APPENDICES

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APPENDIX A

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

vs. **/// CASE No. 22-F-271**

MICHAEL KEITH ALLMAN,

DEFENDANT.

ORDER

This matter came on for hearing on this the 28th day of March, 2023, upon the appearance of the State of West Virginia by and through it's Assistant Prosecuting Attorney, Russell Skogstad; upon the appearance of the defendant, in person, incarcerated and by Counsel, Jenny L. Cochran; and upon the previous filing of the Defendant's Motion to Suppress Evidence.

Whereupon testimony and other evidence was presented in connection with Defendant's motion to suppress, the argument of both counsels, and the entire record, the Court **DENIES** the motion upon the following findings of fact and conclusions of law:

1. Sgt. A.D. McGary of the Parkersburg Police Department is a 14-year veteran who is presently assigned to the Detective Bureau, but at the time of this investigation was on patrol.

2. On June 4, 2022, at approximately 9 p.m., Sgt. McGary was patrolling in the City of Parkersburg, Wood County, West Virginia in and around 16th St. when he looked through an open garage door of the business known as "Proline Collison" and saw Michael Keith Allman, who was known to have an active warrant.

3. Even though other people were in the business as well, Sgt. McGary stopped, calling Mr. Allman by name, who looked at him.

4. Sgt. McGary got out of his car and the defendant walked forward with a backpack, while removing an item from his waistband and placing it between vehicles in an open area. Sgt. McGary also saw the defendant place the backpack on the floor by a vehicle.

5. The defendant was advised to turn around so that handcuffs could be placed on him however he continued to resist, trying to face the officer, until being placed down face first on a vehicle and handcuffed.

6. Sgt. McGary then took the backpack under his control. During this time, 6 to 8 other individuals were in the area of the arrest, when an unknown individual, tried to claim ownership of the backpack.

7. Sgt. McGary exited the building with the defendant and the backpack.

8. Other officers then arrived on scene, specifically Officer Abraham, who was directed to the general location of where the defendant placed something from his

waistband. Officer Abraham found a loaded semi-automatic firearm with a bullet in the chamber.

9. Sgt. McGary also found upon the waist of the defendant an empty holster.

10. Sgt. McGary searched the backpack for any additionally firearms, before placing the defendant in the back of his SUV police car and placing the evidence he secured in the front floorboard.

11. Sgt. McGary testified he is mindful of placing prisoners in the middle seat given their close proximity to himself and/or evidence as well as he was concerned about the prisoner's ability to sometimes manipulate their bodies into positions that will permit them to remove their handcuffed hands from their back to their front.

12. On cross examination, the defendant elicited testimony showing that the police had no search warrant and/or no consent to go into Proline Collision; no consent to search the backpack from either the defendant or the unknown individual who claimed ownership; as well as argued the backpack was not in the immediate control of the defendant as he was under arrest.

Given these arguments, the Court will address the legality of the search.

First of all, the State argued that the Officer had the ability and right to enter into the premises of a business where a person is located that has a warrant issued for his arrest. The business was open and the defendant could be seen clearly. No legal impediment kept the Officer from entering these premises.

Secondly, the defendant argues that the backpack belonged to someone else who claimed it at the scene and time of arrest. If indeed that is his argument, then the

defendant has no standing to object to the seizure of an item not owned or possessed by him.

Lastly, the Defendant argues that since he was "secure and the bag was not under his immediate control or reach," a warrant should have been secured and therefore the evidence should be suppressed. However, there is more to consider. The officer and the defendant were not alone in the garage. Approximately six to eight other individuals were in the garage with the defendant before the officer entered to arrest the defendant. Sgt. McGary witnesses the defendant remove something from his waist and place it on the ground, while sitting the backpack down on the floor. While Sgt. McGary was arresting the defendant over earnest resistance from the defendant, one of the individuals approached the backpack and attempted to assert ownership. The others in the garage were so close that the officer ordered them to back up. The Sgt. picked up the bag and took the defendant and the bag outside. An empty holster was found on the defendant. A gun was found by an additional officer where the defendant had been seen making a furtive gesture by Sgt. McGary. Sgt. McGary testified where one gun is found being held by a person, there is often a second or more gun in their possession.

Additionally, Sgt. McGary was placing the defendant in the back seat of his SUV. Sgt. McGary described in detail his vehicle, where the defendant was sitting and his training on dealing with occupants who resist/escape or reaching for items that have been taken. Behind the seat where the defendant was seated was his work items, so Sgt. McGary placed the defendant in the second seat and the backpack in the front seat on the floor.

Given these facts, the Court **FINDS** the following: The defendant was wanted on an outstanding warrant; the

defendant was placed under arrest; while the officer was trying to secure the defendant, he was trying to escape and wrestled with the officer; the defendant had an empty holster on his waist; the defendant was a carrier of a gun/weapon; the backpack was in the immediate possession of the defendant when the officer first saw him; the defendant tried to hide his backpack at his feet while between the cars; the defendant did hide a weapon after seeing the officer; the defendant was being arrested on a warrant and at the same time the backpack was retrieved from the general area wherein the defendant was; while transporting, the officer was going to place the defendant in the second seat of the police SUV, directly behind the officer; the backpack was going to be in the front seat floor; and in the officer's experience and training, one who carries one gun is likely to carry two and lastly, just because an arrestee is handcuffed, does not mean he doesn't pose danger or threat to an officer.

Therefore, the Court **FINDS AND CONCLUDES** that Sgt. McGary made a reasonable and lawful search of the defendant's backpack incident to a lawful arrest. Based upon the behavior of the defendant as stated above and the testimony of Sgt. McCrady, the search was to prevent the destruction of evidence of a crime, prevent an escape, and/or look for weapons. This preventive action was not only for the safety of the officer, but the defendant and other individuals on the premises.

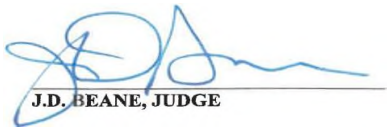
It is therefore **ORDERED** the backpack and items therein, including the drugs are hereby admissible at trial.

It is therefore **ORDERED** that the Defendant's Motion to Suppress is hereby **DENIED.**

The Court takes notice of the Defendant's objection to the rulings herein.

The Clerk shall forward a copy of this Order to the Counsel for the Defendant, Jenny Cochran and to the Wood County Assistant Prosecuting Attorney, Russell Skogstad.

Entered: 4-5-2023



APPENDIX B

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2025 Term

No. 23-421

STATE OF WEST VIRGINIA,
Plaintiff below, Respondent,
v.
MICHAEL KEITH ALLMAN,
Defendant below, Petitioner.

Appeal from the Circuit Court of Wood County
The Honorable J.D. Beane, Judge
Criminal Action No. 22-F-271

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: October 22, 2025
Filed: November 12, 2025

Olivia M. Lee, Esq.
Public Defender Services
Appellate Advocacy Division
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Counsel for Petitioner

John B. McCuskey, Esq.
Attorney General
Michael R. Williams, Esq.
Solicitor General
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Charleston, West Virginia
Counsel for the Respondent

JUSTICE EWING delivered the Opinion of the Court.

SYLLABUS OF THE COURT

1. "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 to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syllabus Point 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

2. "In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo.* Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made." Syllabus

Point 2, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

3. "'The Fourth Amendment of the *United States Constitution*, and Article III, Section 6 of the *West Virginia Constitution* protect an individual's reasonable expectation of privacy.' Syl. Pt. 7, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981)." Syllabus Point 1, *Wagner v. Hedrick*, 181 W. Va. 482, 383 S.E.2d 286 (1989).

4. "'Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution—subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative.' Syllabus Point 1, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)." Syllabus Point 20, *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001).

5. "A warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest." Syllabus Point 6, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

EWING, Justice:

The Petitioner Michael Keith Allman appeals his convictions following a three-day jury trial in the Circuit

Court of Wood County.[1] Seeking to set aside his drug-related convictions, Mr. Allman challenges the denial of his motion to suppress evidence obtained from the search of his backpack. He argues that the search of the backpack violated his rights under the Fourth Amendment to the United States Constitution and article III, section 6 of the West Virginia Constitution. Specifically, Mr. Allman contends that at the time the backpack was searched, the exigencies of the arrest had ended, so the warrantless search was improper. We agree, and accordingly, we reverse the circuit court's April 5, 2023, order denying Mr. Allman's motion to suppress and remand the case for further proceedings consistent with this opinion.

I. Facts and Procedural Background

On the evening of June 4, 2022, a Parkersburg police officer arrested Mr. Allman pursuant to an outstanding warrant. Once Mr. Allman was handcuffed, the officer seized a backpack that Mr. Allman had been carrying but had set down prior to his arrest. After backup arrived and secured the scene, the officers searched the backpack and found drugs, digital scales, and ammunition.

In September 2022, a Wood County Grand Jury returned a six-count indictment against Mr. Allman, charging him with one count of felony possession of a controlled substance with intent to deliver, second offense, in violation of West Virginia Code §§ 60A-4-401(a)(i) (2020), 60A-4-415(b)(1) (2017), and 60A-4-408(a) (1971), for his possession of fentanyl (count one); two counts of felony possession of a controlled substance with intent to deliver,

[1] The initial Notice of Appeal was filed prior to Mr. Allman's sentencing. Public Defender Services was subsequently appointed as appellate counsel and amended the Notice of Appeal to include the Final Sentencing Order.

second offense, in violation of West Virginia Code §§ 60A-4-401(a)(i) and 60A-4-408(a), one for his possession of heroin (count two) and the other for his possession of morphine (count three); one count of misdemeanor possession of a controlled substance, in violation of West Virginia Code § 60A-4-401(c), for his possession of marijuana (count four); one count of felony possession of a firearm by a prohibited person, in violation of West Virginia Code § 61-7-7(a)(1) and (8) (2016) (count five); and one count of felony possession of a concealed firearm by a prohibited person, in violation of West Virginia Code § 61-7-7(d) (count six).

In March 2023, Mr. Allman filed a motion to suppress evidence retrieved from his backpack, asserting that such evidence was illegally seized after an unlawful warrantless search. Specifically, Mr. Allman argued that it was not reasonable for the arresting officer to believe that Mr. Allman could have accessed the backpack at the time of the search because Mr. Allman was secured in handcuffs and not within reaching distance of the backpack. The State did not file a written response.

The circuit court held a suppression hearing on March 28, 2023. The only witness at that hearing was the State's witness, Sergeant Arnold McGary Jr. ("Sgt. McGary") of the Parkersburg Police Department. Sgt. McGary testified to the following facts. On June 4, 2022, at around 9:00 p.m., he was on routine patrol when he drove down an alleyway and observed an open garage door on an establishment known as Pro-Line Collision. As it was after typical business hours, the open garage door drew Sgt. McGary's attention, and he looked inside, observing Mr. Allman and six to eight other people inside the garage. Sgt. McGary stated that he knew that there was an active warrant for Mr. Allman, so he stopped his vehicle and

called for Mr. Allman by name. He testified that Mr. Allman turned around and looked at him, and that Mr. Allman had a shoulder bag or bookbag with him at that point.[2]

Sgt. McGary stated that he then exited his patrol vehicle and began to approach Mr. Allman. At the same time, Mr. Allman began to walk between two vehicles parked inside the garage while maintaining possession of the backpack. It appeared to Sgt. McGary that Mr. Allman removed an item from the front of his waistband and crouched down to discard the item. Sgt. McGary testified that based on his training and experience, he believed the discarded item to be a firearm. Sgt. McGary stated that he "hollered" for Mr. Allman by name, and Mr. Allman turned to face him and began to approach, still in possession of the backpack. Sgt. McGary explained that, as Mr. Allman approached him, "he came up to the backside of another vehicle, he had placed the bookbag on the ground behind the vehicle, and then we met about half-way."

Sgt. McGary stated that he then advised Mr. Allman to turn around, put his hands behind his back, and notified him of the warrant for his arrest. Sgt. McGary indicated that when he went to place handcuffs on Mr. Allman, Mr. Allman did not comply fully and kept turning to face him. Sgt. McGary eventually pushed Mr. Allman against the adjacent vehicle and handcuffed him. Sgt. McGary testified that while he was attempting to handcuff Mr. Allman, one of the other individuals in the garage walked up and "tried

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[2] Throughout the suppression hearing, proceedings below, and on appeal, the parties use the words "shoulder bag," "bookbag," "backpack" and "bag" interchangeably. Each of those terms refers to the bag, the search of which is at issue in this appeal.

to" claim that the backpack was his.[3] In response, Sgt. McGary ordered everyone out of the garage. He stated that, due to being occupied with Mr. Allman, he was not aware if the other people actually exited the garage, but they were away from him and Mr. Allman. At that point, Sgt. McGary was the only officer at the scene.

Sgt. McGary testified that, after placing Mr. Allman into handcuffs, he "walked back up and retrieved the bag—with [Mr. Allman]—that he had laid down behind the vehicle, and we exited the building. . . . so in case [the other individuals present] did want to act on anything, it would—we would be in a safer location for us until backup arrived." Sgt. McGary indicated that when they exited the garage, they went to his cruiser, and the backpack was placed on the front of the vehicle. Based on his recollection, it was around that time when Patrolman Abraham arrived. Sgt. McGary stated that he advised Patrolman Abraham of the area where Mr. Allman appeared to have hidden something. According to Sgt. McGary, Patrolman Abraham investigated the area and located a semi--automatic pistol with one round chambered. Sgt. McGary testified that Patrolman Abraham searched Mr. Allman and located a holster in the front side of Mr. Allman's pants, which suggested to him that Mr. Allman may have been in possession of a firearm.

Sgt. McGary testified that "[u]ltimately—once locating everything else—we went through the book bag and located narcotics," along with digital scales and ammunition. When asked why they searched the backpack, Sgt. McGary stated, "[w]e didn't know what we had at the time. Located the firearm. Went through the bag to locate

[3] Sgt. McGary later testified that this was the only time that any of the other individuals present tried to claim the backpack.

any—possibly any other type of weapons." He testified that, based on his experience, it is common for an individual to have more than one firearm in their custody. Additionally, he noted the risk of an arrestee being able to move handcuffs from the backside to the front and how that can pose a danger to officers if the arrestee can access anything or get their arms around an officer.

Sgt. McGary testified that, after the backpack was searched, it was placed in the front of Sgt. McGary's cruiser on the floorboard. Sgt. McGary testified he typically places evidence in his front floorboard because he has better control over it, due to an arrestee being in the middle row and there being a cage separating the front seats from the middle compartment. Sgt. McGary could not recall if Mr. Allman was placed in his or Patrolman Abraham's cruiser.[4] Eventually other officers arrived, but Sgt. McGary could not recall exactly who was there. There is no indication in the record when the other officers arrived in relation to the search of the backpack.

On April 5, 2023, the circuit court entered its order denying Mr. Allman's motion to suppress. The court found that the backpack was in Mr. Allman's immediate possession when Sgt. McGary first saw him and concluded that "Sgt. McGary made a reasonable and lawful search of the defendant's backpack incident to a lawful arrest." The court further found that the search was "to prevent the destruction of evidence of a crime, prevent an escape, and/or look for weapons. This preventive action was not only for the safety of the officers, but the defendant and

[4] The circuit court's findings stated that Sgt. McGary searched the backpack "before placing [Mr. Allman] in the back of his SUV police car and placing the evidence he secured in the front floorboard."

other individuals on the premises." Accordingly, the court denied Mr. Allman's motion to suppress.

A jury trial commenced on May 31, 2023, and on June 2, 2023, a jury returned a verdict of guilty on all six counts of the indictment. Mr. Allman was sentenced on all six counts by order entered August 3, 2023.[5] Mr. Allman now appeals his drug-related convictions, alleging that the circuit court erred in denying his motion to suppress.

II. Standard of Review

The issue on appeal is whether the circuit court erred in denying Mr. Allman's motion to suppress evidence obtained as a result of the search of his backpack. We have previously set forth the applicable standard of review in *State v. Lacy*:

> 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

[5] Mr. Allman was sentenced to the following terms of incarceration: count one, possession of a controlled substance with intent to deliver (fentanyl) in an amount less than one gram, not less than four nor more than twenty years; count two, possession of a controlled substance with intent to deliver (heroin), not less than two nor more than twenty years; count three, possession of a controlled substance with intent to deliver (morphine), not less than two nor more than thirty years; count four, possession of a controlled substance (marijuana), six months; count five, possession of a firearm by a prohibited person, five years; and count six, possession of a concealed firearm by a prohibited person, five years, with the sentences imposed for counts one, two, four, and six running consecutively to the other counts.

> the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.
>
> In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made."

Id., 196 W. Va. 104, 468 S.E.2d 719, Syl. Pts. 1 and 2. With this standard in mind, we now consider the parties' arguments.

III. Discussion

In his appeal, Mr. Allman raises one assignment of error. He argues that the circuit court erred in denying his motion to suppress evidence seized from his backpack because the warrantless search of the bag violated his rights under the Fourth Amendment to the United States Constitution and article III, section 6 of the West Virginia

Constitution. Mr. Allman asserts that, at the time that the search of the bag was conducted, the exigencies of the arrest had ended, so the warrantless search was improper. We agree.

It is well established that article III, section 6 of our state constitution[6] and the Fourth Amendment to our federal constitution[7] protect citizens from unreasonable searches and seizures.[8] *See State v. Ward*, 249 W. Va. 347, 895 S.E.2d 202 (2023); *State v. Poling*, 207 W. Va. 299, 303, 531 S.E.2d 678, 682 (2000). "A Fourth Amendment inquiry

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[6] Article III, section 6 of the West Virginia constitution provides,

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

[7] The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[8] The right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment. *See Payton v. New York*, 445 U.S. 573, 576 (1980) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). "Article 3, Section 6 of the West Virginia Constitution is generally construed in harmony with the Fourth Amendment of the United States Constitution." *Ullom v. Miller*, 227 W. Va. 1, 8 n.4, 705 S.E.2d 111, 118 n.4 (2010) (citing *State v. Duvernoy*, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973)).

generally consists of two components: (1) whether the defendant asserting the right has a reasonable expectation of privacy in the place searched and (2) whether the search was reasonable." *Ward*, 249 W. Va. at 354, 895 S.E.2d at 209 (citing *United States v. Rodriguez*, 33 F.4th 807, 811 (5th Cir. 2022)). Therefore, in addressing Mr. Allman's assignment of error, we consider both parts of the analysis.

A. Reasonable Expectation of Privacy

Our first inquiry is whether Mr. Allman had a reasonable expectation of privacy in the backpack searched. The State asserts that this first factor is dispositive, alleviating any need for the Court to examine the reasonableness of the search. Specifically, the State contends that Mr. Allman had no privacy interest in the backpack because either it did not belong to him, or he abandoned the backpack. We disagree.

"'The Fourth Amendment of the *United States Constitution*, and Article III, Section 6 of the *West Virginia Constitution* protect an individual's reasonable expectation of privacy.' Syl. Pt. 7, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981)." Syl. Pt. 1, *Wagner v. Hedrick*, 181 W. Va. 482, 383 S.E.2d 286 (1989). The requirement that a person have a reasonable expectation of privacy in the property searched is often characterized as Fourth Amendment "standing." In *State v. Ward*, this Court made clear that Fourth Amendment standing is not jurisdictional, so is an issue that may be forfeited or waived. 249 W. Va. at 355, 895 S.E.2d at 210.[9]

[9] It is a "threshold inquiry" to be addressed prior to addressing the constitutionality of the search itself. *See United States v. Ferebee*, 957 F.3d 406, 412 (4th Cir. 2020). "The concept of standing in Fourth Amendment cases can be useful shorthand for capturing the idea that

Although the State raises the issue of Fourth Amendment standing on appeal, it was not sufficiently raised below.[10] The State's failure to raise whether Mr. Allman had a reasonable expectation of privacy in the backpack prior to appeal results in a record that is completely void of any testimony, evidence or argument directly addressing Mr. Allman's privacy interest in the backpack.[11] During the proceedings below, Mr. Allman had the "burden of proving that he had a reasonable expectation of privacy" in the bag searched. *State v. Payne*, 239 W. Va. 247, 259, 800 S.E.2d 833 845 (2016). However, because the State did not challenge Mr. Allman's privacy interest—and even told the court at the suppression hearing that Mr. Allman "clearly was in possession of the bag"— Mr. Allman proffered no evidence to support his reasonable expectation of privacy in the backpack. Therefore, the State may not ambush Mr.

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a person must have a cognizable Fourth Amendment interest in the place searched *before seeking relief for an unconstitutional search . . .*" *Id.* (quoting *Byrd v. United States*, 584 U.S. 395 (2018)).

[10] The State did not file any written response to Mr. Allman's motion to suppress, did not raise the issue during the evidentiary portion of the suppression hearing, but during closing arguments at the suppression hearing, the State did note that "if [Mr. Allman] doesn't have ownership of the bag then he doesn't have standing to challenge the search of the bag."

[11] The State urges the Court to affirm the circuit court's denial of the motion to suppress based on *Milmoe v. Paramount Senior Living at Ona, LLC*, in which we held that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground *disclosed by the record*, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." 247 W. Va. 68, 875 S.E.2d 206, 207 (2022), Syl. Pt. 2 (emphasis added). The *Milmoe* standard is dependent upon a sufficiently developed record.

Allman on appeal by relying upon a deficient record it failed to create.

The State first asks us to consider a third-party's statement that the backpack was his, for the proposition that Mr. Allman did not have any expectation of privacy in a backpack that he did not own. That lone statement, as part of an undeveloped record, does not support a finding for the first time on appeal that Mr. Allman had no privacy interest in the backpack. A person's reasonable expectation of privacy does not depend on ownership of an item searched. *See Payne*, 239 W. Va. at 258, 800 S.E.2d at 844 (explaining that "our analysis does not turn on whether the petitioner retained an ownership interest in the [bag], but whether he retained a reasonable expectation of privacy in the [bag] and its contents").

Alternatively, the State contends that Mr. Allman abandoned the backpack at the scene, giving up any reasonable expectation of privacy. We have held that "[t]he State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as . . . property that has been abandoned . . . ." *Payne*, 239 W. Va. 247, 800 S.E.2d 833, Syl. Pt. 4, in part (quoting Syl. Pt. 1, in part, *State v. Angel*, 154 W. Va. 615, 177 S.E.2d 562 (1970)). It is well established that "[a]person who voluntarily abandons an item of property may not seek to suppress evidence obtained as a result of the seizure and search of that property." *United States v. Mayberry*, 125 F.4th 132, 144-45 (4th Cir. 2025), *cert. denied*, 145 S. Ct. 2722, 221 L. Ed. 2d 977 (2025). Further, "[a]bandonment should not be casually inferred." *Id.* (quoting *United States v. Small*, 944 F.3d 490, 502 (4th Cir. 2019)). The abandonment inquiry "turns on the intent of the defendant as revealed

through his words and actions," *United States v. Ferebee*, 957 F.3d 406, 413-14 (4th Cir. 2020), and "courts typically consider the circumstances of the defendant's disassociation from the property including (1) his physical actions and (2) any denial or disclaimer of ownership over the property." *Mayberry*, 125 F.4th at 145.

The State maintains that Mr. Allman abandoned the backpack by both his action of setting the bag down while approaching Sgt. McGary and by a disclaimer of ownership. We do not reach any determination regarding abandonment due to the limited record before us. The lack of a record prevents us from undertaking the "highly fact-specific nature" of the inquiry required. *See Lacy,* 196 W. Va. 104, 468 S.E.2d 719, Syl. Pt. 1. Based on the limited information in the record, the facts of the present case are distinguishable from the facts in *Payne* and other cases relied upon by the State. Unlike the defendant in *Payne*, who left a cell phone and jacket in the home where he stayed the night after a shooting "with no indication that he ever planned to return or to retrieve it," 239 W. Va. at 257, 800 S.E.2d at 843, there was no record developed regarding whether Mr. Allman would retrieve the backpack after he spoke with Sgt. McGary. Similarly, in *Brown v. United States*, 97 A.3d 92 (D.C. 2014), cited by the State, the defendant was found to have abandoned property where he left such property behind as he fled from officers, not giving any indication that he would return to retrieve the property because he was trying to make an escape. These and other cases finding abandonment base their conclusions on a defendant leaving personal property unattended, unsecured, and with no indication of an intent to retrieve the property later. *See, e.g.*, *State v. Corbin*, 957 N.E.2d 849 (Oh. App. 2011) (garbage bag of clothes left in the back of a friend's pickup truck with no indication that he intended to

retrieve the bag in the future); *Mayberry*, 125 F.4th 132 (backpack left in hotel stairwell, unhidden, unattended, and with no indication of an intent to retrieve the backpack later); *Small*, 944 F.3d 490 (cell phone discarded during flight from law enforcement found in grassy area); *United States v. Frazer*, 98 F.4th 102, 107 (4th Cir. 2024) (bag thrown into apartment courtyard, more than 40 feet away, following police pursuit and prior to being arrested). Unlike these cases, there is no evidence in the record that Mr. Allman fled the scene or left the backpack unattended, out of his presence. Based on Sgt. McGary's testimony, Mr. Allman was clearly in possession of the backpack, until he set the bag down as he approached Sgt. McGary. There is no indication in the record below that Mr. Allman would not retrieve the backpack after speaking with the officer. Therefore, we decline the State's invitation to find that setting down a bag prior to addressing a law enforcement officer constitutes abandonment.[12]

We similarly reject the State's argument that Mr. Allman abandoned the backpack by disclaimers of ownership. The State's reliance on *Ferebee* for this argument is misplaced. In *Ferebee,* the defendant explicitly told officers that the backpack sitting near him was not his. *Id.* at 410. For that reason, the officers' search of the backpack, after removing the defendant from the home, was upheld. Unlike the facts in *Ferebee*, the limited record before us includes no mention of Mr. Allman

[12] Mr. Allman contends that his action of placing the backpack on the ground was an intentional act of "hiding" the bag, demonstrating a privacy interest in the bag. However, at no time during the suppression hearing was there testimony or evidence regarding Mr. Allman's intention when setting down the backpack. Therefore, we do not address the parties' arguments that turn on the unfounded assumption that Mr. Allman had an intent to hide the backpack by setting it on the ground.

disclaiming ownership. The arguments of Mr. Allman's counsel, throughout the proceedings, that an unidentified third-person claimed ownership of the backpack, have no bearing on whether Mr. Allman intentionally abandoned the backpack at the time that the search was conducted. *See id.*, 957 F.3d at 413-14 (noting that the abandonment inquiry "turns on the intent of the defendant as revealed through *his* words and actions") (emphasis added).

In conclusion, based on the limited record below, including the State's assertion to the circuit court that Mr. Allman was in possession of the backpack, we find nothing in the record to suggest that Mr. Allman lacked a reasonable expectation of privacy in the backpack.

B. The Reasonableness of the Search

We must next address whether the search itself was reasonable. This Court has consistently held that

> "'[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution—subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative.' Syllabus Point 1, *State v. Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)."

Syl. Pt. 20, *State v. Ladd*, 210 W. Va. 413, 557 S.E.2d 820 (2001); Syl. Pt. 5, *State v. Barefield*, 240 W. Va. 587, 814 S.E.2d 250 (2018). Here, it is undisputed that the backpack was seized and searched without a warrant. Mr. Allman concedes that its seizure was proper but challenges the warrantless search of it. Therefore, we must consider whether the search of the backpack fell within a recognized exception to the warrant requirement. The State bears the burden of proof to establish that its conduct fell within the bounds of a legitimate exception. *See Lacy*, 196 W. Va. at 111, 468 S.E.2d at 726 ("When the State seeks to introduce evidence that was seized during a warrantless search, it bears the burden of showing the need for an exemption from the warrant requirement and that its conduct fell within the bounds of the exception. . . . simply articulating a safety reason is insufficient; the burden of proof is with the party asserting the exception to establish that the exception is legitimate and not pretextual."); *see also United States v. Davis*, 997 F.3d 191, 195 (4th Cir. 2021) (quoting *United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013)) ("The government bears the burden of proof in justifying a warrantless search or seizure.").

In the proceedings below and on appeal, the State contends that the search was proper as a search incident to arrest. We have recognized that "[o]ne of the most frequently utilized exceptions to the warrant requirement is the search incident to an arrest." *Julius*, 185 W. Va. at 426, 408 S.E.2d at 5. The seminal case establishing the scope of a permissible search incident to arrest is *Chimel v. California*, 395 U.S. 752 (1969), in which the United States Supreme Court held that:

> "When an arrest is made, it is reasonable for the arresting officer to search the

> person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

Julius, 185 W. Va. at 426, 408 S.E.2d at 5 (quoting *Chimel*, 395 U.S. at 763). In *State v. Moore*, this Court explained that "*Chimel* confined the warrantless search of property to that limited area immediately under the physical control of the arrested person on the basis that it was necessary to uncover weapons that might be used against the arresting officer and to prevent destruction of evidence by the arrested party." 165 W. Va. at 851, 272 S.E.2d at 813.

The Supreme Court has continued to consider and revise the boundaries of the exception. In 2009, the Supreme Court revisited the search incident to arrest exception in *Arizona v. Gant*, noting the need for the rule to remain tethered to "the justifications underlying the *Chimel* exception." 556 U.S. 332, 343 (2009). Accordingly, *Gant* held that incident to an arrest, a vehicle may be

searched without a warrant "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* Thereafter, in *Davis* the Fourth Circuit extended the *Gant* holding to "non-vehicular containers that were not on the arrestee's person," such as a backpack. *Davis*, 997 F.3d at 197. The Fourth Circuit reasoned that the *Gant* holding applies outside the vehicular context because,

> while *Gant* involved the warrantless search of a vehicle incident to an arrest, *Chimel* did not. Considering the Supreme Court's reliance on the rationale of *Chimel*—a non-vehicle case—in reaching the first *Gant* holding, we do not read *Gant* as limited to the vehicular context.

Id. at 197.[13] As a result, the Fourth Circuit concluded that "officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of

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[13] In *Davis,* the Fourth Circuit further discussed that the *Gant* Court could have limited its holding to vehicular searches, but it did not do so. 997 F.3d at 197. As noted in *Davis,* the Third, Ninth and Tenth Circuits similarly extended *Gant* outside of the vehicle context. *See, e.g.*, *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010) (applying *Gant* to the search of a bag the arrestee was holding at the time of arrest, finding "no plausible reason" to limit *Gant*'s application to automobile searches); *United States v. Cook*, 808 F.3d 1195, 1199 n.1 (9th Cir. 2015) ("We do not read *Gant*'s holding as limited only to automobile searches because the Court tethered its rationale to the concerns articulated in *Chimel*, which involved a search of an arrestee's home."); *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019) (extending *Gant*'s principles to a purse near the arrestee at the time of search, "focusing attention on the arrestee's ability to access weapons or destroy evidence at the time of the search . . . regardless of whether the searched involved a vehicle").

the [container] at the time of the search.'" *Id.* (quoting *Gant*, 556 U.S. at 343).

Based on the Fourth Circuit's opinion in *Davis*, Mr. Allman urges this Court to apply the reasoning of *Arizona v. Gant* outside of the vehicular context, to hold that a non-vehicular container may only be searched when the arrestee is unsecured and within reaching distance of the container to be searched.[14] The State argues that this Court should not extend *Gant* but should, instead, consider the search of the backpack as a search of Mr. Allman's person incident to arrest under *United States v. Robinson*, 414 U.S. 218 (1973).[15] We decline to follow either approach.

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[14] We have previously acknowledged that "[t]his Court pays due deference and respect to opinions and analysis of the Fourth Circuit. However, we are not bound to adopt the approach of the Fourth Circuit." *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 595, 788 S.E.2d 319, 341 (2016); *see also State v. Pennington*, 247 W. Va. 631, 639 n.18, 885 S.E.2d 569, 577 n.18 (2022).

[15] During oral argument, the State argued that this Court should not extend *Gant* but should, instead, consider the search of the backpack as a search of Mr. Allman's person incident to arrest under *United States v. Robinson*, 414 U.S. 218 (1973). This argument was not set out in its brief, which did not even cite *Robinson* but, rather, sought to distinguish *Davis*. It was only at oral argument that the State argued that *Robinson* was the appropriate standard in reliance upon *State v. Scullark*, 23 N.W.3d 49, 58 (Iowa 2025), which the State provided as supplemental authority four days prior to oral arguments. In *Scullark*, the Supreme Court of Iowa concluded that the search of a fanny pack attached to the arrestee's person at the time of the arrest was governed by *Robinson* rather than *Gant*. Unlike *Scullark*, at the time of Mr. Allman's arrest, and the time the backpack was searched, the backpack was not close to his person or on his body.

We acknowledge that *Scullark* and *United States v. Perez*, 89 F.4th 247 (1st Cir. 2023), relied upon in *Scullark*, were published after the parties' briefing, so *Scullark* was appropriately identified as an

It is well established in our jurisprudence that "'[a] warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest.' Syllabus Point 6, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980)." *Barefield*, 240 W. Va. 587, 814 S.E.2d 250, Syl. Pt. 6; *Julius*, 185 W. Va. 422, 408 S.E.2d 1, Syl. Pt. 1. Under the facts of this case, we find no need to address whether to adopt *Gant* outside the vehicle context because both *Gant* and Syllabus Point 6 of *Moore* are derived from the rationale set forth in *Chimel*. Therefore, we can decide the reasonableness of the search of Mr. Allman's backpack by applying our previously articulated standard for searches incident to arrest, as set forth in *Moore*.

It is undisputed that Mr. Allman's arrest was lawful because Sgt. McGary had an outstanding warrant for Mr. Allman's arrest. Similarly, Mr. Allman admits that the "[o]fficers lawfully seized the bag and secured it." Therefore, the sole issue was whether the backpack was in the "immediate geographic area under [Mr. Allman's] physical control." Based upon the record before us, we do not believe that it was.

Upon his arrest, Mr. Allman was handcuffed.[16] Sgt. McGary then retrieved the backpack and removed both

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additional authority pursuant to Rule 10(i) of the Rules of Appellate Procedure. However, the guidelines for search of an arrestee's person under *Robinson* were well established and could have been raised in the briefing. As we have previously noted "the failure to raise issues or arguments in an appellate brief commonly renders them waived, so 'appellate courts generally do not consider issues or arguments raised for the first time in oral argument.'" *State v. Maichle*, 249 W. Va. 326, 331 n.5, 895 S.E.2d 181 n.5 (2023) (quoting *Argus Energy, LLC v. Marenko*, 248 W. Va. 98, 103-04, 887 S.E.2d 223, 228-29 (2023)).

[16] At oral argument, the State indicated that Mr. Allman was handcuffed in the front. However, during the suppression hearing,

Mr. Allman and the backpack from the garage, placing the backpack on the hood of the cruiser and Mr. Allman near the cruiser. To the extent that the State argues that the search was necessitated due to Mr. Allman's proximity to the backpack, we note that police cannot circumvent Fourth Amendment protections of a container by choosing to place the container in close proximity to the arrestee. *See, e.g.*, *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995) (finding that exceptions to the warrant requirement do not "pass Fourth Amendment muster if the officers deliberately create them") (citations omitted); *United States v. Johnson*, 12 F.3d 760, 764 (8th Cir. 1993) (explaining that where "the danger of destruction [of evidence]was created by the officers' investigative strategy . . . it could not justify their warrantless entry"); *United States v. Mazzone*, 782 F.2d 757, 761 (7th Cir. 1986) (stating that police may not manipulate circumstances to avoid the warrant requirement to search a closed container by waiting until such container was placed in a vehicle subject to search).

At the time that Sgt. McGary placed the backpack and Mr. Allman near his cruiser, Patrolman Abraham, and possibly other officers, arrived at the scene and were present when the backpack was searched. While we are not unmindful of the dangers faced by law enforcement officers, the warrantless search may not be justified on the implausible chance that Mr. Allman, handcuffed behind his back, in the presence of two or more officers, could have accessed the backpack placed, by the officers, on the hood of the cruiser. Moreover, multiple officers were present at the time that the search was conducted, and if they had legitimate concerns about Mr. Allman accessing

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Sgt. McGary testified that Mr. Allman was handcuffed behind his back.

the backpack, they could have easily relocated the backpack or placed Mr. Allman inside a cruiser, such that he could not access the backpack until they obtained a warrant to open it.

The record reflects that, when the backpack was searched, Mr. Allman was secure, and the backpack was not under Mr. Allman's physical control. The justification for permitting a warrantless search incident to arrest is to "uncover weapons that might be used against the arresting officer and to prevent destruction of evidence by the arrested party." *Moore,* 165 W. Va. at 851, 272 S.E.2d at 813 (discussing the rationale in *Chimel*). At the time of the search, it was not objectively reasonable for officers to believe that the backpack was in an "area from within which [Mr. Allman] might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763; *see Bringham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott v. United States*, 436 U.S. 128 (1978) ("An action is 'reasonable under the Fourth Amendment . . . 'as long as the circumstances, viewed *objectively*, justify [the] action.'"). Accordingly, there is no factual basis for finding that this was a proper search incident to arrest.[17]

This Court has emphasized that the warrant exceptions are "jealously and carefully drawn." *Ladd*, 210

[17] For the same reasons, we reject the State's argument that the search was proper under the exigent circumstances exception. Although not raised below, the State argues on appeal that the search was also proper due to exigent circumstances. It is not necessary for us to address this argument at length. *See State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (discussing the reasoning behind the "raise or waive rule"). Nevertheless, even if the argument had been raised below, we find that, based on the limited record before this Court, the State has identified nothing for us to find "the sense of immediacy or urgency typical of cases justified under exigent circumstances." *Lacy*, 196 W. Va. at 112 n.7, 468 S.E.2d at 727 n.7.

W. Va. at 421, 557 S.E.2d at 828, Syl. Pt. 20, in part (citations and quotations omitted). Moreover, as the Fourth Circuit reminded in *Davis*,

> exceptions to the warrant requirement are *not* "police entitlement[s]" to searches. *Thornton*, 541 U.S. at 624, 124 S.Ct. 2127 (O'Connor, J., concurring). Rather, they are narrow "exception[s]" which must be "justified" by specific circumstances. *Id.* In the words of Chief Justice Roberts, quoting Justice Stewart, "the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow "weighed" against the claims of police efficiency.'" *Riley v. California*, 573 U.S. 373, 401, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). It is the crucial role of courts to ensure that the government conducts searches of property in which individuals have a reasonable expectation of privacy only when permitted by a warrant or when one of a handful of limited exceptions to the warrant requirement applies.

Davis, 997 F.3d at 202–03. Because no exception to the warrant requirement is supported by the record, the circuit court erred in denying Mr. Allman's motion to suppress.

IV. Conclusion

For the reasons stated above, we reverse the circuit court's April 5, 2023, order denying the motion to

suppress, vacate Mr. Allman's drug convictions under counts one through four of the indictment, and remand this matter to the Circuit Court of Wood County for further proceedings consistent with this opinion.[18]

Reversed and remanded with directions.

[18] Mr. Allman requests a new trial in which the bag and its contents are suppressed. No party has stated a position as to Mr. Allman's conviction on counts five and six related to the firearm.