No. 11-0643 - State of West Virginia v. Joshawa Clark

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WORKMAN, Justice, concurring:

I concur with the majority's conclusion that petitioner herein suffered no constitutionally protected invasion of privacy; therefore, the subject phone records and the fruits thereof were admissible. However, I write separately to express my disagreement with the majority's improper substitution of its own credibility findings for that of the trial court below, resulting in the erroneous conclusion that the administrative subpoena herein was improperly obtained. Moreover, while I agree wholeheartedly that this Court has the inherent supervisory authority to maintain the integrity of the criminal justice system, I believe that integrity is well-maintained in the case *sub judice* through the simple application of the existing rule of law.

On remand, the trial court was instructed to receive evidence relative to whether the DEA's issuance of the administrative subpoena at issue was related to investigation of controlled substances. The trial court heard testimony that petitioner was observed by Sergeant Combs, a Huntington Police Department officer and federally deputized drug task force officer, as having a new motorcycle, jacket, and helmet. Sgt. Combs was aware that petitioner resided in government housing[1] and inquired of the

[1] Petitioner resided at Marcum Terrace, a community which Sgt. Combs testified was well-known for drug activity.

petitioner how he acquired the items; petitioner claimed he had received an advance of money for joining the military, which Sgt. Combs discovered to be untrue. Upon further inquiry, the Assistant Manager at Marquee Cinema advised Sgt. Combs that petitioner was believed to be involved in the sale of marijuana. Sgt. Combs advised Agent Bevins of the DEA about his suspicions regarding petitioner's involvement in the robbery and drug activity, and further requested Agent Bevins to issue the subject administrative subpoena.[2] Sgt. Combs and Agent Bevins both testified that dual investigations of drugs and other crimes is very common as the two are frequently intertwined and often yield evidence of both.[3] As a result of this testimony, the trial court found that this information

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[2] Sgt. Combs testified that he investigated petitioner further, but uncovered no further information supportive of a drug offense.

[3] Agent Bevins testified:

> Q. And what is often times the link between drugs and, for instance, robberies?
> A. Money. They need money. They need quick money to pay back their dealers or get quick cash to make another purchase.
> Q. So there have been numerous other instances where you have issued subpoena duces tecums for phone records where the case involved both a drug investigation or a drug nexus, as you call it, and other criminal activities possibly being involved?
> A. Hundreds over the years.

Sgt. Combs further testified: "[I]t's not uncommon for individuals involved in the drug trade or other criminal activity to commit robberies, home invasions to fund their activity, start-up money, stuff like that."

formed the basis of the administrative subpoena and was "material and relevant to a drug-related investigation[.]"

The majority properly recognizes our standard of review for a motion to suppress, which standard holds that the trial court's findings of fact are to be set aside only when they are clearly erroneous. *State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995). In spite of this long-standing provision, the majority then disregards the trial court's above findings of fact solely because it finds that the subpoena was "suspicious on its face" and the State failed to provide a "believable [] explanation" for the scope of the subpoena. Without question, the majority's handling of this issue smacks of credibility determinations which are plainly within the purview of the trial court to resolve: "On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, *factual findings based, at least in part, on determinations of witness credibility are accorded great deference*." Syl. Pt. 3, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994) (emphasis added).

In particular, the majority is critical of the State's failure to mention a drug investigation during the preliminary hearing. However, as evidenced by the testimony on remand, no drug activity was ultimately discovered during the course of this investigation and certainly no charges were brought against petitioner in that regard. To that end, it is

quite understandable that at the preliminary hearing for the robbery charges, there would be little if any utility in mentioning the suspected drug nexus. Moreover, as to the majority's concern about the date restriction in the subpoena to the dates surrounding the July robbery, the DEA agent who issued the subpoena testified that it was customary to restrict the time period sought otherwise the information was "too much to process."

In sum, the State presented three witnesses, two of whom testified under oath that they were investigating or were aware of a parallel investigation of petitioner for crimes involving controlled substances.[4] This testimony was unrefuted. The trial court

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[4] Sgt. Combs testified:

> A. I asked DEA Agent Tom Begins, explained to him, I said, "I think this individual, Mr. Clark, had committed these robberies and I think he might be selling drugs also – marijuana."
> ***
> Q. And you suspected both that he was dealing in drugs as well as possibly a suspect in this robbery?
> A. Yes.
> Q. And did you tell Agent Bevins both of those things?
> A. Yes.
> ***
> Q. . . . [Y]ou were suspicious of both drug activity and that he was also a possible suspect in the robbery?
> A. Yes.

With regard to the information provided by Sgt. Combs which led to the issuance of the administrative subpoena, Agent Bevins corroborated Sgt. Combs' testimony: "[I]n summary he advised that he had information that the Defendant was selling marijuana; that he was purchasing items that were above his qualifications in life; and that he believed he was involved also in robberies." The State's third witness, Officer McMillian, testified that he was involved only in the robbery investigation and had no personal knowledge outside of that investigation.

found the witnesses reliable and credible and, as a result, concluded that there existed a sufficient drug nexus to warrant issuance of the administrative subpoena. The majority has, in so many words, suggested that these law enforcement officers have collusively manufactured testimony to support the use of the administrative subpoena. Such a brazen insinuation without any evidentiary basis clearly undermines our long-held directive that witness credibility issues are to be afforded great deference by this Court. To that end, I disagree with the majority's conclusion that the administrative subpoena was improperly issued and that petitioner has presented no evidence to establish that the trial court's findings on that issue were clearly erroneous.

Nevertheless, the majority then seizes upon what I believe to be the critical issue presented herein and properly concludes that, the circumstances surrounding the issuance of the subpoena notwithstanding, petitioner has no reasonable expectation of privacy in his phone records. This position is in accord with *Smith v. Maryland*, 442 U.S. 735 (1979), and a number of other states. As such, I believe the majority's analysis is properly ended with this conclusion of law. However, the majority improvidently proceeds with a lengthy narrative culminating in the creation of two new, unnecessary syllabus points which conflate the resolution of evidentiary challenges with the inherent authority of this Court to maintain the integrity of the criminal justice system.

As noted above, I take no issue with the majority's description of this Court's authority and *responsibility* to the proper administration of justice; however, I

believe that this case calls for no more than the proper application of the rule of law. As discussed above, proper application of the deferential standard of review yields the conclusion that the trial court committed no error in determining that the subpoena was properly issued and properly released to local officials likewise engaged in the "enforcement of laws related to controlled substances." 28 C.F.R. §0.103 (2002). As the majority itself notes, it "would have no issue with the State's use of records obtained through a legitimately obtained DEA subpoena if a violation of state law also happened to be discovered in the process of investigating a federal drug crime[.]" Had the majority properly applied the standard of review, it would find itself faced with precisely this scenario and, therefore, properly able to affirm the trial court's ruling on that basis.

Moreover, as demonstrated by the majority, thorough analysis of the Fourth Amendment of the United States Constitution and Article II, Section 6 of the West Virginia Constitution, further leads to the conclusion that petitioner's constitutionally protected expectation of privacy has not been disturbed by production and use of his phone records. Nevertheless, the majority wields this Court's supervisory powers over the courts and constitutional duty to ensure the proper administration of justice as a tool to justify an otherwise well-supported legal determination, thereby inviting allegations of judicial overreaching. While I appreciate a thoroughly reasoned opinion which may serve as an academic primer on particular points of law, the majority's final analysis more closely approximates academic puffery. Such an endeavor is particularly dangerous where constitutional concerns are present and such pontification results in two syllabus

points which purport to allow this Court to supplant the rule of law in the name of amorphous "societal interests."

For these reasons, I respectfully concur. I am authorized to state that Justice Loughry joins me in this concurrence.