IN THE

Supreme Court of Virginia

RECORD NO. 092561

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

COREY TAYVON SMITH,

Appellee.

BRIEF OF APPELLEE COREY TAYVON SMITH

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STATEMENT OF THE CASE

Appellee Corey Tayvon Smith was indicted by a Richmond grand jury for possession of a firearm by a convicted felon, in violation of Code § 18.2-308.2. Smith filed a motion to suppress evidence, which was heard on February 21, 2008 by the Honorable Richard D. Taylor, Jr., Judge of the Circuit Court for the City of Richmond. The circuit court took the matter under advisement and, at a hearing held March 12, 2008, denied the motion. On April 2, 2008, Smith entered a conditional guilty plea to the charge, and was sentenced to two (2) years of active incarceration.

By a per curiam order dated October 10, 2008, the Court of Appeals awarded Smith an appeal. Following briefing, argument, supplemental briefing, and supplemental argument, the Court of Appeals reversed Smith's conviction in a published opinion dated October 6, 2009. *See Smith v. Commonwealth*, 55 Va. App. 30, 683 S.E.2d 316 (2009).

On October 20, 2009, the Commonwealth filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. By two orders dated November 24, 2009, the Court of Appeals denied the Commonwealth's petition for rehearing and rehearing *en banc*.

By an order dated July 27, 2010, this Court awarded the Commonwealth an appeal from the Court of Appeals' ruling.

ASSIGNMENTS OF ERROR

The Court granted the Commonwealth an appeal related to the following Assignments of Error:[1]

I. In ruling that police must have a "contemporaneous indication" Smith was armed and dangerous in addition to the database alert based on two prior arrest warrants for felon firearm possession and distribution of crack cocaine,[2] the Court of Appeals misapplied the test of sufficient suspicion to frisk higher than that required under Terry v. Ohio, 392 U.S. 1 (1968).

II. In evaluating the reasonableness of Smith's Terry frisk, the Court of Appeals failed to balance the public's interest in officer safety against Smith's right to be protected from an unwarranted frisk.

III. The Court of Appeals erred by failing to give deference to the trial court's finding the database information was reliable and that police could validly rely upon it for officer safety by holding the database information was "vague," "insufficient," and provided no more than a "hunch" Smith was armed and dangerous.

IV. In ruling that trespassing is a minor offense and trespassers are unlikely to be armed, the Court of Appeals conducted a totality of the circumstances analysis without evaluating a proper balance between the danger to police and the intrusion upon Smith.

V. The Court of Appeals erred by limiting imputation of collective knowledge principles under United States v. Hensley, 469 U.S. 221 (1985) to the information known to the person entering the information

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[1] Mr. Smith has recounted the Assignments of Error as stated by the Commonwealth in its Petition for Appeal and by the Court on the Virginia Judicial System Website. *See* Commonwealth's Petition for Appeal, 3-5; *see also* courts.state.va.us/courts/scv/appeals/092561.html (last viewed September 23, 2010). In its Opening brief, the Commonwealth has reworded several of its Assignments of Error.

[2] Smith's prior narcotics offense was possession with intent to distribute cocaine, not distribution. *See* App. 55 (Prior Conviction Order).

into the police database after the warrants for felon firearm possession and distribution of crack cocaine[3] were executed.

VI. The Court of Appeals erred by ruling that an eleven-month-old offense date for felon firearm possession coupled with a six-month-old offense date for distribution of crack cocaine[4] was too stale rather than a special circumstance justifying a protective frisk.

VII. The Court of Appeals erred by ruling that principles of Herring v. United States, 129 S.Ct. 695 (2009) do not apply to an officer's honest but erroneous conclusion that the PISTOL database provide [sic] sufficient suspicion to justify a protective frisk.

STATEMENT OF FACTS

On September 18, 2007, Officers Hedman and Moore, off-duty officers with the Richmond Police, were patrolling the Hillside Court housing community to enforce its "no trespassing" policy.[5] (App. 12, 13). At an unspecified time that day, the officers conducted a traffic stop of a car, which had a nonfunctioning rear brake light. (App. 12). The officers obtained identification from the vehicle's occupants, including Smith, who was a rear passenger. (App. 12, 13). A record check revealed Smith had no outstanding warrants. However, upon entering Smith's information into his computer system, Officer Hedman received an alert from PISTOL, which Hedman described as a computer database used by the Richmond

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[3] *See* n.2, *supra*.
[4] *See* n.2, *supra*.
[5] Hillside Court is owned by the Richmond Redevelopment Housing Authority. *See* App. 12.

Police in which "other officers who come in contact with people who are probably armed narcotics sellers/users" include that information "as an officer safety issue." (App. 13). The alert stated Smith was "probably armed and a narcotics seller/user." (App. 12, 13).

After receiving the alert, Officer Moore ordered Smith out of the car and inquired whether he had any weapons. Smith said he did not. (App. 14). Over Smith's objection, Moore frisked Smith and retrieved a "two-shot Derringer" pistol from his pants pocket. (App. 14, 15; see App.58).

At the suppression hearing, Detective Timothy Neville testified that, on October 18, 2006, he obtained an arrest warrant for Smith on a charge of possession of a firearm by a convicted felon. (App. 18-19). He said Officer Harris arrested Smith on the warrant and placed the arrest into the PISTOL system, which, in turn, generated the alert Officer Hedman received eleven months later. (App. 19).

At the conditional guilty plea hearing, the Commonwealth submitted a prior conviction order, indicating Smith's prior convictions for possession of a firearm by a convicted felon with an offense date of October 18, 2006, and possession with intent to distribute cocaine with an offense date of March 13, 2007. *See* App. 45, 46, 55. Viewing the conviction order and Officers Hedman and Neville's suppression hearing testimony in the light

most favorable to the Commonwealth, the Court of Appeals concluded only the "probably armed" portion of the alert was generated by Officer Harris's entry of Smith's arrest on the October 18, 2006 warrant into PISTOL. The Court of Appeals concluded the "narcotics seller/user" portion of the alert was generated by another, unknown officer's entry of Smith's arrest on a warrant for the March 13, 2007 possession with intent to distribute cocaine offense date. *See Smith*, 55 Va. App. at 44-45, 683 S.E.2d at 323-24.[6]

ARGUMENT

Standard of Review

On appeal from a trial court's denial of a motion to suppress, the accused must show that, considering the evidence in the light most favorable to the Commonwealth, the trial court's denial of suppression was

[6] Notably, in both the trial court and Court of Appeals, the Commonwealth argued from the premise that the entire alert was generated from Harris's entry of Smith's arrest on the October 18, 2006 arrest warrant. *See* App. 25-26; Brief for the Commonwealth filed in the Court of Appeals at 3 (stating "Detective Timothy Neville testified that the alert derived from an arrest warrant he had obtained for Smith on an earlier offense of felon firearm possession in October, 2006") and 8 (arguing that the information supporting the PISTOL alert "was grounded on an arrest warrant for felon firearm possession necessarily based on probable cause"). Moreover, the trial court accepted the entire alert was approximately "a year old." App. 24. The trial court did not find, and the Commonwealth did not argue in either court below, that the narcotics portion of the alert was based on more recent information than that which supported the October 18, 2006 arrest warrant.

erroneous. *McCain v. Commonwealth*, 275 Va. 546, 552, 659 S.E.2d 512, 515 (2008). The appellate courts defer to the trial court's factual findings, *id.* at 553, 659 S.E.2d at 515, but review *de novo* the trial court's application of the legal standard for reasonable suspicion to the facts of the case. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Similarly, the appellate court reviews *de novo* the lower court's conclusion concerning the applicability of the good faith exception to the exclusionary rule. *Anzualda v. Commonwealth*, 44 Va. App. 764, 791, 607 S.E.2d 749, 762 (2005) (*en banc).*

Discussion

I. The Court of Appeals correctly held the frisk was improper.

A "limited stop and search of a person, where based on a reasonable articulable suspicion that he or she is, has, or is about to engage in criminal activity and may be armed and dangerous, is reasonable under the Fourth Amendment." *El-Amin v. Commonwealth*, 269 Va. 15, 20, 607 S.E.2d 115, 117 (2005) (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Terry v. Ohio*, 392 U.S. 1, 24 (1968)). The United States Supreme Court recently held that, "in a traffic-stop setting, the first *Terry* condition – a lawful investigatory stop - is met whenever it is lawful for police to detain an automobile and its occupants" for a traffic violation. *Arizona v. Johnson*,

555 U.S. ___, 129 S.Ct. 781, 784 (2009). To justify a frisk of the vehicle's occupants during a lawful traffic stop, an officer "need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity." *Id.* Nevertheless, an officer must still "harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.*

Reasonable suspicion is "'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Ornelas*, *supra*, 517 U.S. at 696 (citation omitted). An officer "must be able to articulate something more than an 'inchoate and unparticularized suspicion['] or 'hunch'" that the person is engaged in criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (*quoting Terry*, 392 U.S. at 27). The totality of the circumstances is considered when determining whether sufficient cause exists to justify a weapons frisk. *Jones v. Commonwealth*, 53 Va. App. 171, 177, 670 S.E.2d 31, 34 (2008) (Citations omitted).

The Court of Appeals properly held that, "in the absence of some *contemporaneous* indication that [an] individual might be carrying a weapon," knowledge of the individual's prior arrests, standing alone, "do[es] not provide reasonable suspicion to believe he may be *presently* armed and dangerous." *Smith*, 55 Va. App. at 46, 683 S.E.2d at 324. By recognizing that "[p]rior involvement with guns and drugs is an appropriate

factor for consideration in the totality of the circumstances analysis but is insufficient, standing alone, to provide reasonable suspicion for a weapons frisk," the Court of Appeals properly balanced the concern for officer safety with Smith's right to be protected against unwarranted government intrusions. *Id.*[7]

A. The PISTOL alert alone was insufficient to justify the frisk.

The alert in this case is similar to a flyer or bulletin issued by the police with regard to an individual. *Smith*, 55 Va. App. at 42-44, 683 S.E.2d at 322-23; *see also* 4 Wayne R. LaFave, *Search and Seizure* § 9.5(i), at n.510 (4th ed. Supp. 2008-09) (stating that *United States v. Hensley*, 469 U.S. 221 (1985) "no doubt applies to transferring of information by computer, as well, but in such circumstances the officer must act reasonably as to his interpretation of the [information] received via computer"). "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies" an

[7] Mr. Smith appreciates the danger associated with traffic stops. Notably, however, appellate counsel is unaware of, and the Commonwealth has not cited, any cases authorizing police to frisk all occupants of a vehicle as a matter of course. *But cf. Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (holding that an officer making a traffic stop may order passengers to get out of a vehicle as a matter of course pending completion of the stop).

investigatory detention of the individual. *Hensley*, 469 U.S. at 232.

The Court of Appeals held the evidence showed the alert was based on information supporting prior warrants issued for Smith's arrest in October 2006 and March 2007 – eleven and six months prior to the traffic stop at issue in the present case. Other jurisdictions have recognized that "[i]nformation that is too stale may not serve as the basis for reasonable suspicion." *People v. Ward*, 862 N.E.2d 1102 (Ill. App. 1 Dist. 2007); *see also United States v. Casper*, 536 F.3d 409, 414 (5th Cir. 2008) (recognizing that an informant's tip can provide reasonable articulable suspicion depending on several factors, including "whether the tip or report concerns active or recent activity or has instead gone stale") (quotation marks and citations omitted); *United States v. Payne*, 181 F.3d 781 (6th Cir. 1999); *State v. Spillner*, 173 P.3d 498, 509 (Hawaii 2007) (recognizing that "where the information relied upon by the officer was so "stale" that . . . the logical link between the former illegal activity and any suspicion of current, ongoing criminal activity had dissolved with the passage of time," courts have concluded that investigatory stops were unreasonable). In *Ward*, *supra*, the Illinois appellate court affirmed the finding of reasonable suspicion on other grounds, but held the officers' knowledge of Ward's prior

narcotics arrests was "too stale" to alone provide reasonable suspicion he possessed narcotics seven months later. *See* 862 N.E.2d at 1132-33.

United States v. Maxim, 55 F.3d 394 (8th Cir. 1995), a case upon which the Commonwealth relies, is significantly distinguishable. *See* Commonwealth's Opening Brief at 18-19. *Maxim* involved the question of staleness of probable cause to search a home. The search warrant affidavit contained a Federal Special Agent's statement that "survivalists and other firearm enthusiasts ... tended to hold onto their firearms for long periods of time, often as long as ten or twenty years." 55 F.3d at 397. In contrast, none of the officers in Smith's case testified that, once they saw the alert, they expected Smith would be armed because people are apt to continually carry their firearms about their persons. Furthermore, there is arguably a greater likelihood that people would retain contraband in their house for months or years, as opposed to about their person.

In this case, the "logical link between the former illegal activity and any suspicion of current, ongoing criminal activity had dissolved." *Spillner*, 173 P.3d at 509. That Smith was arrested for illegally possessing a firearm eleven months prior and was arrested for illegally possessing with the intent to distribute cocaine six months prior failed to provide Officers Hedman and Moore with reasonable suspicion he was armed and presently

dangerous at the time of the traffic stop on September 18, 2007. Accordingly, contemporaneous evidence that Smith may have been currently armed was necessary to provide the officers with reasonable suspicion for a protective frisk.

Like the Court of Appeals aptly reasoned:

> a contrary conclusion in this case ... would logically [mean] that an individual arrested for illegally possessing a firearm and possessing drugs with an intent to distribute would forever thereafter be subject to a weapons frisk if stopped for a minor traffic infraction, regardless of whether police had any contemporaneous evidence of ongoing involvement with illegal drugs or weapons.

55 Va. App. at 48, 683 S.E.2d at 325. Such a result is not sanctioned by the well-established principles of Fourth Amendment law applicable to weapons frisks, which indicate contemporaneous observations are required. *See e.g.*, *McCain*, *supra*, 275 Va. at 554, 659 S.E.2d at 517 (noting an officer may only conduct a weapons frisk of the driver and passengers of a lawfully stopped vehicle for officer's safety "if he develops reasonable suspicion *during the traffic or Terry stop* to believe the particular person to be frisked is armed and dangerous") (emphasis added); *see also* *Terry*, *supra*, 392 U.S. at 24 (stating that to conduct a protective frisk for weapons, an officer must have a reasonable articulable suspicion that the individual "is armed and presently dangerous to the officer or to others").

The Commonwealth suggests the alert alone provided the officers with reasonable suspicion because it was grounded on two prior arrest warrants for felon firearm possession and possession with intent to distribute cocaine. *See* Commonwealth's Opening Brief at 15, 16, 16-17. That probable cause may have supported Smith's prior arrests, allowed for his arrests at *those times*. The Commonwealth cites no authority for its position that the probable cause underlying a 2006 and 2007 arrest warrant provides police with reasonable suspicion to frisk an individual six or eleven months after the offense dates of the prior warrants.

The Commonwealth contends the Court of Appeals incorrectly held that "Detective Neville's knowledge in obtaining the warrant for Smith's felon firearm possession on October 18, 2006 could not be lawfully imputed to Officers Hedman and Moore." Commonwealth's Opening Brief at 20 (citing *Smith*, *supra*, 55 Va. App. at 43, 683 S.E.2d at 323). Contrary to the Commonwealth's interpretation, the Court of Appeals did not hold that the probable cause presented by Detective Neville in obtaining the prior arrest warrant for firearm felon possession, and the probable cause presented by the unknown officer in obtaining the prior arrest warrant for possession with intent to distribute cocaine, could not be imputed to Officers Hedman and Moore.

In assessing whether reasonable suspicion existed for the frisk, the Court of Appeals considered "the information proved to be *within the knowledge of* the officers performing the PISTOL data entry[.]" *Id.* at 44, 683 S.E.2d at 323 (emphasis added). The probable cause known to Detective Neville and the unknown officer who obtained the prior arrest warrant for possession with intent to distribute cocaine, "was within the knowledge of" Officer Harris who arrested Smith on the firearm warrant and entered the arrest into PISTOL and within the knowledge of the unknown officer who arrested Smith on the cocaine warrant and entered the arrest into PISTOL, respectively. *See White v. Commonwealth*, 24 Va. 234, 240-41, 481 S.E.2d 486, 489 (holding that one officer's probable cause to arrest may be imputed to other officers who effectuate the arrest), *aff'd. en banc*, 25 Va. App. 662, 492 S.E.2d 451 (1997).

Thus, the probable cause supporting the prior arrest warrants was imputed through the PISTOL alert to Officers Hedman and Moore. Regardless, Mr. Smith's position has been, and remains, that the probable cause supporting the prior arrest warrants, even though known to Officers Hedman and Moore, was too far removed in time to provide the officers with reasonable suspicion that Mr. Smith was armed and presently dangerous when encountered on September 18, 2007 – eleven and six

months after the dates of the conduct forming the basis for probable cause to obtain the prior arrest warrants.

The Commonwealth also asserts: "In its totality of the circumstances analysis, the Court of Appeals wrongly disregarded the fact that the source of the PISTOL alert was an arrest warrant for felon firearm possession in combination with that of cocaine distribution." Commonwealth's Opening Brief at 16-17. The Commonwealth cites several cases for the proposition that drugs and weapons are frequently associated with each other. *See id.* Notably, however, the cases cited by the Commonwealth found sufficient reasonable suspicion for weapons frisks based on officers' *contemporaneous* observations of suspected drug transactions, not on the officers' knowledge of an individual's prior drug-related arrests. *See United States v. Bustos-Torres*, 396 F.3d 935, 939, 943 (8th Cir. 2005) (concluding the officers had reasonable suspicion to conduct a weapons frisk when, while conducting surveillance in an area known for "high drug traffic," the officers contemporaneously observed conduct that led them to suspect the defendants had been involved in a drug transaction); *United States v. Trullo*, 809 F.2d 108 (1st Cir. 1987) (holding that reasonable suspicion existed for a weapons frisk when, while two police detectives and a DEA agent were patrolling for drug activity in a "Combat Zone" – a high crime

area known for prostitution and drug dealing – the officers made contemporaneous observations that led them to suspect the defendant "had just engaged in an illegal transaction, quite probably a narcotics sale"); *Cf. State v. Richardson*, 456 N.W.2d 830, 836 (Wis. 1990) (concluding reasonable suspicion existed for a weapons frisk based on an anonymous tip that the defendant was involved in an ongoing narcotics offense, plus the officers' contemporaneous observations of the defendant, which corroborated the innocuous details of the tip).

Officers Hedman and Moore's observations on September 18, 2007 did not suggest that Smith possessed narcotics or was or had been involved in a narcotics transaction that evening. Accordingly, the cases cited by the Commonwealth are inapposite.

Smith maintains that, under current jurisprudence, an individual does not forever lose his Fourth Amendment protections merely because he has been arrested for some particular offenses in the past. Certainly, the Virginia appellate courts have considered an accused's past criminal history as *one of several* circumstances supporting a finding of reasonable suspicion to justify a stop or protective frisk. *See e.g., Johnson v. Commonwealth*, 20 Va. App. 49, 54-55, 455 S.E.2d 261, 264 (1995) (concluding reasonable suspicion existed for a frisk when (1) two known

and reliable "informants provided detailed, predictive information that the officers were able to corroborate"; (2) the officers were able to identify Johnson as a convicted felon; (3) "the officers confirmed that the addresses given to them were places where drugs could be purchased"; (4) the officers reasonably assumed that Johnson, who was probably in possession of illegal drugs, was also probably armed; and (5) Johnson consented to the pat-down); *Williams v. Commonwealth*, 4 Va. App. 53, 65, 354 S.E.2d 79, 85-86 (1987) (finding reasonable suspicion to stop the accused's vehicle based on (1) recent information provided by two confidential informants, (2) a record check revealing the accused's drug-related criminal history, and (3) the fact that the accused was seen leaving his house to which police were en route to execute a search warrant). However, appellate counsel did not locate, and the Commonwealth does not cite, any case in which either Virginia appellate court has held that an individual's past criminal history alone provides the necessary reasonable suspicion for a protective frisk.

State v. Valentine, 636 A.2d 505 (N.J. 1994) supports the propriety of the Court of Appeals' reversal of Smith's conviction. There, a majority of the New Jersey Supreme Court determined the totality of the circumstances – including Valentine's suspicious conduct of ducking

behind a tree in a high crime area at midnight, his keeping his hands in his pockets upon the officer's approach, and his nervous and evasive behavior when questioned by the officer, as well as the officer's knowledge of Valentine's lengthy arrest sheet for weapons, robbery, and narcotics offenses – justified the protective frisk. *See id.* at 513-14. Nevertheless, the majority cautioned: "[A] frisk never will be justified based solely on an officer's knowledge of a suspect's criminal history." *Id.* at 511. Although "an officer's knowledge of a suspect's prior criminal activity *in combination with other factors* may lead to a reasonable suspicion that the suspect is armed and dangerous[,]" that knowledge "alone is not sufficient." *Id.* at 511; *see also State v. Giltner*, 537 P.2d 14, 17 (Hawaii 1975) (holding "[t]he reputation of an individual for carrying arms is not, in and of itself, a sufficient basis for a stop and frisk").

In *United States v. Laughrin*, 438 F.3d 1245 (10th Cir. 2006), the Tenth Circuit Court of Appeals determined reasonable suspicion for a traffic stop was stale when it was based solely on an officer's knowledge that Laughrin drove on a suspended license approximately five and a half months earlier. The court held that "'knowledge of a person's prior criminal involvement ... is alone insufficient to give rise to the requisite reasonable suspicion.'" *Id.* at 1247 (citation omitted). It reasoned: "'If the law were

otherwise, any person with any sort of criminal record – or even worse, a person with arrests but no convictions – could be subjected to [an] investigative stop by a law enforcement officer at any time without the need for any other justification at all.'" *Id.* (citation omitted).[8]

B. No other circumstances justified the weapons frisk in this case.

Other circumstances justifying a protective frisk include the "characteristics of the area surrounding the stop, the time of the stop, the specific conduct of the suspect individual, the character of the offense under suspicion, and the unique perspective of a police officer trained and experienced in the detection of a crime." *McCain*, *supra*, 275 Va. at 554, 659 S.E.2d at 517. Nervous, evasive behavior is also a pertinent factor. *Id.* As the Court of Appeals held, however, none of these circumstances provided Officers Hedman and Moore with reasonable suspicion to conduct the weapons frisk in this case. *See Smith*, 55 Va. App. at 41-42, 47-48, 683 S.E.2d at 322, 325.

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[8] As the Court of Appeals recognized, the imputed knowledge in this case was limited to the fact of Smith's prior *arrests*, not his convictions, as the convictions were not known either to the the officers who obtained the prior arrest warrants, or to the officers who generated the PISTOL alert by entering the prior arrests into PISTOL immediately following Smith's arrests on the respective warrants. *See Smith*, *supra*, 55 Va. App. at 45-46, 45 n.9, 683 S.E.2d at 324, 324 n.9.

McCain, *supra*, is pertinent in this regard. Like McCain, Smith "was a passenger in a vehicle stopped for a relatively minor traffic infraction" (a nonfunctioning rear brake light) and Officers Hedman and Moore detained Smith "solely because of the actions of the driver." 275 Va. at 554, 659 S.E.2d at 517. Additionally, "the officers did not notice any physical or mental impairment that would indicate drug use by [Smith], and there were no physical or other characteristics observed by the officers that indicated [Smith] might be armed and dangerous." *Id.* at 55, 659 S.E.2d at 617. Rather, Smith fully complied with the officers' requests to provide identification and to exit the car, and he objected only when Officer Moore began to frisk him. *See id.* at 554-55, 659 S.E.2d at 517.

When a stop is "based on reasonable suspicion of a *contemporaneous crime*, the nature of the crime suspected may be sufficient to support a concomitant frisk for weapons." *Smith*, 55 Va. App. at 37, 683 S.E.2d at 320 (emphasis added). In such cases, however, it is the reasonable suspicion of a *current* crime that gives rise to reasonable suspicion for the frisk. *See Terry*, *supra*, 392 U.S. at 28 (stating the suspect's *current* actions "were consistent with [the officer's] hypothesis that these men were contemplating a daylight robbery – which it is reasonable to assume would be likely to involve the use of weapons");

Williams, *supra*, 4 Va. App. at 67, 354 S.E.2d at 87 (1987) (holding the officers "acted reasonably when conducting a protective pat-down search for weapons in light of the fact that they had a reasonable suspicion that Williams was *presently* engaged in narcotics distribution") (emphasis added); *see also Jones v. Commonwealth*, 272 Va. 692, 701 n.3, 636 S.E.2d 403, 407 n.3 (2006) (noting, in a felony child neglect case where police found illegal narcotics and drug paraphernalia in plain view next to Jones's young son, that "'it is reasonable for an officer to believe a person [*i.e.*, Jones] may be armed and dangerous when the person is suspected of being involved in a drug transaction'" (quotations omitted)). None of these courts held an officer's knowledge of *past* narcotics possession with the intent to distribute or *past* firearm possession automatically gives rise to a reasonable suspicion an individual is armed and presently dangerous when he is encountered at any time in the future.

Viewing the evidence in the light most favorable to the Commonwealth, the officers stopped the vehicle in which Smith was a passenger for a non-functioning rear brake light and to investigate whether

the car's occupants were trespassing.[9] Neither of these crimes has been held to give rise to a reasonable inference that an individual is armed and dangerous. In *McCain*, 275 Va. at 555, 659 S.E.2d at 518, a majority of this Court held an officer "may not automatically search a driver or his passengers pursuant to the issuance of a traffic citation ....." In *Harris v. Commonwealth*, 262 Va. 407, 417, 551 S.E.2d 606, 611 (2001), this Court recognized that trespassing is "an offense not generally associated with the wrongdoer being armed." Thus, in Smith's case, the Court of Appeals correctly reasoned that "the record neither contains evidence nor supports an inference indicating that trespassers in general, or trespassers on this property in particular, were likely to be armed." *Smith*, 55 Va. App. at 42, 683 S.E.2d at 322.

Citing *Foley v. Connelie*, 435 U.S. 291 (1978) the Commonwealth argues that the Court of Appeals' (and implicitly this Court's) observation

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[9] The Commonwealth states that the weapons frisk was justified because "the PISTOL alert was based [in part] on the same crime in [sic] which the officers were confronted at the time, coupled with a cocaine possession with intent charge[.]" Commonwealth's Opening Brief at 18. To the extent the Commonwealth suggests that Officers Hedman and Moore were investigating firearm felon possession when they first approached Smith, the Commonwealth is mistaken. The record clearly establishes that the officers stopped the vehicle solely for a non-functioning brake light and to investigate a possible trespass charge. *See* App. 12-13. The officers were not investigating a possible firearm possession charge until *after* they received the PISTOL alert.

that trespassing is an offense not generally associated with the wrongdoer being armed, "shows a misunderstanding of the circumstances in which the officers acted and a failure to recognize that all traffic stops are dangerous." Commonwealth's Opening Brief at 12. Foley, an alien, challenged as unconstitutional a New York statute limiting appointment of members of the state police force to United States citizens. 435 U.S. at 292. When discussing generally the police function (ultimately concluding that the police function is one where "citizenship bears a rational relationship to the special demands of the particular position"), the *Foley* majority noted how, "[i]n stopping cars, [the police] may, *within limits*, require a driver or passengers to disembark and even search them for weapons, *depending on time, place, and circumstances*." *Id.* at 298 (emphasis added).

The *Foley* majority went on to note that such "prophylactic authority is essential [in light of] the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations ...." *Id.* *Foley* does not stand for the proposition that a suspicion of trespass or a minor traffic offense provides an officer with reasonable suspicion to conduct a weapons frisk in all cases.

The Commonwealth also contends the decisions of the United States Supreme Court and Arizona Court of Appeals (on remand) in *Johnson*,

supra, "confirm[ ] the reasonableness of Smith's frisk by the officers for weapons." Commonwealth's Opening Brief at 13. The Commonwealth continues: "The facts in this case are as strong as those in Johnson." Commonwealth's Opening Brief at 15. However, the Commonwealth overlooks that, on remand, the Arizona appellate court determined the *totality of the circumstances*, including Johnson's attire, which the officer testified was consistent with membership in the Crips gang, his carrying a police scanner in his pocket, *and* the officer's knowledge of his prior burglary conviction, provided reasonable suspicion to justify a protective frisk. *See State v. Johnson*, 207 P.3d 804, 808-09 (Ariz. Ct. App. 2009). In ¶ 9 of its opinion, the Arizona Court of Appeals specifically stated that, while standing alone, each individual fact may not have been enough to warrant a frisk, taken together they did. *Id.* Notably, moreover, in ¶ 10, the court focused on the evidence of Johnson's possible gang affiliation as the primary justification for the frisk. *See id.* at 809.

In stark contrast, Officers Hedman and Moore were not on patrol in an area associated with the Crips gang and did not encounter Smith wearing clothing consistent with gang membership. Nor was Smith carrying a police scanner. Rather, but for the alert, which was based on events occurring six and eleven months prior, this case is more akin to

McCain, discussed *supra*. "To find reasonable suspicion in this case could violate a basic precept that law-enforcement officers not disturb a free person's liberty solely because of a criminal record. Under the Fourth Amendment our society does not allow police officers to 'round up the usual suspects.'" *Laughrin*, *supra*, 438 F.3d at 1247.

II. The Court of Appeals correctly held the good faith exception was inapplicable to the officers' honest but erroneous legal conclusion that reasonable suspicion existed for the frisk.

In *Herring v. United States*, 555 U.S. ___, 129 S.Ct. 695 (2009), the Supreme Court held the exclusionary rule was inapplicable to evidence recovered during a search incident to an illegal arrest, when the arrest was rendered illegal due to the police record keeping error of a neighboring county's police department. *See generally* 129 S.Ct. 695. Both of the lower federal courts assumed the Fourth Amendment had been violated, but concluded the evidence was admissible under the good-faith doctrine of *United States v. Leon*, 468 U.S. 897 (1984) because the arresting officer had acted in good-faith on the neighboring county's warrant clerk's representation that the warrant was still outstanding. *Herring*, 129 S.Ct. at 699. The United States Court of Appeals for the Eleventh Circuit reasoned suppression was improper because "'the conduct in question [wa]s a negligent failure to act'" – *i.e.*, another county's police department's failure

to remove the warrant from its database – "'not a deliberate or tactical choice to act.'" *Id.* at 700 n.1 (citation omitted).

A majority of the United States Supreme Court noted the exclusionary rule does not apply to all Fourth Amendment violations, but rather, "'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge that the search was unconstitutional under the Fourth Amendment.'" *Id.* at 701 (citation and internal quotation marks omitted). The "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Id.* at 702 (quoting *Leon*, *supra*, 468 U.S. at 922 n.23). The *Herring* majority noted the neighboring county's police department's failure to update its computer database was negligent, not reckless or deliberate. *Id.* at 700. Moreover, by arresting Herring based on the neighboring county warrant clerk's representations, the "Coffee County officers did nothing wrong." *Id.* Because the error "was the result of isolated negligence *attenuated from the arrest*," *id.* at 698 (emphasis), the *Herring* Court found the good-faith exception to the exclusionary rule applied. *Id.* at 704.

The reasoning underlying the Supreme Court's rejection of the exclusionary rule in *Herring* demonstrates why the good-faith exception is

inapplicable in Smith's case. In *Herring*, the outstanding arrest warrant, by itself, fully justified Herring's arrest and the ensuing search incident thereto. It was only because of an independent third party's attenuated negligence in failing to remove the recalled warrant from the police database (*i.e.*, a third party's mistake of fact), *see id.* at 698, 699, that, unbeknownst to him, the arresting officer violated the Fourth Amendment. In contrast, for the reasons previously stated herein, the PISTOL alert in the present case was *legally* insufficient, by itself, to justify the protective frisk, even assuming the accuracy of the basis for the alert – *i.e.*, that Smith was arrested for illegally possessing a firearm eleven months before the frisk at issue and was arrested for possessing with intent to distribute cocaine six months before the frisk.

Since *Herring*, various state and federal courts have applied the good-faith exception only when the information relied upon by the arresting or searching officer was alone sufficient to justify the search and/or arrest, but for having been incorrect due to a third party's attenuated negligence. *See United States v. Harrison*, 566 F.3d 1254, 1257 (10th Cir. 2009) (citing *Herring* and *Leon* and applying the good-faith exception to the officer's reliance on a defective search warrant "[g]iven the strong presumption in favor of warrant searches, the 'great deference' accorded to a magistrate's

probable cause determination, and the fact that the warrant affidavit was not 'devoid of factual support'") (internal citations omitted;); *United States v. Groezinger*, 625 F.Supp.2d 145, 159 (S.D.N.Y. 2009) (applying *Herring* and the *Leon* good-faith exception to the officer's reliance on a defective search warrant because the warrant affidavit "was not so lacking in indicia of probable cause that a reasonably well trained [federal] agent would have known the search was illegal despite the magistrate's authorization"); *United States v. Moore*, No. RWT-08-203, 2009 WL 1585851 (D. Md. June 4, 2009) (slip op.) (citing *Illinois v. Krull*, 480 U.S. 340 (1987) and *Herring*, and applying the good-faith exception to ATF agents' reliance on the then-valid District of Columbia statutory ban on gun and ammunition possession for probable cause to stop and search the accused's vehicle); *State v. Richardson*, 906 N.E.2d 263 (Ind. App. Ct. 2009) (applying *Herring* and rejecting exclusion of evidence obtained as the result of an illegal arrest for possession of a firearm as a convicted felon when the arrest was based on another's officer's repeated representations that police records showed the accused had a prior felony conviction, despite that the records were later determined to be incorrect); *State v. De La Cruz*, 969 A.2d 413, 417-18 (N.H. 2009) (applying the good-faith exception to the officer's seizure of De La Cruz based on a municipal ordinance which the Court assumed was

unconstitutional; reasoning that "an officer's objectively reasonable reliance upon an ordinance or statute in forming reasonable suspicion is an exception to the exclusionary rule ...").

Herring and the post-*Herring* cases previously cited involved no direct violation of the accused's Fourth Amendment rights by the arresting or searching officers; rather the Fourth Amendment violation resulted from the attenuated negligence of a third party. In contrast, the Fourth Amendment violation in Smith's case resulted directly from the officers' own conduct – *i.e.*, their reliance on a stale record of Smith's prior firearm and drug possession as the sole justification for a protective frisk. This case does not involve an officer's reliance on a deficient warrant, *see Leon*, *supra*; an officer's reliance on a statute subsequently declared unconstitutional, *see Krull*, *supra*; an officer's violation of the knock and announce rule when lawfully present to execute a valid search warrant of a residence, *see Hudson v. Michigan*, 547 U.S. 586 (2005); or a negligent misrepresentation regarding the existence of an arrest warrant or the accused's prior record, either by another law enforcement officer or a court employee, *see Herring*; *Arizona v. Evans*, 514 U.S. 1 (1995); and *Richardson*, *supra*.

As the Court of Appeals held, *Smith*, 55 Va. App. at 50-52, 683 S.E.2d at 326-27, the *Herring* majority did not extend the good-faith

exception to an arresting/searching officer's deliberate *or* negligent belief that certain circumstances provide reasonable suspicion or probable cause to seize, pat down, or fully search someone. *See De La Cruz*, *supra*, 969 A.2d at 418 (reiterating, post-*Herring*, that "an officer's good faith belief that he had reasonable suspicion would *not* serve as an exception to the exclusionary rule when there were no facts that would provide an actual basis for such suspicion"; "[A]bsent facts that would provide actual basis for reasonable suspicion, an officer's good faith belief that reasonable suspicion exists is insufficient to justify a seizure") (emphasis added); *see also State v. Rodriguez*, No. 100,626, 2009 WL 745579, at * 4 (Kan. Ct. App. 2009) (unpublished) (concluding *Herring* did not control where "there was no confusion about a[n outstanding] warrant" and "[t]here was no reporting error by other police personnel" but, rather the officer conducted the search of Rodriguez's vehicle "based upon factors which, taken together, d[id] not provide probable cause to do so").

When appellate courts do not defer to a trial court's determination of reasonable suspicion or probable cause, *see Ornelas*, *supra*, 517 U.S. at 699, surely appellate courts do not defer to an *officer's* determination of the same. *See United States v. DeBruhl*, 993 A.2d 571, 578 (D.C. 2010) (holding that "the good-faith exception cannot excuse a police officer's

mistake of law"). A contrary conclusion would "merg[e] the 'discredited mistake of law' defense into the good faith exception, with all the mischief this could entail." *Id.* at 588 (citation omitted).

In *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710 (2009), a majority of the Supreme Court applied the exclusionary rule to suppress evidence seized from Gant's car, although the officers' decision to search the car while Gant was handcuffed and locked in a police car was based on a twenty-eight year misinterpretation by many federal and state courts of *New York v. Belton*, 453 U.S. 454 (1981). *See generally Gant*. The majority noted "the doctrine of qualified immunity will shield officers from [civil] liability for searches conducted in reasonable reliance on" the widely accepted mistaken interpretation of *Belton*, *id.* at 1722 n.11, but nevertheless applied the exclusionary rule in resolving Gant's *criminal* appeal. As the United States Court of Appeals for the Seventh Circuit has recognized, the majority decision in *Gant* demonstrates that *Herring* does not mean "the exclusionary rule is necessarily on life support." *See Guzman v. City of Chicago*, 565 F.3d 393, 399 (7th Cir. 2009).

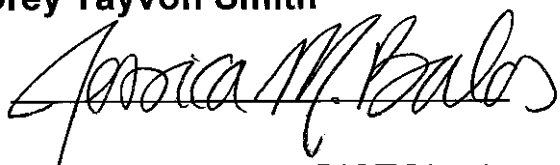
Simply put, the Fourth Amendment violation which occurred in this case was not the result of a third party's "isolated negligence attenuated from" the protective frisk. *Herring*, 129 S.Ct. at 698. Instead, it was the

result of the officers' "'deliberate or tactical choice'" to frisk Smith solely because of an alert which was based on eleven and six-month old information that Smith was "probably armed and a narcotics seller/user." *Id.* at 700 n.1; App. 13. When presented with the alert at issue in this case, any "reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances". *Id.* at 704; *see State v. Walker-Stokes*, 903 N.E.2d 1277, 1281 (Ohio App. 2d 2008) ("[A]t some point in time, a reasonable police officer should suspect that the information he received from a bulletin might be stale").[10] As such, under the majority's analysis in *Herring*, the good faith exception is inapplicable to the present case.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals reversing Smith's conviction should be affirmed.

Respectfully submitted,
Corey Tayvon Smith

By 

[10] Smith has not and does not primarily take issue with the PISTOL alert database. Nevertheless, insofar as the record shows the PISTOL system contains alerts based on "prior interactions" and the record fails to show any "purging" procedure for old alerts, the PISTOL system itself may rise to the level of "systemic error or reckless disregard of constitutional requirements," which the *Herring* Court recognized falls outside the good-faith exception. 129 S.Ct. at 704.

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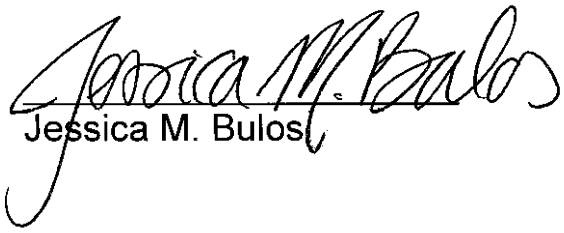
CERTIFICATE

I, Jessica M. Bulos, Counsel for Appellee, certify that on this 29th day of September, 2010, in compliance with Rule 5:26, fifteen (15) copies of this Brief of Appellee were hand-delivered to the Clerk, Virginia Supreme Court; one (1) copy was filed electronically with the Office of the Clerk of the Virginia Supreme Court on disc, CD, or by e-mailing to scvbriefs@courts.state.va.us; and three (3) copies were mailed to opposing counsel, Susan M. Harris, Assistant Attorney General (VSB #30165), at the Office of the Attorney General, Criminal Litigation Section; 900 East Main Street, Richmond, Virginia 23219; Telephone: (804) 786-2071; Facsimile: (804) 371-0151; Email: sharris@oag.state.va.us. One (1) electronic copy was emailed on the same day to opposing counsel stated above.

Counsel for Appellee is appointed and requests oral argument.



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