IN THE

SUPRME COURT OF VIRGINIA

RECORD NO. 090727

RONALD LEE JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

On February 27, 2007, Ronald Lee Jones was convicted in a jury trial in the Circuit Court of Stafford County of refusing to provide a breath sample in violation of Virginia Code § 18.2-268.2. The jury fixed his sentence to thirty days in jail and a fine of $2,500. The judge entered judgment consistent with the jury verdict. (App. 23-25).

Jones appealed his conviction to the Court of Appeals of Virginia, which granted his petition on September 13, 2007. (Record No. 0597-07-4). After briefing and argument, the Court of Appeals affirmed in a published decision on May 6, 2008. (App. 26-34).[1] Jones v. Commonwealth, 51 Va. App. 730, 660 S.E.2d 343 (2008). On June 12, 2008, the Court of Appeals denied Jones's petition for rehearing *en banc*.

After that, this Court dismissed Jones's petition for appeal on September 11, 2008 because he failed to file his notice of appeal in the Court of Appeals. See Rule 5:14(a). On July 23, 2009, however, the Court awarded Jones a delayed appeal under Code § 19.2-321.2.

[1] Page 9 of the 10 page opinion has been omitted from the joint appendix.

DEFENDANT'S ASSIGNMENT OF ERROR

THAT THE COURT ERRED IN FINDING PROBABLE CAUSE TO ARREST THE DEFENDANT [BY] PLACING PARTIAL CAUSE FOR ITS DETERMINATION ON THE DEFENDANT'S REFUSAL TO SUBMIT TO ANY FIELD SOBRIETY TESTS.[2] [3]

QUESTION PRESENTED

DID THE COURT ERR IN FINDING PROBABLE CAUSE TO ARREST THE DEFENDANT [BY] PLACING PARTIAL CAUSE FOR ITS DETERMINATION ON THE DEFENDANT'S REFUSAL TO SUBMIT TO ANY FIELD SOBRIETY TESTS?

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[2] The assignment of error in Jones's brief has been modified from that presented in his petition for appeal. In the petition for appeal, Jones alleged that the "Court erred in finding probable cause to arrest the defendant placing partial cause for its determination on the appellant's refusal to submit to any field sobriety tests." In Jones's brief, however, he says the "Court erred in finding probable cause to arrest the defendant when an essential element for probable cause was predicated on the appellant's refusal to submit to any field sobriety tests." The assignment of error here is the assignment presented in Jones's petition for appeal. See White v. Commonwealth, 267 Va. 96, 103, 591 S.E.2d 662, 666 (2004).

[3] On September 1, 2009, the Virginia Association of Criminal Defense Lawyers moved this Court to file a brief amicus curiae in support of Jones. On September 9, 2009, the Commonwealth objected as the issue contained in the amicus brief was not preserved in the trial court or presented to the appellate courts. See Rule 5:30(c). See also McDonald v. Commonwealth, 274 Va. 249, 255, 645 S.E.2d 918, 921 (2007). As of September 28, 2009, both motions were pending.

STATEMENT OF FACTS

Around 10:00 or 11:00 p.m. on September 29, 2006, Stafford County Sheriff's Deputy Peter Nelson was on patrol when he was dispatched to the Park Ridge Subdivision in response to a report of a home invasion robbery or a breaking and entering. (App. 282, 320). Nelson arrived with his partner, driving one of eight police cars involved in organizing a perimeter, to "lock the area down" by catching the culprit as he escaped on foot or to a waiting car. (App 45, 275).

Deputy Nelson pulled into the subdivision and, by happenstance, fell behind Ronald Lee Jones, driving a SUV. The windows in the truck were tinted "very black" and it was impossible to see if anyone was in the back. (App. 45, 299). Nelson parked his patrol car and "just sat there," watching. (App. 58, 285). From where Nelson was stationed, he could see "down two to three streets" at the same time. (App. 285).

At the suppression hearing on February 5, 2007, Deputy Nelson testified he saw Jones drive by in his truck twice more on two different streets. (App. 45, 62). On the second pass, Jones "was creeping very slow." (App. 45).

Suspecting this "guy right here . . . might be our person," Deputy Nelson, flashlight in hand, said he walked toward Jones and put his other

hand up. (App. 62, 286-287). On direct examination, Jones disputed Deputy Nelson flagged him down.

> First of all, [Nelson] did not pull me over. I came to a stop and asked for his assistance.

(App. 353). Jones also testified he did not stop as the result of "any motions" made by Deputy Nelson, but stopped on his own. (App. 109). He stopped his truck, "trying to get [Deputy Nelson's] attention." (App. 110).

While Deputy Nelson spoke to Jones, he noticed a "definite strong odor of alcohol coming from him and his person." (App. 289). Nelson detected the "strong" smell when Jones stepped from his truck (App. 289) and was conscious of it while Jones sat in the back of the patrol car. (App. 324).

Deputy Nelson described Jones's eyes as a "little glassy, a little red." (App. 71, 302). Inside the truck were a 12-ounce can of beer and two wine cooler bottles. (App. 306, 135). Jones asked Deputy Nelson to tell him if he was in Prince William or Stafford County. (App. 74). Jones's speech was a little slurred and he was "stuttering." (App. 86-87).

Jones denied any drinking and attributed the odor of alcohol first to his cough drops and then to incense. (App. 73, 351). He eventually showed Deputy Nelson a note from his daughter and explained he was in Stafford County to pick her up. (App. 84).

Jones got out of the truck and Deputy Nelson asked him to take certain field sobriety tests. (App. 289). Jones insisted on staying on the curb and would not step into the street to perform the tests. (App. 79, 289). Instead, he exclaimed, "Why are you doing this to me? I don't understand what you're doing." (App. 292). He also said, "If I blow now, you are going to control what I do now"and "I don't want to be involved in what's going on now." (App. 501, VHS Exhibit 1). He added that "if you continue to go on and pursue what is not a fact, we're not going to accomplish anything" and "I want to cooperate, but you are doubting, and I am trying to help you." (App. 501, VHS Exhibit 1).

Later, Jones asked Deputy Nelson "Why would you assume I was drinking?" When Nelson told him, "I don't know how much clearer I can be," Jones interrupted, exclaiming, "Oh my God! You are doubting! Oh my God!" (App. 77, 501, VHS Exhibit 1). Jones also said he came to "help [Deputy Nelson] and [Nelson] was trying to hurt him." (App. 318). At that point, Deputy Nelson testified he "assumed [Jones] had prior DUI's" as

> people with prior DUIs, they know you have to have probable cause. They understand that you are going to run some tests and they probably know that the less they give us, the less of a case we have and I started sensing that.

(App. 76).

Over the police radio, Deputy Nelson confirmed Jones had "been down this road before" and had two prior DUI convictions. (App.76, 358). Deputy Nelson told Jones if he would

> do the field sobriety test and take the PVT [sic] and it determines that you are not a .08, but you might have had something to drink, I can work with you and get you a ride. I'm not going to arrest you at a .05 or .03 and take you to jail.

(App. 83).

After fifteen or twenty minutes more, however, Deputy Nelson "gave up because [Jones] had two priors and he knew what was going on." (App. 77). Jones would "not come off it at all." Jones repeated that Nelson was "doing the wrong thing [and Jones did not] know why." (App. 82). Deputy Nelson testified he never saw "a man in [his] entire life try so hard to prove he's not intoxicated by being uncooperative." (App. 77).

Deputy Nelson read Jones the implied consent law in his patrol car and "discussed it in detail." (App. 321). He asked Jones if he "refused to take the breath test" and Jones said he did. (App. 66). He realized Jones "was not taking the test and arrested him because he can't be on the road." (App. 78). At the magistrate's office, Nelson read the implied consent law again and Jones "continued to refuse." (App. 310, 314).

At both the motion to suppress and at trial on February 27, 2007, Jones testified he refused the breath test because he was "consumed as a

father" about his daughter's whereabouts (App. 355), he had "shut down and lost all sight (App. 355), he was "uncomfortable and wanted to talk to a black police officer" (App. 102), and Deputy Nelson had "approached [him] with such aggression." (App. 107). Jones also said he had refused field sobriety tests in two previous encounters with police, once because he had "an injured toe." (App. 116). He stated he should have also had an "opportunity to speak with an attorney" before submitting to the tests. (App. 164).

At the motion to strike, defense counsel said:

> Judge, with respect to articulable suspicion, I won't make any argument. With respect to probable cause to arrest, that's where I am going to focus my argument. On the articulable suspicion, Mr. Jones stated he stopped his vehicle. I'm not going to dwell on that.

(App. 120).

In finding both reasonable suspicion to stop Jones and probable cause to arrest for driving under the influence, the trial court observed:

> Although I understand there is no argument as to the issue of suspicion, in effect there was . . . What do we have? We have an officer responding to the same, a more recent claim of a breaking and entering. The officer, who is experienced, says that he was concerned that the suspect might be on foot, but also that he could be in a vehicle to avoid detection, so they set up a perimeter.
>
> He sees the defendant drive, passed him slowly twice. This officer's suspicion is heightened because of the driving and

> because of the possibility, based on his experience that sometimes a suspect will bail on foot, but then get in a car. We go through the issue of the gentleman driving the car meets the description of a black male, though the officer says his hair as it appears today is like it was then, but then he wasn't focusing on him being a suspect but as possibly someone transporting the suspect.
>
> The encounter then begins and the officer flags down the vehicle. He has seen this man driving. When he encounters him, he smells alcohol. Containers of alcohol are visible in the vehicle. He speaks to the defendant. He is able to observe his demeanor. He is able to observe and report on the defendant's inconsistency.
>
> [Jones] himself initiated the exchange with the officer as well as the defendant's uncertainty where he was, what county he was in, and at the same time, the defendant is telling the officer he is looking for his daughter. With all of this evidence and with all those findings, this court finds this officer, first of all, did have reasonable articulable suspicion to stop this defendant and from that encounter all the facts that I heard, likewise had probable cause to arrest him for driving under the influence on the night of September 29, 2006. The motion to suppress is denied.

(App. 1334-136).

ARGUMENT

THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S RULING THAT THERE WAS PROBABLE CAUSE TO ARREST JONES FOR DRIVING UNDER THE INFLUENCE.

On brief, as he did in the Court of Appeals, Jones invites this Court to "independently determine if probable cause was established" by viewing the videotape of Jones's encounter with Deputy Nelson. (Def. Br. 9). In

addition, he asks the Court, as an "independent fact finder," to "review and independently judge the credibility of the witnesses," particularly Deputy Nelson. (Def. Br. 20, 27). Further, according to Jones, Deputy Nelson "testified in a conclusory manner . . . regarding his assessment of Jones" and "misapplied" the "content and interpretation" of the videotape". (Def. Br. 15, 24).

Last, Jones argues it was error for the Court of Appeals to rely on Farmer v. Commonwealth, 12 Va. App. 337, 404 S.E.2d 371 (1991) (*en banc*), as authority in approving Jones's refusal to perform field sobriety tests as a factor in a probable cause analysis. (Def. Br. 29).

Jones says reliance on Farmer is "ill-advised" because he "waived his challenge to reasonable articulable suspicion to stop," and so any inference of his consciousness of guilt is "impermissible" and "inappropriate." (Def. Br. 29, 32).

In making a probable cause determination, "courts will focus upon what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control." Parker v. Commonwealth, 255 Va. 96, 106, 496 S.E.2d 47, 53 (1988) (citation and quotations omitted). Additionally, in reviewing an evidentiary suppression ruling, great deference is afforded to the "peculiar fact finding capability of

the trial court" because it "has before it the living witnesses and can observe their demeanors and inflections." Satchell v. Commonwealth, 20 Va. App. 641, 648, 460 S.E.2d 253, 256 (1995) (*en banc*).

Appellate review of witness testimony is controlled by the oft-repeated principle that "[t]he trier of fact is the sole judge of the credibility of the witnesses, unless, as a matter of law, the testimony is inherently incredible." Juniper v. Commonwealth, 271 Va. 362, 415, 626 S.E.2d 383, 417 (2006). "To be incredible, testimony must be either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." Id. (citations and internal quotations omitted).

In this case, Jones's contention that this Court should operate as a fact finder by viewing the videotape and making an independent credibility assessment is wrong on the law and flouts another well-settled principle that the evidence, in addition to all reasonable inferences, must be reviewed on appeal in the light most favorable to the prevailing party below. See Reid v. Commonwealth, 256 Va. 561, 564, 506 S.E.2d 787, 789 (1998) (citations omitted). Cf. Commonwealth v. Hilliard, 270 Va. 42, 51, 613 S.E.2d 579, 585 (2005) (error for appellate court to review videotape to

conduct its own fact finding in concluding defendant invoked right to counsel).

Here, the record confirms the correctness of the holding of the Court of Appeals that Deputy Nelson had ample cause to arrest Jones for driving under the influence and that his refusal to perform field sobriety tests was only one factor in the calculus.

> Deputy Nelson did not solely rely on the odor of alcohol for his belief that Jones was possibly engaged in criminal behavior. Instead, the deputy also relied on Jones' physical appearance, his argumentative demeanor, and his persistent refusal to perform any field sobriety tests.

Jones, 51 Va. App. at 737, 660 S.E.2d at 346.

Further, according to the Court of Appeals, each of the foregoing factors, "taken separately, may not have provided sufficient probable cause," but "taken as a whole," did. Id. at 741, 660 S.E.2d at 348.

Moreover, under Farmer, as the Court of Appeals observed, evidence of a refusal to perform field sobriety tests is admissible in a DUI trial and does not offend the Fifth Amendment's prohibition against self-incrimination. Thus:

> If, in a prosecution for DUI, evidence of a defendant's refusal to perform field sobriety tests is considered relevant and admissible to establish guilt of the offense, we fail to see how the same evidence is not a legitimate factor for an officer's consideration in assessing the existence of probable cause to arrest for the same offense.

Jones, 51 Va. App. at 740, 660 S.E.2d at 348.

Equally unavailing on appeal are Jones's 42 reasons on brief why "an innocent man or woman would refuse to perform field sobriety tests." (Def. Br. 21-23). An example of one explanation specifically rejected by the trial court was the claim that his behavior was no more than a manifestation of a "frightened, terrified father who was desperately attempting to ensure his daughter was safe." (Def. Br. 21). Likewise, the trial court was entitled to reject Jones's testimony he did not know the wine cooler bottles were inside his truck and his explanation he carried the beer can around for good luck at football games. Importantly, the trial court could regard Jones's exculpatory account at trial as affirmative evidence of his guilt. Wright v. West, 505 U.S. 277, 296 (1992).

As the trial judge observed, Jones was "inconsistent," did not know what county he was in, and the odor of alcohol was palpable, in his truck and in the patrol car. Consistent with these authorities, the Court of Appeals properly concluded that the trial court did not err in finding probable cause to arrest. Jones's refusal to submit to field sobriety tests had nothing to do with being "uncomfortable" with Deputy Nelson, his absent daughter, or not consulting with a lawyer first. Twice convicted of drinking and driving, as well as refusal, Jones "knew what was going on"

and contrived an implausible story for Deputy Nelson in the hopes of avoiding a third conviction. See Brothers v. Commonwealth, 50 Va. App. 468, 650 S.E.2d 874 (2007) (consent to take breath test not qualified or conditioned on having access to counsel first).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On September 28, 2009 the required copies of this brief were hand-delivered to the Clerk of this Court for filing and three copies were mailed to J. Burkhardt Beale, Esquire, Boone Beale, 4391 Ridgewood Center Drive, Suite H, Woodbridge, VA 22192. A copy was sent electronically to this Court at scvbriefs@courts.state.va.us.

The Commonwealth does not waive oral argument.

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