

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

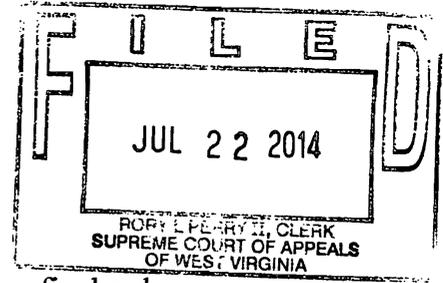
NO. 14-0174

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Appeal from a final order
Of the Circuit Court of
Mercer County (13-F-330-OA)



JAMES EARL NOEL, JR.,

Defendant Below, Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED IN REFUSING TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE SEIZED IN A VEHICULAR SEARCH WHICH VIOLATED THE FOURTH AMENDMENT.

II. THE CIRCUIT COURT ERRED IN FAILING TO ADEQUATELY ADVISE THE DEFENDANT OF HIS RIGHT TO TESTIFY ON HIS OWN BEHALF AND IN ADMITTING AN ALLEGED ORAL STATEMENT ATTRIBUTED TO THE DEFENDANT AND NOT DISCLOSED UNTIL AFTER THE JURY WAS SWORN AND OPENING STATEMENTS WERE MADE.

STATEMENT OF THE CASE

James E. Noel, Jr., was convicted by a Mercer County Circuit Court jury of three felonies which arose out of his unfortunate August 23, 2013, encounter with Bluefield, West Virginia municipal police officer K.L. Adams. After deliberating for approximately three hours after a one-day trial on December 26, 2013, the jury returned guilty verdicts of one violation of Possession with Intent to Deliver Cocaine; Possession with Intent to Deliver methamphetamine, and “Fleeing in a Vehicle in a Manner Showing a Reckless Indifference to the Safety of Others.” (J.A. Vol. 3 - Trial Transcript - p 148). He thus stood convicted of all three counts of the indictment returned by the October term of the Mercer County Grand Jury. (J.A. Vol. 1, p 5).

Mercer County Circuit Court Judge, The Honorable Omar Aboulhosn, after denying a motion for a new trial on January 16, 2014, sentenced Mr. Noel to consecutive terms of one to fifteen years and two one to five years terms of imprisonment, with credit for 22 days served. (J.A. Vol. 4 - New Trial / Sentencing Hearing - p 34). He is presently incarcerated at the Regional Jail at Holden.

Counsel is cognizant that, at this stage, the facts must be viewed in a light most

favorable to the State of West Virginia, and every attempt will be made to recite the same hereinafter in that spirit.

Mr. Noel's difficulties with the constabulary began mid-day in downtown Bluefield when Officer Adams pulled behind him on a downtown street and Mr. Noel made a right-hand turn, attracting Adams' attention, but eliciting no action from him. (J.A. Vol. 3, p 71). Adams shortly thereafter met Mr. Noel traveling in opposite directions, noticed the vehicle he was driving had a cracked windshield, turned around, activated his blue lights and siren and gave chase after Mr. Noel allegedly sped away. (J.A. Vol. 3, pp 72-75). After a trip involving speeds of 80 to 90 mph on a residential street, Mr. Noel pulled over to the side of the road, left the vehicle and began "fleeing on foot." (J.A. Vol. 3, p 77).

Adams ordered Mr. Noel back to the vehicle and he complied, although he was "overly nervous," sweating and scared. (J.A. Vol. 3, p 78). Officer Adams told the jury that Mr. Noel was "fidgety with his hand movements, grabbing toward his pockets" (J.A. Vol. 3, p 80) and appeared to be "staring toward the interior" of the vehicle. (Id.) Adams sat Mr. Noel on the curb at the rear of the vehicle while he radioed in to check for outstanding warrants, learning there were none. (J.A. Vol. 3, p 79). Noel could not produce a valid driver's license because of outstanding traffic tickets, but did show the officer an identification card from the State of Ohio. (J.A. Vol. 3, pp 78-80).

Adams spoke with a woman who emerged from the house where Noel had pulled over and although Noel said he was going there for a visit, the woman said she knew him but was not expecting him and did not know why he would be visiting. (J.A. Vol. 2, p 8).

Meanwhile, at some point, Adams testified he had “had enough” and handcuffed Mr. Noel as he stood by the drivers side door of the vehicle where Adams had directed him to stand. (J.A. Vol. 3, p 79). Stating that Noel repeatedly “fixated” on the car’s console and front seat area, and “leaned toward” the front seat area of the vehicle, Officer Adams testified that he became fearful the vehicle might house a weapon. (J.A. Vol. 3, pp 80; 107). The officer stated that he then reached in the vehicle, opened the lid to the console, and saw drugs “in plain view.” (J.A. Vol. 3, pp 80-81). He admitted that at the time of the search, he had not even “patted Noel down.” (J.A. Vol. , p 107). Nor had he, apparently, summoned “backup.” No drugs or residue were found on Noel himself, and the materials containing the drugs were not fingerprinted. (J.A. Vol. 3, pp 101-102). The officer testified the value of the drugs seized was three thousand dollars (\$3,000.00). (J.A. Vol. 3, p 85). The officer admitted he never read Mr. Noel his rights. (J.A. Vol. 3, p 102).

Although not contained in his report, Officer Adams told the prosecuting attorney for the first time after opening statements (J.A. Vol. 3, pp 50-51; 51-52) that Mr. Noel had asked him while being transported to the police station for processing “Who ratted me out?” or words to that effect. The officer “just missed it” and did not put that item in his report, he stated. (J.A. Vol. 3, pp 58-62). The State conceded it could not use the statement in its case in chief because of its late disclosure, but the Court, over objection, permitted its use for impeachment purposes if the defendant had chosen to testify. (J.A. Vol. 3, p 68).

The Court’s colloquy with Mr. Noel regarding his right to testify on his own behalf or his right to remain silent could be viewed as wholly inadequate. With respect to

his Neuman rights, all Mr. Noel was told was that “Mr. Noel, you understand that you have the right to testify if you want to testify. No one could prevent you from testifying. If you testify the State is going to have a right to cross-examine you. You also have a right to not testify and if you don’t testify the Jury would be instructed about your right not to testify, do you understand that sir.” (J.A. Vol. 3, p 40). Mr. Noel himself never made an election of record, and the Court gave him no further advice or made no further inquiry of him. (J.A. Vol. 3, p 118).

The drug evidence was admitted at trial over objection and after a suppression hearing (J.A. Vol. 2) after which the Court ruled it admissible. At the suppression hearing, Officer Adams’ testimony was largely consistent with his trial testimony insofar as the details of his conduct surrounding the search was concerned. He admitted that Mr. Noel did not consent to the search. (J.A. Vol. 2, p 12). The officer insisted that even though Mr. Noel was handcuffed with his hands behind his back, he still feared the young man could have somehow retrieved a weapon from the console of the vehicle. (J.A. Vol. 2, p 9). He admitted that there were no drugs in plain view. (J.A. Vol. 2, p 12). There was no dash cam in use in the police car and no video of the events of the day was produced. (J.A. Vol. 2, p 15).

At the suppression hearing, and in argument on the motion for a new trial, Noel argued that there was no probable cause for the vehicular stop at the outset, since simply having a cracked windshield is not a crime. (J.A. Vol. 2, p 18; J.A. Vol. 4, p 3). The Court below opined that the Petitioner’s alleged flight essentially “bootstrapped” the probable cause for the stop even if the cracked windshield did not afford probable cause

for the stop. (J.A. Vol. 2, p 18).

With respect to the impact of the Court's admitting the alleged oral statement attributed to the defendant, disclosed only after opening statements had been made in the case, the Court erroneously found that it would not have mattered whether the defendant testified in his own defense or not. (J.A. Vol. 4, pp 8-9).

SUMMARY OF ARGUMENT

There was simply no probable cause for a traffic stop in this matter since driving a vehicle with a cracked windshield is not a crime in the State of West Virginia. The police officer had no adequate legal basis for the allegedly protective sweep search of the interior of the vehicle's console particularly where Mr. Noel was handcuffed with his hands behind his back and thus obviously not capable of securing a weapon from the vehicle and placing the armed police officer in danger. There were no reasonable facts upon which a suspicion could be predicated to justify a search for narcotics or even a weapon under the facts and circumstances here. Mr. Noel had no violent criminal record and the officer knew no facts which could support a conclusion that either drugs or a weapon were concealed in the vehicle.

The court should not have permitted the state's use of the alleged oral statement attributed to the defendant because of its late disclosure, its inherent unreliability, and because it effectively kept the defendant from testifying. The Court's advice to the defendant was wholly inadequate to demonstrate an effective waiver of a fundamental constitutional right - the right to testify in one's own behalf at trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes oral argument is necessary in this case to effectively present the issues involved for resolution and is of the opinion that a colloquy with the Court is essential to achieve a well-reasoned result pursuant to Rule 19.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REFUSING TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE SEIZED IN A VEHICULAR SEARCH WHICH VIOLATED THE FOURTH AMENDMENT.

A. STANDARD OF REVIEW

“In State v. Lilly, 194 W.Va. 595, 461 S.E.2d 101 (1995), this Court explained the standard of review of a circuit court’s ruling on a motion to suppress: [W]e first review a circuit court’s findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court’s ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit’s decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution. *Id.* at 600, 461 S.E.2d at 106 (internal citation and footnote omitted).”

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based

are reviewed under the clearly erroneous standard." Syl. Pt. 3, State v. Stuart, 192 W. Va. 428,452 S.E.2d 886 (1994).

B. THE DRUG EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

As defense counsel argued vigorously below, it is not a crime in the State of West Virginia to drive a motor vehicle with a cracked windshield. Indeed, as indicated in the West Virginia Motor Vehicle Inspection Manual, W.Va. Adm. Reg. 17A-2, Ser. VII, *apparently a vehicle may be operated without a windshield!* {The inspection sticker is placed upon the dash}. The only identified pertinent sections of the West Virginia Code, 17C-15-36 and 17C-15-38, contain no prohibition for cracked windshields.

Accordingly, officer Adams had no probable cause to initiate a traffic stop of Mr. Noel by reason of the cracked windshield on the vehicle he was driving. No citation was issued concerning the matter. Thus, the encounter was unnecessary and unjustified from the get-go.

This Court has long recognized that "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution, subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative." Syllabus Point 1, State v. Moore, 165 W.Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991)." Syl. Pt. 20, State v. Ladd, 210

W.Va. 413, 557 S.E.2d 820 (2001).”

And, although not specifically argued below, W.Va. Code 62-1A-10, in and of itself, renders the search unlawful and the evidence seized as a result thereof inadmissible. The absence of application of that statute in the matter at bar constitutes 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. Syllabus Pt. 7, **State v. Miller**, 194 W.Va. 3, 459 S.E.2d 114 (1995).

It is noteworthy that the officer here has offered no evidence whatsoever which would justify a fear that Mr. Noel was either armed and/or dangerous, thus justifying a search from the outset. There simply are no reasonable facts upon which such a conclusion could be reached. *Cf.*, **State v. Choat**, 178 W.Va. 607, 363 S.E.2d 493 (1987).

Nonetheless, the matter of the propriety of the search in the matter at bar is easily disposed of by simple reference to an on-point decision of the United States Supreme Court.

In **Arizona v. Gant**, 556 U.S. 332, 129 S.Ct. 1710 (2009), the United States Supreme Court announced new, narrow rules governing when law enforcement officers may search the passenger compartment of a motor vehicle incident to the arrest of one of its occupants, limiting the authority to two circumstances: "police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle

contains evidence of the offense of the arrest." In the matter at bar, of course, neither circumstance obtains.

The facts in Gant are similar to those present in this record.

There, Tucson, Arizona, police arrested Rodney Gant for driving with a suspended license. After he was handcuffed and in the back of a police car, officers searched his car and found cocaine in a jacket on the backseat. Gant moved to suppress the cocaine found on the grounds that the warrantless search of his car violated the Fourth Amendment. The Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not justify the search. The U.S. Supreme Court agreed. Since Gant was not within reaching distance of the vehicle at the time of the search, and there was no reason to believe the car contained evidence of the crime for which he was arrested (driving with a suspended license), the search could not be sustained on Fourth Amendment grounds. Therefore, the search of his car violated the Fourth Amendment, and the contraband discovered during the search was suppressed.

Similarly here, Mr. Noel was handcuffed at the time Officer Adams conducted the search of the console of the vehicle Mr. Noel had been driving. He obviously could not have retrieved a weapon even if one had been present in the vehicle. Further, the State can hardly contend that the vehicle contained evidence of the offense of arrest - whatever that was - Noel was never charged for the cracked windshield.

In sum, the Court erred in refusing to suppress the drug evidence seized in violation of Mr. Noel's Fourth Amendment rights.

II. THE CIRCUIT COURT ERRED IN FAILING TO ADEQUATELY

ADVISE THE DEFENDANT OF HIS RIGHT TO TESTIFY ON HIS OWN BEHALF AND IN ADMITTING AN ALLEGED ORAL STATEMENT ATTRIBUTED TO THE DEFENDANT AND NOT DISCLOSED UNTIL AFTER THE JURY WAS SWORN AND OPENING STATEMENTS WERE MADE.

As noted hereinabove, the only advice to Petitioner Noel given by the Court below consisted of this statement: “Mr. Noel, you understand that you have the right to testify if you want to testify. No one could prevent you from testifying. If you testify the State is going to have a right to cross-examine you. You also have a right to not testify and if you don’t testify the Jury would be instructed about your right not to testify, do you understand that sir.” (J.A. Vol. 3, p 40).

In **State v. Neuman**, 179 W. Va. 580, 371 S.E.2d 77 (1988), this Court placed responsibility on the trial courts of this state to see that a criminal defendant is properly advised regarding his right to testify in his own defense or to remain silent. The Court said: “A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, and that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.” Syllabus Point 7, **Neuman**, *supra*.

Recognizing that “A violation of **State v. Neuman**, 179 W.Va. 580, 371 S.E.2d 77 (1988), is subject to a harmless error analysis. A rebuttable presumption exists that a

defendant represented by legal counsel has been informed of the constitutional right to testify. When a defendant is represented by legal counsel, a **Neuman** violation is harmless error in the absence of evidence that a defendant's legal counsel failed to inform him/[her] of the right to testify, or that the defendant was coerced or misled into giving up the right to testify....” Syllabus Point 15, **State v. Salmons**, 203 W.Va. 561, 509 S.E.2d 842 (1998).

It is respectfully submitted, however, that where, as here, the record is silent as to whether the defendant waived his right to testify in his own behalf, we are left to revert to pre-Neuman days where there is a presumed waiver of a fundamental constitutional right. The record here is silent of the defendant’s voice electing not to testify in his own behalf.

As Justice Cleckley wrote in **State v. Blake**, 197 W. Va. 700, 478 S.E.2d 550 (1996): “In **Neuman**, we for the first time held that to protect the right to testify in criminal cases, a criminal defendant should be advised that he or she has a right to testify or not to testify and, if he or she does not testify, then the jury can be so instructed. Neuman places upon the shoulders of the trial court the obligation to question a defendant on the record to ascertain whether the defendant's waiver of his or her right to testify was made based on a complete understanding of his or her rights.”

This Court has further observed: “Our cases have recognized that “[c]ertain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial.” Syl. pt. 5, **State v. Neuman**, 179 W. Va. 580, 371 S.E.2d 77 (1988). The constitutional right

that was waived by defense counsel, not by Mr. Pullin directly, involved the presumption of innocence.” State v. Pullin, 216 W. Va. 231,236,605 S.E.2d 803, 808 (2004).

In the case at bar, the Court effectively kept the defendant off the witness stand by admitting a statement allegedly made by the defendant which was not disclosed until after the jury was sworn and opening statements had been made, then failed entirely to engage the defendant himself in the required colloquy. Then, the Court ruled the alleged statement could be used for impeachment purposes on cross-examination. The impact of the alleged statement - “Who ratted me out” - or words to that effect, is obvious. It amounts to a confession of wrongdoing and an acknowledgement that Mr. Noel knew the drugs were in the vehicle he was driving - undercutting the very basis of his only defense to the charge.

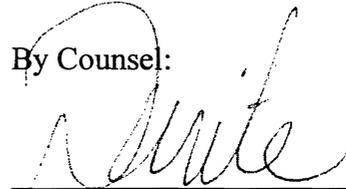
As counsel pointed out at the hearing on the motion for a new trial, “Showing up with that statement the morning of trial we feel is grossly unfair because it essentially said now -- all of our preparation -- spent -- time doing to get ready for trial was meaningless because we essentially knocked this guy off the stand on a non-recorded statement that was never written down in which the officer just happened to remember the day of trial. We feel that that was grossly unfair and that too was prejudicial error....” (J.A. Vol. 2, p 4).

CONCLUSION

Based upon the foregoing, or for reasons otherwise apparent to the Court, Petitioner prays that the Court will enter an Order directing that this case be remanded with directions to suppress the evidence and vacate his convictions.

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CERTIFICATE OF SERVICE

I, David L. White, do hereby certify that I served true copies of the foregoing “Petitioner’s Brief” upon counsel for the Respondent, Julie A. Warren, Assistant Attorney General, by depositing said copies in the United States mail, first-class postage pre-paid, on this 22nd day of July, 2014, addressed to her at 812 Quarrier Street, 6th Floor, Charleston, WV 25301.



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