
NO. 33223

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

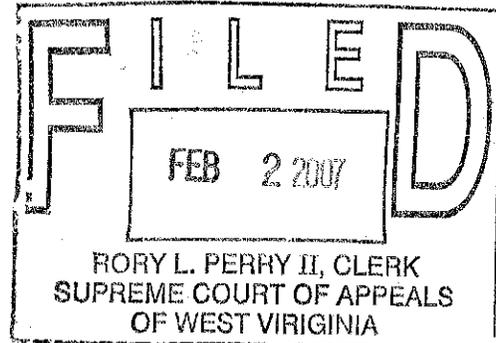
STATE OF WEST VIRGINIA,

*Appellee,
Plaintiff below,*

v.

MICHAEL CUMMINGS,

*Appellant,
Defendant below.*



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF RULINGS BELOW**

This matter is before the Court pursuant to Michael Cummings' ("Appellant") appeal from his conviction in the Circuit Court of Roane County of attempt to operate a clandestine drug laboratory and conspiracy to attempt to operate a clandestine drug laboratory. On appeal, Appellant claims that the trial court erroneously admitted certain evidence during trial. Appellant also claims that the trial court erred when it did not grant his Motion for Judgment of Acquittal.

II.

STATEMENT OF FACTS

At trial, State Trooper Justin Cox testified on behalf of the prosecution. Trooper Cox has been with the State Police for approximately two years. (Tr. 45.) Trooper Cox has received training,

both at the State Police Academy and by his training officer in the field, about clandestine drug laboratories. (Tr. 46.) He has also worked in the field in Roane County on at least three to four cases involving clandestine drug laboratories. (Tr. 47, 49.) Trooper Cox testified that pseudoephedrine is the main ingredient for making methamphetamine. (Tr. 51.) The main source for pseudoephedrine is cold medicine containing this drug. (*Id.*) Trooper Cox also explained that the strike plates on matches contain red phosphorus. Methamphetamine producers commonly scrape the red phosphorus off of the strike plates, which is used for processing methamphetamine. (Tr. 71, 52.) Trooper Cox stated that methamphetamine can come in the form of a rock, crystal or powder, or oil. (Tr. 51.) Methamphetamine can be consumed by smoking it, snorting it or shooting it with a syringe. (*Id.*) Trooper Cox also stated that traffic stops have the potential to be very dangerous situations and officer safety is the number one issue that officers deal with on a traffic stop. (Tr. 55-56.) Trooper Cox testified that he is aware of traffic stops in Roane County where the people stopped were armed. (Tr. 59.)

On February 1, 2005, Trooper Cox was sitting alone at a car wash on Route 14 in Reedy, West Virginia, running radar for speeders. (Tr. 53, 54.) While there, Trooper Cox observed a car traveling at a high rate of speed. (Suppression Hr'g at 3.) The vehicle was clocked at 63 miles per hour, which is above the speed limit for that area. (Tr. 55.)

After determining that the vehicle was speeding, Trooper Cox pulled the car over on the side of the road. (*Id.*) Three people were in the car--Appellant, his wife Amy Cummings, and another passenger Rachel Pritt. Appellant was driving the vehicle with Amy Cummings sitting in the middle of the rear seat, and Ms. Pritt sitting in the front passenger seat. (Tr. 56, 57.) Trooper Cox

approached the driver's side of the vehicle to inform the passengers why he stopped them, as well as to request Appellant's driver's license and other vehicle information. (Tr. 56.)

While approaching the driver's side of the vehicle, Trooper Cox observed a yellow bag containing six boxes of cold medicine in the floorboard behind the driver's seat. (Tr. 58, 65, 68.) This bag was open and Trooper Cox was able to see down into the top of the bag from where he was standing. (Tr. 59.) The average person would only need one to two boxes of this cold medicine, rather than the six boxes discovered by Trooper Cox. (Tr. 70.) The bag also contained a receipt for three of the boxes of cold medicine, dated February 1, 2005, from the Dollar General Store in Parkersburg, West Virginia. (Tr. 68.) The cold medicine found in the bag contained pseudoephedrine, which is the main ingredient for making methamphetamine. (Tr. 51.) The boxes containing the cold medicine were in their factory sealed condition when they were first seen by Trooper Cox. (Tr. 68.)

Once Trooper Cox asked Appellant for his driver's license and other vehicle information, Amy Cummings stated that the car did not belong to them, but rather belonged to another individual named James Forman. (Tr. 57.) Ms. Cummings then stated that she did not know where the vehicle information was located and asked Trooper Cox if she could look for it. (*Id.*) Once Trooper Cox gave her permission to look, Ms. Cummings laid across the front seat and began reaching for the glove compartment. (*Id.*) From where he was standing, Trooper Cox could not see Ms. Cummings' hands or Ms. Pritt in the front seat. (*Id.*) Trooper Cox explained that the hands are the number one thing to keep an eye on during a traffic stop. (*Id.*) He further explained that the glove box in a car is commonly used for concealing weapons. (Tr. 58.) Because of this, Trooper Cox asked Amy

Cummings and Ms. Pritt to step out of the vehicle and, once they were out of the car, he patted them down for weapons. (Tr. 57-58.)

While he was dealing with Amy Cummings and Ms. Pritt, Trooper Cox lost track of Appellant. (Suppression Hr'g at 5.) At this point, Trooper Cox asked Appellant to step out of the vehicle to make sure that he did not have any weapons on him. (*Id.*) The front pockets of Appellant's pants were bulging due to the fact that he had several items in each pocket. (*Id.*) Trooper Cox then asked Appellant to empty his pockets on the hood of the vehicle. (*Id.*) In Appellant's pockets were several lighters, a wrench, several other miscellaneous items, and a knife. (*Id.*) Attached to the knife was a small container on a key ring. (*Id.*) After being requested to do so, Appellant opened the container, which contained three pills and two baggies containing methamphetamine. (*Id.* at 6, 7.)

Trooper Cox then placed Appellant in his police cruiser. (*Id.* at 7.) While he was securing Appellant, Trooper Cox observed Amy Cummings lying across the hood of the car reaching for the items found in Appellant's pockets. (*Id.*) Trooper Cox yelled at Ms. Cummings, walked up to her and saw one of the baggies containing methamphetamine underneath one of the windshield wipers, where Ms. Cummings tried to hide it. (*Id.*) At this point, Trooper Cox placed Ms. Cummings in his police cruiser. (*Id.*)

After seeing all of the items and having safety concerns for himself, Trooper Cox had reason to search the vehicle. (*Id.* at 7, 18.) However, before doing so, Trooper Cox asked Appellant and Amy Cummings if they had a problem with him taking a look in the car for any other illegal items. (*Id.* at 7.) Neither Appellant or Ms. Cummings had a problem with that and told Trooper Cox to go ahead. (*Id.*) At that time, Trooper Cox began searching the vehicle. (*Id.*) In speaking with

Appellant and Amy Cummings, Trooper Cox never coerced them or forced them to do anything. (*Id.* at 12.) Neither of them asked for an attorney during the entire stop. (*Id.*) At no time, did either of them tell Trooper Cox to stop his search. (*Id.*)

During this search, Trooper Cox observed in plain view a white bag in the floorboard behind the passenger seat. (Tr. 65, 66.) This bag contained six containers or boxes of matches, with 50 matchbooks in each container or 300 books of matches. (*Id.* at 70.) The boxes of matches were in their factory sealed condition. (*Id.*) Trooper Cox stated that matches are used for red phosphorus, which is used in processing methamphetamine. (Tr. 52, 71-72.) Also, found in the bag were two bags of syringes, with each bag containing 10 syringes. (Tr. 72.) Syringes are required to shoot methamphetamine into the body. (*Id.*)

Trooper Cox also testified that he did not discover any information that Rachel Pritt was connected to the items seized by himself. (Tr. 74.) Ms. Pritt had her own grocery bag sitting beside her, which contained some candles, clothing items, and nothing else out of the ordinary. (*Id.*) Ms. Pritt did not have anything on her person or in her bag for making methamphetamine. (*Id.*)

The trial court did not admit into evidence the contraband (pills and baggies containing methamphetamine) found in the container attached to Appellant's knife. (*See* trial court's Nov. 17, 2005, Order Granting Appellant's Motion to Suppress in Part and Denying Appellant's Motion to Suppress in Part.) However, the trial court did admit into evidence the items found in the yellow bag (boxes of cold medicine) and white bag (boxes of matches and bags of syringes). (*Id.*) The trial court also denied Appellant's Motion for Judgment of Acquittal.

III.

ASSIGNMENTS OF ERROR

On appeal, Appellant makes the following assignments of error:

1. 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 Petitioner's Pocket.

2. The Circuit Court Erred in Denying the Appellant's Motion for Judgment 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.

3. The Circuit Court Erred in Denying the Appellant's Motion for Judgment of Acquittal on the Indictment Which Charged That the Appellant Attempted to Operate a Clandestine Drug Lab by Assembling, Inter Alia, Cold Medicine Containing "Seudoephedrine," When the Only Evidence Offered Was of Cold Medicine Containing Pseudoephedrine.

IV.

ARGUMENT

A. **TRIAL COURT COMMITTED NO ERROR IN NOT SUPPRESSING EVIDENCE FOUND IN SEARCH OF VEHICLE.**

1. Standard Of Review.

"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.” Syl. pt. 3, *State v. Oldaker*, 172 W. Va. 258, 304 S.E.2d 843 (1983) (quoting Syl. pt. 5, *Casto v. Martin*, 159 W. Va. 761, 230 S.E.2d 722 (1976)). “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.” Syl. pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

2. **Evidence Found In Search Of Vehicle Comes Within Plain View And Automobile Exceptions To Warrant Requirement And, Thus, Was Properly Admitted By Trial Court.**

a. **Plain View Doctrine.**

Generally, searches and seizures are prohibited unless they are made pursuant to a warrant supported by probable cause and approved by a judge or magistrate. However, this general rule has a number of exceptions. One such exception involves seizures of items in plain view or what has come to be known as the “Plain View Doctrine.” “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). This is also the rule followed by the federal courts. *See Horton v. California*, 496 U.S. 128 (1990).

All of the requirements of *Julius* were satisfied in this case. As to the first requirement, Trooper Cox certainly did not violate the Fourth Amendment in arriving at the vehicle from which the boxes of cold medicine were viewed. Trooper Cox stopped Appellant because he was speeding. While approaching the driver's side of the vehicle and speaking with Appellant, Trooper Cox saw into the yellow bag containing boxes of cold medicine. Appellant even concedes that this requirement was satisfied.

As to the second requirement, the boxes of cold medicine in the bag were in plain view from where Trooper Cox was standing and talking with Appellant, as the bag itself was open. On appeal, Appellant asserts that the incriminating character of the boxes of cold medicine were not immediately apparent. To the untrained eye, this might well be true. However, we are not talking about an untrained eye. Trooper Cox has specialized knowledge and experience in the area of methamphetamine laboratories. He has received training, both at the Academy and from his training officer, about the substances and materials needed to make methamphetamine. Trooper Cox has also been involved in at least three or four cases involving methamphetamine laboratories. Trooper Cox knows that cold medicine containing pseudoephedrine is the main ingredient in producing methamphetamine. Trooper Cox also knows that six boxes of cold medicine goes well beyond what is normally needed and used to treat a cold. When Trooper Cox saw the six boxes of cold medicine containing pseudoephedrine, which he knew to be a necessary ingredient for producing methamphetamine, he knew immediately that he was viewing incriminating evidence.

As to the third requirement, once he saw this amount of cold medicine containing pseudoephedrine, Trooper Cox had probable cause to believe that the car contained evidence or instrumentalities of a crime thus giving him a lawful right of access to the boxes of cold medicine.

However, Trooper Cox did not search the vehicle at this time. In fact, he did not conduct his search until he received consent, discussed *infra*, to do so from Appellant and Amy Cummings.

After receiving consent and searching the vehicle, Trooper Cox saw down into the white bag containing six boxes of matches (50 matchbooks per box). The contents of this bag were also in plain view; the bag was open as well. The incriminating character of these matches was also immediately apparent to Trooper Cox. Trooper Cox knows that the red phosphorus on the strike plates of matches is another key ingredient for producing methamphetamine. Also, in this bag were two bags of syringes (10 syringes per bag), which Trooper Cox knows are used to shoot methamphetamine.

b. Automobile Exception.

Another exception to the warrant requirement involves automobiles. "In order to come within the automobile exception which authorizes a warrantless search, the police must initially have probable cause to believe that the automobile contains contraband or evidence of a crime. Second, there must be exigent circumstances which prevent the obtaining of a search warrant." Syl. pt. 3, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). "An automobile may be stopped for some legitimate state interest. Once the vehicle is lawfully stopped for a legitimate state interest, probable cause may arise to believe the vehicle is carrying weapons, contraband or evidence of the commission of a crime, and, at this point, if exigent circumstances are present, a warrantless search may be made." Syl. pt. 4, *Moore*. See *Carroll v. United States*, 267 U.S. 132, 154 (1925) ("[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that

their vehicles are carrying contraband or illegal merchandise.”). *See also Texas v. Brown*, 460 U.S. 730, 742 (1983) (“Probable cause” for search is flexible, common-sense standard, merely requiring that facts available to officer would warrant man of reasonable caution in belief that certain items may be contraband or stolen property or useful as evidence of crime, and it does not demand any showing that such belief be correct or more likely true than false, a practical, nontechnical probability that incriminating evidence is involved being all that is required, and it is not necessary that officer be possessed of near certainty as to seizable nature of items.).

First, Trooper Cox had probable cause to believe that the vehicle contained contraband or evidence of a crime. Upon arriving at the vehicle, by way of a legal traffic stop, Trooper Cox saw in plain view a yellow bag, in the floorboard behind the driver’s seat, containing six boxes of cold medicine containing pseudoephedrine, which Trooper Cox knows is the main ingredient for making methamphetamine. This gave Trooper Cox probable cause to believe that the rest of the vehicle contained contraband or evidence of a crime.

Secondly, exigent circumstances were present during this traffic stop that prevented Trooper Cox from obtaining a search warrant. Trooper Cox had several safety concerns to deal with during the stop. To begin with, Trooper Cox was alone during the stop and there were three passengers for him to keep an eye on. At one point during the stop, Amy Cummings crawled across the front seat and placed her hands inside the vehicle’s glove box. By doing so, Trooper Cox lost sight of her hands as well as Rachel Pritt, who was sitting in the right front passenger seat. Also, during the stop, a knife was discovered in Appellant’s pocket. In addition to these safety concerns, Trooper Cox observed Amy Cummings tampering with evidence on the hood of the vehicle while he was placing Appellant in his police cruiser. Obviously, all of these exigent circumstances made it impossible or highly

impractical for Trooper Cox to obtain a search warrant before searching the vehicle. Nevertheless, Trooper Cox did not conduct his search until he received consent from Appellant and Amy Cummings.

3. **Search And Seizure Of Evidence In Vehicle Did Not Spring From Contents Of Container In Appellant's Pocket, But Rather From An Independent Source And, Thus, Was Not Inadmissible Under "Fruit of Poisonous Tree Doctrine."**

Under the Fruits of the Poisonous Tree Doctrine, evidence 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. *State v. DeWeese*, 213 W. Va. 339, 346, 582 S.E.2d 786, 793 (2003). *See Wong Sun v. United States*, 371 U.S. 471 (1963) (Evidence seized during unlawful search cannot constitute proof against victim of search). However, "[t]he exclusionary rule has no application when the state learns from an independent source about the evidence sought to be suppressed." Syl. pt. 4, *State v. Aldridge*, 172 W. Va. 218, 304 S.E.2d 671 (1983). *See also Segura v. United States*, 468 U.S. 796, 805 (1984) ("[I]t is clear from our prior holdings that 'the exclusionary rule has no application [where] the Government learned of the evidence from an independent source.'" (quoting *Wong Sun*, 371 U.S. at 487).

Contrary to Appellant's assertion on appeal, the evidence gathered by Trooper Cox did not arise out of his search and seizure of the contents of the container in Appellant's pocket. Rather, Trooper Cox's search and seizure of the items in the car was due to an independent source, to-wit: seeing six boxes of cold medicine containing pseudoephedrine in plain view and realizing their incriminating character. This prompted Trooper Cox to search the vehicle for other contraband. Trooper Cox's search of the vehicle was also prompted by exigent circumstances. These include

officer safety, tampering, and possible destruction of evidence. Specifically, Trooper Cox was alone and had to deal with three people. Appellant had a knife on his person. At one point Trooper Cox lost sight of Amy Cummings' hands, as well as Rachel Pritt. Trooper Cox also observed Amy Cummings tampering with evidence on the hood of the car. Finally, Trooper Cox obtained valid consent from Appellant and Ms. Cummings prior to searching the vehicle.

4. **Totality Of Circumstances Shows That Consent To Search Vehicle Given By Appellant And Amy Cummings Was Valid, Even Though They Were in Custody When They Gave Their Consent.**

“A trial court’s decision regarding the voluntariness [issue] will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syl. pt. 3, *State v. Buck*, 170 W. Va. 428, 294 S.E.2d 281 (1982) (quoting Syl. pt. 3, in part, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978)). “(W)hether a consent to a search (is) in fact ‘voluntary’ or (is) the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” *State v. Williams*, 162 W. Va. 309, 315, 249 S.E.2d 758, 762 (1978) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). “Some of the circumstances to be considered in determining voluntariness are the number of officers present at the time of consent; the subjective state of mind, intelligence, and age of the consenting party; the length of detention; and the individual’s knowledge of his or her right to refuse consent.” 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, I-290 (2d ed. 1993).

There is nothing in the record even suggesting that the consent to search the vehicle given by Appellant and Amy Cummings was not voluntary. Trooper Cox simply asked Appellant and Ms. Cummings if they had any problem with him taking a look in the vehicle for any other illegal items. Neither of them had any such problem, and the both of them told Trooper Cox to go ahead with his

search. Trooper Cox never coerced or forced Appellant or Ms. Cummings to give consent. Neither of them asked for an attorney during the entire stop. At no time did either of them tell Trooper Cox to stop his search. Also, nothing in the record indicates that Appellant or Amy Cummings are inexperienced or naïve people with a low level of intelligence. Nor is there any evidence that they were detained for a prolonged period, in an effort to wear them down so they would submit to the search. In looking at the totality of the circumstances, it is clear that the consent to search given by Appellant and Amy Cummings was valid and voluntarily given.

On appeal, Appellant asserts that he and Amy Cummings did not give a valid consent to search the vehicle because they were already in custody when they gave consent. In making this argument, Appellant relies on Syllabus Point 9 of *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974), wherein the Supreme Court stated:

A suspect whose acquiescence to search is secured during police custody occurring by reason of 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.

Although the trial court later ruled that Appellant's arrest for possession of methamphetamine was unlawful, Trooper Cox had a lawful reason to place Appellant and Amy Cummings in his police car during the traffic stop. Trooper Cox took Ms. Cummings into custody because he observed her tampering with evidence on the hood of the vehicle. Trooper Cox placed Appellant in custody out of safety concerns, as Appellant had a knife on his person and Trooper Cox had no way of knowing whether there were any other weapons in the vehicle. The fact that Appellant and Amy Cummings were in custody when they consented to the search does not defeat the voluntariness of their consent. "Although sensitivity to the heightened possibility of coercions is appropriate when a defendant's

consent is obtained during custody, custody alone has never been enough in itself to demonstrate coerced consent to search." Cleckley, *supra*, at I-289; *see also State v. Dyer*, 177 W. Va. 567, 572, 355 S.E.2d 356, 361 (1987) (citations omitted) ("The mere fact that the defendant is in custody is not, of itself, sufficient to demonstrate that the consent to search was not voluntary."). Under the totality of the circumstances, Appellant's consent to search the vehicle was voluntarily given.

B. TRIAL COURT COMMITTED NO ERROR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL; WEIGHT OF EVIDENCE WAS SUFFICIENT TO SUPPORT GUILTY VERDICT ON BOTH CHARGES OF WHICH APPELLANT WAS FOUND GUILTY.

1. Rule 29 Motion For Judgment Of Acquittal And Standard of Review.

West Virginia Rules of Criminal Procedure 29(a) provides, in relevant part, that "[t]he 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."

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

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 inferences 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.

Id., Syl. pt. 3.

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

2. **Attempt To Operate Clandestine Drug Laboratory.**

Appellant was convicted of attempt to operate a clandestine drug laboratory in violation of West Virginia Code Section 60A-4-411. Section 60A-4-411 provides, in pertinent part, as follows:

(a) Any person who . . . attempts to operate a clandestine drug laboratory is guilty of a felony and, upon conviction, shall be confined in a state correctional facility for not less than two years nor more than 10 years

(b) For purposes of this section, a "clandestine drug laboratory" means 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

The evidence adduced at trial clearly shows that the materials and substances in the vehicle driven by Appellant are key ingredients or precursors for producing methamphetamine. Trooper Cox discovered and seized six boxes of cold medicine containing pseudoephedrine. Trooper Cox testified that pseudoephedrine is the main ingredient in the production of methamphetamine. Six boxes of this cold medicine goes well beyond what is needed to treat a cold. Also discovered and seized were six boxes or containers of matches, with 50 matchbooks per container or 300 packs of matches. Trooper

Cox testified that the strike plates on matches contain red phosphorus, which is another key ingredient that methamphetamine producers use to make the drug. Also, found in the vehicle were two bags of syringes with each bag containing 10 syringes. Trooper Cox testified that syringes are used to shoot methamphetamine.

On appeal, Appellant argues that no evidence was presented at trial showing any intent on the part of himself to operate a drug laboratory. Appellant's intent can be inferred from the circumstances and is a question for the jury. *See State v. Walker*, 109 W. Va. 351, 353, 154 S.E. 866, 867 (1930) ("Intent, being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts."). *See also State v. Copen*, 211 W. Va. 501, 507-508, 566 S.E.2d 638, 644-645 (2002) ("Although the issue of intent was in question in the case, in this Court's opinion, there was ample circumstantial evidence from which the jury could have inferred intent.").

Clearly, from the circumstantial evidence presented at trial, the jury could have inferred that Appellant intended to operate a methamphetamine laboratory. The boxes of cold medicine, boxes of matches, and bags of syringes are all used to produce and use methamphetamine. All of these packages were discovered in their factory sealed condition. There was even a receipt found for three of the boxes of cold medicine containing pseudoephedrine. If this were not enough, there is absolutely nothing in the record indicating that anyone in the vehicle even had a cold that would necessitate the use of the cold medicine. Also, there is nothing in the record showing the need for the syringes found in the vehicle, such as one of the passengers being an insulin dependent diabetic. The items in the vehicle were being used by Appellant to produce methamphetamine and not for some other everyday use, as Appellant suggests. Appellant's intent to operate a methamphetamine laboratory was formed when he decided to get in a car and drive to Parkersburg, West Virginia, to

obtain an inordinate amount of cold medicine containing pseudoephedrine and matches with red phosphorus, all of which are key ingredients for producing methamphetamine.

On appeal, Appellant also asserts there is no evidence connecting him with the items found in the vehicle, and because he was not in possession of these items he cannot be guilty of assembling them to make methamphetamine. It is true that Appellant was not in actual possession of the cold medicine, matches, and syringes. However, there is plenty of circumstantial evidence showing that he had constructive possession of these items. ““The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant’s dominion and control.”” Syl. pt. 3, *State v. Chapman*, 178 W. Va. 678, 363 S.E.2d 755 (1987) (quoting Syl. pt. 4, *State v. Dudick*, 158 W. Va. 629, 213 S.E.2d 458 (1975)).

Trooper Cox did not discover a couple cold pills, a single pack of matches, and a syringe thrown under the car seat. Found in the back floorboard were six boxes of cold medicine containing pseudoephedrine, six boxes of matches with 50 packs of matches in each box, and two bags of syringes with 10 syringes in each bag. All of these items were discovered in their factory sealed condition. Trooper Cox pulled Appellant over in Reedy, West Virginia, going south on Route 14. Route 14 connects Reedy with Parkersburg, West Virginia. The bag with the cold medicine contained a receipt from the Dollar General Store in Parkersburg for three of the boxes of cold medicine. The receipt was dated February 1, 2005, which is the date that Trooper Cox pulled over Appellant. All of the items were in close proximity to Appellant; the items were nothing more than an “arm’s reach” away. All of this evidence clearly shows that Appellant had constructive possession of the bags

containing the cold medicine, matches, and syringes; he had knowledge of these items and they were subject to his dominion and control.

As for Rachel Pritt, there is nothing in the record to connect her to the items seized by Trooper Cox. Ms. Pritt had her own grocery bag sitting beside her in the front passenger seat, which contained some candles, clothing items, and nothing else out of the ordinary. Ms. Pritt did not have anything on her person or in her bag for using or producing methamphetamine. As for Amy Cummings, she was acting in concert with Appellant.

3. **Conspiracy To Attempt To Operate Clandestine Drug Laboratory.**

Appellant was also convicted of conspiracy to attempt to operate a clandestine drug laboratory in violation of West Virginia Code Section 61-10-31. Section 61-10-31 provides, in relevant part, as follows: "It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State . . . if . . . one or more of such persons does any act to effect the object of the conspiracy."

"In order for the State to prove a conspiracy under W. Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syl. pt. 4, *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981). "The agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement." *Id.* at 265, 294 S.E.2d at 67 (citing *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *State v. Wisman*, 94 W. Va. 224, 118 S.E. 139 (1923)).

As discussed, there is nothing connecting Rachel Pritt to the cold medication, matches, and syringes found in the vehicle. Nothing was found on her person or in her bag indicating the use or production of methamphetamine. The agreement between Appellant and Amy Cummings was formed when they jointly decided to get in a car and drive to Parkersburg to obtain an extraordinary amount cold medication and matches containing the necessary ingredients (pseudoephedrine and red phosphorus) to make methamphetamine. The overt act occurred when they actually got in the car and proceeded to do the same. They sure did not mistakenly drive to Parkersburg and obtain these materials. Their trip was purposeful and agreed-upon.

C. TRIAL COURT COMMITTED NO ERROR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON INDICTMENT CHARGING THAT APPELLANT ATTEMPTED TO OPERATE CLANDESTINE DRUG LABORATORY BY ASSEMBLING, INTER ALIA, COLD MEDICINE CONTAINING "SEUDOEPHEDRINE," WHEN EVIDENCE OFFERED WAS OF COLD MEDICINE CONTAINING PSEUDOEPHEDRINE.

On appeal, Appellant asserts that the trial court committed reversible error in not dismissing his case because the Indictment charging him misspelled the word "pseudoephedrine," by beginning the word with the letter "s" instead of the letter "p." The Indictment in this case fully and plainly informed Appellant of the particular offenses that he was charged with and does not fail because of the minor mistake of misspelling the word "pseudoephedrine." "An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged, and enables the court to determine the statute on which the charge is based." Syl. pt. 2, *State v. Satterfield*, 182 W. Va. 365, 387 S.E.2d 832 (1989) (quoting Syl. pt. 3, *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983)).

V.

CONCLUSION

Based on the foregoing, Appellant's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

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CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, Assistant Attorney General for the State of West Virginia and counsel for Appellee, do hereby certify that a true and exact copy of the foregoing "Brief of Appellee State of West Virginia" was served upon counsel for Appellant by depositing the same, postage prepaid, in the United States mail, this 2nd day of February, 2007, addressed as follows:

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