**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 22-0211
Case No. 21-F-402
Circuit Court of Raleigh County

CHARLES ERIC WARD,

Petitioner.

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# PETITIONER'S REPLY BRIEF

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## Reply Argument

The State in its Response argues three positions. First, that the Petitioner consented to the police entering the premises in question. Second, that the seized firearm was in plain view. Third, that the presence of the officer in the premises was justified for officer safety. Petitioner addresses those assertions below.

### 1. The State's Claim that Petitioner Consented to the Presence of the Officer in the Premises

The State maintains that the Petitioner consented to the Det. Queen entering the basement area of the house where he saw the firearm. Resp. Br. 3-4, 9. However as made clear by the record in the case (A.R. 63-64, 77-88), the Petitioner's opening brief (Pet. Br. 1-5), the circuit court's order denying the motion to suppress (A.R. 36), and even the State's own Response (Resp. Br. 2-3) the officer only asked for permission to enter an inner room of the house after he entered the outer door without consent. The doorway the officer was standing in when he saw the gun was an inner doorway he reached after he walked into the basement without consent. A.R. 77-78. The State in its Response misleadingly claims that the Petitioner's counsel below conceded "that officers were lawfully present to stand at the doorway of the print shop." Resp. Br. 7. As the context of this statement below makes clear, the doorway being discussed was the outer doorway, not the inner doorway to what was called the "side room" where the gun was located. A.R. 60-61. This case is not about whether the Petitioner consented to the police entering the house. The evidence indicates that he did not. The only issue for this Court to decide is whether the police were justified to enter without his consent.

## 2. The State's Claim that the Firearm was in Plain View

The State asserts in its Response that the firearm was in "plain view" and the facts meet all the requirements of the plain view doctrine as set forth on *State v. Julius*, Syl. Pt. 3, 185 W.Va. 422, 408 S.E.2d 1 (1991). Resp. Br. 7. The State is wrong. The first factor of the *Julius* test is "that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed." *Id.* That is exactly what happened in this case. The record below is clear that there was no search warrant and no consent to enter the basement of the house in question. A.R. 63-64, 77-88. The circuit judge found as much. A.R. 35-37. The State's argument below was that the officer was justified in being inside the basement when he saw the gun based on the officer safety exception to the warrant or consent requirements of the 4th amendment. A.R. 90. That is the only issue present by this appeal. That is, did the officer safety exception justify the officer entering the basement without a warrant or consent?

The Petitioner in his opening brief and now argues that the record below does not justify the officer entering the premises without consent or a warrant, based on the alleged officer safety exception. This is true for two reasons. First, the court erred by not requiring Det. Queen to articulate specific factors that lead him to the conclusion that he needed to enter the building for officer safety. *State v. Lacy*, Syl. Pt. 6, 196 W.Va. 104, 117, 468 S.E.2d 717, 732 (1996). The *Lacy*, *Terry* and *Buie* cases cited by the Petitioner in his opening brief make it absolutely clear that the police safety exception requires the officer provide the court with specific reasons the intrusion into a protected area was necessary. Pet. Br. 9-11. See *Terry v. Ohio*, 392 U.S. 1, 21-23, 27-30 (1968) and *Maryland v. Buie*, 494 U.S. 325, 327 (1990). The only reason Det. Queen gives is that the Petitioner was "agitated ... because of what was going in with the neighbor." A.R. 79. This matter is argued in detail on pages 12-14 of Petitioner's opening brief and need

not be repeated in its entirely here. The following quote from Det. Queen's testimony, however, nails this issue down.

> Q. So you had nothing *specific* to worry about for officer safety, it was just a general thing?
>
> A. We always worry about officer safety when we're in a – go out on a situation.
>
> Q. Of course. But nothing *particular* to this incident gave rise to you fearing for your safety?
>
> A. No.

A.R. 84-85. [Emphasis Added]

Second, the circuit court erred in ruling that the police action of following the Petitioner into the basement was reasonable in light of all the circumstances, separate and apart from the failure to support the police action with *specific, particularized* reasons. That is to say, that even based on the vague and general justification that the Petitioner was "agitated" the court should have found that the police entry of the building was not reasonable. If Det. Queen actually believed that the Petitioner posed a risk grabbing a gun and shooting someone, the last thing he would have done is direct the Petitioner to go into the house where there might be a weapon. While the Petitioner does not believe there was an exigent circumstance, if there was it was created by the officer himself. Police created exigencies are not legitimate exceptions to the search or arrest warrant requirement. *State v. Canby*, Syl. Pt. 1, 162 W.Va. 666, 668-69, 252 S.E.2d 164, 166-67 (1979). The issue of mere agitation creating an exigency is argued to detail on pages 14-16 of Petitioner's brief and will not be repeated here.

As indicated in the Petitioner's brief and the Response the circuit court's findings of the facts are accurate. Pet. Br. 12, Resp. Br. 9. The court found that the officer was inside the building when he saw the gun, and that the Petitioner only consented to the officer entering the

inner room after the officer came into the basement from outside and actually saw the weapon. A.R. 36. The Petitioner's objection to the court's ruling is only to the ultimate legal conclusion that the facts justify applying the police safety exception. Petitioner asserts that the circuit court's conclusion was erroneous and requires reversal. The circuit court's ultimate legal conclusions are subject to a *de novo* standard of review by this Court.

**Conclusion**

The police officer in this case entered the basement of the house without a search warrant or consent. After going inside the building through the outer doorway, he stood in an inner doorway to the Petitioner's shop and from that position saw a firearm. After he saw the gun, he asked the Petitioner if he could come into the inner room. Petitioner said "yes." But the officer was already inside the building when he saw the gun and asked to enter the inner room.

The State seeks to justify this unlawful entry into the building by relying upon the police safety exception. The problem for the State is that the well developed West Virginia and Federal law requires that any such police safety exception be supported by specific, particularized, articulable facts. See *Lacy*, *Terry* and *Buie* cases, *supra*. The officer in this case only testified that "we always worry about officer safety" and that the Petitioner appeared agitated. A.R. 79, 84-85. That is not sufficient to satisfy the specific particularized articulable standard. If this Court upholds this basis for for the police safety exception it means that in order to enter anyone's home or other private premises the police only need to claim that a person inside is agitated, even if the police themselves caused the person to enter the premises. This is the exact circumstance the U.S. Supreme Court was describing when it ruled that "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." *Terry*, 392 U.S. at 21-22. Every time

police knock on a door of a house and a person they deem "agitated" comes to the door, police could justify a search of the inside of the house, at least near the door, for so-called officer safety. This cannot be the law.

For all the reasons set forth above and in the Petitioner's opening brief, the Petitioner moves this Court, exercising the applicable *de novo* standard of review, to reverse the Petitioner's conviction and the circuit court's order denying the Petitioner's motion to suppress, and to remand this case to the circuit court for further proceedings consistent with this Court's order.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I, Gary A. Collias, counsel for Petitioner, Charles Eric Ward, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Reply Brief"* and to the following:

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