

FILE COPY

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AUG - 5 2019

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

Vs.

No. 19-0428

JEFFREY ALAN SYDER,
Defendant Below, Petitioner

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

1. The Circuit Court erroneously found the search of the Petitioner's home to be lawful and any evidence found thereby to be admissible.

STATEMENT OF THE CASE

Petitioner, Jeffrey Alan Snyder, respectfully submits the following brief in support of his appeal from the Circuit Court of Roane County, West Virginia. The Circuit Court committed reversible error when it ruled that the search of the Petitioner's house by the Roane County Sheriff without a search warrant was lawful.

On March 27, 2018, Mr. Snyder's ex-wife filed a domestic violence petition in the Magistrate Court of Kanawha County, West Virginia. The Magistrate then issued a Domestic Violence Emergency Protective Order (DVEPO). Appendix p. 1. The DVEPO included the statements "It may be a VIOLATION of State and Federal Law to possess any firearm or ammunition while this Order is in effect, even those for which Respondent has a

license." and "According to W.Va. Code §48-27-403 and §48-27-502(b), the Respondent shall not possess any firearms (even those for which the Respondent has a license to possess) or ammunition while this Protective Order is in effect, and you are hereby informed of this prohibition." The Magistrate further ordered "Respondent shall surrender any and all firearms and ammunition possessed or owned by the Respondent to the law enforcement officer serving this Order." The DVEPO was transmitted to the Sheriff of Roane County for service. The DVEPO was later dismissed by the Family Court of Kanawha County after the Petitioner failed to appear for the final hearing. Appendix p. 12.

The Sheriff of Roane County, Todd Cole, testified that, as he was getting out of his car at Mr. Snyder's house, it was his intention to go into Mr. Snyder's house and search everywhere a firearm as small as two or three inches could be. He further testified that, at that point in time, he did not have a search warrant, he did not have an arrest warrant for Mr. Snyder or anyone in the house, he was not in pursuit of Mr. Snyder or anyone believed to be in the house, there was no emergency which would require him to go into the house, and he had no probable cause to believe that Mr. Snyder had committed any crime. Appendix p. 278-280.

Sheriff Cole then testified that as he was getting ready to step across the threshold of Mr. Snyder's house, he still intended to search everywhere a gun as small as two or three inches could be, he did not have a search warrant, he did not have an arrest warrant, he was not chasing anyone, there was no emergency, and he did not have probable cause that Mr. Snyder or anyone in the houses had committed any crime. He further testified that at no point did Mr. Snyder have the opportunity to tell the officers they could not come in and that, if Mr. Snyder had told them they could not come in, they would have ignored it. Appendix p. 280-281.

Sheriff Cole then testified that, once he was inside the house, he smelled marijuana. He further testified that based upon the smell of marijuana, he then believed he had probable cause to arrest Mr. Snyder but he admitted that he did not smell the marijuana until he was already inside the house. There was also a pat-down search of Mr. Snyder wherein a small package of suspected methamphetamine was found in one of Mr. Snyder's pockets which was consistent with personal use. Appendix p. 281-284

After already being in the house and alleging smelling marijuana, Sheriff Cole then sought a search warrant.

Mr. Snyder was indicted by the May 2018 term of the Grand Jury for Roane County for manufacturing a controlled

substance to-wit: Marijuana in violation of West Virginia Code §60A-4-401 and possession with intent to deliver a controlled substance, to-wit: marijuana in violation of West Virginia Code §60A-4-401. Appendix p. 15. A suppression hearing was held September 13, 2018, after which the Circuit Court ruled that the search of Mr. Snyder's house was lawful and any evidence obtained would be admissible at trial. Appendix p. 85. After the Circuit Court made its ruling, the parties entered into a plea agreement wherein Mr. Snyder would agree to plead guilty to Manufacturing a Controlled Substance, to-wit: Marijuana, Count 1 of the indictment. The agreement also included the terms that the State would recommend a sentence of probation, the Defendant preserved his right to appeal the Circuit Court's suppression ruling and that Mr. Snyder would meet with the Roane County Sheriff's Department to instruct them on the process he was using to manufacture the marijuana. Mr. Snyder entered his guilty plea on January 4, 2019. Appendix p. 102. On February 22, 2019, the Circuit Court ordered Mr. Snyder serve a sentence of five (5) years of probation with terms and conditions as ordered by the Court. Appendix p. 113. This appeal followed.

SUMMARY OF ARGUMENT

The Circuit Court committed reversible error when it ruled that the search of Mr. Snyder's house was lawful and any evidence obtained would be admissible.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests oral argument under Rule 19, in that this is a case of settled law and is a narrow issue.

ARGUMENT

THE SEARCH OF THE PETITIONER'S HOME WAS UNCONSTITUTIONAL

"'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated' and that prohibition binds the states. **Wolf v. Colorado**, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782, 1785 (1949), overruled on other grounds, **Mapp v. Ohio**, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)." **State v. Lacy**, 196 W.Va. 104, 468 S.E.2d 719 (1996), 196 W.Va. at 110.

"When the State seeks to introduce evidence that was seized during a warrantless search, it bears the burden of showing the need for an exemption from the warrant requirement and that its conduct fell within the bounds of the exception. See generally **Mincey v. Arizona**, 437 U.S. 385, 391, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 299 (1978) (citing **Vale v.**

Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 1971, 26 L.Ed.2d 409, 413 (1970)). In these situations, simply articulating a safety reason is insufficient; the burden of proof is with the party asserting the exception to establish that the exception is legitimate and not pretextual. A lower level of judicial scrutiny would only serve to increase the possibility of collusion and compound the difficulty encountered in detecting the real purpose of a warrantless search.

There is no question but that activities which take place within the sanctity of the home merit the most exacting Fourth Amendment protection. In **Payton v. New York**, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980), the United States Supreme Court stated: "It is a 'basic principle of Fourth Amendment Law' that searches and seizures inside a home without a warrant are presumptively unreasonable." **Lacy**, *supra* at 111.

"Because the search took place at the defendant's residence, the need for a heightened standard of suspicion is at its zenith. Thus, a reasonable belief that a firearm may have been within the residence, standing alone, is clearly insufficient to justify excusing the warrant requirement. However, adequate justification may exist when law enforcement officers fear for their safety. 'The

circumstances that justify warrantless searches include those in which officers reasonably fear for their safety, where firearms are present, or where there is risk of a criminal suspect's escaping or fear of destruction of evidence.' **United States v. Mendoza-Burciaga**, 981 F.2d 192, 196 (5th Cir.1992). See also **United States v. Caraza**, 843 F.2d 432, 435 (11th Cir.1988). In **Maryland v. Buie**, 494 U.S. 325, 334, 110 S.Ct. 1093, 1098, 108 L.Ed.2d 276, 286 (1990), the Supreme Court recognized that following an in-home arrest, the police may conduct a protective sweep of the premises if there are 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.'" **Lacy**, *supra* at 113.

"The issue of whether a search and seizure is proper is governed by both state and federal constitutions. As has been previously recognized by this Court, '[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution — subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing

by those who seek exemption that the exigencies of the situation made that course imperative." Syllabus Point 1, **State v. Moore**, [165] W. Va. [837], 272 S.E.2d 804 (1980) [, *overruled on other grounds by State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991)]. Syl. pt. 1, **State v. Weigand**, 169 W.Va. 739, 289 S.E.2d 508 (1982).'" **State v. Bookheimer**, 221 W.Va. 720, 656 S.E.2d 471 (2007), at 477.

"The petitioner correctly states that where an encounter rises to the level of a "search" or "seizure," both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution require the search or seizure to be reasonable and that the governmental actor have probable cause and, absent a recognized exception, a validly issued warrant. Moreover, searches and seizures performed without a valid warrant are presumed to be unreasonable and will be lawful only if the search and seizure falls within a recognized exception to the warrant requirement. **Coolidge v. New Hampshire**, 403 U.S. 443, 454–55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 575–576 (1971); accord **Katz v. United States**, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967) (valid warrant requirement supported by probable cause "subject only to a few specifically established and well-delineated exceptions"). In Syllabus Point 20 of **State v. Ladd**, 210 W.Va. 413, 557 S.E.2d

820 (2001), this Court explained as follows: "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution - subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative." Syllabus Point 1, **State v. Moore**, 165 W.Va. 837, 272 S.E.2d 804 (1980), overruled in part on other grounds by **State v. Julius**, 185 W.Va. 422, 408 S.E.2d 1 (1991). See also **State v. Kendall**, 219 W.Va. 686, 639 S.E.2d 778 (2006). Examples of recognized exceptions to the general warrant requirement include certain brief investigatory stops, 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. *Warrantless Searches and Seizures*, 37 Geo.L.J. Ann.Rev.Crim.Proc. 39, 40 (2008). See also **State v. Duvernoy**, 156 W.Va. 578, 195 S.E.2d 631 (1973)." **State v. Farley**, 230 W.Va. 193, 737 S.E.2d 90 (2012), at 94.

In the case at bar, there was no effort made by the State to justify the initial entry of Mr. Snyder's home as being pursuant to a search warrant. Additionally, there was no effort by the State to justify the search of Mr. Snyder's home pursuant to any exception to the warrant requirement except to point to circumstances which arose after the officers were already in the house. Sheriff Cole was frank in his position that the DVEPO authorized him to conduct a general search of Mr. Snyder's home down to and including where an object two inches long might be found. He intended to search Mr. Snyder's house before he even got out of his car so whatever happened after the officers were in the house is irrelevant.

A DVEPO is an order issued in a civil case informing a respondent they are not allowed to possess a firearm and, if they have any, they have to surrender them and authorizes the person serving the order to receive the firearm. That is all the DVEPO does. Nowhere in a DVEPO is law enforcement ordered to search a house for firearms, as Cole stated he believed. Even had the order so stated, it would have been invalid because it would not have been issued pursuant to the required affidavit and would not have particularly describe the place to be searched and the things or persons to be seized. See **State v. Lacy**, *supra* at Syllabus Point 3.

The State is not saved by the subsequent seeking and obtaining of a search warrant. Although it was not argued below, the probable cause for the search warrant was only obtained after the officers were already in Mr. Snyder's house. In order for there to be a "plain view" exception to the warrant requirement, "the police [must] have a legal right to be where they are when they make the plain sight observation". **State v. Julius**, 185 W.Va. 422, 408 S.E.2d 1 (1991) at 6. The police in this case did not have a legal right to be where they were and so evidence obtained while they were in that position, whether for trial evidence or in support of a subsequent search warrant was not found pursuant to the "plain view" exception.

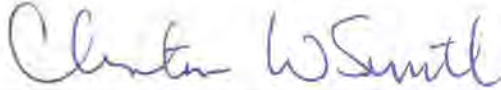
This case involves the warrantless entry of the Petitioner's home without any recognized exception to the warrant requirement even offered. Clearly then, this search was unconstitutional and illegal.

CONCLUSION

Petitioner respectfully requests this Honorable Court grant his Petition for Appeal, set aside the order of the Circuit Court and the Petitioner's conviction and such other

relief as this Court deems just.

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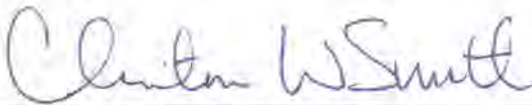
JEFFREY ALAN SYDER,
Defendant Below, Petitioner

CERTIFICATE OF SERVICE

I, Clinton W. Smith, counsel for the Petitioner,
certify that a copy of the foregoing Petitioner's Brief was
served upon:

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by placing the same in an envelope, properly addressed,
with postage fully paid, and depositing the same in the
United States Mail, this 5th day of August 2019.



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