IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RECEIVED
DEC 3 ?
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

RAYMOND D'ARCO,

Petitioner.

Supreme Court No. 11-1158

Circuit Court No. 09-F-868
(Kanawha)

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

John A. Carr (WVSB #10461)
John A. Carr, Atty at Law, PLLC
179 Summers Street, Suite 209
Charleston, WV 25301
(304) 344-4822
Email: jcarr@jcarrlaw.com

Counsel for Petitioner

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S SUPPLEMENTAL ARGUMENT

A. The Lack of A Search Warrant In This Case Constitutes Plain Error Which Was Not Waived

In its Response, the Respondent argues that any error concerning the lack of a search warrant in this matter was waived because the Petitioner did not specifically raise this issue before the Circuit Court.

In support of its argument, the Respondent fails to cite a single case from this Court to support its argument concerning the proper application of Rule 12 and Rule 52.

Instead, the cases cited by the Respondent represent decisions from various other jurisdictions, to include various federal circuit courts of appeal interpreting the Federal Rules of Criminal Procedure. Of course, Federal Rule of Criminal Procedure 12 and West Virginia Rule of Criminal Procedure 12 are not identical, with the relevant state rule providing that motions to suppress must be raised prior to trial "unless the grounds are not known to the defendant prior to trial" – an exception that is not found in the Federal Rule. Moreover, the Rule 12(f) provisions of the Federal and West Virginia Rule are also distinct, with the Federal Rule specifically referring to the waiver of Rule 12(b)(3) matters if not raised before trial and in the absence of good cause shown.

This Court should not find that the Petitioner waived the argument concerning the lack of a search warrant being issued in this case.

B. The "Warrant" Is Not Sufficient to Survive Plain Error Review Because No Warrant Actually Exists

The Respondent's argument concerning review of the issuance of a "search warrant" is unavailing in this matter because no such search warrant exists. Instead, it is apparent from the record that the magistrate signed a complaint for a search warrant and also signed the supporting

affidavit. The magistrate did not sign a search warrant – and made no finding of probable cause, and did not direct law enforcement to seize any specific property within 10 days. The Respondent instead engages in speculation unsupported by the record in arguing what the magistrate "was aware" of at the time she swore the officer to the complaint. The Respondent further speculates that there "appears to be some type of tracking number" on the document, although the record in this case contains no testimony concerning when or why that number was placed on the complaint – and the Respondent's cite to the U.S. Courts *Guide to Judiciary Policy and Procedures* is not persuasive as to the procedures of the Circuit Clerk of Kanawha County, West Virginia.

Finally, it is again noted that the Respondent in this section of its response fails to cite a single case from this Court in support of its argument. Also, contrary to the representations of the Respondent, the facts of this case have not been found permissible in federal court. In United States v. Henry, 931 F.Supp. 452, 453 (S.D.W. Va. 1996), the Defendant did not argue that no search warrant was issued, but instead complained that the affidavit supporting the warrant was neither signed nor sworn to by an officer. Furthermore, unlike in this case, in United States v. Hopson, 184 F.3d 634, 637 (7th Cir. 1999), the federal appeals court specifically cited the fact that the magistrate "weighed the statements and evidence presented to him and concluded that probable cause existed. That bears repeating: the magistrate judge--not the police-- determined probable cause existed, and he had substantial reasons for coming to that conclusion." There is simply no evidence in the record of this case that the magistrate actually made a finding that probable cause existed and subsequently issued an actual search warrant.

C. The Error In This Case Constitutes Plain Error

The Respondent next argues that the lack of a search warrant in this case does not constitute plain error because it is being raised for the first time in a supplemental brief. Such an argument is not persuasive. Under the Respondent's rationale, no error raised for the first time on appeal could ever constitute plain error since if the error was "clear or obvious," then the circuit court, prosecutor, and defense counsel should have raised it at trial. Such is simply not the standard.

Next, the Respondent argues that a case cited by the Petitioner has been overruled by this Court. The case is State v. McClead, 211 W.Va. 515 (2002) (per curiam), which addressed whether the Defendant's consent to withdraw blood was voluntary. In its opinion, this Court concluded that it was not voluntary since the Defendant was told by the officer that if he did not consent, a search warrant would be issued, yet the applicable state statute did not permit the issuance of a warrant if an individual refused to give consent. In Syl. Pt. 7 of State v. Stone, 229 W.Va. 271 (2012) – released by this Court on June 12, 2012 and months after the Petitioner's brief had been filed – this Court clarified the underlying state statute does permit the issuance of a search warrant after an individual refuses to submit to a secondary chemical test.

The warrantless search conducted in this case violated the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, and clearly prejudiced the Petitioner's substantive rights and seriously affects the fairness, integrity, and public reputation of the judicial proceedings.

CONCLUSION

For the foregoing reasons, this Court should suppress the evidence seized during the search of March 10, 2008, vacate Mr. D'Arco's conviction and sentence, and remand the matter to the Circuit Court for a new trial.

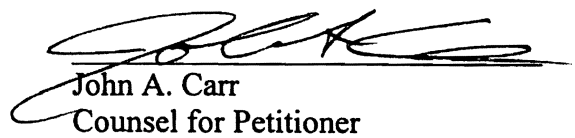
Respectfully submitted,

RAYMOND D'ARCO
By Counsel

John A. Carr (WVSB #10461)
John A. Carr, Atty at Law, PLLC
179 Summers Street, Suite 209
Charleston, WV 25301
(304) 344-4822
Email: jcarr@jcarrlaw.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, John A. Carr, hereby certify that on the 3rd day of December, 2012, I mailed a copy of the foregoing *Petitioner's Reply to Respondent's Response to Petitioner's Supplemental Brief* to Scott Johnson, Assistant Attorney General, State of West Virginia, 812 Quarrier Street, 6th Floor, Charleston WV 25301, (304) 558-5830, counsel for the respondent.



John A. Carr
Counsel for Petitioner