IN THE

Supreme Court of Virginia

RECORD NO. 090175

LEONARD TERRELL WHITAKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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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.

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090175

LEONARD TERRELL WHITAKER,

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COMMONWEALTH OF VIRGINIA,

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REPLY BRIEF OF APPELLANT

ASSIGNMENTS OF ERROR ON BRIEF

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 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.

REPLY ARGUMENT

No Reasonable Articulable Suspicion for Detention

In its brief, the Commonwealth contends that the "facts in Whitfield are instructive" and "[t]his Court's decision in Whitfield dictates the outcome here." Opp. Br. at 13. Yet, the Commonwealth's own recitation of the facts in *Whitfield*, as well as the additional facts cited by this Court therein, demonstrate the significant factual distinctions between *Whitfield* and the present case. Whitfield was dressed in all black, standing on private property between a condemned house and an occupied dwelling, in an area in which several burglaries had recently occurred. 265 Va. 358, 360, 576 S.E.2d 463, 465 (2003). By contrast, there was no testimony or other evidence that Whitaker and the other individuals were standing and/or sitting on *private* property when the officers approached. The encounter did not occur at 3:30 a.m., and Whitaker was not dressed in all black clothing. Further, unlike Whitfield, Whitaker did not flee upon

the officers' initial approach. Rather, he cooperated with the officers, and only after Officer Lindsey walked away, did Whitaker get on his bike and pedal down the block. Whitaker ran 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.

These additional factors – specifically, the time of night, Whitfield's all black clothing, his standing on private property, and his immediate flight upon the officer's initial approach – along with Whitfield's flight, justified his seizure. *See* 265 Va. at 362, 576 S.E.2d at 465 ("The characteristics of the area and the defendant's conduct, *including* his unprovoked flight, justified the stop, and further investigation") (emphasis added). These additional factors are notably absent from the present case. Thus, despite the Commonwealth's contrary suggestion, *Whitfield* does not dictate affirmance of the trial court's denial of suppression in Whitaker's case.

As courts of other jurisdictions have recognized, nothing in *Wardlow* sanctions a *Terry* stop merely because the police "want[] to know why [a person] was running." (App. 106). In *People v. Ray*, the Illinois Court of Appeals noted: "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." 764 N.E.2d 173, 179 (Ill. App. 3d 2002), *appeal denied by* 775 N.E.2d 7 (Ill. 2002). In *State v. Nicholson*, 188 S.W.3d 679 (Tenn. 2006), the Tennessee Supreme Court held, post-*Wardlow*, that the accused's flight from officers in a public housing area being investigated for gang activity did not provide the officers with reasonable suspicion to detain Nicholson when the officer did not testify either that he witnessed criminal activity immediately prior to seeing he accused or that the accused was behaving in a manner indicative of criminal conduct prior to his flight. *Id.* at 661.

In his concurrence and dissent in *Wardlow*, Justice Stevens noted the majority rejected the *per se* rule offered by Illinois "authorizing the temporary detention of anyone who flees at the mere sight of a police officer." 528 U.S. at 126 (Stevens, J., concurring and dissenting). It is true Wardlow's presence in an area of expected criminal activity and his unprovoked flight upon noticing the police were both pertinent factors in determining reasonable suspicion. However, it was the totality of the circumstances in *Wardlow* that gave the police reasonable suspicion and not just the two aforementioned factors. The totality of the circumstances in this case did not justify Whitaker's seizure.

The Commonwealth also suggests that Officers Young and Gilbert's observations of Whitaker holding his coat pocket as he ran gave Officer Lindsey reasonable articulable suspicion to detain Whitaker. *See* Opp. Br. at 14, 15. Specifically, citing *Whitfield*, 265 Va. at 362, 576 S.E.2d at 465 and *White v. Commonwealth*, 24 Va. App. 234, 481 S.E.2d 486 (1997) (*en banc)*, the Commonwealth contends that it "is appropriate to consider" Young and Gilbert's testimony in this regard "as it is part of the collective knowledge of all of the officers involved in Whitaker's apprehension." Opp. Br. at 14.

First, this Court makes no mention of "collective knowledge" in its decision in *Whitfield*, either on the page specifically cited by the Commonwealth or elsewhere. *See generally Whitfield*, 265 Va. 358, 576 S.E.2d 463. Second, *White* is inapposite.

White was one of five to ten males standing in a semi-circle on the sidewalk near houses. As three officers approached the group in a patrol car, one of the individuals shouted "5-0", a street name for police, and the entire group ran. The officers exited the police car and followed. As the crowd disbursed, one of the three officers watched as White dropped a large white object onto the ground. The officer retrieved the object, which he believed to be cocaine. 24 Va. App. at 237, 481 S.E.2d at 487.

Meanwhile, the other two officers followed the men who ran behind the houses, and saw White sitting on the back steps of one of the houses. *Id.* The officers ordered White to stand and patted him down for weapons. Following the officers' seizure and pat down of White, the officer who recovered the cocaine advised the other two officers that he had recovered the cocaine, which White dropped. *Id.* at 237-38, 481 S.E.2d at 487-88. White was then arrested and, upon a search incident to arrest, the officers recovered a pager and a stocking cap which contained over $500 in small denominations. *Id.* at 238, 481 S.E.2d at 488. White subsequently made several incriminating statements. *Id.*

On appeal, White argued that his initial detention by the two officers behind the houses constituted an unreasonable seizure and therefore, that the physical evidence and his statements constituted fruits of an unlawful search and seizure. *Id.* Of particular significance to Whitaker's case, the Court of Appeals acknowledged that, at the time White was detained and frisked, the other officer had not relayed information regarding the cocaine to either of the two detaining officers. *Id.* Therefore, according to the Court of Appeals, "to have been a lawful *Terry* stop and frisk, the [detaining] officers' <u>own observations and knowledge</u> must have provided them with an articulable and reasonable

suspicion of White's involvement in criminal activity." *Id.* (Underline added).

Similarly, in the case at bar, when Officer Lindsey detained Whitaker,[1] neither Officer Young nor Gilbert had informed Lindsey that they had observed Whitaker holding his coat pocket while he ran. (App. 74, 93). The Commonwealth itself recognizes "[t]here is nothing in the record to indicate that Officer Lindsey relied upon or was even aware of Officer Gilbert's 'hunch.'" Opp. Br. at 16. Accordingly, as the Court of Appeals recognized in *White*, Officer Lindsey's "own observations and knowledge must have provided [him] with an articulable and reasonable suspicion" to justify the detention. *White*, 24 Va. App. at 239, 481 S.E.2d at 488. Yet, Lindsey testified that he never noticed anything abnormal about the way Whitaker was running, despite "focusing on him the entire time." (App. 42, 93). Furthermore, for the reasons previously stated in his Opening Brief, Whitaker maintains Lindsey's prior observations of Whitaker on the sidewalk and/or Whitaker's subsequent leaving did not provide Lindsey with reasonable suspicion to detain Whitaker.

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[1] On page 13, footnote 2 of its Opposition Brief, the Commonwealth states that Officer Gilbert detained Whitaker by kneeling on his back. In fact, it was Officer Lindsey who knelt on Whitaker's back after he slipped and fell. (*See* App. 43).

At page 15 of its brief, the Commonwealth states: "Whitaker argues that Officer Gilbert's "hunch" about Whitaker being armed was insufficient reason to justify the *search* of Whitaker's person." (Emphasis added). However, Whitaker does not argue that Gilbert's hunch was insufficient to justify the *search*. Rather, on page 15 of his Opening Brief, Whitaker argues that, in any event, Officer's Gilbert's hunch that Whitaker had a firearm in his jacket pocket (which Gilbert never conveyed to Officer Lindsey), was insufficient to justify Lindsey's *detention* of Whitaker. It is well-settled that an officer "must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity" to justify an investigatory detention. *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Indeed, in *McCain v. Commonwealth*, 275 Va. 546, 555, 659 S.E.2d 512, 517 (2008), the Virginia Supreme Court reiterated that "a hunch does not rise to the level of reasonable suspicion" required for a *Terry* stop.

The Commonwealth also seems to suggest Whitaker's detention was justified by his reaching for his pocket following his detention. Opp. Br. at 15. Assuming, without conceding, that Whitaker's conduct of reaching for his pocket was indicative of criminal activity, he did so only

after being illegally detained. Surely, an illegal detention cannot be retroactively justified by conduct occurring *after* the detention.[2]

The Seizure of the Drugs Was Not Incident To A Lawful Arrest

If this Court were satisfied Whitaker's detention and recovery of the firearm were supported by reasonable suspicion, Whitaker maintains the subsequent search and seizure of the marijuana and cocaine were not justified as a search incident to a lawful arrest for possession of a concealed weapon. The Commonwealth counters that Whitaker's argument is barred by Rule 5:25 because it was not argued in the trial court. *See* Opp. Br. at 16.

At the motions hearing, however, trial counsel alternatively argued that 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 responded 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). Thus, Whitaker made the argument at a time that "allow[ed] the trial court an opportunity to rule intelligently on the issues presented, thereby avoiding unnecessary

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[2] Notably, in *White*, the conduct, which this Court held provided probable cause for the subsequent arrest and search, occurred *before* White had been arguably illegally detained. *See generally White*, 24 Va. App. 234, 481 S.E.2d

appeals and reversals[,]" and allowed the "opposing party an opportunity to address an issue at a time when the course of the proceedings may be altered[.]" *Shelton v. Commonwealth*, 274 Va. 121, 126, 645 S.E.2d 914, 916 (2007). Surely, the most appropriate time to raise the issue was, as Whitaker did, during the oral argument on the motion at issue.

As he did in his Opening Brief at page 21 n.3, Whitaker recognizes the trial court does not appear to have expressly ruled on the argument. *See* App. 111-12. Yet, as noted above, the argument was undoubtedly 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 concealed gun possession.

Virginia law is clear that "'[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal[.]'" *Id.* (*quoting* Code § 8.01-384(A)); *see also Martin v. Commonwealth*, 13 Va. App. 524, 530, 414 S.E.2d 401, 404 (1992) (reiterating that the requirement of noting an exception to a final adverse ruling of the trial judge has been eliminated). Accordingly, Whitaker respectfully contends this argument was

sufficiently preserved. Whitaker relies on his Opening Brief to address the Commonwealth's arguments on the merits of this issue.

The Show Cause Convictions

Whitaker acknowledges that the exclusionary rule, denying illegally obtained evidence from being admitted in an accused's 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); *accord Anderson v. Commonwealth*, 251 Va. 437, 440, 470 S.E.2d 862, 863 (1996). He further recognizes that "'good behavior is a condition of every suspension, with or without probation, whether expressly so stated or not." *Coffey v. Commonwealth*, 209 Va. 760, 763, 167 S.E.2d 343, 345 (1969) (citation omitted).

The Commonwealth, however, overlooks that, in this case, the new convictions constituted the Commonwealth's only evidence in support of revocation of Whitaker's previously suspended sentences. (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. 153-56). Most significantly, despite the Commonwealth's contrary assertion (*see* Opp.

Br. at 21), the revocation judge himself acknowledged that the new charges were the sole basis for the revocation. The following excerpt of the revocation hearing transcript is pertinent:

> THE COURT: [I]f you wanted [the revocation] to be revisited should he get the other conviction reversed, you'd have to have this up on appeal.
>
> [DEFENSE COUNSEL]: Correct, and that's why in the last court hearing I just wanted to ensure that the Court was using, and I believe the Court did today on the record, that the charges were the basis for the revocation.
>
> THE COURT: Right. *That's the only thing I see in there, in the letter.*
>
> [DEFENSE COUNSEL]: It's the only thing reported.
>
> THE COURT: Okay. Thank you.

(App. 150-51).

Unlike in *Anderson* and *Logan*, *supra*, the Commonwealth did not rely on, nor did the revocation judge consider, the conduct and/or physical evidence admitted in the substantive criminal cases to support revocation of Whitaker's previously suspended sentences. *See Anderson*, 251 Va. at 439, 470 S.E.2d at 862 (where, during the probation revocation hearing, the Commonwealth *introduced in evidence* the same evidence which had been suppressed in the substantive criminal proceeding); and *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). Moreover, unlike in *Resio*, all of the convictions forming the sole basis for the revocation are currently on appeal and should be reversed. *See Resio v. Commonwealth*, 29 Va. App. 616, 623-24, 513 S.E.2d 892, 896 (1999) (affirming revocation when only two of Resio's three convictions forming the basis of the revocation were reversed on appeal because the remaining conviction, "standing alone, constituted sufficient evidence to support revocation of the suspended sentences").

In sum, in Whitaker's case, the Commonwealth relied solely on the fact of the new convictions in support of its request for revocation. The Commonwealth did not argue, and the trial court did not find, a violation of good behavior based on evidence of the conduct underlying the new convictions. Thus, if the substantive convictions are reversed, so must be the show cause convictions. As the Court of Appeals noted in *Resio*, 29 Va. App. at 622, 513 S.E.2d at 895-96, when the Commonwealth relies solely upon new 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.[3]

CONCLUSION

For these reasons, as well as those stated in his Opening Brief, Appellant requests that his substantive convictions be reversed and the indictments be dismissed, or any other relief appropriate to the error. He further 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

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[3] On this record there can be no doubt that, at a minimum, the trial court placed significant weight on the new convictions in the revocation of the suspension of Whitaker's prior sentences. Thus, even assuming *arguendo* that the trial court had before it evidence of other probation violations, which Whitaker maintains it did not, he would nevertheless be entitled to a new revocation hearing if the new convictions were reversed. *See Whitehead v. Commonwealth*, 278 Va. 105, 116, 677 S.E.2d 265, 271 (2009) (reversing the revocation of Whitehead's previously suspended sentences and remanding for a new revocation hearing; concluding that, because Whitehead's new substantive convictions were reversed on appeal, "and because those convictions were obviously influential at her revocation hearing, she is entitled to a new hearing"); *see also Resio*, 29 Va. App. at 624, 513 S.E.2d at 896 (remanding revocations for a new sentencing where trial court cited the two reversed convictions as the most serious new law offenses and where the court's consideration of the reversed convictions obviously affected the revocation sentence).

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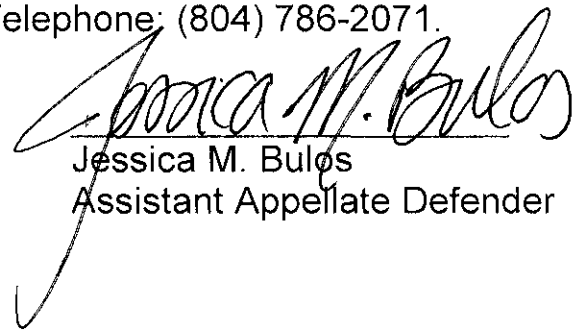
CERTIFICATE

I, Jessica M. Bulos, do hereby certify that on this 1st day of September, 2009, I complied with Rule 5:26(d) and filed by hand fifteen copies of Appellant's Reply Brief with the Clerk, Supreme Court of Virginia, and provided an electronic copy of the brief by filing it on disc, CD, or by e-mailing it to scvbriefs@courts.state.va.us, and on the same day mailed or caused to be delivered three copies of the same to Leah A. Darron, Esquire (VSB #23823), Senior Assistant Attorney General, Office of the Attorney General, Criminal Litigation Section; 900 East Main Street; Richmond VA 23219; Telephone: (804) 786-2071.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