

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No. 11-1158

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

RAYMOND D'ARCO,

Petitioner.

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PETITIONER'S REPLY BRIEF

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**PETITIONER’S REPLY TO THE STATE’S SUMMARY RESPONSE**

The Petitioner’s Petition for Appeal contained a detailed, specific, accurate description and summary of the “facts” alleged in the affidavit supporting the search warrant. This recitation and description contained specific cites to the Appendix Record (A.R), and was summarized by the Petitioner in the following table:

<b>Allegations in Affidavit for Search Warrant – March 10, 2008</b>					
<b>Name of Person Cited in Search Warrant Affidavit</b>	<b>Allegation from Anonymous Calls?</b>	<b>Person Observed at 514 Falcon Drive?</b>	<b>Vehicle Registered to Person at 514 Falcon Drive?</b>	<b>Last purchase of “Sudafed”?</b>	<b>Criminal History?</b>
<b>Debbie Layton</b>	Yes	No	No	---	---
<b>Debbie Richards</b>	No	No	No	Dec 1, 2007	---
<b>Toni Nelson</b>	Yes	No (Driver of vehicle not identified on Mar 6, 2008)	No	Feb 18, 2008	Convicted of Poss w/Intent (No Date)
<b>Melissa Carte</b>	No	No	Jan 21, 2008 Mar 10, 2008	---	Charged with Operating Lab (Sep 2006)
<b>Cheryl Goff</b>	No	No	Jan 28, 2008 Jan 29, 2008	Dec 5, 2007	---
<b>Shawnette Lovejoy</b>	No	No	Jan 29, 2008 Mar 10, 2008	Dec 8, 2007	Charged with Poss Meth (Mar 2006)

A.R. 3-8.

In its Summary Response, the State does not address the Petitioner’s carefully stated recitation of the record. Instead, the State’s Summary Response repeatedly relies upon vague and inaccurate factual generalizations, both in its Statement of Facts as well as in its argument,

which are simply not supported by the record in this case. The evidence seized during the search of March 10, 2008 should be suppressed, Mr. D'Arco's conviction and sentence should be vacated, and this matter remanded to the Circuit Court.

**1. The State Concedes the Anonymous Calls Fail to Establish Probable Cause**

It is clear that the State, at trial and now on appeal, concedes that the vague information contained in the four anonymous calls is insufficient to establish probable cause. State Response, p. 9.

**2. The State Misstates the Facts Contained in the Affidavit Supporting the Search Warrant**

**A. The State Inaccurately Summarizes the Content of the Anonymous Calls**

The State misstates the information contained in the anonymous calls, which were, of course, placed months prior to the issuance of the search warrant. See A.R. 4, State Response, p.

**2. The State inaccurately claims that the caller(s) (which may have been only one person):**

- Described a clandestine drug lab located at 514 Falcon Drive, Charleston, WV, when in fact:
  - None of the four callers provided any address;
- Described whom they had observed coming in and out of the house, when in fact:
  - None of the four callers ever described anyone actually “coming and going” or being present at any residence; and
- Described whom they had observed supplying the lab with materials, when in fact:
  - None of the four callers ever stated that he or she had actually observed a person supplying any lab with materials.

Compare State Response, p. 2, with A.R. 4.

**B. The State Inaccurately Claims that Law Enforcement Identified the Individuals Referenced in the Anonymous Calls Going in and Out of the Residence**

Inexplicably, the State repeatedly, and inaccurately, claims in its Summary Response that law enforcement observed the same people whom the anonymous caller(s) identified also going in and out of the house. See State Response, pp. 3, 9. This claim is simply not true.

The anonymous callers only mentioned two names – Debbie Layton and Toni Nelson. Neither individual was ever observed at 514 Falcon Drive. A.R. 3-8

In fact, as detailed in the above table, law enforcement never actually identified a single person mentioned in the affidavit supporting the search warrant at 514 Falcon Drive. A.R. 3-8.

**C. The State Inaccurately Claims that Individuals Identified at the Residence had Criminal Records Relating Methamphetamine**

The State continues with its inaccurate description of the record, claiming that individuals identified coming and going out of 514 Falcon Drive had criminal records relating to possession of and intent to deliver methamphetamine. See State Response, pp. 3, 9.

First, as detailed above, law enforcement never identified a single person at the residence.

Second, only one of the two individuals mentioned in the four anonymous calls – namely, Toni Nelson – had a conviction, although the affidavit contained no date for when that conviction had occurred. A.R. 7.

Third, only two other individuals referred to in the entire affidavit – namely, Melissa Carte and Shawnette Lovejoy – had ever been charged with a methamphetamine offense. Both charges were in 2006, approximately a year and a half prior to affidavit being filed – and neither resulted in a conviction! A.R. 5, 6.

**D. The State Inaccurately Claims that Individuals Identified at the Residence had Made 34 Purchases of Pseudoephedrine.**

The State continues with its inaccurate description of the record, claiming that individuals identified at the residence had made purchases of 34 boxes of pseudoephedrine pills, resulting in “approximately 650 pills coming into this house in a seven-month period.” See State Response, p. 3. This is simply not true.

First, as detailed above, law enforcement never identified a single person at the residence.

Second, only one individual named in the anonymous calls – Toni Nelson – had purchased pseudoephedrine, and the last purchase was nearly a month prior to the affidavit, as summarized in the above table.

Third, of the six individuals mentioned in the entire affidavit, only three others had ever purchased pseudoephedrine, with the last purchase being over three months prior to the affidavit.

Finally, and most importantly, law enforcement simply had no reason to believe that -- all, the majority, or any -- of the legal purchases of pseudoephedrine by these individuals were being supplied to 514 Falcon Drive.

**E. The State Inaccurately Claims that Magistrate Yeager Testified at Trial**

The State continues with its inaccurate description of the record, claiming that Magistrate Yeager, the magistrate who issued the search warrant, testified at the Petitioner’s trial. See State Response, p. 10. This is simply not true.

The quote the State attributes to Magistrate Yeager was actually made by Circuit Judge Jennifer Bailey during her ruling denying the Petitioner’s motion to suppress the evidence. A.R. Trial Day One, 59. Magistrate Yeager did not testify at the trial.

**3. The Circuit Court's Reliance on the Surveillance Camera, Which Was Not Even Alleged to Be Working, and Its Finding of Fact that "People Do Not Need Them at Their Homes" is Not Supported by Substantial Evidence.**

The State further relies on the Circuit Court's findings regarding the surveillance camera. As stated in the Petitioner's Appeal Brief, there is no evidence concerning how old the camera was or whether it was ever operational. No witness claims to have seen it working – and certainly no witness alleges that Mr. D'Arco had any connection to it. Instead, the affidavit takes the seemingly innocuous, commonplace surveillance camera and leaps to the following statement – "individuals who manufacture methamphetamine or conspire with others to manufacture methamphetamine will often invest in these types of cameras in order to alert them to law enforcement coming to their residence." The Circuit Court, in denying Mr. D'Arco's motion to suppress, called the presence of the surveillance camera "huge," concluding that in the court's opinion "...I do not think persons need them at their homes..." A.R. Trial Day One, 59. Such a broad finding, premised on a belief that home surveillance systems in this State are unnecessary and indicative of criminal behavior, is simply not supported by substantial evidence.

**CONCLUSION**

The State, in its Summary Response, has failed to adequately refute the Petitioner's arguments that the trial court erred when it refused to suppress evidence seized from the residence because law enforcement lacked probable cause to seek a search warrant and the Magistrate lacked probable cause to issue a search warrant, in violation of the Fourth Amendment to the United States Constitution and Article III, Section 6, of the West Virginia Constitution.

Instead, the State's Summary Response to the Petitioner's Petition for Appeal relies upon vague and inaccurate factual generalizations, both in its Statement of Facts as well as in its argument, that are simply not supported by the record in this case.

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

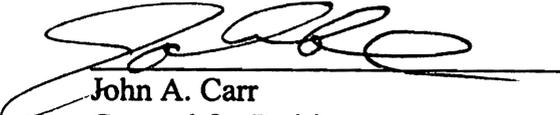


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**CERTIFICATE OF SERVICE**

I, John A. Carr, hereby certify that on the 18 day of January, 2012, I mailed a copy of the foregoing *Petitioner's Reply Brief* to Jake Morgenstern, Assistant Attorney General, State of West Virginia, 812 Quarrier Street, 6<sup>th</sup> Floor, Charleston WV 25301, (304) 558-5830, counsel for the respondent.

  
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