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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161676

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JAMES WILLIS CAMPBELL, SR.

Appellee.

REPLY BRIEF FOR THE COMMONWEALTH

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REPLY BRIEF FOR THE COMMONWEALTH

This Court should reverse the judgment of the Court of Appeals of Virginia and affirm James Willis Campbell, Sr.'s conviction because (1) law enforcement officers entered the shed where Campbell was manufacturing methamphetamine in the presence of probable cause and exigent circumstances; (2) a failure to comply strictly with Code § 19.2-54 does not invalidate what would otherwise be a ***valid warrantless*** search that is justified by probable cause and exigent circumstances; and (3) the law enforcement officers relied in good faith on the warrant that was not properly transmitted to the clerk's office pursuant to Code § 19.2-54.

Campbell does not effectively rebut these arguments, which were made in more detail in the Commonwealth's opening brief. (Commonwealth's Opening Br. at 18-36). Campbell does raise a number of arguments that the Commonwealth will now address in this reply brief. Under Virginia precedent, Code § 19.2-54 need not explicitly state that evidence may be admitted pursuant to an exception of exclusionary rule for such evidence to be admissible. Furthermore, in determining whether the good faith exception to the exclusionary rule applies, a court considers the totality of the circumstances and, under the totality of the circumstances in this case, Officer Begley and the other law enforcement officers relied on the search warrant in good faith.

ARGUMENT

I. Code § 19.2-54's lack of a provision allowing for the admission of evidence under an exception to the exclusionary rule does not mandate suppression of evidence obtained in a lawful warrantless search supported by probable cause and exigent circumstances.

Campbell fails to challenge meaningfully the Commonwealth's argument that Code § 19.2-54[1] only invalidates searches "made under the warrant" and does

[1] Code § 19.2-54 provides in pertinent part:

> Failure of the [judicial] officer issuing such warrant to file the required affidavit shall not invalidate any ***search made under the warrant*** unless such failure shall continue for a period of 30 days. If the affidavit is filed prior to the expiration of the 30-day period, nevertheless, evidence obtained in any such search shall not be

not require suppression of evidence if the evidence could have been obtained during an otherwise reasonable warrantless search justified by probable cause and exigent circumstances.

Campbell turns Virginia jurisprudence on its head when he argues that because Code § 19.2-54 "contains no provision that the evidence should be suppressed unless the search is saved by an exception to the Fourth Amendment's warrant requirement," a failure to comply strictly with the requirements of Code § 19.2-54 renders what would otherwise be a valid warrantless search invalid. (Appellee's Br. at 8). Campbell cites no authority to support that proposition and it is at odds with Virginia precedent refusing to suppress evidence where suppression is not explicitly mandated by statute. See, e.g., Horne v. Commonwealth, 230 Va. 512, 518-19, 339 S.E.2d 186, 191 (1986) (refusing to suppress a confession obtained during a constitutionally permissible detention that nonetheless violated Virginia Code and Rule 3A:5(a)(3), where Virginia Code did not require suppression); Tharp v. Commonwealth, 221 Va. 487, 490, 270 S.E.2d 752, 754-55 (1980) (holding that Code § 19.2-76, requiring presentation before a magistrate of a certain territorial jurisdiction, is procedural, not rising to constitutional dimension

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> admissible until a reasonable time after the filing of the required affidavit.

(Emphasis added.)

and not requiring application of exclusionary rule). As the Court of Appeals of Virginia has accurately noted, "Historically, searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression unless the statute supplies that right." Troncoso v. Commonwealth, 12 Va. App. 942, 944, 407 S.E.2d 349, 350 (1991) (citations omitted). Thus, the General Assembly's omission of a provision allowing the application of an exception to the exclusionary rule does not preclude the application of such an exception.

II. The totality of the circumstances demonstrates that Officer Begley acted in good faith when he relied on the search warrant that the magistrate signed and gave to him.

Campbell argues that the missing affidavit precludes this Court from determining whether Officer Begley acted in good faith. (Appellee's Br. at 12-13). This argument ignores this Court's precedent requiring the consideration of the totality of the circumstances, not just the sworn affidavit, in a good-faith analysis. While the probable-cause determination for a warrant considers "only those sworn, written facts stated in the search warrant affidavit," Adams v. Commonwealth, 275 Va. 260, 270, 657 S.E.2d 87, 93 (2008) (citing Whitely v. Warden, 401 U.S. 560, 565 n.8 (1971)), a determination as to whether an officer acted in good faith "takes into account the totality of the circumstances," Id. at 272, 657 S.E.2d at 94 (citing State v. Edmonson, 598 N.W.2d 450, 461 (Neb. 1999) (a court, "in assessing the good faith of an officer's conducting a search pursuant to a warrant, . . . must look

to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit")). Courts "can, and should, 'look to the totality of the circumstances including what [the executing police officers knew but did not include in [the] affidavit' when conducting the good faith analysis." Id. at 270, 657 S.E.2d at 93 (quoting United States v. Martin, 833 F.2d 752, 756 (8th Cir. 1987)) (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987) (explaining that when assessing good faith of police officer who conducted warrantless search, "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials" and that the relevant question is objective though fact-specific)).

In Adams, the appellant argued that the affidavit lacked probable cause because it failed to establish "a nexus between the residence to be searched" and the appellant or the offense. 275 Va. at 266, 657 S.E.2d at 90. This Court held that the totality of the circumstances, which included both the affidavit and "the knowledge that an officer in the searching officer's position would have possessed," supported a finding that the executing officers acted in good faith. Id. at 273-75, 657 S.E.2d at 94-96 (citation omitted). The Adams Court reasoned:

> To confine the good-faith analysis to the facts set forth in the four corners of the search warrant affidavit (even if the analysis also

> considers additional information presented to the magistrate) changes the focus of the inquiry from the objective good faith of a reasonably well-trained police officer to a magistrate's determination of probable cause. It also leads to the exclusion of competent evidence in the prosecution's case in chief even though reasonably well-trained police officers acted in objective good-faith reliance on a search warrant. This approach undermines the purposes of both the exclusionary rule and its good-faith exception.

275 Va. at 273, 657 S.E.2d at 94.

Thus, this Court's good-faith analysis is not limited to the search warrant affidavit and must include the information known to Officer Begley at the time he sought the search warrant.

III. Robinson v. Commonwealth does not preclude applying the good faith exception.

Campbell is wrong that Robinson v. Commonwealth, 19 Va. App. 642, 453 S.E.2d 916 (1995), precludes applying the good faith exception. To be sure, the good faith exception is not without limitations. It is not available:

> (1) Where the magistrate was misled by information in the affidavit which the affiant knew was false or should have known was false, (2) the issuing magistrate totally abandoned his judicial role, [or] (3) the warrant was based on an affidavit "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable . . . .

Robinson, 19 Va. App. at 647, 453 S.E.2d at 918.

But those circumstances are not presented here. Rather, this case presents a novel set of circumstances because the original affidavit that the magistrate faxed to the clerk's office is unavailable. The hard copy was not preserved by the

magistrate's office and, due to a technological malfunction, the complete affidavit was not transmitted to the clerk's office. In any event, Officer Begley testified, in response to cross-examination by Campbell, that the affidavit that he retained was the affidavit that he "testified to before the magistrate." (App. 188). He further testified that he "stated exactly what's in there" to the magistrate. (App. 188-89). Ultimately, the magistrate signed the affidavit that Begley retained and returned it to him with the search warrant. (Opening Brief Addendum 1-2; App. 87-90). Campbell was provided a copy of Begley's affidavit in early 2015, approximately 6 months prior to trial. (App. 22, 64, 98). No evidence was presented that the affidavit retained by the magistrate included any information with respect to probable cause that was not identical to the information contained in the affidavit that Begley retained.

Campbell is mistaken that the first Robinson exclusion applies on the theory that he cannot determine "whether the affiant knew or should have known that the affidavit that was presented to the magistrate was false." (Appellee's Br. at 12). He argues that he had "no way to challenge the veracity of the affiant" because there is no proof of what the affiant conveyed to the magistrate. (Appellee's Br. at 12). But where the magistrate signed the affidavit retained by Begley (signifying that he read the affidavit), Begley testified to the same facts before the magistrate, and Campbell possessed Begley's affidavit approximately 6 months before trial,

Campbell ***did*** in fact have an opportunity to determine whether the information upon which the warrant was executed was false. Cf. Quintana v. Commonwealth, 224 Va. 127, 136, 295 S.E.2d 643, 646-47 (1982) (considering the affiant's testimony that the challenged affidavit was the one he subscribed before the magistrate in determining there was probable cause to support an affidavit and that the affidavit filed with the clerk for the information of the accused was the same affidavit upon which the probable cause finding was based).

The Commonwealth addressed in its opening brief why the second Robinson exclusion should not apply. (Opening Br. at 35).

Campbell's effort to fit within the third Robinson exclusion founders because he ignores the totality-of-circumstances test. Campbell claims that the exclusion applies because when the affidavit filed in the clerk's office is considered alone, it is "'so lacking in indicia of probable cause' as to render official belief in its existence unreasonable." (Appellee's Br. at 13). He does ***not*** argue that probable cause did not exist, nor does he claim that the affidavit retained by Begley did not articulate probable cause. Instead, he claims that this Court cannot even engage in the good-faith analysis without the missing affidavit. But that argument plainly ignores the totality of the circumstances. Begley prepared and presented a probable-cause affidavit, in triplicate, to the magistrate. He testified that the affidavit that he retained was the affidavit that he "testified to

before the magistrate." (App. 188). He further testified that he "stated exactly what [was] in [the affidavit]" to the magistrate. (App. 188-89). The magistrate signed the affidavit that Begley retained and returned it to him with the search warrant. (Opening Brief Addendum 1-2; App. 90). Indeed, Begley's copy bore the magistrate's original signature in blue ink. (App. 110, 128; Opening Brief Addendum 1-2).

Given those circumstances, Begley relied on the warrant in good faith because "a reasonably well trained officer would [not] have known that the search was illegal despite the magistrate's authorization." See United States v. Leon, 468 U.S. 897, 922 n.23 (1984) (quoted with approval in Adams, 275 Va. at 276, 657 S.E.2d at 96). Campbell's contrary claim stretches Leon to its breaking point. There was no way Begley could have anticipated that a ministerial or technological error would prevent the magistrate's copy of the affidavit from being filed in the clerk's office.

Accordingly, Robinson does not apply, the good-faith exception to the warrant requirement applies, and the circuit court properly denied the motion to suppress.

CONCLUSION

This Court should reverse the Court of Appeals' decision and affirm the judgment of the Circuit Court for Amherst County convicting James Willis Campbell, Sr., of manufacturing methamphetamine.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellant herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On July 13, 2017, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to Robert C. Goad, III, counsel for the appellee, at mail@shradergoadlaw.com In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 2093 words and is within the page limit allowed under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

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