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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 170732

TYSON KENNETH CURLEY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

On August 17, 2015, a Pittsylvania County grand jury indicted Tyson Kenneth Curley on one count of possession with intent to distribute cocaine, possession of a firearm by a convicted felon, possession of a firearm while in possession of cocaine with intent to distribute, and possession of marijuana. App. 1-4. On October 30, 2015, Curley filed a motion to suppress, in which he argued that "the officers did not have a reasonable and articulable suspicion of criminal

behavior or any other constitutionally sound grounds to search the defendant or the vehicle he was operating." App. 5. After a hearing on November 16, 2015, the trial court denied that motion to suppress and accepted Curley's conditional guilty pleas. App. 14-15, 145-53. The trial court sentenced Curley to thirteen years and thirty days in prison, and suspended eight years, nine months, and thirty days of Curley's sentence. App. 16-18.

On appeal, Curley argued that the officers lacked probable cause to search his vehicle. In a *per curiam* order entered on September 7, 2016, the Court of Appeals rejected Curley's argument and affirmed his conviction. App. 22-25. A three-judge panel of the Court of Appeals likewise denied the petition for appeal on October 17, 2016. App. 26.

ASSIGNMENT OF ERROR

The Court has granted review of the following assignment of error:

> The Court of Appeals erred by finding that Investigators Wyatt and Owens had not violated the defendant's Fourth Amendment rights when they entered the defendant's vehicle.

STATEMENT OF FACTS

On October 8, 2014, Investigator H. S. Wyatt of the Pittsylvania County Sheriff's Office conducted a traffic stop of a vehicle driven by Curley for failure to have a front license plate. App. 69-70. As Investigator Wyatt exited his vehicle, he observed Curley leaning over the passenger seat. App. 71. As he approached,

Investigator Wyatt also saw a backpack in the front passenger seat of Curley's vehicle. App. 71.

When asked to present his identification, Curley responded that his driver's license was located inside the backpack. App. 72. Curley took approximately thirty seconds to retrieve his driver's license. App. 72. During that time, Curley was "bent all the way" over the backpack, "with his chest to the top of the bag." App. 72-73. As Curley handed over his driver's license, Curley appeared "very nervous," and Investigator Wyatt noted that his hand was shaking and that he was breathing heavily. App. 74-75. Investigator Wyatt testified that, based on his training and experience, Curley's movements made him concerned about the possibility that the vehicle contained weapons. App. 73.

Investigator J. L. Owens of the Pittsylvania County Sheriff's Office arrived to provide assistance to Investigator Wyatt. App. 84. After Investigator Wyatt shared the details of his encounter with Curley, Investigator Owens asked Curley to exit the vehicle for officer safety purposes. App. 84, 85. Investigator Owens then asked for consent to search the vehicle, which Curley refused. App. 84-85. When Investigator Owens asked for consent to search Curley's person, Curley responded that he did have anything illegal on him, but gave consent to be searched. App. 85. During this encounter, Investigator Owens observed that Curley appeared "overly nervous" and fidgety. App. 85.

During the search of Curley's person, Investigator Owens recovered a set of digital scales from Curley's right rear pants pocket. App. 86. Upon inspection, Investigator Owens observed "a white residue on the part of the scale where it would actually be used to weigh items." App. 86. Based on his training and experience as an expert in the field of narcotics investigations,[1] Investigator Owens believed the white powder on the scale was cocaine residue. App. 86.

Investigator Owens then conducted a search of Curley's vehicle based upon Curley's nervous demeanor, his furtive movements, and his possession of a digital scale covered with suspected cocaine residue. App. 97. Investigator Owens found a bag under the driver's seat containing three individually wrapped "rocks" of cocaine. App. 171. Near the front passenger seat, Investigator Owens found two glass jars, each containing small amounts of marijuana. He also found some plastic baggies, and a "Glock 19 nine millimeter handgun" in the same location. App. 171. Investigator Owens later recovered $369 in cash (consisting of 16 twenty dollar bills, 2 tens, 3 fives, and 14 ones) from inside Curley's sock during a second search of his person. App. 171.

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[1] Investigator Owens testified that he had approximately nine years of experience in conducting narcotics investigations. App. 87. He also testified that he had completed several, ongoing training sessions in the identification of illegal substances. App. 87-90. The trial court found that he qualified as an expert in the field of narcotics investigations. App. 91.

As an expert in the field of narcotics investigations, Investigator Owens testified that Curley's possession of digital scales with white residue on them was "very consistent" with drug distribution and inconsistent with personal use. App. 93-94. He also concluded that the fact that Curley was not in possession of a smoking device was "very inconsistent" with personal use. App. 94. Investigator Owens testified that the large amount of cash, consisting mostly of twenty dollar bills, was consistent with drug distribution and inconsistent with personal use. App. 91-92. Finally, based on his training and experience, Investigator Owens concluded that, "when taken together, the three hundred sixty-nine dollars in cash, the types of bills being mostly twenties, the presence of digital scales, the white residue on those scales, and a [] lack of smoking device," were factors "definitely inconsistent with personal use." App. 95.

The trial court denied Curley's motion to suppress by finding that probable cause existed to support the search of the vehicle. App. 153. The trial court found:

> [T]he Commonwealth has established that we had a defendant [whose] vehicle was stopped for not having a tag. He's acknowledged in his own testimony he did not have a front tag on the vehicle. He says he wasn't nervous but Investigator Wyatt indicated he saw, he pulled him over, he could see him leaning over to the passenger side. He couldn't see what he was doing until he approached the vehicle, asked for his operator's license. He bent over and he could see a backpack, about thirty seconds before he retrieved his operator's license, handed it to, handed the operator's license to him. His hand was visibly shaken [sic]. He was acting very nervous. At that time he

> left and then that's when Investigator Owen[s] came in and Owen[s] was relayed from what Wyatt had told him and at that point he approached the defendant, asked him to step out of the vehicle. As previously indicated he did so for personal safety. I got him out of the vehicle for personal safety, then he patted him down pursuant to the consent, and that he was separating him from the bag, what had been relayed. And that Officer Owens indicated that he was overly nervous, fidgety, and that when he, as he exited the vehicle, but that he did consent to the search, he found the digital scale with the white residue on the back pocket and combined with the nervous behavior and what had been relayed as previously testified to him, he proceeded to search the vehicle. So the Court will find that the officer did have probable cause.

App. 152-53.

STANDARD OF REVIEW

"A defendant's claim that evidence was seized in violation of the Fourth Amendment presents mixed questions of law and fact that this Court reviews de novo on appeal." *Collins v. Commonwealth*, 292 Va. 486, 496, 790 S.E.2d 611, 616 (2016). This Court gives deference to the trial court's factual findings, but will independently determine whether the manner in which evidence was obtained meets the requirements of the Fourth Amendment. *Jones v. Commonwealth*, 277 Va. 171, 177, 670 S.E.2d 727, 731 (2009). "The defendant bears the burden of establishing that the denial of his suppression motion was reversible error." *Glenn v. Commonwealth*, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008).

ARGUMENT

The trial court and the Court of Appeals did not err in finding that there was probable cause to search Curley's vehicle.

While "[t]he Fourth Amendment generally requires police to secure a warrant before conducting a search[,] . . . there is an exception to this requirement for searches of vehicles." *Maryland v. Dyson*, 527 U.S. 465, 466 (1999). Under this "automobile exception," an officer may search a vehicle without first obtaining a warrant authorizing the search when there is probable cause to believe that the vehicle contains evidence of criminal activity. *Id.* at 467.

Probable cause exists whenever "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Jones*, 277 Va. at 178, 670 S.E.2d at 731 (quoting *United States v. Grubbs*, 547 U.S. 90, 95 (2006)).

> The legal standard of probable cause, as the term suggests, relates to probabilities that are based upon the factual and practical considerations in everyday life as perceived by reasonable and prudent persons. The presence or absence of probable cause is not to be examined from the perspective of a legal technician. Rather, probable cause exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.

Taylor v. Commonwealth, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981).

Probable cause requires only "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Ford v. City of Newport News*, 23

Va. App. 137, 143-44, 474 S.E.2d 848, 851 (1996). Probable cause is "less demanding than a standard requiring a preponderance of the evidence" and "does not demand any showing that such a belief be correct or more likely true than false." *Evans v. Commonwealth*, 290 Va. 277, 287, 776 S.E.2d 760, 765 (2015) (citations omitted).

Whether an officer has probable cause to search an automobile "is determined under an objective test based on a reasonable and trained police officer's view of the totality of the circumstances." *Brown v. Commonwealth*, 270 Va. 414, 419, 620 S.E.2d 760, 762 (2005). That determination requires "a consideration of the officer's knowledge, training and experience." *Cost v. Commonwealth*, 275 Va. 246, 251, 657 S.E.2d 505, 507 (2008). Accordingly, in determining whether probable cause exists, courts consider "what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control." *Brown*, 270 Va. at 419, 620 S.E.2d at 762 (quoting *Taylor*, 222 Va. at 820-21, 284 S.E.2d at 836).

Consistent with these principles, the trial court and the Court of Appeals correctly determined that the facts and circumstances of this case provided the officers with probable cause to search Curley's vehicle. Here, the evidence established that Curley made furtive movements towards the passenger seat of his vehicle as Investigator Wyatt approached. The investigator noted that Curley

appeared "very nervous," that his hands were shaking, and that he was breathing heavily throughout their interactions. While Curley retrieved his driver's license, he positioned himself so as to obscure the contents of the backpack from observation by Investigator Wyatt. Investigator Wyatt testified, based on his training and experience, that Curley's actions made him concerned about the possibility that the vehicle contained weapons.

After Investigator Wyatt relayed that information to Investigator Owens, Owens then independently observed Curley's "overly nervous" and fidgety behavior. After receiving consent to search Curley's person, Investigator Owens recovered a set of digital scales from his right rear pants pocket. Upon inspection, Investigator Owens observed a white residue on the scales that he believed to be cocaine residue based on his extensive training and experience as an expert in the field of narcotics investigations.

Based on the totality of these facts and circumstances, a reasonable law enforcement officer with Investigator Owens's knowledge, training and experience could reasonably conclude that there was "a fair probability" that Curley's vehicle contained "contraband or evidence of a crime." *Jones*, 277 Va. at 178, 670 S.E.2d at 731. Investigator Owens thus had probable cause to search Curley's vehicle for suspected contraband. The trial court did not err when it denied Curley's motion to

suppress and the Court of Appeals did not err when it affirmed the judgment of the trial court.[2]

Curley's reliance on this Court's decision in *Brown* in misplaced. In *Brown*, a police officer observed the defendant sleeping in the passenger seat of a vehicle while holding a partially burned, hand-rolled cigarette. *Id.* at 417, 620 S.E.2d at 761. The police officer testified that, based on his nineteen years of law enforcement experience during which he saw over 100 hand-rolled cigarettes each containing a controlled substance, he "knew" Brown's hand-rolled cigarette contained a controlled substance. *Id.* Based *solely* upon the observation of the hand-rolled cigarette, the officer arrested and searched the defendant. *Id.* The search of the defendant's person produced evidence of small amounts of cocaine and heroin, and the defendant was ultimately charged with and convicted of the possession of both substances. *Id.*

This Court reversed Brown's convictions, holding that the officer lacked probable cause to arrest and search the defendant. *Id.* at 422, 620 S.E.2d at 764. The Court noted that probable cause cannot be established "*solely* on the

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[2] The *per curiam* order of the Court of Appeals relied in part upon "the large amount of cash on his person" to support its conclusion that the officers had probable cause to search Curley's vehicle. App. 24. However, it appears from the transcript that the cash was not discovered until *after* the search of vehicle. App. 102-03. Curley did not assign error to the judgment of the Court of Appeals on this basis, nor did he reference the *per curiam* order's reliance on that fact in his petition for appeal in this Court.

observation of material which can be used for legitimate purposes, even though the experience of an officer indicates that such material is often used for illegitimate purposes." *Id.* at 420-21, 620 S.E.2d at 763 (emphasis added). The Court further stated that, to establish probable cause, "such observations must be combined with some other circumstance indicating criminal activity." *Id.* at 421, 620 S.E.2d at 763.

Curley's effort to equate the digital scale found on his person with the hand-rolled cigarette in *Brown* falls flat. It is true that both items can sometimes be used for legitimate purposes. But here, unlike in *Brown*, the record contains *additional* circumstances indicative of criminal activity that establish probable cause to search the vehicle. Those circumstances include (1) the white residue on the scales that Investigator Owens believed to be cocaine residue based on his training and experience in identifying illegal substances, (2) both law enforcement officers' observation that Curley was "overly nervous" and fidgety throughout the encounter, (3) Curley's furtive movements towards the passenger seat of the vehicle as Officer Wyatt approached, and (4) Curley's furtive movements to obscure the backpack from the view of Investigator Wyatt while he retrieved his driver's license. These additional corroborating facts, especially when viewed in their totality, were enough to permit a person of reasonable caution to believe that

there was "a fair probability" that Curley's vehicle contained "contraband or evidence of a crime." *Jones*, 277 Va. at 178, 670 S.E.2d at 731.

For the same reasons, this case also is distinguishable from the post-*Brown* decisions on which Curley relies. Those cases simply reach the same conclusion as *Brown*: that probable cause cannot be established based *solely* on the observation of items that can be used for legitimate purposes. *See Buhrman v. Commonwealth*, 275 Va. 501, 507-08, 659 S.E.2d 325, 329 (2008) (reaffirming that possession of a hand-rolled cigarette, without more, is insufficient to establish probable cause); *Grandison v. Commonwealth*, 274 Va. 316, 321, 645 S.E.2d 298, 300-01 (2007) (holding that the police officer lacked probable cause to remove a dollar bill from Grandison's pocket because "the folded dollar bill was legal material with a legitimate purpose"); *Snell v. Commonwealth*, 275 Va. 472, 472-73, 659 S.E.2d 510, 510-11 (2008) (applying *Grandison* to facts that were "not materially distinguishable"). The scarcity of corroborative facts and circumstances indicative of criminality in these cases stands in stark contrast to the facts of the present matter.

Here, the totality of the circumstances established "a fair probability" that Curley's vehicle contained "contraband or evidence of a crime." *Jones*, 277 Va. at 178, 670 S.E.2d at 731. Accordingly, this Court should conclude that the officers had probable cause to search Curley's vehicle and affirm the judgment of the Court

of Appeals of Virginia affirming the judgment of the Circuit Court of Pittsylvania County.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia affirming the judgment of the Circuit Court of Pittsylvania County should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On April 5, 2018, a copy of this Brief was filed electronically with this Court and the required paper copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy the document was mailed and emailed to Gregory T. Casker, Esq., counsel for appellant, at Post Office Box 1095, 9 Payne Street, Chatham, Virginia 24531, gregcasker@yahoo.com. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 2,729 words.

The Commonwealth desires to present oral argument in this case.

/s/_____
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