IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091539

MICHAEL EUGENE JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

In this appeal from Michael Eugene Jones's convictions in the Circuit Court for the City of Portsmouth for possession of a firearm by a convicted felon, possession of heroin with the intent to distribute, and possession of a firearm while in possession with intent to distribute a schedule I or II drug, Jones argues that the Court of

Appeals of Virginia erred in upholding the trial court's denial of his motion to suppress certain evidence against him. Jones contends that the police violated the Fourth Amendment by illegally detaining him, and that evidence subsequently recovered as the result of a consent search and his subsequent inculpatory statements therefore should have been suppressed.

On June 12, 2008, the Circuit Court for the City of Portsmouth denied Jones's motion to suppress. After a bench trial, the court convicted Jones of those charges and sentenced him to 15 years in prison.[1] (App. 4-6).

In a per curiam order of March 18, 2009, a single judge of the Court of Appeals of Virginia refused Jones's appeal of the trial court's decision denying his motion to dismiss. (App. 10-11). On July 2, 2009, a three-judge panel of the Court of Appeals also denied his petition for appeal. This Court awarded Jones an appeal.

ASSIGNMENTS OF ERROR

Jones raises the following assignments of error:

[1] The Commonwealth agrees that the sentencing order is incorrect and should reflect a sentence on the possession of a firearm by a convicted felon of 5 years for a total sentence of 15 years.

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHEN THE POLICE EXCEEDED THE SCOPE OF THE PAT DOWN FOR WEAPONS BY REMOVING HIS WALLET AND EXAMINING THE CONTENTS WHICH LED THE POLICE TO DISCOVER HIS IDENTITY AND THE FACT HIS LICENSE WAS SUSPENDED ALTHOUGH WITHOUT THIS ILLEGAL CONDUCT BY THE POLICE THE RECORD DOES NOT INDICATE THIS ILLEGALLY OBTAINED EVIDENCE WOULD HAVE BEEN INEVITABLY DISCOVERED.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT'S MOTION TO SUPPRESS AND FINDING THAT THE DEFENDANT CONSENTED TO A SEARCH OF HIS VEHICLE WHEN THE DEFENDANT COULD NOT GIVE VALID CONSENT TO A SEARCH AS HE WAS BEING ILLEGALLY DETAINED, AND ANY CONSENT HE GAVE WOULD BE THE RESULT OF THE ILLEGAL DETENTION AND NOT FREE AND VOLUNTARY CONSENT.

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN UPHOLDING THE DECISION OF THE TRIAL COURT THAT THE DEFENDANT FREELY AND VOLUNTARILY CONSENTED TO A SEARCH OF HIS VEHICLE WHILE HE WAS BEING LEGALLY DETAINED? (Assignments of error I and II).

STATEMENT OF FACTS

On March 14, 2008, while driving in "high crime/high drug area" known for "shootings, murders, stabbings, robberies" and "lots of narcotics transactions," Detectives McNett and Deluca of the Portsmouth Police Department noticed a car stopped in the public roadway impeding traffic. (App. 22-23). McNett could see two people inside the car and a person standing outside the driver's side door of the vehicle leaning in though the driver's window. (App. 23). McNett also noticed five or six individuals standing next to the car on the shoulder of the road. (App. 22-23). The defendant was seated in the driver's seat of the vehicle. (App. 24).

McNett, who during his 14 years at the department had observed over a hundred drug transactions, saw a "hand to hand transaction" between the person leaning into the driver's seat and the defendant. (App. 22-24). After the individual leaning into the car appeared to look up and see the police, he took his hand out of the car and "abruptly walked away." (App. 41). Believing that they had just witnessed a narcotics transaction, the detectives followed the defendant's vehicle and signaled for it to pull over. (App. 24).

McNett approached the driver's side of the car and asked the defendant for his driver's license and registration. (App. 24). Jones was unable to produce either item and was "visibly shaking and breathing hard." (App. 24). After McNett asked the defendant to step out of the vehicle, McNett began talking with the passenger, leaving Deluca to speak with Jones. (App. 24).

Deluca noticed that the defendant was extremely nervous, breathing heavily, and shaking. (App. 43). Although the defendant said he did not have identification, he provided Deluca with a name other than Michael Jones. (App. 43). The defendant also told Deluca that the vehicle belonged to his cousin. (App. 50). Deluca patted down the defendant because he was concerned for his safety based on the nature of the area, the defendant's nervous behavior and Deluca's belief that the defendant had been involved in a drug transaction based on his earlier observations. (App. 43).

During the pat down, Deluca felt what he believed was a wallet in the defendant's rear pocket. (App. 44). Deluca was surprised because the defendant had said that he had no identification with him. (App. 44). When Deluca asked the defendant whose wallet it was, Jones replied that it belonged to his cousin. (App. 45). Deluca

then “asked to look at the wallet, pulled it out” and found a blank check inside with the name Michael Eugene Jones, a different name from the one that the defendant had provided. (App. 44-45). Jones continued to insist it was his cousin’s wallet and began “breathing more heavy” and appeared “extremely nervous and shaking.” (App. 45).

After the defendant began “looking around” and “glancing around,” Deluca handcuffed him and placed him in the car because he was concerned about his safety and was still trying to determine the defendant’s identity. (App. 46). Deluca was waiting for dispatch to verify the defendant’s information and asked a uniformed officer to bring a computer so that he could “verify what the defendant was saying.” (App. 45). The dispatcher informed Deluca that the car was registered to a Michael Jones. (App. 46).

Meanwhile, McNett told the passenger that he was free to leave after he verified his identification card, and the passenger left. (App. 25). McNett then returned to the vehicle and Saw that Jones had been placed in handcuffs. (App. 25). After Jones was seated in the car, about ten minutes after the initial stop, McNett asked the

defendant for consent to search his car. (App. 25, 46, 54). The defendant said, “Sure, no problem.” (App. 25).

McNett discovered a Glock semi-automatic pistol under the driver’s seat. (App. 25). In the trunk, underneath the spare tire, McNett found 60 “decks” or individual portions of heroin divided into six bundles, and a pistol inside a tool bag. (App. 31).

At the scene, McNett provided the defendant with Miranda admonishments from a preprinted card. (App. 96). The defendant then acknowledged that his real name was Michael Jones and that he had falsely provided his cousin’s information because his operator’s license was suspended. (App. 96). He said he knew about the gun and drugs in the trunk, but alleged that the passenger put the other firearm under the front seat. (App. 97).

The defendant moved to suppress the weapons and drugs found in the car and his subsequent inculpatory statements to the police. During the suppression hearing, the defendant argued that the detective exceeded the scope of the pat down for weapons and his consent to search was thus involuntary. (App. 57-76) The trial court denied the motion to suppress and found the defendant guilty at his subsequent trial. (App. 83-84).

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN UPHOLDING THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS BECAUSE THE CONSENT SEARCH WAS NOT THE PRODUCT OF AN ILLEGAL DETENTION.

The defendant argues that the trial court erred in denying his motion to suppress the drugs and guns recovered from the car and his subsequent statements because Detective Deluca exceeded the scope of a pat down when he removed the defendant's wallet from his rear pocket. (Def. Brf. at 11). Jones asserts that any subsequent consent was the product of an illegal detention based on the illegally obtained wallet and that his statements were a fruit of the illegal search. (Def. Brf. at 15, 20). Even if the seizure of the wallet exceeded the scope of the pat down, because the initial detention had not ended, and because the defendant was still properly detained based on reasonable articulable suspicion unrelated to the removal of the wallet, the consent was not the product of an illegal detention.

A. Standard of Review

A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that the

Court reviews *de novo* on appeal. Bolden v. Commonwealth, 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002). However, when reviewing the trial court's ruling rejecting a defendant's motion to suppress evidence, this Court considers the evidence in the light most favorable to the Commonwealth and "accord[s] the Commonwealth the benefit of all inferences fairly deducible from the evidence." Glen v. Commonwealth, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008).

"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 v. Commonwealth, 275 Va. 546, 551-52, 659 S.E.2d 512, 515 (2008) (citations omitted). The defendant in this case has failed to show that the trial court's ruling was incorrect.

B. **Defendant's Continued Detention was Lawful.**

The police recovered the heroin and guns in the defendant's car incident to a consent search. A search conducted pursuant to a valid consent does not implicate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). "Consent loses its validity only if it is involuntary, or the product of a

manipulative exploitation by the police of an earlier unconstitutional search or seizure." Kyer v. Commonwealth, 45 Va. App. 473, 483, 612 S.E.2d 213, 218 (2005) (en banc) (internal citations deleted).

The defendant in this case has failed to demonstrate that his consent was the product of an unconstitutional search or seizure. The defendant does not contest the validity of his initial stop and does not argue that his identity or the check from his wallet should have been suppressed.[2] (Def. Brf. at 17). He also does not dispute that Deluca was entitled to pat him down for weapons. (Def. Brf. at 11).

Instead, Jones argues that an unconstitutional seizure of his wallet resulted in his detention being improperly extended. (Def. Brf. at 14-15). He contends that his consent to the search of the vehicle was invalid because it took place during this unconstitutionally extended detention. Id. Specifically, he alleges that this improper detention began once Deluca received information from dispatch that the name and information provided by the defendant belonged to a licensed driver. (Def. Brf. at 16).

However, once a driver has been lawfully stopped the

[2] On brief, the defendant "declines to argue that the initial stop was invalid." (Def. Brf. at 10 n.3).

> temporary seizure of the driver and passengers ordinarily continues, and remains reasonable for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers that they are free to leave. An officer's inquiries into matters unrelated to the justification of the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not ***measurably extend*** the duration of the stop.

Arizona v. Johnson, 129 S.Ct. 781, 788 (2009) (emphasis added).

The defendant's argument is incorrect. Irrespective of the discovery of the check, the defendant's continued detention was lawful because reasonable suspicion that Jones was involved in criminal activity continued to exist.

In Terry v. Ohio, 392 U.S. 1, 22 (1968) the Supreme Court held that a police officer may "in appropriate circumstances" approach a person to investigate possible criminal activity even though there is no probable cause to arrest. "A stop is permissible so long as the officer has reasonable, articulable suspicion that criminal activity may be afoot." McCain v. Commonwealth, 275 Va. 546, 552, 659 S.E.2d 512, 516 (2008) (citation omitted) In Adams v. Williams, 407 U.S. 143, 145-46 (1972), the Court further stated:

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the ***status quo***

> ***momentarily while obtaining more information***, may be most reasonable in light of the facts known to the officer at the time.

Id. at 145-46 (citations omitted) (emphasis added); see Simmons v. Commonwealth, 217 Va. 552, 554-555, 231 S.E.2d 218, 220-221 (1977).

There is no "litmus test" for reasonable suspicion. Each instance of police conduct is judged for "reasonableness" in light of the circumstances. Terry, 392 U.S. at 21. In ascertaining the reasonableness of an officer's suspicion in making an investigatory stop, the court must consider an objective view of the "totality of the circumstances." Parker v. Commonwealth, 255 Va. 96, 104, 496 S.E.2d 47, 53 (1998). Such circumstances include the characteristics of the area where the stop occurred, the time of the stop, whether late at night or not, and suspicious conduct of the person, such as an "obvious attempt to avoid officers or any nervous conduct on the discovery of their presence." Smith v. Commonwealth, 12 Va. App. 1100, 1103, 407 S.E.2d 49, 51 (1991).

The totality of the circumstances in this case were sufficient for a reasonable officer to conclude Jones might be involved in criminal activity. Deluca testified that they initially pulled the defendant over

because they believed they had seen him engaged in a drug transaction in a high crime area. (App. 55). Even without the discovery of the check, the reasonable suspicion that was the basis for the stop did not dissipate during the ten minutes the police detained Jones, but, in fact, increased as time passed.

After seeing what the detectives believed was a hand to hand drug transaction in a high crime area, the officers observed the defendant, who had no driver's license or registration, acting extremely nervously, shaking and breathing heavily. (App. 43). The defendant had no driver's license, vehicle registration, or any other form of identification. (App. 24, 44). When Deluca properly patted the defendant down for officer safety, he felt what he believed was a wallet, which Deluca regarded as suspicious given the defendant's representation he had no identification with him. (App. 44). Also suspicious was the defendant's representation that a wallet in his back pocket belonged to his cousin and not to him. (App. 44). All of this took place before Deluca seized the wallet. (App. 49-51)

It is certainly reasonable, given these circumstances, that police would have detained Jones long enough to determine his identity by keeping Jones for a few minutes to compare his face with the known

photograph of the person he claimed to be. There is nothing unusual about Portsmouth police being able to make such comparisons during routine traffic stops. While all uniformed officers apparently have the ability to pull up these photographs on computers in Portsmouth, Deluca and McNett, as detectives in plain clothes in an unmarked vehicle, simply did not have a computer with similar access to this information. (App. 40, 52).

While the defendant argues that the reason Deluca continued to hold him was due to the name on the check, Deluca's subjective reason for the detention is irrelevant if the police had an objective basis to hold him until they confirmed or dispelled their suspicions. '"An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action; the officer's subjective motivation is irrelevant.'" Robinson v. Commonwealth, 273 Va. 26, 37, 639 S.E.2d 217, 233 (2007) (quoting Brigham City v. Stuart, 347 U.S. 398, 404 (2006).

The police could certainly detain Jones until they had issued him a summons with the correct name. Jones had committed at least

two traffic infractions in their presence. See Va. Code § 46.2-888; Va. Code § 46.2-300.

The defendant suggests that the police would not have had the name Michael Jones for a comparison if Deluca had not removed the wallet from the defendant's rear pocket. However, the record demonstrates that the dispatcher also informed Deluca that the car was registered to a Michael Jones. (App. 46). Thus, the police had an independent basis upon which to check the name and the photograph.

The defendant has not demonstrated that the police, already suspecting that the defendant was involved in drug transactions would not have asked for consent to search his vehicle.

II. THE CONSENT SEARCH WAS NOT A "FRUIT OF THE POISONOUS TREE" OF THE ILLEGAL SEARCH.

Assuming that the police exceed the scope of the pat down and thus violated the Fourth Amendment when they removed the wallet from Jones's pants, the consent was not obtained as product of that illegal search.[3]

[3] The defendant also alleges that his inculpatory statements obtained after he was provided Miranda admonishments were likewise fruits of

"The exclusionary rule operates not only against evidence seized and information acquired during an unlawful search or seizure but also against derivative evidence discovered because of the unlawful act." Warlick v. Commonwealth, 215 Va. 263, 265, 208 S.E.2d 746, 748 (1974). In Wong Sun v. United States, however, the Supreme Court acknowledged that not all evidence need be suppressed "simply because it would not have come to light but for the illegal actions of the police." 371 U.S. 471, 488 (1963). The Court stated that "the more apt question . . . is whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id.

Moreover, "there are three limitations to the 'fruit of the poisonous tree' doctrine, namely: (1) evidence attributed to an independent source; (2) evidence where the connection has become so attenuated as to dissipate the taint; and (3) evidence which

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the illegal search. The Commonwealth contends that the same reasoning that applies to the consent search also governs the statements. Although the police provided Miranda warnings, there was no significant break in time between the search and the statements.

inevitably would have been gained even without the unlawful action." Warlick, 215 Va. at 266, 208 S.E.2d at 748.

In this case, the Court of Appeals properly held that consent was not obtained by the police's exploitation of any illegality.[4] (App. 14). The police already knew through their discussions with the defendant that he had a wallet in his pocket supposedly belonging to his cousin. (App. 50). The recovery of the check in the wallet actually bolstered Jones's claim. Furthermore, the police discovered from the dispatcher that the vehicle was registered to a Michael Jones. (App. 46). They therefore had the ability though an independent source to check the name.[5] The only information that they obtained from the

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[4] The defendant relies heavily on Davis v. Commonwealth, 37 Va. App. 421, 429, 559 S.E.2d 374, 377 (2002). However, as the Court of Appeals stated in its per curiam opinion denying Jones's petition for appeal, "This is unlike the situation presented in Davis . . . [because in Davis there was an] 'exploitation' of [an] 'unlawful stop.'" In this case, however, both the initial stop and the continued detention were lawful.

[5] In his assignment of error, the defendant argues that the evidence would not have been inevitably discovered. Generally, the doctrine of inevitable discovery is used when evidence that was seized would have been discovered by the police by other legal means. In order to satisfy the doctrine of inevitable discovery the Commonwealth must show "(1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, and (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct." Commonwealth v. Jones, 267 Va. 532, 536, 593 S.E.2d 204 206

check was also obtained from the dispatcher at a time before any claim of illegal detention is made.[6] (Def. Brf. at 15) (App. 73-74).

CONCLUSION

The Court of Appeals did not err in upholding the trial court's decision denying Jones's motion to suppress the evidence recovered from his car and his statements made to police. Thus, Jones's convictions for possession of a firearm as a convicted felon, possession with the intent to distribute heroin, and simultaneous possession of a firearm and a schedule I or II drug should be affirmed.

Respectfully submitted,

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COMMONWEALTH OF VIRGINIA
Appellee herein.

WILLIAM C. MIMS
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(2004). Neither the Court of Appeals nor the trial court addressed the doctrine of inevitable discovery because they both held that the consent search did not violate the Fourth Amendment. The Commonwealth also contends that it is not necessary to reach this doctrine.

[6] As pointed out above Jones argues the detention became illegal after the dispatcher confirmed that the name was "valid." (Def. Brf. at 10, 15, 16).

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CERTIFICATE OF TRANSMISSION AND SERVICE

On January 4, 2010, the required copies of this Brief were hand-filed with this Court, and three copies were mailed to Joseph Sadighian, Senior Assistant Appellate Defender, 701 East Franklin Street, Suite 1001 Richmond, Virginia 23219.

The Commonwealth wishes to present oral argument in this case.

_____
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