

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SCA EFiled: May 20 2024
01:37PM EDT
Transaction ID 73107239

STATE OF WEST VIRGINIA

Plaintiff Below, Respondent,

v.

NO: 24-88

RODERICK LEVI HOWARD,

Defendant Below, Petitioner

**LEGAL MEMORANDUM IN SUPPORT
OF PETITION FOR APPEAL**

A Courtenay Craig (#8530)
CRAIG LAW OFFICE
635 7th Street
Huntington, WV 25701
(304) 697-4422--Telephone
(304) 905-5862--Facsimile

May 20, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
QUESTION PRESENTED.....	2
JURISDICTION.....	3
STANDARD OF REVIEW.....	4
PROCEDURAL HISTORY.....	5
STATEMENT OF CASE AND FACTS.....	6
SUMMARY OF ARGUMENTS.....	9
.	
<u>POINT ONE</u> : THE LOWER COURT CLEARLY ERRED FACTUALLY WHEN IT RULED MR. HOWARD WAS UNDER ARREST AT THE TIME OF SEARCH OF HIS PERSON BECAUSE A 911 CALL BY OFFICER OILER INDICATES MR. HOWARD WAS NOT PLACED UNDER OFFICIAL ARREST UNTIL A MINIMUM OF 25 MINUTES AFTER THE TRAFFIC STOP AND 15 MINUTES AFTER THE PAT DOWN WAS CONDUCTED	10
<u>POINT TWO</u> : BECAUSE MR. HOWARD WAS NOT OFFICIALLY UNDER ARREST DURING HIS PAT DOWN, CONTRABAND MUST BE IMMEDIATELY APPARENT BEFORE OFFICERS MAY REMOVE IT FROM THE DETAINEE’S PERSON WITHOUT A WARRANT.....	14
<u>POINT THREE</u> : THE OFFICER’S REQUEST TO MR. HOWARD REGARDING REMOVING THE ITEM FROM HIS PANTS WAS MADE WHILE HE WAS DETAINED BUT WITHOUT BENEFIT OF MIRANDA WARNINGS AND THE EVIDENCE RETREIVED INCRIMINATED MR. HOWARD.....	18
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

U.S CONSTITUTION

Fourth Amendment to the United States Constitution

Fifth Amendment to the United States Constitution

WEST VIRGINIA CASES

State v. Jones, 193 W.Va. 378, 456 S.E.2d 459 (1995)

State v Lacy, 196 W.Va. 104, 468 S.E.2d 719 (1996)

State v. Stanley, 168 W. Va. 294, 284 S.E.2d 367 (1981)

State v. Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000)

U.S. SUPREME COURT

Arizona v. Hicks, 480 U. S. 321 (1987)

Michigan v. Long, 463 U. S. 1032 (1983)

Minnesota v Dickerson, 508 U.S. 366 (1993)

Sibron v. New York, 392 U. S. 40 (1968)

Terry v. Ohio, 392 U.S. 1 (1968)

Whren v U.S., 517 U.S. 506, (1996)

JURISDICTION

West Virginia Code §58-5-1. When appeal lies.

A party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties. The defendant in a criminal action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court in which there has been a conviction or which affirms a conviction obtained in an inferior court.

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 facts-specific nature of the 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 the testimony on the issues. Therefore, the Circuit Courts factual findings are reviewed for clear error.” Syllabus Point 1, *State v Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996). Questions of law, in a suppression issue, are reviewed de novo. Syllabus Point 3, *State v, Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

PROCEDURAL HISTORY

Roderick Howard was arrested on July 27, 2021. (See Criminal Complaint, Appendix, Pg. 1-5) His preliminary Hearing was held August 10, 2021 (See Preliminary Hearing Transcript, Appendix Pg. 231)

Mr. Howard's case was presented to the grand jury for the first time on March 15, 2022. (See First Grand Jury Transcript Appendix, Pg 65-75) The grand jury returned a two-count indictment for violations of West Virginia Code 60A-4-415(b), possession of the controlled substance fentanyl, and West Virginia Code 61-7-7, prohibited person in possession of a firearm. (See Indictment, Appendix, Pg. 77-78)

A suppression hearing was held in this matter on September 22, 2022. (See Suppression Transcript, Appendix, Pg. 117-189) On that date, subsequent to the suppression hearing, the State dismissed both counts of the indictment, without prejudice, because 60A-4-415(b) was found unconstitutional prior to the hearing and the officer admitted failing to give Miranda Warnings to Mr. Howard prior to questioning him about the contents of the car where the firearm was found. (See Order Dismissing Indictment, Appendix, Pg. 89-90)

Mr. Howard's case was presented to the grand jury for the second time on November 14, 2022. (See Second Grand Jury Transcript, Appendix, Pg. 91-100). The jury returned a one-count indictment for possession with intent to deliver fentanyl in violation of West Virginia Code 60A-4-401. (See Second Indictment, Appendix, Pg. 101-102).

An order supplementing the record was granted on March 3, 2023 where by defense counsel supplemented the record with 911 documents and CDs. (See Order, Appendix, Pg.

199-200) A proposed findings of fact and conclusions of law was submitted by defense counsel on March 13, 2023. (See Proposed Findings, Appendix, Pg. 191-196). The Court ultimately denied the motion to suppress by order on July 7, 2023. (See Order Denying Suppression Motion, Appendix, Pg. 202-207)

Mr. Howard plead “no contest” to one count of attempt to commit a felony, a lesser included offense to the count in the indictment, on December 6, 2023. (See Plea, Appendix, Pg. 215) He was ultimately sentenced on February 2, 2024 to a 1 to 3-year sentence. (See Sentencing Order, Appendix Pg. 226-229)

STATEMENT OF THE CASE AND FACTS

Roderick Howard was arrested on July 27, 2021, after a traffic stop and subsequent search. The contraband used as the basis for Mr. Howard’s conviction was discovered through a custodial interrogation of Mr. Howard without benefit of Miranda Warnings and an improper pat down.

The traffic stop of Mr. Howard occurred on July 27, 2021 (See Criminal Complaint, Appendix, Pg. 1-6), suppression transcript (Appendix, Pg 120), first grand jury transcript (Appendix, Pg. 68), second grand jury transcript (Appendix, Pg. 94) and preliminary hearing (Appendix, Pg.) The stop occurred at 18:51:06 (Appendix, Pg. 6). The traffic stop was initiated because Mr. Howard committed various traffic violations including improper lane change (Appendix, Pg. 1-6).

Officer Oiler pulled in behind Mr. Howard and initiated a traffic stop (Appendix, Pg 123). Officer Oiler testified he noticed Mr. Howard was on the phone with the phone being on Bluetooth (Id). The call was to Dominique Lassiter and her phone records show that call lasting

30 minutes before it was terminated. (See phone record submitted by Defendant, Appendix, Pg. 258-259)

Officer Oiler gave various reasons for arresting Mr. Howard. In the criminal complaint, the Officer stated he found out that Mr. Howard's license was suspended and then pulled him out of the car, and then he was observed standing funny, at which time officers patted him down. (Appendix 1-6). Officer Oiler testified at the preliminary hearing he pulled Mr. Howard out of the car, because he was acting nervous and, to write him a warning ticket (Appendix, Pg. 235). While writing the warning ticket, his partner observed Mr. Howard standing in a suspicious manner (Appendix, Pg. 235-236). At the first grand jury hearing, Officer Oiler testified Mr. Howard's license was suspended and he had an active warrant, and that is why he was arrested (Appendix, Pg. 70). At the suppression hearing Officer Oiler testified Mr. Howard's license was suspended and he had an active warrant, and that is why he was arrested (Appendix, Pg. 124).

Mr. Howard gave Officer Oiler a valid West Virginia driver's license. (Appendix, Pg. 70, 95, 123) Records from dispatch CAD sheets, at 18:53:51, show Mr. Howard had no West Virginia license suspension as testified by the officer (Appendix, Pg. 15). In fact, it showed Mr. Howard had a West Virginia valid driver's license with "no convictions in the last two years or any DUI convictions" and "no active suspensions/revocations and DUI suspensions. (Id.)

Officer Oiler stated it was his intent to write Mr. Howard a warning ticket (Pg. 95 and 136). At 18:59:15 Officer Oiler ran another inquiry on the rental vehicle's registration, after he had already received notice of the Wyoming County warrant. (Appendix, Pg. 17 and 157). At 19:16:04 Officer Oiler had Putnam Co. Dispatch run Mr. Howard's Virginia license number and

found Mr. Howard was not licensed and had restrictions in Virginia. (Appendix, Pg. 19), 911 CD Clip 10) However, that does not change the fact his West Virginia license was valid.

Officer Baumgardner arrived on scene approximately 6 minutes after the stop was initiated at approximately 18:57:26 (Appendix, Pg. 6). Officer Oiler testified Officer Wilson arrived a few minutes after Officer Baumgardner (Appendix, Pg. 147). Mr. Howard was officially marked under arrest at 20:32:07 (Appendix, Pg. 7)

Officer Oiler testified that Mr. Howard was never mirandized (Appendix, Pg. 73, 95 129, 161, 170). Officer Oiler testified that he believed Mr. Howard as a possible threat and asked him to exit the vehicle. (Appendix, Pg. 137). Officer Oiler further testified, although he perceived Mr. Howard as a threat, and was the only officer present at the time, that he was not the individual that patted Mr. Howard down rather Officer Wilson was. (Appendix, Pg. 125 and 160). Officer Oiler testified that he observed an exchange between Officer Wilson and Mr. Howard regarding his stance (Appendix, Pg. 159). Officer Oiler also stated that he saw Officer Wilson pat down Mr. Howard (Appendix, Pg. 161).

Officer Wilson did not immediately recognize the item as a weapon or contraband and instead asked Mr. Howard to remove the item from his pants for inspection. This request was made without the benefit of Miranda warnings. Those drugs were later used as the evidence to support the criminal complaints.

Officer Oiler claims Mr. Howard was under arrest at the time of the search of his person but a phone call to 911 dispatch at 19:14:10 clearly shows Officer Oiler did not believe the Wyoming County warrant was sufficient to arrest Mr. Howard. (Appendix, Pg. 264-268)

Therefore, the search of Mr. Howard was not incident to a lawful arrest but rather a Terry pat down which was extended beyond the legal limits.

SUMMARY OF ARGUMENTS

1. The court clearly erred factually when it ruled Mr. Howard was officially under arrest when he was searched. The Officer testified he immediately arrested Mr. Howard when notified of the Wyoming County warrant, however a call to Putnam County dispatch confirms Mr. Howard was still not under official arrest more than 25 minutes later.
2. The Terry pat down conducted by Officer Wilson on Mr. Howard was subject to the requirements of *Minnesota v. Dickerson* and Officer Wilson did not immediately recognize the object removed from Mr. Howard's person as contraband before requesting its removal. Officer Oiler testified, at the suppression hearing, Officer Wilson patted down Mr. Howard almost immediately upon his arrival. Officer Wilson detected something on Mr. Howard's person that was not of the human body but, he did not immediately recognize it as contraband. Telling Mr. Howard to remove it when he was not under arrest amounted to a warrantless search without probable cause.
3. Even though Mr. Howard was not free to leave and, thus, "under arrest" for purposes of West Virginia law, he was never given Miranda warnings. When Officer Wilson and Officer Oiler asked Mr. Howard to remove the item from his pants, he was never given notice of his Fifth Amendment right against self-incrimination before that request was made. That was clearly a question designed to incriminate Mr. Howard because the evidence taken was the sole basis for the criminal charges at bar

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rule 19 applies because errors in settled law and claims of unsustainable exercise of discretion exist when law governing that discretion is settled.

TIMELINE

- | | | | |
|-----|----------|---|---------------------|
| 1. | 18:51:06 | Traffic Stop Effected | (Appendix, Pg. 6) |
| 2. | 18:51:48 | Vehicle Registration Query | (Appendix, Pg. 13) |
| 3. | 18:53:51 | West Virginia Driver's History Requested | (Appendix, Pg. 15) |
| 4. | 18:57:18 | Report of Wyoming County Capias | (911 CD, Clip 9) |
| 5. | 18:57:26 | Officer Bumgardner Arrives on Scene | (Appendix, Pg. 2) |
| 6. | 19:01:00 | Officer Wilson Arrives on Scene | (Appendix, Pg. 147) |
| 7. | 19:14:10 | Call initiated to Dispatch Questioning the Ability to Arrest Mr. Howard on the Capias | (911 Cd, Clip 10) |
| 8. | 19:16:04 | Virginia Driver's History Requested | (Appendix, Pg. 19) |
| 9. | 19:41:01 | Query Regarding Firearm | (Appendix, Pg. 21) |
| 10. | 20:32:07 | Officially recorded as under arrest | (Appendix, Pg. 7) |

ARGUMENT **POINT ONE**

THE LOWER COURT CLEARLY ERRED FACTUALLY WHEN IT RULED MR. HOWARD WAS UNDER ARREST AT THE TIME OF SEARCH OF HIS PERSON BECAUSE A 911 CALL BY OFFICER OILER INDICATES MR. HOWARD WAS NOT PLACED UNDER OFFICIAL ARREST UNTIL A MINIMUM OF 25 MINUTES AFTER THE TRAFFIC STOP AND 15 MINUTES AFTER THE PAT DOWN WAS CONDUCTED.

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 facts-specific nature of the 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 the testimony on the issues. Therefore, the Circuit Courts factual findings are reviewed for clear error.” Syllabus Point 1, *State v Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996). It should be noted the Court issuing the order denying the motion to suppress did not conduct the suppression. Rather, the State and the defendant agreed to use the transcript from the suppression hearing held in the prior case.

ARGUMENT

The court clearly erred because in four separate times testifying under oath, and in the criminal complaint, Officer Oiler stated his knowledge of the Wyoming Co. warrant for Mr. Howard, his subsequent decision to arrest Howard on said warrant, and his knowledge of a suspended driver’s license all occurred within the first few minutes of approaching Mr. Howard’s vehicle. (See Appendix Pg. 35, 95 and 124). Officer Oiler was told of the Wyoming Co. warrant at 18:57:18. However, the Officer had not requested the Virginia Driver’s license query until 19:16:04 and still had not decided to arrest Mr. Howard until the end of the call initiated at 19:14:10, at minimum. These misrepresentations under oath occurred in both grand jury presentations, the preliminary hearing and, at the suppression hearing.

On the 911 CD, Clip 10, timed stamped at 19:14:10, on July 27, 2021, a two-minute and forty-seven second conversation takes place between Officer Oiler and the Dispatcher, Kim

Hunt, which completely contradicts the Officer's testimony of immediately arresting Mr.

Howard for the Wyoming County warrant and the findings in the Final Order. (Appendix, Pg.

264-268) This conversation confirms Mr. Howard was still not under arrest twenty-five minutes after the traffic stop and, possibly much longer after that because he is not officially marked at under arrest until 20:32:07 (Appendix, Pg. 7).

Oiler: *Hey, um, Bumgardner and Wilson don't think we can do it correctly so that warrant is still out there. Ok?*

Dispatch: *They don't think we can do it? intelligible*

Oiler: *I guess they think we are dumb or something.*

Dispatch: *We are going to fight. I mean I have a capias here and any other time those are printed, they are taken to jail for it. And, if it's wrong, it's on the county who didn't take it out.*

Oiler: *Yeah*

Dispatch: *It's Wyoming County.*

Oiler: *It's for Roderick Levi?*

Dispatch: *Roderick Levi Howard, yes.*

Oiler: *He's saying he's on parole and shit.*

Dispatch: *It should be fine. If not, it's not your fault.*

Oiler: *Yeah, exactly.*

Dispatch: *Do you need a triple I for him or is it just this?*

Oiler: *Can you run his Virginia driver's license? And see if it uh is, see what the status is on him.*

Dispatch: *yes, I can. It's right here.*

Oiler: *I found one for him.*

Dispatch: *It is Bravo 69832313*

Oiler: *Yeah. We just gotta see if it's revoked DUI or something.*

Dispatch: *It says. It says driver's license status is not licensed. Five-point balance. Restrictions from work. It doesn't say why. It just says previous driving under suspension revocation. Of course, It's just not giving me any reasons.*

Oiler: *Ok. Alright. Cool deal. That's fine. We are probably gonna be 1015 with him. Just wait there to officially put it, just to make sure that's what they want to do.*

This exchange demonstrates Officer Oiler did not believe he had probable cause to arrest Mr. Howard until he confirmed procedure with the 911 Dispatcher more than fifteen minutes after Officer Wilson's pat down. It further shows Officer Oiler was not aware of any license suspension of any kind until he asked dispatch to run Mr. Howard's Virginia driver's license. That request was made more than twenty-five minutes after the initial stop, not immediately after. It was also after Officer Oiler had already received a valid West Virginia license from Mr. Howard. In fact, Officer Oiler's own words demonstrate he was still looking for a reason before officially arresting Mr. Howard when he said "*Yeah. We just gotta see if it's revoked DUI or something.*" If Mr. Howard was already under arrest for the Wyoming County warrant, the Virginia driver's license information was unnecessary as probable cause.

If Mr. Howard was actually under arrest when Officer Wilson arrived, and placed in cuffs, as Officer Oiler claimed, it does not explain why the phone call with Ms. Lassiter continued for 30 minutes. Verizon phone records indicate the call Mr. Howard initiated to Ms. Lassiter lasted

thirty-one minutes from 6:50 pm to 7:21 pm. (Appendix, Pg. 258-259) This directly coincides with the time the call Officer Oiler made to dispatch ending at 19:17:00.

The 19:14:10 call to dispatch clearly demonstrates Mr. Howard was not under arrest at the time the search of his person occurred. There is no other way of interpreting Officer Oiler's words. *"Ok. Alright. Cool deal. That's fine. We are probably gonna be 1015 with him. Just wait there to officially put it, just to make sure that's what they want to do."*

ARGUMENT **POINT TWO.**

MR. HOWARD WAS NOT UNDER ARREST DURING HIS PAT DOWN, THEREFORE, THE CONTRABAND MUST BE IMMEDIATELY APPARENT BEFORE OFFICERS MAY REMOVE IT FROM THE DETAINEE'S PERSON WITHOUT A WARRANT

STANDARD OF REVIEW

Questions of law, in a suppression issue, are reviewed de novo. Syllabus Point 3, State v, Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000).

ARGUMENT

Mr. Howard was legally stopped for traffic violations. When Officer Oiler conducted a record's check dispatch provided information Mr. Howard an outstanding warrant from Wyoming County, West Virginia. Officer Oiler claims this was the reason Mr. Howard was immediately arrested. This was also the basis given by the Court suggesting Mr. Howard was under arrest when he was asked to remove contraband from his person.

The lower court has Mr. Howard being searched at the end of the event in its order on suppression, not the beginning as testified by Officer Oiler at the suppression. However, the 911 CAD CD, Clip 10) clearly demonstrates Office Oiler did not believe he had sufficient legal

justification to arrest Mr. Howard when he claims he did. In a conversation with 911 dispatcher, Kimberly Hunt, Officer Oiler clearly questions whether he has sufficient justification for the arrest. (Appendix, Pg. 264-268) In fact, the 911 dispatcher, Kimberly Hunt, has to convince Officer Oiler that the outstanding warrant from Wyoming County is sufficient cause to arrest Mr. Howard stating “*It should be fine. If not, it’s not your fault.*” Officer Oiler then responds “*[w]e are probably gonna be 1015 with him. Just wait there to officially put it, just to make sure that’s what they want to do.*” (911 CAD CD, Clip 10). 1015 is police code for in custody. That means Mr. Howard was not officially in custody until more than 25 minutes after the traffic stop, not arrested immediately as Oiler claims.

That conversation with dispatch occurred nineteen (19) minutes after Officer Oiler claims he placed Mr. Howard under arrest for the Wyoming County warrant. If Officer Oiler was unsure he had probable cause to arrest Mr. Howard on the Wyoming County warrant seventeen (17) minutes after he claimed he did, Mr. Howard was not officially under arrest and in custody when the pat down yielding the contraband was conducted. Officer Oiler testified Officer Wilson patted Mr. Howard down almost immediately upon his arrival. (Appendix Pg. 1150-151) Officer Wilson arrived at 19:01:00 which is 10 minutes after the stop, 4 minutes after Dispatch advised of the Wyoming County warrant and, 13 minutes before Oiler called dispatch regarding the ability to arrest on the warrant. Therefore, it was not a search subsequent to a legal arrest. It was a Terry pat down subject to the requirements of *Minnesota v. Dickerson* regarding identification as contraband.

Minnesota v. Dickerson, 508 U.S. 366 (1993) states the following:

“The police may seize nonthreatening contraband detected through the sense of touch during a protective patdown search of the sort permitted by *Terry*, so long as the search stays within the bounds marked by *Terry*. pp.372-377.”

(a) *Terry* permits a brief stop of a person whose suspicious conduct leads an officer to conclude in light of his experience that criminal activity may be afoot, and a pat down search of the person for weapons when the officer is justified in believing that the person may be armed and presently dangerous. This protective search-permitted without a warrant and on the basis of reasonable suspicion less than probable cause-is not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others. If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Sibron v. New York*, 392 U. S. 40, 65-66. pp. 372-373.

(b) In *Michigan v. Long*, 463 U. S. 1032, 1050, the seizure of contraband other than weapons during a lawful *Terry* search was justified by reference to the Court's cases under the "plain-view" doctrine. That doctrine-which permits police to seize an object without a warrant if they are lawfully in a position to view it, if its incriminating character is immediately apparent, and if they have a lawful right of access to it-has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. Thus, if an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. Cf., e. g., *Illinois v. Andreas*, 463 U. S. 765, 771. If the object is contraband, its warrantless seizure would be justified by the realization that resort to a neutral magistrate under such circumstances would be impracticable and would do little to promote the Fourth Amendment's objectives. Cf., e. g., *Arizona v. Hicks*, 480 U. S. 321, 326-327. Pp. 374-377.

There isn't a single shred of evidence that states officers immediately recognized the item on Mr. Howard's person as contraband. The criminal complaint states: “[t]his officer's partner then proceeded to pat down the subject for weapons and felt the suspect clinching his buttocks. This officer then spoke to the individual about the reasons for clinching and it was eventually told to this officer it was because he has approximately 9.5 grams of fentanyl in his

groin area. This officer's partner then took the suspect to the nearest patrol vehicle and retrieved the fentanyl." (Appendix, Pg. 2)

At the August 10, 2021 preliminary hearing, Officer Oiler testified: "I got him out of the car to write a warning and then while writing the warning, my partner picked up on the way he was standing that indicated that he might have something tucked." (Appendix, Pg. 235-236) "yes, and we arrested him and then conducted a pat down on him, and at that point, confronted him on the aspect of how he was standing and then he came off of that, he did have something small tucked inside of his pants." (Appendix, Pg. 236)

In March 2022 testimony before the grand jury, Officer Oiler testified: "[m]y partner did a Terry frisk of him, if I recall correctly, and felt what he thought was something that's not part of his body. And, that's when we asked him what it was and he stated he had something in there. And I believe we allowed him to retrieve it." (Appendix, Pg. 71)

In November 2022 testimony before the grand jury, Officer Oiler testified "[w]e began to speak to him a little bit further and give him a pat down incident to arrest, at which point in time it was discussed that we believed he had something on his person. And, my partner has been trained in that. So, we give him the option to remove it himself, at which point he produced I believe a 9.5 gram baggie of Fentanyl from his groin." (Appendix, Pg. 95)

At the September 10, 2022 suppression hearing, Officer Oiler testified: "Sir, once again, Officer Wilson informed him that of which he saw, and then told him he had it on him. And, then we took the cuffs off and allowed him to retrieve it out of his own person." (Appendix, Pg. 162)

None of the versions of events just cited demonstrate officers immediately recognized the object on Mr. Howard's person was contraband when he was patted down. It was not was not even discovered through actual touch. It was only discovered to be what it was when officers told Mr. Howard to remove it from his person. This violates the Dickerson requirement the contraband be "immediately apparent" and thus constitutes an unconstitutional search.

ARGUMENT
POINT THREE.

OFFICERS' REQUEST TO MR. HOWARD REGARDING REMOVING THE ITEM FROM HIS PANTS WAS MADE WHILE HE WAS DETAINED BUT WITHOUT BENEFIT OF MIRANDA WARNINGS AND THE ITEM RETREIVED INCRIMINATED MR. HOWARD.

Under West Virginia law a person is under arrest when a reasonable person would believe they are not free to leave.

If the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the West Virginia Constitution is not implicated and no justification for the officer's conduct need be shown. At the point where a reasonable person believes he is being detained and is not free to leave, then a stop has occurred and Section 6 of Article III is triggered, requiring that the officer have reasonable suspicion that criminal activity is afoot. If the nature and duration of the detention arise to the level of a full- scale arrest or its equivalent, probable cause must be shown. Thus, the police cannot seize an individual, involuntarily take him to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest.

State v. Jones, 193 W.Va. 378. 456 S.E.2d 459 (1995)

It's clear Mr. Howard was not free to leave from the moment Officer Oiler approached his vehicle because his original intent was to write a warning ticket before letting Mr. Howard go. (Appendix. Pg. 154) It is also clear Mr. Howard was never given Miranda warnings and Officer Oiler admitted as much. (Appendix, Pg. 73, 74, 129, 161 and 170)

Officer Oiler admitted Mr. Howard was never given Miranda warnings at any time

during the stop. (Id.) In fact, his admission regarding this failure was the reason the State agreed to dismiss the felon in possession of a firearm charge. (Appendix, Pg. 89) It should be noted, the discovery of the firearm in the rental vehicle was subsequent to officers asking Mr. Howard to remove the drugs from his pants. In other words, not only was Mr. Howard questioned without benefit of notice of his Fifth Amendment right against self-incrimination, he was actually asked to provide evidence against himself on two separate occasions.

"A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of Miranda warnings is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the Miranda warnings; and the purpose or flagrancy of the official misconduct."

Syllabus Point 2, State v. Stanley, 168 W. Va. 294, 284 S.E.2d 367 (1981).

Undoubtedly, the State will argue officers had probable cause to arrest Mr. Howard on the Wyoming County warrant but, the Officer Oiler's phone call to dispatch disproves that argument. He clearly stated Mr. Howard was not taken into custody until after the 19:14:10 call ended three minutes later. His exact words at the end of the call were: *"Ok. Alright. Cool deal. That's fine. We are probably gonna be 1015 with him. Just wait there to officially put it, just to make sure that's what they want to do."* If officers did not believe they could legally arrest Mr. Howard on the Wyoming County warrant until 17 minutes after they claim they arrested him, he was being detained and was subject to Miranda protections when the pat down occurred.

In fact, the Officer admits he continued questioning Mr. Howard without Miranda warnings long after the contraband was taken from Mr. Howard's person. Officer Oiler testified at both the preliminary hearing and the suppression hearing he tried to work out a deal with Mr.

Howard to be an informant. (Appendix, Pg. 242) He later reneged on that offer when he found the firearm in the car. So, questioning Mr. Howard without Miranda warnings was no mistake by Officer Oiler. It is his modus operandi. He knows better and testified as much. (Appendix, Pg. 74) He spent the time between finding the drugs on Mr. Howard's person and the actual arrest trying to convince Mr. Howard to become an informant.

CONCLUSION

WHEREFORE, the appellant, Roderick Levis Howard respectfully requests the Court grant his Petition for Appeal, reverse the lower Court's ruling on suppression and remand for action consistent with this Court's ruling.

Respectfully Submitted and Approved,
RODERICK LEVI HOWARD
By Counsel

A. Courtenay Craig
A. Courtenay Craig (WV #8530)
Counsel of Record
635 7th Street
Huntington, WV 25701
Telephone: (304) 697-4422
Facsimile: (304) 908-5862

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

Respondent,

v.

NO: 24-00088

RODERICK LEVI HOWARD,

Petitioner

CERTIFICATE OF SERVICE

I, A. Courtenay Craig, counsel for the Appellant, Roderick Levi Howard, hereby certify that a true and correct copy of the foregoing Memorandum in Support of Petition for Appeal has been served upon counsel of record who are users of the E-filing System as of the date and time listed on the Notice of Electronic Filing, and shall be considered service under Rule 37.

A. Courtenay Craig
A. Courtenay Craig, Esq. (#8530)
Counsel for the Appellant
RODERICK LEVI HOWARD
635 7th Street
Huntington, WV 25701
Telephone: (304) 697-4422
Facsimile: (304) 908-5862