CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
MAR 7 1977
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 761341

PHILLIP LACY MATTHEWS,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

APPENDIX

Joshua Pretlow, JR.,
PRETLOW, PRETLOW & MOORE, P. C.
104 Western Avenue
Suffolk, Virginia 23434

Counsel for Appellant

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

TABLE OF CONTENTS

		APPENDIX PAGES
1.	ARREST WARRANT & INDICTMENT	1-2
2.	JUDGMENT ORDER	3-4
3.	NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR	5-6
4.	TRANSCRIPT OF TESTIMONY AND OTHER INCIDENTS OF THE TRIAL HELD JUNE 10, 1976	7-16

COMMONWEALTH OF VIRGINIA

COUNTY [CITY] OF Suffolk

To Wit:

No.

ARREST WARRANT
(Rule 3A:4)

TO ANY SHERIFF, POLICE OFFICER, OR OTHER AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth forthwith to arrest

Phillip Lacy Matthews
(Name of accused, or a description by which the accused can be identified)

and to bring him (~~her~~) before the General District Court
(Designation of Court)

to answer a charge that he (~~she~~) committed an offense in the County (City) of Suffolk

on or about December 27th, 19 75,

namely (give a brief description of the offense)

Did unlawfully have in his possession a certain quantity of a controlled drug, to wit: Possession of marijuana, in violation of ~~Sec.~~ 18.2-250 of the Code of Virginia

N.G.

On the basis of the sworn statement(s) of 3/2 ✓ Tpr. R. H. McKinney, undersigned has found probable cause to believe the accused has committed the offense.

If a written complaint has been made, it is attached to the original of this warrant.

You are also commanded, in the name of the Commonwealth, to summon the following as witnesses:

Name _____ Address _____ ☐

Name _____ Address _____ ☐

Name _____ Address _____ ☐

Name _____ Address _____ ☐

Given under my hand and seal, this 27th day of Deeember, 19 75.

Virginia P. Smith (SEAL)
(Signature of Issuing Officer)

Magistrate
(Title of Issuing Officer)

COMMONWEALTH OF VIRGINIA,
COUNTY [CITY] OF Suffolk

Philip Lee Matthews and W.M. Underwood
(Name of accused) (Surety)

each (if more than one) acknowledges himself indebted to the Commonwealth of Virginia in the sum of Five hundred dollars ($ 500.00) and waives all benefit under the homestead exemption laws of the State of Virginia as to this obligation.

The condition of this obligation is that if defendant (Accused) shall appear personally before the General District (Designation of court) on the 24th day of Feb., 19 76, at 10 a.m.; and at any time or times to which the proceedings may be continued in that court or heard on appeal, to answer for the offense with which he is charged, and shall not depart without leave of the court and shall keep the peace and be of good behavior, then this obligation shall be void when final disposition of the charge is made; otherwise, this obligation shall remain in full force and effect until declared void and released by order of a competent court. Non-appearance before any court referred to herein shall be deemed to constitute a waiver of trial by jury.

Whenever the context so requires, the masculine shall be deemed to refer to the feminine or neuter and the singular to the plural.

Given under out hands and seals this 27 day of December, 19 75

(Name of corporate surety) (SEAL)

by W.M. Underwood
Attorney-in-fact (or title of signing officer)

Philip L. Matthews
(Accused) (SEAL)

(Individual Surety)

Acknowledged before me in my County (City) on the date last above written.

Virginia P. Smith
(Signature of acknowledging official)

Magistrate
(Title of acknowledging official)

(Address of surety)

DOCKET NO. 76-63

WARRANT OF ARREST

COMMONWEALTH vs. Phillip Lacy Matthews

3881 Bridge Road

Suffolk, Virginia

Executed this, the 27 day of Dec., 1975.

Tpr. R. H. McKinney
Serving Officer

T.D. 2-24-76

DISPOSITION OF CHARGE:

Appeal Noted
Jack Cottrell Jr.

3-23-76 P

30 days suspended

Fine $ 100.00

Costs 13.00
3.00

Total $ 116.00

JUDGE

to appear before the _____ Court of _____ County (City), Virginia, at _____, Virginia, at _____ M., on the _____ day of _____, 19__, under penalty of $ _____.

2

Fine $

Liquidated Damages $

COSTS

Warrant $ 1.00

Trial 10.00

~~Bail~~ B.F. 3.00

Arrest

Clerk of Court 2.00

Commital (Date _____)

Witnesses

Sheriff/Sergeant:

Fees

Mileage

Commonwealth Attorney

Weighing Fee

Reportable Violation D.M.V. ($5.00)

D.M.V. Abstract Fee ($04)

Blood (Sample $ _____ Analysis $ _____)

Court Appointed Attorney

Total Costs $ 16.00

COMMONWEALTH

V. Possession of Marijuana

1179 PHILLIP LACY MATTHEWS

This day came the Attorney for the Commonwealth and the defendant in person, and by his attorney, Joshua Pretlow, Jr.

Whereupon, the accused was arraigned and pleaded not guilty to the warrant charging that on or about the 27th day of December, 1975, the defendant did unlawfully have in his possession a certain quantity of a controlled drug, to-wit: Possession of marijuana, in violation of Section 18.2-250 of the Code of Virginia, which plea was tendered by the accused in person.

And thereupon, after being advised by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury, and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without a jury, and having heard the Commonwealth's evidence, the defendant, by counsel moved the Court to strike the Commonwealth's evidence on the grounds that the Commonwealth did not have probable cause for search and seizure, which motion was overruled and exception noted.

At the conclusion of the Commonwealth's evidence the defendant, by counsel, renewed his motion to strike the Commonwealth's evidence, which motion the Court doth overrule and exception noted.

Cn. Bk. 4
Pg 206
6-10-76

Whereupon, after taking into consideration all the evi dence in the case and argument of counsel, the Court doth find t accused guilty of possession of marijuana, as charged in the warrant.

The Court doth Adjudge and Order that the defendant is sentenced to confinement in jail for a period of thirty (30) days the execution of which sentence the Court doth suspend, and that the defendant pay and the Commonwealth of Virginia recover a fine of $100.00 and $33.50 costs.

The execution of which judgment of the Court is suspenc pending perfection of appeal and the defendant is allowed to remain on bond.

And the defendant is allowed to depart.

COMMONWEALTH OF VIRGINIA — Appellee

v. — POSSESSION OF MARIJUANA

PHILLIP MATTHEWS — Appellant

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO: Gloria H. Morgan, Clerk
Circuit Court of the City of Suffolk
Suffolk, Virginia 23434

Pursuant to the provisions of Rule 5:6, Phillip Matthews, Appellant in the above action, hereby gives notice of an appeal from the verdict and judgment rendered in this cause on June 10, 1976, wherein Appellant was convicted of Possession of Marijuana, and assigns the following error relating to the conviction of Possession of Marijuana:

> The Trial Court erred in admitting into evidence over objection matters which were seized from defendant without probable cause for search or seizure.

A transcript of the testimony in this case will be hereafter filed pursuant to Rule 5:9 of the Rules of Court.

Counsel does desire to be heard before the Supreme Court of Virginia.

Respectfully,

PHILLIP MATTHEWS

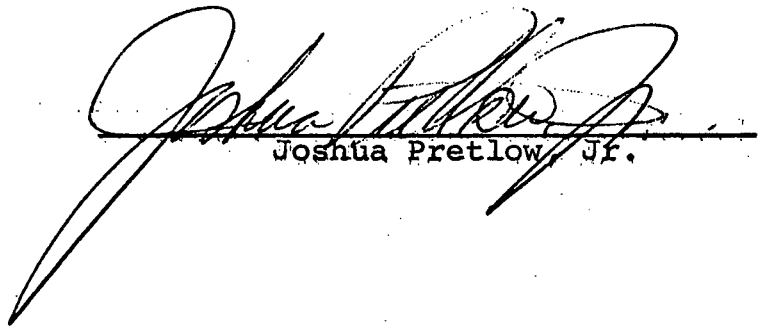
By _____
Of Counsel

CERTIFICATE

I hereby certify that the original of the above Notice

AND PRETLOW
d Counsellors at Law
nial Building
.K, VIRGINIA

of Appeal and Assignment of Error was delivered to Gloria H. Morgan, Clerk of the Circuit Court of the City of Suffolk, Virginia, and a copy hereof was delivered to Moody E. Stallings, Commonwealth's Attorney, City Office Building, Suffolk, Virginia, Counsel for the Commonwealth of Virginia, this 8th day of July, 1976.



Joshua Pretlow, Jr.

Joshua Pretlow, Jr.
PRETLOW & PRETLOW
104 Western Avenue
Suffolk, Virginia 23434

PRESENT: Mr. Moody E. Stallings,
Attorney for the Commonwealth

Mr. Joshua Pretlow, Jr.,
Counsel for defendant

Mr. Phillip Matthews,
The defendant

MR. STALLINGS: This is the case of Phillip Matthews.

MR. PRETLOW: He is charged with possession of marijuana and we plead not guilty and waive the reading of the warrant.

THE COURT: All right, call your witnesses.

TROOPER R.H.MCKINNEY, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STALLINGS:

Q Trooper McKinney, there is a charge here that Mr. Matthews was in possession of marijuana. When and where did it take place?

A This occurred on the 27th day of December, 1975, approximately 12:30 a. m. on route 17 in Crittenden. At that time, I followed the vehicle across the Crittenden Bridge from Isle of Wight County into the

City of Suffolk, and stopped the vehicle in the vicinity of the Frosty-Freeze, which is right on route 17. I stopped the vehicle and the defendant got out and I talked to him. I asked him to produce his driver's license and registration card; he did that, and he when he produced his driver's license, I asked for his registration, and he went back to his car and went into his glove compartment to get it. He handed it to me, and while I was talking to him, I noticed a pack of cigarette wrapping papers laying in the front seat, in front of the driver's seat, I guess it was about, I'd say approximately ten to twelve inches at the most from the front of the driver's seat. I picked them up and looked at them to tell what they were, and they were cigarette wrapping papers, and in the vicinity of the driver's seat, on the left side, near where on most cars is your hand lever to move your seat back and forth, next to the door, there was a brown pag tucked in there. Having seen the papers, I reached down and picked up the brown bag and looked into it.

MR. PRETLOW: I am going to object to any testimony at this point, unless he shows probable cause for taking the bag out of the car, or anything beyond that point for the search of the car that falls under that classification, beyond that point. Anything laying in clear view, of course, that is fine, he can talk about that. He is talking about the papers laying there and he is talking

about a brown paper bag, but anything beyond that, I object to any introduction of any testimony. There is no probable cause to search.

MR. STALLINGS: Your Honor, you have got the probable cause when you see the cigarette papers in the floor of the car. I don't know if it in the advance sheets, or anything I have got, but there is a very recent Richmond case right on that point, where there was cigarette papers, are you familiar with the case?

THE COURT: Yes, sir.

MR. PRETLOW: If the Court will read that case closely, the man is smoking a rolled cigarette, not papers in a pack laying on the floor of the car. I would cite Oglesby v. Commonwealth, 213 Va. 247, as being correct on the particular point that I am objecting to. If the Court is not familiar with it, I will be glad to cover that case, and make it available for the Court to read. What that case says, where there is an item which is perfectly usable for legal procedures, or anything legal, that does not give rise or ground for a criminal search of any nature. In this particular case, the man was carrying a small brown envelope of the type used by

drug dealers in the Lynchburg area. It happened to be a brown bank envelope, which is perfectly legal to use. Officer McKinney has testified there was cigarette papers, and there is nothing illegal about cigarette papers. They are often used legally; merely the fact they are used sometimes by drug users does not make them illegal, nor give grounds for search. I will be glad to make that case available.

THE COURT: I am going to overrule your objection.

MR. PRETLOW: Note my exception, for the record, Judge.

MR. STALLINGS Continuing:

Q Trooper McKinney, after you took the bag out, what did you do?

A It was like a lunch bag folded up. You could tell it was worn, and I picked it up and looked inside of it, and there I saw a plastic bag of what appeared to be marijuana leaves and stalks.

Q Is that what we call a nickel bag?

A Well, I would say at one time, it probably was, but at this time it didn't contain what would normally be sold for a nickel; probably half that amount.

Q Some had been used?

A Yes, sir, and I also found a pipe which appeared to have the residue of marijuana in it, and

several little bags of seeds which were rolled up. The seeds were contained in plastic bags, which also appeared to be marijuana. At that time I asked the defendant to come back to my car and we sat in my car, and I told him that he was under arrest for possession of marijuana, and to lock his car up and I was taking him with me, and we came to Suffolk where a warrant was obtained. At the time of arrest, he was advised of his rights, and the only question I asked him was if he wanted to tell me where he got it from, and he indicated he didn't want to reply any further.

Q Was he alone in the car?

A Yes, sir.

Q Did you have the marijuana analyzed?

A Yes, sir, I did.

Q Do you have the report?

A I believe the original is with the warrant. Here is the copy of it here.

THE COURT: There is a report from Consolidated Laboratories in here. I reckon that is what you are talking about.

MR. STALLINGS: Yes, sir. We'll introduce that

MR. PRETLOW: I am going to object to the introduction on that on the same grounds it is not part of a lawful search.

THE COURT: That will be Commonwealth's Exhibit Number "1".

MR. PRETLOW: I have a few questions.

CROSS EXAMINATION

BY MR. PRETLOW:

Q Officer McKinney, as I understand it, the reason you stopped the defendant was purely for a speeding violation in trailing him?

A Well, I got behind him originally at Benn's Church, which was approximately five to six miles from this location where I stopped him. I made the turn to turn left at Benn's Church from Smithfield, and I noticed his car sitting on the road there, and when he took off, he took off at kind of a high rate of speed, and we got hung up in traffic. When we got to route 17 we turned south, and at that time he increased his speed, and I clocked him in excess of the speed limit, and during the time I was behind him, also at times I felt he was a little erratic every now and then, and he would weave, and when I stopped him, he had been drinking, but I didn't feel like it was enough at the time to charge him with driving under the influence.

Q He was stopped for speeding?

A Correct, a traffic violation.

Q And your search was based purely on the premise that you saw these cigarette papers lying underneath his feet on the driver's side, and when the door was opened, he was looking for a registration card?

A That's correct.

MR. PRETLOW: No further questions.

MR. STALLINGS: That's the case, Your Honor.

1 MR. PRETLOW: I will renew my motion
2 to strike. I think the Court is well aware of
3 the rule that probable cause doesn't come after
4 the arrest or after the finding. It has to be
5 some probable cause for the search before the
6 finding, and I will recite for the Court, "Pro-
7 bable cause must exist before a warrantless
8 arrest, and an incident search may not precede
9 and serve to justify the arrest." In this
10 particular case they summarized the evidence
11 very briefly, in the Oglesby case. The officer
12 saw action, picked up his pace and entered the
13 restaurant. Oglesby had a small brown bank
14 envelope in his hand, such as was commonly
15 used for drug traffic in the Lynchburg area.
16 It is the type also commonly used by banks for
17 legitimate purposes. As he got closer, it ap-
18 peared he might be trying to get rid of it, is
19 the only other circumstance known to the offi-
20 cers at the time of the arrest. "Probable
21 cause, as the very name implies, deals with
22 probabilities. These are not technical; they
23 are the factual and practical considerations
24 of everyday life on which reasonable and pru-
25 dent men, not legal technicians, act. Probable
26 cause exists where the facts and circumstances
27 within the arresting officer's knowledge and
28 of which he has reasonably trustworthy infor-

mation are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." I will submit to the Court there is nothing about the mere fact of cigarette papers lying on the floor of the car to give probable cause to search. Were that the case, should I reach into my pocket at this point, pull my hand out, and a pack of cigarette papers fall on the floor, I would be subject to a search. This is what the Court is saying in denying the motion. I do not believe that is the intent of the law, and the search has got to be lawful; it has got to be a search warrant incident to a lawful arrest. There was no arrest in this case until after the fact; or that there was probable cause that a felony was being committed, and it doesn't come under that; or either permission to search, and none of those four exceptions are applicable in this case, and I would submit to the Court the evidence should be stricken and the case dismissed against the defendant.

MR. STALLINGS: Your Honor, I think you have already ruled on the point that the evidence was admissible, and I don't want to belabor it any further. The Court has

ruled on it.

THE COURT: I am going to overrule your motion, and note your exception in the record.

MR. PRETLOW: Yes, sir, and we will offer no evidence.

THE COURT: All right, sir, I am going to find the defendant guilty, and affirm the lower court's decision in the case.

MR. PRETLOW: I would ask that it be withheld pending an appeal, Judge.

I, Joyce Gray Harrell, having been duly sworn, do certify that I was the court reporter in the CircuitCourt of the City of Suffolk on June 10, 1976, at the time of the trial of the above matter.

I further certify that I have transcribed the proceedings faithfully and accurately, to the best of my ability.

Given under my hand this 28th day of June, 1976.

Joyce Gray Harrell