

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUG 30 2011

NO. 11-0497

ROYAL THOMAS COOPER
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA

*Plaintiff Below,
Respondent,*

v.

TONY CURTIS MYERS,

*Defendant Below,
Petitioner.*

BRIEF ON BEHALF OF RESPONDENT

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I.

STATEMENT OF THE CASE

At approximately 10:00 PM on August 29, 2007, the Petitioner and Defendant Below, Tony Curtis Myers, entered an Exxon One Stop convenience store in Charleston, WV. The Petitioner wore a green hat, red plaid flannel shirt, dark jeans, a black bandana to obscure his face, and carried a firearm. (R. at 297, 155, 194.) At that time, Tammy Bess, One Stop manager and mother to a special needs child, was closing out the store's cash registers. (*Id.* at 149, 151, 168.) One Stop employee, Stephanie Mullins, and A-1 Cleaning and Restoration Employees, Pedro Torres and Mike Price, were also present. (*Id.* at 152-53; R. at 298, 21-22.) At trial, Ms. Bess testified that she was assisting the cleaning crew when the Petitioner entered the store and ordered that, "Everybody get down." Ms. Mullins remained hidden in the store's office during the crime. (*Id.* at 53.) On the

Petitioner's demand, Ms. Bess placed money from the partially-closed register in a bag. (R. at 297, 154.) The Petitioner was given \$68 cash in the denominations of fives and ones from the open register. (*Id.* at 157, 165.) The Petitioner threatened Ms. Bess's life and ordered her to open the other register. Ms. Bess was unable to open the register. (*Id.* at 154-55.) Ms. Bess testified that she complied with the Petitioner's demands because she "didn't want to get shot" but managed to activate the store's silent alarm during the incident. (*Id.* at 158.)

Cleaning crew members, Mike Price and Pedro Torres, were ordered to get down on the floor, then to stand up and empty their pockets. (*Id.* at 158; R. at 298, 24-26.) Both men complied with the Petitioner's demands. (R. at 297, 158; R. at 298, 24-26.) After successfully robbing the cleaning crew, the Petitioner ran to the back door of the store, turned around and ran out the front door. (R. at 297, 159.) The Petitioner thereafter ran down an alley, followed by Ms. Bess, Mr. Torres and mail carrier, Joey Shaffer. Ms. Bess testified that she ran until she reached the corner of the alley. (*Id.* at 183; R. at 298, 26-27.) Mr. Torres and Mr. Shaffer continued to chase the Petitioner. (R. at 298, 27-28.) At trial, Mr. Torres testified that the Petitioner had a gun in hand during the chase but he never saw the Petitioner drop or throw the gun. (*Id.* at 40-41.)

The Charleston Police Department arrived to the scene and Corporal Basford testified that he was advised by Patrolman Hunt and witness, Joey Shaffer, that the Petitioner had fled down Roane Street westbound and had turned into an alley that intersects Roane Street and Wyoming Street. Corporal Basford thereafter executed a search for the subject using a service dog. (R. at 297, 206-207.) Corporal Basford testified that he was then directed to an apartment building located at 200 Wyoming Street. Corporal Basford also testified that he received information from Patrolman Hunt that the Petitioner lived in the top left apartment. (*Id.* at 206-207.)

After arriving at the Petitioner's apartment, Corporal Basford and Detective Randle knocked on the Petitioner's apartment door. (*Id.* at 208.) At trial, Corporal Basford indicated that the door was answered and identified the Petitioner as the person who opened the door. (*Id.* at 208-209.) The police then performed a walkthrough of the apartment to determine if there were any other individuals in the apartment. (*Id.* at 209.) The police thereafter entered the apartment and executed a search that was later determined to be illegal by the circuit court. (R. at 187-188.) Additionally, police officers walked through the alley, looked in yards, in storm drains and around the One Stop store but were unable to locate the handgun that was used in the robbery. (R. at 297, 212-213.)

During trial, Patrolman James Rinick indicated that he performed a legal search of the Petitioner's apartment after waiting 15 or 20 minutes to receive a search warrant. (*Id.* at 222.) During the search, police officers recovered a shirt, pants, rubber gloves, cash, bandanas, headgear and a hat. (*Id.* at 223.) Patrolman Rinick indicated that police officers also recovered a "wad of cash" in "various denominations" and that there was a piece of paper separating \$45.00 in fives and \$23.00 in ones. (*Id.* at 228-229.) Corporal James Rollins testified that the money was recovered from a blue sweatshirt that was hanging on the wall of the Petitioner's living room. (R. at 298, 3.) Corporal Rollins also testified that there was a paper separating \$68.00 from the rest of the cash and that the money was not shuffled. (*Id.* at 5, 17.)

The Petitioner was indicted by grand jury in Kanawha County Circuit Court in August of 2007 for three counts of first degree robbery in violation of W. Va. Code § 61-2-12(a). (R. at 33-34.) On January 25, 2008, the Petitioner filed a Motion to Suppress Identification Testimony, alleging that the on-scene identification procedure conducted at the time of his arrest was overly suggestive. (R. at 122-125.) On January 30, 2008, the Petitioner filed a Motion to Suppress

Evidence Obtained by Search Warrant, alleging that the Charleston Police Department conducted a warrantless search in violation of the Fourth Amendment, that the search warrant was directly based on the illegal arrest of the defendant, and the search warrant should be “invalidated as a direct fruit of the illegal arrest of the defendant and illegal search of the house.” (R. at 128-133.) Pre-trial hearings were held on January 25, 2008 and February 25, 2008. (R. at 187-188.) By Order dated March 3, 2008, the circuit court found that (1) the arrest of the Petitioner was an improper warrantless arrest without exigent circumstances, (2) the in court identification of the Petitioner by witness Pedro Torres was reliable, (3) the search and seizure of the Petitioner’s flannel shirt violated the Petitioner’s fourth amendment rights but was admissible under the doctrine of inevitable discovery and (4) that all other items seized pursuant to the search warrant were also admissible because there was probable cause contained in the affidavit and complaint for the search warrant. (R. at 187-188.)

Following a jury trial, on March 4, 2008, the Petitioner was found guilty of all three counts of first degree robbery. (R. at 189-190.) The jury also found, by special interrogatory that the Petitioner committed each count “with the use of a firearm.” (R. at 191.) The Petitioner’s bond was revoked and he was remanded to the custody of the South Central Regional Jail. (R. at 247-248.) By Order dated April 3, 2008, the Petitioner was sentenced to a determinate term of sixty (60) years for each charge, said sentences to run concurrently. (R. at 257-259.) The Petitioner was awarded credit for 239 days served (R. at 260) and ordered to pay fees in the amount of \$1,730.00. (R. at 262-263.)

At the Petitioner’s request, on August 1, 2008, the circuit court resentenced him for the purpose of permitting him to appeal his conviction. (R. at 265-267.) On September 7, 2010, the

circuit court issued an Order Re-Sentencing Defendant and Appointing Appellate Counsel. (R. at 286-287.) On October 4, 2010, the Petitioner filed a Pro Se Notice of Intent to Appeal. (R. at 290.)

On December 8, 2010, Petitioner's counsel filed a motion for an extension of time to submit a petition for appeal. (R. at 292-293.) The Petitioner's extension was granted by Order dated December 9, 2010. (R. at 74.) On March 18, 2011, the Petitioner filed a Petition for Appeal from his conviction in this Court.

II.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under W. Va. Rev. R.A.P. 18(a) is not necessary because 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.

III.

SUMMARY OF ARGUMENT

A. The circuit court did not err in permitting the State to introduce evidence obtained during a legal search.

The Petitioner argues that the circuit court erred in allowing the State to introduce evidence at trial obtained "pursuant and subsequent to an illegal warrantless arrest, search, and seizure" and there is no way to remove the taint of the illegal arrest, search and seizure because "all fruits of the investigation are irrevocably tainted by police misconduct." (Pet'r's Br. at 10, 17.) The issue of admission of evidence was previously addressed in the Petitioner's multiple motions to suppress. In its Order, the circuit court found the Petitioner's arrest to be a warrantless arrest absent exigent

circumstances. Because of this determination, evidence of the arrest and the subsequent on-scene identification of the Petitioner were suppressed at trial. The Petitioner argues that the search warrant obtained was invalid, but does not meet his burden in showing that “facts were intentionally omitted in reckless disregard of whether their omission made the affidavit misleading” as required under Syl. Pt. 1 of *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995). The Petitioner also argues that the shirt and other evidence that were “excepted from the exclusionary rule by the doctrine of inevitable discovery” should not have been admitted at trial because the police were not actively pursuing a search warrant prior to the time of the police misconduct. (Pet’r’s Br. at 16.) However, in viewing the evidence in the light most favorable to the prosecution, it is clear from the Final Police Report that Patrolman Hunt was in fact, seeking a search warrant prior to the arrest and subsequent search of the Petitioner. The circuit court did not err in allowing the contested evidence at trial because the search warrant was valid, previously discovered evidence was admissible under the inevitable discovery rule and evidence of the Petitioner’s arrest and subsequent on-scene identification was not admitted at trial.

B. The circuit court did not err in allowing witnesses to identify the Petitioner at trial.

As a second point of contention, the Petitioner argues that because the circuit court suppressed out-of-court identification of the Petitioner, the circuit court should not have allowed in-court identification of the Petitioner because the out of court identification was so suggestive as to render their in-court identification invalid. In Syl. Pt. 3 of *State v. Casdorff*, 159 W. Va. 909, 230 S.E.2d 476 (1976), this Court held that: “[i]n 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[.]” The Petitioner was not just randomly identified at the scene. The witnesses tracked the Petitioner on foot after he fled the scene of the crime. The chase eventually led to the arrest of the Petitioner at his own apartment. Tammy Bess testified that she was able to view the Petitioner’s face when the bandana obscuring his face shifted downward and discussed the incident in specific detail. She was able to recognize the Petitioner as someone who frequented the One Stop. Pedro Torres also testified that he was able to see the Petitioner’s face. Local mail carrier, Joey Shaffer was familiar with the Petitioner from his mail route and testified that he recognized the Petitioner by his build, the way he was dressed and the way he carried himself. Because the witnesses were able to identify the Petitioner separately had independent bases for the identification, under the totality of the circumstances, the out-of-court identification was reliable, and was not so suggestive as to render the in-court identification by witnesses invalid. Therefore, the circuit court did not err in allowing the in-court identification of the Petitioner.

C. The circuit court did not err in permitting the State to prosecute multiple robbery charges. *State v. Collins* is applicable only to attempted robberies and to robberies where the business is the only “victim.”

As a third argument, the Petitioner argues that he should only have been charged with and tried for one count of robbery based on the holding of *State v. Collins*, 174 W. Va. 767, 329 S.E.2d 839 (1984). In Syl. Pt. 2 of *State v. Collins* this court held that:

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.

(*Id.*)

Collins cannot extend to this case. First, the holding of *Collins* explicitly holds only for attempted robberies and the Petitioner's robberies were completed. Second, unlike *Collins*, this is not a case where a defendant only attempted to rob a business with multiple employees present. Instead, the Petitioner robbed the One Stop store via Tammy Bess, who was a store employee and then proceeded to rob non-employees Mike Price and Pedro Torres individually by brandishing his weapon, ordering them to the floor and demanding that they empty their pockets. *Collins* is completely inapplicable to this case and despite the Petitioner's contentions, multiple robbery counts were warranted. Therefore, the circuit court did not err in charging, trying and convicting the Petitioner of three counts of robbery.

D. The circuit court did not err in denying the Petitioner's motions for judgment of acquittal and a new trial. The evidence was more than sufficient to sustain a guilty verdict.

As a final argument, the Petitioner asserts that the circuit court erred by denying the Petitioner's motions for judgment of acquittal and a new trial. The Petitioner argues that he was not adequately identified and that no firearm was ever recovered. In Syl. Pt. 1 of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court held that:

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.

(*Id.*)

In reviewing the evidence in the light most favorable to the prosecution, there was more than enough evidence for a rational trier of fact to find the essential elements of the crime proved beyond

a reasonable doubt. The jury was presented with evidence from three witnesses describing the Petitioner's conduct, dress, etc, outside of the on-scene identification that the circuit court held to be inadmissible. There was also testimony presented from two witnesses that the Petitioner used a handgun during the commission of the robbery. In viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that the Petitioner was sufficiently identified as the offender and that the Petitioner used a handgun in the commission of the crimes. Therefore, the circuit court did not err in denying the Petitioner's motion for judgment of acquittal and new trial.

IV.

ARGUMENT

A. The circuit court did not err in permitting the State to introduce evidence obtained pursuant to a search warrant. The search warrant was valid and the introduction of evidence was permissible based on the circuit court's holding in its motion to suppress.

As a first point of error, the Petitioner argues that the circuit court erred in allowing the State to introduce evidence at trial obtained "pursuant and subsequent to an illegal warrantless arrest, search, and seizure." (Pet'r's Br. at 10.) The Petitioner argues that the affiant officer "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." (*Id.* at 15.) The Petitioner argues that there is no way to remove the taint of the illegal arrest, search and seizure because "all fruits of the investigation are irrevocably tainted by police misconduct." (*Id.* at 17.)

Prior to trial, the Petitioner filed a motion to preclude the State from "introducing at trial any evidence relating to his arrest and search of his apartment" on January 24, 2008. (R. at 118-21.) On

the same day, the Petitioner also filed a "Motion to Suppress Identification Testimony" in order to prevent the State from introducing "testimony regarding identification of the defendant due to suggestive pre-trial identification procedures." (R. at 122-25.) On January 29, 2008, the Petitioner filed a "Motion to Suppress Evidence Obtained by Search Warrant" to prohibit the State from introducing any evidence obtained as result of the search warrant. (R. at 128-33.) On January 25, 2008 and February 25, 2008, the circuit court held pre-trial hearings in order to discuss the Petitioner's motions. On March 3, 2008, the circuit court found that (1) the arrest of the defendant was an improper warrantless arrest without exigent circumstances and "evidence of the arrest, and the resulting on-scene identification of the defendant by witnesses" should be suppressed, (2) the in-court identification of Pedro Torres was allowed because the witness had independent basis for making the identification, (3) the search and seizure of the flannel shirt was the result of an illegal warrantless search but was admissible nonetheless under the doctrine of inevitable discovery because "there was a reasonable probability that the evidence would have been discovered by lawful means absent the police misconduct, the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct" and (4) all other items seized pursuant to the search warrant were admissible because there was "probable cause contained in the affidavit and complaint for search warrant, even after disregarding the reference to the on-scene identification by two witnesses." (R. at 187-88.)

In *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995), this Court held that,

The standard of review of a circuit court's ruling on a motion to suppress is now well-defined in this state. 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. When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

(*Id.* at 600, 461 S.E.2d 106 (footnotes omitted, citations omitted).)

The circuit court held that the arrest of the defendant was an improper warrantless arrest without exigent circumstances. Because of this determination, evidence of the arrest and the subsequent on-scene identification of the Petitioner were suppressed at trial. Petitioner's prior counsel did not object to the admission of any evidence based on this determination at trial. However, Petitioner's appellant counsel now argues that the circuit court should have suppressed introduction of evidence obtained pursuant to the illegal arrest because the affiant officer essentially did not provide the magistrate with the "whole story" in his affidavit for obtaining the search warrant. The Petitioner argues that the affiant officer knew of the illegal arrest, the subsequent search, seizure and identification and therefore "omitted crucial information, as a result of which omission a magistrate was hoodwinked into issuing a warrant." (Pet'r's Br. at 16.) The Petitioner's argument is baseless.

The Petitioner quotes language from Syl. Pt. 1 of *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995) which states:

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. Recklessness may be inferred from an omission in an affidavit only when the material omitted would have been “clearly” critical to the finding of probable cause.

In the present case, the Petitioner has not met his burden of showing that “facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading” as required by *Lilly*. The Petitioner argues that “the affiant officer conveniently failed to note in his Affidavit that the Petitioner had been arrested in his home without a warrant 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 already been returned to the apartment to await rediscovery with a warrant in hand.” (Pet’r’s Br. at 14.) The Petitioner argues that the affiant officer “applied for the warrant with full knowledge of what had taken place back at the Petitioner’s home” and “whether his omissions were intentional or merely reckless is irrelevant.” (*Id.* at 15.) The Petitioner offers no evidence to support his claims.

By the Petitioner’s own omission, the affiant officer, Patrolman Hunt left the scene outside of Petitioner’s home to obtain a search warrant prior to the Petitioner’s arrest and prior to any “sweep” or search of the Petitioner’s home. Because Patrolman Hunt had left the scene, he was not involved in any subsequent conduct and the Petitioner has not brought forth any evidence to demonstrate that he knew the specific circumstances of the arrest and any search of the Petitioner’s home. The Petitioner also argues that Patrolman Hunt omitted the fact that the perpetrator was wearing a mask and was instead described generically as a “black male”—an accurate description of the Petitioner. The Petitioner’s blank assertions that Patrolman Hunt had “full knowledge of what had taken place back at the Petitioner’s home” and empty arguments that the Petitioner was described correctly as a “black male” rather than as a masked crusader does not establish by a

preponderance of the evidence that Patrolman Hunt, intentionally omitted facts or that facts were omitted in reckless disregard of whether their omission made the affidavit misleading. Therefore, the Petitioner has not met his burden of proof in demonstrating that “facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading” as required by *Lilly*.

The Petitioner also argues that the shirt and other evidence that were “excepted from the exclusionary rule by the doctrine of inevitable discovery” should not have been admitted at trial because the police were not actively pursuing a search warrant prior to the time of the police misconduct. (*Id.* at 16.) In Syl. Pt. 4 of *State v. Flippo*, 212 W. Va. 560, 575 S.E.2d 170 (2002), this Court held that:

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.

In *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995), this Court held that,

[W]e 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. When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

(*Id.* at 600, 461 S.E.2d at 106 (footnote omitted).)

The circuit court previously considered this argument in the Petitioner's motion(s) to suppress filed prior to trial. In its Order on the motions, the circuit court found the Petitioner's plaid shirt admissible under the inevitable discovery rule of *Flippo*. Because the Petitioner is essentially challenging the findings of the circuit court in its Order, this court must consider the evidence in the light most favorable to the prosecution and affirm the court's holding "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." (*Id.*)

The Petitioner's argument that the police were not actively obtaining a search warrant prior to the time of the misconduct is not supported by the record. By the Petitioner's own "timeline of events described by the State" the "affiant officer leaves the scene to obtain a search warrant" prior to any arrest or search. In his Final Police Report dated October 15, 2007, Patrolman Hunt indicated that he responded to the crime from three blocks away and that while he was in route, he was advised that a store employee was chasing the subject. The employee, who was later identified as A-1 employee, Mike Price, advised Patrolman Hunt that after an extended route, the suspect had fled to an apartment complex on Wyoming Street. At the apartment building, Patrolman Hunt was advised by mail carrier Joey Shaffer, that he believed the suspect to be Tony Myers. Patrolman Hunt notified Metro of his location and after noting a mailbox labeled "Tony Myers 200", he knocked on the door several times with no answer, and noticed the "silhouette of a person moving around in the window above." (R. at 44-45.) Patrolman thereafter notified Corporal Rollins of the situation and was advised to "keep the area secure and get a search warrant." Patrolman Hunt advised the other officers of his orders and left the scene to obtain a search warrant. (*Id.*) After Patrolman Hunt left

the scene, the Petitioner answered the door and was apprehended by Corporal Randall, Corporal Basford, Patrolman Payne and Patrolman Rinick. (R. at 44-46.)

In viewing the evidence in the light most favorable to the prosecution, it is clear from the Final Police Report that Patrolman Hunt was in fact, seeking a search warrant prior to the arrest and any subsequent search of the Petitioner. The conclusion is supported by substantial evidence, including the Final Police Report and affidavit. The conclusion is not based on an erroneous interpretation of applicable law and the Petitioner's dalliance into various laws of other jurisdictions is inapplicable. In light of the entire record, this Court cannot be left with a firm and definite conviction that a mistake has been made. (*Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995)). Therefore, this Court must affirm the circuit court's holding that the inevitable discovery rule of *Flippo* was applicable in this case.

Finally, the Petitioner spends a great deal of time asserting that the Petitioner was illegally arrested in his home without a warrant and that no exigent circumstances existed to justify the arrest. The circuit court previously decided this issue in the Petitioner's favor in its Order on the Petitioner's various motions to suppress evidence. As a result, evidence of the Petitioner's arrest and subsequent on-scene identification was not admitted at trial. Because this issue was previously decided in the Petitioner's favor and no evidence of the arrest or subsequent on-scene identifications were admitted at trial the State finds it unnecessary to readdress this contention.

B. The circuit court did not err in allowing witnesses to identify the Petitioner at trial.

As a second point of error, the Petitioner argues that because the circuit court suppressed out-of-court identification of the Petitioner, the circuit court should not have allowed in-court

identification of the Petitioner. The Petitioner argues that out-of-court identification by Tammy Bess, Pedro Torres, and Joey Shaffer was so suggestive as to render their in-court identification invalid. In Syl. Pt. 3 of *State v. Casdorph*, 159 W. Va. 909, 230 S.E.2d 476 (1976), this Court held that:

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.

At trial, One Stop manager Tammy Bess testified that she was able to get a good look at the Petitioner's face during the robbery.

Q: At any point did you get to look at this person's face?

A: Yes, sir.

Q: How did that happen?

A: When he was hollering and he had the gun like this, his mask kept going, or whatever, the bandana or--kept dropping. It dropped down to here. He pushed it back up over his eyes and then pulled it back down, so I seen from here up.

Q: And did you recognize that person?

A: Yes sir.

Q: And how did you recognize that person?

A: I had just seen him in the store. Not often. I mean, it's not, you know.

Q: Enough to know who it was?

A: Enough to know--you know, I didn't know him. But yes, to know who he was. Yes.

Q: You didn't know his name or anything about him?

A: No.

Q: But you were certain in who it was?

A: Yes, sir.

Q: Is that person in this courtroom?

A: Yes, sir.

Q: Can you identify that person by pointing and telling us what they're wearing?

A: It's the man sitting right there in the white shirt staring at me.

MR. HOLSTEIN: Your honor I'd ask the record reflect she's identified the defendant, Tony Curtis Myers.

THE COURT: The record will reflect that this witness has identified the defendant.

(R. at 297, 155-56.)

At trial, Pedro Torres also testified that he was able to get a view of the Petitioner's face.

Q: Okay. At any point right there did you get a chance to look at this person's face?

A: When he went inside the apartment, yes.

Q: Okay. It was dark outside, so how do you get to see his face?

A: Because when he went up to the apartment and he opened the door, the light was on from the apartment. So since he took everything off, he went to the apartment. When he opened the door without nothing on his face, I recognize him. I saw him, his face, first time.

Q: Okay. And did you also see the shirt that was on that person when they opened the door?

A: Yes.

Q: Is it the same shirt that you saw the person wearing inside the store?

A: Yes.

Q: Is that person in this courtroom?

A: Yes.

Q: Can you identify that person by pointing and telling us what they're wearing?

A: He's wearing a white shirt now.

MR. HOLSTEIN: Your Honor, I'd ask the record to reflect that he's identified the defendant.

THE COURT: The record will reflect that this witness has identified the defendant, Tony Curtis Myers.

(R. at 298, 28-29.)

Mail carrier, Joey Shaffer also testified to his ability to independently identify the Petitioner.

Q: Now, the person that was running and that you saw go, what did you recognize about that person, if anything? Or what did you notice?

A: I recognized the shirt that he had on. I couldn't see, actually see his face. I could tell it was a black male about, you know, around I'd say six foot tall.

As far as actually the face, no, I couldn't tell, but I recognized, would recognize the shirt. Like I say, you know as far as the clothes go, I could recognize but not the face.

Q: Okay. Now how about the way this person carried themselves?

A: His (sic.) carried himself--yeah, a lot of the way I had seen Tony Myers walk around town, same build and whatnot.

Q: The way that this person carried himself, was it consistent with the way you've seen Tony Myers carry himself?

A: Yes, sir.

....

Q: And what was this person wearing?

A: He had the plaid shirt on.

Q: He had a plaid shirt on?

A: Right. He had something at one time had been around his face that had kind of fallen down a little bit around his neck. A bandana per se.

Q: Well, was it a bandana?

A: Yes.

Q: Okay. What else was he wearing?

A: He had a hat on. I remember he had something on his hands, white gloves on his hands, and had something in his hand.

Q: And you remember white gloves on his hands?

A: Yes, sir.

.....

Q: And you're not testifying that the person that you were chasing was Mr. Myers, are you?

A: The way the person carried his self--as far as seeing his face, no, sir. The way he carried his self, I would say, yes.

Q: The way he carried himself--

A: Yes, sir.

(*Id.* at 63-70.)

The issue of in court identification was previously discussed in the circuit court's Order on the Petitioner's motions to suppress. In the Order, the circuit court held that:

1. 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.

2. However, the in court identification of the defendant by witness Pedro Torres is allowed, as this witness had an independent basis for making the identification. Under the totality of the circumstances, the Court finds this identification to be reliable. The witness had an adequate opportunity to observe the defendant, testified to a high degree of attention, is highly certain in his identification, and he made an identification of the defendant (sic.) was made shortly after observing him.

(R. at 187.)

Looking to the totality of the circumstances, the identification was reliable. The Petitioner was not just randomly identified at the scene. The witnesses tracked the Petitioner on foot after he fled the scene of the crime. The chase eventually led to the arrest of the Petitioner at his own apartment. Yes, the Petitioner was wearing a bandana at the time of the robbery. However, there was an abundance of other evidence that was used to identify the Petitioner. Tammy Bess testified that she was able to view the Petitioner's face when the bandana obscuring his face shifted downward and discussed the incident in specific detail. She was able to recognize the Petitioner as someone who frequented the One Stop. Pedro Torres also testified that he was able to see the Petitioner's face. Local mail carrier, Joey Shaffer was familiar with the Petitioner from his mail route and testified that he recognized the Petitioner by his build, the way he was dressed and the way he carried himself. Because under the totality of the circumstances, the out-of-court identification was reliable, it was not so suggestive as to render the in-court identification by witnesses invalid. Therefore, the circuit court did not err in allowing the in-court identification of the Petitioner by witnesses Tammy Bess, Pedro Torres and Joey Shaffer.

C. The circuit court did not err in permitting the State to prosecute multiple robbery charges. *State v. Collins* is applicable only to attempted robberies and to robberies where the business is the only “victim.”

As a third point of contention, the Petitioner argues that the Petitioner should have been charged, tried and convicted of a single count of robbery. The Petitioner argues that the holding of *State v. Collins*, 174 W. Va. 767, 329 S.E.2d 839 (1984) should apply to his case. In Syl. Pt. 2 of *State v. Collins* this court held that:

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.

As the Petitioner summarizes, 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.” (Pet’r’s Br. at 21.) The Petitioner also accurately notes that the Court notes that its opinion only explicitly holds for attempted robbery. In *Collins*, the Court held that:

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.

(*State v. Collins*, 174 W. Va. 767, 773, 329 S.E.2d 839, 844 (1984).

The facts and circumstances of the Petitioner’s case are entirely different from the facts and circumstances of *Collins*. The Petitioner argues that “in the eyes of the perpetrator of the One Stop robbery, of course, all alleged victims were, for all intents and purposes, employees of One Stop” and “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.” (Pet’r’s Br. at 21-22.) These conclusions are not supported by the facts. It is irrelevant whether the Petitioner believed victims Mike Price and Pedro Torres were actual employees of One Stop, because they were robbed individually. After ordering store manager Tammy Bess to put One Stop money in a bag, the Petitioner then ordered Mike Price and Pedro Torres to get down on the floor, and thereafter to stand up and empty their pockets. (R. at 297, 158; R. at 298, 24-26.) Both men complied with the Petitioner’s demands. (R. at 297, 158; R. at 298, 24-26.)

Factually, this is not a case where a defendant attempted to rob a business with multiple employees present. Instead, the Petitioner robbed the One Stop store via Tammy Bess, who was a store employee and then proceeded to rob non-employees Mike Price and Pedro Torres individually by brandishing his weapon, ordering them to the floor and demanding that they empty their pockets. Despite the Petitioner’s contentions, multiple robbery counts were warranted and the holding of this Court in *Collins* is completely inapplicable to this case. Therefore, the circuit court did not err in charging, trying and convicting the Petitioner of three counts of robbery.

D. The circuit court did not err in denying the Petitioner’s motions for judgment of acquittal and a new trial. The evidence was more than sufficient to sustain a guilty verdict.

As a final argument, the Petitioner asserts that the circuit court erred by denying the Petitioner’s motions for judgment of acquittal and a new trial. The Petitioner argues that he was not adequately identified and that no firearm was ever recovered. In Syl. Pt. 1 of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), this Court held that:

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.

Simply put, in reviewing the evidence in the light most favorable to the prosecution, there was more than enough evidence for a rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. Witnesses Tammy Bess and Pedro Torres both testified at trial that the Petitioner used a handgun in the commission of the One Stop robbery. These witnesses, along with mail carrier, Joey Shaffer, each described an active chase of the Petitioner to his apartment complex. The witnesses also described the ensemble that the Petitioner was wearing—a hat, plaid shirt, bandana and latex gloves. In the search performed pursuant to a search warrant, Charleston police officers recovered a shirt, pants, rubber gloves, cash, bandanas, headgear and a hat. (R. at 297, 223.) At trial, Patrolman Rinick indicated that police officers also recovered a “wad of cash” in “various denominations” and that there was a piece of paper separating \$45.00 in fives and \$23.00 in ones. (*Id.* at 228-29.) Although police officers walked through the alley, looked in yards, in storm drains and around the One Stop store but were unable to locate the handgun that was used in the robbery. (*Id.* at 212-13.)

The Petitioner has raised valid arguments regarding witness identification and the unrecovered handgun. However, these were arguments that were presented at trial to a jury of the Petitioner's peers. The standard of review on direct appeal is not whether the Petitioner presented evidence to support his own version of events, but rather “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.” (*LaRock*, 196 W. Va. at Syl. Pt. 1, 470 S.E.2d at Syl. Pt. 1.) The same jury was also presented with evidence from three witnesses describing the Petitioner’s conduct, dress, etc, outside of the on-scene identification that the circuit court held to be inadmissible. There was also testimony presented from two different witnesses that the Petitioner used a handgun during the commission of the robbery. Therefore, in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that the witness was sufficiently identified by conduct outside of the on-scene identification and that the Petitioner used a handgun in the commission of the crimes. The circuit court did not err in denying the Petitioner’s motion for judgment of acquittal and new trial.

IV.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for appeal and refuse any and all relief prayed for by the Petitioner.

Respectfully Submitted,

State of West Virginia
Respondent

By Counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



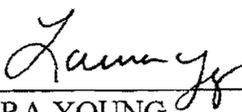
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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General, do hereby certify that I have served a true copy of a "Brief on Behalf of Respondent" upon Petitioner's Counsel by depositing said copy in the United States mail, with first-class postage, on this 30th day of August, 2011, addressed as follows:

To: Scott Driver, Esq.
Post Office Box 911
Charleston, WV 25323


LAURA YOUNG