

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 11-0803**

**DAVID FARLEY**

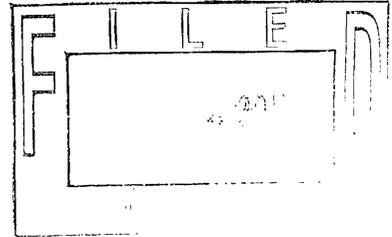
Petitioner

V.)

**STATE OF WEST VIRGINIA,**

Respondent

Appeal from a final order  
of the Circuit Court of Boone County  
(10-F-39)



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**Petitioner's Brief**

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**Counsel for Petitioner, DAVID FARLEY**

Robert Lee White (WV Bar #4568)

*Counsel of Record*

David Lockwood (WV Bar #8667)

Josh Smith-Shimer (On Brief)

**PUBLIC DEFENDER 25<sup>TH</sup> CIRCUIT**

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# **TABLE OF AUTHORITIES**

## **CASES**

Figg v. Schroeder, 312 F.3d 625 (4th Cir. 2002)

Kentucky v. King, 131 U.S. 1849 (2011)

State v. Bookheimer, 656 W.Va 471 (2007)

## **AMENDMENTS**

U.S. Const. amend. IV

## **ASSIGNMENTS OF ERROR**

**THE COURT ERRED BY DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE OBTAINED BY AN UNCONSTITUTIONAL ENTRY AND SEARCH OF PETITIONER'S HOME**

## **STATEMENT OF THE CASE**

This is an appeal of a conditional plea of guilty to First Degree Robbery entered by your Petitioner on the 23<sup>rd</sup> day of March, 2011. Petitioner entered a conditional plea with leave to file an appeal to this Court to the ruling of the Circuit Court of Boone County denying your Petitioner's motion to suppress evidence obtained by State Police upon their warrantless entry of the Petitioner's residence during the early morning hours of the 5<sup>th</sup> day of November, 2009. It is the contention of your Petitioner that this warrantless entry and search of your Petitioner's home was unconstitutional in that it was an unreasonable search and seizure in violation of both the State and Federal Constitutions. Petitioner seeks a reversal of the decision of the Honorable Judge William S. Thompson which denied Petitioner's said Motion to Suppress. (A.R. 1).

## **STATEMENT OF FACTS**

On the evening of November 4, 2009 Cassie Burge was at work as a clerk at the Little General Store located at Wharton, WV in Boone County. She was alone when she decided to step outside the store shortly after 9 PM where she then observed an individual wearing a black ski mask approaching the store. She fled back into the store and held the door closed as the individual in the ski mask attempted to gain entry by pulling the door open from the outside. Ms. Burge successfully prevented the individual

in the ski mask from gaining entry into the Store and he fled after a short struggle. Ms. Burge believed that she saw a gun during the struggle. An older model red Chevy S-10 pickup truck was seen leaving the area at a high rate of speed. (A.R. 85).

Senior Trooper J.R. Brewer and Tfc. M.L. Vance arrived on the scene at 2134 hours to begin their investigation. They took statements from those present and was advised by Ms. Burge that she had seen what appeared to be a gun during the struggle. However they were not able to view any of the video recordings of the incident due to the fact that the recordings were only accessible by the store manager and he was not available.

The officers' investigation led them, at 2325 hours that night, to the home of Tom Lester where they found the red Chevy S-10 pickup truck. (A.R. 87). Tom Lester advised that he had spent the evening at the home of your petitioner, Dave Farley. The officers then left to find the home of Dave Farley but were unable to do so. The officers then returned twice to the home of Tom Lester to get better directions. On the second return visit the officers had determined that Tom Lester was lying to them and confronted Mr. Lester with their suspicions. (A.R. 92). At which point Mr. Lester confessed that he had, in fact, driven your petitioner to the Little General for the purpose of your petitioner robbing the store. (A.R. 95).

The officers then got better directions to the home of your petitioner and proceeded there accompanied by Deputy J. Mathis and Deputy N. Boothe of the Logan County Sheriff's Office. Their stated reasons for going to find Dave Farley was that they wanted to talk to him about the attempted robbery. (A.R. 100). Not to make an arrest nor preserve evidence.

Said officers arrived at the home of your petitioner at 0134 hours on November 5, 2009. At this point the officers did not have a search warrant and did not have individualized knowledge that petitioner had a gun. They had only hearsay from Cassie Burge that whoever it was that attempted the rob the Little General earlier that evening had a gun. The officers then did a “knock and announce” where they knock loud and announce loud State Police. (A.R. 101). They heard no response to the first knock, so they did a second “knock and announce”. After the second knock and announce they heard rapid footsteps, like someone running through the house. (A.R. 101). At this point the officers knocked the door open and entered the home of your petitioner. They then see your petitioner standing in his living room. The officers then pointed their guns at him and ordered him to the ground, to which order petitioner complied. (A.R. 103). The officers then secured petitioner, took a statement from petitioner and searched his home. (A.R. 103). It is this statement and the fruits of that search that Petitioner sought to suppress.

### **STANDARD OF REVIEW**

The crucial issue before this Court relates to the Boone County Circuit Court’s denial of a motion to suppress evidence. This Court has previously explained in *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996), the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed de novo. Thus, a circuit court’s denial of a motion to

suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

### **ARGUMENT**

**Mr. Farley enjoys a constitutional right under the Fourth Amendment, to be secure in his house, person, papers, and effects, against unreasonable searches and seizures.**

Per the Fourth Amendment, these rights enjoyed by Mr. Farley may not be violated and a warrant is not to be issued unless there is probable cause, supported by either an oath or affirmation of a witness and particularly describing the place to be searched, and the persons or things to be seized. Searches that are conducted outside of obtaining approval from a judge or magistrate are per se unreasonable under the Fourth Amendment and Article III. Under the state constitution, § VI states that there are only a few specifically established and well-delineated exceptions that can bypass judicial approval of a search, all of which show that the exigencies of the situation made that course imperative. The instances in which police officers may bypass judicial approval in serving a search warrant listed in § VI are limited to permit a search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question.

There is no allegation in your present case that there was an immediate need for police assistance in the protection of human life. Nor was the search or entry by the

officers motivated by an emergency, rather than by intent to arrest or secure evidence. In fact, Officer Brewer testified that the reason they were looking for Mr. Farley was that they wanted to talk to him about the attempted robbery of the Little General. There is no allegation that there was an emergency in the area.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Undersigned counsel respectfully requests that he be permitted to make oral argument.

**CONCLUSION**

The Circuit Court's order denying your Petitioner's motion to suppress should be reversed, and this matter should be remanded for further proceedings.

Signed: 

Robert Lee White (WV Bar 4568 )  
Counsel of Record for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of August, 2011, a true and accurate copy of the foregoing **Petitioner's Brief** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Counsel for Respondent

Keith Randolph  
Boone County Prosecuting Attorney  
200 State Street  
Madison, WV 25130

Signed: \_\_\_\_\_



Robert Lee White (WV Bar # 4568)  
Counsel of Record for Petitioner