

The Supreme Court of Virginia and the 4th Amendment

A Moot Court Activity

Lesson Plan

Target Audience: 12th grade government students

Length: 2 days (90—minute classes)

Objectives

The students will:

1. Read and analyze two cases presented to the Supreme Court of Virginia and the court's decision in both cases.
2. Participate in a moot court and assume the roles of the various participants in a Supreme Court of Virginia case.
3. Identify and explain the key constitutional issues involved in each court case.
4. Predict the outcome and impact of the court's decisions.
5. Draw conclusions about current Virginia law with respect to searches and seizures under the Fourth Amendment of the U. S. Constitution.

1. Overview

The purpose of this lesson is to provide students with the opportunity to participate in a Supreme Court of Virginia moot court activity. Students will review two decisions of the Virginia Court of Appeals concerning cases involving search and seizure under the Fourth Amendment to the U.S. Constitution. Students will be required to play the roles of attorneys, supreme court justices, reporters, or be observers of the court proceedings.

2. Activities

Day 1

Prior to the moot court (approximately two weeks)

- Review with students Handout #1: *Structure of the Virginia Judicial System* using information provided in the background information of this lesson.
- The teacher should divide the class into two groups—one group will represent the Cost case and the other group the Rudolph case.
- After the groups have been formed, the teacher should assign students within each group the following roles:
 1. Attorneys for the appellant (two students).
 2. Attorneys for the respondent (two students).
 3. Virginia Supreme Court Justices (seven students, one of which should be assigned the role of chief justice).
 4. Court reporters (two students).

- The numbers of students taking each role can be changed to accommodate classes of various sizes.
- At the time that the roles are assigned, distribute the following handouts to the appropriate groups:
 - Handout #2: *Instructions for Appellant and Respondent Attorneys*;
 - Handout #3: *Instructions for Virginia Supreme Court Justices*;
 - Handout #4: *Instructions for Court Reporters*;
 - Handout #5: *Darrio L. Cost v. Commonwealth of Virginia, Brief of Appellant*;
 - Handout #6: *Darrio L. Cost v. Commonwealth of Virginia, Brief for the Commonwealth*;
 - Handout #7: *Demetres J. Rudolph v. Commonwealth of Virginia, Brief of Appellant*; and
 - Handout #8: *Demetres J. Rudolph v. Commonwealth of Virginia, Brief for the Commonwealth*.
- Distribute Handout #9: *Court Decision for the Cost Case* and Handout #10: *Court Decision for the Rudolph Case* to the two court reporters for that case. **The decisions should not be shared with any other students.**
- Students should be advised to read their instructions and materials to fully prepare for their roles by the date of the moot court.

Day 2

- Before students arrive to class, arrange the classroom with tables for the justices at the front of the room and tables for the attorneys for the appellant and the respondent on opposite sides of the room facing the justices. There should also be a podium placed in front of the justices from which the attorneys will present their arguments.
- The following procedures should be used for both the Cost and the Rudolph oral arguments. The chief justice should ask each side to present their arguments in the following order:
 1. Five minute initial argument for the appellant attorneys.
 2. Five minute initial argument for the respondent attorneys.
 3. Three minute rebuttal for the appellant attorneys.
 4. Three minute rebuttal for the respondent attorneys.
 5. The justices may ask the attorneys questions at any time.
- After the oral arguments have been presented, the justices should deliberate and vote on a decision with each justice presenting reasons for his/her decision.
- The chief justice should then tally the votes and announce the decision of the court (a majority of votes is required). A dissenting opinion may also be presented.
- The remainder of the class should listen to the opinions of the justices, but may not interrupt the deliberations of the court.
- The teacher should then conduct a class discussion concerning the court's decision and reasoning including both the majority and minority opinions.
- The court reporters assigned to the case should then present to the class their summary of the actual majority and minority opinions of the Supreme Court of Virginia in the cases.

3. Group Discussion

- The teacher should lead a class discussion with the students reacting to the actual Supreme Court of Virginia decisions. Key “talking points” for the Cost and Rudolph majority and minority opinions are explained in Handout #11: *Talking Points for Group Discussion*. Page references in the handout refer to the page in the opinion where additional information about a particular talking point can be found. Questions that the teacher might ask could include:
 1. What facts did the justices who wrote the majority and minority opinions identify as critical in reaching their decisions?
 2. How did the justices who wrote the majority and minority opinions frame the key issues presented in the case?
 3. What key facts or issues did you believe the majority or minority opinion ignored?
 4. In your opinion, is the majority or the minority opinion a better reasoned opinion? Why?
- After the students have concluded their moot court activities with respect to the Cost and Rudolph cases and debriefed the decisions of the majority and minority opinions, the teacher should continue to debrief the activity by asking the students the following questions:
 1. How are the cases and the court decisions similar or different?
 2. Are the decisions in the two cases consistent or inconsistent? Why?
 3. Using the majority decisions in the two cases as a guide, how would you summarize the law in Virginia with respect to searches and seizures under the Fourth Amendment?
 4. What do these decisions mean for defendants in Virginia and for all residents of the Commonwealth?

4. Background Information

- Use this background information while explaining Handout #1: *Structure of the Virginia Judicial System*.

The Supreme Court of Virginia is Virginia’s court of final resort and possesses both original and appellate jurisdiction. Virginia does not permit an appeal to the Supreme Court as a matter of right except in cases involving the Virginia State Corporation Commission, the disbarment of an attorney, and review of a lower court decision involving the death penalty. The Supreme Court of Virginia has a total of seven justices (a chief justice and six additional justices).

5. Differentiation

This moot court activity is a lesson requiring advanced analytical skills. It is designed primarily for 12th grade government classes with students possessing such skills. The lesson

can be adapted for 12th grade students who struggle with analytical skills and for 8th grade civics and economics classes. The adaptation would include spending more time in class prior to the moot court activity to assist the students in analyzing the legal briefs, court decisions, and helping them prepare their assigned roles. In addition, the time periods for the oral arguments can be shortened.

6. SOL Skills

The student will demonstrate mastery of the social studies skills citizenship requires, including the ability to

- analyze primary and secondary source documents (GOVT.1a);
- select and defend positions in writing, discussion, and debate (GOVT.1g).

7. SOL Content

The student will demonstrate knowledge of the organization and powers of the state and local governments described in the Constitution of Virginia by

- examining the legislative, executive, and judicial branches (GOVT.8a)

The student will demonstrate knowledge of civil liberties and civil rights by

- examining the Bill of Rights, with emphasis on First Amendment freedoms (GOVT.11a);
- exploring the balance between individual liberties and the public interest (GOVT.11d).

8. Materials

- Handout #1: *Structure of the Virginia Judicial System*
- Handout #2: *Instructions for Appellant and Respondent Attorneys*
- Handout #3: *Instructions for Virginia Supreme Court Justices*
- Handout #4: *Instructions for Court Reporters*
- Handout #5: *Darrio L. Cost v. Commonwealth of Virginia, Brief of Appellant*
- Handout #6: *Darrio L. Cost v. Commonwealth of Virginia, Brief for the Commonwealth*
- Handout #7: *Demetres J. Rudolph v. Commonwealth of Virginia, Brief of Appellant*
- Handout #8: *Demetres J. Rudolph v. Commonwealth of Virginia, Brief for the Commonwealth*
- Handout #9: *Court Decision for the Cost Case*
- Handout #10: *Court Decision for the Rudolph Case*
- Handout #11: *Talking Points for Group Discussion*

Name _____
Period _____ Date _____

Structure of the Virginia Judicial System

SUPREME COURT OF VIRGINIA

Court of Final Resort
Chief Justice and 6 Justices

COURT OF APPEALS

Intermediate Appeals Court
11 Judges

CIRCUIT COURTS

Highest Trial Court with General Jurisdiction
31 Circuits–120 Courts

GENERAL DISTRICT COURTS

Trial Court with Limited Civil/Criminal Jurisdiction
Courts in all 32 Districts

JUVENILE & DOMESTIC RELATIONS DISTRICT COURTS

Trial Court with Limited Civil/Criminal Jurisdiction
Courts in all 32 Districts

Name _____

Period _____ Date _____

Instructions for Appellant and Respondent Attorneys

- Review and discuss with your partner the legal briefs that have been provided to you.
- Decide who will present the initial argument (five minutes) and who will provide the rebuttal argument (three minutes).

Steps in Preparing for the Oral Argument

Prepare a summary of the facts of the case based on the legal briefs you were provided. Your summary must accomplish the following:

- Identify the parties that are involved in the case.
- Explain how the lower courts ruled in the case.
- Summarize the legal issue presented by the case.
- Explain how you would like the court to rule.
 - Provide at least two arguments in support of your position.
 - Describe how the ruling will impact your client and society.
 - Describe how a ruling in favor of the opposing side will impact your client and society.
- Identify at least two key legal precedents that are relevant to this case (a precedent is a previously decided case recognized as the authority for future cases on that issue).
 - Explain how these precedents support your position.

Name _____
Period _____ Date _____

Instructions for Virginia Supreme Court Justices

Read and discuss with your fellow justices the facts of the cases from the legal briefs provided.

Choose from among the group someone to serve as the chief justice.

Steps in Preparing for the Oral Argument

Discuss the legal precedents that are raised in the appellant's and the respondent's briefs.

List and explain the arguments that you anticipate hearing from both sides.

Prepare at least five questions you have for each side. During the oral argument, each justice should be prepared to ask at least one question.

The above steps must be done for both cases.

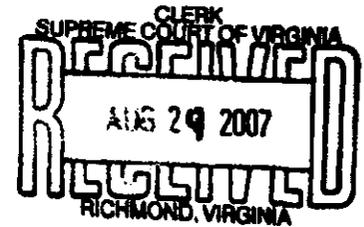
Name _____
Period _____ Date _____

Instructions for Court Reporters

- Read the majority and minority opinions in the court case you have been assigned.
- Decide who will be responsible for summarizing each opinion.
- Do not discuss the court's opinion with any other students.**
- Summarize your assigned opinion focusing on the key facts, issues, and precedents that the justices identified in the opinion.

In The
Supreme Court of Virginia

RECORD NO. 070496



DARRIO L. COST,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF CASE AND OF MATERIAL PROCEEDINGS

Appellant was indicted for the charge of possession with the intent to distribute heroin in violation of § 18.2-248. The defendant's trial was heard before the Honorable Johnny E. Morrison on August 23, 2005. At the conclusion of the evidence presented by the Commonwealth, the defendant moved to strike the evidence. The court denied the defendant's motion to strike. The defendant did not present any evidence and renewed his motion to strike which was denied.

On November 14, 2005, the defendant was sentenced to serve ten (10) years in a Virginia State Correctional Facility with all but three (3) years and five (5) months suspended conditioned upon five (5) years of supervised probation upon release, a fine of one hundred dollars (\$100.00) and his privilege to drive was suspended for a period of six months.

ASSIGNMENT OF ERROR

1. The trial court erred by denying the defendant's motion to suppress regarding the right to be free from unreasonable searches and seizures. (App. 2-3, 6-25, 42)

QUESTION PRESENTED

1. Whether the defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated. (Assignment of Error 1)

STATEMENT OF FACTS

On December 14, 2004 at 12:40 a.m. B.C. Davis had contact with the defendant at 11 Wilson Parkway. The defendant was seated in the passenger seat of a vehicle that was parked in the parking lot next to 11 Wilson Parkway. He approached on the passenger side of the vehicle and the defendant immediately reached across his body towards his left front pants pocket. Davis asked him what he was reaching for and the defendant did not answer. Davis told him to get away from his pocket and the defendant was subsequently taken out of the vehicle. Once out of the vehicle, the defendant stated, "You can't search me, but you can pat me down." Davis patted the defendant down and immediately went to the defendant's left front pants pocket and felt what appeared to be capsules. Davis did not feel what he believed to be a weapon in the defendant's pocket and did not believe that there was a weapon in the pocket. (App. 8-13) Davis felt a large bulge in the pocket and within this item he felt what appeared through his training and experience to be suspected heroin. Davis immediately recovered a baggie of capsules and a large wad of money. The capsules were on top of the money inside of the defendant's pocket. (App. 13-16)

Once Davis recovered the item, he kept it in his sole care and custody, packaged it, marked it, and placed it in the red mailbox in the property and evidence department of the Portsmouth Police Department. Davis, also, recovered one hundred twenty-eight dollars. The denomination being one twenty-dollar bill

and one hundred eight one-dollar bills. In the defendant's right front pants pocket Davis recovered five ten-dollar bills in U.S. Currency and a cell phone. (App. 32-35)

ARGUMENT

THE DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED. (App. 8-25)

The trial court erred by denying the defendant's motion to suppress the evidence that was seized because it violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures. It is established that on appeal, the burden of proving that the trial court's denial of the motion to suppress was reversible error lies with the defendant, McGee v. Commonwealth, 25 Va. App. 193, 197, 487 S.E.2d 259, 261 (1997) and the decision of the trial court will be disturbed only if plainly wrong. Commonwealth v. Grimstead, 12 Va. App. 1066, 1067, 407 S.E.2d 47, 48 (1991). When reviewing the denial of the motion to suppress, the court will consider evidence adduced at both the suppression hearing and the trial. Blevins v. Commonwealth, 40 Va. App. 412, 420, 579 S.E.2d 658, 662 (2003). Further, the court is bound by the trial court's findings of historical fact unless "plainly wrong" or without evidence to support them. McGee, 25 Va. App. at 198, 487 S.E.2d at 261 (citing Ornelas v. United States, 517 U.S. 690, 699, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)) However, determining whether the seizure of the evidence from the defendant was constitutionally valid involves questions of law which the court reviews de novo on appeal. See Ornelas, 517 U.S. at 699.

In this case, the police officer's reason for having the defendant out of the vehicle and patting him down was for officer safety. (App. 15) It has been determined that during an investigative stop authorized under Terry, an officer may conduct a limited search for concealed weapons if the officer reasonably believes that a criminal suspect may be armed and dangerous. Florida v. J.L., 529 U.S. 266, 269-70, 146 L. Ed. 2d 254, 120 S. Ct. 1375 (2000); Adams v. Williams, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972); Harris v. Commonwealth, 241 Va. 146, 150, 400 S.E.2d 191, 193-94 (1991); Jones v. Commonwealth, 230 Va. 14, 19, 334 S.E.2d 536, 539-40 (1985). The Court stated in Murphy v. Commonwealth, 264 Va. 568, 573-74, 570 S.E.2d 836, 839 (2002) that the purpose of this "pat down" search is not to uncover evidence of criminal activity, but to permit the officer to conduct his investigation without encountering a violent response. (citing Adams, 407 U.S. at 146; see Maryland v. Buie, 494 U.S. 325, 336, 108 L. Ed. 2d 276, 110 S. Ct. 1093 (1990); Michigan v. Long, 463 U.S. 1032, 1050, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983)).

Davis violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures when he exceeded the scope of the pat down. Davis testified that he knew when he initially went to the pocket that it did not contain a weapon. He testified that he felt what he believed to be capsules and that through his training and experience that is how heroin is packaged. (App. 15) Davis further admitted that the item he felt in the defendant's pocket could have been Motrin or any other over-the-counter capsule. (App. 16) The Court in Minnesota v.

Dickerson, 508 U.S. 366, 375-76, 124 L. Ed. 2d 334, 345, 113 S. Ct. 2130, 2136-37 (1993) stated that if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context. The Court further explained that when the character of the item is not immediately apparent from the "pat down" search, and the officer does not reasonably suspect that the item is a weapon, further search regarding the item is not allowed because such an evidentiary search is unrelated to the justification for the frisk. Id. at 378; Lovelace v. Commonwealth, 258 Va. 588, 596-97, 522 S.E.2d 856, 860 (1999); Harris, 241 Va. at 151-52, 400 S.E.2d at 194-95.

This case is analogous to the facts in Murphy. In that case the police officer conducted a pat down of the defendant and felt what he believed to be a plastic bag. Based on his training and experience, he concluded that the bag contained marijuana. Subsequently, he retrieved the bag, determined it contained marijuana, and placed the defendant under arrest for possession of marijuana. The court held that although the officer knew from his training and experience that plastic bags often are used to package marijuana, this information was insufficient under the holding in Dickerson to establish probable cause to search Murphy's pocket because the officer's conclusion that the bag contained marijuana was not based on his tactile

perception of the bag's contents. Here, the facts are similar and the rational and holding in Murphy should apply. In this case, Davis felt what he believed to be capsules. He retrieved the items and placed the defendant under arrest for possession with the intent to distribute heroin. Davis knew once his hand touched the defendant's pocket, that there was no weapon in the defendant's possession. Davis' going into the defendant's pocket exceeded the scope of the pat down. The only character of the item that was immediately apparent was that they were capsules. The criminality of the item in the defendant's pocket was not immediately apparent because Davis admitted that although he has known heroin to be packaged in capsules, other legal items are also packaged in the same manner. Davis' knowledge was insufficient under the holding in Dickerson to establish probable cause to search the defendant's pocket because Davis' conclusion that the capsules contained heroin was not based on his tactile perception of the capsules contents.

For the foregoing reasons, the trial court should have granted the defendant's motion to suppress and its failure to do so was error.

CONCLUSION

For the foregoing reasons the conviction should be reversed and dismissed.

Respectfully submitted,
DARRIO L. COST

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify the following:

1. The Appellant is Darrio L. Cost , St. Brides Correctional Center, 701 Sanderson Road, Chesapeake, Va 23328.
2. The Appellee is the Commonwealth of Virginia.
3. The attorney for the Appellee is Eugene Murphy, Senior Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, telephone (804) 786-2071.
4. The counsel for the Appellant is Sonya Weaver Roots, 615 Dinwiddie Street, P. O. Box 543, Portsmouth, Virginia 23705, telephone (757) 393-0237.
5. Three (3) copies of the foregoing Brief of Appellant and Appendix were mailed via U.S. Mail, postage pre-paid, to counsel for the Appellee, Eugene Murphy, at the previously stated address on this 24th day of August, 2007.
6. Twenty (20) copies of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia on this 24th day of August, 2007.
7. That counsel for the appellant has been appointed.



Sonya Weaver Roots

**IN THE
SUPREME COURT OF VIRGINIA**

RECORD NO. 070496

DARRIO L. COST

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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**IN THE
SUPREME COURT OF VIRGINIA**

RECORD NO. 070496

DARRIO L. COST

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Darrio L. Cost was convicted of possession of cocaine with intent to distribute in a bench trial in the Circuit Court of the City of Portsmouth on August 23, 2005. On November 14, 2005, the Court sentenced him to ten years imprisonment, with six years and seven months suspended. (App. 53-54).

The Court of Appeals affirmed the defendant's conviction on December 28, 2006. Cost v. Commonwealth, 49 Va. App. 215, 638 S.E.2d 714 (2006). (App. 55-64). A petition for rehearing was denied on

February 27, 20007. (App. 65). This Court granted his petition for appeal on one issue on July 26, 2007.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS REGARDING THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

QUESTION PRESENTED

WAS THE POLICE OFFICER'S SEARCH OF THE DEFENDANT'S PERSON REASONABLE WHEN DURING A VALID PAT DOWN HE FELT HEROIN IN THE DEFENDANT'S POCKET?

STATEMENT OF FACTS

Around 12:40 a.m. on December 14, 2004, Portsmouth Police Officer B. C. Davis approached the defendant, who was sitting in the passenger's seat of a vehicle in the parking lot for residents of Jeffry Wilson, a PRHA (Portsmouth Rehabilitation and Housing Authority) property. (App. 8-9). The officer was checking to see whether the people in the car were residents of the property. (App. 9).

When Officer Davis arrived at the window, the defendant "immediately reached across his body towards his left front pants pocket." (App. 11). Davis asked him what he was reaching for, but the defendant did not answer. (App. 11). The officer "told him to get away from his pocket. He did that another time at which point [Davis] brought him out of the vehicle." (App. 11).

The defendant then said spontaneously, "You can't search me, but you can pat me down." (App. 12). The officer frisked Cost, going immediately to the left front pants pocket toward which the defendant had been reaching. (App. 12).

The officer felt what appeared to be numerous capsules in that pocket. (App. 12-13). When the officer touched the pocket, he felt "a large bulge; within this item I felt what appeared to be, what I believed to be, capsules. Through my training and experience, I know that that's what heroin is packaged in." (App. 15). He knew the items to be heroin. (App. 16). At that point, the officer went into the defendant's pocket where he discovered a baggie of 20 capsules. (App. 13, 15, 48). Davis had been a police officer for four and a half years and had made 50 or 60 "arrests for drugs, particularly heroin capsules." (App. 15, 17).

ARGUMENT

THE POLICE OFFICER PROPERLY SEIZED THE HEROIN FELT DURING A CONSENSUAL PAT DOWN.

The defendant argues that the police officer engaged in a search of his person without consent. The heroin, however, was properly seized after having been found in “plain feel” when the officer conducted the consensual pat down.

Standard of Review

A defendant’s claim that evidence was seized in violation of his Fourth Amendment rights presents a mixed question of law and fact that this Court reviews *de novo* on appeal. See Murphy v. Commonwealth, 264 Va. 568, 573, 570 S.E.2d 836, 8 (2002); Ornelas v. United States, 517 U.S. 690, 691-99 (1996). In making its determination, this Court gives deference to the trial court’s factual findings that independently determined whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. Murphy, 264 Va. at 573, 570 S.E.2d at 838. The burden is on the defendant to show that denial of his suppression motion, when evidence is viewed in the light most favorable to the Commonwealth, was reversible error. McCain v. Commonwealth, 261 Va. 483, 490, 545 S.E.2d 541, 545 (2001).

Plain Feel

The United States Supreme Court held in Minnesota v. Dickerson, 508 U.S. 366 (1993), that an officer was justified in seizing crack cocaine concealed in a suspect's jacket pocket when he had identified it as such by feeling the object through the fabric of the jacket in a pat-down search. Id. at 375-76. This "plain feel" doctrine necessarily envisions that tactile sense alone can establish probable cause to believe an object is seizable contraband. Id.; see Arizona v. Hicks, 480 U.S. 321 (1987).

Under Dickerson's "plain feel" doctrine, a police officer who immediately detects contraband when he touches it may seize that item:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that adhere in the plain view context.

508 U.S. at 375-76.

The officer is not permitted to manipulate or examine the item after his pat-down, but the item may be seized if, when he conducts the pat-down, it is apparent to him that it is contraband.

However, when the character of the item is not immediately apparent from the "pat down" search, and the officer does not reasonably suspect that the item is a weapon, further search regarding the item is not allowed because such an evidentiary search is unrelated to the justification for the frisk.

Murphy, 264 Va. at 574, 570 S.E.2d at 839.

Here, the officer testified that he recognized the items as heroin when he first felt them. (App. 15). At that point he was justified in seizing the items. Welshman v. Commonwealth, 28 Va. App. 20, 35-36, 502 S.E.2d 122, 129 (1998) (en banc) (identification of item in pocket as contraband without manipulation provides probable cause). See also Ruffin v. Commonwealth, 13 Va. App. 206, 409 S.E.2d 177 (1991) (holding plain view doctrine deals with perception and applying doctrine to situation where officer, conducting pat-down, felt what he believed was controlled substance).

The court in United States v. Hughes, 15 F.3d 798 (8th Cir. 1994), found contraband to be immediately apparent where an officer testified that his first impression was that what he had felt was contraband and that "he could feel lumps that [he] thought would be crack cocaine." Id. at 802. Here, the officer's testimony that he "knew it to be heroin" (App. 16) even more clearly demonstrated that the contraband was immediately apparent.

In defining the term "immediately apparent," the Court of Appeals said in Ruffin that it:

does not require that a police officer "know" that an item is contraband or evidence of a crime before seizing it. "[T]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." Payton v. New York, 445 U.S. 573, 587 (1980). A requirement of probable cause for seizure in the ordinary case is consistent with the fourth amendment. Texas v. Brown, 460 U.S. 730, 738 (1983). Thus, if, while lawfully engaged in a particular place, police officers

"perceive" a suspicious object, they may seize it immediately. Id. at 739 n.4. Perceive means to attain awareness or understanding of, to become aware of through the senses. Webster's New Collegiate Dictionary 1675 (3d ed. 1986). . . . Thus, our inquiry addresses the nature of probable cause and whether Officer Stevens' perception of the object under the appellant's sock gave him probable cause to believe it to be contraband.

13 Va. App. at 209, 409 S.E.2d 177 at 179; see also Arizona v. Hicks, 480 U.S. at 326 (plain view doctrine applies to stereo equipment if police "had probable cause to believe that the equipment was stolen"); Taylor v. Commonwealth, 10 Va. App. 260, 266, 391 S.E.2d 592, 595 (1990) ("The phrase 'immediately apparent' has been construed as requiring that the investigating officer possess probable cause to seize the item without further investigation.")(citing Hicks, 480 U.S. at 326).

The defendant argues that because the officer admitted that Motrin and other innocent substances are packaged in capsules, it could not have been immediately apparent to him that the capsules he felt were heroin. This argument is inconsistent with the Supreme Court's rejection of "an unduly high degree of certainty as to the incriminatory character of evidence for an application of the 'plain view' doctrine" in Brown. 460 U.S. at 741. Instead, the concurring opinion in Brown pointed out that the plurality had held that "incriminating evidence was immediately apparent because [the officer] had probable cause to believe the balloon contained an illicit substance." 460 U.S. at 747.

The Court in Ruffin pointed to the "flexible, common sense standard" for probable cause set forth in Brown, 460 U.S. at 742. "A

‘practical, non-technical’ probability that incriminating evidence is involved is all that is required.” Id.

In making a probable cause determination, “the task . . . is simply to make a practical, common sense decision whether, given all the circumstances . . . , there is a **fair probability** that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213 (1983).

Farmer v. Commonwealth, 21 Va. App. 111, 114-115, 462 S.E.2d 564, 565 (1995)(emphasis added).

This Court has emphasized the practical nature of the concept of “probable cause.”

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).

“In determining whether probable cause exists[,] courts will test what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control.” Hollis v. Commonwealth, 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976).

In Brown, the officer had observed “an opaque, green party balloon, knotted about one-half inch from the top.” 460 U.S. at 733. The officer “testified that he was aware that narcotics frequently were packaged in balloons like the one in Brown’s hand.” Id. at 734. Based

on that testimony, the Supreme Court determined that the officer “had probable cause to believe that it was subject to seizure under the Fourth Amendment.” Id. at 744.

The Court of Appeals emphasized that the defendant’s own actions contributed to establishing the necessary probable cause.

In determining whether there was probable cause to seize the capsules located in the same pocket appellant reached for, the trial court could properly infer appellant was attempting to conceal the illegal contents of that pocket. See Parker v. Commonwealth, 255 Va. 96, 107, 496 S.E.2d 47, 53 (1998) (noting appellant's act of grabbing the waistband of his boxer shorts and pulling them “to the side, up and down” in an apparent effort to prevent the crack cocaine from falling to the ground was a consideration in evaluating whether the arresting officer had probable cause that appellant was engaged in criminal activity).

Cost, 49 Va. App. at 226, 638 S.E.2d at 719. (App. 61).

The Court of Appeals also stressed the significance of the defendant’s furtive gestures towards the pocket in which the heroin was found.

[F]urtive gestures coupled with other indicia of criminal engagement may suffice to establish probable cause. 2 Wayne R. LaFave, *Search and Seizure* § 3.6(d), at 319 (3d. ed. 1996) (“if police see a person in possession of a highly suspicious object or some object which is not identifiable but which because of other circumstances is reasonably suspected to be contraband, *and then* observe that person make an apparent attempt to conceal that object . . . , probable cause is then present” (emphasis added)).

Cost, 49 Va.App. at 226-27, 638 S.E.2d at 719 (other citation omitted).

(App. 61-62)(quoting Copeland v. Commonwealth, 42 Va. App. 424, 434,

592 S.E.2d 391, 395-96 (2004)). The defendant's movements confirmed the officer's perception that the capsules were contraband.

Even if a closed container had been involved here, additional factors demonstrating probable cause would render the contraband in "plain feel." In both People v. Champion, 549 N.W.2d 849, 858-59 (Mich. 1996), cert. denied, 519 U.S. 1081 (1997) and State v. Rushing, 935 S.W.2d 30 (Mo. 1996), cert. denied, 520 U.S. 1220 (1997), seizure of pill bottles was upheld because other facts provided probable cause to believe they contained contraband. Relying on these cases, the court in State v. Briggs, 536 S.E.2d 858, 863 (N.C. App. 2000), held that "the better-reasoned view is to consider the totality of the circumstances in determining whether the incriminating nature of the object was immediately apparent and thus, probable cause existed to seize it."

The Court of Appeals, summarizing the totality of the evidence demonstrating probable cause, concluded:

In addition to appellant reaching over to the same pocket containing the capsules, appellant also failed to heed the officer's warning to "get away from his pocket." Appellant thus continued this furtive behavior despite the officer's command to refrain.

While feeling the capsules alone may not be sufficient probable cause, the totality of the circumstances gave the officer probable cause to believe the numerous capsules contained illicit drugs. Appellant attempted to conceal the drugs, failed to heed the officer's demand that he cease the furtive behavior, and failed to respond to the officer's questions. *See generally* 2 Wayne R. LaFare, *Search & Seizure* § 3.6(f), at 364 (4th ed. 2004) (explaining that "refusal to answer is one factor which an officer may consider, together with evidence that gave rise to his prior

suspicion, in determining whether there are grounds for arrest”). Based on the totality of the circumstances, consisting of furtive movements and suspicious conduct, culminating in the officer feeling numerous capsules, which based on the officer's training and experience contained heroin, the officer had probable cause to seize the capsules.

Cost, 49 Va.App. at 227, 638 S.E.2d at 719-20. (App. 62).

Distinctions From Murphy

This case is different from Murphy v Commonwealth, heavily relied upon by the defendant. There this Court concluded:

Harvey's [the police officer] actions exceeded the permissible scope of that limited search. Harvey did not testify that he sensed from touching Murphy's pocket that the item held there was a weapon, nor did he state that the character of the object as marijuana was immediately apparent to him from the “pat down” search.

Instead, Harvey's testimony established only that the character of the object as a plastic bag was immediately apparent from the “pat down” search, and that he knew from his training and experience that plastic bags often are used to package marijuana. This information was insufficient under the holding in Dickerson to establish probable cause to search Murphy's pocket because Harvey's conclusion that the bag contained marijuana was not based on his tactile perception of the bag's contents. Rather, ***his sense of touch revealed only that there was a plastic bag in Murphy's pocket***. Thus, Officer Harvey lacked probable cause to seize the item from Murphy's pocket because ***the character of the bag's contents as contraband was not immediately apparent from the frisk***.

264 Va. at 574-575, 570 S.E.2d at 839 (citations omitted)(emphasis added).

Here, the officer immediately recognized the items as capsules of heroin like those he had seen in his 50 to 60 prior heroin capsule

arrests. (App. 16-17). Rather than merely feeling a plastic bag, as in Murphy, Davis felt numerous capsules that he “knew” to be heroin. Although other substances are contained in capsules, his own experience and common sense told Davis that one does not carry numerous loose capsules of legal substances in one’s pocket.

Davis engaged in no manipulation of the items before determining that they were heroin. Rather, as required by Dickerson, he felt an “object whose contour or mass makes its identity immediately apparent.” 508 U.S. at 375. It can clearly be concluded that at that point there was a “fair probability” that the defendant was carrying heroin in his pocket.

Moreover, unlike Murphy, the defendant here acted in a manner consistent with the presence of contraband. The Court of Appeals distinguished both Murphy and Harris v. Commonwealth, 241 Va. 146, 400 S.E.2d 191 (1991).

In Murphy and Harris, the only issue before the Supreme Court of Virginia was whether it was immediately apparent to the officers that the plastic bag or the film canister contained illicit drugs. In Murphy, the officer's conclusion that the bag contained marijuana was not based on his tactile perception of the bag's contents. Rather, his sense of touch revealed only that there was a plastic bag in Murphy's pocket. Murphy, 264 Va. at 574, 570 S.E.2d at 839. Here, the officer actually felt the numerous capsules, which he knew to be contraband. A plastic bag could accommodate any number of items, whereas a capsule, by its nature, is an individual container designed solely for dispensing a prearranged dosage of medication. In addition, there was no evidence of furtive gestures in Murphy or Harris. In Harris, although there was evidence that the officer saw “a lot of overt movement in the vehicle’ with its occupants reaching and ‘bobbing around’” and Harris refused to get out of the

vehicle, 241 Va. at 148, 400 S.E.2d at 192, these facts were not part of the Supreme Court's analysis. Rather, the analysis was premised on the officer's "hunch" that the canister contained illegal drugs. Id. at 154, 400 S.E.2d at 196.

However, in the instant case, when the officer approached appellant, he "immediately reached across his body towards his left front pants pocket." When asked what he was reaching for, appellant did not respond. The officer told appellant to "get away from the pocket," and appellant again reached toward his left front pocket.

Cost, 49 Va.App. at 225-26, 638 S.E.2d at 719. (App. 60-61).

Unlike the officer in Murphy, the officer here testified that he "knew" the items to be heroin. Moreover, unlike the defendant in Murphy, Cost behaved in a way that together with the officer's "plain feel" of the heroin justified the officer's seizure of the items.

CONCLUSION

For these reasons, the decision of the Court of Appeals affirming the judgment of the Circuit Court of the City of Portsmouth convicting the defendant of possession of cocaine with intent to distribute should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On September __, 2007, the required number of copies of this brief were hand-delivered to the Clerk of this Court and one copy was mailed to Sonya Weaver Roots, Esquire, 615 Dinwiddie Street, Post Office Box 543, Portsmouth, VA 23705, counsel for the defendant.

Eugene Murphy
Senior Assistant Attorney General

In the
Supreme Court of Virginia
At Richmond

Record No. 080794

DEMETRES J. RUDOLPH,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The police lacked a reasonable articulable suspicion to stop Rudolph's vehicle. (Preserved at pp.46-55 and 79 of the Appendix).

**STATEMENT OF THE NATURE OF THE CASE AND THE MATERIAL
PROCEEDINGS IN THE TRIAL COURT**

On March 20, 2006, the Appellant, Demetres Jerrod Rudolph ("Rudolph") was indicted in the Circuit Court of the City of Virginia Beach, Virginia, for Possession of Marijuana with the Intent to Distribute in violation of Sections 18.2-248.1 and 18.2-10 of the Code of Virginia, 1950, as amended (Appendix p. 1). The alleged offense date was January 23, 2006. Rudolph filed a Motion to Suppress (Appendix p. 2). On July 26, 2006, the Motion to Suppress was argued, the Honorable A. Joseph Canada, Jr., presiding. After hearing evidence and argument of counsel, Judge Canada delayed his ruling and later denied Rudolph's Motion to Suppress by Order (Appendix pp. 71 and 72). On September 27, 2006, Rudolph entered a conditional guilty plea to the charge, pursuant to Section 19.2-254, Code of Virginia, 1950, as amended, the Honorable A. Bonwill Shockley, presiding (Appendix p. 84-85). On January 9, 2007, after considering a pre-sentence report and other evidence, Judge Shockley sentenced Rudolph to seven years in the Virginia State Penitentiary, with all but one year suspended, conditioned on supervised probation and good behavior (Appendix p. 86-88). The Notice of Appeal was timely filed. A panel of the Court of Appeals denied Rudolph's Petition for Appeal on February 26, 2008 (one Judge dissented). On April 4, 2008, the Court of Appeals denied

Rudolph's Petition for Rehearing En Banc. This Court granted Rudolph's Petition for Appeal on September 3, 2008.

QUESTION PRESENTED

Did the police have a reasonable articulable suspicion to stop Rudolph's vehicle? (Preserved at pp. 46-55 and 79 of the Appendix) (Assignment of Error 1)

STATEMENT OF FACTS

On January 23, 2006, at approximately 8:00 p.m., Officer Jeremy P. Latchman of the Virginia Beach Police Department was on patrol in a shopping center in Virginia Beach, Virginia. He was in uniform and in a marked police vehicle. The officer stated that they had "... beefed up a lot of extra patrol and a lot of overtime due to the fact there was a lot of break-ins and robberies in that specific shopping center." (Appendix p. 13). The break-ins were of businesses when they were not open for business and the robberies were of people in the parking lot. The officer was not aware of which particular business' in the shopping center had experienced break-ins or "snatch and grabs". (Appendix p. 31). There is a Citgo gas station which is located in one corner of the shopping center parking lot. At 8:00 p.m. on this date, it was open for business (Appendix p. 29). Officer Latchman had not received any

call that there was a problem at the Citgo on this night (Appendix pp. 32-33). As he was approaching the gas station area in his vehicle, Officer Latchman saw "... a vehicle with no lights on parked parallel in the rear of this Citgo Gas Station." (Appendix p. 13). The officer was approximately "... a car, a car and a half length away..." from the vehicle when he first noticed it (Appendix p. 28). The gas pumps are located in the front of the gas station and the main entrance is in the front of the station. (Appendix p. 15). There is a car wash and parking places in the back of the gas station. There is also a rear entrance to the Citgo (Appendix p. 30). Rudolph's vehicle was not in a marked parking place. (Appendix p. 17). Rudolph's vehicle was not moving and Officer Latchman saw 2 occupants (one driver and one passenger) (Appendix p. 18). Rudolph was in the driver's seat (Appendix pp. 18 - 19). While located approximately one to one and a half car lengths behind Rudolph's vehicle, Officer Latchman noticed Rudolph moving around and his head go down a few times "I don't know if he was looking around for something or what else was going on in the vehicle at the time." (Appendix p. 19). Officer Latchman then "... decided to go around the vehicle and make sure everything was fine, just take a look inside the building as I drove by and make sure everything was fine. When I came around the front, I observed the vehicle start moving away." (Appendix p. 20). As the officer drove around the building, he only noticed

Rudolph's headlights coming on and the car driving away, nothing else that would have alerted him that something was amiss in the Citgo (Appendix p. 33). Officer Latchman then activated his emergency equipment and stopped the vehicle as it was exiting the parking lot to "... initiate the investigation on the vehicle and what was going on back at the end of the building." (Appendix p. 20). The officer said he stopped the vehicle because the lights were off, the vehicle was not parked in a parking spot, 2 people in the car making

"Furtive movements . Bending down. It looked like they were reaching for stuff, and they bent down a couple of times. I don't know what was going on in the vehicle. It was in close proximity to the gas station back into the— ...In the back of the building, no one enters at nighttime. The front of the building is where all the customers come in. So it would have been unusual for the vehicle to be parked there." (Appendix p. 37).

However, upon recross, the officer admitted that, prior to making the stop, he did not have the information about the back door not being open (Appendix p. 38). Rudolph immediately stopped his vehicle when the officer activated his emergency lights, while still in the parking lot. Officer Latchman exited his vehicle and approached Rudolph's vehicle. Ultimately, Officer Latchman and another officer discovered marijuana in the vehicle. The quantity of marijuana was 7.86 ounces. Small empty baggies, a digital scale and U.S. Currency were also recovered.

ARGUMENT

THE POLICE LACKED A REASONABLE ARTICULABLE SUSPICION TO STOP RUDOLPH'S VEHICLE. (Preserved at pp. 46 - 55 and 79 of the Appendix)

The Fourth Amendment of the United States Constitution and Article I, Section 10 of the Virginia Constitution forbid unreasonable searches and seizures. It is clear that when Officer Latchman activated his emergency equipment and Rudolph stopped his vehicle that he was seized for Fourth Amendment purposes. A police officer may conduct a brief, investigatory stop when he has a reasonable, articulable suspicion that the subject is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 30 (1968). "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21 -22. A reasonable suspicion is more than an "inarticulate hunch". Id. at 22. The facts articulated in Terry were specific and detailed and took place over a lengthy period of observation by the officer (2 men hovering at a street corner for a long period, not waiting for anyone, alternately pacing along an identical route and pausing to stare in the same store window 24 times, followed by conferences between the 2 men, etc.). In addition, the experience of the officer in Terry was a significant factor

considered. The experienced officer in Terry also articulated the hypothesis of what criminal activity he thought was being contemplated by these two men. Id at p. 28. The totality of the circumstances (whole picture) must be considered to determine if there is a particularized and objective basis for the officer to suspect the individual of criminal activity. United States v. Cortez, 449 U.S. 411, 417-18 (1981). Cortez instructs that "... the question is whether, based upon the whole picture, they, as experienced ... officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." Id. 421-422. All of the cases involving this issue are necessarily fact specific.

The record reflects nothing about Officer Latchman's experience or lack thereof. The facts that presented themselves to Officer Latchman were that around 8:00 p.m. he observed a car parked behind a gas station while it was open for business, (with an entrance located in the back) with its' lights off.

In addition to an entrance into the gas station, this area contained an entrance from the main shopping center parking lot, a car wash, parking spaces and speed bumps to slow traffic down. There were two occupants in the vehicle and the officer noticed the driver (Rudolph) bend his head down several times as if looking for something. There is no evidence that Rudolph or his passenger noticed the police officer. The officer said they were beefing up their

patrols in this shopping center because there had been break-ins (when businesses were not open), robberies of people in the parking lot and “snatch and grabs”. He was not sure which businesses were involved and he had not had any report of any problem at the Citgo on this night. The officer decided to drive around the Citgo to see if anything was amiss. As he came around the front of the building, he observed Rudolph’s vehicle’s lights go on and it began to drive off. He did not articulate any problem inside the Citgo. The officer activated his lights and stopped Rudolph in the parking lot.

As in Ewell v. Commonwealth, 254 Va. 214, 491 S.E.2d 721 (1997), after considering the totality of the circumstances, Officer Latchman did not have a reasonable articulable suspicion that Rudolph was engaged in preparing to rob the store or any other criminal activity. While Officer Latchman articulated that there was a history of burglaries (breaking windows and entering businesses **when closed**), robberies (of people in the parking lot) and snatch and grabs (unexplained), there is no link between this history and Rudolph’s conduct.

“Reasonable suspicion, while not as stringent a test as probable cause, requires at least an objective justification for making the stop.” Ramey v. Commonwealth, 35 Va. App. 624, 629, 547 S.E. 2d 519, 522 (2001) (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)). Officer Latchman observed

no traffic violation or criminal activity. At best, it was a mere “hunch”. The only thing the officer was able to articulate when asked point blank by Judge Canada “Just tell me why you stopped the car” was that the lights were off, where the vehicle was parked, 2 people in the vehicle and movement by the 2 individuals. (Appendix pp. 36-37). He did not have the information that the back door was locked until after the stop (Appendix p. 38). He never stated that he suspected any kind of criminal activity. Unlike the officer in Glover v. Commonwealth, 3 Va. App. 152, 348 S.E. 2d 434 (1986), affirmed. 236 Va. 1, 372 S.E.2d 134, who stated that he had a feeling that the subject was going to rob the store, Officer Latchman never articulated that he suspected that Rudolph was going to do anything. He just described a series of observations.

The stop of Rudolph's vehicle was without a reasonable articulable suspicion of criminal activity and therefore violated the Fourth Amendment and the Motion to Suppress should be granted as to all evidence seized as a result of the illegal stop.

CONCLUSION

For the reasons stated herein above, Demetres Jerrod Rudolph, appellant herein, requests this Court to reverse the judgment of the trial court.

Respectfully submitted,

DEMETRES JERROD RUDOLPH

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CERTIFICATE OF SERVICE

I, the undersigned, Melinda R. Glaubke, Counsel for the Appellant, Demetres Jerrod Rudolph, hereby certify that the name of the appellant is Demetres Jerrod Rudolph, that the name of the appellee is the Commonwealth of Virginia, that counsel for the appellant is Melinda R. Glaubke, Slipow, Robusto & Kellam, P.C., 2625 Princess Anne Road, Post Office Box 6304, Virginia Beach, Virginia 23456, (757) 427-5094, that counsel for the appellee is Josephine F. Whalen, Assistant Attorney General II, 900 East Main Street, Richmond, Virginia 23209, (804) 786-2071. I further certify that twelve copies of this Brief and twelve copies of the Joint Appendix are filed herewith, three copies of this Brief and of the Joint Appendix have been mailed or delivered to Josephine F. Whalen, counsel for the Appellee, and that an electronic copy of the brief and appendix have been filed with the clerk this 2nd day of October, 2008, in accordance with Rule 5:26(d) of the Rules of the Virginia Supreme Court.

Counsel for Appellant was appointed by the Circuit Court of Virginia Beach, Virginia.

/s/ Melinda R. Glaubke
Melinda R. Glaubke

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 080794

DEMETRES J. RUDOLPH,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF FOR THE COMMONWEALTH

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<u>Jackson v. Commonwealth</u> , 267 Va. 666, 594 S.E.2d 595 (2004) -----	5, 6
<u>McCain v. Commonwealth</u> , 275 Va. 546, 659 S.E.2d 512 (2008) -----	8
<u>Scott v. United States</u> , 436 U.S. 128 (1978) -----	6, 8
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968) -----	6, 7, 8
<u>United States v. Brignoni-Ponce</u> , 422 U.S. 873 (1975) -----	8, 11
<u>United States v. Bull</u> , 565 F.2d 869 (4th Cir. 1977) -----	10, 11
<u>United States v. Cortez</u> , 449 U.S. 411 (1981) -----	7

<u>United States v. Evans,</u> 994 F.2d 317 (7th Cir. 1993)	10
<u>United States v. Mayo,</u> 361 F.3d 802 (4th Cir. 2004)	11
<u>United States v. Paulino,</u> 850 F.2d 93 (2d Cir. 1988)	10
<u>United States v. Ramirez,</u> 523 U.S. 65 (1998)	6
<u>United States v. Sokolow,</u> 490 U.S. 1 (1989)	7
<u>Whren v. United States,</u> 517 U.S. 806 (1996)	6
<u>Yeatts v. Murray,</u> 249 Va. 285, 455 S.E.2d 18 (1995)	3
<u>Other Authorities</u>	
Rule 5:17(c), <i>Supreme Court of Virginia</i>	3

**IN THE
SUPREME COURT OF VIRGINIA**

RECORD NO. 080794

DEMETRES J. RUDOLPH,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On March 20, 2006, Demetres Rudolph was indicted for possession of marijuana with intent to distribute. (App. 1).

Rudolph subsequently moved to suppress evidence found in a search of his car. (App. 2-3). The trial court heard evidence and argument on Rudolph's motion on July 26, 2006. (App. 4-60). The trial court denied Rudolph's motion to suppress by order dated August 1, 2006. (App. 71).

Rudolph reargued his motion to suppress on August 22, 2006. (App. 79-80). By order dated August 28, 2006, the trial court again denied Rudolph's motion. (App. 72).

On September 27, 2006, Rudolph entered a conditional guilty plea, reserving his right to appeal the trial court's denial of his suppression motion. (App. 73-79). On January 9, 2007, the trial court sentenced Rudolph to an active term of one year of imprisonment for possession of marijuana with intent to distribute. (App. 86-88).

Rudolph appealed, arguing the trial court erred in denying his suppression motion. A panel of the Court of Appeals granted Rudolph's petition and, on August 15, 2006, a divided panel of that court, in an unpublished opinion, affirmed the trial court. (App. 89-110).

This Court awarded Rudolph's petition for a writ of error on September 3, 2008.

RUDOLPH'S ASSIGNMENT OF ERROR

THE POLICE LACKED A REASONABLE
ARTICULABLE SUSPICION TO STOP
RUDOLPH'S VEHICLE.¹

QUESTION PRESENTED

DID THE TRIAL COURT ERR IN DENYING
RUDOLPH'S MOTION TO SUPPRESS ON THE
GROUNDS THAT THE POLICE LACKED
REASONABLE SUSPICION TO STOP HIM?

STATEMENT OF FACTS

On January 23, 2006, at about 8:00 p.m., Officer Jeremy Latchman of the Virginia Beach Police Department was patrolling the Cypress Point shopping plaza in Virginia Beach. (App. 12). Officer Latchman was in uniform and was driving a marked police vehicle. Officer Latchman's patrol was part of a larger effort to increase security in the plaza, which had recently suffered a rash of burglaries and robberies. (App. 12-13, 29-30).

As Officer Latchman entered the parking lot of the Citgo gas station, which was located on the outer edge of the plaza, he noticed a car parked

¹ Rudolph's assignment of error does not appear to comply with the requirement of Rule 5:17(c) of the Rules of the Virginia Supreme Court in that it is not an "assignment of error relating to questions presented in, or to actions taken by, the Court of Appeals." The assignment of error does, however, appear to comport with the purpose of the rule, to "point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points." Yeatts v. Murray, 249 Va. 285, 290, 455 S.E.2d 18 (1995) (citation omitted).

behind the station, near the rear entrance. (App. 13-18, 26). The gas pumps were located at the front of the store, as was the main entrance. (App. 15). The car was sitting parallel to the station with its lights off, although it was dark outside. (App. 13-15, 64, 68). Although there were marked parking spaces behind the station, the car was not parked in any of them. Instead, the car was parked in an area in which traffic would normally flow in and out of the station, as evidenced by its position just past one of the speed bumps around the station. (App. 27-30, 70). Further, although there was a car wash behind the station, the car was not in a position to use it. (App. 16-18, 27-28, 64-65, 68).

As Officer Latchman drew closer to the vehicle, he noticed it had two occupants, a driver and a passenger in the front seat. The defendant, Demetres Rudolph, was the driver. (App. 18). Rudolph and the passenger were engaged in some activity – their heads were bobbing up and down and they appeared to be reaching below the seats. (App. 18-19). Officer Latchman was about a car length and a half behind Rudolph's car. He decided to drive around the station to make sure everything was O.K. (App. 19-20). As Officer Latchman came around the front of the station and before he had a chance to look into the station, Rudolph turned on his lights and began to drive away. (App. 20, 31-32). Officer Latchman

activated his lights and stopped Rudolph before he could fully exit the parking lot of the station. (App. 21).

A subsequent search of Rudolph's car, which was triggered by the smell of marijuana, yielded a large open plastic bag of marijuana, a digital scale, empty plastic bags, and over \$ 1,000 in cash. (App. 8, 22-24).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING RUDOLPH'S SUPPRESSION MOTION.

Standard of Review

On appeal, it is the defendant's burden to show the denial of his suppression motion constituted reversible error. See Glenn v. Commonwealth, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008); Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980). When reviewing the trial court's ruling denying a motion to suppress, this Court considers "the evidence and all reasonable inferences flowing from that evidence in the light most favorable to the Commonwealth, the prevailing party at trial." Jackson v. Commonwealth, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004) (citation omitted).

Whether a search and seizure is constitutional under the Fourth Amendment presents a mixed question of fact and law. Thus, this Court will give deference to the trial court's factual findings, but will independently

review the trial court's application of those facts to the law. Id. (citation omitted). In doing so, this Court should "focus upon 'what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control.'" Brown v. Commonwealth, 270 Va. 414, 419, 620 S.E.2d 760, 762 (2005) (citations omitted) (stating standard of review in probable cause case).

Principles of Law

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" Glenn, 275 Va. at 130, 654 S.E.2d at 913 (quoting U.S. Const. amend. IV). The Fourth Amendment, by its very language, does not proscribe all searches and seizures by the government, only those that are "unreasonable." Scott v. United States, 436 U.S. 128, 137 (1978). The touchstone of the analysis is reasonableness. See generally, United States v. Ramirez, 523 U.S. 65 (1998); Whren v. United States, 517 U.S. 806 (1996).

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court held that a "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119,

123 (2000). To be reasonable, and thus permissible under the Fourth Amendment, an investigatory stop must be supported by a “reasonable, articulable suspicion to believe the person may be involved in criminal activity.” Wardlow, 528 U.S. at 123 (citing Terry, 392 U.S. at 30).

In deciding whether a particular stop was reasonable, this Court will consider the “the totality of the circumstances – the whole picture.” United States v. Sokolow, 490 U.S. 1, 8 (1989). Although no single factor may be sufficient to establish reasonable suspicion, all the factors of a given case, taken together, may amount to reasonable suspicion. Id., at 9. Indeed, reasonable suspicion can be based on a series of seemingly innocent acts. Terry, 392 U.S. at 22-23.

Moreover, “the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” Wardlow, 528 U.S. at 124-25. “Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.” United States v. Cortez, 449 U.S. 411, 418 (1981); see also Terry, 392 U.S. at 21-22 (evaluating reasonableness “it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search “warrant a man of reasonable caution in the

belief" that the action taken was appropriate?"). Because the test is objective, Terry, 392 U.S. at 21-22, "that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Scott, 436 U.S. at 138.

Analysis

Based on the totality of the circumstances confronting him, Officer Latchman acted reasonably in stopping Rudolph.

Factors relevant to a determination of reasonable suspicion include the nature of the location of the stop, including whether it is a "high crime area" generally or an area plagued by a specific type of crime, such as "heavy narcotics trafficking," and any "nervous, evasive behavior" on the part of the individual stopped. Wardlow, 528 U.S. at 124 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975)); see also McCain v. Commonwealth, 275 Va. 546, 552, 659 S.E.2d 512 (2008) ("character of the location and the time at which a person is observed are relevant" factors in establishing reasonable suspicion, though not sufficient standing alone) (citations omitted).

Here, Officer Latchman initially observed Rudolph improperly parked behind a gas station in a position that posed a potential impediment to the flow of traffic. Cf. Brown, 270 Va. at 419, 620 S.E.2d at 762 (finding evidence car improperly parked in manner that would potentially obstruct passage of large emergency vehicle “could indicate criminal activity under some circumstances”). The plaza where the station was located had recently experienced numerous burglaries and robberies, which required additional police patrols. While Rudolph’s mere presence in an area recently plagued by violent crime, standing alone, could not provide Officer Latchman with reasonable suspicion of criminal activity, it was certainly a relevant consideration. See Wardlow, 528 U.S. at 124-25 (citing Adams v. Williams, 407 U.S. 143, 144, 147-148 (1972)).

Moreover, Rudolph was clearly not a customer of the gas station, as he was not parked in a proper space, was on the opposite side of the building from the gas pumps, and was not in a position to use the car wash. Indeed, as the panel majority in the Court of Appeals noted, Rudolph was parked on the opposite side of the store from the normal entrance, which Officer Latchman found unusual because his experience with the gas station, which was part of his patrol and with which he was familiar, had been that customers use the front entrance after dark. (App. 26, 29, 36-37,

91). These facts suggest Rudolph was not parked in the lot for any legitimate purpose connected with the business. See United States v. Bull, 565 F.2d 869, 870-71 (4th Cir. 1977) (finding reasonable suspicion where defendants were present in shopping center where most stores were closed and were wandering around without any discernable purpose).²

Further, Rudolph's lights were off, even though it was dark outside and he was parked in an area where other cars might be passing. Rudolph and his companion were making furtive gestures, ducking their heads and reaching down to the car's floor, "like they were reaching for stuff." (App. 36). A reasonable officer could certainly have concluded from this that Rudolph and his companion were attempting to hide what they were doing. See Hollis v. Commonwealth, 216 Va. 874, 877-878, 223 S.E.2d 887 (1976) (acknowledging furtive gestures as circumstance relevant to probable cause); see also United States v. Paulino, 850 F.2d 93, 94, 97-98 (2d Cir. 1988) (recognizing as furtive movement defendant's action in bending over as if placing something on floor of car); United States v. Evans, 994 F.2d 317, 319-21 (7th Cir. 1993) (recognizing as furtive

² Indeed, given that Rudolph's lights were off and his manner of parking, a reasonable officer could certainly infer he was not there to purchase gas or wash his car, not looking for change with which to purchase merchandise from the store, and not lost and checking his directions or map.

defendant's actions in bending forward in car as if "to place or retrieve something under the seat").

Finally, given Rudolph's quick exit of the station's parking lot after the police entered the lot and began to drive around the building, at which point the patrol car would have been visible to Rudolph, a reasonable officer could conclude Rudolph was seeking to avoid contact with or observation by the police. Courts have repeatedly acknowledged that a defendant's evasive behavior, even where it is short of "headlong flight," is relevant to a determination of reasonable suspicion. See Wardlow, 528 U.S. at 124 ("nervous, evasive behavior is a pertinent factor in determining reasonable suspicion") (citations omitted); Brignoni-Ponce, 422 U.S. at 885 (noting "obvious attempts to evade officers can support a reasonable suspicion."); United States v. Mayo, 361 F.3d 802, 807-08 (4th Cir. 2004) (finding relevant that defendant, upon noticing police, "sought to evade their scrutiny" by twice turning walking away); Bull, 565 F.2d at 870-71 (finding pertinent evasive behavior of turning back on police and attempting to hide face); Cf. Brown, 270 Va. at 419, 620 S.E.2d at 762 (finding "dispersal" at sight of police "could indicate criminal activity under some circumstances").

Taken as a whole, the circumstances were sufficiently suspicious to provide a reasonable police officer in Latchman's position with a

reasonable and articulable suspicion to stop Rudolph's car. Indeed, as the panel majority held:

Several of the circumstances that Officer Latchman articulated point to the reasonable inference that the vehicle's occupants were preparing to rob the gas station. The gas station was in the parking lot of a shopping center that had recently been subject to several burglaries and robberies. Rudolph was parked in a dark, low-traffic area in a manner well-suited for a quick getaway. He and the passenger were bending over and reaching around the floorboard, but did not turn on the vehicle's interior lights. When Rudolph saw Officer Latchman's patrol car pull past him, he promptly attempted to drive away.

(App. 92).

Moreover, as the panel majority notes, "Officer Latchman had been assigned to that shopping center specifically because of recent and repeated occurrences of a crime, the imminent commission of which was consistent with Officer Latchman's observation." (App. 92).

Ewell v. Commonwealth, 254 Va. 214, 491 S.E.2d 721 (1997), cited by the defendant, does not compel a different result. The circumstances that Officer Latchman observed in this case are significantly more suspicious than the circumstances of Ewell. In that case, a police officer observed Ewell, who was not known to him, though he was familiar with the development, parked late at night in an apartment complex "suspected of 'high narcotics' trafficking." Ewell attempted to leave upon the officer's arrival. Id. at 216, 491 S.E.2d at 722. The officer in Ewell did not observe

any additional actions consistent with the trafficking of drugs. Id. at 217, 491 S.E.2d at 723.

Here, as in Ewell, the officer observed Rudolph parked at night in an area plagued with crime and, as in Ewell, Rudolph attempted to exit the parking lot shortly after the arrival of the police vehicle. However, here, unlike in Ewell, the officer also observed several facts consistent with, and preparatory to, the very type of crime that had recently been occurring in the shopping center. The officer observed Rudolph and his companion's furtive gestures in their darkened car, which was improperly parked in a manner not consistent with any legitimate purpose related to the business but in a way that would have facilitated a quick exit. Thus, the circumstances in this case, viewed as a whole, are far more persuasive than those in Ewell.

CONCLUSION

For the foregoing reasons the Commonwealth requests this Court to affirm the judgment below.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA
Appellee herein.

By: _____

Counsel

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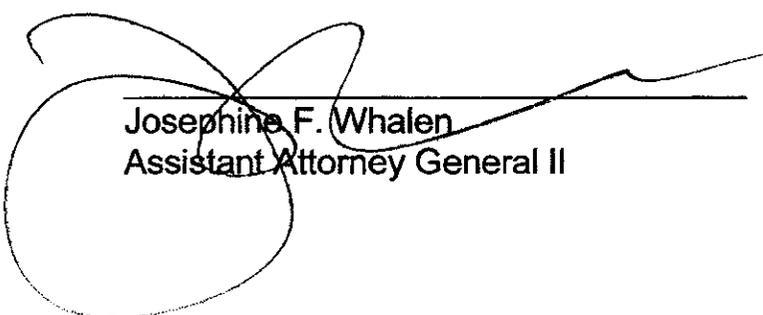
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CERTIFICATE OF TRANSMISSION AND SERVICE

On October ~~27~~, 2008, the required copies of this brief were hand-delivered to the Clerk of this Court, and three copies were mailed to Melinda R. Glaubke, SLIPOW, ROBUSTO & Kellam, P.C., 2625 Princess Anne Road, P.O. Box 6304, Virginia Beach, Virginia 23456, counsel for appellant.

An electronic copy of this brief has been provided to the Court.



Josephine F. Whalen
Assistant Attorney General II

Present: All the Justices

DARRIO L. COST

v. Record No. 070496

COMMONWEALTH OF VIRGINIA

OPINION BY
JUSTICE LAWRENCE L. KOONTZ, JR.
February 29, 2008

FROM THE COURT OF APPEALS OF VIRGINIA

In this appeal, we consider whether the Court of Appeals erred in affirming a circuit court's judgment denying a motion to suppress evidence seized by a police officer from inside the defendant's pants pocket during a "pat-down" search. The sole issue presented is whether the officer had sufficient probable cause to seize a number of capsules based upon his assertion that by the "plain feel" of the capsules he knew, through his training and experience, that they contained an illegal drug packaged in capsule form.

BACKGROUND

The pertinent facts in this case are not in dispute. Around 12:40 a.m. on December 14, 2004, Portsmouth Police Officer B. C. Davis, who was assigned as a full-time agent of the Portsmouth Redevelopment and Housing Authority with responsibility for patrolling residential developments of the Authority, approached Darrio L. Cost, who was sitting in the passenger seat of a vehicle parked in a parking lot designated for residents of the Jeffry Wilson housing complex. This

property was owned by the Authority. As Davis approached the vehicle's passenger side window, he observed as Cost "immediately reach[ed] across his body towards his left front pants pocket." Davis asked Cost what he was reaching for, but Cost did not answer. Davis told Cost "to get away from" his pocket, but Cost reached toward the pocket again. Davis then directed Cost to exit the vehicle.

Upon exiting the vehicle, Cost immediately told Officer Davis, "[y]ou can't search me, but you can pat me down." Davis conducted a "pat down" search of Cost for concealed weapons. In doing so, Davis immediately frisked the left front pants pocket toward which Cost had been reaching. When Davis touched the pocket, he felt numerous capsules inside. Davis reached into Cost's pocket and removed a plastic bag containing twenty capsules. Subsequent analysis of the contents of those capsules showed that they contained heroin.

Cost was indicted by a grand jury in the Circuit Court of the City of Portsmouth on the charge of possession of heroin with the intent to distribute in violation of Code § 18.2-248. Prior to trial, Cost moved to suppress the heroin capsules seized from his person during the pat-down search, claiming they were discovered in violation of his rights under the Fourth Amendment. At the suppression hearing, Officer Davis testified that he had been a police officer for approximately four and a

half years. Davis testified that he did not feel what he thought to be a weapon in Cost's pocket and that he did not think that there was a weapon in that pocket after he felt the capsules there. Davis contended that upon feeling the capsules in Cost's pocket he "knew" that they were heroin because "[t]hrough my training and experience, I know that that's what heroin is packaged in." On cross-examination, Davis admitted that over-the-counter medications such as "Motrin, Tylenol, or something along those lines" are sometimes "packaged in capsules."

The circuit court denied Cost's motion to suppress the evidence seized from his person. Cost was tried without a jury and found guilty of the offense charged in the indictment. The circuit court sentenced Cost to ten years imprisonment, with a portion of the sentence suspended. Cost appealed his conviction to the Court of Appeals challenging the circuit court's failure to suppress the evidence. The Court of Appeals affirmed the conviction in a published opinion, Cost v. Commonwealth, 49 Va. App. 215, 638 S.E.2d 714 (2006). We granted Cost this appeal.

DISCUSSION

A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that we review de novo on appeal. Murphy v. Commonwealth, 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002); Bolden v.

Commonwealth, 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002); McCain v. Commonwealth, 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001); see also Ornelas v. United States, 517 U.S. 690, 691, 699 (1996). In making such a determination, we give deference to the factual findings of the circuit court, but we independently determine whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000). The defendant has the burden to show that, considering the evidence in the light most favorable to the Commonwealth, the circuit court's denial of his suppression motion was reversible error. Bolden, 263 Va. at 470, 561 S.E.2d at 704; McCain, 261 Va. at 490, 545 S.E.2d at 545; Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980).

Cost does not dispute that during an investigative stop, a law enforcement officer may conduct a limited search for concealed weapons if the officer reasonably believes that a criminal suspect may be armed and dangerous. Terry v. Ohio, 392 U.S. 1, 27 (1968); see also Florida v. J.L., 529 U.S. 266, 269-70 (2000); Adams v. Williams, 407 U.S. 143, 146 (1972); Harris v. Commonwealth, 241 Va. 146, 150, 400 S.E.2d 191, 193-94 (1991); Jones v. Commonwealth, 230 Va. 14, 19, 334 S.E.2d 536,

539-40 (1985). Indeed, Cost expressly consented to such a limited search of his person by Officer Davis. Rather, Cost argues that his Fourth Amendment right to be free from unreasonable searches and seizures was violated because Officer Davis exceeded the proper scope of a Terry pat-down search. Cost contends that this is so because the character of the capsules as containing heroin, or some other form of contraband, would not be immediately apparent merely by feeling the capsules through his clothing, and Davis could discern that what he did feel in Cost's pocket was not a weapon. Thus, Cost asserts that the heroin capsules removed from his pocket should have been excluded from evidence.

The Commonwealth responds that the Court of Appeals correctly held that determining whether a law enforcement officer conducting a Terry pat-down search had sufficient probable cause to seize an item suspected to be contraband based upon the feel of the object through the suspect's clothing requires a consideration of the totality of the circumstances. Cost, 49 Va. App. at 227, 638 S.E.2d at 719-20. Thus, the Commonwealth contends that the circuit court correctly ruled, and the Court of Appeals properly agreed, that Officer Davis was justified in seizing the capsules from Cost's pocket because "[a]lthough other [legal] substances are contained in capsules, his own experience and common sense told Davis that one does not

carry numerous loose capsules of legal substances in one's pocket."

We agree with the Commonwealth that the determination whether a law enforcement officer had sufficient probable cause to seize contraband from a person in the course of a Terry pat-down search requires a consideration of the totality of the circumstances surrounding the search, as well as a consideration of the officer's knowledge, training and experience. As we have recently observed, "[a]n officer who conducts a Terry pat-down search is justified in removing an item from a subject's pocket if the officer reasonably believes that the object might be a weapon. Lansdown v. Commonwealth, 226 Va. 204, 213, 308 S.E.2d 106, 112 (1983). Additionally, the removal of an item from a subject's pocket is also justified if the officer can identify the object as suspicious under the 'plain feel' variation of the plain view doctrine. Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993); see Murphy v. Commonwealth, 264 Va. 568, 574, 570 S.E.2d 836, 839 (2002)." Grandison v. Commonwealth, 274 Va. 316, 319-20, 645 S.E.2d 298, 300 (2007).

The "plain feel" doctrine comports with the traditional application of the Fourth Amendment because, when the character of the object felt by the officer is immediately apparent either as a weapon or some form of contraband, the object is for all practical purposes within the plain view of the officer. The

Fourth Amendment does not require the officer to be subjected unreasonably to the risk of harm from a dangerous weapon or to ignore criminal activity occurring in his presence. In Dickerson, the United States Supreme Court explained that when the identity of the object is immediately apparent to the officer conducting a legal pat-down search of a suspect "there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." 508 U.S. at 375-76.

"However, an item may not be retrieved under the plain view doctrine unless it is 'immediately apparent' to the officer that the item is evidence of a crime. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971); Murphy, 264 Va. at 574, 570 S.E.2d at 839." Grandison, 274 Va. at 320, 645 S.E.2d at 300. It is not sufficient probable cause to seize an item from inside the suspect's clothing if the officer has no more than an educated "hunch" based upon the "plain feel" that the item might be contraband. See Harris v. Commonwealth, 241 Va. 146, 151, 400 S.E.2d 191, 194 (1991) (addressing officer's "hunch" that a closed canister contained illegal drugs).

Consistent with these principles, we have stated that "when the character of the item is not immediately apparent from the

'pat[-]down' search, and the officer does not reasonably suspect that the item is a weapon, further search regarding the item is not allowed [by the Fourth Amendment] because such an evidentiary search is unrelated to the justification for the frisk" of the suspect. Murphy, 264 Va. at 574, 570 S.E.2d at 839. In Murphy, we held that marijuana contained in a plastic bag in the suspect's pants pocket was illegally seized during a pat-down search because the character of the bag's contents as contraband was not immediately apparent from the officer's tactile perception and, thus, the officer did not have probable cause to seize the bag and its content without a warrant. Id. at 574-75, 570 S.E.2d at 839-40.

In the present case, Officer Davis admitted in his testimony that over-the-counter medications such as "Motrin, Tylenol, or something along those lines" are sometimes "packaged in capsules." Common experience in the purchase of these legal medications supports this admission. Moreover, it is self-evident that if an item may just as well be a legal medication dispensed in capsule form or a capsule containing an illegal drug, its character as the latter cannot be readily apparent by feeling a suspect's outer clothing that contains the item inside.

In that context, the Court of Appeals acknowledged that "feeling the capsules alone may not be sufficient probable

cause" to support the warrantless seizure of the capsules in question. Cost, 49 Va. App. at 227, 638 S.E.2d at 719. In an effort to distinguish our decision in Murphy, the Court of Appeals reasoned that Cost had "attempted to conceal the drugs, failed to heed the officer's demand that he cease the furtive behavior, and failed to respond to the officer's questions." Id. at 227, 638 S.E.2d at 720.

We disagree with the Court of Appeals' characterization of Cost's actions as "furtive" and its conclusion that Cost "attempted to conceal the drugs." Even viewed in the light most favorable to the Commonwealth, the evidence does not show that Cost did anything by stealth or in a surreptitious manner. According to Officer Davis' testimony, Davis was readily able to observe all of Cost's actions. There is no evidence to even suggest that Cost attempted to remove the drugs from his pocket and secrete them in some other place. There is no evidence that Cost attempted to conceal the drugs; they were already in his pocket. Cost's failure to respond to the officer's questions is of no particular significance because Cost was under no obligation to respond to Davis's questions. Moreover, Cost complied with Davis's order to exit the vehicle and immediately consented to the pat-down search by Davis.

In sum, whatever significance Cost's actions may have had in supporting Davis' suspicions regarding Cost under the

totality of the circumstances, they relate to the justification for the pat-down search conducted by Davis for a possible concealed weapon. Whether those circumstances support the seizure of the capsules is another matter. In Murphy, the "totality of circumstances" was, if anything, more suggestive of the presence of contraband. Murphy was subject to a lawful pat-down search for weapons when he was found in a residence where police executed a "search warrant [that] authorized the police to search 'the entire residence' for 'marijuana, cocaine, cocaine base, heroin, scales, ledgers, logs, money, guns, phone bills, syringes and any other item that would be connected with the illegal sale and/or use of any other illegal narcotic or non-prescription drug.'" Murphy, 264 Va. at 571, 570 S.E.2d at 837. Yet, in that case we held that marijuana contained in a plastic bag in the suspect's pants pocket was illegally seized during a pat-down search because the character of the baggie's contents as contraband was not immediately apparent.

Here, the character of the capsules seized from Cost's pants pocket could not have been immediately apparent to Officer Davis as a result of the pat-down search. Cost's movements and his failure to respond to the officer's questions supported a well-educated "hunch," but were insufficient to establish probable cause required to permit a warrantless seizure of the capsules from inside Cost's pants packet. See e.g., Graham v.

State, 893 S.W.2d 4, 6 (Tex. Ct. App. 1994). Accordingly, we hold that the Court of Appeals erred in affirming the judgment of the circuit court overruling Cost's motion to suppress the evidence illegally seized from his person under the Fourth Amendment of the United States Constitution.

CONCLUSION

For these reasons, we will reverse the judgment of the Court of Appeals. Because the evidence seized from Cost should have been suppressed, there would be insufficient evidence to sustain Cost's conviction for possession of heroin with intent to distribute in any retrial. Accordingly, Cost's conviction will be reversed, and the indictment against him will be dismissed. Jackson v. Commonwealth, 267 Va. 666, 681, 594 S.E.2d 595, 603 (2004).

Reversed and dismissed.

JUSTICE LEMONS, with whom JUSTICE KINSER joins, dissenting.

In this case, it is important to remember that we are not dealing with certainties or even a standard requiring proof "beyond a reasonable doubt," rather, we must consider probabilities.

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. Draper v. United States, 358 U.S. 307, 313 (1959); Schaum v. Commonwealth, 215 Va. 498, 500, 211 S.E.2d 73, 75 (1975). In order to ascertain whether probable cause exists, courts will focus upon "what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control." Hollis v. Commonwealth, 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976).

Taylor v. Commonwealth, 222 Va. 816, 820-21, 284 S.E.2d 833, 836 (1981).

Cost gave the officer permission to conduct a "pat-down" but did not give permission for the officer to reach into his pockets. However, upon conducting the "pat-down" by consent, the officer detected "numerous capsules" in Cost's pocket. In Minnesota v. Dickerson, 508 U.S. 366 (1993), the Supreme Court discussed the seizure of contraband detected by sense of touch during a "pat-down" search. The Court stated:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id. at 375-76.

The officer reached into Cost's left pants pocket and removed a plastic bag containing 20 capsules subsequently determined to contain heroin. If the justification for the search of Cost's pocket depended solely upon the "plain feel" of a capsule in the pocket, the officer could not lawfully search Cost's pocket. But the justification in this case is based upon other circumstances as well.

It was immediately apparent to the officer that the items in Cost's pocket were capsules. The totality of the circumstances, which a court is required to consider, give probable cause that the capsules contained an illegal substance. Cost was a passenger in a parked car when the encounter began. When the officer approached the car on the passenger side, Cost "immediately reached across his body towards his left front pants pocket." The officer asked Cost what he was reaching for, and Cost did not reply. The officer directed Cost to "get away from the pocket." Cost disregarded the officer's direction and again reached for his left front pants pocket. Cost was ordered to exit the car, whereupon a consensual "pat-down" occurred.

The totality of the circumstances included furtive gestures toward the pocket where the contraband was located. Furtive gestures alone may not be sufficient to establish probable cause; however, furtive gestures coupled with other indicia of

criminal activity may suffice to establish probable cause. See Sibron v. New York, 392 U.S. 40, 66 (1968); 2 Wayne R. LaFave, Search and Seizure § 3.6(d), at 351-52 (4th ed. 2004) (“if police see a person in possession of a highly suspicious object or some object which is not identifiable but which because of other circumstances is reasonably suspected to be contraband, and [also] observe that person make an apparent attempt to conceal that object . . . , probable cause is then present”).

The officer detected not one or two capsules, but “numerous” capsules. As the evidence demonstrated, there were 20 capsules in the plastic bag in the pocket. Certainly, it is not impossible that someone would carry vitamins or other legal medication in capsules in a pocket. But we are not dealing with possibilities, we are directed to consider probabilities in this analysis. Additionally, we must consider the specialized training of the officer who, at the time of trial had made 50 - 60 drug arrests and had specialized training on packaging of narcotics.

The majority states that it disagrees with the Court of Appeals opinion that characterizes Cost’s gestures as “furtive.” It was the Commonwealth at trial that characterized Cost’s gestures as “furtive.” The trial court ruling must be considered in the context of the evidence and the arguments advanced by the parties. The Court of Appeals opinion does

exactly what we have stated numerous times is the role of an appellate court. Appellate courts are not fact-finders. Appellate courts are called upon to determine if the facts are sufficient to support a trial court judgment. But an appellate court is not permitted to substitute its judgment concerning the facts for that of the trial court. Here, the majority engages in recharacterization of the facts.

The majority opinion affirms the principle that a reviewing court analyzing a suppression motion must consider the totality of the circumstances. But the majority does not apply the principle in this case.

In Ball v. United States, 803 A.2d 971, 972 (D.C. 2002), the court reviewed a trial court's refusal to suppress the evidence. In Ball, the defendant had been a passenger in a motor vehicle stopped for a traffic infraction. When the officer approached the car, the defendant began "to move his left hand and he was trying to cover his abdomen area with a newspaper which was seated on the seat next to him." Id. at 973. Upon directing the defendant to exit the car, he "immediately put his hands in his jacket pocket." Id. The officer ordered the defendant to remove his hands from the pocket and as the defendant complied, he once again "attempted to place his right hand in his right front jacket pocket." Id. Before the encounter was over, the defendant attempted to reach

into the same pocket for a third time. Upon a protective "pat-down" for weapons, the officer "felt a large cylinder container which [he] thought to be a large medicine bottle," and "because [the defendant] made several attempts to go into his pocket and remove it" the officer concluded that it was probable that the medicine bottle contained contraband. Id. The court affirmed the denial of the motion to suppress based upon the totality of the circumstances including the officer's training in packaging of narcotics. The court concluded:

Viewed against the officer's experience, appellant's conduct added enough information to cross the threshold from reasonable suspicion that appellant might have a weapon in his jacket pocket to probable cause that he had drugs in the medicine bottle felt in the pocket.

Id. at 982.

In the case of State v. Briggs, 536 S.E.2d 858 (N.C. Ct. App. 2000), the Court of Appeals of North Carolina affirmed the trial court's refusal to suppress a cigar holder seized after an officer conducted a "pat-down" for weapons and discerned the presence of the object in a pocket. Using a totality of the circumstances analysis, the court stated:

Accordingly, we consider the numerous facts and circumstances surrounding the officer's seizure of the cigar holder in determining whether seizure of the cigar holder was lawful. Here, the hour was late and defendant was stopped in a "high crime" area. The officer had previously arrested the

defendant for possession of controlled substances and knew defendant was on probation for such an arrest at the time of the stop. The officer smelled burned cigar in defendant's vehicle and on defendant, and was aware that burning cigars were commonly used to mask the smell of illegal substances. Defendant had previously stated he did not smoke cigars. His eyes were red and glassy, and his behavior suggested possible usage of a controlled substance. Furthermore, the officer's experience made him aware that cigar holders were commonly used to store controlled substances. Considering these facts and circumstances, [the officer] had sufficient information to warrant a person of reasonable caution in the belief that the item he detected contained contraband. Absent any evidence indicating impermissible manipulation of the object by the officer, we conclude seizure of the cigar holder in this case was lawful.

Id. at 863-64 (citations omitted).

I can summarize it no better than Judge Frank did in his opinion in the Court of Appeals:

While feeling the capsules alone may not be sufficient probable cause, the totality of the circumstances gave the officer probable cause to believe the numerous capsules contained illicit drugs. Appellant attempted to conceal the drugs, failed to heed the officer's demand that he cease the furtive behavior, and failed to respond to the officer's questions. See generally 2 Wayne R. LaFave, Search & Seizure § 3.6(f), at 364 (4th ed. 2004) (explaining that "refusal to answer is one factor which an officer may consider, together with evidence that gave rise to his prior suspicion, in determining whether there are grounds for arrest"). Based on the totality of the circumstances, consisting of furtive movements and suspicious conduct, culminating in the officer feeling numerous capsules, which based on the officer's

training and experience contained heroin, the officer had probable cause to seize the capsules.

The trial court did not err in denying the motion to suppress.

Cost v. Commonwealth, 49 Va. App. 215, 227-28, 638 S.E.2d 714, 719-20 (2006).

I would affirm the judgment of the Court of Appeals.

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 27th *day of* February, 2009.

Demetres Jerrod Rudolph, Appellant,

against Record No. 080794
Court of Appeals No. 0240-07-1

Commonwealth of Virginia, Appellee.

Upon an appeal from a
judgment rendered by the Court
of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of
counsel, the Court is of opinion that there is reversible error in
the judgment of the Court of Appeals.

Demetres J. Rudolph was charged with and found guilty of
possession of marijuana with the intent to distribute in the
Circuit Court of the City of Virginia Beach. By an unpublished
memorandum opinion, the Court of Appeals affirmed Rudolph's
conviction. Rudolph claims that he was stopped in violation of his
rights under the Fourth Amendment of the United States Constitution
and that all evidence obtained as a result of that stop should have
been suppressed. The Commonwealth contends that, under the
circumstances, the police officer's investigatory stop was
constitutionally permissible.

On January 23, 2006, at approximately 8 p.m., Officer Jeremy
P. Latchman was patrolling the Cypress Point Plaza Shopping Center
area. Multiple burglaries of closed businesses and robberies of
individuals had occurred in that area. Latchman saw a "vehicle
with no lights on parked parallel in the rear of [a] Citgo Gas

Station," located on an outparcel of the shopping center. The gas station was open for business, and there was an entry door for customers in the "rear," which is the side of the building that is opposite the side of the building where the gas pumps are located. Latchman thought the circumstance of the vehicle being parked in that location was unusual because he did not believe that customers used the station's rear entry in the nighttime. In addition, while there are parking spaces on that side of the building, the vehicle was not parked in a marked parking space.

There were two people in the parked vehicle. Rudolph was in the driver's seat. In the few seconds he observed the parked vehicle from about a car length and a half away from Rudolph's vehicle, Latchman saw Rudolph moving around in the vehicle and saw Rudolph's head "[go] down a couple of times and back up." Latchman testified that Rudolph appeared to be looking or reaching for something inside the vehicle. Latchman decided to drive his marked police vehicle around the gas station to "make sure everything was fine." In doing so, he did not observe anything unusual. While Latchman was circling around the gas station, Rudolph began to drive away.

Latchman stopped Rudolph's vehicle. During the stop, Rudolph was asked to exit the vehicle; marijuana was found at the center floor divider where Rudolph's right leg had been. The discovery of that marijuana led to the conviction that is the subject of this appeal.

A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that we review de novo on appeal. Bolden v. Commonwealth, 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002). In making such a determination, we give deference to the factual findings of the circuit court, but we independently determine whether the manner in which the evidence

was obtained meets the requirements of the Fourth Amendment. McCain v. Commonwealth, 275 Va. 546, 552, 659 S.E.2d 512, 515 (2008).

In order to conduct an investigatory stop, a police officer need not have probable cause; he must have a reasonable suspicion, based on objective facts, that the person is involved in criminal activity. Ewell v. Commonwealth, 254 Va. 214, 217, 491 S.E.2d 721, 722 (1997). To establish reasonable suspicion, an officer must be able to articulate more than an unparticularized suspicion or "hunch" that criminal activity is afoot. Illinois v. Wardlow, 528 U.S. 119, 123-24 (2000). A court must consider the totality of the circumstances when determining whether a police officer had a particularized and objective suspicion that the person stopped was involved in criminal activity. Ewell, 254 Va. at 217, 491 S.E.2d at 722-23. The fact that the stop occurred in a "high crime area" is a relevant factor; however, this fact is insufficient to supply a particularized and objective basis for suspecting criminal activity on the part of the particular person stopped. Wardlow, 528 U.S. at 124; McCain, 275 Va. at 552-53, 659 S.E.2d at 516.

We hold that the circumstances and actions observed by Latchman were not enough to create a reasonable articulable suspicion that criminal activity was afoot. Viewing the totality of the circumstances objectively, even though it was 8:00 p.m. and there had been robberies and burglaries in the area, the circumstances did not supply a particularized and objective basis to suspect that Rudolph's observed behavior was a precursor to a break-in, robbery, or any other criminal activity on his part. Therefore, Latchman stopped Rudolph in violation of Rudolph's rights under the Fourth Amendment. Because the marijuana was discovered as a result of an illegal stop, the trial court should have granted Rudolph's motion to suppress.

Rudolph entered a conditional guilty plea pursuant to Code § 19.2-254, which provides in part that "[i]f the defendant prevails on appeal, he shall be allowed to withdraw his plea." Rudolph has prevailed on appeal regarding suppression of the evidence in this case. He is, therefore, entitled by statute to withdraw his plea of guilty. Rudolph must be given the opportunity to reassess the admissible evidence that may be used against him and, if the Commonwealth wishes to continue its prosecution, Rudolph may demand a trial if he so desires. See Code § 19.2-254; Hasan v. Commonwealth, 276 Va. 674, 681, 667 S.E.2d 568, 572 (2008).

Accordingly, the judgment of the Court of Appeals is reversed, Rudolph's conviction in the Circuit Court of the City of Virginia Beach, case number CR06-1036, is vacated, and we will remand this case to the Court of Appeals with direction that the Court of Appeals remand the case to the circuit court for proceedings consistent with the views expressed in this order if the Commonwealth be so advised.

JUSTICE LEMONS, with whom JUSTICE KINSER and SENIOR JUSTICE CARRICO join, dissenting.

The jurisprudence of the United States Supreme Court dealing with searches and seizures under the Fourth Amendment has always sought to strike the correct balance between protecting the constitutional rights of citizens and ensuring that law enforcement officers can take necessary action to protect the public and ensure compliance with the law.

I believe the majority today has misapplied the law relating to investigatory stops under the Fourth Amendment, both in discounting the cumulative effect of the circumstances encountered by the police officer here, and in misconstruing the degree of suspicion required to justify such stops under Terry v. Ohio in a way that imposes a much heavier burden on police than the constitution warrants.

I. Principles of Law

Under the Fourth Amendment, brief stops by law enforcement officers to investigate the possibility of criminal behavior may be justified by a lower standard of suspicion than is required for "a 'technical arrest' or a 'full-blown search,'" in the words of Terry v. Ohio, 392 U.S. 1, 19 (1968).

The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. Because the "balance between the public interest and the individual's right to personal security" tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot."

United States v. Arvizu, 534 U.S. 266, 273 (2002) (citations omitted). This doctrine, which was recognized as to pedestrians in Terry, 392 U.S. at 30, has been extended to stops of vehicles whose drivers are suspected of engaging in wrongdoing. United States v. Cortez, 449 U.S. 411, 417 (1981); see also Delaware v. Prouse, 440 U.S. 648, 663 (1979). We have also recognized and applied this lower standard to vehicle stops. Jackson v. Commonwealth, 267 Va. 666, 673, 594 S.E.2d 595, 598 (2004).

While "reasonable suspicion" must be based on more than an "inchoate and unparticularized suspicion or 'hunch,'" Terry, 392 U.S. at 27, the United States Supreme Court has also made clear that the standard only requires "some minimal level of objective justification" for making the stop in question, INS v. Delgado, 466 U.S. 210, 217 (1984) (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980); Terry, 392 U.S. at 21). Indeed, the Court has often reemphasized the significant difference between the low threshold of "reasonable suspicion" on the one hand, and the considerably more demanding requirements of "probable cause," "a preponderance of the evidence," and "beyond a reasonable doubt" on the other. For example, in United States v. Sokolow, 490 U.S. 1, 7 (1989), the Court noted that reasonable suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less demanding than that for probable cause." And in Alabama v. White, 496 U.S. 325 (1990), the Court further explained that

reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Id. at 330.

Whether officers making an investigatory stop are presented with circumstances sufficiently suspicious to satisfy this minimum standard is determined by examining the totality of the circumstances in the context of the officer's experience and training. United States v. Cortez, 449 U.S. 411, 417-18 (1981). As the Supreme Court has noted, "[t]his process allows officers to

draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" Arvizu, 534 U.S. at 273 (quoting Cortez, 449 U.S. at 418).

And, as the Court has insisted since it first recognized the constitutionality of reasonable investigative stops in Terry, "it is imperative that the facts be judged against an objective standard," Terry, 392 U.S. at 21, meaning that the officer's actual conclusion in the particular case at issue is irrelevant. Instead, reviewing courts must ask: "would the facts available to the officer at the moment of the [stop] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Id. at 21-22.

This legal framework exists to guide trial courts in ruling on challenges invoking the Fourth Amendment, and to guide appellate courts in reviewing the constitutionality of those rulings. In our constitutional order, some (but not all) violations of the Fourth Amendment trigger an extreme remedy: the exclusionary rule, which, if applicable, provides that the improperly obtained evidence is inadmissible against the defendant. See, e.g., id. at 12-13.

The Supreme Court has recently reemphasized the severity of the exclusionary rule and the resulting restraint courts must show when invoking it. "[E]xclusion 'has always been our last resort, not our first impulse.'" Herring v. United States, 555 U.S. ___, ___, 129 S.Ct. 695, 700 (2009) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" Id. at ___, 129 S.Ct. at 701 (quoting Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364-65 (1998)).

The "major thrust" of the rule is "a deterrent one," Terry, 392 U.S. at 12 (citing Linkletter v. Walker, 381 U.S. 618, 629-35 (1965)), targeting "police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires," id. at 15. In contrast, the rule is abused where it is "invoked to exclude the products of legitimate police investigative techniques." Id. at 13.

When applied to evidence recovered pursuant to an investigatory stop, the exclusionary rule is best equipped to deter stops made not because of legitimate suspicion, but because the stop was motivated by some pernicious reason (such as racial profiling, personal animus, or the like), or by arbitrariness evidencing a genuine abuse of police power. Such a wrongful basis for the stop warrants the application of the exclusionary rule's severe penalty.

But not all investigatory stops arise from such base motivations. Indeed, the Supreme Court has explicitly recognized that conduct observed by police may be "ambiguous and susceptible of an innocent explanation" and yet still justify an investigatory stop, allowing the officers to "detain the individuals to resolve the ambiguity." Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

The Court in Wardlow continued:

In allowing such detentions, Terry accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The Terry stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

Id. at 126. Applied injudiciously, the exclusionary rule improperly deters this kind of legitimate police conduct, conduct that strikes the appropriate balance between respecting the privacy citizens enjoy under our Constitution, and preserving the state's interest in preventing crime.

II. Error in Application of Law to Facts

The majority today holds that the circumstances here were insufficient to provide a reasonable suspicion for the stop that led to Rudolph's arrest. In my view, the majority has reached the incorrect conclusion given the facts of this case, in part because it ignores repeated admonishments from the United States Supreme Court and our prior cases that the constitutionality of such stops must be evaluated by examining the collective weight of the totality of the circumstances.

Here, at least four circumstances could have reasonably lent support to Officer Latchman's conclusion that criminal activity may have been afoot. First, the encounter at issue here occurred in the parking lot of a shopping center that had recently experienced a significant rise in criminal activity. As the Supreme Court has held, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. . . . [T]he fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a Terry analysis." Wardlow, 528 U.S. at 124 (citing Adams v. Williams, 407 U.S. 143, 144, 147-48 (1972)). And indeed, the majority here concedes that "[t]he fact that the stop occurred in a 'high crime area' is a relevant factor" in the reasonable suspicion analysis. In the period leading up to this encounter, police "had beefed up a lot of extra patrol and a lot of overtime due to the

fact that there w[ere] a lot of break-ins and robberies in that specific shopping center."

Second, the location of the car was unusual, and inconsistent with where and how a typical patron of the service station would be parked. The car was located on the side of the building opposite the gas pumps and main entrance to the station. Furthermore, the car was "parked parallel," not in any of the marked spaces nearby. This location was particularly odd because of the time of day; although there was a door to the station on that side of the building, in the officer's experience (unquestionably a permissible consideration in evaluating reasonable suspicion), such back doors were rarely if ever used by customers, especially at night. Finally, although it was after dark, the car's lights were off.

Third, the "furtive gestures" of the car's occupants could reasonably have raised questions about their activities and intent. We have previously recognized that furtive gestures are relevant in determining whether probable cause exists for an arrest, see, e.g., Hollis v. Commonwealth, 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976), and therefore they are unquestionably relevant when evaluating the lesser standard of reasonable suspicion. Here, when the officer pulled his vehicle within approximately one and a half car lengths behind the parked car, he observed two individuals within. The driver, who later turned out to be Rudolph, was "moving around in the vehicle" in a way that suggested to the officer that he might be "looking around for something." The other occupant was also "moving around in the vehicle;" the officer described the occupants' actions as "furtive movements," "reaching for stuff," and "ben[ding] down a couple of times."

Finally, the occupants' decision to depart the parking lot after encountering the officer could have been reasonably interpreted as evasion, or at least raised the possibility that was

their motive. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." Wardlow, 528 U.S. at 124 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam); Sokolow, 490 U.S. at 8-9). This is especially true when coupled with other factors. See, e.g., United States v. Briggman, 931 F.2d 705, 709 (11th Cir. 1991) (defendant was parked in lot adjacent to closed businesses and attempted to evade police); Losee v. Dearing, 911 F.2d 48, 49-50 (8th Cir. 1990) (defendants were parked illegally behind closed business in high-crime area, and attempted to evade police). Here, after observing the car from close distance, the officer decided to "go around the vehicle" and around the gas station building to "make sure everything was fine." As he rounded the building on the opposite side from where Rudolph was parked, the officer immediately saw the parked car starting to drive away.

It is of course true that each of these circumstances might be wholly innocent. Indeed, when viewed in isolation from one another, it is doubtful that any of them could provide police with a reasonable suspicion that criminal activity may be afoot. However, engaging in such an exercise, as the majority implicitly does, ignores the correct application of a totality-of-circumstances test. As the Supreme Court has made clear,

Terry, however, precludes this sort of divide-and-conquer analysis. The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation." 392 U.S. at 22. See also Sokolow [, 409 U.S.] at 9 (holding that factors which by themselves were "quite consistent with innocent travel" collectively amounted to reasonable suspicion).

Arvizu, 534 U.S. at 274-75. The point, again, is that when viewed together, circumstances--even if wholly innocent--may be suspicious enough to warrant a reasonable officer in conducting a Terry stop in order to "resolve the ambiguity." Our cases are in perfect accord on this point. See, e.g., Moore v. Commonwealth, 276 Va. 747, 757, 668 S.E.2d 150, 156 (2008); Harris v. Commonwealth, 276 Va. 689, 695-98, 668 S.E.2d 141, 145-47 (2008); Buhrman v. Commonwealth, 275 Va. 501, 505, 659 S.E.2d 325, 327 (2008); Bass v. Commonwealth, 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000). Viewed together, the circumstances here could reasonably be considered suspicious.

In a remarkably similar case, United States v. Dawdy, 46 F.3d 1427 (8th Cir. 1995), the Court of Appeals for the Eighth Circuit considered a Terry stop based on an officer's observation of a vehicle parked, late at night, behind a closed pharmacy at which there had been prior reported false burglary alarms. 46 F.3d at 1428. The car's lights were off but it was occupied, and when the officer entered the parking lot to investigate, the driver of the car started the vehicle and began to drive toward the exit of the lot, at which point officers stopped the car to investigate. Id. at 1428-29. The Eight Circuit held that the stop was valid, emphasizing "not merely the presence of two men sitting in a parked automobile at night," but also the prior suspicious activity in the area, the occupants' apparent lack of a legitimate business purpose, and the occupants' potentially evasive behavior. Id. at 1430.

The similar circumstances here suggest the same result. Like the occupants in Dawdy, Rudolph and his companion were parked, late at night and with the lights off, behind a business. In Dawdy, there had merely been prior false burglary alarms, which could be

seen as less suspicious than the confirmed robberies and break-ins here. In both cases, the likelihood of a legitimate business purpose was slight: in Dawdy, the officer reasonably believed the pharmacy was closed, while here Officer Latchman knew from experience that gas station customers seldom used back entrances, especially at night. When they encountered law enforcement officers, both sets of occupants attempted to make a quick exit. And the furtive gestures of Rudolph here--a factor not present in Dawdy, in which the stop was deemed valid--lends further support to the reasonableness of the stop here.

III. Error in Legal Standard Applied

In this case, the majority's error may reach deeper than merely misunderstanding the way the circumstances here work together to provide a reasonable suspicion. In reaching its conclusion, the majority appears to have applied a more exacting legal standard than the Fourth Amendment permits, declaring legitimate police activity unconstitutional and upsetting the delicate balance between individual privacy and community safety.

It is possible that this divergent standard has its genesis in a slight discrepancy in the language used by the United States Supreme Court, and subsequently in our cases, in describing the reasonable suspicion standard under the Fourth Amendment. In Terry, the Supreme Court explicitly stated its holding, including the following language: "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," an investigatory stop is warranted. Terry, 392 U.S. at 30 (emphasis added). Some later cases utilize the same conditional language. See, e.g., Sokolow, 490 U.S. at 7 ("may be afoot"); Arvizu, 534 U.S. at 273 ("may be afoot").

However, other reasonable suspicion cases have included more definitive language, suggesting that circumstances must indicate that criminal activity is afoot, or that a suspect is involved in criminal activity. These cases include Brown v. Texas, 443 U.S. 47, 51 (1979) ("is involved in criminal activity") and Wardlow, 528 U.S. at 123 ("criminal activity is afoot").

This disparity is reflected in our cases. Compare, e.g., Moore, 276 Va. at 757, 668 S.E.2d at 155 ("may be afoot"); McCain v. Commonwealth, 275 Va. 546, 552, 659 S.E.2d 512, 516 (2008) ("may be afoot") with Harris, 276 Va. at 697, 668 S.E.2d at 147 ("is involved in criminal activity"); Bass, 259 Va. at 475, 525 S.E.2d at 923 ("is afoot"). In at least one case, both kinds of language are used in subsequent sentences. See Ewell, 254 Va. at 217, 491 S.E.2d at 722-23 ("In order to justify the brief seizure of a person by an investigatory stop, a police officer . . . must have a reasonable suspicion, based on objective facts, that the [person] is involved in criminal activity. In determining whether a police officer had a particularized and objective basis for suspecting that the person stopped may be involved in criminal activity, a court must consider" (emphases added) (citations and quotation marks omitted)).

These examples suggest that there may be little theoretical difference between the two constructions. However, semantic differences can come to acquire great practical importance over time. The more definite language of the latter line of cases could be easily misconstrued as a requirement that police officers have some certainty that criminal activity in fact is about to commence, is already underway, or has recently concluded. Terry and its progeny do not go so far, but the conclusion reached by the majority here suggests that it has.

If so, this heightened requirement forecloses a vast range of legitimate investigatory practices, authorized by Terry, that result in only "minimal intrusion." Far from allowing officers the limited ability to request clarification when confronted with ambiguous circumstances, it places a weighty and unwarranted burden of proof on police to postpone any encounter until criminal culpability, or at the very least probable cause to suspect a crime is underway, can be conclusively established. This is not the holding of Terry or the cases that have followed it, and the majority's implementation of this foreign requirement, which is implicit in its resolution of this case, is error.

In this case, the majority does not properly apply the principles articulated by the United States Supreme Court in evaluating Terry stops. The United States Supreme Court has long made clear that states are permitted to provide greater protections to their citizens than the minimal levels guaranteed by the federal Constitution; however, they must do so by means of state law, whether embodied in state statute or state constitution. Danforth v. Minnesota, 552 U.S. ___, ___, 128 S. Ct. 1029, 1046 (2008) (citing Oregon v. Hass, 420 U.S. 714 (1975); Tarble's Case, 80 U.S. 397 (1872); Ableman v. Booth, 62 U.S. 506 (1859)). States are free to "impose higher standards on searches and seizures than required by the Federal Constitution," but this must be accomplished by state law. Virginia v. Moore, 553 U.S. ___, ___, 128 S. Ct. 1598, 1604 (2008) (quoting Cooper v. California, 386 U.S. 58, 62 (1967)).

IV. Conclusion

For all the forgoing reasons, I believe the Court of Appeals was correct in affirming the trial court's denial of Rudolph's motion to suppress and in affirming his conviction. Accordingly, I would affirm the judgment of the Court of Appeals.

This order shall be published in the Virginia Reports and shall be certified to the Court of Appeals and the said circuit court.

A Copy,

Teste:

Peter L. Hanigan

Clerk

Name _____

Period _____ Date _____

Talking Points for Group Discussion

Darrio L. Cost v. Commonwealth of Virginia

A. Majority Opinion

Issue Presented

- Did a police officer have sufficient probable cause to seize capsules in the pocket of the defendant based on the officer's assertion that by the "plain feel" of the capsules he knew, through his training and experience, that the capsules contained an illegal substance?

Facts of the Case

- With the defendant's permission, an officer conducted a pat down search of the defendant for weapons. During the search, the officer felt several capsules in the defendant's pocket. The officer removed the capsules and subsequent analysis revealed they contained heroin. The defendant was charged with possession of heroin with intent to distribute. The defendant moved to suppress the capsules from evidence claiming they were discovered in violation of his Fourth Amendment right against unreasonable search and seizure. The Circuit Court denied the defendant's motion to suppress and he was convicted. The Court of Appeals affirmed the Circuit Court's decision (pgs. 1–3).

Case Holding

- The Supreme Court of Virginia reversed the Court of Appeals decision and the indictment of the defendant was dismissed (p. 11).

Reasoning of the Court

- The Supreme Court of Virginia held that the illegal nature of the capsules could not have been immediately apparent to the officer conducting the weapons search. The defendant's suspicious actions when being investigated by the officer (failing to answer the officer's questions and apparent attempts to hide something prior to the officer's search) did not establish sufficient probable cause to permit a warrantless seizure of the capsules, notwithstanding the experience and training of the officer (pgs. 6–10).

B. Minority Opinion

The Totality of the Circumstances

- Due to the defendant's suspicious activities and the training and experience of the police officer conducting the search, there was sufficient probable cause for the officer to believe that the capsules might contain an illegal substance which would permit the officer to seize the capsules (pgs. 14–17).

Name _____

Period _____ Date _____

Demetres J. Rudolph v. Commonwealth of Virginia

A. Majority Opinion

Issue Presented

- Did a police officer have sufficient probable cause to stop a vehicle and seize illegal drugs based on the officer's assertion that the occupants of the vehicle were acting in a suspicious manner?

Facts of the Case

- At approximately 8 p.m., a police officer noticed a vehicle with two occupants parked in an unusual location in a shopping center which had been the location of several burglaries and robberies. The occupants were moving inside of the vehicle apparently looking for something. As the police officer circled the shopping center, the defendant's vehicle began to drive away. The officer stopped the vehicle and discovered marijuana located at the center floor divider where the defendant's leg had been. The defendant was convicted in circuit court for possession of marijuana with intent to distribute. The defendant claimed that the marijuana was seized in violation of his Fourth Amendment right against unreasonable search and seizure. The Court of Appeals rejected defendant's Fourth Amendment claim and affirmed the decision of the Circuit Court (pgs. 1–2).

Case Holding

- The Supreme Court of Virginia reversed the decision of the Court of Appeals, vacated the conviction of the defendant, and remanded the case to the Circuit Court for further proceedings (p. 5).

Reasoning of the Court

- The Supreme Court of Virginia held that the totality of the circumstances did not supply a sufficient basis for the police officer to suspect that the defendant was involved in illegal activity. The stopping of the defendant and the subsequent search of the vehicle was, therefore, in violation of the defendant's Fourth Amendment right against unreasonable search and seizure. Since the marijuana was discovered as part of an illegal search, the trial court erred in not suppressing the evidence at the defendant's trial (p. 4).

B. Minority Opinion

The Totality of the Circumstances

- The location of the car at the shopping center that had previously experienced significant criminal activity, the suspicious actions of the occupants in a parked vehicle, and the defendant driving off provided sufficient support for the officer's conclusion that defendant was involved in criminal activity. Therefore, the search of the vehicle did not violate the defendant's Fourth Amendment right against unreasonable search and seizure (pgs. 4–16).