IN THE COURT OF APPEALS

OF VIRGINIA

Record No.
Circuit Court No.

,

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

OPENING BRIEF OF APPELLANT FROM THE CIRCUIT COURT OF VIRGINIA BEACH

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STATEMENT OF PROCEEDINGS

On , 2022, a grand jury in the city of Virginia Beach returned true bills of indictment against , hereinafter referred to as "Appellant," for the offenses of Possession of a Schedule I or II Controlled Substance With Intent to Distribute in violation of Virginia Code Section 18.2-248, Possession of a Firearm by a Violent Felon in violation of Virginia Code Section 18.2-308.2, and Possessing a Firearm While Distributing a Schedule I or II Controlled Substance in violation of Virginia Code Section 18.2-308.4. The Appellant was additionally charged by warrant with the misdemeanor offense of Carrying a Concealed Weapon in violation of Virginia Code Section 18.2-308. All of the offenses were alleged to have occurred on or about in the City of Virginia Beach and stemmed from a single incident.

The Appellant filed a written motion arguing that all evidence recovered during a vehicle search should be suppressed because the search was an improper warrantless search in violation of the Fourth Amendment to the United States Constitution. (See Brief In Support of Motion To Suppress filed on A hearing on the Appellant's suppression motion was heard on , before

the Honorable After hearing testimony and argument, the Court denied the Appellant's motion to suppress and noted the Appellant's exception for the record.

On , the Appellant entered a conditional guilty plea pursuant to Virginia Code Section 19.2-254 before the Honorable

On the record, the Appellant's counsel stated "the specific issue that he wishes to preserve for purposes of appeal was a pretrial denial of a motion to suppress heard on of this year before Judge

The issue at that suppression hearing was the defense's argument that a warrantless search of Mr. 's vehicle was in violation of his Fourth Amendment rights." (March 15, 2022 Tr. at 12). The Commonwealth stated on the record that it consented to the conditional guilty plea. (March 15, 2022 Tr. at 16). Both the Appellant and the Commonwealth waived the preparation of a presentence report and proceeded directly to sentencing on

The Court sentenced the Appellant on the charge of Possession of a Schedule I or II Controlled Substance With Intent to Distribute to five (5) years with all five (5) years suspended, on the Possession of Firearm by Violent Felon charge to five (5) years with none suspended, on the Possessing a Firearm While Distributing a Schedule I or II Controlled

Substance charge to five (5) years with none suspended, and on the misdemeanor Carrying a Concealed Weapon to twelve (12) months with all twelve (12) months suspended. The sentences were run consecutively for a total sentence of fifteen (15) years and twelve (12) months with five (5) years and twelve (12) months suspended. (See Sentencing Order entered

Appellant timely filed his notice of appeal challenging all of his convictions.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS VEHICLE SEARCH WAS NOT SUPPORTED BY PROBABLE CAUSE THAT THE APPELLANT HAD CONSUMED ALCOHOL AS REQUIRED FOR A VIOLATION OF VIRGINIA CODE 18.2-323.1.

(PRESERVED BY APPELLANT'S WRITTEN MOTION TO SUPRESS FILED

STATEMENT OF FACTS

On , Officers and of the Virginia Beach Police conducted a traffic stop of the Appellant's vehicle for having expired license plates.[1] acknowledged that the expired license plates were the sole basis for the stop and that he witnessed no bad driving behavior. . The Appellant pulled into a 7-11 convenience store and parked the vehicle. approached on the passenger side of the Appellant's vehicle and approached on the driver's side. The Appellant told the officers that the vehicle belonged to his stepfather and attempted to find the vehicle's registration in the glove compartment.

During the officers' interaction with Appellant, noticed a Hennessy liquor bottle on the front passenger side floorboard that was less than one quarter full with the cap screwed on.

Upon the officers drawing his attention to the bottle, the Appellant denied having consumed any alcohol and volunteered to take a Breathalyzer test. He further told the officers that he was coming from dropping his children off at their mother's residence.

[1] Bodycam footage of the entire encounter was admitted at the suppression hearing as Commonwealth's Exhibit 2.

and both acknowledged that they never smelled any odor of alcohol on the Appellant's person or in the vehicle although both claimed to have lost their sense of smell.

stified that he was a veteran of three different police departments who had received DUI training and conducted numerous DUI investigations. He acknowledged that the Appellant: did not have bloodshot eyes; did not have a flushed face; responded coherently and appropriately to all police questions and commands; was steady on his feet; never swayed; never leaned on the vehicle or anything else for support; and had a normal appearance. The only unusual characteristic testified to by and was that the Appellant had "somewhat odd manner of speaking," and that "the cadence of the speech seemed somewhat distorted."
acknowledged that he had never heard the Appellant speak before and that it might simply be his normal speech pattern.

acknowledged that he later told Officer that the Appellant might have a lisp or a speech impediment.

After viewing bodycam footage, the trial court remarked during its ruling that "I find as a matter of fact that [Appellant's speech] is odd. I

don't know if it's because he was drinking or he's got an issue or whatever, but it sounded odd to the court."

Based on the Hennessy bottle located on the passenger's side floorboard, conducted a search of the vehicle.

Upon being told that the vehicle would be searched, the Appellant repeated multiple times that the officers did not have consent to search. acknowledged that his only basis for searching the vehicle was to look for more liquor bottles. Upon searching the vehicle, found a firearm under the driver's seat that was not visible prior to the search.

After the discovery of the firearm, bodycam footage admitted into evidence depicted step behind the Appellant to detain him at which point the Appellant fled on foot from the scene. After an approximately one-minute chase, the Appellant surrendered and was handcuffed. (See Commonwealth's #2 video admitted at hearing at 18). The Appellant moved to suppress all evidence stemming from the warrantless search of the vehicle.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS VEHICLE SEARCH WAS NOT SUPPORTED BY PROBABLE CAUSE THAT THE APPELLANT HAD CONSUMED ALCOHOL AS REQUIRED FOR A VIOLATION OF VIRGINIA CODE 18.2-323.1.

(PRESERVED BY MOTION TO SUPPRESS HEARING AT 29.)

Standard of Review

"A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that [appellate courts] review **de novo** on appeal." Murphy v. Commonwealth, 264 Va. 568, 573 (2002). "[A]n appellate court must give deference to the factual findings of the circuit court and give due weight to the inferences drawn from those factual findings; however, the appellate court must determine independently whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment." Commonwealth v. Robertson, 275 Va. 559, 563 (2008).

ISSUE RESTATED: UNDER THE CIRCUMSTANCES NEITHER THE OPEN CONTAINER NOR THE "ODD" MANNER OF SPEECH PROVIDED THE OFFICERS WITH PROBABLE CAUSE TO SEARCH THE VEHICLE.

The Fourth Amendment guarantees the right of the people to be secure . . . against unreasonable searches and seizures. Const. amend. IV. It is well-settled that "warrantless searches and seizures are per se unreasonable and, therefore, unlawful under the Fourth Amendment. Commonwealth v. Ealy, 12 Va. App. 744, 751-52 (1991). However, warrantless searches and seizures are permissible where an established and well-delineated warrant exception is applicable under the circumstances. Thompson v. Louisiana, 469 U.S. 17, 19–20 (1984). ***The Commonwealth bears the burden of establishing a warrantless search or seizure was "reasonable"*** under the given circumstances, and thus constitutionally permissible. Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984) (emphasis added). Probable cause to search exists "when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Curley v. Commonwealth, 295 Va. 616, 622 (2018) (quoting Jones v. Commonwealth, 277 Va. 171, 178 (2009)). In determining whether probable cause exists, a reviewing court analyzes how the totality of circumstances would appear to an objectively reasonable officer. Id.

Under Virginia Code 18.2-323.1, it is not illegal to transport open containers of alcohol in vehicles. It is only unlawful if the driver of the vehicle *consumes alcohol while driving*. As relevant, 18.2-323.1(B) provides that there is a rebuttable presumption that the driver has consumed an alcoholic beverage in violation of this section if: "the appearance, conduct, odor of alcohol, speech or other physical characteristic of the driver of the motor vehicle may be reasonably associated with the consumption of an alcoholic beverage."

In this case, there is no evidence whatsoever that the Appellant had consumed alcohol. Officers and both directly interacted with the Appellant and were within feet of him. The officers acknowledged: the Appellant's eyes were not bloodshot; his face was not flushed; he was not unsteady or swaying on his feet; his clothing and appearance were normal; he responded coherently and appropriately to the officer's instructions; he denied having consumed any alcohol; and he had no odor of alcohol about his person or his vehicle. Tellingly, the officers made no effort to conduct a DUI investigation in any manner despite the Appellant offering to take a Breathalyzer test.

Moreover, the liquor bottle's mere proximity to the Appellant was insufficient to establish probable cause that he drank from the container

while driving. See Whitehead v. Commonwealth, 278 Va. 300, 313 (2009) ("mere proximity to criminal activity alone is insufficient to establish probable cause"); see also Code § 18.2-323.1(B) (citing proximity and an open container with alcohol removed as only two of three elements needed to establish the presumption a driver consumed alcohol).

The only attempt to even remotely link the Appellant to alcohol consumption was testimony that the Appellant "had a somewhat odd manner of speech" consistent with a lisp or speech impediment. In light of the totality of the circumstances, this was patently insufficient to establish probable cause that the Appellant had consumed alcohol. The officers acknowledged at the motion to suppress that they had never heard the Appellant speak before and that his behavior and appearance were otherwise completely inconsistent with having consumed alcohol. "Probable cause requires more than a strong suspicion." Whitehead v. Commonwealth, 278 Va. 300, 314 (2009) citing Jones v. Commonwealth, 277 Va. 171, 178 (2009). Instead, probable cause is based on fair probabilities. Whitehead at 314-315. In the present case, there was no reasonable basis to believe that the Appellant had consumed alcohol. If anything, the totality of the circumstances established a fair probability that the Appellant *had not consumed alcohol.*

The only other probable cause analysis offered by the trial court was the assertion that "there were commands given that [the Appellant] didn't follow which objectively [the officers] can look at as well."

Hearing at 28). While the Appellant did eventually run from the police, his flight occurred only after the police had already illegally searched his vehicle and recovered a firearm. Until the police conducted their unlawful search, the bodycam footage reflects that the Appellant had been completely cooperative with the officers. The determination of probable cause is based on the facts known by the police *at the time of the search or seizure*. Wells v. Commonwealth, 6 Va. App. 541, 550 (1988), (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)). As the Appellant's flight occurred only after the search, it was improper for the trial court to consider it in the probable cause analysis.

Because the open container alone was not illegal under Code 18.2-323.1 and there was no evidence the Appellant consumed alcohol while driving, the officers did not have probable cause to search the vehicle for contraband or evidence of a crime relating to alcohol consumption. Therefore, the warrantless search of the Appellant's vehicle was unlawful and the trial court erred by denying the Appellant's motion to suppress.

CONCLUSION

For all the reasons stated, the appellant requests that this Court reverse the ruling of the trial court denying the appellant's motion to suppress, vacate the appellant's convictions, and remand for the Commonwealth to determine whether it has sufficient evidence to retry the appellant after suppression.

Respectfully submitted,

*s/ Taite A. Westendorf*_____
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