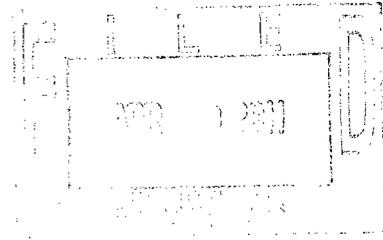


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0457



REESE T. RILEY,
Petitioner

V.)

Appeal from a final order
of the Circuit Court of Mercer
County (10-F-307-OA)

STATE OF WEST VIRGINIA,
Respondent.

Petitioner's Brief

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QUESTION PRESENTED

WHETHER THE PETITIONER'S CONVICTION WAS IN VIOLATION OF ARTICLE III SECTION SIX OF THE WEST VIRGINIA CONSTITUTION, WEST VIRGINIA CODE § 62-1D-7, AND STATE V. MULLENS WHEREIN A MAGISTRATE, INSTEAD OF A DESIGNATED CIRCUIT COURT JUDGE, AUTHORIZED SURVEILLANCE AUDIO/VIDEO RECORDING TO BE CONDUCTED IN THE PETITIONER'S HOME.

STATEMENT OF THE CASE

This case is an appeal from the Petitioner's conviction of "Delivery of a Schedule III Non-Narcotic Controlled Substance", a lesser included offense as charged in Counts One, Two, and Three of the Indictment. (A.R. 2-7). The Petitioner's plea was a conditional plea under Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure, wherein he reserved the right to appeal the Mercer County Circuit Court's denial of his Motion to Suppress. (A.R. 1).

On October 16, 2009, Magistrate Charles Poe signed an Order Authorizing Electronic Interception pursuant to West Virginia Code § 62-1F-1 *et seq.* finding probable cause that a home where the electronic interception to occur was being used in connection of commission of an offense, and authorizing an audio/video of the transaction of the Delivery of a controlled substance in the Petitioner's home. (A.R. 29-36). On October 13, 2010, the Petitioner was indicted with three counts of Delivery of a Schedule III Controlled Substance, To-Wit: Hydrocodone; one count of Delivery of a Schedule II Controlled Substance, To-Wit: Oxycodone; and one count of Possession with Intent to Deliver a Schedule III Controlled Substance, To-Wit: Hydrocodone. The Petitioner subsequently gave an incriminating statement. Id.

The Petitioner through his counsel, Henry L. Harvey, filed his Motion to Suppress Evidence on November 12, 2010, seeking to exclude all of the audio/video recordings; telephone conversations; statements of the Petitioner, if any; and all physical evidence pertaining to the

criminal case at bar pursuant to Article III Section 6 of the West Virginia State Constitution, W. Va. Code § 62-1D-7, State v. Mullens, 221 W. Va. 70, 650 S. E.2d 169 (W. Va. 2007), State v. DeWeese, 213 W. Va. 339, 582 S.E.2d 786 (2003), and State v. Carper, 176 W. Va. 309, 342 S.E.2d 277 (1986). (A.R. 29-36). Essentially, the Petitioner argued that such evidence was illegally obtained as a result of the order entered by Magistrate Poe authorizing police to use a surveillance device. *Id.* The Honorable Omar Aboulhosn denied the Petitioner's motion to suppress on November 22, 2010, finding that the electronic surveillance was properly approved by the magistrate, conformed to the requirements of Article F, and passed constitutional muster under Mullens and pertinent West Virginia Code sections. (A.R. 8-13).

The Petitioner entered a conditional guilty plea, as stated *supra*, and on December 6, 2010, the Honorable Omar Aboulhosn adjudged the Petitioner guilty of the above-mentioned offenses, and sentenced him to an indeterminate term of not less than one (1) nor more than five (5) years for the lesser-included offense of "Delivery of a Schedule III Non-Narcotic Controlled Substance", as the State has alleged in Counts One, Two, and Three of the indictment. (A.R. 2). Judge Aboulhosn ordered that the sentences run consecutively with one another; that said sentences be suspended; and that the Petitioner be placed on probation for a period of five (5) years, with the conditions enumerated in the Order. (A.R. 2-3).

Pursuant to Rules 5 and 38 of the West Virginia Revised Rules of Appellate Procedure, and W. Va. Code § 58-5-1 *et seq.*, the Petitioner filed a timely appeal from the final judgment entered by the Mercer County Circuit Court on February 10, 2011, and the Addendum Order entered on March 3, 2011. (A.R. 1-8).

SUMMARY OF ARGUMENT

West Virginia Code § 62-1D-7, as amended, provides that “[t]he chief justice of the supreme court of appeals shall, on an annual basis, designate five active circuit court judges to individually hear and rule upon applications for orders authorizing the interception of wire, oral or electronic communications”. While W. Va. Code § 62-1D-7 specifically states that only five circuit court judges designated annually by the chief justice of the West Virginia Supreme Court may authorize interception of wire, oral or electronic communications, Chapter 62 Article 1F allows magistrates or circuit court judges, without any mention of special designation, to authorize such interceptions in a home.

The West Virginia Supreme Court has placed a high value on a person’s home and, indeed, “[i]t is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring in that person's home without first obtaining a duly authorized court order pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005). To the extent that State v. Thompson, 176 W. Va. 300, 342 S.E.2d 268 (1986), holds differently, it is overruled.” State v. Mullens, 221 W. Va. 70, 650 S.E.2d 169 (2007). After thorough research of federal law and case law from other states, the West Virginia Supreme Court concluded that “Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987) (Repl. Vol. 2005) where the police have not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005)”. Mullens, 221 W. Va. 70, 650 S.E.2d 169.

In the case at bar, Magistrate Poe, instead of a specially designated circuit court judge, signed the authorization order. Magistrate Poe is not a circuit court judge specially designated by the West Virginia Supreme Court to sign such orders, pursuant to W. Va. Code § 62-1D-1 *et seq.* Following Carper and its progeny, the statutes at bar should be strictly construed against the State and in favor of the Petitioner, especially since Mullins provides a clear and detailed interpretation of who may sign an order authorizing the use of a wire-tapping device.

Accordingly, because such statutes must be interpreted in favor of the Petitioner and against the State, only a specially appointed circuit judge has the power and authority to issue such an order. Hence, using Magistrate Poe's order and utilizing an electronic wire-tapping device to record an alleged drug transaction within the home of the Petitioner violated the sanctity of his home and abode, and violated Article III Section 6 of the West Virginia State Constitution. This order was not obtained pursuant to W. Va. § 62-1D-1 *et seq.*, and should have been deemed invalid, and all of the audio/video recordings obtained pursuant to such order should have been suppressed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The case at bar is suitable for oral argument under Rules 19 and 20 of the West Virginia Revised Rules of Appellate Procedure because it involves assignments of error in the application of settled law, constitutional matters, as well as issues of fundamental public importance.

ARGUMENT

THE PETITIONER'S CONVICTION WAS IN VIOLATION OF ARTICLE III SECTION SIX OF THE WEST VIRGINIA CONSTITUTION, WEST VIRGINIA CODE § 62-1D-7, AND STATE V. MULLENS WHEREIN A MAGISTRATE, INSTEAD OF A DESIGNATED CIRCUIT COURT JUDGE, AUTHORIZED SURVEILLANCE AUDIO/VIDEO RECORDING TO BE CONDUCTED IN THE PETITIONER'S HOME.

West Virginia Code § 62-1D-7, as amended, provides that "[t]he chief justice of the supreme court of appeals shall, on an annual basis, designate five active circuit court judges to

individually hear and rule upon applications for orders authorizing the interception of wire, oral or electronic communications”. West Virginia Code § 62-1D-8 states that a county prosecuting attorney or a duly appointed special prosecutor may apply for such an order from one of the five designated circuit court judges, who does not preside in the county from which the warrant is sought, consistent with W. Va. Code § 62-1D-7.

However, W. Va. Code § 62-1F-2 is in direct conflict with the Chapter 62 Article 1D of the West Virginia Code. West Virginia Code § 62-1F-2 deals with electronic interception of conduct or oral communications in a home, and provides that “[p]rior to engaging in electronic interception, as defined in section one of this article, an investigative officer shall, in accordance with this article, first obtain from a magistrate or a judge of a circuit court within the county wherein the non-consenting party’s home is located an order authorizing said interception. The order shall be based upon an affidavit by the investigative or law-enforcement officer or an informant that establishes probable cause that the interception would provide evidence of the commission of a crime under the laws of this state or the United States”.

While W. Va. Code § 62-1D-7 specifically states that only five circuit court judges designated annually by the chief justice of the West Virginia Supreme Court may authorize interception of wire, oral or electronic communications, Chapter 62 Article 1F allows magistrates or circuit court judges, without any mention of special designation, to authorize such interceptions in a home. Clearly, these statutes are in direct conflict with each other. West Virginia law clearly provides that higher protection to a criminal defendant should be applied, as discussed *infra*.

West Virginia case law sheds light into the interpretation of the statutes and the requirements for allowing an electronic wire-tapping device to be used in a home. The West

Virginia Supreme Court has placed a high value on a person's home and, indeed, "[i]t is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring in that person's home without first obtaining a duly authorized court order pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005). To the extent that State v. Thompson, 176 W. Va. 300, 342 S.E.2d 268 (1986), holds differently, it is overruled." State v. Mullens, 221 W. Va. 70, 650 S.E.2d 169 (2007). Chapter 62 Article 1D Section 11 deals with ex parte orders authorizing interception. In paragraph (a), the statute provides that "[e]ach application for an order authorizing the interception of a wire, oral or electronic communication *shall be made only to a designated judge* by petition in writing upon oath or affirmation and shall state the applicant's authority to make the application". W. Va. Code § 62-1D-11(a) (emphasis added). Notably, only a designated judge may authorize such interception. Nothing is said about a magistrate or an unauthorized circuit court judge having the power to issue such orders.

In Mullens, law enforcement agents employed a confidential informant to effectuate a drug purchase in the home of the appellant. They equipped the confidential informant with a wire-tapping device for making an audio and a video of an illegal drug purchase. The law enforcement agents did not obtain a judicial authorization to allow the confidential informant to use the electronic surveillance device while in the home of the appellant. The electronic surveillance device worn by the confidential informant recorded the sale of marijuana at the appellant's home. The appellant was subsequently indicted and charged with one count of delivery of a controlled substance and one count of conspiring to deliver a controlled substance. The circuit court denied the appellant's motion to suppress the audio/video surveillance, basing

its opinion on United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971).

Mullens, 650 S.E.2d at 169.

As a consequence of the denial of motion to suppress, the appellant entered into a guilty plea agreement with the State, and pled to delivery of controlled substance. The West Virginia Supreme Court reversed and remanded the case, stating that the provisions of the West Virginia Constitution provide higher standards of protection, in some instances, than the ones offered by the Federal law. Syl. pt. 1, Mullens, 650 S.E.2d 169. After thorough research of federal law and case law from other states, the West Virginia Supreme Court concluded that "Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987) (Repl. Vol. 2005) where the police have not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005)".

Mullens, 221 W. Va. 70, 650 S.E.2d 169.

The holding in Mullens is applicable to the case at bar. The factual situation in Mullens deals with an electronic surveillance device, used without an order of authorization, to record a drug sale. The West Virginia Supreme Court reversed and remanded the case based on the ground that such order of authorization was not obtained, and specifically stated that an order of authorization must be obtained pursuant to Chapter 62 Article 1D of the West Virginia Code. There is absolutely nothing in Mullens to indicate or even suggest that a magistrate or an unauthorized circuit court judge could issue such an order pursuant to W. Va. Code § 62-1F-1 *et seq.* Indeed, the West Virginia Supreme Court noted that the sanctity of one's own home requires higher standards and that it is a violation of Article III Section 6 of the West Virginia State

Constitution to utilize an electronic surveillance device without first obtaining an authorization order pursuant to W. Va. Code § 62-1D-11.

Despite the general consensus that the latest statute trumps the meaning of a statute enacted at an earlier date, it has been the law in West Virginia that “[p]enal statutes must be strictly construed against the state and in favor of defendant”. State v. Carper, 176 W. Va. 309, 342 S.E.2d 277 (1986) (citing Syl. pt. 3, State ex rel. Carson v. Wood, 154 W. Va. 397, 175 S.E.2d 482 (1970) internal citation marks omitted). In Carper, the defendant pleaded guilty to delivery of fifteen grams of marijuana and was sentenced to one to five years in a penitentiary and a fine of \$10,000. On appeal, the defendant argued that the mandatory language of W. Va. Code § 60A-4-402(c), read in conjunction with W. Va. Code § 60A-4-407, automatically afforded him probation. West Virginia Code § 60A-4-402(c) provides, in pertinent part, that “any first offense for distributing less than 15 grams of marihuana without any remuneration shall be disposed of under section 407 [§ 60A-4-407].” (Emphasis added). Section 407, in turn, provides that “[w]hensoever any person who has not previously been convicted of any offense under this chapter ... pleads guilty to or is found guilty of possession of a controlled substance under section 401(c) [§ 60A-4-401(c)], the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions”. *Id.* at 311. The circuit court’s argument essentially revolved around application of the statute regarding probation solely to certain professionals, such as physicians or pharmacists. The circuit court reasoned that since the defendant was not one of such professionals, the meaning of the statute did not apply to him. *Id.* at 311-312.

The West Virginia Supreme Court of Appeals disagreed with the circuit court’s argument that the mandatory probation statute applied solely to those individuals, who had authority to

dispense controlled substances by virtue of their profession. *Id.* at 312. Indeed, the West Virginia Supreme Court emphasized that in its interpretation of the criminal statute, it must follow the traditional rule expressed in State ex rel. Carson v. Wood, 154 W. Va. 397, 175 S.E.2d 482 (1970), wherein it held that “[p]enal statutes must be strictly construed against the State and in favor of defendant”, and reversed and remanded the case back to circuit court to allow the defendant to establish that this was his first drug offense, to entitle him to mandatory probation. *Id.* at 313.

In the case at bar, Magistrate Poe, instead of a specially designated circuit court judge, signed the authorization order. (A.R. 8-36). Magistrate Poe is not a circuit court judge specially designated by the West Virginia Supreme Court to sign such orders, pursuant to W. Va. Code § 62-1D-1 *et seq.* Following Carper and its progeny, the statutes at bar should be strictly construed against the State and in favor of the Petitioner, especially since Mullins provides a clear and detailed interpretation of who may sign an order authorizing the use of a wire-tapping device. Accordingly, because such statutes must be interpreted in favor of the Petitioner and against the State, only a specially appointed circuit judge has the power and authority to issue such an order. Hence, using Magistrate Poe’s order and utilizing an electronic wire-tapping device to record an alleged drug transaction within the home of the Petitioner violated the sanctity of his home and abode, and violated Article III Section 6 of the West Virginia State Constitution. This order was not obtained pursuant to W. Va. § 62-1D-1 *et seq.*, and should have been deemed invalid by the Mercer County Circuit Court, and all of the audio/video recordings obtained pursuant to such order should have been suppressed.

Finally, because the order obtained from Magistrate Poe was in direct violation of the Petitioner’s constitutional rights, all evidence obtained as a result of such warrant allowing the

use of a wire-tapping device should have been suppressed under the fruit of the poisonous tree doctrine. The fruit of the poisonous tree doctrine has been firmly established in the West Virginia law and deems evidence obtained as a result of information that leads to an illegal conduct to be fruit of the poisonous tree, and, therefore, inadmissible. State v. DeWeese, 213 W. Va. 339, 582 S.E.2d 786 (2003). Namely, the evidence obtained as the result of the confidential informants traveling to the Petitioner's residence on Mentwood Road, Bluefield, Mercer County, West Virginia to purchase hydrocodone and oxycodone should have been excluded under the fruit of the poisonous tree doctrine. Specifically, the audio/video recording of the alleged sale as well hydrocodone and oxycodone pills should have been suppressed because they were obtained as a direct result of the order signed by Magistrate Poe wherein he authorized electronic surveillance in the Petitioner's home in violation of Article III Section 6 of the West Virginia State Constitution, W. Va. Code § 62-1D-7, and Mullens.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, based on the foregoing grounds, the Petitioner respectfully requests that this Honorable Court REVERSE the decision of the Mercer County Circuit Court, and grant other relief that this Court deems fair and just.

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VERIFICATION

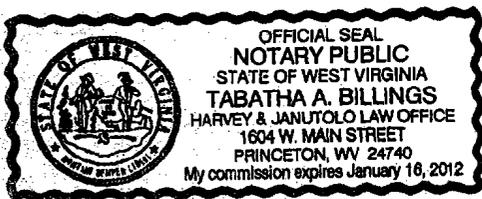
STATE OF WEST VIRGINIA
COUNTY OF MERCER, to-wit

I, Henry L. Harvey, counsel for the Petitioner, Reese T. Riley, in the foregoing PETITIONER'S BRIEF after being duly sworn according to law, depose and say that the facts and allegations contained in the foregoing PETITIONER'S BRIEF are true, except insofar as they are stated therein to be upon information and belief, and that so far as they therein stated to be upon information and belief, I believe them to be true.

Henry L. Harvey
Henry L. Harvey

Taken, sworn to and subscribed before me this 27th day of April, 2011,
by Henry L. Harvey.

My Commission Expires: January 16, 2012



Tabatha A. Billings
Notary Public of in and for the said County and
State aforesaid

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of APRIL, 2011, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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