3IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0161

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

NICKOLAS LEE VELEZ,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

ON APPEAL FROM
THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
CRIMINAL ACTION NO. 17-F-186

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I.

INTRODUCTION[1]

Below, Nickolas Lee Velez ("Petitioner") entered a conditional guilty plea which permitted him to appeal the Circuit Court of Monongalia County, West Virginia's ("circuit court"), denial of his motion to suppress a felony traffic stop related to a "Be on the Lookout" call and his subsequent confession to the felony armed robbery referenced therein. Specifically, Petitioner asserted that (1) the stop was defective due to it being effectuated by an officer operating outside of his jurisdiction; (2) the officer who made the stop lacked reasonable suspicion; (3) his confession should be suppressed based upon the officers' alleged violation of the prompt presentment rule; and (4) his confession should be suppressed based upon an alleged deficiency in the Statement of Rights form which apprised him of his *Miranda* right to an attorney. The circuit court, after holding four separate hearings on the matter, taking evidence, reviewing video and audio recordings, and hearing the arguments of counsel, found Petitioner's allegations to be without merit. Its decision was neither a clearly erroneous finding of fact nor an abuse of discretion. The State of West Virginia ("State") therefore requests that this Court affirm Petitioner's conviction upon review.

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[1] Portions of this brief are substantially identical between three appeals pending before this Court. Petitioner Skidmore (18-0139), Gordon Swiger (18-0160), and Nickolas Velez (18-0161) were defendants in the same criminal action below, which was severed at the time each defendant entered a guilty plea. All three Petitioners appeal primarily on the basis of their joint motions to suppress. This Court has deferred the State's Motion to Consolidate at this time. Based upon the identical nature of the issues raised, and in the interest of providing a consistent response, the State furnishes a similar response to all three matters, updated with appendix citations to the individual appendices filed by the various petitioners.

II.

STATEMENT OF THE CASE

A. Statement of Facts

On the evening of March 5, 2017, three assailants entered 221 Willey Street in Morgantown, West Virginia, and robbed Brett McIntyre at gunpoint.[2] Mr. McIntyre reported the crime to MECCA 911 and identified that three white males entered his apartment and were armed.[3] When police officers arrived at the scene, Mr. McIntyre further reported that three males, wearing masks and black sweatshirts, entered his apartment and stole a jar of marijuana and his cellular phone.[4]

1. The Traffic Stop.

Police then issued a "be on the lookout" ("BOLO") call as follows:

> All units stand by for BOLO regarding suspects in a burglary that occurred at 221 Willey Street. All units be on the lookout for three white males wearing masks [and] wearing black sweatshirts. One male armed with a rifle involved in a burglary at 221 Willey Street. Unknown direction of travel. Occurred about five minutes ago, end of BOLO.[5]

Following the officers' review of surveillance footage from the scene, a second BOLO was transmitted containing identifying information about the suspects' car:

> All units stand [ ] by for updated previous BOLO burglary Willey Street. All units be on the lookout for possible suspect vehicle Audi A4 model.[6]

Twenty minutes after the second BOLO call, Granville Police Department Patrolman Aaron Huyett observed a white Audi sedan containing occupants wearing dark clothing drive by

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[2] Appendix Record Volume ("AR Vol.") I at 57.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] AR Vol. I at 57-58.

his location on Dents Run Boulevard in Granville, West Virginia.[7] He followed the vehicle and identified that it was an Audi A4 containing at least three occupants.[8] He then radioed for backup and notified the Morgantown Police.[9] Before backup arrived, however, the vehicle turned onto Interstate 79, southbound.[10]

Once Granville Police Sergeant Joshua Slagle radioed that he was close by, Officer Huyett initiated a felony stop of the vehicle at mile marker 151.5.[11] When initiating the felony traffic stop, Officer Huyett was approximately two miles outside of his jurisdiction.[12] Because the BOLO indicated that the crime was committed with a firearm, however, he waited until backup was nearby before stopping the vehicle.[13] In addition to Officer Huyett and Sergeant Slagle, one canine unit and three other officers supported the stop.[14]

Sergeant Slagle provided cover while Officer Huyett ordered the occupants out of the vehicle: Petitioner, Gordon Swiger, John Skidmore, and Anthony Jimenez.[15] While being secured by Officer Huyett, Mr. Skidmore stated that there was a black airsoft rifle in the trunk and a handgun under the passenger seat.[16] The officers handcuffed the four occupants of the vehicle and held them in custody until the Morgantown Police arrived on the scene.[17] They were not placed under arrest, but were also not free to leave.[18] Beyond inquiring about firearms in the vehicle, no further questions were asked of the occupants at the time.[19]

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[7] AR Vol. I at 58.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *See id.*
[14] AR Vol. I at 59.
[15] *Id.*
[16] AR Vol. I at 60.
[17] *Id.*
[18] *Id.*
[19] *Id.*

In plain view from Officer Huyett's position on the roadway, he observed a dark hat, a black bandana, a small plastic baggie containing what looked like marijuana, and a thirty-round airsoft rifle magazine.[20] He did not secure any of the evidence from within the vehicle, however, and waited for the Morgantown Police Department to arrive and impound the vehicle until they could obtain a search warrant.[21] Once the Morgantown Police arrived on scene, they took custody of Petitioner and the other occupants and transported them to the station while Sergeant Slagle waited behind for the tow truck to impound the vehicle. [22]

Meanwhile, Morgantown Police Detective Daniel Trejo processed the crime scene at 221 Willey Street.[23] When he learned that Officer Huyett initiated a stop of the possible suspect vehicle, he instructed another officer to obtain a search warrant for the vehicle and to detain the occupants for further questioning.[24] After the vehicle was securely transported to the station, Morgantown police recovered: a blue/white star bandana; a Bersa .380 handgun; .380 Winchester ball ammunition; a Valken tactical battle machine airsoft rifle, a black magazine for an airsoft rifle, the jar of marijuana stolen from the home, and several cell phones.[25]

2. The Suspects' Questioning.

At the police department, Petitioner and the other suspects were placed in separate questioning rooms and interviewed individually.[26] Detective Trejo and Detective Benjamin Forsythe first questioned co-defendant Gordon Swiger, who "gave a statement but did not provide any substantive information."[27] They next questioned Anthony Jimenez, who was

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] AR Vol. I at 61.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

ultimately not charged with a crime and released.[28] Third, they questioned Co-Defendant Skidmore, who confessed to the robbery.[29] Further, Co-Defendant Skidmore stated that Petitioner "carried a firearm owned by Co-Defendant Swiger during the commission of the crime."[30]

Prior to the start of his questioning, Detective Trejo reviewed the Statements of Rights form with Petitioner, including five separate statements that explained Petitioner's rights under *Miranda v. Arizona*.[31] Petitioner initialed each statement and indicated that he understood his rights, and then read aloud the "Waiver of Rights" section of the form.[32] Detective Trejo observed that Petitioner "seemed fine" during questioning, "did not have any difficulty communicating" and "did not appear to be under the influence of any substances that would have impaired his thinking."[33]

Petitioner then confessed to the crime and provided details of what took place.[34] As a result, Detective Trejo advised Petitioner that he was under arrest for the crime of robbery in the first degree. [35] Petitioner, Mr. Swiger, and Mr. Skidmore were then processed and arraigned by approximately 9:00 A.M. the following morning.[36]

B. Petitioner's Criminal Proceedings

On May 5, 2017, a Monongalia County Grand Jury returned an indictment against Petitioner, Mr. Swiger and Mr. Velez on one count of Robbery in the First Degree, in violation of W. Va. Code § 61-2-12(a), and one count of Conspiracy, in violation of W. Va. Code § 61-10-

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] AR Vol. I at 61-62; *see generally Miranda v. Arizona*, 384 U.S. 436 (1966).
[32] AR Vol. I at 62.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

31.[37] Roughly one month later, on June 21, 2017, Petitioner moved to suppress all evidence from the stop and Petitioner's custodial interview.[38] As his basis for the motion, Petitioner argued that the stop was unlawful, that Petitioner was intoxicated during the interview and thus incapable of waiving his constitutional rights, and that the search warrant issued for Co-Defendant Skidmore's vehicle was defective based upon the unlawful stop and involuntary waiver.[39]

The circuit court then held several hearings to adjudicate Petitioner's suppression claim, as well as similar claims raised by his co-defendants.[40] At the initial hearing on June 27, 2017, the State first addressed the traffic stop performed by Officer Huyett.[41] Officer Huyett testified that he observed a white Audi M4 containing multiple occupants during routine traffic observation within the town of Granville and called dispatch to confirm the make and model identified by the BOLO, which had first occurred approximately an hour prior.[42] Upon confirming the BOLO, and due to the purported use of a firearm in commission of the crime, Officer Huyett followed the vehicle until such time that backup was "close enough to where [he] felt comfortable to go ahead and initiate a stop on the vehicle."[43] Officer Huyett noted that he considered the stop a felony stop "[b]ecause the BOLO that was issued was for a crime involving a firearm."[44] Based upon this safety concern, Officer Huyett could not perform the stop until he was approximately two (2) miles outside of his jurisdiction.[45] Upon initiating the stop and waiting for the arrival of backup to the scene, Officer Huyett ordered Co-Defendant Skidmore

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[37] AR Vol. I at 1.
[38] AR Vol. I at 3.
[39] AR Vol. I at 4.
[40] *See* AR Vol. II (June 27, 2017, Hearing Transcript); AR Vol. III (Aug. 7-8, 2017, Hearing Transcript); AR Vol. IV (Aug. 24, 2017, Hearing Transcript); and AR Vol. V (Sept. 18, 2017, Hearing Transcript).
[41] AR Vol. II at 8 (AR Vol. II is printed as four pages of transcript per page of appendix. For purposes of this response, the citation to AR Vol. II is per page of appendix, rather than the transcript page.)
[42] AR Vol. II at 9.
[43] *Id.*
[44] *Id.*
[45] AR Vol. II at 11.

out of the vehicle, secured him, and asked if there were firearms within the vehicle.[46] Co-Defendant Skidmore stated that there was a handgun inside the vehicle, although he was not aware if it was loaded.[47] At the time, neither a search warrant nor an arrest warrant had been issued for the vehicle or its occupants.[48]

Based upon the traffic stop's classification as a felony stop related to the BOLO, Officer Huyett and the other responding officers detained the occupants of the vehicle, restrained them with handcuffs, and placed them in the back seats of two separate police cruisers.[49] Neither Officer Huyett nor any of the responding officers outside of their jurisdiction searched the vehicle.[50] Nor did the officers question the occupants.[51] Once officers from the Morgantown Police Department arrived on scene, the occupants were transferred into Morgantown PD police cruisers and taken to the station for questioning.[52]

Detective Trejo then testified that at the station, he reviewed the *Miranda* rights form with Petitioner. [53] He read through each line on the waiver of rights form, asking him to initial each of the individual rights explained by the form.[54] Detective Trejo said that Petitioner had no difficulty communicating and had no significant questions regarding the rights explained on the form.[55] Importantly, Petitioner never appeared to be impaired.[56] After Detective Trejo informed Petitioner of his rights, Petitioner waived those rights and chose to provide a statement.[57]

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[46] AR Vol. II at 9.
[47] *Id.*
[48] AR Vol. II at 13.
[49] AR Vol. II at 14.
[50] *Id.*
[51] AR Vol. II at 15.
[52] *Id.*
[53] AR Vol. II at 24.
[54] *See id.*
[55] AR Vol. II at 24-25.
[56] *Id.*
[57] *Id.*

Detective Trejo testified that he spoke with Petitioner at approximately 2:23 A.M.[58] The delay between the initial stop and Detective Trejo's interview of Petitioner was the result of the transport and questioning of the individual suspects.[59] During the interview Petitioner immediately and truthfully provided Detective Trejo with a complete confession of the crime.[60] Detective Trejo thereafter processed Petitioner, secured a warrant for his arrest, and presented Petitioner to the Morgantown Magistrate Court for arraignment by 9:00 A.M.[61]

While the interviews took place, other Morgantown police officers executed the search warrant on the Audi, which had been towed to police impound.[62] Police procured the warrant based upon the information gleaned from Co-Defendant Skidmore's confession.[63] As a result of the search, police recovered an airsoft rifle and a jar of marijuana from the trunk.[64]

The circuit court held a further hearing on the suppression issue on August 7 and 8, 2017.[65] There, the State called Officer Robert Meador as a witness.[66] Officer Meador testified that he arrived on the scene between 11:30 P.M. and midnight, and that Petitioner was still on the scene at that time.[67] Officer Meador secured the vehicle for towing, waiting for the tow truck to arrive, and assisted with the transport of the suspects back to the Morgantown Police station.[68] Once there, he prepared an affidavit and obtained a search warrant for the vehicle.[69] Upon

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[58] AR Vol. II at 24.
[59] *See* AR Vol. II at 29.
[60] AR Vol. II at 25.
[61] AR Vol. II at 26-27.
[62] AR Vol. II at 24.
[63] *Id.*
[64] *Id.*
[65] AR Vol. III at 1.
[66] AR Vol. III at 7.
[67] AR Vol. III at 8.
[68] *Id.*
[69] *Id.*

searching the vehicle, he and Detective Trejo recovered cell phones, a black rifle magazine, a loaded handgun, and a jar of marijuana.[70]

Following Officer Meador's testimony, Co-Defendant Skidmore's counsel conducted a further follow-up examination of Detective Trejo.[71] Based upon the need to review body- and dash-cam footage, and to question another officer, Patrolman Dean Candis, Co-Defendant Skidmore requested that the hearing be briefly continued.[72] The proceedings resumed on the following day, but the State was unable to retrieve the body-cam footage in so brief a timeframe.[73] Co-Defendant Skidmore then introduced evidence in the form of the 911 call to MECCA regarding the armed robbery, and played it to the court.[74] Co-Defendant Skidmore also testified on his own behalf, contending that he smoked marijuana with Petitioner prior to the stop and they were both under the effects of the drug during the police interviews.[75]

Following Co-Defendant Skidmore's testimony, the circuit court permitted Co-Defendant Swiger to join the motion to suppress.[76] The court also directed the State to subpoena the body- and dash-cam footage from the third party provider who supplied the Granville Police with the technology, and continued the proceedings until such time that Patrolman Candis could appear to testify.[77]

The next hearing occurred on August 24, 2017.[78] Therein, Co-Defendant Skidmore informed the court that he was in the process of obtaining all relevant body- and dash-cam footage, and that he had further obtained a copy of all transmissions regarding the investigation

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[70] AR Vol III at 16.
[71] AR Vol. III at 60.
[72] AR Vol. III at 66-68.
[73] AR Vol. III at 71-72.
[74] AR Vol. III at 77.
[75] AR Vol. III at 82-83.
[76] AR Vol. III at 93.
[77] AR Vol. III at 102-03.
[78] AR Vol. IV at 1.

that were processed through MECCA.[79] Co-Defendant Skidmore then called Patrolman Candis to testify.[80]

Patrolman Candis identified that he arrived at the scene of the robbery and began searching for surveillance footage from the surrounding buildings.[81] After locating and reviewing such footage, he provided information regarding the vehicle that was used by MECCA to send out the BOLO.[82] Specifically, he provided that the suspects fled the scene in a white Audi A4 sedan.[83] Petitioner also recalled Detective Trejo, who identified that the search of the vehicle occurred in the sallyport of the Morgantown Police Department.[84]

Following the hearing, Petitioner filed a memorandum in support of his motion to suppress the stop and his confession to police.[85] Therein, he alleged the same errors he now asserts on appeal.[86] The State subsequently responded,[87] and the circuit court held a final hearing on the matter on September 18, 2017, wherein the court heard the arguments of counsel on the matter.[88]

After the September 18, 2017, hearing, Petitioner entered a conditional guilty plea to one count of the lesser-included charge of burglary and one count of conspiracy.[89] Per the terms of the plea, Petitioner was permitted to appeal the issues raised in his motion to suppress.[90] The court accepted the plea and set the matter for sentencing on January 23, 2018.[91]

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[79] AR Vol. IV at 5-6.
[80] AR Vol. IV at 8.
[81] AR Vol. IV at 12.
[82] AR Vol. IV at 14.
[83] *Id.*
[84] AR Vol. IV at 34.
[85] AR Vol. I at 9.
[86] *See* AR Vol. I at 9-24.
[87] AR Vol. I at 34.
[88] AR Vol. V.
[89] AR Vol. 1 at 73-77.
[90] *See id.*
[91] *See id.*

By order entered December 15, 2017, the circuit court denied all three Co-Defendants' motions to suppress.[92] Therein, the court found that Detective Trejo did not merely stop the vehicle because of a traffic violation, but performed a felony stop in direct connection with the BOLO.[93] It further found that Detective Trejo "was justified in performing a 'felony stop' in which all occupants of the vehicle were cautiously and methodically removed for officer safety, due to the report of a rifle being used in the burglary."[94] Relying on *State v. Horn*, the court concluded that "a police officer who has reasonable grounds to believe a person has committed a crime . . . can act beyond his territorial jurisdiction and affect a stop and arrest."[95] Moreover, because the "investigatory stop was performed in concert with officers who were within their territorial jurisdiction," the stop was not extra-jurisdictional in nature.[96]

With respect to Petitioner, however, the circuit court also determined that he lacked standing to challenge the stop.[97] Relying on *State v. Tadder*, the court found that Petitioner was merely a passenger in the vehicle with no possessory interest in the vehicle or the items seized, and thus suffered no invasion of a legitimate interest of privacy.[98] Thus, Petitioner lacked "standing to assert a violation of his constitutional right against unreasonable search and seizure."[99]

The court also found that the Co-Defendants were properly informed of their *Miranda* rights; that Petitioner was informed of his right to an attorney; that Petitioner waived his rights;

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[92] AR Vol. I at 56-72.
[93] AR Vol. I at 64.
[94] *Id.*
[95] AR Vol. I at 64-65 (citing *Horn*, 232 W. Va. 32, 750 S.E.2d 248 (2013)).
[96] *Id.*
[97] AR Vol. I at 65-66.
[98] AR Vol. I at 65 (*Tadder*, 173 W. Va. 187, 313 S.E.2d 667 (1984)).
[99] AR Vol. I at 66.

and that Petitioner voluntarily and knowingly confessed to police.[100] Further, Petitioner's contention that he was too high to voluntarily or knowingly confess was unsupported by the evidence.[101] Finally, the court concluded that the police did not violate the prompt presentment rule; Petitioner was correctly processed by police and was brought before the magistrate judge at the start of courtroom hours.[102] Following the court's denial of Petitioner's motion to suppress, Petitioner was ultimately sentenced as a youthful offender for a period of six (6) months to two (2) years.[103] Petitioner now appeals.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is unnecessary pursuant to Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure. First, "the dispositive issue or issues have been authoritatively decided" by this Honorable Court.[104] Second, "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument."[105] As such, this matter is ripe for disposition via Memorandum Decision under Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

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[100] AR Vol. I at 66-69.
[101] AR Vol. I at 68-69.
[102] AR Vol. I at 69-70.
[103] AR Vol. I at 78-81.
[104] W. Va. Rev. R.A.P. 18(a)(3).
[105] W. Va. Rev. R.A.P. 18(a)(4).

IV.

SUMMARY OF THE ARGUMENT

A. Petitioner Lacks Standing to Challenge the Stop

As a preliminary matter, Petitioner was a passenger in Co-Defendant Skidmore's vehicle. He had no possessory or privacy interest in the vehicle or the items seized from within. Because of this, he lacks standing to challenge the constitutionality of the traffic stop. The circuit court's finding that Petitioner lacked standing to assert such a challenge is neither an abuse of discretion nor an erroneous finding of fact, and this Court should therefore refuse to review the matter further.

B. Officer Huyett's Felony Traffic Stop Was Lawful

Officer Huyett stopped Co-Defendant Skidmore's car outside of his jurisdiction after observing it within his jurisdiction of Granville and identifying it as the same vehicle referenced in a previously-dispatched BOLO call. Officer Huyett followed the car outside of his jurisdiction only because the subject crime of the BOLO call was armed robbery, and he was waiting on backup for officer safety. Once backup arrived, he effectuated the stop, but did not question Petitioner or search the vehicle, instead waiting for the Morgantown Police Department to send officers to take custody of Petitioner, his co-defendants, and Co-Defendant Skidmore's car. Multiple jurisdictions converged on the stop, including a Monongalia County Sherriff's office deputy. Thus, the stop was lawful under *State v. Horn*, although extra-jurisdictional, because Officer Huyett had a demonstrable and reasonable suspicion that the occupants of the vehicle had just committed a felony.

C. Petitioner's Confession Was Voluntary

Upon arriving at the Morgantown Police Department, Detective Trejo provided Petitioner with a Statement of Rights form, pursuant to *Miranda v. Arizona*. The form, which contained a provision informing Petitioner of his right to an attorney (*and* his right to have an attorney present), was sufficient to inform Petitioner of his rights. Petitioner immediately initialed that he understood his rights and then executed a signed waiver of the same. Shortly thereafter, he confessed to first degree robbery. While Petitioner alleges that the form was deficient the statement contained on the form, when read in its entirety, is unambiguous and compliant with the requirements of *Miranda*.

Thus, Petitioner engages in further tactics to undermine his confession. First, he asserts that he was too intoxicated to consent to a waiver of his rights at the time of his confession. This assertion is unsupported by any evidence within the record beyond Petitioner's own self-serving statement. Detective Trejo testified that he had no reason to believe that Petitioner was intoxicated to the point of rendering a statement involuntary. Nor did Petitioner's recorded statement show any indication that he was intoxicated. At all relevant times during the police interview, Petitioner was alert, oriented, and engaged.

Second, Petitioner attempts to utilize the prompt presentment rule to negate his confession. Between the time of the initial stop and his confession, however, only 4 1/2 hours elapsed. During this time, Petitioner was detained on-scene while awaiting transport to the Morgantown Police Department. He was not questioned while awaiting or in transit. Upon arriving at the station, Petitioner was the fourth individual questioned. There is no evidence that the delay was the result of any underhanded activity to force Petitioner to confess. Rather, police were simply investigating a crime after potential suspects were within the correct jurisdiction to

begin questioning. The only period time between Petitioner's arrest and his confession that is not expressly excluded under *Simmons* is insufficient for this Court to find that a violation of the prompt presentment rule occurred.

Legal precedent indicates that the circuit court below did not abuse its discretion when denying Petitioner's motion to suppress. And the court's factual findings are not clearly erroneous based upon the evidence contained within the record below. Thus, this Court should affirm Petitioner's conviction on appeal.

V.

ARGUMENT

A. Standard of Review

This Court has previously held:

> 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.[106]

Thus, "the circuit court's factual findings are reviewed for clear error."[107] And "the action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion."[108]

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[106] Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).
[107] *Id.*
[108] Syl. Pt. 1, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999).

B. Petitioner Lacks Standing to Challenge Officer Huyett's Felony Stop of Co-Defendant Skidmore's Vehicle.

Below, the circuit court specifically found that Petitioner lacked standing to challenge the constitutionality of Officer Huyett's felony stop, because he had no privacy interest in the car stopped or the items seized. Petitioner merely addresses this finding in passing, and refuses to classify the felony stop as either a search or a seizure. To have standing to assert a constitutional right against the unreasonable search and seizure of a vehicle related to a felony traffic stop, a passenger must have a property or possessory interest in the vehicle, its compartments, or the items seized therefrom.[109] To circumvent this maxim, Petitioner skips directly to his argument that the stop was unlawful. But such an argument ignores the basic premise that to make such an argument, he must first have standing to do so.[110] Because the circuit court found that Petitioner had no possessory interest in the vehicle subject to the stop, and no possessory interest in the items seized, its determination that Petitioner lacked standing is legally sound. Further, because Petitioner failed to proffer evidence that he did have any such interest to establish standing, the court's factual findings are not erroneous. Thus, this Court should refuse to further review the matter on appeal.

C. Assuming, *arguendo*, that Petitioner Established Standing to Challenge the Stop Below, Officer Huyett's Stop of Petitioner Was a Lawful Felony Stop Based Upon the Information Contained in the BOLO Dispatch from MECCA.

Based upon the information contained in the BOLO dispatch from MECCA, Officer Huyett had reasonable suspicion to perform an investigatory stop outside of his jurisdiction. "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

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[109] *State v. Brown*, No. 16-0154, 2017 WL 969152 at * 2 (W. Va. 2017) (citing Syl. Pt. 2, *Tadder*).
[110] *See generally, id.*

circumstances in which a private citizen would be authorized to make an arrest."[111] "A police officer acting beyond his or her territorial jurisdiction retains power as a private citizen to make an arrest when a felony has been committed and the officer has reasonable grounds to believe the person arrested has committed the crime."[112] This Court has further specified that an officer "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."[113] If articulable facts indicate that a weapon may be present during a stop, an officer may take protective precautions to prevent possible danger to himself or others.[114]

Here, Officer Huyett's stop was in direct response to a BOLO dispatch from MECCA following an armed robbery, a felony, in Morgantown, WV. Officer Huyett witnessed a white Audi A4 sedan, the same type of vehicle identified in the BOLO dispatch, carrying multiple occupants, which was also identified in the BOLO dispatch. Upon observing the vehicle (no doubt an irregular vehicle compared to domestic or less-costly imports), and knowing that the occupants could potentially be the same involved in an armed robbery, Officer Huyett wisely waited until backup was present to effectuate the stop. These facts comport with the holdings of *Gutske*, *Horn*, and *Stuart*. Thus, the circuit court's finding is neither an abuse of discretion nor based upon a clearly erroneous finding of fact.

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[111] Syl. Pt. 2, *State ex rel. State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999).
[112] Syl. Pt. 15, *State v. Horn*, 232 W. Va. 32, 750 S.E.2d 248 (2013).
[113] Syl. Pt. 1, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994) *overruling in part State v. Meadows*, 170 W. Va. 191, 292 S.E.2d 50 (1982).
[114] *See* Syl. Pt. 6, *Lacy*.

D. Because Officer Huyett's Felony Stop Was Both Lawful and Based Upon a Reasonable Suspicion that Petitioner Committed a Felony, Petitioner Was Lawfully Detained at the Time of the Stop.

Moreover, Petitioner was lawfully arrested at the time of the investigatory stop, based upon Officer Huyett's reasonable suspicion that the white Audi A4 sedan was the same vehicle identified by the BOLO dispatch. If a felony has actually been committed, an officer acting outside of his jurisdiction retains arrest power.[115] In *Horn*, this Court adopted Virginia case law which held that "a police officer 'acting beyond his territorial jurisdiction . . . nonetheless retain[s] power as a private citizen to make an arrest when . . . [a] felony ha[s] actually been committed and [the officer has] reasonable grounds for believing the person arrested . . . committed the crime."[116] Thus, "the right to arrest in public without a warrant, based on probable cause that the person has or is about to commit a felony, is the general if not universal rule in this country."[117]

For the same reasons above, Petitioner and his Co-Defendants were all lawfully arrested at the time of the stop. After Mr. Skidmore exited the vehicle and informed Officer Huyett that there was a gun in the car, Officer Huyett had more than sufficient evidence demonstrating probable cause that Mr. Skidmore's vehicle was the same vehicle previously identified leaving the scene of the armed robbery. After finding a rifle magazine (police did not yet know that the "rifle" was in fact an airsoft weapon) in plain view within the vehicle, police were well within their rights under *Horn* to detain Petitioner and his Co-Defendants until such time that an investigation could be completed. Applying *Horn*, the circuit court found that Officer Huyett had reasonable grounds to believe Petitioner and his Co-Defendants committed a crime, and that he therefore retained his police power outside of his territorial jurisdiction to affect a stop and

[115] *Horn* at 46, 750 S.E.2d at 262 (citing *Allen v. Lopinsky*, 81 W. Va. 13, 94 S.E. 369 (1917)).
[116] *Id.* (citing *Tharp v. Commonwealth*, 270 S.E.2d 752 (Va. 1980)).
[117] *Id.* (citing Syl. Pt. 4, *State v. Howerton*, 174 W. Va. 801, 329 S.E.2d 874 (1985)).

arrest.[118] Thus, the circuit court's finding is neither an abuse of discretion nor based upon a clearly erroneous finding of fact.

E. Detective Trejo's Investigation, Questioning, and Processing of Petitioner Did Not Violate the Prompt Presentment Rule.

The delay between Petitioner's arrest at approximately 10:45 P.M. on March 5, 2017, and his confession at approximately 2:30 A.M. on March 6, 2017, did not violate the prompt presentment rule. "Our prompt presentment rule contained in W. Va. Code § 62-1-5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest."[119] "Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered."[120]

"The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant."[121] The delay between the time of the arrest or custodial interrogation and the giving of a confession is most critical for prompt presentment purposes because during this time period custodial confinement and interrogation can be used to attempt to produce a confession."[122] "Ordinarily, the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule."[123]

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[118] AR Vol. I at 64-65.

[119] Syl. Pt. 8, *State v. Simmons*, 239 W. Va. 515, 801 S.E.2d 530 (2017) (citing Syl. Pt. 2, *State v. Humphrey*, 177 W. Va. 264, 351 S.E.2d 613 (1986); Syl. Pt. 4, *State v. Rogers*, 231 W. Va. 205, 744 S.E.2d 315 (2013)).

[120] *Id.*

[121] Syl. Pt. 9, *id.* (citing Syl. Pt. 6, *State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982); Syl. Pt. 1, *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984)).

[122] Syl. Pt. 10, *id.* (citing Syl. Pt. 2, *State v. Wickline*, 184 W. Va. 12, 399 S.E.2d 42 (1990)).

[123] Syl. Pt. 11, *id.* (citing Syl. Pt. 4, *Humphrey*).

Importantly, time spent by officers conducting normal policework is typically not calculated as part of the delay for purposes of determining whether a violation of the prompt presentment rules occurred. "Transporting the defendant to the police headquarters or completing normal booking, processing and paperwork must not be included in the time frame of any 'delay.'"[124] This Court also noted that a defendant being kept at the scene for legitimate law enforcement purposes is not included in calculating delay.[125]

Here, Officer Huyett initiated the stop around 10:45 P.M.[126] Morgantown police officers arrived at the stop between 11:30 P.M. and 12:00 A.M. While they awaited the arrival of the Morgantown police, neither Officer Huyett nor the other attending police questioned Petitioner and his Co-Defendants about the crime beyond requesting information related to a protective sweep, nor pressured them to confess. Shortly after arriving at the police station, Detective Trejo began questioning the suspects at 12:17 A.M.[127] Importantly, the investigation of the armed robbery was still ongoing at this time. Police subsequently searched Petitioner's car after effectuating a lawful warrant, and Petitioner himself was questioned at approximately 2:27 A.M.[128]

The facts here could not be more distinct from the facts of *DeWeese*, which Petitioner purports is a "near identical" case.[129] In *DeWeese*, the defendant was arrested via warrant at 4:00 A.M. and held by authorities until 5:00 P.M.[130] A State Trooper thereafter took custody of the defendant, transported him to the local detachment, and interrogated him at 8:00 P.M., *roughly*

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[124] *Id.*, at 527, 801 S.E.2d at 542 (citing *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009)).
[125] *Id.* (citing *Wickline* at 17, 399 S.E.2d at 47).
[126] AR Vol. I at 58.
[127] AR Vol. I at 61.
[128] *Id.*
[129] *See* Pet'r's Br. at 18.
[130] *State v. DeWeese*, 213 W. Va. 339, 343, 213 S.E.2d 786, 790 (2003).

sixteen hours after the initial arrest.[131] The defendant's statement concluded at approximately 9:30 P.M., yet he was still not presented to a magistrate until approximately 10:45 A.M. on the following morning, more than twenty-four (24) hours after his arrest.[132] Thus, this Court found that the "facts clearly establish that the reason Mr. DeWeese was not promptly taken to a magistrate in Ritchie County was that because law enforcement officials wanted to obtain a statement from him."[133] Not only is the timeframe of Petitioner's case vastly dissimilar to that of *DeWeese*, but the surrounding facts indicate that Petitioner's confession was not the result of the four (4) hour delay between the initial stop and his confession.

At the beginning of Petitioner's interview, Detective Trejo reviewed a *Miranda* rights form which Petitioner promptly waived.[134] Petitioner immediately thereafter confessed to the crime. As such, the initial stop, the detainer immediately following the stop (during which no interview was conducted), and the transport of Petitioner and his Co-Defendants to the police station is expressly excluded from the calculation of delay under *Simmons*. Here, based upon the nature of the investigation, the time spent conducting interviews of other individuals, during which Petitioner was not questioned or coerced into confessing, should also fall under the definition of ordinary policework similarly excluded by *Simmons*. Petitioner's confession, which occurred shortly after questioning commenced (and which also followed Co-Defendant Skidmore's confession implicating Petitioner) does not demonstrate the type of coercion necessary for a prompt presentment violation. And this Court should refrain from attributing any of the time following Petitioner's conviction to a prompt presentment violation calculation pursuant to *Simmons*. Thus, the circuit court's reliance on *Simmons* when finding that the prompt

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[131] *Id.*
[132] *Id.*
[133] *Id.* at 344-45, 582 S.E.2d at 791-92.
[134] AR Vol. I at 61-62.

presentment rule was not violated is neither an abuse of discretion nor based upon a clearly erroneous finding of fact.

F. Petitioner's Confession to Detective Trejo Was Knowingly and Voluntarily Given, Because Petitioner Knowingly and Voluntarily Waived His *Miranda* Rights.

The evidence below does not support a finding that Petitioner was too intoxicated to voluntarily waive his *Miranda* rights. "A claim of intoxication may bear upon the voluntariness of a defendant's confession, but, unless the degree of intoxication is such that it is obvious that the defendant lacked the capacity to voluntarily and intelligently waive his rights, the confession will not be rendered inadmissible."[135] As such, a defendant's mere claim "that he was intoxicated at the time the statements were made may have some bearing upon the reliability of the statements, [but] such claim does not preclude their admission into evidence."[136]

Below, the only evidence of Petitioner's intoxication was the testimony of Co-Defendant Skidmore. As observed by the circuit court, however, "the video-recorded interview of Defendant Velez shows that the Defendant appears to be coherent and competent throughout the questioning."[137] "Det. Trejo did not detect any indication that Defendant Skidmore was intoxicated, high, or impaired."[138] The circuit court's factual findings below are not clearly erroneous.

G. The Waiver of Rights Form Detective Trejo Reviewed with Petitioner Is Not Deficient, Because It Properly Informs Petitioner of His Right to an Attorney.

The circuit court's determination that the Statement of Rights form used by Detective Trejo before questioning Petitioner complied with the requirements of *Miranda* was not an abuse of discretion. In *Miranda* the United States Supreme Court held that "an individual held for

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[135] Syl. Pt. 1, *State v. Hall*, 174 W. Va. 599, 328 S.E.2d 206 (1985).
[136] *Id.* at 601, 328 S.E.2d at 208.
[137] AR Vol. I at 69.
[138] *Id.*

interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[139] "A defendant may waive his constitutional rights, as enunciated in *Miranda*, provided the waiver is made voluntarily, knowingly and intelligently."[140] Historically, a police officer's review of a defendant's *Miranda* rights, administered by a Statement of Rights form, has been an acceptable practice within the State of West Virginia.[141] So long as "the language of the warning in its entirety sufficiently informed the defendant of his constitutional rights[,]" a Statement of Rights form complies with the requirements of *Miranda*.[142] As such, "a form with ambiguous language . . . may not alone compel exclusion of a statement, but in combination with the special circumstances of a case may constitute a compelling factor bearing against a knowing and intelligent waiver."[143]

There is no ambiguity here. Upon interviewing Petitioner, Detective Trejo provided him with a form that contained the following statement, which Petitioner initialed that he understood:

> You have the right to consult an attorney before any statement or answering any questions. You may have him present while you are being questioned.[144]

To the extent that Petitioner now argues that the second statement, and particularly the word "may," negates his understanding of the statement as a whole, such argument is meritless when considering it in its entirety. The first sentence of the statement unequivocally confirms that Petitioner had "the right to consult an attorney before any statement of answering any questions." Further, the second part of the statement, indicating that Petitioner "may have [an attorney] present while [he was] being questioned[,]" is also truthful. In whole or in part, the

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[139] *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).
[140] Syl. Pt. 2, *State v. Bragg*, 160 W. Va. 455, 235 S.E.2d 466 (1977).
[141] *See generally State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995); *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).
[142] *Sugg* at 399, 456 S.E.2d at 480 (citing *Duckworth v. Eagan*, 492 U.S. 192 (1989)).
[143] *Id.*
[144] AR Vol. I at 99.

Statement of Rights form complies with the requirements of *Miranda*. Further, in *Sugg*, this Court considered far more ambiguous language and found it to be sufficient. There, the form contained the following language with respect to the defendant's right to counsel: "We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to court."[145] In reviewing the form and the lower court's decision, this Court stressed the importance of examining whether "the language of the warning in its entirety sufficiently informed the defendant of his constitutional rights."[146] Finding that the lower court's conclusion was not clearly erroneous, this Court affirmed the defendant's conviction.[147]

Nor are there any special circumstances that weigh against the alleged ambiguity of the form. The time between the stop and Petitioner's interview was approximately four (4) hours. Petitioner was not coerced, intimidated, or induced into confessing. Petitioner's confession was almost immediate, it was subsequent to the confession of Petitioner's Co-Defendant, and Petitioner knew or should have known that the search of the vehicle would result in clear evidence implicating him in the crime. While Petitioner alleges that he was under the effects of marijuana at the time of the interview, there is no evidence to suggest that he was incapable of understanding his rights.

"[A] trial court's factual findings regarding the voluntariness of a confession will not be set aside unless they are 'plainly wrong or clearly against the weight of the evidence.'"[148] The circuit court had sufficient, if not substantial, evidence to support its denial of Petitioner's motion to suppress. Thus, this Court should affirm Petitioner's conviction below on appeal.

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[145] *Sugg* at 399, 459 S.E.2d at 480.
[146] *Id.*
[147] *See generally id.*
[148] *Id.*

VI.

CONCLUSION

Based upon the foregoing, the State of West Virginia respectfully requests this Honorable Court to affirm Petitioner's conviction within the Circuit Court of Monongalia County, West Virginia.

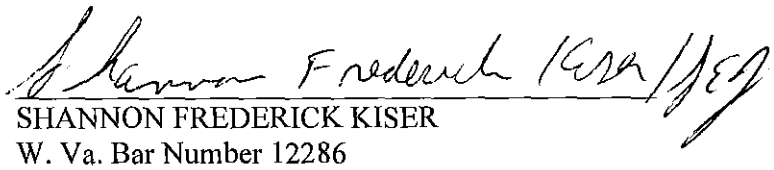
Respectfully Submitted,

STATE OF WEST VIRGINIA,

***Respondent,* By Counsel,**

PATRICK MORRISEY
ATTORNEY GENERAL

Per Procurationem:



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