IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

No. 26568

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

DONNA JEAN POLING,
Defendant Below, Appellant

Appeal from the Circuit Court of Tucker County
Honorable Andrew N. Frye, Jr., Judge
Civil Action No. 98-F-25

AFFIRMED

Submitted: March 22, 2000
Filed: May 8, 2000

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JUSTICE SCOTT delivered the Opinion of the Court.
JUSTICE STARCHER concurs in part and dissents in part and reserves the right to file a concurring and/or dissenting Opinion.
*JUSTICE MCGRAW concurs and reserves the right to file a concurring Opinion.
*On June 22, 2000, JUSTICE MCGRAW withdrew his right to file a separate concurring opinion.

SYLLABUS BY THE COURT

1. " 'The State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as an automobile in motion, searches made in hot pursuit, searches around the area where an arrest is made, things that are obvious to the senses, and property that has been abandoned, as well as searches and seizures made that have been consented to.' Point 1 Syllabus, *State v. Angel*, 154 W. Va. 615 [, 177 S.E.2d 562 (1970)]." Syl. Pt. 4, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973).

2. "If officers are lawfully present and observe what is then and there immediately apparent, no search warrant is required in such instance, and the testimony by the officers with regard to the evidence which they observed is entirely proper." Syl. Pt. 3, *State v. Angel*, 154 W. Va. 615, 177 S.E.2d 562 (1970).

3. Medical necessity is unavailable as an affirmative defense to a marijuana charge in West Virginia because the Legislature has designated marijuana as a Schedule I controlled substance with no exception for medical use.

Scott, Justice:

The Appellant, Donna Jean Poling, appeals from a final judgment of the Circuit Court of Tucker County, entered on February 5, 1999, upon her conditional plea of guilty to the felony offense of manufacturing a controlled substance, with reservation of her right to appeal under Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure.[1] The Appellant seeks a reversal of the conviction and the right to withdraw her plea based on two pretrial evidentiary rulings by the lower court, which denied her motion to suppress evidence seized under a warrant and precluded presentation of the affirmative defenses of compulsion and medical necessity. Finding no error in the challenged rulings, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 30, 1998, Tucker County Deputy Sheriff Brian Wilfong visited the Appellant's residence for the purpose of serving a subpoena on her husband in a matter unrelated to this case. Deputy Wilfong walked onto the front porch of the house and knocked on the front door. As he waited for someone to come to the door, a window in the top portion of the door was at his eye level. His view

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[1] Rule 11(a)(2) provides:

> (2) Conditional Pleas.--With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

W. Va. R. Crim. P. 11(a)(2).

through the window was not obstructed by a curtain, shade, or any other form of covering. Through the uncovered window, Deputy Wilfong saw three marijuana plants sitting on a counter located approximately seventeen feet from the door. The plants were illuminated by a fluorescent light and were in Deputy Wilfong's plain sight as he stood at the Appellant's front door. He did not look into any other windows in the residence. When no one came to the door, he left the residence, contacted a magistrate, and obtained a search warrant for the Appellant's home. The search was conducted by Deputy Wilfong and two other law enforcement officers. In the course of the search, eighteen marijuana plants were discovered in addition to the three plants which Deputy Wilfong had seen through the front door window. The twenty-one marijuana plants were photographed, videotaped, and then seized by the officers. Sometime after the plants were seized, the Appellant and her husband arrived home, and Deputy Wilfong took a statement from the Appellant.

The Appellant was arrested the next day and charged with possession with intent to manufacture a controlled substance in violation of West Virginia Code § 60A-4-401 (1997). On May 26, 1998, a preliminary hearing was held, and in June 1998, the Appellant was indicted for manufacturing a controlled substance by growing and cultivating marijuana.

On June 30, 1998, the Appellant filed a pretrial motion to suppress "all evidence seized or otherwise procured by police officers which stems from the illegal search of the Defendants' home . . . ." Following an in camera suppression hearing, the circuit court took the motion to suppress under advisement. By order entered August 26, 1998, the circuit court denied the motion.

Trial was scheduled for February 5, 1999. On January 25, 1999, the State filed a motion in limine seeking to "prohibit any testimony or defense based upon medicinal qualities of marijuana upon multiple sclerosis." The Appellant filed a response to the State's motion in limine and also filed a renewal of her motion to suppress.

On February 5, 1999, the circuit court conducted a hearing on the Appellant's renewed motion to suppress and the State's motion *in limine*. At the hearing, Appellant's counsel offered evidence and argued in support of the proposed theories of defense (compulsion and medical necessity). The circuit court denied the Appellant's renewed motion to suppress and granted the State's motion in limine. The Appellant then entered a plea of guilty to the felony charge of manufacturing a controlled substance, conditioned on the instant appeal. Upon said plea, the circuit court adjudged the Appellant guilty of manufacturing a controlled substance and sentenced her to one to five years in the state penitentiary. This sentence was suspended, and a five-year term of probation was imposed.

II. STANDARD OF REVIEW

The standard of review applicable to a circuit court's ruling on a motion to suppress evidence was articulated by this Court in the first and second syllabus points of *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996):

> 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.
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> 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.

The standard which governs appellate review of a circuit court's decision to exclude evidence was recited in *State v. Wade*, 200 W.Va. 637, 490 S.E.2d 724, *cert. denied*, 522 U.S. 1003 (1997): "'[a]lthough most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard, . . . an appellate court reviews *de novo* the legal analysis underlying a trial court's decision.' *State v. Guthrie*, 194 W.Va. 657, 680, 461 S.E.2d 163, 186 (1995) (citations omitted)." 200 W.Va. at 652, 490 S.E.2d at 739. It is within the confines of these standards that we review the issues now before us.

III. DISCUSSION

The Appellant assigns as error the circuit court's denial of her motion to suppress the marijuana plants and other evidence seized as a result of the search of her home. She argues that, by peering into the window of her front door from the vantage point of the front porch, Deputy Wilfong conducted a warrantless search which was per se unreasonable and, therefore, in violation of her Fourth Amendment

rights. The Appellant consequently contends that all evidence gained from the search (the marijuana plants, etc.) should have been suppressed. Conversely, the State argues that the lower court correctly admitted the evidence seized from the Appellant's home because it was not the product of an illegal search. Relying on the "open view" doctrine, the State posits that since Deputy Wilfong observed the marijuana plants in plain view from a vantage point that did not infringe on privacy interests, his actions neither constituted a search nor violated the Appellant's Fourth Amendment rights in any way.

At the outset, we observe that there is no question as to the form of the warrant under which the marijuana plants and other evidence were seized. Nor is there any contention that the search conducted under the warrant exceeded its scope. The only issue raised relating to the seizure of evidence from the Appellant's home is whether Deputy Wilfong's observation of marijuana plants through her uncovered front door window amounted to an unjustified warrantless search, which operated to invalidate the search warrant subsequently obtained and rendered the property seized thereunder inadmissible. We conclude that the said observation was not a search within the meaning of the Fourth Amendment, and consequently, the circuit court committed no error in denying the motion to suppress.

This Court has long recognized that "Article III, § 6 of our state constitution[2] and the Fourth

[2] Article III, Section 6 of the West Virginia Constitution provides:

> 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

Amendment of our federal constitution,[3] protect citizens from unreasonable searches and seizures." *State v. Stone*, 165 W. Va. 266, 269, 268 S.E.2d 50, 53 (1980), *overruled on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). However, as stated in syllabus point four of *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973):

> "The State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as an automobile in motion, searches made in hot pursuit, searches around the area where an arrest is made, things that are obvious to the senses, and property that has been abandoned, as well as searches and seizures made that have been consented to." Point 1 Syllabus, *State v. Angel*, 154 W. Va. 615 [, 177 S.E.2d 562 (1970)].

In syllabus point three of *State v. Angel*, 154 W. Va. 615, 177 S.E.2d 562 (1970), we described the situation in which a search warrant is not necessary because things are obvious to the senses: "If officers are lawfully present and observe what is then and there immediately apparent, no search warrant is required in such instance, and the testimony by the officers with regard to the evidence which they observed is entirely proper." *Id.* at 616, 177 S.E.2d at 563; a*ccord* Syl. Pt. 1, *State v. Slaman*, 189 W. Va. 297, 431 S.E.2d 91 (1993). Later, in *State v. Woodson*, 181 W. Va. 325, 382 S.E.2d 519

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searched, or the person or thing to be seized.

[3] The Fourth Amendment to the United States Constitution provides:

> 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.

(1989), we attached the "plain view" label to the situation delineated in *Angel*, stating that "the label 'plain view' . . . applie[s] to a situation where the police officer is present where he has a lawful right to be and sees in plain view an object that constitutes contraband or evidence of a crime." *Woodson*, 181 W. Va. at 330, 382 S.E.2d at 524. Discussing this particular "plain view" situation, we elucidated:

> "[T]he concern here is with plain view . . . as descriptive of a situation in which there has been no search at all in the Fourth Amendment sense. This situation . . . encompasses those circumstances in which an observation is made by a police officer without a prior physical intrusion into a constitutionally protected area . . . ."]

181 W. Va. at 331, 382 S.E.2d at 525 (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE 322-23 (2d ed. 1987)); *see also* Syl. Pt. 3, *Stone*, 165 W. Va. at 266, 268 S.E.2d at 51 ("It is not a search for the police to discover evidence in plain sight . . . .").

Based on the above-stated principles, it is clear that the Appellant's assertions regarding a violation of her Fourth Amendment rights are without merit. Deputy Wilfong was lawfully present at the Appellant's front door with the intention of executing the administrative task of serving a subpoena on her husband. As the deputy stood waiting for someone to answer his knock, he merely observed what was immediately apparent, obvious, and in his plain view through the uncovered window. Under these facts, we find there was "'no search at all in the Fourth Amendment sense.'" *Woodson*, 181 W. Va. at 331, 382 S.E.2d at 525. As explained in *State v. Smith*, 181 A.2d 761 (N.J. 1962), *cert. denied*, 374 U.S. 835 (1963), the Fourth Amendment does not "draw[ ] . . . the blinds the occupant could have drawn but did not." 181 A.2d at 769. Our conclusion on this issue is bolstered by numerous decisions from other jurisdictions. *See, e.g., United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996) (holding that officer's observations

from Appellants' front porch of items clearly visible through picture window located adjacent to front door did not constitute search within meaning of Fourth Amendment); *United States v. Hersh*, 464 F.2d 228 (9th Cir.) (holding that officers' observations through window were not illegal where officers, while standing on Appellant's front porch, merely looked through window located immediately to left of front door), *cert. denied*, 409 U.S. 1008 (1972); *State v. Dickerson*, 313 N.W.2d 526 (Iowa 1981) (holding that officers, who were engaged in legitimate investigative activities, did not invade defendant's reasonable expectation of privacy by coming to door of his residence, and their visual observations through window in door did not constitute search in the constitutional sense); *State v. Rose*, 909 P.2d 280 (Wash. 1996) (holding that officer's observations did not constitute illegal search when officer, while standing on front porch of defendant's mobile home, looked with aid of flashlight through unobstructed window to left of front door and saw cut marijuana and scale on table inside).

Implicit in Appellant's argument is the contention that the affidavit of Deputy Wilfong detailing his observation of marijuana plants was insufficient to support the issuance of a search warrant because the information contained in the affidavit was obtained through an illegal search. "To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search . . . ." Syl. Pt. 1, in part, *Stone*, 165 W.Va. at 266, 268 S.E.2d at 51. In *State v. Wotring*, 167 W. Va. 104, 279 S.E.2d 182 (1981), we rejected the appellant's contention that the search of her home pursuant to a warrant was illegal where the supporting affidavit filed by the investigating officer "contained an assertion that the affiant witnessed a drug transaction on the property to be searched." *Id.* at 111, 279 S.E.2d at 188. Our ruling in *Wotring* took into consideration

the fact that "the affiant stated that he saw the transaction occur on the appellant's premises," which "g[ave] rise to more than a mere belief that the thing to be seized could be found on the premises." *Id.* at 110, 279 S.E.2d at 187. In the instant case, given that Deputy Wilfong's plain view observation of marijuana plants did not constitute a Fourth Amendment search, his affidavit was clearly sufficient to establish probable cause for the issuance of the search warrant.

The Appellant also assigns as error the absence of any factual findings in the circuit court's order denying her motion to suppress. On August 26, 1998, the circuit court entered an order, which stated summarily that "the motion to suppress the search warrant . . . hereby is denied." Although the order does not set forth any factual findings, this Court has never held that the denial of a motion to suppress must be reversed if the circuit court's order does not contain findings of fact. On the contrary, this Court stated in *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996), that "[i]f the circuit court did not make the necessary findings, the matter may either be remanded with appropriate directions or the circuit court's denial of a motion to suppress upheld if there is any reasonable view of the evidence to support it." *Id.* at 110, 468 S.E.2d at 725. Furthermore, the record presented to this Court includes the transcript of a hearing on February 5, 1999, during which the Appellant's renewed motion to suppress was discussed. At that hearing, the circuit court adopted Deputy Wilfong's version of the facts, stating: "I am of the opinion that it happened exactly as the deputy said . . . ." The designated record also includes the transcript of the suppression hearing, during which Deputy Wilfong testified. This evidence permits us to meaningfully review the circuit court's ruling.

The Appellant's third and final assignment of error is that the circuit court improperly granted the State's motion in limine, and thereby foreclosed her presentation of the affirmative defenses of compulsion and medical necessity. Upon review, we find no error in the preclusion of either of these defenses.

In syllabus point one of *State v. Tanner*, 171 W. Va. 529, 301 S.E.2d 160 (1982), this Court articulated the test for compulsion, proof of which can be found to excuse the commission of a criminal act:

> In general, an act that would otherwise be a crime may be excused if it was done under compulsion or duress, because there is then no criminal intent. The compulsion or coercion that will excuse an otherwise criminal act must be present, imminent, and impending, and such as would induce a well-grounded apprehension of death or serious bodily harm if the criminal act is not done; it must be continuous; and there must be no reasonable opportunity to escape the compulsion without committing the crime. A threat of future injury is not enough.

We stated further in *Tanner* that "[i]f the evidence raised a reasonable doubt about [Appellant's] . . . criminal intent to commit the offense charged, [compulsion] . . . would be a valid legal defense." *Id.* at 532, 301 S.E.2d at 163.

Here, the Appellant failed to proffer sufficient evidence of compulsion, as defined in *Tanner*, to raise a reasonable doubt about her criminal intent to commit the offense of manufacturing a controlled substance. The Appellant argues that the *Tanner* test is satisfied because she

> lives with the present, imminent, continuous, apprehension of serious bodily harm resulting from the disease of multiple sclerosis. She tried all legal, prescription, drugs prescribed to her prior to ever possessing marijuana, with no success. To her, there was no other way to escape the symptoms of her disease other than consuming marijuana.

This argument ignores that it is the compulsion, not the apprehension or fear, which must be present, imminent, impending, and continuous in order to negate criminal intent. Before using marijuana, Appellant "suffered . . . from periodic attacks." "[T]wo to three times a year [she would have] an attack of MS that would last . . . [for] approximately three months . . . ." Clearly, these claims do not support the *Tanner* requirements that the "compulsion" be present and continuous, certainly not for the several months necessary to plant, cultivate, and grow marijuana to maturity.

Through its ruling on the motion in limine, the circuit court also barred Appellant from presenting the defense of medical necessity. This Court has not previously recognized medical necessity as an affirmative defense, and we decline to do so today. We find persuasive the reasoning in *State v. Williams*, 968 P.2d 26 (Wash. Ct. App. 1998), *review denied*, 984 P.2d 1034 (Wash. 1999); and *State v. Hanson*, 468 N.W.2d 77 (Minn. Ct. App. 1991).

The appellant in *Williams* attacked his convictions of unlawful manufacturing of marijuana and unlawful possession of marijuana on the grounds that the trial court erred in excluding expert testimony regarding the medical use of marijuana and in refusing to give a jury instruction on medical necessity. Washington's intermediate appellate court affirmed and held that "the defense of medical necessity is unavailable for drugs that are classified as Schedule I Controlled Substances because the Legislature has conclusively determined that marijuana has no currently accepted medical use in treatment in the United States." 968 P.2d at 28. Elaborating on its rationale, the *Williams* Court stated:

> [T]he decision of whether there is an accepted medical use for particular

> drugs has been vested in the Legislature by the Washington Constitution. The Legislature has determined that marijuana has no accepted medical use. Williams has no fundamental right to have marijuana as his preferred treatment over the State's objections. Further, if the debate over medical treatment belongs in the political arena, it makes no sense for the courts to fashion a defense whereby jurors weigh experts' testimony on the medical uses of a Schedule I drug. Otherwise, each trial would become a battlefield of experts. But the Legislature has designated the battlefield as the Board of Pharmacy. The Washington Constitution has not enabled each individual to be the final arbiter of the medicine he is entitled to take--it is the Legislature that has been authorized to make laws to regulate the sale of medicines and drugs.

Id. at 30. Moreover, as noted by the court in *Williams*, the decision upon which the Appellant in the case *sub judice* relies as support for the medical necessity defense was implicitly overruled by the Washington Supreme Court's decision in *Seeley v. State*, 940 P.2d 604 (1997). *Williams*, 968 P.2d at 30 (discussing overruling of *State v. Diana*, 604 P.2d 1312 (Wash. Ct. App. 1979)).

In *Hanson*, the appellant, an epilepsy victim, challenged the trial court's exclusion of the defense of medical necessity in connection with his conviction for manufacturing marijuana. Finding no error in said exclusion, the *Hanson* Court stated that:

> a prime feature of this defense as developed elsewhere is a deference to the legislative prerogative to define the criminal offense: "The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs."

468 N.W.2d at 78 (quoting 1 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.4, 631 (1986)). The *Hanson* Court proceeded to outline controlling statutory provisions which had been enacted by the state legislature: "The Minnesota legislature has attached criminal penalties to the possession, sale or

cultivation of marijuana. The statutory classification of marijuana as a Schedule I substance implies a determination that marijuana has 'no currently accepted medical use in the United States.'" 468 N.W.2d at 78 (statutory citations omitted); *see also State v. Cramer*, 851 P.2d 147, 149 (Ariz. Ct. App. 1992) (holding that trial court did not err in precluding appellant's defense of medical necessity to charge of unlawful production of marijuana because "the Legislature has addressed exceptions and exemptions in detail by statute . . . and . . . unlawful possession of marijuana does not fall within those protected categories").

As we consider the availability of the medical necessity defense in West Virginia, we are mindful that "West Virginia Constitution, Article VI, Section 1, reposes the legislative power in the legislative department," *State v. Grinstead*, 157 W. Va. 1001, 1012, 206 S.E.2d 912, 920 (1974), and the "constitutional powers of the Legislature are particularly broad in matters of health[.]" *Id.* at 1010, 206 S.E.2d at 918. The Uniform Controlled Substances Act, West Virginia Code §§ 60A-1-101 to 60A-9-7 (1997 & Supp. 1999), contains the following proviso:

> The state board of pharmacy shall recommend to the legislature that a substance be included in Schedule I if it finds that the substance:
> (1) Has high potential for abuse; and
> (2) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

W. Va. Code § 60A-2-203. By virtue of its broad constitutional power, and upon the recommendation of the state board of pharmacy, the West Virginia Legislature has designated marijuana as a Schedule I controlled substance. *See* W. Va. Code §§ 60A-2-203, -204(d)(22). In making this classification, the Legislature has adopted the board of pharmacy's determination that marijuana either "has no accepted

medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." W. Va. Code § 60A-2-203. Moreover, the Legislature has imposed criminal penalties upon any person who manufactures, delivers, or possesses with intent to manufacture or deliver, marijuana. The Legislature has made no exception for medical use. Accordingly, we hold that medical necessity is unavailable as an affirmative defense to a marijuana charge in West Virginia because the Legislature has designated marijuana as a Schedule I controlled substance with no exception for medical use.

IV.

CONCLUSION

Upon all of the foregoing, we find no error in the challenged rulings of the circuit court and, therefore, affirm the February 5, 1999, order of the Circuit Court of Tucker County.

Affirmed.