In the

Supreme Court of Virginia

At Richmond

Record No. 160879

COMMONWEALTH OF VIRGINIA,

Appellant,

– v. –

LASHANT LEONARDO WHITE,

Appellee.

BRIEF OF APPELLEE

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APPELLANT'S ASSIGNMENTS OF ERROR

I. The Court of Appeals erred in finding that the defendant had a reasonable expectation of privacy in the bag and that his girlfriend did not have apparent authority to consent to its search.
   A. The defendant did not establish a reasonable expectation of privacy in the bag
   B. Tanya had joint access and apparent ability to consent to search of the bag

II. The Court Appeals erred in reversing the possession with intent to distribute conviction because, given the overwhelming evidence against White, any error in admitting the evidence from the bag was harmless.

STATEMENT OF FACTS

On October 18, 2013, at approximately 11:10pm, investigators of the Norfolk Police Vice and Narcotics Division responded to the Motel 6 located in Norfolk, VA, after receiving an anonymous complaint that someone was selling drugs there. (Joint Appendix pg. 40). Officers of the Norfolk Police Department gave widely varying times as to when the call was received by them. Investigator Glenn Gardiola testified that "the call would have come in somewhere between 4:30 and 5p.m."; however Investigator Leldon Sapp testified he received the call "about 2300 hours, 11 o'clock p.m." (Joint Appendix pg. 44, 60). The caller did not identify himself. (Joint Appendix pg. 45). However, it was uncontroverted that the caller did not identify the race, gender, identity or description of the person alleged to be selling drugs at the Motel 6. (Joint Appendix pg. 45, 46, 71-72). Likewise, the caller did not testify as to the basis for his knowledge about the alleged drug transaction at the Motel 6.

Three (3) Norfolk Police Investigators arrive at the Motel 6, each getting out of the car and position themselves within arm lengths distance around defendant. (Joint Appendix pg. 63, 72-73). Defendant, an African American man, was leaning into the driver side window of a Caucasian woman. (Joint Appendix pg. 63). Defendant stepped away from the car

while holding cash in his right hand and a cell phone in his left hand. Investigators never saw defendant exchange anything with the driver of the vehicle. (Joint Appendix pg. 46, 74). Investigators, likewise never saw defendant engage in any unlawful behavior or furtive movements. (Joint Appendix pg. 46, 50). Gardiola testified he approached and "explained to him that I was advised that – I was following up on a phone call with regard to a complaint that there was suspected narcotics activity going on at the hotel." (Joint Appendix pg. 42, 73). Pursuant of Officer's request, defendant gave Officers his Virginia identification card. Officers ran defendant's information for outstanding warrants and it was determine that defendant did not have any outstanding warrants. (Joint Appendix pg. 51, 73). Officers testified that they did not think or have any reason to believe that defendant was armed or dangerous. (Joint Appendix pg. 74).

It was at this time, that Norfolk Police, assert that defendant granted them consent to search him. Investigator Sapp ("Sapp") testified that he patted down the right side of defendant's body and then began patting downing the left side of defendant's body. When he got to the defendant's lower left leg by his ankle, defendant attempted to push Sapp's hand away, move his left leg away, and flee the scene. (Joint Appendix pg. 53-54, 65, 69-70, 75). Without seeing what was in the defendant's sock and relying

totally on his sense of feel, Officers grabbed defendant and wrestled him to the ground. (Joint Appendix pg. 75-76). It was only after defendant was subdued by officers, was Sapp able to recover the item in defendant's sock, which turned out to be Heroin.

Defendant was arrested and place in a secure police cruiser. He asked investigators to notify his girlfriend, Tanya, in Room 219 that he had been arrested. Investigators went to the room and made contact with Tanya. She agreed and permitted him to search the room. Sapp did not check to see who had rented the room. He merely "assumed" that Tanya was "the lessee" because she "seemed to have control" of it. Upon reaching a closed bag, Investigators asked Tanya who that particular bag belonged to and she replied that the bag belonged to defendant. (Joint Appendix pg. 91). Without a search warrant or the consent of defendant, Norfolk Police Investigator opened and searched defendant's bag from which the recovered, among other things, a digital scale and two hundred (200) gelatin capsules. (Joint Appendix pg. 91).

Sapp testified separately about the bag recovered from the motel room, stating that the items inside were paraphernalia used for distribution. He said that the digital scale found in the bag would be used to weigh the drugs and that the sandwich bags and capsules would be used to "break

down stuff . . . and double [one's] money." Finally, Sapp explained that users of drugs typically have "some[thing] . . . on them . . . to use [the drugs] with" and that a "big time user is going to use it through syringes." No such items were found on the defendant or in the bag.

The trial court found the evidence sufficient to convict the defendant of possession of heroin with intent to distribute, third or subsequent offense. The court stated that it had considered "the combination or the accumulation of all the various factors that leave the Court to conclude that beyond a reasonable doubt that the drugs that were recovered and the various other indicia of distribution . . . indicated that the amount of heroin [the appellee] had on his person that day" proved an intent to distribute. (Joint Appendix 152)

STATEMENT OF THE CASE

Defendant was indicted on one (1) count of Possession with the Intent to Distribute 3rd Offense in violation of Va. Code §18.2-248(C) and Possession of Marijuana in violation of Va. Code §18.2-250.1.

Defendant filed Motion to Suppress on May 7, 2014. That Motion was heard on December 1, 2014, before the Honorable Judge Jerrauld C. Jones. Defendant and Commonwealth Attorney both submitted subsequent memorandums to court, pursuant to the Judge's request.

(Joint Appendix pg. 95). Judge Jones formally denied defendant's Motion to Suppress by opinion letter dated March 3, 2015, although he informed both counsel by email on February 3, 2015 that defendant's Motion was denied. (Joint Appendix pg. 160).

On February 23, 2015, Defendant was tried in the Norfolk Circuit Court with Judge Mary Jane Hall, presiding. Defendant was found guilty on all the offenses for which he was charged. (Joint Appendix pg. 158-159). Defendant was sentenced on March 30, 2015. Defendant timely noted his appeal.

On May 10, 2016, the Court of Appeals affirmed in part and reversed in part the decision of the trial court. White v. Commonwealth, 66 Va. App. 333, __, 785 S.E.2d 239, __, 2016 Va. App. Lexis 151, (2016). The Commonwealth appealed the Court of Appeals decision.

ARGUMENT

I. The Court Appeals Did Not Err in Finding that the Defendant Had a Reasonable of Privacy in the Bag and that His Girlfriend Did Not Have Apparent Authority to Consent to Its Search

Defendant's argument on appeal, pertaining to this particular assignment of error, is that defendant's girlfriend did not have the authority to consent to the search defendant's bag and that any conclusion by the

police that his girlfriend had the authority to consent to searching the backpack was objectively unreasonable as a matter of law. Police had specific or direct knowledge, at the time of the search that the backpack belonged to defendant and did not belong to the person authorizing consent to search the hotel room.

The Fourth Amendment protects people from unreasonable searches and seizures. E.g., Jones v. Commonwealth, 279 Va. 521, 527, 690 S.E.2d 95, 99 (2010). Whether a warrantless search or seizure violated the Fourth Amendment presents a mixed question of law and fact. Id. The appellate court views the evidence in the light most favorable to the prevailing party, granting to the evidence all reasonable inferences fairly deducible from it. Riner v. Commonwealth, 268 Va. 296, 303, 601 S.E.2d 555, 558 (2004). We are "bound by the trial court's findings of historical fact unless 'plainly wrong'" and "give due weight to the inferences drawn from those facts" by the trial judge and law enforcement. McGee v. Commonwealth, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*). Ultimately, however, the Court reviews *de novo* the overarching question of whether a search or seizure violated the Fourth Amendment. Glenn v. Commonwealth, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008).

Warrantless searches and seizures are "presumptively

unreasonable" under the Fourth Amendment. See Harris v. Commonwealth, 241 Va. 146, 152, 400 S.E.2d 191, 195 (1991). Nevertheless, "courts recognize exceptions to this general rule in several circumstances, including when a party voluntarily consents to the search." Glenn, 275 Va. at 130, 654 S.E.2d at 913.

The officers lacked authority to search the bag because, although his girlfriend consented to a search of the motel room itself, she identified the bag as belonging to the defendant and the police did not obtain his consent prior to examining the bag's contents.

Any lack of an objectively reasonable expectation of privacy in the room does not resolve the question of whether he nevertheless maintained such an expectation in the bag and its contents. See Rakas v. Illinois, 439 U.S. 128, 142 n.11, 149 n.16 (1978); see also, e.g., State v.Callari, 478 A.2d 592, 595-96 (Conn. 1984) (noting that although the defendant could not challenge the search of a residence, he was "not precluded from contesting the search of his suitcase" because due in part to his ownership of it, "he possesse[d] an expectation of privacy in it").[1]

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[1] Courts have reached this conclusion under both traditional "standing" analysis and the "reasonable expectation of privacy" analysis of Rakas, 439 U.S. at 139-40. Compare United States v. Fultz, 146 F.3d 1102, 1106 (9th Cir. 1998) (plastic bags and cardboard boxes), and United States v. Alberts, 721 F.2d 636, 639-40 (8th Cir. 1983) (trash

Determining whether the defendant had a reasonable expectation of privacy in the bag located in the motel room involves an overlapping two-pronged test. A defendant must first show "that he personally ha[d] an expectation of privacy in the place [or thing] searched." Rideout v. Commonwealth, 62 Va. App. 779, 786, 753 S.E.2d 595, 599 (2014) (quoting Minnesota v. Carter,525 U.S. 83, 88 (1998)). In evaluating this prong, the Court must determine "whether the individual, by his conduct has 'exhibited an actual (subjective) expectation of privacy,' [*i.e.*,] whether . . . the individual has shown that 'he seeks to preserve [the place or thing] as private.'" Id. at 787, 753 S.E.2d at 599 (citation omitted) (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)).

Second, a defendant must establish that his expectation "[was] objectively 'reasonable' based on 'a source outside of the Fourth Amendment.'" Sanders v. Commonwealth, 64 Va. App 734, 744, 772 S.E.2d 15, 20 (2015) (quoting Rideout, 62 Va. App. at 786, 753 S.E.2d at 599). The defendant may prove such an expectation "by reference to either:

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bags), with Combs v.United States, 408 U.S. 224, 225-28 (1972) (*per curiam*) (remanding for a standing determination where the defendant had no property interest in the searched premises but owned goods stored on them), and Simmons v. United States, 390 U.S. 377, 391 (1968) (noting that the defendant could prove standing to object to the search of a suitcase found on the premises of another by "testify[ing] that he was its owner").

(1) ‘concepts of real or personal property law’ or (2) ‘understandings that are recognized and permitted by society.’” Id. (quoting United States v. Jones, 132 S. Ct. 945, 951 (2012)). “In determining whether an expectation of privacy is objectively reasonable, a court looks to the totality of the circumstances . . . .” Atkins v. Commonwealth, 57 Va. App. 2, 13, 698 S.E.2d 249, 254 (2010). Those circumstances include “whether the defendant has a possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.” United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir. 1981), quoted with approval in McCoy v. Commonwealth, 2 Va. App. 309, 312, 343 S.E.2d 383, 385 (1986). Whether the defendant had an objectively reasonable expectation of privacy “based on a property interest or other societal norm . . . is a legal determination that we review *de novo*.” Sanders, 64 Va. App. at 744, 772 S.E.2d at 20.

Regarding the defendant’s *subjective* expectation of privacy, the Commonwealth’s evidence established that the defendant left the bag with his girlfriend Tanya in the motel room, which was only a short distance from

where the officers encountered him in the motel parking lot. No one else was present in the motel room, and Investigator Sapp concluded that Tanya was the lessee because she "seemed to have control" of the room. The evidence also showed that the defendant planned to reunite with his girlfriend after the drug transaction ended, as indicated by his request to the officers to go to the room and notify her of his arrest. Additionally, before Sapp looked inside the bag, Tanya told him that the bag belonged to the defendant. She made no claim of joint ownership.

Further, no evidence in the record indicates that the defendant disclaimed ownership of the bag or its contents. See Commonwealth v. Holloway, 9 Va. App. 11, 18, 384 S.E.2d 99, 103 (1989). Finally, nothing suggests that the bag was open or transparent, thereby placing its contents in plain view, or that the nature of any of its contents was otherwise discernable through the plastic based on a distinctive shape. Consequently, the evidence establishes that the defendant exhibited a subjective expectation of privacy in the contents of the bag.

Regarding whether the appellee's subjective expectation of privacy in the bag was one that society is prepared to recognize as *objectively* reasonable, we first note that the Fourth Amendment "protects alike the 'traveler who carries a toothbrush and a few articles of clothing in a

paper bag' and 'the sophisticated executive with the locked attaché case.'" Smith v. Ohio, 494 U.S.541, 542 (1990) (*per curiam*) (quoting United States v. Ross, 456 U.S. 798, 822 (1982)), quoted with approval in Al-Karrien v. Commonwealth, 38 Va. App. 35, 42, 561 S.E.2d 747, 751 (2002); see Arnold v. Commonwealth, 17 Va. App. 313, 316-17 & n.1, 437 S.E.2d 235, 237 & n.1 (1993).

Additionally, we observe that the easy cases in which to determine whether one maintains an objectively reasonable expectation of privacy in personal property lie at the poles. At one extreme, an individual generally maintains such an expectation in an item on or adjacent to his person. See Arnold, 17 Va. App. at 316, 437 S.E.2d at 237. Conversely, one who discards an item or leaves it unattended in a public place is usually deemed to have abandoned any objectively reasonable expectation of privacy in it. See Knight v. Commonwealth, 61 Va. App. 297, 308-09, 734 S.E.2d 716, 722 (2012).

Here, the appellee's behavior regarding the bag and its contents fell between these two extremes. Even viewed in the light most favorable to the Commonwealth, that the appellee retained an expectation of privacy in the contents of the bag that society was prepared to recognize as objectively reasonable. The items were inside the bag, and no evidence

indicates that the character of the items was apparent from outside the bag.

The appellee left the bag in the motel room with his girlfriend, who was alone in the room when law enforcement arrived. The police believed that she had control of the room, and the evidence showed that the defendant intended to reunite with her after the drug transaction. See United States v. Morgan, 936 F.2d 1561, 1570-71 (10th Cir. 1991) (observing that leaving an item in the care of another may refute an intent to abandon it); cf. Knight, 61 Va. App. at 309 n.5, 734 S.E.2d at722 n.5 (noting in *dicta* that an owner generally retains a reasonable expectation of privacy even in lost property, subject to the finder's examining it to identify its owner). Further, before the search occurred, the appellee's girlfriend specifically identified the bag as belonging to the appellee. These facts prove that the appellee retained an objectively reasonable expectation of privacy in the bag.

Once a defendant establishes that he had a reasonable expectation of privacy in an item and that the police searched it without a warrant, the burden shifts to the Commonwealth to prove that an exception to the warrant requirement rendered a search of the item reasonable. See, e.g., Megel v. Commonwealth, 262 Va. 531, 534, 551 S.E.2d 638, 640

(2001). The Commonwealth contends here that the appellee's girlfriend had authority to consent to a search of the defendant's bag and in fact did so.

Glenn v. Commonwealth*, 275 Va. 123; 654 S.E.2d 910, (2008)*, a Virginia Supreme Court case, is the controlling case on this matter. In Glenn, the Court found that a grandfather had apparent authority to permit a search of a bag that was recovered from his grandson's room, which was located in his home. Glenn was arrested when he answered the front door of his grandparent's home. Glenn's grandfather indicated that he owned the home and allowed search of the home, which police had learned Glenn resided. Glenn was detained in the living room with his grandfather and police during the conversation and search and did not "protest the search of the rooms or any containers in those rooms". *Id*. at 3.

Police searched a bedroom and found a closed backpack, which the court noted "had no outward indicia of ownership". *Id*. at 3. The Court "held it was objectively reasonable for the police officer to conclude Brooks' consent to search included the authority to consent to a search of the backpack. The Court further stated "that some ambiguity attended the ownership and ability to access the backpack as the police officer seized

and searched it. As noted above, it bore no identifying indicia and could as logically have belonged to Brooks as it could to Glenn." *Id* at 14.

This is markedly different from the instant case in several important regards. First, there was no ambiguity over the ownership of the bag. Tanya, the person giving consent, un-equivocally stated that the bag belonged solely to the Appellee. (Joint Appendix pg. 91).

Second, Appellee was not in position to object or consent, as was Glenn. In the instance case, Appellee was downstairs in police custody. (Joint Appendix pg. 91-92). Unlike Glenn, who was present and could object or consent, Appellee was not in a position to do either.

These factual differences between Appellee's case and the *Glenn* case, require suppression of all evidence recovered from the search of the bag that was recovered from the Police search of hotel room.

A consent search by law enforcement officers may be "reasonable when conducted pursuant to voluntary consent offered not by the defendant . . . but by a third party who shares access to the. . . object being searched." Glenn, 275 Va. at 130, 654 S.E.2d at 913. The person authorizing the search can be one with either actual or apparent authority. Id. at 132, 654 S.E.2d at 914. The Commonwealth has not argued that Tanya had actual authority to consent to the search of

Appellee's bag.

Actual authority exists where the third party has "(1) mutual use of the property by virtue of joint access[] or (2) control for most purposes." Id. (quoting United States v. Andrus, 483 F.3d 711, 716 (10th Cir. 2007)). However, the mere fact that a container owned by one person is located on residential premises belonging to or under the control of another does not mean that the person in charge of the premises has actual authority to consent to a search of the container. Compare id. at 129, 133, 654 S.E.2d at 912, 915 (holding that where a container belonged exclusively to the defendant, who lived on particular premises with the owner's permission, the owner of the premises did not have actual authority to consent to a search of the container), with Frazier v. Cupp, 394 U.S. 731, 740 (1969) (holding that where a defendant left his duffel bag at his cousin's house and authorized the cousin to use the bag, the cousin "clearly had authority to consent to its search").

If actual authority is lacking, apparent authority may render the search reasonable. Apparent authority exists "when an officer reasonably, even if erroneously, believes the third party possesses authority to consent" to the search. Glenn, 275 Va. at 133, 654 S.E.2d at 914 (quoting Andrus, 483 F.3d at 716). Whether apparent authority exists is an objective inquiry

that requires examination of the totality of the circumstances to determine "whether the facts available to the officers at the time they commenced the search would lead a reasonable officer to believe the third party had authority to consent to the search." Id. (quoting Andrus, 483 F.3d at 716-17).

Ordinarily, where a third party with actual or apparent authority provides a "general and unqualified consent for an officer to search a particular area, the officer does not need to return to ask for fresh consent to search a closed container located within that area." Vaughan v. Commonwealth, 53 Va. App. 435, 440, 672 S.E.2d 909, 912 (2009) (quoting United States v. Jones,356 F.3d 529, 534 (4th Cir. 2003) (citing Florida v. Jimeno, 500 U.S. 248, 251 (1991))); see also Glenn, 275 Va. at 135, 654 S.E.2d at 916 (noting that a "contrary rule would impose an impossible burden on the police" (quoting United States v. Melgar, 227 F.3d 1038, 1041 (7th Cir. 2000))).

However, if the consenter volunteers ownership information about a particular container or the police "ma[k]e [inquiry]," they "must be reasonable in drawing conclusions from the responses received." 4 Wayne R. LaFave, Search and Seizure § 8.3(g), at 245 n.171 (5th ed. 2012); see Glenn, 275 Va. at 135, 654 S.E.2d at 916 (stating that a

search is reasonable where the police "do not have reliable information that the container is *not* under the authorizer's control" (quoting Melgar, 227 F.3d at 1041)).

Applying these principles in Glenn, 275 Va. 123, 654 S.E.2d 910, the Supreme Court of Virginia held that consent to search a residence, coupled with an absence of information that any containers within the area belonged to someone other than the consenter, made it "objectively reasonable" for the officers to conclude that they had apparent authority to search a backpack in the residence. 275 Va. at 133-34, 136, 654 S.E.2d at 915, 916. The Court noted that the backpack could have belonged to any of the occupants of the premises and that "some ambiguity attended the ownership and ability to access the backpack." Id. at 134, 654 S.E.2d at 915. Nevertheless, it held that this ambiguity was not controlling on the issue of apparent authority and the search was reasonable. Id. The Court observed, by contrast, that if the backpack had "borne Glenn's name or other identifying marks," or if it had been "locked or secreted among possessions which were exclusively Glenn's, there would likely be few circumstances where an objectively reasonable police officer could conclude [that Glenn's grandfather, the owner of the premises,] had the authority to consent to a search of the bag." Id. at 133, 654 S.E.2d at 915.

The Supreme Court contrasted this situation with the facts in Krise v. State, 746 N.E.2d 957(Ind. 2001), which involved a man and a woman who shared an apartment. Glenn, 275 Va. at 136n.3, 654 S.E.2d at 916 n.3. The police obtained consent from the man to search the apartment in the woman's absence. Id. The Supreme Court of Virginia accepted the conclusion that the officer who searched a purse found in the house "knew that the handbag was a woman's purse and that Krise was the only woman living in the house." Id. (quoting Krise, 746 N.E.2d at 971). On those facts, the Supreme Court opined that the Indiana court "correctly held police could not have reasonably believed the [man] had the authority to consent to a search of the [woman's] purse." Id.

It was unreasonable for Investigator Sapp to conclude that the appellee's girlfriend had the authority to consent to the search of the bag because she specifically told Sapp that the bag belonged to the appellee. Sapp was not required to speculate about who owned it. See also, e.g., United States v. Zapata-Tamallo, 833 F.2d 25, 27 (2d Cir. 1987) (recognizing that consent to search provided by the owner of premises "is generally invalid when it is 'obvious' that the searched item belongs to a guest" (quoting United States v. Isom, 588 F.2d 858, 861 (2d Cir. 1977))). Compare United States v. Salinas-Cano, 959 F.2d 861, 863-65 (10th Cir.

1992) (holding that girlfriend lacked actual or apparent authority to consent to the search of her boyfriend's bag, which he stored in her apartment, because she identified the bag as his and no evidence indicated that she "exercised mutual use or possessed . . . joint interest and control over [it]"), with United States v. Ruiz, 428 F.3d 877, 881-82 (9th Cir. 2005) (holding that a resident had apparent authority to consent to the search of a gun case in plain view on a living room shelf even though he "disclaimed knowledge" regarding its contents because he "did not disclaim ownership of or access to the case").

Accordingly, it was unreasonable for Sapp to conclude that the appellee's girlfriend had apparent authority to consent to a search of the bag and had, in fact, given such consent.

II. The Court of Appeals Did Not Err in Finding that the Trial Court's Consideration of Illegally Seized Items in Reaching Its Verdict was Not Harmless Error

The Commonwealth contends that even if the search of the bag was error, the admission of evidence of the bag's contents was harmless. See Ferguson v. Commonwealth, 240 Va. ix, ix, 396 S.E.2d 675, 675 (1990). An error of constitutional magnitude, such as one involving a violation of the Fourth Amendment, is harmless only if the appellate court "[is] able to declare

a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967); see Clay v. Commonwealth, 262 Va. 253, 259, 546 S.E.2d 728, 731 (2001). This standard requires a determination of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Lilly v. Commonwealth, 258 Va. 548, 551, 523 S.E.2d 208, 209 (1999) (quoting Chapman, 386 U.S. at 23). Harmless error analysis is not "simply a sufficiency of the evidence analysis." Williams v. Commonwealth, 32 Va. App. 395, 400, 528 S.E.2d 166, 169 (2000) (*en banc*) (quoting Hooker v. Commonwealth, 14 Va. App. 454, 458, 418 S.E.2d 343, 345 (1992)). Therefore, an error does not affect the verdict only if we can determine, "without usurping the [trial court's] fact finding function, that had the error not occurred, the verdict would have been the same." Cairns v. Commonwealth, 40 Va. App. 271, 286, 579 S.E.2d 340, 347 (2003).

In convicting the defendant, the trial judge expressly stated that she considered "the combination . . . of all the various factors," including "the drugs . . . and various other indicia of distribution." This reference is clearly broad enough to encompass the digital scale, box of empty plastic bags, and 200 empty capsules found in the bag in the motel room.

The Commonwealth is not asking this court to determine what degree of consideration the trial court gave one individual piece of evidence, but to determine what degree of consideration the court gave three separate pieces of evidence, including the consideration of the pieces of the evidence collectively, the digital scale, the empty plastic bags, and 200 empty capsules found in the bag.

The Commonwealth cites Williams v. Commonwealth, 278 Va. 190, 677 S.E.2d 280, (2009), McCain v. Commonwealth, 545 S.E.2d 541, 261 Va 483 (2001), Weishman v. Commonwealth, 28 Va. App. 20, 502 S.E.2d 122 (1998), and Gregory v. Commonwealth, 22 Va. App. 100, 468 S.E.2d 117 (1996). None of these cases are "harmless error" cases. All of these cases are "sufficiency of the evidence" cases. Harmless error analysis is not "simply a sufficiency of the evidence analysis." Williams v. Commonwealth, 32 Va. App. 395, 400, 528 S.E.2d 166, 169 (2000) (*en banc*) (quoting Hooker v. Commonwealth, 14 Va. App. 454, 458, 418 S.E.2d 343, 345 (1992)).

Based on the record, it cannot determine beyond a reasonable doubt, without usurping the trial court's fact finding function, that the disputed evidence was merely cumulative and that the outcome would have been the

same without the improperly admitted evidence from the bag. Consequently, the erroneous admission of the evidence was not harmless.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals' holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 3, 2017, the Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were sent via third party commercial carrier to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

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