

In the Circuit Court of Pendleton County, West Virginia

State of West Virginia,
Plaintiff,

v.

Richard Hensley,
Defendant

Case No. CC-36-2023-F-3
Judge H. Charles Carl III

Order Denying Motion to Suppress

On a former day, the 16th day of May, 2023, came the State of West Virginia by its Prosecuting Attorney, April D. Mallow; and, the Defendant, in person and by counsel, G. Isaac Sponaugle. All parties appeared for the finalization of the suppression hearing.

WHEREUPON, the State called Senior Trooper K.C. Raymond of the West Virginia State Police to appear before the Court to provide testimony in this matter, subject to direct and cross-examination; and, the same is set forth more fully on the record herein.

Thereafter, the Court heard arguments and proffers of all counsel of record. The Court then ORDERED the Court Reporter to prepare a transcript of the additional testimony of Trooper Raymond and to provide a copy of the same to all counsel of record. The Court then took the matter UNDER ADVISEMENT and afforded the parties an opportunity to submit supplemental briefs within ten (10) days following receipt of the aforesaid transcript.

The Court has now had the opportunity to fully consider the matter, considering arguments and proffers of all counsel of record, evidence and testimony presented, written submissions of the parties, and pertinent legal authority. Based upon the foregoing, the Court does hereby FIND, DETERMINE, ORDER and ADJDUGE as follows:

1. The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants

shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

When law enforcement officers violate the Fourth Amendment, use of the evidence obtained directly and indirectly from that violation may be barred by the exclusionary rule. *Wong Sun v. U.S.*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

2. With regard to the issuance of a warrant, “[r]eviewing courts should grant magistrates deference when reviewing warrants for probable cause. Such warrants should be judged by a ‘totality-of-the-circumstances’ test.” Syl. pt. 1, *State v. Corey*, 233 W. Va. 297, 758 S.E.2d 117, 120 (2014) (per curium) (quoting syl. pt. 5, *State v. Thomas*, 187 W.Va. 686, 421 S.E.2d 227 (1992)).

3. With regard to the validity of an affidavit for a search warrant:

Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.

Syl. pt. 2, *Corey* (quoting syl. pt. 4, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986)).

4. With regard to what constitutes probable cause:

Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances.

Syl. pt. 3, *Corey* (quoting syl. pt. 3, *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995)).

5. Rule 41 of the West Virginia Rules of Criminal Procedure provides, in part:

(a) Authority to Issue Warrant. Upon the request of law enforcement officer or an attorney for the state, a search warrant authorized by this rule may be issued by a magistrate or a judge of a circuit court within the county wherein the property or person sought is located.

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the magistrate or a judge of the circuit court and establishing the grounds for issuing the warrant. If the magistrate or circuit judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, that magistrate or circuit judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the magistrate or circuit judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.

6. The Supreme Court of Appeals of West Virginia has recognized:

To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable.

State v. Bruffey, 231 W. Va. 502, 513, 745 S.E.2d 540, 551 (2013) (quoting syl. pt. 1, *State v.*

Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980); syl. pt. 1, *State v. Hall*, 171 W.Va. 212, 298 S.E.2d 246 (1988)

7. In support of the Defendant's Motion to Suppress, the Defendant argues that the *Affidavit* was insufficient for issuance of a search warrant, as the affiant did not establish the reliability of the confidential informant; and, therefore, viewing the *Affidavit* and Complaint under a totality of the circumstances, the search warrant was deficient and any items seized as a result should be suppressed.

8. The State argues that the information received from law enforcement was not from a confidential informant; that the information was received from the Defendant's wife, who is a victim in the case; and, that Cpl. J.M. Ware sought assistance from Senior Trooper K.C. Raymond, who was also present at the West Virginia State Police Barracks, in completing an

Affidavit for search warrant due to the serious nature of the offense and so that Cpl. Ware could commence with initiating assistance of the State Police's special response team to ensure for the safety of the victims, the community, and responding officers.

9. Upon review of the *Affidavit* for issuance of the search warrant, the Defendant relies heavily on *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995), in his justification that the search warrant was deficient as the reliability of the confidential informant was not verified.

10. While this Court understands the Defendant's argument, the Court FINDS that the issue of reliability of the informant is not dispositive, as the Court must review the totality of the circumstances in reviewing the *Affidavit*.

11. "There are several different ways for the police to corroborate an informant's "veracity." One way is to independently confirm what the informant said is true. Another way is to create circumstances under which the informant is unlikely to lie." *State v. Lilly*, 194 W. Va. 595, 604, 461 S.E.2d 101, 110 (1995).

12. The Court FINDS that the Defendant's wife, Stephanie Hensley, is the alleged victim in this matter. The Court FINDS that Mrs. Hensley provided a detailed statement that she left her residence due to Mr. Hensley threatening to harm himself; that she later returned to the residence to obtain belongings for her and her children; that she encountered obstacles blocking her path of entry to the residence; that she traveled around those obstacles to go to the residence; that she observed that some of the windows were open and screens removed; that she attempted to make contact with her husband, the Defendant, via telephone when she arrived at the residence, but he did not answer; that while sitting in her car, she observed the Defendant through a window armed with an "AR" rifle; that the Defendant then shot at least four (4) times; and, that she then backed out of the driveway and left the area.

13. The Court FINDS that the Defendant's minor children were also present in the vehicle with Mrs. Hensley at the time; and, that Mrs. Hensley immediately went to the West

Virginia State Police Barracks for assistance.

14. The Court **FINDS** that the *Affidavit* sets forth very specific information as to how and why the “informant” made her observations of the Defendant.

15. The Court **FINDS** that the circumstances as presented in the *Affidavit* for search warrant created a situation where the “informant,” who was an eyewitness and victim to the alleged crime, are of such a serious nature that the “informant” is not likely to lie, especially in light of the nature of the relationship between the “informant” and the Defendant.

16. The Court further **FINDS** that the circumstances presented in the *Affidavit* present facts that were readily verifiable, such that any purported “lies” perpetuated by the “informant” would be discovered quickly and could be addressed and disposed of quickly.

17. The Court is not persuaded that the search warrant was invalid as double hearsay due to Senior Trooper Raymond assisting Cpl. Ware in his investigation by preparing the *Affidavit* for search warrant. This Court is mindful that Cpl. Ware took the sworn statement of the victim in support of the *Affidavit*, however, Senior Trooper Raymond was also present at the State Police Barracks when the victim provided a sworn statement to Cpl. Ware. It is not uncommon for officers to assist each other, especially in exigent circumstances, with preparing of search warrants.

18. In reviewing the totality of circumstances, the Court **FINDS** that the Magistrate Court’s issuance of a search warrant in this case was supported by probable cause.

19. Accordingly, the Court does hereby **ORDER** and **ADJUDGE** that the Defendant’s Motion to Suppress is **DENIED**.

20. The Court further **ORDERS** that any evidence seized as a result of the search warrant issued is admissible at the trial of this matter.

21. The Court notes the objections of the parties to any adverse rulings of the Court.

22. Nothing further remaining to be done this date, this matter stands continued to

June 22, 2023, at the hour of 10:00 a.m. for a Status Hearing.

The Clerk is directed to send an official copy of this Order to all counsel of record and to the Pendleton County Probation Department.

/s/ H. Charles Carl, III
Circuit Court Judge
22nd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.



West Virginia E-Filing Notice

CC-36-2023-F-3

Judge: H. Charles Carl III

To: G. Isaac Sponaugle, III
isaac@sponauglelaw.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF PENDLETON COUNTY, WEST VIRGINIA

State of West Virginia v. Richard Hensley

CC-36-2023-F-3

The following order - case was FILED on 9/27/2023 9:35:09 AM

Notice Date: 9/27/2023 9:35:09 AM

Shalee Wilburn
CLERK OF THE CIRCUIT COURT
Pendleton County
PO Box 846
FRANKLIN, WV 26807

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IN THE CIRCUIT COURT OF PENDLETON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v.

Case No. 23-F-3
Honorable H. Charles Carl, III

RICHARD A. HENSLEY, JR.,
Defendant.

PLEA AND CONVICTION ORDER

On the 5th day of September, 2023, came the State of West Virginia by its Prosecuting Attorney, April D. Mallow, and the Defendant, in person, and by counsel, G. Isaac Sponaugle, III. This matter came before the Court for the purpose of entering a plea. The Court placed Defendant under oath and Defendant was sworn to truthfully answer questions.

1. The parties informed the Court that they had reached a plea agreement. The parties tendered to the Court for filing the written Plea Agreement, signed and executed by the Defendant, counsel for the Defendant, and the State of West Virginia. The Court reviewed on the record the terms of the Plea Agreement, which is a conditional plea pursuant to Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure, and which terms are summarized as follows:

Defendant will plead No Contest to the felony offense contained in Count 5 of the Indictment, namely, Wanton Endangerment Involving a Firearm, in violation of West Virginia Code §61-7-12. This is a conditional plea wherein the defendant reserves the right to appeal the court's adverse ruling on the suppression motion in its June 7, 2023 Order denying the suppression motion of the search warrant in this matter. This crime carries a potential penalty of incarceration in the State Penitentiary for a definite term of years of not less than one (1) nor more than five (5) years, or, in the discretion of the court, confinement in the county jail for not more than one (1) year, or a fine not less than \$250 nor more than \$2,500, or both such fine and confinement. The Defendant shall pay restitution for the restitution for all counts of the Indictment regardless of whether or not the Defendant was convicted on each count in the amount of \$1000.00. The State shall move to dismiss the remaining charges contained in the above-styled case with prejudice. The State

will not seek sentencing enhancement in this matter pursuant to *W. Va. Code § 61-11-18*. The State will reserve the right to make a recommendation at sentencing following a review of the presentence investigation report prepared by the Pendleton County Probation Office.

2. The Court inquired of the parties whether or not the Plea Agreement represented the complete agreement between the State of West Virginia and the Defendant, and both responded that it did. Defendant acknowledged his understanding that the Plea Agreement is not binding upon the Court.

3. Pursuant to *State v. Hosea*, 199 W.Va.62; 483 S.E.2d 62 (W.Va. 1996), the Court inquired of the Prosecuting Attorney whether or not the pre-trial suppression issue would be case dispositive and whether or not the Supreme Court of Appeals of West Virginia (“Supreme Court”) could review the matter without a full trial. The Prosecuting Attorney and Defendant’s Counsel advised the Court that the suppression issue would be case dispositive and advised, if the Court’s ruling is overturned, in effect the entirety of the evidence in the case would be suppressed. Both the State and Counsel for Defendant advised that they believe the Suppression Issue could be reviewed by the Supreme Court without a full trial.

4. Therefore, the Court does **FIND** that the pretrial issue to be resolved upon appeal, namely, whether or not the Court’s June 7, 2023 Order properly denied the Defendant’s Motion to Suppress the Search Warrant, is reviewable by the Supreme Court without a full trial or further hearing.

5. Additionally, the Court **FINDS** that the suppression issue is case dispositive and that if the Court’s ruling is overturned on appeal, it would effectively suppress essential evidence, which would substantially affect the State’s ability to prosecute the defendant as charged in the indictment in this matter.

6. Therefore, the Court FINDS it would be proper to consider a conditional plea pursuant to Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure.

7. The Court then entered into a lengthy dialogue with the Defendant, pursuant to the requirements of Rule 11 of the West Virginia Rules of Criminal Procedure, *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975), and *State v. Cabell*, 176 W.Va. 272, 342 S.E.2d 240 (1986) to advise Defendant of his constitutional rights and the fact that he would be waiving those rights by entering a plea. The Court further made inquiry to determine whether or not Defendant's decision to enter a plea was freely and voluntarily made and without any fraud, duress, or undue influence.

8. The Court then heard statements by the Prosecuting Attorney as to the proof the State would offer at a trial of this case. The Defendant acknowledged that the proof the State would offer at a trial of this case is sufficient to sustain a conviction in this matter. Defendant then signed the appropriate plea form in open court, which was witnessed by the Clerk, and made an oral plea of "No Contest."

Therefore, the Court FINDS as follows:

9. Defendant is alert, intelligent, and understands the legal consequences of entering a plea.

10. Defendant's plea has been freely, voluntarily, and knowingly made, with the advice of counsel, and with due regard to the waiver of certain constitutional rights.

11. A factual basis exists for entry of the plea, based upon the State's proffer and the Defendant's acknowledgements.

12. This case is proper to consider a conditional plea.

13. Therefore, in the interests of justice and for the reasons as set forth on the record, the Court does accept the plea.

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** as follows:

14. Defendant now stands **CONVICTED** of the felony offense of Wanton Endangerment Involving a Firearm, in violation of West Virginia Code § 61-7-12.

15. Pursuant to the State's Motion and the Plea Agreement, the remaining Counts of the Indictment are **DISMISSED**.

16. The Probation Officer shall prepare a pre-sentence investigation report and provide it to the Court and counsel prior to sentencing.

17. Defendant is released on post-conviction bond under the previously Ordered terms and conditions. Additionally, as a special term and condition of post-conviction bond, Defendant shall participate in and successfully complete marriage counseling through the South Branch Valley Day Report Program, if his wife's schedule would permit such, and/or participate in and successfully complete the Batterer's Intervention and Prevention Program through Day Report/Community Corrections, as directed by the Pendleton County Probation Officer.

18. Upon verification by the Prosecuting Attorney that Mrs. Hensley and their children desire contact with Defendant, Defendant may have lawful contact with his wife and children, but would continue to have no contact with the other victims in this matter, as a term and condition of his supervision.

19. As this is a conditional plea, this matter shall be continued pending whether or not the Defendant chooses to appeal the suppression issue pursuant to West Virginia Rules of Criminal Procedure Rule 11(a)(2) with the Supreme Court.

20. Should the Defendant choose to pursue the above stated issue, the parties agree that the proper question to the Supreme Court would be the following:

In its June 7, 2023 Order, did the Circuit Court err by denying the Motion to Suppress the search warrant? The Defendant alleges the Affidavit in support of the search warrant was insufficient because it was based on a hearsay statement and did not establish the reliability of the confidential information. Defendant argues, therefore, that the search warrant was deficient, and any items seized as a result should be suppressed.

21. This matter shall be set for further hearing upon resolution of the matter by the Supreme Court.

22. The Court notes the objections and exception of the parties to any adverse findings or rulings herein.

It is further ORDERED:

❖ Counsel for the parties and Probation shall receive this Order via the West Virginia e-Filing System.

ENTERED this 27th day of September, 2023.



H. CHARLES CARL, III, JUDGE