In The

Supreme Court of Virginia

RECORD NO. 092313

ALLEN EDWARD SIDNEY, JR.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 2

QUESTION PRESENTED 2

STATEMENT OF FACTS 3

ARGUMENT 6

The Court of Appeals erred by upholding the trial court's refusal to suppress the evidence where the petitioner was detained without a reasonable suspicion or probable cause because the anonymous tip and dispatch to police did not support the seizure of the petitioner, and the evidence was obtained in violation of his rights under the Fourth Amendment of the U.S. Constitutions, and comparable portions of the Virginia Constitution 6

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

Page(s)

CASES

Adams v. Williams,
407 U.S. 143 (1972) 8

Alabama v. White,
496 U.S. 325 (1990) 8

Barkley v. Commonwealth,
39 Va. App. 682, 576 S.E.2d 234 (2003) 6

Delaware v. Prouse,
440 U.S. 648 (1979) 7

Feathers v. Aey,
319 F.3d 843 (6th Cir. 2003) 14

Florida v. J.L.,
529 U.S. 266 (2000) 8

Harmon v. Commonwealth,
15 Va. App. 440, 425 S.E.2d 77 (1992) 7

Jackson v. Commonwealth,
267 Va. 666, 594 S.E.2d 595 (2004) ..... *passim*

Terry v. Ohio,
392 U.S. 1 (1968) 7

Washington v. Commonwealth,
219 Va. 857, 252 S.E.2d 326 (1979) 7

Wilson v. Commonwealth,
45 Va. App. 193, 609 S.E.2d 612 (2005) 6

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV 2, 6, 7, 8

U.S. CONST. amend. XIV 7

STATUTES

Va. Code § 18.2-248 1

Va. Code § 18.2-250 1

Va. Code § 18.2-250.1 1

STATEMENT OF THE CASE

On June 10, 2008 Allen Sidney appeared in the Petersburg Circuit Court, for a hearing on a Motion to Suppress pursuant to a charge of possession of cocaine intent to distribute in violation of Virginia Code Section 18.2-248, and possession of marijuana in violation of Virginia Code Section 18.2-250.1. The trial court denied the Motion. On June 30, 2008, with the agreement and consent of the Commonwealth, Sidney entered a conditional guilty plea to possession of cocaine in violation of Virginia Code Section 18.2-250, and possession of marijuana in violation of Virginia Code Section 18.2-250.1. On August 27, 2008 the defendant was sentenced pursuant to the conditional guilty plea to serve ten years in the penitentiary with all nine years and ten months suspended, with the suspension conditioned upon payment of court costs, good behavior and indefinite supervised probation for possession of cocaine, and twelve months with all twelve months suspended for possession of marijuana. Sidney then noted his appeal to the Virginia Court of Appeals pursuant to the conditional guilty plea. By a final order dated October 19, 2009 the Court of Appeals denied Sidney's Petition for Appeal. Mr. Sidney filed a notice of appeal in the office of the Clerk of the Court of Appeals simultaneously with the filing of a petition in the Clerk's

Office of this Court. This Court awarded Mr. Sidney an appeal by Order entered March 15, 2010.

ASSIGNMENTS OF ERROR

The Court of Appeals erred by upholding the trial court's refusal to suppress the evidence where the petitioner was detained without probable cause or a reasonable suspicion in violation of his rights under the Fourth Amendment of the U.S. Constitution and comparable parts of the Virginia Constitution, and where the evidence was obtained as a result of this detention.

The Court of Appeals erred by concluding that the anonymous tip and dispatch to police supported the seizure of the petitioner, where the tip and dispatched information were not from an informant whose reliability was established and the information provided in the tip was not predictive and was otherwise insufficient to support the seizure of the petitioner.

The Court of Appeals erred by concluding that the tip and dispatch information supported the seizure of the petitioner where the mere fact that a warrant was on file for Allen Sidney did not make the otherwise unreliable tip reliable enough to support the seizure of petitioner under the circumstances of this case.

QUESTION PRESENTED

Did the Court of Appeals err by upholding the trial court's refusal to suppress the evidence where the petitioner was detained without a reasonable suspicion or probable cause because the anonymous tip and dispatch to police did not support the seizure of the petitioner, and the evidence was obtained in violation of his rights under the Fourth Amendment of the U.S. Constitutions, and comparable portions of the Virginia Constitution? (Assignments of Error 1, 2, 3)

STATEMENT OF FACTS

The defendant's Motion to Suppress was heard prior to trial, and forms the basis of his appeal pursuant to his conditional guilty plea. At the hearing the Commonwealth presented the testimony of Petersburg police officers Dustin Sloan and J.W. Schmidt.

On December 17, 12007, before stopping a driver subsequently identified as Allen Sidney, Officer Sloan had received a radio broadcast from a dispatcher that Allen Sidney, who was at 1300 Patterson Street, was driving a tan Cherokee with wood grain on the side of the vehicle, and had outstanding warrants in Petersburg. App. 9, 12. Sloan said that the tip was called into headquarters and that the caller did not wish to be named. App. 16. The tip described the driver as a black male, 5'7" or 5'9", and did not provide any further description than that. App. 17. Sloan did not say what time the tip had been called in, nor did he testify to the time he acted on the broadcast.

Apparently acting on the broadcast, Sloan observed who was later identified as Sidney in a tan Cherokee with wood grain on the side, in or at a driveway at 1300 Patterson Street in Petersburg. App. 9, 12. Sloan never saw the driver leave the house or enter the vehicle. App. 17. At this time Sloan did not know Mr. Sidney, and he had never seen him before. App. 19.

Sloan did not know Sidney's family, and he did not know who lived at 1300 Patterson Street. App. 20. The Cherokee was a late '80s model which is higher off the ground than a regular car. App. 18. This meant that until the traffic stop, Sloan could only see the driver's head and his arms on the steering wheel. App. 19.

Sloan, who was in his car idling, was waiting for backup to arrive when the Cherokee moved back from the driveway and proceeded northbound on Patterson Street. App. 10, 12. Sloan notified his backup and followed the Cherokee. App. 11. The Cherokee did not appear to pick up speed or drive evasively when Sloan dropped in behind it. App. 16. After officer Billings got behind Sloan in another police car, Sloan initiated a traffic stop at an intersection of Lee Avenue and Halifax Street using the police car's emergency equipment. App. 13, 25. The traffic stop was conducted wholly because the police believed the driver was wanted. App. 20. Sloan approached the passenger door while Officer Schmidt approached the driver's side. App. 13. Schmidt asked for a license and registration information. App. 13. At some point, Sloan had run the tags on the Cherokee and they came back to someone identified as Sidney's mother. App. 10, 20. After identifying the driver as Allen Sidney, the police put him under arrest. App. 15.

Under questioning by the trial court, Sloan acknowledged that he was told that there were warrants for the named subject, but that dispatchers did not tell him what they were for. App. 23. While Sloan was describing the ordinary procedure for this situation, upon a defense objection to anything Sloan had not heard himself, the trial court said “I agree”. App. 23.

Petersburg Officer J.W. Schmidt was dispatched to 1300 Patterson Street at around 7:20 a.m. based upon a description of a wanted subject named Allen Sidney who had a birth date of 5-26-1974, and a description of being a black male, with brown eyes and black hair, 5’3”, 165 pounds. App. 26. Also described was a tan Jeep Cherokee with 30-day tags that was in the driveway of 1300 Patterson Street. App. 26. Upon contacting the subject after the traffic stop, Schmidt asked for a license and registration, and upon being handed a license reading Allen Edward Sidney, Jr., Schmidt asked if that was his ID, to which Sidney replied “Yes”. App. 27. After running the name through dispatch, Schmidt confirmed that there were warrants for Sidney. App. 27. Schmidt was not told what the warrants were for before the stop. App. 27.

Neither Officer Sloan nor Officer Schmidt testified that Schmidt radioed the description he had to Officer Sloan.

The defense stipulated that the stop and custodial arrest lead to the confiscation of suspected contraband for which Sidney was facing prosecution at the time of the suppression hearing. App. 16.

ARGUMENT

The Court of Appeals erred by upholding the trial court's refusal to suppress the evidence where the petitioner was detained without a reasonable suspicion or probable cause because the anonymous tip and dispatch to police did not support the seizure of the petitioner, and the evidence was obtained in violation of his rights under the Fourth Amendment of the U.S. Constitutions, and comparable portions of the Virginia Constitution.

On appeal from the denial of a motion to suppress, the evidence is viewed in the light most favorable to the Commonwealth who prevailed below. *Barkley v. Commonwealth*, 39 Va. App. 682, 576 S.E.2d 234 (2003). However, the review of a motion to suppress made on Fourth Amendment grounds presents a mixed question of law and fact, and the Court, while giving deference to the findings of fact made by the trial court, must review the matter *de novo* and independently determine if the evidence was obtained in violation of the Fourth Amendment. *Wilson v. Commonwealth*, 45 Va. App. 193, 609 S.E.2d 612 (2005).

It is well settled that an arrest must be supported by probable cause, and that the probable cause necessary to support a warrant less arrest is the same that must be shown to a magistrate to support the issuance of a

warrant. *See Washington v. Commonwealth*, 219 Va. 857, 252 S.E.2d 326 (1979). A detention which is not supported by probable cause must be supported by a reasonable articulable suspicion that a crime has occurred, is occurring or is about to occur. *Terry v. Ohio*, 392 U.S. 1 (1968). A traffic stop is a seizure within the meaning of the Fourth and Fourteenth Amendments, even if the stop is brief. *Jackson v. Commonwealth*, 267 Va. 666, 594 S.E.2d 595 (2004) *quoting Delaware v. Prouse*, 440 U.S. 648 (1979). If police did not have probable cause or a reasonable articulable suspicion that the vehicle or its occupants are involved in illegal activity, then the stop is illegal, and evidence seized from the stop must be suppressed as fruit of the poisonous tree. *Id*.

At the suppression hearing, the Commonwealth cited *Harmon v. Commonwealth*, 15 Va. App. 440 (1992), and argued that the seizure in this case was governed merely by general *Terry* stop principles. App. 33. The trial court correctly recognized that the seizure implicated the question detention following an anonymous tip, and analyzed the case by applying *Jackson v. Commonwealth*, 267 Va. 666, 594 S.E.2d 595 (2004).

In *Jackson v. Commonwealth*, 267 Va. 666, 594 S.E.2d 595 (2004), the Virginia Supreme Court analyzed three United States Supreme Court cases involving the sufficiency of anonymous tips and applied them to the

question of whether or not a citizen tip supplied reasonable suspicion under the Fourth Amendment to support a traffic stop. The *Jackson* Court noted that where a tip is anonymous and prior tipster reliability is unknown, a sufficient basis for knowledge is crucial to determining if the tip supported the seizure. *Jackson*, 267 Va. at ___, 594 S.E.2d at 600 *citing Alabama v. White*, 496 U.S. 325 (1990). Crucial to such cases is not only tipster provided facts which could be verified at the time of the police encounter, but the fact that the tip was predictive of a subject's future behavior. *Id.* Where a tipster is known to the police at the time of the tip, the question becomes one of the basis for the informant's veracity rather than the basis of the informant's knowledge. *Jackson*, 267 Va. at ___, 594 S.E.2d at 600 *citing Adams v. Williams*, 407 U.S. 143 (1972). The *Jackson* Court also analyzed *Florida v. J.L.*, 529 U.S. 266 (2000), a case in which the United States Supreme Court found that an anonymous tip that a man at a bus stop was carrying a gun was not sufficient to support a detention because the sole basis for police action was the anonymous tip, and the tip lacked any "predictive information".

In the *Jackson* case itself, the Virginia Supreme Court applied the above cited authority to a case where the defendant had been seized when police received a dispatch based upon an anonymous caller that three

black males in a white Honda at the intersection of 34th (Street) and Jefferson (Avenue) were disorderly, and one of the subjects brandished a firearm. *Jackson*, 267 Va. at ___, 594 S.E.2d at 598. A police officer stopped a white Honda occupied by three black males at the intersection specified in the dispatch based only on the tip information. *Id*. After detaining the occupants, and gun was discovered on one of them. *Id*. Noting that the tipster was not known to the police in advance, the Court ruled that the anonymous tip did not contain sufficient information beyond "easily obtained facts and conditions existing at the time of the tip", to supply police with a reasonable suspicion that an occupant was armed, despite the fact that at least six characteristics of what the police observed matched the tip information. *Id*. The Court was not persuaded that imminent public danger should change the analysis under these facts. *Id.* at ___, 594 S.E.2d at 603.

The appellant concedes that his case presents a fact, the allegation that the seized person was wanted in Petersburg, which makes it different from *Jackson*, and the cases cited therein. However, Mr. Sidney argues that, under these facts, the allegation of outstanding warrants is analogous to an anonymous tip that the person has an illegal gun or contraband. It is undisputed that the tipster was anonymous. App. 16. It is undisputed that

Officer Sloan himself seized Mr. Sidney by pulling the Jeep Cherokee over based upon the information in a broadcast. App. 13, 25. The tip description did nothing more than present “easily obtained” facts which would be available to anyone observing the Cherokee driver. Sloan acknowledged that the only description given other than location, type and color of the vehicle was a black male 5’7” or 5’9”. App. 17. Because Sloan did not say when he received the tip, and no one testified to what time the stop was made in relation to the time of the tip, much less when the broadcast was made to Sloan, the record contains no information showing that the tip had any predictive value. Nothing about the tip suggested that the driver of the Cherokee would leave 1300 Patterson Street, much less when he had arrived at the location. When the plates on the Cherokee were run, and the record is not clear on when this was, the vehicle was not registered to Sidney. App. 10, 20.

Sloan did not know who lived at 1300 Patterson Street, and he had never seen Allen Sidney. App. 19, 20. Sloan did not see a driver leave the house and enter the Jeep Cherokee. App. 17. The view inside the Jeep Cherokee only allowed Sloan to see the head and arms of the driver. App.19. Therefore the tip description as Sloan recounted it could not be confirmed by Sloan’s observation before the seizure had occurred. While it

is true that Officer Schmidt testified that he was dispatched to 1300 Patterson Street at around 7:20 a.m. based upon a description of a wanted subject named Allen Sidney who had a birth date of 5-26-1974, and a description of being a black male, with brown eyes and black hair, 5'3", 165 pounds (App. 26), no one testified to what time Schmidt got to the location of the traffic stop. His information was different and more detailed then the report given by Sloan, and no testimony clarified the source of the differing information. Indeed, no one testified that the information given by Schmidt was relayed to Sloan before Sloan seized Sidney in the car. Schmidt did not say on the record whether the tip he knew of stated that Sidney would be in the Jeep. Instead he said "Also described was a tan Jeep Cherokee with 30-day tags that was in the driveway of 1300 Patterson Street". App. 26. Thus, even Schmidt's testimony failed to show that the tip had predictive value.

The Commonwealth never argued at the hearing that the police possessed knowledge of confirmed arrest warrants for Allen Sidney, much less the basis to believe that the driver of the Jeep was actually none other then Mr. Sidney *before* the traffic seizure. Indeed, and the beginning of the hearing the Commonwealth conceded that the posture of the stop was warrant less by calling witnesses first. App. 8. While it is tempting to conclude, as the *Per Curiam* order did, that the police had confirmed that the

person named Allen Sidney was wanted in Petersburg, a close examination of the record shows that this was never shown. The tip clearly *claimed* that Sidney was wanted, but the trial court's exchange with Officer Sloan shows that the record contains no confirmation that dispatch had confirmed the warrants at all. The following exchange occurred between the Court and Sloan and defense counsel, with the Court examining the witness:

> Q: They had gotten a tip, and you spoke to a policeman or dispatcher or somebody from headquarters?
>
> A: Correct.
>
> Q: They reacted to the tip without checking whether there were any warrants in the police station, or do they know?
>
> A: No. The tip that they received for that name and that person, we did have outstanding warrants through this city for that person.
>
> Q: How were you able to determine that?
>
> A: By running his name. I believe the anonymous caller provided name and his date of birth, and through our database, we were able to locate.
>
> Q: Did you do that?
>
> A: No. I did not do that.
>
> Q: Who would have done it if it were done?
>
> A: Whoever the dispatcher on duty would have been at that time.
>
> Q: They don't tell you what the warrants are for?

> A: No. They just advise us that he has an outstanding warrant.
>
> Defense: I'm going to object to any testimony about what he didn't hear, so speculation of what dispatch might have done.
>
> The Court: I agree.
>
> Defense: Thank you.
>
> Court: I'm just trying to get a picture. I just don't know if a tipster calls in and says a warrant's on file, and they say, "Well, let's go get him," I don't know, without checking it. I'm trying to find out what they knew. But go ahead and see what you can prove, Mr. Newman.
>
> Mr. Newman: I don't have any other questions of him.

App. 22, 24. The exchange, and the comments of the Court show that the Court sustained the defense objection and that the Court understood the matter remained to be proven. The Commonwealth never followed up to clarify. Sloan never said that in *this* case, dispatch had confirmed his wanted status *before* Sidney was seized and his name was run by Schmidt. Although Schmidt said "yes" when asked if he was "advised it was outstanding warrants for this individual", he said he was not told what they were for (App. 26), raising a great doubt about whether the tip, or a dispatch check was the source of this information. Indeed, Schmidt did not merely arrest Sidney upon identifying him. Instead, he ran the information though dispatch after the seizure. App. 27.

There can be no doubt from the exchange quoted above that the Trial Court recognized the factual gaps in the record supporting the stop. In ruling against the motion to suppress, the Court said "I think the Court can take this as the law that you can impute the dispatcher's knowledge to the officer". App. 35. In doing so, the Court did not rule that the police where shown to have received warrant confirmation from the dispatcher before the traffic stop. Instead, the trial court appears to have imputed knowledge of Sidney's wanted status on the apparent theory that the dispatcher knew it to be confirmed. Even if the dispatcher's knowledge were properly imputed to the police in this case, this would not remedy the error because the record upon which the trial court ruled did not support the conclusion that anyone on the police force or at the dispatcher had confirmed any warrants before the seizure. The only proven knowledge which could be imputed was the anonymous tip which *claimed* that Sidney was wanted. *See Jackson*, 267 Va. at ___, 594 S.E.2d at 602 *citing Feathers v. Aey*, 319 F.3d 843 (6th Cir. 2003).

It is Sidney's position that on the record in this case, without proof that dispatch had confirmed to police that Sidney was wanted, the "fact that he was wanted was just as unproved as an anonymous tip that the Cherokee driver was armed, had contraband, or was even Allen Sidney at all. Thus, in

this case, the reliable knowledge that Sidney was wanted did not come from the tip. It was supplied by radio confirmation *after* the unsupported seizure, much like the gun found in the *Jackson* case. Further, even if the dispatch had confirmed a wanted status prior to the traffic stop, and even if this could be imputed to the police on the road, any articulable conclusion that the person being seized was the wanted man still flowed entirely from the unreliable anonymous tip, and not from some reliable independent information received by the officer who stopped Sidney. Therefore, the dispatch information did not supply police with a reasonable suspicion to seize Allen Sidney in the vehicle, and the contraband seized in the arrest which flowed from his ultimate identification should have been suppressed as the fruit of the unlawful seizure.

CONCLUSION

For the foregoing reasons, the evidence should be suppressed, the appellant should be given leave to withdraw his conditional guilty plea, the judgment of the Circuit Court for the City of Petersburg, rendered upon the conditional guilty should be reversed, and his conviction upon the conditional guilty plea for possession of cocaine and possession of marijuana should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d), I hereby certify that fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia, and three paper copies of the same have been served, via U.S. Mail, postage prepaid, upon Benjamin H. Katz, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 23rd day of April, 2010.

Daniel W. Hall