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THE

SUPREME COURT OF VIRGINIA

RECORD NO. 150372

LOREN ANTHONY MASON, JR.,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF FOR THE COMMONWEALTH

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IN THE

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LOREN ANTHONY MASON, JR.,

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v.

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

A police officer stopped the car in which the defendant was a passenger because the officer reasonably believed an object hanging from the car's rear view mirror violated Virginia Code § 46.2-1054, which prohibits placing an object in a vehicle so that it obstructs the driver's view of the highway through the windshield. The issue presented in this

case is whether the trial court improperly denied the defendant's motion to suppress evidence obtained in the course of the traffic stop.

The defendant, Loren A. Mason, Jr., was tried by a judge of the Sussex County Circuit Court and found guilty of distribution of marijuana, possession of a Schedule I or II controlled substance, and possession with intent to distribute a Schedule I or II controlled substance. The court sentenced the defendant to a total of 25 years in prison, with 23 years and 7 months suspended, and entered the final order on August 6, 2013. (App. 184-185).

A panel majority of the Court of Appeals of Virginia, with one judge dissenting, reversed and remanded Mason's convictions; the Court then granted the Commonwealth's petition for a rehearing *en banc* pursuant to Virginia Code § 17.1-402(D) and affirmed the judgment of the trial court. *Mason v. Commonwealth*, 64 Va. App. 292, 767 S.E.2d 726 (2015) (*en banc*). (App. 191-216).

This Court awarded Mason an appeal on October 29, 2015. (App. 218-219).

ASSIGNMENT OF ERROR

The defendant assigned the following error:

> 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.

STATEMENT OF FACTS

While operating stationary radar on Route 460 at about 2:30 p.m. on March 3, 2012, Officer Willie Richards of the Waverly, Virginia, Police Department, observed a green Pontiac sedan with a "[d]angling object on the rearview mirror." (App. 20-25). Richards had been watching the car "come down the hill to make sure it wasn't speeding." (App. 44). Richards stopped the vehicle to investigate whether the dangling object violated Virginia Code § 46.2-1054 by obstructing the driver's view of the highway through the windshield. (App. 21-22, 29, 31).

The object at issue was an opaque 3" x 5" employee parking pass, designed to hang below the car's rearview mirror; the item was admitted

into evidence at the suppression hearing as Defense Exhibit Number 1. (App. 23, 25, 33).[1] Officer Richards testified on cross-examination that the vehicle's windshield was "maybe five feet" across and that the parking pass would be "a small portion" of the entire windshield. (App. 26). He further said, however, the object "could" obstruct a driver's view. (App. 31).

Before Officer Richards issued the driver of the vehicle a summons for violating Code § 46.2-1054 and not wearing a seatbelt, he asked the driver "if he had any weapons" and "if he minded if [Richards] patted him down." (App. 28, 58, 62). The driver consented to a pat-down search. (App. 58). Richards discovered marijuana in the driver's back pocket and arrested him for possession of marijuana, and also charged him with the two traffic offenses. (App. 28, 59).

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[1] An image of the parking pass was included in the Court of Appeals opinion. *Mason*, 64 Va. App. at 297, 767 S.E.2d at 729. (App. 192). The parking pass was similar in size to a handicap parking placard, which may be hung from the rearview mirror when the vehicle is parked, but "[n]o placard shall be displayed from the rearview mirror while a vehicle is in motion." Va. Code § 46.2-1241(E). The parking pass in Mason's case was several inches longer than either a state vehicle inspection sticker or an EZPass toll transponder, both of which may be displayed legitimately on a vehicle's windshield. However, an inspection sticker is adhered to the lower edge of the windshield, as designated by the Virginia State Police. *See* Va. Code § 46.2-1163; 19 VAC 30-70-580(B)(9). The toll transponder is attached behind the rear view mirror. *See* http://www.ezpassva.com/EZPages/Installation.aspx (providing detailed mounting instructions and diagrams).

The defendant was a passenger in the car. (App. 59, 62). After the driver was arrested, Officer Parker, who was in training with Officer Richards, asked Mason to exit the vehicle and then checked him for weapons. (App. 59-60, 62-63). No contraband was found on the defendant, and he would have been free to leave the scene if he had decided to do so. (App. 63-64).

Officer Richards searched the vehicle while the driver and Mason stood outside the car. (App. 61, 64). Richards located a small black backpack on the middle of the back seat near the edge of the seat. (App. 76). Neither the driver nor the defendant claimed ownership of the bag. (App. 76). Richards detected a strong odor of marijuana inside the car. (App. 77). He found "a large sum of individually wrapped marijuana bags with green leaf material inside the bag." (App. 77). He then arrested the defendant and advised him of his *Miranda* rights. (App. 77). Searched incident to arrest, Mason had a cell phone and $3,381 in cash on his person. (App. 123).

Officer Richards recovered other items from the backpack, including a bag with cocaine residue and Ecstasy pills, a box of sandwich bags, a crumpled pack of cigarettes, one sock, and several letters that had been written to the defendant. (App. 117, 120-121, 124).

When asked a second time to whom the bag belonged, Mason said the bag "was just in there." (App. 116). The vehicle was owned by Mason's girlfriend. (App. 74-75, 139-140).

The defendant moved to suppress the evidence. (App. 5-10). The court held the suppression hearing at the beginning of the trial on October 17, 2012. (App. 11, 18-19). The defendant's threshold argument was that Officer Richards lacked an adequate basis for stopping the car in which Mason was riding because there was no evidence the parking pass obstructed the driver's view. (App. 31-33). The court took the matter under advisement and asked the parties to provide additional legal authority on the issue. (App. 53-55).

The case was continued until March 20, 2013. (App. 98, 101). The court denied the motion to suppress, holding that Officer Richards had reasonable suspicion to stop the vehicle to investigate whether the dangling object obstructed the driver's clear view of the highway. (App. 105-106). The court noted that although the parking pass "didn't substantially obstruct a view," the statute did not require "a material obstruction." (App. 102-103). After considering the definitions of the terms "obstruct" and "clear," the court determined the statute prohibited suspending an object in a vehicle "in such a manner as to block off or

cut off from sight the driver's unhampered and unrestricted … view of the highway." (App. 103-104). The court concluded that because "there is reason to believe" a dangling object "could" limit the driver's view, Officer Richards was "entitled constitutionally [to stop the vehicle] to investigate further." (App. 105).

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF MASON'S MOTION TO SUPPRESS BECAUSE THE CIRCUMSTANCES, VIEWED OBJECTIVELY, JUSTIFIED OFFICER RICHARDS' MAKING A TRAFFIC STOP AFTER HE OBSERVED AN OBJECT HANGING FROM THE REARVIEW MIRROR OF THE VEHICLE, WHICH THE OFFICER REASONABLY COULD HAVE BELIEVED VIOLATED VIRGINIA CODE § 46.2-1054.

Standard of Review

When challenging the trial court's denial of the motion to suppress, the defendant must show reversible error occurred. *See, e.g., McCain v. Commonwealth,* 261 Va. 483, 489-90, 545 S.E.2d 541, 545 (2001). The facts are viewed in the light most favorable to the Commonwealth, the party prevailing below, and are given "the benefit of any reasonable inference." *Glenn v. Commonwealth*, 49 Va. App. 413, 416, 642 S.E.2d 282, 283 (2007) (*en banc*), *aff'd*, 275 Va. 123, 654 S.E.2d 910 (2008).

The appellate court gives deference to the factual findings of the trial court, unless they are plainly wrong or lack supporting evidence, but determines de novo whether the facts were properly applied to the law and the evidence was obtained in accordance with constitutional requirements. *See McCain*, 261 Va. at 490, 545 S.E.2d at 545.

Analysis

A police officer may stop a motor vehicle "for investigatory purposes if [the officer] possesses a reasonable and articulable suspicion" that the law has been violated. *Hoye v. Commonwealth*, 18 Va. App. 132, 134, 442 S.E.2d 404, 406 (1994); *see Zimmerman v. Commonwealth*, 234 Va. 609, 611, 363 S.E.2d 708, 709 (1988).[2] As the majority opinion of the Court of Appeals correctly stated: "Reasonable suspicion is simply suspicion that is reasonable. It is not something more than suspicion. And it can hardly be called proof." *Mason*, 64 Va.

[2] Mason's case is factually distinguished from *Zimmerman* because the basis for the vehicle stop in *Zimmerman* was that the driver and passenger switched seats after the passenger had asked a police officer for directions. 234 Va. at 610-11, 363 S.E.2d at 709. This Court held such conduct did not provide reasonable suspicion of criminal activity. *Id.* at 612, 363 S.E.2d at 710. However, there is no statute that prohibits switching drivers in a vehicle. In Mason's case, Code § 46.2-1054 prohibits driving a vehicle "with any object . . . suspended from any part of the motor vehicle in such a manner as to obstruct the driver's clear view of the highway through the windshield."

App. at 300, 767 S.E.2d at 731. (App. 195). *See Perry v. Commonwealth*, 280 Va. 572, 581, 701 S.E.2d 431, 536 (2010). Reasonable suspicion requires only "*a 'moderate chance'*" that at the time of the stop unlawful activity "has occurred, is occurring, or is about to occur." *Mason*, 64 Va. App. at 301, 767 S.E.2d at 731 (emphasis in original) (quoting 4 Wayne R. LaFave, *Search & Seizure* § 9.5(B) at 658-59 (5th ed. 2012) (footnotes and other citation omitted). (App. 196). *See Harmon v. Commonwealth*, 15 Va. App. 440, 444, 425 S.E.2d 77, 79 (1992) ("[a]ctual proof that criminal activity *is* afoot is not necessary; the record need only show that it *may* be afoot") (emphasis in original). Additionally, established case law has "consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.'" *Navarette v. California*, 134 S. Ct. 1683, 1691 (2014) (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

Fourth Amendment analysis turns on whether, considering all the circumstances, the police acted reasonably. *See Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2482 (2014). Importantly, the officer's actions are viewed objectively. *See, e.g., Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (holding that officer's subjective motivations are not relevant to ordinary Fourth Amendment analysis, as long as

circumstances justify officer's actions); *Whren v. United States*, 517 U.S. 806, 813 (1996) (same). In considering a suppression motion, a court should not limit itself "to what the stopping officer says or to evidence of his subjective rationale." *Raab v. Commonwealth*, 50 Va. App. 577, 583 n.2, 652 S.E.2d 144, 148 n.2 (2007) (*en banc*). Rather, the court should assess objectively "'the officer's actions in light of the facts and circumstances confronting him at the time.'" *Morris v. City of Virginia Beach*, 58 Va. App. 173, 179, 707 S.E.2d 479, 481 (2011) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (citation omitted)). Assessing an officer's subjective intent "is fundamentally inconsistent with our Fourth Amendment jurisprudence." *Kentucky v. King,* 563 U.S. 452, 464 (2011); *see also Robinson v. Commonwealth*, 273 Va. 26, 27, 639 S.E.2d 217, 223 (2007).

Officer Richards testified he saw a "dangling object" and that the object could obstruct the driver's view. (App. 22, 31). The essential components of Code § 46.2-1054 are "(i) something 'suspended' (ii) that serves to 'obstruct' a 'clear view of the highway' (iii) through the windshield, the front side windows, or the rear window" of the vehicle. *Mason*, 64 Va. App. at 304, 767 S.E.2d at 732 (App. 198).

As the Court of Appeals majority opinion noted, a highway is not "simply the stretch of pavement immediately in front of a driver's vehicle." *Mason*, 64 Va. App. at 304, 767 S.E.2d at 732. (App. 199). Because a highway includes roadway shoulders, bridges, intersections, crosswalks, and overhead signs, an object hanging from a vehicle's rearview mirror could very well limit a driver's side or overhead view.[3] *See id*. at 304-305, 767 S.E.2d at 732-33. (App. 199-200). A police officer, seeing a vehicle with a hanging object such as the one at issue here, reasonably could suspect the object could obstruct the driver's unrestricted view of the highway and could be justified in stopping the vehicle to investigate whether in fact it did. *See id.* at 306, 767 S.E.2d at 733-34. (App. 200). The officer's actions would be a hallmark of good police work. *See Delaware v. Prouse*, 440 U.S. 648, 659 (1970) ("foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations").

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[3] In *Commonwealth v. Penn*, 26 Cir. CR02538, 61 Va. Cir. 25 (2003), the circuit court judge noted in his opinion denying the defendant's motion to suppress that the case "piqued the Court's curiosity, so it draped a rope over its rear view mirror and discreetly drove around town. At every intersection and every time a right turn is made, the driver must look to his right, and an object suspended from the rear view mirror is squarely within the driver's field of vision through the windshield with respect to the highway." The object at issue in *Penn* was a 4" x 6" blue tree air freshener.

Existing Virginia case law, albeit persuasive rather than binding authority,[4] supported Officer Richards' stopping the vehicle to investigate a potential violation of § 46.2-1054 after observing a "[d]angling object on the rearview mirror." (App. 22). *See Richardson v. Commonwealth*, No. 0946-13-3, 2014 Va. App. LEXIS 98 (Va. Ct. App. March 18, 2014) (upholding traffic stop where officer observed three-inch pine tree shaped air freshener hanging from rearview mirror of defendant's vehicle, which officer thought could be violation of Code § 46.2-1054); *Commonwealth v. Bryant,* No. 0076-04-1, 2004 Va. App. LEXIS 283 (Va. Ct. App. June 15, 2004) (reversing trial court's ruling that had granted defendant's motion to suppress where police officer stopped defendant's car for having 3½" x 1½" plastic air freshener "'in the shape of a dragon'" hanging from rearview mirror); *Pegram v. Commonwealth*, No. 1041-95-2, 1996 Va. App. LEXIS 611 (Va. Ct. App. Sept. 24, 1996) (upholding officer's stop of defendant's vehicle based upon his belief that "large cloth object," hanging from rearview mirror

[4] *See* Rule 5:1(f) (unpublished opinions may be cited as "informative," but are not "blinding authority").

violated Code § 46.2-1054, even though officer was unable to describe cloth at trial).[5]

The defendant argues these cases are distinguished because the officers there all testified they thought the hanging object obstructed the driver's view, while Officer Richards did not say that. However, the test to determine whether a Fourth Amendment violation occurred looks *objectively* at what a reasonable officer would have done. Finding that Richards acted unreasonably because he omitted the "magic words" erroneously changes the standard to a subjective one. A "police officer conducting a stop is not required to 'precisely and individually articulate the facts that added up to suspicion in his mind.'" *United States v. Brown*, 232 F.3d 589, 594 (7th Cir. 2000) (citation omitted).

Because Officer Richards' action was *objectively* reasonable under the circumstances, no Fourth Amendment violation occurred. *See Raab*, 50 Va. App. at 582 n.2, 652 S.E.2d at 148 n.2 (quoting *Brown*, 232 F.3d at 594 (court must look to record "as a whole to determine what facts were known to the officer and then consider whether a

[5] Authority from other jurisdictions is split regarding the propriety of traffic stops under similar circumstances as in Mason's case. *See State v. Hurley*, 117 A.3d 433, 440 n.5 (citing cases in which hanging objects did not support traffic stops) and n.6 (citing cases in which traffic stops based on hanging objects were upheld) (Vt. 2015).

reasonable officer in those circumstances would have been suspicious”)).[6] The fact that Richards did not further investigate the object when he began searching the car does not negate the objective reasonableness of the stop.[7] At the time of the search, Richards had discovered marijuana in the driver’s pocket and detected an odor of marijuana in the car. (App. 58-59, 77). Because he was looking for drugs then, his focus was no longer on the initial traffic infraction.

A Fourth Amendment violation does not always result in the exclusion of the evidence. *See Herring v. United States*, 555 U.S. 135, 141 (2009). “To trigger the exclusionary rule,” therefore, 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.” *Id*. at 144. Because the “bottom-line effect” of exclusion is often “to suppress the truth and set the criminal loose in the community without punishment,” the rule

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[6] The Court of Appeals, sitting en banc, held in *Raab* that the investigating police officer did not illegally detain the defendant to determine why he was parked after midnight in a parking lot of a closed restaurant because the officer had reasonable suspicion the defendant was trespassing.

[7] In any event, the defendant’s assignment of error challenged only whether there was reasonable suspicion to stop the vehicle. *See* Rule 5:17(c)(1).

applies "[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, [and] the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis v. United States*, 564 U.S. ___, 131 S. Ct. 2419, 2427 (2011).

In this case, Officer Richards did not act arbitrarily or recklessly in making the traffic stop. He testified he was observing the car to see if it was speeding and he noticed an object dangling from the rearview mirror, which could be a possible violation of Code § 46.2-1054. (App. 44-45). As noted *supra*, prior unpublished court decisions of the Court of Appeals supported his action.

Even if Richards subjectively made a mistake of law in thinking *any* object hanging from the rearview mirror constituted an offense, the stop was objectively reasonable. *See Heien v. North Carolina,* 135 S. Ct. 530 (2014). The facts in *Heien* were that a police officer stopped the defendant's car for having only one working brake light and after receiving consent to search the vehicle, found drugs. The North Carolina intermediate appellate court interpreted the traffic statute at issue to require only one brake light and held the stop was invalid because the officer's mistake of law was "per se objectively unreasonable." *State v. Heien*, 737 S.E.2d 351, 354 (N.C. 2012). The

North Carolina Supreme Court reversed that ruling, finding that the totality of the circumstances in the case provided "reasonable, articulable suspicion to conduct the traffic stop." *Id*. at 359. The United States Supreme Court affirmed, holding a traffic stop based on an officer's reasonable mistake of law does not violate the Fourth Amendment. *See Heien,*135 S. Ct. at 540. The Supreme Court stated:

> Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Id. at 536. *See Michigan v. DeFillippo*, 443 U.S. 31 (1979) (holding arrest was constitutionally valid because officer had probable cause to believe crime had occurred, even though statute was found later to be unconstitutional).

The Fourth Amendment requires that a police officer always act reasonably, but it does not mandate that his actions "always be correct." *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some

mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien*, 135 S. Ct. at 536 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). Because Officer Richards' actions were objectively reasonable, excluding the evidence in this case is not warranted. *See United States v. Leon*, 468 U.S. 897, 918 (1984) (whether evidence should be suppressed is determined on a case-by-case basis).

CONCLUSION

For these reasons, the Commonwealth asks that the *en banc* ruling of the Court of Appeals of Virginia, which upheld the judgment of the Sussex County Circuit Court, be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On December 30, 2015 the required print and electronic copies of the Commonwealth's Brief were transmitted to the Clerk of this Court and to Paul S. Roskin, Vergara & Associates, 100 Main Street Plaza, Hopewell, VA 23860, proskin@vergaralaw.com, counsel for the appellant.

Exclusive of the table of contents, table of authorities, and the certificate of service, this brief contains 3,581 words.

The Commonwealth desires to present oral argument in this case.

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