

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1158

STATE OF WEST VIRGINIA,

Respondent,

v.

RAYMOND D'ARCO,

Petitioner.

RESPONDENT'S RESPONSE BRIEF
TO PETITIONER'S SUPPLEMENTAL BRIEF

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I.

ARGUMENT

A. Plain Error Review

This Court has held “[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.” *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996). “It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.” *Id.*, 470 S.E.2d at 170. However, this rule is not absolute. “The plain error doctrine ‘enables this Court to take notice of error . . . during the proceedings, even though such error was not brought to the attention of the trial court.’” *State v. Stacy*, 181 W. Va. 736, 741, 384 S.E.2d 347, 352 (1989) (quoting *State v. England*, 180 W. Va. 342,

376 S.E.2d 548, 554 (1988)). While “the plain error doctrine . . . permits a court to review the error, it does not necessarily mean that the plain error standard will be met.” *State v. England*, 180 W. Va. 342, 348, 376 S.E.2d 548, 554 (1988). This Court, therefore, “decide[s] whether to exercise [its] discretion under plain error on a case-by-case basis, keeping in mind the general rule that we do not consider arguments raised for the first time on appeal.” *State v. Marple*, 197 W. Va. 47, 52, 475 S.E.2d 47, 52 (1996).

“[C]ourts should use great caution when considering utilization of the plain error doctrine.” *Brooks v. Galen*, 220 W. Va. 699, 706, 649 S.E.2d 272, 279 (2007). See also *City of Philippi v. Weaver*, 208 W. Va. 346, 350, 540 S.E.2d 563, 567 (2000) (per curiam) (“courts should be very cautious in recognizing 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, 459 S.E.2d 114 (1995). “Meeting all four prongs is difficult, ‘as it should be.’” *Puckett v. United States*, 556 U.S. 129, 135-36 (2009) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83, n. 9 (2004)). “The forfeiture rule . . . fosters worthwhile systemic ends and courts will be the losers if we permit the rule to be easily evaded.” *Cooper*, 196 W. Va. at 216, 470 S.E.2d at 170.

1. There is no error.

The first requirement for plain error is that there be an error. There is no error here, either because any “error” is waived or because there is no error *vel non*.

a. *Any error here is waived.*

“Under the ‘plain error’ doctrine, ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver.” Syl. Pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). West Virginia Rule of Criminal Procedure 12(b)(3) provides that “[m]otions to suppress evidence unless the grounds are not known to the defendant prior to trial . . . must be raised prior to trial[.]” Under Rule 12(f), “[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, may constitute waiver thereof, but the court for cause shown should grant relief from the waiver.” “We believe that the necessary effect of the . . . adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of ‘cause’ which that Rule requires.” *Davis v. United States*, 411 U.S. 233, 242 (1973). In other words, “the waiver provision of Rule 12 ‘trumps Rule 52(b)’s plain error standard in the context of motions to suppress.” *United States v. Valentine*, 451 Fed. Appx. 87, 91 (3d Cir. 2011) (citation omitted). “Other courts . . . have rejected plain error review of a suppression issue that was not raised below, holding that the failure to comply with Fed. R. Crim. P. 12 constitutes a waiver of the issue on appeal.” *Carroll v. State*, 32 A.3d 1090, 1104 (Md. Ct. App. 2011). *See also United States v. Rose*, 538 F.3d 175, 182 (3d Cir. 2008) (citations omitted) (“under Rule 12 a suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent good cause. [O]ur holding applies not only where the defendant failed to file a suppression motion at all in the district court, but also where he filed one but did not include the issues raised on appeal. Because Rose failed without good cause to raise these suppression arguments to the District Court, we do not consider them.”), *accord United States v. Crooker*, 688

F.3d 1, 10 (1st Cir. 2012); *United States v. Burke*, 633 F.3d 984, 987-88 (10th Cir. 2011); *United States v. Chavez-Valencia*, 116 F.3d 127, 129 (5th Cir. 1997) (“We find that the plain language of Rules 12(b)(3) and 12(f), the history of the rules relating to motions to suppress, the relevant Fifth Circuit case law and sound policy considerations all dictate that the failure to raise a suppression issue at trial forecloses a defendant from raising the issue for the first time on appeal.”); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000) (citation omitted) (“It does not matter that Wright made a pre-trial motion to suppress on other grounds, for ‘just as a failure to file a timely motion to suppress evidence constitutes a waiver, so too does a failure to raise a particular ground in support of a motion to suppress.’ By failing to comply with Rule 12, Wright waived any dispute about the legality of his arrest and placed the issue beyond this court's ability to review for plain error.”). “In the instant case, [the Petitioner] does not explain why he waited until his appeal before making these suppression arguments.” *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003). The Petitioner “had ample opportunity to raise and develop [] his argument before the [Circuit] Court and he has not provided, much less established, any reasonable excuse for his failure to so.” *Id.* And leaving aside whether this Court, as opposed to the trial court, is the proper forum to decide whether there is good cause in the first instance, see *United States v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010) (“And the reference in Rule 12(e) to ‘the court’ must be to the district court, not the court of appeals, for Rule 12 as a whole governs pretrial proceedings in federal district courts.”), “[g]ood cause is not shown where the defendant had all the information necessary to bring a Rule 12(b) motion before the date set for pretrial motions, but failed to file it by that date.” *United States v. Seher*, 562 F.3d 1344, 1359 n.15 (11th Cir. 2009). Accord *United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997). Because the Petitioner’s “argument was accordingly waived under Rule 12, and because the

plain error doctrine is inapplicable . . . we [should] not reach its dubious merits.” *United States v. Berrios*, 676 F.3d 118, 130 (3d Cir. 2012) (citation omitted). But, of course, if there is no waiver, the Petitioner is not entitled to relief because he cannot show error at all.

b. *The warrant is sufficient to survive plain error review.*

The Fourth Amendment provides, in pertinent part, “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” While the Petitioner cites to Rule 41, Pet’r’s Supplemental Br. at 2-3, “Rule 41 and the Fourth Amendment are not coextensive[.]”¹ *United States v. Schoenheit*, 856 F.2d 74, 77 (8th Cir. 1988). A search warrant is valid under the Fourth Amendment when: (1) the warrant is issued by a neutral and disinterested magistrate, (2) those seeking a warrant demonstrate to the magistrate probable cause to believe that the evidence sought will aid in apprehending or convicting for a particular offense; and, (3) the warrant particularly describes the place to be searched and the thing(s) to be seized. *Dalia v. United States*, 441 U.S. 238, 255-56 (1979).

¹The Petitioner does not argue that a violation of Rule 41(c) itself occurred here. In any event, where the Fourth Amendment is otherwise satisfied, a Rule 41 violation may require exclusion only where the Rule 41 violation is in “bad faith,” that is done intentionally and deliberately, *United States v. Williamson*, 439 F.3d 1125, 1134 (9th Cir. 2006), or that the defendant is “‘prejudice[d]’ in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed[.]” *United States v. Burke*, 517 F.2d 377, 387 (2d Cir. 1975). See *United States v. Slater*, 209 Fed. Appx. 489, 495 n.1 (6th Cir. 2006) (“Even if we had found plain error, violations of Rule 41 are not a basis for suppression without an additional showing that (1) there was prejudice in the sense that the search may not have occurred or been so intrusive had the Rule been followed, or (2) there is evidence of intentional and deliberate disregard of a provision of Rule 41.”). Here, the failure to raise the issue below resulted in no record being made on these issues and the absence of a record on these issues renders appellate review under plain error unavailable. See *State v. Zacks*, 204 W. Va. 504, 513 n.4, 513 S.E.2d 911, 920 n.4 (1998) (per curiam). Finally, it is an established “concept that suppression is generally not the appropriate remedy for a Rule 41 violation.” *Williamson*, 439 F.3d at 1134 (citing *United States v. Calandra*, 414 U.S. 338, 348 n.6 (1974)). “Many remedies may be appropriate for deliberate violations of the rules, but freedom for the offender is not among them.” *United States v. Hornick*, 815 F.2d 1156, 1158 (7th Cir. 1987).

In judging these criteria, courts have observed that “search . . . warrants long have been issued by persons who are neither lawyers nor judges,” *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983), so “[s]earch warrants are not subject to technical drafting requirements.” *State v. Weimer*, 988 P.2d 216, 222 (Idaho Ct. App. 1999). It is a “general proposition that a search warrant must be read “in a common sense and realistic fashion.”” *United States v. Shakur*, 560 F. Supp. 361, 366 (S.D.N.Y. 1983) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)), and “viewed through a real-world prism[.]” *United States v. Fagan*, 577 F.3d 10, 13 (1st Cir. 2009). *See also United States v. Cannon*, 264 F.3d 875, 880 (9th Cir. 2001) (“A search warrant must be read in a common sense and realistic fashion.”). “We may draw reasonable inferences from the facts and circumstances contained within the affidavit and search warrant.” *Bean v. State*, No. 05-06-01487-CR, 2007 WL 3293633, at *6 (Tex. App Nov. 8, 2007). *See also Rossi v. City of Amsterdam*, 712 N.Y.S.2d 79, 82 (App. Div. 2000) (citations omitted) (finding that because Search Warrants are not written by lawyers “but by ‘police officers acting under stress, [they] are not to be read hypertechnically and may be ““accorded all reasonable inferences””). In short, “common sense must not be abdicated in our analysis of search warrant sufficiency.” *People v. Malone*, 435 N.E.2d 917, 920 (Ill. Ct. App. 1982).

Here, the search warrant is entitled exactly that “Search Warrant.” It is signed by Magistrate Yeager. The Search Warrant is accompanied by an affidavit (referenced in the Search Warrant) which is signed by both Sergeant Drennan and Magistrate Yeager. App. at 8. Sergeant Drennan personally appeared in front of Magistrate Yeager to obtain a search warrant. *Id.* at 3. There appears to be some type of tracking number included on both the Search Warrant and the Affidavit. The

Search Warrant included the following language, “W. Va. Code 62-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.”

Here, Magistrate Yeager’s signed a document entitled “*Search Warrant*.” Coupled with this is that Magistrate Yeager also signed an attached affidavit to the Search Warrant, which was referenced in the warrant itself as an attachment, thus evidencing that the Magistrate was aware she was signing *two different* documents. *See Groh v. Ramirez*, 540 U.S. 551, 558 (2004) (“Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.”). Magistrate Yeager was aware that Sergeant Drennan was seeking not just someone to take his affidavit, but to issue a search warrant. Magistrate Yeager was aware that the “Search Warrant” was exactly that a “*Search Warrant*” (i.e., that it was different from the affidavit attached to it and therefore had a different purpose) and that she made a finding of probable cause in support of the warrant as “[g]enerally, an issuing authority’s finding of probable cause is conveyed via his or her signature on a warrant.” *United States v. Jackson*, 617 F. Supp.2d 316, 320 (M.D. Pa. 2008). Moreover, there appears to be some type of tracking number in the upper right hand side of the Search Warrant and the Affidavit (C-08-03-10-07). App. at 3-8. This evidences Magistrate Yeager considered the Search Warrant to be exactly that—a Search Warrant. ~~*See United States v. Evans*, 469 F. Supp.2d 893, 897 (D. Mont. 2007) (dicta) (citing IV Admin. Off. U.S. Cts. *Guide to Judiciary Policies and Procedures*, § 3.01(d)) (“noting, in many courts, a copy of the search warrant is sent to the clerk’s office and given a miscellaneous case number when the government agent is given the original search warrant”).~~ Further, the Search Warrant here included the following language, “W. Va. Code 62-1A-4 provides specifically that a warrant may be executed

and returned only within 10 days after its date.” App. at 3. “Even though the warrant in this case did not specifically say to ‘search’ the premises or to ‘seize’ the described items, it is clear, when we read the search warrant and its supporting affidavit in a common-sense manner, that it authorized entry into the house and, as a result, a search of the house and the seizure of the evidence described in the affidavit.” *Bean v. State*, No. 05-06-01487-CR, 2007 WL 3293633, at *6-7 (Tex. Ct. App. Apr. 23, 2008).

Indeed, the process followed here has been found permissible (if, admittedly, less than exemplary) in federal court. *See United States v. Henry*, 931 F. Supp. 452, 454 (S.D. W. Va. 1996). *See also United States v. Hopson*, 184 F.3d 634, 636-37 (7th Cir. 1999) (document signed by Magistrate entitled ““Search Warrant Affidavit - Informant” accompanied by probable cause affidavit, both sworn by Detective constituted Search Warrant—“Although it certainly would have been better if the judge had signed a separate document entitled “Warrant,” or at least stricken part of the existing heading, the document he signed passes constitutional muster.”).

2. The error here is not plain.

Under plain error, the error must “be clear or obvious, rather than subject to reasonable dispute[,]” *Puckett v. United States*, 556 U.S. 129, 135 (2009), “error which is so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting the error.” *State v. Marple*, 197 W. Va. 47, 52, 475 S.E.2d 47, 52 (1996).

“The requirements that an error be ‘plain’ and that it ‘affect substantial rights’ limit the authority of the appellate court and prevent us from correcting forfeited errors that are either questionable or inconsequential. When viewed as a limitation, to circumvent forfeiture where an error is debatable, rather than as a measure of circuit court fault, the ‘plainness’ inquiry must look to the error’s

certainty from the perspective of the appellate court.” *State v. Marple*, 197 W. Va. 47, 52 n.13, 475 S.E.2d 47, 52 n.13 (1996).

“To be ‘plain,’ the error must be ‘clear’ or ‘obvious.’ ” Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). “It cannot be subtle, arcane, debatable, or factually complicated.” *United States v. Caputo*, 978 F.2d 972, 975 (7th Cir. 1992). Here, the Petitioner claims the error was plain—even though he did not recognize it at trial, *nor* did he recognize it in his Notice of Appeal, *nor* did he notice it in his initial brief. Indeed, he refers to the “search warrant” at page 1 of his initial brief, at page 2 of his initial brief, at page 9 of his initial brief, page 14 of his initial brief, and page 15 of his initial brief. Any error in the search warrant was not plain.

3. Any error here did not prejudice the Petitioner’s substantive rights.

The Fourth Amendment contains no “provision expressly precluding the use of evidence obtained in violation of its commands.” *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Indeed, any Fourth Amendment violation is accomplished fully when the evidence is seized and the use of the evidence works no new Fourth Amendment violation. *United States v. Leon*, 468 U.S. 897, 906 (1984). Hence, “the governments’ use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.” *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 362 (1998). The court’s have developed the exclusionary rule that prohibits evidence seized in violation of the Fourth Amendment from being introduced into evidence at trial. This rule, though, is “prudential rather than constitutionally mandated,” *Miller v. Toler*, 229 W. Va. 302, ___, 729 S.E.2d 137, 141 (W. Va. 2012) (quoting *Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 363 (1998)), and is “not a personal constitutional right,” nor is it designed to “redress the injury” occasioned by an unconstitutional search.”” *Id.* (quoting *Davis v. United States*, 131 S. Ct. 2419,

2426 (2011) (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). See also *Herring v. United States*, 555 U.S. 135, 141 (2009) (“the exclusionary rule is not an individual right”). Since the Petitioner has no rights at issue, he cannot claim any rights were violated.

4. Any error here does not seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

The exclusionary rule has nothing to do with fairness. “The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.” *Schneekloth v. Bustamonte*, 412 U.S. 218, 242 (1973). See also *Linkletter v. Walker*, 381 U.S. 618, 639 (1965), overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314 (1987). Hence, “[t]he exclusionary rule that prohibits introduction into evidence of unlawfully seized materials is an example of a rule that does not go to the fairness of the trial.” *Membres v. State*, 889 N.E.2d 265, 272 (Ind. 2008). See also *McCain v. State*, 4 A.3d 53, 71 (Md. Ct. App. 2010) (“Fairness does not require us to exclude the evidence of the search because Mr. McCain has no right to benefit from the exclusionary rule.”); *State v. Guidry*, 388 So.2d 797, 800 (La. 1980) (“the issue before us does not involve a particular individual’s right to a fair determination of his guilt or innocence. The issue is the applicability of the exclusionary rule, which is totally unrelated to the guilt or innocence of this particular individual.”); *Journey v. State*, 850 P.2d 663, 667 (Alaska Ct. App. 1993) (“the primary purpose of the exclusionary rule . . . deterrence of unlawful police conduct-was wholly unrelated to the fairness of the prosecution.”).

Further, the exclusionary rule is not premised upon judicial integrity, the rule is now premised *solely* on its deterrent function. “The rule’s sole purpose . . . is to deter future Fourth

Amendment violations.” *Miller*, 229 W. Va. at ____, 729 S.E.2d at 141 (quoting *Davis*, 131 S. Ct. at 2426).

Finally, far from advancing the public reputation of judicial proceedings, application of the exclusionary rule here tends to weaken it. “Suppression of evidence . . . has always been our last resort, not our first impulse[.]” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), because its application “generates ‘substantial social costs,’ *United States v. Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405 (1984), which sometimes include setting the guilty free and the dangerous at large.” *Id.* “The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case.” *United States v. Payner*, 447 U.S. 727, 734 (1980). “Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.” *Id.* “After all, it is the defendant, and not the constable, who stands trial.” *Id.* The Rule “if applied indiscriminately . . . may well have the . . . effect of generating disrespect for the law and administration of justice.” *Stone v. Powell*, 428 U.S. 465, 491 (1976). Here, the Petitioner failed to raise the issue before the circuit court *and* in his notice of appeal *and* in his initial brief and brings it now only after the original briefing in the case is concluded. If the public integrity of legal proceedings is to be protected, it is not by granting the Petitioner relief, but by dismissing his claim of plain error.

Finally, the cases the Petitioner’s relies on do not support his position. First, he relies on *State v. McClead*, 211 W. Va. 515, 566 S.E.2d 652 (2002) (per curiam). *McClead*, though, was overruled in *State v. Stone*, 229 W. Va. 271, 728 S.E.2d 155 (2012). Second he relies on *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001) and *State v. Moore*, 186 W. Va. 23, 409 S.E.2d 490

(1990) (per curiam). Neither of these cases dealt with the Fourth Amendment and “[a] claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.” *Stone v. Powell*, 428 U.S. 465, 489-91 (1976) (citation omitted).

II.

CONCLUSION

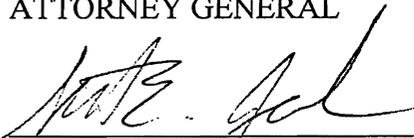
For the foregoing reasons, the circuit court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, SCOTTE E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent,
do hereby verify that I have served a true copy of the “*RESPONDENT’S RESPONSE BRIEF TO
PETITIONER’S SUPPLEMENTAL BRIEF*” upon counsel for the Petitioner by depositing said copy
in the United States mail, with first-class postage prepaid, on this 13 day of November, 2012,
addressed as follows:

To: John A. Carr, Esq.
John A. Carr, Attorney at Law, PLLC
179 Summers Street, Ste. 209
Charleston, WV 25301


SCOTT E. JOHNSON