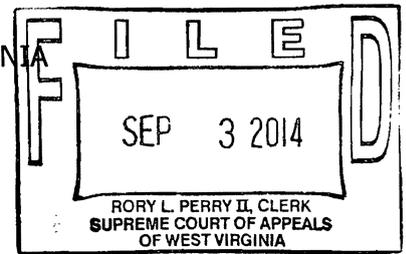


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia, Plaintiff Below,

Respondent

Vs.) No. 14 – 0200

(Wood County Circuit Court #13-F-144)

Rick Brock, Defendant Below,

Petitioner

PETITIONER'S REPLY BRIEF

A handwritten signature in black ink, appearing to read "Eric Powell".

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ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISMISS AS BOTH COUNTS ONE AND TWO EACH ATTEMPT TO CHARGE THE DEFENDANT WITH TWO CRIMES IN VIOLATION OF RULE 8 THE OF WVRCrP AND PETITIONER'S CONVICTIONS THEREON SHOULD BE REVERSED.

A. Attempting to Operate a Clandestine Drug Laboratory is a Separate Offense from that of Operating a Clandestine Drug Laboratory.

The Respondent's Brief incorrectly asserts that "Petitioner's claim must be rejected because the offense of Operating or Attempting to Operate a Clandestine Drug Laboratory is on offense as defined by the Legislature."

However, this Court has explicitly recognized that Attempting to Operate a Clandestine Drug Laboratory is a crime in and of itself. In State v. Cummings, 647 S.E. 2d 869 (W.Va. 2007) and State v. Rymer, No. 12-0020 (W.V. Supreme Court, February 11, 2013) (Memorandum Decision) the Defendants were convicted of Attempting to Operate a Clandestine Drug Laboratory. This Court reversed the conviction in Cummings based solely on lack of evidence but upheld the convictions in Rymer.

More importantly, this Court specifically defined the crime of Attempting to Operate a Clandestine Drug Laboratory in State v. Jett, 220 W.Va. 289, 647 S.E. 2d 725 (2007), stating therein:

"In other words, in order to show attempt to operate a clandestine drug laboratory, no overt act other than the assembly of the chemicals or equipment indicated by the statute is required."

B. Attempting to Operate a Clandestine Drug Laboratory is not a lesser included offense of Operating a Clandestine Drug Laboratory

Next, the Respondent attempts to assert that the Indictment is proper because each count simply charges the "lesser included offense" of Attempt. This is incorrect for several reasons.

First, Attempting to Operate a Drug Laboratory is not a lesser offense to Operating a Drug Laboratory in any way.

"By definition, as we acknowledged in Penwell, a lesser included offense must be a less serious crime in terms of its classification and degree." State ex rel Games-Neely v. Silver, 226 W. Va. 11, 697 S.E. 2d 47 (W.Va. 2010).

In State v. Penwell, 199 W.Va. 111, 483 S.E. 2d 240 (1997) this Court stated:

"We note that, as a practical matter: "An offense, in order to be a lesser included offense, must be a less serious crime in terms of its classification and degree..." 42 C.J.S. Indictments and Information 218 (1991). The Defendant asserts that the crime of assault in the commission of a felony is a "lesser included" offense within the crime of "aggravated robbery". We do not agree. Assault in the commission of a felony is, like aggravated robbery, classified as a felony; however, it carries a penalty of confinement in the penitentiary of two to ten years. Aggravated robbery, on the other hand, carries a penalty of not less than ten years and in this case resulted in the imposition of a sentence of fifty years. Thus, aggravated robbery is the more serious offense and can not be seen in that light, as a "lesser included" offense within the offense of assault in the commission of a felony. Assault in the commission of a felony is clearly the lesser offense. Moreover, we believe that the clear intent of the legislature to create two separate offenses, with two punishments, can be clearly seen from a fair analysis of the elements of the two offenses as expressed in the respective statutes."

In Games-Neely, this Court stated:

"With regard to Mr. Blackford's contention that first degree arson is a lesser included offense of arson resulting in serious bodily injury. Petitioner argues that first degree arson cannot be a lesser included offense because it carries the lengthier sentence between the two offenses under discussion. We agree. Since the penalty for first degree arson is two to twenty in the penitentiary and the penalty for arson resulting in serious bodily injury is only three to fifteen years, the offense of first degree arson is clearly the more serious of the two crimes. See Penwell,

199 W. Va. At 116 483 S.E. 2d at 245. Accordingly, we hold that the offense of first degree arson set forth in West Virginia Code § 61-3-1(a) is not a lesser included offense of arson resulting in serious bodily injury which is set forth in West Virginia Code §61-3-7(b)."

In both cases, this Court made it clear that in order to be a "lesser offense", a crime must carry a lesser penalty than the "greater" offense.

W.Va. Code 60A-4-411(a) provides:

"Any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony and, upon conviction shall be confined in a state correctional facility for not less than two years nor more than ten years or fined not less than five thousand dollars nor more than twenty-five thousand dollars, or both."

Accordingly, both Operating and Attempting to Operate a Drug Laboratory are felony offenses which carry the same penalty. Much like the old robbery statute, the Legislature has expressly chosen not to distinguish between the two in terms of classification, degree or penalty. Under these circumstances, neither crime is a "lesser" offense.

Second, Attempting to Operate a Clandestine Drug Laboratory is not a lesser included offense of Operating a Clandestine Drug Laboratory under the traditional analysis either.

"An offense qualifies as a lesser included offense only if the elements of the included offense are fewer in numbers than the elements of the greater offense, and if the greater offense cannot be committed without also committing the lesser offense. State v. Daggett, 167 W. Va. 411, 280 S.E. 2d 545 (1981).

In Jett, *supra*, this Court found:

“...in order to show attempt to operate a clandestine drug laboratory, no overt act other than the assembly of the chemicals or equipment indicated by the statute is required.”

It is, therefore, possible to commit the crime of Operating a Drug Laboratory without committing the crime of Attempting to Operate a Drug Laboratory. For example, A gets into the backseat of B’s car. Unbeknownst to A at that time, there is a bottle in the backseat with the chemicals already in it necessary to make methamphetamine. A sees this and decides to shake the bottle and begin the chemical reaction necessary to produce meth. At this point, A had Operated a Drug Laboratory but he had nothing to do with assembling the chemicals therefor or assembling them with the necessary intent and, therefore, has not committed the crime of Attempting to Operate a Drug Laboratory.

Similarly, A goes to B’s house. He walks down into B’s basement and discovers a fully operational methamphetamine laboratory. A begins to operate it. He has again committed the crime of Operating a Drug Laboratory without assembling any chemicals therefor or with the necessary intent and, therefore, he has not committed the crime of Attempting to Operate a Drug Laboratory.

In short, one can commit an act without preparing for it ahead of time. Therefore, an attempt is not always a lesser included offense and, this case, is not even a “lesser” offense.

Third, the State did not proceed at trial as if they intended to charge two offenses in each Count. For example, both offenses were contained in the same instruction. No separate instruction was given for an attempt charge. Moreover, the verdict form did not contain separate verdicts for Operating and for Attempting to Operate. If this is truly the argument they are now making it constitutes an admission that Rule 31 of the W.V. Rules of Criminal Procedure was also violated.

Rule 31, WVRCrP provides, in part:

a) “Return. The verdict shall be unanimous...”

- b) Several Defendants and Offenses....In all cases involving multiple defendants or offenses, the court shall require the jury to make a separate finding as to each defendant and offense.
- c) Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

The verdict from utilized in this case included both Operating and Attempting to Operate in the same verdict, rather than requiring the jury to make a separate finding on each offense. In fact, nothing in the record, including the State's instructions, suggests that the jury was ever told they were dealing with separate offenses.

Moreover, Rule 31 may allow for a conviction on either "the offense charged " or "an attempt to commit the offense charged" but it does not allow for a conviction for both as was done here.

It is disingenuous for the State to put forth the arguments they are now making. This matter was brought to their attention prior to trial. They had ample opportunity to seek an amendment of the indictment or a superseding indictment. They had ample opportunity to mold their instructions and proposed verdict from to fit the arguments they are now making. They chose not to do any of the above. Instead, they stubbornly proceeded to trial on the sole theory that the counts in the indictment charged but a single offense each. A defendant would be deemed to have waived these arguments as he was in State v. Wyatt, 198 W.Va. 530, 482 S.E. 2d 147 (1996). In Wyatt, this Court refused to consider a duplicitous count argument because no objection was raised below. The Respondent's arguments, raised for the first time on appeal, should suffer the same fate since they had ample opportunity not only to raise them but also to fix them during the proceedings below.

The Respondent cites United States v. Quinn, 364 F. Supp. 432 (N.D. Ga. 1973), for the proposition that its permissible to charge an attempt in the same count as the substance offense. While Quinn does say that, it misapplies the very precedent

on which it is based. The Quinn court cited Mihailoviki v. California, 364 F. 2d 808 (1966) as authority for it holding. However, the Mihailoviki Court actually held as follows:

“Appellant urges he was not convicted of the crime charged against him. Answer: Under California Law, the crime of attempted rape is a lesser and necessarily included charge in the crime of rape.”

Again, the Attempt to Operate here is not a lesser offense nor is it a lesser included offense. Therefore, Mihailoviki would not permit its inclusion in the same count as the Operating charge.

Quinn also partially relied on Rule 31 of the Federal Rules of Criminal Procedure which permits a conviction for an attempt to commit the substantive offense, as does ours. However, FRCrP 31 does not explicitly require the jury “to make a separate finding as to each . . . offense. Our rule does and it was violated here.

C. Count Two can also read to charge Two Separate Conspiracies.

Without much discussion, the Respondent asserts that an “allegation in a single count of conspiracy to commit several crimes is not duplicitous, for the conspiracy is the crime, and that is one, however diverse its objects.” Braverman v. United States, 317 U.S. 49, 54 (1994).

This claim contradicts the Respondent’s previous argument that Operating and Attempting to Operate constitute the same crime. Moreover, it assumes that only one conspiracy is alleged. A fair reading of the Indictment herein includes the notion that the State charged one conspiracy to attempt to operate a drug lab and a separate conspiracy to operate a drug lab. Respondent cites no authority for the proposition that they are entitled to a reading of the Indictment which suits their brand new arguments.

Moreover, Braverman did not really decide that issue. In that case, there were multiple counts, all alleging the same conspiracy to violate a different law in each count. The United States Supreme Court actually held that the Defendant’s could only be convicted and sentenced for one conspiracy since each count referred to the same

conspiracy. The Braverman Court did not hold that it was alright to allege two conspiracies in one count, however, and did not deal with the precise issue presented here.

D. Duplicity is not a Fault of Form Only

“A duplicitous indictment is one that charges separate offenses in a single count. The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both. Adverse effects on a defendant may include improper notice of the charges against him, prejudice in the shaping of evidentiary rulings in sentencing, in exposure to double jeopardy and, of course, the danger that a conviction will result from a less than unanimous verdict as to each separate offense.” United States v. Duncan, 850 F.2d 1104, 1108 n. 4 (6th Cir. 1988).

In this case, the prejudice to the Defendant is heightened by the fact that Rule 31 requires both a unanimous verdict and a separate jury finding on each offense. The jury herein rendered the type of “general verdict” referred to in Duncan which makes it impossible “to determine whether a conviction rests on only one of the offenses or on both” and whether the verdict was unanimous on a unified theory of guilt.

II. THE TRIAL COURT ERRED BY FAILING TO GIVE THE ENTIRETY OF PETITIONER'S PROPOSED INSTRUCTION NO. 1.

In State v. Cummings, 647 S.E.2d 869 (W.Va. 2007), this Court stated:

“Accordingly, we now hold that in order to sustain a conviction for violation of W. Va. Code §60A-4-411 (2003), by assembling any chemicals or equipment for the purpose of manufacturing methamphetamines, the State must prove beyond a reasonable doubt that the defendant had actual or constructive possession over the chemicals and/or equipment. In order to establish constructive possession where the defendant is present in a vehicle wherein such materials are found, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the chemicals and/or equipment to be used for

the purpose of manufacturing methamphetamine and that such items were subject to the defendants dominion and control.”

Likewise, the State failed to prove actual or constructive possession of the materials by Appellant’s alleged co-conspirator, Amy Cummings, absent evidence sufficient to meet the necessary elements of the crimes for which Appellant was charged . . .”

Therefore, this Court has explicitly acknowledged that not only are the components of constructive possession material elements of the crimes charged against the Petitioner, but also that it was the State’s burden to prove those elements beyond a reasonable doubt. Therefore, the jury should have been instructed that the State’s failure to do so mandated a verdict of not guilty. Respondent admits that Petitioner’s proposed Instruction No. 1 is a correct statement of the law and that “it is obviously correct that if there is a reasonable doubt as to constructive possession, Petitioner should be found not guilty.” (Respondent’s brief, p. 10). This is tantamount to an admission of error.

Where a trial court gives, over objection, an instruction which incompletely states the law, and the defect is not corrected by a later instruction, the giving of such incomplete instruction constitutes reversible error where the omission involves an element of the crime. State v. Walker, 181 W. Va. 162, 381 S.E.2d 277 (W. Va. 1989).

Thus, a jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law. The purpose of instructing the jury is to focus its attention on the essential issues of the case and inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered, they succinctly and clearly will inform the jury of the vital role it plays and the decisions it must make.” State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (W. Va. 1996).

Petitioner’s Instruction No. 1 specifically informed the jury of how it should resolve the issue of reasonable doubt as to constructive possession and it did so

correctly. Moreover, the remainder of the Judge's charge never specifically informs the jury how to resolve a reasonable doubt as to the issue of constructive possession. As given, Petitioner's Instruction No. 1 was incomplete. As proposed it was not. Since it involved an element of the crime and was not corrected, "the giving of such incomplete instruction constitutes reversible error." Walker, supra.

By contrast, the instruction proffered by the State, and given by the Court, very explicitly informs the jury on how to find the Defendant guilty. The problem is that their instruction only defines the statutory elements of the crimes of Operating or Attempting to Operate. It does not include constructive possession. Therefore, the instructions not only fail to explicitly inform the jury of all grounds upon which they could find the Defendant not guilty, they actually informed the jury they could find him guilty on grounds that did not include all necessary elements of the crime. This cannot stand.

III. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE INITIAL STOP OF THE VEHICLE WAS UNLAWFUL AND PRETEXTUAL AND THE POLICE LACKED PROBABLE CAUSE TO SEARCH THE VEHICLE IN THE POSSESSION AND CONTROL OF THE PETITIONER.

On this point, Respondent's brief suffers from two fatal flaws. First, it asserts that a canine sniff is not a search and cites Illinois v. Caballes, 543 U.S. 405, 407-09, 125 S. Ct. 834 (2005) for this proposition. Second, it fails to draw a distinction between contraband and the individual components of a meth lab, all of which are inherently legal to possess.

Petitioner contends that Caballes is no longer good law and, even if it is, it does not apply here.

Respondent cites Caballes for the following proposition:

"A canine sniff is also constitutionally acceptable if performed within the time reasonably required to issue a traffic citation. This is because a dog sniff is not a search within the meaning of the Fourth Amendment, and it

therefore requires no additional justification. Caballes,
supra.

However, in 2013, the United States Supreme Court decided Florida v. Jardines, 133 S. Ct. 1409, 185 L. Ed. 2d 495, 81 USLW 4209 (2013). The Court ultimately held:

“The governments’ use of trained police dogs to investigate the home and its immediate surroundings is a search within the meaning of the Fourth Amendment.”

In Jardines, the police brought a canine to sniff around the outside of the Defendant’s home. When the dog alerted for narcotics the police obtained a search warrant and then searched his home where they found narcotics. In its discussion, the Court stated:

When the Government obtains information by physically intruding on persons, houses, papers or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred. United States v. Jones, 565 U.S. _____, _____, N. 3 (2012) (slip op. at 6, N. 3).”

The Court further stated:

“Since the officers investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion...an officer’s leave to gather information is sharply circumscribed when he steps off those [public] thoroughfares and enters the Fourth Amendment’s protected areas.

Obviously, the Court held that it was an unlicensed physical intrusion.

Incidentally, the Jones case cited above held that a vehicle is an “effect” for purposes of the Fourth Amendment. The Court in that case held that the installation by the police of a GPS receiver on a person’s vehicle to track their movements was a search.

Therefore, Jardines contradicts Caballes in two important ways. First, it holds that a warrantless canine sniff is, in fact, a search, and second, that it is not excused by the discovery of contraband/narcotics, possession of which Caballes held to be an interest not protected by the Fourth Amendment.

In Caballes, the police made a lawful stop of a vehicle. Without cause to do so, the police brought a canine on the scene to walk around the car. The dog alerted, the car was searched and marijuana was discovered. The Supreme Court upheld the search, stating:

“Official conduct that does not” compromise any legitimate interest in privacy” is not a search subject to the Fourth Amendment. Jacobsen 466 U.S., at 123. We have held that any interest in possessing contraband cannot be deemed “legitimate,” and thus, governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest.”

Accordingly, the use of a well-trained narcotics-detection dog—one that “does not expose noncontraband items that otherwise would remain hidden from public view,” Place, 462 U.S., at 707—during a lawful traffic stop, generally does not implicate legitimate privacy interests.

A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”

As stated above, Jardines explicitly contradicts the notion that a canine’s discovery of contraband does not implicate a legitimate privacy interest. Moreover, the canine search conducted here was not one that did not “expose noncontraband items” or substances “that no individual has a right to possess.”

Cocaine, marijuana, heroin, opium and other narcotics are natural substances which are inherently legal to possess. The same is not true of the precursors to methamphetamine. All of them are inherently legal to possess. Therefore, a canine sniff designed to expose the individual ingredients is also then designed to expose the possession of noncontraband items that people do have a right to possess as long as they do not have the requisite criminal intent.

Therefore, in this case, the canine search implicated legitimate privacy interests and did, in fact, expose items which can be lawfully possessed.

Both the lower court and Respondent's brief acknowledged that there was no probable cause to search the Defendant's vehicle until the canine alerted on the car. Since the canine sniff was an unlawful search of the vehicle on a constitutionally protected area, the lower court erred by failing to suppress the fruits of the searches.

IV. THE EVIDENCE ADDUCED AT TRIAL, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS MANIFESTLY INADEQUATE TO CONVINCe IMPARTIAL MINDS OF THE GUILT OF THE PETITIONER BEYONE A REASONABLE DOUBT.

Respondent's brief largely focuses on the argument that the proof adduced at trial was sufficient to prove that methamphetamine was found in the car. That fact is undisputed.

However, the evidence of the Petitioner's knowledge, dominion and control remains insufficient as argued in Petitioner's original Brief.

This Court has given some insight into the kind of evidence necessary to establish constructive possession. In State v. Hypes, 230 W.Va. 390, 738 S.E. 2d 554 (2013), the Defendant was convicted of Operating or Attempting to Operate a Clandestine Drug Laboratory on a theory of constructive possession. After reviewing the evidence, this Court upheld the conviction, stating:

"In the instant case, unlike the evidence examined by the Court in Cummings, there was testimony from the apartment manager that she witness the Petitioner carrying the garbage bag with drug precursors in it to the dumpster. There was also testimony and evidence that the Petitioner resided in the apartment where methamphetamine ingredients and precursors were found. The Petitioner's girlfriend testified that the Petitioner came and went from the apartment as he pleased because he had his own key to the apartment. She testified that she had no knowledge of what was going on in her apartment. The Petitioner's girlfriend testified that she had never cooked methamphetamine and that she could not by Sudafed because she did not have photo identification. Further, the Petitioner's own statement demonstrated that he was addicted to making methamphetamine and learned how to make the illegal drug form Uncle Fester's Cookbook, a book that was seized as evidence that the Petitioner had "actual or constructive possession over the chemicals and/or

equipment" to be used for the purposes of manufacturing methamphetamine and "that such items were subject to the defendant's dominion and control".

In Hypes, there was substantial evidence that the Defendant had access to the materials, knew they were there, disposed of them, knew how to make meth and was addicted to making it. There is no such evidence here. The closest the State came was Trooper Jackson's testimony that he could smell the vapors. However, that did not occur until his head was inside the passenger side of the car. By contrast, Trooper Jackson could not detect the odor when standing immediately next to the Defendant on the driver's side. How could the Defendant be expected to? Trooper Jackson is trained in the detection of meth labs. There is no evidence that Petitioner is so trained or that he could identify the odor even if he could smell it. This case is for more analogous to Cummings than it is Hypes.

V. THE TRIAL COURT ERRED BY ALLOWING AGENT STURM TO TESTIFY AS TO THE DANGERS AND EXPLOSIVENESS OF A METH LAB AS SAID TESTIMONY WAS IRRELEVANT AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

Petitioner incorporates by reference herein the arguments contained in his original Brief without supplementation.

CONCLUSION

For the reasons set forth above, the Petitioner moves the Court to reverse his convictions.

Respectfully submitted

By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff/Respondent,

Wood County Circuit Court
Case No.: 13-F-144

RICK BROCK,

Supreme Court Case No: 14-0200

Defendant/Petitioner

CERTIFICATE OF SERVICE

I, Eric K. Powell, hereby certify that on the 3rd day of September, 2014, I have caused to be served upon the parties hereto listed below, a true and accurate copy of the attached ***Petitioner's Reply Brief*** by sending the same by U.S. Postal Service on same date to all the parties listed below:

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