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SUPREME COURT OF APPEALS

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

OF

WEST VIRGINIA

CHARLESTON

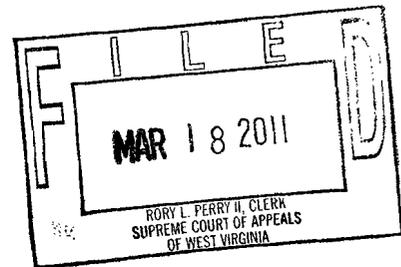
TONY CURTIS MYERS,
Defendant Below, Petitioner

v.

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent.

Underlying Proceeding:
Crim. Case No.: 07-F-569
Judge Bailey

PETITION FOR APPEAL



Scott Driver
Counsel for Tony Curtis Myers, Petitioner
W. Va. Bar ID # 9846
Post Office Box 911
Charleston WV 25323
Telephone: (304) 932-1860
Facsimile: 1 (866) 334-9562
E-mail: scottdriverlaw@gmail.com

**AN APPEAL FROM
THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

STATE OF WEST VIRGINIA

v.

**Crim. Case No.: 07-F-569
Judge Bailey**

**TONY CURTIS MYERS,
Defendant.**

INTRODUCTION

The petitioner, Tony Curtis Myers, defendant below (“Petitioner”), appeals the ruling of the Circuit Court of Kanawha County, by order entered on September 7, 2010, sentencing him to three concurrent terms of incarceration of sixty years each for three separate counts of first degree robbery. The Petitioner so appeals pursuant to the previous Rules of Appellate Procedure, which rules govern appeals from orders entered prior to December 1, 2010.

The Petitioner contends that the circuit court erred by allowing the introduction of testimony and evidence stemming from an illegal arrest, search, and seizure; by allowing the in-court identification of the Petitioner by eyewitnesses who had previously identified the Petitioner in an illegal, suggestive procedure; by allowing the State of West Virginia to go forward on three separate counts of first degree robbery in violation of double jeopardy principles; and by denying the Petitioner’s motions for judgment of acquittal and for a new trial despite the insufficiency of the evidence put on by the State of West Virginia.

The Petitioner seeks reversal of his conviction, voiding of the sentences imposed therefor, and remand for a new trial.

TABLE OF AUTHORITIES

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KIND OF PROCEEDINGS AND NATURE OF RULINGS BELOW

Tony Curtis Myers (“Petitioner”) was indicted in the September 2007 term of court in the Circuit Court of Kanawha County, West Virginia. The indictment charged three counts of first degree robbery, alleging that the Petitioner robbed a local convenience store.

The Petitioner was tried by jury in the January 2008 term of court. Prior to trial, the Petitioner moved to suppress and exclude certain evidence and testimony stemming from an illegal arrest, search, and on-scene identification conducted by the Charleston Police Department, which motions were partially granted. Nonetheless, the jury found the Petitioner guilty of all three counts of first degree robbery.

By order entered April 30, 2008, the Petitioner was sentenced to three concurrent terms of incarceration of sixty years each. By order entered September 7, 2010, the Petitioner was resentenced for purposes of perfecting his appeal¹. It is from this order that this appeal is prosecuted.

STATEMENT OF FACTS

On August 29, 2007, an Exxon One Stop convenience store on the West Side of Charleston, West Virginia was robbed by a single person who wore a bandana as a mask and represented himself as having a firearm. A total of four persons were present other than the perpetrator, including two store clerks and two maintenance workers. Although statements given to police and testimony offered at trial were inconsistent, it is apparent that two of the eyewitnesses and a bystander pursued the perpetrator to some extent.

Based on reports that the perpetrator had fled to an apartment building on the West Side of Charleston, the Charleston Police Department arrived on scene at the

¹ The Petitioner, *pro se*, filed a timely notice of intent to appeal on October 1, 2010.

apartment building. Officers surrounded the building, front and back, for some period of time and appeared to have the situation well in hand. The Petitioner was eventually arrested without a warrant and taken outside of his apartment. After a protective sweep had already been performed, but without a search warrant, officers returned to the Petitioner's apartment and confiscated multiple items of clothing, including shirts and hats, and five hundred sixty five dollars in cash.

Again without a warrant, and still on the scene, officers showed various articles of clothing from the apartment to eyewitnesses, as well as parading the Petitioner, by himself, in front of the same eyewitnesses. Pursuant to these suggestive procedures, the eyewitnesses "confirmed" that the Petitioner was the perpetrator and that certain articles of clothing were those worn by the perpetrator.

Officers also purported to have removed five hundred sixty five dollars in cash from a clothing pocket in the apartment, then to have placed the money so that it was sticking out of the pocket in which they found it, at which point they photographed it. The photographed cash inexplicably had a paper "marker" separating sixty eight dollars – the amount allegedly stolen at the One Stop – from the rest of the bills².

The affidavit seeking a search warrant was filled out by an officer in contact with other officers still on the scene. The affidavit, unsurprisingly, did not mention that the officers had already ransacked the apartment and removed the items for which they were purportedly searching. Again, unsurprisingly, the affidavit does mention that the Petitioner was identified by eyewitnesses, but not the circumstances of the identification.

² No explanation was ever proffered by the State as to why a perpetrator fleeing hot pursuit would take the time to meticulously demarcate "robbery money" from his other funds.

A search warrant was finally obtained but not before the officers returned the clothing and cash to the apartment to be “found” pursuant to the warrant.

No firearm was ever recovered, either from the Petitioner’s apartment or in the relatively short distance between the apartment and the One Stop. None of the eyewitnesses who claimed to have pursued the perpetrator saw any attempt to discard a firearm. No attempt was made by the Charleston Police Department to check nearby gutters or roofs for a discarded firearm.

The Petitioner filed three separate suppression motions, styled Motion to Suppress, Motion to Suppress Evidence Obtained by Search Warrant, and Motion to Suppress Identification Testimony. The State’s responses to these motions admitted that the search, seizure, and identification procedures were improper and illegal, but alleged various justifications or exceptions.

The trial court ruled that the Petitioner’s warrantless arrest was improper and without exigent circumstances; that the resulting on-scene identification of the Petitioner was improper; and that the search and seizure were improper. However, the court ruled that discovery of the flannel shirt was inevitable, and that the search warrant was properly obtained. The court further ruled that in-court identification of the Petitioner by Pedro Torres, one of the store’s maintenance personnel and an alleged victim, would be permitted at trial³.

At trial, the State introduced into evidence the various articles of clothing and photographs of cash which had been illegally searched for and seized prior to application

³ Although the identification by Tammy Bess is not addressed in the Order entered after the suppression hearing, Ms. Bess was permitted to identify the Petitioner at trial.

for a search warrant, and adduced testimony from Pedro Torres and Tammy Bess identifying the Petitioner as the perpetrator of the robberies⁴.

The jury returned a verdict finding the Petitioner guilty of all three counts of first degree robbery. The court subsequently sentenced the Petitioner to three concurrent terms of incarceration of sixty years each.

**ASSIGNMENTS OF ERROR
AND THE MANNER IN WHICH THEY WERE DECIDED**

First Assignment of Error: The trial court erred in permitting the State of West Virginia to introduce evidence obtained pursuant and subsequent to an illegal warrantless arrest, search, and seizure.

Second Assignment of Error: The trial court erred in permitting witnesses called by the State of West Virginia to identify the Petitioner despite a prior illegal, suggestive identification procedure sufficiently improper as to taint subsequent in-court identification.

Third Assignment of Error: The trial court erred in permitting the State of West Virginia to prosecute multiple robbery charges stemming from one occurrence or transaction, in violation of double jeopardy principles.

Fourth Assignment of Error: The trial court erred in denying the Petitioner's motions for judgment of acquittal and a new trial despite the evidence having been manifestly insufficient to sustain a guilty verdict.

POINTS AND AUTHORITIES

⁴ Alleged victim Michael Price did not appear or testify.

1. A warrantless arrest in the home must be justified not only by probable cause, but by exigent circumstances which make an immediate arrest imperative. Syl. Pt. 2, State v. Mullins, 177 W.Va. 531, 355 S.E.2d 24 (1987).

2. The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe. Syl. Pt. 3, id., quoting State v. Canby, 162 W.Va. 666, 252 S.E.2d 164 (1979).

3. 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. Syl. Pt. 5, id., quoting State v. Moore, 165 W.Va. 837, 272 S.E.2d 804 (1980).

4. Evidence obtained as a result of a search incident to an unlawful arrest cannot be introduced against the accused upon his trial. Syl. Pt. 6, id., quoting State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

5. To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with

reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading. Syl. Pt. 1, State v. Lilly, 194 W.Va. 595, 461 S.E.2d 101 (1995).

6. To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct. Syl. Pt. 4, State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002).

7. In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Syl. Pt. 3, State v. Casdorff, 159 W.Va. 909, 230 S.E.2d 476 (1976).

8. It is impossible to conclude from either the common law or W.Va.Code, 61-2-12, that an attempt to rob a store by presenting a firearm and leaving without taking

any property can, in light of double jeopardy principles, result in multiple convictions of attempted aggravated robbery for each clerk present in such store. Syl. Pt. 2, State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

9. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syllabus Point 1, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995), quoting State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

ARGUMENT

First Assignment of Error: The trial court erred in permitting the State of West Virginia to introduce evidence obtained pursuant and subsequent to an illegal warrantless arrest, search, and seizure.

On August 29, 2007, shortly after the robbery at the One Stop, the Petitioner was arrested without a warrant at his home. Literally every step taken by the police from that point forward was improperly undertaken. No exigent circumstances made an immediate arrest imperative. The affidavit sworn in application for a search warrant states that the Petitioner's home was surrounded, with him inside, for some time before application was made for a warrant. In fact, the affidavit makes evident that the Petitioner was already in custody at the time of the application for the warrant, invalidating any possible argument as to exigency:

With information, I approached the door of Tony Myers apartment and knocked several loud times while announcing that I was the Charleston Police Department.

While attempting to investigate the occupants of this apartment I could see a silhouette of a person moving in the window on the second floor of the apartment. The person in the apartment continued to peer out of the side of the window, but refused to open the door. After about a half of an hour Tony Myers answered the door. At that time Tony Myers was identified as the robber by two witnesses. A written statement was obtained from both eye witnesses.

Affidavit for Search Warrant, Attachment 1 (“Affidavit”), paragraph 2.

Furthermore, the State of West Virginia, in its Memo responding to the Petitioner’s motions to suppress, admits that no exigencies existed⁵.

In the meantime other Police Officers on the scene continued efforts to make contact with the suspect by knocking on his door and announcing their presence. The suspect eventually opened his door, and he was immediately secured. The Officers then made a protective sweep of the apartment. Following the sweep and prior to procurement of the search warrant an officer reentered the apartment and retrieved a shirt from the suspect’s closet.

Nonetheless, the Charleston Police Department arrested the Petitioner in his home without a warrant, despite, by their own admission, supposedly camping outside of his door for a half hour.

The West Virginia Supreme Court of Appeals is solicitous of the rights of a man within his own home to be free from unlawful police intrusion. A warrantless arrest in the home must be justified not only by probable cause, but by exigent circumstances which make an immediate arrest imperative. Syl. Pt. 2, State v. Mullins, 177 W.Va. 531, 355 S.E.2d 24 (1987). In Mullins, the Court found that no exigent circumstances justified the defendant’s warrantless arrest in his home and his conviction was reversed. The Court noted that it “[j]ealously guard[s] a person’s right to privacy in the home and [has] strictly limited the circumstances justifying a warrantless arrest in the home.” Id at 534, 26.

⁵ Other issues with the State’s characterization of events in its Memo are taken up infra.

The Mullins Court provided clear guidelines for trial courts to consider in determining whether exigent circumstances exist in a particular case of warrantless arrest in a suspect's home:

The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe.

Syl. Pt. 3, id., quoting State v. Canby, 162 W.Va. 666, 252 S.E.2d 164 (1979).

It is obvious in the instant case that the test is not satisfied. By the State's and the affiant officer's own admission, the Charleston Police Department had surrounded the Petitioner's apartment for a half hour, making no attempt at forced entry or displaying any indicia of urgency, instead waiting on the Petitioner to open his own door before "securing" him. The window for any destruction of evidence or commission of additional crimes had long passed. The trial court agreed:

The Court finds the arrest of the defendant to have been an improper warrantless arrest without exigent circumstances. Accordingly, evidence of the arrest, and the resulting on-scene identification of the defendant by witnesses, is suppressed.

Order of March 3, 2008, item 1.

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. Syl. Pt. 5, Mullins, quoting State v. Moore, 165 W.Va. 837, 272 S.E.2d 804 (1980).

However, the trial court did not suppress introduction into evidence of any of the items of evidence obtained pursuant to the illegal arrest, this despite what might charitably be described as disingenuity on the part of the State and the affiant officer regarding the facts of the arrest, search, and seizure, and the application for a search warrant. A closer examination of the relevant portions of the State's factual characterization in its Memo, with emphasis added, is instructive.

The responding officer was unable to make contact with the suspect at the apartment. That Officer then proceeded back to the station for purposes of obtaining a search warrant for the apartment, based on the assertions of eyewitnesses who had chased the suspect to that location. In the meantime other Police Officers on the scene continued efforts to make contact with the suspect by knocking on his door and announcing their presence. The suspect eventually opened his door, and he was immediately secured. The Officers then made a protective sweep of the apartment. Following the sweep and prior to procurement of the search warrant an officer reentered the apartment and retrieved a shirt from the suspect's closet. The eyewitnesses to the robbery described to police a plaid flannel shirt that was worn by the perpetrator. The Officer presented a flannel shirt to the eyewitnesses who confirmed that the shirt matched the one worn by the perpetrator. The shirt was then returned to the interior of the apartment, and once the search warrant was obtained the shirt was collected along with several other items as evidence.

Memo, page 1.

The timeline of events described by the State, in its own words, is as follows:

- * The affiant officer tries to make contact with the Petitioner at his home and purportedly fails.
- * The affiant officer leaves the scene to obtain a search warrant.
- * The Petitioner is "secured."⁶

⁶ In fact, arrested.

* Other officers “sweep” the Petitioner’s apartment, “retrieving” items without a warrant and while the Petitioner is “secured.”

* At least one item thus found in the sweep is shown to witnesses.

* The item is returned to the inside of the apartment to be “collected” once a warrant is in hand.

* An officer applies for a search warrant.

The State’s responsive Memo disingenuously promotes the appearance that the affiant officer who swore to the Affidavit in application for a search warrant left the scene, swore to the facts independent of any occurrences taking place at the Petitioner’s home, and returned with a warrant untainted by the other officers’ misconduct. This is, of course, not the case. On the face of the Affidavit, it is clear that the affiant officer swore to the facts of the Affidavit on information obtained after the events described above.

With information, I approached the door of Tony Myers apartment and knocked several loud times while announcing that I was the Charleston Police Department. While attempting to investigate the occupants of this apartment I could see a silhouette of a person moving in the window on the second floor of the apartment. The person in the apartment continued to peer out of the side of the window, but refused to open the door. After about a half of an hour Tony Myers answered the door. At that time Tony Myers was identified as the robber by two witnesses. A written statement was obtained from both eye witnesses.

Affidavit, paragraph 2. The affiant officer conveniently failed to note in his Affidavit that the Petitioner had been arrested in his home without a warrant and was secured, that his apartment had already been ransacked, that both the Petitioner and his clothing had already been paraded in front of eyewitnesses, or that the clothing had been returned to the apartment to await rediscovery with a warrant in hand. The Affidavit also omits the fact that at the time of the robbery, the perpetrator was wearing a hat and a mask, instead

describing the perpetrator as a “black male,” by omission implicating that the witnesses got a good look at the perpetrator’s face. The bottom line is that the police had already done everything that they wanted to do, Constitution notwithstanding, and sought the warrant simply as a curative formality after the fact.

The Mullins Court stated that evidence obtained as a result of a search incident to an unlawful arrest cannot be introduced against the accused upon his trial. Syl. Pt. 6, Mullins, quoting State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974). Furthermore, the search warrant itself was improperly obtained, both because of its genesis in an unlawful arrest and because the method by which it was gained was at best reckless and at worst fraudulent.

To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading.

Syl. Pt. 1, State v. Lilly, 194 W.Va. 595, 461 S.E.2d 101 (1995).

The Petitioner brought the search warrant issues to the trial court’s attention in his Motion to Suppress Evidence Obtained by Search Warrant, noting that despite the affiant officer’s actual knowledge of the unlawful events taking place in his absence, he not only neglected to inform but actively misled the magistrate as to the other officers’ activities, the state of affairs at the time, and the circumstances behind the “identification” of the Petitioner. On its face, it is obvious that the affiant officer applied for the warrant with full knowledge of what had taken place back at the Petitioner’s home. Whether his omissions were intentional or merely reckless is irrelevant – he omitted crucial

information, as a result of which omission a magistrate was hoodwinked into issuing a warrant based on an illegal arrest, search, seizure, and identification. Had the magistrate been aware of the pervasive illegality of the police's activities that evening, no warrant would have been issued.

The State countered in its Memo that the shirt and other evidence discovered pursuant to the Petitioner's illegal arrest were excepted from the exclusionary rule by the doctrine of inevitable discovery, citing Syllabus Point 4 of State v. Flippo, 212 W.Va. 560, 575 S.E.2d 170 (2002):

To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.

As demonstrated supra, the police were not actively obtaining a search warrant prior to the time of the misconduct. On the face of the Affidavit, it is obvious that the Affidavit could only have been filled out after and based on the ongoing misconduct of the police. Thus, the third prong of the Flippo test is unsatisfied.

Furthermore, the Flippo Court notes, with unambiguous approval, cases from other jurisdictions holding that to qualify for the inevitable discovery exception to the exclusionary rule, the police must be in active, lawful pursuit of a search warrant before their misconduct.

In adopting the minority view, we do so with a practical realization that "[i]f police are allowed to search when they possess no lawful means and are only required to show that lawful means could have been available even though not pursued, the narrow 'inevitable discovery' exception would 'swallow' the

[constitutional warrant] protection.” State v. Hatton, 389 N.W.2d 229, 234 (Minn. Ct. App. 1986). This we will not permit.

Id.

“If we were to uphold the denial of the motion to suppress in this case, the police could decide to enter a home without a warrant, . . . whenever they believe they have probable cause to obtain a search warrant. This rationale is inconsistent with basic principles which flow from our Supreme Court’s interpretation of N.J. Const. art. I, par. 7[.]”

Id. at footnote 28, quoting State v. Lashley, 803 A.2d 139, 142 (N.J. 2002).

The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable. . . . [A] valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained before the search takes place.

Id., quoting United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984).

From the arrest to the search, seizure, identification, and application for a warrant, the Charleston Police Department managed to commit a grave error at every step. This becomes not so much a matter of “fruit of the poisonous tree” as a matter of great difficulty determining where the tree ends and the fruit begins. There is no point in the police’s activities on August 29, 2007 that the misconduct stops, much less that one can speculate about whether or not the poison has spread. All fruits of the investigation are irrevocably tainted by police misconduct that was shockingly reckless at best and intended to perpetrate a fraud upon the tribunal at worst. None of the evidence or testimony stemming from the illegal arrest, search, and seizure should have been introduced at trial.

Second Assignment of Error: The trial court erred in permitting witnesses called by the State of West Virginia to identify the Petitioner despite a prior illegal, suggestive identification procedure sufficiently improper as to taint subsequent in-court identification.

As previously noted, the Affidavit submitted by the Charleston Police Department in application for a search warrant indicated that the Petitioner was “identified as the robber by two witnesses” while at his home and incident to his unlawful arrest.

Affidavit, paragraph 2. The Affidavit inexplicably fails to note that the perpetrator was wearing a hat and mask at the time of the robbery, which, as discussed supra, leads to the impression that the witnesses got a good look at the perpetrator’s face.

In fact, the Petitioner was led from his apartment and presented to eyewitnesses Tammy Bess, Pedro Torres, and Joey Shaffer, along with a flannel shirt. The witnesses were asked to identify the Petitioner and the shirt, respectively, which they did. No lineup of any type took place, and no efforts whatsoever were made to inoculate the “identification” against the risk of suggestion. The State acknowledges as much in its Memo, claiming other indicia of reliability but again neglecting to mention that the perpetrator was masked at the time of the robbery and sprinting in the dark at the time he was purportedly seen by the bystander witness.

The West Virginia Supreme Court has spoken to the issue of suggestive identification procedures and whether such a procedure is so improper as to prevent subsequent in-court identification by a witness:

In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Syl. Pt. 3, State v. Casdorph, 159 W.Va. 909, 230 S.E.2d 476 (1976). The Casdorph Court adopts the rule in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) in reaching the above formulation of the West Virginia test. The Neil Court further explains as follows:

Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is “a very substantial likelihood of irreparable misidentification.” (citation omitted.) While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of “irreparable” it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. (footnote omitted.) It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Id at 198.

It is thus not simply evidence of the initial identification itself with which the United States and West Virginia Supreme Courts are concerned in providing safeguards against suggestive identification procedures; the risk against which our system must be vigilant is the risk that by conducting an identification procedure in a suggestive manner, the witness himself or herself is irrevocably tainted for purposes of identification of a perpetrator. Once the seed is sown, it is cold comfort to the Petitioner to suppress evidence regarding his initial identification – the corruption has by then taken root, and any subsequent identifications, including the most damning before a jury, bear the taint of the State's initial misconduct. The safeguards exist for a reason, namely that eyewitness identifications under suggestive circumstances are demonstrably unreliable and lead to false identifications both at the time and later.

There is literally no reason that the State could not have performed a proper lineup procedure to allow the witnesses an opportunity to positively identify or reject the Petitioner as the person who robbed them. No reason has been offered because none exists. The police were at this point acting, as they did throughout the course of the investigation, with reckless disregard for any notions of constitutionality, due process, or proper investigative procedures, and topped off an evening of misconduct by literally hauling the Petitioner in front of three frightened, impressionable witnesses for a rubber stamp identification. This willful misconduct renders any subsequent identification inherently incredible and should have rendered it inadmissible. The trial court erred by allowing witnesses subjected to the initial identification procedure to identify the Petitioner in front of a jury.

Third Assignment of Error: The trial court erred in permitting the State of West Virginia to prosecute multiple robbery charges stemming from one occurrence or transaction, in violation of double jeopardy principles.

The Petitioner was indicted on three separate counts of first degree robbery for alleging robbing three different persons in the course of one robbery. One alleged victim was Tammy Bess, a One Stop clerk. The other two were Pedro Torres and Mike Price, maintenance workers contracted by One Stop to clean the premises. The Petitioner objected to this accumulation of charges, which objection was overruled by the trial court.

Syllabus Point 2 of State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984), states that where multiple employees of a single establishment are robbed in one occurrence or transaction, only one charge is properly forthcoming:

It is impossible to conclude from either the common law or W.Va.Code, 61-2-12, that an attempt to rob a store by presenting a firearm and leaving without taking

any property can, in light of double jeopardy principles, result in multiple convictions of attempted aggravated robbery for each clerk present in such store.

In Collins, multiple clerks were robbed at the same time while in the employ of a single convenience store. The defense argued that only one robbery charge could be properly brought. The Court surveyed and analyzed a spectrum of law from other jurisdictions:

We have examined cases from other jurisdictions involving the robbery of stores or banks where more than one clerk or employee was present. It is sometimes argued that since each clerk or employee, through his employment, exercises constructive possession over his employer's property, a separate robbery conviction can be established for each employee present in the store or bank during a robbery. However, this theory has been rejected by most of the courts addressing the issue. The rationale commonly advanced by these courts is that because the property taken is owned by only one entity, i.e., the store or bank, there is only one larceny and, therefore, only one robbery.

Id at 772, 844.

The Court notes that its opinion only explicitly holds for attempted robbery, but that it may have some application for completed robbery cases:

We need not for the purposes of this opinion address whether or not a completed robbery in a business establishment in the presence of multiple clerks or other custodians of the business's property constitutes a single robbery because we are dealing here with attempted robberies. The foregoing opinions provide a useful analogy, but it is in the area of attempted robbery that the double jeopardy issue becomes even more attenuated because of the lack of any factual predicate to warrant a conclusion that more than one attempted robbery occurred.

Id at 773, 845.

In the eyes of the perpetrator of the One Stop robbery, of course, all three alleged victims were, for all intents and purposes, employees of the One Stop. One has difficulty believing that an armed robber would be in a position to distinguish between a regular at-will employee and contracted employees. A single transaction took place in which three

persons working for and on the premises of the One Stop were allegedly robbed at once, and only one first degree robbery charge should have been indicted and prosecuted.

On first impression, the issue may seem to be moot in light of the trial court's sentence, whereby the sentences for all three robbery convictions were made concurrent. However, the accumulation of charges in violation of double jeopardy principles did and does materially prejudice the Petitioner. Firstly, the prosecution of multiple charges in violation of double jeopardy principles increases the likelihood that the jury will be incensed and inflamed at the "bad man" before them. Three robbery charges are worse than one, and a man accused of "multiple armed robberies" is more likely to be considered dangerous and culpable than a man accused of one charge only. Secondly, the conviction for multiple charges will certainly weigh into the Petitioner's consideration for parole or other forms of alternative sentencing. Accordingly, a seemingly moot issue has serious implications for the Petitioner's due process rights.

The Petitioner is serving three separate, albeit concurrent sentences for three separate convictions for one robbery. The trial court erred in allowing the State to go forward with all three robbery charges when only one robbery took place.

Fourth Assignment of Error: The trial court erred in denying the Petitioner's motions for judgment of acquittal and a new trial despite the evidence having been manifestly insufficient to sustain a guilty verdict.

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syllabus Point 1, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1995), quoting State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

This is, of course, a daunting standard for any petitioner to meet on appeal. However, multiple aspects of the instant case are problematic upon even a cursory inquiry, leaving aside the pervasive police misconduct discussed supra.

The Petitioner was convicted on the theory that he entered the One Stop brandishing a firearm and wearing a mask and hat exposing only, at most, his eyes and nose; that he was pursued to some extent and for some amount of time not agreed upon by witnesses; that he was pursued hotly enough that witnesses did not lose sight of him for any significant period of time, but not so hotly that any witness saw him discard a firearm or anything else; that no firearm was discovered between the One Stop and the Petitioner's home⁷; that no other black male could possibly have entered the Petitioner's multiple-unit apartment building; and that witnesses with a passing or no familiarity with the Petitioner could positively identify him based on seeing his eyes and nose at the One Stop, or on seeing the perpetrator's sprinting gait during pursuit⁸.

The alternative explanation is quite simple – much simpler and less straining of credulity, in fact, than the State's proffered explanation. The Petitioner did not rob the One Stop. The witnesses got a look at only the perpetrator's eyes and nose, enough to surmise that he was a black male. The witnesses pursued the perpetrator and either lost

⁷ Ironically, the failure of the Charleston Police Department to perform any search whatsoever of the nearby gutters or rooftops operated to the Petitioner's detriment. If such a search had been performed and no firearm thereby produced, the argument that the perpetrator ran from the One Stop to the Petitioner's apartment would be further eroded.

⁸ Additionally, one of the alleged victims, Mike Price, failed to testify at all, much less as to all essential elements of the offense charged by Count Two of the indictment.

him or saw him run into a multiple-unit apartment building. Without investigating the other units, police retrieved a black male known to live in the apartment building and presented him to witnesses. The witnesses, understandably shaken and desirous of closure, “identified” the black male, inevitably and irrevocably tainting any subsequent identification; for their purposes, the man with whom they were presented became without question, in defiance of the scant evidence, the perpetrator.

Viewing the record in the light most favorable to the State, it is difficult to agree that any reasonable person could conclude that a witness could positively identify a masked, hat-wearing person from his eyes and nose, or that a witness with casual familiarity⁹ with the Petitioner could “identify” him as a man he saw sprinting through alleys without having seen his face.

CONCLUSION

Each of the errors assigned above is, individually, sufficient to cast grave doubt on whether the Petitioner received the axiomatic fair trial in a fair tribunal. In particular, the pervasive, repeated misconduct of the Charleston Police Department in arresting the Petitioner in his home without a warrant, ransacking and removing his belongings, parading him before witnesses, and only then applying for a search warrant is enough to shock the constitutional conscience. The other errors, though troubling on their own, become even more so when viewed in the context of this reckless display of animus and disregard for due process. The aggregation of errors is such that, considered cumulatively, there can be no doubt that the Petitioner was not fairly treated by the system and was not afforded his constitutional rights.

⁹ This witness was the Petitioner’s mailman. No explanation was forthcoming as to how the mailman would have acquired familiarity with the Petitioner’s running gait.

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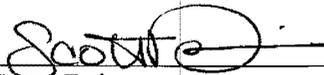
PRAYER FOR RELIEF

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Accordingly, for the foregoing reasons, the Petitioner, Tony Curtis Myers, by counsel, Scott Driver, moves this Honorable Court to reverse his convictions in the above-styled matter, to void the sentences imposed therefor, and remand the matter to the Circuit Court of Kanawha County, West Virginia for a new trial, and for such other relief as is deemed just and appropriate.

Respectfully Submitted,
TONY CURTIS MYERS
By Counsel



Scott Driver
Counsel for the Petitioner
W. Va. Bar ID # 9846
Post Office Box 911
Charleston WV 25323
Telephone: (304) 932-1860
Facsimile: 1 (866) 334-9562
E-mail: scottdriverlaw@gmail.com

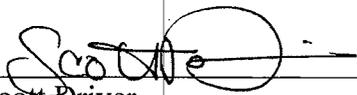
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CERTIFICATE OF SERVICE

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

I, Scott Driver, do hereby certify that on March 8, 2011, two (2) true copies of the attached pleading were placed in United States Postal Service first class mail, postage prepaid, addressed to Daniel Holstein, Assistant Prosecuting Attorney, Kanawha County Office of the Prosecuting Attorney, 301 Virginia Street East, Charleston, West Virginia 25301.



Scott Driver
Counsel for the Petitioner
W. Va. Bar ID # 9846
Post Office Box 911
Charleston WV 25323
Telephone: (304) 932-1860
Facsimile: 1 (866) 334-9562
E-mail: scottdriverlaw@gmail.com