VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 17th *day of* March, 2010.

Michael Deon Hicks, Appellant,

against Record No. 2183-09-2
Circuit Court No. CR09-F-0514

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Richmond

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant contends the trial court erred in denying his motion to suppress the evidence because there was no probable cause to justify the issuance of a search warrant.

"In reviewing a trial court's denial of a motion to suppress, 'the burden is upon [the defendant] to show that the ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error.'" McGee v. Commonwealth, 25 Va. App. 193, 197, 487 S.E.2d 259, 261 (1997) (*en banc*) (quoting Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980)) (alteration in original). "'In so doing, we must discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom.'" Watkins v. Commonwealth, 26 Va. App. 335, 348, 494 S.E.2d 859, 866 (1998) (quoting Cirios v. Commonwealth, 7 Va. App. 292, 295, 373 S.E.2d 164, 165 (1988)). Furthermore, "we are bound by the trial court's findings of historical fact unless 'plainly

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wrong' or without evidence to support them and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers." McGee, 25 Va. App. at 198, 487 S.E.2d at 261.

"When 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). Probable cause for 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 Illinois v. Gates, 462 U.S. 213, 238 (1983)).

> In making a probable cause determination "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision, whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying the hearsay information, 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).

Lanier v. Commonwealth, 10 Va. App. 541, 547, 394 S.E.2d 495, 499 (1990) (alteration in original).

Here, in his affidavit for a search warrant, Detective Armstead stated that he observed four individuals enter a house and leave within thirty seconds; one of the individuals had money in his hand. Armstead also stated that a confidential informant spoke with a woman who entered the home, and the woman told the confidential informant that she had just purchased heroin from inside the house. Armstead was able to partially corroborate this statement because he observed the woman open a folded piece of paper to show his confidential informant the heroin she purchased. From these events, Armstead concluded the behavior he observed was consistent with the sale of narcotics. Because there is no evidence in the record to suggest the statements of the informant were incorrect or that Armstead's

statements were untrue, we cannot conclude the magistrate's decision to issue a search warrant was plainly wrong or without evidence to support it.

II. Appellant contends that if probable cause to search appellant's home existed, the probable cause had dissipated by the time the search warrant was executed in violation of Code § 19.2-56. He argues that the detectives unduly delayed executing the search warrant because they visited appellant's home several times after obtaining the search warrant on September 12, 2008, but did not search the premises for thirteen days because they did not observe any criminal activity until September 25, 2008.

In addition to the provision of Code § 19.2-56 that voids any search warrant not executed within fifteen days after issuance, Code § 19.2-56 also provides that the magistrate "shall issue a search warrant if he finds from the facts or circumstances recited in the affidavit that there is probable cause for the issuance thereof. . . . The warrant shall command that the place be *forthwith* searched . . . ." (Emphasis added).

> The "forthwith" requirement [in Code § 19.2-56] has an independent substantive meaning [from the fifteen-day limitation period]. "Forthwith," within the context of Code § 19.2-56, does not mean immediately, or as soon as physically possible. It does not mandate that officers must immediately execute the search warrant without reference to the circumstances that obtain. The fact that the statute provides that the warrant expires if not executed within fifteen days means that some latitude is provided from the time within the search may be conducted. But, under that statute, "it is . . . necessary that search warrants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." United States v. Nepstead, 424 F.2d 269, 271 (9th Cir. 1970).

Turner v. Commonwealth, 14 Va. App. 737, 742, 420 S.E.2d 235, 238 (1992) (citations omitted) (alteration in original). See also, Whitaker v. Commonwealth, 37 Va. App. 21, 28, 533 S.E.2d 539, 542 (2001) ("'[F]orthwith' is a practical and flexible standard which must conform to the necessities of circumstances." (quoting Turner, 14 Va. App. at 740, 420 S.E.2d at 237)). "Thus, 'a warrant will be tested for "staleness" by considering whether the facts alleged in the warrant provided probable 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.'" Whitaker, 37 Va. App. at 28-29, 533 S.E.2d at 542 (quoting Johnson v. Commonwealth, 259 Va. 654, 671, 529 S.E.2d 769, 778 (2000)).

> "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."

Turner, 14 Va. App. at 745, 420 S.E.2d at 240 (quoting Donaldson v. State, 420 A.2d 281, 286 (Md. Ct. Spec. App. 1980)).

Here, Armstead, an expert in narcotics transactions, observed what he believed to be drug activity taking place at appellant's home on September 11, 2008, and a search warrant was issued the following day. After conducting several "spot-checks" for drug activity at appellant's home, on September 25, 2008, Detective Marsh observed several people "posting up" outside appellant's house, as well as five people entering the home and leaving after approximately twenty-thirty seconds.[1] Because we have previously stated that "the selling of drugs, by its nature, is an ongoing activity," id. at 746, 420 S.E.2d at 240, we cannot conclude the delay of thirteen days between issuing the warrant vitiated the reasonable belief that drugs would be on the premises on September 25, 2008. Thus, we cannot conclude the trial court erred in concluding that the detectives executed the warrant "forthwith" within the meaning of Code § 19.2-56 and in compliance with the requirements of the Fourth Amendment.

III. Appellant contends the evidence was insufficient to support his conviction because the testimony of Detective Marsh was inherently incredible. More specifically, appellant contends that because Marsh mistakenly noted that both bags of suspected heroin tested positive for the substance in a

[1] The Commonwealth described the phrase "post up" to mean acting as a lookout for police officers.

field test, when in actuality, the test results from one bag were inconclusive, the notes Marsh relied upon to refresh his recollection of the events of September 25, 2008, were flawed.[2] Without Marsh's testimony, appellant contends there is no evidence that he had knowledge of the heroin discovered on the back porch of the home where he had been living.

"Where the sufficiency of the evidence is challenged after conviction, it is our duty to consider it in the light most favorable to the Commonwealth and give it all reasonable inferences fairly deducible therefrom." Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). "The credibility of the witnesses and the weight accorded the evidence ware matters solely for the fact finder who has the opportunity to see and hear the evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995). "The jury's finding may only be disturbed on appeal if this Court finds that [Marsh's] testimony was 'inherently incredible, or so contrary to human experience as to render it unworthy of belief.'" Robertson v. Commonwealth, 12 Va. App. 854, 858, 406 S.E.2d 417, 419 (1991) (quoting Fisher v. Commonwealth, 228 Va. 296, 299, 321 S.E.2d 202, 204 (1984)).

Here, the circumstances which appellant alleges made Detective Marsh an incredible witness were before the jury, and the jury resolved the issue of credibility in favor of Detective Marsh.[3] We cannot conclude from the evidence that a mistake in Marsh's notes renders the notes wholly unreliable, or that Marsh's failure to have appellant review and attest to the personal notes Marsh made prevented Marsh and his fellow officer from relying on those notes when testifying. As such, we cannot conclude

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[2] Appellant also contends that Marsh's notes were unreliable because (1) Marsh took some notes in appellant's presence and other notes outside appellant's presence; and (2) Marsh never showed appellant his notes for appellant to verify and attest to the contents.

[3] Moreover, in addition to Marsh's testimony, the Commonwealth also established that appellant constructively possessed the heroin on the porch through appellant's own testimony that (1) he lived in the house where the heroin was found; (2) paid rent each month; (3) his DNA would be found on a plastic bag containing heroin; and (4) he provided money for his cousin to purchase heroin. This testimony established that appellant knew that there was heroin located on the porch of his home.

the trial court erred in relying on Marsh's testimony to convict appellant of possession of heroin in violation of Code § 18.2-250.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Catherine S. Rusz, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K.P. King

Deputy Clerk

ASSIGNMENTS OF ERROR

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.

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.