 367 (1981), where we held:

"A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of *Miranda* warnings is not enough, by itself, to

break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and the purpose or flagrancy of the official misconduct."

No mathematical weight can be assigned to any of the factors we have discussed. No single factor is dispositive. Rather, a court must review the "totality of circumstances" to determine whether the taint has been sufficiently attenuated to permit the admission of the confession. In relying on the factors listed in *Stanley* and *Brown*, the Supreme Court in *Dunaway* discounted the significance of the *Miranda* warnings. Noting that the *Miranda* warnings satisfied the Fifth Amendment concerns, the Supreme Court stated that voluntariness was only the beginning threshold requirement for a Fourth Amendment analysis. The Supreme Court concluded by holding the *Miranda* warnings were relevant, but standing alone the *Miranda* warnings were insufficient to attenuate the taint. In all the cases--*Brown*, Stanley and *Dunaway*--the Supreme Court found the taint had not been attenuated. [FN18]

FN18. In *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 2667, 73 L.Ed.2d 314, 321 (1982), involving a situation similar to the present case, the defendant was arrested without probable cause "in the hope that something would turn up." After being transported to the station and given *Miranda* rights, the defendant was fingerprinted and placed in a lineup. The police later told him that his fingerprint matched those obtained during the investigation of the crime. After consulting with his girlfriend, the defendant confessed. The Supreme Court virtually ignored the argument that there was a six-hour delay between the arrest and the confession, compared with a two-hour delay in *Brown* and *Dunaway*. "[A] difference of a few hours is not significant where, as here, petitioner was in police custody, unrepresented by counsel, and he was questioned on several occasions, fingerprinted, and subjected to a lineup." 457 U.S. at 691, 102 S.Ct. at 2667, 73 L.Ed.2d at 320.

**469 *388 [12] We can find no evidence in the record to show the connection between the illegal "arrest" and the confession was sufficiently curtailed to permit the use at trial of the defendant's statement to Trooper Barnette. *See* Stanley, supra. Of particular importance is the temporal proximity between the detention and the confession. Approximately an hour after the defendant was transported to the detachment, he confessed. "Clearly, there was no break in the causal connection between the illegal' ... [detention] and subsequent statement." *State v. Moore*, 165 W.Va. 837, 857, 272 S.E.2d 804, 817 (1980). Furthermore, we can find no other intervening circumstances sufficient to purge the taint. Therefore, under the attenuation analysis that we adopted in *Stanley*, we hold the statement was the product of illegal police detention, *i.e.*, custody without probable cause, and the admission of the defendant's statement into evidence was reversible error. [FN19]

FN19. We, therefore, decline to address the defendant's second assignment of error that the confession was unreliable.

III.
CONCLUSION

Based on the foregoing, the judgment of the Circuit Court of Kanawha County is reversed and this case is remanded for a new trial.

Reversed and remanded.

BROTHERTON, J., did not participate.

FOX, Judge, sitting by temporary assignment.

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