

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEP 19 2011

Docket No. 11-0803

DAVID FARLEY,
Petitioner

V.

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

STATE OF WEST VIRGINIA,
Respondent

RESPONDENT'S BRIEF

Counsel for Respondent, State of West Virginia

Jennifer L. Anderson (WV Bar #8504)
Assistant Prosecuting Attorney in and for Boone County
200 State Street
Madison, WV 25130

TABLE OF AUTHORITIES

Cases:

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

State v. Bookheimer, 656 S.E.2d 471(2007)

U.S. V. Radford, 106 F.Supp.2d 944, 952 (2000)

U.S. v. Mapp, 476 F.2d 67, 75 (1973).

Comes now the Respondent by counsel, Jennifer L. Anderson, Assistant Prosecuting Attorney for and in Boone County, West Virginia in response to the Petitioner's Brief:

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner having entered a conditional plea of guilty to First Degree Robbery on March 23, 2011, is appealing a prior ruling by the Circuit Court of Boone County denying his motion to suppress evidence obtained by the State Police from the petitioner's home in the early morning hours of November 5, 2009. The Circuit Court held a hearing on the petitioner's motion to suppress evidence and heard testimony from Trooper First Class Vance and Senior Trooper Brewer regarding the collection of said evidence. The Court allowed written submissions by each party outlining their argument and the applicable law and then heard supplemental oral argument before making its ruling, ultimately denying petitioner's motion to suppress. The respondent submits that the Circuit Court's ruling was correct and that the evidence in this instance was not seized illegally or in violation of the State and Federal Constitutions. The respondent requests that this Court uphold the ruling of the lower Court in this matter.

The petitioner, in his brief, has outlined the facts of this case, however, there are some details that were not included in his summary. First, the petitioner acknowledges that during the attempted robbery Cassie Burge "believes" she saw the petitioner with a gun. However, according to the police report and the testimony of the Troopers during the suppression hearing, Cassie Burge told the officers that the person who attempted to rob the store where she was working had a "black handgun." (Petitioner's Appendix pp 26-27) Additionally, Cassie Burge told the 911 operator that the suspect had a handgun because when the call was dispatched, the

responding Troopers were advised that the suspect had a gun. During their ensuing investigation, Troopers Brewer and Vance were led to Tom Lester and Victoria Testerman from whom they learned that Tom Lester had driven the petitioner to the Little General Store for the purpose of robbing it. Further, Victoria Testerman told them that the petitioner had made the comment that evening that "he needed some money and he was ready to rob." (Tr. Suppression Hearing p. 26) Tom Lester also described the clothes that the petitioner was wearing, which was the same thing that Cassie Burge described the robber to have been wearing. And, Victoria Testerman told the Troopers that the petitioner had a green satchel bag with him on that night before the robbery.

The Troopers then went to the home of the petitioner, as he outlines in his brief, arriving at approximately 1:34 a.m. the early morning of November 5, 2009. What is not included in the petitioner's brief is the description both Trooper Brewer and Vance gave of the house and how it was situated. Trooper Brewer testified that the house sat down below the road and that they had to park their cruisers up on the road and walk down to the front door of the house. (Tr. Suppression Hearing p. 29) Trooper Brewer also testified that in the position in which they were standing at the front door of the house, they were illuminated. (Tr. Suppression Hearing p. 31) As the petitioner states, the Troopers knocked twice and announced themselves as police. After the second knock, they heard rapid footsteps as if someone were running through the house, however, they heard no verbal response to the "knock and announce." At this point the Troopers make the decision to enter the home, as they testified, to protect their own safety. Trooper Brewer testified that because of the running through the house, the lack of verbal response and the fact that he knows the petitioner has a gun, that the safety of the officers was in jeopardy at that time. Trooper Brewer testified that he didn't "know if he's running towards me, or to

conceal himself, or shoot out a window, and I didn't want to stand around to find out. I'm lit up, and he's not." (Tr. Suppression Hearing p. 34) Both Troopers Brewer and Vance testified that their decision to enter the home at that point was to "eliminate a threat" and not to gather evidence. (Tr. Suppression Hearing p. 34) However, whilst "clearing the house," ie making sure that there was no one else that could potentially be a danger to them was concealed, they found the evidence in dispute in plain view.

II. STANDARD OF REVIEW

The respondent in no way disagrees with the petitioner's assertion of the appropriate standard of review in this matter.

III. ARGUMENT

The petitioner, at the hearing, relied heavily on the West Virginia Supreme Court Case *State v. Bookheimer*, 656 S.E.2d 471, in which the Court held that warrantless entry and search was unconstitutional. The defendant argued that the facts and circumstances of that case were very much like those in this case. However, there are some vital factual differences. In *Bookheimer*, the police were responding to an anonymous 911 call regarding a domestic dispute involving gunshots and yelling and screaming. When the officers arrived at the residence Ms. Tingler was outside and denied any domestic dispute had taken place and told the officers to leave. One officer went to the front door of the home to check on Mr. Bookheimer's safety, announced his presence and identity and received a verbal response from Mr. Bookheimer that he was in the bathroom and would be out in a minute. The officers went into the home anyway. Here, the Troopers were not working off of an anonymous tip; they were in the midst of a armed

robbery investigation during which they took a statement from the eye witness/victim who actually saw the person attempting to rob the store with a gun. Further, the defendant did not make any response when the officers knocked and announced. But, they heard him moving around in the home.

The United States District Court in the Eastern District of Michigan held that the warrantless entry into a residence “cannot be justified on the basis of ‘running footsteps’ alone.” *US. V. Radford*, 106 F.Supp.2d 944, 952 (2000) However, the officers here did not enter the defendant’s home based solely on the sound of running footsteps. They made the decision based on everything they knew from their investigation to that point, ie that the defendant had a gun, attempted to rob a store, was upset that he was unsuccessful, his failure to respond to their knocks on the door, and the quick footsteps. The officers also considered the situation they were in, physically outside the defendant’s home. The Second Circuit Court, however, held that officer’s warrantless entry was justified under the following circumstances: “After knocking and announcing their identity, the officers waited one or two minutes for the door to open. They heard rapid footsteps in the rear of the apartment.” *U.S. v. Mapp*, 476 F.2d 67, 75 (1973). The Court went on to find that “under the circumstances, the officers could reasonably have believed that persons within the apartment were effecting the destruction of evidence.” *Id* at 75. Here, the officers were facing more than just the mere destruction of evidence but maintaining their own safety.

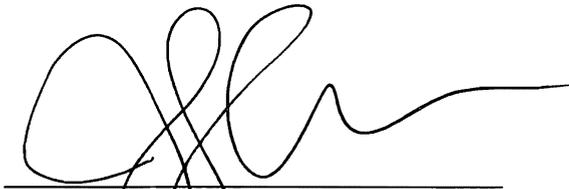
The Fourth Circuit has held that the exigent circumstances exception to the Fourth Amendment’s warrant requirement encompasses officer safety. *Figg v. Schroeder*, 312 F.3d 625, 639 (2002). Further, the Court held that “for police officers successfully to assert the exigent circumstances doctrine they need only possess a ‘reasonable suspicion’ that such

circumstances exist at the time of the search or seizure in question.” *Id* at 639. Also, the Court states that “courts should not engage in ‘unreasonable second-guessing’ of the officers’ assessment of the circumstances that they faced.” *Id* at 639. In that case, officers were investigating a shooting; they were at the home of a family whose reputation for violence and possessing firearms was well-known to the police. That case did not involve a search, but a seizure. Officers detained the Figgs for approximately thirty minutes without a warrant and the Court found they were justified.

Here, the officers, Sr. Tpr. Brewer and TFC Vance both testified that they entered the home without a warrant due to exigent circumstances of maintaining their own safety. The Troopers both testified that they went to the defendant’s home in the early morning hours of November 5, 2010 for the purpose of talking to him regarding a robbery that occurred the previous night. He was a suspect. They knew he had a gun from the account given by the victim, Cassie Burge. They knew that he went to the Little General that night with the purpose of robbing it and that he was upset that his attempt was unsuccessful from the statement given by Tom Lester. The Troopers further testified that they knocked and announced their presence and identity at least two times with no response from inside the house. They did hear quickly moving footsteps coming from inside the house. They also testified that they were illuminated and exposed to the door and front windows of the house while standing on the porch and that they would be exposed to the door and front windows during any journey back to their patrol cars. The petitioner asserts that the entry of the officers into the home was not motivated by emergency, despite their explanation and testimony to the contrary. The emergency was the protection of their own safety and lives.

IV. CONCLUSION

The Circuit Court's order denying the petitioner's motion to suppress should be upheld, as it was supported by substantial evidence, was not based on an erroneous interpretation of the law and was not, based on the entire record, a clear mistake.

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THE STATE OF WEST VIRGINIA
BY COUNSEL

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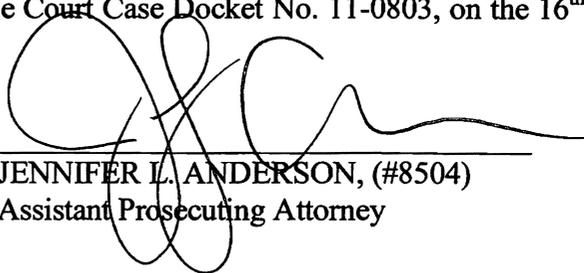
STATE OF WEST VIRGINIA,
Respondent

CERTIFICATE OF SERVICE

I, JENNIFER L. ANDERSON Assistant Prosecuting Attorney for Boone County, West Virginia, do hereby certify that the foregoing:

RESPONDENT'S BREIF

was/were duly served upon counsel for defendant, Robert Lee White, Chief Public Defender, 320 Main Street, Madison, WV 25130 in Supreme Court Case Docket No. 11-0803, on the 16th day of September 2011.



JENNIFER L. ANDERSON, (#8504)
Assistant Prosecuting Attorney