
NO. 33289

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

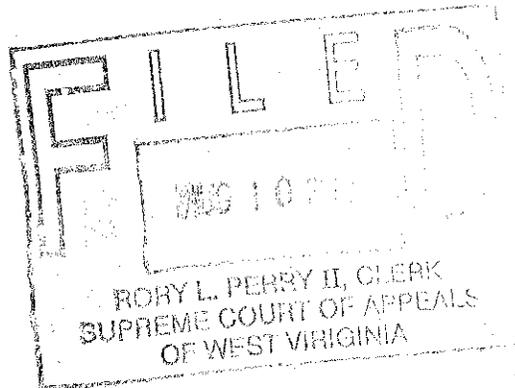
STATE OF WEST VIRGINIA,

Appellee,

v.

KENNETH BOOKHEIMER,

Appellant.



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 THE RULING BELOW**

Kenneth Bookheimer (“Bookheimer” or “Appellant”) appeals the May 11, 2006, order of the Braxton County Circuit Court (Facemire, J.), sentencing him to no less than two nor more than ten years in the penitentiary for operating a clandestine methamphetamine (“meth”) lab, and no less than one nor more than five years for conspiracy. The court ordered the sentences be served consecutively.

Bookheimer claims that the State’s search of the co-defendant’s ¹(“Tingler” or “co-defendant”) home violated his rights under the Fourth Amendment, and Article III, § 6 of the West Virginia Constitution; that the trial court admitted expert testimony without requiring the State to

¹See *State v. Jessica Marie Tingler*, Case No. 33290.

lay the proper foundation; and that it erred by failing to grant Appellant's motion for a judgment of acquittal at the close of the State's case.

II.

STATEMENT OF FACTS

A. THE SUPPRESSION HEARING.

On February 9, 2005, Braxton County 911 dispatched Deputies Shane Dellinger ("Dellinger") and Ron Clay ("Clay") to Tingler's home in response to an anonymous 911 call claiming a domestic dispute between Bookheimer and Tingler with shots fired. (Supp. Hr'g Tr. at 61; Tr. 87.) Upon their arrival, the officers saw Tingler appear from behind her trailer. They described her as behaving hysterically. (Supp. Hr'g Tr. at 31, 45; Tr. 169-70.) As the officers approached, Tingler told them that they should not be there, that they were not needed, and that she wanted them to leave. (Supp. Hr'g at 6-7, 45.)

With their weapons drawn Clay and Dellinger opened Tingler's front door and identified themselves as police officers. (Tr. 171, 299.) From the front kitchen, they proceeded through the living room and down a short hallway. (Tr. at 171.) After clearing a small bedroom on the left, they approached a closed bathroom door. (Supp. Hr'g Tr. at 7, 25, 31, 33, 63; Tr. 171.) Upon hearing a voice from inside the officers ordered the occupant out. He responded that he would come out when he was finished. Clay forcibly opened the door, finding Bookheimer sitting on the toilet. (Supp. Hr'g Tr. at 34, 63; Tr. 171, 224.) Both officers escorted him to the front porch. (Tr. 171.)

Before leaving Dellinger peered down the hallway into Tingler's bedroom. He noticed a pyrex bottle filled with a yellowish liquid sitting on a dresser. He also saw a white paper plate with

a razor blade. Both items were lying in plain view. He testified that these materials were consistent with the use and manufacture of meth.² (Tr. 173.)

After securing Mr. Bookheimer, Clay continued the original protective sweep of Tingler's home. (Tr. 237-38.) Dellinger remained outside.³ He searched behind Tingler's bed and inside her bedroom closet. (Tr. 237.)

Along with the items first noticed by Dellinger, Clay saw a plate with a razor blade. The plate was dusted with brown powder. He also saw a mason jar with residue at the bottom and a length of plastic tubing lying in an open drawer beside Tingler's bed. (Supp. Hr'g Tr. at 64-65; Tr. 173, 238.) Upon seeing these items, Clay asked Tingler for consent to search. (Supp. Hr'g Tr. at 64-65.) When she refused, Clay left to obtain a search warrant.⁴ Deputy Dellinger, along with several other officers, remained at the scene.

Clay filed a complaint and affidavit for a search warrant with Braxton County Magistrate Carolyn Cruickshanks. (Supp. Hr'g Tr. at 20-21, 37; R. at 29.) After reviewing Deputy Clay's affidavit, and questioning him under oath,⁵ the magistrate issued the warrant.

²Tingler's trailer is described as small. The bedroom was at the end of a short hallway. The bathroom door was on the lefthand side of this hallway. (Tr. 227.)

³In fact, Dellinger didn't enter Tingler's bedroom until he received the search warrant.

⁴Clay testified that he left the scene at 3:07 p.m., arrived at magistrate court at 3:18 p.m., where he remained for approximately an hour. Once he obtained the warrant he drove directly to Tingler's house. (Tr. 239-40.)

⁵Magistrate Cruickshanks recorded her questions and the deputy's answers. This tape was played at the suppression hearing. (Supp. Hr'g at 60-70.)

Dellinger and State Trooper Yost executed the warrant.⁶ They found: (1) a large number of matchbooks all missing striker plates, (2) an electric burner, (3) a siphon pump with tubing, (4) cat litter,⁷ (5) used pieces of tubing, (6) a funnel, (7) a police scanner with sheets of paper with police scanner codes, (8) a knife and a bent spoon, (9) a pill crusher, (10) jar lids, (11) a half-bag of rock salt, (12) a marijuana pipe with residue, (13) a dagger, (14) a white paper plate with residue, (15) smoke covered vial with plastic cap, (16) a clear container containing liquid, (17) a milky green container with rolled up tin foil, (18) Pyrex measuring glass container, (19) a bottle of antifreeze, (20) lye, (21) Coleman fuel, (22) drano, (23) acetone, (24) mason jar filled with white milky substance, (25) small measuring container with reddish liquid, (26) and a mason jar containing two separated chemicals. (Supp. Hr'g Tr. at 13-14.)

After hearing and considering the State's evidence, the trial court denied Appellant's motion to suppress. (Supp. Hr'g Tr. at 78-79.)

⁶Both officers are meth lab technicians. (Tr. 175.) Both wore protective clothing. (Tr. 176.)

⁷Cat litter contains anhydrous ammonia, an ingredient used to manufacture meth.

B. THE APPELLANT'S TRIAL.

Bookheimer's three-day jury trial began on January 4, 2006. Forensic chemist, Trooper Erin Feazell, told the jury that she had tested materials she received from officer Clay.⁸ Her tests revealed a small amount of methamphetamine on a plate (Tr. 119), two grams of methamphetamine in an orange and clear plastic container (Tr. 133), a glass vial partially filled with acetone⁹ (Tr. 121), a glass vial with methanol¹⁰ (Tr. 124), and a vial containing hydrochloric acid¹¹ (Tr. 125).

The State also called Trooper Michael Goff, an expert in processing, dismantling, and testing methamphetamine labs. (Tr. 468-69.) Trooper Goff explained the pseudoephedrine, ephedrine reduction method of manufacturing meth. (Tr. 471-80.) Based on his training, experience, and review of the evidence Trooper Goff opined that the evidence recovered was consistent with the operation of a meth lab. (Tr. 481.)

⁸Trooper Feazell received these items in sample containers; they were not in the containers recovered from the crime scene. (Tr. 139-40.) She could not testify that the substances she tested actually came from Tingle's trailer or as to how they were collected. (Tr. 140-41, 145, 149.)

Clay testified that he observed Dellinger and Yost pour the recovered materials into sample bottles. These vials were then numbered and photographed. (Tr. 176, 184-85.) Once this sampling was completed, Clay placed them in a sealed box, and hand delivered them, along with several other sealed evidence bags, to the state crime lab. (Tr. 197.)

⁹Acetone is used to clean methamphetamine by removing dyes used by the manufacturers of the pills, and as a means of extracting pseudoephedrine. (Tr. 122.)

¹⁰Methanol is most commonly used to extract pseudoephedrine from the cold tablets. (Tr. 124.)

¹¹Hydrochloric acid is used in the final stages of production to extract the methamphetamine from the final solution. (Tr. 126.) Manufacturers combine this acid with aluminum, sulfuric acid, or rock salt thus creating hydrogen chloride gas. The container should have two tubes, one of which is placed into the solution to crystalize it into methamphetamine. (Tr. 125-27.)

At the close of the State's case Bookheimer moved for a judgment of acquittal. The trial court denied the motion. (Tr. 499-501.) Bookheimer did not testify, nor call any witnesses to testify on his behalf. (Tr. 506.)

Upon instruction and consideration of the evidence, the jury convicted Bookheimer on both counts of the indictment. (Tr. 574.)

III.

ARGUMENT

A. THE SEARCH OF TINGLER'S TRAILER WAS CONSTITUTIONAL.

1. The Standard of Review.

This Court has held:

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 107, 468 S.E.2d 719, 722 (1996).

This Court applies a *de novo* standard of review to questions of law and the circuit court's ultimate conclusion as to the constitutionality of the search. *State v. McClead*, 211 W. Va. 515, 517, 566 S.E.2d 652, 654 (2002), quoting *State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995).

2. Discussion.

After holding a suppression hearing in late November 2005, the trial court found:

7. That exigent and emergency circumstances existed in that the defendant Kenneth Bookheimer could have presented a danger to the officers or others if he had been inside the residence with a weapon.
8. That exigent and emergency circumstances existed in that the defendant Kenneth Bookheimer could have been inside the residence injured based upon the report of domestic violence with a weapon being discharged and the agitated state in which the officers found the defendant Jessica Marie Tingler.
9. The officers had a right to enter the residence based on said exigent and emergency circumstances to determine if the defendant Kenneth Bookheimer was present and armed with a weapon or injured.
10. The officers found what they believed to be evidence of a clandestine methamphetamine laboratory in plain view when they entered the residence in search of the defendant Kenneth Bookheimer.
11. The officers then removed the defendant Kenneth Bookheimer from the residence and sought permission to search the residence from him.
12. The defendant Kenneth Bookheimer did not give the officers consent to search the residence and in fact objected to the search.
13. The officers then detained the defendants outside of the residence while Deputy Clay went to seek a search warrant.
14. A search warrant for the defendants' residence was properly issued by Magistrate Carolyn Cruickshanks.
15. The evidence sought to be suppressed was seized under the search warrant.
16. The officers would have had the right to seize the evidence without a warrant because of the exception for items which are likely to be destroyed while waiting for a search warrant.

(R. at 76-77; Supp. Hr'g at 77-83.)

“Warrants are generally required to search a person’s home . . . unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

Under the emergency doctrine, law enforcement officers may enter a home without a warrant when they reasonably believe someone inside requires emergency assistance, or to protect an occupant from imminent emergency. *Id.* at 392. The doctrine's elements were most clearly set forth in *People v. Mitchell*, 347 N.E.2d 607, 609 (N.Y. 1976):

1. The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
2. The search must not be primarily motivated by intent to arrest or seize evidence.
3. There must be some reasonable basis, approximating probable cause, to associate the area or place to be searched.

See also Syl. Pt. 2, *State v. Cecil*, 173 W. Va. 27, 28, 311 S.E.2d 144, 146 (1983).

In the case at bar the officers responded to a domestic call, involving a firearm. Once they arrived they found Tingler outside her home. Although she claimed they were not needed, her hysterical demeanor suggested a need to investigate further. The officers reasonably entered Tingler's home.¹² When the officers first entered they identified themselves as police officers. Although ordered to show himself Bookheimer refused to come out of the bathroom.

In *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005), the Court of Appeals for the Ninth Circuit persuasively wrote about the dangers inherent in domestic calls:

The volatility of situations involving domestic violence make them particularly well suited for an application of the emergency doctrine. When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. *Fletcher v. Clinton*, 196 F.3d 41, 50 (1st Cir. 1999).

¹²Law enforcement affords priority to domestic calls, particularly calls involving firearms. (Supp. Hr'g Tr. at 5-6, 26-27, 33; Tr. 238-39.) These officers had been trained to investigate potential domestic calls until the safety of all of the parties is accounted for. (Supp. Hr'g Tr. at 47; Tr. 275.)

Indeed, "more officers are killed or injured on domestic violence calls than on any other type of call." *Hearings before Senate Judiciary Committee*, 1994 WL 530624 (F.D.C.H.) (Sept. 13, 1994) (Statement on behalf of National Task Force on Domestic Violence).

Given the totality of the circumstances, a reasonable officer would not engage in evidence gathering until he was sure that none of the parties had been harmed. Officers responding to potential domestic violence emergencies have a duty to secure the scene while they are there, and to ensure that no further violence occurs after they leave. To adopt the Appellant's reasoning would be a gigantic step backwards.

The State concedes that the second pre-warrant entry by Deputy Cole is more problematic. Although he claimed that he re-entered Tingler's home to complete the sweep he had started before removing Bookheimer, his decision to bring Ms. Tingler with him raises serious questions about his judgment. (Tr. 233.) Although Cole did not testify at the suppression hearing, the State introduced a tape of the search warrant colloquy during which he told the magistrate that he had reentered the premises with Tingler. He testified to this at trial.

Although Appellant's attorney had ample opportunity to follow up on this issue, he chose not to. In fact, neither counsel questioned Cole about the soundness of his decision. Nor did they renew their motion to suppress at trial.

Without any factual development, this Court should take Cole's testimony at face value. The evidence still suggests that his search was motivated by a desire to secure the scene, not an intent to gather evidence. Neither officer had swept the back room; nor had they located the firearm. There was still a possibility that someone was either injured or hiding in Tingler's bedroom.

Once Cole swept the room, he asked for Tingler's permission to search further. Had he intended to gather evidence, he would not have done so. When Tingler refused, Cole obtained a search warrant. Both Cole and Dellinger testified that every item they found before obtaining a warrant was in plain view.¹³ There is no evidence suggesting otherwise.

This Court should also take into account the dangers inherent in the manufacture of methamphetamine. West Virginia Code § 60A-4-411 is not merely intended to stamp out the use of this drug; the statute acknowledges the dangers inherent at all points of the manufacturing process. Assembly of materials for the purpose of manufacturing meth is prohibited because the presence of these chemicals in one area presents a significant health risk. Most of these materials are toxic and highly flammable. It is imperative that law enforcement intervene at the earliest possible moment.

An officer finding materials consistent with manufacturing meth must make sure that there are no other dangerous materials present. This does not mean that the officer has the right to open every drawer, or closet; it simply recognizes the unique exigencies present when manufacturing this drug.

In *United States v. Lloyd*, 396 F.3d 948, 954 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit acknowledged this, "The dangers created by methamphetamine labs can justify an immediate search because of exigent circumstances '[d]ue to the volatile nature of such labs.'" quoting *Kleinholz v. United States*, 339 F.3d 674, 677 (8th Cir. 2003).

In *United States v. Walsh*, 299 F.3d 729, 734 (8th Cir. 2002), and cases cited therein, the court held, "The potential hazards of methamphetamine manufacture are well documented, and

¹³Bookheimer has not challenged this.

numerous cases have upheld limited warrantless searches by police officers who had probable cause to believe that had uncovered an ongoing methamphetamine manufacturing operation.”

Dellinger was a certified meth lab technician; thus, he was able to connect what he had seen in plain sight with the manufacture of meth. *See People v. Gott*, 803 N.E.2d 900, 907-908 (Ill. App. 2004). Although he did not see an operating lab, it was his duty to ensure that the home was not a health hazard.

Clearly, the officers believed that the site was potentially dangerous. After securing the area the officers left Tingler’s home. They did not reenter until they had put on protective suits.

The Appellant also claims that the trial court’s suppression order was based entirely on hearsay.¹⁴ This is not true. The trial court heard the testimony of Deputy Dellinger and Magistrate Cruickshanks. Dellinger testified from firsthand knowledge regarding the events supporting Clay’s application for the search warrant. Magistrate Cruickshanks testified that she placed Lt. Clay under oath, heard his testimony, reviewed and signed the warrant. (Supp. Hr’g Tr. at 50-51.) She would not have signed it if she did not find probable cause to search. Given both witnesses’ firsthand testimony, the court’s determination was not founded on hearsay alone.

The warrant’s affiant, Deputy Clay, did not testify at the suppression hearing. Over objection by the defense the trial court admitted the warrant, affidavit, and property receipt during the suppression hearing. The court also admitted a taped colloquy between Magistrate Cruickshanks and the affiant. (Supp. Hr’g Tr. at 57-70.) The recording was made at the magistrate’s office before she

¹⁴The Appellant does not challenge the court’s legal determination of probable cause, only the hearsay nature of the evidence used to establish it.

issued the warrant. Officer Clay was under oath. (Supp. Hr'g Tr. at 60.) Before the court admitted the recording, defense counsel interposed a *Crawford*¹⁵ objection, which the court overruled.

In 1980 the United States Supreme Court held that hearsay is admissible at pre-trial suppression hearings under the due process clause. *United States v. Raddatz*, 447 U.S. 667, 679 (1980). The Court has also held that the federal rules of evidence do not apply during suppression hearings. *United States v. Matlock*, 415 U.S. 164, 173 (1974) (federal rules of evidence do not apply during suppression hearings in federal court). This Court adopted the Supreme Court's holding in *State v. Haught*, 179 W. Va. 557, 563-64, 371 S.E.2d 54, 60-61 (1988), citing *Matlock and Raddatz*.

The affiant need not be present at the suppression hearing. In fact, there is no legal requirement that the affiant have firsthand knowledge of the facts recited in the affidavit in order to obtain the warrant. Hearsay may serve as the basis for a warrant as long there is a substantial basis for crediting the hearsay. "Where a police officer is reciting information obtained from a fellow police officer, it is ordinarily not necessary to detail information with regard to their veracity." *State v. Adkins*, 176 W. Va. 613, 620, 346 S.E.2d 762, 770 (1986).

Nor did the admission of the tape deny the Appellant his constitutional right to confrontation. *Crawford* addressed a criminal defendant's confrontation clause rights at trial, not during pretrial hearings. Several state courts have refused to apply *Crawford* to suppression hearings. See *People v. Felder*, 129 P.3d 1072, 1073-74 (Colo. App. 2005), and cases cited therein (*Crawford* does not apply to pretrial suppression hearings). See also *State v. Woinarowicz*, 720 N.W.2d 635, 640-41 (N.D. 2006) (confrontation clause does not apply to suppression hearings).

¹⁵*Crawford v. Washington*, 541 U.S. 36 (2004).

This Court has previously recognized limitations on a criminal defendant's pre-trial confrontation rights in other contexts. Hearsay is conditionally admissible during preliminary hearings. Syl. Pt. 2, *State v. Peyatt*, 189 W. Va. 114, 428 S.E.2d 535 (1993). See also *State v. Haught*, 179 W. Va. at 564, 371 S.E.2d at 61. The right to be present, a right rooted in the confrontation clause, is limited to the arraignment, the time of the plea and "every stage of trial." W. Va. R. Crim. P. 43(a). Suppression hearings are pretrial proceedings.

This Court, albeit indirectly, has recognized the distinction. See *Thompson v. Steptoe*, 179 W. Va. 199, 366 S.E.2d 647 (1988) (cannot re-litigate pretrial suppression decision during trial unless court is presented with new evidence which would substantially effect the court's ruling); *State v. Farley*, 192 W. Va. 247, 253 n.7, 452 S.E.2d 50, 57 n.7 (1994) (defendant must re-assert pretrial suppression claim in order to use evidence adduced at trial on appeal).

B. THE STATE ESTABLISHED A SUFFICIENT CHAIN OF CUSTODY.

1. Standard of Review.

This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State ex. rel. Tinsman v. Hott*, 188 W. Va. 349, 424 S.E.2d 584 (1992).

2. Discussion.

The Appellant was charged with conspiracy and operation of a clandestine meth laboratory, not possession of pseudoephedrine. Although this drug is a direct precursor, failure to prove its presence does not render the State's case null.

Nor does it render the State chemist's testimony improper. The State chose to call the chemist before the arresting officers because of scheduling constraints. (Tr. 123.) The trial court conditionally admitted the evidence subject to any further chain of custody objections. See W. Va.

R. Evid. 104(b) (Trial court *shall* admit evidence when relevancy depends on fulfillment of a condition, upon, or subject to, introduction of evidence sufficient to support a finding of fulfillment of that condition.) (emphasis added). *See generally* 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 1-6(C), 30-31 (4th ed. 2000).

The State's chemist identified State's Exhibit 34-8 as pseudoephedrine (Tr. 131-32), Exhibit 34-9D as methamphetamine (Tr. 133), and 34-9E as red phosphorous (Tr. 134-35.) These exhibits were marked, but not admitted. (Tr. 164-65.)

Lt. Clay testified that Deputy Dellinger and Trooper Yost recovered all of the material from the Appellant's home. Once recovered, the two officers photographed the evidence and took it to the Appellant's front porch. (Tr. 175.) Dellinger and Yost placed the samples in a glass vial, then a sealed plastic vial. (Tr. 184.) Trooper Clay saw Deputy Dellinger and Trooper Yost sampling this evidence. (*Id.*)

Once the evidence was sampled, the samples were handed to Lt. Clay. According to Lt. Clay State's Exhibit 34-8 (the pseudoephedrine) was placed in an evidence bag which he sealed, and marked "recovered by Lt. Ronald L. Clay.¹⁶" (Tr. 191.) Lt. Clay remembered that State's Exhibit 34-9D (methamphetamine), and 34-9E (red phosphorous) were delivered to him by one of the officers. (Tr. 194.)

After Lt. Clay collected all of the samples, he placed them in a locked evidence locker, until they could be delivered to the state crime lab. (Tr. 195.) He then transported the samples, along with any other evidence to the lab. (Tr. 196-97.)

¹⁶The State introduced photographs of each of these sealed items.

When asked to identify State's Exhibit 34-8, Deputy Dellinger testified that he could not recall collecting the evidence. (Tr. 349.) He was not familiar with State Exhibit 34-9D, and was not asked about 34-9E. (Tr. 359.) The State did not call Trooper Yost, but represented to the court that he could not recall either. (Tr. 461.)

Out of an abundance of caution, the trial court refused to admit Exhibits 34-8 (pseudoephedrine), 34-9D (methamphetamine), and 34-9E (red phosphorous). (Tr. 495-97.) The court's decision was overly cautious. In *State v. Davis*, 164 W. Va. 783, 786-87, 266 S.E.2d 909, 911-12 (1980), this Court held:

To allow introduction of physical evidence into a criminal trial, it is not necessary that every moment from the time evidence comes into possession of a law enforcement agency until it is introduced at trial be accounted for by every person who could conceivably come in contact with the evidence during that period, nor is it necessary that every possibility of tampering be eliminated; it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.

(Footnotes and citation omitted.) See also *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988) (gaps in chain of custody ordinarily go to weight and not admissibility); *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir. 1994) (testimony by officer who was not present when second officer gathered evidence was sufficient to establish chain of custody).

The State introduced approximately 75 exhibits during its case-in-chief. (R. at 288-89.) The procedures used to sample and preserve every exhibits was identical. Lt. Clay saw Exhibits 34-8, 34-9D, and 34-9E taken out of Tingler's home and sampled. After they were sampled Lt. Clay placed them in a sealed evidence bag on which he wrote "recovered by Lt. Ronald L. Clay." He then personally delivered them to the crime lab.

The only gap in the chain occurred when Deputy Dellinger could not recall gathering the evidence from the Appellant's house. The chain of custody issue went to the weight of the evidence, not its admissibility. As stated above, the State introduced 75 exhibits at trial. If defense counsel wanted to allege that the evidence had not been in the Appellant's home in the first place, he could have done so during cross-examination. This gap in the chain should not have stopped the introduction of this evidence.

The Appellant benefitted from an overly cautious ruling, and now seeks to take further advantage. His position is not tenable. The trial court was well within its discretion to conditionally admit Trooper Feazell's testimony. Indeed, the Appellant did not make a motion to strike the expert's testimony, nor did he request a curative instruction by the court.

C. SUFFICIENCY OF THE EVIDENCE.

1. Standard of Review.

A verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." *State v. Guthrie*, 194 W. Va. 657, 668, 461 S.E.2d 163, 173 (1995).

2. Discussion.

The Appellant next claims that the State failed to adduce sufficient evidence to support a conspiracy conviction. The trial court instructed the jury:

Conspiracy: Conspiracy to commit the offense of manufacturing a controlled substance against the State, is committed when any person enters into an agreement with another person or persons for the purpose of committing the offense of manufacturing controlled substances against the State. And one member of the

conspiracy, subsequent to the agreement committed an overt act to effect the object of the conspiracy which the conspiracy has not been terminated.

....

The essence of the crime of conspiracy is the agreement. It is not necessary to show that the parties met and actually agreed to undertake the performance of an unlawful act. Nor is it necessary if they had previously arranged a detailed plan for execution or that the parties entered into a formal or express agreement. But, rather, an agreement can be shown by a tacit understanding between the co-conspirators to accomplish an unlawful act. Which may be inferred, ladies and gentlemen, from the development and collocation of the circumstances.

(Tr. 529.)

The court's instruction was correct as a matter of law. *State v. Rogers*, 215 W. Va. 499, 503, 600 S.E.2d 211, 215 (2004).

The Appellant claims that the State failed to establish the existence of an agreement between Tingler and Bookheimer, and impermissibly relied upon a "guilt by association" theory. Mere presence, association, knowledge, approval, or acquiescence, is not sufficient proof of a defendant's participation in a conspiracy. *United States v. Richardson*, 596 F.2d 157, 162 (6th Cir. 1979). Although mere presence, standing alone, do not establish a conspiracy, a reasonable juror may view it as a material and probative factor. *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986). This Court has held, "[t]he 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." *State v. Less*, 170 W. Va. 259, 265, 294 S.E.2d 62, 67 (1981).

The State proved the conspiracy count. Bookheimer did not merely associate with Tingler, he lived with her. His presence was not coincidental. The officers found materials used to manufacture the meth., and meth. itself inside Tingler's home. It is safe to say that these materials

were bought from outside. The officers found several objects lying in plain view. Several others were inside kitchen cabinets, or closets.

A reasonable juror could have found that the presence of these materials required planning. Planning oftentimes requires an agreement.

IV.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the judgment of the Circuit Court of Braxton County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

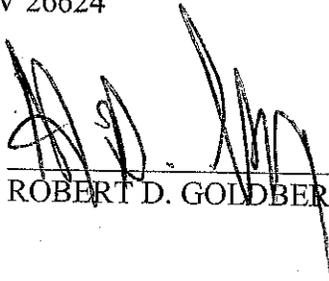


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing "*Brief of Appellee State of West Virginia*" was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this ¹⁸ 0 day of August, 2007, addressed as follows:

To: Daniel Grindo, Esq.
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