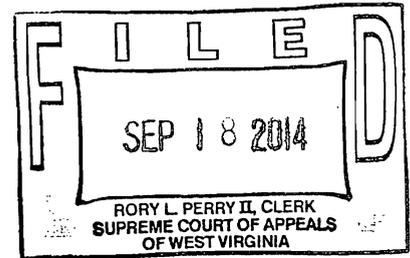


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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.*

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**PETITIONER'S REPLY BRIEF**

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## ARGUMENT IN REPLY

The State continues to assert, with a straight face, that the arresting officer was required, in the interest of officer safety, to search the console of the vehicle Mr. Noel was driving even while Mr. Noel was handcuffed and in the officer's complete control. Obviously, that assertion strains credulity to the extreme. My goodness, the officer was so worried about Mr. Noel, he (1) did not place him in the backseat of his patrol car, even though he had been arrested, or (2) call for backup. The record is completely devoid of evidence that the officer *ever* called for backup. Accordingly, the state's argument here that the officer's conduct might be excused because he didn't have backup is specious. He didn't ask for any. {It is noteworthy that a call for backup would be the first thing an officer involved in a high speed chase would do. Although he did not get to testify at trial - and no his trial counsel is not the same - Mr. Noel disputes having fled from the officer that day.}

The State's claim that Mr. Noel was somehow a danger while he stood, handcuffed with his hands behind his back, beside an armed, fully outfitted police officer is on par with a number of the State's other claims in this case. Oh yes, the "route" Mr. Noel traveled on the day of his arrest was "odd," says the State of West Virginia.

That is because driving while black is still a crime in Bluefield, West Virginia, even in the year 2014. Ask any resident of color in that fair city and they will tell you that it is true.

Similarly, how credible is the claim that Mr. Noel himself "drew attention" to the vehicle's console by "continually staring at it"? (J.A. Vol. 3, pp 80; 107). Yeah, sure

officer. No one would ever think that the console is the first place all officers look when a search of the vehicle is conducted now would they? No, it was only because Mr. Noel was fixating on it - really!

We can all pretend those claims may be credited, but in reality, we know better. What they're really saying is that Mr. Noel is just another young, black dude who deserves to be in prison because some drugs were found in his possession and so what if we have to "pretend" the officer's conduct was legitimate and his absurd testimony credible. (And oh yes, lets not forget, Mr. Noel *might have had a handcuff key!*). It is as if the State is saying Mr. Noel is not entitled to the protections of the constitution - sorry man. We'll just "make it up" to legitimize our unconstitutional search and seizure.

In a similar vein, isn't it *remarkable* that only moments before the trial was to commence did the officer disclose the devastating "statement" he attributed to Mr. Noel - "who ratted me out?" - and that the officer had to "go get" the alleged inventory search form? (J.A. Vol. 3, pp 50-51; 51-52). The case just kept getting better and better. Without permission to be trite, this writer was born at night, but it wasn't last night.

This Court should not sanction the bogus course the State invites it to adopt. What message will affirmation of this search and seizure send to the officers at the Bluefield Police Department? The smug smile and wink and the story about the unlawful search and seizure - tweaked just a bit to legitimize it - that put Mr. Noel behind bars.

**A. THE STATE STILL CANNOT MAKE DRIVING WITH A CRACKED WINDSHIELD A CRIME.**

Despite its best efforts, using twisted logic and an amalgamation of statutes, the

State still cannot make driving a vehicle with a cracked windshield a crime. Thus, there was no probable cause to stop Mr. Noel at the outset.

The analysis utilized by this Court in State v. Dunbar, 229 W.Va. 293, 728 S.E.2d 539 (2012) and in the Florida decision in Hilton v. State, 961 So.2d 284 (Fla. 2007) cited therein are controlling and mandate a finding that the officer had no probable cause to stop Mr. Noel for the broken windshield on the vehicle he was driving.

The officer never cited Mr. Noel for the broken windshield, and the record is devoid of evidence that it rendered the vehicle unsafe to operate. In truth, it did not.

In Dunbar, *supra.*, this Court ruled that because state law did not require vehicles to have a passenger side mirror, the absence of such a mirror on an automobile in which the defendant was a passenger did not provide the police officer with reasonable suspicion to effect the traffic stop for defective equipment. 229 W.Va. at 299, 728 S.E.2d at 545. In so holding, the Court cited and relied upon Hilton, *supra.*, which dealt with the same issue but involved a cracked windshield instead of a side mirror.

Accordingly, despite the State's gyrations, the officer had no probable cause to stop Mr. Noel at the outset. As noted hereinabove, although he did not get to tell his side of the story to the jury, Mr. Noel disputes the officer's allegation that he fled at high speed.

## **B. THE OFFICER HAD NO CAUSE TO SEARCH.**

As a practical matter, the rule Mr. Noel asks this court to apply is that a search cannot be justified on the basis of "officer safety" when "officer safety" is not really an

issue as a factual matter. Here, there is no dispute that Mr. Noel was handcuffed with his hands behind his back and in complete control of the officer. The officer could have, had he wished, placed Mr. Noel in the backseat of his cruiser where he would obviously not be a threat to anyone. Nonetheless, it is respectfully submitted that the claim of officer safety is a mere ruse and should not be sanctioned by this Court to justify the search in this case.

The holding in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009), is controlling and disparities here. In the matter at bar, there is no question - no real factual dispute - that Mr. Noel was simply not in a position to retrieve a firearm from the vehicle, even if he had wanted to. Again, the Gant rule is simple: Police may search a vehicle incident to an 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 that the vehicle contains evidence of the offense of arrest.

Neither circumstance obtains in the matter at bar. Thus, the search was unlawful and the evidence should have been suppressed.

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).”*

**C. THE RECORD DOES NOT REFLECT A KNOWING WAIVER OF MR. NOEL’S RIGHT TO TESTIFY ON HIS OWN BEHALF.**

The Court’s erroneous ruling on the admissibility of the alleged oral statement “who ratted me out” - which Mr. Noel denies making - may have contributed to Mr. Noel’s decision not to testify in this matter. Nonetheless, the Court failed to obtain a knowing waiver on the record from Mr. Noel concerning the matter. State v. Neuman, 179 W. Va. 580, 371 S.E.2d 77 (1988).

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).

Had the court below engaged the defendant in the required colloquy on the record, the Court may have discerned that Mr. Noel’s decision not to testify was not a knowing one. Only Mr. Noel - not his trial counsel - could waive his fundamental constitutional

right to testify in his own behalf.

Did Mr. Noel have any questions concerning the decision he wanted to ask the Court? We will never know. The Court did not ask him. Further, the timing of the inquiry is important in most cases, as often the course of the trial may change the manner in which the defendant on trial will view the issue.

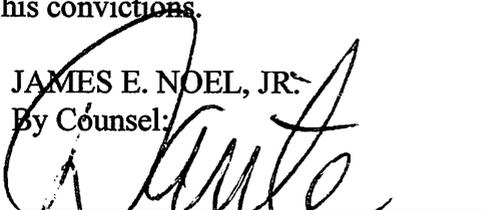
At some point, the Court should reinvigorate the dictates of the **Neuman** rule in the courts of this State. Holdings that the issue may result in a finding of harmless error might have eviscerated the salutary objective served by the mandated inquiry.

In sum, it is a simple matter for the trial court to make the inquiry and insure the defendant understands his rights and is making a knowing election. There is little reason to abandon the effort to see that defendants on trial understand their rights and make a knowing and intelligent election on such a fundamental - and important - matter.

### 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.

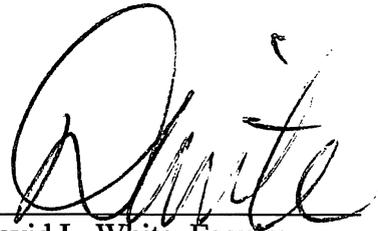
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CERTIFICATE OF SERVICE

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 18th day of September, 2014, addressed to her at 812 Quarrier Street, 6<sup>th</sup> Floor, Charleston, WV 25301.

A handwritten signature in black ink, appearing to read "D. White", written over a horizontal line.

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