No. 35529 – State v. Larry S. White, II

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Alsop, J., concurring in part and dissenting in part.

I concur with the result reached in the majority opinion insofar as it recognizes that the evidence obtained from the search of the Motorola cellular telephone, found in Mr. Mahrous's truck, was properly admitted and the trial court did not err in its motion to suppress said evidence. However, I dissent with the majority opinion as to its reasoning that the evidence was properly admitted. The majority opinion declares the evidence was properly obtained pursuant to the search warrant issued in this case, and fails to address the issue of whether Mr. White even had standing to challenge the search and seizure of the Motorola cellular telephone found in the vehicle. I believe the lack of standing on the part of Mr. White to challenge the search of the subject vehicle is the critical issue, rather than the sufficiency and validity of the search warrant. If Mr. White lacked legal standing to challenge the search, then the analysis stops there.

In the instant matter Mr. White did not have standing to challenge the search of the Motorola cellular telephone as he waived any expectation of privacy to said property when he, as the non-vehicle owner, left the cellular telephone in the yellow truck belonging to Mr. Mahrous. Additionally, in light of the evidence in the record that there were no identifying indicators of ownership on the Motorola cellular telephone and it was not password protected. The United States Supreme Court held in *Illinois v. Andreas* that "an act is not a search unless it intrudes upon a legitimate expectation of privacy." 463 U.S. 765, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983). "In order to obtain standing a party must show that the search and seizure violated his personal Fourth Amendment right to a legitimate expectation of privacy in the particular area searched. Ownership or possession of an item seized is insufficient in itself to establish a right to a legitimate expectation of privacy in the particular area searched. A legitimate expectation of

privacy depends upon two factors: whether the defendant has manifested a subjective expectation of privacy in the particular areas searched and whether society is prepared to recognize this expectation of privacy as objectively reasonable." *U.S. v. Burney,* 937 F.2d 603; *Rakas v. Illinois,* 439 U.S. 128 (1978) "The burden of establishing these factors is on the defendant." *Rakas,* 439 U.S. 134. Further, the Court in *Burney* found the "[f]actors relevant to the determination of the defendant's subjective expectation of privacy in the particular area searched include ownership of the items seized, evidence of the defendant's desire to keep the items seized private, and the defendant's presence or absence at the time of the search." *U.S. v. Burney*, 937 F.2d at 603.

This Court recognized in *State v. Calandros* that a defendant has no right to object to a search and seizure where his right of privacy was not violated and his constitutional rights were not affected in that the premises searched and the property seized were in the possession of a third person. 140 W.Va. 720, 86 S.E.2d 242 (1955).

In this case, Mr. White is claiming the evidence obtained from the Motorola cellular telephone belonging to Mr. White, which had no indication of ownership and was not password protected, and was found in the yellow truck, belonging to Mr. Mahrous, was wrongly admitted as the search of the Motorola telephone was unlawful. A claim of protection under the Fourth Amendment and the right to challenge the legality of a search depends not upon person's property right in the invaded place or article of personal property, but upon whether a person has a legitimate expectation of privacy in the invaded place or thing; if a person is in such a position that he cannot reasonably expect privacy, the court may find that an unreasonable Fourth Amendment search has not taken place. *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512 19 L.Ed.2d 576, 583 (1967); *Wagner v. Hedrick*, 181 W.Va. 482 at 487, 383 S.E.2d 286 at 291 (1989). In *Arizona v. Gant,* the United States Supreme Court recognized that a motorist's

privacy interest in his vehicle is less substantial than that of his home; nevertheless, the interest in one's vehicle is important and deserving of constitutional protection. 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

In the case at hand, the vehicle in which the Motorola cellular telephone was found belonged to Mr. Mahrous, not Mr. White.[1] As such, the holding in *Gant* is not applicable as Mr. White was not the owner of the vehicle searched and therefore, is not entitled to any constitutional protections with regard to expectation of privacy. Further, as previously stated, the relevant factors used to determine a defendant's subjective expectation of privacy in a particular area searched include ownership of the items seized, evidence of the defendant's desire to keep the items seized private, and the defendant's presence or absence at the time of the search. *U.S. v. Burney*, 937 F.2d at 605. The trial court in its order denying the motion to suppress, found that Mr. White lacked standing and the trial court was absolutely correct.

I am fearful that the majority opinion goes too far and addresses a developing area of constitutional law that would be best left for another day. First, the majority opinion purports to grant legal standing to challenge the validity of a search, when clearly Mr. White lacked such standing. Secondly, the majority opinion in this case has adopted a very broad new syllabus point, to wit: syllabus point 14, which states:

> "When searching a vehicle pursuant to a valid search warrant, no additional search warrant is required to examine the contents of items that are properly seized in the execution of the warrant, including, but not limited to, cellular telephones",

without citing any authority for such proposition of law.

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[1] The defendant lacks standing to challenge the search of Mr. Mahrous's vehicle. Under *Rawlings v. Kentucky* a defendant bears the burden of demonstrating that they had a legitimate expectation of privacy in the objects searched and/or seized. 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L. Ed. 2d 633 (1980); *United States v. Givens*, 733 F. 2d 339 (4th Cir. 1984); *United States v. Bellina*, 665 F.2d 1335, 1340 (4th Cir. 1981). Further it was found in *United States v. Mehra*, that items placed in property belonging to others create no reasonable expectation of privacy. 824 F.2d 297.

I am of the opinion this broad language may be ill advised. As written, syllabus point 14 would justify a search of the cell phone simply because it was in the vehicle that was searched pursuant to a search warrant. This syllabus point, as written, can be broadly interpreted and will present challenges in the future. This area of law, as to search and seizure of electronic devices, continues to develop under the United States Constitution. For example, what if the cell phone was clearly indentified as not being the property of Mr. Mahrous and was password protected. This syllabus point, as written, would authorize such a search and seizure.

The above syllabus point would justify such a search even when the lawful owner had taken action to protect his privacy, such as by implementing a pass code protection on his or her cellular phone. In this evolving area of searches of computers, iPhones, smart phones, and other electronic devices, such evaluation would be better addressed on another day.

I acknowledge there is nothing to prevent this Court from creating new laws under the West Virginia Constitution. However, the syllabus point above is extremely broad, and may not be constitutionally permissible under the Fourth Amendment of the Constitution of the United States. Provisions of the state constitution may not however provide a lower standard of protection than that afforded by the federal constitution. *Adkins v. Leverette*, 161 W.Va. 14, 239 S.E.2d 496 (1977) (Specifically holding "[w]hile it is true that state may not interpret its constitutional guarantee which is identical to federal constitutional guarantee below federal level[.]")

Accordingly, I respectfully concur in part and dissent in part.