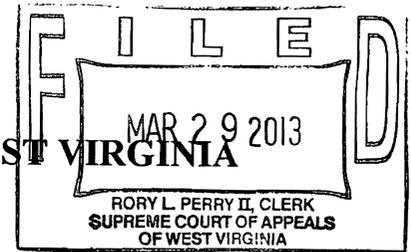


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0643



**STATE OF WEST VIRGINIA,
RESPONDENT,**

V.

**JOSHAWA KEITH CLARK,
PETITIONER.**

Appeal from a final order of
the Circuit Court of Cabell
County (10-F-6)

PETITIONER'S SUPPLEMENTAL BRIEF

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STANDARD OF REVIEW

A circuit court's findings of fact in its ruling on a motion to suppress are reviewed under the clearly erroneous standard. Questions of law and the circuit court's ruling regarding the constitutionality of law enforcement action is reviewed *de novo*. See State v. Lilly, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995).

STATEMENT OF THE CASE

On November 16, 2012, this Court entered an order requiring the Circuit Court of Cabell County to conduct a suppression hearing in order to develop the record regarding two issues. First, whether the DEA complied with federal law in issuing an administrative subpoena for Petitioner Clark's phone records, and second, whether these records were properly released to the Huntington Police Department. Consequently, a suppression hearing was held on February 5, 2013 in this case. The State called two witnesses, J.T. Combs and Tom Bevins. Combs is currently a bailiff at the Federal Courthouse in Huntington. S.R. (Supplemental Record) 4-5. At the time of the alleged robbery, Combs was a Huntington Police Officer and a deputized federal officer with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. S.R. 5-6. Combs also moonlighted as a security officer at the Pullman Square Marquee Cinemas at the time of the alleged robberies. Id. Bevins is a Special Agent with the DEA. S.R. 31.

J.T. Combs testified that after the July 2009 robbery, he noticed Clark had a motorcycle, jacket and helmet that appeared to be new. S.R. 9. Combs says that at the time, Clark was living in a low income housing project. Id. Combs also testified that the assistant manager told him that "they thought he was selling marijuana, that's where he got the money." S.R. 10. Combs said that after he learned this information, he began an

investigation of Clark on the suspicion that he was selling marijuana and also that he was involved in the robbery. S.R. 11, 29. In furtherance of this alleged investigation, Combs approached Bevins for a DEA administrative subpoena of Clark's phone records. S.R. 15-16, 34-35. When Combs received the records, however, he did not even look at them. S.R. 17. Instead, they went straight to the detective unit to Cass McMillian, who was investigating the robbery. *Id.* Despite the fact that Combs gave McMillian the phone records for his robbery investigation, Combs claims that he was not involved in the robbery investigation; he was just working "extra" at the cinema "and [he] gave what information that I had to Detective McMillian." S.R. 15.

Combs also admitted that there was no open drug case against Clark when he requested his phone records, he was merely working on a "tip." S.R. 22, 26. Combs further admitted that he was not involved in a grand jury investigation of Clark when he requested the records. S.R. 17. Combs never found any evidence that Clark was involved in drugs. S.R. 27-28.

There is a noticeable discrepancy between the information provided by the State to the Court during the pretrial motion hearings and Combs' testimony on February 5, 2013. *See* S.R. 4-30, A.R. 102-06, 1094-98. At the February 2013 suppression hearing, Combs claims that "the Assistant Manager ... stated to me that they thought that he was selling marijuana, that's where he got the money." S.R. 10. Combs further testified that "I had a suspicion that he was involved and I had information that he was dealing marijuana so I requested the phone records." S.R. 16. Contrary to Combs' testimony, however, the trial court found in the first order denying the motion to suppress that Combs talked to Clark's assistant manager, and she said that she thought he got the

money for the motorcycle gear from a Marines enlistment bonus. A.R. (Appendix Record) 103. Combs' testimony also contradicts the State's position at the August 2, 2010 suppression hearing that was adopted by the lower court in its findings of fact in the first order denying the motion to suppress. See A.R. 104. During this suppression hearing, the State represented to the Court as follows:

MS. HOWARD: "...I have spoken with Officer J.T. Combs, and he is actually the one who initiated this investigation. He is with the ATF, but he also worked over at the Marquee Cinema as a moonlight-type job, and he observed that this defendant had a lot of new things. And so he got to talking to the people at the Cinema and wanted to know where he had gotten these things or how he had gotten the money for these things, and that's how the investigation started.

THE COURT: You talking about personal property?

MS. HOWARD: Yeah. And that's where the probable cause began. There was also video of this defendant and the co-defendant at Marcum Terrance together the night of the July robbery.¹ So, it was more than just the phone records. And there was more than Detective McMillian involved in the initiation of this case. ...

THE COURT: Well, how about her argument that this subpoena is only to be used on drug cases?

MS. HOWARD: **Well, they didn't know at the time what they were dealing with. They didn't know if it was a drug related case at the time when they initiated the subpoena.**

[Emphasis added]. A.R. 93-94.

At a October 25, 2010 hearing requested by the defense regarding the presence of *ex parte* allegations by the State in the order denying the motion to suppress, prosecutor Howard reaffirmed that "the things listed in the order [denying the motion to suppress] were all things that HPD had noticed about this particular Defendant, and what this order

¹ As noted in the Petitioner's Brief, Ms. Howard is incorrect about her allegation that there was video of Clark and his co-defendant together after the July 2009 robbery. P.B. 4. This video was from the night of the October 2009 robbery. A.R. 616-21.

reflects is an accurate statement of the facts with regard to HPD on their probable cause.”² A.R. 143. It is notable that despite the lengthy list of factual allegations against Clark in the court’s pretrial order, there is no mention of any alleged marijuana dealing.

In contrast to Combs testimony at the February 5, 2013 suppression hearing, there was never any mention of Clark’s alleged marijuana dealing during any of the pretrial hearings in this case. At the preliminary hearing, McMillian testified that Clark was a “common connector” between the November 2008 and July 2009 robberies and that is why “we obtained his phone records through a subpoena.” A.R. 54-55. At the pretrial hearings, the State took the position that they used a DEA subpoena because Clark might be involved in drugs, but they weren’t sure. A.R. 92-93, 143. At trial, McMillian said that a DEA subpoena was in this case because Marquee Cinemas is “a multi-state business to where the Federal Government may be able to pick this up ... because we figured if it was a stiffer penalty, if it was a company that was based in other states and it was one of their businesses the penalty was stiffer if we could have taken it to the Federal level.” A.R. 472. Now, when the Supreme Court specifically directs the lower court to determine the propriety of requesting Clark’s records with a DEA subpoena, the State conveniently and belatedly argues that Combs had specific information that Clark was selling marijuana, despite all the other evidence presented by the State to the contrary.

² The disputed *ex parte* allegations contained in the first order denying the motion to suppress were as follows: “Sgt. JT combs noticed that the Defendant had many new items that he likely could not afford on minimum wage. These items included a new motorcycle, a new motorcycle jacket and helmet. Sgt. Combs also works for the Huntington Housing Authority and knew the Defendant lived at Marcum Terrace, another indicator that he likely would be unable to afford these items. Sgt Combs asked a manager at the Cinema about the Defendant and his newly acquired items and her response was that he had received a check from the Marines because he was going to enlist. HPD looked into this assertion and determined it was not true. As a result of these occurrences, the phone records were investigated.” A.R. 103, 136-39, 143.

DEA Special Agent Tom Bevins testified that “as long as [there is] a drug nexus,” he can subpoena phone records in any case. S.R. 33-34. Bevins opined that the nexus between robberies and drugs is “money ... [because] [t]hey need quick money to pay back their dealers or get quick cash to make another purchase.” S.R. 36. Bevins’ definition of a “drug nexus” is quite broad, because it apparently includes any crime involving money. Bevins was aware that the time period requested, July 12-13, 2009, was around the time of the robbery. S.R. 62. Bevins apparently did not take the alleged Clark drug investigation too seriously because he did not open a new case on Clark. S.R. 54-55. Bevins reasoned that it would have been too time consuming to do so. Id. Instead, Bevins requested Clark’s phone records under a pre-existing case that was in no way related to Clark. Id.

The defense called one witness, Huntington Police Department Corporal Michael Cass McMillian. McMillian testified that he presented the robbery case to the grand jury. S.R. 66. McMillian said that he does not “believe” that he presented any evidence of drug offenses to the grand jury. S.R. 66-67. The record reflects that Clark was not charged with any drug-related offense. See A.R. 77-78. Contrary to Combs’ and Bevins’ testimony, however, McMillian confirmed that “the reason the phone records were obtained was because of the connections of the people – him being in the cinema [during the November and July robberies]. S.R. 70. This is important, because this corroborates McMillian’s testimony at Clark’s 2009 preliminary hearing that the phone records were requested because Clark was a “common connector” between the unsolved November 2008 robbery and the July 2009 robbery. A.R. 53-58. Also, in contrast to Combs’ position that he was not investigating the robbery, McMillian testified that the robbery

investigation as a “joint effort.” McMillian testified that after the robbery, Combs came to him and asked him “Do you have a suspect?” And [McMillian] said, ‘We have a person that is a constant at every robbery.’ And [Combs] said, ‘Do you know that this person started buying numerous things following this robbery?’” S.R. 73. It is appears that Combs requested the subpoena of Clark’s phone records as a result of this conversation.

SUMMARY OF ARGUMENT

First, Petitioner Clark’s telephone records were released to Officer McMillian in violation of federal law because he was not investigating Clark for a controlled substance act violation. Second, Clark’s telephone records were illegally subpoenaed under West Virginia law because no legal proceeding had been instituted against him prior to the issuance of the subpoena.

ARGUMENT

I. Clark’s phone records were unlawfully transferred to McMillian because he was not engaged in the enforcement of the law related to controlled substances.

Clark’s phone records were unlawfully transferred from J.T. Combs to Officer McMillian, who had no involvement in the alleged drug investigation of Clark. A.R. 74; see 28 C.F.R. § 0.103. Although the lower court reasoned that “it was clearly proper for Agent Bevins to share [the phone records] with Sgt. Combs due to the Joint Task Force participation,” it cites no law justifying the transfer of Clark’s records to McMillian for use in the robbery investigation. McMillian was not engaged in the enforcement of controlled substances laws, and it is clear that neither Combs nor Bevins had the legal authority to release Clark’s phone records to McMillian. S.R. 11, 51-53; see 28 C.F.R. § 0.103.

In effect, when Combs requested the subpoena, he was not really acting as a drug enforcement officer. Combs did not start the purported drug investigation until after the July 2009 robbery occurred, and as cinema security, he was obviously interested in solving the robbery. S.R. 16-23. When Combs requested Clark's phone records, he was merely acting as a conduit between Bevins and McMillian so that McMillian could use Clark's phone records in the robbery investigation. Combs never used the phone records in his purported drug investigation. S.R. 17.

Moreover, the fact that prior to February 5, 2013, the State never mentioned that Combs had information that Clark was selling marijuana makes Combs' testimony appear less than credible on this point. If Combs really had information in July 2009 from the assistant manager at the cinema that Clark was selling marijuana, there is no doubt that he would have informed the State of this; and it would have been included in the prosecutor's proffer of facts to the court during the 2010 pretrial hearings. Given the controversy over the propriety of the use of a DEA subpoena in a robbery case, it is difficult to believe that Clark's alleged marijuana dealing would escape the State's attention throughout the proceedings in this case until three years after the trial. After considering the totality of the circumstances, it appears that Combs' alleged investigation of Clark's marijuana dealing is yet another retroactive justification offered by the State in order to justify the unlawful transfer of phone records to McMillian, who was not engaged in the enforcement of controlled substance laws. See 28 C.F.R. § 0.103.

II. Clark's phone records were unlawfully subpoenaed under West Virginia law because there was no legal proceeding pending against Clark.

Clark's phone records were subpoenaed in violation of West Virginia law because there was no legal proceeding pending against Clark when the DEA subpoena was issued

on July 21, 2009. See Syllabus Points 1 and 2, State of West Virginia v. Michael J. McGill, No. 11-1386 (W.Va. March 12, 2013). A legal proceeding “includes the commencement of a criminal or civil action, a grand jury proceeding, or a statutorily authorized administrative proceeding.” McGill, slip op. at 9, fn. 10. It is indisputable that no charges had been filed against Clark and no grand jury proceeding was pending against him on July 21, 2009 when his records were subpoenaed. Combs was merely working “a tip” that bore no fruit and McMillian has admitted that there was not enough evidence to arrest Clark until after the October 2009 robbery. A.R. 473-474, S.R. 20-27. Clark was not indicted until January 2010. A.R. 77-78. Because there was no pending legal proceeding against Clark at the time the administrative subpoena was issued on July 21, 2009, the fruits of the DEA subpoena must be suppressed because they were subpoenaed to further a state robbery investigation, in violation of West Virginia law. Syllabus Points 1 and 2, McGill; W.Va. Code § 57-5-4 (1990) (Repl. Vol. 2012); W.Va. R. Crim. P., Rule 17(c).

This Court should be able to apply McGill in this case because the State clearly used the DEA subpoena to circumvent state law in an investigation of a state robbery offense. Combs did not use Clark’s phone records in his alleged drug investigation. S.R. 17. Rather, he transferred them to McMillian, who was investigating state robbery offenses. If Combs had not secured the DEA subpoena, there would have been no way for McMillian or any other state actor to lawfully subpoena Clark’s phone records under state law because there is no state law that authorizes investigative subpoenas in state robbery investigations. Cf. W.Va. Code § 62-1G-1 (2011) (authorizing investigative subpoenas for certain offenses against minors). The State effectively gamed the system

in this case by creating a ruse of a drug investigation when the real purpose of the subpoena was to investigate the robbery.

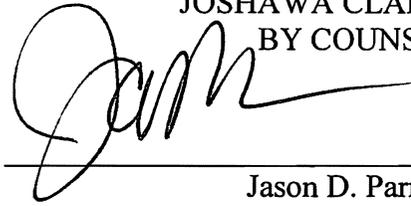
Although Clark's case is somewhat factually distinct from McGill, this Court's subpoena requirements should still be applicable to this case. The central theme of McGill is that subpoenas may not be lawfully issued in West Virginia unless there is pending legal proceeding when the Petitioners' records were requested by authorities. See Syllabus Points 1 and 2, McGill. In McGill, the prosecutor received judicial approval for his fugitive motion for McGill's medical records. In this case, the State used an administrative subpoena issued without judicial oversight. However, the DEA administrative subpoena used in this case is functionally equivalent to a subpoena duces tecum issued under West Virginia law because Clark's phone records were sought for the purpose of investigating violations of the West Virginia criminal code. See W.Va Code § 61-2-12; S.R. 104; 21 U.S.C. § 876; W.Va. Code § 57-5-4; W.Va. R. Crim. P. Rule 17(c); 28 C.F.R. § 0.103. Because there is no substantive difference between the administrative subpoena used in this case and the "fugitive motion" filed in McGill, Clark's phone records should have been suppressed by the court because there was no legal proceeding pending against him when his records were subpoenaed.

CONCLUSION

The Petitioner prays that this Court will find that his phone records were 1) unlawfully transferred to McMillian, who was not engaged in the enforcement of drug laws, and 2) unlawfully subpoenaed under West Virginia law. The Petitioner further prays that this court will reverse Clark's conviction, order the lower court to suppress Clark's phone records from evidence at the new trial, and also find that all other evidence

against Clark is fruit of the poisonous tree. The Petitioner also prays for all other relief deemed just and proper.

JOSHAWA CLARK,
BY COUNSEL

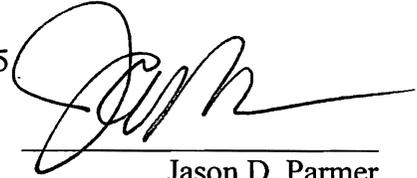
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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing supplemental brief by first class mail on the 29th day of March, 2013 upon:

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