

**In the Supreme Court of Appeals of West Virginia**

Docket No. 23-629

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**THE STATE OF WEST VIRGINIA**

Plaintiff-Respondent

Appeal from a final order  
the Circuit Court of  
Pendleton County (23-F-3)

V.)

**RICHARD A. HENSLEY, JR.**  
Defendant-Petitioner

**Petitioner's Brief**

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## **INTRODUCTION**

This matter comes before the Court on a conditional plea made by the Petitioner in Circuit Court, pursuant to Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure. The issue presented to this Court is 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.

An alleged victim made a verbal criminal allegation to a law enforcement officer, who was not present at the scene when the alleged criminal allegation occurred. The law enforcement officer transcribed the verbal allegation into a written statement from the alleged victim. The law enforcement officer provided the written statement to a second law enforcement officer, who was not present when the verbal allegation was provided from the alleged victim to the original law enforcement officer. The second law enforcement officer did not know of, speak to or verify either the verbal allegation or the written statement made by the alleged victim to the original law enforcement officer. The second law enforcement officer sought a complaint for a search warrant and used the written statement as the basis for the affidavit for the complaint made by the alleged victim, which was granted by a magistrate.

Before a search warrant may be granted off of hearsay alone to search and seize items from an individual's home, law enforcement must either bolster the hearsay information or have firsthand knowledge of the hearsay information for it to be sufficient for a valid search warrant to be issued by a court. If not, then all evidence obtained from the search is inadmissible evidence at the trial pursuant to the Fourth Amendment of the United States Constitution.

In this case, the search warrant was not supported with bolstered hearsay information or firsthand knowledge of the hearsay information by the second law enforcement officer to provide veracity to the hearsay information (written statement). Thus, the complaint and affidavit were not sufficient for a magistrate to grant a valid search warrant. Therefore, the motion to suppress all evidence from the search warrant should have been granted.

### **ASSIGNMENT OF ERROR**

The Circuit Court erred in denying the motion to suppress because the search warrant was granted by a magistrate from an affidavit that was insufficient, which was based on a hearsay statement that did not establish the reliability of the confidential information.

### **STATEMENT OF THE CASE**

On November 8, 2022, Sr. Trooper K.C. Raymond (hereinafter referred to as “Trooper Raymond”) appeared in front of Pendleton County Magistrate Kevin Puffenberger (hereinafter referred to as “Magistrate”), in the magistrate’s office, located in the Pendleton County Courthouse, with an affidavit and complaint for a search warrant in regard to Richard A. Hensley (hereinafter referred to as “Defendant”). (Appendix pg. 12-14)

The basis for the affidavit and complaint that were presented to the magistrate for a search warrant was a statement by Defendant’s wife, Stephanie Hensley (hereinafter referred to as “Defendant’s Wife”), to Corporal J.M. Ware (hereinafter referred to as “Corporal Ware”). (Appendix pg. 131) The verbatim language of the statement for the affidavit is the following:

On Monday 11/7/2022, Stephanie Hensley took her children and left her residence located at 85 Robin Hill Lane in Brandywine, due to her husband Richard Hensley being a threat to himself, On Tuesday, November 8<sup>th</sup> at approximately 1300 hours, Ms. Hensley returned to her residence located at 85 Robin Hill Lane. Ms. Hensley had her children with her. While traveling up the driveway she found the road to be blocked by a tractor. Ms. Hensley then attempted to enter her residence through a driveway.

(Appendix pg. 12)

(The undersigned cannot determine if the second page of "Search Warrant Continued" entitled "State the Facts" is the second page of the affidavit or the complaint for the search warrant, but the language contained therein is below). (Appendix pg. 14)

Located at Hoover Drive. The entrance to the residence was blocked by a Side by Side. Ms. Hensley was able to drive around the road obstruction and travel down the driveway towards the residence. While driving towards the residence Ms. Hensley observed some of the windows of the residence were open and the screens were removed. Ms. Hensley's attempt to make contact with Mr. Hensley by telephone. Ms. Hensley wanted to get some clothes for the children. Mr. Hensley did not answer while sitting in her vehicle she observed Mr. Hensley through a window, and he was armed with his "AR" type rifle. Mr. Hensley then shot at Ms. Hensley's vehicle at least four (4) times. Ms. Hensley then backed out of the driveway and left the area. This crime occurred in Pendleton County.

Corporal Ware gave the statement to Trooper Raymond and instructed him to seek a complaint for a search warrant. (Appendix pg. 134) The search warrant was issued on November 8, 2022. The search warrant granted law enforcement the right to search the Defendant's home located at 85 Robin Hill Lane, Brandywine, Pendleton County, West Virginia; all automobiles and outbuildings located on the residence; search for an AR style rifle; and for the arrest of the Defendant if he was at the location aforesaid. (Appendix pg. 13) The items seized during the search at the Defendant's home included a black AR type rifle and spent round casings. Additionally, the Defendant was arrested during the search. (Appendix pg. 15).

On April 12, 2023, a suppression hearing was held in the Circuit Court of Pendleton County, West Virginia. (Appendix pg. 127-152) The State of West Virginia subpoenaed Corporal Ware and Trooper Raymond to testify on behalf of the State. Pendleton County Prosecuting Attorney April Mallow called Trooper Raymond to the stand as a witness. (Appendix pg. 136-

141) Relevant testimony at the aforesaid hearing regarding the issue presented to this Court is the following:

**Ms. Mallow:** Okay. And who obtained that search warrant?

**Raymond:** It would have been signed by me. I applied for it through the magistrate's office.

**Ms. Mallow:** Okay. And how did you come to do that?

**Raymond:** I obtained the—I was provided and obtained the statement that Mrs. Hensley had provided to Corporal Ware. Corporal Ware provided the statement to me and asked for the assistance in the application of the search warrant for the residence.

**Ms. Mallow:** Okay. And you obtained that through the Magistrate Court of Pendleton County; is that correct?

**Raymond:** Yes, ma'am.

**Ms. Mallow:** Okay. And that was specifically in order to obtain the firearm or anything used in the commission of this crime?

**Raymond:** Yes, ma'am.

**Ms. Mallow:** Okay. And that was based upon the complaint made by Stephanie Hensley that Mr. Hensley had shot at herself and her four children; is that correct?

**Raymond:** That's correct.

**Ms. Mallow:** Okay. With a described AR type rifle; is that right?

**Raymond:** Yes, ma'am.

**Ms. Mallow:** Okay. And that was obtained before Magistrate Puffenberger; is that correct?

**Raymond:** Yes, ma'am.

Trooper Raymond was then subjected to cross examination by the Defendant's Attorney, G. Isaac Sponaugle, III. The testimony that was presented to the Court was the following:

**Mr. Sponaugle:** The affidavit that was presented that was dated November the 8<sup>th</sup>, 2022, how did you obtain that information that was set forth in the narrative?

**Raymond:** It was a signed written statement that Mrs. Hensley had provided to Corporal Ware in reference to the complaints that she had brought forth -- that afternoon.

**Mr. Sponaugle:** Did you speak to Ms. Hensley prior—

**Raymond:** I did not.

**Mr. Sponaugle:** You did not? So you were provided a written statement. You would—you would agree that it's hearsay. You didn't talk to her. It was something that Officer Ware provided to you.

**Raymond:** That is correct. It was a written statement provided by Corporal Ware from Mrs. Hensley.

**Mr. Sponaugle:** And in the affidavit itself, there doesn't seem to be any statement in regards to her reliability or veracity as a hearsay declarant. Did you—is that—that one page, is that the entire affidavit on it?

**Raymond:** Whatever is within the attachment of this affidavit was what would be—

**Mr. Sponaugle:** Is that what was presented?

**Raymond:** Yes, sir.

**Mrs. Sponaugle:** And the affidavit is what—based—the affidavit is what the magistrate issued the search warrant off of, correct?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** And what items were collected on the seizure of the house specifically?

Do you remember?

**Raymond:** It would have been the arrest of Mr. Hensley, as well as the black AR type rifle.

They are listed also within the affidavit of the property receipt. And there would have been several spent round casings, as well as the serial number of the AR description and other ammunition in regards to the rifle itself.

On May 16, 2023, a supplemental suppression hearing was held in the Circuit Court of Pendleton County, West Virginia. The State of West Virginia subpoenaed Trooper Raymond to testify on behalf of the State. Pendleton County Prosecuting Attorney April Mallow called Trooper Raymond to the stand as a witness, and he was subject to cross examination. (Appendix pg. 153-161) Relevant testimony at the aforesaid hearing regarding the issue presented to this Court is the following:

**Ms. Mallow:** Trooper Raymond, you previously testified in this matter, of course.

**Raymond:** Yes, sir – ma’am, sorry.

**Ms. Mallow:** That’s all right. What were you just telling me about Mrs. Hensley’s location during the course of this investigation?

**Raymond:** During the course of the processing and of the statements, she had remained at the office to stay in a secured state; and at that time, there was only Trooper Ware working at that time. That’s when he called to ask for assistance. In order to do the processing for it, she was going to remain at the office, and that’s why he had asked to do the assistance with the process of the search warrant.

**Ms. Mallow:** Okay. So she was there the entire time and you saw her there?

**Raymond:** Yes, ma’am.

**Ms. Mallow:** So you were in her presence?

**Raymond:** Yes, ma'am.

**Ms. Mallow:** What did you observe about her?

**Raymond:** She was taking care of the children. She seemed emotional, distraught, upset.

**Ms. Mallow:** Okay. So you actually viewed that part of...

**Raymond:** I did view her, yes.

**Ms. Mallow:** Okay. And I think you advised me earlier that this all was happening in realtime; is that correct?

**Raymond:** That's correct.

**Ms. Mallow:** And the emergency nature of the situation at that time?

**Raymond:** That's correct.

**Ms. Mallow:** Okay.

Trooper Raymond was then subjected to cross examination by the Defendant's Attorney, G. Isaac Sponaugle, III. The testimony that was presented to the Court was the following:

**Mr. Sponaugle:** How many times have you used Ms. Hensley as an informant for the past for information?

**Raymond:** I did not have prior knowledge of them prior to this.

**Mr. Sponaugle:** How many times have you or your brother police officers used her as a reliable informant to assist you in the prosecution in the past?

**Raymond:** I don't have an answer for that. I don't know.

**Mr. Sponaugle:** When you made reference in the "Probable Grounds for the Issuance of Warrants," did you set forth that she was a confidential and reliable informant that had been reliable in the past?

**Raymond:** No, sir.

**Mr. Sponaugle:** Did you know at the time you obtained the search warrant whether or not she was a reliable informant?

**Raymond:** No, sir.

**Mr. Sponaugle:** At the time of the search warrant, did you have any reliable information that she provided to anybody in the past, Ms. Hensley?

**Raymond:** Other than the discussion of other officers of the mental hygiene issues.

**Mr. Sponaugle:** Were you present when those conversations occurred on the mental hygiene?

**Raymond:** No, sir.

**Mr. Sponaugle:** And was any action taken by law enforcement to have a mental hygiene at that time based off her statements?

**Raymond:** I am not sure.

**Mr. Sponaugle:** Do you know anything about her past conduct?

**Raymond:** No, sir.

**Mr. Sponaugle:** Did you know her identity at the time of observing search warrant meaning other than her statement to you? Had you ever met Ms. Hensley before?

**Raymond:** I had not met her.

**Mr. Sponaugle:** So you had no prior relationship or anything involved with her?

**Raymond:** No, sir.

**Mr. Sponaugle:** And you didn't take the statement, correct?

**Raymond:** No, sir.

**Mr. Sponaugle:** And that was Trooper Ware that took the statement?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** And he handed you the statement to go to the magistrate?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** Okay. And based off the statement is how the search warrant was issued?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** Are you aware of any other investigations that she has participated with in the past?

**Raymond:** No, sir.

On June 7, 2023, the Circuit Court entered an Order Denying the Motion to Suppress. (See Appendix Pg. 1-7) The Court further ordered that any evidence seized as a result of the search warrant that was issued was admissible at the trial. On September 5, 2023, the parties informed the court that they have reached a plea agreement. The plea agreement was a conditional plea pursuant to Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure. (See Appendix Pg. 114-119)

#### **SUMMARY OF ARGUMENT**

The affidavit with the complaint requesting a search warrant that was presented to the magistrate was based solely on a hearsay statement. The affiant lacked any basis of knowledge as to the truth of the hearsay statement and lacked any basis of knowledge as to the veracity of the declarant to support the truth of the hearsay statement. Thus, the search warrant that was granted by the magistrate is invalid. As a result, all evidence obtained from the search and seizure is inadmissible evidence for the State to present at trial.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. This case should be set for a Rule 19 argument as it would significantly aid in the decisional process. This case is suitable for a Rule 19 argument because it involves an assignment of error in the application of settled law; insufficient evidence or a result against the weight of the evidence; and involves a narrow issue of law. This case is not appropriate for a memorandum decision.

### **ARGUMENT**

#### **STANDARD OF REVIEW**

The standard of review of a Circuit Court's ruling on a motion to suppress is set forth in *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994). It is a two-tier standard test. First, a review of the circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, a review of de novo questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action.

#### **FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURES**

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).

The United States Supreme Court has held that it is constitutionally permissible under

certain conditions to attack a search warrant affidavit. If such an attack is successful, this will result in voiding the search warrant and rendering the property seized under such warrant inadmissible.

*Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

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. Wa*, 187 W.Va. 686, 421 S.E.2d 227 (1992)).

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)).

“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).

#### HEARSAY

The Defendant’s Wife provided a written statement to Corporal Ware alleging criminal allegations against the Defendant. Corporal Ware was not present at the scene when the alleged criminal allegations occurred. Corporal Ware provided the written statement to Trooper Raymond who used the written statement as the basis for the affidavit for the complaint for a search warrant with the magistrate.

Rule 801 of the West Virginia Rules of Evidence sets forth the following:

- (a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) Declarant.** "Declarant" means the person who made the statement.
- (c) Hearsay.** "Hearsay" means a statement that:
  - (1) the declarant does not make while testifying at the current trial or hearing; and
  - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

The written statement by Defendant's Wife that was provided to Corporal Ware meets the definition of hearsay under Rule 801. The written statement provided from Corporal Ware to Trooper Raymond who used the same as the basis for the affidavit for the complaint for a search warrant with the magistrate meets the definition of hearsay under Rule 801 or is hearsay within hearsay or double hearsay.

#### HEARSAY REQUIREMENTS FOR AFFIDAVIT

The validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under the law, 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 may include the corroborative efforts of police officers. *State v. Adkins*, 176 W. Va. 613 (1986).

The United States Supreme Court had set forth that when using hearsay for purposes of obtaining a search warrant the affidavit must (1) show the informant's "basis of knowledge" and (2) must contain information so the magistrate can determine the informant's veracity by either showing (a) the informant is credible or (b) his information is otherwise reliable through some independent informant's corroboration such as police investigation. The "basis of knowledge" and the "veracity" were considered the two-prong test. *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct.

1509, 1514, 12 L.Ed.2d 723, 729 (1964); *Spinelli v. United States*, 393 U.S. 410, 415-16, 89 S.Ct. 584, 588-89, 21 L.Ed.2d 637, 643-44 (1969); *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980).

The United States Supreme Court modified that ruling in *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527, 545 (1983), wherein "veracity" and "basis of knowledge" are no longer viewed as independent prerequisites to a finding of probable cause: "[A] deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability" such as corroborating evidence gathered by law enforcement. *Gates*, 462 U.S. at 233, 103 S.Ct. at 2329, 76 L.Ed.2d at 545.

A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers. Syllabus Point 4, *State v. Lilly*, 194 W. Va. 595, 604, 461 S.E.2d 101, 110 (1995).

While hearsay may provide possible probable cause to issue a search warrant, the law requires the existence of the information in the affidavit to corroborate the hearsay statement to support the declarant's reliability. *State v. Corey*, 223 W. Va. 297 (2014).

A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527, 545 (1983). However,

where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. See *State v. Hlavacek*, 185 W.Va. 371, 407 S.E.2d 375 (1991); *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986); *State v. Schofield*, 175 W.Va. 99, 331 S.E.2d 829 (1985). Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers. *Gates*, 462 U.S. at 241-45, 103 S.Ct. at 2333-36, 76 L.Ed.2d at 550-53; *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327, 332 (1959).

In the case before the Court, the affidavit restates all firsthand observations and demonstrated a "basis of knowledge" by the Defendant's Wife, the declarant. The main issue is was there corroboration of the declarant's veracity to support an overall finding of probable cause by the magistrate? See *Thompson*, 178 W.Va. at 257, 358 S.E.2d at 818 (even under *Gates*, information establishing probable cause must "attest[ ] to the 'veracity' and basis of knowledge of the person supplying the information"). See also *State v. Hlavacek*, 185 W.Va. 371, 378, 407 S.E.2d 375, 382 (1991) ("when information received from a confidential informant is relied upon in an affidavit for a search warrant, the affidavit must contain information which establishes the informant's basis of knowledge and lends credibility to the informant's statements").

In this case, the affidavit is entirely silent as to the declarant's veracity to support an overall finding of probable cause. The written hearsay statement provided to Corporal Ware from Defendant's Wife was recited completely by Trooper Raymond in the affidavit. There was no statement about the veracity of Defendant's Wife anywhere inside the affidavit. There was no statement to any collaboration by Trooper Raymond to bolster the written hearsay statement in the affidavit.

In this case, there were no good faith efforts shown on behalf of Trooper Raymond to verify the statement before applying for the search warrant. When questioned at the suppression hearing held on May 16, 2023, Trooper Raymond gave the following responses:

**Mr. Sponaugle:** How many times have you used Ms. Hensley as an informant for the past for information?

**Raymond:** I did not have prior knowledge of them prior to this.

**Mr. Sponaugle:** How many times have you or your brother police officers used her as a reliable informant to assist you in the prosecution in the past?

**Raymond:** I don't have an answer for that. I don't know.

**Mr. Sponaugle:** When you made reference in the "Probable Grounds for the Issuance of Warrants," did you set forth that she was a confidential and reliable informant that had been reliable in the past?

**Raymond:** No, sir.

**Mr. Sponaugle:** Did you know at the time you obtained the search warrant whether or not she was a reliable informant?

**Raymond:** No, sir.

**Mr. Sponaugle:** At the time of the search warrant, did you have any reliable information that she provided to anybody in the past, Ms. Hensley?

**Raymond:** Other than the discussion of other officers of the mental hygiene issues.

**Mr. Sponaugle:** Were you present when those conversations occurred on the mental hygiene?

**Raymond:** No, sir.

**Mr. Sponaugle:** And was any action taken by law enforcement to have a mental hygiene at that time based off her statements?

**Raymond:** I am not sure.

**Mr. Sponaugle:** Do you know anything about her past conduct?

**Raymond:** No, sir.

**Mr. Sponaugle:** Did you know her identity at the time of observing search warrant meaning other than her statement to you? Had you ever met Ms. Hensley before?

**Raymond:** I had not met her.

**Mr. Sponaugle:** So you had no prior relationship or anything involved with her?

**Raymond:** No, sir.

**Mr. Sponaugle:** And you didn't take the statement, correct?

**Raymond:** No, sir.

**Mr. Sponaugle:** And that was Trooper Ware that took the statement?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** And he handed you the statement to go to the magistrate?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** Okay. And based off the statement is how the search warrant was issued?

**Raymond:** Yes, sir.

**Mr. Sponaugle:** Are you aware of any other investigations that she has participated with in the past?

**Raymond:** No, sir.

(Appendix pg. 156-158)

The Circuit Court erred by denying the motion to suppress the search warrant. The result of the ruling was that veracity of declarant does not need to be in the affidavit when using hearsay. For a search warrant to be granted on hearsay alone, the declarant just needs to have a “basis of knowledge” is the net result. This is in violation of *State v. Corey*. “While hearsay may provide possible probable cause to issue a search warrant, the law requires the existence of the information in the affidavit to corroborate the hearsay statement to support the declarant’s reliability.” *State v. Corey*, 223 W. Va. 297 (2014).

#### THE FOUR CORNERS REQUIREMENT

The “Four Corners” is considered that a document’s meaning should be derived from the document itself, from its language and all matters encompassed in it. *State v. White*, 167 W.Va. 374, 380, 280 S.E2d 114, 119 (1981). The court cannot look outside the "four corners" of the affidavit for a complaint for a search warrant to determine if all legal requirements have been met for a lower court to issue a search warrant.

The circuit court erred in considering facts at the supplemental suppression hearing held on May 16, 2023, facts other than those set out in the affidavit in order to determine if there was sufficient probable cause for the issuance of the search warrant. At the aforesaid hearing the State of West Virginia subpoenaed Trooper Raymond to testify on behalf of the State. (Appendix pg. 153-161)

The Circuit Court in paragraph 13 and 17 in its findings portion of the of the Order Denying Motion to Suppress set forth the following:

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.

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.

(Appendix pg. 5-6)

At the supplemental suppression hearing, testimony was taken from Trooper Raymond, affiant, to provide facts that were not contained within the affidavit that was presented to the magistrate. The facts relied upon by the court in this portion of its findings are outside of the "four corners" of the affidavit. The supplemental suppression hearing occurred over seven months after the issuance of the search warrant.

It was not proper for a court to look outside the "four corners" of a search warrant affidavit and consider at a suppression hearing testimony that was given to the magistrate at the time the warrant was issued in order to determine if there was adequate probable cause to issue the warrant.

In *State v. White*, 167 W.Va. 374, 380, 280 S.E.2d 114, 119 (1981), this court discussed in footnote 3 the impact of Rule 41(c) of the West Virginia Rules of Criminal Procedure (W.Va.R.Cr.P.):

"We do not reach, and therefore do not decide, the question of whether a warrant that is insufficient on its face may be upheld by subsequent testimony about information actually given the issuing judge but not contained in the affidavit or warrant. We note, however, that this clearly will be unacceptable after October of this year when the new W.Va. Rules of Criminal Procedure, Rule 41(c) takes effect. That rule states that any information that the issuing judicial officer finds important to his decision to issue a search warrant must be taken under oath and incorporated into the affidavit. As a matter of common sense and judicial efficiency, this is certainly the better practice." (Emphasis in original).

In *State v. Adkins*, 613 W.Va. 613, 346 S.E.2d 762 (1986). This court discussed *State v. White* and set forth the following:

Rule 41(c), W.Va.R.Cr.P., which became effective on October 1, 1981, controls the search warrant in this case since it was issued on April 6, 1983. Rule 41(c) enables a magistrate or judge to flesh out an affidavit or warrant by examining under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.

Our Rule 41(c) is substantially identical to Rule 41(c) of the Federal Rules of Criminal Procedure, as amended in 1972. The federal courts have generally held that the determination of probable cause for issuance of a search warrant must be based solely on the facts contained within the four corners of the affidavit. Consequently, subsequent testimony from the affiant or the judicial official who issued the warrant cannot be considered in determining whether a warrant is valid. *United States v. Sellers*, 520 F.2d 1281 (4th Cir.1975), rev'd on other grounds, 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 728 (1976); *United States v. Acosta*, 501 F.2d 1330 (5th Cir.1974), modified, 509 F.2d 539, cert. denied, 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Mendel*, 578 F.2d 668 (7th Cir.1978), cert. denied, 439 U.S. 964, 99 S.Ct. 450, 58 L.Ed.2d 422 (1978); *United States v. Rubio*, 727 F.2d 786 (9th Cir.1983); *United States v. Hittle*, 575 F.2d 799 (10th Cir.1978); Annot., 24 A.L.R.Fed. 107 (1975).<sup>7</sup> The policy behind Rule 41(c), as commonly expressed, is reflected in this passage from *United States v. Hittle*, 575 F.2d at 802:

"The underlying rationale of the [1972] amendment to Rule 41(c) is important, and the note to the amendment is instructive: 'If testimony is taken it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise.' Fed.R.Crim.P. 41(c).

"It is apparent the reason for adopting this procedural safeguard is to assure that the constitutional rights involved are adequately protected. The probable cause requirement would be significantly weakened if a court can rely on the recollection of those concerned to support a probable cause finding long after the search warrant has been issued. See Justice Brennan and Justice Marshall's dissent in *Christofferson v. Washington*, 393 U.S. 1090, 89 S.Ct. 855, 21 L.Ed.2d 783, upon a denial of certiorari." See 2 W. LaFave, *Search and Seizure* § 4.3(b) (1978).

It also appears that a majority of state courts which have considered the question, follow the rule that search warrants may be issued only upon affidavit and that the affidavit cannot be supplemented or bolstered by subsequent testimony at a suppression hearing. E.g., *State v. White*, 707 P.2d 271 (Alaska App.1985); *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971) (En Banc); *Blue v. State*, 441 So.2d

165, 167 n. 1 (Fla.App.1983); State v. Daniel, 373 So.2d 149 (La.1979); Commonwealth v. Simmons, 450 Pa. 624, 626, 301 A.2d 819, 820 (1973); State v. Appleton, 297 A.2d 363, 367 (Me.1972); State v. Hendrickson, 701 P.2d 1368 (Mont.1985); State v. Smith, 281 N.W.2d 430 (S.D.1979); Hall v. State, 394 S.W.2d 659 (Tex.Crim.App.1965); contra State v. Jansen, 15 Wash.App. 348, 549 P.2d 32 (1976).

Thus, we conclude that under Rule 41(c), W.Va.R.Cr.P., it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information had been contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit.

The circuit court erred in considering facts at the supplemental suppression hearing held on May 16, 2023, facts other than those set out in the affidavit in order to determine if there was sufficient probable cause for the issuance of the search warrant. The information was not contained in the search warrant affidavit to bolster the sufficiency of the affidavit and that information had not been contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit. The circuit court used the testimony of Trooper Raymond that he was “present” at the State Police Barracks, after the statement was provided from Defendant’s Wife to Corporal Ware, as enough evidence to bolster the sufficiency of the affidavit.

#### LAW ENFORCEMENT HAD ABILITY TO CURE DEFECT AND DID NOT

The written hearsay statement could have been cured by law enforcement in two ways. First, Corporal Ware could have been the affiant to the affidavit to seeking search warrant complaint. He obtained the written statement from Defendant’s wife and was present to gauge the credibility of the answers he asked of her when they were provided. Subsequently, Trooper Ware would have been able to verify the statement by adding into his written complaint that he believed that the informant was reliable because he had prior interaction with Defendant’s wife or that she presented evidence to him that would corroborate her statement.

Second, Trooper Raymond could have bolstered the statement's credibility prior to seeking a complaint for a search warrant. He could have asked her additional questions about the written hearsay statement provided to Corporal Ware when both Defendant's Wife and Trooper Raymond were present at the State Police Barracks prior to Trooper Raymond going to the magistrate to seek a search warrant. Trooper Raymond would have been able to form an impression of Defendant's Wife answers to certain questions regarding her reliability or veracity to the same other than just being the wife of the Defendant, which at the time he had no knowledge that she was other than for the written hearsay statement. Independent police work may corroborate information contained in an affidavit for a search warrant, however, the details which are verified through further investigation must be both significant and specific to be considered reliable. Syllabus point 7, *State v. Hlavacek*, 185 W.Va. 371 407 S.E.2d 375 (1991). Neither of the aforesaid actions were taken. As a result, the complaint for a search warrant was based off a double conclusory hearsay with no information contained inside the affidavit to bolster the credibility of the written hearsay statement that was the sole basis for the complaint.

Additionally, any claim of the "good faith" exception does not apply in this case. The error was completely within the control of the investigating officers and the "good faith" exception therefore is not applicable. *State v. Thompson*, 178 W.Va. 254, 358 S.E.2d 815 (1987).

## **CONCLUSION**

The Circuit Court's Order Denying Motion to Suppress be reversed, any evidence seized as a result of the search warrant issued shall be deemed inadmissible at the trial, and this case be remanded to the Circuit Court for further proceedings.

## **CERTIFICATE OF SERVICE**

I, G. Isaac Sponaugle, III, Counsel for Petitioner, do certify that a true copy of the foregoing *Petitioner's Brief* was served upon the State of West Virginia by electronically filing the same with File & Serve Epress, which will generate a Notice of Electronic Filing and email it to the West Virginia Assistant Attorney General, Mary Beth Niday, on this 29<sup>th</sup> day of January 2024.

/s/ G. Isaac Sponaugle, III  
G. Isaac Sponaugle, III, State Bar # 9720  
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