IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081715

ERNEST BAKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

This is an appeal of the judgment of the Court of Appeals of Virginia affirming the March 2, 2007 judgment of the Circuit Court of the City of Petersburg. Ernest Baker was convicted of trespassing on private property in violation of Virginia Code § 18.2-119 and was sentenced to a term in jail of 12 months. (App. 102-103).

Baker appealed his conviction to the Court of Appeals of Virginia, which granted his petition on December 7, 2007. After briefing and oral argument, the Court of Appeals affirmed in an unpublished decision on August 5, 2008. (Record No. 0220-07-2) (App. 109-112). On March 12, 2009, this Court awarded Baker an appeal on three assignments of error. They are quoted below verbatim:

ASSIGNMENTS OF ERROR

I. **THE COURT OF APPEALS ERRED BY UPHOLDING BAKER'S CONVICTION FOR TRESPASSING ON POSTED PROPERTY WHERE THE COMMONWEALTH FAILED TO PROVE THAT THE PROPERTY WAS POSTED BY THE TRUE OWNER, WHICH IS AN ELEMENT OF THE OFFENSE.**

II. **THE COURT OF APPEALS ERRED BY UPHOLDING BAKER'S CONVICTION WHERE THE TRIAL COURT VIOLATED BAKER'S DUE PROCESS RIGHTS BY ALLOWING AN INFERENCE EITHER THAT THE TRUE OWNER HAD POSTED THE PROPERTY, OR THAT THE PROPERTY WAS POSTED, TO SHIFT AN EVIDENTIARY BURDEN TO THE DEFENDANT, AND THE COURT OF APPEALS ERRED BY RULING THAT THE DEFENDANT FAILED TO PRESERVE HIS DUE PROCESS ARGUMENT FOR APPEAL, AND THAT RULE 5A:18 BARRED CONSIDERATION OF THE QUESTION ON APPEAL.**

III. THE COURT OF APPEALS ERRED BY UPHOLDING BAKER'S CONVICTION WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE WAS LEGALLY EXCLUDED FROM THE PROPERTY NOTWITHSTANDING THE SIGNS WHICH WERE POSTED ON THE PROPERTY.

QUESTIONS PRESENTED

I. WAS THE EVIDENCE SUFFICIENT TO CONVICT THE DEFENDANT OF TRESPASSING?

II. DID THE TRIAL COURT IMPROPERLY CONVICT THE DEFENDANT BY RELYING ON AN INFERENCE THAT THE ACTUAL OWNER HAD POSTED THE NO TRESPASSING SIGN, THEREBY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT?

STATEMENT OF FACTS

At about 9:00 p.m. on December 9, 2005, City of Petersburg Police Officer Buffkin was dispatched to the 700 block of Mount Airy Street to investigate a report of shots being fired. (App. 31). He arrived in a patrol car with a recruit Officer, John H. Vasquez, within a minute of the dispatch. (App. 43). The officers saw Baker walking toward them on Mount Airy Street and yelled at him to stop. (App.

43). Both officers were dressed in their police uniforms and displayed police badges. (App. 30, 55).

Baker instead turned away from the officers and began running east on Mount Airy Street. (App. 31). Officer Buffkin saw Baker drop something that "appeared to be black in color." (App. 56-57). While chasing Baker, Officer Buffkin noticed a "No Trespassing" sign posted on the front, left side of the house at 717 Mount Airy Street. Officer Buffkin ordered Baker again to stop, but Baker ran through the yard on the same side as the posted sign. (App. 57). Officer Buffkin tackled Baker after he had crawled through a hole in a wooden fence and landed in sticker-briers. (App. 56).

When the officers asked Baker why he had not stopped when they called to him, he explained he had "just smoked a reefer [and he] didn't want to get in trouble." (App. 35). Baker also said that he had "marijuana in his pocket" and that his cousin owned the property. (App. 41, 58). In the search incident to his arrest, the police discovered a baggie containing cocaine in Baker's pocket. (App. 36).

During the trial on November 9, 2006, Baker presented no evidence. After the trial court overruled Baker's motion to strike, however, defense counsel argued that the evidence was insufficient

to convict because there was "no evidence" the owner at 717 Mount Airy Street had placed the "No Trespassing" sign on the house. In this regard, counsel asserted that the descriptive "posted by the owner" under Code § 18.2-119 was "an element in the statute" that must be proved beyond a reasonable doubt. (App. 75, 78). He also argued there was "no evidence" Baker "was not allowed to be on that property." (App. 76).

In rejecting defense counsel's argument and overruling the motion to strike, the trial judge said:

> [Y]our point is a good one, but I don't think it's quite good enough. There is a presumption that the person has a sign of trespassing in the yard.
>
> It is an interesting point. You make a good point. I concede that. They would have to come out every time somebody trespasses on property and come to Court and say they put the sign there.
>
> I think the State has reached its burden, Mr. Hall, and shows the property was in fact properly posted. The person entered on that property. I think the burden shifts.

(App. 80-81).

In response, defense counsel said, "I understand. We have not offered any evidence." (App. 81). The trial judge repeated that counsel's argument was "interesting." (App. 81).

Defense counsel continued, stating:

> I am renewing my motion [to strike the case], taking beyond a reasonable doubt, they haven't proven he is not allowed to be there.

(App. 82).

For a third time, the trial judge observed counsel's argument was "interesting," but then inquired, "Any evidence?" (App. 82).

In response, defense counsel stated:

> I don't have any evidence. That is why I say I am renewing those beyond a reasonable doubt. That is why we are arguing it should be dismissed." (App. 82).

In convicting Baker of both trespassing and possession of cocaine, the trial judge ruled:

> I overrule the motion. There is no evidence. I will find Mr. Baker guilty of the two charges. We will ask for a presentence report. You want a short form?

Defense counsel said, "Short form is acceptable." (App. 82).

Later, at the sentencing proceeding on January 4, 2007, defense counsel argued that Baker's "amended" and "renewed

motion to suppress" should be granted. (App. 84-86). According to counsel, Moore v. Commonwealth, 272 Va. 717, 636 S.E.2d 395 (2006) compelled the court to suppress the cocaine police had discovered in Baker's pocket on Fourth Amendment grounds. He argued the police should have issued Baker a summons for trespassing under Code § 19.2-74 and released him.[1] The judge agreed, dismissing the cocaine possession conviction, but sentencing Baker to 12 months in jail for trespassing. (App. 103).

ARGUMENT

AS THE TRIER OF FACT, THE TRIAL JUDGE CORRECTLY HELD THE NO TRESPASSING SIGN WAS PROPERLY POSTED AND THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF TRESPASSING.

On appeal in this Court, as was the case on appeal in the Court of Appeals of Virginia, Baker argues that he was denied constitutional due process of law inasmuch as the trial court "shifted an evidentiary burden to the defendant were [sic] the defendant is not required to

[1] On April 23, 2008, the Supreme Court of the United States reversed Moore v. Commonwealth, 272 Va. 717, 636 S.E.2d 395 (2006), ruling the police do not violate the Fourth Amendment when they make an arrest based on probable cause, but prohibited by state law. See Virginia v. Moore, 128 S. Ct. 598, 2008 U.S. LEXIS 3674 (2008).

plead an affirmative defense." (Def. Br. 14). Stated another way, Baker argues that the trial court's inference that the property at 717 Mount Airy Street was properly posted by the owner was unconstitutional because it compelled him to put on evidence to show otherwise.

The Court of Appeals properly recognized, upon its review of the trial record, that Baker did not present this argument in the trial court, intone the term "due process," or argue that the trial court's action "clearly runs afoul of the constitutional authority of In re Winship, 397 U.S. 358 (1970)." (Def. Br. 14). (App. 112). Indeed, during trial, defense counsel affirmed twice he "understood" the judge and did not challenge the ruling that the "State has reached its burden" on the trespassing and the "burden shifts" to him. (App. 80-81).

Further, Baker presented no argument that the judge had unlawfully shifted the burden of persuasion to him or that the prosecution had been unconstitutionally relieved of a portion of its burden of proof. At the point where the evidence closed, Baker simply said, "I understand. I object." (App. 81). Under these facts and circumstances, the Court of Appeals properly rejected the

defendant's constitutional claim as procedurally defaulted under Rule 5A:18. Moreover, Rule 5:25 bars review of his claim.

In order to satisfy this Court's contemporaneous objection rule under Rule 5:25, Baker had to make the same objection in the trial court that he advances on appeal. This Court has ruled innumerable times that the failure to raise the same argument at trial precludes appellate review. See, e.g., Buck v. Commonwealth, 247 Va. 449, 452-453, 443 S.E.2d 414, 416 (1994). An appellate court, in fairness to the trial judge, should not put a "different twist" on what the defendant advanced in the trial court. Commonwealth v. Shifflett, 257 Va. 34, 44, 510 S.E.2d 232, 237 (1999). And, as the Court of Appeals correctly observed, the rule applies equally to purported constitutional claims. (App. 112). See Cherrix v. Commonwealth, 257 Va. 292, 308 n.3, 513 S.E.2d 642, 657 n.3 (1999).

It was incumbent on Baker to promptly and specifically object to the error he now characterizes as "structural" (Def. Br. 15) in the trial court, so that the trial judge might undertake any corrective measures. Because Baker has waited until the appeal of his conviction, he should not now be heard to complain he was unconstitutionally deprived of anything.

Assuming Baker did preserve the issue for review on appeal, the trial judge's remark that the Commonwealth had "reached its burden" was simply an observation that Baker's burden was to produce credible evidence to overcome the reasonable inferences that arose from the evidence. See Yap v. Commonwealth, 49 Va. App. 622, 632, 643 S.E.2d 523, 526 (2007) (due process does not prohibit use of permissive inference as procedural device that shifts the burden of producing some evidence contesting a fact that may otherwise be inferred).

Further, in the context of the entire trial, and not as an isolated statement, the judge's remark also amounted to nothing more than one ground for the ruling denying Baker's motion to strike. See Parker v. Commonwealth, 41 Va. App. 643, 656-657, 587 S.E.2d 749, 755 (2003) ("a trial court's remark is not, in and of itself, the full context simply because it represents the only point at which the court expressly addressed the issue in dispute").

Aside from the point that the trespassing statute does not mention any presumption or permissive inference, Baker also overlooks the fact that this was a bench, not a jury, trial. Thus, the infirmities he identifies by citing on brief to County Court of Ulster

County, New York v. Allen, 442 U.S. 140 (1979) are simply not implicated. (Def. Br. 12). The trial judge, as the fact finder, is presumed to disregard prejudicial or inadmissible evidence. Such a presumption controls, absent clear evidence to the contrary. Hall v. Commonwealth, 14 Va. App. 892, 902, 421 S.E.2d 455, 462 (1992). See also Crest v. Commonwealth, 40 Va. App. 165, 175 n.3, 578 S.E.2d 88, 91 n.3 (2003).

The record establishes that in convicting Baker of trespassing, the judge drew the reasonable inference that the "No Trespassing" sign was properly posted by a homeowner or resident of the house and that Baker was not authorized to enter the yard, especially at night to avoid Petersburg police officers, chasing him on suspicion of firing a weapon nearby. The trial judge also drew the reasonable inference that the property owner had the right to forbid access to the yard. And, as a factual matter, the notion that some other person would "knowingly and intentionally" post the sign without authorization under Code § 18.2-119.1 makes little sense. (Def. Br. 8, 10).

The judge also credited police testimony, especially by Officer Buffkin, that the "No Trespassing" sign was posted on the left side of the house and Baker passed it when he disobeyed Officer Buffkin's

call to stop and cut through the yard at 717 Mount Airy Street. The judge was also free to regard Baker's dubious assertion to police that the property belong to a cousin as a lie to conceal his guilt. See Pearson v. Commonwealth, 221 Va. 936, 946, 275 S.E.2d 893, 900 (1981) (finding incriminatory that "the story [the defendant] told the authorities was a deliberate falsehood designed to conceal what had happened and focus suspicion upon some fugitive gunman").

Finally, the Commonwealth agrees the prosecution is not entitled to a mandatory presumption in this or any other case. There is, however, a fundamental difference between a mandatory presumption where the "trier of fact is compelled to make a certain finding unless the opponent can carry the burden of disposing the presumed fact" and a reasonable inference that the trier of fact merely draws from proven evidence. See 5 Bacigal, Criminal Procedure § 17:8 at 469-471 (2007-2008 ed.). See also Mullaney v. Wilbur, 421 U.S. 684 (1975).

The defendant correctly recognizes that trespass requires proof of Baker's willful intent to trespass. Reed v. Commonwealth, 6 Va. App. 65, 70-71, 366 S.E.2d 274 (1988) (Def. Br. 9). The Commonwealth's unrebutted evidence was that the property was

posted "No Trespassing" by a person who meant to keep intruders off the property and was authorized to do it. Despite the admonition of the posted "No Trespassing" sign, the Commonwealth also proved Baker ignored the warning as he ran from the police and cut through the yard.

Additionally, unlike the defendant in Reed, there is no evidence here of a genuine, albeit mistaken, belief that Baker had the right to enter the property at will. A claim-of-right defense is "usually a question for the trier-of-fact." Groves v. Commonwealth, 50 Va. App. 57, 63, 646 S.E.2d 24, 31 (2007) quoting Reed v. Commonwealth, 6 Va. App. 65, 70, 366 S.E.2d 274, 277 (1988). The burden of going forward with credible evidence to overcome the reasonable inferences of guilt shifted to Baker on the close of the Commonwealth's case, and the "court cannot supply evidence that is lacking." Avent v. Commonwealth, 209 Va. 474, 480, 164 S.E.2d 655, 659 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia upholding the judgment of the Circuit Court of the City of Petersburg should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

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CERTIFICATE OF TRANSMISSION AND SERVICE

On May 15, 2009, the required number of copies of this brief were hand-delivered to the Clerk of this Court and the required number of copies were mailed to Daniel W. Hall, Esquire, Office of the Public Defender, 105 Marshall Street, Second Floor, Petersburg, Virginia 23803.

The Commonwealth does not waive oral argument.

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