In the Supreme Court of Appeals of West Virginia

Docket No. 23-629

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 Reply Brief

Counsel for Petitioner, Richard A. Hensley, Jr.

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INTRODUCTION

This case is a clear infringement upon the Petitioner's constitutional rights. Period. The affiant for the search warrant affidavit 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. This makes the search warrant invalid. No exceptions exist in this case as to this general rule of law.

ARGUMENT

I. The search warrant affidavit did not show probable cause to believe Petitioner had committed a crime and that the police would find evidence of that crime during their search.

A. No Presumption of Reliability Attaches to A Crime Victim In West Virginia

The Respondent attempts to parse the status of the declarant of a hearsay statement, Petitioner's wife, as an average citizen versus a confidential informant. This is not the law in the State of West Virginia and even the Respondent acknowledges the same. The Respondent asserts a presumption of reliability as to a victim's statement. However, in the cases cited, they include a veracity aspect to any hearsay statement. For example, in *Beauchamp v. City of Noblesville,* 320 F. 3d 733, 743 (7th Cir. 2003) the Seventh Circuit explained that "[t]he complaint of a single witness or putative victim alone generally is sufficient to establish probable cause to arrest unless the complaint would lead a reasonable officer to be suspicious." In that holding, the Seventh Circuit is referring to the veracity or bolster aspect of a hearsay statement that must be examined when taking a statement, which wasn't done in this matter and is the sole issue before the Court.

B. Trooper Raymond Needed to Verify or Bolster the Hearsay Statement

The Respondent's proposed expansion of the "collective knowledge doctrine" rule eliminates the present requirement for an officer to test the veracity or bolster a hearsay statement by a declarant before seeking a search warrant. The Respondent confuses or attempts to expand the meaning of the "collective knowledge doctrine," which in short allows for law enforcement to rely on hearsay statements from fellow officers when their fellow officers have firsthand knowledge of evidence because their fellow officers are deemed credible and to have veracity. In this case the firsthand observations of the hearsay statement were observed by the Petitioner's wife who is not a fellow officer. The "collective knowledge doctrine" allows for an officer to trust the veracity of another officer, but not to trust the veracity of a third-party declarant.

The proposed expansion of the "collective knowledge doctrine" by the Respondent allows for the elimination of the veracity of a declarant test. An officer will have no way of estimating the likelihood that his fellow officer holds enough information regarding the veracity of a declarant to justify a search on a hearsay statement. This allows for useful shortcuts when an officer knows an action to be illegal. Perhaps an officer who knows he lacks cause for a search will be more likely to roll the dice and conduct a search anyway. This would create an incentive for officers to conduct searches and seizures they believe are likely illegal. It would be directly contrary to the purposes of longstanding Fourth Amendment jurisprudence. The United States Supreme Court has explained that the very purpose served by the exclusionary rule is to deter illegal searches and seizures. The Respondent is endorsing an approach that has the potential of encouraging police without the requisite level of suspicion or belief in the veracity of an individual's statement to infringe on another person's freedoms.

The Respondent relies significantly on *State v. Corey*, 223 W.Va. 297, 305, 758 S.E.2d 117, 125 (2014). The facts in that case are not remotely comparable to the facts in this case. The *Corey* affidavit consisted of ten paragraphs that described in detail where and how an individual was killed, including a description showing that the trajectory of the bullet that was fired from outside of a home. A statement was provided by Corey's former girlfriend to the Chief of the Romney Police Department. The statement provided to the Chief of the Romney Police Department was used as the basis of the affidavit for a search warrant. The Chief of the Romney Police Department was able to verify the declarant's hearsay statement by interviewing her when taking the statement and form an impression of her veracity. The issue that was challenged in that case was if the statement was bare bones and hearsay (Corey's former girlfriend's statement) was used inside the affidavit. The Court properly ruled that it was a valid affidavit because it was not bare bones and set forth ample grounds that established probable cause. The issue of double hearsay (affiant using hearsay twice removed without verifying or bolstering the hearsay statement) wasn't an issue the Court reviewed, presumably because the Chief of the Romney Police Department was the affiant for the affidavit seeking the search warrant.

The Respondent relies in part on *United States v. Hodge*, 354 F.3d 305 (4th Cir. 2004) in support of his argument. The facts in *Hodge* are that Officer Elmore sought a search warrant and relied on an undercover agent's statement (who had firsthand knowledge of illegal gambling activity), when seeking a search warrant. Officer Elmore even had the undercover agent appear before the magistrate to testify and for the magistrate to test the veracity of the declarant's statement. The *Hodge* Court determined that the undercover agent working under Elmore's supervision was an indication of credibility for the declarant.

The Respondent relies in part on *State v. Barlow*, 181 W.Va. 565 (1989) in support of his argument. The facts in *Barlow* are Trooper Reed recited information obtained from Deputy Sheriff McCauley, it was not necessary for Trooper Reed to detail information regarding McCauley's veracity. McCauley had information that the defendant was selling chainsaws in Mill Creek on July 2, 1987, two days after the theft. McCauley substantiated this information by verifying that the vehicle in which the stolen merchandise was being sold was the same vehicle that was being driven by the defendant. The Court found that there was probable cause to issue the warrant. McCauley was a fellow officer and he had firsthand knowledge of the statement that he provided to Trooper Reed.

The Respondent relies in part on *State v. Maxwell*, 174 W.Va. 632 (1985) in support of his argument. The facts in *Maxwell* are that two United States Navy agents, Henry J. Pataky and Thomas Herman, were conducting an investigation of drugs being sold to Navy personnel. As part of their investigation, they obtained information that Maxwell's Tavern, located in Brandywine, Pendleton County, West Virginia, operated by Ray Maxwell, was in the business of selling drugs. They met with officers of the West Virginia Department of Public Safety in Harrisonburg, Virginia, and requested their cooperation in coordinating the investigation and arrest of non-Navy personnel. On August 10, 1983, the state police and the Pendleton County Sheriff's Department conducted a joint search of Maxwell's Tavern and Ray Maxwell's dwelling pursuant to a search warrant. The search uncovered roach clips, a suitcase containing a small amount of marijuana seeds, and a small bag of marijuana found in a cracker container. Ray Maxwell was convicted by a jury and appealed asserting error with the search warrant. The Maxwell Court held that the "West Virginia Code § 61-6-11 (1984) does not prohibit West Virginia law enforcement officers from coordinating their activities with another law enforcement agency conducting an investigation in West Virginia."

Syllabus Point 1, *State v. Maxwell,* 174 W.Va. 632 (1985); and "Where a Navy internal investigation uncovers illegal conduct by civilians, the Navy agents are not prohibited by 18 U.S.C. § 1385 (1982) from coordinating their activities with West Virginia law enforcement officers or from testifying in the subsequent criminal trial of said civilians." Syllabus Point 2, *State v. Maxwell,* 174 W.Va. 632 (1985). No issue involving a hearsay statement or veracity of the declarant was at issue in the aforesaid case and is not relevant to this matter.

The Respondent relies in part on *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965) in support of his argument. The facts in *Ventresca* are Mazaka, a Government Investigator, swore under oath as an affiant to an affidavit for a search warrant 'upon observations made by me' and 'upon personal knowledge' as well as upon 'information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.' The Court of Appeals ruled the evidence obtained from the search warrant inadmissible because the affidavit might have been based wholly upon hearsay. The Court overruled it. Mazaka swore that, insofar as the affidavit was not based upon his own observations, it was 'based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation and reports orally made to me describing the results of their observations and investigation.' Additionally, the affidavit stated that "Investigators' (employees of the Service) smelled the odor of fermenting mash in the vicinity of the suspected dwelling.' The Court reasoned that a qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant. Moreover, upon reading the affidavit as a whole, it becomes clear that the detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any significant part by persons other than full-time Investigators of the Alcohol and Tobacco Tax

Division of the Internal Revenue Service. Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.

The "collective knowledge doctrine" allows observations of fellow officers to immediately be granted veracity because they have firsthand knowledge. It does not grant the officer the chance to proffer secondhand knowledge stated by another who is not a law officer that same veracity.

II. The search was not proper under any exception to the warrant requirement.

A. Good Faith Exception Does Not Apply

The "good faith exception" does not apply in this case because the error was completely within the control of the investigating officers. To grant a "good faith exception" in this case nullifies the general constitutional safeguards for an individual due to reckless police work. (See *State v. Thompson,* 178 W. Va. 254, 258, 358 S.E.2d 815, 819 (1987). (Analogous to *State v. Adkins*, 176 W.Va. at 625, 346 S.E.2d at 774.)

B. Emergency Exception Does Not Apply

The "emergency exception" does not apply in this case. The "emergency exception" is an exception to a warrant requirement that during the course of time that it would take to get a warrant it would jeopardize public safety or lead to the loss of evidence, result in an imminent threat to an officer's safety, and a reasonable belief that the suspect will dispose of or destroy evidence while police are waiting to get a warrant. There is no evidence to assert that law enforcement acted without a warrant to enter the Petitioner's home. The issue before the Court is if the warrant that was issued by a magistrate a valid warrant. This exception does not cure an invalid warrant, it allows for law enforcement to act without a warrant in emergency situations. The fact that law enforcement took the time to seek a warrant implies that no emergency was present at that time.

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.

/s/ G. Isaac Sponaugle, III
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, G. Isaac Sponaugle, III, Counsel for Petitioner, do certify that a true copy of the foregoing *Petitioner's Reply 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, and Assistant Solicitor General, Frankie Dame, on this 3rd day of April 2024.

/s/ G. Isaac Sponaugle, III
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