

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia
Plaintiff below, Respondent**

vs.) No. 11-0190 (Fayette County 10-F-19)

**Thomas P. Gill
Defendant below, Petitioner**

FILED

**May 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner appeals his conviction by jury in the Circuit Court of Fayette County of one count of breaking and entering and one count of petit larceny and respective sentences of one to ten years and one year, to run 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, the circuit court found that at 12:55 p.m., a female police officer doing a routine sweep of the area behind an Oak Hill strip mall came across petitioner and his brother with their car backed up to the open door of a storage building of a Chinese restaurant; the two suspects appeared to be loading items from the building into the car. As the officer approached the petitioner, she noticed grocery items in the trunk of the subject vehicle. During this initial confrontation, according to the officer's testimony, petitioner closed the trunk of the car while his brother fled. Petitioner also admitted to the officer that he did not own the business in question, nor did he have keys to the building. The officer instructed petitioner to open the trunk again "[f]or officer safety;" she testified that she was unsure if the lid had latched and she needed to search the area of his immediate person; this further served to prevent the other suspect from returning and having access to potential weapons. Once both suspects were detained, the subject vehicle was towed and a search warrant was obtained; a subsequent search revealed additional food items, as well as gloves, pry bars, and bolt cutters. Under these circumstances, the circuit court found that there was no constitutional flaw in having the trunk opened, and that the officer had sufficient evidence to obtain the search warrant. 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.

Petitioner also challenges the sufficiency of the State's evidence as it relates to his conviction of breaking and entering or entering without breaking under count one of the indictment, and argues that the circuit court erred in failing to direct an acquittal on this count. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). After careful consideration of the record and petitioner's arguments, the Court concludes that the State presented sufficient evidence to support the jury's verdict, and this Court finds no error in regard to the circuit court's denial of petitioner's motion for acquittal.

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

Affirmed.

ISSUED: May 16, 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