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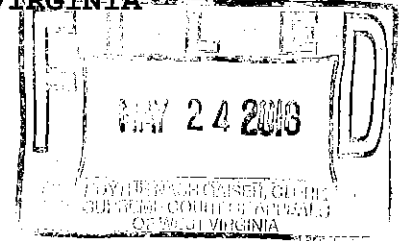
No. 18-0160

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

v.

APPEAL NO. 18-0160



GORDON SWIGER,
Defendant Below, Petitioner

ON PETITION FOR APPEAL
FROM THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA
CASE NO. 17-F-185

BRIEF ON BEHALF OF THE
PETITIONER AND ASSIGNMENT OF ERROR

Ryan J. Umina
W.Va. State Bar No. 13056
CRANSTON & EDWARDS, P.L.L.C.
1200 Dorsey Avenue, Suite II
Morgantown, WV 26501
Phone : (304) 296-3500
rumina@cranstonedwards.com

COUNSEL FOR PETITIONER

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CASE NO. 17-F-185

BRIEF ON BEHALF OF THE PETITIONER

Petitioner, Gordon Swiger ("Petitioner"), hereby appeals to this Court from a Sentencing Order entered on January 24, 2018, by the Honorable Russell M. Clawges, Jr., Judge of the Circuit Court of Monongalia County, that adjudged Gordon Swiger, guilty, upon a conditional plea of guilty pursuant to W.Va. R. Crim. P. 11(a)(2) of the offenses of Burglary and Conspiracy.

ASSIGNMENT OF ERROR

The Circuit Court erred when it found that a "Terry" stop of a vehicle effectuated by municipal police officer acting outside of his territorial jurisdiction was legal.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner and his co-defendants¹ were indicted by the May 2017 Grand Jury in Monongalia County, West Virginia on two (2) counts: Count One of the indictment charged the Petitioner (and his co-defendants) with Robbery in the First Degree, and Count Two charged the Petitioner (and his co-defendants) with Conspiracy. Volume I at 00001-00002. On or about June 21, 2017, the Petitioner's co-defendants filed Motions to Suppress. See *Id.* at 00003-00005. On or about August 23, 2017, the Petitioner joined his co-defendant's motions to suppress. *Id.* at 00009-00011.

Between June 21, 2017 and August 24, 2017, the Circuit Court conducted four (4) days of evidentiary hearings regarding the subject motions to suppress. Specifically, the Circuit Court heard testimony and numerous exhibits were entered into evidence on June 27, 2017, August 7, 2017, August 8, 2017, and August 24, 2017. See Hearing Transcripts at Appendix Volumes II - IV. Additionally, on September 18, 2017, the Circuit Court heard arguments from counsel

¹ Nickolas Lee Velez and John Russell Skidmore were the Petitioner's co-defendants in this matter and both have filed similar appeals.

regarding the issues presented in the motions to suppress and the evidence presented during the prior hearings. See September 18, 2017 Hearing Transcript at Volume V.

Subsequently, the Circuit Court informed the Petitioner and his co-defendants that it was denying the subject motions to suppress; however, the Order Denying Defendant's Motion to Suppress Evidence was not entered until December 15, 2017. Volume I at 00062-00072.

Because of the issue presented in this appeal, as well as those others set forth in the Petitioner's co-defendant's corresponding appeals, the Petitioner and his co-defendants entered conditional pleas of guilty pursuant to W.Va. R. Crim. P. 11(a)(2) to the offenses of Burglary and Conspiracy. *Id.* at 00073-00077. The facts giving rise to the Petitioner's appeal are provided immediately below:

B. Statement of Facts

On or about March 5, 2017, at approximately 9:32p.m., Brett McIntyre ("Mr. McIntyre"), an individual who owned approximately one pound of marijuana in Morgantown, West Virginia, contacted MECCA 911 regarding the robbery of his marijuana and cellular phone. The incident took place at or near Mr. McIntyre's residence located at 221 Willey Street, which is within the corporate limits of the City of Morgantown. See Volume II.

At approximately 9:40p.m., MECCA 911 issued a BOLO, which stated that all units should be on the lookout for "suspects in a burglary, occurred 221 Willey Street . . . all units be on the lookout for three males, wearing masks, wearing black sweatshirts, one armed with a rifle, involved in a burglary, 221 Willey Street, unknown direction of travel, occurred about 5 minutes ago, end of BOLO." Volume VI, CD2, initial BOLO. No identifying vehicle information was provided in the initial BOLO, and no information was given that a vehicle was used in the commission thereof. *Id.*

Shortly thereafter, officers on scene began reviewing video footage captured by surveillance cameras near 221 Willey Street. See Volume III at 12-13. During this process, Morgantown Police Officer Dean Cantis reviewed video footage from the building to the west of where the alleged robbery occurred. Based on Officer Cantis' review, he identified a vehicle that had entered an adjacent municipal parking lot. While testifying, Officer Cantis admitted that he was unable to ascertain any of the following information from his review: (1) where the vehicle was parked, (2) the identify of any of the occupants, (3) whether any of the individuals entering or exiting the vehicle matched the description of the alleged perpetrators, (4) the vehicle's direction of travel upon leaving the parking lot, or (5) any license plate information. Volume IV at 14-33.

Officer Cantis indicated that he relied upon a Google search to identify a possible make and model of the vehicle seen in the video. *Id.* Based on his Google search, Officer Cantis contacted MECCA 911 and stated that "possibly a white four-door Audi" was involved in the alleged robbery but stated that he was "unsure of the model, possibly an Audi A4." Volume VI, CD2 at 7:05. MECCA 911 then sent out an updated BOLO, "all units be on the lookout for possible suspect vehicle, white Audi A4 model, end of update broadcast, 22:21." *Id.* at 7:19.

Officer Aaron Huyett, a patrolman with the Granville Police Department, was observing traffic within the corporate limits of the town of Granville, West Virginia, when the above BOLO was issued. Volume II at 12:4-13:1. "Somewhere between 10:30 at night and 11," Officer Huyett saw a white sedan drive past him with what looked to be multiple occupants inside. *Id.* at 13-14. Officer Huyett then proceeded to follow the vehicle outside of the corporate limits of the town of Granville as he attempted to ascertain whether the vehicle in front of him matched the "possible suspect vehicle" identified in the second BOLO. *Id.* Importantly, at no point did Officer Huyett ever witness the subject vehicle commit any traffic violations or any of its occupants committing any crimes. *See generally Id.*

During the June 27, 2017 hearing on this matter, Officer Huyett testified as follows:

Q. Okay. And do you have before you in Exhibit 1 any documentation from 911 MECCA that identifies how many potential suspects were involved in the armed robbery?

A. In this BOLO, it's suspected that there was three.

Q. Okay. And in fact, the vehicle that you stopped, contained how many persons?

A. Four individuals.

Q. Four. Okay. So before making this actual stop, before - and let's back up. Before making the actual stop, how did you stop this vehicle?

A. Excuse me, sir?

Q. How did you stop - how did you physically engage the vehicle that was stopped?

A. Once I was comfortable enough that there was another unit available, I activated my emergency overhead lighting apparatus, activated my siren, and the vehicle then pulled over to the side of the road and just came to a stop.

Q. And, actually the place of the stop was on I-79?

A. Yes, sir.

Q. Outside the corporate jurisdiction of the City of Granville?

A. Yes, sir.

Q. How far outside? Mile marker - and, again, I'm going to show you Exhibit 2, if that helps you. That's the report of your stop, I believe, is it not?

A. Yes, sir.

Q. It's signed and dated 05/6/17, and you can use either the Exhibit 1, the MECCA records, or your report to refresh your recollection here. Tell us where you effectuated the stop outside the jurisdiction of Granville?

A. According to my report, it was at the 151 and a half mile marker on I-79 South.

Q. Where do you - does Granville, to your knowledge, and best on your practice and procedure and training as a police officer and patrolman of Granville, where does I-79 intersect within the corporate jurisdiction boundaries of your town that you serve?

A. I-79 is not within the boundaries of my town.

Q. How far outside of the jurisdiction of your town was this stop of the vehicle and these four occupants effectuated?

A. Approximately between two, two and a half miles.

Q. Okay. And you knew that - you had not even started your lights or siren or the procedure you identified as utilized to effectuate the stop within the jurisdiction; had you?

A. No, sir.

Q. So you - you encountered the vehicle as it passed you on Dent's [sic] Run, and I believe you said you were parked over in Riverside Apostolic Church's lot; is that correct?

Q. Yes, sir.

A. When you first encountered this vehicle, were you within the corporate jurisdiction of Granville?

Q. Yes, sir.

A. Okay. And then the car proceeded up Dent's [sic] Run, you pulled out, and followed?

Q. Yes, sir.

A. And then you knowingly, in following the vehicle, left the jurisdiction?

Q. Yes, sir.

Volume II at 24:7-26:22.

During the September 18, 2017 hearing, the following exchanges took place between the Court and the State:

THE COURT: [. . .] Let me just ask one question off the top, is it your position that Officer Huyett had probable cause to arrest at the time that he made the stop?

MR. NOEL: No, Judge. It is the State's position that there was reasonable suspicion, based on the two BOLOs that were issued to stop that vehicle.

THE COURT: That's a good place to start the analysis, how do you justify the stop outside the jurisdiction?

MR. NOEL: Relying on the Horn case and the Navarette case, where the Supreme Court defined what reasonable suspicion should be as much lower than what I believe the defendants are advocating, that there was reasonable suspicion for Officer Huyett to stop the vehicle based on the BOLOs, and I'll call them cascading BOLOs.

Volume V at 14:9-23

MR. NOEL: [. . .] The Granville Police Department stop - the Huyett stop. I don't think we should call it the Slagle² stop, because, in fairness, I don't believe that Slagle was involved in the initial stop. I think that Huyett was solely responsible for that stop, and that stop occurred at 10:45 P.M. I believe it's fair to say that. Now, Sergeant Slagle arrived shortly after Officer Huyett made the stop, and I don't believe that Officer Huyett attempted to get the suspects out of the vehicle until Sergeant Slagle was on scene.

So then we have the 10:45 P.M. stop. Now, I think the State is going to take the position that for the purposes of the analysis thereafter that this was an investigative detention rather than an arrest, and I think that the detective - Detective Trejo testified about whether or not he had probable cause to arrest the

² Sergeant Slagle is also a member of the Granville, West Virginia, Police Department and was the second unit to arrive at Officer Huyett's stop.

defendants shortly thereafter, and I think his answer was potentially. So I don't believe that we are conceding that probable cause to arrest occurred after the stop or even after the defendants were returned to MPD for purposes of the interviews.

Which brings me to the interviews. The Swiger interview -

THE COURT: Back up for just a second. Let me stop you there. So, basically, what you're looking at this as is more along the lines of a Terry v. Ohio stop?

MR. NOEL: Correct.

Id. at 16:14-17:15.

Approximately three months after the above hearing, the Circuit Court entered its ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, ruling that "The Stop of Defendant John Skidmore's vehicle outside of the Jurisdiction of Granville was not illegal." Volume I at 00062-00072.

SUMMARY OF ARGUMENT

It is well-settled under West Virginia law that a municipal police officer acting outside of his or her territorial jurisdiction has the same policing authority as does a private citizen. *State ex rel. West Virginia v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999); *State v. Horn*, 232 W. Va. 32, 750 S.E.2d 248, (2013). In the case at bar, the Circuit Court ruled that a "Terry" stop of a vehicle effectuated by a police officer acting outside of his jurisdiction and without probable cause was lawful. Pursuant to West Virginia law and the "under color of office" doctrine,

police officers acting outside their jurisdiction but not in fresh pursuit may not utilize the power of their office to gather evidence. Because the officer who effectuated the "Terry" stop at issue was outside of his jurisdiction and not in fresh pursuit, the Circuit Court erred in ruling that such an investigatory stop was not illegal.

ARGUMENT

BECAUSE OFFICER HUYETT'S "TERRY" STOP OF THE SUBJECT VEHICLE OUTSIDE OF HIS TERRITORIAL JURISDICTION WAS MERELY INVESTIGATORY—AND NOT BASED ON PROBABLE CAUSE—IT WAS ILLEGAL AND AS SUCH, ALL EVIDENCE OBTAINED THEREFROM MUST BE SUPPRESSED.

"A law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen and may make an extraterritorial arrest under those circumstances in which a private citizen would be authorized to make an arrest." Syl. Pt. 2, *Gustke*, 205 W. Va. 72, 516 S.E.2d 283. "Under the common law, a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when that misdemeanor constitutes a breach of the peace." *Id.* at Syl. Pt. 3.

In the case of a felony, "a private citizen is authorized to arrest another person who the private citizen believes committed a felony." *Horn*, 232 W. Va. at 46, 750 S.E.2d at 262. "[A] police officer acting beyond his territorial jurisdiction retains power as a private citizen to make an arrest when a felony actually has

been committed and the officer has reasonable grounds for believing the person arrest has committed the crime." *Id.* at 46, 262.

While police officers acting outside of their jurisdictions retain the limited arrest powers of a private citizen, as described above, the "under color of office" doctrine prohibits a law enforcement officer acting outside of his or her jurisdiction from using the indicia of his or her official position to collect evidence that a private citizen would be unable to gather. *Gustke*, 205 W. Va. 72, 516 S.E.2d 283. "Pursuant to the 'under color of office' doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize the power of their office to gather evidence." *Id.* at 81-82, 292-293. "The purpose of this doctrine is to prevent officers from improperly asserting official authority to gather evidence not otherwise obtainable." *Id.* at 82, 293. As this Court has stated, "when officers unlawfully assert official authority, either expressly or implicitly, in order to gain access to evidence, that evidence must be suppressed." *Id.*

Similarly, other jurisdictions have held that a police officer acting as private citizen outside of his or her jurisdiction may not make a "Terry" stop based solely on reasonable suspicion. See e.g., *United States v. Atwell*, 470 F. Supp. 2d 554, 565, 2007 U.S. Dist. LEXIS 4089, *21 ("There is no authority under Maryland Law for a citizen's "Terry" stop based on reasonable

suspicion rather than probable cause [. . .] in order for [the officer's] arrest to be authorized under the common law, he must have had probable cause to believe that a misdemeanor has been committed and that misdemeanor constituted a breach of the peace."); *People v. Niedzwiedz*, 268 Ill. App. 3d 119, 122, 205 Ill. Dec. 837, 644 N.E.2d 53, 55 (1994) ("A police officer exceeds his authority to make a citizen's arrest, however, when he uses the powers of his office to gather evidence unavailable to the private citizen outside his jurisdiction." (citation omitted)); *Garner v. State*, 779 S.W.2d 498, 501, 1989 Tex. App. LEXIS 2878, *4 (private citizen does not have authority to make a Terry stop); *Commonwealth v. Gullick*, 326 Mass. 278, 435 N.E.2d 348, 351 (1982) (accepting defendant's argument that under New Hampshire law, a private citizen may not make an investigative stop).

Here, the State readily admits that the stop at issue was, in fact, a "Terry" stop. As provided at length in the Statement of Facts above, during the September 18, 2017 hearing on this issue, the following exchanges took place between the Court and the State:

THE COURT: [. . .] Let me just ask one question off the top, is it your position that Officer Huyett had probable cause to arrest at the time that he made the stop?

MR. NOEL: No, Judge. It is the State's position that there was reasonable suspicion, based on the two BOLOs that were issued to stop that vehicle.

Volume V at 14:9-23

THE COURT: Back up for just a second. Let me stop you there. So, basically, what you're looking at this as is more along the lines of a Terry v. Ohio stop?

MR. NOEL: Correct.

Id. at 16:14-17:15.

As discussed by this Court in *Gustke*, a police officer acting outside of his or her jurisdiction has only the power of a private citizen and is not permitted to perform an investigatory stop while acting in such a capacity. *Gustke*, 205 W. Va. 72, 516 S.E.2d 283. Nevertheless, the Circuit Court here ruled that the investigatory "Terry" stop at issue was legal.

As the basis for its reasoning that the "Terry" stop at issue was legal, the Circuit Court cites *Gustke* and *Horn*. 205 W. Va. 72, 516 S.E.2d 283; 232 W. Va. 32, 750 S.E.2d 248. Each case is addressed in turn below.

A. Pursuant to this Court's holding in *Gustke*, the "Terry" stop at issue was illegal.

In *Gustke*, a municipal police officer effectuated a stop outside of his jurisdiction after personally observing a vehicle that was being "driven erratically" and "weaving from lane to lane." *Gustke*, 205 W. Va. at 75, 516 S.E.2d at 286. After the stop was made, a Sheriff's Deputy having jurisdiction arrived and performed field sobriety tests indicating that the driver of the vehicle was intoxicated. *Id.* The driver of the vehicle was ultimately charged with driving under the influence, third

offense, and driving while license revoked for driving while under the influence of alcohol. *Id.*

On a Writ of Prohibition by the State, this Court explained, "[a] law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen and may make an extraterritorial arrest under those circumstances in which a private citizen would be authorized to make an arrest." *Id.* at Syl. Pt. 2. "Under the common law, a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when that misdemeanor constitutes a breach of the peace." *Id.* at Syl. Pt. 3. Thus, because the municipal officer had observed a misdemeanor constituting a breach of the peace when he personally witnessed the driver of the subject vehicle "operating an automobile while under the influence," the officer was permitted to make a citizen's arrest. *Id.* at 292, 81.

Although this Court held that that the extraterritorial stop in *Gustke* was legal because of the fact that the municipal officer acting outside of his jurisdiction had witnessed the driver of the vehicle committing a crime permitting a citizen's arrest, it also took the time to address the "under color of office" doctrine. "Pursuant to the 'under color of office' doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize *the power of their office* to gather evidence or ferret out

criminal activity not otherwise observable. . . . The purpose of this doctrine is to prevent officers from improperly asserting official authority to gather evidence not otherwise obtainable." *Id.* at 293, 82 (emphasis in the original). "Thus, when officers unlawfully assert official authority, either expressly or implicitly, in order to gain access to evidence, that evidence must be suppressed." *Id.*

Here, unlike in *Gustke*, the municipal officer who effectuated the "Terry" stop at issue outside of his jurisdiction did not witness any of the occupants of the vehicle committing a misdemeanor or any other alleged crime. And thus, under this Court's express holding in *Gustke*, that officer had no legal right to effectuate an investigatory stop outside of his jurisdiction. Therefore, pursuant to this Court's holdings in *Gustke*, the "Terry" stop at issue in the present case was illegal. In accordance with this Court's discussion of the "under color of office doctrine" in *Gustke*, because the investigatory "Terry" stop at issue was illegal, any evidence gained therefrom must be suppressed.

B. *Horn* is unrelated to the case at bar and provides no legal justification for the "Terry" stop at issue herein.

It is important to note that the issue at bar is *not* the arrest of the Defendant(s), but rather, the extrajurisdictional "Terry" stop performed by Officer Huyett. *Horn*, on the other hand, contemplates the right of a police officer acting outside of his

or her jurisdiction and in his or her capacity as a private citizen to make a felony arrest. Thus, *Horn* is not applicable or analogous to this case. However, because the lower court cited it as legal authority to support its reasoning for denying the Petitioner's Motion to Suppress, a brief discussion is provided below.

In *Horn*, West Virginia police officers were investigating a murder that took place near the West Virginia/Virginia Border in McDowell County, West Virginia. *Horn*, 232 W. Va. 32, 750 S.E.2d 248. The West Virginia officers saw that Mr. Horn had dried blood on his ear, waistband, and boots. *Id.* Additionally, officers observed blood on the steering wheel of Mr. Horn's vehicle. *Id.* When Mr. Horn was questioned about the blood on his ear by the officers, he immediately tried to wipe it away. *Id.* Mr. Horn was also observed scuffing the top of his boots on the heel of his opposite foot, leading officers to believe that he was trying to destroy the evidence of blood on the boots. *Id.* As a result of the foregoing behavior, the West Virginia officers handcuffed Mr. Horn and placed him in the police cruiser. *Id.*

The West Virginia officers mistakenly believed that they were in the State of West Virginia when they interacted with Mr. Horn, when, in fact, they had been in the State of Virginia. *Id.* The circuit court ultimately did not suppress the evidence from Mr. Horn's arrest, "theorizing that the officers had a good faith belief that they were located within the State of West Virginia,

and, upon learning different, the lower court reasoned that the officers executed a citizen's arrest to prevent the destruction of evidence until the Virginia authorities arrived and arrested Mr. Horn." *Id.* at 45, 261.

On appeal, this Court cited its reasoning in *Gustke* and upheld the lower court's ruling and held, "a police officer acting beyond his territorial jurisdiction retains power as a private citizen to make an arrest when a felony actually has been committed and the officer has reasonable grounds for believing the person arrested has committed the crime." *Id.* at 46, 262.

Here, unlike in *Horn*, when Officer Huyett stopped the subject vehicle, he did not have reasonable grounds for believing that its occupants had committed a felony. As explained at length herein, this was a "Terry" stop and thus, investigatory in nature. By the State's own admissions, Officer Huyett did not have sufficient evidence to effectuate an arrest at the time of the stop. See Volume I 00040-00052; Volume V at 14:9-23 ("THE COURT: [. . .] Let me just ask one question off the top, is it your position that Officer Huyett had probable cause to arrest at the time that he made the stop? MR. NOEL: No, Judge. It is the State's position that there was reasonable suspicion, based on the two BOLOs that were issued to stop that vehicle."). Thus, while acting in his capacity a private citizen, Officer Huyett did have any legal right to perform the investigatory stop at issue.

As this Court explained in *Gustke*, "[p]ursuant to the 'under color of office' doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize the power of their office to gather evidence." *Gustke*, 205 W. Va. at 81-82, 516 S.E.2d 292-293. "When officers unlawfully assert official authority, either expressly or implicitly, in order to gain access to evidence, that evidence must be suppressed." *Id.*

Because Officer Huyett's "Terry" stop of the subject vehicle outside of his territorial jurisdiction was merely investigatory—and not based on probable cause—it was illegal and as such, all evidence obtained therefrom must be suppressed.

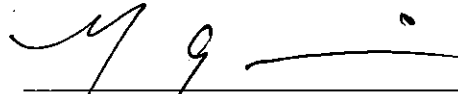
REQUEST FOR ORAL ARGUMENT

The Petitioner requests that he be permitted to present Oral Argument. Given the nature and gravity of the issue presented in this appeal, Petitioner requests argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that this Honorable Court reverse the Circuit Court's Order Denying Defendant's Motion to Suppress, and that this Court rule that the "Terry" stop of the subject vehicle was unlawful, and that all evidence gained therefrom be suppressed.

RESPECTFULLY SUBMITTED,
GORDON SWIGER,
Petitioner, By Counsel.



Ryan J. Umina
W.Va. State Bar No. 13056
CRANSTON & EDWARDS, P.L.L.C.
1200 Dorsey Avenue, Suite II
Morgantown, WV 26501
(304) 296-3500
rumina@cranstonedwards.com