IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-629

SCA EFiled: Mar 14 2024
03:43PM EDT
Transaction ID 72522967

RICHARD A. HENSLEY JR.,

Petitioner,

v.

THE STATE OF WEST VIRGINIA,

Respondent.

BRIEF OF RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

Frankie Dame (WV Bar # 14401)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Frankie.A.Dame@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutions

Statutes

Rules

Other Authorities

INTRODUCTION

This case is much ado about nothing. Everyone agrees that in November 2022 Petitioner began threatening himself and that this behavior eventually culminated in him shooting his AR rifle at his wife Mrs. Hensley and their children. Mrs. Hensley went to the state police right away. One officer took her statement, which another officer used in a warrant affidavit. The officers obtained then executed that warrant, finding Petitioner, his AR, and spent casings where Mrs. Hensley reported the crime had taken place.

Yet where most would see professional, run-of-the-mill police work, Petitioner sees constitutional flaws. He alleges that the two layers of hearsay in the warrant affidavit—that is, Mrs. Hensley telling the first officer and the first officer telling the second—make it technically invalid and require all resulting evidence to be suppressed. But West Virginia law doesn't exclude hearsay in warrant affidavits—it just requires the hearsay to be credible. The State satisfies that requirement here. Because Mrs. Hensley was a crime victim, the law presumes her statement about that crime to be reliable. And the law says the averring officer here was entitled to presume that his fellow officer's work was reliable, too. Nothing in the affidavit or Petitioner's brief offers any reason to doubt Mrs. Hensley's statement or the officer's work taking it down. In short, because the affidavit information was reliable, the magistrate was justified in finding probable cause, and Petitioner's argument fails. Even if the Court disagrees, the search was justified under the emergency and good faith exceptions to the warrant requirement. This Court should thus affirm the lower court.

ASSIGNMENTS OF ERROR

Petitioner's sole assignment of error is:

I. 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.

Pet'r Br. 2.

STATEMENT OF THE CASE

On November 7, 2022, Petitioner became a threat to himself. App. 13. So his wife Stephanie Hensley took their several children and left the home. App. 13. She came back the next day with the kids to get some clothes for them. App. 13-14. She found a tractor blocking the main driveway. App. 13. So Mrs. Hensley tried to access the house via another driveway. App. 14. That second driveway was blocked by a side-by-side, but Mrs. Hensley was able to drive her van around it. App. 14. And as she approached the house, she noticed the windows were open and some of the screens removed. App. 14. Mrs. Hensley called Petitioner on her phone. App. 14. Petitioner did not answer. App. 14. Then Mrs. Hensley noticed Petitioner through a window and saw he was holding an AR rifle. App. 14. Petitioner began shooting at Mrs. Hensley's vehicle—with her and the children in it—firing at least four times. App. 14. Mrs. Hensley immediately backed out of the driveway and left. App. 14.

Mrs. Hensley went to the police right away. At the State Police Barracks, she met Corporal Ware and told him her story. App. 42. Because Petitioner was armed and had shown a willingness use his firearm, Corporal Ware began his investigation by enlisting the help of the "State Police's special response team" for "the safety of the community and officers involved." App. 43, 68. While the team started working, Mrs. Hensley stayed at the police station. App. 94. Corporal Ware interviewed her about what she had seen and experienced and drafted a sworn statement summarizing her account. App. 49. Mrs. Hensley "reviewed and signed" that statement. App. 98.

Corporal Ware asked fellow officer Trooper Raymond, among others, to help with the investigation. App. 46-47. Trooper Raymond had been at the State Police Barracks while Mrs. Hensley was there; he saw her "taking care of the children" and saw that she was "emotional, distraught, [and] upset." App. 94. Corporal Ware asked Trooper Raymond for his "assistance in the application of the search warrant for the residence." App. 49. To facilitate that process, Corporal Ware gave Trooper Raymond Mrs. Hensley's statement. App. 49; *see also* App. 51 (reiterating that the warrant was based on the "signed written statement that Mrs. Hensley had provided to Corporal Ware" about the incident); *accord* App. 44-46. The warrant application was based on Mrs. Hensley's statement that Petitioner "had shot at herself and her four children." App. 49; *see also* App. 97-98.

As planned, Trooper Raymond used Mrs. Hensley's sworn statement to obtain the arrest warrant and search warrant. App. 43. At Petitioner's home, they found him, a black AR type rifle, and "several spent round casings" "in the garage, the bedroom, and other various parts of the property." App. 52. These casings were "[s]imilar" to "the AR type round." App. 52. Because this was Corporal Ware's investigation, he signed off on the property receipt. App. 46.

In early March 2023, a Pendleton County grand jury indicted Petitioner with six counts of wanton endangerment involving a firearm under West Virginia Code § 61-7-12. App. 10-11.

Soon after that, Petitioner filed a motion to suppress the evidence obtained using the search warrant. App. 17-18. At the suppression hearing, Petitioner made the same two arguments he makes here: that the warrant affidavit doesn't explain why Mrs. Hensley, who Petitioner casted as a "confidential informant," was "credible"; and, because the signing officer Trooper Raymond did not speak to Mrs. Hensley directly but got her statement from Corporal Ware, the affidavit consisted only of unacceptable hearsay. App. 52-53. The State responded that Mrs. Hensley "is

not an unidentified confidential informant" but "the wife of [Petitioner]." App. 67. The circumstances she described mean her "credibility is established in the document on its face." App. 67. Further, Corporal Ware "had … Trooper Raymond assist him in the investigation and relayed the information provided so that Sr. Trooper Raymond could prepare the affidavit." App. 68.

After a few hearings and rounds of briefing, in June 2023 the circuit court denied Petitioner's motion to suppress. App. 6 at ¶ 19. It explained that under West Virginia law, it had to review the totality of the circumstances. App. 5 at ¶ 10. It found significant that Mrs. Hensley was not a confidential informant but instead "the alleged victim in this matter." App. 5 at ¶ 12. It also recognized that she gave "a detailed statement" of the events. App. 5 at ¶ 12. The affidavit set forth "very specific information" explaining how Mrs. Hensley came by the information. App. 6 at ¶ 14. These circumstances, the circuit court said, are of such a serious nature that they created a situation where Mrs. Hensley was "not likely to lie, especially" given her marriage to Petitioner. App. 6 at ¶ 15. Also, the circumstances "were readily verifiable, such that any purported 'lies'" would be quickly unmasked. App. 6 at ¶ 16. The circuit court acknowledged Petitioner's argument that it was unacceptable hearsay for Trooper Raymond to use the statement Corporal Ware had created; but it reasoned that Trooper Raymond was present when Mrs. Hensley gave her statement to Corporal Ware and that police officers can assist each other in preparing search warrants. App. 6 at ¶ 17. Thus, the "search warrant in this case was supported by probable cause," App. 6 at ¶ 18, and the evidence seized was admissible.

In September 2023, Petitioner plead no contest under Rule 11(a)(2) to one count of wanton endangerment involving a firearm, conditional on this appeal of the circuit court's denial of his motion to suppress. App. 115. The parties agreed that this issue is dispositive here. App. 116.

SUMMARY OF THE ARGUMENT

I. The affidavit's facts were sufficiently detailed and trustworthy to justify a prudent person in believing that Petitioner had committed a crime and that a search would produce evidence of that crime. Mrs. Hensley's statement to the police was eminently believable. She explained in detail how her husband had become a threat to himself, eventually shooting his AR at her and their children. Neither the affidavit then nor Petitioner now offers a reason to doubt her story. The totality of the circumstances in the affidavit show "probable cause for the issuance of the search warrant"—doubly so given that this Court affords affidavit-sufficiency decisions "great" and "particular" deference and construes all facts and inferences in the "light most favorable" to the State. Petitioner disagrees, arguing that the affidavit was fatally infected with two levels of hearsay—one transmitted from Mrs. Hensley to Corporal Ware, and the other from Corporal Ware to Trooper Raymond. But in West Virginia, affidavits can be based on hearsay so long as it is reliable. Good reason exists here to credit both alleged levels of hearsay as reliable: treatises and state and federal law agree that because Mrs. Hensley was a crime victim, not a confidential informant, her statement is presumed reliable. Those same authorities also agree that the transmission to Trooper Raymond from Corporal Ware was presumably reliable, too. Again, nothing in the affidavit or Petitioner's briefing defeats those presumptions here. So the Court should interpret the affidavit commonsensically and affirm the circuit court.

II. Even if the Court disagrees and holds that the affidavit was insufficient, the search was proper under both the good faith exception and emergency exception to the Fourth Amendment's warrant requirement. First, the officers here relied in good faith on the warrant. Corporal Ware carefully took crime victim Mrs. Hensley's statement and Trooper Raymond faithfully transmitted it to the magistrate. Officers routinely credit victims' statements and rely on each other's work. So no reasonably well-trained officer would have known the search was illegal. Petitioner's

argument to the contrary misreads and tries to amend West Virginia case law by adding a new category of cases where the good faith exception wouldn't apply. The Court should not bite. Second, officers could have conducted this search under the emergency exception even if they did not have a warrant in hand. Under that exception, officers may conduct a limited search when they have an objectively reasonable belief that someone is imminently threatened with serious injury. Here, Petitioner had become a threat to himself, was armed with an AR rifle, and had reached a point where he was willing to shoot at his wife and children. The officers therefore had the right to search the house and seize Petitioner and his weapon to prevent him from hurting himself or others.

STATEMENT REGARDING ORAL ARGUMENT

Because the facts here and the law regarding warrant affidavits are clear, this case does not need Rule 19 or Rule 20 oral argument. The Court can decide it on the briefs, and it is appropriate for a memorandum decision.

ARGUMENT

I. The search warrant affidavit showed probable cause to believe Petitioner had committed a crime and that the police would find evidence of that crime during their search.

The United States and West Virginia Constitutions allow search warrants to issue only "upon probable cause." U.S. Const. amend. IV; W. Va. Const. art. III, § 6. And a magistrate can issue a warrant "only upon complaint on oath or affirmation supported by affidavit sworn to or affirmed before the judge or magistrate setting forth the facts establishing the grounds for issuing the warrant." W. Va. Code § 62-1A-3. Probable cause "exists if the facts and circumstances" in the "affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed." Syl. pt. 7, *State v. Payne*, 239 W. Va. 247, 800 S.E.2d 833 (2016). This "determination does not depend solely upon individual facts; rather, it depends on the

cumulative effect of the facts in the totality of circumstances." *Id.* And "a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial." *United States v. Ventresca*, 380 U.S. 102, 107 (1965).

This Court is highly deferential to magistrate decisions on affidavits' sufficiency:

> [A]fter-the-fact scrutiny by the courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant … .

State v. Dumire, No. 19-1086, 2020 WL 7391153, at *4 (W. Va. Dec. 16, 2020) (quoting *State v. Thomas*, 187 W. Va. 686, 694, 421 S.E.2d 227, 235 (1992) (cleaned up)). This Court also "construe[s] all facts in the light most favorable to the State, as it was the prevailing party below." Syl. pt. 2, *Payne*, 239 W. Va. 247, 800 S.E.2d 833 (cleaned up). And it gives "particular deference" to the lower court at every step of the sufficiency-of-the-affidavit analysis. *Id.*

The affidavit here justifies a prudent, reasonable person's belief that Petitioner had committed a crime and still possessed the crime weapon. Mrs. Hensley came to the police of her own accord. She gave a detailed account of her husband's behavior, explaining that Petitioner had become a threat to himself and barricaded himself in their house; and when she tried to return to the house, he shot his AR at her and their children several times. She came to the police directly after that. Mrs. Hensley's story is simple, straightforward, and believable. At each step it rings true. The affidavit reveals no reason to doubt its veracity—such as pecuniary gain or nefarious motives. And Petitioner suggests none on appeal. So probable cause exists here because, "given all the circumstances set forth in the affidavit, there [was] a fair probability that … evidence of [Petitioner's] crime [would] be found" at his home. *United States v. Cobb*, 970 F.3d 319, 326 (4th Cir. 2020) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)) (cleaned up). Indeed, even the simple fact that the victim identified the defendant "as one of [her] attackers" could have been

enough for "probable cause." *Ritchie v. Jackson*, 98 F.3d 1335 (4th Cir. 1996) (table decision). That conclusion is doubly true now given the "great" and "particular" deference this Court shows to lower courts' warrant decisions and because all facts are construed in favor of the State at this stage.

This case is like *State v. Corey*, for instance, where this Court affirmed a warrant affidavit in the face of insufficiency and hearsay objections. Like the affidavit here, the *Corey* affidavit consisted of several paragraphs, which "describ[ed] in detail how and where" the crime occurred. *State v. Corey*, 233 W. Va. 297, 305, 758 S.E.2d 117, 125 (2014). Both affidavits included a statement by the accused's significant other implicating him by name and establishing their relationship. *Id.* Both affidavits included the potential motive (suicidal ideation here, anger there). *Id.* And both affidavits explained that the perpetrator possessed the crime weapon (guns in both cases). *Id.* If anything, the affidavit here was more reliable than *Corey*'s affidavit because it contains the eyewitness account of the victim herself. This Court said the *Corey* affidavit was "detailed and set[] forth ample grounds that establish probable cause" even without that additional level of detail. *Id.* (quoting *State v. Bruffey*, 231 W.Va. 502, 513, 745 S.E.2d 540, 551 (2013)). In the same way and more, then, "the totality of the circumstances" alleged in this affidavit show a "sufficient basis to demonstrate probable cause for the issuance of the search warrant." *State v. Corbett*, 177 W.Va. 397, 399, 352 S.E.2d 149, 151 (1986).

Petitioner disagrees. He believes the affidavit was insufficient on two grounds: the police did not sufficiently bolster "informant" Mrs. Hensley's reliability and the officer who initially took Mrs. Hensley's statement was not the averring officer. This counts as double hearsay, Petitioner says, and the evidence seized using the purportedly invalid warrant that came from it must be suppressed. Pet'r Br. 12.

It's true that the warrant affidavit included hearsay, but Petitioner is wrong that this type of evidence invalidates the warrant. West Virginia Rule of Criminal Procedure 41(c) allows a magistrate judge to find probable cause even when the warrant affidavit is "based upon hearsay evidence in whole or in part." The U.S. Supreme Court agrees: "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant." *Ventresca*, 380 U.S. at 108 (cleaned up). This Court has provided more detail to the rule, explaining that hearsay isn't a problem so long as there is "a substantial basis for crediting" it. Syl. pt. 2, *Corey*, 233 W. Va. 297, 758 S.E.2d 117 (cleaned up). Here, the magistrate had that substantial basis to credit both levels of hearsay. First, because Mrs. Hensley was a crime victim, not an informant, her statement is presumed to be reliable. Her statement passes the reliability test handily even without that presumption—with it, Petitioner's case is all but ended. Second, information given from one officer to another is presumably reliable, too.

A. Mrs. Hensley was not an informant but a crime victim, so a presumption of reliability attaches to her statement.

Petitioner acknowledges that Mrs. Hensley had an adequate "basis of knowledge" to support probable cause. Pet'r Br. 14. His chief issue with her statement is what he calls a lack of "corroboration of [her] veracity." Pet'r Br. 14. In particular, the affidavit lacked a statement about Mrs. Hensley's veracity or "collaboration by Trooper Raymond." Pet'r Br. 14. Ultimately, this reliability argument flows from Petitioner's misidentification of Mrs. Hensley as a criminal "informant." *See, e.g.*, Pet'r Br. 12-14 (reciting and analyzing reliability tests for "informants"). Applying the correct test, the officers were not required to conduct the additional levels of investigation Petitioner asks this Court to require.

Contrary to Petitioner's repeated assertions, Mrs. Hensley was a crime victim and witness—not an informant. That distinction matters. Authorities draw a sharp distinction between

informants existing in "the criminal milieu" and the "average citizen who has found [herself] in the position of a crime victim or witness." 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.4 (6th ed. October 2022 update); *accord* 4 BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL PROCEDURE § 25:13 (14th ed. June 2023 update). Keeping these categories distinct is important because a "traditional police informer" gives information "in exchange for some concession, payment, or simply out of revenge against the subject," whereas "an ordinary citizen who reports a crime [that] has been committed in his presence" does so with the "intent to aid the police in law enforcement because of his concern for society or for his own safety." *State v. Smith*, 867 S.W.2d 343, 347 (Tenn. Crim. App. 1993) (cleaned up) (quoting *State v. Paszek*, 184 N.W.2d 836, 842-43 (Wis. 1971)). Here, the affidavit accurately presents Mrs. Hensley as a crime victim, not an informant. And the police officers below repeatedly said the same—that Mrs. Hensley was neither an "informant" nor "unidentified." App. 97-98. Rather, she was an ordinary citizen who had the misfortune of suffering criminal violence at the hands of her husband and who reported that violence to the police.

That Mrs. Hensley was a crime victim, not an informant, decides this issue because the law assumes crime victims and witnesses are far more reliable than informants. Although it appears this Court has not squarely adopted this presumption, treatise after treatise says that in the American system, "[a] citizen informant who has personally observed the commission of a crime is presumptively reliable" for probable cause purposes. 5 AM. JUR. 2D *Arrest* § 38 (Feb. 2024 update).[1] State courts also routinely hold that the average citizen reporting a crime in their capacity

[1] *See also* 79 C.J.S. *Searches* § 221 (Aug. 2023 update) ("The reliability of an informant providing information for a search warrant may be shown by the fact that he or she is a citizen informant not involved in the criminal milieu, or is a crime witness or victim."); 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.3(d) (4th ed. Dec. 2023 update) ("person purporting to be a crime victim or witness may be presumed reliable"); JOHN M. BURKOFF, SEARCH WARRANT LAW DESKBOOK § 4:4 (Feb. 2024 update) (saying the U.S. Supreme Court has long "intimated … that probable cause information obtained from

as witness or victim is "presumed to be credible and reliable." *State v. Long*, 2020-Ohio-4090, 157 N.E.3d 362, ¶ 35 (6th Dist.); *see also Diggs v. State*, 257 A.3d 993, 1007 (Del. 2021) (saying a "presumption of reliability" attaches to "an average citizen [who] takes the initiative in communicating to the police the fact that he has been a victim or a witness to a crime").[2]

Federal cases adopt this presumption of reliability, too—going so far as to say that a single "victim's 'reliable identification of [her] attacker' almost always suffices to establish probable cause." *English v. Clarke*, 90 F.4th 636, 646 (4th Cir. 2024) (quoting *Torchinsky v. Siwinski*, 942 F.2d 257, 262 (4th Cir. 1991)). In *Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003), for example, 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." Other circuits say the same. *See Wilson v. Russo*, 212 F.3d 781, 790 (3d Cir. 2000) ("[A] positive identification by a victim witness,

---

victims, eyewitnesses, or other ordinary citizens (as opposed to informants from the criminal milieu) was typically—and presumptively—to be treated as reliable"); BERGMAN, *supra*, § 25:13 ("Unlike confidential informants, the statements of crime victims and disinterested citizen-informants are presumed to be reliable unless there is evidence to the contrary.").

[2] *See also State v. Undahl*, No. A07-2301, 2008 WL 4629093, at *1 (Minn. Ct. App. Oct. 21, 2008) ("There is a presumption that citizen informants are reliable."); *State v. Chenoweth*, 158 P.3d 595, 610 (Wash. 2007) (noting the "presumed inherent reliability of a citizen informant"); *State v. Williams*, 193 S.W.3d 502, 507 (Tenn. 2006) ("The information provided by a citizen informant is presumed to be reliable." (cleaned up)); *State v. Deluna*, 2001 UT App 401, ¶ 14, 40 P.3d 1136 (saying an "ordinary citizen-informant needs no independent proof of reliability or veracity" (cleaned up)); *People v. Cicciaro*, 133 A.D.2d 645, 645, 519 N.Y.S.2d 754, 755 (1987) ("[A] presumption of reliability applies to information provided by a disinterested citizen informant."); *People v. Wirtz*, 661 P.2d 300, 301 (Colo. App. 1982) ("[T]he information of identified citizen informants has an inherent presumption of reliability."); *People v. Grzeskiewicz*, 419 N.E.2d 56, 58 (Ill. App. Ct. 1981) ("In the case of an ordinary citizen informant, as contrasted with a paid police informer or a criminal, the ordinary citizen informant carries a presumption of reliability."); *accord People v. Rowland*, 82 Cal. App. 5th 1099, 1111, 299 Cal. Rptr. 3d 206, 217 (2022) (cleaned up); *State v. Huntley*, 513 P.3d 1141, 1149 (Idaho 2022); *State v. Senna*, 2013 VT 67, ¶ 23, 194 Vt. 283, 79 A.3d 45; *City of Dickinson v. Hewson*, 2011 ND 187, ¶ 10, 803 N.W.2d 814, 817; *State v. Brown*, 2009-2456 (La. 5/11/10), 35 So. 3d 1069, 1074; *State v. Contreras*, 2003-NMCA-129, ¶ 10, 134 N.M. 503, 79 P.3d 1111; *State v. Evans*, 692 So. 2d 216, 219 (Fla. Dist. Ct. App. 1997); *State v. Sailo*, 910 S.W.2d 184, 189 (Tex. App. 1995); *State v. Valley*, 830 P.2d 1255, 1258 (Mont. 1992); syl. pt. 3, *State v. Bowley*, 442 N.W.2d 215 (Neb. 1989); *State v. Michalko*, 419 N.W.2d 360 (Wis. Ct. App. 1987).

without more, would usually be sufficient to establish probable cause."); *Gardenhire v. Schubert*, 205 F.3d 303, 322 (6th Cir. 2000) (saying "a crime victim's accusation standing alone can establish probable cause"); *accord United States v. Beckham*, 325 F. Supp. 2d 678, 687 n.16 (E.D. Va. 2004) (collecting cases). The Fourth Circuit has justified this widespread rule by saying "it is difficult to imagine how a police officer" who didn't personally witness the crime "could obtain better evidence of probable cause than an identification by name of assailants provided by a victim." *Torchinsky*, 942 F.2d at 262; *see also Bailey v. Town of Smithfield, Va.*, 19 F.3d 10, at *3, *6 (4th Cir. 1994) (using a single identification from a photo array to establish probable cause).

So because Mrs. Hensley, the victim here, had "positively identified her attacker to the police and they [had] no reason to disbelieve her," her statement alone sufficed to show probable cause; the officers didn't need to "take any additional steps to corroborate [her] information" before seeking the warrant. *United States v. Decoteau*, 932 F.2d 1205, 1207 (7th Cir. 1991). In short, Mrs. Hensley is an average citizen reporting a crime she witnessed and that victimized her. Her statement to Corporal Ware is therefore entitled to a presumption of reliability. And Petitioner does not even try to overcome that presumption. Nor could he: Nothing in Mrs. Hensley's narrative is inherently unbelievable, and nothing in the affidavit tends against that presumption either.

And even if more were needed to show reliability, the affidavit here would meet it. It was no "bare bones" complaint that "merely provided a statement that an unknown person saw the defendant with the victim," for instance. *Corey*, 233 W. Va. at 304, 758 S.E.2d at 124. As explained above, it passed muster for all the reasons—and more—that the affidavit in *Corey* did. It was "detailed and specific"—"set[ting] forth not merely 'some of the underlying circumstances' supporting the officer's belief, but a good many of them." *Ventresca*, 380 U.S. at 109. Juxtapose

that with the quintessential "bare bones" affidavit in *State v. Adkins*, 176 W. Va. 613, 625-26, 346 S.E.2d 762, 775 (1986). The *Adkins* affidavit alleged only that a "confidential informant" said the defendant had "in his possession with intent to deliver marijuana, a schedule 1 controlled substance over 15 gms." and that the police would find "Marijuana and any other evidence of the crime" at the defendant's house. *Id.* at 615, 346 S.E.2d at 764. It included no supporting details and no narrative. *Id.* Conversely, the affidavit here includes the full narrative of a named crime victim whose story makes her imminently believable. The two couldn't be more dissimilar.

Add to all that the broad deference this Court shows to warrant decisions and Petitioner faces an even steeper climb. Syl. pt. 2, *Payne*, 239 W. Va. 247, 800 S.E.2d 833. The Court will not invalidate a warrant by interpreting it or its supporting documents "in a hypertechnical, rather than a commonsense, manner." *Thomas*, 187 W. Va. at 694, 421 S.E.2d at 235 (cleaned up). But Petitioner's argument would require the Court to do just that. The law enforcement officers and magistrate were entitled to treat Mrs. Hensley's statement as reliable not just because she is a crime victim to whose statements a presumption of reliability attaches, but because it's internally consistent and believable. The circuit court's commonsense finding of probable cause under these circumstances was right, and it is entitled to great deference.

B. Trooper Raymond did not need to explain why he found Corporal Ware's work reliable because Corporal Ware was a fellow investigating officer.

Because Trooper Raymond didn't take Mrs. Hensley's statement himself, Petitioner argues that its inclusion in his affidavit counts as "double conclusory hearsay." Pet'r Br. 21. So even though Mrs. Hensley's statement was sufficiently reliable as she related it to the first officer, the theory would be that the fact a second officer wrote the warrant request invalidates that request nonetheless. Petitioner is wrong here, too.

Even if this scenario does count as another level of hearsay, substantial basis exists for crediting it. Authorities have long agreed that a statement by a "fellow" law enforcement officer "engaged in a common investigation [is] plainly a reliable basis for a warrant applied for by one of their number." *Ventresca*, 380 U.S. at 111; *see also United States v. Crawford*, 552 F. App'x 240, 246 (4th Cir. 2014). This rule is called "the collective knowledge doctrine (also known as the fellow officer rule)," and it allows law enforcement to satisfy various standards like reasonable suspicion or probable cause "based on the collective knowledge of the officers involved in an investigation." *United States v. McRae*, 336 F. App'x 301, 305 (4th Cir. 2009); *see also* 3A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 665 (4th ed. June 2023 update) (saying if an officer does not know "all the facts supporting probable cause but" acts "at the direction of the agents who did, probable cause [can be] established by the collective knowledge doctrine"); Kimberly J. Winbush, Annotation, *Application in State Narcotics Cases of Collective Knowledge Doctrine or Fellow Officers' Rule Under Fourth Amendment—Marijuana Cases*, 35 A.L.R.6th 497 (Originally published in 2008) (noting that under the fellow-officer rule the "observations or knowledge of fellow officers engaged in a common investigation are a reliable basis to establish probable cause"). Those fellow-officer statements "are plainly reliable even without any special showing." *United States v. Hodge*, 354 F.3d 305, 311 n.1 (4th Cir. 2004) (cleaned up). And—particularly relevant to Petitioner's argument that the second officer should have "add[ed] into his written complaint that he believed that the informant was reliable" based on specific evidence or experience, Pet'r Br. 20—relying on the collective knowledge of fellow officers also means it is "unnecessary for" the averring officer "to vouch the reasons he has for believing" the information. *United States v. Harrick*, 582 F.2d 329, 332 (4th Cir. 1978).

This Court adopted the fellow-officer rule decades ago. *See State v. Maxwell*, 174 W. Va. 632, 635, 328 S.E.2d 506, 510 n.10 (1985) (saying statements by "fellow" law enforcement officers "engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number" (quoting *Ventresca*, 380 U.S. at 111)). That rule disposes of Petitioner's argument here. Trooper Raymond and Corporal Ware were engaged in a common investigation. So Trooper Raymond was entitled to treat Corporal Ware's observations and conversations and the resulting information as his own—that is, as their collective knowledge. That Trooper Raymond was acting on collective knowledge meant he didn't have to make any special showing of reliability or vouch the reasons he had for using and swearing to Corporal Ware's work. Petitioner's double-hearsay argument therefore fails.

Further West Virginia case law underscores this conclusion. In *State v. Barlow*, 181 W. Va. 565, 568, 383 S.E.2d 530, 533 (1989), a deputy sheriff gave the averring officer the relevant investigation information, which he dutifully "recited" in his warrant affidavit. Because the averring officer got his information from his fellow officer, the Court explained, "it was not necessary" for him to explain why he found that information reliable. *Id.* The same is true here. Because Trooper Raymond "recit[ed] information obtained from … fellow police officer" Corporal Ware, he didn't need "to detail information with regard to [its] veracity." *Id.* (citing several cases). *Fuller v. Reed*, No. 14-0043, 2015 WL 9693893, at *5 (W. Va. Supreme Court, Mar. 11, 2015) helps here, too. There, a corporal justified a *Terry* stop by relying on his fellow corporal's statement that the petitioner "had attempted to evade him by pulling into the parking lot of a closed business." *Id.* Citing *Ventresca*'s common-knowledge rule, this Court treated one corporal's observation and information as entirely the other's. *Id.* In the same way, Trooper Raymond was entitled to treat Corporal Ware's interview and interactions with Mrs. Hensley as

his own. Finally, in *Maxwell*, the Court found this issue so simple that it said it could "dismiss summarily" the petitioner's argument that the underlying search warrant affidavit was flawed because it was based on "hearsay statements of [fellow] agents." 174 W. Va. at 635, 328 S.E.2d at 509-10. The Court should do the same here.[3]

Petitioner does not address the fellow-officer rule. Instead, he argues only that the Court can't use Trooper Raymond's observation of Mrs. Hensley to show this alleged second level of hearsay was reliable. Under Rule 41(c), he says, a court may not "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." Pet'r Br. 18. Thus, the circuit court wasn't allowed to use Trooper Raymond's testimony "that he was 'present'" after Mrs. Henley gave her statement to Corporal Ware. Pet'r Br. 20. It's true that the circuit court used hearing testimony to find that "Trooper Raymond was also present at the State Police Barracks when the victim provided a sworn statement to Cpl. Ware," App. 6 at ¶ 17—a finding fully supported by the record and that makes it likely that Trooper Raymond, too, heard at least part of Mrs. Hensley's statement. Regardless, Petitioner

[3] *See also United States v. Woods*, No. 1:12-cr-157, 2013 WL 12107462, at *10 (S.D.W. Va. Apr. 8, 2013) (holding that an officer's reliance on work by "other officers" wasn't a problem because it fell "squarely within" the fellow-officer rule and the "defendant's argument that the search warrant lacked probable cause" was therefore "without merit"); *United States v. Jarvis*, No. 3:09-cr-46-2, 2009 WL 2707563, at *4 (N.D.W. Va. Aug. 26, 2009) (holding that because the officers were engaged in a common investigation, the averring officer could include in his affidavit "hearsay allegations" verbally relayed to him by a fellow officer even without citing his fellow officer "as the source" because the allegations were considered "credible and reliable" under *Ventresca*); *United States v. Wellman*, No. 1:08-cr-43, 2009 WL 37184, at *13 (S.D.W. Va. Jan. 7, 2009) (saying that the averring "officer need not have personally observed all facts upon which a finding of probable cause is requested" and may instead rely on fellow officers "participating in the investigation" without "verify[ing]" their information); *State v. Fowler*, 467 S.W.3d 352, 357 (Mo. Ct. App. 2015) (holding that the averring officer could rely on "information supplied to" him "by the case detective as reliable" because "another law enforcement officer is a reliable source and that consequently no special showing of reliability need be made as a part of the probable cause determination"); *Gonzales v. State*, 481 S.W.3d 300, 312 (Tex. App. 2015). (same, even when the averring officer does not list or name the initially investigating officer as his source).

ignores that the circuit court also gave a second reason for permitting this alleged second level of hearsay: "Trooper Raymond [was] assisting Cpl. Ware in his investigation by preparing the Affidavit for search warrant" and it "is not uncommon for officers to assist each other, especially in exigent circumstances, with preparing of search warrants." App. 6 at ¶ 17. The circuit court thus invoked the fellow-officer exception—albeit, not by name.[4] And it was right to do so for all the reasons given above. The Court need not delve into Petitioner's "four corners" argument to affirm. The ordinary collective-knowledge doctrine does the trick.

Similarly, although Petitioner offers several suggestions of how this affidavit could have been "fixed"—such as Corporal Ware being "the affiant" or Trooper Raymond documenting that "he had a prior interaction with" Mrs. Hensley, averring that she gave him evidence corroborating her statement, or questioning Mrs. Hensley himself to better judge her credibility, Pet'r Br. 20-21—the Court can safely ignore these suggestions because this affidavit needs no fixing.

* * *

This Court has long said its "constitutional policy" is to "test[] and interpret[]" warrants and supporting affidavits "in a common sense and realistic fashion." *State v. White*, 167 W. Va. 374, 379, 280 S.E.2d 114, 118 (1981); *cf. United States v. Srivastava*, 540 F.3d 277, 287 (4th Cir. 2008) ("eschewing technical requirements of elaborate specificity" for warrants (quoting *Ventresca*, 380 U.S. at 108) (cleaned up)). The citizen-informant rule and fellow-officer rule further that policy. They effectuate the realistic notions that, as a rule, a crime victim who has nothing to gain from reporting a crime does so honestly and officers can trust their fellows' work.

[4] Of course, even if the circuit court hadn't invoked the fellow-officer rule, the Court could still affirm on that ground. *See* Syl. pt. 7, *State v. Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (2023) (saying the Court "may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment" (cleaned up)).

Nothing in the affidavit, the record, or Petitioner's arguments beat back those presumptions here. This Court should continue to eschew hypertechnical, forced constructions of warrant affidavits in favor of these commonsense realities and affirm the circuit court.

II. The search was proper under two exceptions to the warrant requirement.

Even if the Court disagrees that the affidavit was sufficient, there are two more independent bases on which to affirm to the circuit court: the good faith and emergency exceptions to the Fourth Amendment's warrant requirement.

A. The search was proper under the good faith exception.

Under the good faith exception to the Fourth Amendment's warrant requirement, the Court does not exclude evidence obtained pursuant to a warrantless search when "a police officer acts in good faith reliance on the warrant issued by the magistrate." *State v. Barefield*, 240 W. Va. 587, 597 n.8, 814 S.E.2d 250, 260 n.8 (2018) (cleaned up); *State v. Thompson*, 178 W. Va. 254, 258, 358 S.E.2d 815, 819 (1987) ("[T]he Fourth Amendment exclusionary rule should not be applied to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid."). The Court conducts an objective inquiry into "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Adkins*, 176 W. Va. at 625, 346 S.E.2d at 774. Here, Corporal Ware and Trooper Raymond had no reason to believe that their search of Petitioner's home was illegal (of course, assuming for the sake of this argument it was). They had interviewed the chief victim of Petitioner's crime, accurately recorded her statement, and dutifully presented it to the magistrate—who then made an independent decision to issue the warrant. Law enforcement officers routinely rely on a victim statement alone to seek a warrant. And they routinely rely on each other's work, too. Particularly after the magistrate blessed their

request, no reasonably well-trained officer would have believed that this search was illegal or improper.

To be sure, the good faith exception analysis doesn't end there. Our case law refuses to apply the good faith exception in three kinds of cases: when (1) "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) "the issuing magistrate wholly abandoned his judicial role," acting as a rubber stamp for law enforcement; or (3) the affidavit so lacks "indicia of probable cause as to render official belief in its existence entirely unreasonable." *State v. Hlavacek*, 185 W. Va. 371, 379 n.5, 407 S.E.2d 375, 383 n.5 (1991); *see also State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995). None of those exceptions apply here. The information in the affidavit was true, Petitioner does not suggest the magistrate was a rubber stamp, and the affidavit was chock full of facts showing probable cause. So the good faith exception applies—which advances West Virginia law's strong preference to allow in evidence of a crime. MAX C. GOTTLIEB, TRIAL HANDBOOK FOR WEST VIRGINIA LAWYERS § 30:18 (Nov. 2023 update) ("If a reasonable good faith search is made of a person … , then the better view is that evidence of a crime discovered thereby is admissible in court.").

Petitioner cites *Thompson* in support of his argument that the good faith exception won't work here because the "error" "was completely within the control of the investigating officers." Pet'r Br. 21. But Petitioner misreads *Thompson*. There, the Court rejected the good faith exception because the affiant officer included information he "knew was false or would have known was false except for his reckless disregard of the truth." *Thompson*, 178 W. Va. at 258, 358 S.E.2d at 819. The officer averred in the affidavit that his confidential informant was "reliable" and had been "reliable in the past." *Id.* at 255, 358 S.E.2d at 816. But at a subsequent hearing, he admitted

that he had never used the confidential informant before and that when he swore out the affidavit he did not know anything about her reliability. *Id.* at 255-256, 358 S.E.2d at 816-817. This, the Court said, "showed at least a reckless disregard for the truth if not an intentional misrepresentation." *Id.* at 258, 358 S.E.2d at 819. The Court was at pains to explain its refusal to apply the good faith exception using *Hlavacek*'s three-category framework and the seminal good faith exception case, *United States v. Leon*, 468 U.S. 897 (1984). *Id.* Only then did it offer this final note on policy: "Although *Leon* protects police work and evidence obtained from being excluded because of error beyond the control of investigating officers, here the error was completely within the control of the investigating officers." *Id.* That note wasn't adding a new fourth category to *Leon* and *Hlavacek*'s three. It was explaining that because intentionally or recklessly misleading the magistrate (that is, a category one scenario) is a decision within the officers' control and, suppression is the foreseeable consequences and they have no room to complain. Petitioner's quoted line from *Thompson* is inapposite, and the good faith exception applies.

B. The search was proper under the emergency exception.

Under the emergency exception "to the warrant requirement, law enforcement officers may enter a home and conduct a limited search without a warrant when, considering the totality of the circumstances, they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." *State v. Rexrode*, 243 W. Va. 302, 311, 844 S.E.2d 73, 82 (2020). Under this standard, the Court is "not concerned with the subjective reasons for the officer's entry. Instead, [the Court is] to determine whether the police officer's action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action." *Id.* (cleaned up). After all, a

peace officer's role "includes preventing violence and restoring order, not simply rendering first aid to casualties." *Id.* at 314, 844 S.E.2d at 85.

Here, Mrs. Hensley went immediately from the house where Petitioner had shot at her and her children to the police station. She told Corporal Ware and Trooper Raymond that "her husband Richard Hensley [was] being a threat to himself," that he had an AR rifle, and that he had shot several times at Mrs. Hensley's vehicle. App. 13-14. That sworn statement was an objective basis for the officers to believe that Petitioner was "imminently threatened" with "serious[]" injury. In *Horton v. Cnty. of L.A.*, 177 F. App'x 740, 741 (9th Cir. 2006), a warrantless search was justified when officers received a reliable "report of a possible suicide" and "there was no evidence that the emergency had subsided." The same is true here. Mrs. Hensley gave a reliable statement strongly indicating that Petitioner might take his own life or injure others who came near the house. And the officers had no reason to believe Petitioner's suicidal or otherwise violent ideation was abating—if anything, that concern had intensified to emergency status given his willingness to shoot at his wife and children. This is why the officers acted so swiftly: Petitioner shot at Mrs. Hensley and their children around 1:00 p.m. on November 8. App. 75-76. After Mrs. Hensley arrived at the police barracks, the officers took her statement, drafted the affidavit, and sought and received the warrant, while simultaneously assembling their special response team (including negotiators and a robot), formulating a plan, and executing that warrant—all in less than 13 hours. App. 77 (noting the search occurred shortly before at 2:00 a.m. on November 9). So under the emergency exception, Corporal Ware and Trooper Raymond had the right to seize Petitioner's weapon and arrest him to prevent him from seriously hurting himself.

CONCLUSION

The Court should affirm the circuit court.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ *Frankie Dame*
Frankie Dame (WV Bar # 14401)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Frankie.A.Dame@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-629

RICHARD A. HENSLEY JR.,

Petitioner,

v.

THE STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Frankie A. Dame, do hereby certify that the foregoing Brief of the State of West Virginia is being served on all counsel of record by email and File & Serve Xpress this 14th day of March, 2024.

/s/ Frankie A. Dame
Frankie A. Dame
Assistant Solicitor General