IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090557

COMMONWEALTH OF VIRGINIA,

Appellant

v.

TAVARES LAMONT BROWN,

Appellee

OPENING BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

This appeal calls upon the Court to determine whether the Court of Appeals of Virginia erred when it addressed an issue which was not properly presented to it, and otherwise erred in reversing the defendant's conviction for possession of cocaine with intent to distribute.

On November 8, 2007, in the Circuit Court for the City of Richmond, a judge, sitting without a jury, found Tavares Lamont Brown guilty of

possession of cocaine with intent to distribute. On January 28, 2008, the court sentenced the defendant to ten years imprisonment, with four years and nine months suspended. (App. 88-89).

Brown appealed the judgment of the circuit court to the Court of Appeals of Virginia. By Order entered July 31, 2008, the Court of Appeals granted an appeal on Brown's search and seizure issue, but denied the claim that the evidence was insufficient to establish an intent to distribute the cocaine found in his pocket. (Record No. 0339-08-2) (App. 114-16).

Following briefing and argument,[1] a panel of the Court of Appeals reversed the judgment of the trial court in an unpublished opinion issued January 13, 2009. See Brown v. Commonwealth, 09 Vap UNP 0339082 (2009) (App. 140-45). The Commonwealth sought rehearing *en banc* in the Court of Appeals, which review was denied by Order entered February 20, 2009. (App. 146).

The Commonwealth appealed the judgment to this Court. By Order entered July 20, 2009, this Court granted the appeal.

[1] The Commonwealth presented oral argument in the case; however, Brown's attorney waived argument.

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S JUDGMENT ON A BASIS NOT ARGUED ON APPEAL.

II. THE COURT OF APPEALS ERRED IN RULING THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST BROWN FOR POSSESSION OF THE COCAINE FOUND IN THE FOLDED LOTTERY SLIP ON THE GROUND.

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR BY REVERSING THE CIRCUIT COURT'S JUDGMENT ON A GROUND BROWN DID NOT PURSUE IN THAT COURT, AND OTHERWISE ERR IN FINDING NO PROBABLE CAUSE FOR THE ARREST? (ASSIGNMENTS OF ERROR I AND II)

STATEMENT OF FACTS

On October 24, 2006, Richmond police officer M. P. Warner, of the focus mission team, a "small street-level narcotics unit," received a call from dispatch to investigate two individuals selling narcotics at a dead-end street where Addison Street and the Downtown Expressway come together

at the bridge. (App. 15-17, 29, 56-57, 60). It was between 5 and 6 p.m., and was still light out. (App. 16, 27).

As the officer walked up the ramp at that location, he saw the defendant to the left and Scott Pullen to the right. (App. 17). The ramp is about eight feet wide, and the men were standing about six feet apart; they were not standing all the way to the sides of the ramp, nor were they in the middle. (App. 22, 76). They were the only two people in the area and they were stationary. (App. 57, 76-77).

Pullen was urinating and the defendant was drinking from a 40-ounce bottle of beer. (App. 17-18, 77). Warner spoke to both men. (App. 18). Warner was aware of multiple arrests for narcotics within the vicinity, which was a "high drug area." (App. 27-31, 74b). Warner had made a narcotics arrest one-half block away from the ramp. (App. 27-28). The officer knew who Brown was, and was aware that he was a "known narcotics dealer." (App. 21, 32, 37, 43, 54).

Having observed the men violating the law, Officer Warner "was going to try to escort them back to [his] vehicle where [he] could talk to them more." (App. 18). At that point, the defendant bent over, placed the beer bottle on the ground, and slowly attempted to screw the cap on with his left hand. (App. 18, 45). As he was doing so, his right hand

disappeared behind his back. (App. 19, 49). The officer "saw movement with [Brown's] arm, not really at his right pocket but more at his waistline in the back towards his back right pocket." (App. 19). The officer told the defendant to stop and stand up. (App. 19).

A backup officer was on the way, but had not yet arrived. (App. 19). Warner placed the defendant in handcuffs because of his "furtive movements" and Warner's position as one officer dealing with two suspects. (App. 19, 43-44, 49). The trio then walked back to the officer's vehicle. (App. 19).

The officer patted down both individuals and found nothing on the defendant. (App. 19). On Pullen, however, the officer found a folded lottery slip. Warner, opening it, found what appeared to be cigarette ashes. (App. 20).

When the backup officer arrived, Warner asked that officer to stay with the two individuals while he went back to the area where the two men had been standing. (App. 20). As Warner walked back, he recalled that he had previously observed a folded lottery slip on the ground there, between the two men. (App. 20-21). The slip was located in "the middle of the walkway" in the area where the two individuals had been standing when

the officer first approached. (App. 20-22). The officer picked up the slip, unrolled it, and discovered a small rock of crack cocaine within. (App. 21).

Both men were arrested and additional cocaine and a razor blade were found on the defendant in a search incident to the arrest. (App. 24-25). The trial court denied the suppression motion. (App. 68-70).

ARGUMENT

THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S JUDGMENT ON A BASIS NOT ARGUED TO THE APPELLATE COURT, AND OTHERWISE ERRED IN ITS MERITS RULING.

In his petition for appeal, and again in his opening brief in the Court of Appeals, Brown argued that Officer Warner lacked reasonable articulable suspicion to detain him for any period of time in excess of that necessary to issue a summons for drinking alcohol in public. (App. 105-10, 126-31). The defendant conceded on brief that Officer Warner had a right to detain him long enough to write, and release him on, a summons for drinking alcohol in public, but contended that Warner improperly continued to detain him without reasonable suspicion or probable cause, until arresting him for possession of the rock of cocaine found in the folded lottery slip on the ground. (App. 127-28).

Issue not Properly Pursued on Appeal

Brown argued on appeal in the Court below that his continued detention by Officer Warner was an unreasonable seizure within the meaning of the Fourth Amendment. (App. 128). He referred to the continued detention as a "second seizure," which he described as a "Terry" stop. (App. 128). He acknowledged that probable cause was not required. (App. 129).[2]

Brown argued on appeal in the Court below that Warner improperly continued to detain him after taking him to the police vehicle and conducting a pat down search, which revealed no weapons. According to Brown's argument on brief in the Court of Appeals, at that point, the officer no longer had a basis to detain him. (App. 130). Brown argued:

> ***Because the continued detention of Brown was without reasonable suspicion and in violation of the Fourth Amendment, the contraband found by Warner was a fruit of the illegal seizure***. "Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." *Deer v. Commonwealth,* 17 Va. App. 730, 736, 441 S.E.2d 33, 37 (1994).
>
> The Circuit Court should have considered the absence of an objective basis for ***Brown's continued detention***. Had the Circuit Court done so, it would have concluded that Brown's "second" seizure was not supported by ***reasonable suspicion***.

[2] By referring to the "second seizure" as a Terry stop, and in light of Brown's other arguments, it is clear that he was not referring to his arrest for possession of cocaine when he used the phrase "second seizure."

> The evidence obtained as a result of the continued or "second" seizure by Warner was the direct result of a violation of the Fourth Amendment and was subject to exclusion. Therefore, Brown's conviction for possession of cocaine with the intent to distribute should be reversed.

(App. 130-31) (Emphasis added).

Even in the reply brief filed in the Court of Appeals, Brown argued as the basis for reversal that the officer should have released him on a summons, rather than continuing the detention. (App. 136-37). He argued:

> The Circuit Court did not properly consider the totality of the circumstances in denying the motion to suppress. If it had, the Circuit Court would have concluded that Officer Warner's information and observations were insufficient to establish ***reasonable suspicion to continue detaining Brown***. Brown should have been released on a summons once he was escorted off the bridge and to the police car.

(App. 138) (Emphasis added).

The Court of Appeals actually rejected Brown's argument that Officer Warner lacked reasonable suspicion to detain him further while investigating a narcotics offense. The Court stated that "the ongoing detention for further investigation was reasonable under the circumstances." (App. 141). The Court of Appeals also found:

> Based on the drinking and urinating in public (both misdemeanor offenses for which state law required release on a summons) and the suspicion of possible narcotics dealing, Officer Warner ***was justified in detaining appellant and the second man, Scott Pullen, to further investigate***. When appellant placed his hand behind his back and reached toward

> his rear pocket or waistline area, Officer Warner, whose backup officer had not yet arrived, ***was justified in handcuffing appellant, walking both men to his police vehicle, and frisking them for weapons***. Although the frisk of appellant revealed no weapons, drugs or other contraband, nothing in the record indicates the detention to that point had lasted more than a few minutes, and Officer Warner ***was justified in briefly detaining appellant further while he continued to investigate the drug distribution complaint***. Based on Officer Warner's discovery on Pullen's person of the folded lottery slip containing ashes and his memory of seeing a similar slip in the middle of the ramp to the pedestrian bridge where he had first encountered the two men, Officer Warner ***was justified in having his backup officer continue the detention of both men while he walked back to retrieve the lottery slip***.

(App. 143-44) (Emphasis added). In so ruling, the Court essentially rejected all of the arguments Brown had pursued on appeal.

The Court of Appeals then concluded, however, that, while the officer "may have had probable cause to arrest Pullen for possessing cocaine" and "may also have had reasonable suspicion to continue his detention of [Brown] for further questioning about his involvement with Pullen and the cocaine in the folded lottery slip," the officer lacked probable cause to arrest Brown for possessing the cocaine in the folded lottery slip on the ramp. (App. 144).

Brown included an argument ***at trial*** that the officer may have had probable cause to arrest Pullen, but not Brown, which the trial court

rejected. (App. 67-69). However, Brown ***did not argue that ground on appeal*** to the Court of Appeals in support of his claim that the trial court erred in denying his motion to suppress. His only mention of the matter appeared in the Statement of Facts in his petition and brief, where he recited the arguments he made at the suppression hearing, and the trial court's ruling at that hearing. (App. 101-02, 126).

Brown abandoned the argument in the Court of Appeals. The Court of Appeals should not have decided the case based on an argument that was not presented to it on appeal.

In Clifford v. Commonwealth, 274 Va. 23, 645 S.E.2d 297 (2007), this Court ruled that an appellate court must not consider an argument not presented in the petition for appeal and granted by the Court. See id. at 25, 645 S.E.2d at 297. In Clifford, the Court of Appeals relied on a rationale for decision, which Clifford had not asserted on appeal, to find that the trial court had erred in denying Clifford's right to cross-examine a witness. The Court of Appeals then concluded that the error was harmless. See Clifford, 274 Va. at 25, 645 SE.2d at 297.

When Clifford appealed the Court of Appeals' judgment to this Court, the Commonwealth assigned cross-error to the Court of Appeals judgment, contending that arguments not made in the petition for appeal must not be

considered on appeal. See Clifford, 274 Va. at 25, 645 S.E.2d at 297. This Court agreed and sustained the Commonwealth's assignments of cross-error. Id. at 25-26, 645 S.E.2d at 297. See West v. Commonwealth, 249 Va. 241, 243 n.1, 455 S.E.2d 1, 2 n.1 (1995); see also Richardson v. Moore, 217 Va. 422, 423 n.1, 229 S.E.2d 864, 865 n.1 (1976). Shoup v. Shoup, 37 Va. App. 240, 253 n.6, 556 S.E.2d 783, 790 n.6 (2001) (*en banc*); Cf. Boone v. Harrison, 52 Va. App. 53, 63-64, 660 S.E.2d 704, 709 (2008) (circuit court, acting as appellate court under VAPA, erred in reversing decision of agency on ground not argued in briefs or at hearing).

The Court of Appeals in the instant case correctly determined that Officer Warner possessed the requisite level of suspicion to detain Brown and Pullen, to handcuff Brown, to frisk the men for weapons, and to request the newly arrived backup officer to continue the detention while Warner retrieved the lottery slip on the ground. (App. 143-44). See United States v. Arvizu, 534 U.S. 266, 273 (2002); Whitfield v. Commonwealth, 265 Va. 358, 361-62, 576 S.E.2d 463, 464-65 (2003).

Officer Warner, of course, was entitled to take steps to maintain the status quo while he conducted the Terry stop, see Adams v. Williams, 407 U.S. 143, 145-46 (1972), and, as the Court of Appeals correctly determined, Warner's decision to handcuff Brown, under the circumstances

of this case, was reasonable. See Thomas v. Commonwealth, 16 Va. App. 851, 856-57, 434 S.E.2d 319, 322-23 (1993), *aff'd*, 18 Va. App. 454, 444 S.E.2d 275 (1994) (*en banc*).

The Court of Appeals correctly noted that the officer had a right to charge the defendant for his public drinking, a conclusion the defendant did not dispute. The Court of Appeals correctly determined that during the summons process the officer was entitled to determine whether the folded lottery slip on the ground contained narcotics. (App. 144).[3]

After having rejected the arguments presented on appeal by Brown, the Court of Appeals erred in reversing the trial court's judgment on a basis not argued to that Court on appeal. For that reason, this Court should

[3] Indeed, no additional detention arose beyond that supported by the observation of the defendant's misdemeanor activity. Moreover, any possible extension of the process was attributable to the defendant's own actions. His furtive movements raised concern for the officer, who knew of the defendant's reputation as a known drug dealer and was by himself with the two suspects in an area known for drug dealing.

reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Merits

Even if Brown had raised a claim on appeal that Officer Warner lacked probable cause to arrest him for possession of cocaine, the conviction should not have been reversed on that ground. The totality of the evidence in the record, viewed most favorably to the Commonwealth, established that the officer did have probable cause to effectuate such an arrest.

Standard of Review

A claim that evidence was obtained in violation of the Fourth Amendment "presents a mixed question of law and fact" that an appellate court reviews *de novo* on appeal. Jones v. Commonwealth, 277 Va. 171, 177, 670 S.E.2d 727, 731 (2009) (citations omitted). The Court gives deference to the trial court's factual findings, but independently determines the lawfulness of the manner in which the evidence was obtained. See id. "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 the suppression motion was reversible error." Id. at 177-78, 670 S.E.2d at 731 (citations omitted).

Probable cause for arrest "'exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.'" Buhrman v. Commonwealth, 275 Va. 501, 505, 659 S.E. 2d 325, 327 (2008) (quoting Taylor v. Commonwealth, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981)).

"[T]he probable cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Maryland v. Pringle, 540 U.S. 366, 370 (2003) (citations omitted). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision." Illinois v. Gates, 462 U.S. 213, 235 (1983). "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Id. at 243 n.13.

Furthermore, in determining whether a police officer had probable cause to arrest a person, courts must "test what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control." Hollis v. Commonwealth, 216 Va.

874, 877, 223 S.E.2d 887, 889 (1976). Furtive gestures are relevant in determining whether probable cause exists for arrest. See id.

Analysis

Officer Warner initially went to the location where he observed Brown and Pullen as a result of a complaint received by the police that two individuals were selling narcotics there. (App. 56-57). Because Warner witnessed Brown and Pullen committing misdemeanor offenses, the call received by the police department was not the critical factor in supporting the initial stop of the defendant.

Significantly, the tip received by police was that ***two*** individuals located in the area where the officer found Brown and Pullen, were dealing narcotics. (App. 56-57). The officer first corroborated the presence of the two men at the location. They were the only two people in the area. (App. 57). The area was one known for its drug activity and the defendant was a known drug dealer. (App. 18, 21, 27-31, 32, 37, 43, 54, 74b). See Brinegar v. United States, 338 U.S. 160, 169-70 (1949) (officer's knowledge of suspect's past actions relevant to probable cause determination); Purdie v. Commonwealth, 36 Va. App. 178, 187, 549 S.E.2d 33, 38 (2001) (same).

When Warner initially saw Pullen and Brown, the men were standing about six feet apart. They were stationary. (App. 76-77). It was light

outside; thus Pullen clearly was urinating *in front of* Brown, (App. 22, 76), permitting an inference that the men were together, as Officer Warner concluded. (App. 76).

Brown subsequently engaged in furtive gestures. (App. 19, 49). The officer had observed in the place where the men were standing a folded lottery slip similar to one found on Pullen, which contained ashes. The discovery of cocaine in the lottery slip on the ground provided an explanation for Brown's movements directed at his waistline and corroborated the tip received by the police department.

The trial court did not err in finding that there was probable cause to arrest *both men* for possession of the cocaine found in a paper on the ramp, in a spot in between where the two men had been standing when Warner arrived. See Pringle, 540 U.S. at 372-74. Thus, the cocaine discovered on Brown's person during a search incident to that arrest was not subject to suppression.

CONCLUSION

For the foregoing reasons, the Commonwealth prays that this Court reverse the judgment of the Court of Appeals, and reinstate the judgment of the Circuit Court for the City of Richmond.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 28, 2009, the required copies of this Opening Brief for the Commonwealth and Joint Appendix were hand-delivered to the Clerk's Office of this Court for filing and three copies of each were mailed to Paul F. Fantl, Esquire, 7033 Old Jahnke Road, Richmond, Virginia 23225, counsel for the appellee. An electronic copy of the brief was sent to the Court at scvbriefs@courts.state.va.us.

The Commonwealth desires to present oral argument in this case.

_____

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