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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

OCT 24 2010

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent

Vs.

No. 19-0428

JEFFREY ALAN SYDER,

Defendant Below, Petitioner

PETITIONER'S REPLY BRIEF

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ARGUMENT

The argument of the State is spurious and ignores the facts and evidence.

First, the State argues that the officers were justified in searching all throughout the Petitioner's home because it was "a potentially dangerous situation". There is no "potentially dangerous" exception to the Fourth Amendment prohibition against unreasonable search and seizure. Nor does any such exception to Article I, §6 of the West Virginia Constitution exist. Taken to its logical extension, any time an officer has interaction with any citizen, it could arguably be called a "potentially dangerous situation" justifying searching the citizen, their car, their room, their house or any part of their property. The argument of the State would have the effect of rendering the Fourth Amendment and Article I, §6, nonexistent.

The Sheriff was there to serve the Domestic Violence Protective Order (hereinafter DVPO). Service of process in criminal matters is the same as service in civil matters. Rule 49(b), West Virginia Rules of Criminal Procedure. "Service upon...a party shall be made by delivering a copy to the...party... Delivery of a copy within this rule means: handing it to the...party..." Rule 5(b), West Virginia Rules of Civil Procedure. All the Sheriff had to do was hand the copy of the DVPO to the Petitioner and he had performed his duty. Further, the DVPO

authorized the Sheriff to receive any guns that the Petitioner had. That was all the DVPO ordered.

There was no reason, authorization or order for the Sheriff to go into the Petitioner's home and anything that occurred after he crossed the threshold is irrelevant. The State attempts to justify the search by parading the fruits of the search. The State further tries to justify the search by claiming a danger existed which was created when the Sheriff and the officers with him exceeded their authority. The State cannot be allowed to retroactively create the justification or authority to search a person's home.

Second, the State sets forth all the testimony offered by Sheriff Cole denying the existence of any circumstance which would have justified a warrantless search of the Petitioner's home and then tries to argue that the Petitioner consented to the officers coming into his house. The State ignores the other testimony of the Sheriff. Initially, the Sheriff mischaracterizes the DVPO by saying "I told him that we had a protective order, and that I had an order to take any guns that were in the home." The DVPO actually states "Respondent *shall surrender* any and all firearms and ammunition possessed or owned by the Respondent to the law enforcement officer serving this Order." DVPO, page 4, emphasis added. The order did not authorize the Sheriff to search the house or to "take" any guns.

In fact, the DVPO did not order the Sheriff to do anything. The DVPO ordered the Respondent to surrender his guns.

There was then the following exchange:

Q: Did you tell him you were coming to get them?

A. Oh, I'm sure we did. It was raining too, and that was one of the reasons we stepped in from outside to the inside.

Q. At no point did Mr. Snyder have the opportunity to tell you , you were not coming in?

A. I don't know that he has the right to tell me no with an order from a judge.

Q. And if he had, you would have ignored it and went in anyway?

A. We would have followed the order, yes, sir.

Suppression hearing transcript, page 14

To suggest that Mr. Snyder consented to the search implies he had the ability to refuse. As the Sheriff testified, if Mr. Snyder had refused entry, assuming he was given the opportunity, his refusal would have been ignored and there would have been a forced entry.

In addition to the above, the suggestion that the Petitioner consented to the search ignores the Sheriff's

testimony that before he even got out of his car he intended to go into the house and search it. Suppression hearing transcript, page 8-9. The Sheriff further reiterated that it was his intention to search the house before he even crossed the threshold of the doorway into the house. Clearly, the Sheriff wrongly believed that the DVPO ordered him to go into the house and search for guns. The Petitioner did not consent because he had no meaningful opportunity to refuse and any attempted refusal would have been ignored. Any suggestion the Petitioner consented to this search is spurious.

Finally, the State argues that a law enforcement officer authorized to do no more than hand a person a piece of paper and receive however many firearms that person may own be allowed to ignore both the United States Constitution and the West Virginia Constitution under the guise of giving him "a little latitude". This Court should remember what Sheriff Cole's intention was before he even got out of his car: "[T]o go into the house and search it, and search everywhere that a gun as small as two or three inches could be". Suppression hearing transcript, page 9. Looking everywhere in a person's home where an object no longer than two inches could be is not giving law enforcement "a little latitude". It is giving law enforcement the authority to search everywhere in everyone's home. It is a complete abrogation of the protections contained in the United States and West Virginia

Constitutions. It would be the ultimate exception that swallowed the rule.

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.

JEFFREY ALAN SYDER

By Counsel



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CERTIFICATE OF SERVICE

I, Clinton W. Smith, counsel for the Petitioner, certify that a copy of the foregoing Petitioner's Reply 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 24th day of October 2019.



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