FILED
JUL 13 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0112

STATE OF WEST VIRGINIA,
Plaintiff Below,

Respondent

v.

MATTHEW FEICHT,
Defendant Below,

Petitioner

Appeal from a Final Order
of the Circuit Court of
Monongalia County
(14-M-AP-11)

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I. PETITIONER DID NOT WAIVE HIS HEARSAY OBJECTION AT THE MOTION HEARING OF JANUARY 27, 2014 – HIS CROSS-EXAMINATION WAS AN ATTEMPT TO DESTROY THE PROBATIVE VALUE OF OZIEMBLOWSKY'S TESTIMONY.

1. "Where a party objects to incompetent evidence, but subsequently introduces the same evidence, he is deemed to have waived his objection. However, one does not waive an objection otherwise sound and seasonably made by attempting to explain or destroy the probative value of the evidence on cross-examination." Syl. Pt. 2, *State v. Knuckles*, 196 W. Va. 416, 473 S.E.2d 131 (1996), *citing* Syl. Pt. 3, *State v. Smith,* 178 W.Va. 104, 358 S.E.2d 188 (1987).

2. Relying only on the first sentence of Syl. Pt. 3 of *Smith*, Respondent claims that Petitioner waived his hearsay objection at the motion hearing of January 27, 2014 when he cross-examined Oziemblowsky regarding the reason for the subject traffic stop. This is incorrect – Petitioner's cross-examination was necessary to undermine the probative value of Oziemblowsky's testimony.

3. Oziemblowsky testified that the police were looking for a white male subject wearing a black sweatshirt and gray pants (A.R. 47), and that McRobie had performed a traffic stop on an individual wearing a black sweatshirt and gray pants. (A.R. 49) Over Petitioner's objection, Oziemblowsky continued, stating again that McRobie stopped a vehicle with a driver wearing a black sweatshirt. (A.R. 51) The obvious purpose of this testimony was to show that Petitioner was stopped because he matched the physical description of the suspect.

4. With the improper admission of this testimony (a matter now conceded by the State), Petitioner was not required to stand silent, but was entitled – and indeed had a duty to his client – to destroy the credibility of the witness on cross-examination.

5. Accordingly, Petitioner cross-examined Oziemblowsky, who admitted that the *entire reason that McRobie stopped Petitioner's vehicle* was to ask him if he had seen any pedestrians in the area. (A.R. 53) This admission was not an offensive introduction of evidence – it was defensive, elicited by Petitioner to destroy the probative value of Oziemblowsky's testimony regarding the reason for the stop.

6. This does not constitute a waiver of Petitioner's hearsay objection. Such cross-examination is expressly permitted, and was necessary to undermine Oziemblowsky's assertions regarding the traffic stop.

7. Petitioner adds that the State, having failed without explanation to produce McRobie at the motion hearing, must now bear the consequences of that failure, and should not be permitted to advance specious arguments in support of its position.

II. RESPONDENT IS BARRED FROM ARGUING THAT THE STOP WAS LAWFUL UNDER THE COMMUNITY CARETAKER DOCTRINE – IT IS A NON-JURISDICTIONAL ARGUMENT, OUTSIDE OF THE RECORD, BEING MADE FOR THE FIRST TIME ON APPEAL.

1. This Court has held that "[o]ur general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered." *Noble v. W. Virginia Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009), *citing Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999).

2. Historically, this Court has refused to consider matters not first presented to the trial court. "Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal." *Proudfoot v. Proudfoot*, 214 W. Va. 841, 845, 591 S.E.2d 767, 771 (2003), *citing Mayhew v. Mayhew,* 205 W.Va. 490, 506, 519 S.E.2d 188, 204 (1999). Further, "The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record." Syl. Pt. 2, *State v. Bosley*, 159 W. Va. 67, 67, 218 S.E.2d 894, 895 (1975). *See also* Syl. Pt. 2, *Crain v. Lightner,* 178 W.Va. 765, 364 S.E.2d 778 (1987) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."), *citing* Syl. Pt. 2, *Sands v. Security Trust Co.,* 143 W.Va. 522, 102 S.E.2d 733 (1958) *and* Syl. Pt. 2, *Duquesne Light Co. v. State Tax Dept.,* 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert. denied,* 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985).

3. The record of the motion hearing of January 27, 2014 is clear – the State did not raise the community caretaker doctrine at any point in that proceeding. The first time the State raised the argument was in its Brief before this Court, and as such, it may not be considered – it is a nonjurisdictional question, outside of the record, raised for the first time on appeal.

III. EVEN IF RESPONDENT MAY ARGUE THE COMMUNITY CARETAKER DOCTRINE, SUCH EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT APPLY – THE RECORD DOES NOT SUPPORT RESPONDENT'S CLAIM THAT THE PERSON THE POLICE WERE LOOKING FOR WAS A DANGER TO PETITIONER OR THE PUBLIC AT LARGE.

1. The "community caretaker" doctrine is a widely recognized exception to the general warrant requirement of the Fourth Amendment of the United States

Constitution. The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance. *Ullom v. Miller*, 227 W. Va. 1, 10, 705 S.E.2d 111, 120 (2010).

2. In adopting the community caretaker doctrine, the Court has held that:

> " . . . the role of law enforcement personnel is not limited to merely to the detection and prevention of criminal activity, but also encompasses a non-investigatory, non-criminal role of police officers to help to ensure the safety and welfare of our citizens. In recognizing this doctrine, however, we are mindful of the important protections of the Fourth Amendment and Article III, Section 6, relating to searches and seizures. In order to balance the caretaking role of police officers with the fundamental protections against unreasonable searches and seizures found in the United States Constitution and the Constitution of West Virginia, we believe it necessary to establish specific requirements for applicability of the community caretaker exception to ensure that the privacy expectations of West Virginia's citizens are balanced with the immediate safety and welfare needs of motorists or the public in situations where the immediate safety and welfare of citizens is reasonably at issue."

Ullom, at 12.

3. In *Ullom*, the issue centered on a motorist who parked her vehicle on the side of the road with its parking lights on at dusk. A State Police trooper, who was in the area on routine patrol, spotted the motorist and stopped his cruiser to initiate a road safety check, following which the driver was arrested and charged with driving under the influence of alcohol. The Court held that the stop was a warrantless seizure, but also held that the seizure was permissible under the community caretaker doctrine, since the trooper sensed "that something might be wrong", and since there were objective,

specific, articulable facts that led the trooper to believe that the occupant of the vehicle was in need of emergency aid. *Id, at* 13.

4. No such facts exist in this case. Despite Respondent's extravagant and exaggerated assertions that a "potentially dangerous suspect was on the loose", and that the "community at large was at risk" of an "individual . . . potentially looking to commandeer a car, a house, or other shelter looking to avoid detection", the record of the motion hearing is devoid of any such evidence. Oziemblowsky's only testimony on the issue was that there was a "physical domestic dispute", and that the male suspect had left the area on foot. (AR 45-47) There is accordingly no basis to apply the community caretaker doctrine.

5. It also bears emphasis that the facts of this case are far different than those in *Ullom*. In *Ullom*, the officer relied on specific, articulable facts to support his belief that the driver of the vehicle was in need of emergency aid -- no such evidence was presented at the motion hearing in this case. Petitioner had a reasonable expectation of privacy in his vehicle on the night in question, and in the absence of any evidence that Petitioner's immediate safety and welfare was at issue, the community caretaker exception to the warrant requirement does not apply.

IV. RESPONDENT'S ARGUMENT THAT THE LOWER COURT USED THE WRONG ANALYSIS BUT REACHED A PROPER CONCLUSION HAS NO SUPPORT IN FACT OR IN LAW.

1. Respondent cites Syl. Pt. 3 of *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965), in support of its proposition that the Circuit Court reached the proper conclusion (that Petitioner's traffic stop was valid), despite the fact that it did not consider an alleged waiver of Petitioner's hearsay objection or the public safety doctrine

in reaching its conclusion. In essence, Respondent argues that even though the Circuit Court used the wrong analysis, it reached the right conclusion.

2. Syl. Pt. 3 of *Barnett* states that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on *any legal ground disclosed by the record*, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." *Id*, at 246. (Emphasis added.)

3. As detailed above, a review of the record of the January 27, 2014 motion hearing shows that there is no basis in fact or in law to claim the Petitioner waived his hearsay objection, or for the application of the public safety doctrine. Moreover, Respondent raises these arguments for the first time in this appeal. *Barnett* accordingly has no application, and Respondent's argument fails.

CONCLUSION

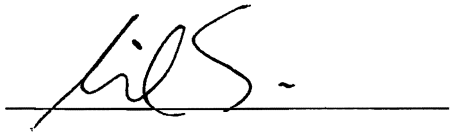
The record is clear that at the motion hearing, the State failed to produce the officer who made the traffic stop (and thereby seized the person of Petitioner), in effect, rolling the dice that it could adduce enough evidence in his absence to sustain its undoubted burden of proof. As often happens with gambling, the gambler lost. The State sought to rely on plain and obvious hearsay evidence in a matter involving a citizen's substantial constitutional rights. The State must not now be permitted to advance matters wholly outside the record in a transparent effort to sustain the burden it failed to meet.

Petitioner again respectfully requests that this Court overturn his convictions and dismiss the charges with prejudice.

Respectfully submitted,

Petitioner,
Matthew Feicht,

By Counsel.



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CERTIFICATE OF SERVICE

I, Michael D. Simms, counsel for Petitioner, do hereby certify that the foregoing PETITIONER'S REPLY BRIEF was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States Mail, this 9th day of July, 2015, addressed as follows:

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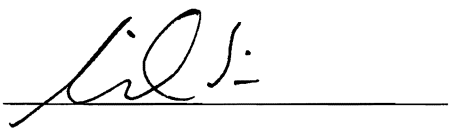

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