IN THE

Supreme Court of Virginia

RECORD NO. 091539

MICHAEL EUGENE JONES,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The appellant, Michael Eugene Jones was indicted by a Grand Jury of the Circuit Court of the City of Portsmouth for possession of a firearm by a convicted felon in violation of § 18.2-308.2; possession of heroin with the intent to distribute in violation of Code § 18.2-248; and possession of a firearm while possessing with intent to distribute a Schedule I or II Drug in violation of Code § 18.2-308.4(C).

Jones pled not guilty, waived his right to a jury trial, and was tried by The Honorable John E. Clarkson on June 12, 2008. Prior to trial, Jones made a motion to suppress the evidence he alleged was obtained in violation of his Fourth Amendment rights. The trial court denied the motion, the case proceeded to trial, and the trial court ultimately convicted Jones of the charges as indicted.

On August 18, 2008, the trial court sentenced Jones to five years to serve in the Virginia State Penitentiary on each of the three felony convictions, and also imposed a $100.00 fine.[1]

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[1] The Sentencing Order entered August 18, 2008, incorrectly states that the trial court sentenced Jones to 15 years on the conviction for possess firearm by convicted felon in Circuit Court case no. CR08000750-01. The sentencing summary correctly states that the "total incarceration sentence imposed" for all three charges is 15 years. Jones asks this Court to remand the case the trial court for correction of the Sentencing Order *nunc pro tunc*. *See* Code § 8.01-428(B).

Jones timely noted an appeal. The Court of Appeals denied the petition for appeal both in a *per curiam* Order dated March 18, 2009, and in a three-judge panel Order entered July 2, 2009. This Court awarded Jones an appeal by Order dated October 28, 2009.

ASSIGNMENTS OF ERROR

1.) The Court of Appeals erred in upholding the decision of the trial court denying Mr. Jones's motion to suppress when the police exceeded the scope of a 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 the illegally obtained evidence would have been inevitably discovered.

2.) The Court of Appeals erred in upholding the decision of the trial court denying Mr. Jones's motion to suppress and finding that Mr. Jones consented to a search of his vehicle when Mr. Jones could not give valid consent to search as he was being illegally detained, and any consent he gave would be the result of his illegal detention and not free and voluntary consent.

QUESTIONS PRESENTED

1.) Did the Court of Appeals err in upholding the decision of the trial court denying Mr. Jones's motion to suppress when the police exceeded the scope of a 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 the illegally obtained evidence would have been inevitably discovered?

(Assignment of Error 1) **Preserved in Jones's motion to suppress, A[2] 19-84, argued at 62, 64-65, 66-75.**

2.) Did the Court of Appeals err in upholding the decision of the trial court denying Mr. Jones's motion to suppress and finding that Mr. Jones consented to a search of his vehicle when Mr. Jones could not give valid consent to search as he was being illegally detained, and any consent he gave would be the result of his illegal detention and not free and voluntary consent?

(Assignment of Error 2) **Preserved in Jones's motion to suppress, A 19-84, argument 75-77.**

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[2] References to the Joint Appendix are designated herein as "A __".

STATEMENT OF FACTS

In accordance with the established standard of appellate review, the facts recited herein are either undisputed or are those most favorable to the Commonwealth, unless otherwise stated.

On March 14, 2007, Detective I. McNett, a fourteen year veteran of the Portsmouth Police Department, was driving his white 1997 Ford Expedition equipped with lights and siren, and Detective N. L. Deluca, a five year veteran of the Portsmouth Police Department, was with him in the passenger seat. A 21, 22, 40, 42. They were on their way to Dale Homes when they observed Jones inside a black BMW stopped in the roadway in the 2400 block of Columbus Avenue in the City of Portsmouth. A 22. McNett described the area as a "high crime/high drug area, lots of narcotics transactions going on, shootings, murders, stabbings, robberies and so forth." *Id.*

The BMW was parked in the actual roadway, there were two people in the vehicle, and there was an individual leaning into the driver's side of the vehicle. A 22-23. McNett saw the individual lean into the vehicle and touch the driver's (Jones's) right hand with his left hand. A 23. Detective Deluca did not see their hands meet; he only saw an individual leaning in the car from his position. A 47. McNett made the right turn on Columbus

Avenue and rolled ahead slowly for ten or fifteen seconds so they could observe. A 34-36. McNett believed he had observed a drug transaction, but acknowledged he did not see anything in their hands. A 24, 35. Deluca also thought a drug transaction had taken place; he admitted he did not see the hands but acknowledged that Detective McNett said he did see the hands. A 44, 55. The individual leaning into the BMW saw the police, knew they were police, and abruptly walked to the side of the road. A 36, 41. At that point, the police detectives were two car lengths behind the BMW. A 36. The BMW was impeding traffic as McNett could not go around the vehicle. A 23.

McNett followed the BMW for three to four blocks until it made a right on Lincoln Street. A 36. He initiated the lights when they were three-fourths of the way down the block of Deep Creek - the BMW immediately pulled over. A 37. Deluca said the reason they stopped Jones was because of their belief they had observed a hand-to-hand transaction and not because he was blocking the roadway. A 55. McNett went to the driver's side of the BMW, and Deluca went to the passenger side. A 37.

McNett asked Jones for his driver's license and registration. He could not produce either item. He was visibly shaking and breathing hard, and McNett asked him to step out of the vehicle. A 24. Once Jones exited

the BMW, he began talking with Detective Deluca. A 25. McNett spoke with the passenger, ran his information, determined he had no warrants, and let the passenger leave after Jones was handcuffed and placed in the police vehicle. A 25, 54-55, 94, 95.

Detective Deluca also noted Jones was extremely nervous. Jones gave Detective Deluca his pedigree information which came back to a gentleman with a valid driver's license. The name Jones gave Deluca was not Michael Jones. A 43. Deluca patted Jones down for officer safety because Detective McNett thought a hand-to-hand transaction had taken place earlier, because of the nature of the area, and because of Mr. Jones's nervous behavior. A 43-44. Deluca did the pat down while he was waiting for Jones's information to come back from dispatch. A 49.

During the pat down of Jones, Deluca felt what he believed to be a wallet in Jones's back pocket. Deluca was "kind of shocked" to find a wallet because Jones said he did not have any identification on him. Deluca asked Jones whose wallet it was, and Jones said it was his cousin's wallet. A 44. Deluca reached in and grabbed the wallet and found a blank check in the wallet with the name Michael Eugene Jones on the blank check. A 44, 49-50. The wallet did not contain identification. A 50. Jones

continued to tell Deluca the wallet belonged to his cousin and Jones began to look in different directions. A 45.

Deluca placed Jones in investigative detention in order to hold him until a uniformed officer could arrive with a computer that could pull up a picture to verify Jones was who he said he was. A 45-46, 52. Deluca handcuffed Jones and placed him in the passenger side of the police vehicle. A 25, 53. Deluca said he placed Jones in handcuffs alone. A 53. But McNett said "...we handcuffed him together." A 39, 94-95. McNett walked back to the police vehicle parked behind the BMW and asked Jones, who was sitting in the police vehicle in handcuffs, if he would consent to a search of the BMW. A 25, 40, 54. Jones gave McNett consent to search the car. A 46, 54. McNett found a Glock semiautomatic pistol under the driver's seat of the BMW which he could not see until he looked under the seat. A 26. McNett found sixty "decks" of heroin and a revolver in the trunk underneath the spare tire. A 31.

The uniformed police officer arrived about five minutes after Deluca requested one. A 56. Detective McNett was already searching the BMW when the uniformed police officer arrived. *Id.* McNett did not know if Jones was the owner of the vehicle. A 92. They were able to determine Jones was Michael Jones and he had a suspended driver's license. A 57.

Jones asked the trial court to suppress the evidence. A 58. He argued when the police frisked him for weapons, they felt a wallet and knew it was not a weapon. A 62. Thus, the police lacked probable cause to take the wallet out of his pocket and search it. A 64-65. Once the information he provided to the police came back as "good," the police had no reason to continue to detain him. A 65. The police should have cited him for blocking the roadway and let him leave. A 66-67, 72-73. The police had no basis to believe Jones was lying about who he was. A 67-68, 70. Jones argued he was illegally detained, consequently, any consent to search obtained by the police was invalid, and any contraband found as a result would be the fruit of the poisonous tree and should be suppressed, including his statements. A 75-77.

ARGUMENT

1.) The police exceeded the scope of a pat down for weapons and the doctrine of inevitable discovery does not apply.

Standard of Review

"At a hearing on a defendant's motion to suppress, the Commonwealth has the burden of proving that a warrantless search or seizure did not violate the defendant's Fourth Amendment rights." *Hayes v. Commonwealth,* 29 Va. App. 647, 652, 514 S.E.2d 357, 359 (1999) (citation omitted). On appeal from a trial court's denial of a motion to suppress, 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, 552, 659 S.E.2d 512, 515 (2008); *see also Jones v. Commonwealth*, 53 Va. App. 171, 176, 670 S.E.2d 31, 34 (2008). Indeed, appellate courts give deference to the factual findings of the trial court, granting to the prevailing party all reasonable inferences fairly deducible from the evidence. *Aldridge v. Commonwealth*, 44 Va. App. 618, 638, 606 S.E.2d 539, 549 (2004); *see also Rashad v. Commonwealth*, 50 Va. App. 528, 533-34, 651 S.E.2d 407, 410 (2007). However, "'[u]ltimate questions of reasonable suspicion and probable cause to make a

warrantless search' involve questions of both law and fact and are reviewed *de novo* on appeal." *McGee v. Commonwealth*, 25 Va. App. 193, 197, 487 S.E.2d 259, 261 (1997) (*en banc*) (*quoting Ornelas v. United States*, 517 U.S. 690, 691 (1996)); *see also Rashad*, *supra*, 50 Va. App. at 534, 651 S.E.2d at 410.

Here, Detective Deluca's removal and search of Jones's wallet was not justified under the rationale for a pat-down search.

Discussion

Jones acknowledges Detective Deluca's admission that the reason he stopped the BMW was Detective McNett's observation of what he believed to be a hand-to-hand transaction and not the fact Jones stopped in the roadway.[3] A 55. Jones also acknowledges Detective Deluca patted Jones down for officer safety because Detective McNett thought a hand-to-hand transaction had just taken place, because of the nature of the area,

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[3] In *Whren v. United States*, 517 U.S. 806, 813 (1996), the United States Supreme Court held "[N]ot only have we never held ... that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *See also Clarke v. Commonwealth*, 32 Va. App. 286, 295, 527 S.E. 2d 484, 489 (2000) (The subjective intent of a police officer in making a stop is irrelevant. If the officer had probable cause to arrest or reasonable suspicion to conduct a *Terry* stop, evidence of criminal activity arising from the detention ***may*** be admitted against the defendant," (citations omitted) (emphasis added). Because of these precedents, Jones declines to argue the initial stop was invalid.

and because of Jones's nervous behavior.[4] A 43-44. In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that an officer may conduct a pat-down search for weapons if the officer can point to specific and articulable facts which reasonably lead him to conclude criminal activity may be afoot and that the person subjected to the search may be armed and dangerous. *See James v. Commonwealth*, 22 Va. App. 740, 745, 473 S.E.2d 90, 92 (1996). The purpose of this "pat down" search is not to uncover evidence of criminal activity, but to permit the officer to conduct his investigation without encountering a violent response. *Murphy v. Commonwealth*, 264 Va. 568, 573-74, 570 S.E.2d 836, 839 (2002) (citations omitted).

Detective Deluca exceeded the scope of a pat-down for weapons when he removed Jones's wallet and searched it without probable cause. Detective Deluca knew the object was a wallet and had no basis for the warrantless seizure and subsequent search of the wallet. At the time he

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[4] In conducting a pat-down search of his person for weapons, Detective Deluca "...was entitled to consider the reputation of the immediate area for violence and drug-related crime," *Welshman v. Commonwealth*, 28 Va. App. 20, 34, 502 S.E.2d 122, 129 (1998) and the fact he was investigating a possible distribution of controlled substances. *See Logan v. Commonwealth*, 19 Va. App. 437, 445, 452 S.E.2d 364, 369 (1994) (*en banc*) (noting that relationship between distribution of controlled substances and possession and use of dangerous weapons "is now well recognized").

conducted the pat-down search, Deluca was waiting for dispatch to provide him information based on the pedigree information Mr. Jones had provided. A 43, 51.

The record demonstrates the wallet was removed without consent:

> [Defense counsel]: Once you felt the wallet, you reached your hand into his pocket and pulled the wallet out?
>
> [Detective Deluca]: I asked him whose wallet it was and he said it was his cousin's.
>
> [Defense counsel]: And then you reached in?
>
> [Detective Deluca]: Yes.

A 49. "[A] seizure of personal property [is] per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause...[or unless] some recognized exception to the warrant requirement is present." *United States v. Place*, 462 U.S. 696, 701 (1983).

Case law holds that law enforcement can only remove an item from a subject's pocket during the course of a pat-down for weapons if the officer reasonably believes the object might be a weapon, or if the officer can identify the object as suspicious under the 'plain feel' variation of the plain view doctrine. *Cost v. Commonwealth*, 275 Va. 246, 251-52, 657 S.E.2d 505, 507-08 (2008). But the item must be a weapon or contraband in order

to justify the warrantless seizure. In *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993), the United States Supreme Court explained that when the identity of the object is immediately apparent to the officer conducting a legal pat-down search of a suspect "there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context."

"[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 124 (1984). The reasonableness of a weapons search is determined by balancing the State's interest in searching against the individual's interest in freedom from unreasonable government intrusions. *Terry*, 392 U.S. at 21; *see also Jacobsen*, 466 U.S. at 125. The search is judged by an objective standard of reasonableness, taking into account the "totality of the circumstances." *See United States v. Cortez*, 449 U.S. 411, 417 (1981). Thus, it is reasonable under the Fourth Amendment for a police officer who has seized a closed container during a pat-down search to examine the

contents of that container when he reasonably believes, based on specific and articulable facts, that it may contain a weapon and that a search of the container is necessary to protect himself or the public from an immediate threat of harm. *Phillips v. Commonwealth*, 17 Va. App. 27, 31, 434 S.E.2d 918, 921-922 (1993).

The record shows Detective Deluca had no reason to think, and did not think, the wallet was a weapon. Deluca removed the wallet because Mr. Jones said he had no identification. Deluca indicated his own conventional belief that because people keep identification in their wallets, the fact Mr. Jones had a wallet belied his assertion he had no identification. The fallacy in Deluca's reasoning is underscored by the fact that the wallet he removed contained no identification. A 50.

Detective Deluca's illegal conduct in making the warrantless seizure of the wallet and searching the wallet without probable cause resulted in his discovery of the blank check. The check had a name on it different from the name Jones had given Deluca. Based on that fact, Deluca began to detain Jones because of "the conflicting information." *See* A 52 (Q. [Defense counsel] "The only reason why you were waiting at that time for the uniform officer was because of the blank check?" A. [Detective Deluca] "Because of the conflicting information, yes."). This further or continued

detention of Jones was a result of Detective Deluca's illegal conduct that also violated Jones's rights under the Fourth Amendment. The discovery of the name "Michael Jones" on the blank check prompted Detective Deluca to call for a uniformed officer "to come over and run his information, Michael Jones and the other information on the computer to verify, maybe see if there was a picture to verify what he was saying." A 45-46, 52.

After Detective Deluca found the blank check, dispatch confirmed the information Jones provided was "good," signifying the person whose identity Jones had provided the police had a valid driver's license and did not have any outstanding warrants. A 51. Had Deluca not found the blank check, the record demonstrates he would have released Jones upon confirmation of the identifying information from dispatch.

The police would not have inevitably discovered Jones was a different person from his cousin whose identity he provided. A 96, 115. The doctrine of inevitable discovery is one of the exceptions to the exclusionary rule. *Commonwealth v. Jones*, 267 Va. 532, 535, 593 S.E.2d 204, 206 (2004). To come within the exception, the Commonwealth must show (1) a reasonable probability the evidence in question would have been discovered by lawful means but for the police misconduct, and (2) the

leads making the discovery inevitable were possessed by the police at the time of the misconduct. *Id.* at 538, 593 S.E.2d at 208.

Detective Deluca would not have discovered Jones's identity except for the fact he found the blank check bearing the name Michael Jones after Deluca illegally removed and searched the wallet, knowing it was not a weapon or contraband. A 44. Immediately after finding the wallet, the police dispatcher reported the information provided by Jones was "valid information." A 51. Detective Deluca placed Jones in handcuffs and held him because of the conflicting information between who Jones said he was and the name on the blank check. A 52. Deluca had no other leads to cause him to suspect Jones misidentified himself. Once Deluca "received confirmation [from dispatch] that [the driver's information] was valid" (A 51), the record indicates the investigation would have ended and Jones would have been free to go on his way.

Jones contends the Court of Appeals erred in analyzing the issues presented in his case. The Court of Appeals' decision does not consider his arguments that (1) the police exceeded the scope of a pat down for weapons by removing the wallet when it was clear the wallet was not a weapon nor contraband; (2) the removal and search of the wallet was improper; (3) the aforementioned improper act resulted in Jones's

continued detention further violating the Fourth Amendment; (4) any purported consent to search the vehicle obtained during the illegal continued detention was involuntary; and (5) because the seizure and search of the wallet was illegal as well as the search of the vehicle obtained by coercion, the evidence obtained through the illegal police conduct - the guns, the heroin, and Jones's statements - should be suppressed.

The Court of Appeals stated Jones was not asking the wallet and its contents be suppressed. *See Jones v. Commonwealth*, Record No. 2050-08-1 (Per *Curiam* Order March 18, 2009), at 4. In effect, there was nothing criminal *per se* about the wallet and its contents. The following analysis from *Harris v. Commonwealth*, 266 Va. 28, 34, 581 S.E.2d 206, 210 (2003) applies equally to the case at bar:

> Here, the consent to search occurred within minutes of the illegal detention and under circumstances in which Harris was not free to leave or disregard the officer's inquiry. The consent, search, and evidence recovered were the products of an illegal detention. Furthermore, nothing on this record indicates that the evidence in issue was obtained by the police pursuant to an independent act of free will.

Jones asks this Court to suppress the evidence obtained by the unlawful means employed by the police. The Court of Appeals erred by not finding the continued detention of Jones violated the Fourth Amendment

and rendered any consent to search obtained from him as involuntary as is argued *infra*.

2.) Any consent given was the product of an illegal detention and was therefore invalid.

"[A] seizure of personal property [is] per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause...[or unless] some recognized exception to the warrant requirement is present." *United States v. Place*, 462 U.S. 696, 701 (1983). Consent is one such exception to both the warrant and probable cause requirements. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

> When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Commonwealth v. Ealy, 12 Va. App. 744, 752-53, 407 S.E.2d 681, 686 (1991) *citing Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 248-49 (1973*);*

accord Limonja v. Commonwealth, 8 Va. App. 532, 540, 383 S.E.2d 476, 481 (1989) (*en banc*) *cert. denied*, 110 S.Ct. 1925 (1990).

"A consensual encounter occurs when police officers 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) (*quoting United States v. Wilson*, 953 F.2d 116, 121 (4th Cir. 1991)). "Such encounters 'need not be predicated on any suspicion of the person's involvement in wrongdoing,' and remain consensual 'as long as the citizen voluntarily cooperates with the police.'" *Id.* (citations omitted).

"A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "The determination of seizure is objective and is judged by whether a reasonable person would have felt restrained." *Davis v. Commonwealth*, 37 Va. App. 421, 429, 559 S.E.2d 374, 377 (2002). Here, there can be no doubt that Jones was told for the first time that he was in "investigative detention" (A 52) after Detective Deluca found the blank check, handcuffed Jones, and placed him in the police car. A 53. Deluca's seizure of Jones was a result

of Deluca's improper removal and search of the wallet as discussed in Argument § 1 *supra*. Deluca held Jones until a uniformed officer could arrive to confirm Jones's identity. A 52. Neither the initial stop nor the continued contact resulting in the detention of Jones was consensual.

In *Davis*, the Court of Appeals held: "[W]hen trying to establish that there was a voluntary consent after an illegal stop, the [Commonwealth] has a much heavier burden to carry than when the consent is given after a permissible stop." *Id.* at 433, 559 S.E.2d at 380. (citations omitted). Clearly, the Commonwealth must prove by a preponderance of the evidence that the consent was voluntary. *Id.* at 432-33, 559 S.E.2d at 379. In addition to discharging this heavy burden, "the Commonwealth then must establish that the consent was 'sufficiently an act of free will to purge the primary taint' of the illegal detention." *Id.* at 433, 559 S.E.2d at 380 (*quoting Wong Sun v. United States*, 371 U.S. 471, 486 (1963). If the consent obtained was the product of the illegal detention, "it is invalid as a 'fruit of the poisonous tree.'" *Davis*, 37 Va. App. at 434, 559 S.E.2d at 380 (citations omitted).

The Court of Appeals in *Davis* set forth the factors to consider in determining if the consent was sufficiently attenuated from the unlawful detention so as to "purge the taint" of that event:

> In determining whether consent was "sufficiently attenuated from the [illegal detention] to purge its taint," we have "considered, in addition to the voluntariness of the consent, the temporal proximity and the presence of intervening circumstances between the [illegality] and the consent, [the defendant's] awareness of a right to withhold consent, and the purpose and flagrancy of the police misconduct." Therefore, if Davis' consent, even if voluntarily given, was not sufficiently attenuated from the unlawful detention as to "purge the taint" of that event, the evidence must be suppressed.

Id. (citations omitted).

In Jones's case, as in *Davis*, "[N]o intervening circumstances occurred to break the chain of events between the illegal detention and the consent to search." *Id.* As stated, Detective Deluca placed Jones in handcuffs and sat him inside the police vehicle after improperly seizing and searching the wallet during the short period of time they were waiting for police dispatch to clear the identifying information Jones provided. A 51-52. Detective McNett returned to the police vehicle "fairly quick" and immediately asked for consent to search. A 53-54. Jones was in the police vehicle when McNett asked for consent to search. A 40. Jones was not advised of his right to refuse consent. After finding the guns and heroin in the BMW, McNett advised Mr. Jones of his Miranda rights while still at the scene and obtained inculpatory statements. A 96-97.

On page 4 of the March 18, 2009 *per curiam* Order, the Court of Appeals quotes *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) for the

proposition that during a "lawful roadside stop" the temporary seizure of the driver and passengers continues and remains reasonable during the stop, and an officer's inquiries into matters unrelated to the stop do not convert the encounter into "something other than a lawful seizure." *Id.* However, Jones does not contend that the officers' inquiries converted the encounter into an unlawful seizure. Rather, he maintains the consent was tainted by the illegal detention resulting from the officers' unconstitutional removal of the wallet from his pocket. *See* Argument § 1, *supra*.

Because the police misconduct in unlawfully detaining Jones was directly related to the ensuing request for consent to search the BMW, the consent obtained in this case was invalid. The evidence objected to in Jones's motion to suppress is "fruit of the poisonous tree" that would not have been found by the officers but for the exploitation of the "primary illegality," namely the unconstitutional continued detention. Thus, the recovery of the gun, drugs, and Jones' statements cannot be said to be "purged of the primary taint." *Wong Sun,* 371 U.S. at 487-88 (1963); *see also*, *Davis*, *supra*, 37 Va. App. at 434, 559 S.E.2d at 330 (recognizing that when consent is obtained as the product of an illegal detention, "it is invalid as a 'fruit of the poisonous tree'") (citation omitted).

CONCLUSION

Detectives McNett and Deluca violated Jones's Fourth Amendment rights and as a result of those violations the guns, drugs, and Jones's statements are inadmissible as "fruits of the poisonous tree." *Wong Sun, supra*, 371 U.S. at 487-88. Jones asks that his convictions be reversed and the indictments dismissed. *See McCain*, *supra*, 275 Va. at 555, 659 S.E.2d at 518 (vacating McCain's convictions and dismissing the indictments against him; reasoning that "[b]ecause the evidence seized ... should have been suppressed, there would be insufficient evidence to sustain [the] convictions"); *see also Harris v. Commonwealth*, 276 Va. 689, 698, 668 S.E.2d 141, 147 (2008) (concluding officer lacked reasonable articulable suspicion to support stop, reversing conviction for felonious driving while intoxicated, and dismissing indictment), *cert. denied, Virginia v. Harris*, 130 S. Ct. 10 (2009).

Respectfully Submitted,
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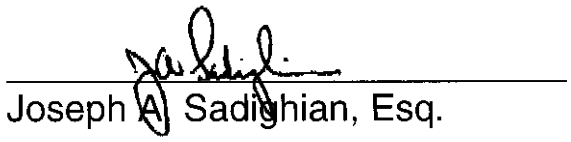
CERTIFICATE

I, Joseph A. Sadighian, Counsel for Appellant, do hereby certify that on December 7, 2009, I filed by hand fifteen copies of Appellant's Opening Brief with the Clerk, Supreme Court of Virginia, and provided an electronic copy of the brief by sending it to scvbriefs@courts.state.va.us and on the same day mailed three copies of this Brief to Counsel for the Appellee, Rosemary V. Bourne, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219; Telephone: (804) 786-2071.

Counsel for Appellant is appointed and requests oral argument.



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