IN THE

Supreme Court of Virginia

RECORD NO. 100727

MICHAEL DEON HICKS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Catherine S. Rusz, Esq. (VSB No. 70273)
JOHNSON, GABORIK,
FISHER-RIZK, and RUSZ, PLC
15 South Belmont Avenue
Richmond, Virginia 23221
(804) 340-5232
(804) 340-5236 (Facsimile)
Email: Catherine@jgfrlaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 100727

MICHAEL DEON HICKS,

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COMMONWEALTH OF VIRGINIA,

Appellee.

STATEMENT OF THE CASE

Appellant Michael Deon Hicks was indicted by a Richmond grand jury charging that, on or about September 25, 2008, he did unlawfully and feloniously possess with the intent to distribute a schedule I or II controlled substance after having been twice previously convicted of like offenses. On June 17, 2009, Hicks appeared before the Honorable Bradley B. Cavedo, Judge of the Richmond Circuit Court for a motion to suppress the evidence recovered pursuant to a search warrant. That motion was

denied. On June 29, 2009, Hicks was tried by a jury, with Judge Cavedo presiding. Hicks made a motion to strike at the close of the Commonwealth's case and renewed his motion after presenting his defense, which motions were denied. The jury found Hicks guilty of the lesser-included charge of simple possession, and sentenced him to ten (10) years of incarceration. On August 24, 2009, the trial court, after reviewing the presentence report and hearing the evidence and arguments of the parties, entered a sentence of ten (10) years of incarceration. Hicks timely noted his appeal to the Court of Appeals of Virginia. That appeal was denied on March 17, 2010. Hicks timely noted this appeal, which was granted in reference to Assignments of Error I and II on August 26, 2010.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred by affirming the trial court's decision to deny Hicks' motion to suppress the evidence when there was no probable cause to justify the search warrant. (Jt. App. 5-22, 44-51, 59-61[1]).

II. The Court of Appeals erred by affirming the trial court's denial of Hicks' motion to suppress the evidence when the probable cause,

[1] References to the Joint Appendix are herein denoted as ("Jt. App. ____").

if any, had dissipated, and the police did not execute the search warrant in a timely manner. (Jt. App. 44, 62-66, 102-114, 116).

STATEMENT OF FACTS

The Suppression Hearing

Attached to the Defendant's Motion to Suppress was a search warrant dated September 12, 2008 for 2111 Richmond Street in the City of Richmond. (Jt. App. 16-22). In the affidavit for the search warrant, Detective Marvin Marsh recounted information he received from Detective Armstead. (Jt. App. 18). Armstead advised Marsh that while he was involved in an unrelated operation utilizing a confidential informant who was wired for audio and video, he observed four people enter 2111 Richmond Street and then leave within thirty seconds. (Jt. App. 18). One of the people, an older man, was seen taking money out of his pocket before entering the house. (Jt. App. 18).

Armstead's confidential informant made contact with an unknown woman who had left the home. Armstead observed the woman open a piece of paper and show the contents to the confidential informant. (Jt. App. 18). The confidential informant told the officers that the woman stated

that she had just purchased the heroin from 2111 Richmond Street and that she had approximately 2 grams. (Jt. App. 18).

Based upon the information Armstead gathered, Marsh believed that heroin would be found at the location of 2111 Richmond Street from the residence or curtilage. (Jt. App. 18). The warrant was issued on September 12, 2008. (Jt. App. 21).

Richmond Detective Marvin Marsh testified at the suppression hearing June 17, 2009. He testified that after September 12, 2008, he had done several "spot checks" of the residence of 2111 Richmond St. and did not see any foot traffic. (Jt. App. 69). In conducting his spot checks, Marsh was involved in mobile surveillance of the residence, driving through the area, and watching the area. (Jt. App. 69). He conducted these spot checks two to three times per week. (Jt. App. 85). When he was conducting the spot checks, he described the area as "dead." (Jt. App. 86).

When Marsh did not see any foot traffic at 2111 Richmond Street, he concluded that the purported drug house was not up and running. (Jt. App. 79). In his training and experience, "if there's little to no foot traffic, then, it's probably less likely that there's going to be anything inside of the home at that particular point in time." (Jt. App. 79).

On September 25, 2008, Marsh drove to the scene and observed people coming to the residence, staying for 20-30 seconds, and then leaving the residence. (Jt. App. 69). During this time, he observed more than five people going in and out of the residence, though he did not observe anyone with money or anyone making hand-to-hand transactions. (Jt. App. 86, 98). Marsh also observed people in the front yard who appeared to be "posting up." (Jt. App. 69). When asked what "posting up" means, Marsh explained that when people are standing in the front yard and looking around, he considered that to be "posting up," or acting as a lookouts. (Jt. App. 71). These people were "very conscientious of their whereabouts, their surroundings." (Jt. App. 71).

In Marsh's experience, when people would act as lookouts, they would call out if they saw the police. (Jt. App. 72). However, since no marked police cars drove by during his surveillance, Marsh did not observe any of the people call out. (Jt. App. 72-3). Marsh did not see any of these people enter the home. (Jt. App. 98). He also could not recollect whether or not they were talking to people, though they possibly could have been engaged in small talk with other people. (Jt. App. 87, 89, 90).

Further, Marsh took no notes at all on September 25 while he was observing the home. (Jt. App. 89). He stayed for approximately ten to

fifteen minutes. (Jt. App. 86). It was approximately 3:00 p.m. when Marsh observed the activity and Marsh admitted that the 2100 block of Richmond Street is a residential area and normally there is foot traffic on the street with people coming and going to and from work. (Jt. App. 87-88). He also admitted that he did not recognize any of the people outside of the home or entering the home. (Jt. App. 91).

Marsh was qualified as an expert without objection, and in Marsh's expert opinion, the observations he made were consistent with narcotics distribution. (Jt. App. 76).

Although Marsh stated that he sometimes needs more personnel to execute search warrants, he ultimately did not execute the search warrant because he did not see any foot traffic in his observations of the home. (Jt. App. 83). He candidly stated, "I did not execute it because I didn't see foot traffic." (Jt. App. 83). From the time he observed the foot traffic and the time of the execution of the search warrant was a few hours. (Jt. App. 84).

The Trial

Detective Marvin Marsh testified that on September 25, 2008, he executed a search warrant at 2111 Richmond Street in the City of Richmond. (Jt. App. 132). He identified Michael Hicks as a person he encountered while executing the search warrant. (Jt. App. 132). Other

people were present, including Hicks' girlfriend, Travarious Woodson, three other adults, and three small children. (Jt. App. 133). Mr. Hicks told Marsh that he lived in the home for five to six months and he pays $200.00 in rent. (Jt. App. 136).

During the search of the kitchen, Marsh observed that Hicks was making eye contact with the officers searching the area and looking interested in the search. (Jt. App. 139). Marsh testified that Hicks continued to show interest in the search, including Philips' search of the enclosed porch. (Jt. App. 141).

When Philips returned from his search, he was carrying what appeared to be heroin. (Jt. App. 142-3). At some point, Detective Philips entered the room and held up another bag with smaller, individually packaged hits of heroin. (Jt. App. 148-9). Hicks told police that those drugs belonged to his cousin. Detective Philips advised Marsh that he found the drugs where Hicks' cousin had been sitting. (Jt. App. 149).

Detective Philips also assisted with the execution of the search warrant on 2111 Richmond Street. Philips recovered heroin from a light fixture at the back porch. (Jt. App. 182). A certificate of analysis for the heroin was introduced into evidence. (Jt. App. 183, 267-8). Philips also recovered a scale in the kitchen cabinet over the sink, plastic baggies in the

bedroom dresser, and $127.00 in cash from Hicks' person. (Jt. App. 184, 187, 188).

ARGUMENT

STANDARD OF REVIEW

On appeal of the denial of a motion to suppress the Court views the evidence it in the light most favorable to the Commonwealth, as the prevailing party, granting to the evidence all reasonable inferences fairly deducible therefrom. *Commonwealth v. Grimstead*, 12 Va.App. 1066, 1067, 407 S.E.2d 47, 48 (1991). The Court is "'bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them [,] and [the Court gives] due weight to the inferences drawn from those facts by resident judges and local law enforcement officers.'" *Ward v. Commonwealth*, 47 Va.App. 733, 742, 627 S.E.2d 520, 525 (2006). (*quoting McGee v. Commonwealth*, 25 Va.App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*) (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996)).

The Appellant has the burden of showing that the ruling denying his motion to suppress constituted reversible error. *McGee v. Commonwealth*, 25 Va. App. 193, 197, 487 S.E. 259, 261 (1997) *(en banc)* (quoting *Fore v. Commonwealth,* 220 Va. 1007 1010, 265 S.E.2d 729, 731 (1980)).

In the cases involving a warrantless search, the Court reviews *de novo* the trial court's application of defined legal standards such as probable cause to the particular facts of the case. *Ornelas*, 517 U.S. at 699, 116 S.Ct. at 1663. In contrast, "[w]hen reviewing a decision to issue a warrant, a reviewing court must grant 'great deference' [both] to the magistrate's interpretation of the predicate facts supporting the issuance of a search warrant and to the determination of whether probable cause supported the warrant." *Janis v. Commonwealth*, 22 Va.App. 646, 652, 472 S.E.2d 649, 652 (1996) (citing *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)) (emphasis added); *see also Ornelas*, 517 U.S. at 699, 116 S.Ct. at 1663.

"'A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" *Williams v. Commonwealth*, 4 Va.App. 53, 68, 354 S.E.2d 79, 87 (1987) (*quoting Massachusetts v. Upton*, 466 U.S. 727, 733, 104 S.Ct. 2085, 2088, 80 L.Ed.2d 721 (1984)). To this effect, the duty of the reviewing court is to make sure that there was a substantial basis for the magistrate to conclude that there was probable cause. *Anzualda v. Commonwealth,* 44 Va. App. 764, 775, 607 S.E.2d 749, 754 (2005) (*en*

banc)(quoting *Illinois v. Gates,* 462 U.S. 213, 236, 103 S.Ct. 2317, 2331 (1983)).

I. The trial court erred by denying Hicks' motion to suppress the evidence when there was no probable cause to justify the search warrant.

Probable cause for the issuance of a search warrant exists when, "'given all the circumstances set forth in the affidavit..., there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Tart v. Commonwealth*, 17 Va.App. 384, 387, 437 S.E.2d 219, 221 (1993) (*quoting Gates*, 462 U.S. at 238, 103 S.Ct. at 2332); see *Garza v. Commonwealth*, 228 Va. 559, 563, 323 S.E.2d 127, 129 (1984). A magistrate is tasked to make a "practical, common-sense decision" whether there is probable cause, while weighing the "evidence presented in light of the totality of the circumstances." *Tart*, 17 Va.App. at 387, 437 S.E.2d at 221. *(quoting Gates*, 462 U.S. at 238, 103 S.Ct. at 2332).

"Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Ward*, 47 Va.App. at 744, 627

S.E.2d at 525 (*quoting United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965)).

In this case, the police utilized a confidential informant to conduct drug buys in *another operation.* During the course of that operation, the confidential informant spoke with a woman whose reliability and identity is completely unknown. The confidential informant told the police that the unidentified woman told the him/her that she received heroin from 2111 Richmond Street and showed him/her something, purporting to be heroin, in a piece of paper. The police never stopped this woman, though they could have. The police never spoke with this woman, though they could have. There is no evidence that the police ever listened to the audio recording of the encounter. The police never ascertained that the woman did, in fact, possess two grams of heroin.

Essentially, the police did not attempt to confirm the observations of the confidential informant.

The police did observe people coming into the home and leaving, but they never observed anyone with drugs. They did not see inside the house. They did not know the people coming and going, and, therefore, could not ascertain whether the people were relatives of the people who lived in the home, or were there for some other lawful purpose. For all the

police know, the people could have been relatives visiting, friends stopping by on their way somewhere else, or any other lawful purpose. Therefore, looking at the totality of the circumstances, there was not a fair probability that drugs would be found in the residence of 2111 Richmond Street based upon the facts set forth in the affidavit.

No controlled buys were set up utilizing 2111 Richmond Street as their target. In fact, the confidential informant whose observations of purported heroin the affidavit is based upon, did not enter the residence. The observations made by Armstead of people coming and going occurred at one time, which, coupled with the statements made by the confidential informant, do not provide probable cause that a drug dealing operation is based out of this residence. Essentially, this is one, random and unknown person's uncorroborated statements and the observations of an officer that people come and go from a house.

It should be noted that the trial court did not take up the issue of the good faith exception to the exclusionary rule because the court held that there was sufficient probable cause and no undue delay (see Assignment of Error II). However, Hicks maintains that the affidavit was so deficient of probable cause that the good faith exception would not apply since the officers could not have an objectively reasonable belief that probable cause

existed. *See Adams v. Commonwealth,* 275 Va. 260, 274, 657 S.E.2d 87, 96 (2008).

II. The trial court erred by denying Hicks' motion to suppress the evidence when the probable cause, if any, had dissipated, and the police did not execute the search warrant in a timely manner.

Virginia Code § 19.2-56 contains two time limitations, "a fifteen-day bar and a "forthwith" requirement. The fifteen-day bar serves to extinguish absolutely the viability of a search warrant if not executed within fifteen days, regardless of circumstances. The "forthwith" requirement of Code § 19.2-56 is directory and defines the policy of the Commonwealth that search warrants be executed as soon as reasonably practical while probable cause continues to exist. "Forthwith" is a practical and flexible standard which must conform to the necessities of circumstances." *Turner v. Commonwealth*, 14 Va.App. 737, 739-740, 420 S.E.2d 235, 236 - 237 (1992).

The Court has "interpreted the "forthwith" provision as requiring something more than a mere showing of the continued existence of probable cause: specifically, that "police officers [ ] execute[d] the warrant with reasonable dispatch and without undue delay."" *Maye v.*

Commonwealth, 44 Va.App. 463, 477, 605 S.E.2d 353, 360 (2004) (*quoting Turner*, 14 Va.App. at 743, 420 S.E.2d at 239).

"Because the question whether the police officers complied with the "forthwith" requirement necessarily entails a determination whether probable cause continued to exist at the time the warrant was executed, [the Court's] analysis of the first question will decide the second issue-whether the information upon which probable cause was found had dissipated or become stale." *Turner*, 14 Va.App. at 739-740, 420 S.E.2d at 236 – 237. Whether probable cause still exists to execute a search warrant depends on "'the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity and the nature of the property to be seized.'" *Turner,* 14 Va. App. at 745, 420 S.E.2d at 240.

To determine if probable cause has become stale, or has dissipated, is an analysis of reason. Other variables other than the calendar come into play. For example, "the character of the crime (chance encounter...or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to the holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.'" *Id.* at 745, 420 S.E.2d at 240 (quoting *Donaldson v. State*, 46 Md. App. 521, 420 A.2d 281 (1980)).

In this case, the police observed the foot traffic and the confidential informant on September 11, 2008. The entirety of the observations listed in the affidavit consist of five or more people coming and going from the residence, one carrying money, and a confidential informant talking with an unknown woman about purchasing drugs at 2111 Richmond Street. The officer saw the unknown woman show a folded slip of paper to the confidential informant, but he could not see what was in or on the paper. The search warrant was issued on September 12, 2008. They executed the search warrant on September 25, 2008.

Detective Marsh candidly testified that he did not execute the search warrant earlier because, in his spot checks, there was no activity around the house. There was no foot traffic. There was no "posting." So, for two to three times a week for nearly two weeks, Marsh observed nothing that could amount to probable cause to allow him to execute his search warrant. He came by at different times and observed nothing. Therefore, from September 12 until September 24, there was no probable cause to execute the search warrant. This should not be in dispute. Although the case law states that probable cause must exist at the time of the execution of the search warrant, Hicks contends that once the probable cause had

dissipated and no longer existed, the police could not execute the search warrant.

The Court reasoned that the house was "closed for business" and the police had to wait until it was "open for business." However, this rationale could support the finding that when a house is "closed for business," no probable cause exists and any probable cause that may have previously existed was gone.

Further, there was never any evidence about what was going on inside the home, how much drugs were available for sale on September 11, and whether it was actually a resident of the home who was dealing the heroin. If the dealer just had a small amount of drugs, or if the dealer was just a friend who happened to have drugs to sell, that would affect the analysis. The only evidence was that an unidentified woman said she purchased drugs at the residence on September 11. The area of 2111 Richmond Street was residential, the September 25 observations were made in the afternoon, and it was not unusual to see foot traffic in that neighborhood.

Although Marsh described behavior he termed as "posting," he did not remember if the people were talking, though they may have been engaged in small talk. Marsh merely describes the behavior of people

standing around outside, watching the people around them, perhaps talking with each other. This behavior seems just as likely to be lawful behavior. Further, there was no "posting" observed in the affidavit. Perhaps the foot traffic was similar, but there were no other factors like seeing people walk in with money or having a confidential informant talk with an unknown purported drug buyer. From September 12 to the 25th, there was nothing observed. On the 25th, there were people coming and going and also standing around. Looking at the totality of the circumstances, the police did not have probable cause at the time of the execution of the warrant.

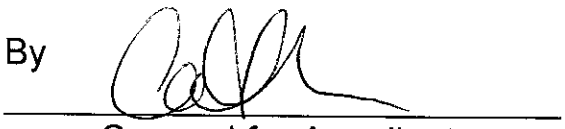
Based on all of these factors, any probable cause that *may* have existed on September 11 had dissipated long before Marsh made observations on September 25. The delay was undue and probable cause no longer existed when the police executed the warrant, in violation of Va Code § 19.2-56 and the Fourth Amendment. Again, the trial court did not take up the issue of the good faith exception to the exclusionary rule, but Hicks maintains, as he did in § I above that the good faith exception does not validate the execution of this search warrant when any reasonably well trained officer should know that there was no probable cause and that the probable cause that existed on September 11, 2008, if any, had dissipated before the execution of the warrant on September 25, 2008.

CONCLUSION

For the reasons stated above, Appellant respectfully prays that the denial of his motion to suppress, and therefore his conviction, be reversed.

Respectfully submitted,

Michael Deon Hicks

By 

Counsel for Appellant

Catherine S. Rusz VSB 70273
Johnson, Gaborik, Fisher-Rizk, and Rusz, PLC
Appellate Counsel for Michael Deon Hicks
15 S. Belmont Ave.
Richmond, Virginia 23221
Telephone: (804) 340-5232
Facsimile: (804) 340-5236
Email: Catherine@jgfrlaw.com

CERTIFICATE

Counsel for the Appellant certifies as true the following information:

a. The Appellant is Michael Deon Hicks; the Appellee is the Commonwealth of Virginia; Appellant's counsel is Catherine S. Rusz (70273), 15. S. Belmont Ave., Richmond, VA 23221, 804-340-5232, 804-340-5236 (fax), catherine@jgfrlaw.com, counsel for the Appellee is Leah A. Darron (23823), Senior Assistant Attorney General, 900 E. Main St., Richmond, VA 23219, 804-786-2071, 804-371-0151 (fax), ldarron@oag.state.va.us;

b. Counsel for Appellant was appointed by Order of the Circuit Court for the City of Richmond;

c. Counsel submits Appellant's case with a request for an oral presentation;

d. On October 5, 2010, a copy of the Opening Brief was mailed to Appellant and three copies were mailed to Leah A. Darron (23823), Senior Assistant Attorney General, 900 E. Main St., Richmond, VA 23219, and fifteen copies of this brief were hand-delivered to the Clerk of the Supreme Court.

e. Counsel certifies that there has been compliance with the entirety of Rule 5:26, including 5:26(h).

f. Counsel certifies that this opening brief contains 4178 words.

Catherine S. Rusz 70273