In The

Supreme Court of Virginia

RECORD NO. 090557

COMMONWEALTH OF VIRGINIA,

***Appellant*,**

v.

TAVARES LAMONT BROWN,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This appeal calls upon the Court to determine whether Brown substantially complied with Rule 5A:12(c) when the Court of Appeals reached the issue of whether there was probable cause to arrest Brown. But, if the Court decides that the particular ground upon which the Court of Appeals ruled was not argued on appeal, it is for the Court to decide "whether a party's failure to adhere strictly to the rule's requirements is insignificant, or so substantial as to preclude the court's addressing the merits of the case." *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008).

Thus, Brown disagrees with the Commonwealth's Question Presented and disagrees with the Commonwealth's Statement of the Case to the extent it restates the Question Presented.

Brown is in substantial agreement with the factual recitations on page two of the Commonwealth's Opening Brief.

ASSIGNMENTS OF ERROR[1]

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.

QUESTIONS PRESENTED[2]

I. Whether Brown abandoned the argument he made at trial, and if the Court finds Brown did not comply with Rule 5A:12(c) whether Brown's failure to adhere strictly to the rule's requirements is insignificant, or so substantial as to preclude the Court of Appeals from addressing the merits of the case.

(Assignment of Error I).

II. Whether the Court of Appeals correctly ruled that the police lacked probable cause to arrest Brown for possession of the cocaine found in the folded lottery slip on the ground.

(Assignment of Error II).

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[1] The Assignments of Error are set forth exactly as stated in the Commonwealth's petition for appeal (granted by this Court on July 20, 2009) and in the Commonwealth's Opening Brief.

[2] Brown's Questions Presented are set forth pursuant to Rule 5:28(b) of the Rules of the Supreme Court of Virginia

STATEMENT OF FACTS

The Commonwealth's first witness on the Motion to Suppress was Officer M. P. Warner who was on duty on October 24, 2006. App. 14-15. Warner was called to a pedestrian bridge that crossed over the Downtown Expressway and connected the southernmost end of Addison Street with Grayland Avenue. App. 15-16. Warner said the call concerned a possible narcotics violation (App. 15), and later said "the initial call was for possible drug dealing…." App. 18, *see also* App. 47, 48. Warner arrived at the dead end (southernmost end) of Addison Street, parked his vehicle, and looked for any people in the area. App. 16. When he began to walk up the pedestrian bridge, he encountered Scott Pullen and Brown. App. 17. Pullen was urinating and Brown was drinking a 40 ounce bottle of beer. App. 17-18.

Warner began talking to the two men in order to escort them back to his vehicle where he could talk with them at greater length. App. 17. Brown bent over with the bottle in his right hand onto which he was applying the bottle cap that was in his left hand. *Id*. Warner perceived that Brown's right hand went behind Brown's back toward the middle of his waistline. App. 19. Warner told Brown to stand up

and placed him in handcuffs. *Id*. Warner took both men back to his vehicle and patted them down for weapons. He did not find anything on Brown. App. 19. He detected a slight bulge on Pullen which turned out to be a folded lottery play slip that contained cigarette ash. App. 20.

The back up officer arrived and Warner left Pullen and Brown with that officer. Warner proceeded back to the area where he first saw the two men. *Id*. He remembered seeing a folded lottery slip on the ground. *Id*. He found it in between where the two men had been standing. Inside the lottery slip was what appeared to be a small rock of crack cocaine. App. 21. Warner said that the lottery slip was folded in the same way as the lottery slip he had seen on Pullen. *Id*. Warner returned and arrested Pullen and Brown. App. 24.

Warner searched Pullen and found an unused smoking device, a can. He also found multiple lottery play slips folded in half that were the same play slips as the one in which Warner found the cocaine. App. 25. At this point, the circuit court found that sufficient evidence had been heard in order to determine the merits of the motion to suppress. App. 26. The circuit court made inquiries of Warner. Warner said that he had never made an arrest on the

pedestrian bridge. App. 26-27. The closest arrest Warner had made in that area was at 2100-2200 Parkwood Street, one half a block away. App. 27-28. Warner, as a member of a police Focus Mission Team, had made multiple arrests in that broader area of the city. App. 28-32.

Warner said that he had been present when Brown had been stopped by other officers before in relation to narcotics investigations. App. 36. Brown had been seen by these officers and Warner while they were driving by in known drug areas. App. 37. Warner was allowed to testify over a hearsay objection that other officers had told him that Brown was a known narcotics dealer. *Id*.

Warner said that he handcuffed Brown because Brown's hand went behind his back. App. 37-39. But when Warner told Brown to stand up and show his hand, Brown complied. App. 40-41. Although Warner had encountered Brown over ten times in the past, Brown had never made any "furtive movements" during those occasions. App. 41. Warner admitted that he intended to release Brown on a summons for open container of alcohol. App. 45. Warner said that he did not release Brown after the pat down search because his back up had not arrived. App. 46. Also, Warner said that he continued to

detain Brown due to the original call regarding a possible narcotics violation at that location. App. 47. The source and reliability of that information was not known to Warner. *Id*.

Brown and Pullen were polite and cooperative. App. 51-52. In the over ten times Warner had encountered Brown, Brown had never been arrested and had never acted suspicious. App. 49. Further, Warner had never made a drug arrest on that pedestrian bridge or on that block. App. 56. Warner did not know how much time had passed between dispatch receiving information regarding a possible narcotics violation and his getting the radio call to go investigate. App. 60.

Brown argued that once Warner did a pat down and found no weapons, he should have released Brown on a summons. App. 62-63. Warner did not have reasonable suspicion to continue detaining Brown on a narcotics violation investigation. App. 63. Neither the reliability nor the basis of knowledge of the information Warner received from dispatch was established or known. The information was not corroborated and did not specifically target Brown or Pullen. App. 66-67. This information did not establish the necessary reasonable suspicion to warrant the continued detention of Brown.

Even after Warner found the folded lottery play slip and suspected crack cocaine, Warner did not have probable cause to arrest Brown. Nothing Warner had observed in his pat down of Brown or in Brown's conduct gave Warner probable cause that Brown had violated a narcotics law. App. 67-68.

The Circuit Court denied the motion to suppress and found that Warner acted properly in going from the investigation of an offense for which he had to release Brown on a summons, to the investigation of an offense for which he needed probable cause to arrest Brown. App. 68-70.

During the search incident to arrest, Officer Warner found lottery play slips on Pullen. Brown had a single razor blade in his left front pocket and a single rock of crack cocaine in his front right pocket. App. 71. The "smoking device" or can Pullen had was not confiscated because it did not have any residue on it. *Id*. Brown had $15.00 and Pullen had $17.00. Warner did not seize their money. App. 72. Brown's only statement was that he was a crack cocaine user. *Id*.

ARGUMENT

I. Brown did not abandon the argument he made at trial, and if the Court finds Brown did not comply with Rule 5A:12(c) then Brown contends that his failure to adhere strictly to the rule's requirements is insignificant, and not so substantial as to preclude the Court of Appeals from addressing the merits of the case.

Argument

The Commonwealth contends that Brown abandoned the argument made in the trial court that Officer Warner did not have probable cause to arrest Brown. The Commonwealth further contends that the Court of Appeals should not have decided the case based on an argument that was not presented to it on appeal. The Commonwealth argues that in *Clifford v. Commonwealth*, 274 Va. 23, 645 S.E.2d 295 (2007), this Court held "that an appellate court must not consider an argument not presented in the petition for appeal and granted by the Court." Commonwealth's Brief at 10.

In *Clifford*, this Court agreed that Rule 5A:12(c) had been properly construed by the Court of Appeals to mean "[O]nly those arguments presented in the petition for appeal and granted by this Court will be considered on appeal." *Id*., 274 Va. at 25, 645 S.E.2d at 297. This Court also cited *West v. Commonwealth*, 249 Va. 241, 243

n.1, 455 S.E.2d 1, 2 n.1 (1995) and stated that *West* was "applying provisions of Rule 5:17 analogous to those of rule 5A:12(c)." Id.

Brown contends that Rule 5A:12(c) does not apply to raise a procedural bar that would have prevented the Court of Appeals from deciding his case on the basis that Officer Warner lacked probable cause to arrest him for the cocaine found in the folded lottery slip. At the petition stage, Brown's Question Presented was: "Did the Circuit Court err in not suppressing the evidence found in this case when the detention of Brown by Officer Ellis constituted a violation of the Fourth Amendment?" App. 98. Upon granting the petition for appeal by Order entered July 31, 2008, the Court of Appeals framed the question presented as: "Whether the trial court erred by denying appellant's motion to suppress." App. 114. The Commonwealth did not object to this reframing of the question presented granted by the Court of Appeals.

In his Opening Brief, Brown set forth the standard for review as *de novo* for questions of whether a person has been seized in violation of the Fourth Amendment, and specifically noted that appellate review of the application of legal standards such as reasonable suspicion and probable cause is *de novo*. App. 127.

Brown argued in his Reply Brief that Officer Warner lacked reasonable suspicion or probable cause. App. 136. The Court of Appeals found that Brown argued "the trial court erroneously denied his motion to suppress the cocaine because it was found in a search pursuant to a narcotics arrest for which the officer lacked probable cause." App. 140. Thus, the Court of Appeals found that Brown had sufficiently preserved the argument he made in the trial court that the police lacked probable cause to arrest him for the cocaine found in the lottery slip.

This Court has held that Rule 5A:12 is a non-jurisdictional rule and "invocation of a non-jurisdictional rule to dismiss an appeal, or to prevent consideration of its merits, should not be undertaken without considering whether a party's failure to adhere strictly to the rule's requirements is insignificant, or so substantial as to preclude the court's addressing the merits of the case." *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008). Brown asks this Court to find that the Court of Appeals reached the merits of his appeal by correctly adhering to this principle quoted from *Jay*. Brown acknowledges that this Court may find the reasonable suspicion and probable cause argument he made directed at the second seizure or

continued detention of Brown does not present the same issue decided by the Court of Appeals. Brown asks this Court to find that his "question presented left no doubt that a Fourth Amendment violation was the subject of his appellate claim." *Moore v. Commonwealth*, 276 Va. 747, 754, 668 S.E.2d 150, 154 (2008).

Brown contends because he made the probable cause to arrest argument to the trial court, because the Commonwealth did not object to the Court of Appeals's July 31, 2008 Order reframing the question presented, and because the Court of Appeals did not find itself precluded from addressing the merits of the case, this Court should find that Rule 5A:12(c) did not preclude the Court of Appeals from addressing the merits of the probable cause to arrest issue.

II. The Court of Appeals correctly ruled that the police lacked probable cause to arrest Brown for possession of the cocaine found in the folded lottery slip on the ground.

Standard of Review

On appeal of a ruling on a motion to suppress, the appellate courts must view the evidence in the light most favorable to the party prevailing below. *Commonwealth v. Grimstead*, 12 Va. App. 1066, 1067, 4067 S.E.2d 47, 48 (1991). "[The appellate courts] are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them." *McGee v. Commonwealth*, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*). However, "[the appellate courts] review *de novo* the question whether a person has been seized in violation of the Fourth Amendment." *Reittinger v. Commonwealth*, 260 Va. 232, 236, 532 S.E.2d 25, 27 (2000); *see also Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996) (noting review of application of legal standards such as reasonable suspicion and probable cause is *de novo*).

Argument

Brown contends that the Court of Appeals correctly found "that Officer Warner lacked probable cause to arrest appellant for possessing the cocaine found in the folded lottery slip on the ground." App. 2. "Whether a warrantless arrest was constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it." *Jefferson v. Commonwealth*, 27 Va. App. 1, 12, 497 S.E.2d 474, 479 (1998) (citations omitted). If so, such "arrest of a suspect…is a reasonable intrusion under the Fourth Amendment" and, "that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477, 38 L. Ed. 2d 427 (1973).

In this case, police did not have probable cause to arrest Brown, and the search of Brown by Officer Warner constituted a further violation of the Fourth Amendment. Detective Warner relied on the very general information from an anonymous source of "possible drug dealing." App. 15, 18. He went to the dead-end of Addison Street and found Pullen and Brown on the nearby pedestrian bridge. Officer Warner investigated Pullen for urinating in public and Brown

for possessing an open container of alcohol. After patting Brown down and finding no weapons or contraband, Officer Warner found a folded lottery slip folded like the one he had found on Pullen. The folded lottery slip was on the pedestrian bridge in a position between where Pullen and Brown had been standing. Inside the folded lottery slip was cocaine.

These facts did not give rise to probable cause to arrest Brown for possession of the cocaine found in the folded lottery slip. Officer Warner may have had probable cause to arrest Pullen, but he only had a bare suspicion that Pullen and Brown were together and the anonymous tip did not possess any quality or quantity of information to provide probable cause even when considered in the totality of the circumstances presented to Officer Warner.

When making a warrantless arrest, an officer "may rely upon information received through an informant, rather than upon his direct observations," so long as the officer has reasonable grounds to believe that the informant's statement is true. *Illinois v. Gates*, 462 U.S. 213, 242, 103 S. Ct. 2317, 2334, 76 L. Ed. 2d 527 (1983). Because the value and reliability of the information provided by informants to the police varies greatly, the veracity of an informant

and the basis of his or her knowledge regarding a particular tip are "relevant considerations" in the totality-of-the-circumstances analysis that guides the determination of probable cause. *Gates*, 462 U.S. at 232-33, 103 S. Ct. at 2329 (*quoting Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612 (1972)); *see also Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2417, 110 L. Ed. 2d 301 (1990) (stating that both the content and reliability of information possessed by the police are considered when determining whether the totality of the circumstances justified an officer's determination of probable cause). When reviewing an officer's determination of probable cause based upon information provided by an informant, a court should conduct a "balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending [the] informant's tip." *Gates*, 462 U.S. at 234, 103 S. Ct. at 2330; *see also White*, 496 U.S. at 329-30, 110 S. Ct. at 2416.

The Court of Appeals properly found that under the totality of the circumstances, Officer Warner lacked probable cause to arrest Brown for possession of the cocaine found. Neither the information

Officer Warner possessed nor his observations upon seeing Brown provided him with probable cause to arrest Brown.

Brown further adopts the argument and reasoning of the Court of Appeals (App. 140-145) in his argument that the police did not have probable cause to arrest him. Brown asks this Court to affirm the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the appellant, Tavares Lamont Brown, prays this Court to affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED,
Tavares Lamont Brown

By_____
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CERTIFICATE

On September 21, 2009, in accordance with Rule 5:26(d), fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellee were hand-filed with the Clerk of this Court and three paper copies were mailed to Virginia B. Theisen, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219, counsel for the appellant, the Commonwealth of Virginia.

Counsel for Appellant waives oral argument pursuant to Rule 5:35(f).

Paul F. Fantl VSB #38252