STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.) No. 11-0643 (Cabell County No. 10-F-6)

JOSHAWA CLARK,
Defendant Below, Petitioner

FILED
November 16, 2012
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, Joshawa Clark, by counsel, Jason D. Parmer, Assistant Public Defender, appeals a conviction of the felony offenses of first degree robbery and conspiracy.[1] Respondent, the State of West Virginia, appears by counsel, Darrell V. McGraw, Jr., Attorney General and Robert D. Goldberg, Assistant Attorney General.

Herein, Petitioner argues that the circuit court erred in denying his motion to suppress all evidence flowing from the State's illegal and unconstitutional subpoena of his cell telephone records. Specifically, Petitioner alleges that: 1) his cell phone records were obtained in violation of his legitimate expectation of privacy guaranteed by Art. III, §6 of the West Virginia Constitution, as government agents should have to seek judicial authorization upon a showing of probable cause before a person's phone records can be seized; 2) even if West Virginians do not enjoy an expectation of privacy in their cell phone records, Petitioner should have standing to challenge the investigative subpoena; and 3) the seizure of Petitioner's cell phone records was unlawful. Based upon the parties' written briefs and oral arguments, the appendix record designated for our consideration, and the pertinent authorities, we determine that the case must be remanded to the circuit court for further factual development on the issue of the legality of the U.S. Department of Justice Drug Enforcement ("DEA") subpoena issued. To the extent that no new or significant questions of law are addressed herein because we are remanding the case for further factual development, this matter will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

[1] Petitioner was sentenced to one to five years on each of Counts II and VI, with sentences to run consecutively. He was also sentenced to twenty-five years on each of Counts I and III, with sentences to run consecutively to each other and consecutive to the sentences Petitioner received in Counts II and VI.

In November 2008, the Marquee Cinemas in Huntington was robbed. No arrests were made and the case remains unsolved. On July 13, 2009, the same cinema was robbed again at approximately 12:40p.m. The Petitioner and another theater employee, Zachary Lewis, had finished their shift and were just walking out the door when the perpetrator suddenly appeared. The perpetrator instructed the Petitioner to call the manager and open the door to the count room. Once inside, he pointed the gun at the manager and instructed him to fill a bag with money from the safe. After the man stole the money, he was seen exiting down the hallway to the Tenth Street Exit. Huntington Police Department Officer Cass McMillian was assigned the investigation of the July robbery. On July 24, 2009, DEA Special Agent Tom Bevins used a DEA administrative subpoena to obtain the Petitioner's cell phone records from Sprint for July 12-13, 2009. The records showed that Petitioner repeatedly called the phone number of his friend, Dustin Shaver, both immediately before and after the July robbery.[2] The records did not contain recordings of the calls or texts. Rather they were limited to telephone numbers of Petitioner's outgoing calls and texts from his cell phone.

The theater was robbed a third time on October 19, 2009, at 11:19 p.m. The Petitioner was also working at the time of the third robbery. The perpetrator had gone to a movie and when it was over, he forced at gunpoint an employee who was cleaning the theater to go to the concession stand where the Petitioner was working. The perpetrator made them call the manager and indicated that the perpetrator should be let into the locked count room. The manager let them in, and the perpetrator made everyone bind themselves with zip ties and he took money from the safe and left the theater. The perpetrator obtained about $5,000. Petitioner and Shaver were seen together on this evening on a video from Marcum Terrace, where they both lived.

On October 21, 2009, the State executed a search warrant on Petitioner's home and recovered a safe which contained the bag used by Shaver in the October 2009 robbery. The officers that searched the safe found $4,600.

At the preliminary hearing held on October 29, 2009, Officer McMillian testified that after determining that Petitioner had worked the night of both the November 2008 robbery and the July 2009 robbery, he obtained his cell phone records through a subpoena. The police department began looking at the numbers that Petitioner had called on July 12, 2009, and July 13, 2009, and determined that there was one number that was reoccurring within minutes of each other on the night of the robbery. After obtaining another subpoena for the number in question, the number was found to belong to Dustin Shaver. McMillian testified that following that, the police department started an

[2] Cell phone records showed that petitioner called Dustin Shaver seven times between 11:54 p.m. and 12:38 on the evening of the robbery. Mr. Shaver called petitioner five times between 9:14 and 9:28 p.m. the evening of the robbery. Petitioner called Shaver three times between 1:56 a.m. and 3:28 a.m. the morning after the robbery.

investigation of the Petitioner and Dustin Shaver to determine what their connections were. The police department learned that they were good friends in school. McMillian testified that the police department began following Petitioner periodically to see where he was going, but nothing of any value was learned from their observations until the third robbery in October 2009.

On January 14, 2010, Petitioner and Shaver were indicted on two counts of first degree robbery and two counts of conspiracy based upon the July 2009 and October 2009 robberies of the movie theater.

On June 24, 2010, Petitioner filed a motion to suppress the cell phone records on the grounds that the information had been illegally obtained through a DEA subpoena. Petitioner sought to suppress all evidence flowing from the subpoena as fruit of the poisonous tree. Petitioner argued that the cell phone records were used initially as a "fishing expedition" in hopes of obtaining information upon which the local police could further their investigation. However, argued the Petitioner, the records were obtained without probable cause and without a valid warrant or subpoena. Petitioner contended that the "proposed need for the subpoena was pursuant to an investigation of violations of 21 U.S.C. 801 et seq." Petitioner asserted that this statement was fraudulent and that the subpoena was sought to avoid proper procedure to access the records. Petitioner argued that there was no drug-related crime being investigated, as required by 21 U.S.C. §876(a) (2011), the authorizing statute for DEA subpoenas.[3] Petitioner also argued that the Fourth Amendment to the United States Constitution required advance notice to the person whose privacy interests may be at stake and opportunity for a judicial determination as to whether or not the inquiry is within the authority of the agency and the information is reasonably relevant. *Hells Angels v. County of Monterey*, 89 F.Supp.2d 1144, 1153 (2000), *overruled* by the Ninth Circuit in *Hells Angels Motorcycle Co. v. McKinley*, 360 F.3d 930 (2004) (concluding that no constitutional violation occurred because Hell's Angels' reasonable expectation of privacy in documents that were the

[3] 21 U.S.C. §876(a) provides, in relevant part:

> Authorization of use by [U.S.] Attorney General.
>
> In any investigation *relating to his functions under this subchapter with respect to controlled substances*, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds *relevant or material to the investigation*. . .

Id. (emphasis added).

subject of a previous lawful seizure was insufficient to require notice and an opportunity to contest the subpoena.).

At the suppression hearing on August 2, 2010, no witnesses testified. Petitioner argued that the subpoena was invalid because the case had no drug involvement, as required by federal statute. Petitioner argued that administrative subpoenas are not to be used as a discovery tool and that the subpoena in question was part of a fishing expedition. Petitioner asserted that the phone records and all evidence resulting therefrom should be dismissed as a result of being fruit from the poisonous tree. The Petitioner relied on the preliminary hearing testimony of Officer McMillian to support his assertion that drugs were not the basis of the subpoena.

The State responded by proffering that J.T. Combs, not McMillian, initiated the investigation. The State proffered that Officer Combs worked with the Bureau of Alcohol, Tobacco and Firearms ("ATF") task force. According to the prosecutor's proffers, Officer Combs also worked over at the Marquee Cinema as a moonlight-type job, and he observed that the Petitioner had a lot of new personal property. The State further proffered that Officer Combs began talking to cinema personnel regarding where Petitioner had gotten these things, and that's how the investigation began and where the probable cause began. The State also proffered that there was a video of the Petitioner and Dustin Shaver at Marcum Terrance together the night of the July robbery. The State misstated the evidence, however, because the video of Clark and Shaver together at Marcum Terrace was from the night of the October robbery, not the night of the July robbery. Petitioner's phone records were seized two months before the October 2009 robbery occurred. When the court asked how the State would respond to Petitioner's argument that the subpoena should only be used in drug related cases, the State responded that, "[w]ell, they didn't know at the time what they were dealing with. They didn't know if it was a drug related case at the time they initiated the subpoena." The circuit court then stated, "[o]kay. Anything else?" State's counsel replied, "[t]hat's all."

On September 30, 2010, the circuit court entered an order denying Petitioner's motion to suppress, including within the order information that was not presented at the suppression hearing. The order added information regarding the specific types of new items that Petitioner had obtained following the robberies, and information regarding the fact that Combs knew that petitioner lived at Marcum Terrace and could not afford these things. Also added was that Combs asked a manager at the theater who said petitioner bought the items with money he got for joining the Marines and that Combs investigated and found this was not true. The order indicated that "as a result of these occurrences, the phone records were investigated."

On October 25, 2010, a hearing was held wherein Petitioner's counsel objected to the above-noted additional findings contained within the court's order which were facts not discussed at the suppression hearing. During this hearing, the assistant prosecutor

admitted that the information had been provided to the judge's law clerk *ex parte*. On March 9, 2011, the circuit court amended the order denying the motion to suppress. Although the added information was deleted, the circuit court still concluded that the motion to suppress should be denied. Trial was conducted on February 8, 9, and 10, 2011. Co-defendant Mr. Shaver testified against Petitioner, indicating that they both came up with the idea of robbing the theater in July and October and the Petitioner acted as the inside man and Shaver performed the actual robberies. The jury returned a guilty verdict.

The issue presented is whether the circuit court erred when it denied Petitioner's motion to suppress all evidence flowing from the State's alleged illegal and unconstitutional subpoena of his phone records. First, Petitioner claims that the subpoena for his phone records violates his legitimate expectation of privacy under the West Virginia Constitution, Art. III, §6, in the phone numbers he dials. Second, even if Petitioner does not have a legitimate expectation of privacy, Petitioner contends that he should have standing to challenge the illegal subpoena. Third, Petitioner argues that the subpoena is illegal because administrative subpoenas in robbery investigations are not authorized by State statute and the subpoena was unlawfully issued under the Federal Controlled Substances Act. Petitioner argues that the investigation of a robbery is outside the scope of the authorizing statute for DEA subpoenas, 21 U.S.C. §876(a).[4]

In response, the State argues that Petitioner has no reasonable expectation of privacy in the cell phone records recovered by administrative subpoena under the West

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[4] See footnote 3, *supra*. With respect to those who have authorization to sign and issue DEA subpoenas, 28 C.F.R. Pt. 0, Subpt. R, App. provides the following:

> Issuance of subpoenas. (a) The Chief Inspector of the DEA; the Deputy Chief Inspectors and Associate Deputy Chief Inspectors of the Office of Inspections and the Office of Professional Responsibility of the DEA; all Special Agents-in–Charge of the DEA and the FBI; DEA Inspectors assigned to the Inspection Division; DEA Associate Special Agents-in–Charge; DEA and FBI Assistant Special Agents-in–Charge; DEA Resident Agents-in–Charge; DEA Diversion Program Managers; FBI Supervisory Senior Resident Agents; DEA Special Agent Group Supervisors; those FBI Special Agent Squad Supervisors who have management responsibility over Organized Crime/Drug Program Investigations; and DEA Regional Directors, Assistant Regional Directors, and Country Attachés, are authorized to sign and issue subpoenas with respect to controlled substances, listed chemicals, tableting machines or encapsulating machines under 21 U.S.C. 875 and 876 in regard to matters within their respective jurisdictions.

Virginia Constitution. The State acknowledges that although the State gave shifting explanations below regarding the reason for the issuance of the DEA subpoena, the State contends that such do not prove affirmative misrepresentations and could simply be the instance of one hand not knowing what the other is doing. The State posits that DEA agent Bevins could have obtained Petitioner's cell phone records independently and later shown them to either Officer McMillian or Officer Combs. The State argues that the investigating officers were under no constitutional obligation to look the other way. The State contends that the Petitioner has no evidence to support the contention that the subpoena was improperly issued by the DEA. Rather, the State asserts that the subpoena contains a case number and a subpoena number which strongly suggests that the DEA was conducting an investigation.

The standard of review of a circuit court's ruling on a motion to suppress is now well defined in this State. *See State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994) (discussing at length the standard of review in a suppression determination). We have held that

> By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. *See State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886, 891 (1994). When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

State v. Lilly, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (W.Va. 1995).

Petitioner correctly indicates that in order for the DEA subpoena to be authorized pursuant to 21 U.S.C. §876(a), the requested information must be material and relevant to a drug-related investigation. Furthermore, our research of this issue indicates that pursuant to 28 C.F.R. §0.103 (2012), the Administrator of the DEA is only authorized to release information obtained by the DEA in certain limited circumstances. The relevant portion of 28 C.F.R. §0.103 provides, in pertinent part:

> (a) The Administrator of DEA is authorized--

> (1) To release information obtained by DEA and DEA investigative reports to Federal, *State, and local officials engaged in the enforcement of laws related to controlled substances.*
>
> (2) To release information obtained by DEA and DEA investigative reports to Federal, State, and local prosecutors, and State licensing boards, engaged in the institution and prosecution of cases before courts and licensing boards related to controlled substances.

(Emphasis added).

However, in examining the record before us, we find that the circuit court did not sufficiently develop the facts at the suppression hearing to make a determination regarding whether the DEA properly issued the administrative subpoena at issue under 21 U.S.C. §876 by providing sufficient evidence that the requested information was material and relevant to a *drug-related investigation*. In addition, we are troubled by a number of discrepancies obvious in our review of the record before us. In addition to the shifting explanation provided as the basis for the issuance of an administrative subpoena, we note that the administrative subpoena contained in the record shows an issuance date of June 28, 2010 – a date long after the Petitioner's indictment. At a minimum, it cannot be authentic. Furthermore, it is likewise obvious that the State's proffer was, in many respects, simply not factually accurate.

Thus, we remand this case to the circuit court for a new suppression hearing to be conducted so that this specific factual issue may be further developed through the introduction of witness testimony and evidence. If it is determined by the circuit court that the DEA subpoena was authorized under 21 U.S.C. §876, it will also be necessary for the circuit court to determine whether the DEA properly released and/or shared this information with members of the Huntington Police Department who were required to be engaged in the enforcement of laws *related to controlled substances* under 28 C.F.R. §0.103.

Indeed, the circuit court's brief order denying Petitioner's motion to suppress does not state what specific facts it relied on in determining that the Petitioner had failed to establish a basis for the suppression of the cell phone records. Accordingly, before we address the remaining issues presented regarding whether the Petitioner had an expectation of privacy under the West Virginia Constitution and whether he should have standing to challenge the subpoena, it is necessary for the circuit court to determine whether the DEA complied with federal law in issuing the subpoena and whether the information obtained was then properly released to the Huntington Police Department in investigating this case. To the extent that the record before us is completely devoid of any development of the issue of whether a drug-related investigation was being conducted, we determine that it is necessary to remand this case to the circuit court for

the limited purpose of conducting such proceedings as are necessary for proper factual and legal development to permit the circuit court to enter an order that is adequate for appellate review.[5]

For the foregoing reasons, we hold the Petitioner's appeal in abeyance for a period of ninety days in order to permit the circuit court to conduct the proceedings and enter an appropriate order. Upon entry of its order, the circuit court is directed to forward a copy of its order to the Clerk of this Court, along with a copy of any other material of record that is considered part of the limited remand. This memorandum decision is final upon its entry and is not subject to rehearing.

Remanded for a limited purpose.
Held in abeyance for ninety days.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

[5] If on remand the trial court determines that the DEA did not properly release the information to the local police, then the court must vacate the judgment and grant the Petitioner a new trial. If the trial court upholds its initial ruling denying the motion to suppress, then this Court will enter an appropriate order allowing the parties to supplement their briefs on appeal to assign error based upon the ruling on remand.