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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-771

STATE OF WEST VIRGINIA,
***Petitioner Below*, Respondent**

v.

BRADLEY ROHRBAUGH,
***Respondent Below*, Petitioner**

RESPONDENT'S BRIEF

Appeal from the order
of the Circuit Court of Grant County
Case No: 21-F-38

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INTRODUCTION

Respondent, State of West Virginia, by counsel, Gail V. Lipscomb, Assistant Attorney General, responds to the Petitioner's brief filed by Bradley Rohrbaugh ("Petitioner") pursuant to his appeal of an order of the Circuit Court of Grant County (Circuit Court No. 21-F-38) entered on September 22, 2022. Petitioner was convicted of the felony offense of "Fleeing from an Officer with Reckless Indifference" pursuant to a bench trial before the Circuit Court of Grant County on June 9, 2022. Petitioner claims the circuit court's verdict of guilty is not supported by the evidence. Respondent asserts the evidence presented at trial was sufficient to support the circuit court's verdict of guilty.

Additionally, Petitioner alleges the record is insufficient to support a finding that he knowingly and voluntarily waived his right to a jury trial. A reasonable review by this Court of the record and totality of the circumstances in this matter demonstrates and supports the circuit court's determination that Petitioner's waiver of a jury trial was knowing and voluntary.

ASSIGNMENTS OF ERROR

Petitioner raises two assignments of error in his brief. First, the circuit court erred by concluding the evidence presented by the Respondent at the Petitioner's bench trial supported a guilty verdict beyond a reasonable doubt. Second, the circuit court erred in determining Petitioner's waiver of a jury trial was knowing, intelligent and voluntary because the record is insufficient to demonstrate a knowing waiver.

Pet'r's Br.at 1.

STATEMENT OF THE CASE

A. Bench Trial

On July 3, 2021, Trooper Rohrbaugh (no relation to Petitioner) observed Petitioner driving a vehicle as Petitioner stopped at a stop sign near Smoke Hole Bridge. A.R. 81. The Trooper testified he was familiar with the Petitioner from an encounter he had with him approximately a year earlier. A.R. 81. The Trooper testified he had previously arrested Petitioner for the offenses of Driving Revoked for DUI, possession of methamphetamine, and possession of a firearm. A.R. 81. The Trooper stated he was also familiar with the passenger in the vehicle due to numerous encounters with him over the years as well. A.R. 81. Although the Trooper had knowledge of Petitioner having been revoked for DUI previously, at the time the Trooper witnessed Petitioner driving on July 3, 2021, the Trooper did not have knowledge as to whether Petitioner was currently revoked. A.R. 82. The Trooper testified he turned around to follow Petitioner while he checked the status of his driver's license. A.R. 82.

As the Trooper was attempting to catch up to Petitioner's vehicle, the Trooper observed Petitioner traveling at a high rate of speed. A.R. 82. "Once I initially closed the gap in the distance, I paced him for a little – for a ways." A.R. 90. The Trooper testified that "based off my observations, I was able to pace him . . . at approximately 73 miles an hour in 55, which is well over the posted speed limit." A.R. 83. The Trooper stated that "[a]fter that point, I activated my emergency lights to initiate a traffic stop based off of that." A.R. 83. "I was relatively close to him at that point in time, because whenever I activated my lights, he was right in front of me." A.R. 92. "I pursued him up over the mountain, down to the road that he turned off of." A.R. 93. Further testimony by the Trooper indicated that once he turned on his emergency lights, Petitioner began driving left of center into the oncoming lane and accelerating to approximately 100 miles an hour. A.R. 83. "I do remember one car around either the top or the backside going off where, at that

point in time, we were running in around a hundred mile per hour going across the – up over." A.R. 94. The following exchange occurred between Petitioner's counsel and the Trooper:

> Q: You indicate that you followed Mr. Rohrbaugh with your lights on . . . . How long do you think you followed Mr. Rohrbaugh with the lights on?
>
> A: Well, from the bottom, it's probably – I don't know – a mile and a half, two miles, just guessing."
>
> Q: [W]hen you saw Mr. Rohrbaugh turn onto Long Hollow Road, approximately how far were you behind him then?
>
> A: Still a few car lengths . . . I was going to run his registration, which that would have been another reason to have stopped him, because it was improper . . . but he never give me that chance, because obviously he was traveling over the speed limit . . . .

A.R. 96-98, 100.

The Trooper testified further that Petitioner's vehicle proceeded to "lock the brakes up" and "slid off the road into the gravel" while making a turn off the main road. A.R. 83. Petitioner abruptly stopped at a trailer and the Trooper testified "[b]oth doors blew open because they were trying to get into the residence." A.R. 83. The Trooper drew his service weapon and ordered Petitioner and the passenger back to the vehicle to wait for police backup. A.R. 84.

Petitioner testified that he was driving the vehicle on July 3, 2021, and heading to his friend "Mark's" house after picking up his passenger. A.R. 103. He testified that he "was stopped and getting ready to make a left . . . and then I stopped, Trooper Rohrbaugh came in front of me and made a left, right in front of me." A.R. 105. Then, the following exchange occurred:

> Q: Did you know it was [the Trooper]?
>
> A: Yes, yes, I knowed [*sic*] who it was. I would say almost completely to the end of Wild Cat Straight is when I seen [*sic*] Trooper Rohrbaugh come back to the road.
>
> Q: Did he have his lights on?

A: No sir. . . . [W]hen I got to Long Hollow Road, I was traveling a little bit too fast – I admit that. I'd say probably, it just came up on me quick.

Q: When did you first see Trooper Rohrbaugh put on his lights?

A: At the end of Long Hollow Road . . . I was already on Long Hollow Road. I mean, I was already parked. We was parked, and then when he got down to there, he turned – right when he got to my black marks is when he turned up – or right before, maybe, he turned his lights on.

Q: Did you ever run anybody off the road?
A: No, sir.

Q: Do you remember seeing any cars coming the opposite direction?

A: Maybe one or two. I mean, I don't exactly; but, maybe, one or two.

A.R. 105-07, 110, 111.

To clarify his testimony, Petitioner was asked "And your version of – your testimony is that you didn't know that a Trooper was behind you? The Petitioner answered, "No." A.R. 114. Then, the examination continued:

Q: You didn't notice him until after you got to Long Hollow and had slid, and that he turned – you saw him turn his emergency lights on for the first time after you were in Long Hollow and almost out of the car?

A: We were sitting there getting ready to get out of the car. By the time, we got out of the car – we were probably 15 feet from the car when he got there. . .

A.R. 114.

Petitioner later testified, "Yeah, I knew – I knew he was behind us, but he never –I mean, he never got close enough, never turned his lights on so I just kept going. I mean, it wasn't that – I mean I did have – I mean, back in the past, I had a felony fleeing. All right. I was drunk." A.R. 115.

During rebuttal, the Trooper testified regarding Petitioner's statement to police on July 3, 2021 after he was arrested.

> Q: . . . After he was stopped and *Mirandized*, did he tell you something on the 3rd of July last year contrary to his testimony today?
>
> A: Mr. Rohrbaugh stated that he was traveling approximately 70 miles an hour in a posted 55 miles an hour zone before he advised he knew the trooper was after him.
>
> Q: Those are his words from July of last year, 'before he knew a trooper was after him?
>
> A: Yes, sir.

A.R. 118.

The circuit court found "[b]ased upon the testimony that I heard here today, I have no doubt Mr. Rohrbaugh may have not seen . . . him right when it happened. But I do believe Trooper Rohrbaugh's testimony. Based upon the facts that have been presented, I'm finding the Defendant guilty." A.R. 121.

B. Pretrial waiver of right to jury trial

During the pretrial stage, Petitioner filed numerous motions *in limine* to prevent a prospective jury from hearing evidence of criminal behavior associated with the felony offense of Fleeing from an Officer with Reckless Disregard. A.R. 13-54. Petitioner was present at the pretrial hearing where the parties informed the circuit court of their discussions regarding the handling of Petitioner's motions and the request for a bench trial. During the hearing was the following exchange:

> THE COURT: Where do we stand? We got some motions here it looks like.
>
> MR. OURS: Well, they're going to go away, Your Honor. What I'm about to tell you . . . Max and I talked Friday, and he told me about those, and I said, "That's not something what I – I intended to do." He said, "We're thinking about a bench trial." I think we're here just to schedule a bench trial before you on a single charge.

A.R. 72.

Petitioner's counsel confirmed this representation by stating:

> MR: WHITE: Two witnesses. Well, my – we might have two. John is probably going to have at least two probably, rather than just one . . . Judge let me ask you this. Can we do maybe June or so . . . I filed a motion to suppress the stop of the vehicle itself. Just want to reserve the right – it really comes before your Honor, because –
>
> THE COURT: Right, We'll decide it then.

A.R. 73, 74.

At the start of the bench trial on June 9, 2022, the circuit court again confirmed the Petitioner's intention to have a bench trial:

> THE COURT: . . . We're here for a bench trial, is my understanding.
>
> MR. WHITE: Yes, Your Honor. . . . The only thing of a preliminary nature, I guess, is the Court remembers I filed a ton of motions. We don't need these because you're obviously the trier of fact today, so it doesn't really matter.

A.R. 79.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record in this case. Accordingly, this appeal is appropriate for resolution by memorandum decision. W.Va. R. App. P. 21.

SUMMARY OF ARGUMENT

The evidence presented at trial was sufficient to support the circuit court's verdict of guilty against Petitioner for the felony offense of "Fleeing from an Officer with Reckless Indifference". The evidence presented at trial consisted of the Trooper's testimony that he witnessed the Petitioner driving a vehicle and had reason to believe Petitioner did not have a valid driver's license. A.R. 81. The Trooper began following the Petitioner while attempting to run a check of his license status. A.R. 82. While following Petitioner, the Trooper observed Petitioner driving at a speed significantly exceeding the speed limit. A.R. 82. The Trooper paced

the Petitioner to determine his speed, then turned his emergency lights on approximately one and a half to two miles before Petitioner made a quick right turn at a high rate of speed causing Petitioner to skid, make black marks on the road, and slide off the road during his turn. A.R. 83, 93, 94. At trial, Petitioner claimed he did not see the Trooper's emergency lights until he had turned off the road and was stopped; therefore, he could not be found guilty of Fleeing. A.R. 114. The circuit court determined that while the Petitioner may not have witnessed the moment the Trooper turned on his lights, the circuit court believed the Trooper's version of events. For a review of the sufficiency of evidence to support a criminal conviction the "relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). The circuit court, as the trier of fact in the bench trial, made proper determinations of credibility and was presented with sufficient facts to support the verdict of guilty.

Additionally, Petitioner's waiver of a jury trial was knowing and voluntarily when applying a totality of the circumstances review. *State v. Redden* 199 W. Va. 660, 666, 487 S.E. 2d 318, 324 (1997). There is a sufficient record to support the waiver of a jury trial by Petitioner was an intentional strategic tactic utilized by Petitioner to maximize his benefits at trial. A.R. 15-24. Petitioner did not raise an issue regarding his waiver of a jury trial during any lower court proceedings, nor assert that he failed to adequately understand his right to a jury trial. The record reviewed applying the totality of circumstances as outlined in *State v. Redden* 199 W. Va. 660, 666, 487 S.E. 2d 318, 324 (1997) demonstrates that Petitioner knowingly, intelligently, and voluntarily waived his right to a jury trial. Therefore, the circuit court's determination that Petitioner made a knowing and voluntary waiver of his right to a jury trial was proper.

ARGUMENT

I. Standard of review

This Court has confirmed the standard of review for bench trials when it held:

> In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. Pt. 1, *City of Martinsburg v. Dunbar* 246 W.Va. 223, 868 S.E. 2d 437 (2022)(citations omitted).

Regarding a review of the sufficiency of evidence to support a criminal conviction, this Court has held:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

When establishing the appropriate review to determine a Petitioner's knowing and voluntary waiver of a jury trial, this Court has held:

> [T]he trial court's ultimate determination of the knowing, intelligent voluntariness of a criminal defendant's waiver of the constitutional right to a jury trial is upon review "a legal question requiring independent [appellate] . . . determination. In such a case, although our appellate review of the trial court's ultimate determination is plenary and *de novo*, this Court will review specific findings of fact by the trial court which underlie its determination under a deferential clearly erroneous standard.

State v. Redden 199 W. Va. 660, 666, 487 S.E. 2d 318, 324 (1997).

II. The evidence admitted at trial was sufficient to support the circuit court's verdict of guilty.

Petitioner asserts the circuit court erred in its determination of guilt beyond a reasonable doubt pursuant to a bench trial because the facts presented by Respondent do not support the court's conclusion. This Court in *State v. Guthrie* has expressly stated,

> [t]his Court, in assessing whether the evidence presented at trial was enough to convict Petitioner, is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt.

Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). "In so doing, this Court "must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution," as "[c]redibility determinations are for a jury and not an appellate court." Syl. Pt. 3, *Guthrie,* 194 W.Va. 657, 461 S.E.2d 163. It is well-established that an appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175, *see also* Syl. pt. 2, *State v. Bailey,* 151 W.Va. 796, 155 S.E.2d 850 (1967) ("The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses."); Syl. pt. 1, *State v. Harlow,* 137 W.Va. 251, 71 S.E.2d 330 (1952) ("In the trial of a criminal prosecution, where guilt or innocence depends on conflicting evidence, the weight and credibility of the testimony of any witness is for jury determination.").

A criminal defendant who challenges "the sufficiency of the evidence to support a conviction takes on a heavy burden." Syl. Pt. 3, in part, *Guthrie*. To succeed on such a claim, Petitioner must show that "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt," and only in those circumstances should the jury verdict be set aside. *Id.* This Court likewise has stated:

> A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb. The defendant fails if the evidence presented, taken in the light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. LaRock, 196 W.Va. 294, 303, 470 S.E.2d 613, 622 (1996). The evidence "need not be inconsistent with every conclusion save that of guilt so long as the [fact-finder] can find guilt beyond a reasonable doubt." *Guthrie*, 194 W.Va. at 669, 461 S.E.2d at 175. Rather, a verdict will be set aside only when "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.*, at 663, 461 S.E.2d. at 169. "This standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *Id.* at 667-68, 461 S.E.2d at 173-74.

Pursuant to W. Va. Code §61-5-17(f): "A person who intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer, or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others, is guilty of a felony." The Trooper testified at trial that he identified Petitioner as the driver of a vehicle on July 3, 2021, while traveling on Smoke Hole Road. A.R. 81. Petitioner confirmed this fact in his testimony as well. A.R. 103. Thus, the first elements of the offense were undisputed: Petitioner drove a vehicle, on July 3, 2021, in Grant County, West Virginia.

The Trooper testified due to Petitioner's arrest for DUI the previous year, he had reason to believe the Petitioner's license was not valid. A.R. 81. The Trooper proceeded to turn his vehicle around to follow the Petitioner while he ran a license check. A.R. 82. Petitioner's testimony confirmed that he saw the Trooper turn around to proceed on the same road and

direction behind Petitioner. A.R. 105. The Trooper testified that he observed the Petitioner exceeding the speed limit, paced the Petitioner's car, and determined he was traveling at 73 miles per hour in a 55 miles per hour zone. A.R. 83. The Trooper stated he engaged his emergency lights signally the Petitioner to stop when Petitioner was right in front of the Trooper. A.R. 83. The Trooper continued to testify Petitioner increased his speed to a point that he was traveling at approximately 100 miles per hour, crossed the center line, and caused an oncoming vehicle to take measures to avoid a collision with Petitioner. A.R. 83, 94. After approximately one and one half to two miles of pursing Petitioner with his emergency lights engaged, the Trooper witnessed Petitioner abruptly lock up his brakes to turn off the road at an excessive speed, causing Petitioner's vehicle to skid, slide, and leave blacks marks on the road. A.R. 83. The Trooper testified he was a few car lengths behind Petitioner when he made the turn to follow Petitioner, at which point the Trooper apprehended Petitioner and his passenger as they were quickly exiting the vehicle. A.R. 83, 84, 94.

Petitioner testified at one point he did not know the Trooper was behind him. A.R. 114. At another point in Petitioner's testimony he confirmed that he did know the Trooper was behind him. A.R. 105, 115. Petitioner agreed he was exceeding the speed limit, several cars went past him in the oncoming lane, and he was traveling too fast when he made the turn off the road. A.R. 105-107, 110, 111. Petitioner testified he only observed the Trooper's emergency lights after he was stopped and exiting his vehicle. A.R. 114. Petitioner's statement to police at the time of his arrest that "he was traveling approximately 70 miles an hour in a posted 55 miles an hour zone before he advised he knew the trooper was after him" was also presented as evidence. A.R. 118.

After hearing all the evidence, the circuit court assessed the credibility of the witnesses, found the Trooper's version of events to be credible, and rendered a verdict of guilty for the

offense of "Fleeing from an Officer with Reckless Indifference". The Trooper's testimony that he engaged his emergency lights when he was right behind the Petitioner, he pursued the Petitioner approximately one and a half to two miles with his emergency lights activated, Petitioner accelerated to approximately 100 miles per hour while the Trooper was in pursuit with his emergency lights activated, and Petitioner's excessive speed caused an oncoming driver's safety to be at risk, provided sufficient evidence to satisfy the remaining elements of the offense of "Fleeing from an Officer with Reckless Indifference" wherein Petitioner: did intentionally flee or attempt to flee, from the Trooper, after a visual signal to stop was given, and Petitioner continued at a high rate of speed that showed a reckless indifference for the safety of others. "To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." *State v. Etchell*, 147 W. Va. 338, 349, 127 S.E.2d 609, 615 (1962) citing Syl. Pt. 1, *State v. Bowles*, 117 W.Va. 217, 185 S.E. 205 (1936) (additional citations omitted). "When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict." Syl. Pt. 2, in part, *LaRock*, 196 W. Va. 294, 470 S.E.2d 613. "This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." *Id.* at 304, 470 S.E.2d at 623.

Here, as in *Guthrie*, "We do not find the evidence so weak as to render the verdict irrational." *Guthrie,* 194 W.Va. 657, 670, 461 S.E.2d 163, 176. Ultimately, these are all credibility issues that the circuit court resolved in the State's favor and this Court should decline

to disturb them on appeal. See *Guthrie*, 194 W. Va. at 663, 461 S.E.2d at 169, syl. pt. 3, in part ("Credibility determinations are for a jury and not an appellate court."). Thus, the circuit court's determination, "[i]n keeping with this Court's precedent and adhering to the tenet that "matters of witness credibility and resolving inconsistencies in testimony are within the sole province of the [trier of fact]," *State v. Horne*, No. 14-0658, 2015 WL 1741146, at *5 (W. Va. Apr. 10, 2015) (memorandum decision) should be affirmed. To prevail on a challenge to the sufficiency of the evidence, a petitioner "must prove there is *no* evidence from which the jury could find guilt beyond a reasonable doubt." *State v. Zuccaro*, 239 W. Va. 128, 145, 799 S.E.2d 559, 576 (2017) (emphasis in original).

Accordingly, Petitioner has failed to show that "the record contains no evidence, regardless of how it is weighed, from which the [trier of fact] could find guilt beyond a reasonable doubt." Syl. Pt. 3, *Guthrie*. Since Petitioner cannot satisfy this heavy burden, his claim as to this issue is without merit.

III. The circuit court did not err in determining the Petitioner voluntarily, knowingly, and intelligently waived his right to a jury trial.

Petitioner next claims the lower court record does not demonstrate sufficient support to show the waiver of his right to a jury trial was knowing and voluntary. "A person accused of a crime may waive his constitutional right . . . to trial by jury, if such waivers are made intelligently and understandingly." Syl. Pt. 4, *State v. Surber*, 228 W. Va. 621, 723 S.E. 2d 851 (2012), citing *Syl. Pt. 5, State ex rel. Powers v. Boles*, 149 W.Va. 6, 138 S.E. 2d 159 (1964). Although this Court has discussed guidelines for circuit courts to utilize in determining the voluntariness of a defendant's decision to waive a certain fundamental right, "[t]hese guidelines are not mandatory." *State v. Sandler*, 175 W. Va. 572, 574, 336 S.E. 2d 535, 537 (1985)(discussing guidelines for a

circuit court's determination of whether an accused has knowingly and intelligently waived his right to counsel). A circuit court "is well advised to ascertain on the record" an accused's knowledge of factors regarding how a jury is composed; the appropriate number of members on the jury; the verdict must be unanimous; and if a jury trial is waived, the judge alone will determine guilt or innocence, but "[t]hese suggested inquiries are neither mandatory nor limiting." *Redden*, 199 W. Va. at 668, 487 S.E. 2d at 326. While the Court in *Redden* made suggestions for the preferred procedure a trial court should utilize in its colloquy with a defendant, the Court expressly stated "[w]e decline to set forth a specific formulation of the degree or kind of knowledge about the nature of the right to a jury trial which a criminal defendant must have to enable the defendant to make a decision which is knowing and intelligent." *Id.* at 667, 487 S.E. 2d 325. "Ultimately, whether a criminal defendant's waiver of the right to a jury trial is personal, knowing, intelligent and voluntary is a matter to be determined by looking at the totality of the circumstances." *Id.* at 668, 487 S.E. 2d at 326.

The Court in *Redden* looked for guidance in a similar "totality of the circumstances" review regarding the voluntariness of a defendant's confession as outlined in Syllabus point 3, *State v. Farley*, 192 W. Va. 247, 452 S.E. 2d 50 (1994). "In circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly support voluntariness." *Id.* Similarly, when considering a defendant's request to waive the constitutional right to a jury trial in favor of entering a plea, "[a] trial court should spread upon the record . . . relevant matters which will demonstrate to an appellate court . . . the defendant's plea was knowingly and intelligently made with due regard to the intelligent waiver of known rights." Syl. Pt. 5, in part, *Call v. McKenzie*, 159 W. Va. 191, 220 S.E. 2d 665 (1975).

"If the trial court did not make specific factual findings going to the knowing, intelligent and voluntary nature of the appellant's jury trial waiver, we will uphold the trial court's determination 'only if a reasonable review of the evidence clearly support [the trial court's determination.]'" *Redden*, at 666, 487 S.E. 2d at 324 (quoting *State v. Farley*, 192 W.Va. at 253, 452 S.E. 2d at 56).

A reasonable review of the record in the current matter clearly supports the trial court's determination that Petitioner's waiver of a jury trial was knowing and voluntary when viewed under a totality of the circumstances lens. Petitioner had the advice of counsel, and had knowledge of the motions *in limine* filed by his counsel to prevent a *jury* from hearing unfavorable evidence. A.R. 15-24. Petitioner was present at the pretrial hearing where the motions were discussed and the waiver of a jury trial was offered, discussed and accepted by the court:

> THE COURT: We got some motions here it looks like . . .
>
> MR. OURS: Max and I talked Friday, and he told me about those, and I said, 'That's not something what I -- I intended to do . . . [h]e said, 'We're thinking about a bench trial'. . . I think we're here just to schedule a bench trial before you on a single charge."

A.R. 72.

Petitioner was also present when his counsel engaged with the circuit court in the discussion scheduling the bench trial at the same hearing:

> MR: WHITE: Two witnesses. Well, my – we might have two. John is probably going to have at least two probably, rather than just one . . . Judge let me ask you this. Can we do maybe June or so . . . I filed a motion to suppress the stop of the vehicle itself. Just want to reserve the right – it really comes before your Honor, because –
>
> THE COURT: Right, We'll decide it then.

A.R. 73, 74.

Further, Petitioner was present at the start of trial where the circuit court again confirmed the case was being tried by bench trial and voiced no objection:

> THE COURT: . . . We're here for a bench trial, is my understanding.
>
> MR. WHITE: Yes, Your Honor.
>
> MR. WHITE: . . . [T]he court remembers I filed a ton of motions. We don't need those because you're obviously the trier of fact today, so it doesn't really matter.

A.R. 79.

Additionally, Petitioner actively participated by testifying at the bench trial where it was clear there was no jury present. A.R. 103. Petitioner did not raise any issue regarding his waiver of a jury trial at any time during the lower court proceedings. This Court in *Surber*, 228 W.Va. at 633, 723 S.E. 2d at 863 explained that "[t]he responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record present to this Court." quoting Syl. Pt. 6, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E. 2d 315 (1999). "An appellant must carry the burden of showing error in the 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." *Surber*, 228 W.Va. at 633-634, 723 S.E. 2d at 863-864, quoting Syl. Pt. 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E. 2d 897 (1996).

Petitioner's contention that the absence of a written waiver is a factor in the determination of voluntariness and intention to waive a jury trial is misplaced. The United States Supreme Court in *United States v. Garrett*, 727 F 2d 1003 (1984), discussed the Federal Rules of Criminal Procedure Rule 23(a) requirement for a written waiver of a jury trial.[1] *United States* v.

[1] While *Garrett* is specifically addressing Rule 23(a) of the Federal Rules of Criminal Procedure, Rule 23(a) found in the West Virginia Rules of Criminal Procedure are the same, thereby making

Garrett, 727 F.2d 1003, 1012, (11th Cir. 1984) *superseded by statute as recognized in U.S. v. Christian*, 614 Fed. Appx. 1001 (11th Cir. 2015). "[T]he purpose of Rule 23(a) is to ensure that a criminal defendant is aware of his jury trial right before waiving it and that any waiver is personal and unequivocal." *Garrett*, 727 F.2d at 1012. "Thus, reversal is warranted where there is no written waiver signed by the defendant in the record *and* the defendant asserts either that he was *unaware of his jury right* or that he *did not consent to its waiver*." *Id.* at 1012. (emphasis added). "If the defendant admits, or the government plainly demonstrates, that at the time of the waiver the defendant was not ignorant of his jury right and consented to the waiver, reversal would not be in order, for the defendant cannot complain on appeal of an alleged error invited or induced by himself." *Id.* at 1012. In *Redden*, this Court analyzed the intent of Rule 23(a) of the West Virginia Rules of Criminal Procedure by stating, "[t]he federal courts have consistently concluded that where a jury trial waiver is knowing and intelligent as reflected in an on-the-record statement made in open court by the defendant personally, the failure to obtain a written waiver signed by the defendant does not make a waiver invalid, despite the "writing" requirement." *Id.* at 669, 487 S.E. 2d at 327.

In applying the *Garrett* analysis, glaringly absent from Petitioner's argument is any contention Petitioner was *unaware* of his right to a jury trial, or that he did not *consent* to waive this right. Petitioner, similar to the appellant in *Redden*, "makes no assertion that he did not actually know about a particular aspect of the jury trial right, or that his knowledge of a particular aspect of the jury trial right would have led him not to waive the right." *Id.* at 668, 487 S.E. 2d at 326. Therefore, Petitioner was "not ignorant of his jury right", and "consented to the waiver".

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the Court's analysis of Rule 23(a) of the Federal Rules of Criminal Procedure illustrative in this Court's application of West Virginia's version of the same rule.

Garrett, 727 F.2d 1003, 1012. The distinguishing factor between the granting of a remand on this issue in *Garrett* and the present case is that, unlike *Garrett* where the appellant "neither attended nor was aware of" a chambers conference during which his attorney waived a jury trial, Petitioner was present for all proceedings in which the waiver was presented, discussed, accepted, and relied upon for scheduling, as well as the bench trial itself. *Garrett*, at 1015 n.7.

To the extent Petitioner briefly mentions the comparison between a waiver and a forfeiture of his right to a jury trial, this Court in *State v. Miller* established that the forfeiture of a right--the failure to make a timely assertion of the right -- and a waiver of a right -- knowing and intentional relinquishment or abandonment of a known right --are distinctly different. Syllabus Point 8, *State v. Miller* 194 W. Va. 3, 459 S.E. 2d 114 (1995). Where there is a waiver of a right "there is no error and any effect of a deviation from the rule of law need not be determined." Syl. Pt. 8, in part, *Miller*. "As noted in *United States v. Lakich*, 23 F3d 1203, 1207 (7th Cir. 1994), when there has been such a knowing waiver, there is no error . . ." *State v. Miller* 194 W.Va. 3, 18, 459 S.E. 2d 114, 129 (1995).

In this Court's review of the totality of circumstances, the facts in the instant matter are analogous with *Redden* wherein the Court opined "[w]e cannot agree with the appellant's contention that he was confused, unfocused and ignorant when he waived his right to a jury trial." *Id.* at 668, 487 S.E. 2d at 326. The *Redden* Court went on to explain, "[o]ur review of the record leaves us with the firm conviction that under the circumstances, the appellant appreciated the nature of what he was giving up, and that he personally, knowingly, intelligently and voluntarily waived his right to a jury trial, in consultation with his counsel and in accordance with a deliberate trial strategy." *Id.* Therefore, the *Redden* Court held upon its "reasonable review" of the evidence "which was before the trial judge in making his ultimate determination that the appellant's jury

waiver was personal, knowing, intelligent and voluntary, we find that the evidence clearly supports the trial judge's determination. The appellant's assignment of error on this issue is therefore without merit." *Id.* at 668–69, 487 S.E.2d at 326–27.

The totality of the circumstances surrounding the current record supports the circuit court's determination that Petitioner knowingly and voluntarily waived his right to a jury trial. Petitioner's choice to have a bench trial was intentional to eliminate the potential that certain evidence might be "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." A.R. 15-24. Moreover, Petitioner was no stranger to the criminal justice system, having gained knowledge through his prior criminal experiences. A.R. 115. Petitioner did not make his jury trial waiver an issue at any point in the trial or during post-trial motions; only raising the issue of for the first time on appeal. *Redden,* at 665, 487 S.E. 2d at 323. As reiterated by this Court, "appellate review must be limited to those issues which appear in the record present to this Court." *Surber*, 228 W.Va. at 633, 723 S.E. 2d at 863 (quoting Syl. Pt. 6, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E. 2d 315 (1999)). "Error will not be presumed, all presumptions being in favor of the correctness of the judgment." *Surber*, 228 W.Va. at 633-634, 723 S.E. 2d at 863-864 (quoting Syl. Pt. 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E. 2d 897 (1996)).

As to the Petitioner's final request to apply the alternate "plain error standard", the Petitioner is still not entitled to relief. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). "[T]he four-pronged plain error analysis is conjunctive," *Spencer v. United States*, 991 A.2d 1185, 1192 (D.C. App. 2010), and the Petitioner carries the burden of satisfying all four prongs before he is entitled to relief. *E.g., United States v.*

Tarabein, 798 F. App'x 576, 580 (11th Cir. 2020) ("In plain error review, it is the defendant who bears the burden to show all four prongs of this demanding standard.") This is no simple feat as "[m]eeting all four prongs is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83, n.9 (2004)). Thus, "[t]he plain error doctrine is utilized sparingly and only in extreme circumstances." *State v. Keesecker*, 222 W. Va. 139, 148, 663 S.E.2d 593, 602 (2008).

Here, Petitioner's argument does not survive the first prong of *Miller*: "[a]s noted in *United States v. Lakich*, 23 F3d 1203, 1207 (7th Cir. 1994), when there has been such a knowing waiver, there is no error . . ." *State v. Miller* 194 W.Va. 3, 18, 459 S.E. 2d 114, 129 (1995). Nor is any such error plain, "[to] be "plain", the"[e]rror must be "clear" or "obvious."" Syl. Pt. 8, in part, *Miller*. "[E]ven if the trial court committed error, the error was clearly 'invited as a part of a trial strategy or tactic.'" *Redden*, at 665, 487 S.E.2d 323. (quoting *State v. Dozier*, 163 W.Va. 192, 197, 255 S.E. 2d 552, 555 (1979)). The Petitioner fails to make a meritorious argument under the plain error standard.

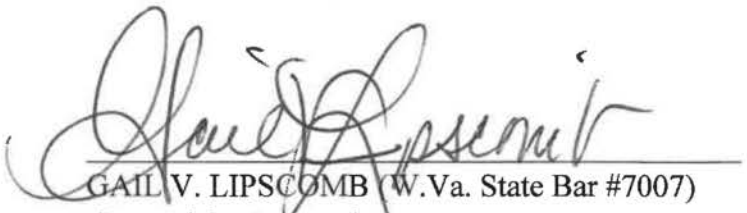
Accordingly, the proper standard for this Court's assessment as to whether Petitioner's waiver of a jury trial was knowing and voluntary must be accomplished by a "reasonable review" of the "totality of circumstances" present before the trial judge. In this case, the totality of the circumstances support the circuit court's determination that Petitioner "wished to waive his right to a jury trial" and his waiver of a jury trial was knowing, intelligent and voluntary. A.R. 55. Therefore, the Petitioner's assignment of error regarding his waiver of a jury trial is without merit.

CONCLUSION

Respondent respectfully requests this Court to affirm the conviction of the Petitioner for the offense of "Fleeing from an Officer with Reckless Indifference", and affirm the circuit court's determination that Petitioner's waiver of a jury trial was knowing, intentionally, voluntary and intelligent.

Respectfully Submitted,
STATE OF WEST VIRGINIA,
Respondent

By Counsel,
PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-771

STATE OF WEST VIRGINIA,
***Petitioner Below*, Respondent**

v.

BRADLEY ROHRBAUGH,
***Respondent Below*, Petitioner**

CERTIFICATE OF SERVICE

I, Gail V. Lipscomb, do hereby certify that on the 9th day of March 2023, I served a true and accurate copy of the foregoing ***"Respondent's Brief"*** on Petitioner, through his counsel, by effecting service through the File & ServeXpress e-filing system:

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