IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 100727

MICHAEL DEON HICKS

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO100727

MICHAEL DEON HICKS

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Following a June 29, 2009 jury trial in the Circuit Court for the City of Richmond, Michael Deon Hicks was convicted of possession of heroin in violation of Virginia Code § 18.2-250. On August 24, 2009, Hicks was sentenced to serve 10 years in prison. Final judgment was entered on August 27, 2009. (App. 23-29).

A judge of the Court of Appeals refused Hicks' petition for appeal in a per curiam order on March 17, 2010. (App. 30-35). On August 26, 2010, this Court granted Hicks' petition, limited to two assignments of error.

ASSIGNMENTS OF ERROR[1]

1. 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. (App. 5-22, 44-51, 59-61).

2. The Court of Appeals erred by affirming the trial court's denial of 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. (App. 44, 62-66, 102-114, 116).

STATEMENT OF FACTS

In an affidavit for a search warrant for a residence located at 2111 Richmond Street in the City of Richmond, (App. 16-22), twelve-year veteran Richmond Police Narcotics Detective Ron Armstead, a certified expert in the sale, use, packaging, and operation of narcotics distributors, including heroin, stated that on September 11, 2008, he was involved in a police operation involving a confidential informant and controlled drug buys. (App. 19). Armstead knew the informant with whom he was working had previously recognized individuals the police knew sold illegal narcotics.

[1] Assignments of Error appear as drafted by the appellant.

(App. 20). The informant had been working with police making controlled buys for six months. His information had led to the police obtaining a number of search warrants, the arrest of five persons and the seizure of illegal narcotics. The informant had used heroin and was familiar with the way the narcotic was packaged for street-level distribution. He was familiar with the methods employed by street-level distributors. (App. 20). Detective Armstead considered the informant to be reliable. (App. 20).

On September 11, 2008, the reliable informant was "wired," working with Detective Armstead on a controlled cocaine buy in the area of Richmond and Coalter Streets. While Detective Armstead was waiting for the reliable informant to complete the transaction, Detective Armstead observed four individuals enter the 2111 Richmond Street home and leave within thirty seconds. He observed one person, an older man, remove money from his pocket before entering the house. (App. 18).

Detective Armstead observed a woman enter and exit the home in a similar fashion. After she left the residence, Armstead observed his reliable informant make contact with the woman. Armstead observed the woman open a piece of folded paper and appear to show the contents to the reliable informant. (App. 18). The reliable informant told Detective Armstead he knew the woman and she told him she had just purchased the

2 grams of heroin she showed him, which were contained in the folded paper from the "Dope House" at 2111 Richmond Street. (App. 18).

Richmond Narcotics Detective Marvin Marsh concluded this activity was consistent with foot traffic involved in the purchase of illegal narcotics from a drug house.[2] He believed the individuals frequenting the residence at 2111 Richmond Street were there to purchase heroin and heroin would be found at the residence. (App. 18). Detective Marvin Marsh secured a search warrant based upon the information obtained from Narcotics Detective Armstead and his reliable informant. (App. 18). The warrant was issued on September 12, 2008, at 9:00 p.m. (App. 21).

From the date the search warrant was issued until September 25, 2008, Detective Marsh conducted "spot checks" of the residence at 2111 Richmond Street two to three times per week at different times of the day, but he did not observe the foot traffic in and out of the residence described by Detective Armstead. (App. 69). When he was conducting the spot checks, he described the area as "dead." (App. 86). He concluded based on his training and experience that the drug operation was not open for business; "if there's little to no foot traffic, then, it's probably less likely that

[2] Marsh was qualified without objection at trial as an expert in street-level narcotics distribution.

there's going to be any [heroin] inside of the home at that particular point in time." (App. 79). He, therefore, waited to execute the search warrant. (App. 83).

On September 25, 2008, thirteen days after the warrant was issued, Detective Marsh made a spot check at 2111 Richmond Street at approximately 3:00 p.m. Within 10 minutes, he observed more than five people enter the residence, stay for 20-30 seconds, and then leave; this was the same pattern of foot traffic noted by Armstead on September 11th. (App. 69. 86). Marsh also observed several men in the front yard who appeared to be "posting up;" or acting as lookouts. (App. 69, 71). The men appeared to Marsh to be "very conscientious of their whereabouts, their surroundings." (App. 71).

Detective Marsh concluded his observations were consistent with narcotics distribution and he left the area to assemble his entry team to execute the warrant. (App. 18, 76). During the days after the warrant was issued but before it was executed, Detective Marsh's investigation revealed that the utilities at 2111 Richmond Street were registered to Isis Trent, and her boyfriend, Michael Hicks, had a criminal record involving robbery and narcotics distribution, specifically heroin. (App. 79-80, 92-93). Marsh took this information into consideration when he organized an entry

team of more than seven officers, made an entry plan, and returned to 2111 Richmond Street to execute the warrant at 6:24 p.m. (App. 88, 155-156, 175).

Upon entry, Detective Marsh encountered the defendant, his girlfriend, several other adults and three young children. A search of the home revealed digital scales, a baggie containing a slab of over 13 grams of heroin with a street value of $1,200 to 1,600, (App. 210), and a second baggie containing 45 individually wrapped small baggies of what also appeared to be heroin. The defendant had more than $100 in cash on his person and additional baggies were found in a dresser drawer. (App. 172-173). The defendant admitted his DNA would be on the baggie containing the bulk heroin, he obtained the heroin from his supplier, and his cousin who was also present in the home when the warrant was executed, sold it. (App. 143-145).

The trial court ruled there was probable cause to issue the warrant and that as in Turner v. Commonwealth, 14 Va. App. 737, 420 S.E.2d 235 (1992), probable cause did not dissipate while Detective Marsh reasonably delayed executing the warrant to a date when he observed the property "posted up" and foot traffic to and from the house consistent with that

observed by Detective Armstead, indicating to Detective Marsh, a narcotics expert, that "the store [was] open." (App. 106-115).

ARGUMENT

Both the trial court and the Court of Appeals correctly concluded the search warrant was issued on probable cause and that probable cause existed when the warrant was executed. (Assignments of Error 1 and 2).

Hicks alleges the trial court erred in denying his motion to suppress heroin recovered during the execution of a search warrant of a residence because he contends the evidence failed to establish probable cause to issue the search warrant and, if probable cause existed, it dissipated by the time the warrant was executed. Both of Hicks' arguments should be rejected.

Applicable Law

Standard of Review

As this Court most recently restated in Barnes v. Commonwealth, 279 Va. 22, 688 S.E.2d 210 (2010):

> A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that we review de novo on appeal. Murphy v. Commonwealth, 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002) ; see Bolden v. Commonwealth, 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002);

> McCain v. Commonwealth, 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001); see also Ornelas v. United States, 517 U.S. 690, 691, 699 (1996). In making such a determination, we give deference to the factual findings of the circuit court, but we independently determine whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000).

Id. at 33-34, 688 S.E.2d at 221.

Further, it is well established that on appeal the burden is on the appellant to show, considering the evidence in the light most favorable to the Commonwealth, that the denial of a motion to suppress constitutes reversible error. Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731, cert. denied, 449 U.S. 1017 (1980). See also Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545.

Probable Cause

In the context of search warrants, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983) (citation omitted); Garza v. Commonwealth, 228 Va. 559, 563, 323 S.E.2d 127, 129 (1984). The initial determination of probable cause requires the magistrate

to weigh the evidence presented in light of the totality of the circumstances. In contrast, "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Gates, 462 U.S. at 238-39 (citation omitted); Garza, 228 Va. at 563, 323 S.E.2d at 129.

It is well-settled "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" Gates, 462 U.S. at 236 (citation omitted); see also United States v. Settegast, 755 F.2d 1117, 1121 (5th Cir. 1985). "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 (1984)).

"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." United States v. Ventresca, 380 U.S. 102, 109 (1965) (citation omitted).

When the validity of a search depends on information supplied by others to the officers on the scene, the officers' training and experience is relevant, and the totality of circumstances bearing upon the credibility and weight of information supplied to the officers must be assessed. See Cost v. Commonwealth, 275 Va. 246, 251, 657 S.E.2d 505, 507 (2008) (totality of the circumstances, in determining whether an officer has sufficient probable cause, includes "a consideration of the officer's knowledge, training and experience"); Hollis v. Commonwealth, 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976) (in determining whether probable cause exists, we focus on "what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control").

While "no mathematical formula . . . can be applied in deciding whether a search . . . is supported by probable cause," Tamburino v. Commonwealth, 218 Va. 821, 824, 241 S.E.2d 762, 764 (1978), the standard of reasonableness, "tested and interpreted in a common sense and realistic fashion[,]" id., suggests that the factors include an awareness by the officers of the underlying circumstances in which the information arose, to assess the reliability of the information source. See Manley v. Commonwealth, 211 Va. 146, 149-51, 176 S.E.2d 309, 312-13 (1970). Indeed, as this Court has previously explained in an analogous situation

involving whether an informant's tip was sufficiently reliable to establish probable cause:

> [T]he [United States] Supreme Court has defined and we have consistently applied a "two-prong test" for determining probable cause to search and seize; to establish probable cause based upon an informant's tip, the prosecution must show "underlying circumstances" sufficient to support the informant's conclusions and the conclusion of the police that the informant "was 'credible' or his information 'reliable'."

Wright v. Commonwealth, 222 Va. 188, 191, 278 S.E.2d 849, 851 (1981) (citation omitted).

Applicable Statute

Code § 19.2-56 provides in pertinent part:

> [A] warrant shall command that the place be forthwith searched, either in day or night, and that the objects or persons described in the warrant, if found there, be seized.
>
> * * *
>
> Any search warrant not executed within 15 days after issuance thereof shall be returned to, and voided by, the officer who issued such search warrant.

Code § 19.2-56. The Court of Appeals has held that two time limitations, a fifteen day absolute limit and a "forthwith" requirement "define[s] the policy of the Commonwealth that search warrants be executed as soon as reasonably practical [and] while probable cause continues to exist." Maye v. Commonwealth, 44 Va. App. 463, 477, 605 S.E.2d 353, 360

(2004) (quoting Turner v. Commonwealth, 14 Va. App. 737, 740, 420 S.E.2d 235, 237 (1992)). The statutory provision does more than merely "codify the constitutional mandate that probable cause must exist at the time a search warrant is executed." Id. It "goes beyond that" to require that "police officers execute the warrant with reasonable dispatch and without undue delay." Id.

Even assuming, *arguendo,* that a warrant is not executed "forthwith," violating Code § 19.2-56, the Fourth Amendment's exclusionary exclusionary rule does not '"encompass [the exclusion of] evidence seized pursuant to statutory violations, absent an express statutory provision for suppression.'" Maye, 44 Va. App. at 488-89, 605 S.E.2d at 365. (Benton, J, concurring) (quoting Troncoso v. Commonwealth, 12 Va. App. 942, 944, 407 S.E.2d 349, 350 (1991). See Horne v. Commonwealth, 230 Va. 512, 518-19, 339 S.E.2d 186, 191 (1986) (holding that "failure to bring the accused forthwith before a judicial officer" in violation of Code § 19.2-76 did not require suppression because the statute does not require suppression). In Virginia v. Moore, 128 S. Ct. 1598, 1606-1608 (2008), the Supreme Court held that where state law rules are more restrictive than what is required by the Fourth Amendment, the exclusionary rule does not apply to

the state law violations because "it is not the province of the Fourth Amendment to enforce state law." Id. at 1608.

Affidavit Established Probable Cause

Applying the well-established aforementioned principles, the record shows the magistrate had a substantial basis for concluding probable cause existed based on the information contained in the search warrant affidavit. Here, the narcotics officers involved were both experts in the use, packaging and operations of street-level narcotics distribution, including heroin. (App. 19). As noted by the Court of Appeals, (App. 31-32), the warrant affidavit informed the magistrate that Narcotics Detective Armstead was conducting an operation involving controlled drug buys using a "wired" informant Armstead considered to be reliable. The informant was a heroin user and familiar with its street-level distribution. In the previous six months, the reliable informant's assistance had led to the issuance of a number of search warrants, the arrest of numerous individuals and the seizure of narcotics. (App. 20). While waiting for the informant to make a controlled buy, Detective Armstead observed four individuals enter the residence at 2111 Richmond Street and leave within thirty seconds; one individual had money in his hand. Armstead saw his reliable informant speak to a woman whom Armstead had observed enter and leave the

home. He observed the woman open a folded piece of paper and appear to be showing something to the reliable informant. The reliable informant told Armstead he knew the woman and she told the reliable informant that she had purchased heroin from the “Dope house” at 2111 Richmond Street. Armstead was able to partially corroborate what the reliable informant told him because he observed the informant talking to the woman and saw her open a folded piece of paper and show it to the informant. (App. 18-19).

Detectives Armstead and Marsh concluded the observed behavior was consistent with the sale of narcotics, specifically heroin. (App. 18, 20). No evidence in the record suggests the statements of the informant were incorrect or that Armstead’s statements were false. Thus, the affidavit established probable cause, a substantial basis exists for the magistrate’s finding of probable cause and the decision to issue the warrant should be upheld.

Probable Cause Did Not Dissipate/Become Stale

Hicks’ argument that probable cause dissipated or became stale when Detective Marsh waited thirteen days to execute the warrant should likewise be rejected.

There is no fixed standard or formula establishing a maximum allowable interval between the date of events recited in an affidavit and the

date of a search warrant. Huff v. Commonwealth, 213 Va. 710, 715, 194 S.E.2d 690, 695 (1973); United States v. McCall, 740 F.2d 1331, 1336 (4th Cir. 1984). Likewise, "a warrant will be tested for 'staleness' by considering whether the facts alleged in the warrant provided probably cause to believe, at the time the search actually was conducted, that the search conducted pursuant to the warrant would lead to the discovery of evidence of criminal activity. Johnson v. Commonwealth, 259 Va. 654, 671, 529 S.E.2d 769, 778 (2000).

"[W]hen a warrant has been issued based upon probable cause, whether probable cause continues to exist at the time the warrant is executed depends on the length of delay and the nature of the observed criminal activity, that is, whether the activity is an ongoing enterprise or an isolated incident." Turner v. Commonwealth, 14 Va. App. 737, 745, 420 S.E.2d 235, 239-40 (1992). "The selling of drugs, by its nature, is an ongoing activity." Id. at 746, 420 S.E.2d at 240. Here, the "criminal forum" was an occupied home, not a vacant building or the trunk of a car. "[T]he fact that the officer delays executing a search warrant until a time the officer determines will be most opportune to yield a successful result does not invalidate the warrant so long as probable cause continued to exist at the time of execution." Id. at 747-48, 420 S.E.2d at 241.

Hicks contends that the probable cause established by the affidavit which supported the search warrant was lost or dissipated when Narcotics Investigator Marsh subsequently failed to observe the foot traffic to and from the home as described by Armstead, thereby invalidating the warrant. However, like the officers in Turner, the police in this instance merely postponed execution of the warrant to a time considered favorable to discovery of the targeted evidence, thereby promoting, rather than diminishing, the efficacy of the warrant. Id. at 747, 420 S.E.2d at 241. In the words of the trial court, Detective Marsh waited to execute the warrant until he observed the foot traffic to resume, the "sign," showing the "store [was] open" for business. (App 112, 115). Given the ongoing nature of narcotics distribution, this decision in no way impaired or displaced the original probable cause established by the affidavit.

The conclusion is consistent with those of other courts that have evaluated whether probable cause continued to exist at the time search warrants were executed and determined the searches were supported by probable cause despite, the existence of information indicating the evidence sought was not available for a period of time. See United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969) (nine-day delay in the execution of a search warrant reasonable; nothing wrong with waiting to execute the

warrant until the facts stated in the affidavit pertained, even if the officer had reason to believe there were no drugs present during the intervening delay); United States v. Shegog, 787 F.2d 420 (8th Cir. 1986) (execution of a search warrant eight days after its issuance, holding that probable cause to believe the evidence sought would be present continued to exist at the time the warrant was executed because the essential facts had not changed despite information obtained during the delay that the defendant's supply of PCP had been exhausted and replenished); Yeagy v. State, 63 Md. App. 1, 491 A.2d 1199 (1985) (court affirmed the defendant's convictions for possession of and distributing controlled substances, holding that despite the fact a suspect who previously had sold drugs to an undercover officer refused to make any further sales, claiming that he had cleaned out his house and was no longer selling, the police had reason to believe there would be evidence at the time of the search because further surveillance and the defendant's statements to the undercover officer to come back later suggested the defendant continuously was exhausting and replenishing his supply of drugs, and the police observed known drug users enter the residence and remain for short periods of time, suggesting a persistent pattern of criminal involvement); People v. Cordero, 124 Misc. 2d 43, 475 N.Y.S.2d 973 (Supp. 1983) (seven-day delay in the execution of a

search warrant did not invalidate the warrant, although the police had learned in the intervening period there were no drugs in one of the apartments to be searched for some of the time; court held that even if the police have reason to doubt the facts asserted in the affidavit underlying the warrant may not be true for some of the waiting period, there is no duty to return to the issuing court for revalidation of a warrant unless the police have a definite reason to know probable cause has dissipated, which it did not in the instant case, which the police knew because they kept the premises under surveillance and carried out another controlled purchase immediately before the search to determine whether drugs were actually on the premises).

As set forth above, probable cause to believe heroin was being distributed from the residence existed at the time the warrant was executed. It is not necessary that the facts support this conclusion beyond a reasonable doubt but only that they support the probability of the conclusion." Huff, 213 Va. at 717, 194 S.E.2d at 696. As the Maryland Court of Appeals explained in Donaldson v. State, 46 Md. App. 521, 420 A.2d 281 (1980):

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not

> punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Id. at 530, 420 A.2d at 286; see also McCall, 740 F.2d at 1336. The facts and circumstances of the case, including the venue of operation, the continuing nature of the unlawful activity alleged, and the nature of the property to be seized support the trial court's finding that probable cause existed when the warrant was executed.

Police Acted in Good Faith

Code § 8.01-678 provides that "when it plainly appears . . . that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed [f]or any other defect, imperfection, or omission in the record . . ." Here, while not addressed by the trial court or the Court of Appeals, the defendant's convictions should be affirmed because the record demonstrates the evidence was admissible under the good faith exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897 (1984).

In Leon, the Supreme Court held that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." 468 U.S. at 918. The purpose of the exclusionary rule historically was to deter police misconduct rather than to punish the errors of magistrates. Id. at 916. This deterrent is absent where, as here, an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant. Derr v. Commonwealth, 242 Va. 413, 422, 410 S.E.2d 662, 667 (1991).

Furthermore, regarding the staleness argument, Detective Marsh was entitled to rely upon Code § 19.2-56, and its provision that the warrant remained "alive" for fifteen days from the date of issuance. The warrant in the present case was executed on the thirteenth day. Moreover, assuming, *arguendo*, that the warrant was stale for Fourth Amendment purposes, and thus "a violation of the Fourth Amendment occurred –-i.e. that search . . . was unreasonable, [that] does not necessarily mean that the exclusionary rule applies." Herring v. United States, 129 S. Ct. 695, 700 (2009). Instead, "to trigger the exclusionary rule' . . . the challenged 'police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and

sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 129 S. Ct. at 702).

Thus, in light of the Supreme Court's recent ruling in Herring, the pertinent question is whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances. As the Supreme Court stated in Herring, "The exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct," Herring 129 S. Ct. at 702, not "police mistakes [that are] the result of negligence . . . rather than systemic error or reckless disregard for constitutional requirements." Id. at 704.

A reasonably well trained officer in this case would not have known that a thirteen day delay in executing the search warrant would render the warrant stale and invalid. That is particularly true, where, as here, Detective Marsh acted diligently conducting spot checks two or three times a week during different hours of the day looking for the foot traffic to and from the home that Armstead had described.

CONCLUSION

For these reasons the judgment appealed from the Court of Appeals and the Circuit Court for the City of Richmond should be affirmed.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On October 22, 2010, in compliance with Rule 5:26(c), the required number of copies of this brief, paper and electronic, were delivered to the Clerk of this Court by hand and email. Three copies of this brief were mailed to Catherine S. Rusz, Esquire, 15 South Belmont Avenue, Richmond, VA 23221, counsel for the appellant. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 4,544 words.

The Commonwealth desires to present oral argument in this case.

_____

Leah A. Darron