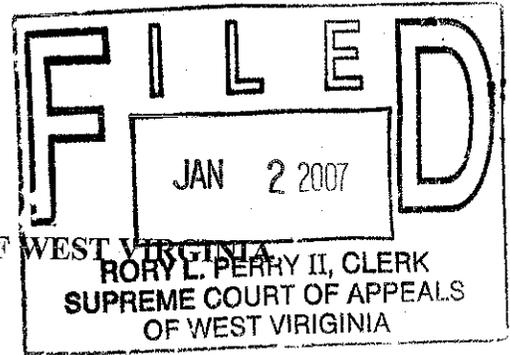


NO. 33223

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON



STATE OF WEST VIRGINIA,

Plaintiff below, Appellee

MICHAEL CUMMINGS,

Defendant below, Appellant.

**BRIEF OF APPELLANT MICHAEL CUMMINGS**

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### **Kind of Proceeding and Nature of Ruling Below**

The appellant was prosecuted in the Circuit Court of Roane County and convicted on charges of attempting to operate a clandestine drug laboratory and conspiring to commit the offense of attempting to operate a clandestine drug laboratory. The prosecutor dismissed four other charges contained in the indictment after a pre-trial ruling by the circuit court (Rec. p. 54-58) suppressing evidence gathered in violation of the appellant's fourth amendment rights. At trial the appellant moved for judgment of acquittal for failure of the prosecution to produce any evidence of a connection between the items used in manufacturing methamphetamine and the appellant. (Record 66, 226-227). That motion was denied. The appellant did not testify or produce any other evidence. The jury convicted him on the two charges.

### **Statement of Facts**

On February 1, 2005, State Trooper Justin K. Cox was running radar from his state vehicle parked at a car wash next to State Route 14 in Reedy, West Virginia. (Record p. 125, 196-197). While on duty he observed a blue Oldsmobile traveling at 63 miles an hour traveling south on Route 14. At the suppression hearing Trooper Cox thought the speed limit was 45 (Record p. 125) but at the trial he testified that he thought the speed limit there was 55. (Record p. 210). Trooper Cox did not have a printout of the clocked speed and testified about the speed by memory. (Record p. 137).

The Appellant, Michael Cummings, was driving the vehicle. Michael was traveling with his wife, Amy Cummings, who was in the back seat, and a female friend, Rachel Pritt, who was riding in the front passenger seat. (Record p. 126, 199-200). After clocking the vehicle at 63

miles per hour Trooper Cox turned on his blue lights and pulled the vehicle over in front of a house that turned out to be Amy Cummings' residence. (Record 196-198). Trooper Cox approached the vehicle and spoke with driver Michael Cummings asking for vehicle information. (Record p. 199). Amy Cummings then spoke up saying the vehicle belonged to James Foreman and she was unaware of where the information was located in the vehicle. (Record p. 200).

Trooper Cox allowed Amy to telephone the owner of the vehicle. (Record p. 127). To find vehicle information Amy, who was in the back passenger seat of the vehicle, laid her body over the front seat and reached into the glove box of the vehicle. After losing sight of her hands, Trooper Cox told both passengers to get out of the vehicle. His reason behind this request was officer safety. (Record p. 200).

Trooper Cox patted down both passengers for weapons and then allowed Amy to continue searching in the glove box for the vehicle information. During this time Michael Cummings remained in the drivers seat of the vehicle. (Record p. 127).

After the two passengers had been patted down Trooper Cox proceeded to pat down Michael Cummings for weapons. After asking Cummings to empty his pockets Trooper Cox observed a knife with a small container attached to it on a key ring. Trooper Cox asked Cummings to empty the small container and observed what appeared to be to be prescription pills and two small baggies, which appeared to contain methamphetamine. (Record p. 128-129). This evidence was not admitted at trial because the Circuit Court suppressed the evidence holding that it came from an illegal search. (Record p. 54-58).

After the search of Michael Cummings brought the pills and baggies to light, Trooper Cox searched the vehicle. "Once I found those items on him, I went ahead and placed him in handcuffs and secured him in the cruiser". (Record p. 129). Apparently while the Cummings

were in handcuffs the Trooper says he asked them if they had a problem with him taking a look into the vehicle and he testified that both Michael and Amy said they did not. (Record p. 133). The trooper's search revealed six boxes of pseudoephedrine cold medicine, six boxes of matches, and two bags of ten syringes all found in plastic bags in the floor of the back seat. (Record p. 130, 207-208, 215). The six boxes of cold medicine were in a yellow plastic shopping bag located on the floorboard behind the driver side seat, which the trooper said at trial that he saw as he first approached the car. (Record p. 201-209). The matches and syringes were found by Trooper Cox in a white plastic bag on the floorboard behind the front passenger seat. (Record p. 134, 207, 209). Trooper Cox never testified that he saw the boxes of matches and the syringes other than when he searched the vehicle after placing the Cummings in handcuffs in his car. The Circuit Court allowed the evidence to be admitted at trial. (Record p. 58).

## **ARGUMENT**

### **STANDARD OF REVIEW**

A two-prong deferential standard of review is applied to a circuit court's findings and conclusions. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. McCormick v. Allstate Insurance Co., 196 W.Va. 415, 475 S.E.2d 507(1996).

On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on

determinations of witness credibility are accorded great deference. State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).

A de novo review is applied to a trial court's disposition of a motion for judgment of acquittal. State v. LaRock, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996).

**I. THE CIRCUIT COURT ERRED IN NOT SUPPRESSING THE EVIDENCE THAT WAS FOUND IN THE SEARCH OF THE VEHICLE PERFORMED AFTER THE ILLEGAL SEARCH OF THE SMALL CONTAINER FOUND IN PETIONER'S POCKET.**

**A. Evidence found in the search was not covered by the "Plain View" Doctrine because the evidence in view was not immediately incriminating and therefore did not meet one of the three required predicates of a plain view seizure as established by common law.**

Cases long decided under the Fourth Amendment of the U.S. Constitution as well as Article 3, Section 6 of the state constitution make it clear that searches conducted without prior approval by judge or magistrate are per se unreasonable, subject only to few specifically established and well delineated exceptions. These exceptions are jealously and carefully drawn, and there must be showing by those who seek exemption that exigencies of situation made that course imperative. The "automobile" exception has been recognized where there are exigent circumstances precluding the obtaining of a warrant and there is also probable cause. The burden rests on the state to show by a preponderance of the evidence that a warrantless search falls within the authorized exceptions. See Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L. Ed. 453 (1925) and State V. Moore, 165 W. Va. 837, 272 S.E. 2d 804 (1980). Trooper Cox testified that he saw a bulge in the defendant's pockets and for officer safety asked him to empty his pockets. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) allows searches for officer safety. That case held that once a motor vehicle has been lawfully detained for a traffic violation, the police officer may order the driver to get out of the vehicle

without violating the Fourth Amendment's proscription of unreasonable searches and seizures and a bulge in the jacket of a defendant automobile operator, who had been lawfully ordered out of automobile following stop for traffic violation, permitted officer to conclude that defendant was armed and thus posed a serious and present danger to safety of officer thus justifying "pat-down" search of defendant whereby the weapon was discovered.

In this case, the circuit court correctly ruled that once Trooper Cox had observed the contents of the appellant's pockets and determined officer safety, there was no safety justification for requiring the appellant to open the very small container, which held pills and powder. (Court Order entered 11/17/05) See also Sibron V. New York, 392 US 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) and Minnesota V. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334, (1993) which held that certain pocket searches exceeded the lawful bounds marked by *Terry*.

Allowed into evidence, however, were of the bags of cold medicine, boxes of matches and bags of syringes, all under the "plain view" exception to warrantless searches. (See Court Order entered 11/7/05). The U.S. Supreme Court has stated, "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). According to the West Virginia Supreme Court of Appeals 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 plainly viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; (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.” State v. Julius, 185 W.Va. 422, 428 (W.Va. 1991). (emphasis supplied). See also U.S. v. Legg, 18 F.3d 240 (4<sup>th</sup> Cir. 1994).

The first requirement for a “plain view” seizure is, according to Julius, supra, that the officer was legally in the spot from which he made his view. Since the testimony of Trooper Cox established that he pulled over Michael Cummings for speeding and there was no evidence that he was not speeding, the trooper did not violate the Fourth Amendment nor did he unlawfully arrive at the vehicle for what he said was his first view of the bag with cold medicine in it. This meets the first predicate of the plain view doctrine.

As to the second predicate, that the item was in plain view and its incriminating character was also immediately apparent, although the bag may have been in “plain view” (although it is not certain the contents were) neither the bag and its’ visible contents, nor the bag with all of the contents, had an “immediately apparent” incriminating character. Having cold medicine in a shopping bag should not give probable cause to search the rest of the vehicle. The bag may have been in plain view and even if the officer could actually see all six boxes inside of it and tell they were all cold medicine containing pseudoephedrine cold medicine, cold medicine does not have an immediately apparent incriminating character. The possession of legally purchased over the counter cold medicine, even six boxes of it (which cost a dollar each and each held 24 pills— record p. 78- that is 12 doses per box or 48 doses which at 4 doses per day would be a 12 day supply) should not be held to have an immediately apparent incriminating character.

A warrantless seizure such as the seizure of the bags in appellant’s car also requires probable cause. See Arizona v. Hicks, 480 U.S. 321, 326 (1987). See also Texas v. Brown, 460 U.S. 730 (1983). In Brown the U.S. Supreme Court said the use of “immediately apparent” in case law was an “unhappy choice of words.” Brown at 741. The Court said what was actually

meant was a standard of probable cause. Id. at 742. Because of the closeness of “immediately apparent,” the wording used when the U.S. Supreme Court discusses plain view seizures, and “immediately incriminating”, the wording this Court used in Julius, supra, the idea of probable cause should be kept in mind when discussing plain view seizures in the state of West Virginia.

Trooper Cox’s testimony that when he approached the vehicle for the first time that he saw a two handled plastic grocery bag containing six boxes of psuedoephedrine cold medicine (Suppression Hearing pg. 8, Trial Transcript pg. 50) is somewhat incredible. The bag was yellow (Trial Transcript pg. 65) and not clear. The boxes of medicine in the bag were in the floor in the back of the vehicle. Despite these things Trooper Cox was able to see six boxes of cold medicine and knew that the medicine contained the specific ingredients necessary for manufacturing meth.

The boxes of medicine alone were not immediately incriminating in nature and therefore should not have allowed Trooper Cox to search the vehicle just because he saw cold medicine in a bag. Trooper Cox did not discover the boxes of matches and the syringes in bags on the floor behind the passenger seat that were also admitted into evidence until he searched the vehicle (Suppression Hearing pg. 9). Three people were in the vehicle at the time that it was pulled over. There was no reason for Trooper Cox to assume that the six boxes of cold medicine belonged to one individual alone. The medicine could have easily belonged to all three occupants of the vehicle. Two boxes of cold medicine per person are far from incriminating in nature to reach a point for a police officer to have probable cause to search a vehicle.

Other state courts have held that seeing one item that could possibly be used in a crime does not lead to enough information to search an individual or vehicle. See Matthews v. Commonwealth, 218 Va.1 (1977) (Officer was not allowed to assume drugs were in the vehicle

because he saw cigarette papers in the vehicle.) and Liichow v. State of Maryland, 288 Md. 502 (1980). (Seeing dime size white pills in a plastic bag was not enough to search a vehicle).

Additionally, case law from other states shows the fact that Michael Cummings had been pulled over for speeding was not enough to lead to a suspicion that he may have been doing something illegal and thus establish probable cause once something was seen in the vehicle. See Reeves v. State of Alaska, 599 P.2d 727 (1979) (Arrest for traffic offense was not enough to lead to a legal search.) and Sullivan v. Texas, 626 S.W.2d 58 (1982) (Traffic accident was not enough to lead to suspicion).

**B. Evidence gathered after the trooper illegally searched the small container is a “fruit of the poisonous tree” search and should also be excluded.**

The “fruit of the poisonous tree” doctrine is that evidence derived from information acquired by police officers through unlawful means is not admissible into evidence. See Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Sharpe, 660 F.2 d 967 (4th Cir. 1981); State v. Goodmon, 170 W.Va. 123, 290 S.E.2d 260, 268 (1981).

It was not until after he had searched Michael Cummings and found what appeared to be meth and prescription pills in Cummings’ possession that Trooper Cox searched the rest of the vehicle. Because Trooper Cox’s suspicion was only raised after an illegal search of Michael Cummings the evidence that was found in the search of the vehicle should have been suppressed under the “fruit of a the poisonous tree” doctrine. Under the fruit of the poisonous tree doctrine “[e]vidence which is located by the police as a result of information and leads obtained from illegal [conduct], constitutes ‘the fruit of the poisonous tree’ and is ... inadmissible in evidence.” State v. DeWeese, 213 W.Va. 339, 346 (2003) (quoting State v. Stone, 165 W.Va. 266, 272 (1980).

**C. Michael Cummings and his wife Amy did not give a valid consent to search because they were already in custody and therefore were in a situation where they did not have a choice other than to consent to the search of the vehicle.**

Although from his testimony Trooper Cox believed that he already possessed the legal authority to search the vehicle, he asked Michael Cummings who was in handcuffs and “secured” in the trooper’s vehicle (Suppression Hearing pg. 9) and his wife, Amy, (Suppression Hearing p. 10) also in the state car, if they had a problem with him looking in their vehicle. Trooper Cox testified that both replied that they did not have a problem with the search (Suppression Hearing pg. 11). However, by the time that he asked this question Michael and Amy were already in custody. In Syllabus Point 9 of State v. Thomas, 203 S.E.2d 445 (1974) the West Virginia Supreme Court of Appeals stated:

A suspect whose acquiescence to search is secured during police custody occurring by reason by an illegal arrest, or similar form of overt or subtle detention, is in no position to refuse to comply with the demands of the officer in whose custody he is, whether such demand is couched in the language of a polite request or direct order, and he cannot be held to have consented to the search voluntarily.

“The history of the law of confessions supports the conclusion that custodial interrogations are inherently coercive, and an alleged consent to search given under such circumstances must be subjected to the most careful scrutiny.” State v. Williams, 162 W.Va. 309, 315 (1978).

While under arrest both Michael and Amy were in a position where they had reason to believe that the vehicle would have been searched regardless of their answer to question. The discussion of what Michael and Amy Cummings thought is a moot point because regardless of how they responded to Trooper Cox’s question the vehicle would have been searched because Trooper Cox said when he testified that he had the legal authority to search the vehicle.

**D. It is poor public policy to search individuals and vehicles because of the presence of everyday household items due to the potential for abuse by law enforcement.**

If the search in this particular case is allowed under the "plain view" doctrine there is great potential for abuse by law enforcement officers. If a police officer is allowed to search a vehicle because he sees some boxes of medicine where is the line to be drawn? In this particular case the State Trooper said that he was able to see six boxes of cold medicine. This is far from an astonishing amount of medicine. Three people were in the vehicle at the time. Elementary calculations show this to be only two boxes of medicine per individual in the vehicle. It is not a crime for three people to purchase the same thing at the same place or at different stores. Would the state trooper have searched the vehicle if he saw only two boxes of medicine if there was only one individual in the vehicle? What if there is only one box of medicine but the police officer simply doesn't like the individual? If searches such as the particular one in this case are allowed we are heading down a road to where someday soccer moms or grandmothers could be searched for having a box of cold medicine in a grocery bag while driving on the way home from the local supermarket.

**II. THE CIRCUIT COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL IN THAT THE WEIGHT OF THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON EITHER OF THE CHARGES ON WHICH THE APPELLANT WAS FOUND GUILTY.**

**A. The evidence was insufficient, even viewing it in the light most favorable to the prosecution, to sustain a verdict that the defendant was guilty of attempting to operate a clandestine drug laboratory.**

There was no evidence presented at trial that was sufficient to convict the appellant Michael Cummings and the court erred in denying his motion for judgment of acquittal. It is true

that an appellant has a heavy burden to overturn a criminal conviction. Syllabus point 3 of State v. Guthrie, 194 W.Va. 657 (1995) states:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inference and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

In State V. LaRock 196 W.Va. 294, 470 S.F.2d 613 (1996) the *de novo* review given to a trial court's disposition of a motion for judgment of acquittal was described. This Court's job, like the trial court's, is to scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt.

1. There was absolutely no evidence of any criminal intent by Appellant Michael Cummings to commit the crimes for which he was found guilty.

W.Va. Code § 60A-4-411 prohibits any person from operating or attempting to operate a clandestine drug laboratory. Paragraph (b) defines a "clandestine drug laboratory" as "any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine, methylenedioxymethamphetamine or lysergic acid diethylamide in violation of the provisions of section four hundred one [§ 60A-4-401] of this article." The indictment charges the Appellant with "unlawfully, feloniously and **intentionally**" attempting to operate a clandestine drug laboratory.

None of the evidence presented by the Prosecutor at trial shows any intent by Michael Cummings to operate any type of a drug lab. This continues to be so even when the evidence is looked at in the most favorable light for the state. The Prosecutor's case at trial relied on six boxes of cold medicine, six boxes of matches, and two bags of syringes. All three pieces of evidence have everyday uses. Simply because the three separate pieces of evidence may be able to be used together to manufacture an illegal substance does not alone show intent to operate a drug laboratory. If this were the case then most households across West Virginia would be guilty of such criminal intent. Every medicine cabinet in the state likely has the ingredients to manufacture some type of drug. In fact many garages across the country likely have the materials necessary to make explosives that could lead to great devastation. In the tragic bombing of the Alfred P. Murrah Building in Oklahoma City in 1995 one of the main components of the bomb was fertilizer, a common product that can be found in garages or tool sheds.

2. There was absolutely no evidence of any connection between the items found in the vehicle and the Appellant except that the Appellant was driving the vehicle.

Simply driving the vehicle that contained cold medicine, matches and syringes should not be enough evidence to convict the appellant, Michael Cummings, of any crime. This court has held that mere presence in a home in which a controlled substance was seized does not give rise to a presumption of possession of a controlled substance, or link the person to possession of that controlled substance. State v. Dudick, 158 W.Va. 629, 213 S.E.2d 458 (1975); State v. Chapman, 178 W. Va. 678, 363 S.E. 2d 755 (1987). In those cases the crime was "possession" of a controlled substance whereas in this case the crime is "assembles" any chemicals or equipment or combination thereof for the purpose of manufacturing. Necessarily included in the physical act of assembling is the possession of the items needed. The appellant can't be guilty of assembling items if he can't be guilty of possessing them. Presence alone at an unregistered still

was not enough to infer possession, custody or control. United States v. Romano, 382 U.S. 86 S. Ct. 279, 13 L. Ed. 2d 210 (1965).

There was no evidence that Michael Cummings even knew these items were in the vehicle. He did not own the vehicle. The items were not beside him, but were in fact beside his wife's feet in the back seat floor. There was no evidence that he had even looked into the floorboard behind the front seat. There were two other people in the automobile, one of whom was not even charged. Several courts have held that the evidence was insufficient to sustain a conviction for unlawful possession of illicit drugs when the drugs were found in the rear floorboard on a vehicle in which there were other occupants. See Parks V. State, 49 Ala. App 722, 248 So. 2d 761 (1971); Commonwealth v. Dasch, 219 Pa Super 43, 269 A2d 359 (1970); Crisman v. Commonwealth, 197 Va 17, 87 S.E. 2d 796 ( 1955); J.M. v. State, 839 So. 2d 832 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist. 2003); and Commonwealth v. Juliano, 340 Pa. Super. 501, 490 A2d 891 (1985).

A receipt was found in the bag along with the cold medicine. No receipt was found on or near Michael Cummings nor was there any information on the receipt that was found that Michael Cummings had bought the items. As a matter of fact, the receipt showed an additional purchase of a perfumed body spray that the police officer admitted was probably not a purchase by Mr. Cummings. The third person in the car, who was not even charged with anything, was seated as close to the items as Mr. Cummings was. None of these facts adduced at the trial contribute to a finding that Michael Cummings had any links to the items found in the vehicle and alleged to be chemicals or equipment used to manufacture methamphetamine.

**B. There was no evidence of any conspiracy except that the appellant was riding in the same car as the alleged co-conspirator.**

W.Va. Code § 61-10-31 states, "It shall be unlawful for two or more person to conspire (1) to commit any offense against the State or (2) to defraud the State, the state or any county board of education, or any county or municipality of the State, if, in either case, one or more of such persons does any act to effect the object of the conspiracy." The state had to show that Michael Cummings entered into an agreement with another person or persons for the purpose of committing the offense of Attempt to Operate a Clandestine Drug Laboratory and that Michael or another member of the conspiracy, subsequent to the agreement, committed an overt act to effect the object of the conspiracy, which conspiracy had not terminated.

As has been discussed in the preceding paragraphs there was no evidence presented at trial that could possibly connect Michael Cummings to any crime other than the speeding violation.

**III. THE CIRCUIT COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL ON THE INDICTMENT WHICH CHARGED THAT THE APPELLANT ATTEMPTED TO OPERATE A CLANDESTINE DRUG LAB BY ASSEMBLING, INTER ALIA, COLD MEDICINE CONTAINING "SPEUDOPEDRINE," WHEN THE ONLY EVIDENCE OFFERED WAS OF COLD MEDICINE CONTAINING PSEUDOEPHEDRINE.**

The indictment charged the appellant with attempting to operate a clandestine drug laboratory by assembling certain chemicals and equipment including cold medicine containing "speudopedrine". The evidence presented was of cold medicine containing pseudoephedrine. There was no evidence that there was any cold medicine containing the chemical named in the indictment. The appellant must be fully and plainly informed of the character and cause of the accusation against him in the indictment. See Scott v. Mohn, 165 W.Va. 393, 268 S.E.2d 117, W.Va., 1980. The court erred in refusing appellant's motion for judgment of acquittal on this ground. (Trial Transcript at p. 83-84. Defendant's Motion dated 12/12/05).

West Virginia Rules of Criminal Procedure 29(a) states, "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

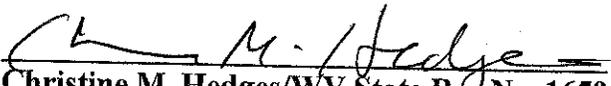
### CONCLUSION

On February 1, 2005, the Appellant, Michael Cummings, was driving down the road when he was pulled over for speeding. The evidence that was seized from the automobile that day should never have reached the courtroom. The Circuit Judge correctly ruled that the search of the small metal container in the appellant's pocket was illegal. That search prompted the further search of the vehicle, which turned up the matches, syringes and cold medicine. The Roane County Circuit Court erred in allowing this evidence in trial.

The evidence that was incorrectly allowed was insufficient to convict the Appellant. When looking at all the evidence in a light most favorable to the state there was simply not enough evidence to convict.

Therefore, for all or any of the reasons stated above the Appellant, Michael Cummings, asks the West Virginia Supreme Court to set aside the guilty verdict rendered against him or in the alternative to grant him a new trial.

**MICHAEL CUMMINGS,**  
Appellant, By Counsel.

  
**Christine M. Hedges/WV State Bar No. 1659**  
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to provide legal assistance pursuant to Rule 10  
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## CERTIFICATE OF SERVICE

I, Christine M. Hedges, do hereby certify that I have this day served the foregoing BRIEF TO SUPREME COURT by first class mail, postage paid, a true copy thereof, to Mark G. Sergent, Prosecuting Attorney, P. O. Box 734, Spencer, WV 25276, and Dawn E. Warfield, Attorney General's Office-Capitol, Building 1, Rm. E-26, 1900 Kanawha Boulevard, East, Charleston, WV 25305, this 2<sup>ND</sup> day of January, 2007.

  
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