IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

v. Appeal No. **18-0608**

JOSHUA S. DEEM,
Petitioner.

BRIEF OF RESPONDENT, STATE OF WEST VIRGINIA

Appeal from an August 9, 2018
Sentencing Order
Circuit Court of Harrison County
Case No. 18-F-17

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I. ASSIGNMENT OF ERROR

Joshua S. Deem, ("Petitioner"), by counsel, advances one assignment of error in this appeal. Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the assignment of error is not restated here but will be addressed below.

II. STATEMENT OF THE CASE

As Petitioner notes, the material facts of this case are not in question. In late 2016, Lieutenant Gary Weaver of the Bridgeport Police Department was working with the West Virginia State Police Internet Crimes Against Children Task Force and the Northern District of West Virginia Violent Crimes Against Children FBI Task Force. (App. at 68-69.) In connection with his role in investigating crimes against children, Lt. Weaver initiated an investigation on December 13, 2016, into a Craigslist post — which, unbeknownst to Lt. Weaver at the time, Petitioner had posted — labeled "Speed for You," which appeared to be soliciting females. (App. at 68-69.) Lt. Weaver responded to the post with "YO 15 F BPORT," and "What's up," suggesting to the originator of the post that he was a fifteen-year-old girl from Bridgeport, West Virginia. (App. at 68-69.) Over the course of the following days, Lt. Weaver corresponded through Craigslist messages with Petitioner; during these conversations, Petitioner asked for Lt. Weaver—whom he believed to be a fifteen-year-old girl—to send nude photographs. (App. at 70.) Petitioner also indicated he wanted to meet up and have sexual intercourse with Lt. Weaver's fifteen-year-old character. (App. at 70.) Petitioner's name was also mentioned during the correspondence. (App. at 70.)

After a few days, Petitioner requested that they shift the conversation to text messaging. (App. at 71.) Lt. Weaver responded by providing a specific phone number the department used in undercover investigations, presenting it to Petitioner as his character's personal number. (App. at 71.) During the course of their texting, Lt. Weaver's character indicated several more times that

she was fifteen years old. (App. at 71.) While carrying on the text message conversation, Lt. Weaver noticed that Petitioner's texts came from several different phone numbers; the content of the conversation would be consistent, but after a series of messages from one number, Petitioner's texts would start coming from a different number. (App. at 71-72.) Lt. Weaver's character addressed this to Petitioner, noting that she did not feel that she could trust Petitioner to send him the nude photographs he had requested, because his text messages kept originating from different numbers. (App. at 73.) With a program the department used to determine the carrier associated with specific telephone numbers, Lt. Weaver was able to ascertain that Petitioner was using a smartphone application that transmitted text messages from a rotating series of numbers. (App. at 71-72.)

After a period of carrying on these communications, Lt. Weaver prepared and submitted an administrative subpoena for Craigslist, seeking the email address associated with the initial post. (App. at 73.) Craigslist responded to the subpoena, informing Lt. Weaver that the post had originated from joshdeem1990@gmail.com, and that it was associated with the phone number 304-917-1527. (App. at 73.) Craigslist also provided the IP address from which the initial advertisement had been posted, as well as the date and time it had been posted. (App. at 73.)

For a period of a few weeks in late 2016 and early 2017, the text conversation lapsed. (App. at 74.) On January 19, 2017, Lt. Weaver received a text message from 304-917-1527, the same number that had been associated with the Craigslist ad. (App. at 74.) Lt. Weaver asked who the sender was, and received the response "Josh." (App. at 75.) The conversation between Petitioner and Lt. Weaver's character then resumed. (App. at 75.) Around that time, Lt. Weaver researched 304-917-1527 and determined that it was a real cellular phone number, rather than another number generated by a smartphone application. (App. at 75.)

Due to Petitioner's name being associated with the emails, Lt. Weaver had investigated him and found that he had prior contacts with another government agency; when Lt. Weaver contacted that agency about him, it provided 304-917-1527 as his phone number. (App. at 75.) Lt. Weaver was also able to find an address in Parkersburg, West Virginia, where Petitioner was apparently living. (App. at 76.) After receiving another text message from the 304-917-1527 number on February 1, 2017, Lt. Weaver coordinated with Detective Travis Wolfe of the Parkersburg Police Department and Trooper Jennifer DeMeyer of the West Virginia State Police to visit Petitioner's suspected address on February 2nd. (App. at 76.)

When the three law enforcement officials knocked on the door of the house they believed to be Petitioner's on February 2nd, Petitioner's father answered the door, and upon inquiry explained that Petitioner was sleeping because he worked night shifts. (App. at 76.) Lt. Weaver asked him to go wake Petitioner up so they could speak to him. (App. at 76.) A woman who was identified as Cindy Deem, whom Lt. Weaver took to be Petitioner's mother, asked why the police were there, and Lt. Weaver said they needed to talk to Petitioner privately. (App. at 77.) When Petitioner came to the door, Lt. Weaver asked if there was somewhere in the house they could speak privately, and suggested that they speak in Detective Wolfe's police cruiser if there was not. (App. at 77-78.) Petitioner invited them into the house, and when Detective Wolfe suggested they move somewhere more private than the living room area, Petitioner stated that they could talk there in front of his father. (App. at 78.)

Lt. Weaver began asking Petitioner questions about his cell phone, including what his number was. (App. at 78.) Petitioner said his number was 304-428-1960. (App. at 78.) When asked if he had the number 304-917-1527, Petitioner claimed it was an old number that was no longer his. (App. at 78.) Petitioner then asked if they could move the conversation into another

part of the house, which they proceeded to do. (App. at 78.) After moving, Lt. Weaver explained that he was pursuing an investigation, and asked Petitioner about his email addresses. (App. at 79.) Petitioner denied any association with the address joshdeem1990@gmail.com. (App. at 79.) When asked, Petitioner did confirm that he occasionally posted ads on Craigslist. (App. at 80.)

The officers had noticed that Petitioner had a phone with him. (App. at 80.) When asked about it, Petitioner stated that it was an Android smartphone, and that his service was through AT&T. (App. at 80.) While the questioning was ongoing, Detective Wolfe took his own cell phone out and initiated a call to 304-917-1527. (App. at 80.) The phone in Petitioner's pocket began to ring, and he pulled it out. (App. at 81.) Lt. Weaver could see on the screen that it listed the caller as "Unknown," and Detective Wolfe held up his phone and informed Petitioner that he was the caller. (App. at 81.) Lt. Weaver told Petitioner at that time that they believed the phone contained evidence of criminal activity, and that they needed to take it. (App. at 85.) Petitioner said that he did not want to give up the phone, pulled it out of his pocket again, and moved his fingers on the screen. (App. at 81-82, 85.) Lt. Weaver and Detective Wolfe then seized the phone away from Petitioner, though he attempted to resist. (App. at 82, 87-88.)

Lt. Weaver then prepared a property receipt for the phone. (App. at 82.) Petitioner's mother came into the room at that point and asked the officers to leave. (App. at 82.) Lt. Weaver explained that they needed to provide Petitioner with a property receipt for his phone, but confirmed that they would leave afterwards. (App. at 82-83.) Lt. Weaver obtained a search warrant for Petitioner's phone before searching it. (App. at 88.)

On January 4, 2018, a Harrison County grand jury indicted Petitioner on one count of attempting to solicit via computer a minor believed to be at least four years younger than himself for an illegal act in violation of West Virginia Code § 61-3C-14b (2016). (App. at 1, 120.) On

February 15, 2018, Petitioner filed a motion to suppress all evidence gleaned from the search of his cell phone on the grounds that it was illegally seized. (App. at 2.) Petitioner also filed a motion to suppress based on the later-issued search warrant for the phone, though that motion is not at issue in this appeal. (App. at 7.)

On March 22, 2018, the Circuit Court of Harrison County held a pretrial hearing on Petitioner's motions. (App. at 65.) At the hearing, the State called Lieutenant Weaver as its sole witness. Weaver testified to the facts of the investigation of Petitioner, including the visit to Petitioner's house, as the events are described above. (App. at 67-88.) Petitioner did not call any witnesses or offer any evidence. (App. at 93.) The Circuit Court then heard arguments on the motion to suppress based on the seizure of Petitioner's phone. (App. at 93.)

Petitioner's arguments focused on the police officers' conduct. Petitioner argued that the officers should have obtained a search warrant for Petitioner's phone prior to coming to his house, and that they were effectively trying to circumvent the warrant requirement by not doing so. (App. at 93-98.) He also argued that there was no evidence Petitioner was attempting to destroy the phone and that no exigent circumstances justified its seizure. (App. at 93-95.) Petitioner conceded, however, that the police officers observed the phone in plain sight and that they were legally in Petitioner's house when they made the observation. (App. at 96.) The State argued that the seizure was proper under the exigent circumstances doctrine, as the officers needed to prevent Petitioner from destroying evidence on his phone, and because the phone was in plain view and they had probable cause to seize it. (App. at 98-99.) The Circuit Court, relying primarily on the plain view doctrine, denied Petitioner's motion to suppress. (App. at 101-02.) The court entered an order embodying this ruling on March 26, 2018. (App. at 49-52.)

Petitioner then proceeded to trial and was convicted. (App. at 121.) Petitioner's sentencing hearing was held on May 24, 2018. (App. at 54.) The Circuit Court entered a sentencing order on June 7, 2018, (App. at 122), an Amended Sentencing Order on June 19, 2018, (*Id.*), and then finally its Second Amended Sentencing Order on August 9, 2018, sentencing Petitioner to not less than two nor more than ten years imprisonment, but suspending that sentence and imposing three years of supervised probation. (App. at 54-60.) It is from that order that Petitioner now appeals.

III. SUMMARY OF ARGUMENT

Petitioner's only assignment of error asserts that the Circuit Court erred in denying his motion to suppress based on the warrantless seizure of his cell phone. While the State concedes that the seizure of his cell phone was effected without a warrant, it was reasonable. The seizure was reasonable both because the phone was in plain view of the officers while they had probable cause to believe it contained evidence of a crime, and because the exigencies of the situation justified the seizure of the phone to prevent the destruction of any evidence it contained.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of Review

On appeal, a circuit court's factual findings regarding a motion to suppress are reviewed for "clear error," and all facts are construed in the light most favorable to the State. Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996) (further explaining that, "[b]ecause 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."). The determination of whether a search or seizure was constitutional is a question of law, and is reviewed *de novo*. *Id.* at Syl. Pt. 2, 468 S.E.2d at 722. "Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made." *Id.*

B. The Circuit Court Did Not Err In Denying Petitioner's Motion to Suppress the Evidence Seized from Petitioner's Cellular Phone.

Petitioner's only assignment of error is that the Circuit Court committed reversible error in denying his motion to suppress the evidence gleaned from his cell phone. (Pet'r's Br. at 4.)

The Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution protect the public from unreasonable searches and seizures by government officials. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); Syl. Pt. 4, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973).[1] These constitutional provisions generally require a government actor obtain a warrant issued upon probable cause before conducting a search. U.S. Const. Amend. IV; W. Va. Const. art. III, § 6; *see also Duvernoy*, 156 W. Va. at Syl. Pt. 5, 195 S.E.2d at 632. Typically, evidence seized without a warrant is subject to the exclusionary rule. *See* Syl. Pt. 1, *State v. Davis*, 170 W. Va. 376, 294 S.E.2d 179, 180 (1982) ("The general rule is that where there is an illegal seizure of property, such property cannot be introduced into evidence, and testimony may not be given in regard to the facts surrounding the seizure of the property.")

There are, however, a number of judicially-created exceptions to this warrant requirement. Syl. Pt. 3, *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111, 114 (2010) (noting that warrantless

[1] In fact, with limited exception, "[t]his Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment." *Duvernoy*, 156 W. Va. at 582, 195 S.E.2d at 634.

searches are *per se* unreasonable subject to "a few specifically established and well-delineated exceptions"); *accord Kentucky v. King*, 563 U.S. 452, 460 (2011) ("[T]he warrant requirement is subject to certain reasonable exceptions."). These exceptions include "searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consensual searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable." *State v. Kimble*, 233 W. Va. 428, 433, 759 S.E.2d 171, 176 (2014) (quoting *State v. Farley*, 230 W. Va. 193, 197, 737 S.E.2d 90, 94 (2012)).

The State acknowledges in this case that Lt. Weaver taking Petitioner's phone constitutes a warrantless seizure for Fourth Amendment purposes. However, the evidence derived from the subsequent warrant-backed search of Petitioner's phone need not be suppressed, as the seizure fell within two exceptions to the warrant requirement: (1) the plain view doctrine and (2) the exigent circumstances doctrine.

1. The Seizure of Petitioner's Phone Was Reasonable Under the Plain View Doctrine.

The Circuit Court relied primarily on the plain view doctrine in denying Petitioner's motion to suppress. As an initial matter, Petitioner has failed to adequately brief the issue of whether the Circuit Court erred in applying the plain view doctrine. While Petitioner cites caselaw related to the doctrine, he offers no argument related its application, focusing instead on his argument that the seizure was not justified under the exigent circumstances exception to the warrant requirement. (Pet'r's Br. at 7-8.) Due to Petitioner's failure to address this issue, this Court should decline to construe his brief to contest the application of the plain view doctrine. *See State v. Allen*, 208 W. Va. 144, 162, 539 S.E.2d 87, 105 (1999) ("In the absence of supporting authority, we decline further to review [these] alleged error[s] because [they] have not been adequately briefed."); *State,*

Dep't of Health & Human Res. v. Robert Morris N., 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (citations and quotations omitted) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim.").

However, even to the extent this Court considers this issue, it is evident that the Circuit Court did not err in finding that the seizure was reasonable under the plain view doctrine. The United States Supreme Court has explained that "[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). This Court set out the requirements of the plain view exception in *State v. Julius*:

> The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

Syl. Pt. 3, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1, 3 (1991); *see Horton v. California*, 496 U.S. 128, 137 (1990) (establishing the requirements this Court adopted in *Julius*). In the hearing below, the Circuit Court relied on *State v. Farley*, an older case which set out a slightly different formulation of the plain view doctrine. (App. at 101-102.) For the plain view doctrine to be satisfied, *Farley* requires:

> (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 that the evidence seen constitutes contraband or fruits, instrumentalities or evidence of crime.

Syl. Pt. 3, *State v. Farley*, 167 W. Va. 620, 280 S.E.2d 234, 235 (1981) (citations and quotations omitted). However, because of the significant overlap between these two tests, and because the record clearly demonstrates that the test set out in *Julius* is satisfied, remand is unnecessary. *See*

Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466, 467 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

The first prong of the *Julius* test, that the officers did not violate the Fourth Amendment in arriving at the place from which they viewed Petitioner's cell phone, is easily satisfied. As noted above, Petitioner invited the officers to come into his home to speak to him. (App. at 78.) Petitioner conceded this point below, (App. at 96) and does so again before this Court, noting "the police officers had justification to be in Mr. Deem's home." (Pet'r's Br. at 7.)

The second *Julius* prong is also satisfied. The first requirement of this prong — that the cell phone was in plain view — is clearly established by the record. For an object to be in "plain view," it must be "obvious to the senses." *United States v. Norman*, 701 F.2d 295, 297 (4th Cir. 1983); *see also* 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 304–05 (2d ed. 1993). Lt. Weaver testified that during the questioning, he had noticed that Petitioner had a phone with him, and that he had put it in his pocket. (App. at 80.) When Detective Wolfe called the number associated with the Craigslist ad, Petitioner's phone started ringing, and he pulled it out of his pocket, where Lt. Weaver could clearly see it. (App. at 81.) When Lt. Weaver asked Petitioner for the phone and Petitioner refused to turn it over, he pulled it out again and started interacting with it with his hand. (App. at 81.) Additionally, Petitioner conceded below that the phone was in plain view, (App. at 96) and does not contest as much before this Court. Accordingly, because Lt. Weaver and the other officers clearly saw Petitioner's cell phone, it was in plain view.

The second requirement of the second prong of *Julius* — that the incriminating character of the phone was immediately apparent — is also satisfied. To meet this requirement, the officers

must have had probable cause to believe that Petitioner's phone contained evidence of a crime. *See State v. Lacy*, 196 W. Va. 104, 118 n.22, 468 S.E.2d 719, 733 n.22 (1996) ("The issue here is whether the incriminating nature of the weapon was 'immediately apparent.' The officers must have probable cause to believe that the item seized is contraband."); *United States v. Waldrop*, 404 F.3d 365, 369 (5th Cir. 2005) (citations and quotations omitted) ("The incriminating nature of an item is immediately apparent if the officers have probable cause to believe that the item is either evidence of a crime or contraband."). This requirement has effectively replaced the third prong of the test used in *Farley*.

In this instance, Lt. Weaver and the other officers had probable cause to believe Petitioner's cell phone contained evidence of the crime of attempted solicitation of a minor. In response to a subpoena, Craigslist had informed Lt. Weaver that the number 304-917-1527 was associated with the ad that gave rise to the investigation. (App. at 73.) Lt. Weaver's undercover identity also received text messages from this number, which continued a conversation in which the sender had requested explicit photographs and expressed a desire to have sexual intercourse. (App. at 70-75.) In coordinating with another government agency, Lt. Weaver found that this number was associated with Petitioner. (App. at 75.) Then, while questioning Petitioner, the officers confirmed that this was in fact Petitioner's cell phone number by calling it while in the room with him. (App. at 80-81.) This occurred just after he had told the officers that this was an old number no longer associated with him. (App. at 78.) These facts, taken together, were more than sufficient to provide Lt. Weaver, Detective Wolfe, and Trooper DeMeyer with probable cause to believe Petitioner's phone contained evidence of a crime. Accordingly, the second prong of *Julius* was satisfied.

Finally, the officers had a lawful right of access to take Petitioner's phone, satisfying the third *Julius* prong. Though this Court has not discussed this prong in detail, federal courts have explained that this prong concerns those scenarios where a police officer sees evidence or contraband in plain view but has no lawful right to enter the property where the item is located. *See United States v. Davis*, 690 F.3d 226, 234 (4th Cir. 2012) (citing *Horton*, 496 U.S. at 128) ("[T]he lawful access requirement is intended to clarify that police may not enter a premises to make a warrantless seizure, even if they could otherwise see (from a lawful vantage point) that there was contraband in plain sight."); *Boone v. Spurgess*, 385 F.3d 923, 928 (6th Cir. 2004) (explaining that the lawful right of access prong refers to "where [an officer] must be to retrieve the item"). In this case, the officers had lawful access to the phone because they had been invited into the house, the location where the seizure was effected.

Because all three prongs of *Julius*'s test are satisfied, Lt. Weaver and the other officers were justified in seizing Petitioner's cell phone without a warrant under the plain view exception to the warrant requirement.[2] Accordingly, the Circuit Court did not err in denying Petitioner's Motion to Suppress.

2. The Seizure of Petitioner's Phone Was Reasonable Under the Exigent Circumstances Doctrine.

"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." *United States v. Brown*, 701 F.3d 120, 126 (4th Cir. 2012) (quoting *King*, 563 U.S. at 460). Preventing the destruction of evidence or contraband is one of the primary examples of exigent circumstances justifying a warrantless

[2] The State notes that the facts would also satisfy the older version of the plain view test relied on by the Circuit Court and cited in Petitioner's brief.

search or seizure. *See King*, 563 U.S. at 460 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)) ("The need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search."). This Court has also recognized the exigent circumstances exception to the warrant requirement. *See State v. Dorsey*, 234 W. Va. 15, 26, 762 S.E.2d 584, 595 (2014) (citation and quotation omitted) ("We have explained that the circumstances . . . justify warrantless searches . . . where there is a risk of a criminal suspect's escaping or fear of destruction of evidence."); *State v. Buzzard*, 194 W. Va. 544, 549 n.11, 461 S.E.2d 50, 55 n.11 (1995) (recognizing that exigent circumstances exist when "quick action is necessary to prevent the destruction of potential evidence").

This Court has explained that "[t]he test for the existence of exigent circumstances is whether the facts would lead a reasonable, experienced police officer to believe the evidence might be destroyed or removed before a warrant could be secured." *State v. Lacy*, 196 W. Va. 104, 112 n.7, 468 S.E.2d 719, 727 n.7 (1996).[3] Federal Courts have explained the test in materially similar terms. *See, e.g., United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir. 1991) (citations and quotations omitted) ("[T]he appropriate inquiry is whether the facts . . . would lead a reasonable, experienced agent to believe that evidence might be destroyed [or removed] before a warrant could

[3] Occasionally when stating this test, this Court has also included language suggesting that police must be "motivated by a need to render aid or assistance" and believe objectively that an emergency exists for the exception to apply. *See, e.g., State v. Kendall*, 219 W. Va. 686, 692, 639 S.E.2d 778, 784 (2006); *Lacy*, 196 W. Va. at 112 n.7, 468 S.E.2d at 727 n.7. This language stems from *State v. Cecil*, 173 W. Va. 27, 311 S.E.2d 144 (1983). A review of *Cecil* clarifies that this language refers to the "emergency" exception to the warrant requirement, in which police officers must be motivated by a need to render aid rather than by law enforcement purposes. *State v. Cecil*, 173 W. Va. 27, 32 n.10, 311 S.E.2d 144, 150 n.10 (1983) ("[T]o justify the application of the emergency doctrine . . . the searching officer must actually be motivated by a perceived need to render aid or assistance . . . [and] a reasonable person under the circumstances must have thought that an emergency existed.") This Court has since made clear that the emergency exception to the warrant requirement is distinct from circumstances in which an officer fears imminent destruction of evidence. *See Ullom v. Miller*, 227 W. Va. 1, 12 n.10, 705 S.E.2d 111, 122 n.10 (2010) (explaining the differences between the emergency exception, the "community caretaker" exception, and exigent circumstances).

be secured."); *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991) ("The police need not . . . produce concrete proof that the occupants of the room were on the verge of destroying evidence; rather, the proper inquiry focuses on what an objective officer could reasonably believe.").

Lt. Weaver testified at the pretrial hearing that, when in response to a request to turn the phone over, Petitioner began interacting with it, Lt. Weaver believed he may have been attempting to destroy evidence. (App. at 81-82.) He explained that, "[b]ased on training[,] experience[,] and having it happen before, things can easily be deleted or the phones can easily be manipulated to delete the information." (App. at 81-82.) In response to Petitioner's arguments, the Circuit Court also observed that "[i]n his experience, [Lt. Weaver] was worried about the deletion of [evidence]." (App. at 100.) Due to the nature of cell phones, as well as the fact that Petitioner started interacting with his phone, Lt. Weaver's belief that Petitioner might destroy or remove evidence of criminal activity from his phone before the officers could secure a warrant was objectively reasonable.

Lt. Weaver's belief that evidence on Petitioner's cell phone could be destroyed was reasonable based in part on the nature of cell phones and digital information. Courts across the country have recognized the danger of destruction or concealment of evidence believed to be on a cellular phone or other portable electronic device. *See, e.g.*, *Brown*, 701 F.3d at 127 ("[I]t was entirely reasonable for the officers to seize Brown's laptop—as they did—to prevent either it or its contents from being damaged or destroyed."); *United States v. Bradley*, 488 F. App'x 99, 103 (6th Cir. 2012) ("[I]t is objectively reasonable to seize a [computer] an officer has probable cause to believe contains evidence of a crime, rather than leave it unguarded in the hands of a suspect who knows that it will be searched."); *United States v. Blood*, 429 F. App'x 670, 671 (9th Cir. 2011) (citation and quotation omitted) ("The fragile and easily destructible nature of the digital evidence at issue raises undeniable concerns regarding loss or possible destruction of contraband

by the owner."); *United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009) (noting that the "seizure of the entire computer to ensure that the hard drive was not tampered with before a warrant was obtained" was reasonable). Indeed, the United States Supreme Court recognized in a similar scenario that seizure of cell phones to prevent destruction of evidence pending the subsequent procurement of a search warrant is appropriate. *See Riley v. California*, 134 S. Ct. 2473, 2486 (2014) (noting the petitioners' "sensible concession" "that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant"); *United States v. Henry*, 827 F.3d 16, 28 (1st Cir. 2016) (citing *Riley*, 134 S. Ct at 2486-87) ("It thus appears that the officers did exactly what the Supreme Court suggested they do: seize the phones to prevent destruction of evidence but obtain a warrant before searching the phones.").

Lt. Weaver's belief that potential evidence on Petitioner's phone was at risk was also reasonable given Petitioner's actions. Lt. Weaver testified that, in response to his request for Petitioner's phone, Petitioner began interacting with the phone. (App. at 81-82.) Given the reasonability of a belief that digital information on a phone can be easily destroyed, the fact that Petitioner began interacting with his phone—directly after Lt. Weaver had asserted his belief that the phone contained evidence of a crime—further justified Lt. Weaver's belief that a seizure under the circumstances was reasonable.

Petitioner argues that there were no exigent circumstances, in that there was "no evidence that any information on the Petitioner's phone was or could have been destroyed prior to obtaining a search warrant." (Pet'r's Br. at 8.) Petitioner errs in his belief that the State must demonstrate that Petitioner was actually attempting to destroy evidence; indeed, Lt. Weaver need only have had a reasonable belief the evidence might be destroyed or removed. *See United States v. Reed*,

935 F.2d 641, 643 (4th Cir. 1991) ("[P]olice need not produce concrete proof that the evidence was on the verge of destruction.").

Petitioner also cites to a United States Supreme Court case in which he claims the 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." (Pet'r's Br. at 7-8 (citing *Missouri v. McNeely*, 569 U.S. 141, 152 (2013)). This statement misrepresents the case cited; in *McNeely*, the Court rejected Missouri's request to establish a *per se* rule that the exigent circumstances exception to the warrant requirement always applied in the context of taking blood from a DUI suspect. *See Missouri v. McNeely*, 569 U.S. 141, 153 (2013). While the Court declined to impose such a *per se* rule, it specifically recognized that the exigent circumstances doctrine could apply based on specific facts. *See id.* ("We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test."). As an initial matter, *McNeely* dealt with a different type of evidence not at issue in this case; additionally, though electronic devices like phones will in many circumstances justify warrantless seizure based upon their nature, State does not seek a *per se* rule that the exigent circumstances doctrine always applies in such cases. Accordingly, Petitioner's reliance on *McNeely* is misplaced.

Because Lt. Weaver's belief that evidence on Petitioner's phone might be destroyed or deleted before a search warrant could be secured was reasonable, the exigencies of the circumstances made the warrantless seizure of the phone reasonable. Therefore, the Circuit Court did not err in denying Petitioner's Motion to Suppress.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's August 9, 2018 Sentencing Order.

STATE OF WEST VIRGINIA,
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