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32582

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

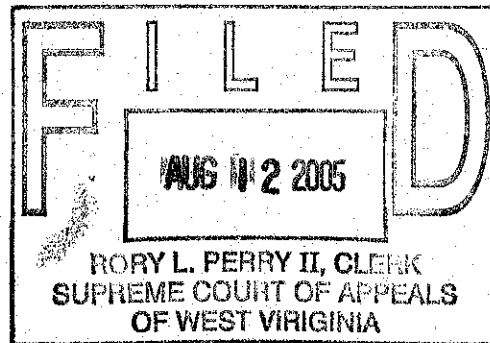
STATE OF WEST VIRGINIA,

Appellee,

v.

FREDERICK SMITH,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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NO. 32586

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

FREDERICK SMITH,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

This is an appeal by Frederick Smith ("Appellant") from his December 5, 2003, jury convictions in the Circuit Court of Marion County (Fox, J.) of one felony count of possession with intent to deliver cocaine, and one felony count of possession of a deadly weapon by a person having been convicted of a felony. On May 19, 2004, the circuit court sentenced Appellant to a period of one to fifteen years in the penitentiary on the possession with intent to deliver cocaine conviction, and for a period of five years on the felon-in-possession conviction, with the sentences to run concurrently.

On appeal, Appellant complains that the circuit court erred in admitting his confession to the police, essentially alleging it was not voluntarily given.

II.

STATEMENT OF FACTS

A. **FACTUAL HISTORY.**

On the night of April 23, 2001, Ms. Bertha Horton ("Peaches" to her friends) already had plans for the evening over at a girlfriend's house,¹ but earlier in the day, a friend of hers, Leslie, called saying she and her boyfriend, Appellant, would "be coming in from Pittsburgh and needed a place to stay until [they] got a place at a hotel."² Leslie and Appellant arrived at Ms. Horton's home at about 8:30 that night. But even though Ms. Horton had already made other plans for later in the evening – intending to stay at her friend's house for the night, Appellant was only allowed to stay in the house until Leslie found another place for she and he to stay.³

Later, Ms. Horton went to her "little get together" at her friend's house at about 10:30 that night, and only Appellant was in her home. She gave him specific instructions, "Lock the door and don't let anybody in [her] house."⁴ Ms. Horton checked on the house a couple of times, saw signs of people coming and going at her home, and finally around 2:30 in the morning, she confronted Appellant. He told her stories she didn't quite believe, and eventually he told her about the drugs. Well, when Appellant told her about the drugs, Ms. Horton became even more concerned because sometime before Appellant had a "confrontation" with an unnamed man, and she did not want Appellant to "run into him and there be trouble in [her] house, that's when [she] knew he had the

¹Trial Transcript ("Tr.") 92-93.

²Tr. 91-92.

³Tr. 93-94.

⁴Tr. 94.

drugs and the gun.”⁵ Ms. Horton asked Appellant to leave, but he didn’t; so Ms. Horton left the house and went looking for a police officer for help.⁶

After flagging down an officer and explaining the matter to the second that arrived (who relayed that information to others), Ms. Horton returned to her home about 15 minutes ahead of the police.⁷ Once back home, Ms. Horton told Appellant she had a “buy, somebody wanted to buy some dope, and they were on their way.”⁸ And so they waited.

It was about 4:00 o’clock in the morning of April 24, 2001, when Detective Moran and Officer Fluharty arrived at the front door of Ms. Horton’s Fairmont home, while Patrolman Murphy and Patrolman Ashby went around to the back.⁹ All of the officers were then employed by the Fairmont City Police Department.

When Detective Moran knocked on Ms. Horton’s door, she answered and said, “It’s the police.”¹⁰ Appellant then ran up the steps, and as the two officers gave chase, they identified themselves as being such, drawing their weapons along the way.¹¹ The armed Appellant ran into Ms. Horton’s bedroom but because the officers were uncertain as to what he might be doing within, they

⁵Tr. 94-96.

⁶Tr. 95 and 96.

⁷Tr. 96-97.

⁸Tr. 99.

⁹Tr. 118.

¹⁰*Id.*

¹¹Tr. 118-19.

proceeded cautiously, then ordered him out.¹² Appellant then surrendered, the officers put him in handcuffs and patted him down and took him to the bottom of the steps.¹³

It was then Ms. Horton gave verbal permission for the officers to search the premises,¹⁴ though Ms. Horton pretended in front of Appellant that she did not really “appreciate” the police being there.¹⁵ Eventually, with the help of Ms. Horton, a woman that Detective Moran has known for at least six or seven years,¹⁶ the police were able to find Appellant’s gun hidden under a pillow in Ms. Horton’s bedroom,¹⁷ a bag of marijuana found on a desk in Ms. Horton’s bedroom, and a large bag containing 90 individual pieces of crack cocaine wrapped in plastic. The officers then took Appellant and the contraband back to the station.

According to Appellant, Detective Moran, and Officer Fluharty, after Detective Moran *Mirandized* him, Appellant refused to sign the Waiver of Rights Form at the station.¹⁸ But at no time did he ever ask for an attorney.¹⁹ Detective Moran ceased interviewing Appellant,²⁰ and Officer

¹²Tr. 119.

¹³Tr. 120 and 101.

¹⁴*Id.*

¹⁵Tr. 100.

¹⁶Tr. 118.

¹⁷Tr. 121.

¹⁸Tr. 218, 126, and 190.

¹⁹*Id.*

²⁰Tr. 126.

Fluharty began processing him.²¹ Amidst fingerprinting Appellant and taking a mug shot, Officer Fluharty asked Appellant more than once, "If the gun wasn't his, whose was it?"²² As a side note, Appellant was not, and never was, under arrest for a stolen weapon. "[F]inally, [Appellant] said that the gun was his, but the drugs wasn't." Appellant stated this to Officer Fluharty while he was "just preparing to get the fingerprint cards filled out and get the camera set up."²³

B. PROCEDURAL HISTORY.

The June 2001 Term of the Grand Jury for Brooke County returned a three-count indictment charging Appellant with *Possession With Intent To Deliver Cocaine, A Schedule II Narcotic Controlled Substance*, in violation of West Virginia Code §§ 60A-4-401 and 60A-4-408 (Count I); *Possession Of Marihuana*, in violation of West Virginia Code § 60A-4-401(c) (Count II); and *Possession Of Deadly Weapon By A Person Having Been Convicted Of A Felony*, in violation of West Virginia Code § 61-7-7 (Count III).²⁴

At the conclusion of his three-day jury trial on December 5, 2003, Appellant was found guilty on Counts I and III.²⁵ On May 19, 2004, the circuit court sentenced Appellant to a period of one to fifteen years in the penitentiary on the conviction of *Possession With Intent To Deliver Cocaine, A Schedule II Narcotic Controlled Substance* (Count I); and for a period of five years on the conviction

²¹Tr. 190.

²²Tr. 190-91.

²³Tr. 191.

²⁴See Indictment, R. 1-2A.

²⁵Tr. 282-83.

of *Possession Of A Deadly Weapon By A Person Having Been Convicted Of A Felony* (Count III), with the sentences to run concurrently and credit for time served in the amount of 446 days.²⁶

It is from these convictions and sentences that Appellant brings this appeal.

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

A. The trial court erred by not excluding the statment [sic] made by the Appellant to authorities after refusing to waive his right to have an attorney present for any questioning.

1. Admitting the appellant's statement to authorities into evidence was plainly wrong because there is no evidence the appellant fully understood his rights or how to exercise those rights.

2. The appellant did not fully understand his rights because he has only an eighth (8th) grade education, a learning disability, and his rights were not explained to him in a manner which the appellant understood.

3. The appellant did not waive his rights and only made the statement after repeated questioning by the authorities.

B. The appellant's statement to authorities was clearly against the weight of the evidence.

IV.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S CONFESSION AT TRIAL, BECAUSE IT WAS GIVEN VOLUNTARILY.

A. THE STANDARDS OF REVIEW.

5. The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all

²⁶See Sentencing Order, R. 316-18.

of an offense were voluntary before such may be admitted into the evidence of a criminal case.²⁷

1. It is not invariably necessary that a person under interrogation make an explicit oral or written statement of waiver in order that it may be properly concluded as a matter of law that the person has waived the right to counsel as guaranteed by W. Va. Const. art. III s 14 and U. S. Const. amend. VI, or has waived the right to remain silent as guaranteed by W. Va. Const. art. III s 5 and U. S. Const. amend. V.²⁸

2. In the trial of a criminal case, the State must prove, at least by a preponderance of the evidence, that a person under custodial interrogation has waived the right to remain silent and the right to have counsel present.²⁹

1. “ ‘ “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syllabus Point 3, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).’ Syl. pt. 7, *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985).” Syllabus Point 2, *State v. Stewart*, 180 W. Va. 173, 375 S.E.2d 805 (1988).³⁰

2. This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.³¹

3. In circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness.³²

²⁷Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E. 2d 242 (1975).

²⁸Syl. Pt. 1, *State v. Rissler*, 165 W. Va. 640, 270 S.E.2d 778 (1980).

²⁹Syl. Pt. 2, *id.*

³⁰Syl. Pt. 1, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994).

³¹Syl. Pt. 2, *id.*

³²Syl. Pt. 3, *id.*

4. “ ‘Once a person under interrogation has exercised the right to remain silent guaranteed by *W. Va. Const.*, art. III § 5, and *U. S. Const.* amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial.’ Syllabus Point 3, *State v. Rissler*, 165 W. Va. 640, 270 S.E.2d 778 (1980).” Syllabus Point 1, *State v. Woodson*, 181 W. Va. 325, 382 S.E.2d 519 (1989).³³

5. To assert the *Miranda*³⁴ right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.³⁵

B. DISCUSSION.

Appellant’s argument seems to be that the circuit court erred in admitting his confession, arguing it was not voluntary because Appellant’s waiver to the *Miranda* warnings given him by police did not pass the three-part analysis set forth in *State v. Rissler*: “[W]ere the rights given in proper form and substance, did the defendant fully understand them, and did he waive them?”³⁶ Appellant is incorrect on all accounts.

The circuit court made findings of fact and conclusions of law at both the Suppression Hearing at trial and in an Order³⁷ denying Appellant’s post-trial motions. These findings and conclusions are entitled to the deference set forth in The Standards of Review section above. That is, because the circuit court’s findings are neither plainly wrong nor clearly against the weight of the

³³Syl. Pt. 4, *id.*

³⁴*Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁵Syl. Pt. 5, *Farley*, *supra*.

³⁶165 W. Va. at 646, 270 S.E.2d at 782.

³⁷R. 291-305.

evidence, this Court should find that Appellant's confession was voluntary, and therefore the circuit court committed no error.

At the Suppression Hearing, the circuit court found and concluded the following.

Okay, the issue is the matter of the officer testifying, the prior evidence in the case is that, as the Court recollects, the defendant was properly Mirandized, refused to sign the Miranda form, but did not ask for counsel. I think the police, under those kind of circumstances, can continue to question him as this officer did.

I have some problem with the fact he actually asked him several times, but based on what I – what is before the Court at this time, I think it is a voluntary statement. I don't see that there's any violation that the – of the defendant's rights in this regard; therefore, I will allow the testimony. And I would anticipate revisiting this issue post trial if there is a conviction, and at that time I'll be in a position to have done more research and make proper findings of fact and conclusions of law. So the statement will be admitted.³⁸

More significantly are the findings of fact and conclusions of law in the circuit court's Order, especially considering the second half of the second paragraph above. While Appellant may read something "greater" into it, the State sees it exactly for what it is: an opportunity for the circuit court to have had the opportunity to have done more research before making its ruling.

11. "In the trial of a criminal case, the State must prove, at least by a preponderance of the evidence, that a person under custodial interrogation has waived the right to remain silent and the right to have counsel present." Syl. pt. 2, *State v. Rissler*, 165 W. Va. 640, 270 S.E.2d 778 (1980).

12. It is not invariably necessary that a person under interrogation make an explicit oral or written statement of waiver in order that it may be properly concluded as a matter of law that the person has waived the right to counsel as guaranteed by W. Va. Const. art. III s 14 and U. S. Const. amend. VI, or has waived the right to remain silent as guaranteed by W. Va. Const. art. III s 5 and U. S. Const. amend. V.

Id. at Syl. pt. 1.

³⁸Tr. 194-95.

13. “It regard to the question of waiver, the determination is threefold: were the rights given in proper form and substance, did the defendant fully understand them, and did he waive them?” *Id.* at 646, 270 S.E.2d at 782. Because there was no evidence to the contrary, the Court finds the rights were given in proper form and substance and the defendant understood them. The Court also finds the defendant waived his rights when he made the statement to Officer Fluharty that the gun was his, but the drugs were not. While asking routine processing questions, Officer Fluharty asked the defendant to whom the gun belonged because the gun was listed as stolen on N.C.I.C. When the defendant answered, he effectively waived his rights.

14. In a case analogous to the case at bar, the Supreme Court of Appeals of West Virginia held a defendant had waived his rights hen he answered a police officer’s question after he refused to sign a rights waiver form. That Court indicated there was no evidence the defendant did not understand his rights when he answered the officer’s question. *See State v. Gwinn*, 169 W. Va. 456, 288 S.E. 2d 533 (1982). The defendant in the case at bar understood his rights. In fact, he had been convicted of a felony in the past, which would make him familiar with the criminal justice system. Sergeant [Detective] Moran ceased questioning and left the room when the defendant refused to sign the waiver form. Officer Fluharty asked the defendant during processing if he knew to whom the stolen gun belonged, and the defendant responded, thereby waiving his right to remain silent. Based on the totality of the circumstances, the Court is of the opinion the State proved, by a preponderance of the evidence, the defendant waived his rights.³⁹

Additionally, Appellant attaches a *non sequitur* at the end of his voluntariness argument, simply stating his confession was “clearly against the weight of the evidence[,]” without really going any further. Appellant cites to no law in support of these statements. Frankly, the State is at a loss as what to make of this series of conclusory comments; therefore, the State will focus its response on the only argument it can discern – the *Miranda* argument above.

³⁹Order (in pertinent part) at R. 302-04.

1. Appellant's *Miranda* Rights Were Given to Him in Proper Form and Substance.

Appellant “contends that his rights were not given to him in proper form or substance[.]”⁴⁰ yet primarily argues (as revealed in his section header) this was so “because there is no evidence the appellant fully understood his rights or how to exercise those rights.”⁴¹ The first prong of *Rissler*'s waiver analysis is: “[W]ere the rights given in proper form and substance[.]”⁴² This prong concerns the procedural actions of the police *only*; it does not concern any subjective understanding of Appellant. Ergo, based on the procedural prong of the *Rissler* analysis, it *appears* Appellant does not contend that his *Miranda* rights were not given to him in proper form and substance, though there is also sufficient evidence of that in the record, as will be shown below.

First and foremost, Appellant himself admitted at trial that Detective Kelly Moran “[tried] to get [him] to sign a *Miranda* form[.]”⁴³ Earlier during the trial, Detective Moran also testified that Appellant refused to sign the Waiver of Rights Form.⁴⁴ During the Suppression Hearing regarding the admissibility of Appellant's statement (held in-camera on the morning of the second day of trial), Officer Raymond Fluharty was testifying regarding Appellant's confession to him. Officer Fluharty had just arrived at the police station and was speaking with Detective Moran. “[Detective Moran] said that [Appellant] was still taking [sic] – that he had *Mirandized* him, which he elected not to sign

⁴⁰Brief, p. 7.

⁴¹*Id.*

⁴²165 W. Va. at 646, 270 S.E.2d at 782.

⁴³Tr. 218.

⁴⁴*See* Tr. 126.

the Waiver, but did not request an attorney.”⁴⁵ Not one but *three* witnesses, including Appellant, testified regarding Appellant being *Mirandized* and Appellant declining to sign the *Miranda* waiver form.

Moreover, the circuit court made specific findings of fact regarding whether Appellant was given his *Miranda* rights in proper form and substance. At the Suppression Hearing, the circuit court ruled, “[A]s the Court recollects, the defendant was *properly* Mirandized[.]”⁴⁶ And in its post-trial Order, the circuit court concluded, “Because there was no evidence to the contrary, the Court finds the rights were given in proper form and substance[.]”⁴⁷ Again, these findings of facts and conclusions of law are entitled to the deference outlined above in the section entitled: The Standards of Review.

Thus, for all of the reasons stated above, this Court should find Appellant’s *Miranda* rights were given to him in proper form and substance.

2. Appellant Fully Understood His *Miranda* Rights.

Appellant next contends that he did not fully understand the rights that were given him, basing his entire argument on conjecture – “[the rights] were not properly given or explained to the appellant by the authorities[.]”⁴⁸ – with no facts or law to support his conjecture, and “facts” –

⁴⁵Tr. 189-90.

⁴⁶Tr. 194 (emphasis added).

⁴⁷Order, R. 303.

⁴⁸Brief, p. 9.

testimony elicited solely from Appellant at trial and by him within his *Pre-Sentence Report*⁴⁹ – again with no supporting facts or law to support his claim.

Appellant first complains in his Brief that he has “only an eighth (8th) grade education and quit attending school due to a learning disability, receiving no additional education or training.”⁵⁰ As authority for this, Appellant cites the *Pre-Sentence Report, supra*. But the “authority” to support this claim within the *Pre-Sentence Report* came only from the Appellant. No one else. That is, whether Appellant dropped out of school during the ninth grade is still speculative, and whether he did so because he had a “learning disability” is also speculative; neither of these two “facts” were verified from any source other than the Appellant himself.

The same argument holds true regarding Appellant’s next assertion; that is, Appellant alleges he receives Social Security for the same learning disability.⁵¹ Once again, however, Appellant uses himself to prove this “fact,” citing his own testimony at trial as authority that he does, indeed, receive “Social Security” for some alleged learning disability.⁵² The problem with Appellant’s argument is simple: he uses no outside source to verify his “facts.” Only Appellant stated that he dropped out of school during grade nine and has a learning disability. There is no corroborative testimony or exhibits of any kind – not one Social Security check or social worker, no expert witness to vouch his “disability” or “lack” of education – all there is on record is just the word of the Appellant himself.

⁴⁹R. 284.

⁵⁰Brief, p. 10.

⁵¹Brief, p. 10.

⁵²*Id.*

Assuming *arguendo*, however, that what Appellant alleges regarding his level of education and difficulties in learning are true, the second prong of the *Rissler* analysis has still been met. In *State v. Farley*,⁵³ the defendant was convicted of arson and falsely reporting an emergency incident. On appeal, one of the defendant's arguments was similar to Appellant's claim herein; that is, the defendant contended he invoked his *Miranda* rights but the officers did not honor that request. Attendantly, and akin to the State's current position, the State asserted that the defendant's statement was not only voluntary but that the defendant did not request to terminate the interrogation or otherwise assert his right to remain silent.⁵⁴ The Court's factual findings are as follows, likening the case to *Davis v. United States*⁵⁵ and *Edwards v. Arizona*.⁵⁶

The transcript of the tape-recorded confession shows that at one point during the questioning Mr. Hall asked the defendant if he was having difficulty talking about the fires. The defendant vaguely stated that he could not talk about them, but he did not otherwise indicate that he wanted the interrogation to end nor did he state that he did not want to answer any further questions. Therefore, we find that the defendant failed to invoke his right to remain silent. He merely expressed his reluctance to give specific and detailed information about the fires.⁵⁷

But the State is ahead of itself, the question in this prong is simply: did the Appellant fully understand the *Miranda* rights given to him? And to that question the answer is still yes, despite any infirmities he may allege because of lack of education or disability. Justice Cleckley discussed this

⁵³192 W. Va. 247, 452 S.E.2d 50 (1994).

⁵⁴See generally, *Farley* at 255, 452 S.E.2d at 58.

⁵⁵512 U.S. 452 (1994).

⁵⁶451 U.S. 477 (1981).

⁵⁷*Id.*

very subject in *Farley* when he was analyzing the issue of voluntariness in confessions, and the *Davis* and *Edwards* opinions, *supra*.

The Court [in *Davis*] acknowledged “that requiring a clear assertion of the right to counsel might disadvantage some suspects who – because of fear, intimidation, lack of linguistic skills, or a variety of other reasons – will not clearly articulate their right to counsel although they actually want to have a lawyer present.” But, it said, “the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.”⁵⁸

Furthermore, Justice Cleckley continued his analysis of the *Davis* opinion and this possible “problem” with some, less articulate suspects in the very next paragraph of *Farley*.

In a concurring opinion, four Justices expressed the view that the rule should be that “when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators’ questions should be confined to verifying whether the individual meant to ask for a lawyer.” The majority observed that asking such clarifying questions would “often be good police practice,” but made it clear that it was not required.⁵⁹

After this extensive analysis, the Court in *Farley* agree[d with the reasoning in *Davis*] that “the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.”

Thus, even though Appellant may have had only an eighth grade education and may have had some type of learning disability, the *Miranda* warnings themselves were there to protect him. Not once did Appellant ever complain or even *suggest* that he had no understanding of his rights, and

⁵⁸*Farley* at 255, 452 S.E.2d at 58 (quoting *Davis*, 512 U.S. at 460).

⁵⁹*Farley* at 256, 452 S.E.2d at 59 (citations omitted).

certainly the police could not *assume* Appellant might not be capable of understanding his *Miranda* rights, especially in light of the fact that Appellant had been through the system more than once.⁶⁰

Thus, for all of the reasons stated above, this Court should find that Appellant fully understood his *Miranda* rights.

3. **Appellant Waived His *Miranda* Rights.**

Finally, Appellant complains that he did not waive his *Miranda* rights, primarily relying on Detective Moran's testimony at trial wherein he stated, "[He – Detective Moran] attempted to interview [Appellant], but [Appellant] refused to sign a Waiver of Rights Form, and [he] wasn't going to interview [Appellant] unless [Appellant] waived his rights to talk to [him]."⁶¹ While this may certainly be commendable and the concurring Justices on the *Davis* Court would be proud, the majority of Justices, and thus the ruling opinion of that Court, as well as our own Court in *Farley* teaches us that it is not necessary.

*Miranda v. Arizona*⁶² holds that a suspect is entitled to the assistance of counsel during custodial interrogation; *Edwards v. Arizona*⁶³ holds that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. *Davis*

⁶⁰See generally, *Pre-Sentence Report* at R. 284.

⁶¹Tr. 126.

⁶²384 U.S. 436 (1966).

⁶³451 U.S. 477 (1981).

v. *United States*,⁶⁴ however, holds that the *Edwards* “rule comes into play only if a suspect ‘unambiguously’ requests counsel.”⁶⁵

Justice Cleckley, writing for the Court in *Farley*, thoroughly examined the issue of ambiguity before making law in this state. “In discussing the issue, the Supreme Court [in *Davis*] stated:

“The rationale underlying *Edwards* is that the police must respect a suspect’s wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning . . . would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.”⁶⁶

....

. . . [The Court] believe[s] that under *Davis* insubstantial and trivial doubt, reasonably caused by the defendant’s ambiguous statements as to whether he wants the interrogation to end, should be resolved in favor of the police and that under these circumstances further interrogation by the police does not offend the West Virginia Constitution.⁶⁷

It is worth noting the following here, though it relates to another argument of Farley’s later in the opinion wherein Farley claimed he was coerced into confessing by the police officers. Obviously, the Court found this argument also to be without merit. But the Court did have this to say regarding Farley’s meritless claim.

We reject any view which would directly or indirectly suggest that it is improper for police to persuade a suspect to confess and there is nothing in our laws

⁶⁴512 U.S. 452 (1994).

⁶⁵*Farley*, 192 W. Va. at 255, 452 S.E.2d at 58.

⁶⁶*Id.* (quoting *Davis*, at 512 U.S. at 460) (citation omitted).

⁶⁷*Farley*, 192 W. Va. at 256, 452 S.E.2d at 59.

to the contrary. Police are permitted in this context to take legal advantage of the vulnerability of particular criminal suspects.⁶⁸

Ultimately, the holding in *Farley* is utterly relevant to the case at bar, adopting the holding of *Davis*. Perhaps it would have been wise of defense counsel to read these cases before arguing as he does -- and so vehemently.

Therefore, as suggested by the Fourth Circuit in *United States v. Gordon*, 895 F.2d 932, 938 (4th Cir. 1990), we hold that to assert the *Miranda* right to terminate police interrogation, the words or conduct must be *explicitly clear* that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.⁶⁹

Therefore, for all of the reasons stated above, this Court should find Appellant waived his *Miranda* rights. And moreover, this Court should find Appellant's confession was voluntarily made; thus, the circuit court did not err in admitting Appellant's statement at trial.

⁶⁸*Id.*, 192 W. Va. at 259 n.18, 452 S.E.2d at 62 n.18.

⁶⁹*Id.*, 192 W. Va. at 256, 452 S.E.2d at 59 (emphasis added).

V.

CONCLUSION

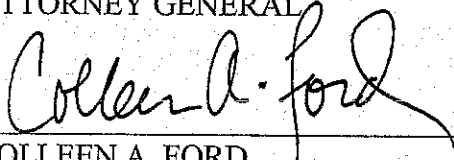
For the foregoing reasons, this Court should affirm the judgment of the Circuit Court of Marion County.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

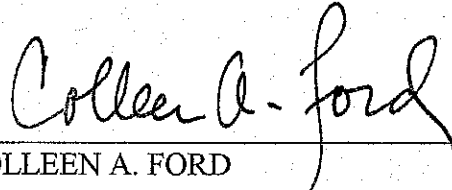


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 12 day of August, 2005, addressed as follows:

To: Aaron S. France, Esq.
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