

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 24-234

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MICHAEL LANE PINKERMAN,

Petitioner,

v.

**Appeal from a final order of the
Circuit Court of Cabell County
(Case No. 20-F-226)**

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S REPLY BRIEF

Date: September 9, 2024

Thomas H. Peyton, Esquire
West Virginia State Bar No. 8841
PEYTON LAW FIRM, PLLC
2801 First Avenue
P. O. Box 216
Nitro, WV 25143
Telephone: (304) 755-5556
Telefax: (304) 755-1255
Email: thpeyton@peytonlawfirm.com

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STATEMENT OF THE CASE

The Petitioner asserts his brief is fully compliant with the West Virginia Rules of Appellate Procedure and certainly should not be dismissed without consideration of the merits on technical grounds as urged by the Respondent. To the extent every fact or underlying argument is not precisely cited, they are self-evident or do not warrant specific citation because they involve collateral matters. For instance, the manner in which law enforcement attempted to enter the Pinkerman residence was contested at trial with Petitioner’s witnesses indicating the Petitioner was attempting to open the door which was damaged from the battering ram. To the contrary, law enforcement officers testified the Petitioner was holding the door shut, thereby impeding their entry. It is uncontested that Petitioner’s adult son entered the area of the door wearing only boxer shorts when an exchange of gun fire occurred through the glass in the closed door resulting in the death of Petitioner’s son and the wounding of two law enforcement officers. The Petitioner did not possess a firearm.

The above facts are important as to Petitioner’s culpability, but are collateral to the issues on appeal. To undersigned’s knowledge, all of the facts recited in Petitioner’s brief are accurate.

ARGUMENT

I. Manipulating a safe pistol for the purpose of taking photographs used as evidence in a search warrant affidavit constitutes a search.

The officers who arrived at the Pinkerman residence for the noon visit with the Petitioner's son first made contact with Petitioner's adult son at the back door of the Pinkerman home. Pinkerman, Jr. exited the back door lawfully carrying a pistol in the low ready position. When addressed by law enforcement, Pinkerman, Jr. complied with instructions to render the firearm safe and placed the same out of reach. There is no doubt the firearm was rendered safe at that time. Pinkerman, Jr. removed the clip or magazine from the pistol and removed the bullet remaining in the chamber. It also appears the safety mechanism of the firearm was engaged. With every bullet separated from the pistol and Pinkerman, Jr. escorted by a senior law enforcement official to a different area of the Pinkerman property, there was no further reason for law enforcement to handle the firearm. Nevertheless, they do so for the purpose of investigation.

A person exiting his own home with a loaded pistol when third parties approach his rear door is not in any manner illegal in West Virginia. Pinkerman, Jr. was within his civil rights to carry the pistol at the time, loaded or unloaded. There is no evidence he pointed the loaded firearm at any of the officers during the noon visit. Once Pinkerman Jr. was informed of law enforcement's purpose, he rendered the weapon safe. According to testimony from Officer Vincent at the February 21, 2023 hearing, the following occurred:

- A. When we informed him that we were the sheriff's department and we were only there to talk to him, he removed the magazine from the weapon and rode the slide to the rear of the gun. I can't remember if he locked the slide in place or not, but he did and -- you know, removed the round that was in the cylinder. And he -- I believe he was the one that -- like, he laid it down. He wanted to hand it to one of us, but we had him lay it down. There was a pile of wood there, some landscaping timbers or something. We said, just lay it down.

February 21, 2023 Hearing Transcript at 23-24.

The officers on scene watched Pinkerman Jr. render the firearm safe and put it down. Unless this maneuver was an illusion, for which there is absolutely no evidence, there was no further need for law enforcement to investigate the firearm via handling. February 21, 2023 Hearing Transcript at 112-113 and 118-119. The Petitioner testified the subject firearm had a safety mechanism that, based on the photographs taken by law enforcement, was engaged. February 21, 2023 Hearing Transcript at 150-153.

While the firearm was visible to officers once it was rendered safe and placed on a pile of wood, the officers manipulated the firearm for the purpose of taking identification photographs used to secure a search warrant. Officer Cremeans was the photographer at the scene. He testified as follows:

Q. What did you do once the weapon was made safe and placed on that pile of wood?

A. Once Lieutenant Vincent cleared the firearm, we had access to both sides of the firearm, so at this point I took photos of the firearm. I don't know if Sergeant Vincent handed it to me to take photos. I don't know if he set it down and then I picked it up. But at that point I took pictures of the firearm.

Q. And from that -- those photographs, was it subsequent to that that a number -- at that time did you believe was a serial number --

A. That is correct.

Q. And were those revealed in those photographs?

A. Yes, sir, it was.

Q. That number, is it on both sides of that pistol?

A. Yes, sir, it is.

February 21, 2023 Hearing Transcript at 64-65.

In response to a question from the prosecuting attorney, Officer Cremeans clearly testified as follows:

Q. And so it is without question that at some point that pistol was manipulated to obtain the number?

A. Yes, sir.

February 21, 2023 Hearing Transcript at 66.

Once the firearm was rendered safe, the right for law enforcement to handle the firearm ended. While photographs may be legally taken of the firearm in the position in which it was placed by Pinkerman, Jr., the firearm was clearly handled and moved for the purpose of investigation before and during the photography process. It is these photographs which were used to seek the warrant. Because the officers did handle and manipulate the firearm after it was rendered safe, there is only speculation as to the portion of the firearm which was visible when rendered safe by Pinkerman Jr. because there is no evidence as to the firearm's specific position when he placed the firearm on the pile of wood. See Syl. Pt. 2, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980)(The burden rests on the State to show by a preponderance of the evidence that a warrantless search falls within an authorized exception.)

II and III. The evidence shows a reckless disregard for the truth when seeking the search warrant.

The evidence is insufficient to support a finding the officers intentionally misrepresented the pistol was stolen while knowing it was, in fact, not stolen. The Petitioner is not arguing in this appeal that the officers "knowingly and intentionally" included a false statement in the warrant application. However, the evidence establishes the officers were reckless in their zeal to get a search warrant so they could return to the Pinkerman residence for a confrontation with Pinkerman, Jr.

While legally within his rights to possess the pistol at his own home, Pinkerman, Jr. did not have a pleasant visit with law enforcement during the noon visit. In particular, Officer Vincent testified Pinkerman Jr. did not want the four officers on his property any longer:

Q. All right. And he -- it was pretty clear, under no uncertain terms, at some point during the visit he didn't want the four officers on his property anymore, correct?

A. To the point of vulgarity.

February 21, 2023 Hearing Transcript at 59.

Addressing the law enforcement officers rudely or with vulgarity is not advisable, but it is also within Pinkerman Jr.'s constitutional rights. Pinkerman Jr. apparently exited his back door carrying a loaded pistol and cursed when directing the officers off his property. Was this behavior motivation for the officers to aggressively seek a search warrant permitting them to raid the Pinkerman home while being willfully blind to evidence the firearm was not stolen? In footnote 8 of Respondent's brief, it touts Officer Stephens "expressly testified there was no celebration about the gun being stolen." Officer Stephens did testify to the that effect, but he was likely not aware of recorded evidence to the contrary.

At the suppression hearing, Petitioner called the dispatch operator as a witness because he participated in the telephone call from law enforcement when the information from the firearm photographs was relayed and run through NCIC. The recording of this telephone call was played during the suppression hearing. February 21, 2023 Hearing Transcript at 134-141. The officer speaking with dispatch is Officer Stephens who, as noted by the Respondent, testified there was no celebration about the gun being stolen. Below is an excerpt from the recorded call:

DISPATCHER SMITH: Yeah. It's [NCIC] says the model is a J92M.

OFFICER STEPHENS: Is the model on that J92M? Can you look, and see? He's got a picture of it.

Well, everybody's celebrating now instead of looking the fucking shit up, so -- model. You got anything else on there? Okay. I'll --

UNIDENTIFIED SPEAKER: They don't have anything with the model on it.

February 21, 2023 Hearing Transcript at 140-141.

The context of the telephone call clearly indicates a number of officers are celebrating as a result of the initial report the pistol was stolen. During this telephone conversation, the investigating officers fail to note the actual serial number on the pistol or the model number. This one telephone call was the only indicator a pistol was stolen.

The dispatcher faxes the NCIC printout to the investigating officers. The printout from dispatch claims a firearm, which ultimately was not the subject firearm, was reported stolen from the state of Arizona on September 6, 2019. The "ORI", or originating agency, was Gilbert Police Department with the telephone number for that police department plainly listed. Just below the telephone number is the following text: "IMMED CONFIRM RECORD WITH ORI." This clearly provides direction to immediately confirm with Gilbert Police Department. Appx. at 055. Gilbert, Arizona is approximately 1,900 miles from Huntington, West Virginia.

The NCIC printout also identifies another firearm with the same serial number just below the firearm noted above. The second entry has the same originating agency. Someone placed an "X" over the second entry. The dispatcher was asked about two firearms having the same serial number and indicated this has only occurred approximately four times in his experience. He testified as follows:

Q. Okay. Like, this -- would this be one of those examples where you gave us earlier where there are, like, four instances you can recall where the same serial number was on two different model weapons?

A. Yes, sir.

Q. And with your NCIC training, that would have caused some concern about accuracy, wouldn't it?

A. Yes, sir.

Q. Would it -- you hesitated.

A. Yes.

Q. And the only information you got to run this check was what we just listened to on the recording, correct?

A. Yes, sir.

February 21, 2023 Hearing Transcript at 145-146.

The dispatcher was asked whether he took any action in response to seeing that there were two serial numbers with different firearms. He responded "I checked the caliber with them (Officers on the call) and the model number. And then once they confirmed the model number, I just focused on the one that had the same model number, same caliber." February 21, 2023 Hearing Transcript at 145. In his earlier testimony at the same hearing, the dispatcher was asked how he resolves the issue of the same serial number reported for two firearms. The testimony was as follows:

Q. Okay. How do you resolve that issue in your position?

A. You'll have to just let the department know that ran the firearm, and they have to check with the agency to confirm it.

Q. Check with --

A. See if it's a matching color, whatever it may be.

Q. All right. Check with the originating agency?

A. Yes, sir.

Q. Because -- and that's an issue because you end up having two firearms with the same serial number, right?

A. Yes, sir.

February 21, 2023 Hearing Transcript at 129.

There was no attempt to confirm any aspect of the NCIC information with the originating agency by dispatch or the officers who saw the NCIC printout.

Importantly, it was the model number dispatch was attempting to confirm when the investigating officers were celebrating rather than “looking the fucking shit up.” Dispatch notes NCIC has the model as J92M. One of the unidentified celebrating officers then states “They don’t have anything with the model on it.” Officer Stephens then directs dispatch: “All right. They don’t have anything with the model. But, if you would, just would you send the hit confirmation?” The hit confirmation is the faxed document at Appendix 055. The model number dispatch was attempting to confirm was listed on one of the purported stolen firearms as J92M and the model number on the other purported stolen firearm, both bearing the same serial number, is M9. The officers apparently disregarded the M9 model number in their haste to attain the search warrant as that was the number on the crossed out entry. Appx. at 055. The photographs the officers took of the subject pistol clearly note model number “M9” on no less than three places on the pistol. Appx. at 053-054. The model number J92M requested by dispatch was not on the subject pistol.

To disregard this clear evidence of the questionable nature of the purported stolen firearm with no follow up whatsoever is reckless considering the gravity of the action taken by law enforcement in reliance up the warrant. The facts of this case clearly indicate a reckless disregard for the truth in supplying objectively false information to the magistrate by asserting Mr. Pinkerman, Jr. was in possession of a stolen pistol.¹ If there was sufficient evidence the officer knew the gun was not stolen at the time, then Petitioner would argue outright fraud. Nevertheless, reckless disregard for the truth can be established notwithstanding whether an officer lied in the warrant application. Further, because all of the charges in this case are the result of the officers’ attempt to serve the warrant, evidence resulting from the attempt to execute the warrant should be excluded as fruit of the poisonous tree. Without the search warrant, the officers had no legal right

¹ The assertion the firearm was stolen is clearly false/not true. Any semantics regarding the word “false” is a red herring.

to raid the Pinkerman residence and no crimes would have occurred. *See State v. Snyder*, ____ W.Va. ____, 857 S.E.2d 180, 190 (2021)(Classic fruit of the poisonous tree scenario.) *Also, State v. Stone*, 165 W. Va. 266, 268 S.E.2d 50, (1980) *overruled in part on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

IV. There was clearly a showing of material misrepresentation from a fair reading of the grand jury transcript.

The Respondent takes the position the information conveyed to the grand jury was knowledge law enforcement possessed as they applied and executed the search warrant. However, the transcript of the grand jury testimony and presentation by the prosecuting attorney clearly conveys to the jury the firearm was, in fact, a stolen firearm. Notably, Respondent cannot cite one piece of testimony or questions posed during grand jury presentment where there is any indication the firearm was anything but a stolen firearm. It is not contested the State was well aware the firearm was lawfully owned by the Pinkermans long before the matter was presented to the grand jury. The rather obvious purpose of telling the jurors the firearm was stolen was to prejudice the jury against the Petitioner because of the otherwise weak evidence as to his culpability for the alleged acts of his adult son.

At trial, the State called the dispatcher as one of its initial witnesses in order to explain how the information regarding a stolen firearm was conveyed to law enforcement. Transcript – Shawn Smith – January 24, 2024. Although the entire trial transcript was not produced for the purpose of this appeal, it is not contested the State presented the true nature of the pistol during the jury trial of this matter. If the truth about the pistol was negligible, the State certainly would not have

presented testimony on this very point during its case in chief.² This is a far cry from the evidence presented to the grand jury where the jurors were clearly lead to believe the Pinkermans harbored a stolen firearm, when the State knew they lawfully owned and possessed the pistol. The denial of an evidentiary hearing for the purpose of exploring the intent of misrepresenting the evidence or even a fair reading of the transcript for determining the merits of the motion was error.

V. The Petitioner makes a good faith request to modify existing law on the importance of peremptory strikes.

The Court has discretion to revisit this particular issue. While not reaching the constitutional level, the law, as it stands, essentially eviscerates the statutory right to peremptory strike jurors from a qualified, unbiased set of jurors. Many states do not require a Defendant show prejudice by placing a juror who should have been struck for cause on the actual jury. See *Ma v. People*, 121 P.3d 205, 210 (Colo.2005) (automatic reversal without showing prejudice); *Harris v. State*, 255 Ga. 464, 339 S.E.2d 712, 714 (1986) (same); *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky.2007) (same); *State v. Jacobs*, 789 So.2d 1280, 1284 (La.2001); *State v. Good*, 309 Mont. 113, 43 P.3d 948, 960 (2002) (same); *People v. Weber*, 103 A.D.3d 822, 959 N.Y.S.2d 736, 737 (N.Y.App.Div.2013) (same); *Townsend v. Commonwealth*, 270 Va. 325, 619 S.E.2d 71, 73 (2005) (same); and *Patterson v. State*, 691 P.2d 253, 256 (Wyo.1984) (same).

As Justice Benjamin noted in his dissent in *State v. Sutherland*, 231 W.Va. 410, 745 S.E.2d 448 (2013), “[i]n practice, most defendants use all of their peremptory strikes. If a defendant wished to use all six of his strikes to eliminate jurors who would otherwise not be struck for cause, but was instead required to use one of those strikes to correct a court's error—failing to strike a

² The Respondent consistently claims a violation of W.Va. R. App. P. 10, but Petitioner literally typed portions of the grand jury transcript into his brief. Further, the Appendix Index clearly notes the nature of designated motions as well as corresponding orders. The transcripts are labeled appropriately as well and included at the end of the Appendix.

juror showing clear bias—that defendant has effectively been denied a peremptory strike. In that case, the jury may contain one juror (or more) whom the defendant may have wished to strike for a perceived bias, but could not do so because of the court's error.” Under these circumstances, the Defendant is essentially left with no remedy. Continuing, “[t]he effective denial of a peremptory strike may result in a person sitting on the jury, who through his responses to questions, mannerisms, and tone, has shown bias that would not rise to requiring the court to strike that juror for cause.” 754 S.E.2d at 461.

Under the above situation and the situation in the case at hand, it is impossible to prove prejudice as established by *Sutherland* and progeny.

CONCLUSION

The Petitioner requests the Court take this matter under consideration and reverse the Petitioner’s conviction or, alternatively, remand for hearing regarding the grand jury presentation or a new trial.

MICHAEL LANE PINKERMAN
BY COUNSEL

/s/ Thomas H. Peyton
THOMAS H. PEYTON, ESQUIRE
WEST VIRGINIA STATE BAR NO. 8841
PEYTON LAW FIRM, PLLC
Post Office Box 216
2801 First Avenue
Nitro, WV 25143
Telephone: (304) 755-5556
Telefax: (304) 755-1255
thpeyton@peytonlawfirm.com
Counsel for Petitioner

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CERTIFICATE OF SERVICE

I, Thomas H. Peyton, counsel for Petitioner, do hereby certify that on the 9th day of September, 2024, I served a true and exact copy of the foregoing “PETITIONER’S REPLY BRIEF” upon all interested parties via Supreme Court of Appeals E-Filing – File & Servexpress, as follows:

Holly M. Mestermacher, Esquire
(West Virginia State Bar # 7996)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220

/s/ Thomas H. Peyton
THOMAS H. PEYTON, ESQUIRE