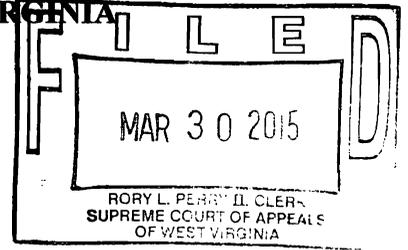


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0174



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Appeal from a final order
Of the Circuit Court of
Mercer County (13-F-330-OA)

JAMES EARL NOEL, JR.,

Defendant Below, Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

David L. White, Esquire
WV Bar No. 4006
Suite 314, The Peoples Bldg.
179 Summers Street
Charleston, WV 25301
(304) 437-3454
dlwhite01@suddenlink.net

Counsel for Appellant

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SUPPLEMENTAL ARGUMENT

While the United States Supreme Court's decision in Heien v. North Carolina, ____ U.S. ____, 134 S.Ct. 1872 (2014), ____ L.Ed.2d ____ (2014), at first blush appears to afford some solace to the position taken by the State of West Virginia in the matter at bar, upon careful examination the decision actually does little to ameliorate the violation of Mr. Noel's Fourth Amendment rights.

Certainly, the arresting officer's "mistake of law" in apparently believing that operating a motor vehicle with a cracked windshield afforded him probable cause for a traffic stop falls within the ambit of the decision in Heien, *supra*. The decision itself nonetheless cautions, however, that the issue must be examined within the context of the "totality of the circumstances," and thus an "objectively reasonable mistake of law" about a Fourth Amendment violation itself can *never* justify or excuse unconstitutional conduct.

Here, the officer's search of the vehicle's inner compartment (where he discovered contraband) for the stated reason of "officer safety" cannot be justified as an "objectively reasonable mistake of law" since at that very moment Mr. Noel was standing handcuffed nearby and was thus obviously unable to pose a threat to the officer or anyone else.

The officer's search can hardly be characterized as "objectively reasonable" in the totality of the circumstances. Thus, the Heien decision, should this Court choose to adopt its reasoning into the jurisprudence of this state, does not excuse the unconstitutional search and seizure which taints Mr. Noel's conviction.

The writer of the Blog “*Police State USA*” summarized the Heien decision in this fashion:

The Supreme Court struck another blow to the Bill of Rights with its 8-1 decision to expand police powers in situations where the police perform traffic stops based on imaginary laws. The *Heien v. North Carolina* decision held that an officer’s “reasonable mistake of law” can lead to an allowable search and arrest for contraband.

While some may believe that characterization of the decision is accurate, it actually overstates the impact of the opinion.

As is the case in the matter at bar, the justification for the traffic stop itself is not the end of the inquiry. While the officer’s “mistake of law” might excuse a stop which would otherwise violate the Fourth Amendment because of a lack of probable cause, the “totality of the circumstances” still must be examined to determine whether the subsequent search was justified.

Here, the officer’s claim of “officer safety” as a justification for a search of the vehicle’s closed, inner compartment cannot be justified under the “mistake of law” analysis. Certainly, that conduct could not be characterized as “objectively reasonable” under any scenario. The officers incredible “story” about Mr. Noel’s “gaze” and the like directing his attention to the contraband seriously undermines any claim of objective reasonableness.

While the “mistake of law” excuse may be invoked to avoid a finding that there was an absence of probable cause for the traffic stop of the vehicle Mr. Noel was driving at the outset, that claim cannot excuse the subsequent search and seizure which violated

Mr. Noel's Fourth Amendment Rights.

Again, as a practical matter, the rule Mr. Noel asks this court to apply is that a search cannot be justified on the basis of "officer safety" when "officer safety" is not really an issue as a factual matter. Here, there is no dispute that Mr. Noel was handcuffed with his hands behind his back and in complete control of the officer. The officer could have, had he wished, placed Mr. Noel in the backseat of his cruiser where he would obviously not be a threat to anyone. Nonetheless, it is respectfully submitted that the claim of officer safety is a mere ruse and should not be sanctioned by this Court to justify the search in this case.

The holding in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009), is controlling and disparities (my computer will not let me type "d i s p o s i t i v e" for some reason) here. Mr. Noel was simply not in a position to retrieve a firearm from the vehicle, or pose any threat to the officer here, even if he had wanted to. Again, the Gant rule is simple: Police may search a vehicle incident to an arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest.

Neither circumstance obtains in the matter at bar. Thus, the search was unlawful and the evidence should have been suppressed. Certainly, there is no suggestion that after the stop Mr. Noel engaged in any conduct whatsoever which could be construed as a threat to the officer's safety or wellbeing.

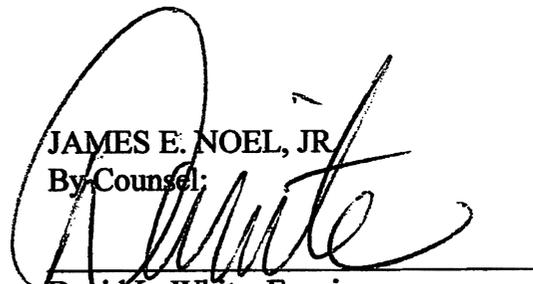
As heretofore pointed out, this Court has long recognized that "Searches

conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution, subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative.' Syllabus Point 1, State v. Moore, 165 W.Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by* State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991)." Syl. Pt. 20, State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001)."

CONCLUSION

Based upon the foregoing, or for reasons otherwise apparent to the Court, Petitioner prays that the Court will enter an Order directing that this case be remanded with directions to suppress the evidence and vacate his convictions.

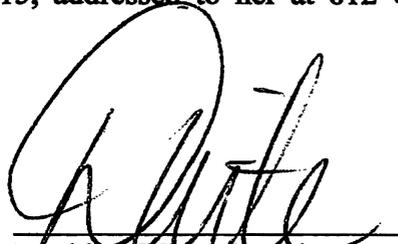
JAMES E. NOEL, JR.
By Counsel:



David L. White, Esquire
WV Bar No. 4006
Suite 314, The Peoples Bldg.
179 Summers Street
Charleston, WV 25301
(304) 437-3454
dlwhite01@suddenlink.net

CERTIFICATE OF SERVICE

I, David L. White, do hereby certify that I served true copies of the foregoing "Petitioner's Supplemental Brief" upon counsel for the Respondent, Julie A. Warren, Assistant Attorney General, by depositing said copies in the United States mail, first-class postage pre-paid, on this 30th day of March, 2015, addressed to her at 812 Quarrier Street, 6th Floor, Charleston, WV 25301.

A handwritten signature in black ink, appearing to read "D. White", written over a horizontal line.

David L. White, Esquire
WV Bar No. 4006
Suite 314, The Peoples Bldg.
179 Summers Street
Charleston, WV 25301
(304) 437-3454
dlwhite01@suddenlink.net