IN THE

Supreme Court of Virginia

RECORD NO. 090979

RUSSELL MAURICE JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A grand jury for the City of Richmond returned an indictment charging that on or about October 30, 2007, Russell Maurice Jones, having been determined to be a habitual offender, and having previously been convicted of driving while a habitual offender, did feloniously and unlawfully drive on a public highway. Jones subsequently filed a motion to suppress, which was denied on February 22, 2008, by the Honorable Walter W. Stout, III, Judge of the Circuit Court for the City of Richmond. On April 1, 2008, the trial court reconsidered its denial of the motion to suppress. After additional evidence and argument, the trial court affirmed its earlier ruling. On that

same day, Jones entered a conditional plea of guilty, reserving his right to appeal the denial of the motion to suppress. Jones was subsequently sentenced to one year of incarceration. He timely noted his appeal, and his Petition was granted by the Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed the trial court's ruling. Jones timely noted his appeal to this Honorable Court, which granted his petition.

ASSIGNMENTS OF ERROR

I. The trial court erred by holding that the off-duty deputy sheriffs were not state actors, and the Court of Appeals erred by not deciding this issue.

II. The trial court erred by denying the motion to suppress when Jones was seized in violation of the Fourth Amendment, and the Court of Appeals erred by holding that the encounter between Jones and the deputies was consensual in nature.

QUESTIONS PRESENTED

I. **Whether state action is implicated when off-duty sheriffs engage in police business while wearing their uniforms and displaying their badges of authority.[1] (J.A. 84–87, 89, 97–98, 100–01, Assignment of Error I).[2]**

II. **Whether the sheriff's deputies seized Jones in violation of the Fourth Amendment. (J.A. 83–87, 97–98, 101–03, Assignment of Error II).**

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[1] It is unclear whether the trial court, in fact, based its final ruling on lack of state action. In the original motion to suppress, the trial court stated that it found no state action. However, on rehearing, the trial court stated that "the Court doesn't reach the issue of state action in this ruling. . . ." (J.A. 105). Since the trial court did not explicitly overrule its earlier motion, Appellant has included this assignment of error and related argument.

[2] References to the Joint Appendix are herein noted as "(J.A. __)." The Joint Appendix includes both the original February 22, 2008 transcript and the amended February 22, 2008 transcript. The original February 22, 2008 transcript was filed on June 2, 2008. Thereafter, defense counsel timely filed objections indicating that the court reporter had omitted a portion of the transcript. (J.A. 10–11). Thereafter, the court reporter filed the amended transcript, which contained the omitted portion of the argument, and the trial court ordered that the amended transcript be made part of the record and considered timely filed. (J.A. 12). Only the amended transcript is cited to in this Brief, although both are included in the Joint Appendix for the Court's reference.

STATEMENT OF FACTS

On October 30, 2007, Richmond City Sheriff's Deputies Feighner and Mannes were working off-duty in Midlothian Village Apartment Complex. (J.A. 62). They were parked in Deputy Mannes' personal vehicle when they saw a white sedan pull into the complex and park. (J.A. 62). Two black males exited the vehicle and walked towards the stairwell. (J.A. 62). Nothing seemed suspicious to the deputies at that time. (J.A. 62). The men walked back to the vehicle and opened the trunk, looking inside the trunk for 20 to 30 seconds. (J.A. 63). They then began walking towards the same building they had originally approached. (J.A. 63). At this point, Deputies Feighner and Mannes approached the driver of the vehicle, later identified as Jones. (J.A. 63). Deputy Feighner had no previous contact with Jones and did not know whether he was a resident of the property or a guest. (J.A. 70–71). Deputy Feighner testified that he thought it was suspicious that Jones went back to his vehicle to look in the trunk. (J.A. 71).

At the time of the encounter, Deputies Feighner and Mannes were wearing Sheriff's Department uniforms consisting of brown pants, Sheriff's Department polo shirts with an embroidered Sheriff's badge and the words "Richmond Sheriff's Department" on the front and back. (J.A. 100). They

were also wearing their firearms. (J.A. 100). Their purpose for working on the property was to "fight Midlothian Village's no trespassing violators." (J.A. 64).

When Feighner and Mannes approached Jones, they asked for his identification. (J.A. 64). Jones did not have identification on his person, but provided his name and date of birth. (J.A. 64). Feighner observed that Jones had bloodshot eyes and slurred speech. (J.A. 64). Deputy Feighner asked why he was on the property, and Jones replied that his baby was sick and it was an emergency. (J.A. 65). When asked which building he was visiting, Jones pointed to a specific building. (J.A. 65). There is no indication in the record that either deputy made an effort to verify Jones's explanation for his visit. The deputies did, however, observe that Jones was accompanied by an unknown female. (J.A. 72, 82). At some point in this initial interaction, Deputy Feighner patted Jones down for weapons. (J.A. 74).

Deputy Feighner then advised Jones that he was going to bar him from the property, and asked Jones to accompany him to the rental office to complete the barment paperwork. (J.A. 66, 75–76). Feighner also stated that he wanted to verify Jones's identity. (J.A. 76). When asked if Jones was free to leave at this point, Feighner candidly admitted that he

would have detained Jones if Jones had tried to leave the scene, and further testified that Jones was not free to leave. (J.A. 66, 73).

Deputy Feighner called the Richmond Sheriff's jail annex to determine whether Jones had any outstanding warrants and also to check his driving record. (J.A. 67). Deputy Feighner testified that he does not usually run driving records when he stops people for trespassing. (J.A. 77–78). The Sheriff's Department reported that Jones's license had been revoked. (J.A. 72). The deputy then placed Jones in handcuffs, and Feighner swore out an arrest warrant for felony driving as a habitual offender. (J.A. 72, 78).

ARGUMENT

Standard of Review

In dealing with the denial of a motion to suppress evidence, appellate courts apply an established standard of review. A defendant's claim that a seizure violated his Fourth Amendment rights "presents a mixed question of law and fact that is reviewed *de novo* on appeal." *McCain v. Commonwealth*, 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001). "In making such a determination, [appellate courts] give deference to the factual findings of the trial court and independently determine whether the manner in which the evidence was obtained meets the requirements of the

Fourth Amendment." *Murphy v. Commonwealth*, 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002).

I. The trial court erred to the extent it found no state action was involved when off-duty sheriffs engaged in police business while wearing their uniforms and displaying their badges of authority.

In this case of first impression, the Court is presented with the question of whether state action is involved when off-duty sheriffs working at a private apartment complex engage in police business while wearing their uniforms and displaying their badges of authority. Though Virginia has not squarely addressed the issue of state action in this context, the facts at bar are remarkably similar to those of *In re Albert S.*, 106 Md. App. 376, 664 A.2d 476 (1995). In that case, the Maryland court was asked to determine whether state action was established when an off-duty officer working part-time for a gated community of townhouses detained the defendant, asked him for his driver's license, and ultimately issued him a summons. *Id.* at 381-83, 664 A.2d at 478-80. Although not in uniform, the officer in that case drove a marked police vehicle and carried his badge and service revolver. *Id.* at 382, 664 A.2d at 479. He also carried a police radio and so had open access to police channels. *Id.* Finding that these

facts clearly established state action, the Maryland court emphasized that "the courts of other states have consistently held that the Fourth Amendment must be applied to the conduct of an off-duty police officer whenever the officer 'steps outside [the] sphere of legitimate private action.'" *Id.* at 387, 664 A.2d at 481 (citing *Commonwealth v. Leone*, 386 Mass. 329, 435 N.E.2d 1036, 1041 (1982)).

First, the Maryland court found it significant that the officer issued a summons. "Because a private security guard is without authority to issue a summons, we [have] held that the officer was engaged in a police department function rather than the business of his part-time employer" by issuing a summons. *Id.* at 388, 664 A.2d at 482. Second, the court emphasized that, although the officer was not dressed in his uniform, the fact that he was driving a marked police vehicle indicated that he was "acting under color of police authority." *Id.* at 390, 664 A.2d at 483. Finally, the Maryland court found it telling that, while performing his private duties, the officer was in close cooperation with his police department. *Id.* at 392, 664 A.2d at 484 (citing LaFave, 1 Search and Seizure § 1-8 (2nd ed. 1987)).

Further, as noted by the Maryland Court of Appeals, this issue has been addressed at length in civil cases involving an alleged violation of a

plaintiff's rights under 42 U.S.C. § 1983. In that context, federal courts have held that state action is implicated whenever "an off-duty officer wears a uniform, displays a badge of authority, *or* makes other assertions of police authority." *In re Albert S.*, 106 Md. App. at 391, 664 A.2d at 484 (emphasis added). *See, e.g.*, *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995) (finding state action where an off-duty officer wore his uniform and drove a marked police vehicle).

Any one of the factors present in the Maryland case, *i.e.*, displaying police credentials, being in close contact with the police department, or writing a summons as a police officer should suffice to establish state action. However, in the instant case, there is not only one of those factors present; every single factor outlined by the Maryland court is present in Jones's case.[3]

In the instant case, Deputies Feighner and Mannes were working off-duty at Midlothian Village Apartment Complex, where their duties centered around enforcing the "No Trespassing" policy at the apartments. The officers implicitly identified themselves as Sheriff's Department employees

[3] While in this case the deputies were in a personal vehicle rather than a marked vehicle as in the Maryland case, there is no indication on the record that Jones ever saw their vehicle, rendering that fact irrelevant. Instead, it appears from the record that the deputies approached Jones on foot and then walked to the rental property office. (J.A. 62–63, 67).

by wearing their uniforms and displaying their Sheriff's Department badges. When they approached Jones to inquire about his presence on the property, they did nothing to investigate his claim that he was there as an invited guest. Rather, they detained him and, working in close cooperation with their employer, called the Sheriff's Department to have them run a records check. Moreover, the encounter ended not with the deputies calling for an on-duty officer to cite Jones for trespass, but instead with Deputy Feighner himself issuing an arrest warrant for Jones. That warrant was not for trespassing, which would at least have been somewhat related to the deputies' duties at the apartment complex, but rather for driving as a habitual offender.

Though not discussed by the Maryland Court of Appeals, there are two additional factors present in this case. Here, the deputies clearly stepped outside their private function of enforcing the apartment's trespassing policy by even investigating a possible driving offense. Further, they not only executed a pat-down, but they handcuffed Jones after deciding to issue the warrant for the traffic violation. Any of these factors standing alone would demonstrate that the deputies did not limit

their actions to their private capacity when they encountered Jones.[4] Taken as a whole, the evidence of state action is overwhelming.

Based on these facts, the Appellant respectfully argues that the trial court erred to the extent it found no state action. Moreover, the Court of Appeals erred by not deciding this issue, as it implicitly applied a state action analysis in determining whether Jones's Fourth Amendment rights were violated.

II. The trial court erred in denying Jones's motion to suppress where the police seized Jones in violation of the Fourth Amendment.

Whether the Encounter Was Consensual

The initial inquiry for the Court is at what point Jones was subjected to an investigatory detention. In particular, the trial court ruled that the encounter was consensual until the deputies handcuffed Jones and arrested him for driving as a habitual offender. In contrast, Jones argues that he was not free to leave the moment he was instructed that he needed to come to the rental office to effect his barment from the property.

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[4] For example, in the context of a criminal charge for assaulting a law enforcement officer in violation of Va. Code § 18.2-57(c), the Court of Appeals has held that an officer engaged in off-duty private security for a housing complex is acting in the scope of his public duties if he merely issues a warrant. *Davis v. Commonwealth*, 44 Va. App. 562, 566–67, 605 S.E.2d 790, 792–93 (2004).

An encounter is consensual if the police merely "approach persons in public places to ask them questions, *provided* a reasonable person would understand that he or she could refuse to cooperate." *Payne v. Commonwealth*, 14 Va. App. 86, 88, 414 S.E.2d 869, 870 (1992) (citation omitted) (emphasis added). "So long as a reasonable person would feel free to disregard the police and go about his business . . . no reasonable suspicion is required." *Lodono v. Commonwealth*, 40 Va. App. 377, 398, 579 S.E.2d 641, 651 (2003) (citation omitted). Essential to an encounter remaining consensual is that the individual must feel free "to ignore the police and to walk away from them," and where the officer makes requests of an individual, that person must "feel free to decline the officers' requests." *Payne*, 14 Va. App. at 88, 414 S.E.2d at 870. The standard is an objective one, what a "reasonable person" would understand under the circumstances, *id.*, and "presupposes an *innocent* person." *Florida v. Bostick*, 501 U.S. 429, 437–38 (1991).

In contrast, a *Terry* stop may be initiated only when an officer has "a reasonable suspicion, based on objective facts, that the [person] is involved in criminal activity." *Ewell v. Commonwealth*, 254 Va. 214, 216, 491 S.E.2d 721, 722 (1997). In such a case, an officer may "detain [the individual]

briefly while attempting to obtain additional information" to confirm or dispel his suspicions. *Hayes v. Florida*, 470 U.S. 811, 816 (1985).

Although the Court of Appeals held that the encounter was consensual, the facts support the contention that Jones was not free to leave almost from the beginning of the encounter. *See Jones v. Commonwealth*, Record No. 0968-08-2, at J.A. 16 (Va. Ct. App. Apr. 21, 2009) (unpublished). Here, armed deputies approached Jones and began asking him why he was at the complex. When he gave them a very plausible explanation, and then pointed in the direction of the apartment where he was heading, the officers did not ask to accompany him to the apartment or make any other efforts to verify his presumptively lawful presence on the property. Instead, they told him they were going to bar him from the property. When these armed, uniformed law enforcement officers indicated that they were definitely going to bar him, and then asked him to come to the rental office to effectuate that unavoidable barment, no reasonable person in Jones's position would have felt free to leave. In the light required by *Bostick*, "presuppos[ing] an *innocent* person" who was not, in fact, trespassing, there is no rational reason why that person would voluntarily accompany the deputies to be barred from the property. Rather, he would have felt that he was obligated to remain in the presence of the

officers at least until the barment paperwork was completed. A reasonable person in that situation would go along with the barment paperwork only because he felt he had no choice.

The testimony of Deputy Feigner is also instructive. Although he stated that Jones agreed to come back to the rental office so that the deputies could complete the barment paperwork, he also candidly acknowledged that Jones was not free to leave, and the officers would not have allowed him to leave the scene. Again, this makes sense in the context of the deputies having made the determination to bar their suspect. It would be irrational for a citizen to expect that he could just walk away from the deputies and therefore avoid barment. Obviously, the officer's subjective intent does not control this Court's analysis. *See Whren v. United States*, 517 U.S. 806, 813 (1996). However, it is equally true that "[t]he fact patterns in [Fourth Amendment] cases arrive in infinite variety, seldom or never exactly duplicated, [and] involve consideration of nuances such as tone of voice, facial expression, gestures and body language," *Malbrough v. Commonwealth*, 275 Va. 163, 171–72, 655 S.E.2d 1, 5 (2008), so that the officer may well have telegraphed his intent to Jones.

Whether There Was Reasonable Suspicion to Justify the Seizure

If the Court concludes that Jones was subjected to an investigatory detention, the next inquiry is whether that detention was supported by reasonable suspicion that Jones was currently engaging in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Based on the testimony of the officers that they were there to "identify people to ensure that they [were] not trespassing," (J.A. 64), and that they intended to detain Jones to bar him from the property, it would appear that they suspected him of engaging in the criminal activity of trespass. However, at the point where they advised Jones that he was going to be placed on the barment list, the deputies did not have reasonable suspicion that he was in fact trespassing.

When they executed the stop, the deputies knew only that an unknown male parked at an apartment complex, exited his vehicle, looked in his trunk, and began approaching one of the buildings in that complex. They did not know who he was, and there is no evidence in the record that they ascertained whether or not he was, in fact, a resident of the property. Rather, when asked why he was there, Jones stated that "my baby daughter is sick and it [is] an emergency." (J.A. 65). This statement is not determinative of whether the defendant lived in the same apartment complex where his infant daughter resided. Further, despite the fact that

he pointed out the apartment building he was going to, the deputies made no effort to accompany him to that apartment to verify his story. Nor did the deputies speak with Jones's companions to determine whether they were lawful residents who had invited Jones as a guest onto the property. Although the deputies said they found it unusual, the fact that Jones looked in his trunk does not contradict his lawful presence on the property.

This Court's decision in *Ewell v. Commonwealth*, 254 Va. 214, 491 S.E.2d 721 (1997), is dispositive. In *Ewell*, the Court held that "merely observ[ing] an unfamiliar automobile and its operator in the parking lot of the [private] apartment complex about 12:30 a.m. ... in an area suspected of 'high narcotics' trafficking," and further observing that the suspect "exited the parking lot upon [the officer's] arrival in a police vehicle," was insufficient to establish a reasonable suspicion of any criminal activity. *Ewell*, 254 Va. at 214–17, 491 S.E.2d at 721–23.

The deputies in the instant case had even less reason to suspect Jones of trespassing than did the officers who stopped Ewell. Here, Deputies Feigner and Mannes did observe someone they were not familiar with in the parking lot of the complex, and, as in *Ewell*, it was late at night. However, unlike *Ewell*, in the instant case the deputies actually questioned Jones about his presence on the property, and were provided with a lawful

explanation. Surely the mere fact that a citizen comes to an apartment complex, parks, looks in his or her trunk, and walks towards a building cannot establish reasonable suspicion that he or she is in the process of committing a crime. This is especially true where, as here, that person provides a lawful and verifiable explanation for his or her presence on the property. *See also Harris v. Commonwealth*, 262 Va. 407, 551 S.E.2d 606 (2001).

Further, Jones was with a woman, further supporting his explanation for being on the property, but there is no indication that Feighner or Mannes spoke with her. As in *Ewell*, the deputies could not point to specific facts indicating that Jones was committing any illegal activity, including trespassing. *See Ewell*, 254 Va. at 217, 491 S.E.2d at 723.

Since this encounter was not consensual and was not supported by reasonable suspicion, the deputies' seizure of Jones violated the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the trial court's denial of his motion to suppress, along with his conviction, be reversed.

Respectfully submitted,
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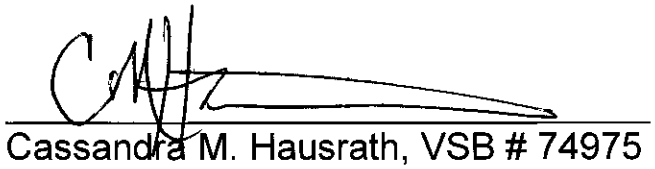
CERTIFICATE

Counsel for the Appellant certifies as true the following information:

a. The Appellant is **Russell Maurice Jones**; the Appellee is the Commonwealth of Virginia; appellate counsel for the Appellant is Cassandra M. Hausrath, Assistant Public Defender, Richmond Public Defender's Office;
b. Counsel for the Appellant was appointed by Order of the Circuit Court of the City of Richmond;
c. Counsel submits Appellant's case on his Opening Brief with a request for oral presentation;
d. On this 4th day of November, 2009, a copy of this Opening Brief was mailed to the Appellant and three copies were mailed to Leah A. Darron, Esq., Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219 (804) 786-2071, along with fifteen copies of this Opening Brief and Appendix and an electronic copy of this Opening Brief and Appendix sent in PDF format by email to the Clerk of the Supreme Court of Virginia;
e. Rule 5:26(d) of the Rules of the Supreme Court of Virginia has been complied with.



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