IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0428

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JEFFREY ALAN SNYDER,

Defendant Below, Petitioner.

STATE'S SUMMARY RESPONSE

PATRICK MORRISEY
ATTORNEY GENERAL

BENJAMIN F. YANCEY, III
ASSISTANT ATTORNEY GENERAL
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 7629
Email: *Ben.F.Yancey@wvago.gov*

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0428

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JEFFREY ALAN SNYDER,

Defendant Below, Petitioner.

STATE'S SUMMARY RESPONSE

I.

FACTS

On March 27, 2018, Petitioner's ex-wife, Stevie Shamblin, filed a domestic violence petition against Petitioner in the Kanawha County Magistrate Court. This same day (March 27, 2018), the magistrate court issued a domestic violence emergency protective order ("EPO") against Petitioner. The EPO contained the following warning to Petitioner: "It may be a violation of State and Federal law to possess any firearm . . . while this Order is in effect[.]" The EPO further informed Petitioner of the following: "[T]he Respondent shall not possess any firearms . . . while this Protective Order is in effect, and you are hereby informed of this prohibition." Lastly, the EPO mandated that "to protect the physical safety of the Petitioner [Ms. Shamblin]", the "Respondent [Petitioner] shall surrender any and all firearms . . . possessed or owned by the Respondent to the law enforcement officer serving this Order." *See generally* App. 1-4, 7 (emphasis omitted).

At the time that the EPO was issued (March 27, 2018), Petitioner was living in Amma, Roane County, West Virginia. Accordingly, the EPO was transmitted to the Roane County Sheriff's Department to be served upon Petitioner. On March 28, 2018, upon receiving the EPO and prior to serving it on Petitioner, Roane County Sheriff Todd Cole ("Sheriff Cole") spoke to Petitioner's ex-wife (Stevie Shamblin), who informed that Petitioner had several guns in his house and that she (Ms. Shamblin) believed that Petitioner had been using methamphetamine. *See generally* App. 18, 140, 162.

On this same day (March 28, 2018), Sheriff Cole and three other police officers drove to Petitioner's house in order to serve him with the EPO. Upon their arrival, Sheriff Cole knocked on the basement door to the house; notably, Petitioner's house is a large home consisting of three floors, including the basement. Thereafter, Petitioner answered the door and identified himself as "Jeffrey Snyder." After identifying himself, Sheriff Cole informed Petitioner that an EPO had been issued against him—and further that he (Sheriff Cole), per the EPO, was there to seize all of the firearms in the house. After so advising Petitioner, Sheriff Cole "asked to step inside of the residence[.]" *See generally* App. 18, 140-141, 162.

When he and the other officers stepped inside of Petitioner's house, Sheriff Cole immediately detected a strong odor of marijuana. For officer safety, Petitioner, along with another male who was present in the basement at the time, Levi Byler ("Byler"), were patted down. During these patdowns, a baggie containing methamphetamine was found in Petitioner's pants pocket. During these same moments, Sheriff Cole asked Petitioner if anyone else was in the house, to which Petitioner responded that his girlfriend, Harli Rhodes ("Rhodes"), was upstairs. On hearing this, Sheriff Cole and one of the other officers conducted a protective sweep of the second and third floors of the house, during which time Rhodes was located. *See generally* App. 18, 141, 162.

During the protective sweep, Sheriff Cole and the other officer observed, in plain view, an open five gallon bucket containing marijuana, as well as a room that had been set up as an indoor marijuana growing operation. Based on these discoveries, Petitioner was placed under arrest and transported to the Sheriff's Department by Sheriff Cole and one of the other officers for processing; the other two officers remained at Petitioner's house to secure the same. After processing Petitioner, Sheriff Cole obtained a search warrant for Petitioner's house from the Roane County Magistrate Court, after which Sheriff Cole returned to Petitioner's house to execute the search warrant. *See generally* App. 18, 75-77, 141, 162.

In searching Petitioner's house, Sheriff Cole and the other officers found numerous items for an indoor marijuana growing operation—i.e., marijuana, marijuana seeds, timers, lighting, fertilizer, pots and soil. Also found during the search were numerous items for the chemical extraction of THC from the marijuana, as well as jars containing a brown-honey-like substance containing THC and e-cigarette cartridges containing THC. During the search, Sheriff Cole also spoke with Petitioner's girlfriend, Rhodes. Rhodes informed Sheriff Cole that Petitioner had been extracting THC from the marijuana, after which Petitioner would place the THC into e-cigarette cartridges and sell the same. *See generally* App. 18, 141, 162.

On May 22, 2018, the Roane County Grand Jury returned a two count Indictment against Petitioner. Count 1 of the Indictment charged Petitioner with one count of manufacturing a controlled substance—marijuana. Count 2 charged Petitioner with possession with intent to deliver a controlled substance—marijuana. *See generally* App. 15-16.

A suppression hearing was held in this case on September 13, 2018. During the hearing, the Roane County Circuit Court ("trial court" or "court") denied Petitioner's motion to suppress the evidence seized by the police in his home on March 28, 2018. *See generally* App. 85-86, 292.

On January 4, 2019, Petitioner entered into a plea agreement with the State. Under the terms of the agreement, Petitioner agreed to plead guilty to Count 1 of the Indictment charging him with manufacturing a controlled substance (i.e., marijuana). In exchange, the State agreed to dismiss the remaining count of the Indictment (Count 2) charging Petitioner with possession with intent to deliver a controlled substance (i.e., marijuana). *See generally* App. 132.

On this same day (January 4, 2019), a plea hearing was held in this case. During the hearing, pursuant to the terms of his plea agreement with the State, Petitioner pled guilty to Count 1 of the Indictment charging him with manufacturing a controlled substance (i.e. marijuana). Afterward, the trial court accepted Petitioner's guilty plea and conditionally adjudged him guilty of manufacturing a controlled substance (i.e., marijuana), as charged in Count 1 of the Indictment. *See generally* App. 101-102, 104.

Petitioner's sentencing hearing took place on February 22, 2019. During the hearing, pursuant to his plea agreement with the State and his guilty plea, the trial court finally adjudged Petitioner guilty of manufacturing a controlled substance (i.e., marijuana), as charged in Count 1 of the Indictment. The court further ordered that Count 2 of the Indictment charging Petitioner with possession with intent to deliver a controlled substance (i.e., marijuana) be dismissed. Finally, the court suspended imposing a prison sentence on Petitioner and, instead, placed Petitioner on probation for five years. *See generally* App. 113-114.

Thereafter, Petitioner brought the current appeal.

II.

ARGUMENT

THE TRIAL COURT DID NOT COMMIT ERROR IN FINDING THAT THE SEARCH OF PETITIONER'S HOME WAS LAWFUL AND THE EVIDENCE FOUND DURING THIS SEARCH WAS ADMISSIBLE.

Prior to Sheriff Cole (and the other officers) going to Petitioner's house to serve him with the EPO, these officers were "walking into" a potentially dangerous situation. This dangerous situation "came to light" when, prior to going to Petitioner's house, Sheriff Cole spoke to Petitioner's ex-wife (Stevie Shamblin), who informed that Petitioner had several guns in his house and that she (Ms. Shamblin) believed that Petitioner had been using methamphetamine. Obviously, someone having guns and, at the same, using a drug like methamphetamine is not a good idea, to say the least. In fact, it presents a potentially dangerous situation for any police officer(s) coming into contact with such person.

The dangerousness of this situation was heightened when Sheriff Cole (and the other officers) stepped into the basement door of Petitioner's house. When they did so, a strong odor of marijuana was detected and another male (Byler) was also present in the basement. Thereupon, Petitioner and Byler were patted down, during which time a baggie containing methamphetamine was found in Petitioner's pants pocket. During these same moments, Sheriff Cole asked Petitioner if anyone else was in the house; Petitioner replied that his girlfriend (Rhodes) was upstairs. Due to these circumstances, and understandably so, a protective sweep of the rest of Petitioner's house (second and third floors) was conducted.

Simply put, this situation presented a potentially dangerous situation from which Sheriff Cole (and the other officers) were reasonably justified in conducting a warrantless protective sweep of Petitioner's house. This Court has held likewise in other cases:

> Neither a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons as long as a two-part test is satisfied: An officer must show there are specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable. If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons.

Syl. Pt. 6, *State v. Kimble*, 233 W. Va. 428, 759 S.E.2d 171 (2014) (internal quotations and citation omitted). *See Ullom v. Miller*, 227 W. Va. 1, 9, 705 S.E.2d 111, 119 (2010) (Finding that one of the "recognized exceptions to the general warrant requirement include[s] . . . searches and seizures justified by exigent circumstances[.]"). *See also State v. Kendall*, 219 W. Va. 686, 692, 639 S.E.2d 778, 784 (2006) (internal quotations and citations omitted) (Finding that one of the "[r]ecognized situations in which exigent circumstances exist include[s] . . . danger of harm to police officers[.]").

Further, it was during their justified protective sweep of Petitioner's house that Sheriff Cole (and another officer) observed, in plain view, an open five gallons bucket containing marijuana, along with a room that had been set up as an indoor marijuana growing operation. In short, these plain view observations (and ultimate seizure of the items found during the observations) were in keeping with the law. Again, this Court has held likewise in other cases:

> The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

Syl. pt. 3, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). *See also Ullom*, *supra*, 227 W. Va. at 9, 705 S.E.2d at 119 (Finding that one of the "recognized exceptions to the general warrant requirement include[s] . . . seizures of items in plain view[.]").

Further, following Sheriff Cole's (and other officer's) lawful plain view discoveries (i.e., five gallon bucket containing marijuana and room set up for the purpose of growing marijuana indoors), Petitioner was arrested, after which Sheriff Cole obtained a valid search warrant for

Petitioner's house. In searching Petitioner's house, Sheriff Cole (and the other officers) found and seized the remainder of the evidence in this case, including numerous items for an indoor marijuana growing operation—i.e., marijuana, marijuana seeds, timers, lighting, fertilizer, pots and soil. Also found during the search were numerous items for the chemical extraction of THC from the marijuana, as well as jars containing a brown-honey-like substance containing THC and e-cigarette cartridges containing THC.

On all of this, during the September 13, 2018, suppression hearing, the trial court denied Petitioner's motion to suppress the evidence found by Sheriff Cole and the other officers during their search of Petitioner's house on March 28, 2018. In doing so, the court correctly found and ruled as follows:

> I will deny the motion to suppress and will find that the sheriff [Sheriff Cole] had every right to be present in the home in service of the domestic violence protective order. His testimony is clear that he followed proper procedures after observing the defendant [Petitioner] to be in possession of . . . a baggie that contained methamphetamine, and smelling the odor of marijuana. The motion is denied.

App. 292.

Following up on these findings and rulings, in its Order of October 9, 2018, the trial court properly found as follows:

> Based upon the evidence presented, the Court finds Sheriff L. Todd Cole and other members of law enforcement in Roane County went to the home of the Defendant [Petitioner] on March 28, 2018 for the purpose of serving a Domestic Violence Protective Order issued in Kanawha County, West Virginia. The Court finds said Order further required the Roane County Sheriff to seize any firearms at the time of the service of the Order. The Court finds law enforcement was legally in the home of the Defendant when a strong odor of marijuana was observed and a bucket of green marijuana was observed in plain view during a protective sweep of the home.
>
> Upon review within the "four corners" of the search warrant the Court finds probable cause existed for the issuance of the search warrant by [Roane County] Magistrate Ronald White on March 28, 2018.

> The Court finds that the execution of said search warrant was legal and orders the evidence obtained as a result of the execution of the search warrant will be admitted at trial[.]

App. 85-86 (emphasis omitted).

Simply put, in making all of these findings and rulings, the trial court did not abuse its discretion. *See State v. Haid*, 228 W. Va. 510, 517, 721 S.E.2d 529, 536 (2011) (internal quotations and citation omitted) ("The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.").

* * *

Despite all of this, Petitioner asserts on appeal that the trial court committed error in finding that the police's search of Petitioner's house was lawful and that the evidence obtained during this search was admissible at trial. In making this assertion, Petitioner essentially argues that Sheriff Cole and the other officers did not lawfully enter his house (i.e., step across the threshold) to begin with. Thus, as Petitioner further argues, the search and seizure of the evidence found by these officers (during their initial protective sweep and subsequent search after obtaining a search warrant) was "fruit of the poisonous tree," and therefore inadmissible.

In support of these assertions/arguments, Petitioner largely relies on the testimony of Sheriff Cole during the suppression hearing. More specifically, as pointed out by Petitioner, Sheriff Cole testified that, at the moment that he was getting out of his car at Petitioner's house, it was his intention to go into Petitioner's house and search everywhere a firearm as small as two or three inches could be found. At this same moment, as he further testified, Sheriff Cole did not have a search warrant; he did not have an arrest warrant for Petitioner or anyone else in the house; he was not chasing Petitioner or anyone else in the house; there was no emergency that would require him

to go into the house; and he had no probable cause to believe that Petitioner had committed any crime. *See generally* App. 278-280.

Sheriff Cole essentially repeated this same testimony as it related to the moment before he entered Petitioner's house. More specifically, as testified to by him, at the moment that he was getting ready to step across the threshold into Petitioner's house, Sheriff Cole intended to search everywhere a firearm as small as two or three inches could be found; he did not have a search warrant; he did not have an arrest warrant; he was not chasing anyone; there was no emergency; and he did not have probable cause that Petitioner had committed any crime. Sheriff Cole further testified that, at no point, did Petitioner have an opportunity to tell him that he could not come into his house; and, had Petitioner told him such, Sheriff Cole would have followed the EPO and went into Petitioner's house anyway. *See generally* App. 280-281, 284.

Sheriff Cole further testified that, once he was inside Petitioner's house, he smelled marijuana. Sheriff Cole also testified that, upon smelling the marijuana, he believe that he had probable cause to arrest Petitioner, but he (Sheriff Cole) admitted that he did not smell the marijuana until he was already inside Petitioner's house. *See generally* App. 281-283.

Again, based on this testimony, Petitioner argues on appeal that Sheriff Cole and the other officers did not lawfully enter his house (i.e., step across the threshold) to begin with. Thus, as Petitioner further argues, the search and seizure of the evidence found by these officers (during their initial protective sweep and subsequent search after obtaining a search warrant) was "fruit of the poisonous tree," and therefore inadmissible. The State disagrees.

Admittedly, Sheriff Cole did testify as to all these matters during the suppression hearing. However, although it is not evident from his testimony during the suppression hearing, Sheriff Cole, prior to stepping into Petitioner's house, *asked Petitioner if he could come into his house.*

More specifically, in filling out the criminal complaint against Petitioner, Sheriff Cole stated as follows:

> Upon arriving at Jeffrey Snyder's [Petitioner's] residence, which was a white three story dwelling house at the end of a long blacktop driveway, this officer [Sheriff Cole] knocked on the basement door facing the driveway. A male answered the door and identified himself as Jeffrey Snyder. This officer advised Jeffrey Snyder that an order of protection had been issued against him by the Magistrate Court of Kanawha Co. *This officer asked to step inside of the residence* as the order stated that this officer had to seize all firearms at the time of service of the order. When this officer stepped inside of the residence, this officer could smell a strong odor of green marijuana coming from the area.

App. 18, 162 (emphasis added).

In short, because Sheriff Cole (prior to stepping into his house) asked Petitioner if he could come into the house, Sheriff Cole (and the other officers) did not unlawfully enter Petitioner's house (i.e., step across the threshold), as insisted by Petitioner in the current appeal. Thus, the search and seizure of the evidence found by these officers (during their initial protective sweep and subsequent search after obtaining a search warrant) was not "fruit of the poisonous tree," as asserted and argued by Petitioner on appeal. Indeed, as correctly found by the trial court, all of the evidence found by these officers in Petitioner's house was lawfully obtained and admissible at trial.

* * *

As a final matter, the underlying statute "at play" in this case is West Virginia's domestic violence statute, W. Va. Code § 48-27-101 *et seq.* (the "DVS"). In enacting the DVS, pursuant to W. Va. Code § 47-27-101 (a), our Legislature (among numerous other things) has found that:

> (3) *Domestic violence is a major* health and *law-enforcement problem in this state* with enormous costs to the state in both dollars and human lives. It affects people of all racial and ethnic backgrounds and all socioeconomic classes; and
>
> (4) *Domestic violence can be deterred, prevented or reduced by legal intervention* that treats this problem with the seriousness that it deserves.

(Emphasis added). In order to promote the purposes of the DVS, pursuant to W. Va. Code § 47-27-101 (b), the Legislature (again among numerous other things) has further found that:

> [The DVS] *shall be liberally construed and applied* to promote the following purposes:
>
> (3) *To expand the ability of law-enforcement officers* to assist victims, *to enforce the domestic violence law more effectively*, and to prevent further abuse[.]

(Emphasis added).

In making all of these findings (among many more) concerning the DVS, the Legislature made clear that domestic violence cases are to be given priority status and, as such, handled effectively and efficiently by the police, as well as the court system. This Court has found likewise: "Domestic violence cases are among those that our courts must give priority status. In W.Va. Code, 48-2A-1, *et seq.*, the West Virginia Legislature took steps to ensure that these cases are handled both effectively and efficiently by law enforcement agencies and the judicial system." Syl. Pt. 2, *In re McCormick*, 206 W. Va. 69, 521 S.E.2d 792 (1999) (internal quotations and citations omitted).

Further, under W. Va. Code § 48-27-403 (a),

> [u]pon the filing of a verified [domestic violence] petition . . . , the magistrate court may enter an emergency protective order as it may determine necessary to protect the petitioner or minor children from domestic violence and, upon good cause shown, may do so ex parte[.] Clear and convincing evidence of immediate and present danger of abuse to the petitioner or minor children constitutes good cause for the issuance of an emergency protective order[.] ...If the magistrate court determines to enter an emergency protective order, *the order shall prohibit the respondent from possessing firearms.*

(Emphasis added). Additionally, under W. Va. Code § 48-27-403 (b),

> the magistrate court shall order a copy of the petition to be served immediately upon the respondent, together with a copy of any emergency protective order[.] ...Copies of any order entered shall also be delivered to any *law-enforcement agency* having

> jurisdiction *to enforce the order*, including municipal police, the county sheriff's office and local office of the State Police, within 24 hours of the entry of the order.

(Emphasis added).

With this entire "backdrop" in place, in the State's view, a police officer serving an EPO should be given a little latitude in doing so. This "latitude" (at a minimum) should include allowing the officer, without first obtaining a search warrant, to step into the doorway of the home of the person against whom the EPO has been issued and calling for such person to surrender his firearms. This same "latitude" (at a minimum) should also include allowing the officer, without first obtaining a search warrant, to accompany the person against whom the EPO has been issued to the place(s) where the firearms are located so that the officer may take possession of the same. This is so (of course) due to the inherent danger of serving an EPO on a person who has firearms in his home, as well as the impracticality of obtaining a search warrant prior to serving the EPO. *See Ullom*, *supra*, 227 W. Va. at 9, 705 S.E.2d at 119 (Finding that one of the "recognized exceptions to the general warrant requirement include[s] . . . searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable."). *See also* Syl. Pt. 5, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996) (Finding that "[l]aw enforcement officials may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified for law enforcement purposes.").

Lastly, in the State's view, to disallow a police officer to carry out the minimal actions described in the preceding paragraph could very well put the officer at great risk. Hypothetically––if the officer were not allowed to take these minimal actions and (instead) had to remain outside in serving an EPO—the recipient of the EPO could disappear back into his house on the pretense of gathering his firearms to be surrendered to the officer at the doorway—but instead arm himself

with a gun, and then return to the doorway and "turn" the gun on the officer. This is particularly true in a situation where (as here) the recipient of the EPO is carrying on drug activity inside of his home.

III.

CONCLUSION

For the foregoing reasons, the Petitioner's conviction should be affirmed by this Honorable Court.

Respectfully submitted,

RESPONDENT,
STATE OF WEST VIRGINIA

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

(WV Bar # 6843) for

BENJAMIN F. YANCEY, III
ASSISTANT ATTORNEY GENERAL
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 7629
Email: *Ben.F.Yancey@wvago.gov*

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0428

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JEFFREY ALAN SNYDER,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, do hereby certify that on the 3rd day of October, 2019, caused the foregoing **State's Summary Response** to be served upon Petitioner's counsel by delivering to him a true copy thereof, via United States Mail, postage prepaid and addressed as follows:

Clinton W. Smith, Esquire
405 Capitol Street
Mezzanine Suite 4
Charleston, WV 25301

(WV Bar # 6843) for

BENJAMIN F. YANCEY, III
Assistant Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 7629
Email: *Ben.F.Yancey@wvago.gov*

Counsel for Respondent