No. 11-0352 – *Christopher L. Toler v. Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles*

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OF WEST VIRGINIA

Benjamin, J., dissenting:

I am deeply troubled that, in legitimizing the Executive Branch's use of unlawfully gathered evidence herein, the Majority makes this Court complicit in the improper *and* unconstitutional acts of Executive Branch officials. By embracing its "end justifies the means" test for whether a constitutionally recognized right is or is not to be protected by this Court, the Majority effectively surrenders to the Executive Branch this Court's constitutional prerogative (and duty) to limit the search and seizure power of the Executive Branch. Specifically, the Majority empowers the Executive Branch itself to define its own constitutional limitations by focusing not on the propriety of the acts of the Executive Branch in its gathering of evidence, but rather on how one arm of the Executive Branch wishes to use the fruits of an unconstitutional search and seizure committed by another arm of the Executive Branch. A stop which leads to a license forfeiture in West Virginia now needs not be lawful.

Furthermore, the majority opinion effectively, without apparent serious consideration, reads into our statutory law a legislative intent to permit unlawful searches and

seizures to serve as a primary and proper evidentiary basis for license revocations. The Majority apparently presumes that the same Legislative Branch which was so careful to protect the *procedural* rights of West Virginians in license revocation matters by enacting extensive statutory protections for such citizens somehow missed protecting the *search and seizure* rights of the same West Virginians.[1]

Our statutory law is clear with respect to evidence of the alleged operation of a motor vehicle while intoxicated. Evidence from an investigation involving DUI must be

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[1]As of June 11, 2010, the Office of Administrative Hearings assumed responsibility for license revocation hearings pursuant to W. Va. Code §§ 17C-5C-1 to -5 (2010). At the same time, an amendment to § 17C-5A-2(f) changed the required factual determinations to be made at revocation hearings to

> (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs . . . ; (2) *whether the person was lawfully placed under arrest* for an offense involving driving under the influence of alcohol . . . , or was lawfully taken into custody for the purpose of administering a second test . . . ; (3) whether the person committed an offense involving driving under the influence of alcohol . . . , or was lawfully taken into custody for the purpose of administering a second test; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five [§ § 17C-5-1 et seq.] of this chapter.

(Emphasis added). The changes to the statute evidence the Legislature's resolve that unlawful searches and seizures not serve as the basis for either criminal *or* non-criminal prosecutions by the Executive Branch.

sent to the Division of Motor Vehicles, and that arm of the Executive Branch must act upon such information. W. Va. Code § 17C-5A-1 (2008). There is therefore no dispute that the evidence unlawfully gathered herein would be used *both* for a criminal and a quasi-criminal (license forfeiture) purpose *and* that the primary evidentiary foundation for both criminal and non-criminal prosecutions would be the same Executive Branch agent who initiated the improper search and seizure. To claim that a primary motivating basis for the unlawful search and seizure herein was not a non-criminal prosecution begs belief—and the facts.

In advancing a "balancing" basis for its decision, the Majority accepts at face value the "safety" contentions of the State related to its desired use of the unlawfully obtained evidence herein. Seeking to enhance the safety of our roads is an exceedingly important goal—a point no doubt as paramount to law enforcement agents as is the enforcement by such agents of criminal traffic laws. The commonly heard term, "serve and protect," underscores this dual role that law enforcement has to not only enforce criminal laws, but also to protect. Indeed, it is our expectation of law enforcement—so long as law enforcement operates within the parameters of individual constitutional rights—to enforce *both* the criminal *and* the non-criminal DUI-related law of West Virginia.[2]

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[2]The conduct challenged herein fits squarely, both criminally and non-criminally, within "the offending officer's zone of primary interest." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1053, 104 S. Ct. 3479, 3491 (1984) (White, J., dissenting) (quoting *United States v. Janis*, 428 U.S. 433, 458, 96 S. Ct. 3021, 3034 (1976)). West Virginia relies on

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The unlawful stop herein was not at a properly constituted "DUI checkpoint" primarily designed for identifying drivers in violation of criminal traffic laws, but rather at something akin to a "safety checkpoint." The State's purported motivating basis for the search and seizure was non-criminal; i.e., safety-related. This fact underscores a failure of simple logic in the majority opinion. All agree that a search initiated for the enforcement of our criminal laws (such as a "DUI checkpoint") must meet constitutional muster to be used in a later criminal prosecution by the Executive Branch. Common sense and basic legal reasoning likewise compel the conclusion that a search initiated for non-criminal purposes by the Executive Branch (such as a so-called "safety checkpoint") must meet constitutional muster to be used in a later non-criminal prosecution by the Executive Branch.

How then does the Majority justify the results of its "balancing" argument? Lacking supporting empirical data and overlooking the compelling separation of powers

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law enforcement officers to perform *dual* criminal and non-criminal roles in executing their law enforcement duties. I see no reason why a police officer would not place equal emphasis on the goals of both criminal or civil proceedings. In fact, I could easily see how a police officer might place more emphasis on removing drunk drivers from the roadways through a license revocation proceeding where criminal proceedings may only result in a fine. *See* W. Va. Code § 17C-5-2 (2010). Further, as a witness, the officer serves as the primary evidentiary foundation for introduction of seized information in *both* criminal and non-criminal proceedings in West Virginia. To assert that the exclusion of unlawfully-obtained evidence in criminal proceedings sufficiently deters future unlawful acts, but that exclusion of unlawfully-obtained evidence in non-criminal proceedings does not significantly deter future unlawful acts is nonsensical.

issues herein, the majority opinion settles on safety. It concludes that the exclusion of unlawfully gathered evidence will not significantly deter similar unlawful conduct in the future and, therefore, the desire for safety is sufficient to overlook how the evidence was obtained. On a visceral level, this is an exceedingly persuasive argument. No sensible person wants drunk drivers on the roads we use. In view of the horrific consequences of drunk driving on our society, there may be no stronger desire that we may have than to try to keep such drivers off the roads. But, as tough as it may be in this case, a court's duty is not to decide tough issues on a visceral basis or on a situational basis. It is our duty to decide tough emotional issues within the framework of our constitutional limitations and the effect which our precedent may have in other cases raising the same legal issues. In this regard, the majority opinion is, though emotionally compelling, constitutionally deficient.[3]

The language of the Fourth Amendment to the United States Constitution and

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[3]I want to emphasize that in no way through this dissent do I intend to lessen the gravity of the great harm and danger drunk drivers pose to the people of West Virginia. I firmly believe that there is a "very valid public policy concern to rid our highways of drunken drivers" and that the government has a strong interest in doing just that. *Fishbein v. Kozlowski*, 743 A.2d 1110, 1126 (Conn. 1999) (Norcott, J., dissenting). While the goal of eliminating drunk drivers from our roadways is an admirable one, the goal should not be achieved by subjecting our citizens to the violation of their constitutional rights.

Likewise, I do not through this dissent intend to disrespect the important and often difficult efforts of our law enforcement personnel. There is no assertion herein that the officers in question deliberately sought to violate the constitutional rights of the driver. The enforcement of individual constitutional rights does no more disservice to law enforcement officers than does the existence of the rights themselves.

the Search and Seizure Clause of the West Virginia Constitution is almost identical. Article 3, Section 6 of our state constitution provides, in part, "The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, *shall not* be violated." (Emphasis added).[4] The logic of the majority opinion fails when viewed against this language. The Fourth Amendment and Article 3, Section 6 of our state constitution were designed to shield citizens from unbridled police power, not to facilitate government programs or operations. No power of government, short of arrest and incarceration, has such a direct impact on the life, liberty, and property of individual citizens.

By their express terms, neither constitution provision limits their protections simply to criminal matters or to criminal prosecutions by the State. The Fourth Amendment's protections, and those of the West Virginia constitution, are plenary. Both constitutional provisions manifest a preference for a procedure of antecedent justification that law enforcement must follow before it may legitimately invade the privacy of citizens. The people's fundamental rights are to be protected without any limitation as to either the State's claimed purpose for a search or the State's intended use for what is seized from the citizen. In other words, "use" is not determinative of the existence of the right to be protected. Unlawful actions do not become acceptable simply because of how the State later wishes to

[4]The Fourth Amendment to the United States Constitution declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

benefit from its misconduct. Unlawful means unlawful.

The exclusionary rule, which is judicially created, evolved as a mechanism to prevent abuse of citizens' rights. It was first adopted in *Weeks v. United States*, 232 U.S. 383 (1914), and it was extended to the several states in *Mapp v. Ohio*, 367 U.S. 643 (1961). It is a logical and necessary corollary to the principle of antecedent justification inherent in the Fourth Amendment and Article 3, Section 6 of our state constitution. Since the state should not benefit from the illegal acts of its police force, the exclusionary rule serves as a deterrent to state actors who may violate citizen's rights. *See Mapp*, 367 U.S. at 648. It also preserves the legitimacy of the judicial process and avoids the courts becoming tainted by the misdeeds of the Executive Branch.[5]

The majority opinion's reliance on a balancing test related to deterrence is unconvincing. The Majority does not reference empirical data to support is conclusions. Such data strongly supports extending the exclusionary rule herein. Based upon his studies, Professor Milton Loewenthal found that there is "strong evidence that, regardless of the

[5] Justice Brennan noted that this purpose for the exclusionary rule was recognized with the adoption of the exclusionary rule in *Weeks* until the Court decided *United States v. Calandra*, 414 U.S. 338 (1974): The exclusionary rule "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness." *Calandra*, 414 U.S. at 357 (Brennan, J., dissenting). When the majority decided *Calandra*, it stated only that the rule's "purpose is to deter." *Calandra*, 414 U.S. at 347.

effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards." Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24, 29 (1980). He also found that the police "have great difficulty believing that standards can have any real meaning if the government can profit from violating them." *Id.* at 39.

The "ends justifies the means" precedent now adopted by the Majority opens the door to troubling scenarios. For traffic stops, is mere suspicion rather than probable cause now a proper basis for stopping a driver so long as the State uses the fruits of such a stop outside the criminal arena? Has subjectivity replaced objectivity with respect to search and seizure protections? Indeed, is *any* reason now needed for a search and seizure so long as the State can articulate a compelling emotional argument for the use of such illegally obtained evidence in a non-criminal proceeding? Are improper bases for State action, such as profiling and stereotyping, now to be excused so long as the evidence seized is not used in a criminal prosecution and the State claims "safety" or another compelling emotional or societal basis as its justification? Removing an objectively-based rationale for a search and seizure, so long as the State can thereafter erect a compelling societal "need" for its actions, squarely places our jurisprudence on a decidedly slippery slope.

Questions abound. Perhaps the State should now be permitted to use the fruits of unlawful searches of personal vehicles, cell phones, desks, lockers, computers, homes, apartments, places of employment, etc., in non-DUI scenarios? So long as the State can later articulate a significant safety or societal basis for using the fruits of its illegal activities, does the Majority's holding now permit the State to use evidence illegally obtained in a criminal tax investigation to prosecute an individual in a non-criminal tax penalty or forfeiture proceeding? Arguably it does. Does the Majority's holding now permit the State in a discharge proceeding unrelated to sexual misconduct to nevertheless use evidence obtained from the State's illegal search of a teacher's computer, locker, office, car or home where the motivation for the search was no more than an incorrect subjective "hunch" by an agent of the State that the teacher *might* be a criminal threat to his or her infant pupils? Again, arguably it does.

The majority opinion suggests that the exclusionary rule does not apply in non-criminal settings. This is incorrect. The United States Supreme Court itself has specifically extended the exclusionary rule to "quasi-criminal" property forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246 (1965).[6] Eleven of the thirteen

[6]"A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution." Syl. Pt. 1, *Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995). *See also* Syl. Pt. 2, *Petry v. Stump*, 219 W. Va. 197, 632 S.E.2d 353 (2006). "There is not much question that in our mobile (continued...)

federal Circuit Courts of Appeals have interpreted *Plymouth Sedan* to stand for the proposition that the exclusionary rule applies to civil *in rem* forfeiture proceedings. Courts in thirty-four states agree.

The exclusionary rule has furthermore been applied in a myriad of other non-criminal settings. *See, e.g.*, *Knoll Assocs., Inc. v. FTC*, 397 F.2d 530 (7th Cir. 1968) (FTC hearings to uncover discriminatory practices); *OKC Corp. v. Williams*, 461 F. Supp. 540 (N.D. Tex. 1978), *judgment aff'd.*, 614 F.2d 58 (5th Cir. 1979) (SEC proceedings); *Savina Home Indus., Inc. v. Sec'y of Labor*, 594 F.2d 1358 (10th Cir. 1979) (OSHA proceedings); *Goldin v. Pub. Utils. Comm'n*, 592 P.2d 289 (Cal. 1979) (proceedings before the public utilities commission to terminate phone service because of illegal use); *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 870 (5th Cir. 1938) (labor controversies); *Sullivan v. District Ct. of Hampshire*, 429 N.E.2d 335 (Mass. 1981) (hearings to terminate a public employee);

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society the suspension of a driver's license . . . constitutes a serious deprivation. It may have a direct impact on the licensee's employment if his job is dependent on the use of a driver's license." *Jordan v. Roberts*, 161 W. Va. 750, 756, 246 S.E.2d 259, 262–63 (1978). It is anomalous to exclude unlawful evidence in a criminal but not a forfeiture proceeding where the forfeiture relies on the same basis as a prosecution for the violation of criminal law. Here, the forfeiture proceeding was not collateral to the criminal proceeding. Even if one argues, unconvincing, that a license forfeiture was not a primary motivating rationale for the unlawful search and seizure herein, the forfeiture "proof" was inextricably connected with the criminal "proof" that the driver drove under the influence. Furthermore, it is the testimony of the officer whose stop was improper which serves as the necessary foundational predicate for both prosecutions. The majority opinion simply overlooks *Plymouth Sedan*.

Yarbrough v. Pfeiffer, 370 So. 2d 1177 (Fla. Dist. Ct. App. 1979) (professional license revocation); *Bd. of License Comm'rs v. Pastore*, 463 A.2d 161 (R.I. 1983) (liquor license revocation); *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975) (student expulsion hearings).[7]

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[7]The majority opinion seeks justification for its holding by looking to other states. Although most other states have revocation proceedings different from that used in West Virginia, the majority is correct that fewer states exclude than do not. *See, e.g.*, *Nevers v. State*, 123 P.3d 958, 963 (Alaska 2005) (Alaska); *Tornabene v. Bonine*, 54 P.3d 355 (Ariz. 2002) (Arizona); *Gikas v. Zolin*, 863 P.2d 745 (Cal. 1993) (California); *Fishbein v. Kozlowski*, 743 A.2d 1110 (Conn. 1999) (Connecticut); *Martin v. Kansas Dept. of Revenue*, 176 P.3d 938 (Kan. 2008) (Kansas); *Powell v. Sec'y of State*, 614 A.2d 1303 (Me. 1992) (Maine); *Chases v. Neth*, 697 N.W.2d 675 (Nebr. 2005) (Nebraska); *Beavers v. State*, 851 P.2d 432 (Nev. 1993) (Nevada); *Jacobs v. Dir., N.H. Div. of Motor Vehicles*, 823 A.2d 752 (N.H. 2003) (New Hampshire); *Commonwealth v. Wysocki*, 535 A.2d 77, 79 (Pa. 1987)(Pennsylvania); *State v. Brabson*, 976 S.W.2d 182 (Tex. 1998) (Texas).

> In dissenting to the majority in *Wysocki*, Justice Papadakos observed:
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> > The majority opinion compels a conclusion that a police officer can stop anyone, anyplace, anytime of the day or night, *for no articulable reason at all*, and *then* form a reasonable belief that the person so stopped . . . has been driving while under the influence of alcohol in violation of [statute].

Wysocki, 535 A.2d at 80 (Papadakos, J., dissenting) (emphasis in original). A number of states agree with such cogent reasoning, and apply the exclusion rule to revocation proceedings in some form or another. *See, e.g.*, *People v. Krueger*, 567 N.E.2d 717, 725 (1991) (Illinois) (holding that where the license revocation statute requires a finding of an arrest; if the arrest is not lawful, the exclusionary rule applies); *Brownsberger v. Dep't of Transp.*, 460 N.W.2d 449, 450–51 (Iowa 1990) (Iowa) (if in the related criminal proceeding a conviction for driving under the influence of alcohol cannot be obtained, the DOT may not then revoke a driver's license in a civil proceeding arising from the same circumstances as the criminal proceeding); *Piotrowski v. Comm'r of Pub. Safety*, 453 N.W.2d 689 (Minn. 1990) (Minnesota) (exclusionary rule applies in license revocation

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Another suggestion is that the threat of civil suits against police misconduct would be enough to deter the same. A civil suit of this sort would be costly. Moreover, a citizen's success with such a remedy is far from certain and it could take years to secure any compensation or vindication for such unlawful acts.

I am cognizant that the exclusionary rule is a judicially-created evidentiary tool to enforce the protections afforded by our federal and state constitutions. I am also aware that some use this fact as a basis to argue against the legitimacy of the exclusionary rule. It is true, that the "exclusionary rule" does not appear in the Fourth Amendment. However, this argument is unconvincing. It is likewise true that the express terms of the Fourth Amendment do *not* limit the protections afforded therein to criminal applications only. Furthermore, such an argument ignores the fact that the other fundamental rights recognized in our Bill of Rights do not have explicit enforcement mechanisms. Rather, our state and federal constitutions leave to our Judicial Branch the duty to use such mechanisms as are necessary to enforce the simple terms of the protection recognized therein. Thus, it falls to

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proceeding); *Armstrong v. State*, 800 P.2d 172, 173–74 (Mont. 1990) (Montana) (holding that evidence of illegally driving under the influence of alcohol must be excluded if the initial stop by an arresting officer violates the driver's search or seizure rights); *Watford v. Bureau of Motor Vehicles*, 674 N.E.2d 776 (Ohio Ct. App. 1996) (Ohio) (a "lawful arrest, including a constitutional stop" required before a refusal to take a test could trigger a license suspension); *State v. Lussier*, 757 A.2d 1017, 1025–27 (Vt. 2000) (Vermont) (holding that the exclusionary rule applies to civil license revocation hearings).

the courts to develop enforcement mechanisms to ensure public and speedy trials despite the fact the Sixth Amendment is devoid of any express enforcement mechanisms. The same is true with respect to protections against Double Jeopardy under the Fifth Amendment and with respect to excessive fines under the Eighth Amendment.

Ultimately, the majority opinion herein severely compromises the constitutional integrity not only of the non-criminal revocation process herein, but also the integrity of our judicial process. The majority's reliance solely on a conclusory "lack of deterrence" rationale, which a critical review herein shows to be dubious, robs the Fourth Amendment and Article 3, Section 6 of the Constitution of West Virginia of their full protections—protections expressly not limited only to criminal rights—and thus robs the judicial process of its full legitimacy. A judicial system which accepts evidence without regard to the manner in which such evidence was obtained fails in its most primary obligation: to do justice under our state and federal constitutions. I therefore dissent.