In the

Supreme Court of Virginia

At Richmond

Record No. 150372

LOREN ANTHONY MASON, JR.,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

PAUL S. ROSKIN, VSB #43156
VERGARA & ASSOCIATES
100 Main Street Plaza
Hopewell, Virginia 23860
T: (804) 458-6394
F: (804) 541-3855
proskin@vergaralaw.com

Counsel for Appellant

COUNSEL PRESS • VA – (800) 275-0668

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STATEMENT OF THE CASE

The accused, Loren Mason, (hereinafter "Mr. Mason") appeared in the Sussex County Circuit Court on October 17, 2012, charged with one count of felony possession of Marijuana with intent to distribute, once count of felony possession of a Schedule I or Schedule II controlled substance and one count of felony possession of a schedule or schedule II controlled substance with intent to distribute. After formal arraignment he entered pleas of not guilty to all three charges.

Prior to beginning the trial the court inquired about pre -trial motions. Counsel for the Common wealth acknowledged the defendant's pre-trial motion to suppress, Id., the same having been docketed with the cou rt on or about October 10, 2013. With the agreement of counsel, the court began to hear evidence on the case, indicating it would take up the motion at the proper juncture.

Shortly into the trial de fendant's counsel moved to *voir dire* the Commonwealth's witness, Officer Richardson, with respect to counsel's written motion to suppress all the evidence gathered from the defendant's vehicle following the officer's stop of the same. The court framed the issue that was at the center of the defendant's motion as "was there reasonable suspicion to believe a traffic infraction had taken p lace and was there

reasonable suspicion to believe that a dangling object object was obstructing the driver's clear view of the highway through the windshield? After further discussion the officer was recalled and after further testimony was given , defendant's counsel renewed his motion to suppress . Still further discussion ensued and the court ordered that both counsel brief the issue.

The trial then continued so the court could hear evidence relating to other issues in defendant's motion to suppress. After taking additional testimony the court overruled two other portions of the defendant's motion to suppress and continued the remainder of the trial for a time following the submission of written briefs with respect to the initial issue raised by defendant's counsel. The court again clarified such issue for both counsel.

Defendant submitted his brief on the suppression motion issue still before the court on or about November 09 2012 and the Commonwealth subsequently responded.

On March 20, 2013, the court reconvened. After acknowledging having read the briefs the court gave an extensive ruling on the Defendant's Motion to Suppress, ultimately denying such motion . The court then noted counsel's exception to its ruling.

The trial resumed and the officer testified to finding three sets of controlled substances in a backpack in the back of the car in which the

defendant was riding. The defendant was ultimately found guilty of possession, or possession with intent to distribute all three controlled substances found in the backpack.

On July 17, 2013 the defendant appeared back in court for sentencing. He received a ten year sentence with eight years and seven months suspended on the narcotics distribution charge and suspended time on the remaining two charges.

On August 16, 2013 defendant filed Notice of Appeal of the Court's decision. One week later he filed Notice of Filing of Transcript, and on October 22, 2013 he filed his initial petition in support of such appeal, designating the failure of the trial court to grant his aforementioned suppression motion as the sole assignment of error.

On December 6, 2013 the Virginia Court of Appeals granted defendant's petition for appeal. On January 15, 2014 the appellant submitted his opening brief and the Office of the Attorney General, representing the interests of the Commonwealth, timely responded.

On April 1, 2014 oral argument was heard on defendant's assignment of error before a three judge panel of the Court of Appeals.

On August 5, 2014, a divided three judge panel, issued the first published opinion in the Commonwealth of Virginia on the issue of stop and

seizure resulting from a potential motor vehicle violation of VA. Code § 46.2-1054, (the statute prohibiting dangling objects that obstruct a driver's clear view of the highway). The Majority, in Mason v. Commonwealth, 63 Va. app. 587, 760, SE .2d 831 (2014) held that the traffic stop and seizure of the defendant violated his fourth a mendment rights because "the facts and circumstances available to the officer at the time of the stop did not support a reasonable suspicion that the driver was violating or about to violate the law." Id. at 605, S.E.2d at 840. The panel majority then reve rsed the defendant's convictions and remanded the matter to the trial court for a new trial, if the Commonwealth was so advised.

Following this decision, the Attorney General's Office, again representing the Commonwealth, moved for a rehearing *en banc* . This motion was granted and on September 30, 2014 the defendant filed his opening brief upon the Commonwealth's granted petition for rehearing *en banc*. The Commonwealth subsequently filed its answering brief and on November 18, 2014 oral argument was heard on the defendant's appeal before a full panel of the Virginia Court of Appeals.

On February 3, 2015 a sharply divided court adopted an opinion authored by then Judge Arthur Kelsey. This opinion in which five of his fellow

judges joined, vacated the hold ing of three judge panel and affirmed the decision of the trial court.

The court's five other judges, however, c dissented, Writing for the five judge dissent, Judge Robert J. Humphries, the author of the majo rity opinion of the three judge panel, again conclu ded that "the trial judge erred in its holding that reasonable suspicion existed to justify the seizure of the vehicle and its occupants under the Fourth Amendment."

Following such decision appellant filed a timely petition for appeal from the *en banc* decision of the Virginia Court of Appeals to this Honorable Court, and on October 29, 2015 such petition was granted.

This is the defendant's Opening Brief in support of such appeal

ASSIGNMENT OF ERROR

I. **THE COURT OF APPEALS ERRED IN ITS HOLDING THAT THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS CONTROLLED SUBSTANCES SEIZED BY OFFICER RICHARDS OF THE WAVERLY POLICE DEPARTMENT WHEN THE COMMONWEALTH FAILED TO MEET ITS BURDEN IN SHOWING THAT HE HAD REASONABLE AND ARTICULABLE SUSPICION, BASED ON ARTICULATED FACTS, TO STOP THE VEHICLE IN WHICH LOREN MASON WAS RIDING .** (Raised by pretrial motion, App.[Court of Appeals Appendix] 4-10; acknowledged by the Commonwealth , App.-18; formally raised and argued App. -21-31; formally clarified by the trial court App.-32& again App. -36, written briefs ordered , App. -53&54, filed by the defendant's counsel on November 9, 2012, App.89-97[,ruled on by Circuit Court, App. 99 -106and counsel's exception noted. App.-106. Assignment of Error subsequently raised before the Court of Appeals in Defendant's Opening Brief in Mason v. Commonwealth, Record no. 1542 -13-2, p.3 and upon rehearing *en banc*, Opening Brief, also p.3.

STATEMENT OF FACTS

I. FACTS CONCERNING THE INITIAL STOP OF THE VEHICLE IN WHICH IN THE DEFENDANTWAS RIDING IN FOR A POTENTIAL VIOLATION OF VA CODE 46.-1054

On March 3, 2012 Officer Richards of the Waverly Town Police stopped the motor vehicle in which the Defendant, Loren Mason, was riding when he observed a dangling object hanging from the rear view mirror of such vehicle. App.-22-32. It was later determined to be a Fort Lee Parking Pass that could fit in the outstretched palm of a man's hand. App.-23-24. It was the only basis for officer's stop of this particular vehicle App.-29 -30.

The pass was hung in such a manner that did not block the view of a driver looking straight ahead through the windshield. App.-26. The officer could not say whether it was moving back and forth and did not indicate his concern for the driver at the time of this stop when specifically asked by the Commonwealth. App.-55. Moreover, the officer, upon entering the vehicle for other reasons, further stated he observed the dangling object hanging from the rearview mirror but did not look to determine whether or not he could see out the window where the dangling object was. App.-56.

After hearing the officer's testimony the court concluded that the officer stopped the vehicle in which Mr. Mason was riding simply because he observed a dangling object App. -51 and App.-102 (and not because the

object in question was potentially obstructing the driver's view) suggesting "it may be a misapprehension of the law." App.-51. This was after the court had previously found that "it's not obstructing anybody's view.. You can see it" App.-49 & subsequently opined " I think everyone can agree it is an object that didn't substantially obstruct a view.. you get in the car and look right through it."App.-102.

Despite the courts factual findings however the defendant's motion to suppress the evidence resulting from the vehicle stop was denied when the court concluded that the mere presence of an object dangling could have created reasonable suspicion for the officer to stop the vehicle and investigate further. App.-105.

It is undisputed by the defendant and the Commonwealth that following the stop of the vehicle a backpack was found in the back seat that contained certain controlled substances. Defendant's three convictions stem from the factual findings of the court that the defendant was guilty of possessing all three of such controlled substances, two of them with intent to sell or distribute the same.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

STANDARD OF REVIEW

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) quoting Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731. (1980). However, "determinations of reasonable suspicion and probable cause are reviewed *de novo* on appeal."… At the same time "the reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges…" Orleans v. United States, 517 U.S. 696, 700 (1996).

In the instant case the only assignment of error is the failure of the trial judge to grant the defendant's motion to suppress evidence seized from the motor vehicle in which the defendant was riding following a traffic stop, alleging that the officer in question did not have reasonable suspicion to make such stop. What follows is the de fendant's argument in favor of such assignment of error, in which the defendant accepts as true, pursuant to Orleans, the court's factual findings with respect to the objective

reasonableness, or unreasonableness, of such stop, but argues that the legal conclusions drawn from the same are clearly erroneous as a matter of law.

DISCUSSION

I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS CONTROLLED SUSBSTANCES SEIZED BY OFFICER RICHARDS OF THE WAVERLY POLICE DEPARTMENT WHEN THE COMMONWEALTH FAILED TO MEET ITS BURDEN IN SHOWING THAT HE HAD A REASONABLE SUSPICION, BASED ON ARTICLUATED FACTS, TO STOP THE VEHICLE IN WHICH THE DEFENDANT, LOREN MASON, WAS RIDING.

A. The Commonwealth Had The Burden Of Showing That Officer Richards Did Not Violate The Constitutional Rights Of The Defendant By Stopping The Vehicle He Was Riding In Without A Warrant.

Generally, searches and seizures conducted without a warrant are presumptively unconstitutional. Minnesota v. Dickerson , 508 U.S 366, 372 (1973). Moreover, the burden of proving the legitimacy of such searches and seizures rests with the Commonwealth. Coolidge v. New Hampshire , 403 U.S. 443, 454-455(1971).

In the instant case the trial court recognized this situation as one that was therefore presumptiv ely unreasonabl e under the fourth amendment. App.-53. Therefore it was the Commonwealth that had the burden of showing

that Officer Richards had a lawful basis to stop the car in which the defendant was riding."(Emphasis added).

B. In Order For Officer Richards To Have Effectuated Even A Brief, Warrantless, Investigatory Stop Of The Vehicle In Which Mr . Mason Was Riding He Had To Have Had A Reasonable Suspicion Based On Articulated Facts, And In Light Of His Training And Experience That The Dangling Object He Observed In The Vehicle Was Hung In Violation Of Virginia Law.

The courts have long recognized that certain brief investigatory stops are allowed when the officer has a reasonable, suspicion based on objective facts that criminal activity may be afoot. Terry v. Ohio, 392 U.S. 1, 30 (1968). "A police officer may conduct a brief investigatory stop, when in light of his training and experience, he has reasonable and articulable suspicion that criminal activity is afoot." Jones v. Commonwealth , 279 Va . 665, 673, 691 S.E.2d 801, 805, (Va. 2010)

Under such circumstances an "officer ... may approach a person for purposes of investigating possible criminal activity".. when the … "officer" has "reasonable suspicion, based on objective facts, that an individ ual is involved in criminal activity " in order to make a brief investigatory stop. Adams v. Commonwealth, 12 Va. app. 37, 39 402 S.E.2d 496, 497 (1991) quoting Moss v. Commonwealth , 7 Va. App. 305, 308, 373 S.E.2d 170, 172 (1988). (Emphasis added) Such stops, including the brief detention of individuals

during a traffic stop constitute a seizure for fourth amendment purposes, and as with all such seizures it is the Commonwealth that bears the burden to prove its legitimacy. Simmons v. Commonwealth, 238 Va. 200 202-203, 380 S.E.2d 656, 658-59. (1989).

In the instant case the Commonwealth stipulated that the officer's sole basis for stopping the vehicle in which in which the defendant was riding was for an alleged violation of VA. Code § 46.2-1054. This statute reads in pertinent part "It shall be unlawful for any person to drive a motor vehicle on the highway in the Commonwealth with any object or objects, other than a rear view mirror…suspended from any part of the motor vehicle in such manner as to obstruct the driver's clear view of the highway through the windshield…Thus in order for the officer to have made an investigatory stop of the vehicle in question he would have had to have had a reasonable suspicion, based on articulated facts that the object he observed was hung in violation of this statute, because it obstructed the driver's clear view of the highway.

C. The Officer However Gave No Specific Details With Respect To His Observation Of The Fort Lee Parking Pass He Observed Hanging In The Win dshield Of Mason's Car, Nor How His Training And Experience Lead Him To A Reasonable Suspicion That It Could Obstruct A Driver's View.

As previously noted a police officer may conduct a brief stop pursuant to Terry v. Ohio , based on articulated facts, in light of his training and experience, to inves tigate criminal activity that lead him to reasonably suspect that criminal activity might be afoot. Moreover, any such facts must be available to the officer at the moment of the stop. See Id. at 21-22.

In the instant case, however, Officer R ichards articu lated no fact s available to him at the moment he seized Mason's car that would support a reasonable suspicion of illegal activity. Indeed when asked if there was anything the parking pass in question that caused him "concern for the driver" he stated simply "just that there was dangling object" App-35. Indeed at no point in his testimony did he give a detailed description of how well he had seen the entire object before he pulled Mason's vehicle, and at w hat distance, how large it appeared to him at the time he made the stop, or when, if ever, during the entire process , in the field, he formed an opinion that the Fort Lee Parking Pass might obstruct a driver's view.

Secondly, while Terry, and Jones, supra, specifically reference consideration of an officer's training and experience in evaluating the constitutionality of a particular stop, the Commonwealth in the instant case presented no evidence on this point. At one point the officer opined that the parking pass could obstruct a view, App. -21, upon direct exam, but there was no testimony elicited from the officer to suggest that he had ever actually sat behind the wheel of a vehicle , any vehicle, to see if it actually did. Moreover, no evidence was ever presented that he had any training, or other experience that would cause him to believe that the Fort Lee Parking Pass , or whatever it was that he actually thought he observed from the road, might actually cause an obstruction.

D. The Trial Judge Specif ically Found That The Pass Itself Did Not Obstruct The Driver's View and That The Offic er Did Not Realize That The Law Specifically Prohibited Such Obstruction Generally , Findings Of Fact Which Should Have Been Acknowledged By The Court Of Appeals On Review.

"Determinations of reasonable suspicion and probable cause are reviewed *de novo* on appeal."… At the same time "the reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences dr awn from those facts by resident judges…"

Orleans v. United States, 517 U.S. 696, 700 (1996). See also Commonwealth v. Redmond, 264 Va. 321, 327, 568 S.E.2d 695, 698 (2002).

In the instant case the trial court made a specific finding of fact that the Fort Lee parking pass in question did not obstruct a driver's view. The court stated emphatically, "I think you can hang it on any car in America and it won't obstruct the driver's view at all" App.-34. "You can put it on any car in the parking lot and it's not going to block anything." App.-35. After having done a "first ever view of the scene," App.-101, the court again concluded that "I think everyone would agree that it didn't substantially obstruct a view. You could get in the car and essentially look right through it." App. 102.

Moreover, the trial judge found that it was the mere presence of the parking pass itself, and not any suspicion that it obstructed a view that caused Officer Richards to stop the vehicle:

> "Listening to him [Officer Richards] answering the questions, this was a stop because of a dangling object. That's what the officer did. And he—I'm not claiming bad faith. It may be a misapprehension of the law…But he didn't stop because this thing was swinging back and forth…I appreciate the Commonwealth's candor. It didn't lead the witness…But I didn't get an answer. You were hoping I think that that he would say that it was dangling and it was blocking the view, but none of that happened. And in listening to the officer and evaluating him, I found him to be very candid and very honest, but almost clueless as to where you were trying to take

him…He didn't have any idea that this needed to be an obstruction." App-51-52, (Emphasis added).

E. Moreover, The Mere Observance Of A Suspended Object Hanging In Front Of A Motorist's Windshield Does Not Give A Law Enforcement Officer A *Per Se* Reason To Conduct An Investigatory Stop In Virginia Because VA. Code § 46.2 -1054 Does Not Ban All Such Suspended Objects And The Observance Of Ordinary Lawful Activity Is Not A Valid Basis For Conducting An Investigatory Stop A Stop Under Terry V. Ohio.

Ordinary lawful activity on the highway, such as switching drivers, or making a routine turn, standing alone, does not provide reasonable suspicion for a law enforcement officer to conduct a traffic stop in the Commonwealth of Virginia. Zimmerman v. Commonwealth , 234 V a. 609, 363 S.E.2d 708 (1988); Murphy v. Commonwealth, 9 Va. App. 139, 384 S.E.2d 125(1989).

In Zimmerman, this court was faced with a situation in which an officer testified that he had stopped a particular vehicle because he "noticed they had switched operators and that had attracted his attention." Id. at 611, S.E.2d at 709. This followed a routine stop by the driver to ask for the directions from the officer and the receipt of directions by the passenger, and ended with the new driver,(the former passenger) failing to make a turn as directed by the officer. The court found this activity, be it the seat switching as described by the officer, in isolatio n, or the entire set of facts, as known to

the court, as "utterly insufficient to generate a reasonable suspicion that defendant was involved in criminal activity." Id. at 612, S.E.2d at 710.

Similarly Murphy involved a situation in which a motorist made a routine turn into an existing roadway some 350 feet from a road block. Va. App. At 144,S.E.2d at 128. This court found that this activity standing alone "does not warrant reasonable suspicion that the operator is involved in criminal activity. Under the government's view, every citizen who turned onto a road within sight of a government check point, for whatever legitimate reason, would be subject to an investigative detention. This result we cannot sanction." Id. at 145-146, S.E.2d at 129.

In the instan t case, as in Zimmerman and Murphy, the officer in question, was faced with an ordinary lawful traffic scenario, an individual driving with a an object hanging from his rear view mirror, specifically a parking pass. The officer made no finding that the ob ject in question obstructed the driver's view, nor provided any testimony that he even thought that it did. Moreover, the court specifically, found that it did not obstruct the driver's view. Thus, under this scenario, to justify the stop of such vehicle, on the theory that an officer could have reasonably suspected that the object may have obstructed the driver's view, would potentially make every vehicle that lawfully hung an object from the rear view mirror, for whatever reason,

subject to a stop and inv estigative detention. This is precisely the type of government overreaching that this court has specifically rejected.

F. The Trial Judge Erroneously Held However That The Mere Presence Of A Dangling Object In The Windshield Of A Virginia Motorist Provide d Sufficient Legal Justification For The Police To Conduct An Investigatory Stop.

Having previously found that the Fort Lee parking pass did not obstruct a clear view of the highway, and that Officer Richards had no particular suspicion that it did or tha t this was what the law prohibited, the trial court never- the- less erroneously held that the mere presence of a dangling object allowed the officer to stop the vehicle to investigate further. This conclusion followed a briefing on th e law by both counsel following a continuance to allow the same.

> "Sergeant Richards testified that he saw the object, he wasn't positive that the object obstructed the driver's view, but it was the presence of the item dangling that lead him to the stop. So the issue becomes, and where the court had put its focus, is whether or not essentially the mere fact of a dangling object gives the officer reasonable suspicion to stop to determine whether or not the object, in fact, and I quote the statute, 'obstructs the driver's clear view of the highway.'
>
> Now the court was of the opinion that there had to be reasonable suspicion, there has to be

> reasonable suspicion to believe that that the object 'obstructs the- because the offense is not a dangling object, it's a dangling object that obstructs the driver's *clear view… App. 102-103*
>
> "However.. I [now] think, that the court is of the opinion that the standard for O fficer Richards to have stopped the vehicle was is there reasonable suspicion that this object is blocking or cutting of f from sight or blocking an unhampered, ah,-- an unrestricted view of the highway? Well there is reason to believe that it could be, <u>because there is an object dangling. He is entitled constitutionally to investigate further. So the court believes that t he presence of the object is, in fact, sufficient reasonable suspicion to justify detention of the vehicle.</u>App.-105. (Emphaiss Added).

Indeed, the opinion of the six judge majority of the Court of Appeals in <u>upholding</u> the decision of the trial court , specifically rejected the *per se* rule on which that decision was clearly based:

> "Needless to say our holding does not endorse any *per se* rule authorizing traffic stops wh enever an object of any kind is observed dan gling from a rear view mirror. While the prosecutor asserted as much in the trial court…the Attorney General correctly disavowed the overstatement on appeal…§ 46.2 - 1054, after all, does not uniformly forbid drivers from dangling objects from their rearview mirrors - only those positioned 'in such a manner as to obstruct the driver's clear view of the highway.' We thus limit our holding to the suspected obstruction in this case: a five by three inch opaque parking pass hanging from a rear view mirror of a sedan." <u>Loren Mason Jr. v. Commonwealth of Virginia</u>, Record No. 1542-13-2 *(en banc* decision, Februaury 3, 2015). p.5.

G. The Court Of Appeals Erred In Upholding The Decision Of The Trial Court By Both Misinterpreting The Findings Of Fact Of The Trial Court And Improperly Substituting It s Own Findings Of Fact Regarding The Alleged Obstruction Caused By The Fort Lee Parking Pass For Those Of The Trial Court.

Despite holding that there was no *per se* rule that would allow traffic stops whenever a dangling object is found suspended from a rear view mirror, which was the the clear basis of the trial court's decision not to suppress the evidence derived from the Terry stop of the defendant's vehicle, the Court of Appeals majority upheld such decision by essentially rewriting the findings of the trial court and then supplementing them with findings of its own. In reaching this conclusion the majority held "Given these facts we agree with the trial court that a reasonable officer coul d suspect that the opaque, five -by-three-inch parking pass dang ling from a rearview mirror might violate Code § 46.2-1054 and thus warrant an investigatory stop." Id. at page 10. As the dissent pointed out however, this was never the finding of the trial court. Id. at 18-19.

As noted above the trial court never found that "a reasonable officer could suspect" that the parking pass in question might violate Code § 46.2 - 1054. Indeed the court said repeatedly that it would not obstruct a view of the highway, a position it never changed. What the trial court did say, incor rectly

as a matter of law, is that it believed that the presence of an object dangling gave an officer sufficient reasonable suspicion to detain a vehicle to conduct an investigation.

Additionally, the trial court never opined that a generic officer might suspect that it did obstruct a view, and as indicated previously, specifically found that at the time of the stop Officer Richards did not investigate to see if it did obstruct the view because he was essentially "clueless" that such obstruction was a requirement of proving a violation. Indeed even the majority's use of the word "opaque" in describing the pass itself might be contrasted with the finding of the trial court that "the facts are clear,… everyone would agree that [the parking pass] didn't substantially obstruct a view.. you could get the car and essentially look right through it." App.-102. Moreover, this last statement was made after the trial judge "took a view of the scene" which the majority oddly relied on in reaching its decision.

In addition to misinterpreting the findings of the trial court the Court of Appeals Majority made numerous factual findings that were simply not supported in the record. "The bottom of the parking pass would be at or slightly above the eye level for a driver of average height." "The parking pass could be at angle that might partially block a driver's clear view of a vehicle ahead and to the right of him." "If a driver wanted to make a right turn at an

intersection the parking pass could obscure his field of visi on." A person of any height could have his clear view of the highway signs partially obstructed by the parking pass, especially during nighttime driving," Id. at pp.10-11.

None of these findings were ever testified to by Officer Richards or findings of the trial court. Indeed no testimony was given regarding the size of the vehicle in question, the exact angle or manner that the pass was hung, other than it was on the rear view mirror, how far up or back the seats were when officer Richards stopped the vehicle, or even if he noticed they were up or back at all. Moreover, we do not know with any detail what Officer Richards might have seen through his mind's eye because we have no information about the distance he was from Mason's vehicle when it passed him, the angle at which he observed the parking pass, or how much thought he gave to mentally process these things given his belief that any dangling object, and not only those that obstruct a view, were improper.

As indicated what we do know is that Office r Richards did not make any investigation of the scene at the time he stopped the vehicle. Indeed as the dissent found nothing in Officer Richards ' testimony "established any facts or reasonable inferences that the parking pass and its placement in the vehicle blocked any view of the highway." Id. at 18. Moreover, as the dissent

also points out, the only other evidence presented in this case, the parking pass itself, was specifically found by the trial judge not to obstruct a view. Id.

H. Additionally, The Court Of Appeals Also Erroneously Declined To Consider The Inadequacy Of The Officer's Stated Reason For Stopping The Defendant's Vehicle.

In Zimmerman, supra., the court was faced with a situation in which the officer "Repeatedly, during his testimony, indicated that the sole reason for the stop was because the persons in the vehicle had switched operators ". In support of its decision to suppress the evidence resulting from such stop and dismiss the indictments filed against the defendant the court held "We will not overlook the officer's articulated particularized, subjective basis, for his actions." Id. at 612, S.E.2d. at 710. (Emphasis added).

In the instant case, by contrast, the majority opinion simply ignored the trial court finding that "This was a stop because of a dangling object. That's what the officer did. …He didn't have any idea that this needed to be an obstruction." App-51-52. Instead the majority held that "Because the reasonable suspicion test is purely objective, the reasonable suspicio n standard imposes no requirement that an actual suspicion by the officer be shown." Mason v. Commonwealth, en banc opinion at pp.7-8.

In reaching this holding, in direct contrast to Zimmerman, the majority relies on a series of decisions from various courts, relating to issues surrounding probable cause, as well as those evaluating the reasonableness of an individual officer's actions. Indeed no court opinion is specifically cited that reaches the conclusion that an actual suspicion by the officer in question need not be shown, with the majority instead relying on a statement from a legal text book. Id. at p.8

However, as noted in the opinion of the five dissenting judges, "To establish reasonable suspicion an officer must be able to articulate more than an unparticularized suspicion or hunch that criminal activity is afoot." Mason at 15 quoting Rudolph v. Commonwealth, 277 Va. 209, 210, 722 S.E.2d 527, 528 (2009). (Emphasis added). Thus the court's plain holding makes the articulation of the officer's stated reasons for his stop, including his suspicion, an important piece in evaluating the reasonableness of a given Terry Stop.

Moreover, as the dissent noted "The sole constitutionally proper objective a Terry Stop is to confirm or dispel suspicion of criminal activity." Mason, Id. at 16, citing United States v. Branch, 537 F.3d 328(4th circuit 2008). (Emphasis added). "The police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be a foot' even if the officer

lacks probable cause." Mason Id. quoting United States v. Sokolow, 490 U.S.1, 7 (1989). (Emphasis added). The purposes of a Terry stop is thus for investigation, not arrest. Thus the individual officer's suspicion, including his proper knowledge of the law, is essential to the entire purpose, and justification, for the stop.

In the present case, the trial court found the officer "clueless" as to the law, and noted that he had made no investigation as to whether or not the dangling object he observed may have caused an obstruction. The two are obviously not unrelated. Because the officer thought, as found by the trial court, that any dangling object violated the law, he made no investigation as to whether or not this particular object actually did. Thus the holding of the majority, that no actual suspicion of wrong doing is required under Terry would lead to the conclusion that an investigatory stop under Terry would be permissible even in situations where the officer in question, based on his own understanding of the facts, or the law, had nothing specific that he actually intended to investigate.

In addition to the foregoing, the requirement that an officer have an actual reasonable suspicion of criminal activity under Terry in order to make an investigatory stop is supported by the specific language of Terry and Jones, supra that part of the evaluation of the reasonableness of an

investigatory stop is "the officer's training and experience." To hold as the Court of Appeals majority does, that a Terry stop should be judged by some purely objective standard, without regarding to what an individual officer suspected, or why he suspected it, is to essentially write the officer out of the equation when evaluating the stop. In so doing this holding would necessarily exclude any consideration of the officer's training and experience, though they are specifically mentioned in Terry and its progeny.

The majority in the instant case, however, essentially reached this conclusion "In suppression hearings, a police officer usually takes the stand and describes what he saw, and occasionally why he did what he did. While the first part is highly relevant, the second is not." Id. at p.6. Thus according to the majority opinion it would simply be irrelevant whether Officer Richards stopped Mason's car because he thought the dangling object he saw was obstructing the driver's view, or he did not, whether he had investigated dozens of similar situations and had reason to believe it might obstruct a view, or he did not, or even whether he wished to conduct an investigatory stop, or merely stop the vehicle to make an unrelated search. Indeed all that would matter in this view, is whether or not some hypothetical officer could objectively conclude that such stop was reasonable.

I. While No There Are No Other Published Virginia Cases On This Point, Courts In Other Jurisdictions Have Regularly Interpreted Statutes Similar To The One In The Present Case To Require A Finding That Law Enforcement Was Required To Have A Reasonable And Articulable Suspicion That A Dangling Object Was Actually Obstructing A Motorist's View Before Stopping The Motorist For Driving In Violation Of Such Statute.

While no Virginia case has ever held that the mere presence of a dangling object in a vehicle windshield, is *per se* grounds for law enforcement to stop such vehicle, appellate courts in several other jurisdictions have emphatically concluded that it is not. People v. White , 132 Cal . Rprtr.2d 371(2003); People v. Brazeau , 831 N.E.2d 372(Mass. 2005); Illinois v. Johnson, 893 N.E.2d 275(2008); Colorado v. Arias , 159P.3d 134 (2007); State of Connecticut v. Cyrus, 1 A.3d 59 (2010).

In White, a California appellate court was faced with a situation in which a driver was stopped when an air freshener was observed dangling from the rear view mirror of his vehicle. Id. at 641. The People argued that such action violated a California statute that prohibited the operation of a motor vehicle with any object "placed, displayed, installed, affixed, or applied, which "obstructs or reduces the driver's clear view through the windshield…" The court, however, found otherwise, noting that "the statute does not flatly prohibit hanging any object on a re ar view mirror." Id. at 42, the officer

making the stop never testified that he believed that the driver's view was obstructed, or that there was any other reason for the stop, and concluded that objectively speaking that the driver's view was not in fact obstructed. No other basis for the stop was found and the defendant's conviction was reversed. Id. at 645.

A similar finding was made in Arias by the Colorado Supreme Court. In that state the court noted that the motor vehicle law simply stated that "No vehicle shall be operated on a Highway unless the driver's vision through any required glass equipment is normal and unobstructed."Id. at 138. In that case the officer testified that the hanging air freshener could have obstructed the windshield of the vehicle he stopped but never testified that he believed it actually did when he made the stop. Id at 137. Additionally, in that case, the lower court found that the there was no showing that a finding by the officer that the air freshener could have obstructed the driver's view would have been reasonable. In upholding the decision of the lower court to suppress the evidence derived from this stop, the Colorado Supreme Court held " Observing an air freshener or like item from a rear view mirror is not automatically basis for a traffic stop. Instead the officer must reasonably believe the air freshener actually obstructs the driver's vision through the windshield." Id. at 139.

While White and Arias both involved hanging air fresheners, several other courts have reached similar conclusions in matters involving other small hanging objects. Thus in Cyrus, the Connecticut Supreme Court found that a Trooper Mattoli's stop of a motor vehicle was without a reasonable and articulable suspicion both because the trooper only testified that he observed something hanging and not that it obstructed the driver's view, and because the state's evidence did not prove that the small wood like cross that was the basis for the stop was actually an obstruction. Id. at 62-66.

Finally, in Brazeau, a Massachusetts court drew a clear distinction between its statute which deals with the proper operation of a motor and those of other states that specifically prohibit the hanging of all objects from the rear view mirror. Id. at 373-74. Thus the court noted that a Minnesota statute specifically prohibits any person from driving or operating "any motor vehicle … with any objects suspended between the driver and the windshield… and a South Dakota statute which makes it a "petty offense for any person to drive a motor vehicle with any object or gadget dangling between the view of the driver and the windshield. Id. The Massachusetts court went on to "take judicial notice of the fact that objects such as air fresheners, graduation tassels, and religious medals commonly are hung from the rearview mirrors of motor vehicles driven in the Commonwealth. We

doubt the legislature intended this ordinary practice to be grounds, without more, for issuing a citation or for justifying a stop by the police."

CONCLUSION

The defendant was a passenger in a vehicle that was stopped because an officer of the law saw a Fort Lee Parking Pass hanging from the rearview mirror.

The law in question makes it illegal for such objects to be hun g if they obstruct the driver's clear view of the highway through the windshield.

The officer, however, never testified that the object in question in fact did obstruct the driver's view of the highway or that he ever suspected that it did.

The trial court, in viewing the object independently, concluded it did not obstruct the driver's view of the highway, and the officer did not suspect it did at the time he stopped the vehicle, but held that the stop was valid because the mere presence of the object form ed the basis for the officer to conduct a further investigation.

The Court of Appeals in reviewing the decision of the trial court correctly concluded that the mere existence of a dangling object in the windshield does not create a *per se* basis for an offi cer to stop a motor vehicle for investigative purposes.

In its six to five *en banc* decision, however, the Court of Appeals majority was also in error. It upheld the decision of the trial court by erroneously concluding that it was the finding of the trial court that the officer in question had reasonable suspicion to believe that the Fort Lee parking pass did in fact obstruct the driver's clear view of the windshield, and by supplementing this holding by making other factual findings regarding the effect of the pass on the driver's view that were simply not supported by the evidentiary record.

Additionally, the Court of Appeals erroneously held that the officer's understanding of the situation at the time it was occurring, including his knowledge or lack of knowledge of the law was essentially irrelevant, by explicitly discounting the suspicion requirement of the reasonable suspicion required for a Terry stop, while implicitly discounting the role of an individual's training and experience in justifying such stops, as well as the connection between such understanding and the purported purpose of such stops, to conduct an investigation.

Finally, but not insignificantly, the failure of the Commonwealth to present any actual evidence as to what Officer Richards actually observed, and from what distance, other than a "dangling objection" before he chose to

make a traffic stop, makes any attempt to justify such stop on the current record, an exercise in pure speculation.

Therefore, because Officer Richards, at the time he made the stop of the defendant's car, had no particularized, reasonable suspicion, based on his training and experience, and supported by articulable facts, that the Fort Lee parking pass he observed in Mason's windshield obstructed the driver's clear view of the highway, his warrantless seizure of such vehicle, even in the form of a temporary investigative detention was wrong as a matter of law. Consequently, all evidence flowing from the immediate aftermath of such seizure should have been suppressed, including all the drugs found in the bag in the back of the car in which Mason was riding. There being no other evidence in support of the defendant's charges the same should have been dismissed as a matter of law.

WHEREFORE, for the reasons stated herein and for such other reasons as may appear, the Appellant respectfully prays that the decisions of the trial court and Virginia Court of Appeals regarding his drug suppression motion be reversed, and there being no other competent evidence to support the defendant's convictions, that the same likewise be reversed and the defendant's convictions be dismissed as a matter of law.

By: *<u>/s/ Paul S. Roskin</u>*
Of Counsel

Paul S. Roskin,
Counsel for Appellant

Vergara & Associates
100 Main Street Plaza
Hopewell, Virginia 23860
(804) 458-6394
(804) 541-3855 (fax)
proskin@vergaralaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 8, 2015 , the Opening Brief and Appendix were filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief and three copies of the appendix were hand delivered to the clerk's office. This same date, a copy of the brief and appendix were sent via email to all counsel of record, at the email addresses below:

Kathleen B. Martin, Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street,
Richmond Virginia, 23219
kmartin@oag.state.va.us

Counsel for the Appellant was appointed by the Court to represent the Defendant in this Appeal.

Counsel for the Appellant desires oral argument.

/s/ Paul S. Roskin
Paul S. Roskin