

**State of West Virginia
Supreme Court of Appeals**

**STATE of WEST VIRGINIA
Plaintiff below, Respondent**

vs.) No. 101475 (Fayette County 10-F-20-H)

**RHINELANDER HERNANDEZ, JR.
Defendant below, Petitioner**

FILED
February 14, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Fayette County, wherein the Petitioner was convicted by jury of one count of Breaking and Entering and one count of Petit Larceny and was sentenced to 1-10 years and 1 year consecutively. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the Petition.

This Court has considered the Petition and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the Petition and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The Petitioner challenges the circuit court's denial of his motion to suppress evidence obtained as a result of a warrantless search of the trunk of the vehicle involved in this case, arguing that the circuit court erred in allowing the use of such evidence at trial. The Petitioner also challenges the admissibility of evidence obtained from a later search of the impounded vehicle pursuant to search warrant as "fruit of the poisonous tree" stemming from the initial search. "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.” Syl. Pt. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E. 2d 719 (1996).

The circuit court held an evidentiary hearing in regard to the motion to suppress. In its order denying the motion to suppress, the circuit court found that the investigating officer, a petite female at 5'4" tall, was alone on a routine patrol of a strip mall at 1:00 a.m. when she “...came upon two men with their car backed up to a storage building with the trunk open...” (Record p. 61-61). The circuit court found that it was “...clear she came upon a breaking and entering in progress.” (Record p. 61-2). The storage building belonged to an adjacent Chinese restaurant. The officer testified that she radioed for backup, got out of her vehicle and approached the Petitioner and his co-Defendant, whom the circuit court found were both approximately 6 ft. (TR, 3-1-10 p.17; Record p. 61-62). At her approach, Petitioner departed behind the storage building. (TR 3-1-10 p. 6) The co-Defendant closed the trunk lid of the car as she approached. (TR 3-1-10 p. 7) The circuit court found that “...as Officer Greenwood approached she saw potatoes on the ground and some food products in the trunk before the trunk lid was pushed closed.” (Record p. 61). The officer testified that she then asked co-Defendant to re-open the trunk “...for officer safety, to make sure there were no weapons that he could or [Petitioner] could access if he was to come back around the building...” (TR, 3-1-10 Hrg p. 7). Under these circumstances, the circuit court found that there was no constitutional flaw in having the trunk opened. (Record p. 62). This Court finds no error in the circuit court’s determination as to the propriety of the initial search. Since the initial search was constitutionally permissible, this Court finds no error in regard to the later search of the vehicle pursuant to a search warrant obtained based upon the initial search.

For the foregoing reasons, we find no error in the decision of the circuit court and the conviction is hereby affirmed.

Affirmed.

ISSUED: February 14, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh