IN THE

Supreme Court of Virginia

RECORD NO. 090175

LEONARD TERRELL WHITAKER,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Jessica M. Bulos, Esq. (VSB # 74043)
Assistant Appellate Defender
Office of the Appellate Defender
701 East Franklin Street, Suite 1001
Richmond, VA 23219
Tel. (804) 225-3598
Fax (804) 225-3673
JBulos@idc.virginia.gov

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090175

LEONARD TERRELL WHITAKER,

Appellant,

VS.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant, Leonard Terrell Whitaker, was indicted by a grand jury for the City of Richmond, charging that, on or about November 17, 2006, he possessed a firearm on or about his person while unlawfully in possession of a Schedule I or Schedule II substance (indictment 07F637), that he possessed a firearm after having been previously convicted of a felony (indictment 07F934), that he possessed with intent to distribute more than one-half ounce but not more than five pounds of marijuana (indictment

07F640), and that he possessed a concealed weapon (07M935). Whitaker was also charged with violating the terms of his probation in Richmond City Circuit Court case numbers 05F2517 (possession with intent to distribute cocaine), 05M2518 (possession marijuana), 05F2576 (statutory burglary), and 05F2577 (petit larceny).

Whitaker filed a motion to suppress in connection with the new firearm and drug offenses. The motion was heard and denied on May 24, 2007 by the Honorable Richard D. Taylor, Jr., Judge of the Circuit Court for the City of Richmond. That same day, the trial court found Whitaker guilty of the new firearm and drug offenses as charged.

On July 24, 2007, after consideration of a presentence report and additional evidence, the trial court (Taylor, J., presiding) sentenced Whitaker to a total of seven (7) years of active incarceration, with additional suspended time. That same day, Whitaker appeared before the Honorable Bradley B. Cavedo, Judge of the Circuit Court for the City of Richmond, and was convicted of violating his probation based on the new convictions. The trial court revoked the entirety of his previously suspended sentences in case numbers 05F2517, 05M2518, 05F2576, and 05F2577.

Whitaker timely noted an appeal. By a *Per Curiam* Order issued May 8, 2008, the Court of Appeals of Virginia granted Whitaker's Petition for

Appeal. By an unpublished opinion issued December 23, 2008, the Court of Appeals affirmed Whitaker's convictions. *See Whitaker v. Commonwealth*, Record No. 1859-07-2, slip op. (Va. Ct. App. 2008) (unpublished), at Joint Appendix ("App.") 27-32. Whitaker thereafter appealed to this Honorable Court, which awarded him an appeal by order dated July 8, 2009.

ASSIGNMENTS OF ERROR

I. The trial court and Court of Appeals erred by holding that Whitaker's conduct constituted headlong flight providing reasonable articulable suspicion to seize him.

II. The trial court erred by denying the motion to suppress, and the Court of Appeals erred by affirming that denial, when the police lacked reasonable articulable suspicion to seize Whitaker.

III. The Court of Appeals erred by failing to reach the issue, and by 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][1] erred by revoking Whitaker's previously suspended sentences, and 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.

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; *Preserved at* Joint Appendix ("App.") at 17-18 (motion to suppress); 96-112 (arguments and ruling on suppression); Opening Brief filed in the Court of Appeals at 8-17; Reply Brief filed in the Court of Appeals at 2-7).

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; *Preserved at* App. 148-51 (argument

[1] Appellate counsel inadvertently omitted the word "court" in Assignment of Error IV when drafting the Petition for Appeal to this Court.

and discussion with court regarding basis for revocation); Opening Brief at 18-19; Reply Brief at 7-8).

STATEMENT OF FACTS

On November 17, 2006, Officers Lindsey, Young, Gilbert and Partain, all of the Richmond Police Department, were riding together on patrol in an unmarked police car. (App. 38, 59). The officers were wearing placards identifying themselves as "Police." (App. 38). The area they were patrolling was known as a "high crime" and "high drug" area, and other officers in Lindsey's unit had made "numerous drug arrests" there. (App. 40).

As the officers approached the area near 27th and P Streets, they observed a group of four people sitting and/or standing on the sidewalk. (App. 39). Whitaker was among the group, as was a gentleman by the name of Arthur Moore. (App. 39, 90). There was a house near the sidewalk, with a fence around it, and, according to Officer Gilbert, the resident of the house "lets Mr. Moore, and whoever is out there with him, come up in the yard." (*Id.*). Apparently, on some days, she asks them not to come on her property, but on other days "they are sitting on their porch." (App. 90-91). On this day, the individuals were not inside the fenced-in yard that the officers could recall. (App. 90). Mr. Moore's girlfriend lives at the house. (*Id.*).

The officers approached Mr. Moore and his friends because "it's a high drug area" and "they were obstructing free passage of others" by sitting on the sidewalk area. (App. 90). They also approached to investigate the possibility of trespassing. (App. 40). Officer Lindsey could not recall whether Whitaker had been standing on the sidewalk, or sitting on the curb. (App. 48-49).

The officers questioned the group, and then Lindsey walked to the residence to knock on the door and inquire if the group had permission to be there. (App. 41). Lindsey did not instruct Whitaker to remain or advise him that he was not free to leave. (App. 52). After Lindsey had knocked on the door several times, he noticed that Whitaker had gotten on his bicycle and was riding down the block. (App. 41-42). Lindsey walked after him and when Lindsey got to the corner, Whitaker "was off his bicycle and had beg[u]n running through the alley eastbound." (App. 42).

Lindsey chased Whitaker down the alley and apprehended him about 2 ½ blocks away on 29th Street. (*Id.*). While he ran, Whitaker "went around a couple of houses [and] jumped a couple of fences[.]" (App. 79, 86). Lindsey testified he did not notice anything unusual about Whitaker during the chase. (App. 42). Lindsey did not order Whitaker to stop at any time. (*Id.*). Lindsey was able to apprehend Whitaker because Whitaker slipped

on some gravel and fell. (App. 43). At that point, Lindsey kneeled down on top of Whitaker and attempted to handcuff him. (*Id.*).

After Lindsey had apprehended Whitaker and put his knee in Whitaker's back, Officer Gilbert arrived on the scene to assist. (App. 53). As the officers were trying to handcuff Whitaker, he was trying to reach around towards his pocket and told Lindsey, "Sir, I've got a firearm in my pocket." (App. 43, 55). Officer Gilbert then retrieved the firearm, and Whitaker was immediately arrested for possession of a concealed weapon. (App. 43-44, 53). Whitaker did not ever struggle with the officers. (App. 43). Officer Lindsey testified that the reason he initially handcuffed Whitaker was because Whitaker was running away. (App. 56).

Officer Young's testimony generally corroborated Lindsey's account. Young added, however, that he had noticed Whitaker holding the right side of his jacket pocket while he was running, though he never mentioned this to any other officer. (App. 60, 74). Young did not arrive at the scene until after Whitaker was arrested and other officers were already conducting a search of Whitaker's person. (App. 61). Young also searched Whitaker, retrieving cocaine, narcotics, and money from his pants pockets. (*Id.*).

Officer Gilbert testified he had also noticed Whitaker holding his jacket pocket while he was running and that he (Gilbert) had a "hunch" that

Whitaker had a firearm in his pocket. (App. 79, 88, 91). Prior to this, Gilbert had not observed anything to suggest that Whitaker was engaging in any criminal conduct. (App. 88). Gilbert further noted that he never told Whitaker he was not free to leave. (App. 89). However, once Whitaker began to run, Gilbert acknowledged that "[w]e were going to stop him and find out who he was and why he was running." (App. 91).

On redirect examination, Officer Lindsey confirmed he never noticed anything abnormal about the way Whitaker was running, and he did not recall either of the other officers telling him that Whitaker had been holding his right side. (App. 93).

The trial court denied the motion to suppress and, after further evidence, found Whitaker guilty of the charges. (App. 111-12, 134-35). On July 24, 2007, the Honorable Bradley B. Cavedo, Judge of the Circuit Court for the City of Richmond, found Whitaker guilty of violating the terms of his previously suspended sentences based solely on the new convictions, and revoked the entirety of the suspended sentences. (App. 144, 150; *see also* App. 153-56 (Probation Violation Report)).

ARGUMENT

I. The police did not have reasonable articulable suspicion to seize Whitaker. (Assignments of Error I & II/Question Presented I).

Standard of Review

On appeal from a trial court's denial of a motion to suppress, 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, 552, 659 S.E.2d 512, 515 (2008). The appellate courts give deference to the factual findings of the trial court, granting to the prevailing party all reasonable inferences fairly deducible from the evidence. *Id.* at 553, 659 S.E.2d at 515. However, the appellate courts review "*de novo* the trial court's application of defined legal standards such as probable cause and reasonable suspicion to the particular facts of the case." *Simmons v. Commonwealth,* 238 Va. 200, 204, 380 S.E.2d 656, 659 (1989) (citations omitted).

Discussion

It is well-settled that the Fourth Amendment guarantees "'[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]'" *El-Amin v.*

Commonwealth, 269 Va. 15, 20, 607 S.E.2d 115, 117 (2005) (*quoting* U.S. Const. amend. IV). The United States Supreme Court has concluded that a "limited stop and search of a person, where based on a reasonable articulable suspicion that he or she is, has, or is about to engage in criminal activity and may be armed and dangerous, is reasonable under the Fourth Amendment." *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Terry v. Ohio*, 392 U.S. 1, 24 (1968)); *see also Jackson v. Commonwealth*, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004) ("An investigatory stop (sometimes referred to as a "Terry stop") . . . constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments 'even though the purpose of the stop is limited and the resulting detention quite brief'") (citation omitted).

The Court looks to the totality of the circumstances in assessing whether an investigatory detention was supported by reasonable suspicion. *See Whitfield v. Commonwealth*, 265 Va. 358, 361, 576 S.E.2d 463, 465 (2003). Furthermore, an assessment of reasonable suspicion "involves application of an objective rather than a subjective standard." *McCain*, *supra*, 275 Va. at 552, 659 S.E.2d at 516. An individual's "presence in a 'high crime area,' standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity." *Illinois v. Wardlow*, 528 U.S.

119, 124 (2000); *see McCain*, 275 Va. at 553, 659 S.E.2d at 516 ("A person's Fourth Amendment rights are not lessened simply because he or she happens to live or travel in a 'high crime' area"); *Riley v. Commonwealth*, 13 Va. App. 494, 498, 412 S.E.2d 724, 726 (1992) ("[T]he general character of a neighborhood does not supply 'a particularized and objective basis for suspecting the particular person stopped of criminal activity'") (citation omitted); *see also United States v. Black*, 525 F.3d 359, 367, 370 (4th Cir. (Va.) 2008) ("[B]y making much of the fact that the events of this case transpired in a 'high crime' area – notably near public housing projects – the majority embarks on the treacherous path of lowering the Fourth Amendment protection afforded to people in low-income areas"; "By creating zones of lower constitutional protection in poor neighborhoods, the majority, albeit unwittingly, engages in a blatant display of class discrimination of the basest variety") (Gregory, J., *dissenting*); *Wardlow, supra*, 528 U.S. at 132, 133 n.10 ("Among some citizens, particularly minorities . . . there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence"; discussing reports of Attorney Generals of several states that note disparate, and often unconstitutional,

treatment of minorities by police) (Stevens, J., *concurring in part, dissenting in part*).

The Court of Appeals characterized Whitaker's conduct as an "unprovoked attempt to flee the scene". *See* App. 31-32. Citing *Illinois v. Wardlow*, 528 U.S. 119 (2000) and *Whitfield v. Commonwealth*, 265 Va. 358, 576 S.E.2d 463 (2003), the Court of Appeals concluded "Lindsey's seizure of Whitaker was justified" because "Whitaker's unprovoked attempt to flee the scene, in a high crime area with a high incidence of drug activity, provided Officer Lindsey with a reasonable suspicion that Whitaker was involved in illegal activity." App. 31, 31-32. However, *Wardlow* and *Whitfield* are distinguishable from the present case.

In *Wardlow*, eight officers in a four-car caravan converged on an area known for heavy narcotics trafficking, expecting to encounter a large number of drug customers and individuals serving as lookouts. *Id.* at 124. The officers decided to investigate Wardlow after Wardlow, who was standing next to a building holding an opaque bag, fled as the caravan approached. *Id.* at 121-22. In *that* context, the closely divided United States Supreme Court held that the officers were "justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further." *Id.* at 125.

In *Whitfield*, the officer was patrolling an area known for illegal drug activity, burglaries, and prostitution, and in which several burglaries had recently occurred. 265 Va. at 360, 576 S.E.2d at 465. At 3:30 a.m., the officer noticed Whitfield, dressed in all black, standing on private property between a condemned house and an occupied dwelling. *Id.* The officer knew that the area in which Whitfield was standing was not a common cut-through to other property. *Id.* When the officer shined the spotlight of his police cruiser on Whitfield, he "'took off running.'" *Id.* (citation omitted). On these facts, the Virginia Supreme Court concluded: "The characteristics of the area and the defendant's conduct, *including* his unprovoked flight, justified the stop, and further investigation." *Id.* at 362, 576 S.E.2d at 465 (emphasis added).

The facts of the present case are significantly distinguishable. Here, in contrast to *Wardlow* and *Whitfield*, the officers were not, on that day, expecting to encounter individuals involved in either narcotics trafficking or burglaries. Rather, as the trial judge noted, the officers initially approached Whitaker and the other individuals to investigate a possible trespass and because the individuals were allegedly obstructing the public sidewalk. (App. 111). However, any reasonable suspicion of trespass was negated by Officer Gilbert's knowledge that the resident of the house often allowed

Mr. Moore and "whoever is out there with him" to be on her property. *See* App. 103 (trial judge observing that, because the officer knew the resident oftentimes permitted the individuals to be on her property, there was no obvious basis to believe a trespass occurred). Furthermore, there was no testimony or other evidence that the four individuals were standing and/or sitting on *private* property when the officers approached. Therefore, Whitaker's subsequent flight did not give rise to reasonable suspicion that he was trespassing.

Moreover, as Officers Lindsey and Gilbert testified, Whitaker's conduct did not suggest that he had engaged, was engaging, or intended to engage in any criminal conduct. (*See* App. 88, 93). Albeit a high crime and drug area, the record is devoid of any evidence giving rise to a reasonable suspicion that Whitaker was involved in any drug offense. *See Thompson v. Commonwealth*, 54 Va. App. 1, 10, 11-12, 675 S.E.2d 832, 836, 837 (2009) (holding that the accused's presence in an "open-air drug market" outside of a convenience store where the officer had previously conducted undercover drug buys did not amount to a reasonable suspicion the accused was engaged drug activity). Significantly, the trial court found that the officers had no basis to suspect Whitaker of criminal activity prior to following him. *See* App. 101 ("The officer said that he has absolutely no

basis to believe that any crime was being committed"); 106 ("I didn't hear anybody say that they were suspicious that criminal activity may be afoot or that a crime -- I thought all they said was they wanted to know why he was running").

True, Officers Gilbert and Young testified they saw Whitaker holding the right side of his jacket pocket as he ran. However, Officer Lindsey noted that he never noticed anything abnormal about the way Whitaker was running. Nor could Lindsey recall the other officers telling him Whitaker had been holding his right side. As the apprehending officer, Lindsey was without personal knowledge of any facts giving rise to reasonable, articulable suspicion to support the seizure. *White v. Commonwealth*, 24 Va. App. 234, 238, 481 S.E.2d 486, 488 (1997) (*en banc*) (holding that to be a lawful *Terry* stop, "the [detaining] officers' own observations and knowledge must have provided them with an articulable and reasonable suspicion of White's involvement in criminal activity").

In any event, Officer Gilbert testified he had only a "hunch" that Whitaker had a firearm in his jacket pocket. Indeed, the trial judge found: "I don't see it as any more than a guess or a hunch here. And they told me they did not -- no observable criminal activity." (App. 103). It is well-settled that an officer "must be able to articulate more than an 'inchoate and

unparticularized suspicion or "hunch"' of criminal activity." *Wardlow*, 528 U.S. at 123-24 (quoting *Terry*, *supra*, 392 U.S. at 27).

Unlike in *Wardlow* and *Whitfield*, *supra*, Whitaker was neither holding any suspicious items (like the opaque bag in *Wardlow*) nor wearing any suspicious clothing (like Whitfield, who was dressed in all black at *3:30 a.m.* and standing on *private* property in an area where several burglaries had recently occurred). In *Wardlow* and *Whitfield*, the officers observed additional suspicious behavior more than merely the suspects' flight in a high crime area. Such additional factors, which, *along with* the supsects' flight, justified the seizures in *Wardlow* and *Whitfield*, are markedly absent from the present case. *See Buck v. Commonwealth,* 20 Va. App. 298, 303, 456 S.E.2d 534, 536 (1995) (recognizing that "flight alone may not supply sufficient reason to suspect a person of criminal activity"); *see also State v. Nicholson*, 188 S.W.3d 649, 661 (Tenn. 2006) (holding that the accused's flight from officers in a public housing area being investigated for gang activity did not give rise to reasonable articulable suspicion to detain when the officer did not testify either that he witnessed criminal activity immediately prior to seeing the accused or that the accused was behaving in a manner indicative of criminal conduct prior to his flight).

Nothing in *Wardlow* or *Whitfield* sanctions a *Terry* stop merely because, as the trial court recognized in the present case, the police "want[] to know why [a person] was running." (App. 106). *See People v. Ray*, 764 N.E.2d 173, 179 (Ill. App. 3d 2002) ("In *Wardlow*, the Supreme Court did not state a *per se* rule that flight from an officer is sufficient in and of itself to support a *Terry* stop, but instead, the Court reflected that this is *a factor* to be considered among the totality of the circumstances"), *appeal denied*, 775 N.E.2d 7 (Ill. 2002) (emphasis added); *see also Wardlow*, 528 U.S. at 126 (Stevens, J., concurring and dissenting) (noting that the majority rejected a *per se* rule "authorizing the temporary detention of anyone who flees at the mere sight of a police officer").[2]

Significantly, moreover, in *Wardlow* and *Whitfield*, the defendants fled upon the officers' *initial approach*. Here, Whitaker cooperated with the officers when they initially approached and, only after Officer Lindsey walked away, did Whitaker get on his bike and pedal down the block. As Officers Lindsey and Gilbert testified, the officers did not advise Whitaker he needed to remain at the scene and that he was not free to leave. (App.

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[2] After extensive research, Appellant's Counsel did not locate any post-*Wardlow* published decisions, in which either Virginia appellate court has held that headlong flight in a high crime area *alone* gives rise to reasonable suspicion.

52, 89). Whitaker ran only after Lindsey, who had no reasonable suspicion that Whitaker was engaged in *any* criminal activity, proceeded to follow him as he lawfully left the scene. This is surely distinguishable from the *unprovoked* flight of the defendants in *Wardlow* and *Whitfield*.

The Court of Appeals also cited *Washington v. Commonwealth*, 29 Va. App. 5, 13, 509 S.E.2d 512, 516 (1999) (*en banc*) for the proposition that a "'single instance of attempted flight or furtive behavior by a suspect is suggestive of guilt.'" *See* App. 31. In *Washington*, however, the Court of Appeals did not hold that a suspect's flight alone constituted reasonable suspicion.

There, the police possessed a capias for Reginald Ford's arrest. Ford's bondsman received a tip from an informant that Ford was at a specific address. An officer accompanied the bondsman to the address, where two other officers met them. The bondsman, who could identify Ford by sight, accompanied one officer to the front of the house, while two other officers, who did not have a description of Ford, went to the back door. 29 Va. App. at 9, 509 S.E.2d at 514. When the bondsman and officer knocked on the front door, a man, later identified as Washington exited the back door "rather fast." Although the man denied he was Reginald Ford, the

officers at the back door seized him, entered the house, and immediately saw cocaine and heroin in plain view. *Id.*

The Court of Appeals considered whether the officers were justified in seizing Washington and then entering the house. *Id.* at 10, 509 S.E.2d at 514. Of pertinence to the case at bar, the Court was satisfied that Washington's seizure was justified because the officers had reasonable suspicion that Ford was the person exiting the back door. *See id.* at 11-13, 509 S.E.2d at 515-16. The Court concluded reasonable suspicion arose from *the combination of* Washington's quick exit from the back door in response to the officer's knocking at the front door, the informant's tip that Ford resided at that address, *and* the existence of a fugitive warrant for Ford, which gave the officers reason to expect Ford would flee. *Id.* at 12-13, 509 S.E.2d at 515-16. The Court stated, *id.* at 13, 509 S.E.2d at 16: "A single instance of attempted flight or furtive behavior by a suspect is suggestive of guilt *and provides a significant reason to believe that the informant was correct and that Reginald Ford was at the specified address*." (Emphasis added).

Thus, Washington's "flight or furtive behavior" corroborated other information already within the officers' knowledge, and the combination of that information *and* Washington's flight gave rise to reasonable suspicion

to justify the seizure. In contrast, here, Whitaker's biking away and then running down the alley did not serve to corroborate any other information already within Lindsey's knowledge. Rather, as previously discussed, the officer's had no reason to suspect Whitaker of any criminal activity.

For the foregoing reasons, the trial court and Court of Appeals erred by concluding that the officer's seizure of Whitaker was justified by reasonable articulable suspicion.

II. The seizure of the drugs was not justified as a search incident to a lawful arrest. (Assignment of Error III / Question Presented I).

The standard of review as stated in Argument § I, also applies to this argument. At the motions hearing, trial counsel further argued the seizure rose "to the level of a full custodial arrest," (App. 97), which was not supported by probable cause. (App. 100-01). The Commonwealth counter-argued that the subsequent search of Whitaker and seizure of the drugs were justified as a search incident to a lawful arrest for carrying a concealed weapon. (App. 102). In his Opening Brief filed in the Court of Appeals, Whitaker argued that even if Whitaker's detention and the subsequent removal of the firearm were justified by reasonable suspicion, the subsequent search and seizure of the marijuana and cocaine "was not justified as a search incident to a lawful arrest" for possession of a

concealed weapon. *See* Opening Brief filed in the Court of Appeals at 17. Whitaker maintains the Court of Appeals erred by not addressing this argument in its decision.[3] *See* App. 32.

On this record, there was no evidence Lindsey inquired, prior to arresting Whitaker, whether Whitaker had a concealed weapons permit and, therefore, was lawfully in possession of the concealed firearm. *See* Code § 18.2-308 (D). Without verification that Whitaker did not have a concealed weapons permit, the police lacked probable cause to arrest him for violating the concealed weapons statute. Indeed, at the time he was arrested, the officers had no basis to believe Whitaker's possession of the weapon was illegal. "Absent some disqualifying status (being a felon, juvenile, or drug possessor) or situs (being in a place where weapons are forbidden), it is not a crime to possess a weapon." *Jackson v. Commonwealth*, 41 Va. App. 211, 231, 583 S.E.2d 780, 790 (2003) (en banc), *rev'd on other grounds*, 267 Va. 666, 594 S.E.2d 595 (2004). Consequently, the seizure of the drugs was not justified as a search

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[3] Whitaker recognizes the trial court does not appear to have *expressly* ruled on this argument. *See* App. 111-12. However, as noted above, the argument was clearly presented to the trial court, and argued by both counsel. By finding Whitaker's seizure proper and the evidence recovered admissible, the trial court impliedly adopted the Commonwealth's position that recovery of the cocaine and marijuana was the product of a search incident to a lawful arrest for gun possession.

incident to a lawful arrest. *See generally e.g.*, *United States v. Robinson*, 414 U.S. 218 (1973) (discussing exception to warrant requirement for search incident to *lawful* arrest).

III. The revocation order should be reversed because the new convictions at issue in this appeal were the sole basis for the revocation and those convictions should be reversed. (Assignment of Error IV/Question Presented II).

Because the Court of Appeals erred by upholding the trial court's suppression ruling, it also erred by declining to address whether the trial court erred by revoking Whitaker's suspended sentences. *See* App. 32. Whitaker acknowledges the exclusionary rule, denying illegally obtained evidence from being admitted in a criminal trial, is inapplicable to probation revocation hearings so long as the evidence was not obtained by the police in bad faith. *See Logan v. Commonwealth*, 276 Va. 533, 535, 666 S.E.2d 346, 347 (2008) ("'[T]he exclusionary rule is not applicable in a probation revocation proceeding absent a showing of bad faith on the part of the police'" (citation and emphasis omitted)); *Accord Anderson v. Commonwealth*, 251 Va. 437, 440, 470 S.E.2d 862, 863 (1996). Nevertheless, he maintains his show cause conviction should be reversed,

as it arose from substantive *convictions*, which, for the reasons previously stated in Argument §§ I and II, should be reversed.

The fact of Whitaker's convictions for the charges at issue in this appeal constituted the sole evidence that he violated the terms and conditions of his previously suspended sentences. *See* App. 150-51; 153-56 (Probation Violation Report). In this regard, *Resio v. Commonwealth*, 29 Va. App. 616, 513 S.E.2d 892 (1999) is pertinent. There, the Court of Appeals held that if the Commonwealth relies solely upon criminal convictions "to establish the reasonable cause necessary to revocation," without evidence of the related conduct, the fate of the underlying convictions will determine the outcome of an appeal of the revocation order. *Id.* at 622, 513 S.E.2d at 895-96; *see also Davis v. Commonwealth*, 39 Va. App. 96, 99, 570 S.E.2d 875, 876 (2002) (citing *Resio* for the previously cited standard). "Should the predicate conviction[s] be reversed or otherwise upset, the solely dependent revocation order is left without support in the evidence and subject to a challenge appropriate to its then existing status." *Resio*, 29 Va. App. at 622; 513 S.E.2d at 895-96.

In Whitaker's case, the actual substantive criminal *convictions*, and not a violation of good behavior, formed the basis for the revocation. *See* App. 150-51; 153-56 (Probation Violation Report). The Probation Violation

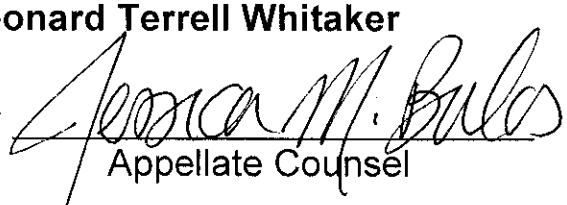
Report charged Whitaker only with failing to obey all federal, state and local laws and ordinances while on probation; it did not contain a general violation of good behavior charge. *See* App. 153-156. No other evidence of any violations apart from the fact of the convictions themselves was admitted at the revocation hearing. The Commonwealth also did not present evidence of the conduct underlying the new convictions at the revocation hearing. Consequently, under *Resio*, *supra*, if the substantive conviction must be reversed, so must be the revocation of Whitaker's previously suspended sentences. *Contra Logan v. Commonwealth*, 50 Va. App. 518, 521, 651 S.E.2d 404, 404 (2007) (where the Commonwealth sought to revoke Logan's prior suspended sentence for a violation of good behavior, based on *evidence of the conduct underlying a substantive criminal conviction* which had been reversed on appeal – "as distinguished from the fact of the conviction itself"), *reversed on other grounds*, 276 Va. 533, 666 S.E.2d 346 (2008).

CONCLUSION

For the reasons previously stated in Argument §§ I & II (Assignments of Error I, II and III/Question Presented I), Appellant respectfully requests that his conviction be reversed and the indictment be dismissed, or any other relief appropriate to the error. *See McCain*, *supra*, 275 Va. at 555, 659 S.E.2d at 518 (vacating McCain's convictions and dismissing the indictments against him; reasoning that "[b]ecause the evidence seized ... should have been suppressed, there would be insufficient evidence to sustain [the] convictions"). For the reasons previously stated in Argument § III (Assignment of Error IV/Question Presented II), Appellant respectfully requests that his show cause convictions be reversed and the Capias to Show Cause be dismissed, or any other relief appropriate to the error.

Respectfully Submitted,

Leonard Terrell Whitaker

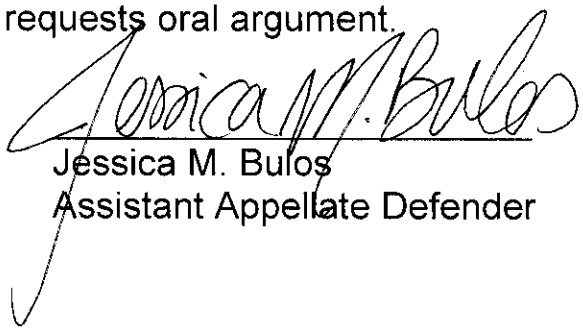
By 
Appellate Counsel

Jessica M. Bulos (VSB # 74043)
Assistant Appellate Defender
Office of the Appellate Defender
701 East Franklin Street, Suite 1001
Richmond, Virginia 23219
Telephone: (804) 225-3598
Facsimile: (804) 225-3673
Email: JBulos@idc.virginia.gov

CERTIFICATE

I, Jessica M. Bulos, Counsel for Appellant, certify that on this 17th day of August, 2009, fifteen (15) copies of this Opening Brief were hand delivered to the Clerk, Virginia Supreme Court; one (1) copy was filed electronically with the Office of the Clerk of the Virginia Supreme Court on disc, CD, or by e-mailing to scvbriefs@courts.state.va.us; and three (3) copies were mailed or hand delivered to opposing counsel, Leah A. Darron, Senior Assistant Attorney General, Office of the Attorney General, Criminal Litigation Section, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071.

Counsel is appointed and requests oral argument.



Jessica M. Bulos
Assistant Appellate Defender