IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 18-0608

JOSHUA S. DEEM,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

Appeal from a Final Order
of the Circuit Court
of Harrison County (18-F-17)

PETITIONER'S BRIEF

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COMES NOW the Petitioner, Joshua S. Deem, by counsel, George J. Cosenza, and respectfully presents the Petitioner's brief pursuant to the West Virginia Rules of Appellate Procedure.

I. ASSIGNMENT OF ERROR

A. The Circuit Court of Harrison County erred when it denied the motion of the Defendant to suppress all information taken from the Defendant's cellular telephone on the grounds that said cellular telephone was seized from the Petitioner without the benefit of a search warrant, lawful arrest or any other legal justification.

II. STATEMENT OF THE CASE

In the January, 2018 term of Court, the Harrison County, West Virginia Grand Jury indicted the Petitioner, Joshua S. Deem, and charged him with one count of soliciting a minor via computer, in violation of W.Va. Code 61-3C-14b [App 1]. After receipt of discovery, the Petitioner filed a motion to suppress all information taken from the Defendant's cellular telephone on the grounds that said cellular telephone was seized from the Defendant without justification under law. [App 2]. A hearing was held on said motion before the Honorable Thomas A. Bedell on March 22, 2018. [App 62 - 119]. After said hearing, the Court denied the Defendant's motion to suppress [App 49 - 51]. The Petitioner went to trial and was convicted of soliciting a minor via computer as charged in the indictment. It is from said conviction that he files this appeal.

III. STATEMENT OF ARGUMENT

This case involves the justification of seizing personal property from the possession of an individual without the benefit of a search warrant. Because such seizures are considered to be "per se unreasonable", such action must fall within a recognized exception to

the search warrant requirement. See *State v. Moore,* 272 S.E. 2d 804 (1980) and *State v. Farley,* 167 W.Va. 620, 208 S.E. 2d 234 (1981).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners seek oral argument to Rule 19 of the Rules of Appellate Procedure on the grounds that the Circuit Court committed an unsustainable exercise of discretion where the law governing that discretion is settled and this appeal presents a case involving a narrow issue of law. The Petitioner believes this case is appropriate for a memorandum decision.

V. AGRUMENT

The facts relating to the issue in this case are undisputed. Lt. Gary Weaver works for the Bridgeport Police Department on the task force that investigates the exploitation of young children [App. 67, 69]. The beginning his investigation of the Defendant was prompted by an ad he saw on Craigslist entitled "Speed for you." In December, 2016, as part of his training and duties with the task force, he recognized this as a suspicious ad and responded pretending to be a fifteen year old female, to-wit: "YO 15 F BPort." "What's Up" [App. 68]. The person who presumably placed the ad, began e-mailing with Lt. Weaver (posing as the fifteen year old). The e-mails and later texts became inappropriate, including requests for nude photographs from Lt. Weaver's character. [App. 70 -71].

Eventually, Lt. Weaver secured an administrative subpoena for Craigslist and learned that the ad was posted using an e-mail account under the name joshdeem1990@gmail.com. The phone number associated with the ad was 304-917-1527. [App. 73]. Through further police work, the telephone number and e-mail address was traced to the Defendant, Joshua S. Deem.

[App. 75].

On February 2, 2017, Lt. Weaver, accompanied by Parkersburg Police Officer Travis Wolfe and Trooper Jennifer DeMeyer went to Mr. Deem's home located at 39 Baltimore Street, Parkersburg, West Virginia. Mr. Deem's father answered the door and after learning the police officers wanted to speak with the Petitioner, went to get him from his room. Mr. Deem came out on the porch to greet the officers and invited them inside [App. 76 - 77]. Once inside the officers began to question the Petitioner about the ad and subsequent communications with Lt. Weaver. Mr. Deem admitted he placed the ad but was reluctant to answer other questions. [App. 78]. While in the Deem home, Officer Wolfe secretly dialed the phone number given to Lt. Weaver by Craigslist. The mobile telephone in Mr. Deem's pocket began to ring. [App. 80]. The petitioner pulled the telephone out of his pocket and hit the ignore button [App. 85]. He put the telephone back into his pocket. Lt. Weaver asked the Petitioner to give him the phone, but Mr. Deem refused. Lt. Weaver continued to demand the phone and Mr. Deem continued to refuse. Finally, Lt. Weaver and Officer Wolfe forcibly took the telephone from Mr. Deem. After securing the telephone, they left the residence and eventually secured search warrants to recover the information on Mr. Deem's telephone [App. 8 - 17]. The information found was significantly incriminating, and led to the Defendant's conviction.

The Fourth Amendment of the United States Constitution protects citizens against unreasonable search and seizures. Although warrantless searches and seizures are considered to be "per se unreasonable," there are a few specifically established and well-delineated exceptions to the search warrant requirement. *Katz v. United States,* 389 US. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). The exceptions are jealously and carefully drawn, and there must be a showing by those who see exemption that the exigencies of the situation made that course imperative. *State*

v. Moore, _____W.Va. _____, 273 S.E. 2d 804 (1980). The underlying command of each exception is reasonableness. *Kentucky v. King,* _____ U.S. ____ 131 S. Ct. 1849, 179 L.Ed. 2d 865 (2011). When the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search or seizure is objectively reasonable under the Fourth Amendment, police officers are entitled to bypass the warrant requirement. *King, supra.* The types of exigent circumstances that may justify a warrantless seizure include imminent destruction of evidence. *United States v. Grissett,* 925 F.2d 776 (4th cir. 1991).

In West Virginia a warrantless seizure of property in plain view is constitutionally permissible provide three requirements are met: '(1) the police must observe the evidence in plain sight without benefit of a search (without invading one's reasonable expectation of privacy), (2) the police must have a legal right to be where they are when they make the plain sight observation and, (3) the police must have probable cause to believe the evidence seen constitutes contraband or fruits, instrumentalities or evidence of crime.' "Syl. Pt. 7, State v. Moore W.Va., 272 S.E. 2d 804 (1980), quoting, syl. Pt. 3, in part, State v. Stone, W.Va. 268 S.E.2d 445 (1974). The burden rests on the State to show by a preponderance of evidence that the warrantless search falls within an authorized exception." Syl. Pt. 2, State v. Moore, W.Va. 272 S.E.2d 804 (1980).

In the case before the Court, although the police officers had justification to be in Mr. Deem's home, they had no authority to seize his cellular telephone without the benefit of a valid search warrant. There was no indication that any exigent circumstances existed *eg.,* destruction of evidence, that would be an exception to the search warrant requirement.

In *Missouri v. McNeely,* 133 S.Ct. 1552, 185 L.Ed.2d 696, 81 USLW 4250 (2013). The United States Supreme Court rejected the argument that blood could be taken from an

individual to determine his blood/alcohol level without a search warrant on the grounds that during the time it took to get a search warrant the level of blood alcohol could dissipate. In rejecting the State's argument the Court stated:

> When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153.

The same logic applies in the case at bar. There is no evidence that any information on the Petitioner's phone was or could have been destroyed prior to obtaining a search warrant. Therefore, the denial of the Petitioner's motion to suppress was in error and any evidence secured from said telephone should have been suppressed.

VI. CONCLUSION

Based on the foregoing, the Appellant respectfully demands that his conviction by the Circuit Court of Harrison County for soliciting a minor via computer be overturned and that his sentence be vacated.

Dated this 9 day of October, 2018.

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