IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090175

LEONARD TERRELL WHITAKER

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

WILLIAM C. MIMS
Attorney General of Virginia

LEAH A. DARRON
Senior Assistant Attorney General
SBN: 23823

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
ldarron@oag.state.va.us
(804) 786-2071
(804) 371-0151

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 2

QUESTIONS PRESENTED 3

STATEMENT OF FACTS 4

ARGUMENT 7

I. THE TRIAL COURT CORRECTLY DENIED WHITAKER'S MOTION TO SUPPRESS. 7

Standard of Review and Applicable Law *7*

Analysis *11*

II. THE TRIAL COURT DID NOT ERR IN REVOKING WHITAKER'S PREVIOUSLY SUSPENDED SENTENCES. 17

CONCLUSION 21

CERTIFICATE OF TRANSMISSION AND SERVICE 23

TABLE OF AUTHORITY

CASES

Alsberry v. Commonwealth,
39 Va. App. 314, 572 S.E.2d 522 (2002) 18

Anderson v. Commonwealth,
251 Va. 437, 470 S.E.2d 862 (1996) 20

Bass v. Commonwealth,
259 Va. 470, 525 S.E.2d 921 (2000) 8

Bolden v. Commonwealth,
263 Va. 465, 561 S.E.2d 701 (2002) 8

Brown v. Texas,
443 U.S. 47 (1979) 9

California v. Hodari D.,
499 U.S. 621 (1991) 13

Castaneda v. Commonwealth,
7 Va. App. 574, 376 S.E.2d 82 (1989) 10

Coffey v. Commonwealth,
209 Va. 760, 167 S.E.2d 343 (1969) 20

Dyke v. Commonwealth,
193 Va. 478, 69 S.E.2d 483 (1952) 18

Florida v. Bostick,
501 U.S. 429 (1991) 13

Fore v. Commonwealth,
220 Va. 1007, 265 S.E.2d 729 (1980) 7

Gomez v. Atkins,
296 F.3d 253 (4th Cir. 2002) 17

Grant v. Commonwealth,
223 Va. 680, 292 S.E.2d 348 (1982) 18

Griffin v. Cunningham,
205 Va. 349, 136 S.E.2d 840 (1964) 19

Hamilton v. Commonwealth,
217 Va. 325, 228 S.E.2d 555 (1976) 19

Illinois v. Wardlow,
528 U.S. 119 (2000)..... passim

Immigration and Naturalization Service v. Delgado,
466 U.S. 210 (1984).....9

Leeth v. Commonwealth,
223 Va. 335, 288 S.E.2d 475 (1982) 10

Logan v. Commonwealth,
50 Va. App. 518, 651 S.E.2d 403 (2007).....20

McCain v. Commonwealth,
261 Va. 483, 545 S.E.2d 541 (2001) 8, 9

McCain v. Commonwealth,
275 Va. 546, 659 S.E.2d 512 (2008) 7, 8, 15

McGee v. Commonwealth,
25 Va. App. 193, 487 S.E.2d 259 (1997) (en banc).....9

Murphy v. Commonwealth,
264 Va. 568, 570 S.E.2d 836 (2002) 8

Ohio v. Robinette,
519 U.S. 33 (1996).....10

Ornelas v. United States,
517 U.S. 690 (1996).....8, 10

Rease v. Commonwealth,
227 Va. 289, 316 S.E.2d 148 (1984) 18

Resio v. Commonwealth,
29 Va. App. 616, 513 S.E.2d 892, 895 (1999).....20

Richardson v. Commonwealth,
131 Va. 802, 109 S.E. 460 (1921) 18

Russnak v. Commonwealth,
10 Va. App. 317, 392 S.E.2d 491 (1990).....19

Rutherford v. Blankenship,
468 F.Supp. 1357 (W.D. Va. 1979).....20

Slayton v. Commonwealth,
185 Va. 357, 38 S.E.2d 479 (1946) 19

Taylor v. Waters,
81 F.3d 429 (4th Cir. 1996).....17

Terry v. Ohio,
392 U.S. 1 (1968).....8, 9, 10, 14

Thompson v. Commonwealth,
51 Va. App. 205, 656 S.E.2d 409 (2008).....9

Torchinsky v. Siwinski,
942 F.2d 257 (4th Cir. 1991).....17

United States v. Cortez,
449 U.S. 411 (1981).....10

United States v. Woodrup,
86 F.3d 359 (4th Cir. 1996).....18

Washington v. Commonwealth,
29 Va. App. 5, 509 S.E.2d 512 (1999).....11, 13

White v. Commonwealth,
24 Va. App. 234, 481 S.E.2d 486 (1997).....14

Whitfield v. Commonwealth,
265 Va. 358, 576 S.E.2d 463 (2003) ..... passim

OTHER AUTHORITIES

Section 18.2-248.1, *Code of Virginia* 2

Section 18.2-308, *Code of Virginia* 2

Section 18.2-308.2, *Code of Virginia* 2

Section 18.2-308.4(B), *Code of Virginia*.....1

Section 19.2-303, *Code of Virginia* 18

Section 19.2-306, *Code of Virginia* 18

Section 5:25, Rules of the Supreme Court of Virginia.....16

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090175

LEONARD TERRELL WHITAKER

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Leonard Terrell Whitaker, ("Whitaker" or "the defendant"), was found guilty on May 24, 2007, following a bench trial in the Circuit Court for the City of Richmond, of one count of possession of a Schedule I or II drug while in possession of a firearm, in violation of Code § 18.2-308.4(B) for which he was sentenced to serve two years in prison; one count of

possession of marijuana with the intent to distribute, in violation of Code § 18.2-248.1, for which the court suspended imposition of sentence; one count of possession of a firearm by a convicted felon, in violation of Code § 18.2-308.2, for which he was sentenced to serve five years in prison; and one count of carrying a concealed weapon, in violation of Code § 18.2-308, for which the court suspended imposition of sentence. Additionally, Whitaker was found to have violated the terms of his probation. The trial court revoked all of Whitaker's previously suspended sentences on his November 9, 2005, convictions of possession of cocaine with intent to distribute, statutory burglary and petit larceny, and ordered those sentences to run concurrently with each other and with his "new" offenses. (App. 9-11, 20-21, 150). Final judgment was entered on August 6, 2007. (App. 24-25).

Whitaker's petition for appeal was granted by the Court of Appeals by on May 8, 2008. On December 23, 2008, the Court affirmed Whitaker's convictions in an unpublished order. (App. 27-32). This Court awarded Whitaker an appeal by order entered July 8, 2009.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY HOLDING THAT WHITAKER'S CONDUCT

CONSTITUTED HEADLONG FLIGHT ESTABLISHING REASONABLE ARTICULABLE SUSPICION TO SEIZE HIM.

II. THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY DENYING WHITAKER'S MOTION TO SUPPRESS WHEN THE POLICE LACKED REASONABLE ARTICULABLE SUSPICION TO SEIZE WHITAKER.

III. THE COURT OF APPEALS ERRED BY FAILING TO REACH THE ISSUE, AND FAILING TO FIND THAT, EVEN IF THE POLICE HAD REASONABLE ARTICULABLE SUSPICION TO SEIZE WHITAKER AND RETRIEVE THE FIREARM, THE SEIZURE OF THE MARIJUANA AND COCAINE WAS NOT JUSTIFIED AS A SEARCH INCIDENT TO A LAWFUL ARREST.

IV. THE TRIAL COURT AND THE COURT OF APPEALS ERRED BY REVOKING WHITAKER'S PREVIOUSLY SUSPENDED SENTENCES BASED UPON HIS NEW CONVICTIONS WHERE THOSE CONVICTIONS SHOULD BE REVERSED.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS, AND WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING THAT DENIAL, WHERE THE POLICE SEIZED WHITAKER AND SEARCHED HIM IN VIOLATION OF THE FOURTH AMENDMENT. (ASSIGNMENTS OF ERROR I, II, AND III).

II. WHETHER THE TRIAL COURT ERRED BY REVOKING WHITAKER'S SUSPENDED SENTENCES, AND WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING THE REVOCATION, WHERE THE REVOCATION WAS BASED ON THE NEW CONVICTIONS AT ISSUE IN THIS APPEAL AND THOSE CONVICTIONS SHOULD BE REVERSED. (ASSIGNMENT OF ERROR IV).

STATEMENT OF FACTS

On November 17, 2006, Richmond Police Officers (Lindsey, Young, Gilbert, and Partain) were on patrol in an unmarked police car in an area of the City of Richmond known for violent crime and frequent drug activity. (App. 37-40, 59). The officers were wearing plain clothes with placards identifying them as "Richmond Police." (App. 39).

In the area of 27th and P Streets, the officers observed a group of four men, including Whitaker, congregating on the sidewalk in front of a house. (App. 39). Officer Lindsey had had previous contact with the woman who lived in the house concerning drug dealing in the area and as a result the police were driving by the house several times a day. Neither she nor any other known occupant of the house was among the individuals on the sidewalk. (App. 39-41, 90). Further, the officers had made numerous drug arrests “right there in that particular block.” The area had also been the scene of numerous shootings. (App. 40, 47). The officers exited their vehicle and made contact with the group in order to investigate possible trespassing and to advise them that they could not block the sidewalk. (App. 39-40, 48).

Officer Lindsey approached the home to speak with the occupant in order to determine if the men were trespassing. He was knocking on the

door, when Whitaker got on a bike and rode off down the block. Lindsey followed Whitaker on foot and upon reaching the corner found that Whitaker had abandoned the bicycle (App. 39-42), and was running down the alley. (App. 50-61, 77-79). Officers Young and Gilbert joined in the chase in the patrol car and called out to Whitaker. While Officer Lindsey did not notice anything unusual about Whitaker during the chase, Officers Young and Gilbert noticed that Whitaker held the right side of his bomber jacket in the area of the pocket as he ran. (App. 57, 60, 72, 74). Officer Gilbert testified that he thought that Whitaker had a firearm in his pocket based upon the way he was holding his pocket as he ran. (App. 56, 79, 88, 91).

Lindsey chased Whitaker for about one-and-one-half blocks until he slipped and fell and Lindsey kneeled down on top of him. (App. 42-43, 72). As he and Officer Gilbert were attempting to handcuff Whitaker, Whitaker tried to reach for his pocket. (App. 43). Officer Lindsey told Officer Gilbert to watch Whitaker's right hand, that he was trying to remove something from his pocket. At this point Whitaker stated he had firearm in his pocket. (App. 43, 55). Officer Gilbert then retrieved the firearm, and Whitaker was arrested for possession of a concealed weapon. (App. 43-44, 53).

The officers pursued Whitaker because they had been talking to him and the other members of the group about possible trespass and blocking the sidewalk, the immediate area was an open-air drug market as well as the scene of a lot of violence and they wanted to find out who he was and why he ran from police. (App. 56, 79, 88, 91). Officer Lindsey handcuffed Whitaker because he fled and because the area was known for violence and drug activity. (App. 56-57). Whitaker was arrested after the concealed weapon was removed from his person. (App. 53-54, 56-57).

Officer Young searched Whitaker incident to his arrest and recovered 16 packages of marijuana and a large amount of cash from his pants pockets. (App. 61).

The trial court denied the defendant's motion to suppress and subsequently found Whitaker guilty. (App. 111-112, 134-135).

On July 24, 2007, Whitaker was also found to have violated the terms of previously suspended sentences (05F2517, 05F2576, and 05M2518) based on the new offenses. This was Whitaker's second revocation hearing on the previously suspended sentences. (App. 143-144). The Commonwealth argued that Whitaker was a "certified gang member," who had been sentenced to seven years, but that sentence did not take into account that the court had previously told Whitaker that if he came back

into court on another probation violation he would face "substantial jail time." (App. 144, 150-151). The trial court stated:

> I find that you violated the terms and conditions of your suspended sentences in connection with these four files, and I'm going to revoke all of your suspended time in these cases, order that it run concurrent with each other and with your new time, [and] remove you from supervised probation.

(App. 150).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED WHITAKER'S MOTION TO SUPPRESS.

Standard of Review and Applicable Law

The defendant has the burden to show that, considering the evidence in the light most favorable to the Commonwealth, the trial court's denial of his suppression motion was reversible error. McCain v. Commonwealth, 275 Va. 546, 551-552, 659 S.E.2d 512, 516 (2008); Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980).

A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that this Court reviews de novo on appeal. McCain, 275 Va. at 551-552, 659 S.E.2d at 516 (citing Murphy v. Commonwealth, 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002)). See Bolden v. Commonwealth, 263 Va. 465, 470, 561

S.E.2d 701, 704 (2002); McCain v. Commonwealth, 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001); see also Ornelas v. United States, 517 U.S. 690, 691, 699 (1996). In making such a determination, the appellate court gives deference to the factual findings of the circuit court, but independently determines whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. McCain, 275 Va. at 551-552, 659 S.E.2d at 516; Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000).

Fourth Amendment jurisprudence recognizes three categories of police-citizen confrontations: (1) consensual encounters, (2) brief, minimally intrusive investigatory detentions, based upon specific, articulable facts, commonly referred to as Terry[1] stops, and (3) highly intrusive arrests and searches founded on probable cause. McGee v. Commonwealth, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (en banc). See Thompson v. Commonwealth, 51 Va. App. 205, 214, 656 S.E.2d 409, 417 (2008).

"An encounter between a law enforcement officer and a citizen in which the officer merely identifies himself and states that he is conducting a

[1] Terry v. Ohio, 392 U.S. 1 (1968)

narcotics investigation, without more, is not a seizure within the meaning of the Fourth Amendment but is, instead, a consensual encounter." McGee, 25 Va. App. at 199, 487 S.E.2d at 262. Likewise, "a police request made in a public place for a person to produce some identification, by itself, generally does not constitute a Fourth Amendment seizure." McCain, 261 Va. at 491, 545 S.E.2d at 546 (citing Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984)).

Further, a consensual encounter may evolve into a Terry stop. "In order to justify the brief seizure of a person by such an investigatory stop, the police officer must 'have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" Whitfield v. Commonwealth, 265 Va. 358, 361, 576 S.E.2d 463, 465 (2003) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)). "To determine whether a police officer had a particularized and objective basis for suspecting that the person stopped may be involved in criminal activity, a court must consider the totality of the circumstances." Id. (citation omitted).

Reasonable suspicion is "'a particularized and objective basis' for suspecting the person stopped of criminal activity." Ornelas, 517 U.S. at 696. However, "[t]here is no 'litmus test' for reasonable suspicion. Each instance of police conduct must be judged for reasonableness in light of the

particular circumstances." Castaneda v. Commonwealth, 7 Va. App. 574, 580, 376 S.E.2d 82, 85 (1989) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)). "In order to determine what cause is sufficient to authorize police to stop a person, cognizance must be taken of the 'totality of the circumstances — the whole picture.'" Leeth v. Commonwealth, 223 Va. 335, 340, 288 S.E.2d 475, 478 (1982) (citing United States v. Cortez, 449 U.S. 411, 417 (1981)); see Ohio v. Robinette, 519 U.S. 33, 39 (1996). Stated differently, the Fourth Amendment does not involve application of bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever changing complexity of human life. It consequently uses the general terms "unreasonable searches and seizures." And that "[r]easonableness . . . is measured . . . by examining the totality of the circumstances." Robinette, 519 U.S. at 39.

In determining what objective facts an officer may rely upon in developing a reasonable suspicion, the United States Supreme Court has held:

> Headlong flight — wherever it occurs — is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. . . . Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000); see also Whitfield, 265 Va. at 362, 576 S.E.2d at 465; Washington v. Commonwealth, 29 Va. App. 5, 13, 509 S.E.2d 512, 516 (1999) (en banc) ("A single instance of attempted flight or furtive behavior by a suspect is suggestive of guilt . . . .").

Additionally, in Wardlow, the Supreme Court recognized that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." 528 U.S. at 124. Further, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a Terry analysis." Id.

Analysis

Here, the Court of Appeals correctly held that the contact between the police and Whitaker began as a consensual encounter but quickly evolved into an investigatory stop and ultimately an arrest. (App. 31-32). The officers observed a group of men, including the defendant, loitering in front of a house whose occupant had complained of drug activity and the

location was a known open air drug market and scene of numerous shootings. The officers approached the group to investigate a possible trespass offense and informed the men they could not block the sidewalk. During this process Whitaker got on a bike and rode off down the street. Officer Lindsey followed Whitaker on foot and upon reaching the corner found that Whitaker had abandoned the bicycle (App. 39-42), and was running down the alley. (App. 50-61, 77-79).

Officers Young and Gilbert joined in the chase, and noticed that Whitaker held the right side of his bomber jacket in the area of the pocket as he ran. (App. 79). The officer's observations led to the belief that Whitaker had a firearm in his pocket. (App. 79, 87-88).[2]

The facts in Whitfield are instructive:

> About 3:30 a.m., Officer Barnes observed defendant, apparently trespassing on private property, near an abandoned building in an area notorious for crime problems. When the officer aimed the spotlight of his marked police vehicle toward defendant, he began to run away. When Officer Bonday joined the chase, defendant continued to run and to evade the officer. When defendant could not escape over a high fence, he was detained.

[2] A seizure does not occur in the absence of physical force used by a law enforcement officer or a defendant's submission to an officer's assertion of authority. Thus, Whitaker was not, in fact, detained until he slipped and fell and Officer Gilbert kneeled on him. Florida v. Bostick, 501 U.S. 429, 434 (1991); California v. Hodari D., 499 U.S. 621, 626 (1991); Washington v. Commonwealth, 29 Va. App. 5, 10-11, 509 S.E.2d 512, 514 (1999).

Id. This Court's decision in Whitfield dictates the outcome here:

> The characteristics of the area and the defendant's conduct, including his unprovoked flight, justified the stop, and further investigation. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion. (citations omitted) Headlong flight — wherever it occurs — is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.

265 Va. at 362, 576 S.E.2d 465 (citing Wardlow, 528 U.S. at 124). Consequently, this Court upheld the Court of Appeals decision that the trial court had properly refused to suppress evidence seized from Whitfield's person. Id.

Further, the Court in Wardlow also rejected the argument that flight from police cannot establish reasonable suspicion of criminal activity because that flight may be motivated by innocent reasons. The Court pointed out that the conduct observed by the officers in Terry — two individuals pacing in front of a store, peering into the window, and conferring with each other — "was ambiguous and susceptible of an innocent explanation." Id. Nevertheless, because this conduct "also suggested that the individuals were casing the store for a planned robbery," Terry held that the officers could stop the individuals "to resolve the ambiguity." Id. "In allowing such detentions," the Court explained, "Terry accepts the risk that officers may stop innocent people." Id. at 126.

Further, in this case, before he was stopped, Officers Young and Gilbert noticed that Whitaker was holding his bomber jacket in the area of the pocket as he ran. (App. 57, 60, 72, 74). The officers suspected that Whitaker was armed, and their reasonable suspicion was proven correct. It is appropriate to consider this testimony as it is part of the collective knowledge of all officers involved in Whitaker's apprehension. See Whitfield 265 Va. at 362, 576 S.E.2d at 465 and White v. Commonwealth, 24 Va. App. 234, 239, 481 S.E.2d 486 (1997).

Further, upon being detained, Whitaker reached for his pocket causing Officer Lindsey to warn the other officers to watch Whitaker's right hand; he was trying to remove something from his pocket. At this point Whitaker stated he had a firearm in his pocket and he was arrested for carrying a concealed weapon. (App. 43, 55).

Plainly, Whitaker's headlong flight in an area known for drug activity and shootings and the added fact of his holding his pocket as he ran provided the officers with reasonable suspicion to believe criminal activity may be afoot justifying an investigatory stop. His reaching for his pocket upon apprehension served to confirm the officers' reasonable belief that Whitaker might be involved in criminal activity. The facts warranted an investigatory stop. Indeed, a determination that reasonable suspicion exists

need not rule out the possibility of innocent conduct. Wardlow, 528 U.S. at 125.

Whitaker argues that Officer Gilbert's “hunch” about Whitaker being armed was an insufficient reason to justify the search of Whitaker’s person. Whitaker is correct that “an officer must be able to articulate more than an unparticularized suspicion or ‘hunch’ that criminal activity is afoot” to justify a search. McCain, 275 Va. at 552, 659 S.E.2d at 516 (citing Wardlow, 528 U.S. at 123-24). However, the fact that Officer Gilbert had a “hunch” about Whitaker being armed is not determinative here. Officer Lindsey observed Whitaker reaching for his pocket and commented on this fact prior to being informed of any “hunch” that Officer Gilbert may have had. There is nothing in the record to indicate that Officer Lindsey relied upon or was even aware of Officer Gilbert's “hunch.” Additionally, Whitaker's spontaneous admission that he was armed, before any search was instigated, provided ample justification for the officers to retrieve the weapon.

Finally, Whitaker argues that his detention and removal of a weapon concealed on his person failed to establish probable cause for his arrest and the search of his person that revealed cocaine and marijuana. (D.Br. at 20-21). Whitaker did not raise this particular argument in the trial court. He admits that the trial court did not specifically rule on this argument. (App.

20-21, 111-112). The record shows that the trial court's attention was focused on holdings in Whitfield and Wardlow and reasonable suspicion to stop the defendant when denying the motion to suppress. Id. The defendant never argued the facts did not warrant a probable cause to search his person incident to a lawful arrest for possessing a concealed weapon. Thus, Rule 5:25 precludes him from raising this claim on appeal.

In any event, even though probable cause means more than a "mere suspicion," it is not necessary for the facts to be "sufficient to convict" the accused of the offense. Gomez v. Atkins, 296 F.3d 253, 262 (4th Cir. 2002) (quoting Taylor v. Waters, 81 F.3d 429, 434 (4th Cir. 1996)). Unlike a factfinder at trial, "reasonable law officers need not 'resolve every doubt about a suspect's guilt before probable cause is established.'" Id. (quoting Torchinsky v. Siwinski, 942 F.2d 257, 260 (4th Cir. 1991)). Here, together with his possession of the gun, the defendant's presence in an area known for drug sales and shootings, his head long flight and his attempt to pull out his weapon when stopped by police supplied probable cause to arrest for carrying a concealed weapon. The record contains no discussion of a permit for the weapon because the issue did not arise in the trial court. More importantly, however, there is no evidence that the defendant said he had a permit for the weapon. Accordingly, the evidence was sufficient to

show probable cause for arrest and Whitaker was searched incident to a lawful arrest.

II. THE TRIAL COURT DID NOT ERR IN REVOKING WHITAKER'S PREVIOUSLY SUSPENDED SENTENCES.

Whitaker contends that if his new convictions are overturned, so too should the revocations adjudged by the court at the revocation hearing concerning his previously suspended sentences. His claim should be rejected.

Preliminarily, it bears noting that the probation statutes "afford to trial courts a valuable means of bringing about the rehabilitation of offenders against the criminal laws." Rease v. Commonwealth, 227 Va. 289, 294, 316 S.E.2d 148, 152 (1984) (citation omitted). These statutes are highly remedial, and are construed liberally so as not to restrict the power of the court to revoke for breach of the terms and conditions of probation beyond the limitations fixed by the statutes. Id. (citing Dyke v. Commonwealth, 193 Va. 478, 484, 69 S.E.2d 483, 486-87 (1952); Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); Richardson v. Commonwealth, 131 Va. 802, 811, 109 S.E. 460, 462 (1921)).

This Court looks upon the granting of probation as an "act of grace." Id. "[U]pon revocation of the suspended sentence, the defendant is punished in accordance with a previously imposed sentence not for the conduct prompting the revocation but for his commission of the original crime." Alsberry v. Commonwealth, 39 Va. App. 314, 320-321, 572 S.E.2d 522, 527 (2002). See United States v. Woodrup, 86 F.3d 359, 362 (4th Cir. 1996). "It is beyond question that '[a] court which has ordered a suspension of sentence undoubtedly has the power to revoke it when the defendant has failed to comply with the conditions of the suspension.'" Russnak v. Commonwealth, 10 Va. App. 317, 321, 392 S.E.2d 491, 493 (1990) (quoting Griffin v. Cunningham, 205 Va. 349, 354, 136 S.E.2d 840, 844 (1964)).

Pursuant to Code § 19.2-303, "[a]fter conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or in part and in addition may place the accused on probation under such conditions as the court shall determine . . . ." Code § 19.2-306 provides in pertinent part:

> A. In any case in which the court has suspended the execution or imposition of sentence, the court may revoke the suspension of sentence for any cause the court deems sufficient . . . .

A trial court's finding of fact and judgment as to an order of revocation is reversible only upon a *clear* showing of abuse of discretion. Hamilton v. Commonwealth, 217 Va. 325, 228 S.E.2d 555 (1976); Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946). Whitaker has failed to show an abuse of discretion.

Because a revocation proceeding is not "a stage of criminal prosecution," a probationer accused of violating the conditions of probation "is not entitled to the same due process protections afforded a defendant in a criminal prosecution." Logan v. Commonwealth, 50 Va. App. 518, 525, 651 S.E.2d 403, 406 (2007). In Anderson v. Commonwealth, 251 Va. 437, 440, 470 S.E.2d 862, 863 (1996), this Court held that "the exclusionary rule is not applicable in a probation revocation proceeding absent a showing of bad faith on the part of the police." Id. at 440, 470 S.E.2d at 863. The Court recognized that "[a]pplication of the exclusionary rule in a probation revocation proceeding would frustrate the remedial and protective purposes of the probation system, because a court would not be permitted to consider relevant evidence of the probationer's rehabilitation or regression." Id.

A reversal of an underlying conviction does not necessarily require the reversal of the revocation of a suspended sentence that flows from that

conviction. Resio v. Commonwealth, 29 Va. App. 616, 621-22, 513 S.E.2d 892, 895 (1999) (holding that the suspension of a suspended sentence can be revoked based on "substantial misconduct," that such revocation does not hinge on the "conviction" of a criminal offense based on that misconduct). ***Good behavior is a condition of every suspension, with or without probation, whether expressly so stated or not.*** Coffey v. Commonwealth, 209 Va. 760, 167 S.E.2d 343 (1969); Rutherford v. Blankenship, 468 F.Supp. 1357 (W.D. Va. 1979).

Whitaker violated the terms of his suspended sentence. He was not of good behavior. He committed several crimes while on probation and the court had warned him at his previous probation violation proceeding that he faced substantial time if he violated again. The trial court stated:

> I find that you violated the terms and conditions of your suspended sentences in connection with these four files, and I'm going to revoke all of your suspended time. . . .

(App. 150). Thus, even assuming he prevails on the first issue, Whitaker has failed to demonstrate a *clear* showing of abuse of discretion regarding the revocation hearing. The trial judge did not state that he was revoking the defendant as a result of his *convictions; the court said he was revoking the previously suspended sentences "in connection with these four files."*

(App. 150). Accordingly, imposition of his previously suspended sentences should stand.

CONCLUSION

The judgments of the Court of Appeals and the Circuit Court for the City of Richmond should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

By: _____
Counsel

WILLIAM C. MIMS
Attorney General of Virginia

LEAH A. DARRON
Senior Assistant Attorney General
Bar No.: 23823

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)

CERTIFICATE OF TRANSMISSION AND SERVICE

On August 26, 2009, the required copies of this brief were hand-delivered to the Clerk of this Court, and three copies were mailed to Jessica M. Bulos, Assistant Appellate Defender, Office of the Appellate Defender, Seventh and Franklin Building, 701 East Franklin Street, Suite 1001, Richmond, Virginia 23219. An electronic copy of this brief has been provided to the Court.

_____

Leah A. Darron
Senior Assistant Attorney General