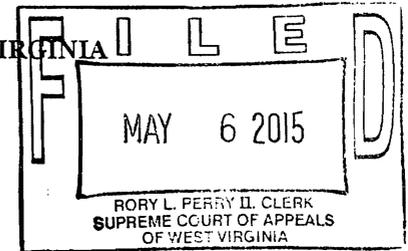


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0112



STATE OF WEST VIRGINIA,
Plaintiff Below,

Respondent

v.

MATTHEW FEICHT,
Defendant Below,

Petitioner

Appeal from a Final Order
of the Circuit Court of
Monongalia County
(14-M-AP-11)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. AS A MATTER OF LAW, THE CIRCUIT COURT'S ORDER AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS WAS PLAIN ERROR – THE STATE FAILED TO SATISFY ITS BURDENS AT THE MOTION HEARINGS.
2. THE CIRCUIT COURT IMPROPERLY CONSIDERED TRIAL TESTIMONY IN AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS.
3. EVEN IF IT WAS PROPER TO CONSIDER TRIAL TESTIMONY IN REVIEWING PETITIONER'S MOTION TO SUPPRESS, AS A MATTER OF LAW, NO REASONABLE, ARTICULABLE SUSPICION EXISTED TO JUSTIFY PETITIONER'S TRAFFIC STOP.
4. ALTHOUGH THERE WAS NO ISSUE OF STANDING, THE CIRCUIT COURT IMPROPERLY HELD THAT IT WAS PETITIONER'S BURDEN TO PROVE THAT HIS FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE CHALLENGED SEIZURE.

STATEMENT OF THE CASE

On March 15, 2013, at approximately 2:30 a.m., Deputy Steven McRobie (“McRobie”) of the Monongalia County Sheriff's Department followed Petitioner's vehicle, initiated his emergency lights and performed a traffic stop of Petitioner's vehicle in the area of Greenbag Road in Morgantown, West Virginia. (A.R. 83-84) It is undisputed that there was no reasonable, articulable suspicion to perform the stop – McRobie and other officers were canvassing the area searching for a suspect in an unrelated domestic violence incident, and the sole purpose of the stop of was to ask Petitioner if he had seen anyone traveling through the neighborhood on foot. (A.R. 83-84)

After stopping Petitioner, speaking with him and obtaining his driving license, McRobie learned that Petitioner's driving license was revoked pursuant to a previous conviction for Driving Under the Influence of Alcohol ("DUI"). At that point, Deputy Daniel Oziemblowsky ("Oziemblowsky") arrived at the scene to assist. (A.R. 52, 93) Oziemblowsky placed Petitioner under arrest for the revoked license, and eventually charged Petitioner with Driving on a Suspended/Revoked License for DUI, ("SRO-DUI") and second offense DUI. (A.R. 1-4)

Petitioner timely requested a jury trial in Magistrate Court, and filed a Motion to Suppress and Dismiss on October 29th, 2013, asserting that the subject seizure was not based on articulable, reasonable suspicion, and that it violated Petitioner's rights under the Fourth Amendment to the United States Constitution, and Article III, Section 6 of the West Virginia Constitution. (A.R. 5-10) The State filed no response to Petitioner's motion.

The matter came on for hearing in Magistrate Court on November 12th, 2013. Neither party called any witnesses – counsel made their arguments to the Magistrate, following which the Magistrate denied Petitioner's Motion to Suppress and Dismiss. (A.R. 11-13, 68)

Unfortunately, the November 12 hearing was not recorded. Learning of this, the Court scheduled another motion hearing for January 27, 2014 to create a record and hear any additional motions. (A.R. 69)

Petitioner thereafter filed a Renewed Motion to Suppress and Dismiss alleging that – by failing to present any evidence at the November 12th motion hearing – the State had failed to carry its burden of showing by a preponderance of the evidence that the seizure fell within an authorized exception to the warrant requirement of the Fourth Amendment of the United States Constitution and Article III, Section 6 of the West Virginia Consitution. Petitioner’s Renewed Motion also objected to the State presenting any evidence at the January 27 motion hearing on due process grounds. (A.R. 14-16) The State did not file a response.

At the January 27th, 2014 motion hearing, over Petitioner’s objection, the State called Oziemblowsky as its only witness – McRobie (again) did not testify. Oziemblowsky testified that he did not see Petitioner operate his vehicle; that he arrived on scene after McRobie had stopped Petitioner; and stated his belief that McRobie’s entire reason for stopping Petitioner was to inquire if he had seen any pedestrians in the area. (A.R. 52-53)

Following Oziemblowsky’s testimony, the Magistrate denied Petitioner’s Renewed Motion to Supress and Dismiss. (A.R. 68-70)

Petitioner was convicted of DUI on August 13th, 2014, following a jury trial in Magistrate Court on that date. (The prior DUI, as well as the SRO-DUI charges were bifurcated.)

Petitioner returned to Magistrate Court for sentencing on October 1, 2014. After stipulating to his conviction for first offense DUI, and with the consent of the Court and

no objection from the State, Petitioner entered a conditional guilty plea to the SRO-DUI charge, preserving his right to appeal the Magistrate's denial of Petitioner's Motion to Suppress.¹ (A.R. 120-123) Petitioner was then sentenced to two concurrent terms of six months in jail, both suspended in lieu of of six months of home incarceration.² Petitioner filed a Notice of Intent to Appeal on that same date. (A.R. 118-119)

On October 17th, 2014, Petitioner filed a Petition for Appeal in the Circuit Court of Monongalia County, West Virginia. The matter was assigned to Circuit Judge Russell M. Clawges Jr.

In his Circuit Court Appeal, Petitioner again alleged that the subject traffic stop was a warrantless seizure, not supported by articulable, reasonable suspicion, which violated Petitioner's rights under the Fourth Amendment of the United States Constitution and Article III, Section 6 of the West Virginia Constitution, and that the Magistrate's denial of Petitioner's Motion to Suppress was plain error in light of the fact that the State twice failed to introduce **any** evidence in support of the stop. (A.R. 124-139)

¹ The defendant may plead guilty or *nolo contendere* and reserve appellate review of an adverse determination of a pretrial motion by entering a conditional plea, in writing, specifying the issue or issues reserved for appeal. Entry of the conditional plea is contingent upon approval of the trial court and the consent of the prosecution. *State v. Lilly*, 194 W. Va. 595, 607, 461 S.E.2d 101, 113 (1995).

² No Sentencing Order was entered by the Magistrate Court. Accordingly, Petitioner's Appendix does not contain the same.

Petitioner requested that the Circuit Court reverse the Magistrate's rulings on the pretrial Motion to Suppress, overturn Petitioner's convictions for second offense DUI and SRO-DUI, and enter an Order dismissing the charges with prejudice, since all of the evidence used to convict Petitioner was gathered after the improper traffic stop. (A.R. 125)

The State's Reply did not discuss its failures of proof at the motion hearings. Rather, it attempted to re-litigate the issue of the legality of the traffic stop by discussing evidence that was developed by McRobie's testimony **at trial**. The State also implied that the traffic stop was not a seizure, relying (again) on trial testimony from McRobie to attempt to make its point. (A.R. 140-142)

Petitioner's Response to the State's Reply stressed the plain fact that at both motion hearings, the State failed to show by a preponderance of the evidence that the warrantless seizure of Petitioner's vehicle fell within an authorized exception to the rule. (A.R. 143-145)

On November 26, 2014, the matter came on for oral argument before Judge Clawges. No evidence was taken – counsel made arguments to the Court regarding whether the stop was a seizure, whether the State satisfied its burden at the Suppression Hearings and whether the denial of Petitioner's proposed jury instruction was proper.³ (A.R. 146-161)

³ The denial of the Petitioner's proposed jury instruction is not contested in this Appeal. As such, the issue will not be argued or briefed.

On January 13, 2015, Judge Clawges issued an Order Affirming Judgment. The Order found that the traffic stop of Petitioner's vehicle was valid (A.R. 166); that McRobie performed the traffic stop with the sole purpose of asking Petitioner if he had seen anyone in the area; that Petitioner did not violate any traffic laws before being pulled over; and that McRobie did not observe Petitioner's physical characteristics (a white male wearing a black shirt) until after the stop and McRobie approached the vehicle on foot. (A.R. 163)

The Order further concluded that Petitioner bore the burden of proving that he had a reasonable expectation of privacy in the area searched or the item seized (A.R. 165); that the general rule is that the proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure; and that Petitioner had an obligation to demonstrate a subjective expectation of privacy that society is prepared to recognize as reasonable. (A.R. 166)

The Court made no findings with regard to the State's failure to call McRobie at either motion hearing; whether the State satisfied its burdens of proof and production at the motion hearings; and what reasonable, articulable suspicion existed to stop Petitioner's vehicle.

Petitioner's timely Notice of Appeal to this Court followed.

SUMMARY OF ARGUMENT

The State failed to satisfy its burdens of production and proof at the motion hearings. As a matter of law, Petitioner's Motion to Suppress should have been granted.

The Circuit Court improperly considered trial testimony in determining that the stop was valid. Even if it was proper to consider trial testimony, it is undisputed that there was no reasonable, articulable suspicion to perform the stop.

Although there was no issue of standing, the Circuit Court erroneously shifted the burden of proof at the motion hearings to Petitioner.

As a matter of law, the stop of Petitioner's vehicle violated the Fourth Amendment. Petitioner's convictions should be overturned, and the charges should be dismissed with prejudice, since all of the evidence used to convict Petitioner was gathered after the traffic stop.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rev. R.A.P. 19 since the matter involves assignments of error in the application of settled law, and since the matter involves insufficient evidence and/or a result that is against the weight of the evidence.

ARGUMENT

I. AS A MATTER OF LAW, THE CIRCUIT COURT'S ORDER AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS WAS PLAIN ERROR – THE STATE FAILED TO SATISFY ITS BURDENS AT THE MOTION HEARINGS.

1. When discussing the protections afforded by the Fourth Amendment, the Supreme Court of the United States has held that “[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a “seizure” of “persons” within the meaning of this provision.” *Whren v. United States*, 517 U.S. 806, 809-810 (1994).

2. The Fourth Amendment prohibits “unreasonable searches and seizures” by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *United States v. Arvizu*, 534 U.S. 266, 273 (2002), citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968), and *United States v. Cortez*, 449 U.S. 411, 417 (1981).

3. The purpose of Article III, Section 6 of the West Virginia Constitution “is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement officers, so as to safeguard the privacy and security of individuals against arbitrary invasions [by governmental officials].” *State v. Legg*, 207 W.Va. 686, 692, 536 S.E.2d 110, 116 (2000), quoting *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979), *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978), and *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). “Moreover, searches and seizures performed

without a valid warrant are presumed to be unreasonable, and will be lawful only if the search and seizure falls within a recognized exception to the warrant requirement.” *State v. Farley*, 230 W.Va. 193, 197, 737 S.E.2d 90, 94 (2012), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971).

4. In West Virginia, “[p]olice officers may stop a vehicle to investigate if they have an articulable, reasonable suspicion that the vehicle is subject to a seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994). Further, “[w]hen evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” *Id.*, Syl. Pt. 2.

5. “When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure.” *Illinois v. Krull*, 480 U.S. 340, 347, (1987). See *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (Under the exclusionary rule “no evidence seized in violation of the Fourth Amendment [can] be introduced at [a defendant’s] trial unless he consents.”), *State v. Flippo*, 212 W.Va. 560, 578 n. 20, 575 S.E.2d 170, 188 n. 20 (2002) and *Miller v. Chenoweth*, 229 W. Va. 114, 117 n. 3, 727 S.E.2d 658, 661 n. 3 (2012).

6. “The burden rests upon the State to show by a preponderance of the evidence that (a) warrantless search falls within an authorized exception.” Syl. Pt. 2, *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).

7. “[I]n contrast to a review of the circuit court’s factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court’s denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.” Syl. Pt. 2, *State v. Dorsey*, 234 W.Va. 15, 762 S.E.2d 584 (2014), citing Syl. Pt. 2, *State v. Lacy*, 196 W. Va. 104, 107, 468 S.E.2d 719, 722 (1996).

8. “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.” *State v. Rogers*, 231 W. Va. 205, 216, 744 S.E.2d 315, 326 (2013), quoting Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

9. McRobie’s stop of Petitioner’s vehicle was a warrantless seizure within the meaning of the 4th Amendment. Once Petitioner – the sole occupant and driver of his vehicle – raised the issue of the illegal seizure in his October 29, 2013 Motion to Suppress,

the State had the burden to show by a preponderance of the evidence that the warrantless seizure fell within an authorized exception to the rule. *Moore*, Syl. pt. 2.

10. The State failed to put forth any evidence at the November 12, 2013 motion hearing, and called (over Petitioner's objection) (A.R. 15) Oziemblowsky as its only witness at the January 27, 2014 motion hearing – an officer who did not observe Petitioner driving, who did not observe the traffic stop and who arrived on scene after the stop had been completed. (A.R. 52-53)

11. Notwithstanding the State's clear failures of proof, the Magistrate and the Circuit Judge denied Petitioner's Motion to Suppress.

12. As a matter of law, the State failed to satisfy its burdens at both motion hearings. Consequently, the Circuit Court should have reversed the Magistrate Court's rulings denying Petitioner's Motion to Suppress. Failure to do so was plain error; not supported by the evidence; not supported by the law; and a violation of Petitioner's Constitutional rights.

II. THE CIRCUIT COURT IMPROPERLY CONSIDERED TRIAL TESTIMONY IN AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS.

1. In reviewing the denial of Petitioner's Motion to Suppress, the Circuit Court made multiple findings based on McRobie's testimony at trial. It found that McRobie talked with the alleged victim of the unrelated domestic violence call; that she described the suspect to McRobie as a male wearing a black sweatshirt and grey pants; that the

suspect was on foot, traveling in the direction of Apollo Drive; that McRobie spotted a motorist while looking for the suspect; that McRobie stopped the Petitioner's vehicle with the sole purpose of asking the driver if he had seen anyone in the area; that McRobie did not observe the Petitioner violating any traffic laws before he was pulled over; that as McRobie approached the Petitioner's vehicle, he observed the driver to be a white male wearing a black shirt; that McRobie asked the Petitioner for identification; that McRobie ascertained after talking with the Petitioner that he was not who the police were looking for; and that McRobie ran a routine check on the Petitioner's license. (A.R. 163) All of these findings came from *trial testimony*. (A.R. 76-79, 81, 83-84, 88)

2. Oziemblowsky's testimony was the only evidence the Court should have considered when reviewing the Magistrate's rulings on the Motion to Suppress, since he is the only witness the State called at the second motion hearing. Oziemblowsky was not present when McRobie talked with the alleged victim and obtained a description of the suspect (A.R. 46); he arrived on scene after the stop was completed (A.R. 52); he did not observe Petitioner driving (A.R. 52); he did not know where Petitioner's vehicle came from (A.R. 48); he did not observe Petitioner's dress or physical description until after the traffic stop (A.R. 52); and he could not recall if he or McRobie ran Petitioner's license (A.R. 51-52). None of this testimony was sufficient to satisfy the State's burden at the motion hearings.

3. This Court has held that even with a favorable pretrial ruling regarding the admissibility of evidence, absent a request by the State to re-open the suppression hearing at trial, the State's failure to present sufficient evidence at a suppression hearing cannot

be cured by later presenting evidence at trial. *State v. Buzzard*, 194 W.Va. 544, 551-552, 461 S.E.2d 50, 57-58 (1995).

4. In *Buzzard*, (another Fourth Amendment case) the issue was whether consent to search a hotel room was given voluntarily. The State obtained a favorable pretrial suppression ruling, even though the record was devoid of any evidence on the issue of consent. *Id.*, at 551-552. The State's only evidence which tended to support that the Appellant consented to the hotel room entry was developed *at trial*, and the trial court found – based on this evidence – that the Appellant voluntarily consented to the officers' entry. *Id.*, 552.

5. On appeal, this Court reversed the trial court, holding that absent a request by the State to reopen the pretrial suppression hearing in order to consider more testimony regarding the consent issue, the State's failure to present sufficient evidence at the suppression hearing could not be cured by later presenting evidence of consent at trial. *Id.*, at 552. The Court explained:

“Had the State brought to the trial court's attention during the suppression hearing that the Appellant had invited the officers to enter the room, and had the trial court determined that the Appellant's invitation was made voluntarily under the circumstances, then the trial court would have had evidence to support a finding that the Appellant indeed rendered a voluntary consent to enter. *However, there is no authority to support the State's position that upon appellate review, we should consider the sheriff's testimony at trial in upholding the trial court's ruling which arose out of the pretrial suppression hearing.* While it is clear that “[a] trial court has the authority to reconsider and set aside its prior order granting a defendant's motion to suppress a confession when presented with new or additional evidence that would have a substantial effect on the court's ruling[,]” *the problem in this case is that the State obtained a favorable ruling with regard to the suppression hearing and, therefore, failed to recognize that even with the favorable ruling, in reality, the burden of proof on the consent issue had not been met.* Syllabus, *Thompson v. Steptoe*, 179 W.Va.

199, 366 S.E.2d 647 (1988). *It certainly was within the realm of possibilities for the State to have recognized this flaw during trial and requested the trial court to reopen the pretrial suppression hearing in order to consider more testimony concerning the consent issue. See id. at 201, 366 S.E.2d at 649 n. 2 (stating that “ability to reconsider suppression rulings has not been confined to cases in which reopening would operate in the defendant’s favor”). However, absent a motion by the State which would trigger the trial court’s duty to revisit its decision on the suppression issue, the State, on appeal, cannot use trial testimony to correct an erroneous pretrial ruling.* Consequently, considering the totality of the circumstances presented to the lower court, we conclude that since the State failed to present sufficient evidence to support a finding on whether the Appellant consented to the officers’ entry, the trial court’s finding that the Appellant voluntarily consented to enter was clearly erroneous. *See Honaker*, 193 W.Va. at 56, 454 S.E.2d at 101.” (Emphasis added.)

Id., at 552-53.

5. Here, as in *Buzzard*, the State’s favorable pretrial ruling with regard to the stop was not sufficient to satisfy its burden of proof, since it failed to call the witness who performed the stop. The State did not request that the Magistrate Court reopen the pretrial suppression hearing at trial. It was therefore clearly erroneous for the Circuit Court to consider any of McRobie’s trial testimony in finding that the stop was valid.

III. EVEN IF IT WAS PROPER TO CONSIDER TRIAL TESTIMONY IN REVIEWING PETITIONER’S MOTION TO SUPPRESS, AS A MATTER OF LAW, NO REASONABLE, ARTICULABLE SUSPICION EXISTED TO JUSTIFY PETITIONER’S TRAFFIC STOP.

1. McRobie testified at trial that it was only until **after** the stop was completed that he observed that Petitioner was a male, wearing gray pants and a black shirt. (A.R. 78, 88)

2. The Circuit Court found likewise – McRobie noticed that Petitioner partially matched the description of the suspect he was looking for **after** the stop was completed, and also found that the sole purpose of the stop was to ask the driver if he or she had seen anyone in the area. (A.R. 163)

3. Although the Circuit Court’s Order cited the proper standard for a traffic stop under *Stuart* (reasonable, articulable suspicion that the vehicle is subject to a seizure or a person in the vehicle has committed, is committing, or is about to commit a crime), the Court made no findings regarding whether the standard was met in this case – it simply found that the stop of Petitioner’s vehicle was valid and justified. (A.R. 166-167)

4. Inexplicably, the Circuit Court accorded significance to the fact that Petitioner’s attire roughly matched that of the suspect, even though this similarity was not noted until after the stop, and was in no part the basis for the stop itself. (A.R. 166)

5. The law is clear that the reasons, if any, for a traffic stop must exist prior to the stop. Further, an arrest cannot be justified by the fruits of an illegal search. Syl. Pt. 8, *Moore*, citing Syl. Pt. 10, in part, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

6. As a matter of law, there was no reasonable, articulable suspicion to stop Petitioner’s vehicle. The Circuit Court’s failure to recognize this and hold that Petitioner’s stop violated the Fourth Amendment was plain error.

IV. ALTHOUGH THERE WAS NO ISSUE OF STANDING, THE CIRCUIT COURT IMPROPERLY HELD THAT IT WAS PETITIONER'S BURDEN TO PROVE THAT HIS FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE CHALLENGED SEIZURE.

1. The Circuit Court held that Petitioner had the burden of proving that he had a reasonable expectation of privacy in the area searched or the item seized; that Petitioner had the obligation to demonstrate a subjective expectation of privacy that society is prepared to recognize as reasonable; and that the general rule is that the proponent of a motion to suppress has the burden of establishing that his own Fourth amendment rights were violated by the challenged search or seizure. (A.R. 165-166)

2. In support, the Court cited *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978), *Simmons v. U.S.*, 390 U.S. 377, 389-390 (1968) and *State v. Lopez*, 197 W.Va. 556, 569, 476 S.E.2d 227, 240 (1996) (per curiam, J. Workman, dissenting). **However, in each of those cases, standing was an issue.** In *Rakas*, the Petitioners were passengers in a vehicle who had no property or possessory interest in the vehicle; in *Simmons*, the Petitioner moved to suppress evidence that was found in a home that did not belong to the Petitioner, (the Petitioner had to testify as to ownership of the evidence to establish standing to challenge the search); and in *Lopez*, the issue was whether the Defendant had standing to challenge the seizure of his clothing that had been turned over to nurses in the course of receiving treatment at a hospital. No such issues existed in this case.

3. The Court also cited *United States v. Moore*, 22 F.3d 241, 243 (10th Cir. 1994), a case which carries no precedent in West Virginia, and in which the only issue was

whether there was reasonable suspicion to detain a passenger's bag on a train and subject it to a dog sniff.

4. The United States Supreme Court has held: “[a]lthough we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, see *New York v. Class*, 475 U.S. 106, 112–113 (1986), the former interest is nevertheless important and deserving of constitutional protection . . .”. *Arizona v. Gant*, 556 U.S. 332, 345 (2009). The Supreme Court has also held that “[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalk; nor are they shorn of those interests when they step from the sidewalks into their automobiles.” *Delaware v. Prouse*, 440 U.S. 648, 649 (1979).

5. Petitioner was the sole occupant, driver and owner of his vehicle. Unquestionably, he was entitled to a reasonable expectation of privacy on the night in question. There was no issue of standing, and the Court's holding that Petitioner was required to prove as much at the suppression hearings was an impermissible burden shift, and constituted plain error.

CONCLUSION

There is no factual dispute surrounding the reasons why Petitioner's vehicle was stopped on March 15, 2013. As a matter of law, the traffic stop of Petitioner's vehicle violated Petitioner's rights under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution. Petitioner properly raised the issue by filing a pretrial Motion to Suppress, and the State failed – pretrial and at trial – to carry its burdens of proof and production with regard to the legality of the stop.

In discussing Fourth Amendment violations, the United States Supreme Court has stated that in our society, there is a “deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.” *Jackson v. Denno*, 378 U.S. 368, 386 (1964), citing *Spano v. New York*, 360 U.S. 315, 320-321 (1959).

The remedy to deter illegal policing methods is suppression, and it is appropriate in this case, since all of the evidence used to convict Petitioner was gathered after the subject traffic stop. By law, such evidence is inadmissible, since that evidence falls within the purview of the “fruit of the poisonous tree” doctrine. *Buzzard*, at 552-553, see generally *State v. Goodmon*, 170 W.Va. 123, 131, 290 S.E.2d 260, 268 (1981), and

Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure, I-208-10 (2d ed. 1993).

As a matter of law, Petitioner's convictions should be overturned, and the charges should be dismissed with prejudice.

Respectfully submitted,

Petitioner,
Matthew Feicht,

By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0112

STATE OF WEST VIRGINIA,

Plaintiff Below,

Respondent

v.

Appeal from a Final Order
of the Circuit Court of
Monongalia County
(14-M-AP-11)

MATTHEW FEICHT,

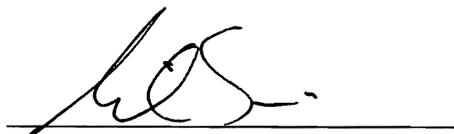
Defendant Below,

Petitioner

CERTIFICATE OF SERVICE

I, Michael D. Simms, counsel for Petitioner, do hereby certify that the foregoing PETITIONER'S BRIEF was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States Mail, this 4th day of May, 2015, addressed as follows:

David A. Stackpole, AAG
Office of the Attorney General
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