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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0252

STATE OF WEST VIRGINIA,

Respondent,

DO NOT REMOVE
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v.

JUAN MCMUTARY,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the March 3, 2022, Order
Circuit Court of Wood County
Case No. 21-F-266

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I. INTRODUCTION

Respondent, State of West Virginia, by counsel, William E. Longwell, Assistant Attorney General, respectfully responds to the appellate brief filed by Juan McMutary ("Petitioner") challenging the judgment of the Wood County Circuit Court as set forth in the order entered on March 3, 2022, and contained in Wood County Criminal Action Number 21-F-266. Petitioner's attempt to support his allegations that the circuit court erred in any respect by directing this Court to certain transcripts, motions, or orders contained within the record without providing any pertinent legal authority or argument is deficient under Rule 10 of the West Virginia Rules of Appellate Procedure. Even if this Court liberally construes Petitioner's brief and addresses the merits of each of his claims, he has failed to meet his burden of proof with respect to both due to his failure to clearly point out any error other than his own disagreement with the circuit court's rulings. Accordingly, this Court should refuse Petitioner's request for relief, and affirm the judgment of the Wood County Circuit Court.

II. ASSIGNMENTS OF ERROR

Petitioner raises two assignments of error in his brief:

1. 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 Forth [sic] Amendment to the Constitution of the United States.

2. The Circuit Court erred by denying the Defendant's Motion for Judgement [sic] of acquittal relevant to sentencing enhancement statute West Virginia Code Chapter 60A, Article 4, Section 415, Repealed as of June 10, 2022.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 [sic] the evidence in the case supported.

III. STATEMENT OF THE CASE

A. Factual Background

On December 31, 2020, Sgt. T.K. Phillips of the Wood County Sheriff's Department was conducting surveillance of a home known to be a hub of illicit drug activity. A.R. Vol. I, 16, 23-24.[1] Sgt. Phillips was surveilling the house at the direction of a Parkersburg Narcotics Task Force agent who had alerted Sgt. Phillips to the presence of a silver Toyota Camry, believed to be involved in illicit drug activity, parked at the residence. A.R. Vol. I, 25.

As Sgt. Phillips was observing the home, she observed an African American male, later identified as Petitioner, exit the residence, enter the Camry and drive off. A.R. Vol. I, 25. Sgt. Phillips left her position in order to catch up to the Camry she had just observed leave the home she was surveilling. A.R. Vol. I, 25. While Sgt. Phillips was able to close the distance on the subject Camry, she was unable to initially get directly behind it due to another vehicle separating her cruiser from the Camry. A.R. Vol. I, 26. Sgt. Phillips continued to follow and observe the Camry, eventually observing the driver's-side tires cross the solid double yellow lines in the center of the road. A.R. Vol I, 26. At this time, Sgt. Phillips activated her emergency lights to conduct a traffic stop. A.R. Vol. I, 26. The Camry initially pulled off and came to a stop along the side of the road while Sgt. Phillips pulled in behind. A.R. Vol. I, 26, Vol. III, 300. After remaining still for a few seconds, the vehicle accelerated and began driving off. A.R. Vol. I, 26-27. Sgt. Phillips then activated her sirens in addition to her emergency lights and began a pursuit of the Camry as it drove away. A.R. Vol. I, 27. The Camry then turned onto another street where it again pulled

[1] The Appendix Record provided by Petitioner is not sequentially paginated. Respondent will cite to Volume I of the Appendix record sequentially, with page one being the first page of the Docket Sheet. Moreover, Respondent will cite to the trial transcripts included in Volume III, based upon the included pagination of said transcripts, as denoted in the top right corner of each page.

off the road and came to stop. A.R. Vol. I, 27. After coming to a stop, Petitioner stuck both his hands out the window of the vehicle as Sgt. Phillips approached. A.R. Vol. I, 28.

Petitioner was then detained and placed in handcuffs. A.R. Vol. I, 29. Sgt. Phillips asked Petitioner if she could search his vehicle, to which Petitioner initially gave a non-responsive answer. A.R. Vol. I, 31-32. After a conversation with Sgt. Phillips about why she pulled him over and detained him, Petitioner then consented to a search of his vehicle. A.R. Vol. I, 32. Prior to beginning the search, however, Petitioner advised Sgt. Phillips that there was a "weapon" inside the vehicle. A.R. Vol. I, 32. Sgt. Phillips then located a 9-mm caliber Luger LC9 pistol with a full magazine and a round in the chamber hidden under the driver's-side seat. A.R. Vol. I, 34.

After recovering the firearm, Sgt. Phillips deployed her K-9 partner to conduct a free-air sniff of the exterior of Petitioner's vehicle. A.R. Vol. I, 16. The K-9 did not alert on Petitioner's vehicle. A.R. Vol. I, 16. Also around this time, law enforcement ran a check of Petitioner's driver's license and uncovered that Petitioner was a convicted sex offender and that he was previously convicted of domestic battery. A.R. Vol. I, 16. Because of these convictions, Petitioner was a person prohibited from possessing a firearm. A.R. Vol. I, 16.

Officers then conducted a search of Petitioner's vehicle where the found a small plastic bag containing suspected fentanyl or heroin. A.R. Vol. I, 16. Under the passenger seat floor mat, law enforcement officers found another bag containing suspected heroin. A.R. Vol. I, 16. Finally, officers located two additional baggies of suspected heroin on Petitioner's person. A.R. Vol. I, 16. The controlled substances appeared to be individually packaged in a manner consistent with distribution. A.R. Vol. I, 16.

B. Indictment, Motion to Suppress, and Suppression Hearing

On or about September 16, 2021, the Wood County Grand Jury returned a five-count indictment in 21-F-266 charging Petitioner with one felony count of being a prohibited person in possession of a firearm; one count of possession of a controlled substance, to-wit: methamphetamine; two felony counts of possession of a controlled substance with the intent to distributed, to-wit: fentanyl; and one felony count of possession of a controlled substance with intent to distribute, to-wit: heroin. A.R. Vol. I, 8-9.

On October 28, 2021, Petitioner filed his Motion to Suppress Fruits of Search, wherein he sought to have the court suppress all items seized during the search of Petitioner's vehicle which uncovered the firearm and various packages containing controlled substances. A.R. Vol. I, 11-13. In support of his motion, Petitioner alleged that Sgt. Phillips lacked reasonable articulable suspicion to stop Petitioner's vehicle, and, further, that the State had provided no evidence that the subsequent search of the vehicle was conducted with Petitioner's consent. A.R. Vol. I, 11-13.

And evidentiary hearing was held before the Wood County Circuit Court on November 4, 2021, wherein Sgt. Phillips testified as to the events involving the traffic stop and subsequent search of Petitioner's vehicle. *See generally*, A.R. Vol. I, 17-74. During her testimony, Sgt. Phillips testified consistently with the information placed in her criminal investigation report. A.R. Vol. I, 16, 22-62. In addition to the information contained in her report, the State also admitted into evidence the audio and video recording of Sgt. Phillips encounter with Petitioner as captured by Sgt. Phillip's body camera. A.R. Vol. I, 29-30.

On November 12, 2021, the circuit court issued an order denying Petitioner's Motion to Suppress. A.R. Vol. I, 76-81. In its order, the circuit court found that Sgt. Phillip's stop of Petitioner's vehicle was lawful, and was conducted in order to investigate her "reasonable

articulable suspicion that the vehicle was subject to seizure or that the sole occupant/driver had committed or was committing a crime." A.R. Vol. I, 80. The court also found that the "driver/defendant voluntarily consented to a search of his vehicle upon his second stop and the arrival of an additional police unit." A.R. Vol. I, 80. A subsequent motion filed by Petitioner to reconsider its ruling was denied by the circuit court by order entered on December 22, 2021. A.R. Vol. I, 75.

C. Trial and Sentencing

Petitioner proceeded to trial upon his indictment in 21-F-266 on January 5, 2022. A.R. Vol. III, 1. In addition to Sgt. Phillips testimony as to the circumstances of the stop and search of Petitioner's vehicle, as well as the items located therein and on Petitioner's person, the State called Courtney Miller of the West Virginia State Police Forensic Laboratory. A.R. Vol. III, 337. Ms. Miller was qualified as an expert witness in the field of chemistry and the analysis of controlled substances. A.R. Vol. III, 340. Ms. Miller testified that one of the samples she tested revealed that it contained fentanyl, and the total weight of the substance was 1.349 grams, plus or minus .039 grams. A.R. Vol. III, 355. Ms. Miller also testified that the State Police Forensic Laboratory does not do quantification of substances, meaning that they cannot specify what percentage of a particular substance is a particular drug. A.R. Vol. III, 355.

After deliberation, the jury found Petitioner guilty of the felony offense being a person prohibited from possessing a firearm, for the felony offense of possession of a controlled substance with intent to deliver, to-wit; fentanyl, and the misdemeanor offense of possession of a controlled substance, to-wit; methamphetamine.[2] A.R. Vol. I, 83.

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[2] The Parties agreed at the November 4, 2021 hearing to sever the remaining two counts charging Petitioner with possession with intent to deliver heroin and fentanyl, due to those two offenses

On March 2, 2022, Petitioner filed his motion for post-verdict judgment of acquittal. A.R. Vol. I, 84-87. Petitioner asserted in his motion that the State failed to present sufficient evidence to establish Petitioner was subject to the three to fifteen year sentence as provided in West Virginia Code § 60A-4-415(b)(2), in that the State could not provide a quantitative analysis of the amount of fentanyl contained within the substance seized. A.R. Vol. I, 84-85. Petitioner also alleged error in the court's pretrial ruling with respect to his motion to suppress. A.R. Vol. I, 85. The circuit court denied both of these motions. A.R. Vol. I, 103-04.

The court then announced its sentence, wherein it imposed a three to fifteen year sentence with respect to Petitioner's conviction of possession with intent to deliver a controlled substance, to-wit; fentanyl, pursuant to the jury's verdict that Petitioner possessed over one gram of fentanyl, but less than five grams, pursuant to West Virginia Code § 60A-4-415(b)(2). A.R. Vol. I, 90.

Petitioner now appeals the judgment of the circuit court with respect to its denial of Petitioner's motion for post-verdict judgment of acquittal, and, specifically with respect to the court's denial of his motion to suppress, and the court's imposition of his three to fifteen year sentence.

IV. SUMMARY OF THE ARGUMENT

Petitioner's appeal should be dismissed for utterly failing to comply with Rule 10 of the West Virginia Rules of Appellate Procedure. Petitioner's argument section contains two paragraphs, wherein he merely points this Court to his motion for summary judgment and the transcripts from the hearing held upon his motion as support for his contention. Petitioner does not provide a single citation to any case law in support of any of his claims, nor does he provide a

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relating to a separate incident approximately one month after the incidents which gave rise to the other three charges. A.R. Vol. I, 21.

table of authorities. Petitioner's second assignment of error is equally as deficient as his first, and is based solely upon his assertion that his sentences was "unfair and unjust." Pet'r's Br. at 6.

Even if this Court were to reach the merits of his claims, Petitioner has completely failed to meet his burden of proof. Petitioner was observed exiting a known drug house, and his vehicle was believed to be involved in drug trafficking. Although this information alone likely provided reasonable articulable suspicion to conduct a traffic stop, Petitioner attempted to flee law enforcement, thus providing an independent basis for law enforcement to lawfully stop his vehicle. Once his vehicle was stopped, Petitioner consented to a search of his vehicle which uncovered various controlled substances. In addition to consenting to the search, Petitioner admitted to law enforcement that he had a firearm in the vehicle. This fact alone inevitably provided law enforcement with probable cause, as they quickly learned that Petitioner was a prohibited person after uncovering that he had a felony sexual offense conviction, as well as a domestic battery conviction during his criminal history check.

Finally, Petitioner's claim that his sentence was contrary to the evidence enjoys no support from any legal authority. Petitioner's assignment attempts to read an additional element into West Virginia Code § 60A-4-415 that requires the State to "quantify" any controlled substance that contains fentanyl in order for Petitioner to be properly sentenced under the statute. This claim not only finds no support from any legal authority, but is actually contrary to the majority of courts throughout the country.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary 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. This case is suitable for memorandum decision.

VI. ARGUMENT

A. Standard of Review

> "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because 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. Therefore, the circuit court's factual findings are reviewed for clear error." Syllabus Point 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Syl. Pt. 1, *State v. Farley*, 230 W. Va. 193, 737 S.E.2d 90 (2012).

"The Court applies a *de novo* standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) (per curiam) (citing *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

> Upon a motion [for judgment of acquittal], the evidence is to be viewed in the light most favorable to [the] prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.

Syl. Pt. 6, *State v. Vilela*, 238 W. Va. 11, 792 S.E.2d 22 (2016) (citations omitted).

B. Petitioner's brief does not comply with Rule 10 of the West Virginia Rules of Appellate Procedure and should be completely disregarded without further consideration.

Petitioner's brief should be completely disregarded as it makes no attempt to comply with the requirements set forth in Rule 10 of the West Virginia Rules of Appellate Procedure. Because of the woefully deficient brief provided by Petitioner, not only is Respondent unable to provide a

meaningful response to the merits of his claims, but such deficiencies necessarily strips from this Court the ability to provide an adequate, and thorough review of his claims.

All appellate briefs that exceed five pages "must include a table of authorities with an alphabetical list of cases, statutes, and other authorities cited, and references to the pages of the brief where they are cited." W. Va. R. App. P. 10(c)(2). In the argument section, all appellate briefs,

> must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Intermediate Court and the Supreme Court may disregard errors that are not adequately supported by specific references to the record on appeal.

Id. at 10(c)(7). One's compliance with the Rules of Appellate Procedure are critical, as this Court has recognized by stating such rules are "not mere procedural niceties; they set forth a structured method to permit litigants and this Court to carefully review each case." Administrative Order, *Filings That Do Not Comply with the Rules of Appellate Procedure* (Dec. 10, 2012). In maintaining this exacting approach, this Court has routinely refused to address claims that are inadequately supported. *See Porter v. Logan Co. Fire Dep't.*, No. 15-0520, 2016 WL 1735243, at *2 n. 2 (W. Va. Supreme Court, April 29, 2016) (memorandum decision) (disregarding a portion of petitioner's argument because he failed to cite to the 1,400-page appendix record); *Jones ex rel. Estate of Jones v. Underwriters at Lloyd's, London*, No. 12-0293, 2013 WL 3185081, at *2 (W. Va. Supreme Court, June 24, 2013) (memorandum decision) ("[W]e require that arguments before this Court be supported by 'appropriate and specific citations to the record on appeal . . .." (quoting, in part, W. Va. R. App. P. 10(c)(7))).

"The decisions of this court are quite clear. 'Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but [that] are not supported with pertinent authority, are not considered on appeal.'" *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) (quoting *State v. LaRock*, 196 W. Va. at 302, 470 S.E.2d at [illegible]). "[A] skeletal argument, really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs." *State v. Surber*, 228 W. Va. 633, 723 S.E.2d 851, 863 (2012) (internal quotations and citation omitted). Moreover:

> An appellant must carry the burden of showing error in judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.

Syl. Pt. 4, *State v. Myers*, 229 W. Va. 238, 728 S.E.2d 122 (2012) (internal quotations and citations omitted).

The argument section in Petitioner's brief amounts to nearly a whole-cloth departure from the requirements set forth in Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure and should be rejected without further consideration. To the extent that Petitioner attempts to direct the court to the suppression motion, suppression hearing transcript, or the order denying Petitioner's suppression motion as sufficient to support his appeal, such attempt is entirely inappropriate. Indeed, Petitioner's brief essentially asserts "general error;" an act which this Court has specifically disavowed in *Reed v. Orme*, 221 W. Va. 337, 655 S.E.2d 83 (2007). In *Reed*, the court noted that the petitioner's argument only alleged that "the circuit court erred in its application of the law." *Id.* at 341 n. 2, 655 S.E.2d at 87 n. 2. This Court went on to "caution counsel to specifically and accurately set forth the issue being appealed and not merely assert general error." *Id.* Moreover, Petitioner does not offer any specific contention as to why the circuit court's denial of his motion to suppress was erroneous; he merely asserts that "the facts and arguments were

made in the suppression hearing and would be adequately reviewed by reference thereto." Pet'r's Br. 6. This method of argument is entirely deficient under this Court's clear jurisprudence, and, thus, this Court should refuse to even dignify such a cursory argument.

Petitioner's second cursory assertion alleging that the circuit court erred in failing to "mitigate the sentence and the degree of the conviction to the lower level enhancement" for his conviction of Possession of Fentanyl with the Intent to Deliver nearly as deficient as his first. Petitioner's argument contains no citation to any legal authority other than a reference to the statute which proscribes the conduct for which Petitioner was found guilty. Petitioner provides no legal or factual support for his argument, or in any way identify why the Court's judgment was incorrect or inconsistent with any legal precedent.

Because of the patent deficiencies in Petitioner's appellate brief, this Court should completely disregard all of Petitioner claims without further consideration. Such whole-cloth departure from the Rules of Appellate Procedure does not warrant this Court's consideration beyond that which is necessary to reject the claims in their entirety without any thought given to the merits.

C. Neither the stop, nor the subsequent search of Petitioner's vehicle was unreasonable or unconstitutional, as the stop was supported by reasonable articulable suspicion, and the search was conducted pursuant to the voluntary consent of Petitioner.

1. Not only did Sgt. Phillips possess reasonable articulable suspicion to stop Petitioner's vehicle, but his attempt to flee after initially stopping amounted to an independent justification for the stop wholly separate from any reasonable articulable suspicion Sgt. Phillips possessed prior.

If this Court reaches the merits of Petitioner's claims, it should affirm his convictions as he has utterly failed to meet his burden of proof. Article III, Section Six of the West Virginia Constitution, as well as the Fourth Amendment to the United States Constitution generally

proscribe the warrantless seizure or search of a person or his or her personal affects. This general prohibition also applies to traffic stops, as a traffic stop "entails a seizure of the driver." *Brendlin v. California*, 551 U.S. 249, 255 (2007). In the context of a motor vehicle stop, this Court has recognized that a police officer need not possess probable cause; rather, an officer must be able to identify personal observations that lead him or her to "reasonably suspect that a particular person has committed, is committing or is about to commit a crime." *State v. Stuart*, 192 W. Va. 428, 431, 452 S.E.2d 886, 889 (1994) (citation and internal quotation marks omitted."

In order to establish the existence of this "reasonable suspicion," courts look to the "totality of the circumstances, which includes both the quantity and quality of the information known by the police." *Id.* at Syl. Pt. 2, in part. When determining whether a particular stop offends the guarantees set forth in Article III, Section Six of the West Virginia Constitution and the Fourth Amendment of the United States Constitution, courts apply an "objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (citation omitted). This objective assessment looks to whether a police officer in possession of the same information known to the officer at the time of the initiation of the stop, "would have had, under the totality of the circumstances, an articulable reasonable suspicion to conduct the stop." *Fuller v. Reed*, No. 14-0043, 2015 WL 9693893 (W. Va. Supreme Court, March 11, 2015) (memorandum decision).

The United States Supreme Court has reduced the analysis as to whether an officer possesses the requisite reasonable articulable suspicion to conduct a stop to a two element test: First, the assessment looks to the sum total of the circumstances and considers the "various objective observations" including "information from police reports, if such are available, and the

consideration of the modes or patterns of operation of certain kinds of lawbreakers." *United States v. Cortez*, 449 U.S. 411, 418 (1981). "From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person." *Id.*

The second element looks to whether the "whole picture" demonstrates "a particularized suspicion . . . that the particular individual being stopped [is, was, or is about to] engage[ ] in wrongdoing." *Id.* Moreover, "factors such as erratic or evasive driving, the appearance of the vehicle or its occupants, the area where the erratic or evasive driving takes place, and the experience of the police officers are significant in determining reasonable suspicion." *Dale v. Odum*, 233 W. Va. 601, 608, 760 S.E.2d 415, 422 (2014). An officer may also rely on "tips," even ones from anonymous sources, "if subsequent police work or other facts support its reliability." Syl. Pt. 5, in part, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

The record demonstrates that Sgt. Phillips possessed reasonable articulable suspicion at the time she initially attempted to conduct a traffic stop of Petitioner's vehicle. Sgt. Phillips was conducting surveillance of a "known drug house," a classification she had personal knowledge of due to her participation in the execution of a drug-related search warrant months prior. A.R. Vol. I, 16. In addition, she had information, provided to her from an agent from the Parkersburg Narcotics Task Force, that the Toyota Camry parked in front of the house was believed to be involved in drug trafficking. A.R. Vol. I, 16.

Armed with this information, Sgt. Phillips followed Petitioner after she personally observed him exit the known drug house, enter the vehicle that she was advised was involved in drug activity, and drive off. A.R. Vol. I, 16. After observing the vehicle cross the double-yellow lines in the middle of the road, she attempted to conduct a traffic stop. A.R. Vol. I, 16. While the vehicle initially pulled over, and Sgt. Phillips pulled directly behind him with her emergency lights

still flashing, Petitioner nevertheless accelerated and returned to the road and began driving off. A.R. Vol. III, 300. It appearing that Petitioner was attempting to flee, Sgt. Phillips then activated her emergency siren along with her lights and gave chase to the fleeing vehicle. A.R. Vol. III, 328. Petitioner eventually stopped, however, at which time he placed his hands outside of the vehicle. A.R. Vol. I, 16.

The evidence Sgt. Phillips possessed at her initial attempt to conduct a traffic stop was such that a reasonable officer would have believed that criminal activity was afoot. Moreover, the fact that she was advised by a narcotics officer of the suspicious conduct of the Toyota Camry and its driver does not lessen the value of the information. As the United States Supreme Court recognized in *United States v. Hensley*, 469 U.S. 221, 232 (1985), reasonable suspicion may be based upon the collective knowledge of the officers involved in a particular investigation.

Assuming *arguendo* that Sgt. Phillips lacked the sufficient reasonable articulable suspicion to conduct a traffic stop of Petitioner's vehicle, it would not excuse his decision to drive off after Sgt. Phillips had clearly pulled in behind his stopped vehicle. A.R. Vol. III, 300. Petitioner had no right to unilaterally determine that he was not the subject of the traffic stop. Indeed, this Court has found this precise conduct to be an "independent justification" for a traffic stop. *State v. Noel*, 236 W. Va. 335, 340, 779 S.E.2d 877, 882 (2015). Similarly, one's decision to ultimately comply with a law enforcement officer's demands to stop does not serve to negate an earlier attempt to flee from the same law enforcement officer. *State v. Pannell*, 225 W. Va. 743, 752, 696 S.E.2d 45, 54 (2010).

Petitioner's decision to flee after Sgt. Phillips pulled in behind him with her emergency lights activated destroyed any opportunity he may have had to subsequently argue his stop was not supported by reasonable articulable suspicion. Although the record demonstrates that Sgt. Phillips

did possess such information, Petitioner's decision to drive off, by itself, amounted to a new criminal offense, and, therefore, justified his eventual stop independent of any other justification Sgt. Phillips had at the time of the initial stop.

Finally, Petitioner has failed to demonstrate that Sgt. Phillips lacked reasonable articulable suspicion in the first instance, nor has he demonstrated any legitimate justification for his conduct following his initial acquiescence to Sgt. Phillips attempt to conduct a traffic stop. To be sure, at the time Petitioner stopped for a second time, Sgt. Phillips had two independent justifications for the traffic stop, neither of which Petitioner can demonstrate were improper. Thus, the circuit court committed no error in finding the stop of Petitioner's vehicle was proper.

2. Petitioner consented to the search of his vehicle, and such consent to search was not limited by Petitioner in its scope, nor was such consent ever revoked throughout the duration of the search.

Once a vehicle is lawfully stopped, "probable cause may arise to believe that the vehicle is carrying weapons, contraband, or evidence of the commission of a crime," and, if exigent circumstances are present, "a warrantless search may be made." Syllabus, in part, *State v. Shingleton*, 171 W. Va. 668, 301 S.E.2d 625 (1983). It is only "unreasonable" searches that the West Virginia and United States constitutions prohibit, and there are "numerous situations in which a search and seizure warrant are not needed, such as an automobile in motion . . . as well as searches and seizure made that have been consented to." Syl. Pt. 4, in part, *State v. Duvornoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973). "[I]t is well-established that the search and seizure conducted by police is not unlawful or unreasonable, notwithstanding the absence of probable cause and a search warrant, where the search is voluntarily consented to." *State v. Williams*, 162 W. Va. 309, 314, 249 S.E.2d 758, 762 (1978) (citations omitted).

Petitioner's mere recitation to his motion to suppress filed in the proceedings below, even if considered as a legitimate argument by this Court, is simply an incomplete argument, if it can be considered an argument at all. A.R. Vol. I, 12. Petitioner's motion to suppress specifically claims that he had not been provided "a copy of any video relevant to this case." A.R. Vol. I, 12. But the record reveals that such video was ultimately provided, A.R. Vol. I, 31, which contains Petitioner's verbal consent to Sgt. Phillip's request to search his vehicle. A.R. Vol. I, 32. The record also reveals that Petitioner, at no point after giving his verbal consent to search, revoke such consent, or limit the consent he provided in any way. A.R. Vol. I, 33.

In addition to Petitioner's consent to search, he also advised Sgt. Phillips that there was a weapon hidden within the vehicle. A.R. Vol. I, 32. This admission by Petitioner, alone, would have provided officers probable cause to search even if he had refused consent. This is because Sgt. Phillips later uncovered during a standard criminal history check after stopping Petitioner's vehicle that he had a felony conviction, as well as a domestic battery conviction, both of which classify Petitioner a person prohibited from possessing a firearm. A.R. Vol. I, 16.

The information contained in the record provides Petitioner's argument no solace. The initial stop Sgt. Phillips attempted to conduct on Petitioner was based upon her reasonable articulable suspicion that he was involved in illicit drug activity due to his presence at a home known to be a "drug house," as well as the tip she received from the Parkersburg Narcotics Task Force that the vehicle he was driving was involved in illicit drug activity. A.R. Vol. I, 16. In addition to, and independent of this suspicion, Petitioner attempted to flee from Sgt. Phillips after she had given clear visual signal for him to pull over, and after she had pulled directly behind him when he initially complied with the signal to stop. A.R. Vol. III, 300. Regardless of how far Petitioner drove after accelerating after being given the signal to stop, he cannot explain away such

lawless disregard by claiming "confusion." A.R. Vol. I, 12. Moreover, once stopped, Petitioner gave Sgt. Phillips consent to search his vehicle, which he never revoked or limited at any point thereafter. A.R. Vol. I, 32-33. Petitioner also admitted to being in possession of a weapon, A.R. Vol. I, 32, information which would have soon thereafter provided Sgt. Phillips with probable cause to search upon inevitably learning of his prior criminal convictions rendering him a person prohibited from possessing a firearm. A.R. Vol. I, 16.

Notwithstanding Petitioner's woefully deficient brief, the record simply provides no support for his claim that the stop, or subsequent search of his vehicle was in any way unconstitutional. Thus, if this Court is unwilling to dismiss Petitioner's claims on procedural grounds, it should nevertheless affirm his convictions on the merits of his claims, as he has completely failed to demonstrate the existence of reversible error.

D. The premise of Petitioner's claim that he was sentenced to a term of imprisonment longer than that which the evidence supported is based upon a misplaced interpretation of the relevant statute, and should be rejected by this Court.

In Petitioner's second assignment of error, he claims that he was impermissibly sentenced to a term of incarceration under West Virginia Code § 60A-4-415. Pet'r's Br. 1. While it is unclear to Respondent as to whether Petitioner raises this claim as a sufficiency of the evidence claim or one raising a disproportionate sentencing claim, Respondent will treat it as one involving insufficiency of the evidence given the context in which Petitioner asserts it.

First, Petitioner's notation that West Virginia Code § 60A-4-415 was repealed as of June 10, 2022, is of no relevance to his claim. Petitioner was charged with his offense under such code section on September 16, 2021, A.R. Vol. I, 8-9, at time in which said code section was in full force and effect. Pursuant to West Virginia Code § 63-1-2, the repeal of a statute has no effect on any "offense or act committed or done" during the time in which the subsequently repealed statute

was enforceable. Petitioner does not contend that West Virginia Code § 60A-4-415 was not in effect at the time of his offense, but, rather, that such statute was repealed at a later time. Pet'r's Br. at 1. Therefore, any claim that the subsequent repeal of the relevant statute has any relevance to his claim is misplaced and should be completely disregarded by this Court.

In addressing the substance of his claim, Petitioner's assertion that there must be a quantification of the specific substance for which he was convicted of possessing with the intent to distribute enjoys no support. West Virginia Code § 60A-4-415 specified that any person who violations the provisions of West Virginia Code § 60A-4-401, "in which fentanyl is a controlled substance involved in the offense, either alone or in combination with another controlled substance" is guilty of a felony. W. Va. Code § 60A-4-415(b). The statute then specifies different sentences based upon the weight of the fentanyl involved. *Id.* at (b)(1)-(3).

Petitioner's argument that the State was required to quantify and prove the exact amount of fentanyl within the substance finds no legal support in this state, or various other jurisdictions throughout the country. West Virginia Code § 60A-1-101, *et seq.*, known as the West Virginia Controlled Substances Act ("WVUCSA") was adopted and codified in 1971. *State v. Young*, 185 W. Va. 327, 335, 406 S.E.2d 758, 766 (1991). The WVUCSA was derived from the Uniform Controlled Substances Act, which was created and approved by the National Conference of Commissioners on Uniform State Laws in 1970. *Id.* The Uniform Controlled Substances act was modeled after, and is substantially similar to, its federal counterpart, the federal "Controlled Substances Act" of 1970, as codified in 21 U.S.C. §§ 801-871. *Id.* This Court has recognized that the "Uniform Controlled Substances Act of 1970 'was drafted to achieve uniformity between the laws of the several States and those of the Federal Government.'" *Id.* (quoting Unif. Controlled Substances Act of 1970 prefatory note, vol. 9, Part II, U.L.A. 2 (1988)). This goal of uniformity

is acknowledged in West Virginia Code § 60A-6-603, wherein it states that "[t]his act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this act among those states which enact it."

When applying the statutorily-mandated uniform interpretation of the relevant code sections, this Court must reject Petitioner's contention that the State must prove, in addition to the presence of fentanyl, the specific amount of it separate and apart from the total weight of the substance in which it is found. This is made clear through various federal and United States Supreme Court decisions regarding the "knowledge" requirement for purposes of the Uniform Controlled Substances Act. "[The] knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *McFadden v. United States*, 576 U.S. 186, 192 (interpreting 21 U.S.C. § 802). *See also, United States v. Martin*, 274 F.3d 1208, 1210 (8th Cir. 2001) (concluding that the defendant "did not need to know the exact nature of the substance in his possession, only that it was a controlled substance of some kind."); *United States v. Ramirez-Ramirez*, 875 F.2d 772, 774 (9th Cir. 1989) ("[A] defendant charged with importing and possessing a controlled substance need not know the exact nature of the substance with which he is dealing." (internal citations and quotations omitted)); and *United States v. Cheung*, 836 F.2d 729, 731 (1st Cir. 1988) ("While [the defendant] may not have known whether the bag contained heroin, cocaine, or some other granular 'controlled substance,' . . . 'the law is settled that a defendant need not know the exact nature of a drug in his possession[.]'"(citations omitted)).

Various States throughout the country have also concluded that proof of the knowledge and intent element only extends to the general nature of the controlled substance as opposed to its specific identity. *See State v. Kerns*, 831 N.W.2d 149, 160 (Iowa 2013) ("the State must prove the

accused . . . had knowledge that the material was a narcotic." (citation omitted)); *People v. Perea*, 126 P.3d 241, 245 (Colo. 2005) ("We are persuaded by these authorities, and, accordingly, we construe [Colorado's version of the Uniform Controlled Substances Act] to require only that a person know that he or she possesses a controlled substance, and not that he or she know the precise controlled substance possessed."); *State v. Bunker*, 874 A.2d 301, 319 (Conn. 2005) ("[T]he substance [the defendant] possessed . . . was a narcotic and [ ] he intended to exercise dominion and control over it."); *McDonald v. State*, 701 A.2d 675, 686 (Md. 1997) ("The accused must have knowledge of both the presence and general character or illicit nature of the substance."); *State v. Sartin*, 546 N.W.2d 449, 455 (Wis. 1996) ("The majority of courts that have addressed this issue agree that in drug possession or delivery cases, the defendant's knowledge that he had a controlled or illegal substance is all that the State need prove; there is no requirement to prove the defendant knew the exact nature of the substance."); and *State v. Mendez*, 256 S.E.2d 405, 409 (N.C. 1979) ("[I]t is not required that the State offer evidence tending to show that the defendant knew the scientific name or the actual chemical composition of the controlled substance.").

The case law from throughout the country demonstrates the majority approach that a person who possesses a controlled substance need not intend to possess a particular substance, or even know what the substance is, so long as he or she had knowledge that the substance was one that appears on the schedule. Petitioner's argument goes against this, and seeks to have this Court adopt the approach that, under West Virginia Code § 60A-4-415 requires quantification of the amount of fentanyl in any controlled substance in which it is found. Indeed, the plain language of West Virginia Code § 60A-4-415 specified that, anyone who possesses, transports, manufactures, or delivers fentanyl, either alone or in combination with another substance, is guilty of a felony

offense and subject to the graduated penalties based upon weight. Nothing in the relevant statutory provisions provides the Legislature intended that any time fentanyl is involved, that the substance be separated, or otherwise quantified apart from the substance with which it was mixed.

To illustrate the absurd results that could flow from such an interpretation, assume one possess 5 grams of a controlled substance he believes to be pure fentanyl. Subsequent quantification testing reveals, however, that the substance only contains half of a gram of fentanyl, while the remainder of the substance is something else. Under Petitioner's interpretation of the relevant statute, he could possess a substance, believing it to be such that would subject him to a prison sentence of not less than four, nor more than twenty years under West Virginia Code § 60A-4-415(b)(3), but would only be subject to a prison sentence of not less than two nor more than fifteen years under West Virginia Code § 60A-4-415(b)(1) because he was mistaken as to the purity of the substance he intended to illegally possess and distribute. This "quantification" requirement that Petitioner reads into the statutory provision is not required of any other substance or for any other offense identified in the WVUCSA. Given the widely recognized dangers fentanyl poses to not only those who use it, but to the law enforcement officers and K-9 officers who may come into contact with it during the course of their work, it is incongruous to believe the Legislature had an unstated intention to impose a heightened burden on the State in order to convict and sentence those who are found to be in distributable quantities of fentanyl than the burden imposed upon the State for any other controlled substance.

There is nothing in the statute that indicates the Legislature intended the State to "quantify" the amount of fentanyl in a particular substance in order to subject a particular defendant to the sentencing enhancement provisions contained in West Virginia Code § 60A-4-415. If this were true, it would be the only drug the legislature required the State to quantify, even though the

Legislature determined that the substance was such a risk to the public that it warranted a special sentencing scheme for those who are found to possess it in distributable quantities.

Petitioner has provided no support for this contention, and, therefore, this Court should utterly disregard it. Therefore, if this Court is unwilling to dismiss Petitioner's claims based on procedural grounds, it should affirm his conviction and sentence as he has failed to meet his burden of proof.

VII. CONCLUSION

Based upon the foregoing, this Court should dismiss Petitioner's case, or, in the alternative, affirm the March 3, 2022 judgment of the Circuit Court of Wood County.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0252

STATE OF WEST VIRGINIA,

Respondent,

v.

JUAN MCMUTARY,

Petitioner.

CERTIFICATE OF SERVICE

I, William E. Longwell, 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, August 19, 2022, and addressed as follows:

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