IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090557

COMMONWEALTH OF VIRGINIA,

Appellant

v.

TAVARES LAMONT BROWN,

Appellee

REPLY BRIEF OF THE COMMONWEALTH

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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 this Reply Brief, the Commonwealth will respond to arguments Brown has presented in the Brief of Appellee. The Commonwealth also will address an opinion of this Court, issued since the filing of the Commonwealth's Opening Brief. The

Commonwealth continues to rely upon the factual and legal arguments presented in the Opening Brief in support of the Assignments of Error in this case.

Brown notes on brief that the Question Presented in his Petition for Appeal in the Court of Appeals of Virginia asked whether the trial court had erred in denying the motion to suppress when the detention of Brown by the officer constituted a violation of the Fourth Amendment. (Appellee Br. at 9; App. 98). Brown notes that when the Court of Appeals granted the appeal, the Court re-framed the Question Presented to read only "Whether the trial court erred by denying appellant's motion to suppress." (Appellee Br. at 9; App. 114).

Brown argues that because at trial he raised the issue of whether the officer had probable cause to arrest him for possession of the cocaine found in the lottery slip on the ground, and because the Commonwealth did not object to the re-framing of the Question Presented by the Court of Appeals, the Court of Appeals was not precluded from deciding the "probable cause to arrest issue." (Appellee Br. at 11). That argument is incorrect.

The Court of Appeals did not re-phrase Brown's Question Presented to include the issue of whether there was probable cause for Officer Warner to arrest Brown. Nor did the Court of Appeals direct the parties to address whether the officer had probable cause to arrest Brown.

Moreover, it does not appear that Brown saw the re-wording of the Question Presented by the Court of Appeals as significant because he presented virtually the same arguments in the Opening Brief in that Court as he had included in his Petition for Appeal. (App. 105-10, 126-31). Indeed, the title of Brown's argument in his Opening Brief in the Court of Appeals was "The Circuit Court erred in not suppressing the evidence found in this case ***when the initial stop of the defendant constituted a seizure of his person in violation of the Fourth Amendment***." (App. 126) (Emphasis added).

Brown did not present any argument in the Petition for Appeal or the Opening Brief regarding probable cause for arrest for possession of the cocaine found in the lottery slip on the ground. The Court of Appeals erred in finding that such an argument had been

presented on appeal.[1]

In his current brief in this Court, Brown notes that he argued in his Reply Brief in the Court of Appeals that the officer lacked reasonable suspicion or probable cause. (Appellee Br. at 10). However, a review of the Reply Brief filed in the Court of Appeals reveals that Brown argued as follows:

> Brown acknowledges that the issuance of the summons for his alcohol offense had not been completed because Officer Warner improperly effected a "second" seizure of his person without reasonable suspicion or probable cause.

(App. 136). It is clear that Brown was addressing his detention by Officer Warner *prior* to his arrest, *not* the arrest itself. Nowhere in the Reply Brief did Brown argue that Warner lacked probable cause to arrest him for possession of the cocaine found in the lottery slip on the ground. (App. 136-38).

Brown contends that his Question Presented in the Court of Appeals "left no doubt that a Fourth Amendment violation was the

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[1] The Commonwealth does not contend that the argument was waived at trial. As noted in the Commonwealth's Opening Brief in this Court, the argument was presented to the trial court at the suppression hearing and the trial court ruled on the issue. (CW Br. at 10). The waiver of the issue occurred on appeal in the Court of Appeals.

subject of his appellate claim." (Appellee Br. at 11). His cites Moore v. Commonwealth, 276 Va. 747, 668 S.E.2d 150 (2008), in support of his argument. This reliance is misplaced. Unlike Moore, the justification for Brown's pre-arrest detention and the probable cause to support his arrest concerned two different events; they did not simply concern the proper standard of review for evaluating a single event.[2]

Brown's reliance on Jay v. Commonwealth, 275 Va. 510, 659 S.E.2d 311 (2008), also is misplaced. This Court ruled in Jay that the Court of Appeals had erred in *dismissing* the appeals of two appellants who had failed to comply with the Rules of Court concerning briefs in that Court. In Jay, the Court of Appeals concluded that the appellants had not complied with the Rule requiring inclusion of principles of law, argument, or citations to legal authority in support of an issue raised in the appeal. See id. at 515-16, 659 S.E.2d at 314. In the instant case, by contrast, Brown failed to present to the Court of Appeals the *issue* of probable cause for arrest.

[2] In Moore, the single event was the traffic stop of the vehicle.

The Court of Appeals correctly ruled against Brown on the issues concerning his pre-arrest detention. The Court erred in addressing the issue of probable cause for arrest when that issue had not been presented to it. See Clifford v. Commonwealth, 274 Va. 23, 25, 645 S.E.2d 295, 297 (2007).

The Court of Appeals also erred in its ruling that Officer Warner lacked probable cause to arrest Brown for possession of the cocaine found in the lottery slip on the ground in a place directly between where Brown and Pullen had been standing when the officer first arrived.

In Whitehead v. Commonwealth, 278 Va. ___, ___ S.E.2d ___ (9/18/09), a trained police drug dog had alerted on a car in which Whitehead was one of four occupants. This Court addressed the issue of whether, after a search of the vehicle and three of the four occupants revealed no contraband, the officer had probable cause to search Whitehead, the fourth occupant. The Court concluded that Whitehead's mere presence as a passenger in the car was

insufficient to provide probable cause for his arrest.[3]

The Court held:

> The United States Supreme Court's decisions in Di Re and Ybarra demonstrate that probable cause to arrest and/or search an individual must be particularized to that individual; mere proximity to criminal activity alone is insufficient to establish probable cause. However, as illustrated by the decision in Pringle, evidence showing a common criminal enterprise can provide the necessary link between criminal activity and an individual so as to establish probable cause sufficiently particularized to that individual.

Whitehead, 278 Va. at ___, ___ S.E.2d at ___ slip op. at 17.

In reversing Whitehead's conviction, this Court held that after the dog alerted on the car, the officer "unquestionably" had probable cause to search the vehicle. Id., slip op. at 18. The Court held, however, that "without something more, the positive alert did not provide probable cause sufficiently particularized as to Whitehead to allow the search of his person." Id. The Court noted that the only evidence that Whitehead was involved in any common criminal activity was his presence as a passenger in the car. See id.

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[3] The Court in Whitehead discussed United States v. Di Re, 332 U.S. 581 (1949); Ybarra v. Illinois, 444 U.S. 85 (1979); Maryland v. Pringle, 540 U.S. 366 (2003); and El-Amin v. Commonwealth, 269 Va. 15, 607 S.E.2d 115 (2005).

By contrast, in the instant case, Officer Warner initially responded 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). Brown and Pullen were the only two people in the area, which was known for its drug activity, and the defendant was a known drug dealer. (App. 21, 27-31, 32, 37, 43, 54, 57, 74b).

When the officer first saw Pullen and Brown, the men were standing about six feet apart. Pullen was urinating in front of Brown, (App. 22, 76-77), permitting an inference that the men were together, as the officer concluded. (App. 76).

Brown subsequently engaged in furtive gestures. (App. 18-19, 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 suspicious movements directed at his waistline and corroborated the tip received by the police department. All of these circumstances support a conclusion that the officer had probable cause to arrest Brown.

CONCLUSION

For these reasons, as well as those stated in the Opening Brief for the Commonwealth, the decision of the Court of Appeals should be reversed, and the judgment of the Circuit Court of the City of Richmond should be reinstated.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellant herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On October 2, 2009, the required copies of this Reply Brief of the Commonwealth were hand-delivered to the Clerk's Office of this Court for filing and three copies 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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