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IN THE

Supreme Court of Virginia

RECORD NO. 170732

TYSON KENNETH CURLEY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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OPENING BRIEF OF APPELLANT

The Appellant, Tyson Kenneth Curley, respectfully represents to the Court that he is aggrieved by the final order of the three-judge panel of the Court of Appeals of Virginia.

The Appellant herein after shall be referred to as the Defendant and the Appellee as the Commonwealth. References to the Appendix will be indicated (App.).

STATEMENT OF THE CASE

The defendant was indicted on one count of possession of cocaine with intent to distribute, one count of possession of a firearm having been previously convicted of a non-violent felony, one count of possession of a firearm while possessing cocaine with the intent to distribute and one count of possession of marijuana. On November 16, 2015, a suppression motion hearing was held at which time both the Commonwealth and the Defendant presented evidence. At the conclusion of the hearing the trial court denied the defendant's Motion to Suppress. (App: 145-153) On that same date the defendant entered conditional pleas of guilty to the pending charges. (App: 155-175) On February 1, 2016 the defendant was sentenced to a total active sentence of 4 years and 3 months. (App:189-192)

The defendant subsequently filed his notice of appeal. A transcript of the proceedings was timely filed along with the record in the Court of Appeals of Virginia. A three-judge panel of the Court of Appeals denied the defendant's Petition for Appeal by order dated October 17, 2016. (App: 26) The Supreme Court of Virginia granted the defendant's motion for delayed appeal by order dated April 26, 2017. (App: 27) Pursuant to that order the defendant filed his Notice

of Appeal and Petition for Delayed Appeal with the Supreme Court of Virginia. By order dated January 30, 2018, the Supreme Court of Virginia awarded an appeal to the defendant. (App: 32)

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR BY FINDING THAT THE TRIAL COURT CORRECTLY HELD THAT THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN OFFICER OWEN SEARCHED THE DEFENDANT'S VEHICLE?
(The defendant preserved this issue at arguments made at the Motion to Suppress; App. 122-145)

STATEMENT OF FACTS

On November 16, 2015, a hearing on the defendant's Motion to Suppress was conducted. At that hearing Investigator H.S. Wyatt of the Pittsylvania County Sheriff's Office testified that on October 8, 2014, he conducted a traffic stop of the vehicle operated by the defendant for the failure of the vehicle to have a front license plate. (App: 69-70) The location of the stop was within a mobile home park, approximately 100 yards from the roadway. (App: 71; 101) As Investigator Wyatt exited his vehicle he noted that the defendant was leaning over to the passenger seat of the vehicle. As he approached

the defendant's vehicle he noted that there was a backpack in the passenger seat. (App. 71) Wyatt asked for the defendant's license and the defendant responded that it was in the backpack. Wyatt instructed the defendant to retrieve it from the backpack. The defendant bent over the backpack and retrieved his license; it took thirty seconds to produce the license. (App: 72) The defendant appeared nervous with heavy breathing and a shaking hand when he handed over the license. (App: 74-75)

Wyatt asked Investigator Owen, who had arrived at the scene, to ask the defendant for consent to search the vehicle because the defendant appeared nervous and there was a backpack in the defendant's car. (App: 73-74) Wyatt was approximately a car length away from Owen and the defendant when he heard Owen ask for consent and heard the defendant deny consent. (App: 75-76) Wyatt then heard Owen ask the defendant for consent to search his person and Wyatt did not hear the defendant's response despite being at the same location when he heard the request and response pertaining to the consent to search the vehicle. (App: 76-77)

Investigator J.L. Owens testified that after he arrived Wyatt relayed information to me that would make him believe there was

something going on with the defendant and the vehicle. (App: 84) Wyatt asked Owens to obtain from the defendant consent to search the vehicle. (App: 84) Consequently, Owen told the defendant to get out of the vehicle for safety purposes. (App: 84) The defendant appeared fidgety and nervous. (App: 85) Owens asked for permission to search the vehicle. The defendant refused permission to search vehicle and then Owen asked to search the defendant's person. Owen quoted the defendant as saying, "I don't have anything illegal but you can search me." (App: 84-85) Owens recovered a set of scales from the defendant's right rear pocket that had a white residue on them. (App. 86) Owens did not perform a preliminary test to determine whether the residue was cocaine or another illegal substance. (App: 103) No test was performed on the residue despite the fact that Investigator Owens had a Narc Kit that was used to field test substances that were later found in the vehicle. (App: 171)

Owens testified that he found three hundred sixty-nine dollars on the defendant's person <u>after</u> he searched the defendant's vehicle. (App: 102-103) Owens further testified that he searched the vehicle based upon the actions of the defendant relayed to him by Wyatt, the

nervousness of the defendant he witnessed and the presence of scales (App: 97)

The defendant testified that as Wyatt approached his vehicle he reached to his right to get his wallet that was under the dash. (App: 107-108) The defendant testified that Wyatt was the individual who asked for consent to search his vehicle and his person and that he denied consent to both requests. He testified that he did not speak to Investigator Owens at the scene. (App: 110-111) The defendant testified that Wyatt conducted the search of his person and that he found no scales, just a pocketknife. (App: 111) The defendant denied being nervous as he knew that the officer was stopping him for the missing license plate. (App: 113-114)

ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED BY FINDING THAT INVESTIGATOR OWENS HAD NOT VIOLATED THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WHEN HE ENTERED THE DEFENDANT'S VEHICLE
(The defendant preserved this issue at arguments made at the Motion to Suppress; App: 122-145)

STANDARD OF REVIEW

Where "the constitutionality of a search and seizure under the Fourth Amendment involves questions of law and fact, we give deference to the factual findings of the trial court but independently decide whether, under the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements." Jackson v. Commonwealth, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004)

ARGUMENT

INVESTIGATOR OWENS DID NOT HAVE PROBABLE CAUSE OF CRIMINAL ACTIVITY TO JUSTIFY A SEARCH OF THE DEFENDANT'S VEHICLE

Investigator Owens relied upon the presence of scales with a white residue that had been found on the defendant's person to justify his search of the defendant's vehicle. In Brown v. Commonwealth, 270 Va. 414, 620 S.E.2d 760 (2005) the Supreme Court of Virginia found that "probable cause cannot be established solely on the observation of material which can be used for legitimate purposes, even though the experience of an officer indicates such material is often used for illegitimate purposes." In the Brown case the officer saw the defendant holding a partially burned, hand-rolled cigarette. In

reversing the defendant's conviction, the Supreme Court of Virginia held that the rolled papers were also capable of having legitimate uses. That court also cited Harris v. Commonwealth, 241 Va. 146, 400 S.E.2d 191 (1991) where a pat down of defendant revealed a film canister, which the officer seized. In again reversing the defendant's conviction, the Supreme Court of Virginia opined that people possess film canisters for legitimate purposes and that it was of no moment that the officer had experience with canisters being used for non-legitimate purposes.

Additionally, in Buhrman v. Commonwealth, 275 Va. 501, 659 S.E.2d 325 (2008) a woman, who appeared drunk, was asked for her identification. Upon opening her car door an officer saw a hand-rolled cigarette. The Supreme Court of Virginia ruled that evidence of intoxication and vaguely suspicious actions do not suffice to indicate that the hand-rolled cigarette was being used for an legittimate purpose as opposed to legitimate and reversed the defendant's conviction.

Likewise, in Cost v. Commonwealth, 275 Va. 246, 657 S.E.2d 505 (2008), an officer witnessed a defendant reach across his body towards his pant pockets and refused to answer questions before he

conducted a pat down. The officer felt capsules in the defendant's pants pockets. In finding the subsequent seizure of the capsules as being unconstitutional, the Supreme Court of Virginia held that it must be immediately apparent to the officer that the item in the pocket is evidence of a crime before it can be seized from the pocket. In applying a totality of the circumstances analysis, the Court found that the fact that the defendant reached across his body towards his pocket and his refusal to answer questions was not enough to constitute probable cause.

It is clear from these cases that the mere fact that the defendant had a scale in his back pocket is insufficient to establish probable cause in that a scale may have a legitimate use as opposed to an illegitimate use. Likewise, the presence of an unidentified white residue on the scale gave Owens no better grounds to assume the scale was being used for an illegitimate purpose. Owens had the opportunity to determine whether the white residue was a narcotic as he had a narc kit with him, which he used to test items found inside the automobile after the search was conducted. However, he did not use the narc kit on the scale prior to his search of the vehicle.

Another factor used by the trial court and the Court of Appeals to justify the search was the defendant's behavior at the scene of the stop. It should be remembered that the analysis at hand is whether Investigator Owens had probable cause for the search. Investigator Wyatt testified as to his observations of the defendant when he approached the defendant's vehicle, but it is unclear as to what specifically he stated to Owens as to that behavior before Owens conducted his search. Owens testified that Wyatt "relayed information to me that would make me believe that there may be something going on with Mr. Curley in the vehicle." (App: 84) Owens never specified what Wyatt relayed. It is respectfully submitted that without that information it cannot be established that Owens had probable cause of criminal activity to conduct the search.

Assuming, *arguendo,* that it was established at the suppression hearing that Owens was aware of the fact that Wyatt saw the defendant reach over to the passenger side front seat where the backpack was located, that fact does not establish any viable suspicion of criminal activity. To the contrary, as the Supreme Court of Virginia held in Cost, the reaching across one's body on multiple

occasions does not give rise to an allowable conclusion that there is criminal activity afoot that would allow a permissive search.

In addition, conclusions that the defendant was “nervous” and observations that the defendant’s hands were shaking constitute what the Cost court deemed “well-educated hunch[s]” but insufficient to establish probable cause.

It is respectfully submitted that the Court of Appeals made an error when it cited the fact that the cash found on the defendant after the search had been found prior to Owens’ search of the vehicle. Owens testified that the cash was found after the search of the vehicle. (App: 102-103) This is important as the Court of Appeals relied on this mistaken fact in determining that the totality of circumstances allowed for the search. Specifically, the Court of Appeals listed the “large amount of cash on his person” (App: 24) as one of the facts that “provided more than a fair probability that the vehicle contained contraband and criminal evidence.” (App: 24)

Under a totality of circumstances analysis there simply was insufficient facts to establish probable cause to allow Investigator Owens’ search of the defendant’s vehicle. The defendant’s motion to suppress should have been granted and the evidence found in the

vehicle suppressed. Consequently, the defendant's convictions should be reversed and dismissed.

It is also respectfully submitted that the trial court's reliance on the case of Joyce v. Commonwealth , 56 Va. App. 646, 696 S.E.2d 237 (2010) is misplaced. The analysis pertaining to the application of probable cause involved the probable cause necessary to arrest a defendant who had committed a crime in the presence of the arresting officer. The search involved in that case was a search incident to arrest, not a warrantless search of a vehicle.

CONCLUSION

WHEREFORE, in consideration of the foregoing arguments, the Defendant prays this Court reverse the decision of the Court of Appeals and dismiss the charges against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email to Liam A. Curry, Assistant Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, on this the 12th day of March, 2018.

Gregory T. Casker /s/
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