In the

Supreme Court of Virginia

At Richmond

Record No. 151277

RYAN AUSTIN COLLINS,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in denying Collins' motion to suppress the evidence related to the motorcycle because the officer illegally trespassed onto private property for purpose of conducting a search in violation of his Fourth Amendment right to be free of unreasonable searches and seizures. (J.A. 118-121) The Court of Appeals of Virginia erred in upholding the judgment of the trial court and finding that the officer acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle. (J.A. 282)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

On September 10, 2014, the defendant-appellant, Ryan Austin Collins, was arrested and charged on a warrant with receiving stolen goods having a value of $200.00 or more in violation of Virginia Code § 18.2-108.

On October 17, 2013, the General District Court for Albemarle County found probable cause that Collins had committed the offense and certified the matter to the grand jury.

On December 2, 2013, the grand jury for Albemarle County returned an indictment for the felony offense of receiving stolen goods as charged on the warrant.

On December 18, 2013, Collins filed a motion to suppress all evidence in the case on the grounds that the search and seizure of the evidence was in violation of his Fourth Amendment rights to be free of unreasonable searches and seizures.

On April 30, 2014, the Circuit Court of Albemarle County, upon evidence and argument of counsel, denied his motion to suppress.

On May 7, 2014, Collins was tried by a judge sitting without a jury and was found guilty as charged in the indictment. Final judgment was entered on May 20, 2014.

Mr. Collins filed a timely notice of appeal.

On December 19, 2014, the Court of Appeals granted his appeal. On July 21, 2015, the Court of Appeals of Virginia affirmed the judgment of the trial court.

Mr. Collins noted a timely appeal. On December 16, 2015, the Supreme Court of Virginia awarded him this appeal.

STATEMENT OF FACTS

On September 10, 2013, Collins was temporarily detained at the Department of Motor Vehicles (DMV) in Albemarle County for attempting to register a motor vehicle (automobile) which had been reported stolen (J.A. 172-172, 188). It was later discovered that the vehicle had not, in fact, been stolen and this matter is unrelated to the present charge (J.A. 188).

However, during his detention at DMV, Officers Rhodes and McCall of the Albemarle County Police Department, having heard Collins name mentioned on the police radio, proceeded to DMV for the purpose of questioning him about two suspected, but unrelated, instances of eluding while operating a motorcycle (J.A. 162, 173-175). The dates of these incidents were June 4, 2013 involving Officer McCall and July 25, 2013 involving Officer Rhodes respectively (J.A. 85-86, 165-166, 189-190).

During the July eluding incident, Officer Rhodes had recorded the licence plate number on the eluding motorcycle (J.A. 174). DMV records indicated that the license plate was inactive (J.A. 174). Officer Rhodes then checked a local police database (known as PISTOL) and the license plate had been associated with an earlier incident involving Eric Jones

(J.A. 174).

At the pre-trial hearing, Officer Rhodes testified that he had spoken to Jones several times but he could not recall the dates (J.A. 93). He stated that spoke to Jones after July 25, 2013 (the date of the eluding incident) and both before and after September 10, 2013 (the date of Collins' arrest) (J.A. 93). Jones told Officer Rhodes that he had sold the motorcycle; however, Officer Rhodes stated Jones had been difficult to contact and that he had received information linking Collins to the motorcycle from a source other than Jones (J.A. 93-94).

Officer Rhodes had recorded the eluding incident on a video device installed in his police vehicle and subsequently took a still shot of one frame of the video (J.A.190, 129).

While still at DMV, Collins was shown the aforementioned still shot which was a photograph of a person on a motorcycle allegedly speeding away from a police vehicle (J.A.190, 129). Collins denied all knowledge of this or any other eluding incident (J.A. 190-192).

While Officer McCall spoke to Collins, Officer Rhodes went to a police vehicle and took some photographs of Collins Facebook page with his phone (J.A. 175). Another unidentified police officer had access to his

Facebook page and permitted Officer Rhodes to photograph it (J.A. 88). One photograph showed a motorcycle, similar to the one Officer Rhodes had encountered, parked at residence in the City of Charlottesville (J.A. 125). A second photograph showed that same residence with a picture of a silver Accura similar to the one Collins was attempting to register at DMV (J.A. 124). Officer Rhodes then showed the photographs of the Facebook page to Collins who, according to Officer Rhodes, denied all knowledge of the motorcycle (J.A. 175).___

Officer Rhodes, through other sources, had developed information that a motorcycle similar to the one used to elude the police might be located at an address on Dellmead Lane in the City of Charlottesville (J.A. 178). Upon arrival at that address, Officer Rhodes saw a motorcycle parked in a private driveway and covered with a tarp (J.A. 178-179). The outline of the motorcycle was similar to the one he had seen on July 25, 2013 and he suspected that it might be the same one (J.A. 179).

Without the consent of anyone residing at the property, Officer Rhodes proceeded onto private property, removed the tarp, examined the motorcycle and recorded both the license plate number and the Vehicle Identification Number (VIN) (J.A. 90-91, 101, 179). The licence plate was

not the same one that was on the motorcycle during the eluding incident (J.A. 180). However, DMV records revealed that the licence plate was associated with the different motorcycle and that the VIN was associated with a motorcycle that had been reported stolen out of New York several years prior to this date (J.A. 180-181, 186).

Officer Rhodes set up surveillance of the residence while he developed further evidence (J.A. 182). Later he proceeded to the front door to talk to the resident(s) (J.A. 182). Collins answered the door (J.A. 214).

Collins initially denied knowledge of the motorcycle but later admitted that he had purchased the motorcycle from Eric Jones and that he had recently driven it from his mother's house to Jarman's Sportscycles to get new tires and then to Dellmead Lane (J.A. 183-184). Officer Rhodes then placed Collins under arrest for receiving stolen property (J.A. 185, 197). Officer Rhodes stated that he did not inform Collins that the motorcycle was reported stolen until after he placed him under arrest (J.A. 197).

At a pre-trial hearing, Officer Rhodes justified his trespass onto private property by saying that (a) he needed to verify that this motorcycle was in fact the same one he had encountered during the eluding incident

of July 25, 2013; (b) a motorcycle is movable; (c) he needed to verify the owner of the vehicle and whether the owner lived at that address; (d) he needed to verify whether the motorcycle was properly registered; (e) he needed to verify whether the motorcycle was properly insured; (f) he needed to verify whether the operator of the motorcycle was properly licensed to do so (J.A. 97-98). He admitted, however, that the motorcycle itself is not contraband (J.A. 98).

He also admitted that, even after examining the motorcycle and determining all of the foregoing facts related to the motorcycle, he still had no probable cause to charge Collins with eluding (J.A. 98).

SUMMARY OF ARGUMENT

Officer Rhodes of the Albemarle County Police Department entered onto private property without a warrant to search for a motorcycle which he suspected as having been involved in a previous incident of eluding. Once established in the curtilage of the home, he physically removed a tarp which covered the motorcycle and recorded the tag and vehicle identification numbers. After determining that the motorcycle had been

reported stolen, he arrested Collins for receiving stolen property.

The Commonwealth does not dispute that Rhodes' actions constituted a warrantless search within the meaning of the Fourth Amendment. Moreover, both the trial court and the Court of Appeals rejected the Commonwealth's argument that the search was justified by the automobile exception to the warrant requirement.

The trial court held that the search was reasonable because the officer had probable cause to conduct the search. The Commonwealth made no argument for and the trial court made no findings of exigent circumstances. The trial court erred because, assuming without conceding that probable cause existed, exigent circumstances were required to conduct the search without a warrant.

The Court of Appeals correctly held that both probable cause and exigent circumstances were required to justify the trespass and the search. However, the Court of Appeals erred in finding that the officer had probable cause to conduct the search because the motorcycle was not evidence of a crime and was irrelevant to the issue of establishing the identity of the driver in the eluding incident under investigation.

More importantly, the Court of Appeals erred in holding that exigent

circumstances existed to justify the warrantless search because (a) the motorcycle was not contraband that could be destroyed, moved or hidden without the knowledge of the police, and (b) Officer Rhodes had both the resources and the time secure a warrant prior to his illegal trespass onto private property.

The Court of Appeals erred in holding that exigent circumstances existed to justify Officer Rhodes warrantless trespass onto private property in order to conduct a search for evidence.

ARGUMENT

I THE TRIAL COURT ERRED IN DENYING COLLINS' MOTION TO SUPPRESS THE EVIDENCE RELATED TO THE MOTORCYCLE BECAUSE THE OFFICER ILLEGALLY TRESPASSED ONTO PRIVATE PROPERTY FOR PURPOSE OF CONDUCTING A SEARCH IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES

a. Standard of review

On appeal, the circuit court's factual findings in denying a motion to suppress are reviewed for clear error, but the circuit court's application of

the law is subject to *de novo* review. *Commonwealth v. Quarles,* 283 Va. 214, 720 S.E.2d 84 (2012).

b. Officer Rhodes illegally trespassed onto private property for the purpose of conducting a search for evidence

The government's physical intrusion onto an effect for the purpose of obtaining information constitutes a search within the meaning of the Fourth Amendment. *United States v. Jones,* 565 U.S. _____ 101259 (2012). Fourth Amendment jurisprudence applies not only to a reasonable expectation of privacy but also to common law trespass. Id. A police officer may not enter the curtilage of a home simply to conduct a search without a warrant. *Florida v. Jardines,* 569 U.S. _____ 11564 (2013).

In *Jones,* the U. S. Supreme Court held that the Government's attachment of a GPS device to a vehicle and the use of that device to monitor the vehicle's movements constituted a search under the Fourth Amendment and upheld the suppression of all evidence obtained by the warrantless use of a GPS device. *Jones* at Slip. Op. 1, 12. In that case, the vehicle was parked at the defendant's residence at the time the device

was attached. Id. The motor vehicle is an effect protected by the Fourth Amendment. Id.

In *Jardines*, the U. S. Supreme Court held that when the government obtains information by physically intruding on the curtilage of a house, a search within the meaning of the Fourth Amendment has undoubtedly occurred. *Jardines* at Slip. Op. 1. In that case, the police had received an unverified tip that marijuana was being grown at Jardines' home. Id. After a brief period of surveillance, the police entered the curtilage of the home with a drug detecting dog which gave a positive alert for narcotics at the base of the front door. Id. At Slip. Op. 2. The Court upheld the suppression of all evidence holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause. Id. at Slip. Op. 1, 10.

In this case, several facts are uncontested; namely, (1) Officer Rhodes entered into the curtilage of a home without a warrant and without permission of the residents; (2) he did so for the purpose of conducting a search for a particular motorcycle which was parked in the driveway at the residence; (3) he was investigating the crime of eluding; (4) he had received a tip, the source of which was not disclosed, that Collins may

have been the driver that had eluded him on July 25, 2013; (5) he physically removed a tarp which was covering the motorcycle noting its appearance and recording the licence tag number and the Vehicle Identification Number; (6) even after verifying that Collins owned the motorcycle, Officer Rhodes had, and still has, no probable cause to arrest him for the crime of eluding; (7) Collins was an invited overnight guest at the residence and had standing to contest the Fourth Amendment violation.

The trial court opined that *Jardines* was not applicable because it could be distinguished on the facts; specifically, that *Jardines* involved the use a drug detecting dog (J.A. 118-121). The principal issue before the court in *Jardines* was whether the use of a drug detection dog by the police constituted a "search" within the meaning of the Fourth Amendment. *Jardines* at Slip. Op. 1. Yet in this case neither the Commonwealth nor the trial court disputed that Officer Rhodes had conducted a search. Thus, the trial court relied upon a "distinction" without a difference.

As the U. S. Supreme Court said:

> ". . .when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505,

> 511 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity . . . A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria*, 341 U.S. 622, 626 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

Jardines, 569 U.S. at Slip. Op. 4, 6.

As in *Jardines*, the police in this case trespassed onto private property for the purpose of conducting a search. This act violated the Fourth Amendment.

As the U. S. Supreme Court has said,

> "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."

Jardines, 569 U.S. at Slip. Op. 9.

By this standard, this case is easy. Officer Rhodes trespassed onto private property to search for evidence of a crime. Thus Officer Rhodes

violated the Fourth Amendment when, without a warrant, he entered onto the curtilage of Collins' home for the purpose of conducting a search for a motorcycle, physically removed the tarp from the motorcycle and conducted a search of the motorcycle.

Thus the trial court erred in concluding that the holding in and the logic of *Jardines* were not applicable to this case.

c. <u>The emergency exception to the warrant requirement does not apply</u>

Warrantless entry and search of a home or its curtilage require not only probable cause but also exigent circumstances. See, *Warden v. Hayden*, 387 U.S. 294 (1962) (hot pursuit of a suspect armed felon); *Minnesota v. Olsen*, 495 U.S. 91 (1990) (imminent risk of destruction of evidence, escape of the suspect, or danger to police or others); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (police reasonably believe an occupant is seriously injured or in imminent danger); *Washington v. Commonwealth*, 60 Va. App. 427, 728 S.E.2d 521 (2012) (exigent circumstances, coupled with a showing of probable cause of house having been broken into,

justified warrantless entry into home); *Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 752-53 (1985) (warrantless entries are presumed to be unreasonable, in Fourth Amendment terms, casting upon the police a heavy burden of proving justification by exigent circumstances).

(i) Probable cause

The trial court initially expressed some concerns about the applicability of *Jones* to the analysis of this case because in *Jones* the government had forfeited certain arguments. (J.A. 113-114). Collins explained why the fact that the government had forfeited certain arguments in *Jones* did not affect the analysis in this case. (J.A. 114-115).[1] In *Jones,*

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[1]The Court of Appeals stated that "More egregiously, appellant fails to note that in Jones, the government forfeited the argument that it had probable cause for the search, and thus the search was lawful **under the automobile exception,** because it had failed to raise the argument below. *Collins,* Ct. App. at 5, n.2. Collins could find no reference to the automobile exception in the *Jones* opinion where cited by the Court of Appeals. *Jones* was cited by Collins for the proposition that a trespass on an effect (i.e., an automobile) was a search under the Fourth Amendment independent of the long standing reasonable expectation of privacy standard. At oral argument, Collins specifically argued that *Jones* and *Jardines* created recent precedents in Fourth Amendment jurisprudence

the Supreme Court held that police trespassed on an effect when they attached a GPS unit to a motor vehicle and used the GPS unit to monitor the vehicle's movements. The trespass alone triggered Fourth Amendment protections under the property rights analysis independent of any "reasonable expectation of privacy." Officer Rhodes, in addition to trespassing on private property when he entered the curtilage of the home, also trespassed on an effect when he removed the tarp from the motorcycle for the purpose of searching for evidence. Unlike the government in *Jones*, Collins was not forfeiting his challenge to the probable cause requirement.

Nonetheless, the trial court held that Officer Rhodes' intrusion onto Collins' property was not unreasonable solely because he had probable cause to conduct the search. (J.A. 121). The trial court erred.

Officer Rhodes could see the outline of a motorcycle from the street but was unable to determine from that vantage point if it was the same one involved in the eluding incident. At that time, he had no reason to suspect that the motorcycle was stolen. Moreover, even if it proved to be the same

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which require courts to look beyond the reasonable expectation of privacy standard and determine whether a trespass has occurred.

motorcycle he had encountered on July 25, he had no reason to believe that identifying the motorcycle would enable him to identify Collins as the driver on that date.

Only after physically intruding on Collins' property did he learn that the motorcycle may have been the same one involved in an earlier eluding incident. But Officer Rhodes knew that the identity of the driver, not the identity of the motorcycle, was the principal object of his investigation. Even after removing the tarp to search for evidence, he still has not learned and could not have learned who was driving the motorcycle at the time. To this day, Officer Rhodes is without probable cause to charge Collins with eluding.

Moreover, only after physically intruding on Collins' property did he learn that the motorcycle had been reported stolen. Prior to his intrusion, Officer Rhodes had no suspicion, much less probable cause, to suspect that it had been stolen.

Thus, the trial court erred in holding that Officer Rhodes had probable cause to trespass onto private property to search for evidence of a crime.

(ii) Exigent circumstances

The Commonwealth argued that a warrant was not required under the automobile exception to the warrant requirement. (J.A. 115-117). Collins argued that the automobile exception did not apply to the facts of this case because the exception was created to authorize the search in a vehicle that had been stopped on a highway where probable cause existed to believe that contraband would be found in the vehicle. In this case, the vehicle was not stopped on a highway and the officer had no probable cause to believe contraband would be found in the vehicle. He was simply searching for a vehicle. Thus, Collins argued that both probable cause and exigent circumstances were required to justify the officer's trespass onto private property for the purpose of conducting the search. (J.A. at 117-118).

The court agreed that the automobile exception did not apply to the facts of this case because of the distinctions cited by Collins. (J.A. at 119). Nonetheless, the court held that the search was not an unreasonable government intrusion because Officer Rhodes had probable cause to conduct the search. (J.A. at 119-121). The court, however, did not find or

even address requirement for or the existence of exigent circumstances. (J.A. 119-121).

In this case, no exigent circumstances existed. None were articulated by Officer Rhodes, none were argued by the Commonwealth and none were cited by the court.

This was not a “hot pursuit” situation because Officer Rhodes was investigating a crime of eluding which had occurred nearly two months prior to the date of his warrantless trespass. There was no risk that evidence would be destroyed because the motorcycle was in plain view and Officer Rhodes had already set up surveillance of the residence to prevent anyone from removing the motorcycle without his knowledge. Nothing about the case or in the testimony suggested that there might be any danger to the police or to others.

Officer Rhodes could easily have complied with the law by knocking on the front door for the purpose of talking to and seeking consent from the residents. Instead of complying with the traditional invitation to “knock and talk,” Officer Rhodes trespassed onto the property and removed the tarp which covered the motorcycle. This act exceeded the licence generally accepted for entry onto private property.

Alternatively, he could have sent Officer McCall to the magistrate for a search warrant based on a showing of probable cause to an independent judicial officer. He had already sent Officer McCall on another fact-finding errand to Jarman's Sportcycles. Thus, Officer McCall was not a critical component of the surveillance operation.

Even if some semblance of probable cause existed, there were no exigent circumstances to justify the trespass onto the curtilage of Collins' home. Officer Rhodes' warrantless trespass onto private property to search for evidence without probable cause and exigent circumstances was *per se* unreasonable and a violation of Collins' rights under the Fourth Amendment of the Constitution of the United States.

Thus, the trial court erred in holding that the warrantless intrusion onto private property was reasonable.

d. Conclusion

For the foregoing reasons, this court should find that the trial court erred in denying Collins' motion to suppress evidence related to the motorcycle, reverse his conviction and remand the matter back to the

circuit court for further proceedings.

II THE COURT OF APPEALS OF VIRGINIA ERRED IN UPHOLDING THE JUDGMENT OF THE TRIAL COURT AND FINDING THAT THE OFFICER ACTED LAWFULLY UNDER THE FOURTH AMENDMENT IN ENTERING THE PROPERTY AND SEARCHING THE MOTORCYCLE.

a. The Court of Appeals erred in finding that the officer had probable cause to search for the motorcycle on private property.

Probable cause exists when the facts and circumstances within the officer's knowledge alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Commonwealth v. Grimstead,* 12 Va. App. 1066, 1069, 407 S.E.2d 47 (1991). However, suspicion, or even strong reason to suspect is not an adequate substitute for probable cause to justify the entry and search. Id.

The Court of Appeals held that Officer Rhodes "unquestionably had probable cause to believe that the motorcycle was the one from the eluding incident before entering the property." (J.A. 279). If that is all probable cause requires in this case, then Collins must concede the issue.

However, the probable cause standard requires more. "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" *Maryland v. Pringle,* 540 U.S. 366, 370 (2003), quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

In this case, the officer was investigating a crime of eluding which had occurred approximately two months prior to the date of this search. At trial, Collins produced evidence that the charges of eluding were completely unfounded because (a) he was in court and otherwise confined to home electronic incarceration on the date of the first alleged incident involving Officer McCall and (b) he did not even own or possess the motorcycle until about two weeks after the date of the second incident involving Officer Rhodes. And as argued, even after conducting his search, the officer still does not have probable cause the charge Collins with eluding.

The Court of Appeals stated that this argument "confuses probable cause needed to arrest and charge an individual with the probable cause required to conduct the search." (J.A. 279, n.3). The two, however, are

not completely inseparable because probable cause to search must be supported by facts to show that the search will yield evidence of the crime under investigation. To prove the crime of eluding, the Commonwealth must prove the identity of the driver and the nature of the driving. The make, model or type of the vehicle involved in the offense of eluding is not relevant to proving the elements of the offense.

Merely ascertaining that the motorcycle here as parked on private property was the same one involved in the eluding incident does not advance his investigation. The motorcycle itself was not evidence of a crime. Moreover, Officer Rhodes articulated no facts to support any reasonable belief that the motorcycle itself might be contraband or that it might contain contraband.

In this case, the officer, without a warrant, trespassed on private property to conduct a search. This act alone was an unreasonable intrusion on Collins' privacy interests and his property rights. Moreover, the crime under investigation was then and remains completely unfounded.

Thus, considering the broad purpose of the probable cause standard, the Court of Appeals erred in holding that the officer had probable cause to enter the property to conduct the search.

b. The Court of Appeals erred in holding that exigent circumstances justified the officer's warrantless entry onto the property and the search of the motorcycle.

The Court of Appeals concluded that the following circumstances created an exigency that justified a warrantless intrusion on the private property to conduct a search: (a) "Officer Rhodes had a reasonable belief that the motorcycle could be removed or destroyed, as a motorcycle is readily movable;" (b) "the motorcycle had successfully eluded the police on two previous occasions and could potentially have done so again;" (c) "appellant had already denied owning or knowing anything about the motorcycle or the residence in the picture;" (d) appellant was aware that law enforcement was investigating incidents involving the motorcycle and . . . that he might have an interest in concealing or destroying evidence;" (d) the officer "saw that someone had placed a tarp over the motorcycle, indicating a possible attempt to conceal it." (J.A. 281).

Even conceding those facts, the Court of Appeals erred in concluding that they created an emergency compelling the officer to act immediately.

(i) The automobile exception

When a motor vehicle is lawfully stopped on a highway, the police may search the vehicle without a warrant if they have probable cause to believe there is contraband or other evidence of criminal activity in the vehicle. *Carroll v. United States*, 267 U.S. 132 (1925); *Maryland v. Dyson*, 527 U.S. 465 (1999). This exception may also apply to vehicles which are capable of being used on a highway but are found stationary in a place not regularly used for residential purposes. *California v. Carney*, 471 U.S. 386 (1985).

The logic of the foregoing automobile exception is premised on the assumption that citizens have considerably less expectation of privacy in their automobiles than in their homes because motor vehicles travel on the open road. Officer Rhodes claimed authority for the warrantless search on the grounds that the motorcycle was mobile. But unlike the trailer in *Carney*, the motorcycle in this case was clearly parked at a private residence

The Court of Appeals noted that "United States Supreme Court has suggested that a search of a vehicle on private property required more

than mere mobility, as is generally sufficient under the automobile exception." *(*J.A. 282, n.4). Moreover, *Carroll* and its progeny were decided before *Jones* and *Jardines* both of which add a property rights analysis to the established "reasonable expectation of privacy" analysis which had heretofore dominated the Court's Fourth Amendment jurisprudence.

Thus, the Court of Appeals correctly did not rely on the automobile exception to justify the warrantless search in this case.

(ii) Exigent circumstances

The U. S. Supreme Court has held that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), to prevent the **imminent destruction** of evidence, *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion) (**emphasis added**), or to engage in "'hot pursuit'" of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42, 43 (1976). *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). Warrants are generally required unless 'the exigencies of the situation' make the

needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. Id., *quoting Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

An exigent circumstance exists to justify a warrantless search where a law enforcement officer has probable cause to believe that it is necessary to prevent destruction of evidence. *Evans v. Commonwealth*, 290 Va. 277, 287, 776 S.E.2d 760 (2015). The proper inquiry focuses on what an objective officer could reasonably believe. Id. If the defendant himself has the power to destroy the evidence, the courts assume that he is likely to avail himself of the opportunity. Id.

In *Evans*, law enforcement officers detected the odor of marijuana emanating from the window of an apartment and knocked on the door to investigate. 290 Va. at 280-281. After being rebuffed several times by the defendant's mother, the police entered the apartment without a warrant and found contraband. Id. The Supreme Court of Virginia held that the warrantless entry was justified to thwart the objectively reasonable possibility that evidence would be destroyed, discarded, or hidden if they did not take immediate action. Id. at 291.

The opinion in *Evans* drew a strong dissent which noted that

probable cause requires facts creating more than a bare suspicion that an exigency existed and concluded that the officers' subjective belief that the occupants would imminently destroy evidence is not supported by the record. Id. at 300-302.

In this case, the facts cited by the Court of Appeals may, at best, give rise to a generalized belief that Collins might attempt to move or further conceal the motorcycle. Thus, without citing *Evans* specifically, the Court of Appeals applied similar logic; namely, that exigent circumstances existed to justify a warrantless search because Collins knew the police were searching for the motorcycle in connection to a crime for which he was the suspect and because he had the motive to conceal it.

However, unlike illegal drugs, the motorcycle was in no imminent danger of being destroyed. Officer Rhodes had set up a surveillance of the residence with the motorcycle in plain view and had already dispatched Officer McCall to collect additional evidence. Had Collins emerged from the residence, removed the tarp and attempted to drive the motorcycle away, Officer Rhodes would have had clear evidence linking Collins to the motorcycle and could have immediately approached him to further investigate the suspected incident of eluding. Had Collins refused to talk

and attempted to drive away, Rhodes could have noted the tag number and developed probable cause to stop him based on a faulty registration. Had Collins attempted to elude the stop, Officer Rhodes would have probable cause to arrest him on a new charge of eluding. None of these possibilities compelled Officer Rhodes to trespass on private property to identify the motorcycle. Thus, even assuming the validity of Rhodes' subjective belief in Collins' motives, Collins did not have the power to destroy, move or hide the motorcycle without Rhodes' knowledge.

However, in finding exigent circumstances, the Court of Appeals relied almost exclusively on *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977). This case can easily be distinguished on the facts. In *Thims*, the police officer seized a motor vehicle and during an inventory search found contraband which was introduced into evidence at trial. In that case, the police had probable cause to believe that the vehicle had been purchased by the defendant with a forged check and thus was itself evidence of a crime. The police also had probable cause to believe that contraband from a recent burglary would be found in the trunk of the vehicle. The officer articulated facts about why he thought exigent circumstances existed (possible movement of the vehicle and/or

destruction of the contraband in the trunk) and why he did not have time to seek a warrant (fast-paced investigation of a recent crime). The Supreme Court of Virginia found that the seizure of the automobile and the subsequent search of the trunk were lawful under the exigent circumstances exception to the warrant requirement.

In this case, no reasonable law enforcement officer could claim that, under these facts, the motorcycle was in imminent danger of being destroyed. Indeed, Officer Rhodes made no such claim and the Commonwealth made no such argument either at in the trial court or on appeal.

In conclusion, the Court of Appeals erred because the facts do not objectively support the conclusion that sufficient exigencies existed to justify a warrantless intrusion onto private property.

(iii) Time for a warrant

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, courts must look to the totality of circumstances. *Missouri v. McNeely,* 569 U.S. ___ 111425 (2013), citing

Brigham City v. Stuart, 547 U.S. 398 (2006). The exigent circumstances exception to the warrant requirement applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. *Missouri v. McNeely,* 569 U.S. ___ 111425 (2013) (Chief Justice Roberts concurring).

In *McNeely*, a law enforcement officer arrested a suspect for driving under the influence of alcohol. After the suspect declined to take a breath test, he was taken to a nearby hospital for blood testing. The Court found that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. Id. Nonetheless the Court held that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. Id.

The concurring opinion by Chief Justice Roberts certainly indicates that whether sufficient time exists to get a warrant is one additional factor in determining whether the exigencies permit warrantless searches.

He stated, "(t)he natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical

evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant." *Missouri v. McNeely,* 569 U.S. ___ 111425 (2013).

The government bears the burden of showing that a warrant could not have been secured in time. See, *United States v. Davis*, 313 F.3d 1300 (11th Cir. 2002).

In this case, even if the Court were to conclude that the motorcycle was in imminent danger of destruction, the Court must further assess whether the officer had sufficient time to secure a warrant. The answer is self-evident from the facts. Officer Rhodes, like the law enforcement officer in *McNeely*, never testified or claimed that he did not have time to get a warrant, only that he thought he had the authority to search without one. The Commonwealth never argued that the officer did not have time to get a warrant.

And the facts suggest ample time. Officer Rhodes had set up surveillance of the residence and had already dispatched Officer McCall on

another fact-finding mission. Not only could Officer Rhodes have dispatched Officer McCall to the more urgent requirement of securing a search warrant but in today's age with access to cell phones, text messaging, mobile e-mail and two-way radio communications, Officer Rhodes could have initiated the process on his own without abandoning his surveillance position. He not only failed to do so but failed to show why he could not have done so. In short, the Commonwealth has failed to meet this burden of proof.

Moreover, the requirement to prove a time element further demonstrates the inapplicability of *Thims* which was decided before the age of cell phones, text messaging and mobile e-mail integrated with two way radio communications. Such technological advances in the ability of officers on the street to secure timely warrants must be considered in determining whether sufficient exigent circumstances exist to justify a warrantless search.

In conclusion, the Court of Appeals erred because the facts support the conclusion that Officer Rhodes had ample time and the means to secure a warrant without requiring a warrantless trespass onto private property for the purpose of conducting a search.

(iv) Awareness of police presence

Exigent circumstances will not normally exist where the suspects are unaware of the police surveillance or presence. See *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000); *United States v. Davis*, 1270 F. Supp. 2d 1234 (M.D. Fla. 2001); *United States v. Hernandez*, 214 F. Supp. 2d 1344 (S.D. Fla. 2002).

An exigent circumstance exists to justify a warrantless search where a law enforcement officer has probable cause to believe that it is necessary to prevent destruction of evidence. *Evans v. Commonwealth*, 290 Va. 277, 287, 776 S.E.2d 760 (2015). The proper inquiry focuses on what an objective officer could reasonably believe. Id.

In this case, no evidence was introduced to support a finding that Collins was aware of the presence or surveillance law enforcement officers. Nonetheless, the Court of Appeals noted several factors from which Officer Rhodes could have reasoned that Collins knew of the eluding investigation and thus might attempt to move or conceal the motorcycle.

However, Officer Rhodes had already taken the step to secure the

premises visually by setting up surveillance of both the motorcycle and the front entry/exit from the premises. Even if Collins had become aware of their presence and attempted to exit from the rear, the motorcycle would have remained in place until such time as a warrant had been authorized.

For this additional reason, the Court of Appeals erred to holding that sufficient exigencies existed for officer Rhodes to enter the property and examine the motorcycle.

CONCLUSION

The Appellant, Ryan Austin Collins, respectfully prays that this Honorable Court find that the Court of Appeals erred in upholding the rulings of the trial court, reverse the judgment of the trial court and remand the matter back to the Court of Appeals for further proceedings consistent with this ruling.

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CERTIFICATE

The undersigned Counsel for the Appellant hereby certifies, pursuant to Rule 5:27, that:

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(5) This brief contains 6,744 words

(6) Counsel for the Appellant has been appointed by the court

(7) This brief complies with Rule 5:26

(8) One copy of the foregoing Opening Brief and a copy of the Appendix in PDF format were served on counsel for the Commonwealth by electronic means, this 26th day of January, 2016. This same date, ten copies of the Brief and three copies of the Appendix have been hand delivered to the clerk's office.

/s/ Charles L. Weber, Jr.