Per Justice Kinser, the Court should be aware that the petitioner has not moved for leave to file the attached response to the motion to dismiss. In addition, the response was filed after the statute of limitations for filing a petition for a writ of habeas corpus had expired. Petitioner's conviction became final on June 23, 2005 and this Court dismissed his appeal on March 14, 2008 (petition for rehearing was denied on June 13, 2008).

VIRGINIA:

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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE SUPREME COURT

MICHAEL ANTWUAN WILLIAMS, #347945
PETITIONER,

v. RECORD No. ~~090482~~ 090483

WARDEN, SUSSEX I STATE PRISON,
RESPONDENT.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

The Petitioner, Michael Antwuan Williams, by Counsel, in response to the Respondent's Motion to Dismiss responds as set forth herein.

PROCEDURAL HISTORY

1. The Respondent alleges in his Motion to Dismiss, specifically in paragraph 3 that the Petitioner had filed two (2) motions requesting a delayed appeal with this Honorable Court. This is incorrect. The procedural history herein is that on July 13, 2006, Appellant noted his appeal to the Supreme Court of Virginia from the Court of Appeals. Petitioner was assigned the case record number of 062246. The Petition for Appeal was untimely filed on November 8, 2008, and was

dismissed on February 28, 2007. Counsel, on behalf of Petitioner, then filed a Petition for Rehearing, which was also refused on May 2, 2007. Counsel filed a Motion to Pursue a Delayed Appeal with the court on or about May 4, 2007, which was granted. A new record number was assigned: 071504. Counsel was then able to file on or about June 21, 2007, the Notice of Appeal anew. On July 17, 2007, the Petition of Appeal was filed, whereby on October 31, 2007, the Petition was granted. The Opening Brief was submitted by the Appellant on December 10, 2007, as was the Appendix. Said matter was then placed on the March session and the matter was heard and dismissed on March 14, 2008. Counsel filed a Notice of Rehearing on or about March 24, 2008, and the subsequent Petition on April 8, 2008. The Petition for Rehearing was refused on June 13, 2008.

2. Petitioner's appellate counsel filed a Petition for Appeal with the Court of Appeals referencing numerous issues. The relevant issue for the purpose of this Writ was whether the trial court erred by failing to find that the law enforcement officer did not have the requisite probable cause or reasonable suspicion of criminal activity prior to seizing the defendant for extended time period.

3. By Order, dated August 8, 2006, the Court of Appeals awarded the Petitioner an appeal from the judgment of the Stafford County Circuit Court with respect to this singular issue: Whether appellant, the passenger in a rental car, had standing to object to the stop of the vehicle. The remaining issues propounded in the Petition for Appeal were denied. See Exhibit A.

4. Said Order of the Court of Appeals effectively changed the issue propounded by Petitioner in his Petition for Appeal; counsel for the Petitioner was governed accordingly with regard to the filing of his brief. At no time herein, did appellate counsel submit an additional issue in said brief regarding the validity of the stop nor did appellate counsel file any motions regarding said issue.

5. The Court of Appeals by memorandum opinion on June 20, 2006, affirmed the ruling of the trial court in finding that the Petitioner "had no standing to challenge the traffic stop of said vehicle." Further, Justice Benton, in his dissenting opinion thought that the proper issue to be considered by the Court of Appeals was the issue raised by the Petitioner in his Petition for Appeal which was "whether the deputy sheriff had proper grounds to seize Williams." Justice Benton opined

in his dissent that the trial judge erred. See Exhibit B.

6. Appellate counsel for the Petitioner noted an appeal to the Supreme Court on November 7, 2006, by stating in said Notice ". . . hereby notes his appeal to the Supreme Court of Virginia of the judgment of this Court on June 20, 2006, whereby this Honorable Court denied the Appellant's Opening Brief and affirmed the Trial Court's Decision." See Exhibit C.

STATEMENT OF FACTS

7. The Petitioner reaffirms the Statement of Facts set forth in his Writ and incorporates the facts as stated in the Respondent's Motion to Dismiss which are consistent to the facts set forth in Petitioner's Writ.

MATERIAL PROCEEDINGS IN THE TRIAL COURT

8. The Petitioner reaffirms the references made regarding the material proceedings in the Trial Court as set on page 7 of his Writ and incorporates the Respondents statement of the material proceedings in paragraphs 10 and 11 of his Motion when consistent with the representations of the Petitioner.

INEFFECTIVE ASSISTANCE STANDARD OF REVIEW

9. The Petitioner agrees with the Respondent that a habeas petition must

satisfy the two part test set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). As such, Petitioner must show that counsel was both deficient in his representation and said deficiency caused Petitioner to be prejudiced. See **Strickland**.

10. The performance requirement under **Strickland** requires that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. See also **Bowles v. Nance**, 236 Va. 310, 374 S.E.2d 19 (1988).

11. The second prong of the **Strickland** test is that the Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See also **Lovitt v. Warden**, 266 Va. 216, 250, 585 S.E. 2d 801, 821 (2003).

12. The Respondent attacks the **Morrison** and **Tice** cases as quoted in Petitioner's Writ as being inapplicable because in said cases counsel failed to file a motion to suppress. However, said argument by the Respondent is a "red herring." Said cases were referenced for the standards required under **Strickland,** which are the very same standards articulated by the Respondent in his Motion to Dismiss. As

such, the Petitioner and Respondent have clearly articulated the standards required hereunder.

DISCUSSION OF CLAIM

13. The Respondent has failed to address the first prong test of **Strickland** with regard to whether or not appellate counsel's performance was deficient. Lacking any argument with regard to appellate counsel's performance herein, it can only be logically concluded that the Respondent does not contest the fact that appellate counsel's performance fell below the necessary standard of care in the representation of Petitioner on appeal.

14. The Respondent contends that the Petitioner's reliance on **Bendlin v. California**, 551 U.S. ____, 127 S.Ct. 2400 (2007) is misplaced. However, in making said contention the Respondent has failed to comprehend the argument alleged in Petitioner's Writ. The Petitioner is not arguing the issue of "standing" in his Writ, he is arguing that appellate counsel's failure to assign an error on the issue of the "validity of the stop" on appeal thereby denied Petitioner of effective assistance of counsel and the ability to have said issue raised and therefore argued on appeal.

15. The Respondent further states that the standard of review is set forth in Section 8.01-680 of the Code of Virginia (1950), as amended. In reviewing said section, the General Assembly specifically sets forth that if a party is convicted by a jury and/or judge and files a motion to set aside said verdict that the standard for review is "plainly wrong or without evidence to support it." This is not the factual scenario of this case and, therefore, Petitioner questions the applicability of said statutory section.

16. The Respondent relies on **McCain v. Commonwealth**, 275 Va. 546, 659 S.E.2d 512 (2008). The Respondent takes a portion of said case and uses the following quotation; "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 a reversible error." The problem that is derived from quoting a portion of a case is that the Respondent misses the true dicta and logic that the Supreme Court is relying upon. The Supreme Court in said case specifically stated that a "violation of the Fourth Amendment presents a mixed question of law and fact" and is therefore, "*reviewed de novo on appeal.*" Although the appellate court gives deference to the factual

findings of the trial court, the "issue of whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment is independently determined." See **McCain**.

17. Notwithstanding the fact that Respondent cites **McCain**, which stands for the proposition that this is a de novo review, the Respondent uses paragraphs 19 through 24 to justify the actions of the deputy sheriff from an evidentiary perspective, totally ignoring the fact that the second prong of the **Strickland** test is whether counsel's deficient performance prejudiced the Petitioner. The second prong of the Strickland test was met because the Petitioner never had his day in Court with regard to the validity of the stop at the appellate level. This failure is a deprivation of such proportion that it is unconscionable. Counsel's failure to appeal this issue denied the Petitioner the right to the "de novo review" and, as such, prejudiced the Petitioner in his appeal.

18. The Respondent argues that this Honorable Court needs to give deference to the Circuit Court with regard to the determination that the Petitioner has no standing and that the stop was valid.

19. However, to give deference to the Circuit Court's determination to the exclusion of making an "independent" finding of fact is contrary to the

very same case that the Respondent has relied on. See **McCain, supra**. When an issue of whether or not a Fourth Amendment violation has occurred, the Court is required to review said matter "de novo."

20. It is clear that the majority opinion of the Court of Appeals of June 20, 2006, does not deal with the issue of the validity of the stop, but instead only deals with the issue of "standing." As such, the issue that is pertinent herein was never addressed and appellate counsel's failure to address this deviation in issues prejudiced the Petitioner.

21. At trial, the evidence showed that the deputy sheriff caused the driver of the vehicle to stop because he allegedly saw the Petitioner, a passenger, commit an act that he suspected was unlawful. Specifically, the Petitioner allegedly rolled marijuana into a cigarette and commenced smoking it. When confronted with the video tape of the stop, the deputy acknowledged multiple discrepancies between his testimony and the video. He testified that the interior dome light was continuously on when approaching the vehicle from the rear, however, he admitted that the video from his cruiser showed that the dome light was on and then went off. The deputy sheriff testified that, when adjacent to the vehicle, he could look into the cab of the vehicle and see

the Petitioner rolling and then smoking a marijuana cigarette because the interior dome light was on. He admitted, upon reviewing the video from his cruiser, that the video showed the interior dome light was off at that time as well. Despite these material discrepancies, the trial judge ruled that there were no substantial disparities between the tape and the deputy's testimony. Further, the trial court's finding that said deputy was terminated from his job for reasons relevant to veracity did not impeach him as a witness on the issue of credibility. **See dissent, June 20, 2006, memorandum opinion of the Court of Appeals.**

22. The deputy gave testimony which gave rise to his suspicion. However, in his testimony, he could not "pinpoint exactly what the passenger was putting into [it]". **See dissent, June 20, 2006, memorandum opinion of the Court of Appeals**. Pursuant to **Terry v. Ohio**, 392 U.S.1 (1958) and **Zimmerman v. Commonwealth**, 234 Va. 609, 611, 363 S.E.2d 708, 709 (1988), a reasonable suspicion requires the deputy to articulate something more than "inchoate and unparticularized suspicion or a hunch." Beyond the fact that the officer could not clearly state what was going into the rolling paper that he allegedly saw the Petitioner in possession of, the deputy was operating off of a hunch and there was

no other evidence on the record, prior to the stop, to establish a fact or circumstance that supports the deputy's conclusion. See **Brown v. Texas**, 443 U.S. 47, 51 (1969).

23. "The inference the deputy sheriff drew from seeing a person roll an unseen substance into cigarette paper is not a reasonable basis upon which to conclude that the unseen substance was marijuana and a basis for the stop of the vehicle in which the Petitioner was a passenger." **See Justice Benton's dissent, memorandum opinion dated June 20, 2006.**

24. The appropriate issue to address is whether counsel's performance prejudiced the Petitioner. However, the Respondent, in paragraphs 21 to 23, addresses this issue by requesting this Honorable Court to give deference to the Circuit Court's factual determination.

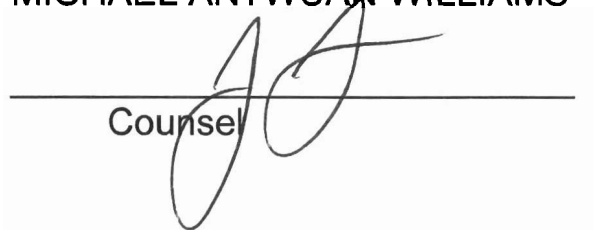
25. Given the totality of circumstances of this case and the relevant standard of review, it is clear that appellate counsel's performance was deficient and said deficiency caused the Petitioner to be prejudiced. It is further clear that the Respondent has admitted by his omission that appellate counsel's performance was deficient. Further, by the Respondent's omission to address the second prong of the **Strickland**

test, Respondent is admitting that Petitioner was prejudiced by his appellate counsel's failure to raise this issue on appeal. Respondent attempts to circumvent this second prong of the test by requesting this Honorable Court to give deference to the Circuit Court' factual consideration. However, said deference requested by Respondent is contrary to case law. See **McCain, supra**.

26. The Petitioner agrees that a plenary hearing is not necessary herein, however, requests this Honorable Court to review all documents of this cause of action, inclusive of the relevant transcripts and allow Counsel, to orally argue this matter before this Honorable Court.

WHEREFORE, the Petitioner prays that the Petition for Writ of Habeas Corpus be allowed and arguments to be had in this cause.

Respectfully Submitted,
MICHAEL ANTWUAN WILLIAMS



Counsel

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Counsel for Michael Antwuan Williams

CERTIFICATE

I do hereby certify that on this 6th day of April a true copy of the foregoing Petitioner's Response to Respondent's Motion to Dismiss with exhibits was sent by first class mail to:

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Richmond, Virginia 23219

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Counsel for Michael Antwuan Williams

VIRGINIA:

In the Court of Appeals of Virginia on Monday *the* 8th *day of* August, 2005.

Michael Antwuan Williams, Appellant,

against Record No. 2217-04-4
Circuit Court Nos. CR03001024-02 through CR03001024-04

Commonwealth of Virginia, Appellee.

From the Circuit Court of Stafford County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is granted in part and denied in part. An appeal is awarded to the petitioner from a judgment of the Circuit Court of Stafford County, dated June 23, 2005, with respect to the following question:

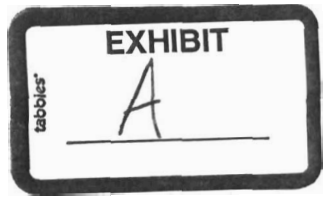
I. Whether appellant, the passenger in a rental car, had standing to object to the stop of the vehicle.

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

II. Appellant contends the trial court erred by failing to grant his "motion to separate the defendants."



> On motion of the Commonwealth, for good cause shown, the court shall order persons charged with participating in contemporaneous and related acts or occurrences or in a series of acts or occurrences constituting an offense or offenses to be tried jointly unless such joint trial would constitute prejudice to a defendant. If the court finds that a joint trial would constitute prejudice to a defendant, the court shall order severance as to that defendant or provide such other relief justice requires.

Code § 19.2-262.1.

"In determining whether a joint trial would prejudice a defendant, the trial court should require '[t]he party moving for severance [to] establish that *actual prejudice* would result from a joint trial.'" Goodson v. Commonwealth, 22 Va. App. 61, 71, 467 S.E.2d 848, 853 (1996) (citation omitted). "Actual prejudice results only when 'there is a serious risk that a joint trial would compromise a specific trial right of [defendant], or prevent the jury from making a reliable judgment about guilt or innocence.'" Adkins v. Commonwealth, 24 Va. App. 159, 163, 480 S.E.2d 777, 779 (1997). "[P]rejudice does not exist merely because a co-defendant has a better chance of acquittal if tried separately . . . ." Barnes v. Commonwealth, 22 Va. App. 406, 412-13, 470 S.E.2d 579, 582 (1996).

Appellant contends Code § 19.2-262.1 "violates the Sixth Amendment right to confrontation." He asserts he did "not have the opportunity to cross examine the co-defendant thereby leaving him unable to test the truthfulness and credibility of the co-defendant."

"[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965). "The Confrontation Clause of the Sixth Amendment . . . grants a criminal defendant the right to cross-examine witnesses called by the prosecution." James v. Commonwealth, 254 Va. 95, 98, 487 S.E.2d 205, 207 (1997).

Appellant's codefendant did not testify at trial, and no extra-judicial statements were introduced. Thus, the codefendant was simply not a witness against appellant, and appellant was not denied any right to confront her. We find no error in the trial court's denial of appellant's motion to separate.

III. and IV. Appellant contends the evidence is insufficient to support his convictions for two counts of transporting a controlled substance in the Commonwealth and one count of possession of a firearm while in possession of a controlled substance with the intent to distribute.

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (citation omitted).

So viewed, the evidence proved that on March 24, 2003, Deputy Kevin Gary was on routine patrol on Interstate 95 when he observed appellant, the passenger in a vehicle driven by Twana Davis, roll and light what appeared to be a marijuana cigarette. Gary initiated a traffic stop. As he approached the vehicle he detected a strong odor of marijuana. Gary asked for identification from Davis and appellant. Davis produced a driver's license and informed the officer that they were on their way back from New York City. Appellant was unable to produce identification. He denied having smoked marijuana and told Gary that he had not lit a cigarette since leaving Baltimore.

Gary asked appellant to exit the vehicle. As he stepped out, red baggies containing what appeared to be marijuana fell from appellant to the floor. Gary arrested appellant and searched him. Gary located a large brick of cocaine and approximately three thousand dollars in cash on appellant's person.

Gary arrested appellant and searched the vehicle. Inside was a large quantity of heroin concealed under a bag containing $18,000 in cash in the rear passenger area and a loaded revolver beneath the driver's seat. There was drug residue and paraphernalia in the front seat area.

Documents inside the vehicle revealed it had been rented at the airport in Richmond, Virginia on March 21, 2003 at 8:20 p.m. and that neither appellant nor Davis was authorized to drive it. Davis had been issued a parking ticket in Cherry Point, New Jersey approximately three hours before being stopped by Gary.

Possession of Drugs and Weapon

Appellant argues the Commonwealth failed to establish he possessed the drugs and weapon located in the car.

"The Commonwealth may prove possession of a controlled substance by showing either actual or constructive possession." Barlow v. Commonwealth, 26 Va. App. 421, 429, 494 S.E.2d 901, 904 (1998).

> To support a conviction based upon constructive possession, "the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the substance and that it was subject to his dominion and control."

Drew v. Commonwealth, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986) (citation omitted). "The Commonwealth is not required to prove that there is no possibility that someone else may have planted, discarded, abandoned or placed the drugs . . . ." Brown v. Commonwealth, 15 Va. App. 1, 10, 421 S.E.2d 877, 883 (1992) (*en banc*).

> In determining whether a defendant constructively possessed drugs, the defendant's proximity to the drugs and his occupancy of the vehicle must also be considered. Although mere proximity to the drugs is insufficient to establish possession, and occupancy of the vehicle does not give rise to a presumption of possession, [see] Code § 18.2-250, both are factors which may be considered in determining whether a defendant possessed drugs.

Josephs v. Commonwealth, 10 Va. App. 87, 100, 390 S.E.2d 491, 498 (1990) (*en banc*).

The heroin was located within arm's reach behind appellant in the vehicle's backseat. Appellant was reaching back to the area in which the gun was located when the officer arrived. Additionally, in the front seat area, in plain view, were other illegal narcotics and drug paraphernalia. Appellant's proximity to the narcotics, his occupancy of the vehicle, and the presence of narcotics and drug paraphernalia in plain view support the jury's determination that appellant was aware of the presence and character of the heroin and that it and the weapon were subject to his dominion and control.

The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of transportation of heroin into the Commonwealth.

Transportation into Commonwealth

Appellant asserts the Commonwealth failed to exclude the reasonably hypothesis of innocence that the drugs were obtained within the Commonwealth.

"[A] violation of Code § 18.2-248.01 occurs at the moment a person transporting illegal substances penetrates the borders of the Commonwealth." Seke v. Commonwealth, 24 Va. App. 318, 325, 482 S.E.2d 88, 91 (1997).

Circumstantial evidence may establish the elements of a crime, provided it excludes every reasonable hypothesis of innocence. See, e.g., Tucker v. Commonwealth, 18 Va. App. 141, 143, 442 S.E.2d 419, 420 (1994). However, "the Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant." Hamilton v. Commonwealth, 16 Va. App. 751, 755, 433 S.E.2d 27, 29 (1993). Whether a hypothesis of innocence is reasonable is a question of fact, see Cantrell v. Commonwealth, 7 Va. App. 269, 290, 373 S.E.2d 328, 339 (1988), and a finding by the fact finder is binding on appeal unless plainly wrong. See Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987).

The evidence demonstrated appellant and his codefendant were transporting a large quantity of heroin and cocaine in the car at the time they were stopped. Appellant and Davis both informed Gary that they were traveling from points north. Davis admitted they were returning from New York City, and appellant indicated they had come through Baltimore. Furthermore, inside the vehicle was a New Jersey ticket issued to Davis just hours before the stop. Finally, Detective Donald Thodos testified as an expert in the identification, distribution, and processing of narcotics. He indicated his familiarity and experience with the narcotics trade in areas other than Virginia, including New York and Baltimore. He

explained the purity level and packaging of the narcotics were typical of areas other than central Virginia.

Thodos' testimony combined with the evidence that appellant and Davis traveled into Virginia from the north provided the jury with sufficient evidence to conclude appellant transported the narcotics into the Commonwealth. See Kelly v. Commonwealth, 41 Va. App. 250, 259, 584 S.E.2d 444, 448 (2003).

The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of two counts of transporting a controlled substance in the Commonwealth and one count of possession of a firearm while in possession of a controlled substance with the intent to distribute.

This order is final unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

This Court's records reflect that Brent A. Jackson, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K. P. Ring

Deputy Clerk

EXHIBIT
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COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Haley and Senior Judge Bumgardner
Argued at Alexandria, Virginia

MICHAEL ANTWUAN WILLIAMS

v. Record No. 2217-04-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE JAMES W. HALEY, JR.
JUNE 20, 2006

FROM THE CIRCUIT COURT OF STAFFORD COUNTY
Ann Hunter Simpson, Judge

Brent A. Jackson (Olaun A. Simmons; The Jackson Law Group, on brief), for appellant.

Michael T. Judge, Assistant Attorney General (Judith Williams Jagdmann, Attorney General, on brief), for appellee.

Convicted of transporting cocaine with intent to distribute, transporting heroin with intent to distribute, and possession of a firearm while in possession of drugs, Michael Antwaun Williams maintains the trial court "committed reversible error by holding that appellant, a passenger in a rental vehicle, had no standing to challenge the traffic stop of said vehicle" and in accordingly denying a motion to suppress.[1] We affirm.

---

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

[1] In Fourth Amendment jurisprudence, for analytical purposes, the establishment of a reasonable expectation of privacy has replaced the classic concept of "standing." See Minnesota v. Carter, 525 U.S. 83, 85 (1998); Rakas v. Illinois, 439 U.S. 128, 139-40 (1987). "Standing is subsumed into that inquiry, and 'standing' is now only a shorthand way of referring to the expectation of privacy inquiry." 1 John Wesley Hall, Jr., Search and Seizure, § 6.1 (3d ed. 2000).

I.

STANDARD OF REVIEW

In determining whether or not the trial court properly denied Williams' motion to suppress, "we consider the evidence and all reasonable inferences flowing from that evidence in the light most favorable to the Commonwealth, the prevailing party at trial." Jackson v. Commonwealth, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004) (citing Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 923-24 (2000)).

II.

FACTS

The uncontested facts are as follows:

At approximately 1:20 a.m. on March 24, 2003, Stafford County Sheriff's Deputy Kevin Gary observed a vehicle with its interior lights (including the "dome" light) on traveling southbound on Interstate 95. Deputy Gary pulled up next to the vehicle and witnessed the "passenger rolling what . . . appeared to me to be a marijuana cigarette." Gary testified the passenger "was pouring it - - pouring something out of a bag into it, into his cupped hand . . . proceeded to roll the end of the cigarette and then light it." He described the rolled cigarette as "tapered on each end" with "twisted" ends. The deputy testified that he was familiar with marijuana, seeing the same "once a week" as either an arresting or back-up officer. Gary continued:

> Since I've been in law enforcement, I've never come across anything that was hand rolled other than marijuana cigarettes. I've got family members who work on tobacco farms who roll personally. It's not rolled the same, and it doesn't look the same.

Based on his observations, Deputy Gary pulled behind the vehicle, switched on his emergency equipment, and performed a traffic stop. As he approached, all the windows were down, and he smelled marijuana coming from the vehicle. He asked the driver for her license

and registration. She provided a driver's license, which identified her as Twana Davis. She stated the car was rented and produced a Hertz rental agreement that was issued on March 21, 2003 at 8:20 p.m., was to terminate one day later - March 22, 2003 - at the same time, and named one Crystal James as the lessee and sole authorized driver. During the stop, subsequent arrest, and seizure, neither Davis nor appellant offered any information to explain how either had come into possession of the vehicle.

The agreement contained the following language: "No 'additional authorized operators' without Hertz written approval," and "WARNING: You must obtain Hertz's prior written approval for any additional authorized operators." A representative of Hertz testified at trial that the vehicle was "rented 3-21, [with] charges for one day, and you're supposed to return on 3-22, so one day." He confirmed Crystal James was the only authorized driver.

At the scene, Gary also asked the appellant for identification. After appellant stated that he did not have an ID, Gary asked him to step out of the vehicle. As appellant opened the door and began to exit, "two little red plastic baggies" fell from under his leg into the floorboard of the vehicle. Gary testified that "[t]hey appeared to be marijuana," as later analysis proved. Gary subsequently arrested appellant for possession of marijuana. A search of appellant incident to this arrest produced $2,800 in cash and a brick of cocaine. A subsequent search of the vehicle garnered a half-kilo of heroin, $18,000 in cash, a loaded .357 revolver, and various other drug paraphernalia and residue.

As here relevant, appellant moved to suppress "all items seized as a result of the illegal stop." Appellant offered no evidence at the suppression hearing. Following argument, the trial court denied the motion, holding that defendant was "without standing to challenge the stop."[2]

---

[2] The trial court further held that it accepted the testimony of Deputy Gary as credible and persuasive and found he had "reasonable articulable suspicion" to justify the stop, in accordance with the principles enunciated in Delaware v. Prouse, 440 U.S. 648, 653 (1979).

III.

ANALYSIS

An individual may only assert a Fourth Amendment violation if he has "a reasonable expectation of privacy" in the place searched. Rakas v. Illinois, 439 U.S. 128, 130 (1987); DeLong v. Commonwealth, 234 Va. 357, 363, 362 S.E.2d 669, 672 (1987); Hardy v. Commonwealth, 17 Va. App. 677, 680, 440 S.E.2d 434, 436 (1994).

In support of a motion to suppress, the defendant has the burden of proving he has a reasonable expectation of privacy in the place searched. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); Barnes v. Commonwealth, 234 Va. 130, 135, 360 S.E.2d 196, 200 (1987); Sharpe v. Commonwealth, 44 Va. App. 448, 455, 605 S.E.2d 346, 349 (2004).

> In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched . . . [and] . . . a defendant must demonstrate . . . that his expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real property or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (citations omitted).

In Josephs v. Commonwealth, 10 Va. App. 87, 91, 390 S.E.2d 491, 492 (1990) (*en banc*), the appellant was a passenger in a rental car, which had been rented to a third party who was not present in the vehicle. The rental agreement showed that neither the appellant nor the driver was an authorized driver, that the vehicle was not to be driven outside Florida, and that "the occupants were not authorized to have possession of the vehicle." Appellant was charged with theft of the vehicle, and a subsequent search of the same produced 130 pounds of marijuana. Appellant filed a motion to suppress.

This Court formulated the issue presented as follows:

> The defendant challenges the legality of the initial stop of the vehicle, which she asserts was a violation of her right under the

> fourth and fourteenth amendments to be free from illegal seizure. The Attorney General contends that, since the defendant was a thief in a stolen car, she has no standing to complain of the stop and search of the car.

Id. at 91, 390 S.E.2d at 493.

Noting that a stop of a motor vehicle is a seizure, this Court resolved the above issue by holding as follows:

> Having only an illegitimate, wrongful, and unreasonable expectation of privacy in the stolen vehicle, Josephs lacks standing to object to the stop of the car. *Josephs' expectation of privacy in her own person does not confer automatic standing upon her to contest the stopping* of the vehicle in which she was riding when she had no reasonable expectation of privacy in it.

Id. at 98, 390 S.E.2d at 497 (emphasis added).

As this Court further explained, while a passenger may have a legitimate expectation of privacy in their person when a vehicle is stopped, that principle "presupposes the occupant's rightful presence in the vehicle. Otherwise the privacy expectation is not legitimate." Id. at 96, 390 S.E.2d at 496. Rather, an occupant has the burden of establishing a "property []or a possessory interest" in the vehicle as a condition precedent to a Fourth Amendment challenge. Id. at 97, 390 S.E.2d at 496. "'[M]ost courts agree that an occupant of a vehicle cannot be said to have standing by virtue of his presence if he is in possession of a stolen or otherwise illegally possessed or controlled vehicle.'" Id. at 92, 390 S.E.2d at 493 (quoting 4 W. LaFave, Search and Seizure § 11.3(e) (2d ed. 1987)). This Court's analysis flowed from Rakas, where appellants occupied a vehicle they "neither owned nor leased" and "asserted neither a property nor possessory interest in the automobile." 439 U.S. at 140, 148. Finally, this Court specifically rejected the minority's view that there was a distinction between "standing to challenge a *search* of an automobile in which she was riding and her standing to challenge a *stop* of the same

automobile," and maintaining standing for the later remained. Josephs, 10 Va. App. at 102, 390 S.E.2d at 499 (Barrow, J., dissenting) (emphasis in original).

Though dealing with standing as to a search of a vehicle rather than the stop of the same, in Bell v. Commonwealth, 264 Va. 172, 190, 563 S.E.2d 695, 708 (2002), the appellant asserted a reasonable expectation of privacy in a vehicle because "he had been driving it, had the keys in his possession and had parked it in a parking lot, leaving it locked with his belongings inside." The vehicle had been impounded by a lien-holder. The owner had not given appellant permission to use the vehicle; the owner's girlfriend had taken the car from the impoundment lot; she had twice given appellant permission to use it; appellant had returned the vehicle to her once, but not the second time, despite her requests that he do so.

There, the Virginia Supreme Court held that the defendant

> bore the burden of proving he had a legitimate expectation of privacy in the vehicle so as to confer standing to challenge the search. He did not carry that burden. Bell did not own the vehicle, and he did not establish that he was authorized to have the car in his possession when it was searched. See United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (unauthorized driver of rental had no legitimate expectation of privacy in the vehicle) . . . . [Bell] lacked the requisite standing to challenge the search of the vehicle.

Id. (citation omitted).

More specifically, and though dealing with the drivers of rental cars, other jurisdictions have addressed the issue of permissive use of such vehicles. In Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. Ct. 2005), the court held:

> Appellant cannot claim a reasonable expectation of privacy in the automobile. Further, Appellant's subjective expectation of privacy was not reasonable where he was the operator of a rental car but not the named lessee, was not an authorized driver, the named lessee was not present in the vehicle, *Appellant offered no*

> *explanation of his connection to the named lessee*, and the return date for the rental car had passed.

(Emphasis added).

In State v. Hill, 94 P.3d 752, 757-59 (Mont. 2004), the Montana Supreme Court found as follows:

> Considering [appellant's] status as an unauthorized driver [of a rental car], *combined with his failure to demonstrate any relationship with an authorized user*, it is doubtful that he had an actual or subjective expectation of privacy in the vehicle's trunk and its contents. . . . [Defendant] had not rented the car, and he had no permission to use the car. . . . We find [defendant] had no reasonable expectation of privacy in the vehicle and its contents.

(Emphasis added). See also United States v. Seeley, 331 F.3d 471, 472 (5th Cir. 2003) (per curiam) ("Seeley has not established that there was plain error in the holding that he lacked standing to challenge the search of the rental car, as he (the sole occupant of the car) was not the renter or an authorized driver."); United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990) ("Roper did not have standing to challenge the search of the [rental] vehicle he was driving at the time of the stop. He was not the owner nor was he in lawful possession or custody of the vehicle.").

In the instant case, the evidence affirmatively shows that neither the driver of the rental vehicle, Davis, nor appellant was the lessee or an authorized driver. The record contains no evidence of any relationship between the lessee and either Davis or appellant, nor any evidence as to how either came into possession of the vehicle.

We hold that, in the absence of evidence sufficient to establish a valid possessory interest, neither the driver nor a passenger of a rental vehicle has a reasonable expectation of privacy in that vehicle, where the terms of the rental agreement do not include either as the lessee or an authorized driver. Josephs, an *en banc* decision of this Court, held that the establishment of a reasonable expectation of privacy in a vehicle was a condition precedent to a grant of standing to

assert a constitutional challenge to the stop of that vehicle. Here, appellant failed to establish a reasonable expectation of privacy in the rental vehicle. That failure, consistent with Josephs and the principle of *stare decisis*, denies appellant standing to challenge the stop of the vehicle.[3]

Appellant's convictions are therefore affirmed.

Affirmed.

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[3] By *per curiam* order dated August 8, 2005, this Court granted an appeal on the following issue: "I. Whether appellant, the passenger in a rental car, had standing to object to the stop of the vehicle." In accordance with that order and by letter dated August 23, 2005, counsel advised the following: "Appellant hereby states the following question presented for review: 1. Whether the trial court erred by finding that the appellant, a passenger in a rental car, did not have standing to object to the stop of the vehicle." Appellant's brief states the "assignment of error" as follows: "I. The trial court committed reversible error by holding that Appellant, a passenger in a rental vehicle, had no standing to challenge the traffic stop of said vehicle."

Rule 5A:20 requires appellant's brief to contain "a statement of the questions presented" and "the principles of law, the argument, and the authorities relating to each question presented . . . ." Thus, in Buchanan v. Buchanan, 14 Va. App. 53, 56, 415 S.E.2d 237, 239 (1992), we held that "[s]ince this argument was not fully developed in the appellant's brief, we need not address this question."

On brief, appellant makes no argument whatsoever that the police officer did not have reasonable articulable suspicion to stop the vehicle. Rather, the brief, properly, addresses only the assignment of error; that is, does appellant under these facts have a reasonable expectation of privacy, or standing, in a rental vehicle. Appellant's brief complies with Rule 5A:20.

In Parker v. Commonwealth, 42 Va. App. 358, 592 S.E.2d 358 (2004), we held that "In beginning our analysis . . . 'on appeal, we will consider "only those arguments presented in the petition for appeal *and granted by this Court* . . ."'" Id. at 373, 592 S.E.2d at 366 (quoting Megel v. Commonwealth, 37 Va. App. 676, 679, 561 S.E.2d 21, 22 (2002) (quoting Alexander v. Commonwealth, 28 Va. App. 771, 776, 508 S.E.2d 912, 914, aff'd on reh'g en banc, 30 Va. App. 152, 515 S.E.2d 808 (1999), rev'd on other grounds, 260 Va. 238, 531 S.E.2d 567 (2000))) (emphasis added).

The dissent concludes the motion to suppress should have been granted because "the deputy lacked a reasonable basis to suspect that [appellant] was involved in criminal activity" and "the evidence [was] discovered as a consequence of the illegal stop . . . ." However, no appeal was ever granted by this Court on that issue. The appeal was granted on the issue of standing alone. The establishment of a reasonable expectation of privacy, or standing, is a condition precedent to a Fourth Amendment challenge. For these reasons, we do not address the dissent.

Benton, J., dissenting.

I believe the proper question for us to consider on appeal is the one raised in Michael A. Williams's petition for appeal, asking whether the deputy sheriff had proper grounds to seize Williams. I would hold that the trial judge erred in ruling that Williams could not challenge his detention and in concluding that the deputy sheriff had a reasonable articulable suspicion to detain Williams. The trial judge should have suppressed any evidence derived from the unlawful detention. Therefore, I would reverse the convictions and remand for a new trial.

At trial, the evidence proved the deputy sheriff caused the driver of the sports utility vehicle to stop because he saw Williams, the passenger, commit an act that he suspected was unlawful. Specifically, he suspected Williams rolled marijuana into cigarette paper and began smoking it. At trial, Williams argued that stopping him while he was in the car violated his Fourth Amendment rights because "[t]he Supreme Court has always recognized the right of every person to the possession and control of his own person, free from all restraint or interferences of others unless by clear and unquestionable authority of law." Relying upon the principles announced in Terry v. Ohio, 392 U.S. 1 (1968), he argued that he had "standing to protest . . . any illegal stop as a result of the seizure of [his] person." The trial judge ruled, however, that "the driver was not an authorized driver of this vehicle" and that "Williams is without standing to challenge this stop and detention."

When Williams filed his petition for appeal, he raised the following issue concerning the detention:

> Whether the trial court erred by failing to find that the law enforcement officer did not have the requisite probable cause or reasonable suspicion of criminal activity prior to seizing the defendant for [an] extended time period.

The order granting the petition for appeal recast the issue to: "Whether appellant, the passenger in a rental car, had standing to object to the stop of the vehicle." Conforming to the order granting the appeal, Williams's brief raises the issue "[w]hether the trial court committed reversible error by holding that Appellant, a passenger in a rental vehicle, had no standing to challenge the traffic stop of said vehicle." I believe Williams's petition raised a valid issue for appeal that is more narrowly focused than the broad question raised by the order granting the appeal. Thus, I believe this Court should address the issue that Williams properly raised in his petition for appeal.

After ruling that "Williams is without standing to challenge this stop and detention," the trial judge found alternatively that although the deputy did "not [have] the most experience or the most training [she] . . . has ever encountered in a case, [the deputy] did have adequate training and experience to guide him in making the suspicion that he's testified to that he made." The trial judge ruled "that this deputy had reasonable articulable suspicion based upon the facts to support criminal activity." In our review of this ruling, we must give deference to the trial judge's factual findings, but, because the constitutionality of a seizure involves questions of law and fact, we must "independently decide whether, under the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements." Jackson v. Commonwealth, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004).

The United States Supreme Court established long ago that, when the police detain for investigative purposes persons who are in an automobile, the police must have either probable cause or a reasonable articulable suspicion that either the automobile or the occupants of the automobile are subject to seizure under the criminal or traffic laws. United States v. Brignoni-Ponce, 422 U.S. 873, 878-81 (1975). This is so "because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth]

Amendments." Delaware v. Prouse, 440 U.S. 648, 653 (1979); see also Zimmerman v. Commonwealth, 234 Va. 609, 611, 363 S.E.2d 708, 709 (1988) (holding that "[w]hen the police stop a motor vehicle and detain an occupant, this constitutes a 'seizure' of the person for Fourth Amendment purposes").

Viewing the tape taken from his patrol car's camera, the deputy testified as to his decision to stop the vehicle:

> A: As I stated, when I saw what was being lit beside me, the flickering -- what the camera picks up as the flickering light is what I watched, the defendants lighting up what I believed to be a marijuana cigarette and start to smoke it. That's when I pulled in behind the vehicle and made my traffic stop.
>
> Q: And at that point in time, that was when you discerned that you needed to stop the vehicle; is that correct?
>
> A: That's correct.
>
> Q: And notwithstanding -- and when you decided to stop the vehicle, sir, that was based just on the lighting of what you suspected was marijuana, right?
>
> A: Correct.[4]

---

[4] On direct examination, without reference to the videotape, the deputy testified that when he approached the vehicle to the left and was slightly behind the driver's door, he noticed the interior dome light of the vehicle was illuminated and saw "the passenger . . . was rolling . . . what appeared to [the officer] to be a marijuana cigarette." After the passenger lit the item, the deputy activated his emergency equipment to stop the vehicle.

On cross-examination, the deputy explained that, although he earlier testified that the vehicle's interior dome light was continuously illuminated, the tape from his patrol car's camera did not show that. The deputy sheriff acknowledged that the tape showed the dome light "go on" and then "off" as the vehicle was in front of his car. He testified: "On the tape I see it go on and off. At the time, I did not see it go on and off." He also said "that night I didn't pick up on [the light] going on and off. I picked up on it being on." Viewing the tape, he also acknowledged that, when the vehicle was to his right and slightly ahead of his car, the tape indicated the interior light was not illuminated and that when he moved behind the vehicle to stop it the interior light was "off." He persisted, however, in his recollection that the vehicle's interior dome light was continuously illuminated, and said "[the tape] picks up on what the tape saw."

Despite these discrepancies, the trial judge ruled that there was no substantial disparity between what the tape depicted and what the officer testified he saw that morning. The trial judge also noted that the evidence showing the deputy sheriff "has been terminated from [his]

The deputy sheriff did not stop the vehicle in which Williams was a passenger because he saw a traffic infraction, despite his use of the term "traffic stop." He testified that the vehicle was not speeding or violating any traffic laws. When the deputy stopped the vehicle, he did so solely because he believed Williams, the passenger, had violated a law unrelated to the registration or use of automobiles.

"An individual . . . traveling in an automobile does not lose all reasonable expectation of privacy simply because [that individual is in] the automobile." Prouse, 648 U.S. at 662. Because the deputy detained Williams for suspicious behavior separate and apart from traffic concerns, the legal analysis is no different than if Williams had been walking down the street instead of riding in an automobile. See id. at 663 (citing Terry and stating that "people are not shorn of all Fourth Amendment protections . . . [or privacy] interests when they step from the sidewalks into . . . automobiles"). Williams had standing to contest his detention, which occurred by the deputy sheriff's stop of the vehicle.

The legitimacy of the deputy's stop of the vehicle and consequent detention of Williams is governed by the usual Terry analysis. Under the well-established Terry principle, a deputy sheriff may initiate an investigatory stop of an individual only when the deputy has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Brown v. Texas, 443 U.S. 47, 51 (1979).

In our analysis of the Terry issue, we do "not overlook or disregard the officer's articulated, particularized . . . basis for his actions." Zimmerman, 234 Va. at 612, 363 S.E.2d at 710. The deputy testified in detail about the facts that gave rise to his suspicion. The deputy acknowledged he was not able to discern what the passenger was putting onto the cigarette

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employment for reasons that may be relative to veracity . . . does not impeach him as a witness on the issue of his credibility in this case."

paper. He testified that "[d]uring the whole time [he] wasn't able to say -- pinpoint exactly what [the passenger] was putting into it" and "[he] wasn't able to tell exactly what it was coming out of." He saw no pouch or baggy or any other container.

> Q: So all you used for the basis of stopping these individuals was the fact that they rolled a cigarette, which, based on your hunch, was marijuana; is that correct?
>
> A: Based on my suspicion it was. Yes, sir.

The Terry standard of "reasonable suspicion" required the deputy sheriff to articulate something more than an "inchoate and unparticularized suspicion or 'hunch'" that criminal activity was occurring. 392 U.S. at 27. Explaining his experience, the deputy sheriff further testified as follows:

> Q: Okay. Do you know how to roll -- well, have you ever encouraged or observed -- I'm going to back up a little bit, sir. You have never rolled a cigarette, tobacco cigarette; is that correct?
>
> A: Right.
>
> Q: You never learned how to roll one; isn't that correct?
>
> A: That's correct.
>
> Q: You have never saw or observed anybody roll a clove cigarette; is that correct?
>
> A: I have seen someone roll a clove cigarette, yes, sir.
>
> Q: And do you know how to do it yourself, sir?
>
> A: No, I don't.
>
> Q: And would I be correct in stating, sir, that when people roll their own smoking device, they use a multitude of ways of doing it; is that correct?
>
> A: That's correct.

* * * * * * *

> Q: And would it also be correct in stating, sir, that people who roll cigarettes sometimes twist an end; isn't that correct?
>
> A: That would be a fair statement to say, I guess.
>
> Q: So when you saw Mr. Williams, or the passenger, twist the cigarette, you presumed it was marijuana instead of a cigarette, is that correct?
>
> A: That's correct.
>
> Q: And why was that, sir, when you have a history or have observed people twisting the ends of cigarettes who roll their own cigarettes?
>
> A: Because as I stated earlier, in the time I've been with the Sheriff's Office, I have yet to come across one that was rolled that wasn't a marijuana cigarette.
>
> Q: However, at the same time, sir, you have observed people roll and twist an end, and they were smoking something legitimately; is that correct?
>
> A: Yes, sir. That wasn't while I was with the Sheriff's Office though.
>
> Q: So why on this occasion, when you've had legitimate -- or have observed people twisting cigarettes legitimately, did you just presume that this gentleman had an illegal narcotic?
>
> A: As I stated just a minute ago, based on prior times with the Sheriff's Office where I've come into contact with a rolled cigarette, it was always a marijuana cigarette. I have yet to ever come across a rolled cigarette, and the rolled cigarettes I did come across was back when I was a teenager on my uncle's farm. So that's the only time I've seen anyone roll a cigarette.

When, as here, the deputy sheriff's testimony, "viewed as a whole, demonstrates innocent, lawful conduct," the evidence fails to articulate "a basis for a reasonable suspicion of illegal, criminal conduct." Zimmerman, 234 Va. at 612, 363 S.E.2d at 709-10. Beyond his hunch that "the defendant [was] lighting up what [he] believed to be a marijuana cigarette," no other evidence in this record establishes a fact or circumstance that supports the deputy's conclusion. See Brown, 443 U.S. at 51-52 (holding that a finding of reasonable suspicion of

criminal activity is flawed when the observed conduct is indicative of innocent activity and an officer is unable to point to any fact supporting his suspicion); Matthews v. Commonwealth, 218 Va. 1, 3, 235 S.E.2d 306, 307 (1977) (noting that officer who saw cigarette paper and a brown bag on the floor of a car, without any other circumstances connecting the two, could not rationally conclude that the bag contained marijuana).

The inference the deputy sheriff drew from seeing a person roll an unseen substance into cigarette paper was not a reasonable basis upon which to conclude the unseen substance was marijuana. Law abiding people roll cigarettes for their own personal use. The deputy provided no facts beyond his hunch that the substance he saw being put onto the cigarette paper was not tobacco. Indeed, he testified that he could not discern whether the substance was coming from a pouch in which tobacco would be sold. The deputy's hunch does not become reasonable suspicion merely because he had not seen anyone roll a cigarette since he was a teenager visiting a farm or because during his time with the sheriff's office every time he had "come in contact with a rolled cigarette, it was always a marijuana cigarette."

Judged on an objective standard, the facts and circumstances indicate the deputy sheriff saw nothing more than conduct that was indicative of a person rolling and lighting a cigarette. The conduct that the deputy observed when "viewed either in isolation as the officer considered it or along with the other behavior as the court must examine it, is utterly insufficient to generate a reasonable suspicion that the defendant was involved in criminal activity." Zimmerman, 234 Va. at 612, 363 S.E.2d at 710. The deputy lacked a reasonable basis to suspect that Williams was engaged in criminal conduct, and therefore his detainment was unlawful. See Prouse, 440 U.S. at 663 (noting that stopping a vehicle to detain an occupant in the absence of at least an articulable, reasonable suspicion of an offense is an unlawful seizure of the occupant within the meaning of the Fourth Amendment).

The Commonwealth seeks to use against Williams incriminating evidence discovered as a result of the unlawful detention of Williams. "If evidence is seized during an illegal stop, it is not admissible at trial under the doctrine known as 'the fruit of the poisonous tree.'" Jackson, 267 Va. at 672, 594 S.E.2d at 598; see Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) (excluding evidence obtained as the result of illegal police action). "'The exclusionary rule operates . . . against evidence seized and information acquired during an unlawful search or seizure . . . [and] against derivative evidence discovered because of the unlawful act.'" Watson v. Commonwealth, 19 Va. App. 659, 662, 454 S.E.2d 358, 360 (1995) (quoting Warlick v. Commonwealth, 215 Va. 263, 265, 208 S.E.2d 746, 748 (1974)). Thus, the trial judge erred in admitting the evidence found as a result of the deputy's unlawful detainment of Williams.

I believe the officer unlawfully detained Williams by stopping the vehicle in order to investigate Williams's conduct. Therefore, I would hold that the evidence discovered as a consequence of the illegal stop should have been suppressed at trial, and I would reverse the convictions and remand for a new trial if the Commonwealth be so advised.

EXHIBIT
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November 7, 2006

Clerk's Office
Court of Appeals of Virginia
109 North Eighth Street
Richmond, Virginia 23219

Re: Michael Antwuan Williams v. Commonwealth of Virginia
Record Number: 2217-0402
Notice of Appeal

Dear Sir/ Madam:

Pursuant to the attached Order from the Virginia Supreme Court, please find enclosed a Notice of Appeal pertaining to the above-mentioned cause of action. I ask that you please file this along with the other documents pertaining to this matter.

I thank you in advance for your time and attention. If you have any questions or concerns, please contact this office.

Sincerely,

Brent A. Jackson

BAJ/tlg
Enclosure(s)
cc: Supreme Court of Virginia, Clerk's Office
Michael T. Judge, Esquire
Sarah Deneke, Esquire
Michael A. Williams
File

IN THE
COURT OF APPEALS
OF VIRGINIA

MICHAEL ANTWUAN WILLIAMS,
APPELLANT,

v. Record Number: 2217-0402

COMMONWEALTH OF VIRGINIA,
APPELLEE.

NOTICE OF APPEAL

Pursuant to the Order issued by the Supreme Court of Virginia on November 2, 2006 and Supreme Court Rule 5:14(a), the Appellant, Michael A. Williams, by Counsel, hereby notes his appeal to the Supreme Court of Virginia of the judgment of this Court on June 20, 2006, whereby this Honorable Court denied the Appellant's Opening Brief and affirmed the Trial's Court Decision.

Respectfully Submitted,
MICHAEL ANTWUAN WILLIAMS

BY: _____
Counsel

Brent A. Jackson, Esquire
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CERTIFICATE OF SERVICE

I, Brent A. Jackson, do hereby certify that a true and exact copy of the above Notice of Appeal was sent by first-class mail to Michael T. Judge, Esquire, Senior Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 7 day of November 2006.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 2nd *day of* November, 2006.

Michael A. Williams, Appellant,

against Court of Appeals No. 2217-04-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon consideration of the motion for delayed appeal filed by counsel and the affidavit of counsel, the motion is granted and appellant is authorized to file a notice of appeal to the Court of Appeals and a petition for appeal with the Supreme Court of Virginia from the judgment rendered against him by the Court of Appeals on June 20, 2006, with all computations of time as required by the rules of this Court and applicable statutes to commence on the date of entry of this order or, if the appellant is entitled to appointed counsel upon this appeal, from the date of entry of the order of the Circuit Court of Stafford County appointing counsel, whichever date shall be later.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Stafford County.

A Copy,

Teste:

Pete L Harrington

Clerk