IN THE

Supreme Court of Virginia

RECORD NO. 091539

MICHAEL EUGENE JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR ON BRIEF

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.

REPLY ARGUMENT

No Reasonable Articulable Suspicion for Continued Detention

In its brief, the Commonwealth contends that Jones's argument rests upon the premise that "his consent to the search of the vehicle was invalid because it took place during this unconstitutionally extended detention." Opp. Br. at 10. The Commonwealth contends that even if the police had not improperly removed Jones's wallet, they would have continued to detain Jones because they had reasonable suspicion. Opp. Br. at 11. This reasonable suspicion, the Commonwealth argues, continued to exist "[e]ven without the discovery of the check[,]" (Opp. Br. at 13) because the police had an objective basis to hold Jones other than the basis articulated by Detective Deluca. Opp. Br. at 14. However, the Commonwealth's argument relies on a fact not established in the record.

The Commonwealth mistakenly argues the "record demonstrates that the dispatcher also informed Deluca that the car was registered to a Michael Jones." Opp. Br. at 15. The Commonwealth cites the Appendix at page 46 for this proposition and for its mistaken factual assertion that

"[t]he dispatcher informed Deluca that the car was registered to a Michael Jones." Opp. Br. at 6. The record does not support this mistaken assertion of fact. On page 46 of the Appendix, Detective Deluca responds to a question on cross-examination and states: "Also I guess the vehicle was registered to a Michael Jones." App. 46. Deluca never indicates the source of the information for his "guess." However, the record demonstrates that Deluca had obtained the registration for the vehicle Jones was driving and Deluca brought a copy of the registration to the trial court:

> Q. (Ms. Oxenham) Detective Deluca, at any time did you obtain the registration for this vehicle?
>
> A. Yes, I actually did. I don't know if I have a copy of it or not, but I did, yes. I don't believe I have a copy of it here, but I did obtain one, yes. Actually, it's right here, I have it.
>
> Q. And the individuals listed on that registration are a Phillip David Keller and a Michael Eugene Jones, Jr.; is that correct?
>
> A. Yes.
>
> Q. So two individuals are actually listed?
>
> A. Yes.

App. 99. Taken in context, Deluca's "guess" made at trial that the vehicle was registered to a Michael Jones was based on the fact Deluca had obtained the registration to the vehicle at some point. Nothing in the

record indicates that dispatch informed Detective Deluca that the vehicle was registered to Michael Jones immediately before or after Deluca improperly removed and searched Jones's wallet.

The Commonwealth correctly argues that "[T]he 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). The evidence seized in this case, the gun and the heroin, was such derivative evidence as Detective Deluca's only reason for continuing to detain Jones was the conflicting information on the blank check Deluca discovered in violation of the Fourth Amendment. App. 52. Moreover, in Jones's case, "the evidence to which instant objection is made has been come at by exploitation of that illegality...." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

The Commonwealth presses its mistaken assertion of fact in its argument opposing application of the exclusionary rule. Opp. Br. at 17-18. Nothing in the record supports the Commonwealth's assertion in this portion of its argument that the dispatcher informed Detective Deluca the vehicle was registered to a Michael Jones. In fact, as has been pointed out *supra*, Deluca had in his possession at the suppression hearing and trial a copy of the registration for the vehicle listing Phillip David Keller

and Michael Eugene Jones, Jr. Thus, a reasonable inference is that dispatch would have provided both names and not simply reported that the vehicle was registered to a Michael Jones.

CONCLUSION

For these reasons, as well as those stated in his Opening Brief, Appellant requests that his substantive convictions be reversed and the indictments be dismissed, or any other relief appropriate to the error.

Respectfully submitted,

Michael Eugene Jones

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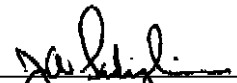
CERTIFICATE

I, Joseph A. Sadighian, do hereby certify that on this 19th day of January, 2010, I complied with Rule 5:26(d) and filed by hand fifteen copies of Appellant's Reply Brief with the Clerk, Supreme Court of Virginia, and provided an electronic copy of the brief by filing it on disc, CD, or by e-mailing it to scvbriefs@courts.state.va.us, and on the same day mailed or caused to be delivered three copies of the same to Rosemary V. Bourne, Esquire , Assistant Attorney General, Office of the Attorney General, Criminal Litigation Section; 900 East Main Street; Richmond VA 23219; Telephone: (804) 786-2071.



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