
NO. 35477

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

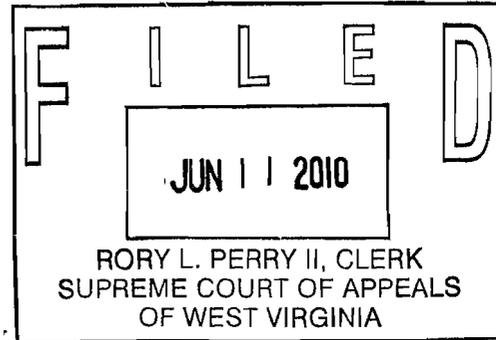
STATE OF WEST VIRGINIA,

Appellee,

v.

JASON DEVON WILLIAMS,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS AND PROCEDURAL HISTORY	2
III. RESPONSE TO ASSIGNMENT OF ERROR	5
IV. ARGUMENT	5
A. THIS COURT SHOULD REVISIT ITS OPINION IN <i>STATE v. BARROW</i> IN LIGHT OF THE DECISION OF THE UNITED STATES SUPREME COURT IN <i>MONTEJO v. LOUISIANA</i>	5
B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION TO SUPPRESS HIS CONFESSION	10
1. Standard of Review	10
2. Because Appellant Was Not Under Arrest on These Charges, His Right to Counsel Had Not Attached and He Was Free to Waive His <i>Miranda</i> Rights Without Counsel Being Present	10
V. CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES:	
<i>State v. Albright</i> , 209 W. Va. 53, 543 S.E.2d 334 (2000)	10
<i>Michigan v. Jackson</i> , 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)	6, 8
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	<i>passim</i>
<i>Montejo v. Louisiana</i> , ___ U.S. ___, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009)	<i>passim</i>
<i>State v. Barrow</i> , 178 W. Va. 406, 359 S.E.2d 844 (1987)	<i>passim</i>
<i>State v. Bowyer</i> , 181 W. Va. 26, 380 S.E.2d 193 (1989)	11
<i>State v. Crouch</i> , 178 W. Va. 221, 358 S.E.2d 782 (1987)	6
<i>State v. Messer</i> , 223 W. Va. 197, 672 S.E.2d 333 (2008)	10
<i>State v. Moss</i> , 180 W. Va. 363, 376 S.E.2d 569 (1988)	12-13
<i>State v. Potter</i> , 197 W. Va. 734, 478 S.E.2d 742 (1996)	12
<i>State v. Smith</i> , 218 W. Va. 127, 624 S.E.2d 474 (2005)	10
<i>State v. Wyer</i> , 173 W. Va. 720, 320 S.E.2d 92 (1984)	9, 10
STATUTES:	
W. Va. Code § 61-8B-5	1

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I.

**KIND OF PROCEEDING
AND NATURE OF THE RULING BELOW**

Jason Devon Williams (hereafter “Appellant”) appeals the August 7, 2009, order of the Circuit Court of Mercer County (Aboulhosn, J.), which sentenced him to one to five years in the penitentiary upon his conditional plea of guilty to the offense of Sexual Assault in the Third Degree, in violation of West Virginia Code § 61-8B-5.¹ (R. 71-73.)

¹West Virginia Code § 61-8B-5 [2000] provides in relevant part:

(a) A person is guilty of sexual assault in the third degree when . . . [t]he person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

(b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

On appeal, Appellant challenges the August 4, 2009, order of the circuit court which denied Appellant's motion to suppress his confession to police that Appellant, who was 25 years old, had engaged in sexual intercourse with the 15-year-old victim, S.K. (R. 62-68.)

Appellant remains free on bond, pending appeal.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant was previously convicted of attempted sexual abuse of a minor child, which required him to register for life as a sex offender.² Following completion of the youthful offender program at the Anthony Correctional Center, Appellant was released on supervised probation for five years, beginning on May 29, 2008. The conditions of Appellant's probation included a prohibition on contact with children under 18 years of age.

On or about March 20, 2009, Mercer County probation officer Kimberly Moore filed a petition to revoke Appellant's probation due to three alleged violations, one of which was having social contact with two teenage girls, including the victim in this matter. Appellant's present counsel, Steven K. Mancini, was appointed to represent Appellant for purposes of the probation revocation hearing. Appellant appeared with his counsel for arraignment on March 24, 2009, at which time he waived his right to a preliminary hearing and the matter was scheduled for a final hearing on April 1, 2009. Appellant was released on bond with home confinement.

²Appellant's prior criminal case is not part of the record in this matter. The pertinent facts regarding this conviction and probation revocation are taken from the pleadings filed by the parties and the circuit court's order denying Appellant's suppression motion.

On March 27, 2009, Appellant reported to Corporal James Long at the West Virginia State Police detachment to update his sex offender registry information, as required by law upon his release from jail. Prior to his arrival, Ms. Moore had called Cpl. Long to report her suspicion that something more may have transpired between Appellant and one or both of the girls. (R. 5; Tr. 5-6, 17.)³ Upon Appellant's arrival at the State Police barracks, Cpl. Long updated the registry information, and asked Appellant if he could talk to him about his contact with the girls. (Tr. 7-8.) Appellant agreed to be interviewed. (Tr. 17.) Corporal Long informed Appellant that he had the right to have an attorney present, that he was not under arrest, and that he was free to leave at any time. (Tr. 7, 9, 11-12, 23-24.) He advised Appellant of his *Miranda* rights,⁴ and obtained a waiver of rights form initialed and signed by the Appellant. (Tr. 8-9; R. 81.)⁵ Corporal Long then questioned Appellant regarding his relationship with the juveniles, and obtained a recorded statement from Appellant in which he confessed to having sexual intercourse with one of the girls, S.K., on one occasion. (R. 5; Tr. 10.) Appellant also admitted that he knew that S.K. was only 15 years old. (Tr. 11.) Following the interview, Appellant left the building and returned to his home. (Tr. 9.)

Later that day Cpl. Long met with S.K., who provided a recorded interview stating that she had sexual intercourse with the Appellant at her father's home in Mercer County on one occasion during the previous four months. (R. 5.) A criminal complaint was filed in the magistrate court, (R. 3-5), and Appellant was arrested three days later, on March 30, 2009. (R. 1.) At his initial

³"Tr." citations are to the transcript of the suppression hearing on July 29, 2009.

⁴*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵At no point leading up to the interview did Appellant ask to speak to an attorney. (Tr. 12.)

appearance before the magistrate on that date, Appellant indicated that he wanted to hire an attorney to represent him. (R. 6.) On April 3, 2009, Appellant appeared without counsel, (R. 10), and his preliminary hearing was continued to April 22, 2009. (R. 1.) That same day, Appellant completed an affidavit for appointment of counsel, (R. 21), and Mr. Mancini was appointed to represent him in this matter. (R. 19.) Mr. Mancini first entered an appearance for Appellant in this case on April 22, 2009, at which time Appellant waived his right to a preliminary hearing and the case was forwarded to the circuit court. (R. 1, 11.) On June 9, 2009, the grand jury returned an indictment charging Appellant with Sexual Assault in the Third Degree. (R. 22.)

On July 28, 2009, Appellant filed a motion to suppress his confession on the grounds that he was represented by counsel in the pending probation revocation proceeding, and that Cpl. Long was required to contact Appellant's counsel prior to questioning him regarding the same matter. (R. 44-46.) A hearing on the motion was held on July 29, 2009, following which the court requested briefs from the parties on the issue. (*See* R. 51-60.) By order entered August 4, 2009, the circuit court denied the suppression motion, finding that Appellant had voluntarily, knowingly, and intelligently waived his right to counsel before providing the statement now sought to be suppressed. (R. 62-68.)

On August 6, 2009, Appellant entered into a plea agreement with the State in which he agreed to plead guilty to the indictment, conditioned on the right to pursue this appeal of the trial court's denial of his suppression motion, and to withdraw his guilty plea should the circuit court's ruling thereon be reversed. (R. 42-43.) Appellant entered his guilty plea to Sexual Assault in the Third Degree on August 5, 2009, (R. 36-41), and by order entered August 7, 2007, the circuit court accepted his plea and sentenced Appellant to one to five years in the penitentiary. The court also

granted Appellant a stay of execution and post-conviction bond with home confinement pending appeal. (R. 71-73.) It is from this order that Appellant now appeals.

III.

RESPONSE TO ASSIGNMENT OF ERROR

Appellant contends that the trial court erred in denying his suppression motion, because Appellant's right to counsel had attached at the time of questioning, and the State Police therefore could not secure a waiver and thereby proceed to questioning without counsel present.

However, Appellant was not in custody at the time of questioning, and was free to leave at any time. Because Appellant had neither been arrested nor arraigned on these charges, his right to counsel had not yet attached. Appellant did not at any time during questioning invoke his right to counsel, but voluntarily, knowingly, and intelligently waived his right to have an attorney present, after being given *Miranda* warnings. Consequently, the circuit court did not abuse its discretion in denying Appellant's motion to suppress his confession.

IV.

ARGUMENT

A. THIS COURT SHOULD REVISIT ITS OPINION IN *STATE v. BARROW* IN LIGHT OF THE DECISION OF THE UNITED STATES SUPREME COURT IN *MONTEJO v. LOUISIANA*.

In Syllabus Point 1 of *State v. Barrow*, 178 W. Va. 406, 359 S.E.2d 844 (1987), this Court held in relevant part:

If police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant's Sixth Amendment right to counsel.

In so holding, this Court expressly relied on the decision of the United States Supreme Court in *Michigan v. Jackson*, 475 U.S. 625, 636, 106 S. Ct. 1404, 1411, 89 L. Ed. 2d 631, 642 (1986), which held that “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.” 178 W. Va. at 409, 359 S.E.2d at 847. *See also State v. Crouch*, 178 W. Va. 221, 222-23, 358 S.E.2d 782, 783-84 (1987) (quoting *Jackson*).

However, as both Appellant and the circuit court have noted, *Michigan v. Jackson* was overruled by *Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079, 2091, 173 L. Ed. 2d 955 (2009), in which the Supreme Court found that the rule announced in *Jackson* had proven to be unworkable, and that its “marginal benefits” in suppressing coerced confessions were dwarfed by “its substantial costs to the truth-seeking process and the criminal justice system.” 129 S. Ct. at 2089-91. The Court noted that “even on *Jackson*’s own terms, it would be completely unjustified to presume that a defendant’s consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.” *Id.* at 2088.

The Court’s discussion of the jurisprudential background for its decision is informative:

It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all “critical” stages of the criminal proceedings. *United States v. Wade*, 388 U.S. 218, 227-228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Interrogation by the State is such a stage. *Massiah v. United States*, 377 U.S. 201, 204-205, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *see also United States v. Henry*, 447 U.S. 264, 274, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Patterson v. Illinois*, 487 U.S. 285, 292, n. 4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Brewer v. Williams*, 430 U.S. 387, 404, 97

S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. *Michigan v. Harvey*, 494 U.S. 344, 352-353, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment:

“As a general matter ... an accused who is admonished with the warnings prescribed by this Court in *Miranda* ... has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.” *Patterson, supra*, at 296, 108 S. Ct. 2389.

The only question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances. 475 U.S., at 630, 633, 106 S.Ct. 1404. We created such a presumption in *Jackson* by analogy to a similar prophylactic rule established to protect the Fifth Amendment based *Miranda* right to have counsel present at any custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), decided that once “an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,” unless he initiates the contact. *Id.*, at 484-485, 101 S.Ct. 1880.

The *Edwards* rule is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights,” *Harvey, supra*, at 350, 110 S.Ct. 1176. It does this by presuming his postassertion statements to be involuntary, “even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.” *McNeil v. Wisconsin*, 501 U.S. 171, 177, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). This prophylactic rule thus “protect[s] a suspect’s voluntary choice not to speak outside his lawyer’s presence.” *Texas v. Cobb*, 532 U.S. 162, 175, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (KENNEDY, J., concurring).

Jackson represented a “wholesale importation of the *Edwards* rule into the Sixth Amendment.” *Cobb, supra*, at 175, 121 S.Ct. 1335. The *Jackson* Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel “at every critical stage of the prosecution,” 475 U.S., at 633, 106 S.Ct. 1404, despite doubt that defendants “actually inten[d] their request for counsel to encompass representation during any further questioning,” *id.*, at 632-633, 106 S.Ct. 1404, because doubts must be

“resolved in favor of protecting the constitutional claim,” *id.*, at 633, 106 S.Ct. 1404. Citing *Edwards*, the Court held that any subsequent waiver would thus be “insufficient to justify police-initiated interrogation.” 475 U.S., at 635, 106 S.Ct. 1404. In other words, we presume such waivers involuntary “based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily” in subsequent interactions with police. *Harvey, supra*, at 350, 110 S.Ct. 1176.

Montejo, 129 S. Ct. at 2085-86.

The Court rejected the Louisiana Supreme Court’s interpretation of *Jackson* as requiring an initial “invocation” of the right to counsel in order to trigger the presumption, because it would not work in states which appoint counsel without a request from the defendant. *See Montejo* at 2083-85. It also found *Montejo*’s solution of eliminating the invocation requirement entirely to be untenable, because “*Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.” *Id.* at 2087.

Finally, the Court held that *Jackson*’s presumption was unnecessary given the constitutional protections already afforded by other decisions of the Court:

Under *Miranda*’s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U.S., at 474, 86 S.Ct. 1602. Under *Edwards*’ prophylactic protection of the *Miranda* right, once such a defendant “has invoked his right to have counsel present,” interrogation must stop. 451 U.S., at 484, 101 S.Ct. 1880. And under *Minnick [v. Mississippi]*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990)]’s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, “whether or not the accused has consulted with his attorney.” 498 U.S., at 153, 111 S.Ct. 486.

These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but “badgering” by later requests is prohibited. If that regime

suffices to protect the integrity of “a suspect’s voluntary choice not to speak outside his lawyer’s presence” before his arraignment, *Cobb*, 532 U.S., at 175, 121 S.Ct. 1335 (KENNEDY, J., concurring), it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

Montejo, 129 S. Ct. at 2089-90.

After the *Montejo* decision, the foundation for this Court’s decision in *State v. Barrow* no longer exists. Consequently, that opinion should now be revisited and possibly modified to the extent it conflicts with *Montejo*. Moreover, inasmuch as the *Barrow* decision overruled this Court’s previous ruling in *State v. Wyer*, 173 W. Va. 720, 320 S.E.2d 92 (1984), that opinion should also be revisited. In Syllabus Points 3 and 4 of *Wyer*, this Court held:

3. There is no per se rule against a waiver of the Sixth Amendment right to counsel. We do, however, hold that a waiver of the Sixth Amendment right to counsel should be judged by stricter standards than a waiver of the Fifth Amendment right to counsel. Furthermore, we do not equate a general request for counsel at the initial appearance before a magistrate as foreclosing in all cases the right of police officials to initiate a further discussion with the defendant to determine if he is willing to waive his Sixth Amendment right to counsel for purposes of procuring a confession.

4. Because of the higher standard against which the Sixth Amendment right-to-counsel waiver is measured, we hold that once the Sixth Amendment right to counsel has attached, it can only be waived by a written waiver signed by the defendant. It must also be shown at the time that the waiver is executed that the defendant was aware that he was under arrest and had been informed of the nature of the charge against him. These elements must be shown in addition to the customary *Miranda* warnings.

These holdings would now appear to be sound, in light of the *Montejo* decision.

Under *Montejo*, courts must no longer presume that a post-appointment confession arising from a police-initiated interrogation is invalid and inadmissible. As long as the defendant is given the warnings prescribed by *Miranda*, he has been sufficiently apprised of his Sixth Amendment rights to be able to knowingly and intelligently waive them without consulting with counsel.

B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION TO SUPPRESS HIS CONFESSION.

1. Standard of Review.

“When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court’s factual findings are reviewed for clear error.” Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Syl. Pt. 1, *State v. Smith*, 218 W. Va. 127, 624 S.E.2d 474 (2005).

“It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review.” Syllabus Point 2, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).

Syl. Pt. 2, *State v. Albright*, 209 W. Va. 53, 543 S.E.2d 334 (2000).

“‘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.’ Syl. Pt. 3, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).” Syl. Pt. 4, *State v. Moore*, 193 W. Va. 642, 457 S.E.2d 801 (1995).

Syl. Pt. 7, *State v. Messer*, 223 W. Va. 197, 672 S.E.2d 333 (2008).

2. Because Appellant Was Not Under Arrest on These Charges, His Right to Counsel Had Not Attached and He Was Free to Waive His Miranda Rights Without Counsel Being Present.

In *State v. Wyer, supra*, this Court held that “the Sixth Amendment right to counsel attached when the defendant was arrested, initially brought before the magistrate, and requested counsel.” 173 W. Va. at 729-30, 320 S.E.2d at 101. The Court reaffirmed this holding in *Barrow* when it held that “the initial presentment of a criminal defendant to a magistrate signals the initiation of adversary

criminal proceedings and this brings into play the Sixth Amendment right to the assistance of counsel.” 178 W. Va. at 410, 359 S.E.2d at 848.⁶

Appellant appears to concede that he did not expressly “assert” his right to counsel in this proceeding. He argues instead that “Appellant, while not verbalizing a ‘desire to obtain a lawyer’, nevertheless was seated next to his appointed attorney at the probation-violation hearing before Judge Swope.” (Appellant’s Brief at 4.) Thus, he asserts, “there is no essential distinction between his situation and that of Mr. Barrow, as to attachment of Sixth Amendment right to counsel.” (*Id.*) However, there is a significant difference between the two cases: Mr. Barrow had already been arrested and taken before a magistrate when he “indicated a desire to obtain a lawyer and made a telephone call to a local attorney.” *Barrow*, 178 W. Va. at 408, 359 S.E.2d at 846. This Court ruled that Mr. Barrow’s right to counsel had attached at that time, and that subsequent questioning by police was prohibited. *Id.* at 410, 359 S.E.2d at 848.

In the present case the Appellant, on advice of counsel, voluntarily went to the State Police detachment on March 27, 2009, to update his sex offender registration. While there, Appellant agreed to speak with Cpl. Long about his activities with the teenage girls. Because Appellant was not in custody but was free to leave at any time, *Miranda* warnings were not even required.⁷

⁶Syllabus Point 2 of *Barrow* provides: “An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to W. Va. Code, 62-1-5 [1965], and is, *inter alia*, informed pursuant to W. Va. Code, 62-1-6 [1965], of the complaint against him and of his right to counsel.” Syllabus Point 1, in part, *State v. Gravely*, 171 W. Va. 428, 299 S.E.2d 375 (1982).” *See also* Syl. Pt. 1, *State v. Bowyer*, 181 W. Va. 26, 380 S.E.2d 193 (1989) (“The Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against a defendant whether by way of formal charges, preliminary hearing, indictment, information, or arraignment.”).

⁷The Interview & Miranda Rights Form signed by Appellant stated: “You are not under arrest and are free to leave at any time.” (R. 81.)

However, Cpl. Long did explain Appellant's *Miranda* rights to him, and Appellant expressly waived them in writing before giving his recorded statement. At no time before or during questioning did Appellant ask for an attorney.⁸ It was not until March 30, 2009, that Appellant was arrested and brought before a magistrate. (R. 1, 6.) Even then, he did not request that counsel be appointed to represent him until four days later, on April 3, 2009. (R. 21.)

Although Mr. Mancini had been appointed to represent Appellant in a probation violation proceeding in another case, he was not appointed to represent Appellant on this sexual assault charge until April 3, 2009. (R. 19.) And while it is true that the subject matter of the two criminal proceedings was related, the probation violation was based merely upon Appellant being in the presence of two minor females. The subject upon which Cpl. Long asked to interview the Appellant involved sexual intercourse with one of the girls—an entirely separate criminal offense. Even under *Barrow*, the facts of this case do not support a finding that Appellant's right to counsel had attached on this charge at the time of questioning.

Moreover, this Court has recognized that the right to counsel may be waived where the defendant has not requested the assistance of counsel: “[W]e are aware that the United States Supreme Court held during its most recent term that a knowing and intelligent *Miranda* waiver will also waive the Sixth Amendment right to counsel after it has attached. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (U.S. 1988).” *State v. Moss*, 180 W. Va. 363, 374 n. 16,

⁸“A defendant, in order to assert his or her right to counsel during a police interrogation, must make some affirmative indication that he or she desires to speak with an attorney or wishes to have counsel appointed. Absent such an affirmative showing by the defendant, the right to counsel is deemed waived.” Syl. Pt. 1, *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996).

376 S.E.2d 569, 580 n.16 (1988). In the present case, Appellant did not request counsel prior to waiving his *Miranda* rights and giving his statement to Cpl. Long.

In its order denying Appellant's suppression motion, the circuit court found that Appellant's reliance on *Barrow* was misplaced, in light of the *Montejo* decision. The court further found:

- (6) Here, while the Defendant's counsel, Mr. Mancini, had been appointed and appeared representing the Defendant in a separate, probation revocation proceeding, no formal charges were pending for Sexual Assault-Third Degree, the alleged crime against S.K., at the time of the Defendant's March 27, 2009 statement.
- (7) At the July 29, 2009 Suppression Hearing, Corporal Long testified that he was unaware of the appointment of counsel in the probation revocation proceeding.
- (8) Further, his testimony as well as the March 27, 2009 Interview & Miranda Rights Form (State's Ex. 1) indicate that the Defendant was neither in constructive nor actual custody during his interview, and that he was free to leave at any time during the encounter.
- (9) As *State v. Hall*[, 174 W. Va. 599, 600, 328 S.E.2d 206, 208 (1985)] states above, and as the *Montejo* case indicates, a Defendant can waive his right to counsel, so long as the relinquishment of the right is voluntary, knowing, and intelligent.
- (10) The Court ***FINDS and CONCLUDES*** that the Defendant was not under arrest on March 27, 2009, at the time he provided Cpl. Long with his statement; that he was free to leave; and that the Defendant waived his Fifth Amendment and Sixth Amendment rights to counsel, at that time before providing the statement now sought to be suppressed regarding the Sexual Assault-Third Degree, after he was fully informed of his rights.
- (11) Accordingly, the Court ***FINDS and CONCLUDES*** that the State has proven by a preponderance of the evidence that the Defendant's statements were provided after he voluntarily, knowingly, and intelligently signed a waiver of his right to counsel regarding the criminal charge of Sexual Assault-Third Degree, which is a crime separate and distinct from probation violation matter for which Mr. Mancini was appointed for legal representation thereon.

- (12) Therefore, as in the *Montejo* case, the Sixth Amendment shall not provide a basis for suppression in this proceeding.

(R. 67-68.)

Appellant argues that the circuit court's distinction between Cpl. Long questioning Appellant about being in the company of S.K. and questioning him regarding having sex with her "is too formalistic" because to conclude that one could be suppressed while the other could not lacks common sense and affords no meaningful protection to Appellant. (Appellant's Brief at 7.) However, that is precisely what the correct result should be in this instance. Appellant's statement to Cpl. Long, taken in the absence of his appointed counsel in that matter, would be inadmissible in the probation violation proceeding. However, it should be admissible on this sexual assault charge where the right to counsel had not yet attached when the statement was made.

The State has found no reported decision of this Court in which *Barrow* has been applied to prohibit questioning of a defendant who is represented by counsel in a "related" but entirely separate criminal matter. Under the Petitioner's theory a defendant who already has an attorney, for whatever reason, can never be questioned by police about other crimes that he may have committed. The opinions of this Court do not support such a conclusion.

The circuit court's findings of fact were supported by the record, and the court did not abuse its discretion in denying Appellant's motion to suppress his confession on these grounds.

V.

CONCLUSION

WHEREFORE, based upon the foregoing, the judgment of the Circuit Court of Mercer County should be affirmed by this Honorable Court.

Respectfully submitted,

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Appellee,

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Charleston, West Virginia 25305
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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 served upon counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 11th day of June, 2010, addressed as follows:

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