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SUPREME COURT OF APPEALS

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

Docket No. 22-0252

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STATE OF WEST VIRGINIA,
Plaintiff-Below, Respondent

v.

JUAN MCMUTARY,
Defendant-Below, Petitioner

PETITIONER'S REPLY BRIEF

Upon Appeal from the Circuit Court of Wood County, West Virginia
Case No. 21-F-266
The Honorable Judge J.D. Beane Presiding

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REPLY BRIEF OF THE PETITIONER

Now comes JUAN MCMUTARY, Defendant-below and Petitioner herein and pursuant to the *Scheduling Order* of this Court and Rule 10 of the West Virginia Rules of Appellate Procedure, hereby submits his **Reply Brief** in support of his appeal.

Reply Assignment of Error Number One

Petitioner's First Assignment of Error

> "The Circuit Court erred in denying Petitioner's *MOTION TO SUPPRESS FRUITS OF SEARCH*, thereby violating his rights under West Virginia Constitution Article Three, Section Five and the Fourth Amendment to the Constitution of the United States of America."

Respondent's Brief argues that the Petitioner has provided little if any authority to support his first assignment of error.

On appeal from denial of motion to suppress evidence, circuit court's findings of fact are reviewed under clearly erroneous standard, and questions of law and ultimate conclusion as to the constitutionality of law enforcement action are reviewed de novo. U.S.C.A. Const.Amend. 4; Const. Art. 3, § 6. State v Lilly 194 WV 595 provides

The standard of review of a circuit court's ruling on a motion to suppress is now well defined in this State. See State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994) (discussing at length the standard of review in a suppression determination) By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard.

Second, we review de novo questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. See State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886, 891 (1994). When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

Article Three, Section Five and the Fourth Amendment to the Constitution of the United States of America both provide for protection against unreasonable searches and seizures. A determination of each warrantless search and stop must be evaluated under a reasonableness standard.

Unfortunately, a rapidly aging and dusty decision of the United States Supreme Court minimizes the issue of racial profiling in the context of traffic stops.

In 1996 The United States Supreme Court decided Wren v U.S .517 U.S. 806, which rejected the argument of the Petitioners therein which asked the Court to address the subjective intent of arresting officer in the context of the issue of pre-textual stops The Petitioners therein argued that in the unique context of civil traffic regulations probable cause is not enough. They contended that the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible and that a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. The Petitioners therein were both black. The Petitioners

argued further that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants.

To avoid this danger, they argued that the Fourth Amendment test in regards to traffic stops should be, not the normal one (applied by the Court of Appeals in that case) of whether probable cause existed to justify the stop; but rather, whether any police officer, acting reasonably, would have made the stop for the reason given.

The facts in our case upon appeal support a theory of pretextual stop, a subject of the decision in Wren (supra), The arresting Wood County Sheriff's Deputy received second hand information from other law enforcement officers that Petitioner, who had stopped at a suspected drug house the arresting officer was observing (Suppression Transcript p. 9), might be involved in drug trafficking. The Petitioner, a black male, was then subjected to a traffic stop for merely crossing the center or yellow line in the operation of his vehicle (Suppression Transcript p. 9). There was no other evidence or testimony of any other traffic violation. It is Petitioner's position that the mere crossing of the yellow line was used as a pretext to stop the defendant, a black man who stopped at a suspected drug house. It is further his position that he was profiled for the stop because he is black. A reasonable law enforcement officer would not pull over a white person for merely crossing a yellow line without some other evidence of driving irregularity such as speeding, swerving or disregarding traffic signs and directions.

In Wren (supra) , The Court, in an opinion by Justice Anton Scalia determined that the subjective impressions of the arresting officers was irrelevant to a constitutional determination of reasonableness and found that the objective standard of what a reasonable officer would do was constitutionally permissible, thereby totally eliminating any evaluation of "pretext" from traffic stop evaluations.

Wren was decided in 1996. Over a quarter of a century has passed. In the summer of 2020 social justice demonstrations and protests swept over the world and the United States of America. Citizens of all persuasions demanded social justice and an end to systemic racism. In this current day context, it is worth revisiting older decisions such as Wren to address minority citizen complaints of racial profiling and systemic racism. This case affords such an opportunity.

If the stop of the Petitioner's vehicle is determined to be unconstitutional, and the Court determines that the Motion to Suppress should have been granted, then the convictions for all Counts of the Indictment below should be reversed.

Further ground for suppression of the controlled substance contraband lies in the arresting Deputy's misuse of a body-camera she employed during the stop. The relevant suppression hearing testimony appears on the Suppression hearing transcript (Suppression Transcript p.27 through 31.) The arresting deputy did turn on her body cam when she initiated the traffic stop. The arresting deputy believed she was obligated to keep the video portion of the body camera on during the stop (Suppression Transcript p. 30) but only the video.

Said footage does not show the Defendant crossing a yellow line while operating his vehicle. More significant is that during the course of the subsequent search of the Defendant's car, the Arresting Deputy did turn off her body cam microphone or sound for a period of two minutes and fifteen seconds so that she could have a private conversation with Agent McClung of the area narcotics task force. Timing of this muting of this recording in regards to the sequence of events is significant. From the suppression transcript one can read the sequence of significant events.

-Petitioner was stopped.

-Petitioner was removed from this car and handcuffed. (Suppression Tr. P. 31.)

- the arresting Deputy, a police canine handler deployed her drug dog to sniff the Defendant's car, which did not indicate. . (Suppression Tr. P. 31.)

-The arresting deputy turned off her body cam microphone and made a call to Task Force Agent McClung. . (Suppression Tr. P. 31.)

- Agents then search Petitioner's car and found the drugs which were offered at trial and admitted and which form the basis of the conviction for Count Two.

The Petitioner argued that the fruits of the search should be suppressed because it is not a reasonable search if the search is being monitored by a law enforcement officer equipped with a body cam, and the arresting Deputy muted her microphone during the continuum of the search, and most importantly, after her canine sniffed negative (Suppression Tr. P. 46 through 53.) The Petitioner finds it dubious that a drug dog sniff occurred, the Deputy assumed a seat in her vehicle, muted her microphone, and then drugs are found in the car which was just sniffed and not indicated by the canine.

Respondent Brief argues that Petitioner provides no authority to support his First Assignment of Error that the trial court erred in failing to suppress the Fruits of the Search as being the Fruits of an unreasonable search. This criticism begs the conclusion that the issue of body cams and their use and misuse as subjects of suppression of evidence issues is novel. Undersigned counsel is unaware of any case law in West Virginia or the Federal Court system which addresses this issue.

Reply: Second Assignment of Error

Respondent's Brief over simplifies Petitioner's second assignment of error which relates to sentencing. Also, Respondent's Brief erroneously assumes that the Petitioner argues that the State must prove the exact amount of fentanyl involved in the offense to support any conviction. The Second Assignment of error is as follows:

" 2) The Circuit Court erred by denying the Defendant's Motion for Judgement of Acquittal relevant to sentencing enhancement statute West Virginia Code Chapter 60A, Article 4, Section 415, Repealed as of June 10, 2022. Consequently the Appellant was sentenced to an inappropriate and longer term of incarceration on Count Two of the Indictment below then the evidence in the case supported. "

At trial the Petitioner moved for Judgment of Acquittal (TT P. 376, 377) relative to the sentencing enhancement provisions of the now repealed West Virginia Code Chapter 60A, Article 4, Section 415 (repealed.) Prior to sentencing the Defendant filed a Motion for Post Judgement of Acquittal and argued the same at sentencing relative to the same issues.

West Virginia Code 60A-4-415 (repealed) provided, before repealed,

"(a) For purposes of this section,

(1) "Controlled substance" shall have the same meaning as provided in subsection (e), section one hundred one, article one of this chapter.

(2) "Fentanyl" refers to the substance identified in subdivision (9), subsection (c), section two hundred six, article two of this chapter, and any analog or derivative thereof.

(b) Any person who violates the provisions of subsection (a), section four hundred one of this article or section four hundred nine of this article in which fentanyl is a controlled substance involved in the offense, either alone or in combination with another controlled substance, shall be guilty of a felony, and upon conviction thereof, shall be punished in accordance with the following:

> (1) If the net weight of fentanyl involved in the offense is less than one gram, such person shall be imprisoned in a correctional facility not less than two nor more than ten years.
>
> (2) If the net weight of fentanyl involved in the offense is one gram or more but less than five grams, such person shall be imprisoned in a correctional facility not less than three nor more than fifteen years.
>
> (3) If the net weight of fentanyl involved in the offense is five grams or more, such person shall be imprisoned in a correctional facility not less than four nor more than twenty years."

In order for the Circuit Court to incrementally enhance the sentence for possession of fentanyl to longer periods of incarceration under this statute, the State is required to prove with evidence beyond a reasonable doubt that *the net weight of the fentanyl involved in the transaction*" is either less than one gram (not less than two to nor more than ten years), or one gram or more but less than five grams, (not less than three nor more than fifteen years), or five grams or more, (not less than four nor more than twenty years.") Although the State was not required to prove the exact weight of the fentanyl involved in the transaction it must prove, to convict the defendant of a violation of the fentanyl laws with a sentence of 3 to 15 years as was done in the trial below, the State must prove that *the net weight of the fentanyl involved in the transaction* was more than one gram but less than five grams.

Defendant moved for acquittal on the sentencing enhancement elements of the possession of fentanyl charge at trial. He filed a Motion for Post-Verdict Judgment of Acquittal prior to sentencing, which issues were heard at sentencing, and was denied relief on each occasion. He filed a Motion for Reconsideration of Sentence on June 27, 2022, arguing the same issues and

was denied without hearing by Order dated July 6, 2022. The issue was thoroughly considered below.

West Virginia Code 60A-4-415 was repealed effective June 10, 2022 by the Enrolled Committee Substitute (ECS) for Senate Bill 536, The ECS for Senate Bill 536 did repeal West Virginia Code 60A-4-415, did amend and re-enact West Virginia Code 60A-4-401, 60A-4-409, and added section 60A-4-418.

The relevant amendment to West Virginia Code 60A-4-401 provides that in cases involving fentanyl a uniform sentence of 3-15 years, without regard to the "weight of the fentanyl involved in the transaction". It is as follows: WV Code 60A-4-401 now provides:

> (a) Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance.
> Any person who violates this subsection with respect to:
> (i) A controlled substance classified in Schedule I or II, which is a narcotic drug or which is methamphetamine, is guilty of a felony and, upon conviction thereof, may be imprisoned in a state correctional facility for not less than one year nor more than 15 years, or fined not more than $25,000, or both fined and imprisoned: *Provided, That any person who violates this section knowing that the controlled substance classified in Schedule II is fentanyl, either alone or in combination with any other substance shall be fined not more than $50,000, or be imprisoned in a state correctional facility for not less than 3 nor more than 15 years, or both fined and imprisoned;*

The effect of the repeal of 60A-4 - 415 and the amendment to 60A-4-401 was to eliminate the bothersome and impossible duty of "quantifying "the amount of fentanyl involved the transaction. It made all fentanyl violation punishable by a sentence of three to fifteen years.

In the trial below the identity of the controlled substance was determined through testing at the West Virginia State Police Forensic Laboratory. The testimony of Courtney

Miller is contained in the Trial Transcript Volume 1 and 2, pages 337 through 361 of the transcript section of the appendix. Ms. Miller testified she was a forensic scientist in the West Virginia State Police Forensic Laboratory. (TT p. 337). Her duties were analyze suspected controlled substances that are submitted to the laboratory. . (TT p. 337). On direct examination witness Miller was asked "...Do you purify testing on fentanyl? Her answer was "We don't do quantification." (TT p. 354) Further on direct examination, she testified "We don't do quantification so I can't say how much of that was fentanyl (TT p. 355.) On cross examination Ms. Miller testified Quantification is just determining a percentage of a target compound in the overall sample, and we don't perform that." (TT p. 362.)

The error in the lower court's rulings is obvious. The expert testimony as to quantification was clear and unequivocal. The expert drug analyst testified she cannot quantify the amount of fentanyl submitted to her for analysis. Over objection the Court permitted the jury to determine whether or not the :"fentanyl involved in the transaction" was between one and five grams. The evidence did not support the verdict in regards to the sentence enhancement elements. The various Defense motions on this issue raised at trial in the form of Motions for Judgement of Acquittal, at sentencing, and upon Motion for Reconsideration should have been ruled on in such manner to limit the verdict and subsequent sentence to that under WV Code 60A-4-415(b)(1). If the Defendant's conviction of for Delivery of a Controlled Substance Fentanyl is upheld, the sentence should be a commitment to the division of corrections for two to ten years (2-10_)in the penitentiary and not three to fifteen years (3-15) in the

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asks for oral argument as the facts and legal arguments cannot be adequately presented in the briefs and record on appeal, and the decisional process would be significantly aided by oral argument.

CONCLUSION

The Petitioner prays that this Supreme Court reverse his convictions below for Count 1 *"Person Prohibited from Possessing a Firearm"* and Count Two *Possession of a Controlled Substance (Fentanyl) with Intent to Deliver* as the stop which led to the discovery of the contraband and firearm was unconstitutionally pre-textual, and unreasonable given the Deputy's muting of the body cam, and direct that the convictions in this matter be overturned or set aside. If the Supreme Court declines such relief then the Petitioner prays that the sentence be appropriately limited on Count Two of the Indictment to two to ten years and opposed to the sentence of three to fifteen years as Ordered by the Court in the case below as is argued hereinabove, and for such further relief the Court deems appropriate.

JUAN MCMUTARY,
Petitioner

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CERTIFICATE OF SERVICE

I, JOSEPH W. MCFARLAND, JR, **counsel for the Appellant,** JUAN RODRIGUEZ MCMUTARY**, do hereby certify that I served a true copy of the attached** Petitioner's Reply Brief **by REGULAR MAIL , to** William E. Longwell, Assistant Attorney General, Office of the Attorney General, Appellate Division, 1900 Kanawha Blvd East. State Capitol, Bld 6., Ste. 406, Charleston, West Virginia, 25305, William.E.Longwell@wvago.gov **on the ___8TH__ day of September 2022.**

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