

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

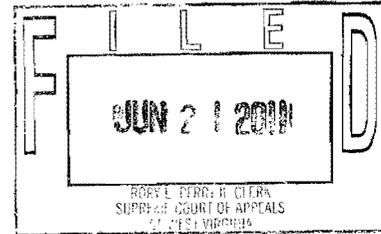
PLAINTIFF/PETITIONER,

v.

**CIVIL ACTION NO. 11-0555
(Indictment No. 10-F-2235)**

MARCELLA LORENZA DUNBAR,

DEFENDANTS/RESPONDENTS.



BRIEF OF THE PETITIONER

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III. ASSIGNMENTS OF ERROR

- 1. It Was Error for the Circuit Court to Determine that a Missing Passenger-Side Mirror Constituted Sufficient Reasonable Suspicion to Stop the Vehicle in which the Petitioner was a Passenger**
- 2. It Was Error for the Circuit Court to Determine that a Police Officer Who is Not a Member of the Department of Public Safety Had the Authority to Stop a Vehicle for Allegedly Defective Equipment**

IV. STATEMENT OF THE CASE

This case arises from the unlawful stop, improper search, and subsequent arrest of the Petitioner, Marcellas Dunbar. On January 20, 2010, the Petitioner was a passenger in a motor vehicle driven by Jarod Dillon and registered in the State of Ohio. (Appendix p. 10, 75). The sole reason Mr. Dillon was stopped by the Huntington Police Department was for defective equipment, specifically a missing passenger-side mirror. (Appendix p. 10, 74). Following the illegal stop, the officer removed both the Petitioner and the driver from the car. (Appendix p. 79, 91, 97-98). Next, the officer performed a canine search resulting in the discovery of certain evidence located in the console of the vehicle, the discovery of which led to the charges against the Petitioner. (Appendix p. 1, 2, 10, 75). The Petitioner was subsequently charged with three counts of possession of a controlled substance with intent to deliver. (Appendix p.1, 2)

On October 23, 2010, the Petitioner filed a Motion to Suppress Evidence obtained during the stop based upon lack of reasonable suspicion due to the illegality of the stop, as the stop was made solely due to the missing passenger-side mirror. (Appendix p. 3-22). As neither West

Virginia law, where the stop was made, nor Ohio law, where the vehicle was registered, require vehicles to have passenger-side mirrors, no traffic violation was committed and therefore, reasonable suspicion did not exist to make the stop. *Id.* Additionally, the Petitioner presented oral argument that the police officer did not have authority to make any stop for defective equipment as he was not an employee of the Department of Public Safety. (Appendix p. 33-34). The Circuit Court entered an Order denying the Petitioner's Motion to Suppress on October 28, 2010, finding probable cause and jurisdiction. (Appendix p. 49-51).

Thereafter, on December 7, 2010, the Petitioner filed a second Motion to Suppress Evidence obtained during the search based upon the fact that the search was overly broad and exceeded the scope of the initial stop. (Appendix p. 53-57). The police officer made the stop for allegedly defective equipment and then preformed a full canine search. The Circuit Court denied the Petitioner's Motion on January 11, 2011. (Appendix p. 117).

Following the Circuit Court's rulings, the parties entered into plea negotiations and reached a plea agreement on or about February 22, 2010. (Appendix p. 119-124). On that date, the Petitioner entered a Kennedy Plea of guilt pursuant to Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure to the felony offense of possession of a controlled substance with intent to deliver in violation of West Virginia Code § 60A-4-401(a)(i). (Appendix p. 120). Pursuant to that Kennedy Plea agreement, the State agreed to dismiss the remaining two charges. (Appendix p. 121). Likewise, the parties agreed to permit the Petitioner to appeal the Circuit Court's Orders denying his Motions to Suppress to this Court. (Appendix p. 122). The

Petitioner was sentenced to a State penitentiary for not less than one (1) nor more than fifteen (15) years. (Appendix p. 125-126). The Petitioner remains out on bond during the pendency of this appeal. (Appendix p. 122-123).

V. SUMMARY OF ARGUMENT

1. **It Was Error for the Circuit Court to Determine that a Missing Passenger-Side Mirror Constituted Sufficient Reasonable Suspicion to Stop the Vehicle in which the Petitioner was a Passenger**

West Virginia Code § 17C-15-35 only requires every motor vehicle in which the driver does not have a clear view to the rear to be equipped with a mirror so that the driver can see for a distance of at least 200 feet to the rear of the vehicle. There is clearly no requirement that every motor vehicle in the State of West Virginia be equipped with a passenger-side mirror. The relevant statute only requires an unobstructed view from the driver's seat to the rear of the car *or* a mirror which gives the driver a view of the highway for a distance of at least 200 feet to the rear of the vehicle. Furthermore, it is not disputed that the vehicle in which the Petitioner was traveling had a rearview and driver's side mirror. Additionally, the law of Ohio, the jurisdiction where the vehicle in which the Petitioner was traveling was registered, only requires vehicles to have a rearview mirror providing a view to the operator of the highway to the rear of that vehicle. O.R.C. § 4513.23.

It is clear that police officers may only stop a vehicle if they have a reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is

about to commit a crime. State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994). The only articulable suspicion that a person in the vehicle in which the Petitioner was traveling was committing a crime was the missing passenger-side mirror. As West Virginia does not require a passenger-side mirror, the police officer did not have reasonable suspicion to stop the vehicle. Strick v. Cicchirillo, 224 W.Va. 240, 83 S.E.2d 575 (2009). Due to lack of reasonable suspicion for the stop, all of the evidence obtained as a result of that stop should have been excluded pursuant to the Fruit of the Poisonous Tree Doctrine. State v. DeWeese, 213 W.Va. 339, 582 S.E.2d 786 (2003). As such, the Circuit Court erred when it refused to suppress the evidence obtained as a result of the illegal stop.

2. It Was Error for the Circuit Court to Determine that a Police Officer Who is Not a Member of the Department of Public Safety Had the Authority to Stop a Vehicle for Allegedly Defective Equipment

The police officer who stopped the vehicle did not have authority to do so as he was a member of the Huntington Police Department. Pursuant to West Virginia Code § 17C-16-2, only employees of the Department of Public Safety have the authority to stop a vehicle for allegedly defective equipment. W.Va. Code § 17C-16-2. Due to the illegality of the stop, the evidence obtained during the subsequent search should have been excluded and the Circuit Court erred in not doing so.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this case is necessary pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure as not all of the parties have waived oral argument. Furthermore, the Petitioner states that oral argument should be permitted pursuant to Rule 19(a)(4) as the legal issues are relatively narrow. The Petitioner believes that the case is not appropriate for a memorandum decision as the legal issues, while narrow, affect a large number of individuals, namely every person who operates or owns a motor vehicle in this State.

VII. ARGUMENT

1. It Was Error for the Circuit Court to Determine that a Missing Passenger-Side Mirror Constituted Sufficient Reasonable Suspicion to Stop the Vehicle in which the Petitioner was a Passenger

A. Standard of Review

As this case involves a legal determination regarding a suppression hearing, this Court's review is *de novo*. "On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Suppression determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard." Syl. Pt. 1, State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).

B. Reasonable Suspicion Standard

It is undisputed that the only reason for stopping the vehicle in which the Petitioner was traveling was due to a missing passenger-side mirror. As a missing passenger-side mirror is not a

traffic violation, the police officer did not have a reasonable suspicion to stop the vehicle.

The Fourth Amendment protects individuals from unreasonable search and seizure. Delaware v. Prouse, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Because a routine traffic stop is only a limited form of seizure, it is more analogous to an investigative detention than a custodial arrest. Berkemer v. McCarty, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984). Therefore, legality of these stops is analyzed under the standard articulated in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). United States v. Sharpe, 470 U.S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985).

It is well settled that police officers only need a reasonable suspicion in order to make an investigatory stop. State v. Stuart, 192 W.Va. 428, 431, 452 S.E.2d 886, 889 (1994). “Police officers may stop a vehicle to investigate it if they have an articulable suspicion that the vehicle is subject to seizure or a person in the vehicle ‘has committed, is committing, or is about to commit crime.’” Id. at 889-890 (citing Berkemer v. McCarty, 468 U.S. 420, 439 (1984)). The Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution require that the police articulate facts which provide some minimal, objective justification for a stop. Id. at 891, fn 10. If the missing passenger-side mirror, which was the basis of the stop, was not a traffic violation, then the police officer did not have the predicate reasonable suspicion necessary to make the initial stop without violating the Petitioner’s Fourth Amendment rights. Strick v. Cicchirillo, 224 W.Va. 240, 242, 683 S.E.2d 575, 577 (2009).

C. **A missing passenger-side mirror does not amount to a traffic violation, and therefore, the police officer did not have probable cause to stop the vehicle in which the Petitioner was traveling**

The police officer in this case did not have reasonable suspicion to stop the vehicle in which the Petitioner was a passenger because neither West Virginia nor Ohio, the state in which the vehicle was registered, require vehicles to have a right, or passenger-side, mirror. As such, all of the evidence seized by police officers and used to charge the Petitioner should have been suppressed.

“Police officers may stop a vehicle to investigate if they have a reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994). As outlined above, the only articulable suspicion which led to the motor vehicle stop was a missing passenger mirror. However, as there is no such requirement in either West Virginia or Ohio, the police officer lacked probable cause to stop the vehicle. Strick v. Cicchirillo, 224 W.Va. 240, 683 S.E.2d 575 (2009), attached as Exhibit B.

Pursuant to West Virginia Code § 17C-15-35, every motor vehicle in which the driver does not have a clear view to the rear shall be equipped with a mirror so that the driver can see two hundred feet to the rear of the vehicle. Therefore, the only requirement in West Virginia is that the driver have an unobstructed view to the rear *or* a mirror which gives a view of 200 feet to the rear of the vehicle. Additionally, the State regulations outlining the equipment necessary to pass inspection do not require a passenger, or right-hand, side mirror. W.Va. C.S.R. § 91-12-2.1. (Appendix p. 21). As such, even the relevant State regulation only requires a rearview and

driver's side mirror.¹

In Strick v. Cicchirillo, 224 W.Va. 240, 683 S.E.2d 575 (2009), this Court examined whether a police officer had probable cause to stop a motor vehicle that had multiple tail lamps with at least one not in proper working condition. This Court in Strick recognized that West Virginia law may only *require* a motor vehicle to have one rear tail lamp. Id. This finding was based upon statutory language which stated that “every motor vehicle... shall be equipped with at least one tail lamp mounted on the rear...” Id. at 578 (citing W.Va. Code § 17C-15-5(a)).

However, this Court also recognized that there was a statutory section that required all tail lamps that were on a vehicle to be working properly. Id. at 580. The requirement that all of the tail lamps that a vehicle is equipped with be working was based upon a different part of the same statute which reads “any tail lamp or tail lamps, together with any separate tail lamp for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.” Id. (citing W.Va. Code § 17C-15-5(c)). Reading the two statutory sections in *pari materi*, this Court determined that the statute required any lamp on a vehicle to be lighted at night. Id. Therefore, the police officer had probable cause to stop the Petitioner as some of his tail lamps were not working. However, this case is readily distinguishable as there is no requirement in West Virginia that a motor vehicle have a passenger-side exterior rear view mirror.

¹It should be noted that the Official Motor Vehicle Inspection Manual contained in West Virginia C.S.R. § 91-12-2.1 was revised on June 1, 2010, after the stop issue in this case, and still does not require a passenger-side mirror.

As outlined above, the relevant statute in this case states:

Every motor vehicle which is so constructed or loaded as to obstruct the driver's view to the rear thereof from the driver's position shall be equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least 200 feet to the rear of such vehicle.

West Virginia Code § 17C-15-35.

The plain meaning of this statute must be accepted without resorting to any rules of interpretation as it is clear and without ambiguity. Little v. W.Va. Adjutant Gen., 223 W.Va. 790, 794, 679 S.E.2d 622, 626 (2009). A plain reading of West Virginia Code § 17C-15-35 only requires mirrors to be on vehicles which are constructed or loaded in a manner which obstructs the driver's view to the rear of the vehicle when sitting in the driver's seat. Obviously, there was no evidence or allegation in this instance that the vehicle in which the Petitioner was traveling was constructed or loaded in such a manner as to obstruct the driver's view.

Even if the vehicle in which the Petitioner was traveling was constructed or loaded in such a manner as to obstruct the driver's view, the relevant statutory provision was still not violated. The vehicle was equipped with both the driver's side and a rearview mirror, and as such, the requirements set forth in West Virginia Code § 17C-15-35 were met.

Although not controlling, the United States Court of Appeals for the Eleventh Circuit has decided a similar case. In United States v. Chanthasouxat, 342 F3d 1271 (11th Cir. 2003), a police officer stopped a van for failure to have an inside rearview mirror. The controlling ordinance in Chanthasouxat read as follows:

No person shall drive on any street of the city a motor vehicle which is so constructed or loaded as to prevent the driver from obtaining a view of the street to the rear by looking backwards from the driver's position unless that vehicle is equipped with a mirror so located as to reflect to the driver a view of the streets for a distance of at least 200 feet on the rear of the vehicle.

Id. at 1274 (citing Birmingham City Code § 10-11-5).

In its interpretation of the statute, the Eleventh Circuit held that “the Birmingham law merely requires that the driver be able to ‘obtain a view of the street to the rear by looking backward from the driver’s position’ *or* have ‘a mirror so located as to reflect to the driver a view of the streets for a distance of at least 200 feet of the rear of the vehicle.’” Id. at 1278. (emphasis by Court).

Although the police officer who made the stop in Chanthasouxat believed that the statute required an inside rearview mirror, the Eleventh Circuit determined that the statute did not require an inside rearview mirror. Id. at 1280. As a result, the Eleventh Circuit held that the police officer’s “mistake of law cannot provide the objective basis for reasonable suspicion or probable cause” and concluded that the traffic stop at issue violated the Fourth Amendment. Id.

Likewise, in the present case, the statute, which is very similar to the one at an issue at Chanthasouxat, does not require a passenger-side mirror. Regardless of whether the officer believed a traffic violation occurred, his mistake of law cannot provide the necessary reasonable suspicion to have made the traffic stop. Therefore, the traffic stop violated the Petitioner’s Fourth Amendment right and the evidence against the Petitioner should have been suppressed.

Furthermore, even if Ohio law regulates the safety requirements of a vehicle registered in Ohio, the officer still lacked reasonable suspicion to make the stop as Ohio law does not require vehicles to be equipped with a passenger-side mirror. Pursuant to Ohio Revised Code § 4513.23, motor vehicles are only required to have a rear view mirror providing a view to the operator of the highway to the rear of that vehicle. O.R.C. § 4513.23. Additionally, Ohio has no requirements with respect to vehicle inspections, as Ohio does not require such inspections.

As such, regardless of whether West Virginia or Ohio laws apply, the car in which the Petitioner was traveling was not required to be equipped with a passenger-side mirror. As the lack of the passenger-side mirror formed the *only* basis for the stop of the vehicle, the police officer lacked the predicate reasonable suspicion in order to make the initial stop. Therefore, all the evidence obtained as a result of the subsequent search should have been suppressed.

2. It Was Error for the Circuit Court to Determine that a Police Officer Who is Not a Member of the Department of Public Safety Had the Authority to Stop a Vehicle for Allegedly Defective Equipment

Pursuant to West Virginia Code § 8-14-3, any member of a police force may only make any arrest which can be legally exercised or discharged by a Deputy Sheriff of a county. W.Va. Code § 8-14-3. Only employees of the Department of Public Safety, namely State Troopers, have the authority to stop vehicles for defective equipment. W.Va. Code § 17C-16-2. As the Huntington City Police Officer made the stop in this case did not have the authority to make such a stop pursuant to West Virginia Code § 17C-16-2, the stop was illegal, and any evidence obtained as a result of that stop should have been suppressed.

VIII. CONCLUSION

The legal issues in this case are narrow ones. The sole reason the vehicle in which the Petitioner was traveling was stopped was due to a missing passenger-side mirror. There is no requirement that a vehicle operating in the State of West Virginia, or Ohio for that matter, be equipped with a passenger-side mirror. As such, the officer making the stop did not have reasonable suspicion to do so, as no traffic violation was occurring. Therefore, the only conclusion that can be reached is that the stop illegally violated the Petitioner's Fourth Amendment Rights and the subsequent evidence used against the Petitioner should have been suppressed by the Circuit Court.

Furthermore, only members of the West Virginia State Police Department have the authority to stop vehicles for allegedly defective equipment. As such, the Huntington Police Officer did not have the authority to stop the vehicle, even if passenger-side mirrors were required. Again, due to the illegality of the stop, the Circuit Court erred in refusing to suppress the evidence obtained as a result of the subsequent search.

Lastly, although the legal issues raised are narrow ones, this Court should grant the Petitioner's appeal as the issues affect a large number of people. The issues involved affect every individual who either owns or operates a motor vehicle in the State of West Virginia. Essentially, the Huntington Police Department has broadened the requirements which the Legislature specifically set forth as they pertain to safety equipment on vehicles operating in this State, and specifically passenger-side mirrors. Simply put, the Huntington Police Department

has no authority whatsoever to implement its own safety requirements beyond what the Legislature has clearly dictated.

As the Petitioner's Fourth Amendment rights were violated for being stopped and searched with no reasonable suspicion whatsoever, the Petitioner requests that this Court reverse the Circuit Court's ruling regarding the suppression of evidence and determine that all of the evidence which was obtained following the illegal stop must be suppressed due to the Fruit of the Poisonous Tree Doctrine.



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CERTIFICATE OF SERVICE

The undersigned counsel for the Defendant hereby certifies that he has served a copy of the foregoing **BRIEF OF PETITIONER, MARCELLA DUNBAR** upon the following via U.S.

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