

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0174

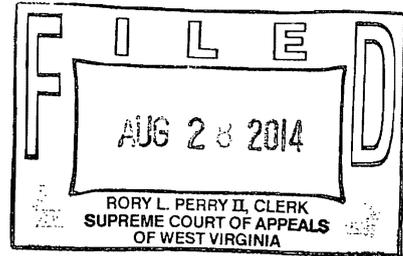
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JAMES EARL NOEL, JR.,

Defendant Below, Petitioner.



BRIEF ON BEHALF OF RESPONDENT

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Comes now the Respondent, by counsel, Julie A. Warren, Assistant Attorney General and files the within brief in response.

I. STATEMENT OF THE CASE

On October 13, 2013, James Earl Noel, Jr. (“the Petitioner”) was indicted by a Mercer County grand jury on 2 counts of Possession with Intent to Deliver a Schedule II Controlled Substance (Cocaine and Methamphetamine), and one count of Fleeing in a Vehicle in a Manner Showing a Reckless Indifference to the Safety of Others. App. vol. I at 4-5.

The Petitioner filed a pre-trial motion to suppress evidence related to what he alleged was the illegal search of his vehicle. App. Vol. II. At the suppression hearing, the arresting officer, Officer K.L. Adams of the Bluefield Police Department, testified that he first noticed the Petitioner’s vehicle when he pulled behind the vehicle and the Petitioner immediately pulled off and onto another roadway, which Officer Adams characterized as “suspicious activity,” but he did not follow the vehicle. *Id.* at 4-5. Officer Adams continued on his route and again noticed the Petitioner’s vehicle coming off another

road, which he found odd, since “the only way to get from the way he was at, to Highland Avenue, is to take a curvy road that goes across the top of a hill through a residential neighborhood in that area.” *Id.* at 5. Officer Adams observed that the Petitioner’s windshield “was cracked from one side completely to the other and several other cracks coming off that crack,” which prompted Officer Adams to initiate a traffic stop using his lights and siren, but the Petitioner sped off. *Id.* at 6, 32-33; App. vol. I at 32, App. vol. III at 72-74. After a chase ensued with the Petitioner’s vehicle travelling at a high rate of speed, and then the Petitioner pulled over and fled on foot.¹ App. vol. II at 6-7. Officer Adams then commanded the Petitioner to return to the vehicle, which he did, and Officer Adams noticed the Petitioner “was very nervous and appeared to be scared at the time.” *Id.* at 7.

Upon request, the Petitioner presented an identification card issued by the State of Ohio, but he did not have a driver’s license, and Officer Adams instructed the Petitioner to sit beside the vehicle while he ran a check that revealed the Petitioner’s license was revoked for numerous violations. *Id.* 7-8. Officer Adams questioned the Petitioner about why he had fled, to which the Petitioner responded that he was on his way to the house that he had ultimately stopped in front of. *Id.* at 8. The Petitioner claimed that the vehicle he was driving belonged to his girlfriend who lived in Beckley. *Id.* About this time the female occupant of the house came out and informed Officer Adams that she was familiar with the Petitioner, but that she did not really know him and did not know why he would be coming to her house. *Id.* According to Officer Adams, the Petitioner began

¹ At trial, Officer Adams testified that he attempted to pull the Petitioner over because the crack in the windshield that spanned the entire horizontal length of the windshield, with several cracks forming from the main crack. *Id.* at vol. III at 72. He explained that once he initiated his lights and siren, the Petitioner “accelerated his vehicle rapidly to leave the scene,” and turned onto Route 52 at a “dangerous rate of speed,” actually picking up speed on Officer Adams who was going 70-80 mph. *Id.* at 75. According to Officer Adams, the Petitioner drove at an excessive speed through high traffic, campus and residential areas, in order to avoid capture. *Id.* at 76.

to “distance himself from me,” and again “tried to actually leave the scene, tried to walk away again,” and had to be ordered back. *Id.* While he was speaking to the Petitioner, Officer Adams noticed that “he made gestures towards the front seat of the car, towards the console,” and Officer Adams asked “do you have something to hide in this vehicle?” and “why are you wanting to get in this vehicle?” *Id.* at 9. At this point Officer Adams restrained the Petitioner, but as he testified “I was standing right with him at the doorway of the car, and I leaned over and looked into the console of the vehicle on fear there could be weapon in the vehicle.” *Id.* Officer Adams went on to add that “[e]ven though I had restrained him and he had his hands behind his back at that time, I was still afraid there might be a weapon there, something that could do harm.” *Id.* He testified that “[a]fter I looked inside the console of the vehicle, I noticed the drugs sitting in the center of the console,” and so he then “immediately shut the console back,” put the Petitioner into the police cruiser and placed him under arrest for fleeing and possession of drugs. *Id.* at 9-10. Officer Adams was asked if there was anyone else on the scene to drive the vehicle away, and he responded that there was not. *Id.* at 10.

Upon placing the Petitioner under arrest, Officer Adams conducted an inventory search, since there was no one to drive the vehicle away and the Petitioner apparently never requested to make arrangements for the vehicle, thus it had to be towed from the scene. The purpose of vehicle inventories is to account for valuables that might go missing. *Id.* at 11-12, 17. Officer Adams compiled an inventory list of every item found in the vehicle, which included 28.75 grams of crack cocaine, 4.7 grams of powder cocaine, and 14.08 grams of methamphetamine, dentists straws used to crush and inhale drugs, and latex gloves. *Id.* at 11-13.

The Petitioner argued that Officer Adams did not have probable cause to initiate a stop of his vehicle because he had not done anything unlawful, and that the broken windshield was not sufficient to justify the stop, since the law requires that it obscure vision. *Id.* at 17. The Circuit Court asked the Petitioner’s counsel to explain why the Petitioner’s act of fleeing did not “bootstrap the stop” even if there was no probable cause to pull him over based on the broken windshield. *Id.* at 19. The Petitioner responded that he had “the right to take off,” because there was no probable cause to justify the stop, and thus he had “the right to resist an unlawful arrest . . . unlawful stop.” *Id.* at 20-21. In fact, the Petitioner argued that even if traffic laws were violated, including those that put the public at risk, so long as no one actually gets hurt then the fleeing is justified. *Id.* at 26-27. The Circuit Court held that the Petitioner negated whether probable cause existed based on the windshield when he fled police. *Id.* at 23.

As for the search of the vehicle, the Petitioner argued that there were technically two searches. *Id.* at 23. The justification offered for the first search of the console was “the fear of there being a weapon in the car, even though he [the Petitioner] was handcuffed.” *Id.* The Petitioner argued that because he was handcuffed on the side of the road, there was not a safety issue, “particularly when you’re going into the console,” and not laying out in plain view. *Id.* at 25. The Circuit Court summarized the evidence for the record, noting that the Petitioner was “handcuffed at the driver’s door with the driver’s door open, and he had him against the car and had him handcuffed, and he was concerned because of . . . the defendant’s actions, that he may be going for a weapon in the car.” *Id.* at 30. The Circuit Court further found that Officer Adams only briefly looked in the console and did not search any further. *Id.*

The second search was an inventory search, which the Petitioner argued was not an inventory search at all, since the vehicle was inventoried “on the side of the road on Cherry Street in the middle of an arrest.” *Id.* at 24. The Circuit Court asked Officer Adams to confirm that the vehicle was towed, and then concluded that “whether they inventoried it on the side of the road, or whether they inventoried it at the police station, is irrelevant to this Court.” *Id.* The Circuit Court held that it “believe[d] that the inventory search was certainly a right to do, and I don’t think there’s a law that says it has to be done at the police impoundment lot or on the side of the road or anywhere.” *Id.* at 30. The Circuit Court denied the Petitioner’s request to suppress the drug evidence, finding the evidence was “clearly admissible.” App. vol. III at 9, 10-53.

Prior to the opening statements, the Circuit Court placed the Petitioner under oath, and informed him of his rights to testify at trial. *Id.* at 40. The court made the following inquiry of the Petitioner:

Q. Mr. Noel, you understand that you have the right to testify if you want to testify. No one could prevent you from testifying. If you testify the state is going to have a right to cross-examine you.

You also have the right to not testify and if you don’t testify the Jury would be instructed about your right not to testify. Do you understand, sir?

A. Yes, sir.

Id.

Officer Adams testified at trial and described the Petitioner’s behavior once he returned back to his vehicle and after he initially attempted to flee on foot, as “extremely nervous . . . shaking, sweating, very scared.” *Id.* at 78. Officer Adams said that he got the impression the Petitioner “was trying to hide something,” and that he was “someone that is a safety issue; that you really need to

watch this person, something is going on here.” *Id.* at 79. He further described how the Petitioner was “[f]idgety with his hand movements, grabbing towards his pockets at lot times . . . like the flight or fight response that you see people have like they’re deciding what to do.” *Id.* Officer Adams explained how he ran a check on the Petitioner, then they both walked back to the Petitioner’s vehicle and he questioned Petitioner about what he was doing, etc., but the Petitioner became “impressively more nervous.” *Id.* at 79.

At one point, the Petitioner actually walked away and Officer Adams had to order him back to the vehicle. *Id.* at 80. While they were standing beside the opened driver’s side door of the vehicle, Officer Adams said that he “placed him in restraints because at that point I’d had enough,” and he did not believe he was in “a good situation” for either of them. *Id.* at 80. Officer Adams had the Petitioner stand beside the driver’s side door in restraints while he questioned him about the vehicle, and he kept “staring towards the interior, the front interior of the vehicle, the driver’s side.” *Id.* at 80, 108. When asked if he was trying to hide something, “he would look at the console in the car,” and was “leaning towards the interior of the vehicle.” *Id.* Officer Adams explained that “we’ve had officers with individuals in handcuffs that they’ve got out of the cuffs, they keep a cuff key on them, all these things that we’re trained -- you know, safety first,” and he was concerned that there might be a gun in the car. *Id.* The Petitioner was then separated from the vehicle a “mere distance,” and then Officer Adams “leaned inside” the vehicle, opened the console and saw “individual bags of narcotics.” *Id.* at 80-81. Specifically, he observed crack cocaine, crack powder, and methamphetamines contained in “large bags, large quantities in the one bag,” with bag containing smaller bags that had “already been set up for sale in smaller amounts.” *Id.* at 81. He also found a

digital scale for weighing the drugs that had powder residue on it. *Id.* Officer Adams clarified that when he found the drugs he was not searching the vehicle, but only opened the console “because he [the Petitioner] was staring at it,” and he feared it might, and actually expected that it would, contain a weapon. *Id.* He further stated that he thought the Petitioner possessed a weapon and “that might be why he was scared, why the chase happened, why everything was going on,” and that he did not want “to get caught with a gun.” *Id.*

After the State rested its case, the Circuit Court granted a recess to allow the Petitioner to discuss with his counsel whether he would testify at trial. *Id.* at 117-18. When the court reconvened, the Petitioner’s counsel represented to the court that the Petitioner would not be testifying. *Id.* at 118. The Petitioner was ultimately convicted on all three charges contained in the indictment. *Id.* at 148. The Petitioner moved for a new trial, wherein he argued that the Petitioner’s incriminating statement to Officer Adams should have been suppressed, even for the purpose of impeachment, since it had not been disclosed until just prior to trial.² App. vol. IV at 4. The Circuit Court refused the Petitioner’s argument on the grounds that Rule 12(d)(2) did not require said disclosure by the State, and because the State first learned of the statement at the same time the Petitioner did it could not have disclosed it the statement earlier. *Id.* at 8-9. The Petitioner was sentenced to consecutive sentences of 1 to 15 years for the cocaine charge, 1 to 5 for the methamphetamine charge, and 1 to 5 for Fleeing with Reckless Disregard. App. vol. IV at 34.

² Just prior to trial, both sides learned from Officer Adams for the first time that the Petitioner had asked him during transport “who ratted me out? How did you know to pull me over?” App. vol. III at 42. Because this information was not disclosed to the Petitioner in a timely fashion, the State was not permitted to use this statement as a part of its case-in-chief, but it could use the statement on cross-examination for the purpose of impeachment. *Id.* at 42-62.

The Petitioner appeals his conviction on the grounds that the Circuit Court erred by refusing to suppress the drug evidence, and that the Circuit Court failed to adequately advise the Petitioner concerning his rights to testify at trial. The Respondent addresses each the Petitioner's assignments of error forthwith.

II. SUMMARY OF THE ARGUMENT

The Circuit Court did not err by refusing to suppress the drug evidence. There was probable cause for Officer Adams to initiate a traffic stop to inform the Petitioner of the safety hazard caused by a severe break in his windshield. Moreover, when reviewing the facts in the light most favorable to the State, it is reasonable that Officer Adams would check the console for a weapon out of concern for his own safety. Moreover, because there was no one available to remove the vehicle from the scene, Officer Adams was justified in conducting an inventory search of the vehicle before it was lawfully impounded. Finally, the record is clear that the Circuit Court performed the necessary colloquy to insure the Petitioner understood he had a right to testify, as required by *State v. Neuman*, and that he knowingly and voluntarily waived said right after discussing the same with his counsel.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for a memorandum decision. Further, oral argument would appear to be unnecessary in this matter. The dispositive issue has been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. Motion to Suppress.

The standard of review of a circuit court's ruling on a motion to suppress is described by this Court:

The standard of review of a circuit court's ruling on a motion to suppress is now well defined in this State. *See State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994) (discussing at length the standard of review in a suppression determination). By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. *See State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886, 891 (1994). When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

State v. Lilly, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995) (footnotes omitted). The Court later added that, “[b]ecause 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.” *State v. Lacy*, 196 W. Va. 104, 109, 468 S.E.2d 719, 724 (1996).

1. Officer Adams had probable cause to initiate a traffic stop of the Petitioner's vehicle, as the damaged windshield presented a safety risk.

In *State v. Dunbar*, this Court referenced a Florida case interpreting a statute admittedly similar to W. Va. Code § 17C-16-2, wherein the Florida court held that a “cracked windshield violates the statutory scheme *only* if it renders the vehicle in such unsafe condition as to endanger persons or property.” 229 W. Va. 293, 299, 728 S.E.2d 539, 545 (2012), *citing Hilton v. State*, 961 So.2d 284 (Fla. 2007). The *Dunbar* Court also noted that the issues in the Florida case were similar, that being “whether the alleged defect was either (1) in *violation of state law*; or (2) rendered the vehicle in *such unsafe condition as to endanger persons or property*.” *Id.* The Court concluded that code provisions

“§§ 17C-15-1(a), 17C-15-35, 17C-16-1, and 17C-16-2(a) must be read in conjunction with one another,” and therefore, “[a] traffic stop for defective equipment must be premised upon a defect in equipment that is required under West Virginia law.” *Id.* In *Dunbar*, the Court concluded the stop was illegal because W. Va. Code § 17C-15-1(a) does not require a passenger side mirror or “that all mirrors with which a vehicle is originally equipped be maintained in working order.”

However, West Virginia law expressly forbids obstructions of a windshield on a vehicle, a point the Petitioner’s counsel conceded during the suppression hearing. App. Vol. II at 18. Pursuant to W. Va. Code § 17C-15-36, which sets forth the mandate that “[w]indshields must be unobstructed and equipped with wipers,” with § 17C-15-36(a) stating as follows:

No person shall drive any motor vehicle with any sign, poster, or other nontransparent material upon the front windshield, side wings, or side or rear windows of such vehicle which obstructs the driver’s clear view of the highway or any intersecting highway.

As required in *Dunbar*, when W. Va. Code § 17C-15-36 must be applied in conjunction with § 17C-15-1(a), § 17C-16-1, and §17C-16-2(a). W. Va. Code § 17C-15-1(a) provides:

It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly 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.

W. Va. Code § 17C-16-1 provides:

No person shall drive or move on any highway any motor vehicle, trailer, semitrailer, or pole trailer, or any combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this chapter and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon any highway.

W.Va. Code §17C-16-2(a) provides:

The department of public safety may at any time upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of such vehicle to stop and submit such vehicle to an inspection and such test with reference thereto as may be appropriate.

W.Va. Code §17C-16-2(c) provides:

In the event such vehicle is found to be in unsafe condition or any required part or equipment is not present or is not in proper repair and adjustment the officer shall give a written notice to the driver and shall send a copy to the department. Said notice shall require that such vehicle be placed in safe condition and its equipment in proper repair and adjustment specifying the particulars with reference thereto and that a certificate of inspection and approval be obtained within five days.

It is clear that the West Virginia Legislature intended for a windshield to be maintained without any obstruction to the driver's vision, and thus the Petitioner's severely broken windshield was a defect that was in violation of the safety standards required under West Virginia law. Here there is no question that the Petitioner's vehicle had a severe crack in the windshield that extended the full length of the glass. Not only did this create an obstruction to the Petitioner's vision of the road, but it was also a significant public safety risk due to the threat of the glass shattering while he travelled on the roadway. Therefore, Officer Adams was within the purview of his authority to stop the Petitioner's vehicle once he noticed its severely broken windshield, in order to bring the safety issue to the Petitioner's attention and require that the same be fixed.

In addition to the probable cause stemming from the severely broken windshield, the Petitioner's act of fleeing Officer Adams, and fleeing in such a reckless manner as to jeopardize the public's safety, created a clear justification for the stop, as there exists "a legitimate state interest in the . . . the safety of the public necessitated the stopping of the erratically driven vehicle." *State v. Flint*, 171 W. Va. 676, 681 301 S.E.2d 765, 770 (1983). The fact that the Petitioner fled from Officer

Adams at an excessive rate of speed through residential and high traffic areas, created further probable cause to stop the Petitioner's vehicle because there was a legitimate state interest in protecting the public from the danger caused by the Petitioner's reckless driving.

2. Officer Adams had a legitimate fear that his safety was at risk, thus justifying his act of opening the console of the Petitioner's car.

In *Flint*, the Court held that “[o]nce the vehicle is lawfully stopped for a legitimate state interest, probable cause may arise to believe the vehicle is carrying weapons, contraband or evidence of the commission of a crime, and if exigent circumstances are present, a warrantless search may be made.” *Id.* The Court clarified what constitutes probable cause, stating that “[a] furtive gesture on the part of the occupant of a vehicle is ordinarily insufficient to constitute probable cause to search a vehicle if it is not coupled with other reliable causative facts to connect the gesture to the probable presence of contraband or incriminating evidence.” *Id.* The Court concluded in *Flint* that “furtive gestures upon the appellant’s part were not the sole reasons why the officer searched under the front seat,” but were also “coupled with the officer’s knowledge that the appellant was wanted in West Virginia for an unlawful killing with a gun, and that these “reliable causative facts established probable cause to believe that a weapon or evidence of the commission of a crime was placed beneath the front seat.” *Id.* (internal quotations omitted). In the present case, the Petitioner’s gestures and fixation on the console were coupled with the knowledge that the Petitioner was operating the vehicle without a valid license, as well as the fact that he had attempted to flee from Officer Adams in a reckless manner, and then twice attempted to flee on foot.

The Petitioner relies upon the U.S. Supreme Court’s decision in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009) to support his argument that Officer Adams was not justified in opening

his vehicle's console. Although the Supreme Court found the search at issue in *Gant* to be invalid, the facts in that case are readily distinguishable from the facts presented here. In *Gant*, the "Respondent [] was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket." *Id.*, 556 U.S. at 332, 129 S.Ct. at 1712. The Court further noted that there was not just one officer involved, but "five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began," and that "Gant clearly could not have accessed his car at the time of the search." *Id.*, 556 U.S. at 333, 129 S.Ct. at 1713. Here, Officer Adams was without any back up, and the Petitioner was only handcuffed after he gestured, leaned toward, and fixated on the vehicle's console. Moreover, the Petitioner was still standing right beside the opened driver's door when Officer Adams quickly opened the vehicle's console to make sure that the Petitioner was not attempting to access a weapon.

Although factually distinguishable, the holding in *Gant* actually applies to support Officer Adams initial check of the console, where the Court held that "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.*, 556 U.S. at 339, 129 S.Ct. at 1716 (citations omitted). Here, the Petitioner was standing right beside the driver's door and in close proximity to the console, and although he was restrained, Officer Adams testified of instances where restrained individuals were found to possess handcuff keys. These facts, coupled with the Petitioner's keen interest in accessing the console of the vehicle, created a reasonable concern for his safety. Thus, Officer Adams was justified in taking steps to secure his own safety by making sure there was not a

weapon in the console. Moreover, the totality of the circumstances, i.e. the fact that the Petitioner initially fled from Officer Adams at a high rate of speed in when he attempted to execute a traffic stop of his vehicle, and then attempted to flee on foot, coupled with the Petitioner's nervous demeanor and suspicious fixation with the vehicle's console, made it reasonable for Officer Adams to believe evidence relevant to the crime of arrest might be found in the vehicle.

The admission of the drugs into evidence at trial was not error given the propriety of the initial search that lead to the discovery of the drugs, and therefore, the Petitioner's argument relevant to the inventory search is rendered powerless in terms of establishing reversible error. However, as discussed *infra*, the inventory search was lawful, and standing alone, justifies the trial court's refusal to suppress the drug evidence at trial.

3. The inventory search of the Petitioner's car was lawful.

Even if this Court determines that Officer Adams initial act of opening the console constituted an illegal search, the drugs were still admissible since they were discovered during a lawful inventory search of the vehicle. *See Murray v. United States*, 487 U.S. 533, 539-540 (1988) (evidence recovered during a legal search will not be excluded at trial even if it was first discovered during an illegal search if the illegal search played no role in its recovery).

“The right to an inventory search begins at the point where the police have a lawful right to impound the vehicle.” Syl. Pt. 1, *State v. Goff*, 166 W.Va. 47, 272 S.E.2d 457 (1980). “An inventory search is not proper when there is no showing that the police saw any items of personal property in the interior of the vehicle, which would warrant the initiation of an inventory search.” *Id.* at Syl. Pt. 2. In reliance upon the Supreme Court's opinion in *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct.

3092 (1976), the West Virginia Supreme Court held that the “predicate for such a search does not arise because the police suspect the vehicle contains contraband or evidence of a crime, but instead are justified by such “practical considerations,” such as “(1) the protection of the owner’s property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property; and (3) the protection of the police from potential danger.” *Id.*, 166 W. Va. at 48-49, 272 S.E.2d at 459. Moreover, the Court found that the following conditions, while not considered by the U.S. Supreme Court in *Opperman* to be “integral” under the Fourteenth Amendment, were necessary under Article III, Section 6 of the West Virginia Constitution:

(1) there was an initial lawful impoundment of the vehicle; (2) the driver was not present at the time of the impoundment to make other arrangements for the safekeeping of his belongings; (3) the inventory itself was prompted by a number of valuables in plain view inside the car; and (4) there was no suggestion that the inventory search was a pretext for conducting an investigative search.

Id., 166 W. Va. at 49-50, 272 S.E.2d at 460.

At the suppression hearing, the Petitioner attacked the inventory search solely on the basis that the search took place along the side of the road, rather than an impoundment lot, and that there was not an inventory for the inventory search.

First, the Respondent has found no authority requiring the inventory search take place after the vehicle has been towed away and impounded by law enforcement. Here, the inventory search took place at the scene of the Petitioner’s arrest, prior to towing the vehicle to police impoundment, but the vehicle was lawfully towed and impounded as required by Goff. Second, the Petitioner’s argument that there was no inventory was addressed by the court’s order directing Officer Adams to produce the inventory list, but which the Petitioner failed to include in the Appendix.

The record reveals that the Petitioner was present during the inventory search, and that the vehicle belonged to a girlfriend who resided in Beckley, so the Petitioner was alone with no one to drive the vehicle away. At the suppression hearing, the Petitioner failed to illicit any testimony from Officer Adams concerning what other valuables would have been in plain view inside the vehicle, and again, the court ordered Officer Adams to produce a copy of the inventory list to both parties, there is no indication that Officer Adams failed to comply, and yet the Petitioner failed to include this list in his Appendix. Therefore, since the facts have to be construed in the light most favorable to the Petitioner, and there is no indication that there were no valuables in plain view, it must be assumed that there were other valuables inside the vehicle to warrant the inventory search, and that the inventory search was not a pretext for conducting an investigative search.

B. The Circuit Court properly informed the Petitioner of his right to testify.

The Petitioner claims the Circuit Court failed to “adequately advise” him of his right to testify on his own behalf, pursuant to *State v. Neuman*. However, the record clearly reflects that the Circuit Court informed him of said right, and that he knowingly and voluntarily waived his right after discussing the same with his legal counsel.

In Syl. Pt. 7, *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988) this Court held:

A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

Here, the Circuit Court's colloquy comported with all of the requirements set forth in *State v. Neuman*. The court placed the Petitioner under oath outside the presence of the jury, and then proceeded to apprise him of his right to testify on his own behalf, and that he also had the right not to testify, but if he chose to testify he will be subject to cross-examination. The Petitioner was also informed that the jury would be instructed as to the Petitioner's right not to testify if he chose to exercise this right. The Circuit Court specifically asked if he understood his rights, to which he responded "yes, sir." App. vol. III at 40. Moreover, the record shows that after the State rested its case-in-chief, the Circuit Court recessed to provide the Petitioner with an opportunity to further discuss the exercise of his right to testify, after which the Petitioner's counsel informed the Circuit Court that the Petitioner had decided to waive said right. The fact that he expressed his desire to waive via his legal counsel, and did not himself make the verbal representation is inconsequential.³

The fact that there existed a statement the Petitioner made to Officer Adams that the court deemed to be fair game for the purpose of impeachment on cross-examination, does not undermine the validity of the *Neuman* colloquy issued by the Court. It's almost a foregone conclusion in criminal trials that there will be evidence that may be used for the purposes of impeaching a defendant, and this impeachment evidence is taken into account by the defendant and his/her counsel when deciding strategically whether he/she should exercise the right to testify or the right against self-

³ *State v. Pullin*, 216 W.Va. 231, 605 S.E.2d 803 (2004) is not analogous and does not support the Petitioner's argument that a proper waiver of his right to testify cannot be secure through his defense counsel. *Pullin* involved language contained in a verdict form that purported to waive the defendant's right to a presumption of evidence, which the State argued was waived because defense counsel noted no objection to the language. The case at bar does not involve a waiver by failure of counsel to object. The Petitioner discussed his right to testify with the Circuit Court and affirmed he understood his rights. His counsel made an affirmative representation to the Circuit Court that the Petitioner would not testify, and he made said representation in presence of the Petitioner, and after discussing the same with the Petitioner.

incrimination. The fact that there existed impeachment evidence in the form of the Petitioner's incriminating statement is irrelevant when reviewing the propriety of the Circuit Court's colloquy to the Petitioner concerning his right to testify.

Moreover, even if this Court were to find that the Circuit Court's colloquy informing the Petitioner of his rights to testify or not to testify was somehow deficient, the deficiency should be considered nothing more than harmless error. As this Court held in *State v. Salmons*,

A violation of *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988), is subject to a harmless error analysis. A rebuttable presumption exists that a defendant represented by legal counsel has been informed of the constitutional right to testify. When a defendant is represented by legal counsel, a *Neuman* violation is harmless error in the absence of evidence that a defendant's legal counsel failed to inform him/ of the right to testify, or that the defendant was coerced or misled into giving up the right to testify. When a defendant represents him/self at trial, a *Neuman* violation is harmless error where it is shown that the defendant was in fact aware of his/her right to testify and that the defendant was not coerced or misled into giving up the right to testify.

Syl. Pt. 15, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998).

The Petitioner was represented by counsel at trial, and in fact, he was represented by the same counsel who is representing him on appeal. Furthermore, the record shows that the Petitioner's counsel requested a recess after the State rested its case in chief, so that he might discuss with the Petitioner whether or not he wished to testify on his behalf. When the court reconvened the Petitioner's counsel informed the court, with the Petitioner present, that he did not wish to testify. Thus, even if the Court finds the Circuit Court's *Neuman* colloquy to the Petitioner to be lacking, it would not warrant the reversal of the Petitioner's conviction since it amounted to nothing more than harmless error.

V. CONCLUSION

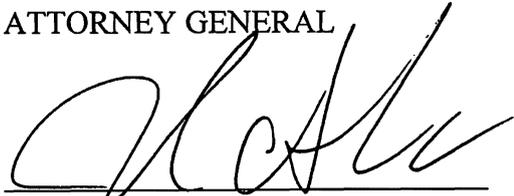
Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests that the order of the Circuit Court of Mercer County, denying the petitioner's motion to suppress be affirmed, and further that his the guilty verdict rendered by the Mercer County jury, likewise be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL

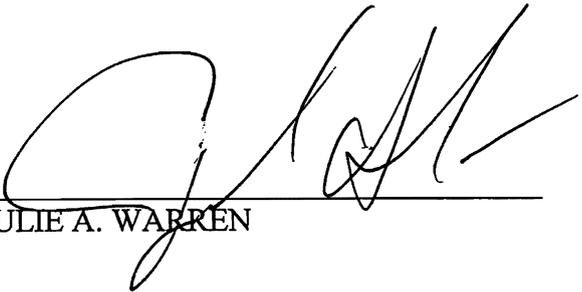


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CERTIFICATE OF SERVICE

I, JULIE A. WARREN, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF RESPONDENT* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 28th day of August, 2014, addressed as follows:

David L. White, Esq.
179 Summers Street, Suite 314
Charleston, WV 25301



JULIE A. WARREN