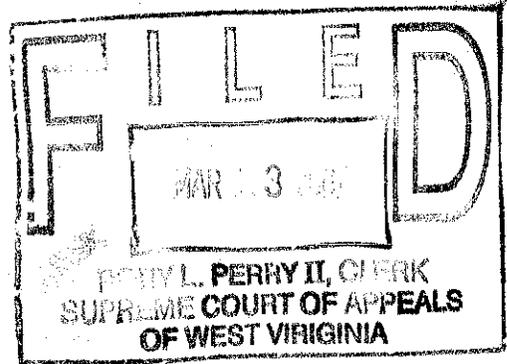


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Appellee

vs.

CASE NO. 33290
BRAXTON COUNTY

JESSICA MARIE TINGLER,

Appellant

BRIEF OF APPELLANT JESSICA MARIE TINGLER

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MEMORANDUM OF APPEARANCE

FOR THE STATE:

Robert Goldberg, Esq., Assistant Attorney General

FOR THE PETITIONER:

G. Ernest Skaggs, Attorney at Law, Fayetteville, West Virginia,
Counsel for Appellant Jessica Marie Tingler

TABLE OF AUTHORITIES

CASES

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BRIEF OF APPELLANT JESSICA MARIE TINGLER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA:

Comes now the appellant and states as follows:

**THE KIND OF PROCEEDING AND NATURE OF
THE RULING IN THE LOWER TRIBUNAL**

The appellant, Jessica Marie Tingler, appeals from her conviction by a Braxton County jury on or about January 6, 2006, of one count of Operation of a Clandestine Drug Laboratory and one count of Conspiracy in a joint trial with her co-defendant, Kenneth Bookheimer.

The appellant was sentenced by Sentencing Order of May 11, 2006, to the maximum penalty of not less than two nor more than ten years in the State penitentiary on Count One of the indictment, Operating a Clandestine Drug Laboratory, and the maximum penalty of not less than one year nor more than five years on the charge of Conspiracy. The sentences were to be served consecutively.

STATEMENT OF THE FACTS OF THE CASE

The co-defendants, Jessica Marie Tingler and Kenneth Bookheimer, resided together at least part of the time in a mobile home in Braxton County near Frametown, West Virginia.

A 911 call was made to the Braxton County 911 Center on or about February 9, 2005, by an anonymous caller. This caller alleged that shots had been fired at the appellant's residence approximately twenty to twenty-five minutes prior to the call. The caller reported that she had also heard screaming and yelling at the residence. (Trial Transcript, Page 217-18)

By the time Sheriff's Deputies and State Police officers responded to the scene, it was several minutes from the time of the alleged shots. When they arrived at the scene, they saw the appellant, Jessica Marie Tingler, walking on the property. She denied that there was anything going on, and there was no indication that there was any trouble. (Trial Transcript, Page 169-70) The officers found no firearms or evidence indicating firearms were present. (Trial Transcript, Page 218)

The officers asked if there was anyone else in the residence, and she replied that Kenneth Bookheimer, the co-defendant, was there.

When the officers called out to the co-defendant, he stated he was fine but was using the bathroom and would be

right out. The officers then entered the residence and forcibly removed the co-defendant. While he was in the home, one of the officers observed certain items in plain view which he believed indicated that the appellants had a meth lab. (Trial Transcript, Pages 170-72) The officers asked for permission to search the residence, and both appellants refused permission. (Trial Transcript, Page 174)

A search warrant was then obtained, and evidence which the officers believed indicated the existence of a meth lab was gathered from the residence. (Trial Transcript, Page 174-81) The appellants were later indicted as a result of this search.

On the first day of the trial, the appellant, Jessica Marie Tingler, came to court obviously on drugs. Upon defense counsel's request, the Court ordered the probation officer to do a drug test on both appellants. Mr. Bookheimer, who was in the Central Regional Jail, tested negative. However, the appellant, Jessica Marie Tingler, tested positive for several drugs.

The Court stated as follows:

"Tingler tested positive for cocaine, opiates, methamphetamine, benzodiazepines and THC and marijuana. And I would note that it appears that the defendant's eyes are

dilated here today. And, Mr. Skaggs, what is the position of your client? (Trial Transcript, Page 52)

Counsel stated as follows:

"Your honor, I'll...make the motion on her behalf. That uh, it's my opinion that she is incompetent due, due to her drug abuse to assist counsel. And I make a motion that we sever". (Trial Transcript, Page 52)

When the Court asked the prosecuting attorney his position, he stated as follows:

"Your honor, the state would object to that being done this late. Uh, on her part, if she wants to uh come to court under the influence of uh, drugs, that is her choice. Uh, I haven't personally seen anything out of her, which indicates uh, to me she's not uh, gonna be a disruption...We've got a witness who thinks probably already delayed a day or two, of going to Florida and is planning on being gone for a while." (Trial Transcript, Pages 52-53)

The Court denied the motion to sever and stated:

"In regard to this matter the Court notes that the defendant was aware this matter being scheduled for a jury trial. The Court would note that the defendant appears...and when she appeared and understands when she was communicated to and was able to communicate back. And the Court is not going

to sever the matter. And the defendant put her own self in the situation of her impairment. That I believe that she is not so substantially impaired. That she could not effectively assist her counsel. That she could not effectively go to trial. And I'll deny the motion to sever. And I'm going to allow Mr. Skaggs, you (inaudible) post uh, motions..." (Trial Transcript, Page 53)

The appellant's bond was revoked, and she was incarcerated in the Central Regional Jail for the rest of the trial. (Trial Transcript, Page 54)

At the close of the first day, counsel renewed his motion and asked that a drug test be conducted on his client the next day. (Trial Transcript, Page 199)

The next day the appellant was again tested, and counsel renewed his previous motions.

The drug test indicated positive for everything but opiates. It was clear to counsel that the appellant was suffering from withdrawal. (Trial Transcript, Page 200-201)

On the third day of trial the appellant was again tested. However, the results are not on the record.

**ASSIGNMENTS OF ERROR RELIED UPON APPEAL
AND THE MANNER IN WHICH IT WAS DECIDED
IN THE LOWER TRIBUNAL**

(1) THE COURT ERRED BY FORCING AN APPELLANT WHO WAS NOT COMPETENT DUE TO DRUG ABUSE PRIOR TO THE TRIAL TO GO TO TRIAL

AFTER SHE TESTED POSITIVE FOR SEVERAL DRUGS.

(2) THE COURT ERRED BY NOT SUPPRESSING THE EVIDENCE OBTAINED AS A RESULT OF AN ILLEGAL SEARCH OF APPELLANT'S RESIDENCE.

(3) THE COURT ERRED WHEN IT ALLOWED IMPROPER EXPERT TESTIMONY BY ERIN FEAZELL, A CHEMIST FROM THE WEST VIRGINIA STATE POLICE CRIME LABORATORY, AS TO THE IDENTITY OF CERTAIN SUBSTANCES WITHOUT A PROPER FOUNDATION.

(4) THE COURT ERRED BY NOT GRANTING THE APPELLANT'S MOTION TO DISMISS FOR FAILURE OF THE STATE TO PROVE A PRIMA FACIA CASE ON THE CHARGE OF CONSPIRACY.

**POINTS AND AUTHORITIES RELIED UPON,
DISCUSSION OF THE LAW, AND
THE RELIEF PRAYED FOR**

(1) THE COURT ERRED BY FORCING AN APPELLANT WHO WAS NOT COMPETENT DUE TO DRUG ABUSE PRIOR TO THE TRIAL TO GO TO TRIAL AFTER SHE TESTED POSITIVE FOR SEVERAL DRUGS.

On the first day of trial counsel noticed that the appellant's eyes were dilated and that she appeared to be under the influence of drugs. He brought her condition to the court's attention prior to the start of the trial and asked for a drug test to be conducted. The Court then ordered the probation officer to do a urine test on the appellants. Mr. Bookheimer, who had been incarcerated, tested negative. However, the appellant, Jessica Marie Tingler, tested positive for the following drugs: "cocaine, opiates, methamphetamine, benzodiazepines and THC and marijuana." Counsel moved to sever, and the Court denied the motion. Counsel certainly did

not waive his objection, for he renewed it at every opportunity.

It is settled case law that an appellant cannot be tried or convicted while she is mentally incompetent. She must be able to understand the proceedings and cooperate in her defense. See State v. Cheshire, 292 S.E. 2d 628 (1982); State v. Hatfield, 413 S.E. 2d 162 (1991); State v. Bias, 352 S.E. 2d 52 (1986); State v. Arnold, 219 S.E. 2d 922 (1975).

The Court stated that the appellant "understands when communicated to and was able to communicate back." (Trial Transcript, Page 53) Although there is nothing in the record to indicate that the Court questioned the appellant, it is possible this was done in chambers. While the appellant could respond to simple questions when asked, it was clear to counsel that she had no real understanding and was incapable of assisting counsel. She furthermore could not take the stand on her own behalf.

Perhaps had the appellant been under the influence of alcohol rather than under the influence of drugs, it would have been more obvious to the Court that she was not competent to stand trial. Slurred speech and staggering are symptoms exhibited by an individual on alcohol. A person under the influence of drugs, however, does not usually exhibit the kind

of physical symptoms that an intoxicated person does. Often they appear normal in appearance and speech and may even appear completely coherent.

The principle that the appellant did it to herself does not apply in this situation since the appellant was clearly unable to assist counsel or to understand the proceedings. She was clearly incompetent throughout the three-day trial.

The appellant was like a rag doll propped up in a chair. Therefore the appellant's due process rights were violated by being forced to trial in a confused and altered mental state, and she was denied a fair trial.

(2) THE COURT ERRED BY NOT SUPPRESSING THE EVIDENCE OBTAINED AS A RESULT OF AN ILLEGAL SEARCH OF APPELLANT'S RESIDENCE.

Several items which the State contended were used for a clandestine drug laboratory were obtained by law enforcement officers as a result of an illegal search and seizure in violation of the Fourth Amendment of the United States Constitution and the Constitution of the State of West Virginia.

Individuals have an expectation of privacy in their homes. As a general rule a warrantless search of an individual's home by governmental authorities is prohibited. A

search without a warrant is considered to be *per se* unreasonable. See Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 576 (1967); United States v. Rusher, 966 F. 2d 868 (Fourth Circuit, 1992); State v. Peacher, 280 S.E. 2d 559 (W.Va. 1981).

However, there are a few exceptions, one of which is if an exigent or emergency situation exists. In State v. Cecil, 311 S.E. 2d 144 (W.Va. 1983), the West Virginia Supreme Court of Appeals adopted the emergency doctrine. The emergency doctrine permits a limited warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance to protect the life of an individual; (2) the motivation of the search or entry is the emergency rather than the intent to arrest or secure evidence and (3) a reasonable connection exists between the emergency and the area in question.

Moreover, the emergency doctrine adopted by this Court in Cecil requires a two-step subjective and objective test. Under the subjective test, the actual motivation of the officer must be his perception of a need to render aid or assistance. Under the objective test, a reasonable person under the circumstances must believe that an emergency exists.

Cecil does not apply to the instant case. From all

indications, the call reporting shots fired was a false report. Arguably the officers did not know this when they arrived at the residence of the appellant. However, once they were on the scene a reasonable police officer under the circumstances would have immediately determined that there was no emergency. They heard no shots fired nor did they find any firearms. They found the appellant walking around the yard, and she stated there was no problem. There was no indication from her demeanor or her physical condition that a domestic situation had occurred. She told them that the co-defendant, Kenneth Bookheimer, was in the house. When the officer called out to him and he stated that he was fine but was on the toilet and would be right out, the police had no reason to enter the home. A reasonable officer would have waited for the co-defendant to come out.

The officers had already been alerted by a DNR officer that there were drugs in the home. (Transcript, Page 514) It is obvious that the primary reason to enter the home was to see if they could view any possible evidence of drug activity. They did see evidence that indicated the presence of a meth lab. However, they had illegally entered the home.

The search warrant was obtained only after the illegal entry of the residence. Therefore, the evidence gathered

should have been suppressed, and the Court erred by denying the appellant's Motion to Suppress.

Further the Court erred by basing its ruling entirely on hearsay evidence. The investigating officer was not present at the Suppression Hearing, and another officer who was present at the residence testified. (Suppression Hearing Transcript, Pages 9-10)

(3) THE COURT ERRED WHEN IT ALLOWED IMPROPER EXPERT TESTIMONY BY ERIN FEAZELL, A CHEMIST FROM THE WEST VIRGINIA STATE POLICE CRIME LABORATORY, AS TO THE IDENTITY OF CERTAIN SUBSTANCES WITHOUT A PROPER FOUNDATION.

In trial, Erin Feazell, the chemist from the West Virginia State Police Laboratory, testified about the identity of red phosphorous and ephedrine, which are precursor materials for the manufacture of methamphetamine. She was further allowed to explain how the substances were used in the manufacture of meth. (Trial Transcript, Page 125-28) This testimony was objected to by counsel, but the objection was overruled. (Trial Transcript, Page 122.)

According to Rule 901 of the West Virginia Rules of Evidence, a piece of evidence must be authenticated, and the chain of custody must be established prior to the admission of that evidence. Further, according to Rule 103 (c) of the West

Virginia Rules of Evidence, a piece of evidence may not be published before the jury other than for demonstrative purposes.

This evidence, which was published before the jury, was particularly damaging because these were the only direct precursor materials the State alleged proved the appellants were involved in the manufacture of meth. Another expert witness called by the State testified that without red phosphorous and ephedrine there is no meth lab. (Trial Transcript, Page 487)

Later in the trial the officers who did the search of the residence said that they had never seen the substances before and did not know how they were in the evidence sent to the lab. (Trial Transcript, Page 461) Therefore, the Court excluded these exhibits from the evidence. (Trial Transcript, Page 496).

(4) THE COURT ERRED BY NOT GRANTING APPELLANT'S MOTION TO DISMISS FOR FAILURE OF THE STATE TO PROVE A PRIMA FACIA CASE ON THE CHARGE OF CONSPIRACY.

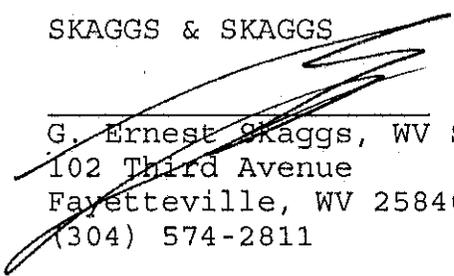
One of charges the appellant went to trial on was Conspiracy, which requires the element of conspiring with another person to commit a crime. The State proved only that the appellants resided together in a mobile home near

Frametown, Braxton County, West Virginia. There was no evidence of any plan or activities in furtherance of a plan, or any other evidence which indicated that the two appellants were working together for an illegal purpose. Therefore, the Court erred by not dismissing the conspiracy count.

WHEREFORE appellant prays that this Court reverse the judgment and conviction of the lower court and remand this case to Braxton County Circuit Court for further proceedings.

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Appellant
By Counsel

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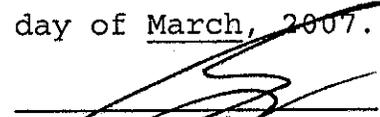
CERTIFICATE OF SERVICE

I, G. Ernest Skaggs, certify that I have served this Brief
of Appellant Jessica Marie Tingler by mailing a true copy thereof
in the United States Mail, postage prepaid, to the following:

Robert Goldberg, Esq.
Asst. Attorney General
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P.O. Box 100
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Dated this the 22nd day of March, 2007.



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