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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO.: 18-0963**

**STATE OF WEST VIRGINIA
Respondent**

**APPEAL FROM THE CIRCUIT COURT
OF FAYETTE COUNTY**

v.

**RAYMOND C. HOWELLS, JR.
Petitioner**

PETITIONER'S BRIEF ON APPEAL

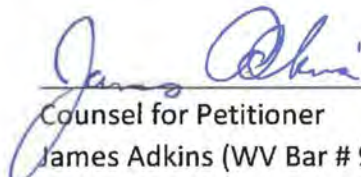

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ASSIGNMENTS OF ERROR

- I: The trial court committed error when it refused to suppress from evidence, all evidence obtained as a result of a recorded transaction within the Petitioner's home without an Electronic Intercept Order issued prior to the transaction.
- I: The Petitioner was Denied Due process when the attorney for the State as proponent of evidence sought to and admitted illegally obtained evidence obtained without a required Electronic Intercept Order.

STATEMENT OF THE CASE

On June 12, 2017, Sgt. Shannon Morris, Fayette County Sheriff's Department and Sgt. Richie Callison, Fayette County Sheriff's Department, operating in an undercover capacity, went to the Petitioner's residence at 357 Thomas Street, Gauley Bridge, Fayette County, West Virginia in search of a confidential informant named Michelle. [T. 56-57, 73]¹. They told the Respondent that Michelle usually supplied them with narcotics when they were in town. [T. 57] The Respondent told the officers that he could supply them with narcotics. [T. 57]

Morris and Callison returned to the residence a short time later to purchase twenty dollars' worth of methamphetamine. Sgt. Morris was wearing a recording device. Callison was able to purchase methamphetamine with Morris present inside of the Petitioner's residence. [T. 57-61]. The officers obtained an Electronic Intercept Order the following day, June 13, 2017.[T. 59, 76-77]²

On June 13, 2017, Morris and Callison arranged to meet the Petitioner at the Walmart in Fayetteville, West Virginia and purchased one hundred dollars' worth of methamphetamine. [T. 61-62]³

On the morning of trial August 24, 2018, counsel for the Petitioner requested a continuance due to the fact that the Electronic Intercept Order was provided to him on August 23, 2018. The court denied the motion. [T. 5-6]

¹ Pages in the trial transcript are referenced in the form [T. Pg#]

² The transaction which occurred at the Defendant's residence is Count 1 of the Indictment.

³ The transaction occurring at the Fayetteville Wal Mart is Count 2 of the Indictment.

At trial counsel for the respondent cross examined Morris concerning the lack of electronic order and counsel for the state questioned about exigent circumstances. [T. 76-79]

Counsel for the Petitioner cross examined Sgt. Callison concerning the lack of an Electronic Intercept order. [T 87-91, 94-95] After making initial contact with the Petitioner, Morris and Callison returned to the Petitioner's residence after about thirty minutes to make a purchase of methamphetamine. They were equipped with a recording device. They did not contact a magistrate or the Prosecuting Attorney. [T 88-91]. An Electronic Intercept Order was issued on June 13, 2017. [T. 91-92; A. 14-16]

The jury was released for lunch and there was a brief hearing on the issue concerning lack of an Electronic Intercept Order. The court avowed to examine the statute (§ 62-1F-1 et seq.) during the recess. [T. 98-105] The court determined that evidence related to Count 1 was admissible as there was retroactive authorization of an Electronic Intercept order. [T. 105-110]

Once the State rested its case, counsel for the Petitioner moved for a judgment of acquittal on grounds that there was no Electronic Intercept at the time of the transaction in Count 1 order nor exigent circumstances present to justify retroactive issuance of an order. [T. 134-135,137] The Prosecuting Attorney assured the court that exigent circumstances existed to enter the Petitioner's home without an Electronic Intercept Order. [T. 138-142]. The court denied the motion for judgment of acquittal. [T. 142]⁴

Counsel again raised issues concerning the Electronic Intercept Act when he requested jury instructions which would permit the jury to acquit if they found that the officers violated the Act. [T. 156-163; A. 19-20] The request for jury instructions was denied. [T. 162-163]

⁴ Counsel for the Petitioner, counsel for the State, and the court were all silent on the requirement in West Virginia Code § 62-1F-9 that exigent circumstances appear on the Electronic Intercept Order when it is issued retroactively.

The Petitioner was convicted of two counts of delivery of methamphetamine and his bond was revoked. [T. 192, 200; A. 2-5]

At sentencing on October 18, 2018, the Petitioner was ordered to served two consecutive terms of not less than one, but not more than five years for his convictions for delivery of methamphetamine. [A. 6-10]

SUMMARY OF ARGUMENT

I: All evidence related to Count 1 should have been excluded because there was not an Electronic Intercept Order in effect at the time law enforcement officers entered the Petitioner's home wearing a recording device to purchase methamphetamine and there is not an explanation of exigent circumstances on the application or Electronic Intercept Order that was issued retroactively.

I: The Defendant was denied due process by the Prosecuting Attorney. As the proponent of evidence in a criminal case, the Prosecuting Attorney should not seek to introduce evidence when they know it has been procured in violation of the Constitution or statutes of the State of West Virginia.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests oral argument pursuant to Rule 20 as there is no established precedent concerning the Electronic Intercept Act.

ARGUMENT

I: The trial court committed error when it refused to suppress from evidence, all evidence obtained as a result of a recorded transaction within the Petitioner's Home without the issuance of an Electronic Intercept Order prior to the transaction.

The trial court committed error when it admitted evidence for Count 1 that was obtained in violation of the Electronic Intercept Act, West Virginia Code § 62-1F-1 et. seq.

It is a violation of the West Virginia Constitution Article III §6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic

recording device to record matters occurring in that person's home without first obtaining a court order pursuant to W.Va. Code § 62-1D-11. Syl. Pt. 2. *State v. Mullens*, 221 W.Va. 70, 650 S.E. 2d 169 (2007).

Shortly following the *Mullens* decision, the legislature enacted §§62-1F-1 et. seq., which sets forth specific requirements for obtaining authorization for the use of a body wire or other surreptitious audio or video recording devices by law enforcement officers within a person's home. The relevant provisions of the Act are as follows:

§62-1F-2 (a) Prior to engaging in electronic interception, an investigative or law enforcement officer shall, in accordance with this article, first obtain from a magistrate or judge of a circuit Court located in the county where the nonconsenting party's home is located, an order authorizing said interception. The order shall be based upon an affidavit by the investigative or law enforcement officer or an informant that establishes probable cause that the interception would provide evidence of the commission of a crime under the laws of this State or the United States.

§62-1F-9 Notwithstanding any other provision of this article, when (1) a situation exists with respect to engaging in electronic interception before an order authorizing before an order authorizing such interception can with due diligence be obtained; (2) the factual basis for issuance of an order exists; and (3) it is determined that exigent circumstances which prevent the submission of an application under section three [§62-1F-3] of this article, conduct or oral communications in the person's home may be electronically intercepted on an emergency basis if an application submitted in accordance with section three of this article is made to a magistrate or circuit court judge within the county wherein the person's home is located as soon as practicable, but not more than three business days after the aforementioned determination. If granted, the order shall recite the exigent circumstances present and be retroactive to the time of such determination. In the absence of an order approving such electronic interception, the interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earliest.

An examination of the Application for Electronic Interception Order and Order Authorizing Electronic Interception dated June 13, 2017, the day following Count 1, reveals on Attachment A Paragraph (4) that the sole statement related to retroactive authorization is that:

"The investigating officer states he and Detective-Corporal W.R. Callison both currently assigned to the Central West Virginia Drug Task Force has purchased Methamphetamine from this subject on (1) occasion on 6/12/2017 during a controlled purchase." [A. 14]

Trial counsel first raised the issue concerning the Electronic Intercept order in the form of a verbal motion for a continuance at the commencement of the trial. [T. 5-6] He cross examined both Morris and Callison concerning the lack of an Electronic Intercept Order to the point where he was admonished by the court. [T. 94-95] The court examined provisions of the Electronic Intercept Act when the jury was released for lunch and denied the Petitioner's oral motion to suppress evidence. [T. 107] Counsel for the Petitioner again raised the issue in his motion for judgment of acquittal at the conclusion of the State's case. [T.134-137] While a written pretrial motion would have been better, counsel did preserve the argument. Counsel again tried to raise the issue concerning a jury instruction on the requirements of the Electronic Intercept Act and the fruit of the poisonous tree doctrine. He was denied by the trial court. [T.160]

While the statute provides for retroactive issuance of an order, there is a requirement that the order shall recite the exigent circumstances presentment. West Virginia Code § 62-1F-9. There was not description of exigent circumstances on the Application, Order, or Attachment. The Electronic Intercept Order is analogous to a search warrant. A court may not permit testimony concerning information not contained in a search warrant in the search warrant affidavit to bolster the affidavit unless contemporaneously recorded at the time and incorporated by reference into the search warrant. *State v. Adkins*, 176 W.Va. 613, 346 S.E. 2d 762 (1986); West Virginia Rules of Criminal Procedure 41 (c).

All evidence related to Count 1 should be excluded under the fruit of the poisonous tree doctrine. Under the fruit of the poisonous tree doctrine, evidence which is located by the police as a result of information and leads obtained from illegal conduct constitutes the fruit of the poisonous tree and is inadmissible in evidence. *State v. Stone*, 165 W.Va. 266, 272, 268 S.E. 2d 50 54-55 (1980) (quoting *French v. State*, 198 So. 2d 668 (Fla Dist. Ct. App. 1967)). Entering the Petitioner's home with a recording device constitutes both a Constitutional and statutory violation. *State v. Mullens*, Syl. Pt. 2., 221 W.Va. 70 (2007), West Virginia Code 62-1F-2, 62 1F-9.

Therefore, all evidence related to Count 1, which occurred within the Petitioner's residence on June 12, 2017 should be excluded from evidence and the conviction and sentence for Count 1 should be vacated.

I: The Petitioner was denied Due Process when the Prosecuting Attorney, as proponent of evidence sought to admit and admitted illegally obtained evidence in violation of the Electronic Intercept Act.

The Petitioner was Denied Due Process when the Prosecuting Attorney, as proponed of the evidence sought to admit and admitted illegally obtained evidence in violation of the Electronic Intercept Act.

In determining whether a statement introduced by the prosecution represents an instance of misconduct we first look at the statement or evidence in isolation and decide if it is improper. If it is, we then evaluated whether the improper statement or evidence rendered the trial unfair. *State v. Guthrie*, 194 W.Va. 657, 677 n. 24, 461 S.E. 2d 163, 183 n.25 (1995).

The Petitioner incorporates by reference all portions of the argument in the preceding section. The Defendant proceeded to trial on an indictment for two counts of delivery of methamphetamine. Counsel for the petitioner unartfully, but persistently sought to suppress evidence related to Count 1 which occurred on June 12, 2018 within the Petitioner's residence.

The prerequisite for admissibility for evidence obtained with the aid of a body wire (recording device) worn by a law enforcement officer within the Petitioner's home was a valid Electronic Intercept Order issued either prior to the transaction or issued retroactively with exigent circumstances recited on the order. West Virginia Code §§ 62-1F-2, 9.

The State has conceded that there was no Electronic Intercept Order prior to the transaction on June 12, 2017. An examination of the Electronic Intercept Order, the Application for the Electronic Intercept Order, and Attachment A does not reveal any recitation of exigent circumstances. Therefore,

all evidence obtained by the officers on June 12, 2017 was illegally obtained. That illegally obtained evidence was the sole basis for the Petitioner's conviction on Count 1. The Prosecuting Attorney chose to rely on illegally obtained evidence to obtain a conviction on Count 1.

Ignoring the prerequisites for admissibility of evidence obtained within the Petitioner's Home by use of a law enforcement officer wearing a recording device has resulted in a Due Process violation under Article 3 § 10 of the West Virginia Constitution and the 5th and 14th Amendments of the United States Constitution.

Therefore, the conviction for Count 1 should be vacated.

CONCLUSION

For the reasons stated above, the Petitioner moves the Court for an order suppressing from evidence all evidence pertaining to Count 1 of Fayette County Indictment 18-F-102 and an order vacating the conviction and sentence for Count 1.



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