IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0211

STATE OF WEST VIRGINIA,

Respondent,

v.

CHARLES ERIC WARD,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the December 2, 2021, Order
Circuit Court of Raleigh County
Case No. 21-F-402

PATRICK MORRISEY
ATTORNEY GENERAL

COURTNEY M. PLANTE
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 12798
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: Courtney.M.Plante@wvago.gov

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF CONTENTS

Other Authorities

INTRODUCTION

Respondent, State of West Virginia, by counsel, Courtney M. Planté, Assistant Attorney General, responds to Charles Eric Ward's ("Petitioner") brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error in the circuit court's denial of his suppression motion to exclude evidence of a firearm seized from his basement. Because the circuit court did not err in denying Petitioner's motion, this Court should affirm the court's order.

ASSIGNMENT OF ERROR

Petitioner raises a single assignment of error:

> The circuit court erred in denying the Petitioner's motion to suppress evidence of a firearm seized by police for the reason that the search and seizure of the weapon was in violation of the Petitioner's rights under the 4th Amendment to the U.S. Constitution and Article III, Section 6 of the West Virginia Constitution.

Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner was indicted on a single count of prohibited possession of a firearm in September 2021.[1] A.R 26. Petitioner filed a Motion to Suppress on November 22, 2021, arguing "that the warrantless seizure of the firearm did not comport with the requirements of the plain view doctrine in violation of the [Petitioner's] rights under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution." A.R. 30. The circuit court held a pretrial hearing on December 1, 2021, during which it heard arguments from counsel and testimony from Petitioner and arresting officer Det. Queen. *See generally*, A.R. 54-103. At the hearing, Petitioner's counsel argued that the police did not have consent to enter the premises

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[1] Petitioner was previously convicted of felony delivery of a Schedule I narcotic, heroin, on December 14, 2017, in the Circuit Court of Raleigh County. A.R. 26.

and, thus, the firearm that was seized "should be suppressed as the fruits of the poisonous tree." A.R. 59.

The testimony at the hearing on the motion to suppress revealed that on March 22, 2021, Dep. J.T. Howard and Det. Roger Queen, both of the Raleigh County Sheriff's Department, responded to a dispute—a "quarreling neighbors call"—at 204 Heritage Street in Raleigh County between Petitioner and a neighbor. A.R. 5, 76. Dep. Howard arrived first on the scene and initially spoke with Petitioner's neighbor. A.R. 76. When Det. Queen arrived on the scene, Dep. Howard had just finished talking to Petitioner's neighbor and was about to speak to Petitioner. A.R. 76. Det. Queen accompanied Dep. Howard to 196 Heritage Street to speak with Petitioner and his mother. A.R. 62–63, 76.

As Dep. Howard was talking with Petitioner, Det. Queen asked Petitioner if he had identification. A.R. 63, 77. Petitioner said that he did but that it was in his t-shirt shop, which was located in the basement of his mother's house. A.R. 63, 71, 77. Petitioner was cooperative and agreed to get his identification. A.R. 63, 84. In fact, in cross-examining Det. Queen, defense counsel pointed out, "And [Petitioner] was complying with you? . . . He went to get it voluntarily? . . . [H]e didn't even have to go do that, did he; he could have said no?" A.R. 84. Det. Queen agreed that Petitioner was cooperative and voluntarily complied. A.R. 84.

Once through the door into the basement, there was a second door immediately to the left. A.R. 63, 77. Det. Queen followed Petitioner through the second doorway "for officer safety." A.R. 77. He stepped inside the second door so he "could see the entire room as [Petitioner] went in there and got his ID." A.R. 85. Det. Queen explained, "We were there for a disturbance." A.R. 77. So, Det. Queen followed Petitioner far enough through the second door that he could see where Petitioner was in order to preserve officer safety. A.R. 79. Det. Queen testified, "And then as

[Petitioner] was getting his ID, I noticed a weapon over in the corner . . . ." A.R. 77. At that point, Det. Queen asked, "Do you mind if I come in?" to which Petitioner answered that he did not. A.R. 77-78, 86. Det. Queen put himself between Petitioner and the gun "in case there was an altercation or in case he changed his mind or whatever." A.R. 87. Det. Queen indicated to Petitioner that he was not supposed to have firearms. A.R. 78. Petitioner admitted that he was a felon but denied that the gun was his. A.R. 78.

Again, Det. Queen clarified that he was concerned about his and Dep. Howard's safety, noting that they were on the scene in response to a dispute between neighbors. A.R. 79. Det. Queen "didn't know the level of [Petitioner's] anger" or against whom it was directed. A.R. 79. Petitioner "was agitated" and the officers did not know whether Petitioner was "going to take that anger out on us or if [he was] going to try to retaliate against the neighbor by grabbing a firearm, a weapon, or whatever." A.R. 79-80. For that reason, Det. Queen felt it "best" to keep an eye on Petitioner. A.R. 80.

Following final arguments by the parties, the circuit court took the matter under advisement. A.R. 32, 98. On December 2, 2021, the circuit court denied Petitioner's suppression motion. A.R. 35-37. The court concluded that "[t]he discovery of the weapon was within the scope of the plain view doctrine." A.R. 36. The court found that Det. Queen had a legitimate reason to be in the doorway—"for the purpose of officer and community safety"—and "[w]hile in that location he observed the object which resembled a firearm, asked permission to enter, and upon entry confirmed that it was a firearm." A.R. 36. The court ruled that the circumstances satisfied the requirements of the plain view doctrine and *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

Subsequently, Petitioner conditionally pled guilty to and was convicted of possession of a firearm having previously been convicted of a felony. A.R. 39-40, 140-43. The court consented to the "entry of this conditional plea pursuant to Rule 11(a) to permit the defendant the defendant to consider an appeal of the Court's December 2, 2021 Order Refusing to Grant Defendant's Motion to Suppress." A.R. 40. The circuit court sentenced Petitioner to five years in the penitentiary. A.R. 42. The court suspended the sentence and ordered that Petitioner be placed on supervised probation for twelve months. A.R. 42. Petitioner appeals the denial of his motion to suppress.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not warranted in this case as "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." W. Va. R. App. P. 18(a)(4). This case is suitable for memorandum decision.

SUMMARY OF THE ARGUMENT

Petitioner's only assignment of error asserts that the Circuit Court erred in denying his motion to suppress based on the warrantless seizure of a firearm in his print shop. While the State concedes that the seizure of the firearm was without warrant, it was reasonable. The seizure was reasonable because the firearm was in plain view of the officers and Petitioner consented to the officers' presence.

STANDARDS OF REVIEW

On appeal, a circuit court's factual findings regarding a motion to suppress are reviewed for "clear error," and all facts are construed in the light most favorable to the State. Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996) (further explaining that, "[b]ecause of the

highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues."). The determination of whether a search or seizure was constitutional is a question of law, and is reviewed *de novo*. *Id.* at Syl. Pt. 2. "Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made." *Id.*

ARGUMENT

The Circuit Court Did Not Err in Denying Petitioner's Motion to Suppress the Firearm Seized in Petitioner's Print Shop.

The Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution protect the public from unreasonable searches and seizures by government officials. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); Syl. Pt. 4, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973).[2] These constitutional provisions generally require a government actor to obtain a warrant issued upon probable cause before conducting a search. U.S. Const. Amend. IV; W. Va. Const. art. III, § 6; *see also* Syl. Pt. 5, *Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631. Typically, evidence seized without a warrant is subject to the exclusionary rule. *See* Syl. Pt. 1, *State v. Davis*, 170 W. Va. 376, 294 S.E.2d 179 (1982) ("The general rule is that where there is an illegal seizure of property, such property cannot be introduced into evidence, and testimony may not be given in regard to the facts surrounding the seizure of the property.")

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[2] In fact, with limited exception, "[t]his Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment." *Duvernoy*, 156 W. Va. at 582, 195 S.E.2d at 634.

This Court has routinely found that "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." Syl. Pt. 3, in part, *State v. Deem*, 243 W. Va. 671, 849 S.E.2d 918 (2020) (quotations and citation omitted). These exceptions to the warrant requirement, however, "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." *Id.* (quotations and citation omitted). These exceptions include "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." *State v. Kimble*, 233 W. Va. 428, 433, 759 S.E.2d 171, 176 (2014) (quoting *State v. Farley*, 230 W. Va. 193, 197, 737 S.E.2d 90, 94 (2012)).

The State acknowledges in this case that Det. Queen's taking of the firearm constitutes a warrantless seizure for Fourth Amendment purposes. But the seizure does not violate the Fourth Amendment as it falls within the plain view doctrine. The United States Supreme Court has explained that "[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). This Court set out the requirements of the plain view exception in *State v. Julius*:

> The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

Id. at Syl. Pt. 3, 185 W. Va. 422, 408 S.E.2d 1 (1991); *see Horton v. California*, 496 U.S. 128, 137 (1990) (establishing the requirements this Court adopted in *Julius*). It is evident that the circuit court did not err in finding that the seizure was reasonable under the plain view doctrine. In the hearing below, the circuit court found that the "circumstances satisfy the elements of the plain view doctrine as stated in *State v. Julius*." A.R. 37. Given that the record clearly demonstrates that the test set out in *Julius* is satisfied, remand is unnecessary.

The first prong of the *Julius* test—that the officers did not violate the Fourth Amendment in arriving at the place from which they viewed the firearm—is easily satisfied. As noted above, the police were called after a neighbor threatened to shoot Petitioner. A.R. 92. In response to the call, officers showed up to speak with Petitioner and the neighbor. A.R. 76. Petitioner does not dispute that officers had justification to be at Petitioner's mother's home. In fact, Petitioner concedes that officers were lawfully present to stand at the doorway of the print shop. A.R. 60.

The second *Julius* prong is also satisfied. The first requirement of this prong—that the firearm be in plain view—is clearly established by the record. For an object to be in "plain view," it must be "obvious to the senses." *United States v. Norman*, 701 F.2d 295, 297 (4th Cir. 1983); *see also* 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 304–05 (2d ed. 1993). Det. Queen explained that he was not looking for a weapon when he followed Petitioner into the print shop as he "wasn't there to search." A.R. 82. Det. Queen testified that he was standing in the doorway and "noticed a weapon in the corner" while Petitioner was getting his ID. A.R. 77. Petitioner's own testimony suggests that once someone entered the t-shirt shop, the gun was in plain view. A.R. 67. Additionally, Petitioner admits in his brief that he believes that testimony by Det. Queen was truthful and accurate and does not contest his veractiy before this Court. Pet'r Br. 12. Accordingly, because Det. Queen clearly saw the firearm, it was in plain view.

The second requirement of the second prong of *Julius*—that the incriminating character of the firearm was immediately apparent—is also satisfied. To meet this requirement, the officers must have had probable cause to believe that the firearm is contraband. *See Lacy*, 196 W. Va. at 118 n.22, 468 S.E.2d at 733 n.22 (1996) ("The issue here is whether the incriminating nature of the weapon was 'immediately apparent.' The officers must have probable cause to believe that the item seized is contraband."); *United States v. Waldrop*, 404 F.3d 365, 369 (5th Cir. 2005) ("The incriminating nature of an item is immediately apparent if the officers have probable cause to believe that the item is either evidence of a crime or contraband." (citation and quotation omitted)).

In this instance, Det. Queen saw the firearm. A seven-year veteran of the Raleigh County Sheriff's department, A.R. 75-76, Det. Queen recognized that Petitioner was not supposed to possess firearms (which Petitioner confirmed), A.R. 78. Petitioner, a former habitual drug user, has a criminal history stretching back to 2001 and including past charges of malicious wounding and malicious assault and convictions for possession with intent to deliver and delivery of a controlled substance. A.R. 157-58. These facts, taken together, were more than sufficient to cause to Det. Queen to believe the firearm was not only contraband, but actually evidence of a crime. Accordingly, the second prong of *Julius* was satisfied.

Finally, the officers had a lawful right of access to take the firearm, satisfying the third *Julius* prong. Though this Court has not discussed this prong in detail, federal courts have explained that this prong concerns those scenarios where a police officer sees evidence or contraband in plain view but has no lawful right to enter the property where the item is located. *See United States v. Davis*, 690 F.3d 226, 234 (4th Cir. 2012) (citing *Horton*, 496 U.S. at 137 n.7) ("[T]he lawful access requirement is intended to clarify that police may not enter a premises to make a warrantless seizure, even if they could otherwise see (from a lawful vantage point) that

there was contraband in plain sight."); *Boone v. Spurgess*, 385 F.3d 923, 928 (6th Cir. 2004) (explaining that the lawful right of access prong refers to "where [an officer] must be to retrieve the item").

In this case, the officers had lawful access to the firearm because Petitioner consented to the officer following Petitioner into the second room where the firearm was located and the seizure effectuated. Det. Queen testified that he asked to come in and "[Petitioner] said yes." A.R. 78. Petitioner testified to the contrary but in his brief states that he "believes the entirety of Det. Queen's testimony to be truthful and accurate." Pet'r Br. 12. Further, Petitioner submits that "all of the court's factual finding [sic] to be accurate and the Petitioner is in complete agreement with all of them," but contends that the circuit court's conclusions of law are erroneous. *Id.* Petitioner argues that the circuit court erred for two reasons: (1) by "not requiring Det. Queen to articulate specific factors...for officer safety" and (2) ruling that that "the police action of following the Petitioner into the building was reasonable in light of all the circumstances." Pet'r Br. 12, 14.

Finally, in addressing Petitioner's claims that the court's conclusion of law was in error, the threshold question to be answered is whether the encounter in question rises to the level of a "search" or "seizure" whereby protections of the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution apply. The Fourth Amendment is recognized to protect "people, not places." *Katz*, 389 U.S. at 360. As a general matter, police officers are free to approach and question people, without necessarily effecting a seizure. The seizure of a person under the Fourth Amendment occurs when an officer "accost an individual and restrains his freedom to walk away." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

Additionally, the United States Supreme Court has held, "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Katz v.*

United States, 389 U.S. 347, 360 (1967)). In *State v. Mazzei*, this Court noted that the United States Supreme Court instructed that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" No. 18-0340, 2019 WL 1223252, at *3 (W. Va. Supreme Court, Mar. 15, 2019) (memorandum decision) (internal quotation marks omitted) (quoting *Jimeno*, 500 U.S. at 251). Indeed, in addressing this issue, this Court has similarly held that

> [c]onsent to search may be implied by the circumstances surrounding the search, by the person's prior actions or agreements, or by the person's failure to object to the search. Thus, a search may be lawful even if the person giving consent does not recite the talismanic phrase: "You have my permission to search."

Syl. Pt. 1, State *v. Flippo*, 212 W. Va. 560, 575 S.E.2d 170 (2002).

Petitioner in this case was questioned by the officers in response to a call about a dispute between neighbors where Petitioner was actually present during the call. A.R. 153. The officers talked to the Petitioner on the front porch of his mother's house. A.R. 76. Petitioner, after telling the officers that his ID was in "my T-shirt shop," walked around the house to retrieve his ID. A.R. 77. Nothing in the record indicates the officers restricted his ability to move about or that the officers did anything other than ask questions. Det. Queen did not threaten Petitioner in any manner. A.R. 78-79. Petitioner testified at the suppression, "We walked around the side to get to the door." A.R. 63. The choice of the word "we" connotes cooperation between Petitioner and the officers. At a minimum, the behavior of the Petitioner, and in light of the fact that the Petitioner was the party to whom the threatened violence was directed, indicates an implicit agreement to cooperate.

Petitioner maintains that the actions of the officer once in the T-shirt shop are unreasonable because the court erred in not requiring Det. Queen to "articulate specific factors" justifying his

entry into the building. Petitioner contends that Petitioner's agitation was the "only justification." Det. Queen indicated the reasons for his heightened awareness of officer safety. A.R. 77-79. Det. Queen testified that it was neighbor dispute and it was unknown if "they're going to talk that anger out on us or they're going to try to retaliate . . . it's best to keep your eye on the person that you're talking to, see his hands and make sure that that keeps you safe and everybody else around you safe." A.R. 80. On cross-examination, Det. Queen reiterated that he "wasn't looking for a weapon. [He] wasn't there to search. [He] was watching the [Petitioner] at the time . . . ." A.R. 82. He further clarified:

> We don't know who we're dealing with on the road. Once we show up at a place, it could be a cordial conversation or it could turn ugly, so you're always on guard every time you get out of the vehicle. And when you're talking to people, you want to keep them in front of you. You want to keep their hands available, because you don't know what's going to happen next.

A.R. 83. Defense counsel averred at the suppression hearing that the neighbor had threatened to shoot Petitioner. A.R. 81. Petitioner acknowledged that there was only one means of egress to and from the basement shop. A.R. 73. So, Det. Queen's concerns that tensions were high were well founded.

Because all three prongs of *Julius*' test are satisfied, Det. Queen was justified in seizing the firearm without a warrant under the plain view exception to the warrant requirement. Accordingly, the Circuit Court did not err in denying Petitioner's Motion to Suppress.

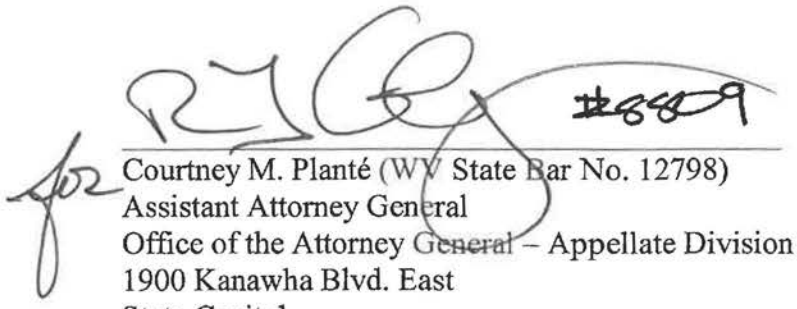
CONCLUSION

Respondent requests that this Court affirm the Raleigh County Circuit Court's December 2, 2021, Order.

Respectfully submitted,

STATE OF WEST VIRGINIA,
By Counsel

PATRICK MORRISEY
ATTORNEY GENERAL



Courtney M. Planté (WV State Bar No. 12798)
Assistant Attorney General
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Courtney.M.Plante@wvago.gov

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CERTIFICATE OF SERVICE

I, Courtney M. Plante, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, July 29, 2022, and addressed as follows:

Gary A. Collias, Esq.
Public Defender Services
Appellate Advocacy Division
1 Players Club Drive, Suite 301
Charleston, WV 25311

for #8809
Courtney M. Plante (State Bar No. 12798)
Assistant Attorney General