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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 151277

RYAN AUSTIN COLLINS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

MICHAEL T. JUDGE
Senior Assistant Attorney General
VA State Bar No. 30456

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)
oagcriminallitigation@oag.state.va.us

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Ryan Austin Collins was indicted for possession of stolen property by an Albemarle County grand jury on December 2, 2013. (App. 50). On April 30, 2014, the Albemarle County Circuit Court denied Collins's motion to suppress evidence, which challenged a warrantless search of a partially covered motorcycle in his girlfriend's driveway. (App. 118-21, 268). The following week, the trial court, sitting without a jury, convicted Collins of receiving stolen property and sentenced him to three years in prison, with

all but two months suspended. The final judgment order was entered on May 20, 2014. (App. 271).

The Court of Appeals of Virginia granted Collins's petition for appeal and then affirmed the ruling of the trial court on July 21, 2015. (App. 274-86). *Collins v. Commonwealth*, 65 Va. App. 37, 773 S.E.2d 618 (2015).[1]

ASSIGNMENT OF ERROR

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 the purpose of conducting a search in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. The Court of Appeals 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. *Collins v. Commonwealth*, 65 Va. App. 37, 46, 773 S.E.2d 618 (2015).

STATEMENT OF FACTS

On July 25, 2013, Officer David Rhodes of the Albemarle County Police Department was on patrol and noticed a motorcycle coming from behind him at a high rate of speed. (App. 65-66, 79). Rhodes activated his radar, which indicated the motorcycle was traveling at 100 mph in a posted 55 mph zone. (App. 79). The motorcycle passed him on his left. Rhodes

[1] The Court of Appeals rejected Collins challenge to the sufficiency of the evidence. Collins did not include that issue in his petition for appeal to this Court.

made eye-contact with the driver, but could not identify him because the driver wore a helmet with a tinted shield. Rhodes activated his emergency equipment and attempted to stop the motorcycle, which he noted was an orange and black Suzuki. (App. 84). The motorcycle "took off at a very high rate of speed [exceeding] 140 mph." (App. 80). Rhodes pursued the motorcycle until it drove onto the interstate. Rhodes then stopped the pursuit because the driver "was driving too reckless." (App. 80).

During the incident, Rhodes's dash camera made a video recording of the incident and he took a screen shot of the motorcycle from that video. He also recorded the "tag number" on his hand during the pursuit. (App. 88-89, 91). Rhodes checked the tag number and it came back not "on file." Further investigation established the tag had been inactive for several years and was last used by an "Eric Jones." (App. 91). Sometime after July 25, 2013, Rhodes's investigation developed Collins as the likely driver of the motorcycle. (App. 95).[2] Rhodes drove by Collins's residence on

[2] At some point after July 25, 2013, Eric Jones told another officer he had sold the motorcycle to Ryan Collins, and that officer related that information to Rhodes. (App. 95, 203). Jones testified at trial that he sold the motorcycle to Collins for $1800 in April 2013, telling Collins it lacked a title and was "possibly stolen." (App. 140-41, 159). Collins told Jones the lack of title or possibility it might be stolen did not concern him because he intended to turn the motorcycle into a racing bike. (App. 142, 146).

Northfields Circle several times after July 25, 2013, but never saw the "orange and black motorcycle" at that residence. (App. 96-97).

On September 10, 2013, while on patrol, Officer Rhodes heard Collins's name on the radio. Other officers were investigating Collins in reference to a vehicle (a silver Acura) he was attempting to register at the DMV. Rhodes went to the DMV to talk with Collins about the motorcycle incident on July 25, 2013. (App. 66, 68, 161, 172-73). Another officer, Matthew McCall, also spoke with Collins at the DMV. McCall was investigating a June 4, 2013 eluding incident involving an orange and black motorcycle with an extended frame. (App. 166).

At the DMV, Officer McCall first advised Collins of his *Miranda* rights and then questioned him about a motorcycle involved in the June 4, 2013 eluding incident. (App. 162, 165-66). Collins responded that he had not owned or driven a motorcycle in months, that it was not him, and also that the last motorcycle he had owned was green. (App. 163-64). While McCall talked to Collins at the DMV, Rhodes looked up Collins's Facebook page and took two pictures with his phone of pictures on Collins's Facebook page. (App. 175). Rhodes recognized the motorcycle in the pictures as the one involved in the July 25, 2013 eluding incident. (App. 176).

After McCall finished talking with Collins, Rhodes showed Collins the two photographs he had obtained from Collins's Facebook page. (App. 67). Rhodes wanted to find the motorcycle and use it to help identify who operated it on July 25, 2013, when it eluded him. (App. 97). The first photograph depicted a residence with several vehicles parked in the driveway and one in front of the house on the street. The vehicle parked on the street was "the same Acura" Collins was attempting to register at the DMV. (App. 68-69, 82, 100). The second Facebook photograph showed an orange and black motorcycle parked between a black sedan and a silver Toyota 4-Runner in the driveway at the same residence. (App. 68-69, 124-125). Rhodes asked Collins if he knew where the house was located or where the motorcycle in the photograph was located. Collins told Rhodes that "he didn't know anything about it or where it was located." (App. 78, 175-76, 178). The photographs from the Facebook page shown to Collins depicted the same motorcycle Rhodes had "attempted to stop" on July 25, 2013. (App. 176).

Officer Rhodes testified at the suppression hearing that the motorcycle he had seen on July 25, 2013 had "been stretched out," which meant a rear end had been added onto the motorcycle to make it longer than a "conventional motorcycle," and indicated the motorcycle was a

"racing type" used for drag racing. (App. 69). Rhodes also had noted that the motorcycle had chrome wheels and a chrome swing arm "which was somewhat unique" and noted that you "normally" do not see someone driving down the road on such a motorcycle. It was "customized" and not something that could be bought "from the factory." (App. 69-70). When Officer Rhodes saw the photograph of the motorcycle on Collins's Facebook page, he was "100% sure that that was the same motorcycle that had not stopped for [him] on the bypass based on looking at it. It was very distinctive and [he] knew, absolutely no question in [his] mind that was the same motorcycle." (App. 100).

Shortly after finishing his conversation with Collins, and Collins's departure from the DMV, Officer Rhodes learned through an informant that the house in the Facebook photograph was on Dellmeade Avenue in the City of Charlottesville. (App. 70-71). Within 30 minutes of seeing the Facebook photographs, Rhodes found the house in the photograph at 2304 Dellmeade Avenue, within the City of Charlottesville, about one block from the Albemarle County line. (App. 71-73). While still in his police car, from the street, Rhodes could see the motorcycle in the driveway, which was partially covered with a white tarp. (App. 178-79).

The motorcycle was parked in front of the silver SUV at the same angle and in about the same spot as the motorcycle depicted in the Facebook photographs. (App. 179). The cover did not completely obscure the motorcycle underneath it. Rhodes testified about "a quarter of the wheel was sticking out from underneath the cover and the cover was "sticking up." (App. 90). Rhodes observed that the partially covered motorcycle was much longer than an average motorcycle by its outline under the cover and that "both" wheels were chrome. (*Id.*). Based on the outline and visible chrome sticking out from underneath the cover, the motorcycle "appeared to be the same motorcycle that [Rhodes] had attempted to stop." (App. 72).

From the sidewalk, Officer Rhodes took a picture of the motorcycle with the tarp on it. (App. 179). Because of the mobile nature of the motorcycle, Officer Rhodes walked up the driveway about one car length and then lifted the cover off of it to obtain the license plate or VIN in his effort to determine who had driven the motorcycle on July 25, 2013. (App. 74, 90). When Rhodes took the cover off, he confirmed that the motorcycle was the same motorcycle he had been looking for since it had eluded him on July 25, 2013. (App. 100). Rhodes was 100% certain it was the same

one that had eluded him on July 25th and the same one in the Facebook photos. (App. 180).

Rhodes first ran the tag number on the motorcycle, which was different than the tag number he had seen on it on July 25, 2013. The new tag number, however, was for a different motorcycle, a Kawasaki motorcycle from Waynesboro that had been sold. (App. 74, 180). Rhodes next acquired the VIN number off the motorcycle and checked the VIN, which indicated that the 2008 Suzuki had been "stolen out of New York State." (App. 74, 81, 181).

Officer Rhodes found Collins at the residence on Dellmeade Avenue later on September 10, 2013. (App. 182). Collins was dressed in a long-sleeved shirt and Timberland-style boots, "the same exact boots that the rider was wearing…the day [Rhodes] tried to stop the motorcycle." (*Id.*). Throughout the conversation, Collins's story changed several times. First, Collins stated he did not know anything about the motorcycle and then he told Rhodes it was a friend's motorcycle. Eventually, however, Collins admitted he had purchased the motorcycle from Eric Jones. (App. 183). Collins told Rhodes the last time he moved the motorcycle was about a week earlier. (App. 183). When confronted with information showing the motorcycle had been serviced at Jarman's Sportcycles, Collins admitted to

driving it there to get new tires put on it. (App. 128, 183-84). Collins explained the license plate on the motorcycle had been the plate on another motorcycle he had previously sold. (App. 184).

Collins was then arrested and Rhodes conducted a search incident to that arrest. Rhodes uncovered a key in Collins's pants pocket which fit the motorcycle in the driveway. (App. 185).

According to Collins's girlfriend, Kandace Beach, who moved to 2304 Dellmeade Avenue on August 8, 2013, Collins spent "a couple of nights per week" at that residence and was there the night of September 9-10, 2013. (App. 103-104). She testified that the motorcycle in the Facebook picture introduced into evidence had only been parked in the driveway for approximately one week prior to September 10, 2013. (App. 106, 228). Beach previously had lived intermittently at Collins's mother's home on Northfields Circle, and had spent "a good bit of time" at the Northfields Circle home with Collins. Beach testified at trial, however, that she had never seen the motorcycle at the Northfields address. (App. 226, 228).

Collins's mother, Terri Roberts, who lived on Northfields Circle, testified that the motorcycle from the Facebook photos was parked in front of her home that August. (App. 231-32, 234, 237).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING COLLINS'S MOTION TO SUPPRESS BECAUSE OFFICER RHODES HAD PROBABLE CAUSE TO BELIEVE THE PARTIALLY COVERED MOTORCYCLE IN THE DRIVEWAY WAS THE SAME MOTORCYCLE INVOVLED IN THE JULY 25, 2013 ELUDING INCIDENT, IT WAS REASONABLE TO BELIEVE THAT SEARCHING IT WOULD PROVIDE INFORMATION LEADING TO THE IDENTITY OF THE RIDER IN THAT INCIDENT, AND THAT THE WARRANTLESS SEARCH WAS SUPPORTED BY EXIGENT CIRCUMSTANCES.

The issue in this case is whether Officer Rhodes's entry onto the driveway and removal of the tarp that partially covered the motorcycle was justified under the Fourth Amendment. Collins, as he did at trial, argues that Rhodes did not have probable cause and there were no exigent circumstances justifying Rhodes's entry onto the driveway and removal of the tarp.

STANDARD OF REVIEW

On appeal, the denial of a motion to suppress presents a mixed question of law and fact that this Court reviews de novo on appeal. *See Branham v. Commonwealth*, 283 Va. 273, 279, 720 S.E.2d 74, 77 (2012) (citations omitted). In that review, this Court views "the evidence in the light most favorable to the Commonwealth [granting] the Commonwealth the benefit of all reasonable inferences fairly deducible from that evidence," and it is the defendant's burden to show "that even when the evidence is

reviewed in that light, denying the motion to suppress was reversible error." *Id.*; s*ee also Covil v. Commonwealth*, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) (false or evasive account is circumstance fact-finder may properly consider as evidence of guilty knowledge). In reviewing the denial of the suppression motion, the Court "consider[s] facts presented both at the suppression hearing and at trial." *Testa v. Commonwealth*, 55 Va. App. 275, 279, 685 S.E.2d 213, 215 (2009) (citation omitted); *accord Mason v. Commonwealth*, 64 Va. App. 292, 296, 767 S.E.2d 726, 728 (2015) (en banc), *appeal granted on other grounds*, 2015 Va. LEXIS 152 (Oct. 29, 2015); *see, e.g., Weeks v. Commonwealth*, 248 Va. 460, 466, 450 S.E.2d 379, 383 (1994).

PRIOR RULINGS

In the circuit court, Collins argued that Officer Rhodes lacked probable cause, the automobile exception did not apply, and Rhodes could have obtained a warrant. (App. 117-18). The trial court heard and denied Collins's motion to suppress focusing on whether probable cause existed to believe the partially covered motorcycle in the driveway at 2304 Dellmeade Avenue was the same motorcycle that eluded Rhodes on July 25, 2013. (App. 119). The trial court noted that the picture of the motorcycle (without the tarp) posted on Collins's Facebook page (along with other identifying

information such as the house and other vehicles) was "almost identical" to the "unique" motorcycle that eluded Rhodes; Collins's statements to Rhodes at the DMV were deceitful; and the motorcycle was in plain view. The judge went on to note that Rhodes could clearly see the partially covered motorcycle from the sidewalk and credited his testimony that it matched the description of the "unique" motorcycle he had been looking for, and concluded that Rhodes had probable cause. (App. 120-21).

In the Court of Appeals, Collins argued the same points he raised at trial. The Court of Appeals first found that Officer Rhodes "unquestionably had probable cause to believe" that the partially covered motorcycle in the driveway was the same one that had eluded him on July 25, 2013 and summarized the unique facts Rhodes could see from a public street before he entered the property.

> These include the unusual length of the motorcycle due to it having been "stretched out" for drag racing, which was clearly visible even when under the tarp. In addition, the tarp did not extend to the ground, leaving the customized chrome wheel covers and swingarm uncovered. These are all distinctive features Officer Rhodes recognized from the motorcycle he encountered, and videorecorded, during the eluding incident. Furthermore, Officer Rhodes possessed photos of the same motorcycle before someone covered it with a tarp, parked at a similar angle and in the same location at that residence.

Collins, 65 Va. App. at 44-45, 773 S.E.2d at 622.

The Court of Appeals found it unnecessary to determine if the motorcycle was within the curtilage of the house because the exigencies apparent from the record justified the entry and search (specifically the likely loss/concealment of the item Rhodes sought to search in his effort to identify the driver); and assumed without deciding it was within the curtilage. *Id.* at 45, 773 S.E.2d at 623. In addition, because the record clearly established exigencies separate and apart from the automobile exception, the Court of Appeals did not reach the issue. *Id.* at 44-48, 773 S.E.2d at 622-24.

In this Court, Collins asserts the officer: could not walk up the driveway; had no probable cause to remove the tarp; had no probable cause to believe that Collins was the driver of the motorcycle on July 25, 2013; and the officer should have watched the motorcycle and obtained a warrant. He also claims that the automobile exception does not apply to a car in a driveway. Collins's arguments overlook well established precedent that allows an officer to: observe items in plain view from a public street; walk up a driveway; and forgo obtaining a warrant even if there is time to obtain one. Collins's position that no exigency, including the automobile exception, applies to a vehicle in a driveway is inconsistent with the exigency precedent of the United States Supreme Court and this Court.

ANALYSIS

Fourth Amendment

An officer with probable cause to believe he will find evidence pertaining to a crime he is investigating by searching a vehicle may search that vehicle if the circumstances support the finding of an exigency. To be sure, as this Court has held, evidence pertaining to a crime includes evidence that may identify the perpetrator of a crime in which the vehicle was used. *See McCary v. Commonwealth*, 228 Va. 219, 226-29, 321 S.E.2d 637, 640-42 (1984) (officer seeking information from within a vehicle regarding the identity of a bank robber may search said vehicle for that information provided there is probable cause to believe the robber used the vehicle as a getaway car) (citing *United States v. Robinson*, 533 F.2d 578, 583 (D.C. Cir. 1976)).

The United States Supreme Court and this Court have held that the Fourth Amendment generally, *subject to certain exceptions*, requires a police officer to obtain a warrant before conducting a search. *See California v. Carney*, 471 U.S. 386, 390 (1985) (a warrant issued by an independent judicial officer preserves the fundamental "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" subject to exceptions to that general

rule); *McCary*, 228 Va. at 227, 321 S.E.2d at 641 (searches conducted without prior judicial approval are per se unreasonable under the Fourth Amendment, subject to exceptions allowed when exigencies require warrantless searches) (citing *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Fore v. Commonwealth*, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980); *Thims v. Commonwealth*, 218 Va. 85, 88-89, 235 S.E.2d 443, 445 (1977)).

Collins's brief contends that Officer Rhodes needed probable cause to charge him with eluding and that a warrant (or warrantless search that falls with an exception) has to be tied to a particular person. (Def. Br. at 16-17). In rejecting Collins's argument, the Court of Appeals noted that his

> argument confuses the probable cause needed to arrest and charge an individual with the probable cause required to conduct a lawful search. Officer Rhodes had numerous reasons to believe that the motorcycle was the one involved in the eluding incident and that a search would provide information leading to the individual who committed the crime. Officer Rhodes's decision not to pursue eluding charges against appellant, regardless of the reason, did not vitiate the probable cause he had to search.

65 Va. App. at 45 n.3, 773 S.E.2d at 622 n.3.

The Court of Appeals is correct because warrants are not issued solely to search for a specific item of contraband (such as drugs). Warrants may issue to allow the search or seizure of items that will

facilitate identification of suspects; and are routinely directed at third parties (such as communication service providers) who have no connection to a crime, but nevertheless have either evidence related to a crime or evidence that may assist in identifying a suspect. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978) ("Search warrants are not directed at persons; they authorize the search of [places] and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized."); *Warden v. Hayden*, 387 U.S. 294, 310 (1967) ("there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband");[3] *see also Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (noting that *United States* v. *Ross,* 456 U.S. 798, 824 (1982), held that the permissible scope of a warrantless car search "is defined by the object of the search and the places in which there is probable cause to believe that it

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[3] Collins reliance on *Hayden* is misplaced. In *Hayden*, even though the specific exigency involved in *Hayden* was different, the case supports the Commonwealth's position that an officer can search for items to aid in identifying a suspect although the items themselves are not contraband. In *Hayden*, the Court held that an officer could pursue an armed fleeing robbery suspect into a building and that the search of a closed washing machine for weapons in which the officer found and seized clothes that matched the description of the clothes worn by the robber did not violate the Fourth Amendment. 387 U.S. at 307. The Court concluded that the police could have "reasonably believe[d] that the [clothes] would aid in the identification of the culprit." *Id.*

may be found" is the same principle reflected in *Zurcher* "involving the constitutionality of a search warrant directed at premises belonging to one who is not suspected of any crime").

An officer's actions in conducting a warrantless search of a vehicle comply with the Fourth Amendment when he "has probable cause to believe that he will find the instrumentality or ***evidence pertaining to a crime*** before they begin their warrantless search." *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 221 (1968) (emphasis added); *see United States v. Johns*, 469 U.S. 478, 483 (1985) ("exception to the warrant requirement recognized by *Carroll* allows a search of the same scope as could be authorized by a magistrate" and that a "warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search") (citing *Ross*, 456 U.S. at 821, 823, 825). This is so because even if the police suspect a person, but lack probable cause to arrest, "such a person's property may be searched upon probable cause to believe" the evidence sought will be found. *See United States v. Melvin*, 596 F.2d 492, 495-96 (1st Cir. 1979); *see also United States v. Glenn*, 908 F.2d 163, 165 (7th Cir. 1990) (no need for a nexus between the owner and the crime under investigation for which evidence is sought; only need probable cause that the evidence sought will found in a particular

place). In short, if a warrantless search is justified, the scope of that search is the same "'as could be authorized by a magistrate'" and that would include "a search of every part of the vehicle that might contain the object of the search." *Johns*, 469 U.S. at 483 (citation omitted).

Driveway

In support of his Assignment of Error, Collins argues it is undisputed that Rhodes entered the curtilage of a home. (Def. Br. at 11). His assertion, however, overlooks the standard of review and the fact that the Court of Appeals assumed without deciding, for purposes of the appeal, that Rhodes entered the curtilage for purposes of the appeal because "numerous exigencies justified the search." *Collins*, 65 Va. App. at 46, 773 S.E.2d at 623. Further, the Fourth Amendment does not prohibit an officer, without a warrant, from walking up a driveway "because that is 'no more than any private citizen might do.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013); *Robinson v. Commonwealth*, 273 Va. 26, 34, 639 S.E.2d 217, 221-22 (2007) (doctrine of implied consent deems an officer's entry by driveway or sidewalk, an entry into the curtilage, "a reasonable intrusion into an area otherwise protected by an expectation of privacy under the

Fourth Amendment") (citations omitted).[4] Although the record here was not as developed as in *Robinson*, the driveway[5] in the photographs of 2304 Dellmeade Avenue establish beyond genuine dispute that Rhodes's walking on just a portion of the driveway did not violate any interest in privacy.

The picture introduced into evidence clearly shows that the driveway is the customary manner in which people approach this house and that Officer Rhodes did not have to cross any barriers as he walked from the street, across the sidewalk, and then up the driveway toward the partially

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[4] The United States Supreme Court also had no issue with officers that "proceeded down the driveway to investigate" a noise complaint. *See Brigham City v. Stuart*, 547 U.S. 398, 401 (2006); *cf. Shaver v. Commonwealth*, 30 Va. App. 789, 793, 797, 520 S.E.2d 389, 395, 397 (1999) (holding appellant had no expectation of privacy when driveway where stolen goods were located was completely visible from the road). The Supreme Court also applied the automobile exception to the warrantless search of a truck in the driveway of a farmhouse. *Pennsylvania v. Labron*, 518 U.S. 938, 939-40 (1996).

[5] Numerous courts have applied the automobile exception to vehicles parked on private driveways. *See United States v. Hines,* 449 F.3d 808, 814-15 (7th Cir. 2006); *United States v. Brookins,* 345 F.3d 231, 234, 238 (4th Cir. 2003); *United States v. Fladten,* 230 F.3d 1083, 1085-86 (8th Cir. 2000) (per curiam); *United States v. Markham,* 844 F.2d 366, 368 (6th Cir. 1988); *United States v. Hamilton,* 792 F.2d 837, 843 (9th Cir. 1986). The Ninth Circuit has also applied the exception to an inoperable vehicle parked in a driveway. *See United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994); *see also Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (justification to conduct warrantless search of a vehicle does not depend on the reviewing court's assessment car would have been driven away).

covered motorcycle, which was in plain view from the street. As in *Jardines*, where the Fourth Amendment was not implicated until the canine sniffed at the front door, the Fourth Amendment was not implicated here until Rhodes removed the tarp.

Probable Cause

Collins's assertion that Officer Rhodes lacked probable cause is predicated in large part on a misconception of what an officer can search and search for without violating the Fourth Amendment. Collins argues that Rhodes had no reason to suspect that the motorcycle was stolen and no reason to believe that by identifying the motorcycle it would enable Rhodes to identify Collins as the driver. (Def. Br. at 16-17). As noted in this brief previously, and by the Court of Appeals, Collins's position does not recognize that an officer can search an object that may help identify a suspect. *See supra* at 15-18. The record in this case establishes "unquestionably" that Rhodes had probable cause to believe that the partially covered motorcycle in the driveway at 2304 Dellmeade Drive on September 10, 2013 was the same motorcycle that had eluded him on July 25, 2013. *Collins*, 65 Va. App. 45, 774 S.E.2d at 622. Further, it was reasonable for Rhodes to look at information such as the license plate and VIN in an effort to identify the driver of the motorcycle on July 25, 2013.

Probable cause "does not demand any showing that [the officer's] belief be correct or more likely true than false." *Delong v. Commonwealth*, 234 Va. 357, 366, 362 S.E.2d 669, 674 (1987). Probable cause is a "flexible, commonsense standard" that in the totality of the circumstances would warrant a "person of reasonable caution to believe" that the partially covered motorcycle in the driveway was the same motorcycle that had eluded Officer Rhodes on July 25, 2013 and that the license plate or VIN would assist in identifying the driver. *Id*. (citations omitted); *see Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."); *Taylor v. Commonwealth*, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981) (when facts and circumstances within an officer's knowledge "alone are sufficient to warrant a person of reasonable caution to believe that" evidence of a crime is present in a vehicle, probable cause exists to search that vehicle under the automobile exception). Police "officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist when the

decision to [search] was made." *Keeter v. Commonwealth*, 222 Va. 134, 141, 278 S.E.2d 841, 846 (1981).

The evidence in this case established probable cause to believe that evidence related to the crime Rhodes was investigating would be found by searching the motorcycle and that the motorcycle Rhodes had been trying to locate was under the tarp. *See Florida v. White*, 526 U.S. 559, 565 (1999) (upholding seizure of a car from a public place where police had probable cause to believe the car was evidence of a crime); *see, e.g., McCary*, 228 Va. at 226-29, 321 S.E.2d at 640-42 (upholding search of vehicle for information regarding identity of bank robber because there was probable cause to believe the robber used the vehicle as a getaway car); *Thims*, 218 Va. at 91-92, 235 S.E.2d at 447 (upholding entry onto private driveway and opening car door to obtain VIN because there was probable cause to believe car was stolen and contained stolen property).

After the incident, Rhodes developed Collins as a suspect. Having found the motorcycle on Collins's Facebook page, and then having located the address that corresponded with what he had seen on Collins's Facebook page, within thirty minutes of confronting Collins with the Facebook pictures, Rhodes was putting the pieces together. When he observed the partially covered motorcycle, which appeared to be the same

vehicle as the one in the Facebook page photograph and the one that had eluded him, Rhodes approached the object to obtain information about its licensure and registration to further his investigation into who had driven it on July 25, 2013. (App. 97-98, 179). The now partially covered motorcycle was parked at nearly the identical angle and in about the same spot in relation to the silver SUV as the motorcycle in the Facebook photograph. It also had the same chrome wheels and extended silhouette as the motorcycle for which Rhodes had been searching.

Given the particular facts and circumstances of this case, Rhodes had probable cause to believe that the covered motorcycle in the driveway at 2304 Dellmeade Avenue was the same motorcycle. *See Ornelas v. United States,* 517 U.S. 690, 699 (1996) (courts should give due weight to the inferences drawn by law enforcement officers based upon their experiences and expertise). In short, it was evidence connected to a crime and likely to help him identify the rider through information on the motorcycle, such as the VIN number.

Exigent Circumstances

The United States Supreme Court, as well as this Court, has recognized exigent circumstances as an exception to the warrant requirement of the Fourth Amendment. In the present case, the trial court

found the partially covered motorcycle was in plain view (App. 120-21), which necessarily implicates exigent circumstances. *See Robinson*, 273 Va. at 40, 639 S.E.2d at 225 (after officers had seen evidence of a crime in plain view, exigent circumstances were required for the officer to proceed without a warrant) (citing *Horton v. California*, 496 U.S. 128, 137 n.7 (1990) ("[N]o amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'")).

The circumstances deemed exigent include not only plain view, as applied by the trial court, but numerous others including the imminent destruction[6] of evidence. *Kentucky v. King*, 563 U.S. 452, 460 (2011); *Verez v. Commonwealth*, 230 Va. 405, 410-11, 337 S.E.2d 749, 753 (1985) (noting ten justifications for finding exigency).[7] In addition to these

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[6] *King* noted several examples of possible loss/destruction of evidence when a warrant was not required. 563 U.S. at 460 n.3 (citing *Richards v. Wisconsin*, 520 U.S. 385, 395-96 (1997); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *United States v. Banks*, 540 U.S. 31, 37-40 (2003).

[7] There are numerous exceptions to the warrant requirement other than those cited herein. See JAMES WM. MOORE ET AL., **MOORE'S** FEDERAL PRACTICE — CRIMINAL PROCEDURE § 641.51 (2016); *see also Evans v. Commonwealth,* ___ Va. ___, ___, 776 S.E.2d 760, 763 (2015) ("No fixed legal definition fully captures the meaning of exigent circumstances. Police officers find themselves in a myriad of situations with varied fact patterns. No court could provide an exhaustive enumeration of factors that would distinguish circumstances that qualify as exigent from those that would not.").

instances, two exigent circumstances (the automobile exception and search incident to arrest) apply "categorically."

> We have recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case. *See, e.g., California v. Acevedo*, 500 U.S. 565, 569-570 (1991) (automobile exception); *United States v. Robinson*, 414 U.S. 218, 224-235 (1973) (searches of a person incident to a lawful arrest). By contrast, the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry.

Missouri v. McNeely, 133 S. Ct. 1552, 1559 n. 3 (2013). Whether a police officer was justified in acting without a warrant when an exigency requires a case-specific inquiry is determined under the totality of the circumstances test. *Id.* at 1559 (citations omitted).

> We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that…a warrant… provides." Absent that established justification, "the fact-specific nature of the reasonableness inquiry," demands that we evaluate each case of alleged exigency based "on its own facts and circumstances."

McNeely, 133 S. Ct. at 1559 (citations omitted). In the present case, as found by the Court of Appeals, there were numerous (self-evident) exigencies apparent from the record.

As noted previously, the Court of Appeals discussed the fact that the motorcycle had twice eluded police and had not been seen for approximately six weeks when Rhodes (who had developed Collins as a suspect) confronted Collins at the DMV. The Court noted Rhodes's concern over the loss of the motorcycle a third time by stating he "had a reasonable belief that the motorcycle could be removed or destroyed, as a motorcycle is readily movable," that Collins "recently had driven the motorcycle," and that "the same motorcycle had successfully eluded the police on two previous occasions, and could potentially have done so again here." 65 Va. App. at 46, 773 S.E.2d at 623.

The court in *Collins*, however, stated "mere mobility is far from the only exigency Officer Rhodes faced." *Id.* "Officer Rhodes had, within the same hour, spoken with [Collins] at the DMV where [Collins] denied owning or knowing anything about the motorcycle or the residence in the picture." *Id.* Rhodes, therefore, knew Collins was aware not only that law enforcement was investigating the motorcycle and where it might be found, but that Collins had an interest "in concealing or destroying evidence" and found the previously uncovered motorcycle was covered less than 30 minutes after he had found it on Collins's Facebook page. 65 Va. App. at 47, 773 S.E.2d at 623.

> In the brief time between when [Collins] returned to the house and when Officer Rhodes knocked on the door, he had changed his clothing from what he wore at the DMV to jeans, a heavy long sleeve shirt, and work boots similar to those worn during the eluding incident, despite it being over 90 degrees that day. [Collins] even had the key to the motorcycle in his jeans pocket. Although the search took place before [Collins] returned home and changed, these actions further speak to the reasonableness of Officer Rhodes's belief that [Collins] might attempt to relocate the motorcycle. Together, the facts indicate that [Collins] not only possessed an interest in, but also the ability and probable intention to, move the motorcycle out of the reach of law enforcement. *See Thims v. Commonwealt*h, 218 Va. 85, 91, 235 S.E.2d 443, 446 (1977) (holding that exigent circumstances existed when law enforcement went onto private property to examine a stolen vehicle, despite the fact that defendant, and the keys to the vehicle, was in police custody). In view of the above, we conclude that sufficient exigencies existed for Officer Rhodes to enter the property and examine the motorcycle.

65 Va. App. at 46-47, 773 S.E.2d at 623. Rhodes faced the loss of evidence that might assist in identifying the driver of the motorcycle on July 25, 2013, yet again, if Rhodes failed to act.

Further, Rhodes was investigating a serious felony offender who had twice eluded police. Indeed, Rhodes had to break off his pursuit of the motorcycle on July 25, 2013 due to the reckless nature in which the motorcycle was being driven (at 140 mph). Va. Code § 46.2-817 (willful and wanton disregard of signal by law enforcement officer that interferes with or endanger the operation of the law-enforcement vehicle or endangers a person is a Class 6 felony). Operating a motorcycle at a

speed of 140 mph without question shows a reckless disregard for the life and safety of others.

Nevertheless, despite the unquestionable existence of probable cause and numerous exigencies evident from the record, Collins asserts that the trial court erred because it made no explicit finding of exigent circumstances, only that Officer Rhodes had probable cause. (Def. Br. at 16). In so doing, Collins ignores that "[t]here is no general requirement that trial courts must state for the record the reasons underlying their decisions." *Shannon v. Commonwealth*, 289 Va. 203, 206, 768 S.E.2d 433, 436 (2015)). "In Virginia, a trial court has no common law duty to explain in any detail the reasoning supporting its judgments. Absent a statutory requirement to do so, 'a trial court is not required to give findings of fact and conclusions of law.'" *Fitzgerald v. Commonwealth*, 223 Va. 615, 627, 292 S.E.2d 798, 805 (1982)." *Pilati v. Pilati*, 59 Va. App. 176, 180, 717 S.E.2d 807, 809 (2011).

> Trial judges sometimes refrain from providing a detailed explanation because they think "the reasons self-evident." Others may conclude that, in some cases, saying too much is as detrimental as saying too little. The correct balance depends on the unique context of each case, the informative value of an explanation, and the possibility of inflaming an interminable dispute with an overly detailed explanation. With few exceptions, when no specific explanation is given by a trial court, we presume the court followed the governing legal

> principles, and resolved all factual contests favorable to the prevailing party.

Pilati, 59 Va. App. at 181, 717 S.E.2d at 809 (citations omitted). The issue of "exigency," however, was expressly before the trial court during the motion. (App. 110-18).

Collins's assertion of error in this regard has no merit. *See Starks v. Commonwealth*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983) ("[a]bsent clear evidence to the contrary," this Court presumes a "trial judge applied the correct standard to the facts.") (citing *Yarborough v. Commonwealth*, 217 Va. 971, 978, 234 S.E.2d 286, 291 (1977); *see also Yarborough,* 217 Va. at 978, 234 S.E.2d at 291 (appellate courts should not fix upon isolated statements of a trial judge taken out of full context and "use them as a predicate for holding the law has been misapplied").

Collins also relies on two recent cases from the United States Supreme Court (*Florida v. Jardines*, 133 S.Ct. 09 (2013), and *United States v. Jones*, 132 S.Ct. 945 (2012)), implying that one or both cases have somehow negated or altered the exigency exception for entry onto or search of property, regardless of whether the officer had probable cause.

Jones involved placement by law enforcement officers of a GPS device on a car the defendant drove. The Court held that such a trespass to property constituted a search. *Id.* at 949. The Court reasoned that the

government's physical occupation of private property "for the purpose of obtaining information" constituted a search. *Id.* Importantly, the *Jones* Court refused to consider the government's alternative argument in that case that the search was reasonable because it had been supported by either reasonable suspicion or probable cause because the government had failed to raise that argument below. *Id.* at 954; *see also* 65 Va. App. at 44 n.1, 773 S.E.2d at 621 n.1.

Jardines involved a police officer walking to the front porch of Jardines's home with a narcotics dog. The Court held that this simple approach to the house did not implicate the Fourth Amendment, but that bringing the dog for purposes of obtaining information beyond the threshold constituted a search because even though the officer was implicitly allowed to approach the house as any private citizen would have been able to, his use of the dog exceeded the scope of that implied consent. 133 S.Ct. at 1415-16.

Further evidence that neither *Jardines* nor *Jones* undermined or abated the exigency exception to warrantless searches is the Court's 2011 re-affirmance that the rule against warrantless searches of a home "is subject to certain reasonable exceptions." *King*, 563 U.S. at 459. Undeniably, *King* noted that even the threshold of a house could be

crossed without a warrant if exigent circumstances existed. *Id.* "One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), and citing *Payton* v. *New York*, 445 U.S. 573, 590 (1980)).

Jardines merely noted that the Court had added to the reasonable expectation test established in *Katz v. United States*, 389 U.S. 347 (1967), by announcing a physical intrusion test in *Jones*. 133 S.Ct. at 1417. In sum, neither *Jardines* nor *Jones* limited or nullified the long-standing precedent establishing exceptions to the warrant requirement. That point is well-established in the precedent of this Court.

> When government agents conduct a search or seizure within protected areas of a dwelling without a warrant such actions are presumptively unreasonable, *Payton v. New York*, 445 U.S. 573, 586-87 (1980), and unlawful ***unless they are supported by both probable cause and exigent circumstances***. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002).

Robinson, 273 Va. at 34, 639 S.E.2d at 221 (emphasis added); *accord Keeter*, 222 Va. At 141, 278 S.E.2d at 846. In addition to the exigency the Court of Appeals found to sustain the trial court's ruling, at least two other recognized exigencies that support the denial of Collins's motion to suppress are apparent from the record.

Automobile Exception

Although mentioned but not applied by the Court of Appeals, 65 Va. App. at 46-47, 773 S.E.2d at 623, the automobile exception is clearly applicable here.[8] This categorical exigency exception was first recognized nearly 100 years ago in *Carroll v. United States*, 267 U.S. 132, 153 (1925), and has no separate exigency requirement. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999).

> We made this clear in *United States v. Ross*, 456 U.S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained*." (Emphasis added). In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment…permits police to search the vehicle without more." *Id.* at 940.

Dyson, 527 U.S. at 467.

If there is one fact that this record establishes it is that the 2008 Suzuki motorcycle was "readily mobile." "'If a car is readily mobile and

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[8] On appeal, a judgment can be affirmed on alternative legal reasoning. *See Director of the Dep't of Corr. v. Kozich*, ___ Va. ___, ___, 779 S.E.2d 555, 563 n.12 (2015) (citing *Alexandria Redevelopment & Hous. Auth. v. Walker*, 290 Va. 150, 156 n.1, 772 S.E.2d 297, 300 n.1 (2015); *Perry v. Commonwealth*, 280 Va. 572, 581-82, 701 S.E.2d 431, 437 (2010).

probable cause exists to believe it contains contraband, the Fourth Amendment…permits police to search the vehicle without more.'" *Id.* *Dyson* made clear that exigent circumstances are presumed when an operational vehicle is involved. *Id.* at 466-67; *see Labron*, 518 U.Sat 940 (an automobile's inherent mobility is "an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear").

As noted previously, Collins's argument regarding the alleged significance of the driveway is of no moment or merit. If the magistrate could have issued a warrant to authorize Rhodes to enter the driveway and lift the tarp, then Rhodes's actions did not violate the Fourth Amendment. "'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.'" *Ross*, 456 U.S. at 807 n. 9 (quoting *Chambers*, 399 U.S. at 52); *see supra* at 15-18.

Plain View Exception

As discussed previously, the trial court denied Collins's motion because the partially covered motorcycle was in plain view and the facts

known to the officer formed a reasonable basis upon which to conclude that the motorcycle that had eluded him on July 25, 2013 was the same motorcycle that was partially covered in the driveway on Dellmeade Avenue. "The seizure of property in plain view is presumptively reasonable assuming that there is probable cause to associate the property with criminal activity." *Payton*, 445 U.S. at 587; *see, e.g.*, *United States v. Drew,* 451 F.2d 230, 233-34 (5th Cir. 1971) (outline of a weapon inside an opaque plastic folder was in plain view and sufficient basis for seizure of and search within the folder); *State v. Parnell*, 960 So.2d 1091, 1099 (La. App. 2007) (outline of weapon in defendant's pocket gave officer probable cause to arrest); *Commonwealth v. Barrett,* 458 N.E.2d 348, 349 (Mass. App. 1984) (observation of a firearm in defendant's pocket gave officer probable cause to believe defendant was carrying a firearm and his action in taking the weapon was justified); *State v. Peck*, 283 S.E.2d 383, 386 (N.C. Ct. App. 1981) (plain view does not require "unobstructed sight," but only as much sight as necessary to give reasonable man belief evidence of criminal activity present); *see also Texas v. Brown*, 460 U.S. 730, 743 (1983) (plurality opinion) (irrelevant that officer could not see through the "opaque fabric of the balloon" because of its distinctive character).

In sum, the trial judge did not err in denying the motion to suppress because Officer Rhodes had probable cause to believe that he would find evidence related to his investigation and exigent circumstances—indeed, several different recognized exigencies existed. The Court of Appeals did not err in affirming the trial court's judgment.

CONCLUSION

For these reasons, the judgment of the Court of Appeals of Virginia and the judgment of the Albemarle Circuit Court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: S/_____
Counsel

Mark R. Herring
Attorney General of Virginia

Michael T. Judge
Senior Assistant Attorney General
VA State Bar No. 30456
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)
oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On February 17, 2016, a copy of this Brief was filed electronically with this Court and the required paper copies of this brief were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy was electronically mailed to Charles L. Weber, Jr., Attorney at Law, cweber977@aol.com. A courtesy copy has been sent to the trial judge and Commonwealth's Attorney. This brief complies with Rule 5:26(b). The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 8,027 words.

The Commonwealth desires to present oral argument in this case.

By: S/_____
Michael T. Judge
Senior Assistant Attorney General