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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0963

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

RAYMOND C. HOWELLS, JR.,

Defendant Below, Petitioner.



**BRIEF OF RESPONDENT
STATE OF WEST VIRGINIA**

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On June 12 and 13, 2017, Petitioner sold methamphetamine to two undercover police detectives. The facts and circumstances of these two illegal drug transactions are as follows:

On June 12, 2017, Detectives Shannon Morris and Richie Callison (both of the Fayette County Sheriff's Department, and whom were assigned to the Central West Virginia Drug Task Force at the time) were looking for one of their confidential informants, Michelle Saunders, who had come up missing. App. T, 55-56, 73-74, 82-83. Worried about Michelle, Detectives Morris and Callison (along with other officers) reached out to their other informants to see if any of them had heard from Michelle. *Id.* 56. Afterward, one of these other informants contacted Detective Morris and informed that Michelle was staying at Petitioner's house in Gauley Bridge, West Virginia. *Id.* This other informant also informed that Petitioner was dealing narcotics out of his house. *Id.*

In the nighttime hours of this same day, while operating in an undercover capacity, Detectives Morris and Callison traveled to Petitioner's house and knocked on the door. App. T, 56-57, 82-83. When he answered, the Detectives asked Petitioner if Michelle (the missing informant) was there—and further that Michelle would usually get them some narcotics when they came to town. *Id.* 57, 75, 87. Petitioner then told the Detectives that he “could hook [them] up with some methamphetamine” and “asked [them] how much they wanted”. *Id.* 57-58. In response, the Detectives told Petitioner that they would buy \$20 worth of methamphetamine. *Id.* 58. Petitioner then told the Detectives to leave and come back a while later, during which time he (Petitioner) would go get the methamphetamine and return to his house. *Id.* 58, 78. Detectives Morris and Callison then left Petitioner's house, after which the Detectives drove down the street and parked. *Id.* 58, 88.

A short time later (30 minutes or less) on this same night, Detectives Morris and Callison returned to Petitioner's house, during which visit Detective Morris was wearing a hidden audio/video recording device. App. T, 58-60, 76, 84, 88. On their return, Petitioner invited the Detectives into his house. *Id.* 60, 78. Once inside, an exchange took place whereby Detective Callison gave Petitioner \$20 and Petitioner, in turn, gave Detective Callison a baggie containing methamphetamine. *Id.* 60-61, 83-84, 86. Following this transaction, Detectives Morris and Callison left Petitioner's house. As they did so, Petitioner gave Detective Callison his phone number. *Id.* 61.

The next morning, on June 13, 2017, Detective Morris applied for and obtained a warrant (an electronic interception order) from the magistrate court for the recorded drug transaction that occurred in Petitioner's house the previous night, June 12, 2017. *See generally* App. T, 77-78, 91. This same morning, contact was had between Detective Callison and Petitioner by way of a phone

call or texting. During this contact, Petitioner and Detective Callison arranged to meet each other in the parking lot of the Walmart in Fayetteville, West Virginia, where Detective Callison would buy one gram of methamphetamine from Petitioner for \$100. *Id.* 61-62, 84. Later this same day, Detectives Morris and Callison drove to the Walmart parking lot, after which Petitioner arrived in his own vehicle. *Id.* 62. On his arrival, Detectives Morris and Callison got into Petitioner's car; again, Detective Morris was wearing a hidden audio/video recording device at the time. *Id.* 62, 84. While in the car, a conversation ensued between Petitioner and Detective Callison, during which Petitioner remarked, "I've got what you came for". *Id.* 62. Detective Callison then handed Petitioner \$100 and Petitioner, in turn, handed Detective Callison a baggie containing methamphetamine.¹ *Id.* 62, 84-86.

On May 10, 2018, the Fayette County Grand Jury indicted Petitioner on two counts of delivery of a controlled substance—methamphetamine. App. A, 1.

Petitioner's trial took place on August 24, 2018, and ended with the jury convicting him of both counts of the indictment charging him with delivery of methamphetamine. *See generally* App. A, 2-3; App. T, 191-192.

Petitioner's sentencing hearing took place on October 10, 2018. For his conviction of count 1 of the indictment charging him with delivery of methamphetamine, the circuit court ("trial court" or "court") sentenced Petitioner to a term of 1 to 5 years in the penitentiary. For his conviction of count 2, which likewise charged him with delivery of methamphetamine, the trial court again sentenced Petitioner to a term of 1 to 5 years. Lastly, the court ordered that both of these sentences

¹ Notably, the baggies containing the methamphetamine from both drug sales that Petitioner made to Detectives Morris and Callison (on June 12 and 13, 2017) were taken to the West Virginia State Police Laboratory for testing. This testing showed that the crystalline/powdered substance contained within the baggies was indeed methamphetamine. *See generally* App. T, 114-116, 122-124.

were to run consecutive to one another. *See generally* App. A, 6, 8; App. S, 9-10, 14. Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

Although the application for the electronic interception order (“EIO”) and the EIO itself did not describe the exigent circumstances that existed at the time of the drug transaction in Petitioner’s home, such exigent circumstances did indeed exist, which exigent circumstances necessitated the police to wait until the next day to apply for and obtain the EIO. Thus, the EIO was validly obtained and had retroactive application to the recorded transaction that took place in Petitioner’s home.

Further, the EIO was not a general search warrant, but merely a warrant to electronically record the drug transaction in Petitioner’s home. Thus, all of other evidence (apart from the recorded transaction in Petitioner’s home) was admissible at Petitioner’s trial.

Further, assuming *arguendo* that the recording of the drug transaction was inadmissible, all of the other evidence (apart from the recorded transaction in Petitioner’s home) does not constitute fruit of the poisonous tree. Rather, this other evidence flowed from an independent source and, thus, was admissible at Petitioner’s trial.

Further, given the poor quality of the recording of the drug transaction in Petitioner’s home, as well as the other overwhelming evidence presented by the State, the admission of the recording of the transaction in Petitioner’s home was absolutely harmless.

For all of these reasons, the trial court did not commit error in not suppressing the evidence of the drug transaction in Petitioner’s home. Lastly, for all of these same reasons, the prosecuting

attorney did not seek to admit, nor admit illegally obtained evidence, as such evidence related to the drug transaction in Petitioner's home.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State leaves to the discretion and wisdom of the Court as to whether this case is appropriate for oral argument. Given that Petitioner has requested oral argument, and if so ordered by the Court, the State will be there to respond. The State also leaves to the discretion and wisdom of the Court as to whether any such argument, if so occurring, be conducted under Rule 19 or Rule 20.

IV.

ARGUMENT

A. **THE TRIAL COURT DID NOT COMMIT ERROR IN NOT SUPPRESSING THE EVIDENCE OF THE DRUG TRANSACTION IN PETITIONER'S HOME.**

Petitioner illegally sold methamphetamine to Detectives Morris and Callison on two occasions in June of 2017. The first sale took place on June 12, 2017, in Petitioner's home in Gauley Bridge. The second sale took place the next day on June 13, 2017, in Petitioner's vehicle at the parking lot of the Walmart in Fayetteville.² Both of these illegal drug transactions were recorded by Detective Morris, who was wearing a hidden audio/video recording device at the time of the transactions. As for the recording of the first transaction in Petitioner's home on June 12, Detective Morris applied for and obtained an EIO for this June 12 recording from the magistrate court on the following day, June 13.

² Hereafter, for sake of simplicity, these two dates—June 12, 2017 and June 13, 2017—will be referenced as “June 12” and/or “June 13.”

With this factual backdrop in place, Petitioner argues on appeal that Detectives Morris and Callison did not first obtain an EIO prior to entering his home on June 12 and recording (with a hidden recording device) Petitioner's sale of methamphetamine to these two Detectives. As part of this argument, Petitioner states that Detective Morris' application for the EIO (dated June 13) and the EIO itself (also dated June 13) was insufficient to justify the retroactive application of the EIO to the June 12 drug transaction in Petitioner's home. On this point, Petitioner further states that neither Detective Morris' EIO application or the EIO itself describe the exigent circumstances that existed at the time of the first transaction in Petitioner's home (on June 12), which exigent circumstances necessitated Detective Morris waiting until the next day (on June 13) to apply for and obtain the EIO. Based on these arguments, as well as the fruit of the poisonous tree doctrine, Petitioner asserts that the trial court committed error by not suppressing all of the evidence presented by the State during his trial as to count 1 of the indictment, which charged Petitioner with delivery of methamphetamine on June 12—i.e., the first transaction in Petitioner's home.³ The State disagrees.

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. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. Pt. 1, *State v. Hoston*, 228 W. Va. 605, 723 S.E.2d 651 (2012) (internal quotations and citation omitted).

³ It should be noted that Petitioner makes no claims of error in this appeal as to the evidence presented at his trial relating to count 2 of the indictment, which also charged Petitioner with delivery of methamphetamine on June 13, 2017.

With this standard of review in place, the statutory law governing the issue(s) raised by Petitioner in this appeal are found in the Electronic Interception Act (“EIA”), W. Va. Code §§62-1F-1 *et seq.* More specifically, under Section 62-1F-2 (a) of the EIA,

[p]rior to engaging in electronic interception, . . . an investigative or law-enforcement officer shall . . first obtain from a magistrate or a judge of a circuit court within the county wherein the nonconsenting party’s home is located an order authorizing said interception. The order shall be based upon an affidavit by the investigative or law-enforcement officer . . . that establishes probable cause that the interception would provide evidence of the commission of a crime[.]

Section 62-1F-9 of the EIA further provides that

when: (1) a situation exists with respect to engaging in electronic interception before an order authorizing such interception can with due diligence be obtained; (2) the factual basis for issuance of an order . . . exists; and (3) it is determined that exigent circumstances exist which prevent the submission of an application . . . , conduct or oral communications in the person’s home may be electronically intercepted on an emergency basis if an application . . . is made to a magistrate or judge of the circuit within the county wherein the person’s home is located as soon as practicable, but not more than three business days after the aforementioned determination. If granted, the order shall recite the exigent circumstances present and be retroactive to the time of such determination.

Here, it is true that Detectives Morris and Callison did not obtain an EIO prior to entering Petitioner’s home on June 12 and recording (with a hidden recording device) Petitioner’s sale of methamphetamine to these two Detectives. It is also true that Detective Morris’ application for the EIO and the EIO itself did not describe the exigent circumstances that existed at the time of the first transaction in Petitioner’s home (on June 12), which exigent circumstances necessitated Detective Morris waiting until the next day (on June 13) to apply for and obtain the EIO. *See generally* App. A, 14-16. That said, however, exigent circumstances did indeed exist at the time of the first transaction in Petitioner’s home (on June 12) that necessitated Detective Morris waiting until the next day (on June 13) to apply for and obtain the EIO. These exigent circumstances are borne out by the trial testimony of Detectives Morris and Callison.

More specifically, as set forth above and testified to at trial by themselves, on June 12, Detectives Morris and Callison were looking for one of their confidential informants, Michelle Saunders, who was missing at the time. Concerned about Michelle, the Detectives (along with other officers) reached out to their other informants to see if any of them had heard from Michelle. One of these other informants then contacted Detective Morris and informed that Michelle was staying at Petitioner's house. This other informant also informed that Petitioner was dealing drugs out of his house.

After receiving this tip, Detectives Morris and Callison (while acting in an undercover capacity) traveled to Petitioner's house on this same night (June 12) and knocked on the door. When he answered the door, the Detectives asked Petitioner if Michelle Saunders (the missing informant) was there—and further that Michelle would usually get them some drugs whenever they came to town. Petitioner then told the Detectives that he could get them some methamphetamine and asked them how much they wanted. In response, the Detectives told Petitioner that they would buy \$20 worth of methamphetamine. Petitioner then told the Detectives to leave and come back a while later, during which time he (Petitioner) would go get the methamphetamine and return to his house. Detectives Morris and Callison then left Petitioner's house and drove down the street and parked.

A short time later (30 minutes or less) on this same night (June 12), Detectives Morris and Callison returned to Petitioner's house, during which visit Detective Morris was wearing a hidden audio/video recording device. On their return, Petitioner invited the Detectives into his house. Once inside, an exchange took place whereby Detective Callison gave Petitioner \$20 and Petitioner gave Detective Callison a baggie containing methamphetamine. Following this transaction, Detectives Morris and Callison left Petitioner's house. The next morning (on June 13),

Detective Morris applied for and obtained an EIO from the magistrate court for the recorded drug transaction that occurred in Petitioner's house the previous night (on June 12).

As to the exigent circumstances that existed on June 12 that necessitated him to wait until the next day (June 13) to apply for and obtain the EIO, Detective Morris gave the following testimony during Petitioner's trial:

[Defense Counsel] Q. When you went to Mr. Howells' [Petitioner's] residence on June 12th, 2017, are you saying that you went there twice --

[Detective Morris] A. Yes, sir.

Q. -- that day?

A. Yes, sir.

Q. With Richie Callison, the other deputy sheriff.

A. Yes, sir. That's correct.

Q. And are you telling us that the first event was not recorded, but the second was?

A. Yes, sir.

Q. And did you have the court order [EIO] on you to do the recording at his residence?

A. Not at that time.

Q. You didn't -- you went and you took a video when you didn't have the permission under the law to do so?

A. That's correct, sir. The reason being, on the first instance, we made an arrangement to meet him on his porch. I did not know that we was going to go inside of his residence on the second occasion. It wasn't our intentions to go inside his residence on the second occasion.

Q. But you did go inside his residence on the second occasion.

A. Yes, sir.

Q. And you had no court order to do so --

A. That's correct.

Q. -- and to record him.

A. That's correct.

Q. But that's required by law, isn't it?

A. It is.

App. T, 75-77.

[Prosecuting Attorney] Q. Detective Morris, you did get a warrant [EIO] for the recording, did you not?

[Detective Morris] A. Yes, ma'am. The first thing the next morning [on June 13], I did.

Q. And there is a provision under the law that allows you to do that in a circumstance where you have an undercover buy that you don't know where it's going to happen, called --

.....

Q. --an exigent circumstance, where as long as you get the warrant within a certain amount of time, it is allowed.

A. That is correct, ma'am. It was an exigent circumstance.

App. T, 77.

[Defense Counsel] Q. What's the exigent circumstance?

[Detective Morris] A. We'd previously arranged to meet outside, and he invited us in the house, which it was almost midnight; there was no magistrate on duty. So the first thing the next morning I went to the magistrate's office to obtain the order.

.....

Q. Wouldn't it have been just as easy to await and get the warrant and go back the next day?

A. No, sir, not with the way the first meeting went.

Q. And why is that?

A. Because he [Petitioner] said he was going to go get methamphetamine for us to purchase and to come back later. I could not wait until the next day for that.

App. T, 77-79.

For his own part, Detective Callison testified at trial as follows:

[Defense Counsel] Q. If there were two contacts [on June 12], Sergeant [Callison], what was the duration of time between the first contact and the second contact?

[Detective Callison] A. It wasn't very long. A short period.

.....

Q. Thirty minutes?

A. I don't believe it was even thirty minutes, no, sir.

Q. From the first contact to the second contact, where did you go?

A. We just went down the street.

Q. Who did you call?

A. We didn't call anybody, sir.

Q. Did you call to determine whether there was a magistrate on duty?

A. No.

Q. Did you call to determine whether a magistrate could have been readily called out?

A. No, sir.

Q. Did you call the prosecuting attorney in relation to the requirement to get a court order [EIO] if you were going to enter the man's [Petitioner's] house?

A. We had no intention of entering the house, sir.

.....

Q. But you did so, did you not?

A. We did end up entering the residence.

Q. Without the court order that permitted you to do so; correct?

A. Correct.

Q. So the first contact, you went to his home.

A. Yes.

Q. The second contact, you went to his home.

A. Yes.

Q. Well, sir, was it your expectation that he was going to come out on the porch in the middle of all and in front of all the world . . . and sell you people methamphetamine on the porch of that house?

A. Yes.

.....

Q. And you mean to me that you two men went back to his house and didn't anticipate the need to go into that house?

A. Yes, sir.

.....

[Prosecuting Attorney] Q. Detective Callison, at some point, was there an intercept order issued for this recording?

[Detective Callison] A. There was, the following morning [on June 13].

Q. And that was done in an abundance of caution to protect this defendant's [Petitioner's] rights?

A. Absolutely.

Q. And is it true that you wouldn't and Detective Morris wouldn't have even brought me a video in this case of that unless you had proper authority to get it? Correct?

A. Correct.

....

[Defense Counsel] Q. You say you got a court order to protect him [Petitioner].

[Detective Callison] A. To protect his rights. I'm not out to violate anybody's rights.

Q. I didn't say you were. But you say that's to protect him. And I asked you, did you do it for that or did you do it to legitimize the purchase?

A. We did that, sir, because after we was invited in, -- that was the reason we did that.

Q. Under the law.

A. On both sides, yes, sir.

App. T, 88-92.

Taking this testimony as a whole, exigent circumstances did indeed exist at the time of the first drug transaction on June 12 in Petitioner's house. These exigent circumstances included the following: (1) when they left Petitioner's house on the first occasion on June 12, Detectives Morris and Callison drove down the street and parked for a short period of time--30 minutes or less; (2) at the time that they did so, it was around midnight and no magistrate judge was on duty; (3) on their return to his house, Petitioner invited Detectives Morris and Callison into his house; (4) Detectives Morris and Callison did not anticipate (nor have any intention of) going into Petitioner's house to carry out the transaction, but rather believed that the transaction would take place outside of Petitioner's house; and (5) because Petitioner had told them to leave his house and come back, during which time he would go get the methamphetamine and return to his house, Detectives Morris and Callison could not wait until the next day (on June 13) to obtain the EIO. Obviously, all of these exigent circumstances combined to prevent Detective Morris from first obtaining an EIO prior to entering Petitioner's house (on June 12) and recording (with a hidden recording device) the drug transaction. In ruling that the EIO obtained by Detective Morris on June 13 was

valid as it had retroactive application to the June 12 transaction, the trial court echoed many of these same exigent circumstances during several motions hearings with the parties out of the presence of the jury. *See generally* App. 105-107, 140-142, 153-154.

In sum, although Detective Morris' application for the EIO and the EIO itself did not describe the exigent circumstances that existed at the time of the June 12 drug transaction in Petitioner's home, such exigent circumstances did indeed exist at the time of this transaction that necessitated Detective Morris waiting until the next day (on June 13) to apply for and obtain the EIO. Thus, contrary to Petitioner's contentions, the trial court did not commit error in ruling that the EIO was validly obtained (on June 13) and had retroactive application to the drug transaction in Petitioner's house on June 12. Nor did the court commit error by not suppressing all of the evidence presented by the State during his trial as to count 1 of the indictment, which charged Petitioner with delivery of methamphetamine on June 12 in his home.

* * *

On appeal, under the guise of the fruit of the poisonous tree doctrine, Petitioner asserts that the trial court committed error by not suppressing "all evidence" obtained as a result of the recorded transaction within his home, as such other evidence related to count 1 of the indictment charging him with delivery of methamphetamine in his house on June 12. However, Petitioner does not specifically state what "all evidence" includes. Presumably, Petitioner is not only talking about the audio/video recording of the June 12 transaction, but also the trial testimony of Detectives Morris and Callison, as such testimony related to this transaction, as well as the methamphetamine itself that these Detectives bought from Petitioner on June 12. Again, the State disagrees.

First, in his quest to convince this Court that all of the evidence—i.e., audio/video recording, Detectives Morris’ and Callison’s trial testimony, and the methamphetamine itself—should have been suppressed, Petitioner attempts to pass off the EIO as being a general search warrant. Bluntly stated, it was not. Rather, the EIO was simply a warrant to electronically *record* the drug transaction in Petitioner’s home on June 12—and nothing more. Moreover, Detectives Morris and Callison certainly did not need a search warrant to simply enter Petitioner’s house on June 12, as Petitioner invited these Detectives into his house and the Detectives did not search for anything while in Petitioner’s house. Additionally, Petitioner was the one that initiated the June 12 drug transaction in the first place. This occurred when Petitioner first told (on June 12) Detectives Morris and Callison that he could get them some methamphetamine and asked them how much they wanted. When they replied back that they would buy \$20 worth of methamphetamine, Petitioner then told these Detectives to leave and come back, during which time he (Petitioner) would go get the methamphetamine and return to his house. When, in fact, the Detectives went back to his house, Petitioner invited them in, after which the drug transaction took place.

Further, as this Court has held, “[u]nder the fruits of the poisonous tree doctrine [e]vidence which is located by the police as a result of information and leads obtained from illegal[] [conduct], constitutes the fruit of the poisonous tree and is ... inadmissible in evidence.” *State v. DeWeese*, 213 W. Va. 339, 346, 582 S.E.2d 786, 793 (2003) (internal quotations and citations omitted). However, the Court has also held that “the fruit of the poisonous tree doctrine has no application where the government learns about evidence from a source independent of an illegal search or seizure.” *State v. Black*, 175 W. Va. 770, 773, 338 S.E.2d 370, 373 (1985). *See also* Syl. Pt. 4, *State v. Aldridge*, 172 W. Va. 218, 304 S.E.2d 671 (1983) (“The exclusionary rule has no

application when the state learns from an independent source about the evidence sought to be suppressed.”).

Simply put, assuming *arguendo* that the recording of the June 12 drug transaction was inadmissible, the trial testimony of Detectives Morris and Callison concerning this transaction, along with the actual methamphetamine that these two Detectives bought from Petitioner during the transaction, do not constitute fruit of the poisonous tree. Rather, this evidence flowed from an independent source apart from the recording that Detective Morris made of the transaction in Petitioner’s house on June 12. This independent source was what these Detectives saw with their own eyes, heard with their own ears and obtained with their own hands during their encounters with Petitioner on June 12. More specifically, on June 12, Petitioner told Detectives Morris and Callison that he “could hook [them] up with some methamphetamine” and “asked [them] how much they wanted”. When they told him that they would buy \$20 worth of methamphetamine from him, Petitioner told these Detectives to leave and come back a while later, during which time he (Petitioner) would go get the methamphetamine and return to his house. When they returned, Petitioner invited the Detectives into his house, after which Detective Callison gave Petitioner \$20 and Petitioner, in turn, gave Detective Callison a baggie containing methamphetamine.

Further, in “pitching” his fruit of the poisonous tree argument to this Court, Petitioner cites to and relies on the case of *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007). In *Mullens*, the police employed a confidential informant to make an illegal drug purchase at the defendant’s house. In doing so, the police equipped the informant with a hidden audio/video recording device. However, the police did not first obtain judicial authorization to allow the informant to use the electronic surveillance device while in the defendant’s house.

The actual drug transaction took place when the confidential informant went to the defendant's house, whereupon the defendant and his wife invited the informant into his house. Once inside the house, the informant purchased marijuana from the defendant, which purchase was recorded by the electronic surveillance device that the informant was wearing at the time.

The defendant and his wife were indicted with delivery of a controlled substance and conspiring to deliver a controlled substance. The defendant filed a motion to suppress the audio/video recording of the drug transaction in his home, wherein the defendant asserted that the federal and state constitutions, as well as West Virginia's electronic surveillance law, required judicial authorization for the confidential informant to enter his home with an electronic surveillance device. The trial court denied the motion, after which the defendant entered into a conditional plea agreement with the State. Pursuant to the agreement, the defendant pled guilty to the charge of delivery of a controlled substance, on the condition that he be allowed to appeal the trial court's denial of his motion to suppress. The trial court accepted the plea agreement and sentenced the defendant to a term of 1 to 5 years in the penitentiary. Thereafter, the defendant filed a direct appeal with this Court. *See generally Mullens*, 221 W. Va. at 72-73, 650 S.E.2d at 171-172 (footnotes omitted).

In framing the issue before it, the *Mullens* Court stated that the defendant "assigns error to the circuit court's denial of his motion to suppress an audio and video recording of the drug transaction that occurred in his home." *Mullens*, 221 W. Va. at 72, 650 S.E.2d at 171. The *Mullens* Court further pointed out that the defendant "asserts that the audio and video recording should have been suppressed because the evidence was obtained by an informant acting under color of law without a court order." *Id.* (emphasis omitted).

Afterward, in a very lengthy and comprehensive discussion of the issue before it, the

Mullens Court held the following:

[I]t is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to *record matters* occurring in that person's home without first obtaining a duly authorized court order pursuant to W. Va. Code § 62-1D-11 (1987) (Repl.Vol.2005).

Mullens, 221 W. Va. at 91, 650 S.E.2d at 190 (emphasis added).

Following this holding, the *Mullens* Court returned to the facts before it and found as follows:

Turning to the facts of this case, there is no dispute. The police failed to obtain judicial authorization to send the informant into Mr. Mullens' home while the informant was wearing an electronic surveillance device. Consequently, the trial court should have granted Mr. Mullens' motion to suppress the *electronic surveillance recordings* obtained in his home by the informant."

Mullens, 221 W. Va. at 91, 650 S.E.2d at 190 (emphasis added).

In its holding and the application of the same to the facts before it, it seems clear that the *Mullens* Court was *only addressing the admissibility of recordings* that are made in a person's home without first obtaining a court order/warrant to do so. Here, conversely, Petitioner attempts to *extend* the holding and findings of the *Mullens* Court to the admissibility of all of the other evidence (apart from the June 12 recording) presented by the State during his trial, including the testimony of Detectives Morris and Callison, as well as the actual methamphetamine that these Detectives bought from Petitioner during the June 12 transaction in his house. Simply put, such *extension* should not be countenanced by the Court.

Given all of this, contrary to Petitioner's contentions, the trial court did not commit error by not suppressing all of the other evidence (apart from the June 12 recording) presented by the

State during Petitioner's trial, as such other evidence related to count 1 of the indictment, which charged Petitioner with delivery of methamphetamine in his house on June 12.

* * *

Lastly, as this Court has held, "it is well settled that, [m]ost errors, including constitutional ones are subject to harmless error analysis." *State v. Reed*, 218 W. Va. 586, 590, 625 S.E.2d 348, 352 (2005) (internal quotations and citation omitted). The Court's also held that "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 3, *State v. Keesecker*, 222 W. Va. 139, 663 S.E.2d 593 (2008) (internal quotations and citation omitted). The Court has also found that "[e]rrors involving deprivation of constitutional rights will be regarded as harmless . . . if there is no reasonable possibility that the violation contributed to the conviction." Syl. Pt. 7, *Keesecker, supra* (internal quotations and citation omitted). As also found by the Court, "if the evidence of a defendant's guilt is so overwhelmingly one-sided that this Court can say that there is absolutely no reasonable possibility that any prejudice flowing from the error could have made a difference in the jury's verdict, then this Court may find the error to be harmless beyond a reasonable doubt." *State v. Keeton*, 215 W. Va. 376, 383, 599 S.E.2d 799, 806 (2004).

Here, assuming that the audio/video recording of the June 12 drug transaction in Petitioner's house was inadmissible (which it was not), and the trial court committed error by allowing the State to play this recording during Petitioner's trial (which it did not), such error was harmless beyond a reasonable doubt. On this point, the trial court summed the June 12 recording up best:

Once it went down inside the home [on June 12], it was videotaped, but the videotape is very poor quality. As I indicated to you earlier, it was a situation where --about the only thing I can make out of it was a dog barking several times. Other than that, I couldn't -- the Court could determine who was saying what or did what.

App. T, 141. Moreover, given the overwhelming evidence presented by the State at trial—i.e., testimony of Detectives Morris and Callison concerning the June 12 drug transaction, as well as the actual methamphetamine that these Detectives purchased from Petitioner on June 12—any error on the part of the trial court in allowing the State to present the audio/video recording of the June 12 transaction was absolutely harmless.

B. THE STATE’S ATTORNEY NEITHER SOUGHT TO ADMIT, NOR ADMITTED ILLEGALLY OBTAINED EVIDENCE DURING PETITIONER’S TRIAL.

In determining whether . . . evidence introduced by the prosecution represents an instance of misconduct, we first look at the . . . evidence in isolation and decide if it is improper. If it is, we then evaluate whether the improper . . . evidence rendered the trial unfair.

State v. Guthrie, 194 W. Va. 657, 677 n. 25, 461 S.E.2d 163, 183 n. 25 (1995) (citations omitted).

With this standard in place, Petitioner asserts on appeal that the prosecuting attorney, during his trial, violated his rights to due process under the Federal and State Constitutions. In making this assertion, Petitioner argues that the prosecuting attorney sought to admit and admitted illegally obtained evidence, as such evidence related to count 1 of the indictment charging him with delivery of methamphetamine in his house on June 12. As part of this argument, Petitioner states that “all evidence” presented by the prosecuting attorney during his trial (as such evidence related to count 1) was illegally obtained. All of this is so, further argues Petitioner, due to the application for the EIO and the EIO itself not describing the exigent circumstances that existed at the time of the June 12 transaction which, in turn, violated Sections 62-1F-2 (a) and 62-1F-9 of the EIA. The State disagrees.

First of all, these are essentially the same assertions/arguments that Petitioner makes in this appeal in connection with the trial court’s failure to suppress the evidence of the drug transaction in Petitioner’s house on June 12. All of these same assertions/arguments are fully addressed above

in the preceding section of the State's brief. As such, the State hereby incorporates by reference all its arguments in the preceding section here. *See* Section I, A, *supra*.

Furthermore, as more fully addressed in the preceding section, the State reasserts the following: (1) while the application for the EIO and the EIO itself did not describe the exigent circumstances that existed at the time of the drug transaction in Petitioner's home (on June 12), such exigent circumstances did indeed exist necessitating the police to wait until the next day (on June 13) to apply for and obtain the EIO—and thus the EIO was valid and had retroactive application to the June 12 transaction; (2) the EIO was not a general search warrant, but merely a warrant to electronically record the June 12 drug transaction—and thus the prosecutor's introduction and admission of the other evidence (apart from the June 12 recording) was valid; (3) assuming *arguendo* that the recording of the June 12 drug transaction was inadmissible, the prosecutor's introduction and admission of the other evidence (apart from the June 12 recording) does not constitute fruit of the poisonous tree, but rather this other evidence flowed from an independent source—and thus the prosecutor's introduction and admission of this other evidence was not improper in any way; and (4) given the poor quality of the recording of the June 12 drug transaction, as well as the other overwhelming evidence presented by the State, the prosecutor's introduction and admission of the recording of the June 12 transaction was absolutely harmless—and that is assuming that this recording was inadmissible to begin with, which it was not.

V.

CONCLUSION

Petitioner's conviction on count 1 of the indictment charging him with delivery of methamphetamine in his home on June 12, 2017, should be affirmed.

Respectfully submitted,
STATE OF WEST VIRGINIA,
Respondent,
By counsel

PATRICK MORRISSEY
ATTORNEY GENERAL


A handwritten signature in blue ink that reads "Benjamin F. Yancey, III". The signature is written in a cursive style and is positioned above a horizontal line.

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