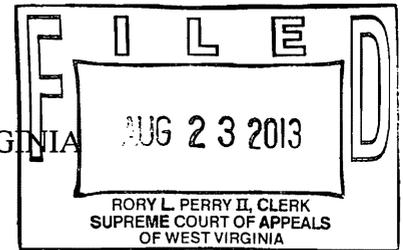


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA

VS.

Supreme Court No. 12-1486
Circuit Court No. 12-F-32
(Logan)

LAMAR DORSEY,

Petitioner.

PETITIONER REPLY BRIEF

Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 348-2323
cwalden@wvdefender.com

Counsel for Petitioner

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- I. Probable Cause did not exist to search Gillispie's home at the time officers entered, therefore exigent circumstances was not applicable. Mr. Dorsey did have an expectation of privacy at Gillespie's home where he had resided for approximately three weeks. Therefore, he does have standing to challenge the illegal entry and illegal search of Gillispie's home despite the state's assertion to the contrary. The consent to search was granted by Gillespie after the illegal entry and due to submission to authority, therefore consent was invalid. *Reply to State's brief 8-20*

Based on T. Harris's testimony, the lead officer in this case, on the evening of January 21, 2011, officers went to Gillespie's home to conduct a "consensual" knock and talk. The entire purpose of that knock and talk was to determine if **Mr. Dorsey** was at Gillespie's home and to determine if he was there conducting illegal drug activity. T. Harris knocked and no one answered. Instead of leaving when no one answered the door, as they are required to do, T. Harris continued knocking. T. Harris' behavior was in direct violation of the appropriate bounds of a knock and talk as laid out by the United States Supreme Court in *Kentucky v. King*, --U.S.--, 131 S.Ct. 1849, 1862 (2011):

When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. Cf. *Florida v. Royer*, 460 U.S. 491, 497-498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). ("[H]e may decline to listen to the questions at all and may go on his way"). When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." *Chambers*, 395 F.3d, at 577 (Sutton, J., dissenting). **And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.**

The Supreme Court specifically stated officers have no more authority than a citizen. Additionally, the court held the occupant of a residence has no obligation to open the door to

officers. Once officers overstep their bounds in a knock and talk situation they are trespassers. Due to the continuous knocking by T. Harris, Gillespie testified she knew officers were not going to leave. After numerous instances of knocking, based on nothing more than failure to open the door, movement inside the home, and a sound **believed to be** the flushing of a toilet, T. Harris ordered Gillespie to open the door on more than one occasion.¹

Importantly, at the time T. Harris was ordering that the door be opened, officers **did not know if Mr. Dorsey was inside.**² Therefore, there was no “accused” requiring “immediate arrest” at the time the order was issued to open the door. Not only did the officers not have proof that Mr. Dorsey was present, they had no proof a felony was being committed or had been committed at the time the order to open the door was issued.³ Furthermore, the issue of officer safety claimed in this situation could have easily been remedied by leaving the porch, as they were obligated to do, when no one answered to the “consensual knock and talk.”

Officers knew nothing more at the time they illegally entered Gillespie’s home than they did at the time they left the headquarters with the intention to conduct a “consensual knock and talk” at Gillespie’s residence. Based on their own testimony, the anonymous tips they were acting on did not rise to the level of probable cause. Additionally, officers had no “accused” that

¹ Interestingly, some additional facts the State now relies on in an attempt to “piece” together an assertion that probable cause existed is proof of additional violations of the Fourth Amendment. “Trooper Hensley who was looking through one of the back windows...” *State’s brief at 3*. “Trooper Harris also informed Gillespie that another officer could see her standing in front of the door.” *State’s brief at 11*. Justice Scalia plainly stated officers conducting knock and talk investigations were limited to what an average citizen could do and nothing more : **“This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window.”** *Florida v. Jardines –U.S. 133 S.Ct. 1409, (2012)*. Scalia further explained:[t]his area around the home is ‘intimately linked to the home, both physically and psychologically,’ and is where ‘privacy expectations are most heightened.’” *Id. (quoting California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986))*.

² There was no testimony or evidence that Gillespie was known to use or sell drugs, or that she owned weapons.

³ However, in this situation officers without a doubt escalated the knock and talk to a seizure once the order was issued to open the door.

required immediate arrest at the time they entered the home, because they still did not know if Mr. Dorsey was in the home. It was not until they illegally ordered the door be opened, illegally entered without permission, and went to the very back of the house that the officers were even able to verify Mr. Dorsey was present. Moreover, verifying he was present still did not establish that a felony was occurring.

At trial, the state conceded officers immediately entered the home without permission once Gillespie opened the door, something the State, on appeal, tries to dispute. *State's Brief at 20⁴*. The testimony the state relies on to prove this represents one of the changes in Gillespie's version of events that occurred after she was given her plea agreement. T. Harris specifically testified that officers burst through the door immediately, without asking permission to come in, because they did not have time to explain the situation to Ms. Gillespie. (A.R. Vol. I, p. 90-92). Instead officers entered, detained everyone and then explained they had "reasonable suspicion" that a crime was being committed, and they were there to investigate further. T. Harris admitted that at the time officers entered Gillespie's home without permission he did not know what was occurring in the home. He testified that he had suspicion but was not sure: "I had reasonable suspicion that a crime was occurring and, I detained them for officer safety purposes." *A.R. Vol. I, p. 88-90*.

T. Harris testified he entered the home with "reasonable suspicion that a crime was occurring" and "due to officers' safety." However, according to this Court's precedent, in order to rely on

⁴ The State makes an indefensible assertion regarding this issue by stating: "[a]s a final note on this issue, the police did not just burst into Gillespie's trailer. Rather, Gillespie voluntarily opened the door and let them in." The prosecutor and the investigating officers admitted officers immediately burst through the door once Gillespie **complied with T. Harris' order[not voluntarily] to open the door.** (A.R. Vol. I, p. 33, 63). While T. Harris admitted to entering without permission, he claimed officer's safety as the reason for the uninvited entry.

exigent circumstances officers must be able to establish **that both probable cause existed and that exigent circumstances, not of their own making,** prevented the application for a warrant.

The test of exigent circumstances for the making of an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, **the accused** would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test based on what a reasonable, well-trained police officer would believe. *Syl. Pt. 3, State v. Farmer 173 W.V. 285, 515 S.E.2d 392(1983) (quoting Syl. pt. 2, State v. Canby, W.Va., 252 S.E.2d 164 (1979))*.

As demonstrated above, this test was not met in Mr. Dorsey's case, officers did not have an accused to arrest on a felony at the time that they stormed into Gillespie's home and, even more troubling, it was not until after they had illegally searched the entire home that they had enough evidence to make an arrest on a felony.

The State's assertion, that because Mr. Dorsey was here to conduct illegal behavior voids his standing to challenge the search of Gillespie's home, is without merit.⁵ State's Brief at 8. The suggestion that an individual loses his or her right to privacy in the place in which they are residing because they are participating in illegal behavior is just plain wrong. The State fails to cite any authority for this assertion **and**, the United States Supreme Court has specifically held the opposite is true. The Court held that while crime in one's home is of great concern it can only be reached by proper procedure, otherwise we are no better than a police state. *Johnson v. United States 333 U.S. 10,17, 68 S.Ct. 367,370-71 (1948)*.

It was not disputed that Mr. Dorsey resided at Gillespie's home and had his own room for approximately three weeks with not only her knowledge but, with her agreement. This Court

⁵ Additionally, the record indicates that Mr. Dorsey was here to attend a court hearing.(A.R. Vol. I, 376-77, 382) This was stipulated to in order to avoid the jurors hearing that he had a separate court hearing in a different county.

specifically addressed this exact situation in *State v. Adkins*, 176 W.Va. 613, 616-17, 346 S.E.2d 762, 766(1986) (*internal citations omitted*), holding: “a defendant who is more than a casual visitor to an apartment or dwelling in which illegal drugs have been seized has the right under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution to challenge the search and seizure of the illegal drugs which he is accused of possessing.” Furthermore, the Fourth Amendment's privacy protections extend to overnight guests, a status Mr. Dorsey held at the very least. *Minnesota v. Olson*, 495 U.S. 91, 98, 110 S.Ct. 1684 (1990).

Maybe Gillespie regretted her decision to allow Mr. Dorsey to stay in her home, but she testified she agreed to allow him to stay at her residence. (A.R. Vol. I, p. 112)(A.R. Vol. II, p. 995). Additionally, the fact that he was not intended to be a permanent roommate is of no consequence. As was established at trial, her lease did allow for overnight, guests just not permanent roommates. Finally, it was to Gillespie's benefit to paint herself as a victim who did not like the fact Mr. Dorsey was there to lessen her own culpability, and to ensure she kept her plea agreement by testifying in a satisfactory manner. As stated in the initial brief *Petitioner's brief at 9*, Gillespie's version of how events unfolded changed dramatically from the night of the incident when she gave her statement, and the testimony she gave at trial. The only difference being she was charged and facing uncertainty when she gave her statements.

In her statement she asserted, just as Mr. Hurley did, that the officers threatened to kick the door in if she did not open it. (A.R. Vol. I, p. 145-146)(A.R. Vol. II, p. 1042). At trial, after receiving the plea deal, she gave two separate explanations as to why she said that: she lied; and, it was not the police that said it but Mr. Hurley. (A.R. Vol. I, p. 144)(A.R. Vol. 2, p. 1131). Mr. Hurley testified the officers did threaten to kick the door in if it was not opened, that as soon as

the door was opened officers entered the house, detained everyone, and immediately began searching. (A.R. Vol. II, p. 1123-24).

Even though Gillespie changed her version of events, testifying her act of opening the door was voluntary and it served as her invitation to officers to come in, a review of all of her testimony describes a very different set of circumstances. She testified: officers burst through the door as soon as she complied with the order to open it, officers immediately detained everyone, and immediately begin searching her home, “going all through it.” (A.R. Vol. I, p. 125, 151)(A.R. Vol. II, p. 1011). Significantly, Gillespie testified she signed the consent to search but does not remember when, that she could not say it was before her home was searched, or even while she was at her home. (A.R. Vol. I, p. 127, 148, 165) (A.R. Vol. II, p. 1011).

As to consent being voluntary, it was not. It was gained under the color of authority, and **after** the officers had illegally entered her home. Gillespie testified she did not believe the officers would leave. Therefore, the entry and search of her home was due to submission to authority not a voluntary grant of consent. Importantly, Gillespie testified **she was not advised** she could refuse the search and further testified **she felt like she had no choice**. (A.R. Vol. I, p. 152). Additionally, Gillespie testified she had just smoked a joint of marijuana when officers arrived at her home, and she had smoked crack earlier that evening around 5:30 p.m, a significant issue impacting the validity of consent the state did not even acknowledge on appeal. (A.R. Vol. I, p. 121, 127)(A.R. Vol. II, p. 1009, 1039, 1051). Finally, T. Harris testified he told Gillespie how bad the situation was, how serious the charges were that she faced, and that it was in her best interest to cooperate with officers. (A.R. Vol. I .p. 35, 37-38, 41)(A.R. Vol. II, p. 924). He also informed her his main interest was not in her, but in Mr. Dorsey.

As demonstrated above, consent was not valid in this case despite the state's assertion to the contrary. The officer's behavior invalidated consent: "[a]lthough evidence acquired by consent is admissible against the accused in trial, mere submission to colorable authority of police officers is insufficient to validate a 'consent' search or to legitimize the fruits of the search, and evidence so obtained is incompetent against an accused." *Syl. Pt. 8, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974)*. Everything the officers learned on January 21, 2012, was learned by physically intruding on Gillespie's property, and by the improper use of their authority. All of the evidence gathered during the illegal search violated Mr. Dorsey's reasonable expectation of privacy. In *Syl. Pt. 10, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974)*, this Court held: "**[a]n arrest cannot be justified by the fruits of an illegal search nor can a search be justified by what it produces.**" Mr. Dorsey's arrest and conviction were based solely on the fruits of an illegal search and he now respectfully requests this Court to reverse his conviction and rule that all the evidence and statements taken as a result be suppressed.

- II. Despite the State's assertion to the contrary, the trial court's stated, on the record, the reason it was refusing the plea agreement was that it had given the parties' sufficient time to reach an agreement the day before. Therefore, according to this court's precedent, the trial court's refusal of the plea was an abuse of discretion that requires reversal. *Reply to State's brief 21-22*.

Counsel for Mr. Dorsey did not assert he had a constitutional right to a plea bargain as the state insinuates. What counsel did assert was the reason the trial court gave for refusing to accept the plea agreement the parties had reached was an abuse of discretion, which this Court has previously held is reversible error. The State, in an attempt to muddy the water on this issue, paints Mr. Dorsey as a "difficult client." The state details the pleas Mr. Dorsey refused.

This does not in any way impact the record as to why the final two offers, which were the best offers that had been made by the state, were refused by the trial court. The relevant facts in the record are:

1. Mr. Dorsey was prepared to accept either of the two offers presented to him by the state.
2. This was communicated to the court by his counsel.
3. The court asked that the offers be placed on the record.
4. The court specifically questioned the prosecution if these were in fact the offers made.
5. The offers were rejected by the trial court by responding: “ [t]he Court spent more than enough time yesterday giving the parties a chance to reach a resolution so we’ll proceed to trial today.” (*A.R. Vol. II, p. 857-858*).

The precedent from this Court is clear. While Rule 11 of the West Virginia Rules of Criminal Procedure gives the trial court discretion to refuse a plea bargain, *Syl. Pt. 5, State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984)*, the court must exercise “sound judicial discretion” in doing so. *Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 498 (1971)*. *Accord Sears, 208 W.Va. 700, 703, 542 S.E.2d 863, 866 (2000)*. As a general matter, “[a] court’s ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.” *Syl. Pt. 4, Myers v. Frazier, 173 W.Va. 658, 319 S.E.2d 782 (1984)*. “A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant’s prior criminal record whether the plea bargain enables the court to dispose of the case in a manner

commensurate with the seriousness of the criminal charges and the character and background of the defendant.” *Id. at Syl. Pt. 6.*

Here, the trial court was advised of two separate offers the State had presented to Mr. Dorsey, and that Mr. Dorsey was willing to accept either of them. The trial court refused to accept the plea offer, not based on any procedure in which it was justified in refusing such offer, but instead based on the timing of the offer and acceptance. The state’s speculation that the court was tired of Mr. Dorsey and his “shenanigans”, is just that, speculation and even if true, is also not an acceptable reason as to why a plea agreement can be refused. *State’s brief at 22.*

In *State v. Sears*, 208 W.Va. 700, 703, 542 S.E.2d 863, 866 (2000), this Court reversed a conviction, when the trial court refused a plea offer for the same reason as the court gave Mr.

Dorsey’s case, stating:

When a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court.

Id. at Syl. Pt. 5.

The *Sears* Court reversed *Sears*’ conviction and remanded to the trial court with instructions to permit him “to offer to the Court his plea pursuant to the plea negotiation originally agreed to by the State.” *Id. at 705, 542 S.E.2d at 868.* This Court should order the same relief in Mr. Dorsey’s case.

- III. It is impossible for the trial court to judge the reliability of evidence to be presented, as it is required to do in a hearing to determine the admissibility of Rule 404(b), WVRE, evidence, without hearing the evidence from the witnesses. This is especially true in Mr. Dorsey’s case where the state’s witnesses were co-defendants to Mr. Dorsey.

The state correctly points out that counsel for Mr. Dorsey, at the time the 404(b) hearing was held, did not object to the prosecution's proffering of what the evidence would be at the hearing. *State's brief at 24*. However, the state did not address the point in Mr. Dorsey's original brief that trial counsel did address the error and did therefore give the court the opportunity to hold a proper 404(b) hearing. Trial counsel noted his objection to the use of the evidence due to this issue. (A.R. Vol. I, 868-69). Further, as this court has held in the past, the trial court is the gatekeeper and as such it has an obligation to ensure the rules of evidence are strictly followed. *State v. Graham, 208 W.Va. 463, 471, 541 S.E.2d 341, 349 (2000) (Starcher, concurring)*. This obligation, held by all trial courts, is an added layer of protection of a defendant's constitutional right to a fair trial. Therefore, it was the trial court's obligation, as much as it was counsel's obligation, to see that the rules of evidence were complied with in Mr. Dorsey's trial. A trial court is obligated to hear the evidence determine that it is reliable, relevant, and make a determination the state has proven by a preponderance of the evidence that the alleged acts did occur and that Mr. Dorsey committed the acts before the 404(b) evidence can be presented before a jury. *Syl. Pt.2, State v. McGinnis 193 W.Va. 147, 455 S.E.2d 516 (1994.)* That did not occur in this case. The judge did not hear the evidence. The judge heard a proffer of what the evidence would be and made a finding based on the proffer. Finally, there is no way to say how the trial was impacted by allowing a proffer of the evidence at the 404(b) hearing, rather than requiring testimony at both the hearing and at trial, and any attempt to would be nothing more than an assumption.

CONCLUSION

Mr. Dorsey Respectfully requests that this Honorable court reverse his conviction and remand it back the Circuit Court.

A handwritten signature in black ink, appearing to read 'Crystal L. Walden', written over a horizontal line.

Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323

CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 23rd day of August, 2013, I hand delivered a copy of the foregoing *Petitioner's Reply Brief* to counsel for respondent, Benjamin Yancey, Assistant Attorney General, Office of the Attorney General, State Capitol, Building 1, Room W-435, Charleston, WV 25305.

A handwritten signature in black ink, appearing to read 'Crystal L. Walden', written over a horizontal line.

Crystal L. Walden
Counsel for Petitioner
cwalden@wvdefender.com

Counsel for Petitioner