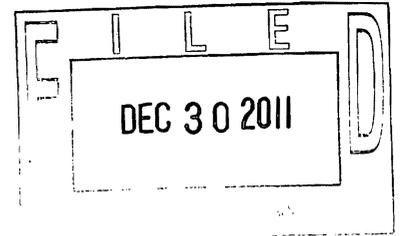


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1158



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

RAYMOND D'ARCO,

*Defendant Below,
Petitioner.*

SUMMARY RESPONSE TO PETITION FOR APPEAL

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SUMMARY RESPONSE TO PETITION FOR APPEAL

Comes now the State of West Virginia, by counsel, Jake Morgenstern, Assistant Attorney General, and files the within Summary Response to the Petition for Appeal.

I.

STATEMENT OF THE CASE

A. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.

On March 10, 2008, the Kanawha County Sheriff's Department obtained a search warrant, the execution of which led to the arrest and subsequent conviction of the Petitioner on one count of conspiracy, one count of operating a clandestine drug laboratory, and one count of possession of substances to be used as precursors. During the pretrial hearing on August 23, 2010, trial counsel for the Petitioner made a motion to suppress the evidence seized upon during the March 10, 2008 search warrant, arguing that there was a lack of probable cause to issue the search warrant. The Petitioner now appeals on the trial court's denial of his motion to suppress.

B. STATEMENT OF FACTS.

On March 10, 2008, Sgt E. S. Drennan of the Kanawha County Sheriff's Office presented an affidavit to Kanawha County Magistrate Julie M. Yeager, seeking the issuance of a search warrant for the residence of 514 Falcon Drive, Charleston, West Virginia. (App. at 3.) Magistrate Yeager authorized the issuance of the search warrant, which sought *inter alia* methamphetamine and methamphetamine manufacturing equipment, and any and all evidence associated with the crime of manufacturing and selling methamphetamine. (*Id.*)

In the five-page affidavit, Sgt. Drennan swore to many statements detailing an extensive investigation by the Kanawha County Sheriff's Department. To begin, the affidavit described four anonymous calls to the Kanawha County Sheriff's Office "Meth Tip Line." These callers provided statements describing the existence of a clandestine drug laboratory ("lab,") located at 514 Falcon Drive, Charleston, West Virginia), the location of this lab, whom they believed to be running the lab (namely, the Petitioner), whom they had observed coming in and out of the house, and whom they had observed supplying the lab with materials. (App. at 4-8.)

Specifically, the four calls were recorded in the affidavit as follows:

On 10/30/2007, an anonymous caller called the Kanawha County Sheriff's Office "Meth Tip Line" and stated that Raymond D'Arco was cooking methamphetamine underground in his basement.

On 11/6/2007, an anonymous caller called and the Kanawha County Sheriff's Office "Meth Tip Line" and stated that Raymond D'Arco ran when he knew police were coming and his sister lied to police. The caller stated that "they" brag about an underground methamphetamine lab that the police have not been able to locate.

On 1/11/2008, an anonymous caller called the Kanawha County Sheriff's Office "Meth Tip Line" and stated that Debbie Layton of Clover Drive in Charleston has been purchasing meth making materials for Raymond D'Arco. The caller advised that she had been purchasing iodine online and other products at Wal-Mart.

On 1/14/2008, an anonymous caller called the Kanawha County Sheriff's Office "Meth Tip Line" to report an underground meth lab at the residence of Raymond Darco. The caller stated that Toni Nelson is purchasing meth making products for him. The caller also stated that Debbie Layton purchasing meth making materials.

(Id. at 4.)

Several callers referred specifically to "a secret underground lab." The callers' descriptions of the lab were consistent with the surveillance that the sheriff's department conducted on the house suspected of functioning as a meth lab. Furthermore, the same people whom the callers said had been going in and out of the house were observed doing so by the sheriff's department. These individuals had criminal records relating to the possession of and intent to deliver methamphetamine.

(Id.)

The affidavit further detailed the purchases made, by several persons observed coming and going from the lab, of large quantities of pseudoephedrine pills from Wal-Mart. These purchases were individually documented in the affidavit. Specifically, the affidavit contained documentation of 34 different purchases in about a seven-month period. These purchases were made by individuals observed going in and out of the meth house. These purchases amounted to approximately 650 pills coming into this house in a seven-month period. *(Id.)*

Regarding the extensive pseudoephedrine pill purchases, Sgt. Drennan stated in the affidavit: "Based on your affiant's training and experience, individuals who manufacture methamphetamine or conspire with others to manufacture methamphetamine will often make multiple purchases of cold medication containing pseudoephedrine. Pseudoephedrine is one ingredient used to manufacture methamphetamine." *(Id.)*

The affidavit further detailed a number of cars coming and going from the meth house, several of which were registered to individuals documented to have purchased the aforementioned pseudoephedrine pills from various Wal-Marts in and around the area. (*Id.*)

Finally, the affidavit described the existence of at least one surveillance camera mounted on the residence. Regarding this surveillance camera, Sgt. Drennan stated in the affidavit: “Based on your affiant’s training and experience, individuals who manufacture methamphetamine or conspire with others to manufacture methamphetamine will often invest in these types of cameras in order to alert them to law enforcement coming to their residence.” (*Id.*)

Affiant Sgt. Drennan has been a member of the Kanawha County Sheriff’s Office for over ten years. During that time, Sgt. Drennan had investigated several hundred criminal cases and has received extensive in-service training, including clandestine laboratory training. It was based upon the contents of the affidavit and the totality of these aforementioned circumstances that lead Kanawha County Magistrate, Julie M. Yeager, to conclude that there was probable cause to believe a clandestine drug lab was operating in the house. (*Id.* at 3.)

The resulting search of the 514 Falcon Drive, Charleston, West Virginia resulted in the Kanawha County Sheriff Department’s discovery of the meth lab. Based upon the items seized during the search, a Kanawha County grand jury indicted the Petitioner and two other defendants on various drug related charges. (*Id.* at 9-12.) On August 23, 2010, the Circuit Court of Kanawha County began a joint trial of the Petitioner and a second defendant on three counts alleging conspiracy, operating a clandestine drug laboratory, and possession of substances to be used as precursors. (*Id.* at 8.)

During the pretrial hearing on August 23, 2010, trial counsel for the Petitioner made a motion to suppress the evidence seized upon during the March 10, 2008 search warrant, arguing that there was a lack of probable cause to issue the search warrant. (App. at 11.)

The circuit court held a hearing on the Petitioner's motion to suppress. As documented in the accompanying 59 page transcript of the motion to suppress, Sgt. Drennan, the affiant for the search warrant application, was questioned extensively by the Petitioner's trial counsel as well as the prosecuting attorney.

Of particular importance was the following exchange between the prosecution and Sgt. Drennan regarding the basis for seeking a search warrant for the meth house.

- Q. Is there anything about the nature of how he [the Petitioner] -- was or where he was manufacturing the methamphetamine that's similar in all the calls?
- A. Some of them referred to an underground meth lab, some the --
- Q. At that point did you go ahead and get a search warrant and go ahead and search the house?
- A. No, I didn't.
- Q. Why is that?
- A. Basically, I didn't think that was probable cause enough just to go out and run out and get a search warrant.
- Q. So did you do more investigation in furtherance of getting your search warrant?
- A. Yes, sir. We actually went to his house on one occasion to do what we call a knock and talk to see if Mr. D'Arco would talk to us. But we couldn't get anybody to come to the door.
- Q. Did you ever set up any kind of surveillance or what they call stake out, looking at the house, seeing who comes in and out, that sort of thing?
- A. Yes. Myself and Sergeant Meadows went out one day in an unmarked vehicle and noted different vehicles that were parked at the location.

Between that, and I work that area of the county. I drove by it in my personal cruiser several times and made note of who's vehicles were out there.

Q. Why would you do that?

A. Basically to corroborate some of the anonymous tips. We already had some names. If we could corroborate that these people were coming and going from the residence and that they were involved in meth activity, we could corroborate that some of these tips had some validity to them.

(App. at 57-58.)

At the conclusion of Sgt. Drennan's testimony, and after hearing the arguments of counsel, the trial court made the following record of its findings of fact and denied the Petitioner's motion to suppress.

THE COURT: All right. Well, your motion's denied. I believe there is probable cause and I believe that all in all, there was a lot of probable cause, frankly, over a several month period of time after four consistent unanimous-anonymous phone calls.

The same residence, the persons names coming and going and the tracking of the purchases of Suphedrine, the indications that several of the persons coming and going whose vehicles were -- came back registered to them were in previous arrests for methamphetamine laboratories.

There's just a whole lot of information here, actually, that was followed up on, followed up on indicating that there's the suspicion of a meth lab and I hear it day in day out.

Same set of facts leading up to these arrests. Frankly, the surveillance camera is huge and I order people on home confinement to remove those when I can remember to because I do not think persons need them at their homes and they're very typical in meth lab cases.

I hear it day in and day out, so all of the information here is something I hear on a routine basis as a Judge, frankly, on what police officers observed in these cases.

I think there is a lot of probable cause and I hold that the search warrant was properly issued bases on the uncontroverted testimony and the affidavit given to the magistrate.

(*Id.* at 58-59.)

After a four-day trial, the jury convicted the Petitioner and his co-defendant of all three counts. On November 22, 2010, the Petitioner was sentenced to be confined for no less than one year and no more than five years; no less than two and no more than ten years; and no less than two and no more than ten years - all to be served consecutively. (*Id.* at 13-15.)

The Petitioner now appeals on the trial court's motion to suppress.

II.

ARGUMENT

A. The trial court did not err in refusing to suppress evidence seized from the residence, because law enforcement had probable cause to seek and the magistrate had probable cause to issue a search warrant.

1. Standard of Review

This Court has previously explained in Syl. Pt one of *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996), as follows:

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.

Further,

In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

Syl. Pt. 2, *Lacy*, (*Id.*) We have also explained that "we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality

of the law enforcement action.” *State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995).

State v. Bookheimer, 221 W. Va. 720, 656 S.E.2d 471, 476 (2007).

2. Argument

The trial court did not err when it refused to suppress evidence seized from the residence, because law enforcement had probable cause to seek and the magistrate had probable cause to issue a search warrant.

As this Court has held, “[u]nder the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.” Syl. Pt. 4, *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986).

Further, in Syl. Pt. 1 of *State v. Stone*, 165 W. Va. 266, 268 S.E.2d 50 (1980), this Court stated that:

To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable.

In Syl. Pt. 7, *State v. Hlavacek*, 185 W. Va. 371, 407 S.E.2d 375 (1991), this Court held:

Independent police work may corroborate information contained in an affidavit for a search warrant. However, the details which are verified through further investigation must be both significant and specific in order to permit a judicial officer to impart some degree of reliability upon the confidential source of the information.

Finally, this court has detailed the amount of independent verification necessary in order to establish the reliability of confidential or anonymous informants:

A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. **Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers.**

Syl. Pt. 4, *State v. Lilly*, 194 W. Va. 595, 598, 461 S.E.2d 101, 104 (1995) (Emphasis added.)

The Petitioner alleges that the trial court erred when it refused to suppress evidence seized from the residence because law enforcement lacked probable cause to seek and the magistrate lacked probable cause to issue a search warrant. Specifically, the Petitioner alleges that the four anonymous calls failed to establish probable cause.

To begin, the State conceded that the four anonymous calls, by themselves, did not establish probable cause. As Sgt. Drennan stated at trial, "I didn't think that was probable cause enough just to go out and run out and get a search warrant." (App. at 20.) As required by this Court in *Stone*, Sgt. Drennan conducted an independent investigation to gather sufficient facts demonstrating the reliability of the anonymous telephone calls. The Kanawha County Sheriff Department's investigation, led by Sgt. Drennan, provided independent corroboration of the information contained in the affidavit for a search warrant. As documented above in the Respondent's "Statement of Facts," the Kanawha County Sheriff's Department observed multiple individuals, who had criminal records relating to the possession of and intent to deliver methamphetamine, coming and going from the residence. Further corroboration of the anonymous phone calls came when the Kanawha County Sheriff Department discovered several of these individuals had recently purchased at Wal-Mart substantial amounts of products directly related to the production of methamphetamine.

Further corroboration of the information provided in the anonymous phone calls came when Sgt. Drennan discovered the existence of a surveillance camera. Sgt. Drennan, an experienced police officer, elaborated on the significance of this detail, stating at trial that “when combined with other things,” such as the details set forth in the affidavit, this indicated the presence of a meth lab. (App. at 55.) As Magistrate Yeager observed at trial, “[f]rankly, the surveillance camera is huge.” (*Id.* at 59.) Finally, Sgt. Drennan had probable cause to believe that the Petitioner was living at the residence because “[t]he computer reports generated with the Sheriff’s Department listed it as his address.” (*Id.* at 25.)

The results of this investigation, as outlined above and as contained within the search warrant, were exactly the type of independent verification necessary to establish the reliability of the anonymous informants who described the existence of a meth lab at the residence. The details were verified through independent police investigation, containing details both “significant and specific” as required by this Court in *Hlavacek*. The Kanawha County Sheriff’s Department thus had “some degree of reliability upon the confidential source of the information.” Thus, the trial court did not err when it approved the search warrant, which ultimately led to the Petitioner’s arrest and conviction. Sgt. Drennan and the Kanawha County Sheriff’s Department should be commended for their outstanding investigatory work.

This Court has examined several occasions where police action based upon anonymous tips was unjustified. The case at bar is distinguishable from those cases. In *State v. Bookheimer*, 221 W. Va. 720, 656 S.E.2d 471 (2007), upon responding to one anonymous call of domestic dispute, where upon arrival of the police “neither resident . . . indicated a need for protection from the police,” this Court determined that the subsequent entry by police into the residence was improper. In *State v. Hlavacek*, 185 W. Va. 371, 407 S.E.2d 375 (1991), a police officer detained a suspect

based upon an anonymous tip that the suspect was engaged in drug trafficking. While the suspect was being detained, a police officer required the suspect empty his pockets. When the suspect complied, he pulled out three marijuana cigarettes from his pockets. This Court found such a search unconstitutional. The case at bar has multiple instances of independent corroboration by extensive police investigation, which were more than sufficient to establish probable cause. The aforementioned cases do not.

The Petitioner further alleges that “to the extent that Sgt. Drennan provided testimony at the hearing that was not within the four corners of the affidavit, and the Circuit Court is deemed to have relied upon such testimony in denying the motion to suppress, such reliance is improper.” This is a claim without merit, as an examination of the entire testimony, as well as the trial court’s finding of fact, shows that Sgt. Drennan did not offer testimony relied upon in the trial court’s denial of the Petitioner’s motion to suppress. The testimony given by Sgt. Drennan, including the lengthy cross-examination and multiple re-cross examinations made by the Petitioner’s trial counsel, merely allowed the well-trained and experienced police officer to elaborate on the totality of the circumstances detailed in the affidavit.

Finally, the Petitioner alleges the information contained in the affidavit is stale. The time between the first anonymous phone call (10/30/2007) and the resulting search, seizure, and arrest (March 10, 2008), was less than five months. In *State v. George*, 185 W. Va. 539, 546 (W. Va. 1991), the fact that police officers waited three months before seeking a search warrant did not raise a staleness issue in connection with information in the affidavit due to an ongoing investigation. The similarity of *George* to the case at bar is readily apparent. Here, the investigation was ongoing for approximately four months, and similarly in *George*, the investigation was ongoing for three months

before a search warrant was obtained. Given that this Court ruled for the State in *George*, the Court should rule the same for State in the instant case.

III.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court dismiss the petition and deny any and all relief requested by the Petitioner.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

By counsel,

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CERTIFICATE OF SERVICE

I, Jake Morgenstern, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "*SUMMARY RESPONSE TO PETITION FOR APPEAL*" was served upon the following by depositing the same, postage prepaid in the United States, on this the 30th day of December, 2011, addressed as follows:

To: John A. Carr, Esq.
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179 Summers Street, Ste. 209
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JACOB MORGENSTERN