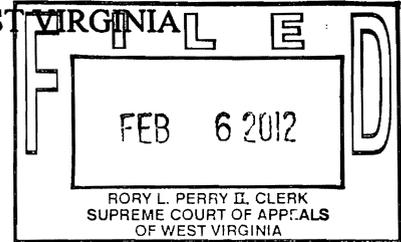


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent,

Supreme Court No. 11-1158

v.

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

RAYMOND D'ARCO,

Petitioner.

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

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SUPPLEMENTAL ARGUMENT

I. The Magistrate Did Not Find Probable Cause And Did Not Issue A Search Warrant In This Case, Resulting In The Search Of The Residence Being Made Without A Warrant, Which Constitutes a Per Se Violation Of The Fourth Amendment To The United States Constitution And Article III, Section 6, Of The West Virginia Constitution. The Introduction Of The Seized Evidence At Trial Represented Plain Error.

A. Standard of Review

Since this issue was not raised to the Circuit Court, the standard of review is plain error.

To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. Pt. 7, State v. Miller, 194 W.Va. 3 (1995).

B. The Magistrate Did Not Make A Finding of Probable Cause and Did Not Issue A Search Warrant

As clearly reflected in the record here, the Magistrate simply did not make a finding of probable cause, and did not issue a search warrant. Rather, the *only* act taken by the Magistrate was to take, subscribe, and swear the law enforcement officer to his affidavit and complaint for a search warrant.

The documents relevant to the application for a search warrant in this case are contained in the Appendix Record at A.R. 3-8. The first of these pages, A.R. 3, is a typed page entitled “Search Warrant.” The remaining five pages, A.R. 4-8, comprise the supporting “Affidavit.”

Simply put, the document entitled “Search Warrant” is not actually a search warrant – and the Magistrate never found that probable cause existed, or actually issued a search warrant to law enforcement in this case.

Instead, the document incorrectly entitled “Search Warrant” is actually, upon closer inspection, an “Affidavit and Complaint for Search Warrant.” The only action taken by the

Magistrate on an “Affidavit and Complaint for Search Warrant” is contained in the line “Taken, subscribed and sworn before me this __ day of __, 20__.” Consequently, the only legal action taken by the Magistrate on an “Affidavit and Complaint for Search Warrant” is to swear the officer to the contents of the affidavit and complaint.

Likewise, in this case, the Magistrate in signing A.R. 3, was only “taking, subscribing, and swearing” the “Complainant” Sgt. E.S. Drennan to the representations made in the affidavit and complaint for a search warrant. The Magistrate did nothing more than swear the officer to the contents of the affidavit and complaint – no finding of probable cause was made and no search warrant was issued.

The important legal distinctions between an “Affidavit and Complaint for Search Warrant” and an actual “Search Warrant” are perhaps most readily identifiable when comparing the standard forms of the two distinct documents, page one and two of SCA-M28 available from the West Virginia Supreme Court of Appeals. Unlike an affidavit and complaint:

- a search warrant is “directed to the sheriff or any deputy sheriff of the county, to any member of the department of public safety, or to any police officer of the municipality wherein the property is located, or to any other officer authorized by law to execute such search warrants,” as provided for by W.Va. Rule of Crim. Proc. 41(c);
- a search warrant issued by a magistrate or circuit judge shall identify “the property or person to be seized and naming or describing the person or place to be searched,” as provided for by W.Va. Rule of Crim. Proc. 41(c);
- a search warrant states the grounds upon which probable cause for the issuance of the warrant is based, as provided for by W.Va. Rule of Crim. Proc. 41(c);

- a search warrant “shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified,” as provided for by W.Va. Rule of Crim. Proc. 41(c); and
- a search warrant is issued by – or “given under” the hand of – the magistrate or judge.

There is no document in this case that meets any of the above criteria. Therefore, there is no search warrant. Since the Magistrate did not make a finding of probable cause, and did not issue a search warrant, the search of the residence in this case was a “warrantless search.”

This Court has held that “[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution -- subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative.” Syl. Pt. 3, State v. Bookheimer, 656 S.E.2d 471 (W.Va., 2007) (per curiam); Syl. Pt. 1, State v. Moore, 272 S.E.2d 804 (1980), *overruled on other grounds by State v. Julius*, 408 S.E.2d 1 (1991); Syl. Pt. 1, State v. Weigand, 169 W.Va. 739 (1982).

In light of the facts of this case, which involved a search of a residence based upon stale and vague assertions made by anonymous sources months before law enforcement sought a search warrant, no such exception or exigency is present.

The failure of the Circuit Court to suppress the evidence seized during the warrantless search, and its introduction by the State at trial, far exceeds the requirements necessary to meet the standard for plain error. The introduction of evidence seized from a residence without a search warrant is an error that is plain, and affected the substantial rights of the Petitioner --

namely his fundamental rights under the Fourth Amendment to the United States Constitution and Article III, Section 6, of the West Virginia Constitution. Moreover, the introduction of the evidence seized without a warrant from the residence was the only evidence introduced against the Petitioner at trial, and, therefore, the failure to suppress it seriously affected the fairness, integrity, or public reputation of the judicial proceeding. See e.g., State v. McClead, 211 W.Va. 515 (2002) (per curiam) (finding plain error based upon introduction of involuntarily obtained blood test); State v. Ladd, 210 W. Va. 413 (2001) (State conceded plain error for court to introduce out-of-court statements when statements were only evidence supporting the defendant's conspiracy charge); State v. Moore, 186 W.Va. 23 (1990) (per curiam) (finding plain error based upon improper use of prior inconsistent statements and comments of prosecutor during closing argument).

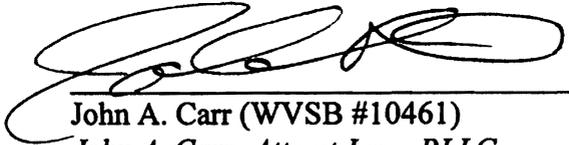
CONCLUSION

The Magistrate in this case only signed an "Affidavit and Complaint" for a search warrant, but did not make a finding of probable cause and did not issue a search warrant. Consequently, the search of the residence was made without a warrant and is per se unreasonable under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution. While this error was not raised before the Circuit Court, given the facts of this case the introduction of the seized items at the Petitioner's trial constitutes plain error.

Consequently, Mr. D'Arco respectfully requests this Court to 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,

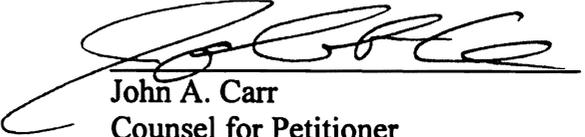
RAYMOND D'ARCO
By Counsel



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 6 day of February, 2012, I mailed a copy of the foregoing *Petitioner's Supplemental Brief* to Jake Morgenstern, 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