STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101542 (Jackson County 09-F-93)

Richard Cooper,
Defendant Below, Petitioner

FILED
May 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA, 2011

MEMORANDUM DECISION

Petitioner Richard Cooper files this timely appeal following his convictions on one count of operating a clandestine laboratory, two counts of possession of substances to be used as a precursor to the manufacture of methamphetamine, one count of manufacturing a controlled substance (methamphetamine), and one count of conspiracy. Petitioner raises various issues related to the search and seizure of evidence, as well as instructional error at trial. Petitioner seeks a reversal of his convictions. Respondent State of West Virginia has filed a Response.

This Court has considered the parties' briefs 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 parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, 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.

On February 27, 2009, Deputy Mellinger of the Jackson County Sheriff's Department was on routine patrol when he observed petitioner, who was already the subject of a methamphetamine-related investigation, make several lane changes without deactivating his turn signal and make a U-turn. Believing that petitioner might be impaired, Deputy Mellinger initiated a traffic stop. Deputy Mellinger ordered petitioner to exit his vehicle to check for impairment. Upon petitioner exiting his vehicle, Deputy Mellinger noticed a large bulge in the groin area of petitioner's trousers, which was revealed to be approximately 231 pseudoephedrine tablets. Deputy Mellinger took custody of the tablets. During the ensuing search of petitioner's vehicle with his consent, Deputy Mellinger took possession of petitioner's cellular telephone, which was plugged into the dash of petitioner's vehicle for recharging. Petitioner was not arrested at that time.

On May 28, 2009, the Jackson County Sheriff's Department executed a search warrant for the residence of Roger Hinzman. Upon execution of the search warrant, petitioner was discovered in Mr. Hinzman's residence where both were engaged in the production of methamphetamine. The officers executing the warrant observed petitioner holding a "gas generator," which is an item commonly associated with the final stage of methamphetamine production known as "gassing."

Petitioner was charged in a fifteen-count indictment with various drug-related offenses, including a violation of West Virginia Code §60A-10-4(d),[1] which provides, in part, that "any person who knowingly possesses any amount of ephedrine, pseudoephedrine . . . with the intent to use it in the manufacture of methamphetamine . . . shall be guilty of a felony . . . ." Petitioner's motion to suppress the evidence seized during the traffic stop was denied. At trial, the circuit court instructed the jury, *inter alia*, that "the element of this offense [§60A-10-4(d)] that requires proof beyond a reasonable doubt that the pseudoephedrine was possessed . . . with intent to use it in the manufacture of methamphetamine, you are instructed that this does not mean that in order to find the defendant guilty, you must find beyond a reasonable doubt that the defendant specifically intended to personally manufacture methamphetamine with the substance . . . so long as it is the specific intent and knowledge of the defendant that the pseudoephedrine is intended to be used for methamphetamine manufacture, whether by the defendant or another."

The jury returned its verdict finding petitioner guilty of one count of operating a clandestine drug laboratory in violation of West Virginia Code §60A-4-411, two counts of possession of substances to be used as precursor to the manufacture of methamphetamine in violation of West Virginia Code §60A-10-4(d), one count of manufacturing a controlled substance (methamphetamine) in violation of West Virginia Code §60A-4-401(a)(ii), and one count of conspiracy in violation of West Virginia Code §61-10-31. The circuit court sentenced petitioner to terms of imprisonment in accordance with the statutory penalties for his crimes. Petitioner does not raise any challenge to his sentencing in his petition for appeal.

Petitioner challenges the traffic stop by Deputy Mellinger and the evidence seized

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[1]Petitioner argues that he should have been charged under West Virginia Code §60A-4-401(a)(iv) and not under West Virginia Code §60A-10-4(d). However, West Virginia Code §60A-4-401(a)(iv) states, in part, that for offenses relating to any substance classified as Schedule V (ephedrine and pseudoephedrine) in Article 10 of Chapter 60A, the penalties established in Article 10 for possession of pseudoephedrine with intent to use it in the manufacture of methamphetamine apply. Further, West Virginia Code §60A-2-212(e) provides that neither of the offenses set forth in §60A-4-401, nor the penalties therein, shall be applicable to ephedrine, pseudoephedrine, or phenylpropanolamine, which shall be subject to the provisions of West Virginia Code §§60A-10-1 et seq.

pursuant thereto. "Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime." Syl. Pt. 1, in part, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994). "When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police." *Id.*, Syl. Pt. 2. Here, the circuit court found in its order denying petitioner's motion to suppress that Deputy Mellinger's investigatory stop was justified under the totality of the circumstances and after he had personally observed petitioner violating at least one traffic law (West Virginia Code §17C-8-8; Turning movements and required signals; penalty).[2]

"'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)." Syl. Pt. 13, *State v. White*, No. 35529, 2011 WL 504760 (W.Va. Feb. 10, 2011). Applying this standard of review, the Court finds no error in the circuit court's denial of petitioner's motion to suppress evidence.

Petitioner asserts that Deputy Mellinger's search and seizure of his cellular telephone was unlawful. The circuit court found the Deputy Mellinger's seizure of petitioner's cellular telephone was "supported by a probability that it contained evidence of a crime and was an instrumentality necessary for the commission of other crimes. . . ." The record reflects that the cellular telephone was in plain view and was seized after petitioner consented to the search of his vehicle and person. Thereafter, Deputy Mellinger obtained a search warrant for the contents of petitioner's cellular telephone having observed numerous missed calls and text messages, or text messages that had not been answered, on the face of the cellular telephone. The circuit court found that "a sufficient basis existed for the issuance of a Search Warrant for the search and seizure of the contents of the subject [petitioner's] cell phone."[3]

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[2] While petitioner argues that Deputy Mellinger lacked reasonable suspicion to stop petitioner's vehicle on the basis that petitioner failed to deactivate his turn signal given the Court's holding in *Clower v. West Virginia Department of Motor Vehicles*, 223 W.Va. 535, 541, 678 S.E.2d 41, 47 (2009), as the circuit court found in its order denying petitioner's motion to suppress, the facts in the case *sub judice* are distinguishable from the facts in *Clower*.

[3] Although petitioner asserts that the subsequent warranted search of his cellular telephone violated West Virginia's Wire Tapping and Electronic Surveillance Act (West

Under the previously stated standard of review, we agree.

Last, petitioner challenges the circuit court's jury instruction with regard to West Virginia §60A-10-4(d). Petitioner asked the circuit court to instruct the jury that the State had to prove that he, personally, intended to manufacture methamphetamine with the pseudoephedrine that was recovered from his person during the traffic stop before the jury could find him guilty of violating West Virginia Code §60A-10-4(d). The State argues that this statute is clear that the intent a defendant must possess is the intent to use the ephedrine or pseudoephedrine in the manufacture of methamphetamine and not the intent to use it personally to manufacture methamphetamine. The State adds that the jury heard evidence at trial that petitioner was caught in the act of manufacturing methamphetamine with Roger Hinzman; therefore, it was reasonable for the jury to conclude that the pseudoephedrine pills in petitioner's possession at the time of the traffic stop were destined for the same purpose. "[T]he question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. Pt. 1, in part, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). The Court cannot find that the circuit court erred in its instruction to the jury under the facts and circumstances of this case.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 13, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum

DISSENTING:

Justice Brent D. Benjamin

DISQUALIFIED:

Justice Thomas E. McHugh

Virginia Code §62-1D-3), this Court recently upheld the search and seizure of cellular telephones in *State v. White*, No. 35529, 2011 WL 504760 (W.Va., Feb. 10, 2011).