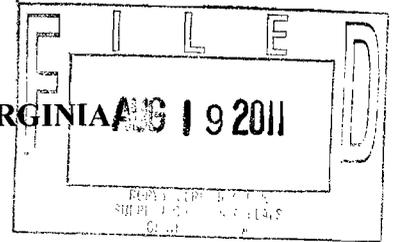


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA

PLAINTIFF/PETITIONER,

v.

CIVIL ACTION NO. 11-0555
(Indictment No. 10-F-2235)

MARCELLA LORENZA DUNBAR,

DEFENDANTS/RESPONDENTS.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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I. ASSIGNMENTS OF ERROR

- 1. It Was Error for the Circuit Court to Determine that a Missing Passenger-Side Mirror Constituted Sufficient Reasonable Suspicion to Stop the Vehicle in which the Petitioner was a Passenger**
- 2. It Was Error for the Circuit Court to Determine that a Police Officer Who is Not a Member of the Department of Public Safety Had the Authority to Stop a Vehicle for Allegedly Defective Equipment**

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this case is necessary pursuant to Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure as not all of the parties have waived oral argument. Furthermore, the Petitioner agrees with the Respondent that oral argument should be permitted because this case involves the exercise of discretion and narrow issues of law. Rev. R.A.P. 19(a).

Additionally, the Petitioner believes that the case is not appropriate for a memorandum decision as the legal issues, while narrow, affect a large number of individuals, namely every person who operates or owns a motor vehicle in this State.

III. ARGUMENT

1. **It Was Error for the Circuit Court to Determine that a Missing Passenger-Side Mirror Constituted Sufficient Reasonable Suspicion to Stop the Vehicle in which the Petitioner was a Passenger**

A. **Standard of Review**

As this case involves a legal determination regarding a suppression hearing, this Court's review is *de novo*. "On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Suppression determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard." Syl. Pt. 1, State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).

B. **A mistake of law cannot provide an objective basis for reasonable suspicion or probable cause to justify a traffic stop**

It appears that the parties agree on what is necessary in order to make a lawful traffic stop. See, Petitioner's Brief, p. 6, and Respondent's Brief, p. 7. "Police officers may stop a vehicle to investigate it if they have an articulable suspicion that the vehicle is subject to seizure or a person in the vehicle 'has committed, is committing, or is about to commit a crime.'" State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886, 889-890 (1994) (citing Berkener v. McCarty, 486 U.S. 420, 439 (1984)).

The Respondent goes to great lengths to demonstrate that vehicle stops based upon equipment violations have been held valid for purposes of the Fourth Amendment. See, Respondent's Brief, p. 7-8. However, the Respondent fails to address the fact that police officers making a stop for equipment violations based upon mistake of law cannot provide the objective basis for reasonable suspicion or probable cause. United States v. Chanthasouvat, 342 F.3d 1271 (11th Cir. 2003). The majority of the Circuit Courts that have considered this issue are in agreement that a stop is invalid when based on an officer's mistake of law. The United States District Court for the Eastern District of Virginia, in summarizing the law and examining this particular issue, stated as follows:

The majority of circuits to have considered the issue have held that a stop is invalid when it is based on an officer's mistake of law, even if that mistake is a reasonable one. See e.g. United States v. Chanthasouvat, 342 F.3d 1271 (11th Cir. 2003) ("[A] mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop."); accord United States v. McDonald, 453 F.3d 958, 960 (7th Cir. 2006); United States v. Tibbetts, 396 F.3d 1132, 1138 (10th Cir. 2005); United States v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000); United States v. Lopez-Valdez, 178 F.3d 282, 288 (5th Cir. 1999). The explanation given by the Seventh Circuit when it joined the majority view is instructive. In United States v. McDonald, 453 F.3d at 961-62, the Seventh Circuit held that:

Probable cause only exists when an officer has a "reasonable" belief that a law has been broken.... Law enforcement officials have a certain degree of leeway to conduct searches and seizures, but "the flip side of that leeway is that the legal justification must be objectively grounded". . . An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law.

It makes no difference that an officer holds an

understandable or "good faith" belief that a law has been broken. Whether the officer's conduct was reasonable under the circumstances is not the proper inquiry. . .Rather, "the correct question is whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable grounds for providing reasonable suspicion or probable cause." . . .The answer is that it cannot. A stop based on a subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable.

United States v. Davis, 692 F.Supp.2d 594, 600 (E.D. Va. 2010).

As highlighted above, a stop based on a subjective belief that a law has been broken, when no actual violation occurred, cannot possibly be objectively reasonable. Therefore, if no law made the alleged equipment violation illegal, the police officer could not have had an objectively reasonable basis for the stop, and the evidence obtained as a result of that stop should have been suppressed.

C. **A missing passenger-side mirror does not amount to a traffic violation, and therefore, the police officer did not have probable cause to stop the vehicle in which the Petitioner was traveling**

The police officer in this case did not have reasonable suspicion to stop the vehicle in which the Petitioner was a passenger because no equipment violation occurred. The primary statute regulating mirrors on motor vehicles in the State of West Virginia, West Virginia Code § 17C-15-35, states as follows:

Every motor vehicle that is so constructed or loaded as to obstruct

the driver's view to the rear thereof from the driver's position shall be equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle.

The Respondent readily agrees that this Code section "does not require that the vehicle [the Petitioner] was traveling in be equipped with a passenger-side mirror." See, Respondent's Brief, p. 9. However, the Respondent urges this Court to insert requirements into the statute that simply are not there. The Respondent requests that this Court rely on West Virginia Code § 17C-15-1(a) to find that a passenger-side mirror is required for all vehicles originally equipped with one. See, Respondent's Brief, p. 10. West Virginia Code § 17C-15-1(a) states as follows:

It is a misdemeanor for any person to drive or move or for the owner to cause or know to permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, or which is equipped in any manner in violation of this article, or for any person to do any act forbidden or fail to perform any act required under this article.

In support of its position that a passenger-side mirror was required in this case, the Respondent relies on the following language in West Virginia Code § 17C-15-1(a): "It is a misdemeanor for any person to drive...any vehicle...which does not contain those parts or is not at all times equipped with...other equipment in proper condition and adjustment." See, Respondent's Brief, p. 10. (citing language emphasized in Respondent's Brief). However, the Respondent ignores the remaining language in the portion of the statute it chose to rely on. When read more fully, the statute states that "It is a misdemeanor for any person to drive ... any vehicle ... which does not contain those parts or is not at all times equipped with other equipment

in proper condition and adjustment **as required in this article.**” (Emphasized language added by Petitioner). As the Respondent readily admitted, the Code section applying to mirrors, West Virginia Code § 17C-15-35, does not require that a vehicle be equipped with a passenger-side mirror. Furthermore, there is no other operative section that requires a vehicle to be equipped with a passenger-side mirror. Therefore, there is nothing “as required in this article” which mandates that vehicles have a passenger-side mirror, whether originally equipped with one or not.

The Respondent’s reliance on West Virginia Code § 17C-15-1(a) and this Court’s interpretation in Strick v. Cicchirillo, 224 W.Va. 240, 683 S.E.2d 575 (2009) is misplaced. While this Court in Strick did rely on West Virginia Code § 17C-15-1, which makes it a violation to have equipment that is not in proper condition as required in the article, this Court also relied on West Virginia Code § 17C-15-5(c) in determining that an improperly working tail lamp, when a car was designed to have more than one, was considered a violation. West Virginia Code § 17C-15-5(c) requires that: “Any tail lamp or tail lamps...shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.” The fact that there was a separate statutory section, West Virginia Code § 17C-15-5(c), which required all tail lamps to be working, satisfied the requirement in West Virginia Code § 17C-15-1(a) that all equipment “as required in this article” be in proper working condition. As this Court stated:

In detailing the wiring-related requirements applicable to tail lamps, the Legislature has provided “*any tail lamp or tail lamps, together with any separate lamp illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.*” W.Va. Code § 17C-15-5(c). (Emphasis supplied).

As the Division notes, the subject of this provision was written in

both the singular and the plural to address the alternative design possibility of vehicles having one or more tail lamps. Of significance to the Division is the requirement that those tail lamps are “to be lighted” in tandem with the use of head lights or auxiliary driving lamps. Id.

Strick, 683 S.E.2d at 578. Obviously, in this case, there is no similar statutory section which accounts for different design possibilities with respect to mirrors. The only requirement in West Virginia is that the driver have an unobstructed view to the rear **or** a mirror which gives a view of 200 feet to the rear of the vehicle. W.Va. Code § 17C-15-35. It is undisputed that the motor vehicle in which the Petitioner was traveling had both.

Essentially, the Respondent is requesting that this Court insert a requirement into the relevant statute that plainly is not there. Although this Court acknowledged in Strick that the vehicle equipment statutes were outdated, those statutes still have not been revised. Strick at 683 S.E.2d at 580. This Court should not be charged with updating motor vehicle equipment requirements.

Simply put, there is no statutory section which requires either multiple rear view mirrors or that all mirrors with which a vehicle is originally equipped be in proper working condition. And this Court should not find such a requirement. As this Court has held:

Moreover, when we interpret a statutory provision, this Court has bound to apply, and not construe, the enactments of plain language. We have held that “a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the Courts but will be given full force and effect.”

Taylor v. Nationwide Mut. Ins. Co., 214 W.Va. 324, 328, 589 S.E.2d 55, 59 (2003) (citing Syl. Pt. 2, State v. Epperley, 135 W.Va. 877, 65 S.E.2d 488 (1951)). As such, this Court should

refuse to adopt the Respondent's reading of the statute, and recognize that the only requirement is that a car have one rear view mirror or an unobstructed view.

Clearly, no statute requires a motor vehicle in the State of West Virginia to be equipped with a passenger-side mirror. As such, West Virginia Code § 17C-15-1 general requirements of having equipment in the proper working order is not applicable to passenger-side mirrors. Therefore, the police officer who stopped the vehicle in which the Petitioner was traveling was operating under a mistake of law and could not have possibly had an objectively reasonable suspicion that a crime was being committed. Therefore, the Petitioner's Motion to Suppress should have been granted.

2. It Was Error for the Circuit Court to Determine that a Police Officer Who is Not a Member of the Department of Public Safety Had the Authority to Stop a Vehicle for Allegedly Defective Equipment

Pursuant to West Virginia Code § 8-14-3, any member of a police force may only make any arrest which can be legally exercised or discharged by a Deputy Sheriff of a county. W.Va. Code § 8-14-3. Only employees of the Department of Public Safety, namely State Troopers, have the authority to stop vehicles for defective equipment. W.Va. Code § 17C-16-2. As the Huntington City Police Officer made the stop in this case did not have the authority to make such a stop pursuant to West Virginia Code § 17C-16-2, the stop was illegal, and any evidence obtained as a result of that stop should have been suppressed.

Simply put, there is no authority in the statute which permits a Huntington City police officer to stop a vehicle for defective equipment. The Respondent relies on West Virginia Code

§ 8-14-3 which provides, in pertinent part according to the Respondent, as follows:

[A]ny member of the police force or department or municipality...shall have all of the powers, authority, rights and privileges within the corporate limits of the municipality with regard to the arrested persons, the collection of claims, and the execution and return of any such warranty, warranty of arrest or other process, which can legally be exercised or discharged by a deputy sheriff of a county...

Respondent's Brief, p. 14 (emphasis omitted). What the Respondent asks this Court to disregard is that the powers, authority, rights and privileges which the members of the municipal police force have only pertain to "the arrest of persons, the collection of claims, and the execution and return of any search warrant, warranty of arrest or other process." As such, there is no authority for the Huntington City Police to pull over drivers for allegedly defective equipment.

IV. CONCLUSION

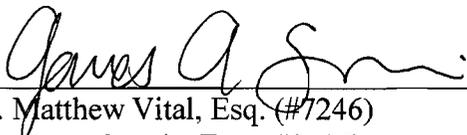
The parties agree that the sole reason for the vehicular stop which is at issue in this case was the allegedly defective equipment, specifically a missing passenger-side mirror. The parties also agree that West Virginia Code § 17C-5-35 does not require the vehicle be equipped with a passenger-side mirror. Furthermore, there is no other statutory section which requires that a vehicle be equipped with a passenger-side mirror, and the Respondent points to none.

Instead, the Respondent wants this Court to insert requirements into the statute that simply do not exist. It is true that both Strick and West Virginia Code § 17C-15-1(a) do indicate that it is a violation to have equipment that is not in proper condition as required by the article. However, unlike in Strick, there is no other requirement in the article that all mirrors that a vehicle was originally equipped with be in proper working condition. As such, the missing

passenger-side mirror is not considered defective equipment. The officer's mistake of law that he thought the missing passenger-side mirror was considered defective equipment is insufficient to create an objectively reasonable suspicion that a crime was being committed. As such, the stop was unlawful and the Petitioner's Motion to Suppress should have been granted.

As the Petitioner's Fourth Amendment rights were violated for being stopped and searched with no reasonable suspicion whatsoever, the Petitioner requests that this Court reverse the Circuit Court's ruling regarding the suppression of evidence and determine that all of the evidence which was obtained following the illegal stop must be suppressed due to the Fruit of the Poisonous Tree Doctrine.

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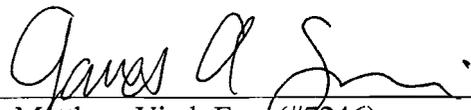
Petitioner/Defendant below.

CERTIFICATE OF SERVICE

The undersigned counsel for the Defendant hereby certifies that he has served a copy of the foregoing **PETITIONER'S REPLY TO RESPONDENT'S BRIEF** upon the following via U.S. Mail this 18th day of August, 2011.

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