

**Supreme Court of Appeals of West Virginia**  
**April 21, 2015, Argument Docket**  
**LAWS Program**  
**Mason County Courthouse, Point Pleasant, WV**

For a full description of the facts and legal arguments raised on appeal, please review the briefs filed by the parties.

**3. STATE OF WEST VIRGINIA V. RICK BROCK, No. 14-0200**

**Procedural Background:**

This case involves a criminal appeal. On July 18, 2013, an indictment was returned in the Circuit Court of Wood County charging the defendant with one count of operating or attempting to operate a clandestine drug laboratory and one count of conspiracy to operate or attempt to operate a clandestine drug laboratory. Prior to trial, the defendant filed a motion to dismiss the indictment, arguing that the applicable law (W.Va. Code § 60A-4-411) creates two distinct offenses, and that, by implication, the conspiracy statute also creates two distinct offenses. The court denied the motion to dismiss. The defendant also filed a motion to suppress the evidence seized during a search of his vehicle, arguing that the officers did not have a reasonably articulate suspicion that he was engaged in illegal activity prior to stopping the vehicle in which he was traveling. The court denied the motion upon hearing the evidence.

The defendant appeals the Circuit Court of Wood County's order entered on February 20, 2014, sentencing him, subsequent to his conviction after a two-day jury trial, to serve an indeterminate term of two to ten years in the West Virginia penitentiary for operating or attempting to operate a clandestine drug laboratory; and one to five years for conspiracy to operate or attempt to operate a clandestine drug laboratory. The court ordered the sentences to be served concurrently, but both were suspended to allow the defendant to serve a three-year period of probation. On appeal, the defendant requests that his convictions be reversed.

**Statute:** W.Va. Code § 60A-4-411 provides:

(a) 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.

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(b) For purposes of this section, a “clandestine drug laboratory” means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine, methylenedioxymethamphetamine or lysergic acid diethylamide in violation of the provisions of section four hundred one of this article

(c) Any person convicted of a violation of subsection (a) of this section shall be responsible for all reasonable costs, if any, associated with remediation of the site of the clandestine drug laboratory.

**Factual Background:**

On April 27, 2013, Deputy Woodyard was working undercover and conducting surveillance on a home where the residents of the home were suspected of illegal drug activity. Two people were in the vehicle outside the home, but Deputy Woodyard could not identify who they were. Deputy Woodyard watched as one of the individuals went into the house. Approximately fifteen to twenty minutes later, an individual came out of the house and got in the vehicle. Then, the vehicle left the premises. Approximately fifteen to thirty minutes later, the vehicle returned to the house. The officer identified the passenger in the vehicle as Terry Abbott. The vehicle stayed outside the home for approximately ten to fifteen minutes and then left when an individual exited the home and got in the vehicle. The jury was not privy to the above information due to the lower court’s pre-trial ruling.

Deputy Woodyard followed the vehicle and claims to have observed minor traffic violations. Deputy Woodyard did not stop the vehicle for any of the minor traffic violations. Instead, he radioed for a marked car, and Trooper Jackson advised Deputy Woodyard that he was in the area and began to follow the vehicle. Trooper Jackson did not observe any driving violations. After following the vehicle for a quarter of a mile, Trooper Jackson activated his lights and stopped the vehicle.

Trooper Jackson approached the driver’s side of the vehicle and made contact with the defendant, who was driving the vehicle. Trooper Jackson became aware that the defendant borrowed the vehicle with permission from its owner, the defendant’s girlfriend. The defendant had a revoked driver’s license. Trooper

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Jackson did not smell any odors while standing at the driver's side of the vehicle. Trooper Jackson was accompanied by another state trooper, Trooper DeMeyer. The officers conducted a pat down search of both the defendant and Mr. Abbott, but nothing suspicious was found. The defendant declined to consent to a search of the vehicle. Trooper Jackson radioed for the assistance of the Parkersburg K-9 unit. From the time that Trooper Jackson approached the vehicle to the time the canine unit arrived took less than twelve minutes.

Officer Nichols responded with a dog and it indicated on the passenger door of the two-door vehicle. Once the dog indicated, Trooper Jackson noticed a number of items on the passenger side floorboards. Trooper Jackson noticed a blue insulated cooler bag. Inside the cooler bag was a pop bottle with sediment at the bottom, a syringe, a cold pack, and a used coffee filter with white powder residue. The troopers never determined who owned the cooler or its contents. The defendant denied knowledge of the cooler. Trooper Jackson states that he detected a chemical odor indicative of a methamphetamine laboratory. There is a question as to whether the methamphetamine laboratory was active. The defendant and Mr. Abbott were then arrested. Four of the items seized from the vehicle were submitted to the West Virginia State Police Laboratory: 1) two plastic bags containing powder in chunks and coffee filters each containing white and off-white chunks; 2) an unidentified liquid; 3) a powder residue which contained methamphetamine; and 4) chunks and powder residue that did not contain methamphetamine.

**Defendant Brock's Argument:**

The defendant raises five assignments of error on appeal. First, the defendant argues that the circuit court erred in denying his motion to dismiss the indictment. The defendant states that operating a clandestine drug laboratory is a separate offense from the crime of attempting to operate a clandestine drug laboratory. Since the statute uses the disjunctive term "or", the defendant argues that the statute requires the State to make an election or bring two separate counts for each of the two offenses. Nevertheless, the defendant asserts that both the crime of operating *and* attempting to operate a clandestine drug laboratory were charged in the first count of the indictment, and the crimes of conspiracy to

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operate *and* attempt to operate a clandestine drug laboratory were charged in the second count of the indictment. The defendant asserts that the indictment violates Rule 8 of the Rules of Criminal Procedure, which requires that all offenses be charged in a separate count for each offense.

Second, the defendant asserts that the circuit court improperly gave only part of the defendant's proposed jury instruction regarding the jury's duty to return a verdict of not guilty if the jury had reasonable doubt as to whether the defendant had knowledge of the presence of drugs in the vehicle or whether the defendant exercised dominion or control over them. The defendant states that the instruction involved two critical elements of the crime charged in count one of the indictment, and the court's refusal to provide the full instruction impaired the defendant's ability to present an effective defense.

Third, the defendant argues that the trial court erred by denying the defendant's motion to suppress where the initial stop of the vehicle was unlawful, and the police lacked probable cause to search the vehicle in the possession and control of the defendant. The defendant argues that the canine sniff constituted a search in and of itself. The defendant states that police are not automatically entitled to delay a traffic stop to bring a dog to search a vehicle. The defendant states that a misdemeanor traffic violation was not observed by the arresting officer or committed in that officer's presence and should not provide a reasonably articulable suspicion for the stop. Therefore, the defendant states that all items seized as a result of the search should have been suppressed.

Fourth, the defendant asserts that the evidence adduced at trial was insufficient to convince a jury of the defendant's guilt beyond a reasonable doubt. The defendant argues that the State failed to offer evidence that the defendant had knowledge of the presence of the drugs in the car or that he exercised dominion or control over the drugs.

Fifth, the defendant argues that Officer Sturm's testimony about the dangers of methamphetamine laboratories during the trial was not probative, was irrelevant, and was prejudicial. The defendant states that the only purpose for the testimony was to inflame the jury.

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**Respondent State's Argument:**

The State asserts that the circuit court did not err in denying the defendant's motion to dismiss the indictment. The State contends that operating or attempting to operate a clandestine drug laboratory is one offense as defined by the legislature. The State argues that even if it is not, attempt is a lesser included offense of operating. The State argues that a count is not duplicitous where the offense charged includes a lesser included offense.

Also, the State asserts that the circuit court did not err by refusing to give the entirety of the defendant's proposed jury instruction. The State argues that the portion omitted from the defendant's proposed instruction is substantially covered in the instructions that were given to the jury.

Additionally, the State argues that the circuit court properly found probable cause to search the vehicle. The State asserts that observed traffic violations provide sufficient justification for a routine traffic stop, and a canine sniff is acceptable if performed within a reasonable amount of time of issuing a traffic citation. The State argues that a canine sniff is not a search within the meaning of the Fourth Amendment. The State asserts that Trooper Jackson had probable cause to search the vehicle when the dog indicated on the front passenger side door. Therefore, the States argues that the circuit court did not err in denying the defendant's motion to dismiss as probable cause existed to search the vehicle.

Further, the State asserts that there was sufficient evidence to convict the defendant. The State argues that the jury heard evidence regarding the initial traffic stop, that materials consistent with manufacturing methamphetamine were found in the vehicle, and that the process of manufacturing the methamphetamine had already begun at the time the materials were found.

Finally, the State argues that Officer Sturm's testimony regarding methamphetamine laboratories during the trial was relevant and supported the defendant's conviction. The State asserts that even if allowing Officer Sturm to testify about the danger of methamphetamine laboratories was error, it was harmless error.