In the

Supreme Court of Virginia

At Richmond

Record No. 150372

LOREN ANTHONY MASON, JR.,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT AND AUTHORITIES

In its Answering Brief the Commonwealth adv ances a number of arguments in support of its positon that this Honorable Court should uphold the six to five majority decision of the en banc panel in Mason v. Commonwealth, 64 Va. App. 292, 767 S.E.2d 726 (2015) (en banc), denying defendant Mason's motion to suppress and upholding his convictions. Such arguments, however, are inconsistent with the trial record or otherwise not supported by the same.

Firstly, and primarily, the Commonwea lth argues that "because Officer [Willie] Richards' [of the Waverly Police Department] action was *objectively* reasonable under the circumstances, no fourt h amendment violation occurred." Commonwealth 's Brief (CB) at 13. In support the same the Commonweal th cites United States v. Brown, 232 F.3rd 589, 594, "[The]Court must look to the record as whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious." CB at Id. The Commonwealth argues that in this instance the thing an officer would have been objectively suspicious of was a violation of Va . Code 46.2 -1054, something suspended that serves to obstruct a clear view of the highway, through the windshield. Id. at 10.

In the instant case, however, the trial record is silent as to many of the facts that may or may not have been known officer. We do not know, for example how far from the vehicle the officer was when he observed the "dangling object" that lead to his decision to stop Mason's car at the time he stopped it. We do not know what angle he actually observed the vehi cle from and how that may have a ffected the decision of an "objective officer" to stop the vehicle. We do not know the weather conditions and again, whether these would or would not have made a "reasonable officer "suspicious.

Secondly, those facts that we can surmise from the record, based on the officer's own testimony, do not support the conclusion that an objective officer under those circumstanc es would have believed that the view was obstructed. When asked by the Commonwealth did "..anything about it cause you concern for the driver?" the officer answered "Just that there was a dangling object." App.-44-45. When then a sked what he observed after having pulled the vehicle over and looking at the rear view mirror, the officer then stated "Just there was a dangling object on it." Id. Finally, when asked if he looked out the window after getting into the passenger car he stated 'Not where the dangling object was no ma'am." Id. at 46. Thus at no time did he ever indicate, while he was out in the field, that the size or the

position of the dangling object at the time he observed it on the scene caused him concern that it might obstruct the driver's view.

Moreover, the trial judge, as the trier of fact, after having had an opportunity to view the object stated "I think you can hang it on any car in America and it won't obstruct a view at all." App.-34. Again, this at least suggests that it would not be objectively reasonable for a police officer to make a traffic under these circumstances.

Instead of looking to the record of this case, however, the Commonwealth relies upon factual findings in several other matters in which the Virginia Court of Appeals, upheld the validity of motor vehicle stops based on potential violations of Va. code 46.2-1054. See CB-12. In contrast to the present case, however, the record was clear in those cases as to exactly what the officer observed at the time he made the stop. While the Commonwealth is correct that there are no "magic words" that officer must say in order for a stop to be valid, the mere statement by an officer that he saw something dangling in the window, does not demonstrate that he had or should have had reasonable suspicion of a law violation at the time he made this observation, even if post hoc analysis shows that such suspicion, under certain circumstances, may have been reasonable.

In addition to arguing the validity of Officer Richard's stop of the Mason vehicle under the fourth amendment, the Commonwealth argues that irrespective of the same the evidence arising from the stop need not be suppressed, as it would have then been the result of a reasonable mistake of law, and thus subject to the good fait h exception announced by the United States Supreme court in Heien v. North Carolina, 135 S. Court 530 (2014). The court in Heien specifically limited this exception to the "mistakes of reasonable men". at 536, and held that an "officer can gain no fourth amendment advantage of a sloppy study of the law he is duty bound to enforce." Id. at 539-40.

The law at question in Heien and the instant case could not be more different. Heien involved a state statute that, for whatever reason, required one working br ake light instead of the normal two . The officer in question conducted a routine stop when he noticed the missing light on the vehicle in question. To make the situation more confusing for the officer, another North Carolina law seemed to contradict the statute on which the defendant attempted to rely.

In the instant case, by contrast, the officer's mistake of law was clearly the kind of "sloppy study" that the court in Heien said the constitution would not tolerate. The statue in question prohibits dangli ng

objects that obstruct a view, not all dangling objects. It could hardly be viewed a mistake of a reasonable man to believe that all such dangling objects are prohibited in Virginia, when the law clearly limits their prohibition and when their use is open to common observation throughout the Commonwealth.

Finally, although the focus of the defendant's appeal is as stated in his assignment of error, i.e. the failure of the trial court to suppress certain evidence arising from the improper stop of the vehicle in which he was riding, the defendant does take issue with a certain characterization of the events by the Commonwealth, following such stop, as expressed in its statement of facts. Specifically, the Commonwealth asserts that Mason would have been free to leave the scene after he had been checked for weapons, and had decided to do so. CB-5. In fact, the trial court specifically found that Mr. Mason was the subject of an immediate temporary detention, one that began after a codefendant admitted to Marijuana possession and ultimately resulted in the defendant's arrest when contraband was found in a bag in the rear of the vehicle. App-74. Moreover, all these events resulted directly from the stop and detention of the vehicle in which Mr. Mason had been riding in,

CONCLUSION

The vehicle in which the defendant was riding was the subject of a warrantless stop that lead directly to the discovery of certain controlled substances in a bag in such vehicle which the trial court found to belong to the defendant.

That stop was based the observation by the police officer conducting it of a dangling object hanging from the rearview mirror of the vehicle.

No information was provided by the officer's testimony, or otherwise, as to why a reasonable person, sta nding in the shoes of the officer, and observing what he observed, would have had a reasonable suspicion that such object obstructed the driver's clear view of the highway, in violation of Va. Code 46.2-1054, at the time of the stop.

Moreover, to the extent that such action was the result of a mistake of law on the part of the officer as to the requirements of such statute, it would be an unreasonable mistake and not excuse the Commonwealth's violation of the defendant's fourth amendment rights, making the same subject to the exclusionary rule.

WHEREFORE, for the reasons stated herein and for such other reasons as may appear, the Defendant prays that the decision of the court of appeals and trial court, denying his motion to suppress certain evidence be reversed, and there being no other competent evidence to sustain the convictions entered against him, that the same be dismissed.

By: *<u>/s/ Paul S. Roskin</u>*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 13, 2016, the Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief were hand delivered to the clerk's office. This same date, a copy of the brief was sent via email to all counsel of record, at the email addresses below:

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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
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