IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33289

STATE OF WEST VIRGINIA,
Appellee,

V.

KENNETH BOOKHEIMER,
Defendant Below, Appellant.

Appeal from the Circuit Court of Braxton County
Honorable Richard Facemire, Judge
Criminal Action No. 05-F-58

REVERSED AND REMANDED

Submitted: October 23, 2007
Filed: November 8, 2007

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AND

No. 33290

STATE OF WEST VIRGINIA,
Appellee,

V.

JESSICA MARIE TINGLER,
Defendant Below, Appellant.

Appeal from the Circuit Court of Braxton County
Honorable Richard Facemire, Judge
Criminal Action No. 05-F-59

REVERSED AND REMANDED

Submitted: October 23, 2007
Filed: November 8, 2007

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The Opinion of the Court was delivered PER CURIAM.

JUSTICES MAYNARD AND BENJAMIN dissent and reserve the right to file dissenting opinions.

JUSTICES STARCHER and ALBRIGHT concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syllabus point 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

2. "In 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." Syllabus point 2, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

3. "'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 on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)]." Syllabus point 1, *State v. Weigand*, 169 W. Va. 739, 289 S.E.2d 508 (1982).

4. "Although a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the 'emergency doctrine' exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry." Syllabus point 2, *State v. Cecil*, 173 W. Va. 27, 311 S.E.2d 144 (1983).

5. "A protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is

limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured." Syllabus point 8, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

6. "A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers." Syllabus point 4, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995).

Per Curiam:

The appellants, Kenneth Bookheimer and Jessica Marie Tingler (hereinafter "appellants" collectively, or "Mr. Bookheimer" and "Ms. Tingler" individually), appeal from separate sentencing orders entered May 11, 2006, by the Circuit Court of Braxton County. In those orders, the circuit court sentenced each of the appellants to one to five years' imprisonment on a charge of conspiracy and to two to ten years' imprisonment on a charge of operating a clandestine drug laboratory, both sentences to be served consecutively. On appeal, the appellants assert three common assignments of error, and Ms. Tingler asserts one additional assignment of error.[1] Based upon the parties' arguments, the record designated for our consideration, and the pertinent authorities, we determine that the circuit court erred by allowing the introduction of evidence seized as a result of an illegal search and seizure.[2] Thus, the circuit court's denial of the motion to suppress is reversed, and the subsequent convictions are vacated. Both cases are remanded for a new trial consistent with this Opinion.

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[1]The appellants argue that the circuit court: (1) erred in denying the motion to suppress evidence obtained as a result of an illegal search, (2) improperly allowed the State to introduce expert testimony as to the identity of certain substances without a proper foundation, and (3) improperly failed to dismiss the conspiracy charge after the State failed to prove a prima facie case. Ms. Tingler's fourth assignment of error alleges that the circuit court erred in proceeding to trial when she was incompetent due to drug abuse.

[2]Our reversal based on the determination that the search and seizure was unlawful disposes of our need to address the other three assignments of error. Therefore, this Opinion will not address the merits of the mooted assignments of error.

I.

FACTUAL AND PROCEDURAL HISTORY

Jessica Marie Tingler lived in Braxton County, West Virginia. Kenneth Bookheimer lived with Ms. Tingler at her rented residence. On February 9, 2005, Braxton County 911 received an anonymous call of a domestic dispute involving gunshots and yelling and screaming at Ms. Tingler's residence. Two deputies were dispatched to the scene.[3] When they arrived, they saw Ms. Tingler appear from the side of the trailer. Her behavior was described as hysterical, and it was reported that she was yelling and screaming. When questioned by the deputies, Ms. Tingler denied any domestic dispute. Further, she told the police they were not needed, were not wanted, and to leave. When questioned as to Mr. Bookheimer's location, Ms. Tingler told the police that he was inside the residence.

One of the officers opened the front door and identified himself. Mr. Bookheimer responded that he was in the bathroom and would be out once he was finished.[4] The officers proceeded to the bathroom door. Upon reaching the bathroom door, the officers noted materials normally used in the manufacture of methamphetamine in plain view in the nearby bedroom. The deputies procured Mr. Bookheimer and removed him from the

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[3]En route to the scene, the responding deputies were notified by dispatch that the residence was believed to have drugs on the premises.

[4]The residence was described as a small mobile home with all rooms in close proximity to each other.

residence. The officers asked for consent to search, which was denied. Both Ms. Tingler and Mr. Bookheimer were detained outside the trailer, while one of the officers went to the magistrate court to obtain a search warrant. The basis of the search warrant was to search and obtain evidence showing the operation of a clandestine drug laboratory. Upon execution of the warrant, the officers obtained various materials, all allegedly used in the manufacture of methamphetamine.

Both Ms. Tingler and Mr. Bookheimer were indicted for operation of a clandestine drug laboratory and conspiracy. A suppression hearing was held on November 28, 2005, at which the appellants argued that the search was illegal and that all materials found therefrom should be suppressed. The circuit court denied the motion to suppress on the basis that exigent circumstances existed. Specifically, the order by the circuit court entered December 5, 2005, found as follows:

> 4. The defendant Jessica Tingler was found outside the residence in what the officers described as an agitated state when they arrived.[5]

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[5]As testified to at the suppression hearing by one of the responding deputies,

> I initially uh, noticed a female, uh, Jessica Tingler . . . running around the uh, what, what appeared to me facing the front of the trailer would have been running around the left side of the trailer. Uh, at that point, uh, she was yelling and, and making some type of garble. Uh, I immediately went towards her direction. . . . And, the only thing she

(continued...)

5. The defendant Jessica Tingler did not give the officers consent to enter or search the residence and in fact objected to a search and denied that any incident of domestic violence had taken place.

6. The officers were aware the residence was shared by the defendant Kenneth Bookheimer, and they did not know if he had been injured in the reported incident of domestic violence or if he was in the residence with a weapon.

7. That exigent and emergency circumstances existed in that the defendant Kenneth Bookheimer could have presented a danger to the officers or others if he had been inside the residence with a weapon.

8. That exigent and emergency circumstances existed in that the defendant Kenneth Bookheimer could have been inside the residence injured based upon the report of domestic violence with a weapon being discharged and the agitated state in which the officers found the defendant Jessica Tingler.

9. The officers had a right to enter the residence based on the said exigent and emergency circumstances to determine if the defendant Kenneth Bookheimer was present and armed with a weapon or injured.

10. The officers found what they believed to be

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[5](...continued)

> could say is, we shouldn't have been there. We're not wanted here, uh, don't be around here, uh, you need to leave, um, uh, we did ask her if there was anybody else there. She advised us that Kenny was inside the house.
>
> . . . .
>
> I saw her running around going hysterical, around the back side of the trailer. Which is sometimes evidence to me to be a domestic in progress.

> evidence of a clandestine methamphetamine laboratory in plain view when they entered the residence in search of the defendant Kenneth Bookheimer.
>
> . . . .
>
> 12. The defendant Kenneth Bookheimer did not give the officers consent to search the residence and in fact objected to a search.
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> . . . .
>
> 14. A search warrant for the defendants' residence was properly issued by [the magistrate court].
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> 15. The evidence sought to be suppressed was seized under the search warrant.

(Footnote added).

The case proceeded to a joint trial. Ms. Tingler and Mr. Bookheimer were found guilty of all charges and were sentenced to one to five years' imprisonment on the conspiracy charge and to two to ten years' imprisonment on the clandestine drug laboratory charge, with both sentences to be served consecutively. They appeal their convictions and sentencing to this Court.

II.

STANDARD OF REVIEW

The crucial issue before this Court relates to the circuit court's denial of a motion to suppress evidence. We have previously explained in Syllabus point one of *State*

v. Lacy, 196 W. Va. 104, 468 S.E.2d 719 (1996), as follows:

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Further,

> In 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, *Lacy, id*. We have also explained that "we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action." *State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995). Mindful of these applicable standards, we now consider the substantive issues raised herein.

III.

DISCUSSION

On appeal to this Court, Ms. Tingler and Mr. Bookheimer argue three common

assignments of error. The appellants argue together that the circuit court: (1) erred in denying the motion to suppress evidence obtained as a result of an illegal search, (2) improperly allowed the State to introduce expert testimony as to the identity of certain substances without a proper foundation, and (3) improperly failed to dismiss the conspiracy charge after the State failed to prove a prima facie case. Ms. Tingler's fourth assignment of error alleges that the circuit court erred in proceeding to trial when she was incompetent due to drug abuse. The State contends that the circuit court was correct on all decisions, and that the convictions and the sentencings should be affirmed. We determine that the search was illegal and that all evidence flowing therefrom should have been suppressed. Thus, this Opinion will discuss the illegal search and seizure, without need to analyze the other asserted assignments of error that are now moot. The circuit court's denial of the motion to suppress is reversed, and the subsequent convictions are reversed.

The issue of whether a search and seizure is proper is governed by both state and federal constitutions.[6] As has been previously recognized by this Court,

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[6]Amendment IV to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(continued...)

> "[s]earches 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 on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)].

Syl. pt. 1, *State v. Weigand*, 169 W. Va. 739, 289 S.E.2d 508 (1982). More specific to the present case,

> [a]lthough a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the "emergency doctrine" exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry.

Syl. pt. 2, *State v. Cecil*, 173 W. Va. 27, 311 S.E.2d 144 (1983). Stated more generally,

> the emergency doctrine has been defined in various ways and

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[6](...continued)
Similarly, W. Va. Constitution, art. III, § 6, provides as follows:

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

> must be considered upon a case by case basis. . . . [T]he emergency doctrine may be said to permit a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question.

Cecil, 173 W. Va. at 32, 311 S.E.2d at 149 (internal citations omitted). Thus, the case-by-case analysis rests on the reasonableness of the actions of the police and has been explained in the following manner:

> the "reasonableness" of a warrantless search or entry under the emergency doctrine is established by the "compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection."

Id., 173 W. Va. at 32, 311 S.E.2d at 150 (internal citations omitted).

Applying the above-cited legal principles to the present case, we find it unreasonable for the officers to have conducted a warrantless entry and search. At the suppression hearing, the responding officers testified that Ms. Tingler clearly told them that there was no domestic dispute, they were not wanted, they were not needed, and that she wanted them to leave. In the face of this clear rebuke, it would not be reasonable for an officer to proceed to enter and search the premises unless there was some other condition

lending to an emergency circumstance.[7]

While the officer testified that Ms. Tingler was acting in a "hysterical" manner, a review of the record reveals the contrary. After listening to the officer's testimony at the suppression hearing, the trial judge could not agree that "hysterical" was a proper characterization of Ms. Tingler's behavior. From the bench, the judge "note[d] that upon arriving at the scene the testimony of [the] Deputy . . . was that Ms. Tingler was yelling, and was in a state of less than quite [sic] demeanor. I would not say that she was irrate [sic], but it appears that there was yelling by Ms. Tingler[.]" Moreover, the order stemming from the suppression hearing referred to Ms. Tingler's demeanor as "agitated." Being less than "irate" and "agitated" does not lend support to the officer's contention that Ms. Tingler was hysterical. An objective review of the record reveals a woman who was angry and who was, indeed, probably yelling. However, her anger and yelling were not caused by circumstances occurring prior to the arrival of the officers. Rather, her agitation was aimed at the fact that the officers were present on her property. Thus, Ms. Tingler's behavior did not create an emergency or an exigent circumstance justifying entry into the residence.

The United States Supreme Court recently authored an opinion supportive of

[7]The facts show that the officers were warned, en route, that the residence possibly contained drugs. Thus, the facts suggest that the deputies' entry into the residence was not motivated by a possible emergency, but rather was motivated by an intent to arrest or secure evidence.

our conclusion that the warrantless entry and search of the appellants' residence was unconstitutional. *See Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).[8] In *Randolph*, the police were called by the estranged wife to come to her aid in a domestic dispute. Upon their arrival, the wife informed the police that the husband was a drug addict and that there was evidence of cocaine in the house. When asked for consent to search the house, the wife agreed, but the husband refused. The police entered with the wife and after seeing some evidence of cocaine use, left and obtained a search warrant. The police then returned, finished the search, and procured evidence.

The *Randolph* Court ultimately held "that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Randolph*, 547 U.S. at 120, 126 S. Ct. at 1526, 164 L. Ed. 2d at 226 (footnote omitted). The ruling determined that the evidence should have been suppressed as illegally obtained against the husband. In drawing this conclusion, the high court determined that there was no protective need indicated for the police to enter the home. In so deciding,

[8]We wish to make clear that we believe our decision is supported by the United States Supreme Court decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). However, the same conclusion would have been reached based on our current state jurisprudence and absent the *Randolph* decision. We have previously explained that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syl. pt. 2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

the opinion stated: "The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw[.]" *Id.*, 547 U.S. at 123, 126 S. Ct. at 1528, 164 L. Ed. 2d at 227.

Likewise, neither resident in the present case indicated a need for protection from the police.[9] The facts of the case before this Court are even more egregious than the facts in *Randolph* because the police never had consent from either co-tenant in the case *sub judice*. In fact, at the suppression hearing, the officer confirmed that the responding deputies were expressly told they were not needed, they were unwanted, and they were told to leave by Ms. Tingler. The deputies in the present case then proceeded to enter the front door to check on Mr. Bookheimer, who responded that he was in the bathroom and would be out when he finished. Neither tenant exhibited any signs that would make it reasonable for the deputies to think entry into the residence was necessary on the basis of affording protection to any resident. Further, when asked for consent to search, Mr. Bookheimer also refused

[9]We wish to reiterate that had the facts been different, the result of this decision would have been different based on our case by case analysis. "[T]he question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes." *Randolph*, 547 U.S. at 118, 126 S. Ct. at 1525, 164 L. Ed. 2d at 225 (internal citations omitted). Thus, the facts of this case turn on the reasonableness of the deputies' entry into the house based on the facts as found upon arrival at the scene. However, had facts been present to suggest a possible domestic dispute, including injury or the presence of firearms, the resulting decision by this Court may have been different.

consent. Indeed, one deputy testified that Mr. Bookheimer, while being detained outside the residence, attempted to educate the deputies on the constitutional implications of their entry into his place of residence.

The State argues that the entry into the home was proper as both a protective sweep for the safety of the deputies, as well as to determine the health status of Mr. Bookheimer. However, both arguments fail. As we have previously recognized,

> [a] protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured.

Syl. pt. 8, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. In this case, the officers had no individualized suspicion that a firearm was present, or that a firearm posed a threat to the well-being of anyone present. As previously explained, the anonymous tip mentioned that a domestic dispute was taking place, with shots fired. However, the deputies never heard shots and never saw any evidence of firearms.

We have previously addressed the issue of information provided by an informant as a basis for probable cause to issue a warrant as follows:

> A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish

> the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers.

Syl. pt. 4, *Lilly*, 194 W. Va. 595, 461 S.E.2d 101. In the present case, the situation did not involve an informant whose track record could be examined. Rather, the present case involved an even more mistrustful situation: a tip by an anonymous caller. Our case law provides many caveats when relying on tips from an anonymous caller. *See, e.g.,* Syl. pt. 5, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) ("For a police officer to make an investigatory stop of a vehicle the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In making such an evaluation, a police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability, and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard."); Syl pt. 4, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994) ("A police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard."). Thus, it follows that an anonymous tip requires more corroboration than the tip of an informant whose identity is known and who may or may not have a track record. In the present case, there was absolutely no independent evidence at the residence to

corroborate the information supplied by the anonymous tip. Indeed, all information at the scene was in direct contravention of the information supplied in the anonymous call. Moreover, the health status of Mr. Bookheimer was known as soon as officers called out to him and he replied he would be out when he finished using the bathroom. There was no need to enter the home at that time. Thus, there was no indication that a protective sweep was warranted or justified. No emergency situation or exigent circumstance existed that would have made the warrantless entry reasonable under the state and federal constitutions.

IV.

CONCLUSION

For the foregoing reasons, the circuit court's denial of the motion to suppress is reversed. The search and seizure was illegal, and all evidence flowing therefrom should have been suppressed. Accordingly, the subsequent trial was also in error and the resulting convictions are vacated. The cases are remanded for a new trial consistent with this Opinion.

Reversed and Remanded.