IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090979

RUSSELL MAURICE JONES

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Following the denial of his motion to suppress, Russell Jones entered a conditional guilty plea in the Circuit Court for the City of Richmond to driving after being determined a habitual offender, a felony, in violation of Virginia Code § 46.2-357(B)(3). He was sentenced to serve one year in

prison on the offense. Final judgment was entered on April 7, 2008. (App. 2-3). His conviction was affirmed by the Court of Appeals in an unpublished opinion on April 21, 2009. (App. 13-18). This Court granted Jones' petition for appeal on September 29, 2009.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED BY HOLDING THAT THE OFF-DUTY 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. (App. 84-87, 89, 97-98, 100-101; ASSIGNMENT OF ERROR I)

II. WHETHER THE SHERIFF'S DEPUTIES SEIZED JONES IN VIOLATION OF THE FOURTH AMENDMENT. (App. 83-87, 97-98, 101-103; ASSIGNMENT OF ERROR II)

STATEMENT OF FACTS

At the February 22, 2008, suppression hearing the evidence showed that at approximately 2:00 a.m. on October 30, 2007, Richmond City Sheriff's Deputies Jeffrey Feighner and Tom Mannes were working off-duty as private security for the Midlothian Village Apartment Complex located in the City of Richmond. (App. 25, 82). Their purpose for working on the property was to "fight Midlothian Village's no trespassing violators." (App. 27). The officers were in uniform wearing shirts identifying them as police officers and displaying their firearms. (App. 100).

At 2:15 a.m. the officers observed a white four-door sedan pull into the complex and park in front of an apartment building. (App. 25). Two black males exited the vehicle and walked towards the stairwell/breezeway of Apartment Building 4024. (App. 25-26). Nothing seemed suspicious to the deputies at that time, (App. 25), but their suspicions were aroused when the men returned to the vehicle, opened the trunk, looked inside the trunk for 20-30 seconds, but retrieved nothing. (App. 26, 63). Afterward, the men began walking towards the same building they had originally approached. (App. 6, 26, 62-63). Based on these activities, Deputy Feighner believed the men were trespassing. (App. 63-64). He proceeded

to the breezeway where he encountered the driver of the vehicle, later identified as Jones. (App. 26, 63-64).

Deputy Feighner had had no previous contact with Jones and did not know whether he was a resident of the property or barred from the property. He initiated contact with Jones in order to determine whether Jones had a legitimate reason for being on the property. (App. 27, 75).

Deputy Feighner told Jones he was on private property marked no trespassing and asked Jones for his identification. (App. 27, 75). Jones did not have any identification on his person, but verbally provided his name and date of birth. (App. 27). Feighner noted that Jones eyes were hazy and bloodshot eyes and that his speech was slurred. (App. 27). Deputy Feighner asked why he was on the property, and Jones replied that his child was sick and it was an emergency. (App. 28, 65). When asked which building he was visiting, Jones could only point in the general direction of an apartment building; he could not provide the officer with a building or apartment number. (App. 65, 75). Also during this initial interaction, Deputy Feighner received Jones' permission to conduct a pat-down of his person for weapons. (App. 67).

Deputy Feighner then asked Jones to accompany him to the apartment complex office to complete the paperwork necessary to verify

Jones' identity and bar him from the property. Jones agreed and they walked to the rental office, which was located 50 feet away.[1] (App. 59, 66-69).

While Deputy Mannes was processing the paperwork required to bar Jones from the property, Deputy Feighner called the sheriff's office to determine if Jones had any outstanding warrants and also to verify his driving record. (App. 67-68). Deputy Feighner did not usually run a DMV driving record check when he stopped people for trespassing, but this did not prolong the defendant's stay in the rental office. (App. 70-71). Upon learning that Jones' license had been revoked, (App. 67, 68), Jones was arrested for operating a vehicle while being a habitual offender. (App. 1, 72-73).

At the conclusion of the suppression hearing on February 22, 2008, the trial court stated the three cases relied upon by the defense were inapposite. The court held the defendant's actions were "normal" until he returned to the trunk of the vehicle, retrieved nothing and then attempted to return to the apartment building. (App. 90-91). The deputies approached. They had a "normal conversation" with Jones, who was cooperative. He advised the deputies that he had no identification on his person, but he

[1] Even though Jones did so voluntarily, Feighner testified that he would have detained Jones if he had not cooperated. (App. 66).

verbally provided them with his name and birth date. He stated that he was present on the property to visit a sick child but he could "only point [] vaguely" toward an apartment building; he was unable to provide the building or apartment number. (App. 91).

The trial court found that Jones voluntarily accompanied the officers to the rental office to complete the paperwork to bar him from the property. The trial judge found no evidence that the deputies coerced Jones or that his will was overborne. The judge noted that the officers testified that 10 minutes passed from the time they initially encountered Jones to the time he was taken into custody on the driving offense. (App. 67-68, 99). The trial judge found this was a "very limited intrusion, time-wise." (App. 92). The court concluded there was no evidence of force or coercion. (App. 92). Jones cooperated. (App. 92). The court denied the motion to suppress finding Jones was "not seized." (App. 105). The trial judge specifically stated that he was not addressing the issue of state action. (App. 98).

ARGUMENT

I. WHETHER THE ACTS OF THE DEPUTIES CONSTITUTED STATE ACTION, IS NOT PROPERLY BEFORE THIS COURT.

Jones contends that the conduct of Deputies Feighner and Mannes implicated state action and therefore the trial court erred in finding no state action. The record specifically shows, however, that at the conclusion of the second hearing on Jones' motion to suppress the trial court stated that *it was not reaching the issue of state action*. (App. 98). Jones did not object to the court's ruling. Thus, his claim on this issue is barred by Rule 5:25, Rules of the Supreme Court of Virginia.[2]

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING JONES' MOTION TO SUPPRESS; THE TRIAL COURT FOUND THE ENCOUNTER WAS CONSENSUAL.

Jones contends the trial court erred when ruling the encounter between him and the deputies was consensual until the point the officers learned his driver's license was suspended. He contends he was unlawfully seized from the outset of the encounter. His claim should be rejected.

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[2] The Court of Appeals held it "need not reach" the issue, given its ruling the trial court had not erred in finding the encounter was consensual. (App. 17). The court also noted the Commonwealth had not argued the deputies were acting in a private capacity. (App. 17).

Standard of Review

The appellate standard of review applicable in this case is well settled:

> In reviewing the denial of a motion to suppress evidence claiming a violation of a person's Fourth Amendment rights, we consider the facts in the light most favorable to the Commonwealth, the prevailing party at trial. The burden is on the defendant to show that the trial court committed reversible error. We are bound by the trial court's factual findings unless those findings are plainly wrong or unsupported by the evidence.

Malbrough v. Commonwealth, 275 Va. 163, 168-69, 655 S.E.2d 1, 3 (2008); accord Murphy v. Commonwealth, 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002). See Whitehead v. Commonwealth, 278 Va. 300, 306-307, 683 S.E.2d 299, 304 (2009).

A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that this Court reviews de novo on appeal. McCain v. Commonwealth, 275 Va. 546, 551-552, 659 S.E.2d 512, 516 (2008) (citing Murphy, 264 Va. at 573, 570 S.E.2d at 838). See Bolden v. Commonwealth, 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002); McCain v. Commonwealth, 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001); see also Ornelas v. United States, 517 U.S. 690, 691, 699 (1996). In making such a determination, the appellate court gives deference to the factual findings of the circuit court, but independently

determines whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. McCain, 275 Va. at 551-552, 659 S.E.2d at 516; Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000).

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 his suppression motion was reversible error. McCain, 275 Va. at 551-552, 659 S.E.2d at 516; Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980).

Applicable Law

Fourth Amendment jurisprudence recognizes three categories of police-citizen confrontations: (1) consensual encounters, (2) brief, minimally intrusive investigatory detentions, based upon specific, articulable facts, commonly referred to as Terry[3] stops, and (3) highly intrusive arrests and searches founded on probable cause. McGee v. Commonwealth, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (en

[3] Terry v. Ohio, 392 U.S. 1 (1968)

banc). See Thompson v. Commonwealth, 51 Va. App. 205, 214, 656 S.E.2d 409 (2008).

"Police officers are free to engage in consensual encounters with citizens, indeed, it is difficult to envision their ability to carry out their duties if that were not the case." Malbrough, 275 Va. at 169, 655 S.E.2d at 4. "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." United States v. Drayton, 536 U.S. 194, 200 (2002). "[A] consensual encounter does not require any justification," White v. Commonwealth, 267 Va. 96, 104, 591 S.E.2d 662, 666 (2004), and remains consensual "'as long as the citizen voluntarily cooperates with the police,'" Payne v. Commonwealth, 14 Va. App. 86, 88, 414 S.E.2d 869, 870 (1992) (quoting United States v. Wilson, 953 F.2d 116, 121 (4th Cir. 1991)).

"A police request made in a public place for a person to produce some identification, by itself, generally does not constitute a Fourth Amendment seizure." McCain, 261 Va. at 491, 545 S.E.2d at 546 (citing Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984)). Lawful consensual encounters are limited "to such encounters . . . in which a reasonable person would feel free to disregard the police and

go about his business." Reittinger v. Commonwealth, 260 Va. 232, 236, 532 S.E.2d 25, 27 (2000) (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)) (internal citations and quotation marks omitted). The reasonable-person test "presupposes an innocent person," Bostick, 501 U.S. at 438 (emphasis in original), "rather than one laboring under a consciousness of guilt," Malbrough, 275 Va. at 169, 655 S.E.2d at 4. "The consensual encounter becomes a seizure '[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" Id. (quoting Bostick, 501 U.S. at 434).

Various factors have been identified as relevant in determining whether an officer "by means of physical force or show of authority" would cause a reasonable person to feel seized. United States v. Mendenhall, 446 U.S. 544, 553-54 (1980). These factors include the threatening presence of several officers, the display of weapons by officers, physical contact with the citizen, and an officer's language or tone of voice compelling compliance. Id.; see also Harris v. Commonwealth, 266 Va. 28, 32, 581 S.E.2d 206, 209 (2003), and Londono v. Commonwealth, 40 Va. App. 377, 398-99, 579 S.E.2d 641, 651 (2003) (citing Mendenhall, 446 U.S. at 554). "The decision whether the encounter was consensual must be

made based on the totality of the circumstances." Harris, 266 Va. at 32, 581 S.E.2d at 209.

No one circumstance, however, should be considered apart from the larger context. An encounter—otherwise consensual—does not become a seizure merely because of the presence of several armed officers, United States v. Drayton, 536 U.S. 194, 204-05 (2002), or the failure of the officers to inform the person that he is free to ignore further questioning, Delgado, 466 U.S. at 216, or their failure to tell the individual he is free to leave, Ohio v. Robinette, 519 U.S. 33, 39-40 (1996). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." Delgado, 466 U.S. at 216.

Equally true, "the mere fact that officers ask incriminating questions" is not itself dispositive — "what matters instead is 'the manner' in which such questions were posed." United States v. Ringold, 335 F.3d 1168, 1173 (10th Cir. 2003) (citation omitted). Even "persistent questioning regarding criminal activity" does not necessarily negate the consensual nature of the conversation. Dickerson v. Commonwealth, 266 Va. 14, 17-18, 581 S.E.2d 195, 197 (2003) (holding that an officer did not seize an

individual simply by asking whether he "smoked marijuana" or had any illegal drugs).

The proposition that "police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions," the United States Supreme Court has emphasized, "is by no means novel; it has been endorsed by the Court any number of times" and has the support of a "long, unbroken line" of judicial decisions. Bostick, 501 U.S. at 439; see also United States v. Kim, 27 F.3d 947, 953 (3d Cir. 1994).

Concluding the encounter between Jones and the deputies was consensual, the trial court found that the deputies approached Jones with "no guns drawn" and engaged in "normal conversation." The trial court further found Jones was "cooperative" and there was "no evidence of any coercion or overbearing his will in any way." According to the trial court, "it took no time at all" and "[Jones] consented to [go with them]." As this Court recently observed:

> There is good reason for the rule that appellate courts must defer to the factual findings of the trial judge in Fourth Amendment cases. The fact patterns in such cases arrive in infinite variety, seldom or never exactly duplicated. Moreover, they involve consideration of nuances such as tone of voice, facial expression, gestures and body language seldom discernable from a printed record. The controlling inquiry [in determining whether a person was seized] is the effect of such

> matters on a reasonable person in the light of all the surrounding circumstances.

Malbrough, 275 Va. at 171, 655 S.E.2d at 5.

According proper deference to the trial court, it cannot be said the trial court's finding was "plainly wrong" or "unsupported by the evidence." The record demonstrates "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." Drayton, 536 U.S. at 204. Although the deputies were armed and wearing clothing identifying them as members of the sheriff's office, "mere presence of officers who are uniformed and armed does not constitute a 'show of authority' that transforms a consensual encounter into a seizure" under the Fourth Amendment. Dickerson, 266 Va. at 18, 581 S.E.2d at 197 (citation omitted). "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." Drayton, 536 U.S. at 205.

Thus, contrary to Jones' contention, he was not seized within the meaning of the Fourth Amendment. As the trial court found, the encounter was consensual and concluded in a lawful arrest.

CONCLUSION

For the foregoing reasons, the judgment appealed from the Court of Appeals of Virginia and the Circuit Court for the City of Richmond should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 30, 2009, the required copies of this Brief were hand delivered to the Clerk's Office of this Court for filing, and mailed to Cassandra M. Hausrath, Esquire, Assistant Public Defender, 701 East Franklin Street, Suite 600, Richmond, VA 23219, counsel for appellant.

The Commonwealth does not waive oral argument.

_____
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